IN THE SUPERIOR COURT OF FULTON COUNTY
STATE OF GEORGIA

GEORGIACARRY.ORG, INC.,	)	
TAI TOSON,	)	
JEFFREY HUONG,	)	
JOHN LYNCH,	)	
MICHAEL NYDEN, and	)	
JAMES CHRENCIK	)	
Plaintiffs,	)	
	)	Civil Action No. 2007 CV 138552
v.	)	
	)	
FULTON COUNTY, GEORGIA,	)	
CITY OF ATLANTA, GEORGIA,	)	
CITY OF EAST POINT, GEORGIA,	)	
CITY OF ROSWELL, GEORGIA,	)	
CITY OF SANDY SPRINGS, GEORGIA	)	
and	)	
CITY OF UNION CITY, GEORGIA,	)	
Defendants	)	

BRIEF IN SUPPORT OF PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT[1]

I.

INTRODUCTION

Plaintiffs brought this action for declaratory and injunctive relief against Defendant county and municipalities because Defendants unlawfully prohibit Plaintiffs (and Plaintiff GeorgiaCarry.Org's members) from carrying firearms in Defendants' parks. Because Defendants admit the existence of their ordinances, and because the law clearly preempts the ordinances, Plaintiffs are entitled to summary judgment as a matter of law.

[1] This Motion applies only to Defendants Fulton County, Atlanta, East Point, Roswell, and Sandy Springs. Plaintiffs and Union City are in settlement discussions that Plaintiffs hope to be fruitful. Plaintiffs seek to avoid additional litigation with Union City while these discussions are in progress. Further references to "Defendants" in this Brief apply only to the Defendants that are the subject of this Motion.

The position of the Plaintiffs with respect to such matters, in general, is that gun bans are bad as a matter utility and of public policy.

> Laws that forbid the carrying of arms . . . disarm only those who are neither inclined nor determined to commit crimes. Such laws make things worse for the assaulted and better for the assailants; they serve rather to encourage than prevent homicides, for an unarmed man may be attacked with greater confidence than an armed one.

Thomas Jefferson, Manuscript of Legal Commonplace Book, Library of Congress, item #828, quoting Cesare Beccaria, *Dei Delitti e delle Pene* [Of Crimes and Punishments] (1766), chap. 40. The recent events at Virginia Polytechnic Institute and State University tragically and vividly demonstrate the gross error of setting aside certain areas to be fertile fields for vicious criminals resolved to commit acts of violent brutality, unhampered by the dread of encountering an armed and determined citizen. Were this issue in Georgia a simple matter of public policy, however, this court would be constrained not to act in favor of either the Defendant or Plaintiffs, as matters of policy are not, generally, susceptible of judicial determination.

The policy determination on this issue has already been made by the General Assembly in Plaintiff's favor. As a result, the issue in this case is not a matter of mere policy, but a matter of law, and legal determinations are emphatically within the province of the judiciary.

This litigation is in the rather unusual situation of having all of the operative facts admitted by Defendants, leaving purely legal issues for this Court's determination. Moreover, the Court of Appeals has answered the legal issues in a recent case directly on point. In the present case, the legal issue is a simple one: Does a state law expressly providing that Defendants may not regulate in any manner the carry or possession of firearms ***really*** mean that Defendants County may not regulate the carry and possession of firearms? O.C.G.A. § 16-11-173(b)(1) provides, "No county or municipal corporation, by zoning or by ordinance, resolution,

or other enactment, shall ***regulate in any manner*** . . . the possession, . . . transport, [or] carrying, . . . of firearms . . .” (emphasis added).

In spite of this express state preemption law, Defendants have ordinances that flatly prohibits the possession, transport, or carrying of firearms in their parks[2]. These ordinances are expressly preempted by state law, in addition to being implicitly preempted by state law, and there being no factual dispute whatsoever, Plaintiffs are entitled to summary judgment as a matter of law on their Amended Complaint.

II.

STATEMENT OF FACTS

Plaintiffs Tai Toson, Jeffrey Huong, John Lynch, Michael Nyden, and James Chrencik (the “Individual Plaintiffs”) are natural persons who reside in or work in one or more of the Defendant governmental entities. Complaint, ¶¶ 9-14.[3] They all are members of Plaintiff Georgiacarry.Org, Inc. (“GCO”), a non-profit corporation organized under the laws of the State of Georgia. GCO is a member-oriented corporation whose goals include protecting the right of its members, including the Individual Plaintiffs, to own and carry firearms. Complaint, ¶ 15. The Individual Plaintiffs, plus hundreds more members of GOC possess valid firearms license issued by the Fulton County Probate Court (and other county probate courts) pursuant to O.C.G.A. § 16-11-129. Amended Complaint, ¶¶ 4-6; Complaint, ¶ 33. The Individual Plaintiffs and other members of GCO desire to exercise their rights to carry firearms in compliance with state law

[2] In an apparent attempt to deprive this Court of jurisdiction, Roswell and Sandy Springs recently modified their ordinances. The modified ordinances make it unlawful to carry firearms to a public gathering. Of course, the modified ordinances are preempted, illegal, *ultra vires,* and unconstitutional as much as the original ones were.

[3] The allegations contained in the Complaint were restated and verified in the Amended Complaint. All allegations in the Complaint and Amended Complaint are therefore verified upon oath and tantamount to an affidavit.

while visiting Defendants' recreation facilities, sports fields, or any surrounding areas being property of the Defendants, but they are in fear of unlawful arrest and prosecution under Defendants' preempted ordinances for doing so. Complaint, ¶ 34. Defendants admit that their ordinances ban the carrying of firearms in their parks. Defendants' Brief in Opposition to Plaintiffs' Motion for Interlocutory Injunction, p. 2.

III.

STANDARD OF REVIEW

"To prevail at summary judgment under OCGA § 9-11-56, the moving party must demonstrate that there is no genuine issue of material fact and that the undisputed facts, viewed in the light most favorable to the nonmoving party, warrant judgment as a matter of law." Lau's Corp. v. Haskins, 261 Ga. 491, 405 S.E.2d 474 (1991). "The movant has the original burden of making this showing. Once the movant has made a prima facie showing that it is entitled to judgment as a matter of law, the burden shifts to the respondent to come forward with rebuttal evidence." Kelly v. Pierce Roofing Co., 220 Ga. App. 391, 392- 393, 469 S.E.2d 469 (1996). "In rebutting this prima facie case, an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in O.C.G.A. § 9-11-56 must set forth specific facts showing that there is a genuine issue for trial." Entertainment Sales Co. v. SNK, Inc., 232 Ga. App. 669-670, 502 S.E.2d 263 (1998).

IV.

ARGUMENT AND CITATION OF AUTHORITY

Except for Defendants' ordinances, the Individual Plaintiffs and other members of GCO are entitled under law to carry a firearm in Defendants' parks, recreation facilities, sports fields,

or any surrounding areas being property of the county, subject only to applicable state law regulating his carry of a firearm.

The standard applicable to the discussion of whether Defendants' ordinances are preempted was provided in Mobley v. Polk County, 242 Ga. 798, 801-02 (1979), in which it was stated, "If there is reasonable doubt of the existence of a particular power [of a county], the doubt is to be resolved in the negative." In addition, it has been noted, "Counties are creatures whose limited powers must be ***strictly construed***." Wood v. Gwinnett County, 243 Ga. 833, 834 (1979) (emphasis added). "The powers of county commissioners are strictly limited by law, and they can do nothing except under express authority of law." Taylor v. Bartow County, 860 F. Supp. 1526, 1536 (N.D. Ga. 1994) (citations and punctuation omitted). With this in mind, let us turn to an examination of Defendants' ordinances and applicable state law regarding preemption.

(A) STATE STATUTORY PREEMPTION: Defendants' Ordinances are Preempted by O.C.G.A. § 16-11-173

Defendants admit that their ordinances prohibit carrying of firearms in their parks. The field of firearms regulation, however, has been entirely preempted by the state, with some narrow exceptions that are not applicable to this lawsuit. Accordingly, Defendants may not regulate in any manner the possession or carrying of firearms. Defendants' ordinances are "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)

(A)(1) *The Ordinances Are Expressly Preempted by Statute*

O.C.G.A. § 16-11-173(a) states, "It is declared by the General Assembly that the regulation of firearms is properly an issue of general, state-wide concern." Thus, the General Assembly has declared its policy that firearms regulation is not a local concern but that firearms

laws are to have uniform operation throughout the state.[4] More to the point, O.C.G.A. § 16-11-173(b)(1) states:

> No county or municipal corporation, by zoning or by ordinance, resolution, or other enactment, shall regulate in any manner gun shows; the possession, ownership, transport, carrying, transfer, sale, purchase, licensing, or registration of firearms or components of firearms; firearms dealers; or dealers in firearms components.

This state statute expressly preempts Defendants' ordinances. As if to emphasize the point, the General Assembly left to counties and cities only three very narrow exceptions to the state law preemption of firearms regulation, none of which are applicable here. Those three exceptions are:

(1) regulation of Defendant's employees while they are actually working;

(2) regulations *requiring* heads of households within the county to own and maintain a firearm, and

(3) reasonable regulation of the actual discharge of weapons within the county or city.

See O.C.G.A. § 16-11-173 (c), (d), and (e). Defendants' ordinances are preempted because they do not seek to regulate Defendants' employees while they are at work; they do not require heads of households to own and maintain firearms; and they do not pertain to the discharge of firearms. The legislature made no exception for ordinances regarding possession of firearms on recreational facilities. "It is a well-established canon of statutory construction that the inclusion of one implies the exclusion of others." Sturm, Ruger & Co. v. City of Atlanta, 253 Ga. App. 713, 721, 560 S.E.2d 525, 531 (2002). "By expressly authorizing local governments" to exercise one power, "the legislature impliedly preempted all other" powers. Id. City of Atlanta v. SWAN

[4] To GCO's collective knowledge, Fulton County is one of only 5 counties, out of 159 in the entire state, that have such an ordinance. GCO is diligently working on reducing that number to zero. GCO likewise is working on reducing that number to zero for municipalities.

Consulting & Security Servs., Inc., 274 Ga. 277, 553 S.E.2d 594 (2001) ("By expressly authorizing additional local regulation . . . in that limited instance, the Act impliedly preempts the City's regulation" outside of that instance).

While there clearly is no room for doubt that state law expressly preempts the ordinances, the Court of Appeals has recently ruled, in a substantially identical case, that counties may not prohibit the carrying of firearms in parks. *GeorgiaCarry.Org, Inc. v. Coweta County*, 288 Ga. App. 748, 655, S.E.2d 346 (2007). In *Coweta County,* GCO sued the county on substantially identical facts under the same legal theory. The superior court granted summary judgment in favor of the county ***three days after the county's motion was filed***. The Court of Appeals reversed on the merits, saying:

> In construing [O.C.G.A. § 16-11-173], we are mindful of the "golden rule" of statutory construction, which requires that we follow the literal language of the statute unless doing so "produces contradiction, absurdity or such an inconvenience as to insure that the legislature meant something else." And the plain language of the statute expressly precludes a county from regulating "in any manner [the] … carrying … of firearms." Under these circumstances, the preemption is express, and the trial court erred in concluding otherwise.

288 Ga. App. 748. The Court of Appeals went on to say that "the language of the statute is not doubtful," and, "It follows that the trial court erred in denying the Appellants' [i.e., GCO's] motion for summary judgment." *Id* at 749. Given this holding, directly on point in an identical case, it is inconceivable that any other result can be obtained here. This Motion must be granted.

Ironically, Defendants sought a stay in this case while *Coweta County* was pending in the Court of Appeals. Although they did not say so, Defendants implied that the decision in *Coweta County* would be dispositive in the instant case. While Plaintiffs were concerned that the Court of Appeals would reverse on procedural grounds (related to the superior court's failure to give Plaintiffs in *Coweta County* the required 30 days to respond to the counties motion), the Court of

Appeals reached the merits and ruled squarely in favor of Plaintiffs' position here. Defendants' continued resistance is disingenuous at best, having implied to this Court that *Coweta County* would be dispositive, and frivolous at worst. There simply is no valid defense in this case.

(A)(2) *The Attorney General Weighs In*

Even though no additional authority is needed to rule in Plaintiffs' favor, Plaintiffs nonetheless will provide thorough arguments to the Court. The Attorney General of the State of Georgia reached the same conclusion [as the Court of Appeals in *Coweta County*] when Columbus (Muscogee County consolidated government) requested his opinion on a proposed safe storage ordinance for firearms. In U98-6, the Attorney General concluded:

> Because the proposed ordinance is not limited to employees of Columbus government in the course of their employment, is not a firearm ownership requirement for heads of households within Columbus, and is neither limited to nor even addresses the discharge of firearms within the boundaries of Columbus, it is my opinion that the ordinance is preempted by Georgia law.

U98-6. The Attorney General is of course referring to the three narrow exceptions previously outlined from O.C.G.A. § 16-11-173(c), (d), and (e). The opinion also noted that the proposed ordinance was in direct conflict with O.C.G.A. § 16-11-173(b), in that it would "impact the possession, ownership, transport, and carrying of firearms," and that it was not consistent with O.C.G.A. § 16-11-126, the state law regarding carrying concealed firearms.[5] Defendants' ordinances suffer from all of the same defects.

(A)(3) *Other Cases from the Georgia Court of Appeals*

The Georgia Court of Appeals earlier addressed Georgia's firearms preemption statute, with similar results. In Sturm Ruger Co. v. City of Atlanta, 253 Ga. App. 713, 560 S.E.2d 525 (2002), the Court of Appeals held that the City of Atlanta's action violated preemption because it

[5] As will be seen later, the opinion also noted that in addition to violating preemption, the ordinance was ultra vires and beyond the constitutional and statutory limitations on home rule.

was an exercise of power not fitting within one of the three narrow and well defined categories of authority left to cities and counties in O.C.G.A. § 16-11-173(c), (d), and (e). Id. at 722 ("No claims survive because of the legislature's clear directive that municipalities may not attempt to regulate the gun industry ***in any way except in the limited manner*** prescribed in O.C.G.A. § 16-11-184(b)(2), (c), (d), and (e)" [now re-numbered as O.C.G.A. § 16-11-173 (c), (d), and (e)]) (emphasis added). The Court of Appeals noted that "state law may preempt local law expressly, by implication, or by conflict," and held, "More importantly, the State has also ***expressly preempted the field of firearms regulation*** in O.C.G.A. § 16-11-184 [now 173], which, even before its amendment in 1999, provided "that the regulation of firearms is properly an issue of general, state-wide concern." Id. at 718 (emphasis added).[6] The Court of Appeals also held that the City of Atlanta "seeks to punish conduct which the State, through its regulatory and statutory scheme, expressly allows and licenses." Id. at 719. Similarly, Defendants' ordinances in the instant case seek to punish conduct which the State, through its regulatory and statutory scheme, expressly allows and licenses. See O.C.G.A. §§ 16-11-126 through 129. As will be noted below, the General Assembly preempted the field of firearms regulation through a comprehensive statutory scheme regarding how and where one may carry a firearm even without the express preemption stated in O.C.G.A. § 16-11-173, but the express preemption adopted in section 173 certainly leaves Defendants with no arguable basis on which to prosecute their preempted ordinances.

The Court of Appeals stated that the "effect of the preemption doctrine is to preclude ***all other local or special laws on the same subject***." Id. (emphasis added). This would include Defendants' preempted ordinances (even Roswell's and Sandy Springs' revised ordinances).

[6] The Court of Appeals also addressed implied preemption, and this will be addressed later in the brief.

Simply put, Defendants' ordinances, as local laws on the same subject, that of possessing, transport, and carry of firearms, are preempted. "Because the City sought to establish a duplicate regulatory system which was not authorized by the comprehensive general law . . . the trial court was correct in its limited holding that the Act preempts by implication the City's enforcement . . . of the municipal Code . . ." City of Atlanta v. SWAN Consulting & Security Servs., Inc., 274 Ga. 277, 280, 553 S.E.2d 594, 596 (2001).

In sum, O.C.G.A. § 16-11-173(b) expressly preempts the field of firearms regulation with three narrow exceptions that are ***not*** applicable to Defendants' ordinances. Because Defendants' ordinances do not fall within one of the three exceptions the General Assembly left to municipal and county authority, Defendants' ordinances are expressly preempted by O.C.G.A. § 16-11-173.

(B) THE GEORGIA CONSTITUTION AUTHORIZES ONLY THE GENERAL ASSEMBLY TO REGULATE THE CARRY OF WEAPONS

Article I, Section I, Paragraph VIII of the Georgia Constitution states, "The right of the people to keep and bear arms shall not be infringed, but the General Assembly shall have the power to prescribe the manner in which arms may be borne." In Georgia, it is clear that the words in the Constitution, "bear" and "borne," connote their ordinary meaning, which is to ***carry***. See Strickland v. State, 137 Ga. 1 (1911) (discussing "bear" interchangeably with "carry"; see also the dissent, "Whatever else might be said of this statute, it ought not to be held that it does not infringe the right to carry a pistol or revolver"); Hill v. State, 53 Ga. 472 (1874) (discussing the "bearing" of arms in various locations); Stockdale v. State, 32 Ga. 225 (1861) (pistol "with the barrel inserted beneath the pantaloons in front," is to "bear about his person a pistol"); Nunn v. State, 1 Ga. 243 (1846) (the right to bear arms openly protects the right to carry a "breast pistol" in the hand). The General Assembly also expressed the same idea in O.C.G.A. § 16-11-

173. See Sturm, Ruger & Co. v. City of Atlanta, 253 Ga. App. 713, 719 n.1, 560 S.E.2d 525, 529 n.1 (2002) (the preemption statute "gives the General Assembly the sole power to regulate the right to keep and bear arms") (citing the concurring opinion in Smith & Wesson Corp. v. City of Atlanta, 273 Ga. 431, 432-36, 543 S.E.2d 16 (2001)). With respect to the state constitutional provision on the right to bear arms, it is clear that the power to prescribe the manner of bearing belongs to the General Assembly alone. "The General Assembly has exercised this power given by the constitution to create a regulatory scheme for the distribution and use of firearms." Id. at 718. Accordingly, Defendants may not attempt to usurp that power with its own regulation.

(C) CONSTITUTIONAL PREEMPTION

Article I, Section II, Paragraph V of the Georgia Constitution states, "Legislative acts in violation of this Constitution or the Constitution of the United States are void, ***and the judiciary shall so declare them***." (emphasis added). Article IX, Section II, Paragraph I(a) of the Georgia Constitution, known as the home rule authority for Georgia counties, states, in pertinent part, "The governing authority of each county shall have legislative power to adopt clearly reasonable ordinances…for which no provision has been made by general law….This, however, shall not restrict the authority of the General Assembly by general law to further define this power or to … limit … the exercise thereof." Defendants' ordinances both violate the constitution and attempt to usurp authority for which provision has been made by general law. The General Assembly has made provision in general law for the carrying and possession of firearms through a comprehensive statutory framework. O.C.G.A. §§ 16-11-126 through 135. This includes not only how weapons are to be possessed and carried, but ***where***. See, e.g., O.C.G.A. §§ 12-3-10, 16-11-34.1, 16-11-127, 16-11-127.1, 16-11-127.2, 16-12-123, 16-12-127, 27-3-1.1. Because provision has been made in general law, Defendants may not also attempt to regulate this issue.

Pursuant to its constitutional power listed above, the General Assembly has also exercised its authority to define even further and limit the exercise of Defendants' governing authority relating to the carrying and possession of firearms and the use of firearms in self defense. O.C.G.A. §§ 16-11-173 and 16-3-21(c).

(D) IMPLICIT PREEMPTION

The Sturm, Ruger case, in discussing express statutory preemption, held that through the statute "the State has ***also*** expressly preempted the field of firearms regulation . . ." 253 Ga. App. at 718 (emphasis added). The emphasized word alludes to the earlier language wherein the court noted that the Georgia Firearms and Weapons Act and other statutes implicitly preempted the local government's authority. "In this case, preemption can be inferred from the comprehensive nature of the statutes regulating firearms in Georgia . . ." Id. As can be seen from the extensive list of statutes above regulating the ***places*** where a Georgia citizen may carry a firearm, the State has heavily and comprehensively regulated the locations where one may carry a firearm.[7] Cf. Franklin County v. Fieldale Farms Corp., 270 Ga. 272, 276, 507 S.E.2d 460, 463-64 (1998) ("Preemption may inferred generally from the comprehensive nature of [the statute] and its implementing regulations"); Cotton States mut. Ins. Co. v. DeKalb County, 251 Ga. 309, 312, 304 S.E.2d 386 (1983). As a result of the State's comprehensive regulation, Defendants may not also regulate the places where one may carry a firearm.

The Georgia Attorney General, in the aforementioned U98-6, noted that "a person could fully comply with O.C.G.A. § 16-11-126 and still violate the proposed ordinance." Similarly, a person could fully comply with the extensive list of state statutes provided above and still violate Defendants' ordinances in this case.

[7] GCO's extensive research has revealed that no other State in the union that actually allows the carry of firearms places as many locations off limits to carry as does the state of Georgia.

CONCLUSION

"The practical effect of the preemption doctrine is to preclude all other local or special laws on the same subject." Sturm, Ruger & Co. v. City of Atlanta, 253 Ga. App. 713, 718, 560 S.E.2d 525, 530 (2002). Because all other local or special laws on the same subject are precluded, Defendants may not be heard to argue that their regulations are coextensive with any state laws on the subject or contend that their ordinances actually mimic state laws on the subject.[8] Even assuming such an assertion to be true, the ordinances are nonetheless preempted. "Because the State has reserved to itself the right to prescribe the manner in which firearms may be regulated, the [county] may not attempt to usurp that power, whether by litigation or regulation . . ." Id. at 719. The exercise of the power to prescribe regulations on the right to keep and bear arms is reserved exclusively to the General Assembly, completely preempting Defendant's ordinance, and Plaintiffs are entitled to judgment as a matter of law.

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[8] They do not.