No. 14-13739

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

GEORGIACARRY.ORG, Inc., and DAVID JAMES,

Plaintiffs-Appellants,

v.

U.S. ARMY CORPS OF ENGINEERS, and JON J. CHYTKA, in his official Capacity as Commander, Mobile District of the U.S. Army Corps of Engineers,

Defendants-Appellees.

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

BRIEF FOR APPELLEES

JOYCE R. BRANDA
Acting Assistant Attorney General

SALLY QUILLIAN YATES
United States Attorney

MICHAEL S. RAAB
ABBY C. WRIGHT
(202) 514-0664
Attorneys, Appellate Staff
Civil Division, Room 7252
U.S. Department of Justice
950 Pennsylvania Ave., N.W.
Washington, D.C. 20530

GeorgiaCarry.Org, Inc. v. U.S. Army Corps of Engineers, No. 14-13739

CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

Pursuant to 11th Cir. R. 26.1-1, Appellees, U.S. Army Corps of Engineers and Jon Chytka, in his official capacity, certify that the following individuals and entities have an interest in this case:

Anderson, Melissa, Bureau of Alcohol, Tobacco, Firearms & Explosives

Beranek, Lori, United States Department of Justice

Branda, Joyce R., United States Department of Justice

Brinkmann, Beth S., United States Department of Justice

Chytka, Col. Jon J., U.S. Army Corps of Engineers

Delery, Stuart F., United States Department of Justice

GeorgiaCarry.Org, Inc. [no stock issued and not publicly traded]

James, David

Kelleher, Diane, United States Department of Justice

Monroe, John R.,

Murphy, the Hon. Harold L.

Raab, Michael S., United States Department of Justice

Riess, Daniel, United States Department of Justice

U.S. Army Corps of Engineers

United States of America

Wright, Abby C., United States Department of Justice

Yates, Sally Quillian, United States Department of Justice

STATEMENT REGARDING ORAL ARGUMENT

We do not believe oral argument is necessary given the district court's thorough and well-reasoned decision, but we stand ready to present oral argument if it would be of assistance to the Court.

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Cases: **Page**

Constitution:

Statutes:

Regulations:

JURISDICTIONAL STATEMENT

Plaintiffs invoked the jurisdiction of the district court under 28 U.S.C. §§ 1331, 1346(a). Tab 1, at 1, ¶ 2. On August 18, 2014, the district court denied plaintiffs' motion for a preliminary injunction. Tab 19, at 1-58. Plaintiffs timely filed a notice of appeal on August 20, 2014. Tab 23-1, at 3. This Court has jurisdiction under 28 U.S.C. § 1292(a)(1).

STATEMENT OF THE ISSUE

The Army Corps of Engineers (Army Corps) constructs, operates, and maintains infrastructure and other public works projects throughout the United States on federal land. In order to use this land more fully in the public interest, as authorized by Congress, the Army Corps allows public access to the land for recreational purposes. An Army Corps regulation generally bans loaded firearms and ammunition on Army Corps land. The regulation permits loaded firearms if possessed by a law enforcement officer and permits loaded firearms if used at designated hunting or fishing areas, or at Army Corps shooting ranges. The issue in this case is whether the agency's regulation violates the Second Amendment.

STATEMENT OF THE CASE

A. Factual and Statutory Background

1. Federal regulations govern the public use of Corps-managed water-resource development projects. *See* 36 C.F.R. pt. 327. To provide for "more effective recreation-resource management of the lake and reservoir projects," the Corps issued regulations in 1973. 38 Fed. Reg. 7,552, 7,552 (Mar. 23, 1973). As amended, the regulation entitled "Explosives, firearms, other weapons and fireworks" provides:

> (a) The possession of loaded firearms, ammunition, loaded projectile firing devices, bows and arrows, crossbows, or other weapons is prohibited unless:
>
> (1) In the possession of a Federal, state or local law enforcement officer;
> (2) Being used for hunting or fishing as permitted under § 327.8, with devices being unloaded when transported to, from or between hunting and fishing sites;
> (3) Being used at authorized shooting ranges; or
> (4) Written permission has been received from the District Commander.
>
> (b) Possession of explosives or explosive devices of any kind, including fireworks or other pyrotechnics, is prohibited unless written permission has been received from the District Commander.

36 C.F.R. § 327.13.

2. Plaintiff David James, a Georgia resident, "frequently camps and recreates on Corps property and facilities at Lake [Allatoona]," a Corps project and water facility located in Northwest Georgia. Tab 1, at 3, ¶¶ 17-18. James is a member of GeorgiaCarry.Org, Inc., a non-profit corporation, which is also a named plaintiff. Tab

1, at 2, ¶ 4. James alleges that because of the Army Corps firearms regulation he "refrains from keeping and carrying a handgun when he recreates and camps at Allatoona." Tab 1, at 4, ¶ 29. In May 2014, James requested permission from Col. Donald Walker to bring his handgun to Allatoona; that request was denied. Tab 1 at 5, ¶ 30, ¶ 32.

B. Procedural History

On June 12, 2014, plaintiffs commenced this action, contending that the application of the Army Corps firearms regulation to plaintiff James during his visit to the Lake Allatoona project violates the Second Amendment. Tab 1, at 5-6, ¶ 35. Plaintiffs filed a motion for preliminary injunction the next day.

On August 18, 2014, the district court denied plaintiffs' motion for a preliminary injunction. Tab 19, at 1-58. Turning first to the question whether the Army Corps regulation burdens conduct protected by the Second Amendment, the court explained that it could not "fathom that the framers of the Constitution would have recognized a civilian's right to carry firearms on property owned and operated by the United States Military, especially when such property contained infrastructure products central to our national security and well being." Tab 19, at 25-26. The court observed that although "Defendant Army Corps' property is more expansive than just a 'building,' there is no reason to doubt that the Firearms Regulation, which restricts the use of firearms on military property nearby sensitive infrastructure projects," fits within *Heller*'s discussion of existing "laws forbidding the carrying of firearms in

sensitive places." *Id.* at 27 (quoting *District of Columbia v. Heller*, 554 U.S. 570, 626, 128 S. Ct. 2783, 2817 (2008)).

The court next held that even assuming the Army Corps regulation was subject to some level of scrutiny, it easily passed constitutional muster. Tab 19, at 39, 45. The court explained that "the lowest possible level of scrutiny applies because Defendant Army Corps' issuance of the Firearms Regulation was not an act of governance—it was a managerial action affecting only government owned lands." Tab 19, at 41. The court recognized that "the voluntary nature of Plaintiffs' presence on Defendant Army Corps property limits the extent to which Plaintiffs' Second Amendment rights are burdened by the Firearms Regulation." Tab 19, at 43.

The court explained that the regulation satisfied intermediate scrutiny because the Army Corps has a substantial interest in providing the public with safe and healthful recreational opportunities while protecting its public works projects. Tab 19, at 46. Relying on record evidence pointing to the inevitability of conflicts in Army Corps campgrounds and the need to keep loaded firearms out of the hands of those involved in disputes, the court also found the requisite "reasonable fit" between the Army Corps' interest and the firearms regulation. Tab 19, at 46-47.

The court determined that plaintiffs had not established their entitlement to a preliminary injunction because they failed to demonstrate a substantial likelihood of success on the merits. Moreover, the court concluded that plaintiffs had not demonstrated irreparable harm nor shown that the balance of harms or public interest

favored an injunction. Tab 19, at 52-53. The court explained that a change in the firearms regulation would have a ripple effect on other Army Corps programs, including that the Army Corps might limit alcohol, increase spending on Park Rangers and outside police forces, and limit public services and access due to budgetary concerns. Tab 19, at 55.

SUMMARY OF ARGUMENT

The Army Corps of Engineers plays a vital role in constructing, maintaining, and protecting our nation's infrastructure and water resources. In order to further the public's interest in safe and enjoyable recreational activities, the Army Corps has opened up portions of its lands for such uses. In so doing, it has adopted and implemented a variety of regulations to maintain the safety of both park visitors and the projects located on the Army Corps property.

Plaintiffs contend that the Army Corps regulation that restricts the carrying of loaded firearms on Army Corps property violates the Second Amendment. The district court correctly rejected that argument. The Supreme Court in *Heller* emphasized that it was not casting doubt on prohibitions on the carrying of firearms into sensitive places, and Army Corps land fits comfortably within the category of places in which the carrying of firearms may be regulated without implicating the Second Amendment. The primary purpose of Army Corps facilities is not recreation: the Army Corps administers the land because it contains an important water-resource or infrastructure project. These projects are indisputably sensitive, and plaintiffs offer

no explanation for the counter-intuitive proposition that the Framers intended the Second Amendment to permit the carrying of handguns on land surrounding such projects.

Even assuming this Court should apply Second Amendment scrutiny to the Army Corps regulation at issue here, there is no justification for strict scrutiny. The regulation imposes limited place restrictions on the carrying of firearms, and plaintiffs are free to carry firearms for self-defense on other public and private properties throughout Georgia. As the district court recognized, at most, therefore, intermediate scrutiny applies, and the Army Corps regulation is both reasonable and easily sustainable under that level of review.

As the district court explained, therefore, plaintiffs have not satisfied the prerequisites to the extraordinary relief that they seek. Plaintiffs have demonstrated no likelihood of success on the merits, and they also have shown no irreparable injury. And the balance of harms and the public interest strongly counsel against the grant of a preliminary injunction.

STANDARD OF REVIEW

This Court reviews the district court's denial of a preliminary injunction for abuse of discretion, reviewing the court's factual findings for clear error and its legal conclusions *de novo*. *Scott v. Roberts*, 612 F.3d 1279, 1289–90 (11th Cir. 2010).

ARGUMENT

THE DISTRICT COURT CORRECTLY DENIED PLAINTIFFS' MOTION FOR A PRELIMINARY INJUNCTION.

As the district court correctly held, plaintiffs have failed to demonstrate their entitlement to the "extraordinary and drastic remedy" of a preliminary injunction. *Siegel v. LePore*, 234 F.3d 1163, 1176 (11th Cir. 2000) (en banc). A party seeking preliminary injunctive relief must demonstrate (1) a substantial likelihood of success on the merits of its claims; (2) that it will suffer irreparable injury unless an injunction is issued; (3) that the balance of harms weighs in favor of an injunction; and (4) that the requested injunction would not harm the public interest. *Odebrecht Constr., Inc. v. Sec'y, Fla. Dep't of Transp.*, 715 F.3d 1268, 1273-74 (11th Cir. 2013). A plaintiff's failure to show any of the four factors is fatal to its claim. *ACLU of Fla. v. Miami-Dade Cnty. Sch. Bd.*, 557 F.3d 1177, 1198 (11th Cir. 2009).

A. Plaintiffs Have Not Demonstrated Any Chance of Success on the Merits of Their Second Amendment Claim.

This Court has explained that in analyzing Second Amendment claims "a two-step inquiry is appropriate: first, we ask if the restricted activity is protected by the Second Amendment in the first place; and then, if necessary, we would apply the appropriate level of scrutiny." *GeorgiaCarry.Org v. Georgia*, 687 F.3d 1244, 1260 n.34 (11th Cir. 2012), *cert. denied*, 133 S. Ct. 856 (2013). Plaintiffs' challenge fails both steps of this inquiry. The Army Corps firearms regulation does not burden conduct

protected by the Second Amendment. And, even assuming that the Second Amendment is implicated here, the regulation readily satisfies the appropriate level of scrutiny.

1. The Army Corps Regulation Does Not Burden Conduct Protected by the Second Amendment.

a. In *District of Columbia v. Heller*, 554 U.S. 570, 128 S. Ct. 2783 (2008), the Supreme Court held that the Second Amendment protects an individual's right to bear arms for purposes of self-defense in the home. The Court thus invalidated a District of Columbia statute that the Court characterized as an "absolute prohibition of handguns held and used for self-defense in the home." *Heller*, 554 U.S. at 636, 128 S. Ct. at 2816.

The Court expressly recognized, however, that "the right secured by the Second Amendment is not unlimited." *Heller*, 554 U.S. at 626, 128 S. Ct. 2816. The Court noted that over the course of history, "commentators and courts routinely explained that the right was not a right to keep and carry any weapon whatsoever in any manner whatsoever and for whatever purpose." *Ibid.* The Court emphasized that "nothing in [its] opinion should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons and the mentally ill, or laws forbidding the carrying of firearms in sensitive places such as schools and government buildings, or laws imposing conditions and qualifications on the commercial sale of arms." *Id.* at

626–27. The Court "identif[ied] these presumptively lawful regulatory measures only as examples; [the] list does not purport to be exhaustive." *Id.* at 627 n.26.

The Supreme Court in *McDonald v. City of Chicago*, 130 S. Ct. 3020 (2010), reaffirmed its statements in *Heller* regarding the limited nature of the Second Amendment right. In *McDonald,* the Supreme Court considered a Chicago ordinance that, like the District of Columbia provision at issue in *Heller*, "effectively bann[ed] handgun possession by almost all private citizens who reside in the City." *Id.* at 3026. The Court concluded that the right recognized in *Heller* was incorporated against the States. In so doing, a plurality of the Court reiterated the point from *Heller* "that the right to keep and bear arms is not 'a right to keep and carry any weapon whatsoever in any manner whatsoever and for whatever purpose.'" *Id.* at 3047 (quoting *Heller*, 554 U.S. at 626, 128 S. Ct. at 2816) (Alito, J., joined by Roberts, C.J., and Scalia and Kennedy, JJ.). And the plurality further noted that the Court "made it clear in *Heller* that [its] holding did not cast doubt on . . . longstanding regulatory measures" including, as most relevant here, "'laws forbidding the carrying of firearms in sensitive places such as schools and government buildings.'" *Id.* (quoting *Heller*, 554 U.S. at 626, 128 S. Ct. at 2817). The plurality continued: "[w]e repeat those assurances here. Despite municipal respondents' doomsday proclamations, incorporation does not imperil every law regulating firearms." *Ibid.*

Relying on these assurances, this Court has upheld provisions of federal law prohibiting possession of firearms by convicted felons and domestic violence

misdemeanants. *United States v. Rozier*, 598 F.3d 768 (11th Cir. 2010); *United States v. White*, 593 F.3d 1199 (11th Cir. 2010). This Court explained in *Rozier* that the "right secured by the Second Amendment is not unlimited." 598 F.3d at 770 (quoting *Heller*, 554 U.S. at 626, 128 S. Ct. at 2817). As the Court made clear, statutes "disqualifying felons from possessing a firearm under any and all circumstances do not offend the Second Amendment." 598 F.3d at 771.

Similarly, restrictions on firearm possession in the "sensitive places" described in *Heller* and *McDonald* do not burden conduct protected by the Second Amendment. The Supreme Court in *Heller* provided two examples of such "sensitive places" where firearm prohibitions were presumptively valid: schools and government buildings. The Court made clear, however, that it "identif[ied] these presumptively lawful regulatory measures only as examples; [the] list does not purport to be exhaustive." 554 U.S. at 627 n.26, 128 S. Ct. at 2817 n.26. Relying on this assurance, the Fifth Circuit has recognized, for example, that land adjacent to a Post Office is also a "sensitive place" in which the Postal Service may constitutionally prohibit firearms. *See United States v. Dorosan*, 350 F. App'x 874, 875 (2009) (unpublished) (upholding firearms prohibition on Postal Service parking lot); *see also United States v. Masciandaro*, 638 F.3d 458, 473 (4th Cir. 2011) (declining to decide whether a national park was a "sensitive place," but concluding that the regulation passed constitutional muster under intermediate scrutiny). And this Court has recognized the presumptive validity of firearms restrictions beyond those included in *Heller*'s non-exhaustive list. *See White*, 593 F.3d at

1206 (finding "no reason to exclude [18 U.S.C.] § 922(g)(9) from the list of longstanding prohibitions on which *Heller* does not cast doubt").

Here, the district court correctly concluded that Army Corps land is a "sensitive place" within the meaning of *Heller*. Armed visitors to Army Corps recreational facilities raise precisely the concerns raised by weapons in schools and government buildings. As is the case with schools and government buildings, Army Corps land attracts large numbers of individuals and families with children who congregate for recreational activities with dense concentrations of individuals from diverse backgrounds. Tab 11, Ex. 1, ¶ 4 (Declaration of Stephen B. Austin). In order to maintain order and safety on Army Corps land, the Army Corps has regulations governing boating, swimming, sanitation, fires, pets, and quiet hours. *Ibid.* It is similarly permissible for the Army Corps to restrict possession of firearms in light of the nature of the public's use of Army Corps land.

And Army Corps property presents unique sensitivities, as well. It is not simply federal land set aside for enjoyment by the public. The Army Corps administers the federal land because it houses one or more public works projects crucial to our infrastructure and national security. *See* Tab 11, Ex. 1, ¶ 9 ("Recreation is never the sole purpose of a Corps-managed Water Resources Development Project."). As the district court explained, "[t]hese dams and other infrastructure works, just like the fortifications built by Defendant Army Corps during the founding era of our country, are vitally important to our national security and well being." Tab 19, at 25. Protecting

such projects is therefore important to both the Army Corps and the public. *See* Tab 11, Exh 1, ¶ 9 (explaining that if the Army Corps permitted firearms on its land "the Corps would need to perform a full safety and security assessment of Corps-managed infrastructure to determine how best to secure its facilities"). A prohibition on armed visitors allows the Corps to quickly assess and diffuse threats to these sensitive projects because anyone carrying a firearm is in violation of the regulation and could be stopped on that basis. *Ibid.* ("Early detection of threats to Corps-managed infrastructure is aided by current Corps policy, and could be compromised by an overly permissive firearms policy.").

Contrary to plaintiffs' suggestion, nothing in *Heller* suggests that outdoor land, or a large area of land, cannot constitute a sensitive place from which a government may exclude firearms. As two judges in the Ninth Circuit have explained, open, public spaces "such as County-owned parks, recreational areas, historic sites, parking lots of public buildings . . . and the County fairgrounds" "fit comfortably within the same category as schools and government buildings." *Nordyke v. King*, 563 F.3d 439, 460 (9th Cir. 2009), *vacated on rehearing en banc*, 575 F.3d 890 (9th Cir. 2009); *see also Warden v. Nickels*, 2010 WL 933875, at *6 (W.D. Wash. Mar. 11, 2010) (upholding a regulation making it illegal to carry concealed firearms or display firearms at certain park facilities where "children and youth are likely to be present and . . . appropriate signage has been posted to communicate to the public that firearms are not permitted at the facility"). *But see Morris v. Army Corps of Engineers,* No. 13-336 (D. Idaho).

Plaintiffs' argument regarding the proximity of campgrounds to the Allatoona Dam is similarly unavailing. As plaintiffs recognize (Pl. Br. 16), the campgrounds at issue here are within several miles of the Allatoona Dam. Even assuming that plaintiffs are correct that private residential land is located closer to the dam than are the relevant campgrounds, that land is private and does not present the risks to public safety of public campgrounds. Nor should the historical circumstances as to why that land was not acquired by the federal government play a role in determining whether federal land is in fact a sensitive place. Plaintiffs' proposed analysis would require this Court to wade into the details of precisely how far out from a dam or other infrastructure project the Army Corps may prohibit firearms. But the Army Corps is in the best position to assess the sensitivity of the land surrounding such projects. *See* Pl. Br. 20 (conceding that the buildings associated with the Allatoona Dam are sensitive places).

Plaintiffs' reliance on *United States v. Grace*, 461 U.S. 171, 180, 103 S. Ct. 1702, 1708-09 (1983), is entirely misplaced. *Grace* concerned a First Amendment challenge to a restriction on expressive activity on the sidewalk in front of the Supreme Court building. As the Supreme Court explained, "[s]idewalks, of course, are among those areas of public property that traditionally have been held open to the public for expressive activities and are clearly within those areas of public property that may be considered, generally without further inquiry, to be public forum property." *Id.* at 179. It was against this background that the Supreme Court distinguished its other cases

concerning sidewalks within a military compound, explaining that in the case of the Supreme Court sidewalks, "[t]here is no separation, no fence, and no indication whatever to persons stepping from the street to the curb and sidewalks that serve as the perimeter of the Court grounds that they have entered some special type of enclave." *Id.* at 180. Nothing in *Grace* suggests that such a "perimeter" is required when not dealing with an area "traditionally … held open to the public for expressive activities." *Id.* at 179; *see Greer v. Spock*, 424 U.S. 828, 838, 96 S. Ct. 1211, 1217 (1976) ("The notion that federal military reservations, like municipal streets and parks, have traditionally served as a place for free public assembly and communication of thoughts by private citizens is . . . historically and constitutionally false."). *Grace* has no application outside the First Amendment context. And plaintiffs' suggestion that the Army Corps must establish a clearly marked perimeter around its land to constitutionally prohibit firearms is without basis.[1]

b. Even setting aside the question of whether the Army Corps land here is a "sensitive place," the firearms regulation is far removed from the broad prohibitions that were at issue in *Heller* and *McDonald*. And, as the district court correctly explained,

[1] Plaintiffs emphasize that Georgia law would otherwise permit firearms outside the home. And amicus emphasizes that Florida law does as well. FloridaCarry Br. 14-15. But state law has no bearing on this Second Amendment issue concerning federal land. And, in any event, Georgia law prohibits even licensed firearms owners from carrying firearms onto certain sensitive places, including government buildings, courthouses, prisons, mental health facilities, the "premises" of nuclear power facilities, and within 150 feet of a polling place. O.C.G.A. § 16-11-127(b).

nothing in the historical record suggests that the Second Amendment was designed to protect self-defense rights when on government property.

The Army Corps regulation at issue here does not purport to regulate firearms in public places generally, but simply constitutes the permissible exercise of authority to issue regulations ancillary to the proper carrying out of governmental functions on government property. *Cf. Adderley v. Florida*, 385 U.S. 39, 47, 87 S. Ct. 242, 247 (1966) ("The State, no less than a private owner of property, has power to preserve the property under its control for the use to which it is lawfully dedicated."). In evaluating Second Amendment challenges courts have therefore recognized that it is significant whether the government is acting as a property owner. *See Masciandaro*, 638 F.3d at 473 ("The government, after all, is invested with 'plenary power' to protect the public from danger on federal lands under the Property Clause."(citing U.S. Const. art. IV, § 3, cl. 2)); *Nordyke v. King*, 681 F.3d 1041, 1044-45 (9th Cir. 2012) (en banc) (citing *Engquist v. Or. Dep't of Agric.,* 553 U.S. 591, 598, 128 S. Ct. 2146, 2151 (2008) ("We have long held the view that there is a crucial difference, with respect to constitutional analysis, between the government exercising 'the power to regulate or license, as lawmaker,' and the government acting 'as proprietor, to manage [its] internal operation.'") (alteration in original).

In addition, Army Corps land is not simply government land; it is land owned by the military, which only underscores the control the government exercises over

that land.[2] As the district court explained, "[u]nlike city streets, or even public schools, post offices, and other government properties, Defendant Army Corps has the right to exclude Plaintiffs from its property altogether." Tab 19, at 35; *cf. United States v. Albertini*, 783 F.2d 1484, 1487 (9th Cir. 1986) ("[T]he interest of the base commander in maintaining control over the entry of persons to Hickam Air Force Base is substantial; indeed, there is a strong tradition of treating that interest as being in a specially protectible class by itself."); *United States v. Jelinski*, 411 F.2d 476, 478 (5th Cir. 1969); *Tokar v. Hearne*, 699 F.2d 753 (5th Cir. 1983); *Cafeteria & Rest. Workers Union, Local 473 v. McElroy* , 367 U.S. 886, 890-94, 818 S. Ct. 1743, 1746-48 (1961); 16 U.S.C. § 460d (allowing the Secretary of the Army to determine that use of Army Corps land by the public is contrary to the public interest).[3]

[2] Amicus's contention that the Army Corps is not sufficiently military is without basis. Amicus concedes that the Army Corps is part of the Department of the Army. FloridaCarry Br. 9. That the Army Corps has both military and civilian leadership is of no consequence. Civilians may work on military bases, and the presence of civilians does not change the character of military land.

[3] Amicus relies on this statute to argue that the Army Corps may not ban loaded firearms on Army Corps property. But that argument assumes the truth of its conclusion that a Second Amendment right to carry firearms on government property exists. *See* FloridaCarry Br. 10-11.

2. In Any Event, the Army Corps Regulation Survives the Appropriate Level of Scrutiny.

a. At most, intermediate scrutiny applies to the challenged regulation.

Even assuming that the Army Corps regulation burdens conduct protected by the Second Amendment, it need only be reasonable and is subject to, at most, intermediate scrutiny.

As other courts of appeals have explained in the Second Amendment context, the level of scrutiny applied depends on "the nature of the conduct being regulated and the degree to which the challenged law burdens the right." *United States v. Chovan*, 735 F.3d 1127, 1138 (9th Cir. 2013).[4] A partial restriction on firearm use on government property does not implicate the core Second Amendment right, nor does the prohibition generally burden the exercise of that right outside the context of the use of Army Corps property.

When the Corps acts to regulate its land, it is acting as a property owner, and not as an entity exercising its police power. *Cf. GeorgiaCarry.Org*, 687 F.3d at 1265. The Supreme Court has consistently recognized that, when evaluating government action, a court must consider the context in which the government is acting. *See NASA v.*

[4] Plaintiffs' assertion that the district court's analysis of the "sensitive place" question influenced the rest of the opinion is without basis. Pl. Br. 13. The district court engaged in a full analysis of the appropriate level of scrutiny, based on the assumption that the prohibitions on firearms on Army Corps land were not presumptively valid.

Nelson, 562 U.S. 134, 131 S. Ct. 746, 757-58 (2011). "It is a long-settled principle that governmental actions are subject to a lower level of [constitutional] scrutiny when the governmental function operating is not the power to regulate or license, as lawmaker, but, rather, as proprietor, to manage its internal operations." *United States v. Kokinda*, 497 U.S. 720, 725, 110 S. Ct. 3115, 3119 (1990) (plurality opinion) (citation, internal quotation marks, and alterations omitted).

The government may permissibly limit the exercise of constitutional rights on its property. In the First Amendment context, for example, government property may generally be "reserve[d] . . . for its intended purposes, communicative or otherwise, as long as the regulation on speech is reasonable and not an effort to suppress expression merely because public officials oppose the speaker's view." *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 46, 103 S. Ct. 948, 955 (1983). This is especially true with respect to military land, which is plainly not a public forum unless the military expressly chooses to create a public forum. *See United States v. Corrigan*, 144 F.3d 763, 767 (11th Cir. 1998) ("There is no question, and the appellants do not dispute, that Fort Benning is a nonpublic forum that, like virtually all military installations, has never been regarded or designated as a place open to public speech activities."); *United States v. Albertini*, 472 U.S. 675, 686, 105 S. Ct. 2897, 2905 (1985) ("Military bases generally are not public fora . . . .").

And it is not just the First Amendment that has a different scope when the right is exercised on government property. For example, although warrantless

searches are generally impermissible, the Supreme Court has explained that "where the risk to public safety is substantial and real, blanket suspicionless searches calibrated to the risk may rank as 'reasonable'—for example, searches now routine at airports and at entrances to courts and other official buildings." *Chandler v. Miller*, 520 U.S. 305, 323, 117 S. Ct. 1295 (1997). A person's due process rights are also subject to a different analysis when ejected from military property, for example. *Jelinski*, 411 F.2d at 478; *Cafeteria Workers*, 367 U.S. at 890-94 (1961).

In the Second Amendment context in particular, the Supreme Court recognized in *Heller* that restrictions applicable only on government property are not fairly analogized to restrictions applicable within the home or even in public places generally, by explicitly stating that its decision did not cast doubt on regulations applicable only to government buildings. *Heller*, 554 U.S. at 626-27, 128 S. Ct. at 2817. Even if that limitation on the Court's holding does not remove regulations on government property from the scope of the Second Amendment entirely, *see supra* p. 8-16, at a minimum it confirms that in this context, as in the context of other constitutional rights, the government has greater authority to regulate its own property than it might enjoy when regulating other areas.

The limited scope of the regulation at issue here makes clear that, at most, intermediate scrutiny applies. Plaintiffs are free to carry their firearms, as permitted by state law, outside Army Corps property. Plaintiffs may carry firearms in their homes, businesses, on privately owned or state-owned outdoor land, and in most public

places. Moreover, plaintiffs are in no sense required to use Corps recreational facilities and individuals "can preserve an undiminished right of self-defense" by not entering Corps land. *See Moore v. Madigan*, 702 F.3d 933, 940 (7th Cir. 2012) ("[W]hen a state bans guns merely in particular places, such as public schools, a person can preserve an undiminished right of self-defense by not entering those places."); Tab 19, at 44 ("[T]he property in question is not a road, a school, or a post office that Plaintiffs arguably *need* to use on a regular basis."). [5] Nor is plaintiffs' access to firearms completely prohibited by the Army Corps regulation. Plaintiffs may use firearms at shooting ranges or for hunting in designated areas. And, as explained above, plaintiffs are regulated by the government acting as property owner, not as a sovereign exercising police power. The nature of the conduct regulated by the Army Corps plainly does not warrant strict scrutiny. And other courts of appeals considering similar restrictions on carrying firearms outside the home have agreed. *See, e.g., Masciandaro*, 638 F.3d at 473 (upholding National Park Service firearms regulation under intermediate scrutiny); *Kachalsky v. Cnty. of Westchester*, 701 F.3d 81 (2d Cir. 2012), *cert. denied*, 133 S. Ct. 1806 (2013); *Woollard v. Gallagher*, 712 F.3d 865 (4th Cir.

[5] Amicus attempts to raise an argument that the Army Corps regulation impairs its "constitutional right to travel." FloridaCarry Br. 13. This argument was not raised by plaintiffs and therefore should not be considered. *United States v. Allegheny-Ludlum Indus., Inc.*, 517 F.2d 826, 840 n.13 (5th Cir. 1975). In any event, the argument is meritless, and amicus's reliance on *United States v. Guest*, 383 U.S. 745 (1966), is entirely misplaced. That case involved a conspiracy ("to injure, oppress, threaten, and intimidate Negro citizens of the United States in the vicinity of Athens, Georgia") that prevented African-Americans from engaging in interstate travel. *Id.* at 747 n.1.

2013), *cert. denied*, 134 S. Ct. 422 (2013); *Drake v. Filko*, 724 F.3d 426, 431 (3d Cir. 2013), *cert. denied*, 134 S. Ct. 2134 (2014); *Dorosan*, 350 F. App'x at 875.

Plaintiffs' reliance (Pl. Br. 21) on *Peruta v. Cnty. Of San Diego*, 742 F.3 d1144, 1168 (9th Cir. 2014), is misplaced. *See also* FloridaCarry Br. 7-8; *Palmer v. District of Columbia*, __F.Supp.2d__, 2014 WL 3702854 (D.D.C. July 24, 2014). *Peruta* concerned San Diego County's scheme for permitting the carrying of handguns. As relevant in the case, San Diego County only granted firearms licenses where a person could distinguish himself from an ordinary individual, and the county policy expressly stated that "one's personal safety alone is not considered good cause." 742 F.3d at 1148. The court held that the policy, like the law struck down in *Heller*, operated to "destroy" the Second Amendment right, and so could not satisfy any level of scrutiny. *Id.* at 1170. The court concluded that "the Second Amendment does require that the states permit some form of carry for self-defense outside the home." *Id.* at 1172.

Even assuming it was correctly decided, *Peruta* has no bearing here. The Army Corps regulation has no impact on plaintiffs' ability to carry firearms for self-defense except when plaintiffs choose to camp on Army Corps land. This does not "destroy" the right. As explained, plaintiffs are free to carry firearms on other public land, private land, and in their homes, businesses, and cars. *Peruta* said nothing about the Second Amendment as applied to government property; nor did it concern a limited restriction based on a particular location. The Seventh Circuit has explained that "[a] blanket prohibition on carrying gun in public prevents a person from defending

himself anywhere except inside his home." *Moore*, 702 F.3d at 940. The court observed, however, that "[i]n contrast, when a state bans guns merely in particular places, such as public schools, a person can preserve an undiminished right of self-defense by not entering those places; since that's a lesser burden, the state doesn't need to prove so strong a need." *Ibid.*

b. The regulation at issue here survives the appropriate level of review.

As explained above, this Court need only determine whether the Army Corps regulation is reasonable. *Kokinda*, 497 U.S. at 726, 110 S. Ct. at 3119. And it is entirely reasonable for the Army Corps to protect both visitors and water-resource development projects from the risks posed by armed visitors. This Court should therefore uphold the Army Corps regulation as a permissible regulation of the government's use of its own property.

Even if this Court were to apply more rigorous intermediate scrutiny, the Corps regulation readily passes constitutional muster. Under intermediate scrutiny, a law will be upheld where "(1) the government's stated objective [is] significant, substantial, or important; and (2) a reasonable fit [exists] between the challenged regulation and the asserted objective." *Chovan*, 735 F.3d at 1139 (citing *United States v. Chester*, 628 F.3d 673, 683 (4th Cir. 2010)); *see also Nat'l Parks Conservation Ass'n v. Norton*, 324 F.3d 1229, 1244 (11th Cir. 2003); *Drake*, 724 F.3d at 436. Plaintiffs do not specifically argue that the Army Corps regulation fails intermediate scrutiny; they rely

solely on *Peruta* and *Palmer*. *See* Pl. Br. 21-22. And for the reasons explained *supra* p. 21-22, these cases have no bearing here.

Applying intermediate scrutiny, the Fourth Circuit upheld a very similar regulation that prohibited possession of a loaded weapon in a motor vehicle in a national park area. *See Masciandaro*, 638 F.3d at 460.[6] The court concluded "that the government has a substantial interest in providing for the safety of individuals who visit and make use of the national parks." *Id.* at 473. In fact, "[a]lthough the government's interest need not be 'compelling' under intermediate scrutiny, cases have sometimes described the government's interest in public safety in that fashion." *Ibid.* The court also reasoned that the prohibition at issue was "reasonably adapted to that substantial government interest," given the dangers of loaded firearms and the reasonableness of concluding that "when concealed within a motor vehicle, a loaded weapon becomes even more dangerous." *Ibid.*

Here, the Corps similarly has an important—indeed, compelling—interest in promoting order and public safety on the land it manages, protecting its water-resource development projects, and protecting visitors from the risk of firearm violence. As the Supreme Court has repeatedly emphasized, "the government's interest in preventing crime . . . is both legitimate and compelling." *United States v.*

[6] In 2010, Congress passed a law permitting loaded firearms on National Park land consistent with state law. Credit Card Accountability Responsibility and Disclosure Act of 2009, Pub. L. No. 111-24, § 512, 123 Stat. 1734, 1764-65.

Salerno, 481 U.S. 739, 749, 107 S. Ct. 2095, 2103 (1987) (citation omitted); *see also Schall v. Martin*, 467 U.S. 253, 264, 104 S. Ct. 2403, 2410 (1984) ("The legitimate and compelling state interest in protecting the community from crime cannot be doubted.") (citations and quotation marks omitted); *United States v. Skoien*, 614 F.3d 638, 642 (7th Cir. 2010) (en banc) ("no one doubts that the goal of . . . preventing armed mayhem, is an important governmental objective").

And just as in *Masciandaro*, there is a reasonable fit between the safety and security issues the Army Corps faces and its chosen regulation. The projects managed by the Corps—navigational locks and dams, hydropower, water supply, navigation, fish and wildlife—are vast and vital to our nation's infrastructure and national security. The Army Corps manages hundreds of projects throughout the country, and a substantial number of Americans depend on Army Corps projects for their electricity and drinking water. The land surrounding these projects makes up just a small percentage of federal land, but the Army Corps hosts over 300 million visitors per year.

The Army Corps must consider a number of factors when deciding whether the public interest is furthered by opening Corps-managed lands for recreation, and when developing rules for their recreational use. Tab 11, Ex. 1, ¶ 3. These rules require the Army Corps to consider the safety of visitors and of Corps employees; the protection of natural, cultural, and developed resources; and the promotion of recreational opportunities. *Ibid.* The Army Corps recognizes that the large number of

visitors it manages at its recreational sites, including Lake Allatoona, coupled with the diverse backgrounds of campers, including families and children, and the use of alcohol, lead to significant safety concerns. Army Corps regulations are aimed at ensuring that the inevitable conflicts that arise as a result of disagreements about how different visitors make use of Army Corps recreational areas are resolved as quickly and peacefully as possible. *Id.* ¶ 4. The Army Corps has reasonably concluded that the presence of a loaded firearm could more quickly escalate tensions resulting from such disagreements, and therefore such firearms present a significant threat to public safety. *Ibid.*

Moreover, Congress has not provided the Army Corps with authority to perform many typical law enforcement functions, including carrying firearms, making arrests, or executing search warrants; nor are rangers trained in law enforcement functions. Tab 11, Ex. 1, ¶ 5. Rather, full police power at Army Corps projects, including the ability to enforce state and local laws and to place persons under arrest, is exercised solely by state and local authorities. *Ibid.* Consequently, one of the ways the Army Corps maintains public safety and infrastructure security at its projects—despite this limited law enforcement authority—is to restrict the public's authority to carry loaded firearms. A permissive firearms policy might very well delay detection of threats to those projects. *Id.* ¶ 9 ("With an overly permissive policy, Corps officials or other law enforcement officers could face situations in which they would not be able to intervene or ascertain bad intent on the part of an individual with a firearm until he

or she actually uses it."). And the Army Corps has also reasonably decided that allowing armed visitors on Army Corps-managed lands could create a chilling effect on the enforcement of Corps regulations, as park rangers might be required to confront armed visitors in violation of facility policies. Tab 11, Ex. 1, ¶ 6. Thus, in order to fulfill its mission of "manag[ing] the natural, cultural, and developed resources of each project in the public interest, [and] providing the public with safe and healthful recreational opportunities," 36 C.F.R. § 327.1, the Army Corps has reasonably determined that limiting loaded firearms to certain designated areas best serves its interest in protecting the safety of visitors and infrastructure projects.

The safety and security concerns described above are presented to a more limited extent, however, when loaded firearms are used solely in designated hunting areas or at shooting ranges. There is less likelihood of the kinds of confrontations that have occurred in Army Corps campgrounds, and Army Corps staff seeing a loaded weapon in such areas have less reason to fear a threat to a water-resource development project or to a park visitor. *See* Tab 11, Ex. 1, ¶ 9. The Army Corps regulation thus reasonably permits loaded firearms under these limited circumstances. And the Army Corps' judgment in this area is in line with similar judgments made by Congress. For example, under 18 U.S.C. § 930(a) and (d)(3), most individuals are barred from possessing a "firearm or other dangerous weapon in a Federal facility," except for "lawful carrying of firearms or other dangerous weapons . . . incident to hunting or other lawful purposes."

B. Plaintiffs Have Demonstrated No Irreparable Harm, and the Balance of Harms Favors Denial of a Preliminary Injunction.

Although, as this Court has explained, the absence of a substantial likelihood of injury on the merits is itself reason to deny a preliminary injunction, we note further that plaintiffs have failed to demonstrate their entitlement to a preliminary injunction under the other three factors. *See ACLU of Fla.*, 557 F.3d at 1198.

Contrary to plaintiffs' contention, merely alleging constitutional injury is not enough to demonstrate the likelihood of irreparable harm. This Court has rejected the "conten[tion] that a violation of constitutional rights always constitutes irreparable harm," noting that "[o]ur case law has not gone that far." *Siegel*, 234 F.3d at 1177 (citing cases). Rather, "[t]he only areas of constitutional jurisprudence where we have said that an on-going violation may be presumed to cause irreparable injury involve the right of privacy and certain First Amendment claims establishing an imminent likelihood that pure speech will be chilled or prevented altogether." *Id.* at 1178. Plaintiffs' assertion that financial compensation will not adequately remedy any alleged harm, Pl. Br. 23-24, thus does not support their argument of per se irreparable harm here.

Second, even assuming that *Ezell v. City of Chicago*, 651 F.3d 684, 690 (7th Cir. 2011) (cited at Pl. Br. 24), correctly held that the deprivation of Second Amendment rights constituted irreparable harm in that case, *Ezell* concerned a ban that "impermissibly burden[ed] the core Second Amendment right to possess at home for

protection." *Id.* at 698. That is not the situation here, where the regulation at issue does not burden the core Second Amendment right. *See Heller*, 554 U.S. at 635, 128 S. Ct. at 2821 (2008) ("[W]hatever else it leaves to future evaluation, [the Second Amendment] surely elevates above all other interests the right of law-abiding, responsible citizens to use arms in defense of hearth and home."). *Ezell* does not stand for the proposition that merely by asserting a Second Amendment claim, a plaintiff establishes irreparable harm. Moreover, insofar as plaintiffs attempt to draw a parallel between the First and Second Amendments in this way, courts have been justifiably hesitant to import unique First Amendment doctrines into this context. *See Kachalsky*, 701 F.3d at 91-92; *see also Hightower v. City of Boston*, 693 F.3d 61, 80-82 (1st Cir. 2012) (declining to apply First Amendment prior restraint and overbreadth doctrines to a Second Amendment claim).

The balance of harms and the public interest also do not favor a preliminary injunction. The regulation protects the safety of unarmed park rangers and the millions of visitors to Corps lands, and it ensures the security of the dams, levees, and hydropower facilities co-located within recreation areas. In the absence of the regulation, the agency would be required to perform full safety and security evaluations of all Corps-administered lands to account for the presence of firearms, and to determine whether the public's access to certain facilities might need to be curtailed or eliminated. Tab 11, Ex. 1, ¶ 9. And, as the district court explained, Tab 19, at 55, a change in the firearms regulation would have a ripple effect on other Army

Corps programs, including that the Army Corps might limit alcohol use, increase spending on park rangers and outside police forces, and limit public services and access due to budgetary concerns. Tab 11, Ex. 1, at ¶ 10.

Plaintiffs' reliance on the Army Corps' response to an Idaho district court's injunction does not advance their claim. Pl. Br. 25. The time for appealing the Idaho order granting injunctive relief has not yet run, and the Army Corps will be assessing the impact of the injunction in Idaho as part of its ongoing comprehensive review of the security and safety vulnerabilities of Army Corps infrastructure. For all the reasons explained above, the district court in this case correctly declined to grant plaintiffs' request for a preliminary injunction.

CONCLUSION

For the foregoing reasons, the order of the district court should be affirmed.

Respectfully submitted,

JOYCE R. BRANDA
Acting Assistant Attorney General

SALLY QUILLIAN YATES
United States Attorney

MICHAEL S. RAAB

s/ Abby C. Wright
ABBY C. WRIGHT
(202) 514-0664
Attorneys, Appellate Staff
Civil Division, Room 7252
U.S. Department of Justice
950 Pennsylvania Ave., N.W.
Washington, D.C. 20530

DECEMBER 2014

CERTIFICATE OF COMPLIANCE WITH
FEDERAL RULE OF APPELLATE PROCEDURE 32(A)(7)

I certify that this brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B). This brief contains 7,420 words as counted by Microsoft Word and was prepared in proportionally spaced 14-point Garamond font.

s/ Abby C. Wright
Abby C. Wright
Counsel for the Appellees

CERTIFICATE OF SERVICE

I hereby certify that on December 5, 2014, I electronically filed the foregoing brief with the Clerk of the Court for the United States Court of Appeals for the Eleventh Circuit by using the appellate CM/ECF system. Participants in the case are registered CM/ECF users and service will be accomplished by the appellate CM/ECF system.

s/ Abby C. Wright
Abby C. Wright
Counsel for Appellees