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.	)	

PLAINTIFFS' REPLY IN SUPPORT OF PLAINTIFFS' 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 filed this emergency motion for a preliminary injunction during the pendency of this case.

Argument

I. Corps Lands Are Not "Sensitive Places"

Defendants begin their opposition by claiming, without support, that Corps recreational lands are "sensitive areas" of the type referred to in *District of Columbia v. Heller*, 554 U.S. 570 (2008), the Supreme Court's landmark opinion declaring that the Second Amendment guarantees an individual right to keep and bear arms. In *Heller*, the Supreme Court said its opinion should not "cast doubt on longstanding prohibitions on … laws forbidding the carrying of firearms in sensitive places such as schools and government buildings." 554 U.S. at 626.

Defendants fail to undertake any effort at all to explain how their vast areas of recreational lands, characteristically un- or underdeveloped to retain their natural features, are anything at all like schools and government buildings. They merely declare them to be so and then move on to explain what the Court should do if it disagrees. And disagree this Court must, because undeveloped arguments should not be considered. *South Dakota v. Bourland*, 508 U.S. 679 (1993) (Declining to consider Corps argument that was not developed). But even if the Court considers

Defendants' argument, there simply is nothing in the record by which the Court can conclude that the Corps' recreational areas have anything in common with schools and government buildings.

The 11th Circuit has adopted the popular two-step inquiry into cases challenging a law on Second Amendment grounds. First, the court looks to see if the law burdens a Second Amendment right. If it does, then the court applies the appropriate level of scrutiny. *GeorgiaCarry.Org, Inc. v. Georgia*, 687 F.3d 1244, 1260, FN 34 (11th Cir. 2012).

Defendants urge that their regulation fails the first test because, they say, their lands are "sensitive places." They make no effort to differentiate among their various real estate holdings. They declare by fiat that all their lands are sensitive. Their position is severely undermined, however, by their admission that they readily allow hundreds of millions of visitors per year onto their facilities, unmonitored and free to roam throughout. They do not themselves protect their supposedly sensitive areas with armed officers.

Defendants' position is further weakened by their own policy. Hunting, with firearms, is widely permitted on Corps property. 36 CFR § 327.8(a). It is difficult to take Defendants seriously on their claim that their lands are vital national

infrastructure, so sensitive that firearms cannot possibly be allowed, lest they upset the delicate balance of public safety, except of course for people roaming those same lands with all manner of firearms, hunting all manner of game.

They undertake no discussion of what makes a given area "sensitive," nor how their lands are similarly situated to schools or government buildings. Without elaboration from the Supreme Court on what makes an area sensitive, and no attempt by Defendants to explain their argument, this Court simply cannot conclude that the designation "sensitive" applies to every square foot of Corps land throughout the nation.

II. The Corps' Regulation Burdens the Second Amendment Right

Having dispensed with the notion that all Corps lands are sensitive places, we must consider whether the firearms ban impacts a right protected by the Second Amendment. *Heller* determined that the right is a fundamental individual right, and that the right is one to "possess and carry weapons in case of confrontation." 554 U.S. at 657. The need for defense of self, family, and property is most acute in the home. 554 U.S. at 628. But the Court clearly intended more than home defense by emphasizing the right applies to possession ***and carrying.*** *Palmer v. District of Columbia*, 2014 U.S.Dist. LEXIS 101945, 1:09-CV-1482 (D.C., July 24, 2014)

("[T]he *Second Amendment* secures a right to carry a firearm in some fashion outside the home"), Slip.Op. at 8, *citing Peruta v. San Diego*, 742 F.3d. 1144, 1153 (9th Cir 2011), *citing Heller* (pointing out that for the right to be "most acute" in the home, it must also exist in some fashion outside the home). *See, also, Moore v. Madigan*, 702 F.3d 933, 935, 936 (7th Cir 2012) ("*Heller* repeatedly invokes a broader Second Amendment right than the right to have a gun in one's home…") ("A right to bear arms thus implies a right to carry a loaded gun outside the home.")

It is therefore clear that Defendants' regulation imposes some level of burden on the Second Amendment right. The regulation prohibits firearms at all on Corps property (except when hunting or shooting at a range), even when camping overnight. Camping overnight makes one's camping facility (tent or trailer) tantamount to a home, and otherwise carrying on Corps property is outside the home.

III. The Regulation Cannot Withstand Any Applicable Level of Scrutiny

The Court must therefore consider the appropriate level of scrutiny to apply to Defendants' regulation. Defendants urge rational basis review. Of course, they dare not say that phrase, because rational basis was declared by *Heller* to be "redundant with the separate constitutional prohibitions on irrational laws" and

therefore of "no effect." 554 U.S. at 628 FN 27. Instead, Defendants call their standard "not heightened." But because all other levels of scrutiny (intermediate and strict) are "heightened" (meaning "not rational basis"), rational basis is indeed what Defendants suggest. As already noted, however, the Supreme Court determined that rational basis is a nonstarter for Second Amendment cases.

That leaves strict scrutiny or some form of intermediate scrutiny. The Supreme Court has not adopted a standard of review, and neither has the 11th Circuit. The 7th Circuit has said that restrictions that are closest to the core right of the Second Amendment to keep guns in the home are subject to, at a minimum "not quite strict scrutiny." *Ezell v. City of Chicago*, 651 F.3d 684, 708 (7th Cir 2011). The government bears the burden of showing that its regulation a strong public interest justification and a close fit between the restrictions imposed and the public interests it serves, together with a showing that the public interests are strong enough to justify the substantial encumbrance on and individual Second Amendment right. *Id.*

Defendants seek to supersede these specific Second Amendment principles with the notion that the government acting as a proprietor is subject to less scrutiny than the government acting as the sovereign. Defendants are not able to come up

with even applicable persuasive authority for this proposition. Instead, they rely on a plurality opinion of the Supreme Court in *United States v. Kokinda,* 497 U.S. 720 (1990). Not only is *Kokinda* not a majority opinion. It also is in applicable. In *Kokinda*, a group sought to use the sidewalk on Post Office property for their own "First Amendment" purposes unrelated to postal business. The Court ruled the Postal Service could rightfully limit use of Postal Office property to the uses for which it was intended. But this is nothing new. There are numerous cases of people being convicted of trespassing for refusing to case using government property for a purpose other than that for which it was intended.

Those facts do not apply here, however, because Plaintiffs do not seek to use Corps property for any purpose other than that which is expressly intended: camping and recreation. It cannot be said that carrying firearms while using the property in exactly the way the government intends is covered by this "government property trespass" doctrine.

Defendants also rely on an unpublished 5th Circuit opinion in *United States v. Dorosan*, 350 F.Appx. 874 (5th Cir 2009), in which the Court affirmed a conviction of a postal employee for having a gun in his car in a restricted access parking lot. Again, the facts of *Dorosan* can be distinguished. Plaintiffs do not seek to carry

guns in areas of Corps property that are restricted from public access. They seek to carry firearms in those areas of Corps property that are specifically available to the public for camping and recreation. *See Bonidy v. U.S. Postal Service*, No. 10-CV-02408 (D. Colo, July 9, 2013) (Distinguishing *Dorovan* as applying to restricted parking areas where mail trucks are busily used and finding that public parking lots on Postal Service property cannot have blanket bans on firearms).

Finally, while not federal court cases, there are several cases in Georgia showing that a governmental entity is not necessarily free to regulate carrying firearms on its property solely as proprietor. *GeorgiaCarry.Org, Inc. v. Coweta County*, 288 Ga.App. 748 (2007); *GeorgiaCarry.Org, Inc. v. City of Roswell*, 298 Ga.App. 686 (2009). In those two cases, multiple local government entities banned carrying firearms in their parks and recreational facilities, and all such bans (that were not voluntarily repealed in the face of litigation) were enjoined from enforcement.

Against this backdrop, Defendants claim to have struck a "delicate balance" with their regulation so as "to ensure the safety of visitors to the lands it manages…." This is just platitudinous mumbo-jumbo. Is this Court expected to believe that the Government of the United States actually ***ensures*** the safety of

visitors? Is the Government strictly liable for any and all injuries occurring on Corps land because the Corps has achieved this delicate balance? Of course not. If anything, the Corps has foisted some responsibility for personal safety onto its public visitors by declining to provide any kind of armed law enforcement presence on its property. Plaintiffs readily accept that responsibility and seek to address it in part by exercising the right to be armed.

Defendants fall far short of carrying their burden of showing a strong public interest and that there is a close fit between their regulation and the public interest. They offer only conjectural conclusions of any fit at all. They claim to have "reasonably concluded that the presence of a loaded firearm could far more quickly escalate tensions resulting from such disagreements, and present a significant threat to public safety, involving the potential use of deadly force against a visitor or a Corps Park Ranger." Defendants' Brief at 9. This is all hyperbolic policy discussion, not the creation of a "close fit" to the public's interest.

The truth is that Defendants have no idea what the effect would be, if any, of repealing their regulation and not interfering with the public right to go armed. *Madigan*, 702 F.3d at 937 ("[T]he net effect on crime rates in general and murder rates in particular of allowing the carriage of guns in public is uncertain both as a

matter of theory and empirically.") ("Based on the findings from national law assessments, cross-national comparisons, and index studies, evidence is insufficient to determine whether the degree or intensity of firearms regulation is associated with decreased (or increased) violence.") (Posner, J.)

The data just do not exist to support Defendants' naked assertions. Given that they bear the burden of showing the close fit between their regulation and the public interest they seek to protect, they have failed to do so. Instead, they just presume that restricting law-abiding citizens from carrying firearms on Corps property will protect those citizens from violent crime. The lack of correlation, let alone logic, is astonishing.

Defendants also deny that a tent pitched on their property, with their permission, is in any way similar to the tent occupants' home. They apparently give no consideration to such factors as that is where the occupants perform the large majority of daily living tasks that take place in the home: they cook, eat, drink, sleep, listen to music, watch video entertainment, play games, read books and magazines. They essentially do all that one does in one's home, and they frequently

do it as a family. To dismiss so cavalierly that a campsite can be a person's home, just because it is on government property, is to close ones' eyes to reality.[1]

Defendants then criticize, as they must, the preliminary injunction issued against them in a nearly identical case by the U.S. District Court for the District of Idaho. (*Morris v. U.S. Army Corps of Engineers*, 2014 WL 117527 (D. Idaho, January 10, 2014). Defendants understandably do not like the result in *Morris*, but they cannot (at least they should not) deny that *Morris* is persuasive authority in the present case. It represents the current opinion of a sister district on virtually identical facts and with the same defendant governmental agency over the same regulation of that agency. It is the most on-point case to be found anywhere in any court. It simply cannot be ignored.

IV. Irreparable Harm is Present

[1] Even though this is a case against a federal entity, so the 14th Amendment does not come directly into play, Defendants also pedantically deny that *McDonald v. City of Chicago*, 130 S.Ct. 3020 (2010) "struck down a total ban on keeping functional firearms in one's home." This is a curious position. *Heller* held that "the District's ban on handgun possession in the home violates the Second Amendment…." 554 U.S. at 685. *McDonald* held that the 14th Amendment "incorporates the Second Amendment right recognized in *Heller*. Four justices voted for the 14th Amendment provision that does so is the Due Process Clause, and one justice concurred in the judgment but opined that the Privileges or Immunities Clause was the applicable one. Together, a majority adopted the *Heller* right against the states.

Defendants next contend Plaintiffs cannot show irreparable harm because Plaintiff James uses Corps property without an injunction. In other words, because Defendants have managed to violate Plaintiffs' rights in the past, they should be permitted to continue to do so *ad infinitum*. One would hope for better from one's own government. Fortunately, the 11th Circuit has not had occasion to adopt such a rule, and this Court should not create one. Violation of fundamental constitutional rights is irreparable harm *per se,* and nothing more need be shown.

Defendants resist the concept that violation of a Second Amendment right is irreparable harm *per se,* saying the 11th Circuit only has applied that principle to the First Amendment. Plaintiffs cited authority to the contrary in their opening brief, but further point out the 11th Circuit has not had an opportunity to apply the principle to the Second Amendment. There is ample reason to believe they would do so if given that opportunity.

Second Amendment jurisprudence is in its relative infancy compared to other fundamental constitutional rights. Not until 2008 and *Heller* did the Court provide any meaningful opinion on the scope of that Amendment. In *Heller,* however, the Court likened the Second Amendment to the First. 554 U.S. at 635 ("The Second Amendment is no different [from the First]. Like the First, it is the very ***product*** of

an interest balancing by the people…."). *See also Printz v. United States*, 521 U.S. 898 (1997), Thomas, J. *concurring* (The First Amendment … is fittingly celebrated for preventing Congress from prohibiting the free exercise of religion or abridging the freedom of speech. The Second Amendment similarly appears to contain an express limitation on the government's authority."). *See also Note Treating the Pen and the Sword as Constitutional Equals: How and Why the Supreme Court Should Apply its First Amendment Expertise to the Great Second Amendment Debate*, 44 Wm. & Mary L. Rev. 2287 (April 2003, Issue 5).

Other Circuits considering the question have come down on Plaintiffs' side. *Ezell v. City of Chicago*, 651 F.3d 684, 699-700 (7th Cir. 2011):

> [F]or some kinds of constitutional violations, irreparable harm is presumed. When an alleged deprivation of a constitutional right is involved, most courts hold that no further showing of irreparable harm is necessary. This is particularly true in First Amendment claims…. The Second Amendment protects similarly intangible and unquantifiable interests. *Heller* held that the Amendment's central component is the right to possess firearms for protection. Infringement of this right cannot be compensated by damages. In short, for reasons related to the form of the claim and the substance of the Second Amendment right, the plaintiff's harm is properly regarded as irreparable and having no adequate remedy at law.

Defendants assert that if the preliminary injunction is granted, there will be "safety concerns for the unarmed Park Rangers and visitors, security problems for

dams, levees, and hydropower facilities co-located within recreation areas…." Defendants fail to explain how "safety concerns" would harm themselves and the public. This is especially ironic in light of the fact that hunters freely hunt Corps property, apparently with no such "safety concerns." The reality is that "concern" is not harm.

Defendants likewise fail to explain how James' possession of a handgun in his tent will pose a sudden "security problem" for dams, levees, and hydropower facilities. As a reminder to Defendants, Plaintiffs are not seeking an injunction against enforcing the ban against those without licenses to carry weapons in Georgia. It is already a crime in Georgia to carry a gun in public absent narrow exceptions. That means that Defendants would continue to be able to enforce their ban against carrying firearms by people without licenses.

But Defendants' position betrays a more fundamental flaw in the regulation. Defendants (amazingly naively) seem to believe that their regulation is protecting dams, levees, and hydroelectric facilities. Somehow a misdemeanor prohibition against carrying firearms on Corps properties is the bulwark against terrorist attacks resulting in felonious destruction of our infrastructure. It is seriously disconcerting

that Defendants believe this to be true, but Plaintiffs are confident the Court will give such beliefs the credence they deserve.

Conclusion

Defendants have not effectively rebutted Plaintiffs' arguments for issuance of a preliminary injunction, nor have they differentiated the present case in any meaningful way from *Morris.* The court in *Morris,* an essentially identical case, issued a preliminary injunction. There is no reason why this Court should not do so as well.

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CERTIFICATE OF SERVICE

I certify that on August 14, 2014, I served a copy of the foregoing via ECF upon:

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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
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