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

GEORGIACARRY.ORG, INC. And DAVID JAMES,	)	
Plaintiffs	)	CIVIL ACTION FILE NO.
v.	)	4:14-CV-139-HLM
THE U.S. ARMY CORPS OF ENGINEERS, And JON J. CHYTKA, in his official Capacity as Commander, Mobile District of the US Army Corps of Engineers,	)	**EMERGENCY MOTION 7.2B**
Defendants.	)	

MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFF'S MOTION FOR A PRELIMINARY INJUNCTION

Introduction

Plaintiffs commenced this action to enjoin Defendants' enforcement of 36 C.F.R. § 327.13. Because the operation of that regulation violates Plaintiffs' rights

to keep and bear arms, and the violation is ongoing, Plaintiffs file this emergency motion for a preliminary injunction during the pendency of this case.

Factual Background

Plaintiff James is a natural person who regularly uses the U.S. Army Corps of Engineers' facilities at Lake Allatoona, particularly during the summer months. Doc. 1, ¶¶ 5-7, 14-17. James is a member of Plaintiff GeorgiaCarry.Org, Inc. ("GCO"), a non-profit Georgia corporation whose mission is to foster the rights of its members to keep and bear arms. *Id.*, ¶ 7. James asked for, and was denied, permission from Defendant Chytka to carry a loaded firearm for self-protection while using Corps facilities, including while James camped at Allatoona. *Id.*, ¶¶ 30-32. James therefore is subject to the prohibition of 36 C.F.R. § 327.13.

Argument

36 C.F.R. § 327.13 provides:

> (a) The possession of loaded firearms, ammunition, loaded projectile firing devices, bows and arrows, crossbows, or other weapons is prohibited unless:
> (1) In the possession of a Federal, state or local law enforcement officer;
> (2) Being used for hunting or fishing as permitted under § 327.8, with devices being unloaded when transported to, from or between hunting and fishing sites;
> (3) Being used at authorized shooting ranges; or

> (4) Written permission has been received from the District Commander.
> (b) Possession of explosives or explosive devices of any kind, including fireworks or other pyrotechnics, is prohibited unless written permission has been received from the District Commander.

A violation of § 327.13 carries a penalty of a $5,000 fine or 6 months' imprisonment or both. 36 C.F.R. § 327.25(a).

Plaintiff James is a frequent user of the camping and boating facilities at Lake Allatoona, and he desires to keep and carry a firearm in case of confrontation while recreating at Lake Allatoona. James does not claim to qualify for any of the exceptions to § 327.13, so on May 21, 2014, he requested the written permission described in § 327.13(a)(4). On June 9, 2014, Defendant Chytka, the District Commander for the Corps' Mobile District (which includes Lake Allatoona) denied James' request.

I. The Corps is Estopped From Re-Litigating This Case

As an initial matter, Plaintiffs note that the very issues brought in this case, and indeed the very issues brought in this Motion, already have been litigated unsuccessfully by the Corps. In *Morris v. U.S. Army Corps of Engineers*, No. 3:13-CV-336-BLW, "Memorandum Decision and Order" (D.Id. January 10, 2014)

("Idaho Order")1, the plaintiffs brought an essentially identical case against the Corps. In granting a preliminary injunction to stay enforcement of § 327.13 during the pendency of the case the Court said, "This ban [contained in § 327.13] poses a substantial burden on a core Second Amendment right and is therefore subject to strict scrutiny." Idaho Order, p. 5. The Court "[Granted] the injunction requested by plaintiffs enjoining the Corps from enforcing 36 C.F.R. § 327.13 as to law-abiding individuals possessing functional firearms on Corps-administered public lands for the purpose of self-defense." *Id.*, p. 10.

As a result of *Morris*, the Corps should be collaterally estopped from re-litigating the same issues here. *See, e.g., Parklane Hosiery Company, Inc. v. Shore*, 439 U.S. 322 (1979). In *Parklane,* the Court approved the use of "offensive" collateral estoppel when the plaintiff seeking to use it did not have an opportunity to participate in the earlier case. Obviously, neither James nor GCO were involved in similar litigation in Idaho, nor do they assert that they would have had standing to do so.

1 For the Court's Convenience, a copy of the Idaho Order is being filed as an

II. Plaintiffs Are Entitled to a Preliminary Injunction

A district court may grant injunctive relief if the movant shows the following: (1) substantial likelihood of success on the merits; (2) irreparable injury will be suffered unless the injunction issues; (3) the threatened injury to the movant outweighs whatever damage the proposed injunction may cause the opposing party; and (4) if issued, the injunction would not be adverse to the public interest. *McDonald's Corp. v. Robertson*, 147 F.3d 1301, 1306 (11th Cir. 1998). Plaintiffs shall address each factor in turn.

A. Likelihood of Success on the Merits.

This factor perhaps merits the bulk of the discussion in this case, and the remaining factors fall out easily in Plaintiffs' favor. Plaintiffs will subdivide it into a claim for carrying a handgun while camping and a claim for carrying a handgun while engaging in non-camping activities on Corps property.

Plaintiffs claim that the Ban (contained in 36 C.F.R. § 327.13) violates their Second Amendment rights. The Second Amendment states, "A well regulated militia being necessary to the security of a free state, the right of the people to keep and bear arms shall not be infringed." The Second Amendment went largely

---

electronic attachment to this Motion.

undiscussed for over 200 years. The 21st Century, however, has seen a spate of Second Amendment litigation.

The discussion can begin in this case with *District of Columbia v. Heller*, 554 U.S. 570 (2008), in which the Supreme Court announced for the first time that the Second Amendment guarantees a fundamental, individual right to keep and carry arms "in case of confrontation. The 11th Circuit recognized the Supreme Court's decision that "the need for defense of self, family, and property is most acute in the home and … the special role of handguns as the most preferred firearm in the nation to keep and use for protection of one's home and family…." *GeorgiaCarry.Org, Inc. v. Georgia*, 687 F.3d 1244, 1259 (11th Cir. 2012).

In both *Heller* and then two years later in *McDonald v. City of Chicago*, 130 S.Ct. 3020 (2010), the Supreme Court struck down total bans on keeping functional firearms in one's home. If any one lesson can be learned from *Heller* and *McDonald*, it is that bans on guns in one's home are unconstitutional.

The Court in *Morris* applied a 9th Circuit holding that a tent was much like a home (*U.S. v. Gooch*, 6 F.3d 673 (9th Cir. 1993)). As such, the *Morris* Court ruled, the Corps is prohibited, by *Heller* and *McDonald*, from banning possessing a gun in a tent, even when that tent is pitched (legally) on Corps property.

Heller, McDonald, and *Morris* should end the inquiry. The Corps is absolutely prohibited from enforcing § 327.13 against law-abiding campers. Plaintiffs will therefore transition to a discussion of non-campers on Corps property (but the Court should keep in mind that the non-camper discussion also would apply to campers).

The Supreme Court declined to articulate the contours of the Second Amendment right, nor of the standard of review for Second Amendment cases, leaving such matters for another day (or for the Circuit Courts of Appeals). The 11th Circuit has not had occasion to announce a standard of review for Second Amendment cases, so we must look to other circuits. Perhaps the most thorough discussion of this topic comes from the 7th Circuit, in *Ezell v. City of Chicago*, 651 F.3d 684 (7th Cir. 2011) and *Moore v. Madigan*, 702 F.3d 933 (7th Cir. 2012).

In *Ezell*, the Court struck down a ban on gun ranges in the City of Chicago, and in *Moore*, the Court ruled unconstitutional Illinois' then-ban on carrying guns in public. Both rulings were based on an analysis of the Second Amendment.

Ezell developed a rather thorough process for evaluating Second Amendment challenges to regulatory provisions:

> [I]f the government can establish that a challenged firearms law regulates activity falling outside the scope of the Second Amendment right as it was understood at the relevant historical moment – 1791 or 1868 – then the analysis can stop there; the regulated activity is categorically unprotected, and the law is not subject to further Second Amendment review.
>
> If the government cannot establish this – if the historical evidence is inconclusive or suggest that the regulated activity is *not* categorically unprotected – then there must be a second inquiry into the strength of the government's justification for restricting or regulating the exercise of Second Amendment rights.

651 F.3d at 702-703. *Ezell* based this approach on *United States v. Marzzarella,* 614 F.3d 85 (3d Cir. 2010) and *United States v. Chester,* 628 F.3d 673 (4th Cir. 2010).

Thus, the burden is on the Corps to establish that the right to carry a firearm on Corps property is ***categorically*** outside the Second Amendment. This burden the government cannot bear.

In *Moore,* the 7th Circuit, in an opinion written by Judge Posner, rejected the Illinois carry ban because it "flat[ly] ban[ned] … carrying ready-to-use guns outside the home" with no self-defense exception. 702 F.3d at 940-41. The *Morris* Court found the *Moore* decision persuasive, because the Corps' Ban "contains a flat ban on carrying a firearm for self-defense purposes." Idaho Opinion, p. 7. The *Morris* Court further said the Corps Ban probably should be subject to strict scrutiny, but

that the Ban could not even pass muster under intermediate scrutiny. *Id.* The Court went on to say that the Ban, "drafter long before *Heller,* … violates the Supreme Court's description of Second Amendment rights in that case. This regulation needs to be brought up to date." *Id.*

In summary, Plaintiffs are highly likely to succeed on the merits, both for their claim associated with camping on Corps property and associated with other recreational activities on Corps property.

B. Irreparable Injury

As promised, the remaining factors for issuing a preliminary injunction fall out rather easily in Plaintiffs' favor. "Generally, an alleged deprivation of a constitutional right is sufficient to constitute an irreparable injury." *Cate v. Oldham,* 707 F.2d 1176, 1188 (11th Cir. 1983). Plaintiffs have not only alleged a deprivation of a constitutional right, but they have shown that they are likely to succeed on the merits in their alleged deprivation.

Aside from the *per se* irreparable injury, however, Plaintiffs also show that they cannot be financially compensated for their harm, and they are suffering the harm now, and on a continual basis, at the height of the outdoor recreational season in Georgia.

C. Balance of Harms

Again, this factor easily resolves in favor of Plaintiffs. The harm to them is deprivation of a fundamental constitutional right. The harm to the Corps if the injunction issues is nonexistent. In fact, arguably the Corps would benefit by no longer having to spend resources enforcing the illegal Ban. Moreover, the Corps already has been enjoined by the District Court of Idaho from enforcing the Ban. It is difficult to imagine any incremental harm to the Corps by extending the injunction to the Northern District of Georgia.

D. Public Interest

There can be little argument that the public has an interest in seeing a deprivation of fundamental constitutional rights being imposed. The public policy in Georgia has shifted more and more in the past six years toward liberalized carrying of firearms in public. In 2008, the State decriminalized carrying guns in restaurants that serve alcohol and in ***state parks,*** and imposed sanctions on license issuers who fail to issue a timely license to carry pistols. 2008 Act 802 (House Bill 89). In 2010, the State repealed the 140-year old "public gathering law," a Jim Crow law that banned carrying guns in many public places, and replaced it instead with a list of 8 locations where a gun may not be carried in public. 2010 Act 643

(Senate Bill 308); *GeorgiaCarry.Org, Inc. v. Georgia*, 687 F.3d at 1248. Just this year, the State further decriminalized carrying guns in bars and schools, and lessened the penalty for carrying guns in churches. 2014 Act 575 (House Bill 826); 2014 Act 604 (House Bill 60). Finally, state law preempts local bans on carrying guns in parks. *GeorgiaCarry.Org, Inc. v. Coweta County*, 288 Ga.App. 748 (2007); *GeorgiaCarry.Org, Inc. v. City of Roswell*, 298 Ga.App. 686 (2009).

Given that the public policy in Georgia strongly favors carrying firearms in state and local parks for people with licenses to carry weapons, it is all but impossible to assert that the public would be harmed by allowing carrying firearms in federally-controlled recreational facilities in Georgia. This is especially true now that Congress preempted bans on national parks in 2010 via the so-called "Coburn Amendment." The Forest Service already did not ban guns in national forests, so now the vast majority of non-Corps federally-controlled recreation areas do not ban guns for self defense.

Conclusion

Plaintiffs have shown that they are likely to succeed on the merits, that they are being irreparably harmed, that the balance of harms favors granting a preliminary injunction, and that a preliminary injunction would be in the public

interest. They therefore have satisfied all four factors for obtaining a preliminary injunction and ask the Court to do so.

JOHN R. MONROE,

___/s/ John R. Monroe_____
John R. Monroe
Attorney at Law
9640 Coleman Road
Roswell, GA 30075
Telephone: (678) 362-7650
Facsimile: (770) 552-9318
jrm@johnmonroelaw.com
Georgia Bar No. 516193
ATTORNEY FOR PLAINTIFFS

CERTIFICATE OF SERVICE

I certify that on June 13, 2014, I served a copy of the foregoing via fax and U.S. Mail upon:

Sally Yates
U.S. Attorney for the Northern District of Georgia
75 Spring Street, NW, Suite 600
Atlanta, GA 30303
Fax 404-581-6181

/s/ John R. Monroe
John R. Monroe

RULE 7.1D CERTIFICATION

I certify that this brief was prepared in accordance with the page, font, size, margin and other requirements of Rules 7.1D and 5.1C.

/s/ John R. Monroe
John R. Monroe