IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 10-cv-02408-RPM

DEBBIE BONIDY,
TAB BONIDY, and
NATIONAL ASSOCIATION FOR GUN RIGHTS,

Plaintiffs,

v.

UNITED STATES POSTAL SERVICE,
PATRICK DONAHOE, Postmaster General, and
STEVE RUEHLE, Postmaster, Avon, Colorado,

Defendants.

PLAINTIFFS' OPPOSITION TO DEFENDANTS' MOTION TO DISMISS

Plaintiffs Debbie Bonidy, Tab Bonidy, and the National Association for Gun Rights ("NAGR")[1], by and through their undersigned attorney, hereby file their opposition to Defendants' Motion to Dismiss Plaintiffs' Second Amended Complaint (Doc. 16).

[1] Defendants assert that NAGR lacks standing "in its own right as opposed to in its representational capacity." Mot. to Dismiss at 6 n.4. As Defendants concede, NAGR has standing in its representational capacity. *Hunt v. Washington State Apple Adver. Comm'n*, 432 U.S. 333, 342–43 (1977). Whether NAGR has standing in its own right is largely irrelevant here because the Bonidys have standing to bring this as-applied challenge. *Steffel v. Thompson*, 415 U.S. 452, 459 (1974). In cases where, as here, Plaintiffs seek injunctive and declaratory relief, so long as "at least one individual plaintiff . . . has demonstrated standing," a court "need not consider whether the other individual and corporate plaintiffs have standing to maintain the suit." *Village of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 264 & n.9 (1977); *see also Watt v. Energy Action Educ. Found.*, 454 U.S. 151, 160 (1981).

INTRODUCTION

Plaintiffs' Second Amended Complaint raises two distinct issues: (1) Whether Defendants may prohibit the Bonidys from possessing a firearm in a private vehicle parked on postal property adjacent to the Avon Post Office; and (2) whether Defendants may prohibit the Bonidys from carrying a firearm inside the Avon Post Office. On April 25, 2011, Defendants moved to dismiss Plaintiffs' claims. Defendants' Motion to Dismiss relies principally on dicta in *District of Columbia v. Heller*, 554 U.S. 570 (2008). Their Motion is unpersuasive because it attempts to extrapolate from the dicta a rule of law that is broader than the Court's dicta, at odds with the Court's reasoning, divergent from the historical background, and unsupported by the precedent flowing from *Heller*. Contrary to Defendants' suggestion, the core conduct protected by the Second Amendment explicitly includes the right of law-abiding citizens to carry firearms for self-defense. Moreover, even if the *Heller* dicta did apply to the instant case, Defendants would not be relieved of their burden of proving the constitutionality of the Postal Service firearms ban, as applied to the Bonidys. Yet, at the motion to dismiss stage, Defendants are prohibited from presenting evidence in an attempt to meet this heavy burden. Accepting the truth of the allegations in the Complaint, and drawing all inferences in the light most favorable to Plaintiffs, Defendants' Motion to Dismiss should be denied.

FACTUAL BACKGROUND

United States Postal Service ("USPS") regulations generally prohibit law-abiding individuals from possessing or carrying functional firearms, openly or concealed, onto any real property under the charge and control of the USPS. 39 C.F.R. § 232.1(*l*). The Bonidys live in rural Colorado and, because they do not have home mail service, they must drive approximately

10 miles roundtrip everyday from their home to reach the local Post Office in Avon to pick up their mail. Second Am. Compl. ¶¶ 15, 16, 19, 20. There is a public parking lot adjacent to the Avon Post Office; the parking lot is located on real property under the charge and control of the USPS. *Id*. ¶ 21. The public USPS parking lot adjacent to the Avon Post Office is the only public parking consistently available to patrons of the Avon Post Office. *Id*. ¶¶ 22–23.

The postal parking lot and the public area of the Avon Post Office where the Bonidys pick up their mail are not sensitive places. Security personnel do not electronically screen persons entering the Avon Post Office to determine whether persons are carrying firearms, or weapons of any kind. *Id*. ¶ 17. Security personnel do not restrict access to the Avon Post Office to only those persons who have been screened and determined to be unarmed. *Id*. ¶ 18.

The Bonidys lawfully own handguns, which they are licensed to carry pursuant to Colorado's Concealed Carry Act. C.R.S. § 18-12-201 *et seq*. Mr. and Mrs. Bonidy presently intend to possess a handgun for self-defense when traveling to, from, through, or on USPS property but are prevented from doing so by Defendants' active enforcement of 39 C.F.R. § 232.1(*l*). Second Am. Compl. ¶ 24. The Bonidys are law-abiding individuals; they are over 21 years old, have no history of substance abuse or criminal activity, are not subject to a protection order, have demonstrated competency with a handgun, and have been approved by the Eagle County Sheriff to carry a concealed handgun almost everywhere in the State. *Id*. ¶ 25.

On July 22, 2010, the Bonidys contacted the USPS to inquire as to whether they would be subject to prosecution pursuant to 39 C.F.R. § 232.1(*l*) if they carried a firearm on USPS property or stored a firearm in their cars while parked on USPS property when picking up their mail. *Id.* ¶ 26, Ex. 1. By return letter, Senior Vice President and General Counsel Mary Anne

Gibbons confirmed, on behalf of then-Postmaster General John Potter, that "the regulations governing Conduct on Postal Property prevent the Bonidys from carrying firearms, openly or concealed, onto any real property under the charge and control of the Postal Service. . . . There are limited exceptions to this policy that would not apply here." *Id.* ¶ 27, Ex. 2. Thus, 39 C.F.R. § 232.1(*l*) imposes a total ban on law-abiding individuals' possession of firearms; the USPS ban does not even allow the Bonidys to safely store a firearm in their vehicles. This effectively results in a broad ban on possession of firearms—not only on USPS property—but also when the Bonidys are traveling to or from USPS property. *Id*. at ¶ 24.

On October 4, 2010, Plaintiffs filed the instant action seeking declaratory and injunctive relief to remedy Defendants' unconstitutional deprivation of their right to keep and bear arms. Defendants responded by filing a Motion to Dismiss. This Court granted that Motion and dismissed Plaintiffs' Complaint with leave to amend. Plaintiffs filed an amended Complaint raising two narrow claims for relief: (1) Defendants violate the Second Amendment by prohibiting the Bonidys from possessing a firearm in a private vehicle parked in the public USPS parking lot adjacent to the Avon Post Office; and (2) Defendants violate the Second Amendment by prohibiting the Bonidys from carrying a firearm inside the Avon Post Office. On April 25, 2011, Defendants again moved to dismiss Plaintiffs' claims.

ARGUMENT

I. STANDARD OF REVIEW.

When reviewing a motion to dismiss for failure to state a claim, courts "accept all well-pleaded allegations in the complaint as true, and draw all reasonable inferences in Plaintiff's favor." *Kamplain v. Curry County Bd. of Com'rs*, 159 F.3d 1248, 1250 (10th Cir. 1998).

Defendants bear the burden of proving that the USPS ban does not violate the Constitution as applied to the Bonidys, and Plaintiffs must ultimately rebut any evidence offered by Defendants; but at the motion to dismiss stage, this Court "must assume that [Plaintiffs] can, even if it strikes [this Court] 'that a recovery is very remote and unlikely.'" *Dias v. City and County of Denver*, 567 F.3d 1169, 1184 (10th Cir. 2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 556 (2007)). "The court's function on a Rule 12(b)(6) motion is not to weigh potential evidence that the parties might present at trial, but to assess whether the plaintiff's complaint alone is legally sufficient to state a claim for which relief may be granted." *Smith v. United States*, 561 F.3d 1090, 1098 (10th Cir. 2009) (quoting *Sutton v. Utah State Sch. for Deaf & Blind*, 173 F.3d 1226, 1236 (10th Cir. 1999)). Accepting the truth of the allegations in the Complaint, and drawing all inferences in the light most favorable to Plaintiffs, this Court should deny Defendants' Motion to Dismiss.

II. THE SECOND AMENDMENT GUARANTEES THE RIGHT TO CARRY FIREARMS FOR SELF-DEFENSE IN CASE OF CONFRONTATION.

Defendants argue that the Second Amendment provides no protection for the right to keep and bear arms on USPS property; but this argument cannot be reconciled with the text of the Constitution. The core conduct protected by the Second Amendment explicitly includes the right to carry firearms for self-defense:

> A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and *bear* Arms, shall not be infringed.

U.S. Const. amend. II (emphasis added). In *Heller*, the Supreme Court concluded in no uncertain terms that, "[a]t the time of the founding, as now, to 'bear' meant to 'carry.'" 554 U.S. at 584. The Court applied this common historical understanding of the term "bear" to conclude

that the Second Amendment protects the "individual right to possess and carry weapons in case of confrontation." *Id*. at 592. In reaching this conclusion, the Court adopted Justice Ginsburg's definition of the phrase "to bear arms," which she offered in *Muscarello v. United States*, 524 U.S. 125, 143 (1998):

> Surely a most familiar meaning is, as the Constitution's Second Amendment . . . indicate[s]: "wear, bear, or carry . . . upon the person or in the clothing or in a pocket, for the purpose . . . of being armed and ready for offensive or defensive action in a case of conflict with another person."

Heller, 554 U.S. at 584 (internal citations omitted) (omissions in original). Thus, contrary to Defendants' suggestion, core conduct protected by the Second Amendment is infringed by the USPS firearms ban because it is a broad prohibition on the possession and carrying of firearms "in case of confrontation." *Id*.

The *Heller* court's reliance on a number of 19th century authorities offers guidance about the nature of the right to carry. These cases stand for the proposition that if one manner of carrying a firearm outside the home is restricted, some other means of carrying arms must be preserved. These cases are of particular importance because "the Second Amendment, like the First and Fourth Amendments, codified a pre-existing right" that can only be fully understood in light of the "historical background." *Heller*, 554 U.S. at 592. For example, as the Court noted in *Heller*:

> In *Nunn v. State,* [1 Ga. 243, 251 (1846)] the Georgia Supreme Court struck down a prohibition on carrying pistols openly (even though it upheld a prohibition on carrying concealed weapons). In *Andrews v. State,* [50 Tenn. 165, 187 (Tenn. 1871)] the Tennessee Supreme Court likewise held that a statute that forbade openly carrying a pistol "publicly or privately, without regard to time or place, or circumstances," violated the state constitutional provision (which the court equated with the Second Amendment). That was so even though the statute did not restrict the carrying of long guns. *See also State v. Reid,* 1 Ala. 612, 616–617 (1840) ("A statute which, under the pretence of regulating, amounts to a

> destruction of the right, or which requires arms to be so borne as to render them wholly useless for the purpose of defence, [sic] would be clearly unconstitutional").

Id. at 629. Thus, the Court indicated its approval of the longstanding principle that bans on carrying firearms outside the home, or regulations that amount to bans, violate the right to keep and bear arms. As the Court's discussion of the 19th century authorities above illustrates, this proposition has long been accepted by state courts. *See, e.g., Lakewood v. Pillow*, 501 P.2d 744, 745 (Colo. 1972); *City of Las Vegas v. Moberg*, 485 P.2d 737, 738 (N.M. Ct. App. 1971); *People v. Nakamura*, 62 P.2d 246, 247 (Colo. 1936); *People v. Zerillo*, 189 N.W. 927, 928 (Mich. 1922); *In re Brickey*, 70 P. 609, 609 (Idaho 1902). Moreover, the rule that bans on the carrying of firearms by law-abiding individuals violate the right to keep and bear arms has been applied post-*Heller*. *See Peruta v. County of San Diego*, 2010 WL 5137137, *6 (S.D. Cal. Dec. 10, 2010) (upholding California's concealed-handgun licensing law because the law still permitted unlicensed citizens to carry handguns in plain view).

The central holding of *Heller* concerns the constitutionality of possessing functional firearms in the home: "the District's requirement . . . that firearms in the home be rendered and kept inoperable at all times . . . makes it impossible for citizens to use them for the core lawful purpose of self-defense and is hence unconstitutional." *Id.* at 630. The facts of that case did not give the Court occasion to rule on all aspects of Second Amendment law, and its holding is appropriately narrow. *See id.* at 635 ("But since this case represents this Court's first in-depth examination of the Second Amendment, one should not expect it to clarify the entire field, any more than *Reynolds v. United States*, our first in-depth Free Exercise Clause case, left that area in a state of utter certainty." (internal citation omitted)). Yet, the Court made clear that the right to

"possess and carry weapons in case of confrontation" is the core of the right guaranteed by the Second Amendment. *Id*. at 592. In *McDonald v. City of Chicago*, the Court confirmed that the right protected is "fundamental to *our* scheme of ordered liberty." 561 U.S. ___, 130 S.Ct. 3020, 3050 (2010) (emphasis in original). *McDonald* emphasized that the Second Amendment does *not* embody "a second-class right, subject to an entirely different body of rules than the other Bill of Rights guarantees." *Id*. at 3045.

Thus, although the Court has not weighed in on the full contours of the right to carry, it is clear from *Heller* that the Court views the Second Amendment as explicitly guaranteeing the right to carry firearms for self-defense. *McDonald* teaches that this right is fundamental, like the rights protected by the First Amendment. Moreover, the Court has indicated approval for the majority view that bans on the carrying of firearms are unconstitutional. Thus, contrary to Defendants' suggestion, core conduct protected by the Second Amendment is infringed by the USPS firearms ban because it is a broad prohibition on the possession and carrying of firearms "in case of confrontation." *Heller*, 554 U.S. at 629. Accordingly, Defendants' Motion to Dismiss should be denied.

III. DEFENDANTS' ARGUMENT STRAINS THE *HELLER* DICTA TO ITS BREAKING POINT.

Defendants' argument—that the Second Amendment provides no protection for the right to keep and bear arms on USPS property—relies principally on dicta in *Heller*. As discussed below, the USPS firearms ban does not fit within the "presumptively lawful" regulatory measures identified in the *Heller* dicta. Moreover, even if the *Heller* dicta did apply to the instant case, Defendants would not be relieved of their burden of proving the constitutionality of the USPS ban. Accordingly, Defendants' motion should be denied.

A. The Postal Property at Issue is Not "Sensitive."

The USPS firearms ban is much broader than the "presumptively lawful" regulations identified by the *Heller* dicta, and thus Defendants cannot escape the burden of proving that the ban does not violate the Constitution. Defendants overstate the scope of the Supreme Court's dicta when they contend that:

> In *Heller*, the Court explained that "laws forbidding the carrying of firearms in sensitive places" are "presumptively lawful." . . . Postal property, including the inside of post office buildings, parking lots, and other property under the charge and control of the Postal Service, is a "sensitive place," and therefore, the regulation at issue is presumptively lawful.

Mot. to Dismiss at 2 (citation omitted). As Defendants correctly state, the *Heller* dicta concerned carrying firearms in "sensitive places." 554 U.S. at 626. Defendants point to a case dealing with an actual sensitive area, *United States v. Davis*, 304 Fed. Appx. 473 (9th Cir. 2008) (airplanes), but that case is inapposite. The postal property at issue in this case—a public USPS parking lot and the public area of the Avon Post Office where the Bonidys pick up their mail—is not "sensitive" in the sense of the *Heller* dicta. Unlike airports or federal court facilities, security personnel do not electronically screen persons entering the Avon Post Office to determine whether persons are carrying firearms, or weapons of any kind. Second Am. Compl. ¶ 17. Security personnel do not restrict access to the Avon Post Office to only those persons who have been screened and determined to be unarmed. *Id*. ¶ 18. The postal parking lot adjacent to the Avon Post office is similarly unsecured and open to the public. *Id*. ¶¶ 17–18, 21.[2]

[2] Even public schools provide a greater level of security than the Avon Post Office. *See, e.g.,* Denver Public Schools Policy KI, Visitors to Schools, *available at* http://tinyurl.com/68h9rx3.

Indeed, in the only post-*Heller* case to consider the constitutionality of the USPS ban, restricted access portions of postal property were determined to be "sensitive places," but the court declined to extend this reasoning to the public areas of postal property:

> [T]he constitutionality of the regulation's ban on carrying firearms . . . in public areas without official purpose—i.e., operating a vehicle [on postal property] while . . . armed with a loaded handgun stowed in the glove compartment . . . [is not] before the Court in this case, which involves the prohibited conduct of carrying and storing firearms without official purpose *in the gated/restricted access employee parking, loading and unloading area* of the subject "Postal property."

United States v. Dorosan, No. 08-042, Written Reasons for Conviction and Sentence at 9 (E.D. La. July 7, 2008) (emphasis added).[3] The Fifth Circuit also noted the peculiarly sensitive nature of the restricted access postal property at issue in *Dorosan*, which the Post Office used "for loading mail and staging its mail trucks." *United States v. Dorosan*, 350 Fed. Appx. 874 (5th Cir. 2009).

Here, the Bonidys claim only a right to possess firearms in public, non-restricted areas of postal property, including the public postal parking lot adjacent to the Avon Post Office. In fact, their first claim for relief requests only the right to possess firearms in a private vehicle in the postal parking lot. Second. Am. Compl. ¶ 31. There is no plausible argument that the public USPS parking lot adjacent to the Avon Post Office is a "sensitive place." *See Nordyke v. King*, 563 F.3d 439, 460 (9th Cir. 2009) ("The only one of these that seems odd as a 'sensitive place' is parking lots."), *vacated on other grounds*, ___ F.3d ___, 2011 WL 1632063 (9th Cir. 2011). Accordingly, there is substantial reason to conclude that the USPS firearms ban is not narrowly

[3] A copy of this decision is attached hereto as Exhibit 1.

focused on those "sensitive places" the *Heller* court had in mind when it referred to "presumptively lawful" prohibitions on carrying firearms.

B. The USPS Ban is a Uniquely Broad Prohibition on the Right to Carry.

The breadth of the USPS regulation at issue here places it outside the "presumptively lawful" regulatory measures the Court identified in the *Heller* dicta. As discussed above, the USPS firearms ban prohibits possession of firearms not only "in . . . government buildings," but also in the parking lots adjacent to those buildings. This ban is broader than most other regulations of firearms on federal property, which allow law-abiding citizens to possess firearms in some capacity. *See* Mot. to Dismiss at 4 n.2 (listing examples of regulations that do not prohibit storage of a firearm). For example, 18 U.S.C. § 930 strikes a balance between the need for security in federal courthouses—evidenced by the robust security in place throughout those buildings—and the constitutional right to carry. Possession of a firearm "in a Federal court facility" is prohibited. 18 U.S.C. § 930 (e)(1). But outside federal court facilities, Congress did not prohibit "the lawful carrying of firearms . . . incident to hunting or other lawful purposes." 18 U.S.C. § 930(d)(3).[4]

Also because of the striking breadth of the USPS ban, the cases that have relied on the *Heller* dicta provide no support for Defendants' position.[5] For example, in *United States v. Masciandaro*, the Fourth Circuit noted that "by permitting [National Park] patrons to carry

[4] The statute also explicitly recognizes the federal courts' inherent authority to regulate the courthouse and punish for contempt any violations of court rules. 18 U.S.C. § 930(f).

[5] Defendants cite a number of other cases, Mot. to Dismiss at 11, that either do not analyze the Second Amendment, *Warden v. Nickels*, 697 F. Supp. 2d 1221, 1224 (W.D. Wash. 2010), or do so in such a cursory manner as to have little persuasive value. *See United States v. Davis*, 304 Fed. Appx. 473 (9th Cir. 2008); *United States v. Walters*, 2008 WL 2740398 (D.V.I. July 15, 2008).

unloaded firearms within their vehicles, [36 C.F.R.] § 2.4(b) leaves largely intact the right to 'possess and carry weapons in case of confrontation.'" ___ F.3d ___, 2011 WL 1053618, *15 (4th Cir. 2011) (quoting *Heller*, 554 U.S. at 592). Similarly, the Virginia Supreme Court recently upheld a narrowly tailored university firearms regulation because it "does not impose a total ban of weapons on campus." *DiGiacinto v. Rector & Visitors of George Mason Univ.*, 704 S.E.2d 365, 370 (Va. 2011) ("Individuals may still carry or possess weapons on the open grounds of GMU, and in other places on campus not enumerated in the regulation."). The USPS firearms ban is not nearly so narrow as 18 U.S.C. § 930, 36 C.F.R. § 2.4(b), or the other regulations cited by Defendants, because it prohibits all firearms without exception, both inside and outside government buildings.

The breadth of the USPS ban, in comparison to other regulations of firearms on federal property, imposes a significant burden on the right to carry. Because the USPS ban extends outside government buildings—and thus outside the *Heller* dicta—law-abiding citizens like the Bonidys are effectively prohibited from exercising the right to carry when traveling to, from, or through USPS property; the USPS ban does not even allow them to safely store a firearm in their vehicles.

Defendants suggest that the Bonidys can park off-site if they wish to exercise their Second Amendment rights. Mot. to Dismiss at 22. It is a question of fact whether this accommodation could actually save the USPS ban as applied here. At the motion to dismiss stage, this inference cuts against Defendants; thus the first claim for relief cannot be dismissed on this basis. *Dias*, 567 F.3d at 1184. Moreover, this accommodation does nothing to address the Bonidys' second claim for relief, the right to carry inside the Avon Post Office.

Plaintiffs have alleged that the only public parking consistently available to patrons of the Avon Post Office is under the charge and control of the USPS. Second Am. Compl. ¶¶ 22–23. The only other public parking available to patrons of the Avon Post Office is on West Beaver Creek Boulevard. *Id.* at 22. However, parking on West Beaver Creek Boulevard is prohibited whenever snow accumulation exceeds two inches. *Id*. Because of this restriction, public parking on West Beaver Creek Boulevard is effectively unavailable throughout the winter. *Id*. The right to keep and bear arms is not subject to seasonal hiatus.

Nor is it any answer to say, as Defendants do, that if the Bonidys wish to exercise their Second Amendment rights, they can do so on public property in the general vicinity of the Post Office or elsewhere in the Town of Avon. Mot. to Dismiss at 22; *see United States v. Grace*, 461 U.S. 171, 182 (1983) (rejecting the contention that a ban on speech on the Supreme Court grounds could be justified by allowing speech across the street). This accommodation is especially hollow in the Second Amendment context, because "[s]ome rights, such as free speech, may be only slightly burdened by laws that bar speech in some places but allow it in many other places. But self-defense has to take place wherever the person happens to be." Eugene Volokh, *Implementing the Right to Keep and Bear Arms for Self-Defense: An Analytical Framework and a Research Agenda*, 56 UCLA L. Rev. 1443, 1515 (2009).

Because the USPS ban is an outlier among regulations of firearms on federal property, there is substantial reason to conclude that it is not included among those "presumptively lawful" regulations the *Heller* court had in mind when it referred to prohibitions on carrying firearms "in sensitive places such as . . . government buildings." Indeed, the USPS ban falls outside the plain

terms of the *Heller* dicta because the USPS ban extends outside government buildings and applies to areas that could not reasonably be deemed "sensitive places."

C. Presumptively Lawful Regulations May Still be Unconstitutional.

Even if the USPS firearms ban could be crammed into the *Heller* dicta, this would not result in a "free pass" for Defendants. As the Seventh Circuit explained in a case challenging the felon-in-possession prohibition of 18 U.S.C. § 922(g)(1):

> [T]he government does not get a free pass simply because Congress has established a "categorical ban"; it still must prove that the ban is constitutional, a mandate that flows from *Heller* itself. *Heller* referred to felon disarmament bans only as "presumptively lawful," which, by implication, means that there must exist the possibility that the ban could be unconstitutional in the face of an as-applied challenge. Therefore, putting the government through its paces in proving the constitutionality of § 922(g)(1) is only proper.

United States v. Williams, 616 F.3d 685, 692 (7th Cir. 2010); *see also United States v. Chester*, 628 F.3d 673, 679 (4th Cir. 2010) ("In fact, the phrase 'presumptively lawful regulatory measures' suggests the possibility that one or more of these 'longstanding' regulations 'could be unconstitutional in the face of an as-applied challenge.'") (quoting *Williams*). Indeed, if the *Heller* dicta absolved the USPS of the burden of proving the constitutionality of its firearms ban as applied to the Bonidys, then *Heller* would impose something approximating the rational basis test; that approach was explicitly rejected by *Heller*. 554 U.S. at 628 n.27 ("If all that was required to overcome the right to keep and bear arms was a rational basis, the Second Amendment would be redundant with the separate constitutional prohibitions on irrational laws, and would have no effect."); *see also Chester*, 628 F.3d at 679.

Defendants are incorrect that Tenth Circuit precedent post-*Heller* absolves them of the burden to prove the constitutionality of the USPS firearms ban. In *United States v. McCane*, the

court rejected a challenge to the felon-in-possession prohibition of 18 U.S.C. § 922(g)(1) because the law of the circuit already foreclosed such a challenge. 573 F.3d 1037, 1047 (10th Cir. 2009). A number of courts have applied a similar approach to § 922 challenges post-*Heller*. *See United States v. Anderson*, 559 F.3d 348, 352 (5th Cir. 2009); *United States v. Frazier*, 314 Fed. Appx. 801, 807 (6th Cir. 2008); *United States v. Walters*, 2008 WL 2740398 (D.V.I. July 15, 2008).

United States v. Anderson is instructive of this trend. In that case, the Fifth Circuit held that a challenge to § 922(g)(1) "was foreclosed in this circuit by *United States v. Darrington*. . . . *Heller* provides no basis for reconsidering *Darrington*. We therefore reaffirm *Darrington* and the constitutionality of § 922(g)." *Anderson*, 559 F.3d at 352 (internal citations omitted). The Tenth Circuit explicitly took the same approach in *McCane*. 573 F.3d at 1047 (citing *Anderson*).

Unlike § 922, no court has analyzed the USPS firearms ban as it applies in this case, *i.e.*, law-abiding citizens exercising the right to carry on public, non-sensitive postal property. Moreover, as applied to the Bonidys, the ban places a heavy burden on the right of law-abiding citizens "to possess and carry weapons in case of confrontation" protected by the Second Amendment. *Heller*, 554 U.S. at 592. Accordingly, Defendants' Motion to Dismiss should be denied.

IV. DEFENDANTS CANNOT ESCAPE THEIR EVIDENTIARY BURDEN.

A. Under Strict or Intermediate Scrutiny, Defendants Bear the Evidentiary Burden.

Defendants urge this Court to apply a form of intermediate scrutiny to the USPS firearms ban. Mot. to Dismiss at 18. Although a per se invalidity test like that applied in *Heller* or strict scrutiny is the appropriate standard, this Court need not decide this question at the motion to dismiss stage. Under any level of scrutiny, Defendants bear the burden of proving that the ban

does not violate the Constitution. *Nixon v. Shrink Missouri Government PAC*, 528 U.S. 377, 379 (2000) ("This Court has never accepted mere conjecture as adequate to carry a First Amendment burden."); *Abilene Retail No. 30, Inc. v. Dickinson County*, 492 F.3d 1164, 1173–74 (10th Cir. 2007); s*ee also City of Los Angeles v. Alameda Books, Inc.*, 535 U.S. 425, 438–39 (2002); *Chester*, 628 F.3d at 682 ("[W]e agree with those who advocate looking to the First Amendment as a guide in developing a standard of review for the Second Amendment."). This requires Defendants to offer evidence to prove, at the very least, that the USPS firearms ban is a:

> [R]easonable restriction[] on the time, place, or manner of protected [conduct], [that] the restriction[] [is] justified without reference to the content of the regulated [conduct], that [it is] narrowly tailored to serve a significant governmental interest, and that [it] leave[s] open ample alternative channels . . . .

United States v. Kokinda, 497 U.S. 720, 738 (1990) (internal quotations omitted). Moreover, Plaintiffs must then have an opportunity to "rebut the [Defendants'] proffered evidence." *Abilene Retail*, 492 F.3d at 1174. This evidentiary inquiry is inappropriate at the motion to dismiss stage. *Smith v. United States*, 561 F.3d 1090, 1098 (10th Cir. 2009) ("The court's function on a Rule 12(b)(6) motion is not to weigh potential evidence that the parties might present at trial, but to assess whether the plaintiff's complaint alone is legally sufficient to state a claim for which relief may be granted." (internal quotation omitted)). Accordingly, Defendants' Motion to Dismiss should be denied.

B. Defendants' Suggested Level of Scrutiny Relegates the Second Amendment to Second-Class Status.

The USPS firearms ban effects a broad prohibition on law-abiding citizens' right to keep and bear arms, not just on postal property, but everywhere a law-abiding individual travels before and after visiting postal property. No court has applied *Heller* and *McDonald* to analyze

such a broad ban. Defendants cite a number of cases in support of the proposition that a weak form of intermediate scrutiny applies, but these cases involve either: (1) regulations that apply only to people who "undeniably pose a heightened danger of misusing firearms," *United States v. Reese*, 627 F.3d 792, 802 (10th Cir. 2010); or (2) regulations that are less burdensome. *See Chester*, 628 F.3d at 682 ("In the analogous First Amendment context, the level of scrutiny we apply depends on the nature of the conduct being regulated and the degree to which the challenged law burdens the right."). Defendants' cavalier approach to the Second Amendment should be rejected.

Defendants' reliance on cases involving 18 U.S.C. § 922 is unavailing. Courts reviewing the prohibitions contained in § 922, including the Tenth Circuit, have ruled that intermediate scrutiny applies in those cases only because the various subsections of § 922 "prohibit the possession of firearms by narrow classes of persons who, based on their past behavior, are more likely to engage in domestic violence. Based upon these characteristics, we conclude that § 922(g)(8), like the statutes at issue in *Marzzarella* and *Skoien*, is subject to intermediate scrutiny." *Reese*, 627 F.3d at 802 (citing *United States v. Marzzarella*, 614 F.3d 85 (3d Cir. 2010) and *United States v. Skoien*, 614 F.3d 638 (7th Cir. 2010)); *see also Chester*, 628 F.3d at 683. A criminal's violent history makes his claim of Second Amendment rights "of less constitutional moment," *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of New York*, 447 U.S. 557, 563 n.5 (1980), and thus it is logical that the Circuit Courts have applied a different level of scrutiny in cases challenging § 922.

Debbie and Tab Bonidy have nothing in common with the felons and misdemeanants disarmed by § 922. The Bonidys are law-abiding individuals; they are over 21 years old, have

no history of substance abuse or criminal activity, are not subject to a protection order, have demonstrated competency with a handgun, and have been approved by the Eagle County Sheriff to carry a concealed handgun almost everywhere in the State. Second Am. Compl. ¶ 25. There is simply no basis for drawing a connection between *Reese* and other cases analyzing § 922 and the scrupulously law-abiding Plaintiffs in this case. Accordingly, this Court should not apply intermediate scrutiny.

Moreover, as discussed above, *infra* Part III.B., unlike other limitations on the right to keep and bear arms that have been analyzed under intermediate scrutiny, the USPS ban leaves no room for "the right to 'possess and carry weapons in case of confrontation.'" *Masciandaro*, 2011 WL 1053618, *15 (quoting *Heller*, 554 U.S. at 592); *DiGiacinto*, 704 S.E.2d at 370 ("Individuals may still carry or possess weapons on the open grounds of GMU . . . ."); *GeorgiaCarry.Org v. Georgia*, ___ F. Supp. 2d ___, 2011 WL 240108, *13 (M.D. Ga. 2011) ("[T]he statute would allow [the CEO of the Tabernacle] to keep a firearm in his office if he obtained permission from security or management personnel of the Tabernacle and kept it secured or stored as directed."). In a significant way, the USPS ban imposes a greater burden than even the handgun bans at issue in *Heller* and *McDonald*; at least in those cases self-defense with a long gun was still possible, whereas the USPS ban applies to all firearms. *See Heller*, 554 U.S. at 629; *McDonald*, 130 S.Ct at 3106 (Stevens, J., dissenting). The overwhelming burden imposed by the USPS ban, both on the Bonidys' right to possess a firearm on postal property and when traveling to and from postal property, demonstrates that intermediate scrutiny is not the appropriate standard. *See Chester*, 628 F.3d at 682 ("'A severe burden on the core Second Amendment right of armed self-defense should require strong justification. But less severe

burdens on the right, laws that merely regulate rather than restrict, and laws that do not implicate the central self-defense concern of the Second Amendment, may be more easily justified.'" (quoting *United States v. Skoien*, 587 F.3d 803, 813–14 (7th Cir. 2009), *vacated*, 614 F.3d 638 (7th Cir. 2010))).

Defendants ignore these important distinctions between the cited cases and the case at bar. Instead, they argue that the rigorous review employed by courts in the First Amendment context is inapplicable to the Second Amendment, and thus a weak form of intermediate scrutiny should apply in all Second Amendment challenges. Defendants wrongly urge this court to abdicate its duty "to make an independent examination of the record in its entirety to ensure the challenged regulation does not improperly limit [fundamental constitutional rights]." *Abilene Retail*, 492 F.3d at 1170. Accordingly, Defendants' Motion to Dismiss should be denied.

C. Defendants Cannot Carry Their Evidentiary Burden.

Under any level of scrutiny, it is unclear what evidence Defendants could possibly marshal in an effort to support their draconian ban, especially in light of the utter lack of security in the Avon Post Office and its adjacent parking lot. *See* Second Am. Compl. ¶¶ 17–18. Under strict scrutiny, Defendants must show that the USPS ban is "narrowly tailored to serve a compelling governmental interest." *Abrams v. Johnson*, 521 U.S. 74, 91 (1997). Under intermediate scrutiny, Defendants must meet a similar burden, but the means chosen "need not be the least restrictive or least intrusive means" of accomplishing the government's interest. *Ward v. Rock Against Racism*, 491 U.S. 781, 798 (1989). In either case, a "complete ban [on constitutionally protected activity] can be narrowly tailored, but only if each activity within the proscription's scope is an appropriately targeted evil." *Frisby v. Schultz*, 487 U.S. 474, 485–86

(1988) (citing *City Council of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789, 808–810 (1984)). Defendants have done nothing to show how the USPS ban meets either intermediate or strict scrutiny, nor is it clear how such evidence could be produced.

Defendants claim an interest in "preventing armed violence on all" USPS property. Mot. to Dismiss at 23. Certainly this is a compelling governmental interest. But Defendants fail to draw a connection between this interest and the means Defendants have chosen to advance that interest. This is unsurprising because, in fact, such a connection does not exist. Statistics show a clear lack of evidence to support any connection between the government's interest in public safety and disarming law-abiding, licensed individuals such as the Bonidys. *See* Volokh, 56 UCLA L. Rev. at 1520 n.323 (citing research showing no net increase in crime or death associated with licensed concealed carry). The Bonidys' possession of a firearm in non-sensitive places—a private vehicle parked in a public parking lot or in the public area of the Avon Post Office where the Bonidys pick up their mail—is not "an appropriately targeted evil," *Frisby*, 487 U.S. at 485, and thus the sweep of the USPS ban is unconstitutionally broad. While the connection between preventing violent crime and disarming violent felons may be obvious, the correlation in the instant context falls short of the precision required by the Constitution. *See Heller*, 554 U.S. at 628.

CONCLUSION

For the foregoing reasons, Defendants' Motion to Dismiss should be denied.

DATED this 19th day of May 2011.

Respectfully Submitted By:

/s/ James M. Manley
James M. Manley, Esq.
Mountain States Legal Foundation
2596 South Lewis Way
Lakewood, Colorado 80227
(303) 292-2021
(303) 292-1980 (facsimile)
jmanley@mountainstateslegal.com

Attorney for Plaintiffs

CERTIFICATE OF SERVICE

I hereby certify that on the 19th day of May 2011, I filed the foregoing document electronically through the CM/ECF system, which caused the following to be served by electronic means:

Leslie Farby
United States Department of Justice
Civil Division, Federal Programs Branch
20 Massachusetts Ave. NW, Room 7220
P.O. Box 883
Washington, DC 20044
Lesley.Farby@usdoj.gov

/s/ James M. Manley
James M. Manley

Exhibit 1

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

UNITED STATES OF AMERICA	**CRIMINAL ACTION**
VERSUS	**NO. 08-042**
CLARENCE PAUL DOROSAN	**DIVISION "B" (3)**

WRITTEN REASONS
CONVICTION AND SENTENCE
FOR VIOLATING Title 39 C.F.R. § 232.1(l)

On this date, the above captioned matter came on for trial before the undersigned Magistrate Judge. *See* Order of Reference issued pursuant to Local Criminal Rule 5.1E(a) [Doc. # 20]. The defendant, Clarence Paul Dorosan ("Dorosan"), appeared and was represented by Federal Public Defender Roma Kent. Assistant United States Attorney Andre Jones appeared and prosecuted the case on behalf on the United States.

Background

Dorosan was charged with a violation of Title 39 C.F.R. § 232.1(l),[1] which provides:

> (l) Weapons and explosives. Notwithstanding the provisions of any other law, rule or regulation, no person while on postal property may carry firearms, other dangerous or deadly weapons, or explosives, either openly or concealed, or store the same on postal property, except for official purposes.

39 C.F.R. § 232.1(l). The statute requires that the regulation "be posted and kept posted at a conspicuous place on all such property." *Id.* at § 232.1(a).

The term "postal property" means "all real property under the charge and control of the Postal Service, to all tenant agencies and to all persons entering in or on such property." 39

[1] *See* Superseding Bill of Information filed May 9, 2008 [Doc. # 16].

C.F.R. § 232.1(a).[2] Section 232.1 further explicitly addresses vehicles and their contents brought into, while on or being removed from restricted nonpublic areas, to wit:

> (2) Vehicles and their contents brought into, while on, or being removed from restricted nonpublic areas are subject to inspection. A prominently displayed sign shall advise in advance that vehicles and their contents are subject to inspection when entering the restricted nonpublic area, while in the confines of the area, or when leaving the area. Persons entering these areas who object and refuse to consent to the inspection of the vehicle, its contents, or both, may be denied entry; after entering the area without objection, *consent shall be implied*. *A full search of* a person and *any vehicle driven* or occupied by the person may accompany an arrest.

Id. at § 232.1(b)(2) (italicized emphasis added). The penalties for violating the law at issue are set forth in the regulation under the subsection entitled "penalties and other law", to wit:

> (2) Whoever shall be found guilty of violating the rules and regulations in this section while on property under the charge and control of the Postal Service is subject to fine of not more than $50 or imprisonment of not more than 30 days, or both. Nothing contained in these rules and regulations shall be construed to abrogate any other Federal laws or regulations of any State and local laws and regulations applicable to any area in which the property is situated.

Id. at § 232.1(p)(2); *see also id.* at § 232.1(p)(1) (noting that alleged violations of said postal regulations may be heard either by a Federal district court or by a Federal magistrate in accordance with applicable court rules).

The government charge is that, on the 22nd day of October, 2007, Clarence Paul Dorosan "did [without official purpose] carry, conceal, and store a firearm, to wit: a Springfield Armory Model XD-40, semi-automatic pistol, bearing serial no. US 431816 on postal property" – i.e.,

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[2] *See also* Orientation Booklet at p. 40 (setting forth "Rules and Regulations Governing Conduct on Postal Property; noting under "Applicability" that "[t]hese rules and regulations apply to all real property under the charge and control of the USPS; providing that "[n]o person while on postal property may carry firearms") [Gov't Exh. "1"].

"the United States Postal Service employee parking lot at the United States Post Office, located in Gretna Louisiana." Superseding Bill of Information filed May 9, 2008 [Doc. # 16].

The evidence at trial on the merits bears out beyond a reasonable doubt the summary factual basis provided by the Government at the outset and reiterated in this Court's decision rejecting the defendant's Second Amendment challenge. *See* Memorandum Opinion dated June 30, 2008 [Doc. # 33].

Findings of Fact

On or about October 20, 2007, Norbert Lewis, a postal inspector at the Gretna Post Office in Gretna, Louisiana, discovered a black canvas bag on the workroom floor next to a letter case for Route 5301. Said route was worked by the defendant, Clarence Dorosan ("Dorosan"), a letter carrier on the previous day (October 19, 2007).[3] Lewis did not know to whom the bag belonged and when he lifted the bag a casing fell out of the bag. He opened the bag and found a magazine with twelve (12) rounds or .40 caliber hand gun ammunition and three (3) empty shell casings in the bag. Lewis called another supervisor, Elemuel Coleman, who watched Lewis secure the bag and lock it in a file cabinet until the Postal Inspectors arrived.[4] Dorosan was supposed to work the morning of October 20, 2007 but did not.

Postal Inspector Sheldon Jones was called to the Gretna Post Office on Saturday, October 20, 2007 and he took statements from Postal Supervisor's Lewis and Coleman. P.I. Jones secured the ammunition and spent casing found in the black bag along with personal items including Clarence Paul Dorosan's mail badge. He sealed the items taken into custody in an evidence bag and placed same marked with his initials in the Postal Inspector's evidence room on October 22, 2007.[5]

On Monday, October 22, 2007, Postal Inspector Sheldon Jones returned to the Gretna Post Office accompanied by Postal Inspector Manuel Maciel-Rodriguez to conduct a follow up investigation regarding the recovery of the loaded magazine. At approximately 10:00 a.m., Dorosan arrived at the Post Office. Postal Inspectors identified themselves to Dorosan and requested to speak with him. Dorosan said he knew why they were there and stated, "Yes, I

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[3] *See* Trial Testimony of Postal Supervisor Norbert Lewis[Government's 3rd Witness].

[4] *See id.*; Trial Testimony of Postal Supervisor Elemuel Coleman [Government's 2nd Witness].

[5] *See* Trial Testimony of Postal Inspector Sheldon Jones [Government's 1st Witness]; Ammunition found in Black Canvas Bag at Gretna Post Office on October 20, 2007 [Gov't Exh. "6"]

know about you finding the magazine in my bag but I can explain everything."[6]

Both Jones and Rodriguez escorted Dorosan to his locker and searched it along with a bag he was carrying. No weapons were found in the locker or the bag. Dorosan voluntarily surrendered a red pocket knife he was carrying on his person. The Postal Inspectors asked Dorosan if he was otherwise armed. Dorosan admitted having a gun in the glove compartment of his personal vehicle which was parked in the Post Office parking lot in front of the loading dock.[7] The employee parking lot is adjacent to the post office building and is enclosed by a gate.[8] The gate has a sign on both of its entrances which warns all parties entering that their vehicles are subject to search and cites Title 39 C.F.R. 232.1(b)(2).[9] Both Postal Inspectors escorted Dorosan to his vehicle and Dorosan remained behind the vehicle with Rodriquez, while Jones searched the vehicle. Dorosan unlocked the vehicle with the remote vehicle entry device and handed the keys to Postal Inspector Sheldon Jones, giving Jones verbal consent to unlock the glove compartment. In the glove compartment was a hand gun, holstered in a black canvas holster with an extra magazine attached to the holster.[10] Jones removed the gun from the holster. He later identified the gun as a Springfield Armory XD-40, semi-automatic handgun, serial no. U.S. 431816, stainless steel slide, with a black plastic grip. Jones advised Dorosan of his *Miranda* rights and then asked Dorosan if he would speak to him about the ammunition and firearm recovered on postal property. On the advice of his union steward, Dorosan declined to answer questions without an attorney present. While at the Gretna Post Office on October 22, 2007, P.I. Rodriguez took photographs of the firearm prohibition posters that were in the building, including those near the employee time clocks.[11] Rodriguez testified that there were

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[6]*See id.*; Trial Testimony of Postal Inspector Manuel Maciel-Rodriguez [Government's 5th Witness].

[7]*See* Trial Testimony of Postal Inspector Sheldon Jones; Trial Testimony of Postal Inspector Manuel Maciel-Rodriguez (who marked the location of Dorosan's vehicle in the parking lot at the time it was searched by making a red "X" on the Site Plan of the Gretna Post Office which had been admitted as Gov't Exh. "3"].

[8]*See* Trial Testimony of Architect John E. Campo [Government's 4th Witness] (who authenticated the Facility Detail Report [Gov't Exh. "4"] as well as the Gretna Post Office Site Plan [Gov't Exh. "3"] and highlighted the boundaries of the postal property on the site plan with a yellow marker and verified that the property at issue is owned by the United States Postal Service).

[9]*See* Photographs of Employee Parking Lot [Gov't Exh. "8" *in globo*].

[10]*See* Firearm and Ammunition retrieved from Dorosan's Vehicle [Gov't Exh. "7" *in globo*].

[11]*See* Photographs of Firearms Prohibition Posters [Gov't Exh. "5" in globo]; Testimony of P.I. Rodriguez identifying photographs he took by both time clocks, in the employees' breakroom and on two different bulletin boards].

approximately 8 to 10 firearms prohibition signs posted in the facility that the he did not photograph. He and other witnesses did admit that there were no such signs posted outside of the facility.

David Olivier, the Postal Service's Orientation Training Manager, testified that all new employees are given an orientation packet which includes notices of prohibition of all firearms on postal property. He further identified and authenticated Dorosan's Individual Training Record [Gov't Exh. "2"] as well as the Orientation Booklet [Gov't Exh. "1"], which sets forth the Postal Service's ban of firearms from all postal property and explains the Zero Tolerance Policies of the agency which includes zero tolerance of workplace violence.[12]

Conclusions of Law

The undersigned Magistrate Judge specifically finds that all of the elements of the violation charged in Count One of the Superseding Bill of Information have been proved by evidence (testimonial, documentary and physical) beyond a reasonable doubt. Moreover, the relevant facts found were and are to this date undisputed. The government has met its burden of proof (beyond a reasonable doubt) that, on the date at charged in the superseding bill in the Eastern District of Louisiana, the defendant violated 39 C.F.R. § 232.1(l). More specifically, the defendant has shown that Dorosan carried a firearm (a semi-automatic handgun) concealed in his vehicle onto "postal property" (the Gretna Post Office employee parking lot).[13] Said "postal property" is adjacent to the post office building, enclosed by a gate which has signs on both sides of the entrance, warning all persons entering that their vehicles are subject to search and as set forth in Title 39 C.F.R. § 232.1(b)(2).

The term "carry firearms" is not limited to the carrying of firearms on the person; rather, the Supreme Court in *Muscarello v.United States* explained that the term "also applies to a

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[12]Orientation Booklet at pp. 39-40 [Gov't Exh. "1"]

[13]*See* Gretna Post Office Site Plan [Gov't Exh. "3 "]; Facility Detail Report [Gov't Exh. "4 "].

person who knowingly possesses and conveys firearms in a vehicle, including in the locked glove compartment or trunk of a car, which accompanies a person."[14] This explication certainly encompasses the situation here, where Dorosan carried the firearm in his vehicle onto "postal property." *See* 39 C.F.R. §§ 232.1(a) and (b)(2). In addition to admitting to the postal inspectors that he did in fact have a gun in the glove compartment of his personal vehicle which was parked in the Gretna Post Office employee parking lot,[15] Dorosan unlocked the vehicle and handed the keys to Postal Inspector Sheldon Jones. The defendant gave Jones verbal consent to unlock the glove compartment. Moreover, the inspection revealed a hand gun in the glove compartment, holstered in a black canvas holster with an extra magazine attached to the holster. In addition to "carrying" the firearm on postal property, the defendant stored the hand gun in his vehicle during his shift. It clear to the undersigned from the evidence adduced that Dorosan both "carried" and "stored" his firearm on "postal property," even if the firearm was concealed in the locked glove compartment of his vehicle.[16]

The evidence presented is more than sufficient to find, as this Court does, that the defendant intended to have his firearm available for use immediately before entering the premises of the noticed "postal property," upon crossing through the gate threshold, during his shift on postal property and upon leaving the confines of the Gretna Post Office, albeit for

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[14]*See e.g., Muscarello v. United States,* 524 U.S. 125, 126-27 (1998) (construing the phrase "carries a firearm" within the context of 18 U.S.C. § 924(c)(1); holding that a defendant carries a firearm if it is carried directly on his person or in his vehicle; noting that the statute responds in part to the concerns of law enforcement personnel, who had urged that "carrying short firearms in motor vehicles be classified as carrying such weapons concealed").

[15]*See* Photograph's of Employee's Gated Parking Lot [Gov't Exh. "8 " *in globo*].

[16]*See* Photograph of the Open Glove Compartment of Dorosan's Vehicle [Gov't Exh. "7"].

arguably legitimate reasons. However, that is not the litmus test of guilt or innocence in this case.

The Court has considered defense counsel's argument that Dorosan's vehicle is an extension of his home; however, that result obtains only when the vehicle is not parked on postal property where access is restricted. In this case, the restricted employee parking and loading area where Dorosan parked his vehicle during his shift bears signs that advise all who enter the gates, as follows:

> Vehicles and their contents brought into, while on, or being removed from restricted nonpublic areas are subject to inspection. A prominently displayed sign shall advise in advance that vehicles and their contents are subject to inspection when entering the restricted nonpublic area, while in the confines of the area, or when leaving the area. Persons entering these areas who object and refuse to consent to the inspection of the vehicle, its contents, or both, may be denied entry; after entering the area without objection, *consent shall be implied*. *A full search of* a person and *any vehicle driven* or occupied by the person may accompany an arrest.[17]

An area, such as the Gretna Post Office's employee parking lot, which bears warnings the likes of that aforestated can hardly be analogized to "home sweet home" or an extension of same. By the same token, privately owned vehicles parked on such "postal property" cannot be reasonably be considered an extension of home. The "postal property" at issue more closely approximates one of those "sensitive places" excepted by the Supreme Court in *Heller*,[18] the Court's latest

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[17]39 C.F.R. § 232.1(b)(2) (italicized emphasis added)

[18]In *Heller*, the Supreme Court cautioned that "nothing in our opinion should be taken to cast doubt on the longstanding prohibitions on the possession of firearms by felons and the mentally ill, or laws forbidding the carrying of firearms in sensitive places ...." *District of Columbia v. Heller*, --- S.Ct. ----, 2008 WL 2520816 at ** 34-35 & n. 26 (U.S. Jun 26, 2008) (No. 07-290) (holding that the Second Amendment of the Constitution of the United States secures the fundamental right of all Americans to bear arms).

opinion addressing the Second Amendment "right to bear arms." Certainly a loaded semi-automatic weapon, even if secured in the locked glove compartment of a privately owned vehicle, creates an opportunity for violence on such "postal property" – i.e., a "sensitive" area where access is restricted for reasons of facilitating the movement of inbound and outbound mail entrusted to the USPS.

Eradicating the potential for deadly workplace violence and ensuring the safety of both Government employees and the public on "postal property" is exactly the security measure that the regulation at issue was designed to effect. The regulation is an adjunct of the Postal Service's policies and more particularly the "zero tolerance" of workplace violence.[19] Indeed, many of those who use postal facilities, including postal workers, do so from necessity, not choice; many members of the public must go to a post office to conduct their business and personal correspondence, carrying cash for stamps or money orders. Postal employees must enter and exit the postal property at issue carrying the U.S. mail.[20]

As previously addressed in this Court's prior opinion, the postal regulation at issue (39

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[19]*See* USPS Orientation for New Employees Participant WorkBook at pp. 29, 39-40 (January 2000 ed.) (noting that practices covered by the Postal Service's "Zero Tolerance Policies" include "workplace violence"; stating that the "possession of firearms and other dangerous weapons on postal property is prohibited by law," specifically 39 C.F.R. 232.1(l); and further elucidating its applicability to "all real property under the charge and control of the USPS") [Gov't Exh. "1"1]; U.S. Postal Service Individual Training Record of Clarence P. Dorosan entering service on June 30, 2001 (noting Dorosan's signature as having completed Postal Orientation on July 2, 2001 [Gov't Exh. "2"].

[20]*See, e. g., United States v. Kokinda,* 497 U.S. 720, 737 (1990) (Justice Kennedy concurring) (agreeing that the postal regulation of solicitation passes 1st Amendment constitutional muster and is reasonable as applied; noting that the Government has a significant interest in protecting the integrity of the purposes to which it has dedicated the property (facilitating postal transactions)).

C.F.R. § 232.1(l)) passes Second Amendment constitutional muster and is reasonable as applied to Dorosan. The Government has a significant interest in protecting the integrity of the purposes to which it has dedicated the property (facilitating postal transactions) and ensuring the security of postal employees and the public who *must*: (1) visit postal property to conduct official and personal business; (2) wait single file in roped off lines inside of postal facilities; (3) idle in vehicles single file in "snorkel lanes"[21] on postal property to use "drive and drop" mail receptacles placed outside of the Post Office building; and (4) carry cash or other legal tender for stamps, money orders, passports and other goods and services provided by the United States Postal Service.

Noting the fact that there were no signs prominently displayed outside of the Gretna Post Office building publishing the regulation's prohibition against carrying firearms (§ 232.1(l)) or animals (§ 232.1(j)) on "postal property," the defendant argued that the statute was vague, overly broad and unconstitutional as applied to the defendant. More particularly, defense counsel suggested that the regulation effectively outlaws conduct including matriculating the drop box lane in a vehicle with either a firearm or an animal safely stowed within its confines. The undersigned Magistrate Judge expresses no opinion whatsoever as to the constitutionality of regulation's ban on carrying firearms or animals in public areas without official purpose – *i.e.*, operating a vehicle through the "snorkel lane" of the Gretna Post Office while accompanied by a pet Shih Tzu, other non-seeing eye dog or, perhaps, armed with a loaded handgun stowed in the glove compartment. Neither of those issues are before the Court in this case, which involves the

[21] *See* Testimony of John Campo (describing the convenience lane designed for drive and drop mail deposit as the "snorkel lane" of the Gretna Post Office).

prohibited conduct of carrying and storing firearms without official purpose in the gated/restricted access employee parking, loading and unloading area of the subject "postal property."

For all of the above and foregoing reasons including those mentioned in open court, the defendant was found guilty beyond a reasonable doubt, convicted of count one of the superseding bill of information and sentenced to pay a fine of $25.00, which is payable within thirty (30) days of the entry of judgment in this case.

New Orleans, Louisiana, this 7th day of July, 2008.

DANIEL E. KNOWLES, III
UNITED STATES MAGISTRATE JUDGE