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.	)	

PLAINTIFFS' RESPONSE IN OPPOSITION TO DEFENDANTS' MOTION FOR JUDGMENT ON THE PLEADINGS

Defendants' Motion Improperly Relies on Matters Outside the Pleadings

A motion for judgment on the pleadings pursuant to Rule 12(c) must not consider matters outside the pleadings. Rule 12(d). If such matters outside the pleadings are not rejected by the Court, the motion must be treated as one for summary judgment pursuant to Rule 56. *Id.*

Defendants have filed a rather voluminous appendix to their Motion, including reports, transcripts, and congressional records. If the Court considers all these materials, Defendants' Motion must be treated as one for summary judgment and Plaintiffs must be given an opportunity to respond to it in that fashion. *Id.*

I. There is no Federal Preemption of State Law Pertaining to Firearms in Airports

The Supremacy Clause of the Constitution can have the effect of preempting state law in three ways: 1) Express preemption, where Congress explicitly defines

the extent to which its acts preempt state law; 2) where Congress intends for the federal government to "occupy the field" exclusively; and 3) where there is an actual conflict between state and federal law so that it is impossible for a ***private*** party to comply with both requirements. *English v. General Electric Co.*, 496 U.S. 72, 74 (1990). [Emphasis supplied]. Defendants assert preemption under the latter two means only.

Laboring under the misconception that state laws on topics such as the carrying of firearms ***grant*** rights rather than ***restrict*** rights, Defendants struggle with the concept that the State of Georgia, under H.B. 89, ***permits*** people with GFLs to carry firearms in the Airport. This is just not true. H.B. 89 decriminalized carrying guns in airports by people with GFLs. H.B. 89 did not ***grant*** a right. It ***removed*** a restriction.

There is, therefore, no state regulatory scheme for Defendants to worry about being preempted by federal law. Plaintiffs are asserting the ***absence*** of state regulation of carrying firearms by people with GFLs. If, as Defendants assert, state regulation of the carrying of firearms in airports is completely preempted (because Congress has occupied the field), then there is no need to consider state law at all. Under Defendants' logic, the state is powerless to prohibit carrying firearms in the Airport.

By insisting that Georgia is powerless to regulate carrying firearms in airports, Defendants have conceded this entire case. There is no federal law prohibiting carrying firearms in airports, as Defendants well know. Defendants have no power to regulate carrying firearms "in any manner." O.C.G.A. § 16-11-173; *GeorgiaCarry.Org, Inc. v. Coweta County*, 288 Ga. App. 438 (2007). Moreover, Defendants are collaterally estopped from claiming that they can regulate carrying firearms. *See* Plaintiffs' Reply in Support of Their Motion for a Preliminary Injunction, pp. 10-11.

With no federal or local laws restricting the carrying of firearms at the Airport, the only jurisdiction that ***might*** exercise authority over this topic is the State of Georgia. But, Defendants insist that Georgia has no such authority because the federal government has occupied the field, leaving no room for state or local regulation. Any laws that Georgia has regulating firearms at the airport are, under Defendants' logic, invalid and of no force or effect.

Thus, according to Defendants, the Airport is a gun-friendly island in a sea of state regulation. Anyone prohibited from carrying a pistol (without a GFL) or from carrying a concealed firearm (without a GFL) or from carrying a firearm in an airport (without a GFL) is free to load up and holster her firearm when she enters Airport property. Despite Defendants' willingness to concede the case

completely, Plaintiffs do not believe that Defendants' understanding of the law is correct.

Congress Has Not Occupied the Field of Carrying Guns in Airports

In order to find preemption by occupying the field in areas that have "been traditionally occupied by the States," congressional intent to supersede state laws must be clear and manifest. *Jones v. Rath Packaging Co.*, 430 U.S. 519 (1977). ("We start with the assumption that the historic police powers of the States were not be superseded by the Federal Act unless that was the clear and manifest purpose of Congress.")

The carrying of firearms is historically a matter of state concern. The Gun-Free School Zone Act, 18 U.S.C. § 922(q), is one of the very few instances in which Congress has ventured into the field of gun-carrying regulation (in places not otherwise under federal jurisdiction such as federal property or the ***secured*** areas of airports). On the other hand, the states have been regulating the carrying of firearms since colonial days (*see, e.g.*, an early Georgia law requiring carrying a firearm to church, 1770 Georgia Colonial Laws 471). Every state regulates carrying firearms to some degree, and only two states (Vermont and Alaska) do not outright prohibit the carrying of concealed firearms without a license (Wisconsin

and Illinois have no licensing provisions, thus banning concealed carry of loaded firearms altogether).

It is far from clear that the manifest purpose of Congress was to preempt all state and local regulation of carrying guns in airports.[1] Indeed, it is difficult to imagine that this novel theory of Defendants', if it has any merit, has not been tested successfully by anyone charged with a state or local crime of carrying a firearm in an airport ***somewhere***, including by someone in Georgia. If Defendants' truly believe that Georgia has no power to regulate carrying firearms in airports, why do Defendants arrest people for carrying firearms in the Airport and charge them with violating O.C.G.A. § 16-11-127? Either Defendants do not believe their own arguments or Defendants are knowingly and willfully detaining, arresting,

[1] Plaintiffs note that Defendants criticized Plaintiffs' research on state laws regarding carrying firearms in airports as "inaccurate." Defendants claim to have found two additional states that prohibit carrying firearms in airports (Alaska and Ohio). Defendants' research on those two states is itself inaccurate. Ohio only prohibits ***concealed*** carry in airports, presumably allowing openly carried firearms in airports. Ohio Rev. Code § 2923.126(B)(1). Alaska has an administrative regulation that prohibits carrying at ***two*** of its airports (Anchorage and Fairbanks). Alaska Admin. Code, Title 17, § 42.065. There is no penalty for a violation. The airport manager can ask a person found to be carrying a firearm to stop carrying a firearm or leave the airport. Plaintiffs are unsure why Defendants bothered to fill a page-long footnote with a discussion of state and local laws regulating carrying firearms in airports when Defendants believe all such laws are preempted by federal law.

searching, and prosecuting people for something that Defendants assert is not a crime.

There is no Conflict with Federal Law

Defendants also claim, inexplicably, that Georgia's ***elimination*** of a prohibition against carrying a firearm in an airport for GFL holders ***conflicts*** with an unidentified provision of federal law. This concept is beyond comprehension.

To reiterate the application of conflict preemption, it applies when it is impossible for a ***private*** party to comply with both state and federal law. Defendants have failed to identify the state and federal laws that are in conflict with one another, and for good reason. There are not any. There is no federal regulation of carrying firearms in the unsecured areas of airports at all. Georgia no longer has a law prohibiting GFL holders from carrying firearms in airports. There is no conflict.

Defendants assert that their "policy on firearms in the Airport is nothing more than an act in compliance with the mandate of federal law to establish and carry out an airport security plan…." Defendants fail to cite any authority that says the federal government requires them to prohibit guns at the Airport. Defendants also fail to cite or supply their policy that they claim is embedded in an "airport security plan."

Even if there were a federal mandate as suggested by Defendants, however, it would be unconstitutional. The federal government has no power to press into service the officers or governments of the states. *Printz v. United States,* 521 U.S. 898, 930 (1997). The federal government likewise can give no commands to state legislatures. "The Framers explicitly chose a Constitution that confers upon Congress the power to regulate individuals, not States." *Id.* at 920. "Congress may not simply commandeer the legislative processes of the States by directly compelling them to enact and enforce a federal regulatory program." *New York v. United States,* 505 U.S. 144, 161 (1992), *citing Hodel v. Virginia Surface Mining & Reclamation Association, Inc.,* 452 U.S. 264, 288, 69 L.Ed. 1, 101 S.Ct. 2352 (1981). "[T]his Court never has sanctioned explicitly a federal command to the States to promulgate and enforce laws and regulations." *New York v. United States, Id., citing FERC v. Mississippi,* 456 U.S. 742, 761-762, 72 L.Ed. 532, 102 S.Ct. 2126 (1982). "[T]he the Constitution has never been understood to confer upon Congress the ability to require the States to govern according to Congress' instructions. The Court has been explicit in this distinction. Both the States and the United States existed before the Constitution. The people, through that instrument, established a more perfect union by substituting a national government, acting, with ample power, directly upon the citizens, instead of the Confederate

government, which acted with powers, greatly restricted, only upon the States." *New York, Id.* (citations omitted).

The enactment of laws by a city is "an application of power which has been primarily entrusted to the state, and which the state may reclaim at its discretion." *Sturm, Ruger & Co. v. City of Atlanta,* 253 Ga. App. 713, 720-21, 560 S.E.2d 525, 531 (2002). The regulation of carrying firearms is an instance where the state has reclaimed the power. O.C.G.A. § 16-11-173. Defendants have no authority to regulate carrying firearms, because the state has retained that power for itself. The federal government has no authority to wrest that power from the state and grant it to Defendants.

"If Congress intends to alter the usual constitutional balance between the States and the Federal Government, it must make its intention to do so unmistakably clear in the language of the statute." *Gregory v. Ashcroft*, 501 U.S. 452, 460 (1991). "[F]ederal legislation threatening to trench on the States' arrangements for conducting their own governments should be treated with great skepticism, and read in a way that preserves a State's chosen disposition of its own power….." *Nixon v. Missouri Municipal League*, 541 U.S. 125, 141 (2004).

In *Nixon*, the State of Missouri prohibited its cities from providing telecommunications services, despite the provisions of the Telecommunications

Act of 1996 that said, "No State … may prohibit … the ability of any entity to provide any … telecommunications service." 47 U.S.C. § 253(a). The Court applied the rule in *Gregory*, saying there was no clear statement from Congress that it intended to interfere with Missouri's decisions about its own government. The federal statute was ruled not to apply to Missouri's regulation of its own cities.

In the case at bar, Defendants cite nothing even close to the words of the Telecommunications Act (that still were not good enough to meet the high test in *Gregory*). Absent a clear statement from Congress that it intended to grant to Defendants powers specifically prohibited from Defendants by Georgia, it is impossible to reach that result.

Defendants cite to a federal regulation requiring them to have an "airport security plan." The required contents of an airport security plan are listed in 47 C.F.R. § 1542.103. Nothing in that regulation remotely includes a requirement that firearms be prohibited in the non-sterile area of the Airport. Plaintiffs understand that Defendants' own airport security plan contains no such measure.

Even if Defendants' own plan were amended to contain such a measure, it still would not pass the *Gregory* test. Defendants clearly have discretion in amending their airport security plan (the test is that the laundry list of items must be included and that "safety and the public interest will allow it.") 49 C.F.R. §

1542.105(b)(3). Absent congressional mandate that Defendants include a gun prohibition in their security plan, they cannot begin to claim they are ***required*** under federal law to have such a provision. Any attempt to include such a provision would therefore be nothing more than an attempt by the city to "do indirectly that which it cannot do directly," which *Sturm, Ruger* specifically said Atlanta may not do. 253 Ga. App. at 718 (holding that Atlanta could not "regulate" firearms by suing firearms manufacturers).

Federal Authorities Cited by Defendants Do Not Constitute Preemption

The pertinent portion of Title 49 of the Code of Federal Regulations states as follows:

> §1540.111 **Carriage of weapons, explosives, and incendiaries by individuals**
> (a) *On an individual's person or accessible property—prohibitions.* Except as provided in paragraph (b) of this section, an individual may not have a weapon, explosive, or incendiary, on or about the individual's person or accessible property—
>
> > (1) When performance has begun of the inspection of the individual's person or accessible property before entering a sterile area, or before boarding an aircraft for which screening is conducted under this subchapter;
> > (2) When the individual is entering or in a sterile area; or
> > (3) When the individual is attempting to board or onboard an aircraft for which screening is conducted under §§1544.201, 1546.201, or 1562.23 of this chapter.

> (b) *On an individual's person or accessible property—permitted carriage of a weapon.* Paragraph (a) of this section does not apply as to carriage of firearms and other weapons if the individual is one of the following:
>
> > (1) Law enforcement personnel required to carry a firearm or other weapons while in the performance of law enforcement duty at the airport.
> > (2) An individual authorized to carry a weapon in accordance with §§1544.219, 1544.221, 1544.223, 1546.211, or subpart B of part 1562 of this chapter.
> > (3) An individual authorized to carry a weapon in a sterile area under a security program.

The Preemption Doctrine does not apply to this case and the Defendants' invocation of it does not prevent Plaintiffs from showing that they have a substantial likelihood of prevailing on the merits.

> 49 USC §44903(h)(4) states in pertinent part:
>
> Airport perimeter screening.— The Under Secretary—
> (A) shall require, as soon as practicable after the date of enactment of this subsection, screening or inspection of all individuals, goods, property, vehicles, and other equipment before entry into a secured area of an airport in the United States described in section 44903(c)

The definition of "Secure area of an airport" at 49 USC §44903(c) is as follows:

> The term "secure area of an airport" means the sterile area and the Secure Identification Display Area of an airport (as such terms are defined in section 1540.5 of title 49, Code of Federal Regulations, or any successor regulation to such section).

The pertinent definitions at 49 CFR §1540.5 are:

> *Screening location* means each site at which individuals or property are inspected for the presence of weapons, explosives, or incendiaries.

> *Secured area* means a portion of an airport, specified in the airport security program, in which certain security measures specified in part 1542 of this chapter are carried out. This area is where aircraft operators and foreign air carriers that have a security program under part 1544 or 1546 of this chapter enplane and deplane passengers and sort and load baggage and any adjacent areas that are not separated by adequate security measures.
>
> *Security Identification Display Area (SIDA)* means a portion of an airport, specified in the airport security program, in which security measures specified in this part are carried out. This area includes the secured area and may include other areas of the airport.
>
> *Sterile area* means a portion of an airport defined in the airport security program that provides passengers access to boarding aircraft and to which the access generally is controlled by TSA, or by an aircraft operator under part 1544 of this chapter or a foreign air carrier under part 1546 of this chapter, through the screening of persons and property.

It is clear that an SIDA is an area that is not accessible to members of the general public. Lawful access to any SIDA is conditioned upon the display of a picture ID issued by the airport operator with information prescribed by the TSA. See 49 CFR §1542.211. The discussion of the SIDA identification system reminds the reader of the security credentials issued to military personnel in secure areas of a military installation.

Conspicuous by its absence from the voluminous materials included in the Defendants' Appendix filed with the Court is any provision prohibiting persons such as the Plaintiffs from possessing loaded firearms in the "non-sterile" areas away from the screening location, in particular the parking lot, MARTA train

platform, the Atrium and the airport lobby ticket counters. Furthermore, the very language of 49 CFR 1540.5 undercuts the preemption argument because it shows that the federal regulatory scheme is not so all-encompassing in its scope as to displace the authority of Georgia's laws outside of: the Screening Location, the Secured Area, the SIDA and the Sterile Area.

The Georgia General Assembly has been deferential to the federal establishment of a "sterile" area at the Airport. The language of OCGA §16-11-27 even allows for the possibility that the TSA might in the future expand the "sterile" areas at any airport -- avoiding the need for any future amendment to it in the event of such expansion.

Similarly, Congress and the TSA were following sound precedent and established policy in deferring to state criminal law in the non-sterile areas (i.e. MARTA train platform, parking lot, ticket counter, shopping mall, etc.) by *not* writing preemptive laws and regulations for those areas. As the U.S. Supreme Court stated in *Brecht v. Anderson*, 507 U.S. 619 (1993): under our federal system, the "'States possess primary authority for defining and enforcing the criminal law.'" (quoting *Engle v. Isaac*, 456 U. S. 107, 128 (1982)).

It is easily possible to harmonize all of the Title 49 authorities (statutes and regulations), OCGA §16-11-127 and the principles of federal preemption to show

that the conflict that the Defendants have found does not really exist because the physical area covered by the preemptive federal law is confined to those areas described in the statute (49 USC §44903) and the regulations issued pursuant to such statute. A mugging in a parking lot at the Airport is not a "federal case." But it is possibly a matter of life or death for the Georgia resident picking up visiting relatives.

II. H.B. 89 Applies to Airports

Defendants allege that despite the passage of H.B. 89, Georgia law still criminalizes the possession of firearms anywhere on Airport property, even outside the "sterile" areas where passengers and their carry-on articles are screened for weapons. Defendants state in their Response in Opposition to Plaintiffs Motion for a Preliminary Injunction:

> H.B. 89 by its terms does not apply to airports. In fact, other Georgia statutes – the "public gathering" law (O.C.G.A. § 16-11-127) and Georgia's Transportation Passenger Security Act of 2002 (O.C.G.A. § 16-12-122 *et seq*.) – prohibit Plaintiffs from carrying concealed, loaded guns in the Airport.

[Doc. 25, p. 3]; *see also* Doc. 24-2, page 18.

Defendants' analysis is incorrect. The Public Gathering law, to the extent it applied to the Airport, was repealed by implication, by the far more detailed Transportation Passenger Safety Act of 2002 ("TPSA 2002") and its specific

provisions generally making a felony out of what had been a misdemeanor Public Gathering violation. In addition, TPSA 2002 and subsequent legislation contained exceptions that would allow law-abiding citizens to take their firearms to the airport for the purpose of putting them into checked baggage and that would prevent the application of the TPSA 2002 to a situation involving a person who inadvertently brings a gun to an airport and immediately discloses it to a security officer. This latter affirmative defense, codified as O.C.G.A. § 16-12-127 (c), was not part of the TPSA 2002, but it was added the next year as a result of House Bill 397, passed by the Georgia legislature in its 2003 legislative session and signed into law by the Governor on May 31, 2003.

TPSA 2002 and H.B. 397 had, as of 2003, removed airports from the scope of the Public Gatherings law, because even though the Airport terminal buildings are publicly owned or operated, the far more detailed and specific legislation passed subsequently to the public gathering law fully occupies the field on the subject of weapons in the non-sterile areas of airports. The phrase "publicly owned or operated buildings" has been in the public gathering law since 1976. (1976 Ga. Laws, p. 1432).

The Public Gatherings law is very broad. At the time TPSA 2002 and HB 397 were passed, in addition to covering publicly owned and operated buildings,

the Public Gatherings law also applied to "athletic or sporting events, churches or church functions, political rallies or functions" and "establishments at which alcoholic beverages are sold for consumption on the premises (the latter provision being repealed with respect to pistol permit holders who do not consume alcohol in such an establishment, per H.B. 89) (O.C.G.A. 16-11-127). Because the Public Gatherings law is so wide-reaching and only includes municipal airports incidentally, as a sub-species of public buildings, there were no exceptions written into this law for the lawful transportation of unloaded firearms in checked baggage, creating a conflict with longstanding federal law that specifically authorizes firearms to be carried in checked baggage, subject to a number of conditions, such as that their presence be declared to the airline, that the weapons be fully unloaded, and securely encased. (18 U.S.C. § 922 (e)). This situation was corrected by the Georgia General Assembly with the passage of TPSA 2002, which provided the following exception:

> "…nor shall the prohibition apply to persons transporting weapons contained in baggage which is not accessible to passengers if the presence of such weapons has been declared to the transportation company and such weapons have been secured in a manner prescribed by state or federal law or regulation for the purpose of transportation."

(O.C.G.A. 16-12-123 (b)).

There is a glaring and obvious inconsistency with a misdemeanor Public Gatherings law that forbids guns at, among other places, publicly owned airport buildings and a felony transportation security law that both increases the penalty for unlawfully carrying weapons at airports but then also recognizes a number of exceptions that would make such an act not an offense at all.

The rule of law to be applied when faced with such an inconsistency is that the specific provisions of one law control over the inconsistent general provisions of another law. *Hooks v. Cobb Center Pawn & Jewelry, Inc*. 241 Ga. App. 305, 309 (1999). In *Hooks,* the plaintiff pawned his car and failed to make payments, ultimately losing his car. He sought to rescind the pawn contract, claiming, *inter alia,* that the pawn contract violated the general usury statute. The court ruled, however, that a later-enacted specific statute regulating pawn contract interest controlled over a previously-enacted general usury statute. Thus, even though the general usury statute was still valid and still applied, on its face, to all contracts including pawn contracts, the court refused to apply the general statute to the pawn contract, saying the general statute was repealed by the specific statute to the extent it applied to pawn contracts. This rule, and the holding of *Hooks,* was confirmed by *Metzger v. Americredit Financial Services, Inc.*, 273 Ga. App. 453, 459 (2005).

Applying the *Hooks* rule to the facts of the instant case, the general Public Gathering law was repealed, to the extent it applied to airports, by the later-enacted and more specific TPSA 2002. Put simply, the Public Gatherings law, O.C.G.A. § 16-11-127, has not applied to airports since 2002.

Another rule of interpretation of conflicting statutes is that the more recent in time will control over inconsistent provisions in an older statute, and where the legislature implies that the new law is to replace the old law on a given set of facts, the Court should declare that the new law affected a repeal of the prior legislative act. *Keener v. MacDougall*, 232 Ga. 273 (1974) (involving two recent statutes on the subject of a defendant's waiver of indictment by a Grand Jury). This is true because "…the intent of the legislature is the cardinal guide to the construction of statutes; and when plainly collected, should be carried into effect, ***though contrary to the literal sense of terms.***" *Id* at 276 (emphasis supplied) (citing *Erwin v. Moore*, 15 Ga. 361 (1) (1854)).

There are two ways in which a statute will be deemed to have been repealed by new legislation. The first is when the something in the new law is irreconcilably inconsistent with what is required by the older law, and the other situation is when the later Act "deals with and embraces the whole subject matter of the legislation." *Keener*, at 276.

Because the TPSA 2002 and the amendment to O.C.G.A. § 16-12-127 that was affected with H.B. 397 in 2003 are legislative acts that are both more recent in time and more detailed and specific than the Public Gatherings law, this Court should find that it was the will and intent of the Georgia General Assembly to replace and repeal the Public Gathering law to the extent it previously criminalized weapons at public airports. Up until July 1, 2008, it was therefore not a misdemeanor, but a felony, to carry a weapon in the Airport, and the only law that applied to such an offense was the TPSA 2002 as amended.

Effective July 1, 2008 the Georgia General Assembly passed House Bill 89, which specifically announced that its provisions allowing for GFL holders to carry weapons in "public transportation." H.B. 89 specifically referenced the Code sections of TPSA 2002. "[GFL holders]…shall be permitted to carry a firearm… in public transportation ***notwithstanding Code Sections 16-12-122 through 16-12-127***; provided, however, that a person shall not carry a firearm into a place prohibited by federal law." [Emphasis supplied]. This language proves a clear and explicit legislative intent to repeal the conflicting provisions of the old law (TPSA 2002), as applied to GFL holders taking their firearms to airports and other terminals of public transportation.

Defendants incorrectly argue that because H.B. 89 did not specifically use the word "airport," therefore it must not apply to airports. The "public transportation" language of H.B. 89 was meant to include airports, train stations, and bus stations. All of these locations are public transportation facilities, and all were covered by Code sections 16-12-122 through 16-12-127.

O.C.G.A. § 16-12-122(11) defines "transportation company" to mean, *inter alia*, "transportation facilities owned or operated by local public bodies; by municipalities…." O.C.G.A. § 16-12-122(10) defines "terminal" to mean, *inter alia*, "an aircraft, … any such transportation facility, or infrastructure relating thereto operated by a transportation company…."

It is clear from the definitions in the statute that "transportation" means more than just the actual means of conveyance (bus, train, aircraft). The General Assembly included facilities such as airports in the definition of "transportation company." Airports that are publicly owned, such as the Airport, are, therefore, "public transportation." In addition, Article 4 of Chapter 12 of Title 16 of the O.C.G.A (*i.e.*, O.C.G.A. § 16-12-120 through 16-12-128) is entitled, "Offenses Against ***Public Transportation.***" [emphasis supplied]. The General Assembly labeled everything in this Article, including O.C.G.A. § 16-12-127, "public transportation."

Defendants' cramped reading of the meaning of "public transportation" to be just the actual means of conveyance leads to the absurd result that, under H.B. 89 and TPSA 2002, a GFL holder cannot carry a firearm onto MARTA property, including the parking structures and station buildings, but once on the bus or train, the GFL holder is free to load and carry the firearm she was not allowed to have in her possession before she boarded the bus or train. This cannot be the intention of the General Assembly.

Moreover, the General Assembly made an explicit exception in H.B. 89 in deference to federal law ("provided, however, that a person shall not carry a firearm into a place prohibited by federal law"). If, as Defendants suggest, H.B. 89 applied only to publicly-owned buses and trains, there would have been no need to have the federal law exception. The only reason for including this exception is to make clear that carrying firearms by GFL is not prohibited in the Airport, but it is prohibited in the Airport if prohibited by federal law (*i.e.*, in the sterile areas of the Airport).

Finally, H.B. 89 specifically says "notwithstanding the provisions of …. [O.C.G.A. §] 16-12-127…." O.C.G.A. § 16-12-127 deals only with introduction of weapons (including firearms) into "terminals." The General Assembly would have had no need to make clear in H.B. 89 that a GFL holder could carry a firearm

in public transportation "notwithstanding O.C.G.A. § 16-12-127" if the General Assembly were not intending to include the Airport in the decriminalization.

III. Plaintiffs' Individual Claims are Valid and Meritorious

Defendants once again mistakenly believe Plaintiffs are claiming that H.B. 89 ***created*** a right to carry a firearm in the Airport. As discussed above and in Plaintiffs' Reply in support of their Motion for a Preliminary Injunction, that is not Plaintiffs' position.

For Count 1 of their Amended Complaint, 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). *See also* Plaintiffs' discussion of collateral estoppel on this issue above.

For Count 2 of the Amended Complaint, Defendants incorrectly state that the Militia Clause of Article I of the Constitution is not a source of substantive rights. The Militia Clause of the Constitution empowers Congress to call forth, organize, arm, and discipline the militia. U.S. Const. Article I, § 8. The militia is composed of "all males physically capable of acting in concert for the common defense." *Heller,* Slip Opinion at 22, citing *United States v. Miller,* 307 U.S. 174, 179 (1939). Congress further divided the militia into the "organized" militia and the "unorganized" militia, by establishing the organized militia as all able-bodied

male citizens between ages 17 and 45 that are National Guard and Naval Militia members and the unorganized militia as such able-bodied male citizens that are not members of those units. 10 U.S.C. § 311. Plaintiffs, in alleging that Bearden is an able-bodied man between 18 and 45, have established that Bearden is a member of the militia.

As a member of the militia, Bearden is subject to being called up by Congress to act in concert for the common defense. He is "the natural defence of a free country." *Heller* Slip Opinion at 24 (citation omitted). A member of the militia must have access to arms, as "history showed that the way tyrants had eliminated a militia consisting of all the able-bodied men was not by banning the militia but simply by taking away the people's arms…." *Id.* at 25.

"In all the colonies, as in England, the militia system was based on the principle of the assize of arms. This implied the general obligation of all adult male inhabitants to possess arms…." *U.S. v. Miller*, 59 S.Ct. 816, 818 (1939) (citations omitted). The Militia Clause was inserted into the Constitution as a furtherance of the Second Amendment's guarantee of an individual right to keep and bear arms. *Silveira v. Lockyer*, 328 F.3d 567, 585 (9th Cir 2003) (Kleinfeld, C.J., *dissenting).* *See* also *Presser v. Illinois*, 116 U.S. 252 (1886) ("It is undoubtedly true that all citizens capable of bearing arms constitute the reserved

military force or reserve militia of the United States as well as of the states, and, . . . the states cannot, even laying the constitutional provision (i.e., the Second Amendment) in question out of view, prohibit the people from keeping and bearing arms, so as to deprive the United States of their rightful resource for maintaining the public security . . .”). If Defendants can deny Plaintiffs the right to carry firearms, then Defendants can deprive Plaintiffs of their right and duty to be effective members of the militia.

For Count 4 of the Amended Complaint, Plaintiffs discuss their Fourth Amendment claims in detail in their Reply in support of their Motion for a Preliminary Injunction, pp. 7-9.

For Count 5 of the Amended Complaint, Defendants state that an "additional procedure" (before depriving Plaintiffs of their GFLs) would be worthless, but Defendants have not provided any procedure at all. Defendants argue a matter outside the four corners of the Pleadings by referring to their “generally applicable regulation” barring firearms at the airport. Though Defendants have provided various newspaper articles and testimonials to supplement the record, they seem content to leave the record completely absent of the text or even a citation pointing to the “generally applicable regulation” which they claim to have created, and which they claim allows them to arrest and prosecute Georgia Firearms Licensees.

Assuming for the sake of argument that the City has power to supersede a state limitation on its authority by accepting Federal rule-making authority, it has failed to comply with even the most basic requirements for exercising such authority. If the Defendants are allowed to operate pursuant to the delegated authority of a Federal agency, they must comply with the provisions of the Administrative Procedure Act which govern the use of such delegated rule-making powers. 5 U.S.C. § 551 ("'agency' means each authority of the Government of the United States, whether or not it is within or subject to review by another agency").

In addition, notices of proposed rule makings must be published in the Federal Register. 5 U.S.C. § 553(b). There must be an opportunity for public comment on the proposed rule. 5 U.S.C. § 553(c). Finally, the text of the rule must be published according to the APA. 5 U.S.C. § 553(d).

Conclusion

Defendants have relied on matters outside the pleadings in their Motion, and for that reason alone their Motion should be denied. Moreover, Plaintiffs have shown that Defendants Motion is not well-founded, that Defendants' case for federal preemption is non-existent, and that no law criminalizes carrying firearms in the non-sterile areas of the Airport by GFL holders. Defendants' Motion should be denied.

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Local Rule 7.1D Certification

The undersigned counsel certifies that the foregoing Plaintiffs' Response in Opposition to Defendants' Motion for Judgment on the Pleadings was prepared using Times New Roman 14 point, a font and point selection approved in LR 5.1B.

/s/ John R. Monroe
John R. Monroe

CERTIFICATE OF SERVICE

I certify that I electronically filed the foregoing Plaintiffs' Response in Opposition to Defendants' Motion for Judgment on the Pleadings 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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