Docket No. 16-13486

The United States
Court of Appeals
For
The Eleventh Circuit

GeorgiaCarry.Org, Inc., *et.al.*, Appellants
v.
U.S. Army Corps of Engineers, Appellees

Appeal from the United States District Court
For
The Northern District of Georgia
The Hon. Harold L. Murphy, District Judge

Brief of Appellants

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Certificate of Interested Persons

Appellants certify that the following persons are known to Appellants to have an interest in the outcome of this case:

Barrs, Brian

Beranek, Lori M., Esq.

Chytka, Col. John J.

Delery, Stuart F., Esq.

GeorgiaCarry.Org, Inc.

James, David

Kelleher, Diane, Esq.

Monroe, John R., Esq.

Murphy, The Hon. Harold L.

Riess, Daniel, Esq.

Raab, Michael S., Esq.

U.S. Army Corps of Engineers

Yates, Sally Quillian, Esq.

Wright, Abby C., Esq.

Appellants further certify that GeorgiaCarry.Org, Inc. has no parents or subsidiaries and is not publicly traded.

Statement on Oral Argument

Appellants in this case request oral argument. The appeal involves the exercise of important fundamental Constitutional rights of the Appellants, namely, their ability to be free to exercise their Second Amendment rights to keep and carry arms in case of confrontation on tens of thousands of acres of federal property without arrest or detention for doing so. Moreover, the District Court decision directly conflicts with district and circuit court precedence in other circuits. The appeal is not frivolous and the dispositive issue has not been authoritatively determined.

Table of Contents

Table of Citations

Cases

Statutes

Rules

Regulations

Statement on Jurisdiction

The District Court had jurisdiction of this case because the case involved federal questions under 28 U.S.C. § 1331 and the United States and its officers are defendants. 28 U.S.C. § 1346(a).

The District Court entered an order on September 1, 2015, granting Defendant-Appellee's Motion for a Protective Order, which barred the Plaintiffs-Appellants from conducting discovery. The District Court also entered an order on April 25, 2016 granting Defendants-Appellees motion for summary judgment. Appellants filed a notice of appeal on May 23, 2016 [Doc. 67], so this appeal is timely. F.R.A.P. § 4(a)(1)(B)(ii).

Statement of the Issues

The District Court erred in failing to enter a default on the part of the Government, in denying Plaintiffs-Appellants discovery, and in granting Defendants-Appellees motion for summary judgment.

Statement of the Case

Nature of the Case

Plaintiffs-Appellants GeorgiaCarry.Org, Inc. ("GCO"), David James ("James"), and Brian Barrs ("Barrs") seek declaratory and injunctive relief against the United States Army Corps of Engineers ("Corps"); Col. John Chytka ("Chytka"), Commander of the Mobile District of the Corps, and Thomas J. Tickner ("Tickner"), then-Commander of the Savannah District of the Corps.

James' case arose when James contacted Chytka, requesting permission to carry a loaded firearm when James camped or recreated on Corps property at Lake Allatoona in Northern Georgia. Chytka denied the request, leaving intact as applying against James a Corps regulation that generally prohibits loaded firearms on Corps property. GCO (of which James is a member) sued on the theory that the regulation as applied to James violates James' Second Amendment right to keep and bear arms.

Barrs' case arose when Barrs contacted Tickner, requesting permission to carry a loaded firearm when Barrs camped or recreated on Corps property at Thurmond Lake near the border of Georgia and South Carolina. Tickner denied the request, leaving intact as applying against Barrs a Corps regulation that generally prohibits loaded firearms on Corps property. GCO (of which Barrs is a member) sued on the theory that the regulation as applied to Barrs violates Barrs' Second Amendment right to keep and bear arms.

Proceedings Below

GCO and James commenced this action in the District Court for the Northern District of Georgia and immediately thereafter filed a Motion for Preliminary Injunction [Doc. 5]. GCO and Barrs commenced this action in the District Court for the Southern District of Georgia.

On August 14, 2014, the District Court entered an order transferring Barrs' action to the Northern District [Doc. 24], and then after the motion was briefed denied the Motion on August 18, 2014 without a hearing, ruling, *inter alia*, that the entirety of Corps property is a "sensitive place" and therefore not subject to Second Amendment protections. Doc. 19. The District Court consolidated Barrs' and James' actions in an order on February 18, 2015 [Doc. 27]. Plaintiffs-Appellants appealed the District Courts decision on the Motion for Preliminary Injunction, and on June 9, 2015, the Court of Appeals for the Eleventh Circuit ruled that although the District Court did not abuse its discretion by denying the Motion for Preliminary Injunction, the court lacked basic information required to engage in a complete constitutional analysis. Doc. 29. The matter was thus remanded to the District Court for further proceedings.

On remand, Defendants-Appellants moved for a Protective Order barring Plaintiffs-Appellants from performing discovery, substituting review of an "administrative record." The District Court entered an order granting this motion

on September 19, 2015 [Doc 35].

On April 25, 2016, the District Court granted Summary Judgment for Defendants-Appellees against Plaintiffs-Appellants [Doc 28].

Statement of the Facts

GCO is a non-profit corporation whose purpose is to foster the rights of its members to keep and bear arms. Doc. 1, ¶¶ 4-5. James is a resident of the State of Georgia and a citizen of the United States; he is also a member of GCO. *Id*., ¶¶ 6-7. James possesses a Georgia weapons carry license ("GWL") issued to him pursuant to O.C.G.A. § 16-11-129, and he regularly keeps and carries a handgun in case of confrontation, except in locations where carrying handguns is prohibited by law. *Id.*, ¶¶ 14-16. James frequently camps and recreates on Corps property and facilities at Lake Allatoona, a Corps project and water facility in Northwest Georgia that provides nearly 600 campsites and 200 picnic sites along the lake. *Id.*, ¶¶ 17-21. On May 21, 2014, James sent an email to Col. Donald Walker, of the Corps, asking for written permission to carry a loaded firearm at Allatoona; Walker replied that he had forwarded the request to Chytka. On June 9, 2014, Chytka denied James' request. *Id.*, ¶¶ 30-32.

Barrs is also a resident of the State of Georgia, a citizen of the United States, and a member of GCO. *Id*., ¶¶ 6-7. Barrs possesses a GWL issued to him pursuant

to O.C.G.A. § 16-11-129, and he regularly keeps and carries a handgun in case of confrontation, except in locations where carrying handguns is prohibited by law. *Id.*, ¶¶ 14-16. Barrs frequently camps and recreates on Corps property and facilities at Thurmond Lake, a Corps project and water facility near Augusta, Georgia that is one of the 10 most visited Corps lakes in the United States. *Id.*, ¶¶ 17-21. On June 16, 2014, Barrs sent an email to Col. Donald Walker, of the corps, asking for written permission to carry a loaded firearm at Thurmond; Walker replied that he had forwarded the request to Tickner. On July 8, 2014, Tickner denied James' request. *Id.*, ¶¶ 34-36.

Statement on the Standard of Review

This court reviews rulings setting the limits of discovery for abuse of discretion. *Farnsworth v. Proctor & Gamble Co*, 758 F.2d 1545, 1547 (11th Cir. 1985). A judgment will be overturned only when a clearly erroneous principle of law is applied or no evidence rationally supports the decision. *Id.*

A District Court's order granting summary judgment is reviewed de novo. *Broadcast Music, Inc. v. Evie's Tavern Ellenton, Inc*, 772 F.3d 1254, 1257. (11th Cir. 2014). When reviewing such a decision, the court views the record and draws all reasonable inferences in the light most favorable to the non-moving party. *Id.* Summary judgment is appropriate only when there is no genuine dispute to any

material fact and the movant is entitled to judgement as a matter of law. *Id.*

Summary of the Argument

The District Court abused its discretion by barring Plaintiffs-Appellants (collectively, "GCO") from conducting discovery, particularly considering that this Court specifically ruled in its June 9, 2015 opinion on GCO's appeal of the District Court's order on GCO's motion of interlocutory injunction that the record was insufficient for a full constitutional analysis.

By denying GCO's ability to conduct discovery, the District Court fatally hampered its ability to properly consider the Government's motion for Summary Judgment – it did not, and could not have had all of the facts needed to complete a constitutional analysis. Further, the District Court misapplied the standards for Second Amendment cases to the incomplete facts before it.

In both cases below (prior to consolidation), none of the defendants responded to the summonses and complaints within the time allowed by law. GCO moved for entry of defaults against all defendants. Despite the fact that such entries were required by the Federal Rules of Civil Procedure, the District Court denied the motions.

Argument and Citations of Authority

I. GCO should have been permitted to conduct discovery, rather than rely on an irrelevant Administrative Record

This Court specifically ruled in its June 9, 2015 opinion on GCO's appeal of the District Court's order on GCO's motion for a preliminary injunction that the record was insufficient for a full constitutional analysis, holding "After discovery, [the District Court] will have an opportunity to reconsider its analysis against a fuller factual background." Doc 29 at 18. The District Court allowed the Government to provide an "administrative record" in lieu of formal discovery, despite the fact that they had already filed factual material beyond an administrative record, namely an affidavit from a park ranger employee of the Corps prepared specifically for this litigation and not as part of an administrative record, upon which the 11th Circuit and the District Court relied. Barring GCO from performing additional discovery was fundamentally unfair. This is especially true in light of the fact that there were no real "proceedings" at the Corps, the way there are in a typical administrative case, such as a Social Security Administration or Federal Communications Commission Case.

This Court provided at least a partial roadmap of exactly what it would need to perform a proper constitutional analysis. In particular: 1) the size of the Allatoona

Dam; 2) the size of the recreational area at issue; 3) how far the recreational area extends beyond the dam; 4) whether the recreational area is separated from the dam itself by a fence or perimeter; and 5) to what extent the dam is policed. Doc. 29, p. 20. This Court also later indicated an additional need to know 1) how heavily trafficked the relevant area is at various times of the year; 2) what types of activities the visitors engage in; 3) how the visitors are distributed throughout the property; 4) the frequency and nature of crimes committed; 5) the incidence of altercations among visitors; and 6) whether the Corps coordinates with local law enforcement during peak periods. Doc. 29, pp. 21-22. As of this appeal, a mere handful of those questions are answered, but some of the most important answers thereof remain a mystery. Clearly, this Court expected the parties to engage in full discovery, and the unanswered questions evidence exactly *why* this Court felt discovery was needed.

In a similar case in the District of Idaho, the Corps filed its "administrative record," and the District Court in Idaho eventually entered a permanent injunction against the Corps from enforcing the very regulation at issue in the present case. *Morris v. U.S. Army Corps of Engineers*, 60 F.Supp. 3d 1120 (D. Idaho, 2014), appeal filed sub.nom. *Nesbitt v. U.S. Army Corps of Engineers*, No. 14-36049 (9th Cir., December 10, 2014). On appeal, the Corps urged the 9th Circuit to "vacate the district court's judgment and allow the government to develop the record further in

the district court." *Nesbitt v. U.S. Army Corps of Engineers*, No. 14-36049, Doc. # 37, pp. 18-19, FN 5 (9th Cir., August 12, 2015). Only after obtaining a poor result did the Corps decide that the "administrative record" was insufficient to decide the matter at hand. As a matter of judicial economy, it would not make sense to litigate this case once on an administrative record and then a second time on a "further developed" record if the Corps is dissatisfied with the outcome the first time around.

"Judicial review of agency action under ... the APA is generally limited to a review of the administrative record." *Sierra Club v. U.S. Dep't of Energy*, 26 F. Supp. 2d 1268, 1270 (D. Colo. Aug. 13, 1998). "Supplementation of an administrative record is only allowed in the following circumstances: (1) the record is so inadequate to explain the agency action that it effectively frustrates judicial review; (2) the record is incomplete in that it does not contain documents considered by the decision-maker; (3) the agency has failed to consider relevant factors; or (4) there is a strong showing that the agency engaged in improper behavior or acted in bad faith." *United States v. Amtreco. Inc.*, 806 F. Supp. 1004, 1006 (M.D. Ga. Nov. 13, 1992) (internal quotation marks and citation omitted). Those exceptions are narrowly construed, and a party who seeks to supplement the administrative record bears "a heavy burden to show that supplementation is necessary." *Id.*

The record filed by the Corps, despite reaching nearly 10,000 pages, does not

supply information crucial to a complete constitutional analysis of GCO's claim. In particular, neither GCO, the District Court, nor this Court know whether a fence separates the dam proper from the recreational facilities; whether the dam or the fence, if existent, is policed in any way, or whether the dam houses any staff or control rooms that need protecting. Simply put, the District Court could not possibly infer correctly that the dam itself is a sensitive area if it did not know whether the Corps bothers to enclose or police it, and could not possibly infer correctly whether the sensitive nature of the dam, if sensitive, extends to the recreational area beyond the vicinity of the dam.

In addition, the "administrative record" filed by the Corps is fundamentally lacking. Somehow in all 10,000 pages, there is no evidence of any kind of any actual consideration of the requests – no internal memos, applications, background checks or copies of GWLs or Driver's Licenses, or anything else that would lead the reader to believe that the Corp ever considered GCO's requests at all.

In general, "limiting judicial review of response actions to the administrative record expedites the process of review, avoids the need for time-consuming and burdensome discovery, reduces litigation costs, and ensures that the reviewing court's attention is focused on the criteria used in selecting the response." *U.S. v. Akzo Coatings of America, Inc.*, 949 F.2d 1409, 1424 (6th Cir. 1991), citing H.R.Rep. No. 253, Pt. 1, 99th Cong., 1st Sess. 81 (1985). Here, the Corps produced

nearly 10,000 mostly irrelevant pages that burden the courts yet provide little in the way of useful information to resolve the case.

II. The District Court misapplied the standards for deciding Second Amendment Cases

36 C.F.R. § 327.13(a) 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.

The Eleventh Circuit has adopted a two-step analysis for deciding Second Amendment cases: 1) is the restricted activity protected by the Second Amendment in the first place? 2) If so, does it pass muster under the appropriate level of scrutiny? *GeorgiaCarry.Org, Inc. v. Georgia,* 687 F.3d 1244, 1261 (11th Cir. 2014).

The District Court discussed a rather extensive history of the Army Corps of Engineers while analyzing whether the regulation at issue impacts the Second Amendment. As a preliminary matter, the Government has the burden of showing that the regulation at issue does not impact the Second Amendment. *Ezell v. City of*

Chicago, 651 F.3d 684, 703 (7th Cir. 2011). In the instant case, the Corps made no showing that the regulation does not impact the Second Amendment; rather, the District Court ruled *sua sponte* that 1) private individuals ***probably*** could not carry firearms in Army forts, 2) recreational facilities provided by the Corps are incidental to its other functions and it has a right to exclude the public altogether, 3) that the recreational areas in question are sensitive in nature, and 4) that the right is not impacted also because Plaintiffs-Appellants can merely recreate elsewhere. Doc 28 generally, including p. 46.

The District Court describes generally the history and present function of the Corps, but never cites a case, statute, or regulation in existence at the time of the ratification of the Second Amendment barring private individuals from carrying weapons on forts. This is likely because there were not any cases, statutes, or regulations barring private individuals from carrying weapons on Army forts. In any event, the Government bears the burden of proving that the regulation in question falls outside the scope of the Second Amendment. *Ezell*, 641 F.3d at 702 ("If the government cannot establish this – if the historical evidence is inconclusive or suggests that the regulated activity it *not* categorically unprotected – then there must be a second inquiry into the strength of the government's justification ….")

In the present case, the government established nothing at all. It was mere supposition by the District Court that in 1791 citizens could not carry weapons in

Army forts. If the Government's burden can be satisfied through assumption of facts by the District Court, then there is no burden at all.

Pretermitting whether the public would tolerate being banned from vast areas of recreational land in the country, not to mention almost all navigable waterways, the theoretical power of the Corps to do so does not result in the conclusion drawn by the District Court. It is beyond question that the Government may restrict access to public lands or buildings for a variety of reasons. *United States v. Kokinda*, 497 U.S. 720, 725 (1990) ("The Government's ownership of property does not automatically open that property to the public.") That power, however, does not translate into power to trample citizens' fundamental constitutional rights when the people are not restricted from access. *Id.* ("The Government, even when acting in its proprietary capacity, does not enjoy absolute freedom from First Amendment constraints, as does a private business….") This is especially true where "There is no separation, no fence, and no indication whatever to persons [entering the grounds]…that they have entered some special type of enclave." *United States v. Grace*, 461 U.S. 171, 180 (1983). The issue in *Grace* was whether the Government could ban protests on the sidewalk in front of the Supreme Court building. The Court ruled that it could not, because the sidewalk in front of the Court was indistinguishable from the surrounding streets and sidewalks of the District of Columbia. Even though the sidewalk was Government property (and not a city

sidewalk) and had not been dedicated to public free speech use, the public had a First Amendment right to speak freely on the sidewalk. Likewise, the Corps lands at issue do not constitute some special sort of enclave, and it is entirely possible to pass in and out of Corps property without notice.

A recreational facility surrounding a dam is a far cry from an Army fort. Although some of the recreational facilities provided by the Corps are admittedly incidental to their other functions, Congress has mandated that the Corps maintain that land for public recreation, and so the District Court's belief that they have a right to exclude the public altogether is incorrect. *See, e.g.*, P.L. 104-303, 110 Stat. 3680 ("The Secretary shall provide increased emphasis on, and opportunities for recreation at, water resources projects operated, maintained, or constructed by the Corps of Engineers.")

Besides, whether the Corps can exclude the public altogether is no justification for stripping an individual's constitutionally protected rights once the public at large is granted use of the property. In *U.S. v. Johnson Lake,* 312 F.Supp. 1376 (U.S. District Court, S.D. Alabama 1970), the District Court ruled that a privately owned club could not exclude African Americans because it is open to the public to "present shows, performances and exhibitions to a passive audience and those establishments which provide recreational or other activities for the amusement or enjoyment of its patrons." *Id.* at 1380. There, making the club open

to the public created the requirement for the club owners to abide by civil rights protections. In the instant case, the analysis is much simpler: if a private property owner may not abridge civil rights because he opens his doors to the public, neither then can the U.S. Government do likewise on public property. As the Corps is required to maintain its recreational facilities[1] for the public, it cannot legitimately curtail fundamental constitutional rights.

In *District of Columbia v. Heller*, 554 U.S. 570 (2008), the Court said that its opinion should not "cast doubt on … laws forbidding the carrying of firearms in sensitive places such as schools and government buildings…." 554 U.S. at 626. In the present case, the District Court found that Corps property is a "sensitive place." Doc. 19, p. 24 ("[I]t cannot be overlooked that the existence of Defendant Army Corps' 'recreation facilities' is merely a byproduct of the sensitive dam construction projects nearby…."); p. 27 ("[T]here is no reason to doubt that the Firearms Regulation … does not fall squarely into … laws forbidding the carrying of firearms in sensitive places…."); p. 48 ("The Court finds it reasonable for Defendant Army Corps to limit the carrying of loaded firearms around such sensitive areas.")

The *Heller* Court did not define "sensitive area" for the purposes of Second

[1] As of this filing, the Corps is the largest provider of recreation in the United States, according to its website. http://www.usace.army.mil/Missions/Civil-Works/Recreation/

Amendment analysis, so it will fall to subsequent courts to interpret the nature of a sensitive area. The recreational woodlands and waterways maintained for public use by the Corps contain none of the trappings of a school or government building, besides perhaps dams and the immediate vicinity of the dams. Nothing distinguishes the woodlands and waterways maintained by the Corps from the woodlands and waterways adjacent, and nothing sensitive is going on in those areas. This Court can rest assured that there is nothing vital to national security going on with the pine trees 20 miles away from the dam.

In terms of protecting a sensitive area, the proverbial horse has left the barn. People are already allowed to possess loaded firearms on the lands in question for hunting purposes, and the Corps has given no indication that these individuals could not walk directly up to the dam and lay hands on it if they wanted to, nor have they disclosed what danger small arms might pose to a mammoth concrete dam; whether or not there is a control room, whether or not it is manned, whether or not it is locked, or whether or not it is guarded. Besides the threat hunters might pose to the asserted "sensitive area" of the woods surrounding the dam, the dam itself is open to general traffic from the roadway; the Corps would have us believe that it is perfectly fine to stand on the road on top of the dam in possession of any firearm permissible under state and federal law without being in a sensitive area, but the woods 1,000 feet or more away is a sensitive area, extending miles in every

direction. Allowing tractor-trailers across the dam, with potentially hazardous materials in freight, would be significantly more dangerous than a law-abiding citizen with a valid GWL and a handgun.

Because the Government failed to carry its burden of showing that the Ban does not implicate the Second Amendment, it was and is necessary to reach the second prong of the *GeorgiaCarry.Org* test. The Government bears the burden of showing that the Ban satisfies an appropriate means-end test. And, because this is an as-applied challenge, the Government was required to show that the Ban satisfies an appropriate means-end test, ***as applied to Appellants James and Barrs.*** This the Government failed to do.

There is nothing at all in the record regarding James and Barrs, other than their own emails to Corps officials. In other words, the Government made no investigation of them and has no information by which to conclude that they are anything other than law-abiding citizens. The Corps allows anyone who can obtain a hunting license to hunt on Corps properties, and the Corps readily allows ***anyone*** to possess an ***unloaded*** firearm on Corps property.

In finding that District of Columbia laws requiring registration of long guns did in fact impinge the Second Amendment, the D.C. Circuit Court examined historical factors: "basic registration of handguns is deeply enough rooted to support the presumption that [it] is constitutional; the registration requirement for

long guns lacks that historical pedigree," *Heller v. District of Columbia*, 801 F.3d 264, 272. (D.C. Circuit 2015) (*"Heller III")* (Internal quotation marks and citations omitted). In the case at bar, no such presumption exists (insofar as the Corps has failed to bring any evidence that such a presumption exists, and such a restriction is not cloaked in similar historical perspective. Alternatively, the Ban does not impinge the Second Amendment ***only*** if it is *de minimis;* here, the complete ban of any and all loaded firearms outside of hunting activities does not compare to a *de minimis* licensing requirement as in *Heller III*. *Id.* at 273. In that case, the court found that a requirement making it "considerably more difficult for a person lawfully to acquire and keep a firearm … for the purpose of self-defense in the home," would not be a *de minimis* burden. *Id.* at 273. Beyond making bearing arms for self-defense more difficult, the Ban makes it utterly impossible.

The Corps attempted to show why disallowing everyone from possessing firearms is desirable. But the Corps made no distinction – none at all – why banning only ***loaded*** firearms is the least bit likely to advance any kind of government objective. For example, the Corps states its rangers are unarmed and ill-equipped to deal with armed visitors. Those same rangers, however, already interact with armed hunters and visitors with unloaded firearms. The Corps failed to explain how their rangers are perfectly suited to dealing with those visitors with loaded firearms that are hunting and those visitors with unloaded firearms that are not

hunting, but not visitors with loaded firearms that are not hunting. Indeed, there is nothing in the record to indicate how a ranger would know the difference between a visitor with a loaded gun versus a visitor with an unloaded gun. Given their admitted lack of firearms training, there is little reason to believe the rangers could know the difference.

The above-described crazy quilt of rules and exceptions fails to meet even a rational basis test, and we know from *Heller* that a rational basis test is off the table. 554 U.S. at 629. The circuit courts have applied either "intermediate scrutiny" or "strict scrutiny" to laws challenged under the Second Amendment, depending on the severity of the burden imposed. In *Ezell*, the court applied "not quite strict" scrutiny in a case that essentially imposed a ban on gun ranges. 651 F.3d at 708. Here, the burden is even more severe, in that it deprives everyone of a meaningful opportunity to bear a loaded firearm for self-defense, even when on their own boats or in their own tents. The Government has failed to show how the regulation is narrowly tailored to advance a compelling objective.

Even if intermediate scrutiny were applied, the Government fails to show any kind of close fit between the Ban and the public interest that justifies the significant burden on the Second Amendment right. To survive intermediate scrutiny, the Corps must show that "it promotes a substantial government interest that would be achieved less effectively absent the regulation, and second that the

means chosen are not substantially broader than necessary to achieve that interest. *Heller III*, 801 F.3d at 272.

The District Court identified two interests nearly identical to the interests claimed by the District of Columbia in *Heller III*: protecting police officers by telling them, in advance, whether guns may be present; and "promoting public safety," and one interest not discussed in *Heller III:* protection of a sensitive area. *Id.* at 273. The Corps has failed to show any connection between the Ban and any of these three interests.

Although the lack of discovery prevents confirmation of such an assertion, it can reasonably be presumed that rangers encountering a person in possession of a gun, whether hunting or not, and whether loaded or not, will treat such an encounter with caution. In *Heller III*, testimony by D.C. police officers showed that officers would respond to any call regardless of the presence of weapons "as always having the potential to have a dangerous weapon present." As such, the D.C. Circuit Court concluded that the law would have little to no effect upon the conduct or safety of police officers. *Id.* at 275. The Corps has also asserted that because rangers are unarmed, GWL holders lawfully carrying firearms pose a threat to the rangers. The Corps has failed to give any evidence, and the District Court cited no authority that could lead this Court to believe that such individuals pose a greater threat to anyone, including law enforcement officers or rangers.

The Corps implies, but does not outright say, that more guns means more gun violence, similar to the District of Columbia's assertion that "more guns lead to more gun theft, more gun accidents, more gun suicides, and more gun crimes." There, the District of Columbia suggested that a gun trafficker would bring fewer guns into D.C. because he could not register more than one per month. The D.C. Circuit Court rejected the suggestion as "[lacking] in support of experience and common sense." *Id.* at 279. Here, the Corps implies that GWL holders lawfully in possession of a firearm logically lead to gun violence. The Corps has made no showing that GWL holders lawfully carrying firearms significantly contribute to gun violence, and common sense implies that such individuals (who manage to go to banks, car washes, restaurants, and bars without shooting anyone) that obey the law in all other areas will not continue to obey the law on property managed by the Corps. Further, the District of Columbia asserted that "the most effective method of limiting misuse of firearms … is to limit the number of firearms present." The D.C. Circuit Court flatly refused to uphold the one-per-month rule for this reason, holding that "Accepting that as true … it does not justify restricting an individual's undoubted constitutional right to keep arms … whether for self-defense or hunting or just collecting, because, taken to its logical conclusion, that reasoning would justify a total ban on firearms." *Id.* at 279-280.

Whether or not the areas in question are sensitive has been discussed

extensively above. To the extent that the Ban operates to protect a sensitive area, GCO again asserts that the Corps has failed to show how banning lawfully carried firearms miles away from the dam proper would protect such a mammoth concrete structure. The Corps has further failed to show how the Ban reconciles allowing anyone to drive on the dam in possession of anything they please (pursuant to state and federal law), or how allowing hunters but not lawful carriers of firearms would protect the dam.

In *Palmer v. District of Columbia*, 59 F.Supp.3d 173 (D.D.C., 2014) the Court ruled on the constitutionality of the District of Columbia's ban on carrying firearms. The Court concluded, "In light of *Heller*, *McDonald*, and their progeny, there is no longer any basis on which this Court can conclude that the District of Columbia's total ban on the public carrying of ready-to- use handguns outside the home is constitutional under any level of scrutiny." *Id.* at 182-183. We also know from *Moore v. Madigan*, 702 F.3d 933 (7th Cir. 2012) that a state cannot ban carrying guns on a statewide basis. Thus, both statewide bans and city-wide bans are unconstitutional. Nevertheless, the District Court Concluded, the Corps can ban guns on all Corps property.

The District Court did not explain how it is that the District of Columbia cannot ban carrying loaded guns throughout its 68 square miles, but the Corps of Engineers may ban carrying loaded guns on all nearly 19,000 square miles of Corps

property. Of course, land area is not the test. The smallest of municipalities in the country can no more violate the Constitution than can entire states. The fatal flaw in the Corps' Ban is that it applies on ***all*** property the Corps controls. The Corps cannot say it provides an outlet or meaningful alternative to a citizen wishing to exercise the Second Amendment right, because the Corps does not permit exercising the right ***at all.*** It is a non-starter for the Corps to claim a person can go elsewhere to exercise the right. *See Doe v. Bolton*, 410 U.S. 179 (1973) (Striking down Georgia law banning abortions to non-residents); *Ezell, supra* (striking down Chicago law that required residents to leave the city to shoot on a gun range). A governmental entity simply cannot ban the exercise of a constitutional right on the grounds that a person can go elsewhere to exercise the right.

III. The District Court Erred In Refusing to Issue a Default Against the Government

In the Allatoona case, Chytka and the Government were served on June 13, 2014. Docs. 6, 7, and 16. By August 12, 2014, no response to the summons and complaint had been filed. Doc. 16. On August 14, 2014, GCO moved for a clerk's entry of default, pursuant to Fed.R.Civ.P. 55(a). On August 15, 2014, the District Court entered an Order [Doc. 18] denying the motion. As grounds, the District Court recited Fed.R.Civ.P. 55(d), which pertains to default ***judgments*** against the Government.

GCO clearly moved for a ***default,*** not a ***default judgment,*** the difference being quite clear in the federal system. GCO's motion stated on its face that it was made "pursuant to Fed.R.Civ.P. 55(a)." Rule 55(a) is entitled "Entering a Default," in contrast to Rule 55(b), entitled "Entering a Default Judgment." Rule 55(a) states:

> (a) Entering a Default. When a party against whom a judgment for affirmative relief is sought has failed to plead or otherwise defend, and that failure is shown by affidavit or otherwise, the clerk must enter the party's default.

GCO showed in its motion all the necessary antecedent facts for a default. The Government did not dispute them. Pursuant to Fed.R.Civ.Proc. 55(a), the clerk of the District Court was ***required*** to enter a default. It was error for the District Court to rely on Rule 55(d), pertaining to default ***judgments,*** as grounds for overriding the requirement for the clerk to enter a ***default.***

In the Savannah case, Tickner was served on September 5, 2014. Doc. 9. Tickner did not respond to the summons and complaint by November 4, 2014, so GCO filed a motion for entry of default, pursuant to Fed.R.Civ.Proc. 55(a). Doc. 11. The Government was served on September 10, 2014. Doc. 10. As of November 9, 2014, the Government had not responded to the summons and complaint, so GCO moved for an entry of default against the Government pursuant to Fed.R.Civ.Proc. 55(a). Doc. 17. The District Court never ruled on these motions, but it did grant the defendants (post-default) an extension of time to respond, effectively denying the

motions for entry of default. Again, it was error for the District Court to ignore the clear requirements of Fed.R.Civ.Proc. 55(a).

The fact that the rules have strict requirements for entry of default judgments but not defaults against the Government indicates that the Government is as subject to entries of default as any defendant. The fact that the Government consistently fails to respond to summonses and complaints within the generous (i.e., nearly three times the amount of time given to "regular" defendants) amount of time allotted is bad enough, evidencing disdain for the system it created. For the district courts to give the Government a pass and routinely allow it to flout the rules gives the public the impression that there is a thumb on the scales of justice where the Government is concerned.

Conclusion

The District Court erred in barring discovery in this case and in granting summary judgment to Defendants-Appellants. The District Court further erred by failing to enter defaults against the Government. For the reasons articulated above, this Court should reverse the District Court's decision and remand for further proceedings..

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Certificate of Compliance

I certify that this Brief of Appellants complies with F.R.A.P. 32(a)(7)(B) length limitations, and that this Brief of Appellants contains 6,636 words as determined by the word processing system used to create this Brief of Appellants.

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Certificate of Service

I certify that I served a copy of the foregoing Brief of Appellants via U.S. Mail on September 14, 2016 upon:

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I also certify that I filed the foregoing Brief of Appellants by mailing it via U.S. Mail to the Clerk on September 14, 2016.

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