IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

GEORGIACARRY.ORG, INC. *et. al.*, Plaintiffs	)	
	)	CIVIL ACTION FILE NO.
v.	)	1:08-CV-2171-MHS
CITY OF ATLANTA, *et. al.* Defendants.	)	

REPLY IN SUPPORT OF PLAINTIFFS' MOTION FOR TEMPORARY RESTRAINING ORDER OR PRELIMINARY INJUNCTION[1]

Introduction

Defendants fundamentally misunderstand Plaintiffs' claims in this case, resulting in Defendants' both mischaracterizing Plaintiffs' Motion and arguing points that have no bearing on the Motion. Plaintiffs contend merely that there is no law, state or federal, prohibiting people with Georgia firearms licenses ("GFLs") from carrying guns in the nonsterile areas of the Airport, and it is illegal for Defendants to threaten (or to carry out a threat) to arrest and prosecute absent a law. Defendants

[1] Plaintiffs' Motion [Doc. 7] was for a temporary restraining order or preliminary injunction. Given the procedural developments since the filing of the Motion (Plaintiffs consented to giving Defendants ***more*** time to respond to the Motion than is allowed for motions generally [Doc. 20]; Defendants will have an opportunity to be heard on the Motion at the scheduled August 11, 2008 hearing [Doc. 17]), there is no need to consider a temporary restraining order. Plaintiffs' Motion, therefore, should

point to no laws rebutting Plaintiff's position. Because Defendants have failed to rebut Plaintiffs' Motion, the Motion should be granted.

Factual Background

Defendants have stipulated to this Court that they have an established policy of arresting anyone seen carrying a firearm at the airport and that they specifically threatened to arrest Plaintiff Bearden if he carried a firearm at the Airport. Doc. 28, pp. 1-2, Ex. B pp. 1-3. Plaintiffs have introduced evidence of its members carrying firearms and intending to continue carrying firearms in the unsecured areas of the Airport. Doc. 16-5. Defendants' policy violates Plaintiffs' rights and subjects them to irreparable harm.

Argument

Defendants completely misunderstand the fundamental premise in Plaintiffs' position: The law no longer prohibits GFL holders from carrying guns in the Airport.[2] Plaintiffs do not contend, as Defendants believe, that 2008 Georgia Act 801 (House

be treated as one for a preliminary injunction.

[2] Plaintiffs do not assert that the law does not prohibit carrying firearms in the secured ("sterile") areas of the Airport. Because carrying guns in the sterile areas of the Airport is not at issue in this case, Plaintiffs refer to carrying guns in the Airport, without repeating "in the non-sterile areas" for simplicity. Unless specifically indicated otherwise, Plaintiffs are referring only to the non-sterile areas of the Airport.

Bill 89)[3] ***confers*** or "creates" a right to do anything. HB 89 merely decriminalized the carrying of firearms at the airport by GFL holders. Because there no longer is a law prohibiting GFL holders from carrying firearms in the Airport, they are free to do so. "In general, that which is not prohibited is permitted." *Glazner v. Glazner*, 347 F.3d 1212, 1228 (footnote 11) (11th Cir. 2003), *en banc*, (Edmondson, C.J., dissenting).

Defendants mistakenly assert that the federal government has completely preempted the field of safety and security in the Airport, including firearms carry in the Airport, leaving no room for state (or local) regulation. Oddly, Defendants do not produce a federal law banning firearms, and, in any event, there is no state law conflict, as HB 89 removed a state regulation, rather than imposed one.

Defendants also claim, mistakenly and in contrast to the unrefuted declaration of a GCO member [Doc. 16-5], that the *status quo* is that Plaintiffs "leave their loaded guns at home when visiting the Airport." There simply is no reason for Defendants to believe that the Airport is not filled daily with many people carrying firearms in the parking lots, at the ticket counters, in the baggage claim areas, and in the Atrium, now

[3] Defendants refer to this law as 2008 Georgia Laws Act 802. Plaintiffs understand that it was made Act No. 801. Either way, it was passed as House Bill 89 and Plaintiffs shall refer to this law in this brief as HB 89.

that it no longer is a crime for GFL holders to do so (and given Defendants' evidence of how many people visit the Airport daily).

Finally, lapsing into policy arguments, Defendants assail Plaintiffs' (non-existent) suggestion that the Airport would be more secure "by allowing untrained civilians to enter the Airport with lethal weapons." It is not for this Court to determine whether it is "safer" not to arrest falsely people legally carrying firearms. Plaintiffs raise the issue of what the law ***is.*** Defendants are arguing their notion of what the law ***should be.*** Defendants have no authority to set any "effective safety policy" regarding carrying of firearms, and they know it (Plaintiffs and others already have litigated that issue with Defendants multiple times).

In an attempt to show "harm," Defendants speculate, with no evidence offered, that allowing "thousands of people to carry legal weapons" would cause "staggering" harm to them. Such speculation is meaningless, but people already are carrying firearms in the Airport as a result of HB 89. Defendants have suffered no harm at all, because they do not even seem to be aware it is happening. Defendants also overlook the fact that airports all over the country have been open to licensed firearm carry for years, and those airports are not suffering the "staggering" harm Defendants predict.

Defendants are also mistaken in believing that a preliminary injunction ***must*** maintain the *status quo*[4]. "The purpose of a preliminary injunction is always to prevent irreparable injury so as to preserve the court's ability to render a meaningful decision on the merits. It often happens that his purpose is furthered by preservation of the status quo, ***but not always.***" *Canal Authority of Florida v. Callaway,* 489 F.2d 567, 576 (1974) [emphasis supplied]. "If the currently existing status quo itself is causing one of the parties irreparable injury, it is necessary to alter the situation so as to prevent the injury…." *Id.*

I. Plaintiffs are Likely to Succeed on the Merits

Plaintiffs dispute Defendants' position that federal law preempts state regulation of firearms in the Airport.[5] Plaintiffs showed in their opening Brief that Georgia law no longer criminalizes carrying firearms in the Airport for GFL holders. Defendants refer to a vague "policy" of theirs restricting such carry, but do not cite that policy nor show how a violation of it is criminal. In any event, Defendants lack

[4] Defendants' description of the *status quo* again ignores that Plaintiffs filed a declaration refuting that description. Doc. 16-5.

[5] For a thorough discussion of Defendants' preemption argument, see Plaintiffs Response in Opposition to Defendants' Motion for Judgment on the Pleadings, pp. 1-14.

the power to regulate carrying firearms in any manner, as discussed below in a section dealing with deprivation of property interests.[6]

II. Plaintiffs Face Irreparable Harm

"When an alleged constitutional right is involved, most courts hold that no further showing of irreparable injury is necessary." *Kikumura v. Hurley*, 242 F.3d 950, 963 (10th Cir. 2001) *citing* 11A Charles Alan Wright, *et. al., Federal Practice and Procedure* § 2948.1 (2d ed. 1995). "Continued deprivation of the Plaintiffs' fourth amendment rights is the type of irreparable injury necessary to justify injunctive relief." *Community for Creative Non-Violence v. Unknown Agents of U.S. Marshals*, 797 F.Supp. 7 (D.D.C. 1992) (law enforcement threatening citizens with actions beyond their authority). Defendants contend that *Siegel v. LePore*, 234 F.3d 1163 (11th Cir. 2000) stands for the proposition that a court should not issue a preliminary injunction involving a constitutional question "absent necessity," apparently contending that nothing is "necessary" until they manage to get a Plaintiff in this case into handcuffs in the absence of any crime. That is not the holding of *Siegel*. In *Siegel*, the court found that there had been no adequate showing of

[6] For additional analysis of the application of HB 89 to state laws regulating carrying firearms in the Airport, see Plaintiffs' Response in Opposition to Defendants' Motion for Judgment on the Pleadings, pp. 14-22.

irreparable harm and that, absent irreparable harm, it would not be appropriate to consider the likelihood of success on the merits of the constitutional question.

Defendants also believe that Plaintiffs' Motion would require this Court to decide whether the Supremacy Clause preempts state law. This is not the case. Plaintiffs' position is that they are likely to succeed on the merits because there is no law prohibiting GFL holders from carrying firearms in the Airport. Defendants' federal preemption (Supremacy Clause) argument only supports Plaintiffs' position. If the Court adopts Defendants' absurd position with respect to federal preemption, then any defense that the state public gathering law prohibits firearms is irrelevant.

II. A. Fourth Amendment Claims

Defendants incorrectly assert that a specific and concrete threat of arrest cannot be a Fourth Amendment violation and cite *United States v. Mendenhall,* 446 U.S. 544, 554 (1980), to say "a mere threat to arrest is not a seizure and does not trigger the Fourth Amendment's protections." *Mendenhall* says nothing of the kind. In *Mendenhall,* the defendant ***voluntarily*** consented to a search that revealed contraband drugs. In other words, there was no Fourth Amendment violation at all. Nowhere in the opinion in *Mendenhall* is there any discussion of a threat to arrest the defendant.

Mendenhall is nothing like the facts of the instant case. Plaintiffs assert that they are being threatened with arrest for behavior that is ***not criminal.*** Being arrested for behavior that is ***not criminal*** clearly is a Fourth Amendment violation, so the threat of a Fourth Amendment violation constitutes a threat of irreparable harm. The Supreme Court has ruled that it was error for a district court to deny a ***preliminary injunction*** to plaintiffs who were objecting to a roadblock used to check for drugs, finding that even the brief detention at a roadblock without probable cause or reasonable articulable suspicion violated the Fourth Amendment. *City of Indianpolis v. Edmond*, 531 U.S. 32 (2000). Obviously, actual arrest without probable cause, as Defendants' "policy" requires, is much more intrusive than a mere brief detention.

Defendants focus only on whether Fourth Amendment violations are presumed to be irreparable. Regardless of the presumption, Plaintiffs showed in their opening Brief how the harm was actually irreparable. Defendants have not attempted to refute that showing. Plaintiffs also put into evidence an affidavit from a GCO member who regularly carries a firearm at the Airport since July 1 and intends to continue to do so. Doc. 16-5. Defendants have completely failed to respond to this evidence, instead arguing, "Plaintiffs rely on Rep. Bearden's statement on July 1, 2008, that he purportedly planned to bring a gun to the Airport" and then responding only to that

argument, as if that is all that were before the court. Doc. 16-5 by itself vitiates any concerns that the likelihood of Plaintiffs being searched, detained, and arrested illegally is "merely conjectural." The threat is real and concrete for those GCO members who are carrying firearms in the unsecured areas of the airport in full compliance with the law.[7]

The erroneous argument that this lawsuit is a "pre-enforcement challenge" to some unknown statute completely misses the issues involved in this case. The argument depends for its validity on the concept that there is a statute out there (somewhere) that Plaintiffs are challenging. Nothing could be further from the truth. As is demonstrated by Defendants' vague musings on some ambiguous "policy" that supposedly makes it illegal to carry a firearm at the Airport parking lot and unsecured areas inside the terminal, no law is broken when a person with a GFL carries a firearm at these locations. Plaintiffs' challenge is not a pre-enforcement challenge to a statute, but a challenge to Defendants' repeated threats to arrest Plaintiffs illegally ***in the absence of any criminal conduct***. Plaintiffs are not challenging any statute or other law applicable to the Airport.

[7] The fact that people are legally carrying at the airport *now* significantly undermines Defendants' frivolous contention that granting the preliminary injunction will somehow result in harm to Defendants.

II. B. Plaintiffs are Being Deprived of Their Property Interests

Defendants wrongly assert that Plaintiffs' property interests in their GFLs are subject to Defendants' "reasonable restrictions." Defendants lack any authority to regulate the carrying of firearms "in any manner." O.C.G.A. § 16-11-173; *GeorgiaCarry.Org., Inc. v. Coweta County,* 288 Ga. App. 748, 655 S.E.2d 346 (2007).

Moreover, the City of Atlanta is collaterally estopped from claiming it can regulate the carrying of firearms. Collateral estoppel, or issue preclusion, bars re-litigation of issues actually litigated and necessary to the judgment of prior litigation when the party against whom the earlier decision is asserted had a full and fair opportunity to litigate in the earlier proceeding. *Precision Air Parts, Inc. v. Avco Corp.*, 736 F.2d 1499, 1501 (11th Cir. 1984). The prerequisites for collateral estoppel are 1) the issue at stake must be identical to the one involved in the prior litigation; 2) the issue must have been actually litigated in the prior suit; 3) the determination of the issue in the prior litigation must have been a critical and necessary part of the judgment in the earlier action; and 4) the party against whom the earlier decision is asserted must have had a full and fair opportunity to litigate the issue in the earlier

proceeding. *I.A. Durbin, Inc. v. Jefferson National Bank*, 793 F.2d 1541, 1549 (11th Cir. 1986).

Plaintiff GCO sued the City of Atlanta last year for regulating the carrying of firearms. 2nd Declaration of Edward Stone, ¶ 3. In the suit seeking a declaratory judgment that Atlanta lacked the power to regulate carrying firearms, the Superior Court of Fulton County granted GCO's motion for summary judgment against Atlanta and enjoined Atlanta from enforcing its illegal ordinance purporting to regulate carrying firearms. *Id.*, ¶¶ 8, 10. Atlanta was given a full opportunity to brief the issue and to argue the issue at oral argument. *Id.*, ¶¶ 6, 7. Not surprisingly, in the face of overwhelming authority, Atlanta lost the issue. Finally, if, as Defendants insist, Congress has preempted state regulation of firearms in the Airport, Defendants likewise are preempted by federal law.

Defendants concede that Plaintiffs have property interests in their GFLs [Doc. 25-1, p. 17], but try to apply a procedural due process analysis to Defendants' deprivation of that property. While Plaintiffs do assert lack of due process as a Count in their Amended Complaint, that is not the same as the irreparable harm Plaintiffs cite as grounds for a preliminary injunction. Lack of due process goes to the redressability of the harm, but is not part and parcel of the harm.

Plaintiffs' point is simple: They have GFLs, and licenses issued by the state are property. Under state law, a GFL holder is not prohibited from carrying firearms in the Airport. By asserting that GFL holders may not carry firearms in the Airport, and threatening to arrest them if they do, Defendants are depriving Plaintiffs of a portion of their property interest in their GFLs. Contrary to Defendants' claim to the contrary, Defendants have effectively revoked Plaintiffs' GFLs on Airport property.

Defendants Misapply *Heller*

Defendants cite to *District of Columbia v. Heller*, 128 S.Ct. 2783 (2008) for the proposition that bearing firearms is subject to ***Defendants'*** "reasonable restrictions." *Heller* has no application to this Motion, because Plaintiffs are not making a Second Amendment claim in this case. Moreover, the point of the quoted phrase is that the Second Amendment does not prohibit all regulations of the right to keep and bear arms in "sensitive areas." This does not mean that such regulations ***actually exist*** in the present case.

III. An Injunction Would Not Burden Defendants

Defendants ignore that fact that GFL holders already are carrying firearms in the Airport. Doc. 16-5. The fact that they are not currently suffering the grave harm

they predict completely undermines the credibility of their prediction.

There Will be no Economic Harm to Defendants

Defendants pretend that citizen carry of firearms creates a greater risk then law enforcement carry of firearms. However, law enforcement has a similar risk of accidental discharges as the citizen of Georgia. Special Agent Lee Paige of the Drug Enforcement Agency received international fame following his speech at the Orlando Youth Minority Golf association when he accidentally discharged his firearm into his own foot. (The Sydney Morning Herald, *Gun Safety Lesson Goes Off Like A Shot* http://www.smh.com.au/news/world/gun-safety-cop-shooting/2006/04/23/1145730809084.html viewed on 08/07/08) Being a highly trained professional is no more likely to prevent accidental discharges than any other criteria, and attempts to ban those firearms they do not have control over. The rights of the citizens of Georgia to be free from unreasonable searches and seizures are more important than the city's baseless fears.

While Defendants worry that "every" person in the Airport would be armed, the mere presence of the firearm is not probable cause or even reasonable articulable suspicion of any crime. *United States v. Ubiles*, 224 F.3d 213 (3d Cir 2000); *State v. Jones*, 289 Ga. App. 176 (2008). There would be no need to stop everyone seen

merely carrying a firearm.

While Defendants would have us believe that the carrying of firearms into the parking deck or other unsecured areas of the airport would cause fiscal havoc, the reality is quite different. Even the massive restructuring of security following the 9/11 tragedy resulted in comparatively little increased spending. "An analysis of public and private expenditures on homeland security shows that overall spending rose by $44 billion between 2001 and 2005 - a clear increase but one that represents a gain of only 1/4 of 1 percent as a share of U.S. GDP. Private sector expenditures increased very modestly in dollar terms and remained unchanged as a fraction of the sector's GDP**."** Hobijn, Bart and Sager, Erick, What Has Homeland Security Cost? An Assessment: 2001-2005. Current Issues in Economics and Finance, Vol. 13, No. 2, February 2007 Available at SSRN: http://ssrn.com/abstract=971861 viewed on 08/05/08.

"It suggests that the total amount of public- and private-sector spending will be relatively small: the annual direct costs of the homeland security efforts are estimated to be $72 billion, or 0.66 percent of GDP in 2003. In the private sector, homeland security expenses are estimated to lower labor productivity levels by at most 1.12 percent. Therefore, the reallocation of resources associated with homeland security is unlikely to have any large and long-lasting effects on the U.S. economy." Hobijn,

Bart, What Will Homeland Security Cost? Economic Policy Review, Vol. 8, No. 2, November 2002 Available at SSRN: http://ssrn.com/abstract=802964

Therefore, unless the Airport is so grossly mismanaged by the City of Atlanta as to create a greater than average increase in costs,[8] the most that could be expected from a change as radical as all of the new security measures of 9/11 should only result in a necessary increase in labor of roughly one percent. Defendants have not asserted that the security changes necessary to watch law abiding citizens would be anywhere near the changes implemented post-9/11.

IV. The Injunction Sought Will Not Harm the Public Interest

The public interest is served by having the rule of law followed and the Constitution observed. The public has no legitimate interest in depriving citizens of their rights to be free from unreasonable searches and seizures. The public likewise has no interest in the enforcement of non-existent laws.

Given Defendants' absolute defiance of state law and the Constitution, the request for an injunction is not drastic, but rather well calculated to achieve the necessary goal of protecting individuals safety and safeguarding their protected rights.

[8] Plaintiffs do not doubt that the City of Atlanta is very responsible in handling its

Conclusion

There is no law prohibiting a GFL holder from carrying a firearm in the nonsterile areas of the Airport, which makes Georgia just like the vast majority of states. Defendants, however, declared in a stipulation filed with this Court that they have a policy of arresting anybody with a firearm anyway. This Court should enjoin such a blatantly unconstitutional practice during the pendency of this case to prevent citizens from being falsely arrested and to protect Defendants' own hapless employees from civil rights lawsuits for which they may well lack qualified immunity.

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Local Rule 7.1D Certification

The undersigned counsel certifies that the foregoing Reply in Support of Plaintiffs' Motion for a Preliminary Injunction was prepared using Times New Roman 14 point, a font and point selection approved in LR 5.1B.

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CERTIFICATE OF SERVICE

I certify that I electronically filed the foregoing Reply in Support of Plaintiffs' Motion for Preliminary Injunction on August 8, 2008 using the CM/ECF system which automatically will send email notification of such filing on the following:

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