IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

CASE NO. 10-11951-C

GEORGIACARRY.ORG, INC., *et al*.,

Appellant/Plaintiff

v.

PINKIE TOOMER,

Appellee/Defendant,

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA

BRIEF OF APPELLEE PINKIE TOOMER

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Docket No. 10-11951-C
GeorgiaCarry.Org, Inc., et al., v. Pinkie Toomer

CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

Pursuant to Eleventh Circuit Rules 26.1-1 and 28-1(b), the undersigned counsel for Appellee/Defendant certifies that the following is a full and complete list of all trial judges, attorneys, persons, associations of persons, firms, partnerships, or corporations (including those related to a party as a subsidiary, conglomerate, affiliate, or parent corporation) that have an interest in the outcome of this particular case:

Northern District of Georgia Judge

The Honorable Clarence Cooper, United States District Court Judge, Northern District of Georgia, Atlanta Division

Parties

GeorgiaCarry.Org, Inc., Plaintiff

Regis Goyke, Plaintiff

The Honorable Pinkie Toomer, Judge of the Fulton County Probate Court, Defendant

Counsel for Plaintiffs – Appellants

John Monroe

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Additional Interested Parties

Fulton County, Georgia

The State of Georgia

Edward Stone, President of GeorgiaCarry.Org, Inc.

STATEMENT REGARDING ORAL ARGUMENT

Appellee Pinkie Toomer respectfully submits that oral argument is not needed in this case and the Court can resolve the issues presented without oral argument being heard.

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STATEMENT OF THE CASE

A. Course of Proceedings Below

On June 27, 2008, Appellants GeorgiaCarry.Org, Inc. (hereinafter referred to as "GCO") and Regis Goyke (hereinafter referred to as "Goyke") filed the original Complaint initiating these proceedings and seeking declaratory and injunctive relief against Appellee The Honorable Pinkie Toomer, Judge of the Fulton County Probate Court (hereinafter referred to as "Judge Toomer"). Specifically, GCO and Goyke sought a declaration that O.C.G.A. § 16-11-129(a) is unconstitutional to the extent that it does not allow nonresidents of Georgia to apply for and obtain a Georgia Firearms License (hereinafter referred to as a "GFL") as well as an injunction prohibiting Judge Toomer from denying nonresidents of Georgia the right to apply for and obtain a GFL solely on account of the applicant's status as a non-resident of the State of Georgia. GCO and Goyke further sought to have their action certified as a class action against all Probate Court Judges in the State of Georgia, with Judge Toomer to serve as the class representative.

On July 17, 2008, Judge Toomer filed a Motion to Dismiss GCO and Goyke's Original Complaint. On July 29, 2008, GCO and Goyke filed and Amended Complaint seeking the same relief outlined above. Judge Toomer filed a Motion to Dismiss such Amended Complaint on August 12, 2008. Oral Argument as to Judge Toomer's Motion to Dismiss GCO and Goyke's Amended Complaint

was held before the Honorable Judge Clarence Cooper of the United States District Court for the Northern District of Georgia on March 6, 2009. After consideration of the briefs and argument of counsel, the District Court granted Judge Toomer's Motion to Dismiss GCO and Goyke's Amended Complaint, finding that the Court lacked subject matter jurisdiction as to GCO and Goyke's claims. The District Court also dismissed GCO and Goyke's Motion to Certify Class as moot.

On March 26, 2009, GCO and Goyke filed a Motion for Reconsideration of the District Court's ruling. Judge Toomer responded to such Motion for Reconsideration on April 11, 2009, asserting that GCO and Goyke laid out no grounds authorizing the District Court to reconsider its previous Order dismissing their Amended Complaint for lack of subject matter jurisdiction. On March 29, 2010, the District Court issued an Order denying GCO and Goyke's Motion for Reconsideration. GCO and Goyke have now appealed the denial of their Motion for Reconsideration.

B. Statement of the Facts

At the heart of this dispute is GCO and Goyke's refusal to follow Georgia law as embodied in O.C.G.A. § 16-11-129 governing the process for applying for a GFL and the standards to be use in determining eligibility for a requested GFL. Instead of actually applying for a GFL and following the procedures to obtain a final decision as to such application from Judge Toomer, GCO and Goyke chose to

attempt to use the legal process to force Judge Toomer to issue a GFL for which no application has ever been requested or submitted.

GCO is a non-profit corporation organized under the laws of the State of Georgia. R1-10-2. Goyke is a citizen and resident of the state of Wisconsin, a citizen of the United States and a member of GCO. R1-10-2. Goyke is a frequent visitor to the State of Georgia and has engaged in activities involving firearms, including the recreational shooting of handguns, while in the State of Georgia. R1-10-5-7. Judge Toomer serves as the Fulton County, Georgia Probate Judge. R1-10-2. James Brock (hereinafter referred to as "Brock") serves as the Clerk of the Fulton County Probate Court. R1-10-9.

On June 19, 2008, John Monroe, counsel for GCO and Goyke, wrote to Judge Toomer's office asking if Goyke would be permitted to apply for a Georgia firearms license (hereinafter "GFL") pursuant to O.C.G.A. § 16-11-129. R1-10-3. GCO and Goyke allege that Brock responded in writing expressing his opinion that Goyke would not be allowed to apply for a GFL as the law governing the issuance of GFL's does not make any exceptions allowing persons who are not residents of the State of Georgia to be granted a GFL. R1-10-1, 7. There is no indication that Judge Toomer was in any way involved in the preparation of this response or that she was even aware that such an inquiry had been received by her clerk. R1-10-generally.

GCO and Goyke allege that blank GFL applications are not readily available to the general public and are "closely guarded." R1-10-9. However, there is no indication that any member of GCO, Goyke or his counsel requested such an application at any time relevant to this matter. R1-10-generally. GCO and Goyke allege that Brock, as clerk of the Fulton County Probate Court, is in essence the gatekeeper of GFL applications, R1-10-8, and that Judge Toomer has effectively delegated her responsibility as to GFL applications to Brock. R1-10-8. However, there is no allegation that Goyke or any other member of GCO has ever been denied a GFL application when such was requested and the Amended Complaint points to no individual who has ever been denied a GFL application when such actually was requested. R1-10-generally.

GCO and Goyke allege the Brock's opinion that Goyke would not be allowed to apply for a GFL permit amounts to a violation of their rights under the Privileges and Immunities Clause of the Constitution of the United States. R1-10-13. GCO and Goyke further assert that this same statement of opinion amounts to a violation of the Militia Clause of the United States Constitution, R1-10-13, the Second Amendment to the United States Constitution, R1-10-13, and the Equal Protection provisions of the Fourteenth Amendment to the United States Constitution, R1-10-14.

C. Standard of Review

The District Court's grant of a Motion to Dismiss pursuant to Fed.R.Civ.P. 12(b)(1) is reviewed *de novo*. McElmurray v. Consolidated Government of Augusta-Richmond County, 501 F.3d 1244, 1250 (11th Cir. 2007). In addition, the District Court's interpretation of law is reviewed *de novo*. Mega Life & Health Ins. Co. v. Pieniozek, 516 F.3d 985 (11th Cir. 2008).

SUMMARY OF ARGUMENT

The District Court was correct in its determination that such Court lacked subject matter jurisdiction as to the Amended Complaint filed by GCO and Goyke as GCO and Goyke failed to present a ripe controversy to the Court for consideration. This ruling was based squarely on facts alleged in Plaintiff's Amended Complaint. As the Amended Complaint makes clear, neither Goyke nor any other member of GCO has requested a GFL application, applied for a GFL, or received final determination as to any such application from Judge Toomer or from any other Probate Court Judge serving elsewhere in the State of Georgia. As such, GCO and Goyke have not presented a ripe claim to the Court for consideration. Further, when given the opportunity to discuss the application process with Judge Toomer directly, GCO and Goyke failed to take that opportunity to pursue these claims with the diligence required to show that a ripe claim or controversy exists.

The District Court was also correct in its determination that applying for the GFL at the heart of this litigation would not have been a futile act. O.C.G.A § 16-11-129 contains numerous requirements for the issuance of a GFL and allows the Probate Court Judge discretion in the granting or denial of such an application. Without an application by Goyke or another member of GCO that has been processed by Judge Toomer or another Probate Court Judge serving elsewhere in the State of Georgia, the District Court had no way to determine if Goyke or another applicant member of GCO might have been denied the requested GFL on other statutory or discretionary grounds. Absent such a determination by Judge Toomer or another Probate Court Judge serving elsewhere in the State of Georgia, GCO and Goyke lack the requisite standing to pursue the current action.

Finally, the Court was correct in denying GCO and Goyke's Motion for Reconsideration as GCO and Goyke's Motion for Reconsideration relied on facts not included in the Amended Complaint.

ARGUMENT AND CITATIONS OF AUTHORITY

I. The District Court Did Not Err in Its Consideration of the Facts Alleged in the Amended Complaint

GCO and Goyke assert that the District Court erred by failing to give proper weight to certain allegations contained in GCO and Goyke's Amended Complaint. Specifically, GCO and Goyke assert that the District Court discounted its allegations that Judge Toomer had delegated her authority to accept, process and

make decisions as to GFL applications to Brock, Judge Toomer's Chief Clerk. GCO and Goyke are correct that the law requires the Court to take the facts alleged in its Amended Complaint as true for the purposes of deciding a motion to dismiss. Lawrence v. Dunbar, 919 F.2d 1525, 1529 (11th Cir. 1990). However, the plain language of the District Court's March 13, 2008 Order makes clear that its holding that GCO and Goyke failed to present the District Court with a ripe controversy is based on a plethora of facts that **are** included in Plaintiff's Amended Complaint.

Article III of the U.S. Constitution limits the power of the federal courts to hear "cases" and "controversies." U.S. Const. Art. III, § 2. Therefore, in order to exercise subject matter jurisdiction over a case, the court must determine initially whether the plaintiff has standing to bring his claims and whether his claims are ripe. Midrash Sephardi, Inc. v. Town of Surfside, 366 F.3d 1214, 1223 (11th Cir. 2004).

There is considerable overlap between the doctrines of ripeness and standing, and in practice, these two justiciability doctrines present similar inquiries. Women's Emergency Network v. Bush, 323 F.3d 937, 945-56, n. 10 (11th Cir. 2003) (citing Erwin Chemerinsky, *FEDERAL JURISDICTION*, pp. 114-17 (3d ed. 1999)). What distinguishes the two is that the ripeness doctrine seeks to separate matters that are premature for review because the injury is speculative and may never occur, whereas standing focuses on whether the type of injury alleged is

qualitatively sufficient to fulfill the requirements of Article III and whether the plaintiff personally suffered that harm. Abusaid v. Hillsborough County Bd. Of County Com'rs, 2007 WL2669210 (M.D. Fla. 2007) (citing Erwin Chemerinsky, *FEDERAL JURISDICTION*, 113-15 (3d ed. 1999)). The ripeness doctrine protects federal courts from engaging in speculation or wasting their resources through the review of potential, hypothetical or abstract disputes. Digital Props. v. City of Plantation, 121 F.3d 586, 589 (11th Circ. 1997).

Central to the District Court's ruling that GCO and Goyke did not present a ripe controversy in this matter was its recognition of the fact that neither Goyke nor any other member of GCO had ever requested an application for a GFL, actually applied for a GFL, or received a final determination on an application for a GFL. R1-26-6. In light of these facts, it is clear that Judge Toomer, the only defendant named in GCO and Goyke's Amended Complaint, has never taken any action as to an application for a GFL filed by Goyke. R1-26-6; R1-10-generally. Indeed, as neither Goyke nor any other member of GCO ever filed or even sought to file an application for a GFL with Judge Toomer or any other Probate Court Judge in the State of Georgia, it would have been impossible for a final decision to have been rendered on such a non-existent application. The District Court's decision as to ripeness is based on the fact that no application was requested or submitted. R1-16-6. Without an application to consider, the question of whether

Judge Toomer may have delegated her authority to make decisions as to the issuance of GFLs (which she has not) becomes irrelevant.

However, GCO and Goyke assert that the District Court erred in its basic determination that "neither Mr. Goyke nor any other member of GCO, at the time this action was commenced, actually requested or submitted any application." R1-26-6. GCO and Goyke argue that such a determination is undermined by an allegation contained in their Amended Complaint that their counsel subpoenaed a GFL application but was allegedly ignored. However, the relevant portion of the Amended Complaint simply states that "Plaintiffs' counsel once subpoenaed the Fulton County Probate Court for a copy of a blank GFL application form, and the subpoena was disobeyed, with the clerk on whom the subpoena was served saying, 'We don't just give those out to people.'" R1-10-10.

The plain language of the Amended Complaint supports the District Court's conclusion since this provision does not allege that a subpoena was served in relation to this matter or in an attempt to obtain a GFL application for Goyke or any other member of GCO. As such, there is no indication anywhere in the Amended Complaint that Goyke, his counsel, or any other member of GCO ever actually requested a GFL application in relation to this matter, submitted such a GFL application, or received a final determination as to such a GFL application before initiating litigation.

GCO and Goyke have also asserted that Brock's alleged statement, that an individual who was not a resident of Georgia would not be permitted to apply for a GFL, equates to a denial of a GFL and ripens their claims. However, the Amended Complaint shows that neither Goyke nor any other member of GCO ever questioned this opinion, actually requested a GFL application, or actually filed such a GFL application with Judge Toomer, the individual in Fulton County vested with the authority to determine if such an application could be issued in compliance with the law. Indeed, as noted above, the Amended Complaint itself makes clear that no action of any kind was ever taken by Judge Toomer, any other probate judge in the State of Georgia, or any person authorized under Georgia law to take action in relation to this matter as no GFL application was ever filed that would have required such action.

Instead, GCO and Goyke inexplicably accepted a statement from a member of Judge Toomer's staff, given in response to a hypothetical question, as a final decision in this matter and filed the instant action. While GCO and Goyke assert that Judge Toomer had a policy of not allowing non-residents of Georgia to apply for and receive GFL's, neither Goyke nor any other member of GCO has alleged that they themselves ever actually requested a GFL application from Judge Toomer or any member of her staff. Indeed, the Amended Complaint does not name a single individual who was denied a GFL application when one was requested from

a member of Judge Toomer's staff or from any other Probate Court within the State of Georgia. An inquiry as to whether an individual would be allowed to apply for a GFL under certain circumstances simply does not equate to a request for a GFL application and certainly does not equal the denial of a GFL. As the District Court recognized, Brock's opinion that Goyke would not be allowed to apply for a GFL "was nothing more than a hypothetical opinion, as neither Mr. Goyke not any other member of GCO, at the time this action was commenced, actually requested or submitted an application." R1-35-3.

As the quoted language makes crystal clear, the District Court's ruling as to ripeness was based on the fact that no application had ever been actually requested or submitted, **not** on its failure to consider the allegation that Judge Toomer had delegated her authority to issue GFL applications to Brock. Without an application actually being requested or filed, any question as to whether a person with certain qualifications would be issued a GFL, if he were to apply for one, can be seen as nothing more than a hypothetical question. Likewise, the question of whether Judge Toomer had delegated her authority to make a decision as to the issuance or denial of such an application is equally hypothetical with no actual application to consider. It is the failure of Goyke, or any other member of GCO, to actually request and submit an application for a GFL that is fatal to GCO and Goyke's case, not any error by the District Court.

II. The District Court Did Not Err in Ruling that Plaintiffs Lack Standing

GCO and Goyke next allege that the District Court erred in holding that GCO and Goyke do not have standing to bring the current action based on the failure of Goyke or any other member of GCO to request or submit a GFL application. As noted above, the U.S. Constitution limits the subject matter jurisdiction of federal courts to "Cases" and "Controversies." U.S. Const. Art. III, § 2. "[T]he core component of standing is an essential and unchanging part of the case-or-controversy requirement of Article III." Lujan v. Defenders of Wildlife, 504 U.S. 555, 560, 112 S.Ct. 2130, 2136 (1992).

GCO and Goyke assert the District Court's holding to be in error for three reasons: (1) filing the application would have been a futile act; (2) the state-county residency distinction recognized by the court makes no difference; and, (3) standing to sue a different defendant is irrelevant. As is shown below, each of these assertions of error is completely without merit.

A. Filing an Application for a GFL Would Not Have Been a Futile Act

As a general rule, the law will not require that an individual make a futile act in order to gain standing to challenge a policy or statute. Ohio v. Roberts, 448 U.S. 56, 74 (1979), *overruled in part on other grounds by Melendez-Diaz v. Massachusetts, 129 S.Ct. 2527 (2009)*. In this instance, however, the District Court was correct in its determination that actually requesting an application for a

GFL and submitting same to Judge Toomer, or another Probate Court Judge serving elsewhere in Georgia, would not have amounted to a futile act because O.C.G.A. § 16-11-129 contains multiple requirements for issuance of a GFL and vests the Probate Court Judges with discretion in the issuance of GFLs--even to applicants who appear to meet the statutory requirements.

GCO and Goyke assert that the District Court erred in holding that O.C.G.A. § 16-11-129 vests the Probate Court Judge with discretion in the issuance of GFLs, citing language in Moore v. Cranford, 285 Ga.App. 666 (2007), in which the Court stated "[t]he legislature expressly provided that the probate court shall issue a license… The use of the term "shall" means that the probate judge has no discretion." However, GCO and Goyke's argument omits an important part of this quote, giving a misleading impression as to its meaning. In its entirety, the portion of Moore v. Cranford quoted by GCO and Goyke in their brief to this Court should read as follows:

> The legislature also sought to protect the rights of qualified applicants by providing that they were able to obtain a firearms license within a reasonable period of time. Thus, the legislature expressly provided that the probate court *shall* issue a license to a qualified applicant within 60 days of the date of application. O.C.G.A. § 16-11-129(d)(4). The use of the term "shall" means that the probate court judge has no discretion to extend the 60-day time period.

As the above-quoted language makes clear, the question in Moore v. Cranford was whether a probate court judge has the discretion to extend the time period in which

a license is to be issued to an individual deemed to be qualified for same, not whether the probate court judges have discretion in actually issuing GFLs.

Further, while GCO and Goyke attempt to distinguish the case at bar from Propst v. McCurry, 252 Ga. 56 (1984), Probst states in no uncertain terms that "O.C.G.A. § 16-11-129 grants to probate courts the discretion to grant or deny applications for licenses to carry handguns." While the holding of Propst v. McCurry was made in the context an applicant who had a history of treatment for mental health related issues, the generally applicable portion of O.C.G.A. § 16-11-129(d)(4) states as follows:

> that not later than ten days after the judge of the probate court received the report from the law enforcement agency concerning the suitability of the applicant for a firearms license, the judge of the probate court shall issue such applicant a license or renewal license to carry a pistol or revolver unless the judge determines such applicant has not met all the qualifications, is not of good moral character, or has failed to comply with all of the requirements contained in this code section.

The plain language of this provision makes clear that a Probate Court Judge **must** exercise his or her discretion to determine if an applicant is of good moral character. Therefore, despite Goyke's assertion that he meets all qualifications for the issuance of a GFL other than residency, it is impossible to know if Judge Toomer, or another Probate Court Judge serving elsewhere in Georgia, would have found Goyke to be of sufficient moral character to receive a GFL without an application having been filed and such a determination having been made. In light

of the discretion vested in the Probate Court Judges of the State of Georgia by O.C.G.A. § 16-11-129(d)(4) in the issuance of GFLs, actually filing an application for a GFL with the individual vested by Georgia law with the discretion to issue same cannot be seen to be a futile act.

B. The Distinction Between Residency and Domicile Is Fatal to GCO and Goyke's Request for Relief

In addition to the discretion to grant or deny a GFL vested in the Probate Court Judges of the State of Georgia by O.C.G.A. § 16-11-129(d)(4), as recognized by the District Court in its March 13, 2009 Order, R1-26-9, the District Court's Order of March 29, 2010 recognized that a GFL application by Goyke or another GCO member who is not a resident of the State of Georgia, had such an application been submitted, could also be denied based on the applicant's lack of domicile in the county of application, R1-35-4. As the District Court noted, GCO and Goyke requested an injunction stating that Judge Toomer and those similarly situated "could not deny nonresidents of Georgia the right to apply for and obtain a GFL, solely on account of their nonresident status." R1-35-4. However, O.C.G.A. § 16-11-129 actually requires that Probate Court Judges consider the county of **domicile** of an applicant, not the applicants state of residence, stating, in relevant part, that "[t]he judge of the probate court of each county may . . . issue a license . . . to any person whose domicile is in that county . . . ." O.C.G.A. § 16-11-129.

In arguing that this determination by the District Court was error, GCO and Goyke assert that this determination is aimed more at the merits of the case than at any issue of standing. However, standing "is the threshold question in every federal case, determining the power of the court to entertain the suit." Warth v. Seldin, 422 U.S. 490, 499, 95 S.Ct. 2197, 2205 (1975). "In the absence of standing, a court is not free to opine in an advisory capacity about the merits of a plaintiff's claims," Bochese v. Town of Ponce Inlet, 405 F.3d 964, 974 (11th Cir. 2005), and "the court is powerless to continue," Univ. of S. Ala. v. Am. Tobacco Co., 168 F.3d 405, 409 (11th Cir. 1999). Therefore, the District Court must consider issues it believes go to standing before any decision on the merits of the case may be issued.

In order to establish the requirements of standing, a plaintiff who invokes the jurisdiction of a federal court must demonstrate: (1) an injury-in-fact, one that is concrete and particularized, and actual or imminent, not conjectural or hypothetical; (2) there is a causal connection between the injury and the conduct complained of, that is, the injury is fairly traceable to the conduct of the defendant; and (3) a likelihood that the injury will be redressed by a favorable decision. Lujan v. Defenders of Wildlife, 504 U.S. 555, 560-61, 112 S.Ct. 2130, 2136-37 (1992); Granite State Outdoor Adver., Inc. v. City of Clearwater, 351 F.3d 1112, 1116 (11th Cir. 2003).

In the District Court's March 29, 2010 Order denying GCO and Goyke's Motion for Reconsideration, the Court addressed the question of whether GCO and Goyke had established that the injuries alleged in their Amended Complaint would be redressed by a decision in their favor. R1-35-4. The District Court correctly determined that a GFL application by Goyke or another GCO member who is not a resident of the State of Georgia, had such an application been submitted, could be denied based on the applicants lack of domicile in the county of application. R1-35-4. As GCO and Goyke requested an injunction prohibiting Judge Toomer and those similarly situated "from denying non-residents of Georgia the right to apply for and obtain a GFL, solely on account of their nonresident status," the District Court correctly held that issuance of this injunction would not redress GCO and Goyke's alleged injuries as such a license could still be denied based on the applicant's lack of **domicile** in the county of application.

GCO and Goyke attempt to cure this redressability issue by asserting to this Court that in order to get meaningful relief, they must be permitted to apply for an receive GFLs notwithstanding their non-residency in Georgia **and notwithstanding their non-residency in Fulton County**. However, the relief actually requested by GCO and Goyke in the Amended Complaint makes no mention of domicile or residency within Fulton County or any other County in the State of Georgia. Whether GCO and Goyke's alleged injuries could be redressed

by an order they have not requested the District Court to issue is irrelevant. To establish standing, a party must show that their injuries can be redressed by the specific relief requested, not by some hypothetical remedy that has not been sought. Lujan v. Defenders of Wildlife, 504 U.S. 555, 560-61, 112 S.Ct. 2130, 2136-37 (1992). As such, the District Court was correct in its determination that GCO and Goyke's alleged injuries cannot be redressed by the relief requested, meaning that they do have standing to bring the current litigation.

C. The Relevance of Standing to Sue a Different Defendant

GCO and Goyke further allege that the District Court erred in its reasoning that their claim potentially could have been ripened if they had received a final determination as to a submitted GFL application from Probate Court Judge in a Georgia county other than Fulton County. GCO and Goyke appear to misinterpret the District Court's Order to find that applying for a GFL in another county within the State of Georgia would have given them standing to sue Judge Toomer. Instead, the District Court appears to simply pointing to steps that could have been taken to ripen GCO and Goyke's claims. R1-26-7-8.

The Court recognized GCO and Goyke's alleged issues with obtaining a GFL application in Fulton County, but noted that Fulton is only one of many counties in the State of Georgia. R1-26-7. Obtaining and submitting a GFL application in another county within the State of Georgia, the Court notes, might

have ripened GCO and Goyke's challenge to the constitutionality of O.C.G.A. § 16-11-129. R1-16-7. As nothing in this portion of the Court's Order addresses standing to bring the instant action against Judge Toomer, GCO and Goyke's assertions of error on this point are misdirected and without merit and should not be considered by this Court.

III. The District Court Did Not Err in Denying Appellants' Motion for Reconsideration as Such Motion Relied on Facts Not Pled in the Amended Complaint

Finally, while GCO and Goyke have not specifically addressed the District Court's Denial of their Motion for Reconsideration, Judge Toomer asserts that such denial was proper, given the arguments presented by GCO and Goyke. The Northern District of Georgia does not routinely grant motions for reconsideration. LR 7.2E. A motion for reconsideration is appropriate only where there is: (1) newly discovered evidence; (2) an intervening development or change in controlling law; or (3) a need to correct a clear error of law or fact. Jersawitz v. People TV, 71 F.Supp.2d 1330, 1344 (N.D. Ga. 1999); P.E.A.C.H., Inc. v. U.S. Army Corps of Eng'r, 916 F. Supp. 1577, 1560 (N.D. Ga. 1995). Further, a motion for reconsideration is not to be used to present the Court with arguments already heard and dismissed, or to offer new legal theories or evidence that could have been presented in the previously-filed motion. Bryan v. Murphy, 246 F.Supp.2d 1256, 1259 (N.D. Ga. 2003). Moreover, a "motion for reconsideration

is not an opportunity for the moving party and their counsel to instruct the court on how the court 'could have done it better' the first time." P.E.A.C.H., 916 F. Supp. at 1560. A motion for reconsideration is an extraordinary remedy and should only be granted when there is discovery of new evidence, an intervening change in controlling law, or a need to correct clear error. Deerskin Trading Post, Inc. v. United Parcel Serv., 972 F. Supp. 665, 674 (N.D. Ga. 1997).

Regardless of whether Plaintiffs brought this motion for reconsideration under Fed. R. Civ. P. 59 or 60, they wholly fail to: (1) discuss newly discovered evidence; (2) identify an intervening development or change in controlling law; or (3) establish a need to correct a clear error of law or fact. Indeed, as the District Court noted, GCO and Goyke based their Motion for Reconsideration in large part on facts that were not included in the Amended Complaint. R1-35-4. However, the District Court's analysis when considering Judge Toomer's Motion to Dismiss was limited by law to the sufficiency of the allegations contained in the Amended Complaint. See Paterson v. Weinberger, 644 F.2d 521, 523 (5th Cir. 1981). As such, the District Court was correct to deny GCO and Goyke's Motion for Reconsideration.

CONCLUSION

For all the foregoing reasons, Defendant Fulton County respectfully requests that the Court either dismiss this appeal or affirm the ruling of the District Court.

Respectfully submitted this 6th day of July, 2010.

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 28-1(m) of the Rules of the United States Court of Appeals for the Eleventh Circuit, counsel for Appellee hereby certifies that this brief contains 6,104 words, excluding exempted parts, has been prepared in mono-spaced typeface using the Microsoft Office Word word processing software, and is presented in 14-point Times New Roman type and therefore conforms to the type-volume and type-style limitations set forth in Rule 32(a)(7).

CERTIFICATE OF SERVICE

I hereby certify that the Internet upload of the following will be completed at approximately 3:00 p.m. on July 6, 2010, and that I have served a copy of the foregoing **BRIEF FOR THE APPELLEE PINKIE TOOMER** on all counsel of record, in paper format, by depositing same in the United States First Class mail, with sufficient postage attached and addressed as follows:

John R. Monroe
9640 Coleman Road
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This the 6th day of July, 2010.

/s/ Matthew C. Welch
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