No. 14-36049

In the
United States Court of Appeals
for the Ninth Circuit

ELIZABETH E. NESBITT, et al.,
Plaintiffs-Appellees,

v.

U.S. ARMY CORPS OF ENGINEERS, et al.,
Defendants-Appellants.

On Appeal from the United States District Court
for the District Of Idaho

BRIEF OF NATIONAL RIFLE ASSOCIATION OF AMERICA, INC. AND CALIFORNIA RIFLE AND PISTOL ASSOCIATION AS AMICI CURIAE IN SUPPORT OF APPELLEES AND AFFIRMANCE

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CORPORATE DISCLOSURE STATEMENT

National Rifle Association of America, Inc. has no parent corporations. Because it has no stock, no publicly held company owns 10% or more of its stock.

California Rifle and Pistol Association has no parent corporations. Because it has no stock, no publicly held company owns 10% or more of its stock.

Date: July 15, 2015

Respectfully submitted,

/s/ C.D. Michel
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STATEMENT OF IDENTITY, INTEREST AND AUTHORITY TO FILE

Pursuant to Rule 29(c)(4) of the Federal Rules of Appellate Procedure, the National Rifle Association of America, Inc. ("NRA") and the California Rifle and Pistol Association ("CRPA") respectfully submit this amici curiae brief, with the consent of all parties, in support of Appellees.

The NRA is America's foremost and oldest defender of Second Amendment rights. Founded in 1871, the NRA has approximately five million members and is America's leading provider of firearms marksmanship and safety training for civilians. Since its formation, the NRA has been widely recognized as a political force and defender of the Second Amendment, providing resources, cultivating members, and advocating for the right to self-defense and the right to keep and bear arms. The NRA has extensive experience litigating firearms-related cases at the national and state levels, having been party to and amicus curiae for many cases addressing various firearm related issues.

Founded in 1875, the CRPA is a non-profit organization that seeks to defend the Second Amendment and advance laws that protect the rights of individual citizens. CRPA regularly participates as a party or amicus in firearms-related litigation. CRPA works to preserve the constitutional and statutory rights of gun ownership, including the right to self-defense, the right to hunt, and the right to keep and bear arms. CRPA is also dedicated to promoting the shooting sports,

providing education, training, and organized competition for adult and junior shooters. CRPA's members include law enforcement officers, prosecutors, professionals, firearm experts, the general public, and loving parents.

Amici offer their unique experience, knowledge, and perspective to aid the Court in the proper resolution of this case. They have at their service preeminent Second Amendment law scholars, as well as reputable firearms and self-defense experts and lawyers with decades of experience in firearms litigation. As such, amici respectfully submit that they are uniquely situated to bring an important perspective to the resolution of the issues raised in this appeal.

STATEMENT REGARDING PARTICIPATION BY PARTIES, THEIR ATTORNEYS, OR OTHER PERSONS IN FUNDING OR AUTHORING THE BRIEF

Pursuant to Federal Rule 29(c)(5), amici attest that no counsel for a party authored this brief in whole or in part, and that no person other than amici, their members, or their counsel made a monetary contribution to its preparation or submission.

ARGUMENT

I. THE CORP'S POSITION THAT 12 MILLION ACRES OF WILDERNESS AND RESERVOIRS ARE ALL "SENSITIVE PLACES" COMPARABLE TO SCHOOLS AND GOVERNMENT BUILDINGS, WHERE THE RIGHT TO BEAR ARMS CAN BE PROHIBITED, IS UNTENABLE.

The Plaintiffs have no Second Amendment rights in this case, we are told, because the 30,000 acres of forest and wildlife habitat surrounding the Dworshak Dam and Reservoir in Idaho—along with the other 12 million acres of similar lands that the Corps of Engineers manages throughout the country—fall within the category of "sensitive places such as schools and government buildings" from which firearms may be banned under *District of Columbia v. Heller*. 554 U.S. 570, 626 (2008). Merely reciting the assertion gives one pause, and for good reason: the wilderness areas managed by the Corps are among the least plausible candidates for "sensitive places" under *Heller*. The Dworshak Reservoir is not a *government building*, such as a courthouse, school or post office; nor is it a *restricted* area *adjacent* to a government building, such as a gated parking lot. It is not even inhabited. It is 30,000 acres of woods, timberlands and wildlife habitat—e.g., white-tailed deer, Rocky Mountain elk, bear—surrounding a 20,000-acre reservoir that includes the largest steelhead salmon hatchery in the world. The

recreational opportunities include hiking, fishing, hunting and camping—including "primitive camping."[1]

The appellation "sensitive area" does not suit the Dworshak Reservoir. And if it did, then the same characterization—and the same prohibition on Second Amendment rights—would, under the Corps' argument, extend to the *other* 12 million acres of public lands that the Corps manages in 43 of the 50 States, including 55,000 acres of river and lake shoreline, 92,000 campsites, 7,700 miles of hiking trails, vast stretches of hunting preserves, and 32 shooting ranges.[2]

The Corps claims the right to suspend the Second Amendment over all of these lands because they are federal property. Br. for Appellants at 12-14, ECF No.14-1 ("Corps Br."). This confirms just how outlandish—and bereft of any limiting principle—the Corps' position is, because fully 28% of all the territory in the United States is owned by the federal government.[3] Thus, to reverse the decision below, this Court would have to embrace the proposition that the Second Amendment has no application in more than one-fourth of the entirety of these

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[1] *See* Corps of Engineers website for Dworshak Dam and Reservoir, Exh. 1 to Plaintiffs' Unopposed Request for Judicial Notice (July 10, 2015), ECF No. 25 ("Dworshak Website").

[2] Excerpts R. at 35, 38 ECF No. 14-2 ("ER"); Appellees' Suppl. Excerpts R. at 12 ECF No. 22-2 ("SER").

[3] *See* Ross W. Gorte, et al., Cong. Research Serv., R42346, *Federal Land Ownership: Overview and Data* 1 (2012), *available at* http://fas.org:8080/sgp/crs/misc/R42346.pdf.

United States. The breadth of this suspension of the Second Amendment is particularly staggering within the jurisdiction of the United States District Court of Idaho—the source of this appeal—because the federal government owns 62% of the territory in Idaho.[4]

The geographic scope of the Corps of Engineers' ban on "carrying a loaded firearm for the purpose of self-defense," ER 8 (decision below),—which *Heller* defined as the "core" of the Second Amendment right, 554 U.S. at 591, 630—is vast; and the assertion of power by a federal agency to strip citizens of an enumerated constitutional right is unprecedented. But the evidentiary showing offered as the justification for this radical infringement is meager; and not one of the justifications the Corps advances in support of this breathtaking usurpation withstands any scrutiny.

[4] *See id.* at 4 tbl.1 (as of 2010, the federal government owned 32,635,835 acres of land in Idaho, which is 61.7% of the state).

A. The Corps' Contention That the Carrying of Firearms and Ammunition for Self-Defense on Lands Managed by The Corps Threatens Both Public Safety and National Security—While the Carrying and Use of Firearms and Ammunition for Hunting and Target-Practice on the Very Same Lands *Does Not*—Is Incoherent.

Putting aside for the moment the Corps' strange notion that forests and lakes are " 'sensitive places' where firearm prohibitions [are] presumptively valid," Corps Br. 10, the challenged regulation does not, contrary to the Corps' mischaracterizations, impose a "prohibition on armed visitors," *id.* at 12; *see also, e.g.*, *id*. at 22 (stating that Corps does not "allow[ ] armed visitors on Army Corps-managed lands"). In truth, as the Corps itself concedes, firearms—including "heavy-caliber," long-range rifles used for hunting large game such as deer and elk—are permitted on the very same lands from which the Corps bans firearms used for self-defense, even when the defensive firearms are handguns of much shorter range and much smaller and less threatening caliber. *Id.* at 18, 23. The same large-caliber rifles are permitted at target ranges on these same Corps lands. *Id.*. Indeed, the Corps concedes that it relies on recreational hunting by private citizens to manage the wildlife populations on Corps lands. *Id.* at 23. We are at a loss to imagine a plausible theory for why handguns threaten public safety and national security among woods and lakes when "heavy-caliber" rifles do not, and the Corps fails to offer one.

B. Contrary to the Corps' Suggestion, the Unfenced, Unguarded Reservoirs and Forests that It Manages As Public Water Resources Are Not Sensitive Military Bases.

The Corps takes the position that because it is technically part of the Army, the lands it manages are military bases from which civilian self-defense firearms and ammunition may be banned (again, even if one credits this theory, the Corps fails to explain how handguns or other defensive firearms threaten a military base when more "heavy-caliber" rifles, by the Corps' own estimation, do not). Thus the Corps confidently asserts that it has authority to prohibit the use of firearms for self-defense "on property owned and operated by the United States Military" that is devoted to "national security" installations. Corps Br. 4 (quoting *GeorgiaCarry.org, Inc. v. U.S. Army Corps of Eng'rs*, 38 F. Supp. 3d 1365, 1373 (N.D. Ga. 2014)). "Army Corps land," we are solemnly informed, "is not simply government land; it is land owned by the military." *Id.* at 14; *see also id.* at 6, 11-12, 17, 19, 25. The Corps' brief makes many citations to cases discussing the federal government's unique power to restrict and sometimes even ban the exercise of constitutional rights on military bases. *Id.* at 14, 17.

But the obvious difference is that those cases involved *actual military bases with gates, guards, soldiers, airmen, tanks and military jet airplanes*. *See, e.g.*, *United States v. Corrigan*, 144 F.3d 763, 767 (11th Cir. 1998) (Fort Benning, Georgia, home to, among other units and facilities, the 75th Ranger Regiment and

the Army Infantry School); *United States v. Albertini*, 783 F.2d 1484, 1485 (9th Cir. 1986) (Hickam Air Force Base, Hawaii, headquarters of the Pacific Air Forces and home to jet fighter, airlift and refueling airplanes); *United States v. Jelinski*, 411 F.2d 476, 477-78 (5th Cir. 1969) (Kelly Air Force Base, Texas, at that time a major facility for both B-52 bombers and transport aircraft supporting the Vietnam war).

In contrast, the Dworshak Reservoir at issue here—along with the other 12 million acres of water and flood control projects managed by the Corps of Engineers—are not military facilities by even the most remote stretch of the imagination. The Corps manages these water projects in fulfillment of its "Civil Works mission." SER 11. Although the Corps' Brief intones the word "Army" more times than one can count, and although the Corps ultimately answers to the Secretary of the Army, the reality is that the Civil Works Program has a mere 294 military members, compared to its overwhelmingly civilian work force, which comprises some 23,033 civilian employee work years. SER 11. It is in fulfillment of this Civil Works mission that the Corps of Engineers manages the flood control and water resource projects at issue here, along with 702 other dams and 14,500 miles of levees. Corps Br. 11; *see also id.* at 20 (Corps-managed land is devoted to "water-resource development projects"); *id.* at 21 ("navigational locks and dams, hydropower, water supply, navigation, fish and wildlife"). The Dworshak Dam and

Reservoir at issue here has a mere 45 Corps employees—none of them military; they are, instead, park rangers, fish biologists, engineers and maintenance staff.[5]

Thus the supposedly "military" nature of the Corps of Engineers' duties, lands, and facilities—on which the Corps relies so heavily in its brief—is little more than a charade.

C. Congress Has Found That There Is No Threat to Public Safety or Any Other Government Interest From Allowing Law-Abiding Citizens To Carry Defensive Firearms in National Parks and National Wildlife Refuges.

In its argument that all Corps lands constitute "sensitive places" where the government is free to suspend the Second Amendment, the Corps places great reliance on the decision in *United States v. Masciandaro*, 638 F.3d 458 (4th Cir. 2011). Corps Br. 11, 13, 19-20.

First, the National Park Service regulation at issue in *Masciandaro* was narrowly interpreted to forbid loaded firearms *only* in motor vehicles. *See* 638 F.3d at 473 ("Under § 2.4(b), national parks patrons are prohibited from possessing loaded firearms, and only then within their motor vehicles.") (emphasis omitted); *United States v. Masciandaro*, 648 F. Supp. 2d 779, 790 (E.D. Va. 2009) ("§ 2.4(b) does not prohibit carrying or possessing a loaded firearm on National Park land *outside* motor vehicles."). As construed by the courts, the regulation at issue there

[5] Dworshak Website, *supra* note 1, at 2.

allowed the carrying of loaded handguns for protection on National Park land *outside* vehicles, for example on hiking trails or in tents in campgrounds. Thus, as the Fourth Circuit observed, the regulation challenged there "le[ft] largely intact the right to 'possess and carry weapons in case of confrontation.' " *Masciandaro*, 638 F.3d at 474 (quoting *Heller*, 554 U.S. at 592). The Corps regulation challenged here sweeps far more broadly for, as the court below found, it flatly and comprehensively "bans carrying a loaded firearm for the purpose of self-defense" on Corps lands. ER 8. "It also bans carrying an unloaded firearm along with its ammunition . . . . An unloaded firearm is useless for self-defense purposes without its ammunition." ER 8.[6]

Second, the regulation sustained in *Masciandaro* was abrogated by Congress even before Masciandaro's case got to the District Court (though the Fourth Circuit held that the law that governed Masciandaro's case was the law in effect at the time). *See* 638 F.3d at 462-63. Congress expressly and formally found "that 'the right of the people to keep and bear arms' " applies within the entirety of the "National Park System" and that government regulations far more permissive than

[6] The individual convicted in *Masciandaro* was found sleeping (illegally) in a parked car in a parking lot of a small area administered by the National Park Service in an urban part of Virginia, adjacent to the heavily traveled George Washington Memorial Parkway and a very short distance from Ronald Reagan National Airport. 638 F.3d at 460. He was not licensed in Virginia to carry a firearm. *Id.*

the one challenged here "entrapped law-abiding gun owners while" on National Park lands. 54 U.S.C.A. § 104906(a)(1), (4) (West, Westlaw current through P.L. 114-25 (excluding P.L. 114-18)) (quoting U.S. Const. amend. II). Congress apparently found no threat to public safety (or any other government interest) from the carriage of loaded firearms for self-defense in the National Parks by law-abiding citizens. *See id*. And Congress directed that the "Secretary [of the Interior] shall not promulgate or enforce any regulation that prohibits an individual from possessing a firearm" so long as the individual was in compliance with the laws of the State in which the Park was located. *Id.* § 104906(b).

Even more pointedly, Congress declared it unacceptable "that unelected bureaucrats" who administer federal lands were abusing their regulatory powers by trying to "override the 2d Amendment rights of law-abiding citizens on 83,600,000 acres of [Park] System land." *Id.* at § 104906(a)(6). Congress simultaneously enacted an identical protection of Second Amendment rights that applies to the carriage of defensive firearms within lands of the National Wildlife Refuge System. *See* 16 U.S.C.A. § 1a-7b(a)(7) (West, Westlaw current through P.L. 114-25 (excluding P.L. 114-18). Those lands constitute an additional 90,790,000 acres of forests and wilderness lands open to the recreational uses of the American public. *See* 16 U.S.C.A. § 1a-7b(a)(6).

Despite Congress' emphatic repudiation of the regulation applied in *Masciandaro*, the Corps relies on that superseded regulation (and *Masciandaro*) no fewer than four times, mentioning only in a footnote that Congress specifically enacted a statute to abrogate the Park Service regulation on which the Corps relies so heavily. Corps Br. 20-21 n.5. And the Corps never explains why, if the carriage of defensive firearms poses no threat to public safety (or any other government interest) in the nation's parks and wildlife refuges—which encompass lands more than an order of magnitude more vast than those administered by the Corps[7]—the same logic does not apply on Corps lands.[8] That silence is deafening.[9]

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[7] The Corps manages 12 million acres. The National Park Service System and the National Wildlife Refuge System together constitute more than 174 million acres.

[8] As discussed in Part B above, the Corps' purported distinction that its lands are "military" is without merit. As discussed in Part A above, the Corps cannot provide a plausible, let alone a persuasive, explanation for how defensive firearms—particularly handguns—threaten public safety and the security of dams and levees while "high-powered" hunting rifles do not. The supposed sensitivity of Corps water infrastructure projects is further discussed below.

[9] The Corps asserts strenuously (and repeatedly) that carriage of defensive firearms in recreational areas of the lands it manages pose a threat to the safety of both Corps staff and recreational users of Corps lands due to the "*dense concentrations of individuals from diverse backgrounds*." Corps Br. 11 (emphasis added);*See also id.* at 21 (noting danger created by "diverse backgrounds of campers"). The Corps does not explain what is threatening or dangerous about people from "diverse backgrounds."

D. The Corps' Contention That Carriage of Defensive Firearms on Corps Lands Threaten Infrastructure Vital to National Security Is Without Merit and Insufficient To Sustain the Challenged Regulation.

Upping the ante on its wager that it can persuade this Court that Corps' water resource projects are essentially "military" bases, the Corps of Engineers theorizes—with no evidence whatsoever—that the carriage of defensive firearms by law-abiding citizens must be outlawed on its lands. It does so even though Congress has found no threat of any kind on the vastly larger national parklands and wildlife refuge lands—because Corps lands contain dams, levees and other flood control projects that are critical infrastructure. Catastrophic failure of some of those projects, the Corps says, could affect as many as 100,000 people and cause economic harms of $10 billion. Corps Br. 12.

The Corps does not explain how personal self-defense firearms could damage, for example, the Dworshak Dam situated on the Corps lands at issue here. That dam is one of the largest in the nation: more than 700 feet high and 3000 feet wide, and built of myriad tons of steel and reinforced concrete.[10] Explosives might well blow up such a structure, but explosives are banned by a different Corps regulation that has not been challenged and is not at issue here.[11] The Corps

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[10] *See* Dworshak Website, *supra* note 1.

[11] *See* 36 C.F.R. § 327.13(b).

simply never explains how the self-defense firearms it outlaws (including handguns) pose a threat to dams whereas the "high-powered" rifles that the Corps permits on its lands do not. *See supra* Part II.A. To be sure, the catastrophic failure of a Corps Civil Works Project such as a Flood Risk Management project, *see, e.g.*, SER 11-12, could indeed cause widespread damage. But the Corps identifies not a single human injury, nor a single-dollar-loss, from a water- resource or flood-control project failure that is even remotely attributable to the use of a firearm in self-defense.

E. The Corps' Position that All Federally Owned Land Should Be Considered a "Sensitive Place" Under Heller, and that the Second Amendment Does Not Apply to Such Land, Is Bereft of Any Limiting Principle.

The Corps contends that its lands should be deemed "sensitive places" under *Heller*, and therefore outside the ambit of the Second Amendment, simply because they are lands owned by the federal government. Corps Br. 6, 11-14, 16-18, 21, 25. This argument proves far too much because it knows no stopping point. The federal government owns 62% of the land in Idaho and 28% of all the land in the fifty States. *See* Gorte, *supra* note 3. The Corps' premise that all such federal property should be treated as "sensitive places" under *Heller* by virtue of the mere fact of federal ownership would allow every federal agency that manages federally owned lands—the U.S. Forest Service, the Corps of Engineers, the National Park Service, the Fish and Wildlife Service, the Bureau of Land Management, and the

Bureau of Reclamation—to criminalize the exercise of fundamental Second Amendment rights on all such lands by the simple expedient of noting federal ownership. The Corps' expansive "sensitive" federal "places" argument would thus put more than a quarter of the Nation's territory outside the protection of the Second Amendment. That position is untenable. The very purpose of the Second Amendment, after all, was to restrain *federal* power.

More fundamentally, the Corps' sweeping power to ban the exercise of the right to bear arms on federally-owned land would surely stun the Framers and the generations of trappers, hunters, explorers, traders, farmers, ranchers, homesteaders, and other pioneers who settled America's vast frontiers—all of whom ventured into that void bearing arms to protect themselves from the predations of both man and beast:

> As the most important early American edition of Blackstone's Commentaries (by the law professor and former Antifederalist St. George Tucker) made clear in the notes to the description of the arms right, Americans understood the "right of self-preservation" as permitting a citizen to "repe[l] force by force" *when "the intervention of society in his behalf, may be too late to prevent an injury."*

Heller, 554 U.S. at 594-95 (quoting 1 Blackstone's Commentaries *145-46 n.42 (St. George Tucker ed. 1803)) (emphasis added) (alteration in original). Those are precisely the conditions that prevail on the frontier, and the right to bear arms was always understood in those terms. *See id.* at 599 ("The prefatory clause does not suggest that preserving the militia was the only reason Americans valued the

ancient right; most undoubtedly thought it even more important for self-defense and hunting.").

II. THE DISTRICT COURT CORRECTLY CONCLUDED THAT THE CORPS' OUTRIGHT BAN ON THE POSSESSION AND CARRIAGE OF FIREARMS FOR SELF-DEFENSE IS UNCONSTITUTIONAL UNDER ANY STANDARD.

Given that the right to keep and bear arms secures a right to possess and carry firearms that is not confined to the home, and because the vast lands within the Corps' jurisdiction are not immune from Second Amendment protections, the district court properly turned its focus to whether the Corps' regulation violates that right.

As the district court succinctly explained, the Corps' regulation completely "bans carrying" an operable "firearm for the purpose of self-defense." ER 8. That total ban "goes far beyond merely burdening Second Amendment rights," and flatly denies those rights for all "law abiding citizens." ER 8. Relying in part on the decision in *Peruta v. County of San Diego*, 742 F.3d 1144 (9th Cir. 2014), *vacated pending rehearing en banc*, 781 F.3d 1106 (9th Cir. 2015), the district court concluded that the Corps' ban is "invalid no matter what degree of scrutiny is used in its evaluation." ER 8.

That conclusion follows directly from *Heller* itself. There, the Supreme Court struck down the District of Columbia's total "ban on handgun possession in the home" as categorically unconstitutional "[u]nder any of the standards of

scrutiny that we have applied to enumerated constitutional rights." *Heller*, 554 U.S. at 628, 635. So, too here. If the Second Amendment secures a right to bear arms in public, a blanket denial of that right is necessarily incompatible with the Second Amendment's protections. *See* Appellee's Answer Br. at 33-51, ECF No. 22-1 ("Appellees' Br.") No amount of "judicial interest-balancing" can be used to declare that right extinct. *McDonald v. City of Chicago*, 561 U.S. 742, 785-86 (2010). These "policy choices" have been taken "off the table." *Heller*, 554 U.S. at 636.

This is not to say the government may not *regulate* the use of firearms. Indeed, the Supreme Court has acknowledged that the government retains that power. ER 9; *Peruta*, 742 F.3d at 1178 (citing *Heller*, 554 U.S. at 626-27, 636; *McDonald*, 561 U.S. at 780). "But here the Corps is attempting to *ban*" the possession and carriage of handguns for self-defense, "not *regulate* them." ER 9 (emphasis added). That plainly goes too far.

In an attempt to defend its ban on appeal, the Corps argues that the district court's conclusions are drawn into question because *Peruta* was recently reheard by an en banc panel of this Court. Corps Br. 24. The Corps' argument is unpersuasive. In *Peruta*, the plaintiffs challenged San Diego's policy of requiring residents to demonstrate a particular need to carry a firearm for self-defense in

order to obtain a permit under California law.[12] 742 F.3d at 1148. While that requirement itself operates as a flat ban on the ordinary, law-abiding citizen's right to carry firearms in public for self-defense, at least those citizens who make an *extraordinary* showing of their particular need to carry a firearm in case of confrontation are permitted to exercise that right. Cal. Penal Code § 26150(a). Plaintiffs here have no such luck.

Unlike San Diego, the Corps flatly bans all individuals from carrying a firearm for self-defense. Plaintiffs have no opportunity to obtain a permit from the Corps to carry a firearm for self-defense on the millions of outdoor recreation acres within the Corps' jurisdiction. 36 C.F.R. § 327.13. Nor does the Corps allow individuals who have already obtained a carry permit from the State of Idaho to carry a firearm for self-defense. *Id*. In fact, Ms. Nesbitt herself demonstrated a particularized need to carry a firearm for self-defense and obtained a permit from the state on that very basis. Appellees' Br. 5; ER 44; SER 06. The Corps nonetheless prohibits her from carrying a firearm for self-defense and ignored her request for a written exemption from the ban. Appellees' Br 5; SER 8.

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[12] During oral argument before the en banc panel, the government's counsel expressly conceded that the Second Amendment applies outside the home. Oral Argument at 41:05, *Peruta v. County of San Diego*,No. 10-56971 (9th Cir. June 16, 2015), *available at* http://www.ca9.uscourts.gov/media/view_video.php?pk_vid=0000007886 .

Ultimately, the Corps' restriction operates like the flat carry prohibitions that were summarily struck down by the Seventh Circuit in *Moore v. Madigan*, 702 F.3d 933 (2012), and by the district court in *Palmer v. District of Columbia*, 59 F. Supp. 3d 173 (D.D.C. 2014). So whether or not the en banc court ultimately concludes that the "good cause" policy at issue in *Peruta* passes constitutional muster, the Corps' outright ban cannot. Because the Corps flatly denies Plaintiffs their core right to carry a firearm for self-defense within the Corps' jurisdiction at any time, anywhere, and for any reason, the district court properly concluded that it is necessarily incompatible with the Second Amendment's guarantees under any level of judicial scrutiny.

But should the Court opt to apply a particular level of means-end review, the district court's decision must be affirmed. For whether the Court applies strict scrutiny or intermediate scrutiny,[13] the result here is the same because the Corps' carry ban lacks the necessary "fit" with the Governments' public safety objectives under either standard.

Strict scrutiny requires the government to establish that its regulation is necessary to advance a "compelling state interest" and that it is narrowly tailored to achieve that interest in the "least restrictive means" available. *McCullen v.*

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[13] *Heller* expressly forecloses rational basis review. 554 U.S. at 628-29 n.27.

Coakley, –U.S.–, 134 S. Ct. 2518, 2530 (2014). Intermediate scrutiny requires a "reasonable fit" or a "substantial" relationship between an important government objective and the means chosen to advance it, *United States v. Chovan*, 735 F.3d 1127, 1139 (9th Cir. 2013) (citing *United States v. Chester*, 628 F.3d 673, 683 (4th Cir. 2010)); *United States v. O'Brien*, 391 U.S. 367, 376-77 (1968), and it must be likely to further that interest to some "material degree," *Edenfield v. Fane*, 507 U.S. 761, 770-71 (1993). But under both standards, the government bears the burden of proving that its chosen means are narrowly drawn to further a sufficiently important interest without unnecessarily infringing upon constitutional rights. *Chovan* at 1139; *McCutcheon v. Fed. Election Comm'n.*, –U.S.–, 134 S. Ct. 1434, 1456-57 (2014) (quoting *Buckley v. Valeo*, 424 U.S. 1, 25 (1976)); *see also Ward v. Rock Against Racism*, 491 U.S. 781, 782-83 (1989).

Here, the Corps attempts to justify its regulation as advancing public safety, a concededly important government interest. Corps Br. 20. But it seeks to further that objective by banning *all* law-abiding citizens from carrying a firearm for self-defense under any circumstance. While the Corps' policy of prohibiting the possession and carriage of firearms for self-defense is not likely to advance public safety in any meaningful way, the challenged regulation is separately unconstitutional because it is not "narrowly tailored" to those interests.

The Corps suggests that its ban furthers public safety because allowing responsible, law-abiding citizens to carry firearms for self-defense will inevitably turn ordinary campfire gatherings and outdoor recreation outings into shootouts when disagreements arise. *Id.* at 21-22; ER 12, 18, 37-38. This is precisely the type of "speculation or conjecture" that is insufficient to carry the day under even intermediate scrutiny. *Edenfield*, 507 U.S. at 770-71. Indeed, "[i]f the mere possibility that allowing guns to be carried in public would increase the crime or death rates sufficed to justify a ban, *Heller* would have been decided the other way." *Moore*, 702 F.3d at 939.

But this Court need not hypothesize or speculate to determine whether the carriage of firearms by law-abiding citizens poses the sort of public safety threat the Corps imagines. The verdict is already in. Over forty states now authorize responsible citizens to carry firearms for self-defense. Time and time again, opponents of these policies direly predicted that allowing responsible adults to carry handguns would cause endless bloodshed, turning everyday traffic accidents into shootouts. But these doomsday proclamations never came to fruition. Instead, more and more states began reforming their policies in favor of issuing carry permits after seeing the results in other states. As one observer noted, studies of these reforms show "[i]t would be difficult to find a significant demographic group

in the United States with a lower rate of handgun crimes" than concealed-carry licensees.[14]

Based on actual experience, many of the worriers have frankly admitted that they were wrong. For example, John B. Holmes, District Attorney of Harris County (which contains Houston), and Glenn White, President of the Dallas Police Association, were strong opponents of licensed carry in Texas. Both changed their minds after seeing how lawful carry worked in practice and realizing that their fears were incorrect.

> Holmes said, "I . . . [felt] that such legislation . . . present[ed] a clear and present danger to law-abiding citizens by placing more handguns on our streets. Boy was I wrong. Our experience in Harris County, and indeed statewide, has proven my initial fears absolutely groundless." And White said, "All the horror stories I thought would come to pass didn't happen. . . . I think it's worked out well, and that says good things about the citizens who have permits. I'm a convert."

H. Sterling Burnett, *Texas Concealed Handgun Carriers: Law-abiding Public Benefactors*, Nat'l Center for Pol'y Analysis (June 2, 2000), *available at* http://www.ncpa.org/pdfs/ba324.pdf.

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[14] David B. Kopel, *Pretend "Gun-free" School Zones: A Deadly Legal Fiction*, 42 Conn. L. Rev. 515, 565 (2009).

Florida state legislator Ron Silver, "the leading opponent" of his state's groundbreaking "Shall Issue" law in 1987, admitted in November 1990, "There are lots of people, including myself, who thought things would be a lot worse as far as that particular situation [carry reform] is concerned. I'm happy to say they're not." Clayton E. Cramer & David B. Kopel, *"Shall Issue": The New Wave of Concealed Handgun Permit Laws*, 62 Tenn. L. Rev. 679, 693 (1995). John Fuller, general counsel for the Florida Sheriffs Association, stated, "I haven't seen where we have had any instance of persons with permits causing violent crimes, and I'm constantly on the lookout." *Id*. And the Metro Dade Police Department, out of concern with the risks of the new law, kept detailed records of every incident involving concealed-carry licensees from the enactment of the law in 1987 until August 31, 1992, when the rarity of problems caused the department to cease tracking such incidents. *Id*. at 692-93.

Michigan adopted a "Shall Issue" law in 2001. In 2004, the Daily Oakland Press reported on the first three years of the new law that claims the law "was surely a recipe for disaster" turned out to be wrong. Jose Juarez, *Our Quiet Rise in Handguns*, Daily Oakland Pr., June 27, 2004. "There have been no major incidents involving people with the permits. No accidental discharges. No murders. No

anarchy." *Id*. Significantly, the actual experience of licensed carry has not led any "Shall Issue" state to revert to either arbitrary licensing or a ban on lawful carry.[15]

It would be remarkable if a policy that has worked so well for every adopting state would cause disaster on Corps recreation lands. In fact, the public used these lands for recreational purposes long before the Corps prohibited the possession and carriage of firearms for self-defense, yet there is no evidence that the possession of firearms by law-abiding citizens ever triggered shootouts among campers, hikers, or park rangers. Much like the warnings of those opposed to state-level carry reforms, the Corps' speculations and prognostications are undermined by all the available historical evidence. And in no event are these assumptions and hypotheses sufficient to justify the blanket denial of a fundamental right.

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[15] Law enforcement professionals also know that, instead of leading to a "wild west" atmosphere or blood running in the streets, licensed concealed carry by law-abiding citizens helps reduce crime and assists police officers. That is the overwhelming opinion of experienced law enforcement personnel as revealed in a recent, large-scale survey.

In 2013, the national law enforcement organization PoliceOne conducted its own survey, receiving 15,595 responses from verified police professionals across all ranks and department sizes. PoliceOne, *Survey Results* 1, 17 (2013). 91.3 percent of the respondents indicated that they support the carry of firearms by civilians who have not been convicted of a felony or been deemed psychologically or medically incapable. *Id.* at 10. This widespread law enforcement support for carry by law-abiding citizens is based, no doubt, on the experience most of them have had in the large majority of states that do not prohibit this practice.

Moreover, the Supreme Court has unequivocally instructed that laws restricting constitutional conduct cannot survive even intermediate scrutiny if the government fails to carry its burden of establishing narrow tailoring—regardless of whether the law is likely to advance an important governmental interest. *McCutcheon*, 134 S. Ct. at1456-57. As one Second Amendment opinion recently acknowledged, narrow tailoring under intermediate scrutiny requires the government to demonstrate that its law is "not broader than necessary to achieve its substantial government interest in preventing crime and protecting public safety." *Wrenn v. District of Columbia*, No. 1:15-CV-162, 2015 WL 347748, at *7 (D.D.C. May 18, 2015). Significantly, that opinion noted that both this Court and the Supreme Court have made clear that the government is not entitled to *any deference* when assessing the "fit" between the government's important interest and the means selected to advance it. *Id*. (citing *Turner Broad. Sys., Inc. v. F.C.C.* ("*Turner II*"), 520 U.S. 180 (1997); *Peruta*, 742 F.3d at 1177). As such, the Corps bears the distinct burden of establishing that its regulation does not burden substantially more conduct than necessary to further its public safety goals, and it is afforded no deference on this point. *Id*.; *cf. Moore*, 702 F.3d 933.

To be sure, amici do not suggest that the Corps is foreclosed from enacting firearms regulations that are properly tailored to its public safety interests while respecting the constitutional rights of law-abiding citizens. But here, the Corps, by

definition, has selected the *broadest possible means* of attempting to reduce violence involving firearms. The Corps has banned the possession and carriage of firearms for self-defense in all places, and at all times. And it has completely prohibited the exercise of this right by all responsible citizens, including those who have passed a background check, undergone training requirements, and even those who have a demonstrated a specialized need to carry a firearm for self-defense.

The Corps offers no explanation why it should not have to establish narrow tailoring in the Second Amendment context, even though it is expressly required in the First. And surely it cannot. Such unequal treatment would improperly single the Second Amendment out for "special—and specially unfavorable—treatment," in direct contravention of the Supreme Court's admonition that the Second Amendment is not "a second-class right." *McDonald*, 561 U.S. at 745-46, 780.

Because the firearms prohibition is not likely to advance its interests as applied to responsible, law-abiding firearm owners, and because the Corps has not demonstrated that the law does not burden substantially more conduct than necessary to achieve its interests, the district court was right to conclude that the Corps' ban is unconstitutional.

CONCLUSION

For these reasons, the judgment of the district court should be affirmed.

Date: July 15, 2015

Respectfully submitted,
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1. This brief complies with the type-volume limitation of Fed. R. App. P. 29(d) and 32(a)(7)(B) because this brief contains 6,044 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

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