UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

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

DEFENDANTS' REPLY BRIEF IN SUPPORT OF THEIR MOTION FOR JUDGMENT ON THE PLEADINGS

For more than 30 years it has been unlawful to carry concealed, loaded guns in Hartsfield-Jackson Atlanta International Airport ("Airport"). Plaintiffs contend that the Georgia legislature deliberately enacted 2008 Georgia Laws Act 802 ("H.B. 89") to change state law to allow licensed gun owners to carry loaded guns in all non-sterile areas of the Airport. As the court noted in denying Plaintiffs' motion for a preliminary injunction, H.B. 89 does not apply to airports, and even if it did, it would be preempted by federal law.

As a matter of statutory construction, Plaintiffs' contention is without merit because H.B. 89 makes no mention of airports. Plaintiffs attempt to finesse this

stark omission with the convoluted argument that the reference to "public transportation" in H.B. 89, an undefined term, includes an airport. An airport, however, is a stationary, immobile building. And, as Plaintiffs concede, federal law prohibits loaded guns on airplanes – the "transporting" vehicles. To accept Plaintiffs' construction of H.B. 89, the Court would have to conclude that the Georgia legislature carefully chose the phrase "public transportation" so as to include only those few persons who visit the Airport with no intention of being transported by an airplane, and to ***exclude*** the overwhelming majority of people who visit the Airport for the singular purpose of passing through the security gates so they can board an airplane and travel to their business or pleasure destinations. Based on ordinary language usage, the Georgia legislature did not choose such a curious and circuitous way to express itself and Plaintiffs' construction of H.B. 89 must therefore be rejected.

Plaintiffs' flawed construction of H.B. 89 is also futile because any state law that purports to allow visitors to carry concealed, loaded weapons at the Airport is preempted under well established principles of conflict preemption because it would create an obstacle to Congress's dominant objective of maintaining safe and secure airports. Notably, Plaintiffs did not even address this conflict preemption issue in their Opposition to Defendants' Motion for Judgment on the Pleadings.

Congress, moreover, has occupied the field of airport safety and security by creating a pervasive and comprehensive federal regulatory regime that leaves no room for state interference.[1]

ARGUMENT AND CITATION OF AUTHORITIES

I. House Bill 89 Does Not Apply to Airports

H.B. 89 refers to "public transportation." O.C.G.A. § 16-11-127(e). It does not mention the term "airport," nor does it define "public transportation." Plaintiffs nonetheless argue that "public transportation" includes "airports." (Pls' Resp. at 20.) Ignoring ordinary language usage, Plaintiffs turn instead to the definitions of two irrelevant terms – "transportation company" and "terminal" – from a different statute as the ***sole*** support for their argument that an "airport" is "public transportation."[2] *Id.* Those terms do not appear in H.B. 89 and have no

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[1] Plaintiffs' unsupported argument that Defendants' citation to statutes, regulations, legislative history and congressional testimony converts the motion for judgment on the pleadings into a motion for summary judgment is wrong. The law governing the conversion of a motion for judgment on the pleadings is the same as for a motion to dismiss, *Horsley v. Feldt*, 304 F.3d 1125, 1134 (11th Cir. 2002), and citations to such public records do not convert the motion into one for summary judgment. *Papasan v. Allain*, 478 U.S. 265, 269 n.1 (1986) ("Although this case comes to us on a motion to dismiss under Federal Rule of Civil Procedure 12(b), we are not precluded in our review of the complaint from taking notice of items in the public record....").

[2] Plaintiffs note that Article 4 of Chapter 12 of Title 16 of the Georgia Code is entitled "Offenses Against Public Transportation." (Pls' Resp. at 20.) H.B. 89, however, amends O.C.G.A. § 16-11-127, which is within Article 4 of ***Chapter 11***

bearing on whether an "airport" is "public transportation." Rather, the Court must construe H.B. 89 according to the ordinary meaning of the terms in the statute. *F.D.I.C. v. Meyer*, 510 U.S. 471, 476 (1994) ("[W]e construe a statutory term in accordance with its ordinary or natural meaning."); *Simon Prop. Group, Inc. v. Benson*, 628 S.E.2d 697, 701 (Ga. Ct. App. 2006) *aff'd*, 642 S.E.2d 687 (Ga. 2007) ("In construing Georgia statutes, we apply the fundamental rules of statutory construction that require us to construe a statute according to its terms, and to give words their plain and ordinary meaning. Where the language of a statute is plain and unambiguous, judicial construction is not only unnecessary but forbidden."). According to its ordinary meaning, the term, "public transportation" does not include an "airport." (Defs' Brief at 17-20.)

Plaintiffs misconstrue Defendants' interpretation of H.B. 89 to restrict the definition of "public transportation" to "just the actual means of conveyance (bus, train, aircraft)." (Pls' Resp. at 20-21.) Although Defendants correctly note that the immobile Airport itself does not provide any transportation, public or otherwise, they also note that an airport cannot be considered "public ***transportation***" under H.B. 89 when it is undisputed that federal law prohibits a passenger from carrying

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of Title 16 of the Georgia Code, and therefore not within the "Offenses Against Public Transportation" chapter of Title 16. Regardless, the title of a chapter within the Georgia Code cannot alter the plain language of the statute.

a gun onto the actual mode of transportation that uses an airport (*i.e.*, an airplane). It would therefore contort ordinary words beyond any recognizable meaning to conclude that a provision purportedly applying to "transportation" was intended to apply only to those persons who were not traveling – or "transporting."

II. H.B. 89 Did Not Repeal the Georgia Transportation Passenger Safety Act of 2002 or the Public Gathering Law

To further support their contorted reading of H.B. 89, Plaintiffs assert that the Georgia Transportation Passenger Safety Act of 2002, O.C.G.A. § 16-12-122 *et seq.* ("2002 Act"), "repealed by implication" the Public Gathering Law, O.C.G.A. § 16-11-127(a), and that H.B. 89 then repealed the 2002 Act. (Pls' Resp. at 14-19.) Any plain reading of these two statutes highlights the several fatal flaws in Plaintiffs' arguments.[3]

A. The 2002 Act Did Not Repeal the Public Gathering Law

The 2002 Act did not repeal by implication the Public Gathering Law because the two statutes constitute ***different*** crimes and criminalize ***different*** conduct. The 2002 Act requires specific intent; the Public Gathering Law does not. An individual is guilty of a felony under the 2002 Act if he or she carries a gun "with the ***intention*** of avoiding or interfering with a security measure or of

[3] The Court need not address this issue if it holds that H.B. 89 does not apply to airports.

introducing [it] into a terminal…." O.C.G.A. § 16-12-127(a) (emphasis added).[4] An individual is guilty of a misdemeanor under the Public Gathering Law if he or she simply carries a gun at a public gathering, which includes a publicly owned building, ***regardless of intent***. O.C.G.A. § 16-11-127(a). Therefore, Plaintiffs are simply wrong to argue that there is a "glaring and obvious inconsistency" between the 2002 Act and the Public Gathering Law. (Pls' Resp. at 17.); s*ee Mullis v. State*, 27 S.E.2d 91, 97-98 (Ga. 1943) ("An assault with intent to murder … is a felony… and a bare assault or simple assault and battery is only a misdemeanor.") (citation omitted); *Jones v. State*, 622 S.E.2d 425, 427 (Ga. Ct. App. 2005) (holding that misdemeanor crime and felony crime can apply to the same conduct, where felony requires an additional element).[5] Accordingly, the 2002 Act did not impliedly repeal the Public Gathering Law.

Indeed, it is well settled that repeals of statutes by implication are not favored. *Watt v. Alaska*, 451 U.S. 259, 266-67 (1981) ("[R]epeals by implication

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[4] The 2002 Act contains an "affirmative defense to a violation ***of this Code section***" if the individual notifies a law enforcement officer of the presence of the gun as soon as possible after learning of its presence and surrenders the gun to the officer. O.C.G.A. § 16-12-127(c). Therefore, this provision is not an affirmative defense to an arrest under the Public Gathering Law, O.C.G.A. § 16-11-127(a).

[5] Plaintiffs' reliance on *Hooks v. Cobb Center Pawn & Jewelry, Inc.*, 527 S.E.2d 566 (Ga. Ct. App. 1999), is misplaced. (Pls' Resp. at 17.) In *Hooks*, the two usury statutes were in conflict by their terms and could not be reconciled. 527 S.E.2d at 570. As described above, there is no conflict between the 2002 Act and the Public Gathering Law, and the two statutes can be reconciled.

are not favored….We must read the statutes to give effect to each if we can do so while preserving their sense and purpose.") (citations and quotations omitted); *County of Yakima v. Confederated Tribes & Bands of Yakima Indian Nation*, 502 U.S. 251, 262 (1992) ("[I]t is a 'cardinal rule ... that repeals by implication are not favored….'") (citations and quotations omitted); *Thornton v. McElroy*, 20 S.E.2d 254, 256 (Ga. 1942) ("Repeals by implication are never favored"). Here, any conclusion that the Public Gathering Law was repealed by implication based on the criminalization of different conduct would be especially unwarranted.

B. H.B. 89 Did Not Repeal the 2002 Act or the Public Gathering Law

H.B. 89 did not repeal the 2002 Act because, as explained above, H.B. 89 does not apply to airports, whereas the 2002 Act prohibits the carrying of concealed, loaded guns in the Airport. (Defs' Brief at 19-20.) H.B. 89, moreover, made no attempt to modify or repeal the prohibition on carrying guns in "publicly owned and operated buildings" contained in the Public Gathering Law.

III. State Laws Purporting to Permit Loaded Guns in Airports are Preempted by Federal Law

A. H.B. 89 Creates Affirmative Rights to Carry Concealed, Loaded Guns in Designated Places

Plaintiffs once again assume that language took a holiday when they concoct the meaningless distinction that H.B. 89 "did not grant a right … [i]t removed a

restriction." (Pls' Resp. at 2.) Not only does their semantic razor fail to split the hair, but it also fails to take a cut at the actual right-creating language of the statute, which expressly provides that:

> A person licensed or permitted to carry a firearm by this part ***shall be permitted*** to carry such firearm, subject to the limitations of this part … in public transportation….

O.C.G.A. § 16-11-127(e) (emphasis added). There is no question that this affirmative language purports to grant a state created right to carry concealed, loaded guns in public transportation. Plaintiffs' attempt to re-characterize H.B. 89 as an absence of regulation ignores the express terms of the statute, and, even if it were accurate, cannot save the statute from otherwise being preempted by federal law.

B. State Laws Purporting to Permit Loaded Guns in Airports Would be Preempted Under the Doctrine of Conflict Preemption

Plaintiffs fundamentally misunderstand the doctrine of conflict preemption, arguing that it applies only "when it is impossible for a ***private*** party to comply with both state and federal law." (Pls' Resp. at 6 (emphasis in original).) Not surprisingly, Plaintiffs cite no authority for this incorrect statement of law. Conflict preemption does not depend on a party's identity, but instead exists if "state law stands as an ***obstacle*** to the accomplishment and execution of the full purposes and objectives of Congress." *Crosby v. Nat'l Foreign Trade Council*, 530

U.S. 363, 373 (2000) (emphasis added); *see also Fla. State Conference of N.A.A.C.P. v. Browning*, 522 F.3d 1153, 1157 (11th Cir. 2008). Plaintiffs ignore the issue of whether a state law that permitted concealed, loaded guns in the Airport would obstruct Congress's objective of maintaining safe airports.[6]

Rather than address the legal issue before the Court, Plaintiffs cite instead to *Nixon v. Missouri Municipal League*, 541 U.S. 125 (2004), an irrelevant case involving ***express*** preemption, not conflict or field preemption as in the present case. (Pls' Resp. at 8-9.) In *Nixon*, the Supreme Court addressed the issue of an express preemption provision in the Telecommunications Act of 1996 that purported to preempt state and local laws prohibiting "the ability of ***any entity*** to provide telecommunications services." 541 U.S. at 128 (emphasis added). The Court held that the phrase "any entity" was limited to "private" entities and, therefore, a Missouri state law was not preempted. *Id.* at 133. *Nixon* therefore has no application to this case.

Plaintiffs' argument that "[t]he federal government has no power to press into service the officers or governments of the states" also misses the point because Defendants do not argue that "the federal government requires them to prohibit

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[6] Defendants have previously shown that a state law permitting individuals to carry concealed, loaded guns in the Airport would constitute an obstacle to the federal objectives of maintaining safe and secure airports and instilling public confidence in airport security. (Defs' Brief at 14-17.)

guns at the Airport." (Pls' Resp. at 6-7.) Plaintiffs have the argument completely backwards because Congress has imposed no requirement on Georgia. Congress, under its plenary Commerce Clause powers, has enacted a pervasive regulatory regime for airport security, and individual states, under the constraints of the Supremacy Clause, cannot pass laws that create obstacles to the accomplishment of the full objectives of Congress. (Defs' Brief at 14-17.) Therefore, any state law – including H.B. 89 – that purports to permit concealed, loaded guns in the Airport is preempted by federal law because it creates an obstacle to the accomplishment of Congress's objective of maintaining safe and secure airports.

C. State Laws Purporting to Permit Loaded Guns in Airports Are Preempted Because Congress Occupies the Field of Aviation and Airport Security

Plaintiffs make the partisan observation that "[i]t is far from clear that the manifest purpose of Congress was to preempt all state and local regulation of carrying guns in airports," (Pls' Resp. at 5), but, unlike the Plaintiffs, the Court cannot ignore the terms of the Aviation and Transportation Security Act ("ATSA"), the comprehensive regulations promulgated pursuant to it, and the sweeping regulatory authority Congress granted to the Transportation Security Administration ("TSA") after September 11th. (Defs' Brief at 5-13.) Rather than address the specific regulatory scheme Congress has created, Plaintiffs cite to the

existence of certain state laws that they contend allow loaded guns in airports. (Pls' Resp. at 4-5.) The mere existence of state laws, and Plaintiffs' feigned incredulity that the preemption issue has not previously been raised anywhere in the country, is irrelevant to whether Congress has preempted the field of airport security.

Plaintiffs also argue generally that "[t]he carrying of firearms is historically a matter of state concern." (Pls' Resp. at 4.) But this general point must give way to the specific issue in this case: whether the regulation of the nationally interconnected network of airports and aviation security – the regulated field – is a federal concern and within Congress's power to regulate. The ATSA, the Implementing Recommendations of the 9/11 Commission Act of 2007, the Federal Aviation Administration ("FAA") enabling statutes, and the extensive TSA and FAA regulations clearly establish that the issue is a federal concern. (Defs' Brief at 5-13.) As the Supreme Court observed, "[p]lanes do not wander about in the sky like vagrant clouds. They move only by federal permission, subject to federal inspection, in the hands of federally certified personnel and under an intricate system of federal commands." *City of Burbank v. Lockheed Air Terminal Inc*., 411 U.S. 624, 633-34 (1973) (holding that local ordinance regarding aircraft schedules is preempted by federal law). (Defs' Brief at 4-17.) Congress has occupied the

field of airport safety and security, and the State of Georgia cannot interfere with Congress's regulatory scheme by purporting to establish a state-created right that would allow individuals to carry concealed, loaded guns in the Airport.

IV. Defendants Are Entitled to Judgment on the Pleadings on Each Individual Claim

Plaintiffs do not dispute that each individual claim depends on the false assumption that Georgia can create a right to carry concealed, loaded guns at the Airport. (Pls' Resp. at 22.) Their claims fail as a matter of law because Georgia has not, and indeed, cannot, create such a right. These claims fail for the additional reasons described below.

A. O.C.G.A. § 16-11-173 (Count 1)

The City of Atlanta ("City"), in its capacity as operator of the Airport, must establish and carry out an airport security plan to ensure the safety of individuals at the Airport. 49 U.S.C. §§ 44903(c), 44903(h); 49 C.F.R. § 1542.101. This necessarily allows the City to prohibit individuals from carrying concealed, loaded guns in non-sterile areas of the Airport. Plaintiffs argue that state law, specifically O.C.G.A. § 16-11-173, precludes the City from regulating the carrying of guns "in any manner." (Pls' Resp. at 3 (quoting O.C.G.A. § 16-11-173).) To the extent that this Code Section purports to interfere with the ability of the City to comply with its federal requirements as an airport operator, as defined in 49 C.F.R. § 1540.5, it

constitutes an obstacle to the dominant federal objectives of airport security and preventing the introduction of guns onto an aircraft and therefore is preempted.[7]

B. Militia Clause (Count 2)

Plaintiffs have not established that the Militia Clause is a source of substantive rights. (Pls' Resp. at 22-24.) Regardless, Plaintiffs have not established how a prohibition on concealed, loaded guns in the Airport "deprive[s] Plaintiffs of their right and duty to be effective members of the militia." (Pls' Resp. at 24.) Plaintiffs can be effective members of the militia without toting guns in the Airport.

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[7] Plaintiffs' ill-conceived argument that the City is "collaterally estopped from claiming that [it] can regulate carrying firearms" due to the outcome of *Georgiacarry.org, Inc. v. Fulton County, Georgia,* Civ. Action File No. 2007CV138552, Superior Court, Fulton County, Georgia, (2008) is meritless. That case involved the issue of prohibiting guns in city parks. The issue of federal preemption had no application and was not litigated in that case. *Shields v. Bellsouth Adver. & Pub. Co.*, 228 F.3d 1284, 1289 n.7 (11th Cir. 2000) ("[C]ollateral estoppel only precludes those issues that actually were litigated and decided in the previous action, or that necessarily had to be decided in order for the previous judgment to have been rendered…. Before collateral estoppel will bar consideration of an issue, that issue must actually have been decided.") (citation omitted).

C. Equal Protection (Count 3)

Plaintiffs have apparently abandoned their Equal Protection claim as they did not address it in response to Defendants' motion. Plaintiffs simply have no Equal Protection claim. (Defs' Brief at 22.)

D. Fourth Amendment (Count 4)

The protections of the Fourth Amendment only apply if there has been a search or seizure. *Craig v. Singletary*, 127 F.3d 1030, 1041 (11th Cir. 1997) ("[O]nly when a seizure occurs does the Fourth Amendment … requirement apply.").[8] Here, Plaintiffs have not pled either a search or a seizure.

Plaintiffs' attempt to distinguish *United States v. Mendenhall*, 446 U.S. 544, 554 (1980), from the present case misunderstands the proposition for which *Mendenhall* is cited. *Mendenhall*, like the other cases cited by Defendants, stands for the proposition that a person has been "seized" within the meaning of the Fourth Amendment "***only if*** … a reasonable person would have believed he was not free to leave." *Id.* (emphasis added). Given that no one was searched, no one

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[8] *Sterne v. Thompson*, No. 1:05 CV 477 JCC, 2005 WL 2563179, at *4 (E.D. Va. Oct. 7, 2005) ("Turning first to the plaintiff's allegations that [defendant] threatened to arrest him, the complaint contains no allegation that any of the defendants ever detained the plaintiff in any manner or for any length of time.… ***Where there is no search or seizure at all, the Fourth Amendment's protections are not triggered***.") (citing *United States v. Young*, 105 F.3d 1, 5-6 (1st Cir. 1997)) (emphasis added).

was seized, and the Amended Complaint fails to allege that anyone felt that he was not "free to leave," Plaintiffs have failed to plead a Fourth Amendment violation.[9]

E. Due Process (Count 5)

Plaintiffs have failed to establish a violation of the Due Process Clause because, put simply, there has been no deprivation. The inability to carry a loaded gun in the Airport no more interferes with the property interest in a firearm license than a detour sign interferes with the property interest in a driver's license. Plaintiffs can still utilize their GFLs in various other areas of the state.[10]

CONCLUSION

For the foregoing reasons and the reasons set forth in Defendants' Memorandum of Law in Support of their Motion for Judgment on the Pleadings, Defendants respectfully request that the Court grant their Motion for Judgment on the Pleadings.

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[9] Plaintiffs fail to cite a single Supreme Court or 11th Circuit decision suggesting that the mere threat to arrest constitutes a Fourth Amendment violation. In fact, Plaintiffs fail to cite *any* case stating that a mere threat to arrest constitutes a Fourth Amendment violation. Instead, Plaintiffs rely on a single case in which individuals (1,160 of them) ***were actually detained and prevented from moving*** as a result of police roadblocks. *City of Indianapolis v. Edmond*, 531 U.S. 32, 34-35 (2000).

[10] Furthermore, Plaintiffs have apparently abandoned their substantive due process claim, as they did not address it in response to Defendants' motion. Plaintiffs fail to cite a single case in support of the proposition that they have a fundamental right to carry concealed, loaded guns in the airport.

Respectfully submitted this 25th day of August, 2008.

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CERTIFICATION OF COMPLIANCE

I hereby certify that, pursuant to Local Rule 7.1D, the foregoing **DEFENDANTS' REPLY BRIEF IN SUPPORT OF THEIR MOTION FOR JUDGMENT ON THE PLEADINGS** has been prepared in Times New Roman, 14-point font, in conformance with Local Rule 5.1C.

/s/Michael P. Kenny

CERTIFICATE OF SERVICE

I hereby certify that on this day I electronically filed the within and foregoing **DEFENDANTS' REPLY BRIEF IN SUPPORT OF MOTION FOR JUDGMENT ON THE PLEADINGS** with the Clerk of Court using the CM/ECF system, which will automatically send email notification of such filing to the following attorneys of record:

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This 25th day of August, 2008.

/s/Michael P. Kenny