

**IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLORADO**

Civil Action No. 10-cv-02408-RPM

TAB BONIDY, and  
NATIONAL ASSOCIATION FOR GUN RIGHTS,

Plaintiffs,

v.

UNITED STATES POSTAL SERVICE,  
PATRICK DONAHOE, Postmaster General, and  
MICHAEL KERVIN, Postmaster, Avon, Colorado,

Defendants.

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**DEFENDANTS' OPPOSITION TO PLAINTIFFS' CROSS-MOTION  
FOR SUMMARY JUDGMENT AND REPLY IN SUPPORT OF  
DEFENDANTS' MOTION FOR SUMMARY JUDGMENT**

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## INTRODUCTION

As the proprietor of Postal Service property and the federal agency charged by Congress with administering and protecting that property, the United States Postal Service has enacted various “Conduct on Postal Property” regulations governing what the public may and may not do on Postal Service property. Among other things, the public may not carry or store “firearms [or] other dangerous or deadly weapons” on Postal Service property. 39 C.F.R. § 232.1(*l*) (“USPS regulation”). Plaintiffs contend that this regulation violates their Second Amendment rights, and they seek a broad injunction preventing enforcement of the regulation. In seeking this relief, Plaintiffs ask this Court to recognize a constitutional right far more expansive than any right recognized by the Supreme Court or any other court – namely, a right to carry firearms onto sensitive government property contrary to the administrative needs and safety concerns of the federal agency that owns and controls that property. The Supreme Court has made clear, however, that the right protected by the Second Amendment is a limited one and does not encompass the right Plaintiffs claim. This Court should reject Plaintiffs’ claim on this basis alone, just as the Fifth Circuit did in an analogous case involving the same USPS regulation.

Even if the Court were to determine or assume that the Second Amendment includes Plaintiffs’ claimed right within its scope, this Court should still uphold the USPS regulation because it passes constitutional muster under any applicable standard of review. As a threshold matter, Plaintiffs have failed to demonstrate that the USPS regulation imposes any substantial burden on their purported right. At most, the regulation creates a minor and occasional parking inconvenience, but that is not sufficient to support a constitutional claim. And even if the regulation did impose a more substantial burden, Plaintiffs do not dispute that the Postal Service

enacted the regulation in its capacity as proprietor of Postal Property. Therefore, the regulation is subject to reasonableness review and easily passes muster under this standard.

Plaintiffs instead ask this Court to depart from the vast majority of courts reviewing restrictions on firearm possession – including the Tenth Circuit – and apply strict scrutiny, but they provide no sound basis for doing so. Plaintiffs also provide no evidence to refute the expert opinion of the Postal Service’s Inspector in Charge of Security and Crime Prevention explaining how the USPS regulation furthers the Postal Service’s compelling interest in protecting its employees and the public on its property. Rather, Plaintiffs rely on their own say-so and on a few articles touting the purported public safety benefits of concealed carry laws and firearms proliferation generally. But the cited articles have little to do with the Postal Service’s stated justifications for the regulation and are insufficient to undermine the substantial fit between the regulation and the Postal Service’s important law enforcement objectives. Accordingly, under any applicable standard, the Postal Service’s regulation withstands constitutional scrutiny.

#### **RESPONSE TO PLAINTIFFS’ STATEMENT OF UNDISPUTED FACTS**

Defendants submit the following response to Plaintiffs’ statement of undisputed facts, set forth on pages 4-9 of Plaintiffs’ cross-motion for summary judgment (“Pl. Opp.”). Defendants do not concede the materiality of any of these facts.

1. Undisputed.
2. Undisputed.
3. Undisputed.
4. Undisputed.
5. Defendants do not dispute that the Avon Postmaster is responsible in part for providing a safe work environment for employees at the Avon Post Office. However, the Postal

Inspection Service is primarily responsible for protecting Postal Service property and employees. Decl. of Keith Milke (“Milke Decl.”) ¶¶ 5-11 (Ex. A-1)<sup>1</sup>; see also 39 C.F.R. § 231.1(b) (“The Chief Postal Inspector is designated as the Security Officer for the U.S. Postal Service. That official is responsible for the issuance of instructions and regulations pertaining to security requirements within the Postal Service.”).

6. Undisputed.

7. Undisputed.

8. Undisputed.

9. The deposition testimony cited by Plaintiffs does not support the asserted fact. The Avon Post Office serves as a repository for U.S. burial flags pursuant to an inter-agency agreement with the U.S. Department of Veterans Affairs, and conducts sales of migratory bird hunting and conservation stamps pursuant to an inter-agency agreement with the U.S. Fish and Wildlife Service. See generally Decl. of Dean Granholm (Ex. A-2) ¶ 11 & Ex. Granholm-6.

10. Undisputed.

11. Undisputed.

12. Undisputed.

13. Undisputed.

14. Undisputed.

15. Undisputed.

16. Undisputed.

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<sup>1</sup> Exhibits A-1 through A-16 and the accompanying declaration exhibits were attached to Defendants’ Motion for Summary Judgment.

17. Disputed. In addition to prohibiting firearms, 39 C.F.R. § 232.1(*l*) prohibits “other dangerous or deadly weapons, or explosives.”

18. Disputed. Employees at the Avon Post Office routinely screen packages over 13 oz. to ensure compliance with U.S. Postal Service mailability requirements. See Postal Service Domestic Mail Manual Section 601 (Mailability). While mail is generally sealed against physical inspection, the Postal Service’s Administrative Support Manual (“ASM”) permits inspection pursuant to specified exceptions. See ASM Section 274 (Mail Security). This is consistent with the deposition testimony of Postmaster Ruehle. The relevant testimony is as follows:

Q: I assume people bring packages into the post office, into the Avon Post Office, to have them shipped?

A: Correct.

Q: And are those packages screened for explosives or other weapons?

A: Employees are instructed to ask the customer if it contains anything liquid, hazardous, or perishable. There are restrictions against mailing firearms and explosives, and they’re posted in the post office.

Q: Is the package inspected to determine if it contains any restricted items?

A: Not in my office.

Q: Is it inspected at any point after it leaves the Avon Post Office?

\* \* \* \* \*

A: It could possibly be inspected if -- if there’s a concern about the package.

Ruehle Depo. at 41-42 (Plaintiffs’ Exhibit 1).

19. Undisputed.

20. Undisputed.

21. The Avon Post Office parking lot is limited to use by Post Office customers. See Defendants' Statement of Undisputed Facts ¶ 36. Otherwise undisputed.

22. Undisputed.

23. Disputed. The deposition testimony cited by Plaintiffs does not support the asserted fact. Plaintiffs have produced no admissible record evidence to support the asserted fact. See Fed. R. Civ. P. 56(c)(1)(B). The deposition testimony cited by Plaintiffs was as follows:

Q: So do you know how often they [the snow removal company] plow the lot?

A: Whenever it snows over 2 inches.

Q: Do you know how often that is, based on experience?

A: This year is different than last year. Last year it snowed more than this year, so this year it wasn't as frequent.

\* \* \* \* \*

Q: And so estimating, what would you say, how many times did they plow last winter?

A: Just a wild guess, once a week. If you needed exact figures, I'm sure the snowplowing company could supply those.

Ruehle Depo. at 19-20 (Plaintiffs' Exhibit 1).

24. Disputed. Plaintiffs have presented no admissible evidence to support their assertion that public parking on West Beaver Creek Boulevard is regularly unavailable during the winter. Although Mrs. Bonidy stated in her deposition that "[y]ou could pretty much ride by here any time in the winter and just passing, and you're not able to park," Deposition of Debbie Bonidy (Ex. A-9) at 78, Mrs. Bonidy did not establish her competency to testify generally to weather and parking conditions in Avon. Moreover, Mrs. Bonidy's testimony is contradicted by the sworn declaration of Gary Padilla, the Road and Bridge Superintendent for the Town of

Avon. Mr. Padilla has stated that, in his over twelve years of experience supervising parking and snow removal in Avon, public parking has rarely been unavailable because of snow accumulation. Declaration of Gary Padilla (attached hereto as Ex. A-17) ¶¶ 1, 4, 5. Mr. Padilla's declaration is consistent with the testimony of both Mr. and Mrs. Bonidy; each testified that snow accumulation has never prevented them from parking on West Beaver Creek Boulevard.

Debbie Bonidy testified as follows:

Q: Have you ever tried to go to the Avon Post Office and not been able to park on the street because snow hadn't been plowed from the street?

A: No. I try to avoid the Avon Post Office. I see no reason at this point for me to come when my husband's employee is picking up the mail.

Q: So you've never actually not been able to find a parking place on the street because of snow; is that accurate?

A: I'm not really – I'm not understanding the question.

Q: Let me ask it this way. Have you ever driven toward the Avon Post Office, intending to go to the post office, but not been able to park on the street because of snow?

A: I don't – I don't come to the Avon Post Office, so I'm not always looking for parks on the street.

Q: Has there ever been a time where you intended to go to the Avon Post Office but couldn't because you couldn't find a place to park?

A: I – no.

Debbie Bonidy Depo. at 79-80 (Ex. A-9).

Tab Bonidy testified as follows:

Q: Do you ever park on the public street in front of the post office?

A: No.

Q: Why not?



A: It's never been available or convenient.

Q: When you say it's never been available, is that because other cars are parked there?

A: Usually.

Q: Have you ever waited in your car until one of the cars pulled out of one of those spots in the front of the post office?

A: No.

\* \* \* \* \*

Q: Have you ever not been able to park on the public street because of snow restrictions?

A: I don't think I went there during when there was snow, so I didn't have that occasion to test that.

Q: Other than because there were cars already occupying the spots on the street in front of the post office, has there been another reason why you haven't been able to park on the street in front of the post office?

A: Not to my knowledge.

Tab Bonidy Depo. at 54-55 (Ex. A-8).

25. Disputed. The deposition testimony cited by Plaintiffs does not support the asserted fact. In any event, neither Mr. nor Mrs. Bonidy has established his or her competency to testify to the availability of public parking in Avon. As explained in the Padilla Declaration, public parking is available throughout Avon, both on public streets and in municipal parking lots. Padilla Decl. ¶¶ 2, 3 & Exhibit Padilla-1. In addition, a map published on the Town of Avon's website indicates several parking locations in Avon in close proximity to the Post Office. See <http://www.avon.org/DocumentView.aspx?DID=2819>.

26. The deposition testimony cited by Plaintiffs does not support the asserted fact that Mr. Bonidy owns handguns lawfully. Defendants do not dispute that Mr. Bonidy holds a concealed carry permit in Colorado.

27. The deposition testimony cited by Plaintiffs does not establish that Mr. Bonidy “has no history of substance abuse or a criminal record.” As noted above, Defendants do not dispute that Mr. Bonidy holds a concealed carry permit in Colorado.

28. Undisputed.

29. The deposition testimony cited by Plaintiffs does not support the asserted fact.

30. Undisputed.

31. Undisputed.

32. Undisputed.

33. Undisputed.

34. Undisputed.

35. Undisputed.

#### **REPLY CONCERNING DEFENDANTS’ STATEMENT OF UNDISPUTED FACTS**

Plaintiffs have not disputed the following paragraphs of Defendants’ Statement of Undisputed Facts: 1-6, 8-9, 11-12, 14-28, 30-38, 40, 43-45, 47. Therefore, these facts should be treated as undisputed. Defendants reply as follows to the paragraphs that were disputed by Plaintiffs.

7. Plaintiffs’ response does not dispute the facts in paragraph 7. Defendants asserted that “the Postal Service has long been *committed* to achieving a violence-free workplace through comprehensive policies, preventative measures, and threat management strategies.” Defendants’

Statement of Undisputed Facts ¶ 7 (emphasis added). Defendants have not claimed that the Postal Service has definitively achieved a violence-free workplace.

\* \* \* \* \*

10. Keith Milke is the Inspector in Charge of Security and Crime Prevention for the United States Postal Inspection Service. Milke Decl. ¶ 1. He is responsible for providing oversight to policies and programs involving Physical and Personnel Security, Workplace Violence, Dangerous Mail Investigations, Executive Protection, and Transportation Security. Id. The statement made in paragraph 10 of Defendants’ Statement of Undisputed Facts, like all the statements made in Inspector Milke’s Declaration, are based on Inspector Milke’s personal knowledge drawn from his experience and training through over 21 years as a federal law enforcement officer, as well as knowledge made available to him in his official capacity as Inspector in Charge of Security and Crime Prevention. Id. ¶¶ 1, 2. Pursuant to Fed. R. Civ. P. 26(a)(2)(C), Defendants disclosed to Plaintiffs that Inspector Milke would present evidence under Fed. R. Evid. 702, 703, or 705. Defendants’ Rule 26(a)(2) Disclosure (attached hereto as Ex. A-18).

\* \* \* \* \*

13. Plaintiffs dispute that “the presence of or access to firearms is a ‘critical factor’” in assessing the credibility of threats. Plaintiffs’ sole basis for disputing this fact is their assertion that the exhibits cited by Defendants “identify[] dozens of other factors weighted equally to or greater than access to firearms.” Pl. Statement of Disputed Facts ¶ 13. A review of the relevant exhibits indicates that this is not the case. Although “[h]aving a concealed weapon or flashing a weapon in the workplace” is listed as the second of 24 risk factors, Exhibit 2-6a (“Risk Indicators”) does not purport to rank or “weight” the listed risk factors. In fact, the “Risk

Indicators” list specifically notes that “no definite profile exists to determine whether or not a threat maker will ultimately commit an act of workplace violence.” Ex. Milke-11, Exhibit 2-6a.

As explained in the Milke Declaration and the supporting exhibits, the highest risk level is one involving “a clear and immediate threat of violence to an identifiable target.” Milke Decl.

¶ 37, Exhibit Milke-11 (Exhibit 3-2.2, Priority Risk Scale). As a matter of common sense, the presence of or access to firearms is an important factor in determining whether there is a “clear and immediate threat of violence.” Plaintiffs cite no record evidence, admissible or otherwise, to dispute this fact. Moreover, Plaintiffs cite no record evidence to dispute the facts that “[w]hen the Inspection Service receives reports of threatened violence, the first question asked regarding threat credibility is whether a firearm is involved” and that “the removal of firearm possession as a factor in threat assessment would significantly impair the Inspection Service’s ability to assess threats and respond immediately to those that pose the greatest risk.” Milke Decl. ¶ 42.

\* \* \* \* \*

29. Plaintiffs appear to dispute the fact that the Postal Service has implemented many policies to minimize incidents of violence on its property. However, contrary to the requirements of Fed. R. Civ. P. 56(c), they do not cite any record evidence for their assertion that this fact is inaccurate.

\* \* \* \* \*

39. The deposition testimony does not support Plaintiffs’ assertion that Mr. and Mrs. Bonidy “avoid the Avon Post Office . . . only because” of the USPS regulation. With respect to his reasons for ceasing to pick up his own mail from the Avon Post Office, Mr. Bonidy testified as follows:

Q: Why did you stop picking up your own mail?

A: Because I got an administrative assistant.

Q: Any other reason?

A: No.

Q: That's one of the perks of having someone who works for you, right?

A: Exactly.

Tab Bonidy Depo. at 51 (Ex. A-8). Mr. Bonidy further admitted that he began sending an employee to pick up his mail in 2005, approximately four years before he obtained a concealed weapon permit and began regularly carrying a firearm on his person. Tab Bonidy Admissions ¶ 7 (Ex. A-15). Regarding the timing of this arrangement, Mr. Bonidy testified as follows:

Q: So, between the time you moved to Colorado [1984] and 2009, when you first got your concealed carry permit, did you never carry a firearm with you?

A: Not on my person.

Tab Bonidy Depo. at 142 (attached hereto as Ex. A-19).<sup>2</sup>

\* \* \* \* \*

41. Plaintiffs' response does not dispute the fact in paragraph 41.

42. Plaintiffs' response does not dispute the fact in paragraph 42. See also

Defendants' Response to Plaintiffs' Statement of Undisputed Facts ¶ 24.

\* \* \* \* \*

46. Plaintiffs' response does not refute the fact stated in paragraph 46. Mrs. Bonidy's deposition testimony indicates that her sworn statement on her concealed carry permit application that she "[d]oes not chronically and habitually use alcoholic beverages to the extent that the applicant's normal faculties are impaired" was not correct as of the time of her

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<sup>2</sup> The previous exhibits containing portions of Tab Bonidy's deposition testimony did not include the cited page.

application. Mrs. Bonidy testified that she checked herself into an inpatient rehabilitation facility in early 2009 after she began “drinking every day” and realized that her alcohol consumption was “getting out of control.” The relevant testimony is as follows:

Q: Have you ever received counseling or treatment for substance abuse?

A: I have.

Q: Was it alcohol abuse?

A: It was.

\* \* \* \* \*

Q: What did the counseling consist of?

A: I was – I put myself in rehab.

Q: Was it an inpatient situation?

A: It was.

Q: How long were you there?

A: I was there for 30 days.

Q: Was there an event that triggered your decision to go into rehab?

A: I just found myself drinking every day, and I felt like it was getting out of control and it was time to make some changes, and I felt like I needed help in making those changes.

\* \* \* \* \*

Q: January 26<sup>th</sup>, 2009, you went into rehab?

A: Yes.

Q: And you came out of rehab on February --

A: February the 22<sup>nd</sup> of 2009.

Q: You said your last drink was in May of 2010, right?

A: Yeah. You have to understand an alcoholic. It took me a year and a half to convince myself, to accept that I was an alcoholic, and I would go out and try to see if I could be a normal person. And I found out that it was never one drink, and it would end up being a couple drinks. . . .

Debbie Bonidy Depo. at 152-154 (attached hereto as Ex. A-20).<sup>3</sup>

Mrs. Bonidy further testified that she engaged in dangerous and illegal behavior while drinking, including driving under the influence of alcohol. The relevant testimony is as follows:

Q: Have you ever driven a car under the influence of alcohol?

A: Yes.

Q: Do you have a sense of how many times?

A: I don't know. I'm not sure.

Q: Do you think that you've ever driven in an impaired state?

A: I am going to answer honestly. I have.

Id. at 179 (Ex. A-9).

\* \* \* \* \*

48. Plaintiffs' response does not dispute the fact in paragraph 48.

## **ARGUMENT**

### **I. THE USPS REGULATION DOES NOT IMPLICATE, LET ALONE SUBSTANTIALLY BURDEN, CONDUCT PROTECTED BY THE SECOND AMENDMENT.**

#### **A. The Limited Right Protected By the Second Amendment Does Not Encompass a Right to Possess Firearms on Sensitive Government Property.**

As the Supreme Court explained in District of Columbia v. Heller, 554 U.S. 570 (2008), the right to keep and bear arms has never been unlimited. Id. at 626 ("the right was not a right to keep and carry any weapon whatsoever in any manner whatsoever and for whatever purpose").

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<sup>3</sup> The previous exhibits containing portions of Debbie Bonidy's deposition testimony did not include all of the cited pages.

The Tenth Circuit recently explained that “no right is absolute” and that the constitutional right to bear arms is “qualified by what one might call the ‘who,’ ‘what,’ ‘where,’ ‘when,’ and ‘why.’” United States v. Huitron-Guizar, 678 F.3d 1164, 1166 (10th Cir. 2012) (collecting cases upholding constitutionality of limitations on the right to possess firearms). It is clear from Heller and its progeny, then, that the right to bear arms is limited. The initial question before this Court is whether the USPS regulation burdens conduct within those limits by prohibiting firearms on property owned and operated by the United States Postal Service. Heller itself provides guidance in answering that inquiry, explaining that laws forbidding firearms in sensitive places – including but not limited to government buildings – are completely consistent with the right embodied in the Second Amendment and are “presumptively lawful.” 554 U.S. at 626-27; see also, e.g., United States v. Marzzarella, 614 F.3d 85, 91-92 (3d Cir. 2010), cert. denied, 131 S. Ct. 958 (2011) (explaining that the “presumptively lawful regulatory measures” identified in Heller concern “exceptions to the right to bear arms” to which “the Second Amendment affords no protection”).<sup>4</sup>

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<sup>4</sup> As explained in Defendants’ opening brief, the Tenth Circuit and numerous other courts have treated the “presumptively lawful regulatory measures,” which include “laws forbidding firearms in sensitive places,” as restricting conduct outside of the scope of the Second Amendment altogether. Def. Mot. at 26-27. Plaintiffs’ only response is to suggest, citing United States v. McCane, 573 F.3d 1037, 1047 (10th Cir. 2009), that courts that have upheld firearms regulations post-Heller were simply following pre-Heller circuit precedent. Pl. Opp. at 31-32. Contrary to Plaintiffs’ assertion, however, McCane, which summarily rejected a challenge to 18 U.S.C. § 922(g)(1), the prohibition on firearm possession by felons, was not based on pre-Heller Tenth Circuit precedent upholding that statute. The court did not cite a single pre-Heller Tenth Circuit case, but rather relied on Heller’s statement that “nothing in our opinion should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons.” 573 F.3d at 1047 (quoting Heller, 554 U.S. at 626). Just as the Court of Appeals did in McCane, this Court should summarily reject Plaintiffs’ challenge to one of the “presumptively lawful regulatory measures” identified in Heller.



Plaintiffs' complaint and cross-motion for summary judgment repeatedly emphasize a broad "right to carry firearms for self-defense" while declining to acknowledge the inherent limitations on that right recognized by the Supreme Court, the Tenth Circuit, and numerous other courts. Plaintiffs ask this Court to adopt an interpretation of the Second Amendment that is far broader in scope than the one recognized in Heller's holding. Compare Heller, 554 U.S. at 635 ("[W]e hold that the District's ban on handgun possession in the home violates the Second Amendment, as does its prohibition against rendering any firearm in the home operable for the purpose of immediate self-defense."), with Pl. Opp. at 21 ("it is clear from Heller that the Court views the Second Amendment as explicitly guaranteeing the right to carry firearms for self-defense"). Plaintiffs further suggest that the USPS regulation falls outside the "presumptively lawful" regulatory measures identified in Heller because it is a "total ban" rather than a less restrictive regulation on possession in certain subsections of those places. Pl. Opp. at 27. But Plaintiffs provide no support whatsoever for this assertion. The Supreme Court expressly approved of comprehensive prohibitions on firearms in sensitive places, not merely restrictions on carrying certain types of weapons in certain subparts of sensitive places. See Heller, 554 U.S. at 626-27 ("laws *forbidding* the carrying of *firearms* in sensitive places such as schools and government buildings" are "presumptively lawful") (emphasis supplied); see also McDonald v. City of Chicago, 130 S. Ct. 3020, 3047 (2010) (plurality opinion) ("repeat[ing] . . . assurances" stated in Heller that the Court's holding "did not cast doubt on" the constitutionality of the types of longstanding regulatory measures identified in Heller).<sup>5</sup>

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<sup>5</sup> Furthermore, contrary to Plaintiffs' suggestion, the limitations on the right need not be tied to "some form of mal intent [sic] or bad action." Pl. Opp. at 18. The Supreme Court specifically approved of categorical restrictions on the possession of firearms in sensitive places, regardless of the intent of the possessor. Heller, 554 U.S. at 626-27; see also United States v. Skoien, 614 F.3d 638, 640 (7th Cir. 2010) (en banc) ("That *some* categorical limits are proper is part of the

The concept of a limited Second Amendment right that does not extend to sensitive places is consistent with the time, place, and manner restrictions on firearms possession that existed prior to and during the Founding era. See Defendants’ Motion for Summary Judgment (“Def. Mot.”) at 21-24. As Defendants explained, Blackstone catalogued a number of early English restrictions on the right to defend oneself with a weapon, which he referred to as “Offenses Against the Public Peace.” 4 William Blackstone, Commentaries on the Laws of England, at \*142. Plaintiffs contend that the specific restrictions cited in Defendants’ opening brief are inapposite because those laws dealt with “poaching” and “riding or going armed with dangerous or unusual weapons,” not the right to “carry firearms for self-defense.” Pl. Opp. at 17-19. However, these laws illustrate that even the “right to carry firearms for self-defense” was not absolute and was subject to public safety restrictions. As the Fifth Circuit recently explained, “when the fledgling republic adopted the Second Amendment, an expectation of sensible gun safety regulation was woven into the tapestry of the guarantee.” Nat’l Rifle Ass’n v. ATF, --- F.3d ---, 2012 WL 5259015 at \* 11 (5th Cir. Oct. 25, 2012). “Since even before the Revolution, gun use and gun control have been inextricably intertwined” and “[t]he historical record shows that gun safety regulation was commonplace in the colonies,” including “laws prohibiting the use of firearms on certain occasions and *in certain places*.” Id. (emphasis supplied). To be consistent with this historical understanding, modern public safety restrictions “need not mirror limits that were on the books in 1791.” United States v. Skoien, 614 F.3d 638, 640 (7th Cir. 2010) (en banc). The USPS regulation is simply a place restriction consistent with the historical understanding of the Second Amendment right as a limited one.

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original meaning, leaving to the people’s elected representatives the filling in of details.”) (emphasis in original).

The near-limitless right to bear arms for self-defense claimed by Plaintiffs cannot be squared with history or the right described in Heller. History and precedent make clear that laws like the one at issue here, which prohibit firearms in sensitive places, are completely consistent with the Second Amendment right.

**B. United States Postal Service Property Is Sensitive.**

As explained in Defendants’ opening brief, the Fifth Circuit upheld the precise regulation at issue here, expressly concluding that a Postal Service employee parking lot “falls under the ‘sensitive places’ exception recognized by Heller . . . [g]iven th[e] usage of the parking lot by the Postal Service as a place of regular government business.” United States v. Dorosan, 350 F. App’x 874, 875 (5th Cir. 2009) (unpublished) (quoting Heller, 554 U.S. at 626), cert. denied, 130 S. Ct. 1714 (2010). Plaintiffs try to distinguish Dorosan by contending that the district court “declined to extend this reasoning to the public areas of postal property,” Pl. Opp. at 24, and they rely on dictum by the Magistrate Judge specifying that the constitutionality of the prohibition on firearms in public areas of postal property was not at issue in that case. But the mere fact that Dorosan did not involve a public area on postal property does not imply that the court would have reached a different result if it had. In fact, the Fifth Circuit did not even mention the fact that access to the employee parking lot was restricted, let alone cite it as a basis for its decision. Rather, the court expressly relied on the fact of government ownership, emphasizing that the Postal Service’s “restrictions on guns stemmed from its constitutional authority as the property owner,” and that the parking lot at issue in that case was used “as a place of regular government business.” Dorosan, 350 F. App’x at 875.<sup>6</sup> The Avon Post Office parking lot is likewise “used

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<sup>6</sup> Plaintiffs claim that Dorosan “specifically declined to rely on the fact of government ownership alone.” Pl. Opp. at 23. However, they cite the unpublished decision of the magistrate judge, rather than the express reasoning of the Fifth Circuit mentioned above.

as a place of regular government business,” *id.*, as postal business is conducted in the parking lot itself, and access to the lot is limited to Post Office patrons conducting business at the Post Office – facts Plaintiffs do not dispute. *See* Pl. Statement of Disputed Facts ¶¶ 36, 37.

Plaintiffs’ attempt to distinguish Dorosan therefore fails. The Court should follow the persuasive reasoning of that court and uphold the USPS regulation because the Postal Service property at issue here “falls under the ‘sensitive places’ exception recognized by Heller.” Dorosan, 350 F. App’x at 875.

Contrary to Plaintiffs’ assertion, Defendants have not argued that all government-owned or public places, including all “public roads, sidewalks, and parking lots,” are “Second Amendment-free zones.” Pl. Opp. at 24.<sup>7</sup> Rather, consistent with Heller, Defendants explained

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<sup>7</sup> None of the pre-Heller state court cases cited by Plaintiffs bears on the issues before this Court. In contrast to the discrete prohibition on firearms on Postal Service property, the laws successfully challenged in most of those cases were broad bans on the carrying of weapons anywhere within city or territorial limits. *See State v. Blocker*, 630 P.2d 824, 824 (Or. 1981) (invalidating, under Oregon Constitution, statute prohibiting manufacture, sale, carrying, and possession of any “instrument or weapon having a blade which projects or swings into position by force of a spring or other device. . . .”); *City of Lakewood v. Pillow*, 501 P.2d 744, 745 (Colo. 1972) (invalidating, pursuant to Colorado Constitution, municipal ordinance making it “unlawful for any person to have in his possession, except within his own domicile, or to carry or use, a revolver or pistol, shotgun or rifle of any description”); *City of Las Vegas v. Moberg*, 485 P.2d 737, 738 (N.M. Ct. App. 1971) (invalidating, pursuant to New Mexico Constitution, city ordinance that prohibited carrying of deadly weapons “within the corporate limits of the City of East Las Vegas”); *People v. Nakamura*, 62 P.2d 246, 247 (Colo. 1936) (invalidating, under Colorado Constitution, statute that prohibited “any unnaturalized or foreign-born resident” from owning or possessing “a shotgun or rifle of any make, or a pistol or firearm of any kind”); *People v. Zerillo*, 189 N.W. 927, 929 (Mich. 1922) (invalidating, under Michigan Constitution, statute that prohibited “the possession of a shotgun, or rifle, or pistol, or firearm of any kind, at any place outside of buildings within this state by an unnaturalized foreign-born resident”); *In re Brickey*, 70 P. 609, 609 (Idaho 1902) (invalidating Idaho statute that “prohibit[ed] the carrying of [deadly weapons] in any manner in cities, towns, and villages”). Because the USPS regulation does not prohibit firearms broadly on all public property, Plaintiffs’ reliance on these cases is misplaced. Plaintiffs’ reliance on other state court cases recognizing a limited, state-guaranteed right to bear arms also is inapposite. *See Kellogg v. City of Gary*, 562 N.E.2d 685, 692, 696 (Ind. 1990) (holding, prior to Heller, that while “there is no right under the Second Amendment to keep and bear arms, such as handguns, which do not have some reasonable relationship to the

that government property serving a quintessential governmental function is a “sensitive place” where prohibitions on firearms possession are “presumptively lawful.” 554 U.S. at 626-27.

Plaintiffs do not dispute that the Avon Post Office is a “government building” serving a governmental function, nor do they meaningfully contest the notion that the Avon Post Office parking lot is an extension of that building open exclusively to Post Office patrons conducting postal business.<sup>8</sup> Plaintiffs’ position that the Avon Post Office is not a “sensitive place” is thus impossible to square with Heller and Dorosan.

Plaintiffs also provide no support for their repeated assertions that locations that are open to the public and that do not provide armed security guards or electronic screening upon entry cannot be sensitive. Pl. Opp. at 26-30. Indeed, many schools and government buildings – the precise sensitive places referred to in Heller – do not employ security guards or electronic screening, nor do they prohibit public entry.<sup>9</sup> Moreover, Plaintiffs’ assertion that “Defendants

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preservation or efficiency of a well regulated militia, . . . there is a state created right to bear arms which includes the right to carry a handgun with a license, provided that all of the requirements of the Indiana Firearms Act are met”); State ex rel. City of Princeton v. Buckner, 377 S.E.2d 139, 148-49 (W. Va. 1988) (“[T]he right to keep and bear arms guaranteed by [the West Virginia Constitution] is not unlimited. The individual’s right to keep and bear arms and the State’s duty, under it [sic] police power, to make reasonable regulations for the purpose of protecting the health, safety and welfare of its citizens must be balanced.”).

<sup>8</sup> The fact that this government function makes Postal Service property an attractive site for criminal activity provides an additional basis for considering Postal Service property sensitive. See Def. Mot. at 31-32.

<sup>9</sup> Contrary to Plaintiffs’ assertion, Pl. Opp. at 28, Colorado law does not restrict public access to public schools, but rather prohibits criminal loitering “with intent to interfere with or disrupt the school program or with intent to interfere with or endanger schoolchildren.” C.R.S. § 18-9-112. Indeed, the Denver Public School Board policy cited by Plaintiffs “encourages parents and other citizens of the district to visit classrooms at any time to observe the work of the schools,” albeit requiring non-parent visitors to check in with the school office before entering the classrooms. Denver Public Schools Policy KI, Visitors to Schools (Pl. Opp. at 28). The Eagle County School District has a nearly identical policy. See Eagle County School District, File K1, Visitors to Schools, available at:

have taken no active steps to protect customers of the Avon Post Office from criminals,” Pl. Opp. at 30, is undermined by the undisputed facts in this case. See Defendants’ Statement of Undisputed Facts ¶¶ 1-6 (providing overview of United States Postal Inspection Service measures to protect Postal Service customers, employees, and property); Plaintiffs’ Statement of Disputed Facts ¶¶ 1-6 (declining to dispute Defendants’ statements).

Because Postal Service property, including the Avon Post Office and parking lot, is government property serving a quintessential government function, it is a “sensitive place” under Heller. Therefore, the restriction on the possession of firearms is “presumptively lawful.” 554 U.S. at 626-27. The Court should uphold the regulation on that basis and enter summary judgment in favor of Defendants.

**C. Any Burden Imposed on Plaintiffs By the USPS Regulation Is Minimal and Does Not Warrant Heightened Constitutional Scrutiny.**

Even if the Court were to find that the USPS regulation implicates Second Amendment protections, it need not engage in heightened constitutional scrutiny. “[N]ot every limitation or incidental burden on the exercise of” a constitutionally-protected right “is subject to a stringent standard of review.” Bullock v. Carter, 405 U.S. 134, 143 (1972) (citation omitted). See Def. Mot. at 32-36. As several federal Courts of Appeals have held since Heller, “heightened scrutiny is triggered only by those restrictions [on the possession of firearms] that (like the complete prohibition struck down in Heller) operate as a *substantial* burden on the ability of law-abiding

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<http://www.eagleschools.net/Modules/ShowDocument.aspx?documentid=1405>. Except for the check-in requirement, this public access is similar to that offered by the Postal Service. Although post offices are generally open to the public, the United States Postal Service prohibits “[d]isorderly conduct, or conduct which creates loud and unusual noise, or which impedes ingress to or egress from post offices, or otherwise obstructs the usual use of entrances, foyers, corridors, offices, elevators, stairways, and parking lots, or which otherwise tends to impede or disturb the public employees in the performance of their duties, or which otherwise impedes or disturbs the general public in transacting business or obtaining the services provided on property.” 39 C.F.R. § 232.1(e).

citizens to possess and use a firearm. . . .” United States v. DeCastro, 682 F.3d 160, 166 (2d Cir. 2012), petition for cert. filed, (emphasis supplied) (citations omitted).

The Fifth Circuit held that the USPS regulation did not “place any significant burden” on a Postal Service employee’s “ability to exercise his claimed constitutional right” because “[i]f Dorosan wanted to carry a gun in his car but abide by the ban, he ostensibly could have secured alternative parking arrangements off site.” Dorosan, 350 F. App’x at 876 (noting that “Postal Service was not obligated by federal law to provide parking for its employees, nor did the Postal Service require Dorosan to park in the lot for work”). Plaintiffs have not explained why the same regulation imposes more of a burden on Mr. Bonidy than it did on Mr. Dorosan, an employee of the Postal Service. The USPS regulation, which imposes a discrete limitation on where an individual may possess a firearm, is at the opposite end of the spectrum from the complete handgun prohibition at issue in Heller, and therefore, it does not warrant any heightened constitutional scrutiny. See DeCastro, 682 F.3d at 166; Nordyke v. King, 644 F.3d 776, 786, 787-88 (9th Cir. 2011) (holding that “only regulations which substantially burden the right to keep and to bear arms trigger heightened scrutiny under the Second Amendment” and noting that “a regulation is particularly unlikely to impose a substantial burden on a constitutional right where it simply declines to use government . . . property to facilitate the exercise of that right”), superseded by 681 F.3d 1041, 1044 (9th Cir. 2012) (en banc) (finding ordinance “permissible” under the Second Amendment because it “regulates the sale of firearms at Plaintiffs’ gun shows only minimally, and only on County property”).

Plaintiffs contend that the USPS regulation imposes a severe burden on their claimed Second Amendment right because it affects not only their purported right to bear arms on Postal Service property, but also “everywhere a law-abiding individual travels before and after visiting

postal property.” Pl. Opp. at 33. Plaintiffs provide no support for this assertion. Moreover, Plaintiffs’ contention assumes that parking in the Postal Service-provided parking lot is required, which is certainly not the case. In any event, as the Supreme Court has explained, “not every law that which makes a right more difficult to exercise is, *ipso facto*, an infringement of that right.” Planned Parenthood of S.E. Pa. v. Casey, 505 U.S. 833, 873-74 (1992) (plurality opinion) (explaining that not every ballot access limitation amounts to an infringement on the right to vote because states must be granted substantial flexibility in establishing the framework within which voters can choose candidates). “The fact that a law which serves a valid purpose, not one designed to strike at the right itself, has the incidental effect of making it more difficult or more expensive to [exercise a constitutional right] cannot be enough to invalidate it.” Gonzales v. Carhart, 550 U.S. 124, 157-58 (2007) (quoting Casey, 505 U.S. at 874).

The Postal Service’s authority to control its own property at each of its 32,000 locations across the country cannot vary depending on the parking and weather conditions surrounding each location. See United States Postal Serv. v. Council of Greenburgh Civic Ass’ns, 453 U.S. 114, 132-33 (1981) (“[I]n exercising its authority to develop and operate a national postal system,” the Postal Service “should not be put to the test of defending in one township after another the constitutionality of a statute. . . .”). The Postal Service is not obligated to provide parking to its customers but does so at certain locations, including in Avon, to facilitate postal business and as a convenience to its customers. But the fact that the Postal Service offers parking in Avon, subject to its system-wide restriction on firearms on Postal Service property, does not make the Postal Service responsible for the *incidental* effects that the USPS regulation might have on Mr. and Mrs. Bonidy’s travel, parking, and gun storage arrangements. Under Plaintiffs’ logic, 18 U.S.C. § 930(e)(1), the federal statute prohibiting firearms in this courthouse



would “effect a broad prohibition on law abiding citizens’ right to keep and bear arms for self-defense,” Pl. Opp. at 33, because the court does not provide parking for visitors where firearm storage is permitted. Therefore, according to Plaintiffs’ reasoning, the statute burdens their purported Second Amendment right to carry firearms “everywhere a law-abiding individual travels before and after visiting” the courthouse. Id. This cannot be the case, as it would “cast doubt” on many “laws forbidding the carrying of firearms in sensitive places,” contrary to the Supreme Court’s express assurances otherwise. Heller, 554 U.S. at 626.

In any event, the record evidence indicates that: (i) ample nearby public parking options other than the parking lot controlled and operated by the Postal Service are available to Mr. and Mrs. Bonidy on the rare occasions when they visit the Avon Post Office; and (ii) Mr. and Mrs. Bonidy have never been prevented from parking on the public street directly in front of the Post Office by anything other than their own unwillingness to wait for a parking space. Plaintiffs have therefore failed to show that the USPS regulation imposes a substantial burden on their purported constitutional right.<sup>10</sup> The Court should grant summary judgment to Defendants because the *de minimis* effect of the USPS regulation on Plaintiffs’ ability to possess a firearm does not give rise to a constitutional claim.

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<sup>10</sup> The restriction on firearms inside the Avon Post Office, of course, is directly governed by Heller’s statement that prohibitions on firearms in a “government building” are “presumptively lawful.” 554 U.S. at 626-27.

## **II. EVEN IF THE USPS REGULATION DOES IMPLICATE PLAINTIFFS' SECOND AMENDMENT RIGHT, IT IS CONSTITUTIONAL.**

### **A. The USPS Regulation Is a Permissible Regulation Enacted By the Postal Service As the Proprietor of Postal Property.**

Defendants' opening brief explained that, even if this Court were to proceed to step two of the two-part analysis adopted in United States v. Reese, 627 F.3d 792 (10th Cir. 2010),<sup>11</sup> it should review the USPS regulation for reasonableness, as the Postal Service was undoubtedly acting in its proprietary capacity, rather than exercising police powers, in enacting the Conduct on Postal Property regulations. Def. Mot. at 36-39 (citing, e.g., United States v. Kokinda, 497 U.S. 720, 725-26 (1990) (plurality opinion) (quoting Cafeteria & Restaurant Workers v. McElroy, 367 U.S. 886, 896 (1961)); Int'l Soc'y for Krishna Consciousness, Inc. v. Lee, 505 U.S. 672, 679-80 (1992)). Plaintiffs neither directly dispute that this standard applies nor contest the conclusion that the Postal Service was acting in its capacity as proprietor of Postal Property in enacting the challenged regulation. Plaintiffs' sole response is their notation in a footnote that Kokinda involved a plurality opinion. See Pl. Opp. at 25 n.7.

Plaintiffs' observation does not provide this Court with any basis for applying a more stringent level of review. While Kokinda was indeed a plurality opinion, as Defendants acknowledged from the outset, Def. Mot. at 36, it is well settled that governmental actions are subject to a lower level of constitutional scrutiny when the government is acting as proprietor. Indeed, a full majority of the Supreme Court has repeatedly endorsed that view, both before and after Kokinda. See, e.g., McElroy, 367 U.S. at 896 (explaining that the federal government, when acting "as proprietor, to manage the internal operation of an important federal military

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<sup>11</sup> The Tenth Circuit has resolved at least one case by assuming without deciding the existence of a constitutional right and proceeding to apply the applicable level of scrutiny. United States v. Huitron-Guizar, 678 F.3d 1164, 1169 (10th Cir. 2012).

establishment . . . has traditionally exercised unfettered control”); Lee, 505 U.S. at 678 (“Where the government is acting as a proprietor, managing its internal operations, rather than acting as lawmaker with the power to regulate or license, its action will not be subjected to the heightened review to which its actions as a lawmaker may be subject.”) (citations omitted); id. at 683 (finding “no doubt” that regulation prohibiting solicitation in airport terminal satisfies “reasonableness” requirement); Engquist v. Oregon Dep’t of Agric., 553 U.S. 591, 598 (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.’”) (quoting McElroy, 367 U.S. at 896).<sup>12</sup> Accordingly, this Court should uphold the USPS regulation as a permissible regulation of the government’s use of its own property.

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<sup>12</sup> In the First Amendment context, the Supreme Court has “adopted a forum analysis as a means of determining when the Government’s interest in limiting the use of its property to its intended purpose outweighs the interest of those wishing to use the property for other purposes.” Cornelius v. NAACP Legal Def. & Educ. Fund, 473 U.S. 788, 800 (1985). Under this analysis, “the extent to which the Government can control access depends on the nature of the relevant forum.” Id. Regulation of speech activity on government property (i) that has traditionally been open to the public for expressive activity, such as public streets and parks, and (ii) that the government has expressly dedicated to speech activity, are subject to a stringent level of review. Perry Educ. Ass’n v. Perry Local Educators’ Ass’n, 460 U.S. 37, 45 (1983). However, regulation of speech activity where the government has not dedicated its property to First Amendment activity is evaluated only for reasonableness. Id. at 46.

This forum analysis has limited utility in the Second Amendment context, as few if any government facilities are expressly dedicated to Second Amendment activity. See United States v. Chester, 628 F.3d 673, 687 (4th Cir. 2010) (Davis, J., concurring in the judgment) (noting that Heller’s limited references to the First Amendment are “hardly an invitation to import the First Amendment’s idiosyncratic doctrines wholesale into a Second Amendment context, where, without a link to expressive conduct, they will often appear unjustified”). Nevertheless, to the extent this Court finds the forum analysis useful, the USPS regulation is akin to a speech restriction in a nonpublic forum, which is subject to reasonableness review, as there is no dispute that the Postal Service has not specifically dedicated its property to Second Amendment purposes.

**B. Even If Heightened Scrutiny Were Applicable, Intermediate Scrutiny Would Be the Appropriate Level of Review.**

Plaintiffs have provided this Court with no basis for applying strict scrutiny. The overwhelming weight of authority indicates that the appropriate standard of review is, at most, intermediate scrutiny. As explained in Defendants’ opening brief, courts addressing restrictions on the possession of firearms outside the home such as the USPS regulation have almost uniformly declined to apply a standard above intermediate scrutiny. See, e.g., United States v. Masciandaro, 638 F.3d 458, 470-71 (4th Cir.), cert. denied, 132 S. Ct. 756 (2011) (applying intermediate scrutiny to “laws that burden the right to keep and bear arms outside of the home” and noting that “as we move outside the home, firearm rights have always been more limited, because public safety interests often outweigh individual interests in self-defense”); id. at 471 (“Were we to require strict scrutiny in circumstances such as those presented here [involving restrictions on firearm possession on National Park land], we would likely foreclose an extraordinary number of regulatory measures, thus handcuffing lawmakers’ ability to prevent armed mayhem in public places and depriving them of a variety of tools for combatting that problem.”) (citations omitted); Heller v. Dist. of Columbia, 670 F.3d 1244, 1257-58 (D.C. Cir. 2011) (applying intermediate scrutiny to firearm registration requirements because they do not “prevent[] an individual from possessing a firearm in his home or elsewhere”); Kachalsky v. County of Westchester, No. 11-3642, slip op. at 36 (2d Cir. Nov. 27, 2012) (applying intermediate scrutiny to state regulation requiring “proper cause” to carry a concealed firearm in public “[b]ecause our tradition so clearly indicates a substantial role for state regulation of the carrying of firearms in public”); Peterson v. LaCabe, 783 F. Supp. 2d 1167, 1177-78 (D. Colo. 2011) (applying intermediate scrutiny to statute requiring concealed carry permit applicant to be Colorado resident because requirement does not infringe on the “right of self-defense in the

home,” where the Second Amendment “extends the strongest protection” and because “the statute is even less restrictive than the federal statutes discussed in Reese and Skoien, as it does not completely prevent this class of persons from possessing firearms while in the state”), appeal docketed.<sup>13</sup>

Plaintiffs incorrectly assert that Reese and other cases finding intermediate scrutiny to be the appropriate level of review for Second Amendment challenges to federal laws did so “only because the various subsections of [18 U.S.C.] § 922(g) ‘prohibit the possession of firearms by narrow classes of persons who, based on their past behavior, are more likely to engage in . . . violence.’” Pl. Opp. at 34 (quoting Reese, 627 F.3d at 802). This assertion is demonstrably erroneous. In deciding to apply intermediate scrutiny, Reese relied heavily on the Third Circuit’s decision in Marzzarella addressing 18 U.S.C. § 922(k), which prohibits *everyone* – not just a narrow class of persons – from possessing a firearm with an obliterated serial number. As explained in Reese, Marzzarella applied intermediate scrutiny “because ‘the burden imposed by the law did not severely limit the possession of firearms,’ as did ‘the District of Columbia’s handgun ban’ that was at issue in Heller.” Reese, 627 F.3d at 801 (quoting Marzzarella, 614 F.3d at 97) (internal alterations omitted). The USPS regulation likewise “d[oes] not severely limit the possession of firearms as did the . . . handgun ban that was at issue in Heller.” Id.

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<sup>13</sup> Plaintiffs rely on the Seventh Circuit’s decision in Ezell v. City of Chicago, 651 F.3d 684 (7th Cir. 2011), to argue that strict scrutiny is the appropriate standard because “a severe burden on the core Second Amendment right of armed self-defense will require an extremely strong public-interest justification and a close fit between the government’s means and its end.” Pl. Opp. at 33 (quoting Ezell, 651 F.3d at 708). But the court in Ezell required the government to make a “rigorous showing,” which it described as “not quite ‘strict scrutiny,’” because the challenged law directly implicated the core right to possess firearms for self-defense *in the home*. Ezell, 651 F.3d at 708. The ordinance challenged in that case permitted handgun possession *only* inside the home, but conditioned possession of any firearm on the completion of range training, which it simultaneously prohibited anywhere within city limits. Id. at 690-91. Here, by contrast, the USPS regulation does not in any way implicate the right to possess any firearm in one’s home.

Therefore, to the extent this Court finds it necessary to employ any form of heightened constitutional scrutiny, it should apply no more than intermediate scrutiny.

**C. The USPS Regulation Is Substantially Related to the Postal Service's Important Objectives.**

Defendants have explained that the Postal Service regulation helps law enforcement protect Postal Service employees and the public on Postal Service property by facilitating efficient and effective responses to threats and perceived threats. The Inspection Service has also specifically determined based on experience that permitting storage of firearms in Postal Service parking lots would increase security risks and undermine law enforcement authority. Def. Mot. at 44-46. Plaintiffs do not dispute that the Postal Service has provided a compelling governmental interest for the regulation. Pl. Opp. at 43. Nor have they provided this Court with expert testimony or any other evidence to counter the expert judgment of the Inspector in Charge of Security and Crime Prevention for the Postal Inspection Service that the USPS regulation is a necessary part of the law enforcement and risk management strategy relied upon by that federal law enforcement agency. Rather, Plaintiffs suggest that Defendants have not sufficiently “proven” that prohibiting firearm possession on Postal Service property “is a reasonable means of achieving their stated goal of crime reduction,” because, they assert, “such a means-end connection does not exist.” Pl. Opp. at 44-45. In support of this assertion, Plaintiffs rely exclusively on a series of articles that they claim “contradict . . . the more guns, more crime” hypothesis. *Id.* at 45. Plaintiffs’ citation to these articles, however, does not undermine the substantial fit between the USPS regulation and the Postal Service’s stated objective of protecting employees and customers on Postal Service property.<sup>14</sup>

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<sup>14</sup> Plaintiffs suggest that Defendants have not shown a substantial fit between the Postal Service’s compelling governmental objectives and the USPS regulation simply because they have

As an initial matter, many other studies have challenged the validity of the evidence on which Plaintiffs rely. See, e.g., National Academy of Sciences, “Firearms and Violence: A Critical Review” at 116-117, 127-150 (2005) (relevant portions attached hereto as Ex. A-21) (after conducting extensive evaluation of data and research on firearms violence, expressly disagreeing with the conclusion that adoption of right to carry laws reduces crime, and explaining that data on defensive gun uses is problematic). Additionally, regardless of the reliability of the articles cited by Plaintiffs, there is no question that a competing body of academic literature reaches a conclusion diametrically opposed to Plaintiffs’: that increasing the prevalence of concealed weapons and firearms in the public sphere generally increases risks to public safety and to law enforcement. See, e.g., John Donohue, *The Impact of Concealed-Carry Laws*, EVALUATING GUN POLICY EFFECTS ON CRIME AND VIOLENCE 289, 320 (2003) (states with lenient concealed carry laws “experience increases in violent crime, murder, and robbery when [those] laws are adopted”); Jens Ludwig, *Concealed-Gun-Carrying Laws and Violent Crime*:

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produced no studies “that were relied on by the Postal Service prior to the promulgation of 39 C.F.R. § 232.1(I)” in 1972. Pl. Opp. at 30 n.11. But production of empirical evidence pre-dating the enactment of a regulation is not required to satisfy heightened judicial scrutiny. For example, in concluding that “[b]oth logic and data establish a substantial relation” between 18 U.S.C. § 922(g)(9), which prohibits individuals convicted of misdemeanor crimes of domestic violence from possessing firearms, and the “important governmental objective” of “preventing armed mayhem,” the Seventh Circuit relied extensively on empirical research that post-dated the enactment of the statute. Skoien, 614 F.3d at 642, 643-44. The Tenth Circuit pointed to this precise evidence as “highly relevant to, and supportive of, the government’s assertion that the restriction imposed by” a different provision of the Gun Control Act – 18 U.S.C. § 922(g)(8), which was enacted even prior to § 922(g)(9) and prohibits persons subject to a domestic protection order – “is substantially related to an important governmental objective.” United States v. Reese, 627 F.3d 792, 802 (10th Cir. 2010). Moreover, as explained in Defendants’ opening brief, the Supreme Court has repeatedly indicated that empirical evidence is not always necessary at all to satisfy “heightened judicial scrutiny of legislative judgments.” Nixon v. Shrink Missouri Gov’t PAC, 528 U.S. 377, 391 (2000); Florida Bar v. Went For It, Inc., 515 U.S. 618, 628 (1995) (citations omitted) (upholding restriction on speech, even under strict scrutiny, based “solely on history, consensus, and simple common sense”); Milavetz, Gallop & Milavetz, P.A. v. United States, 130 S. Ct. 1324, 1340 (2010) (rejecting notion that government must adduce evidence to justify restriction on speech).

*Evidence from State Panel Data*, 18 INT’L REV. L. & ECON. 239 (1998) (laws broadly allowing concealed carrying of weapons “have resulted, if anything, in an increase in adult homicide rates”); Craig Perkins, *National Crime Victimization Survey, 1993-2001: Weapon Use and Violent Crime*, Bureau of Justice Statistics Special Report (Sept. 2003) (firearms increase completion rate of robberies); Charles C. Branas et al., *Investigating the Link Between Gun Possession and Gun Assault*, AM. J. OF PUBLIC HEALTH 99:11 (2009) (concluding in National Institutes of Health-funded study that, for civilian gun users in urban areas, the probability of successful defensive gun use is low); David Hemenway & Deborah Azrael, *The Relative Frequency of Offensive and Defensive Gun Uses: Results from a National Survey*, 15 VIOLENCE AND VICTIMS 257, 571 (2000) (concluding that guns are “used far more often to intimidate and threaten than they are used to thwart crimes”). While this Court need not resolve this ongoing empirical dispute, Plaintiffs’ selective citation to the literature is insufficient to undermine the substantial and reasonable fit between the USPS regulation and the Postal Service’s compelling public safety objective. See Nixon v. Shrink Missouri Gov’t PAC, 528 U.S. 377, 394-95 (2000) (“invocation of academic studies” that purportedly cast doubt on government’s justification for speech restriction does not undermine government’s asserted justification, particularly when “other studies . . . point the other way”).

Most fundamentally, Plaintiffs’ citation to research on the safety benefits or hazards of concealed carry laws generally is misplaced in the context of this case. The empirical question of whether permitting the public to carry concealed weapons in the public sphere *generally* enhances or diminishes public safety is a different question from whether, as a constitutional matter, the fit between the USPS regulation and the Postal Service’s compelling objectives of protecting employees and customers on Postal Service property is a substantial and reasonable



one. Defendants' justification for the regulation is not that public possession of firearms generally is inherently dangerous. Rather, the Postal Service has explained that Postal Service property is sensitive and that the Inspection Service's own experience and expertise in protecting Postal Service employees and customers on this sensitive property strongly indicates that the USPS regulation is an effective and necessary tool helping law enforcement fulfill its statutory duties. Plaintiffs have pointed to no evidence that undermines this logical and reasonable conclusion by the federal agency tasked with administering and protecting its own property, and this Court is not well-positioned to second-guess it. See, e.g., Kachalsky, No. 11-3642, slip op. at 38 ("In the context of firearm regulation, the legislature is 'far better equipped than the judiciary to make sensitive public policy judgments (within constitutional limits) concerning the dangers in carrying firearms and the manner to combat those risks.'") (quoting Turner Broad. Sys. v. FCC, 512 U.S. 622, 665 (1994)); id. at 42-43 (acknowledging competing studies and data but noting that "assessing the risks and benefits of handgun possession and shaping" public policy "is precisely the type of discretionary judgment that officials in the legislative and executive branches of . . . government regularly make"); Nordyke, 644 F.3d at 785 ("Sorting gun-control regulations based on their likely effectiveness is a task better fit for the legislature.").

Although Plaintiffs do not dispute the Postal Service's compelling government interests, they also contend that the regulation is not sufficiently tailored to these compelling interests because it "targets all gun possession on all postal property" whether the firearm is possessed with "criminal intent" or ostensibly for "lawful purposes." Pl. Opp. at 43-44. But Plaintiffs fail to rebut Defendants' explanation that it is impossible for Postal Service employees to determine quickly in most situations whether a particular individual is bringing a firearm onto Postal Service property with criminal intent. Plaintiffs point to the GAO Report on Concealed Carry

Permits, cited in Defendants' motion, to argue that state, local and federal law enforcement distinguish between lawful and unlawful firearms every day. Pl. Opp. at 46. However, the situation of a law enforcement official encountering an individual armed with a concealed carry permit "during a routine traffic stop" is not analogous to a Postal Service employee needing to determine whether a particular firearm possession inside a Post Office or in Post Office parking lot is lawful and/or whether it poses a legitimate safety threat. As the GAO Report explained, during traffic stops, armed police officers have "mechanisms available to further validate the permit, as needed, such as checking a permit against state databases or contacting state dispatchers," in addition to means for validating permits issued in other states. Ex. A-16 at 29-31. Plaintiffs' attempt to conflate two very different situations, therefore, is unavailing. Similarly, Plaintiffs' attempt to compare Postal Service property to National Park land is unpersuasive. As a matter of common sense, Post Offices and their attached parking lots have little in common with the "83,600,000 acres of National Park System land and 90,790,000 acres of land under the jurisdiction of the United States Fish and Wildlife Service" covered by 16 U.S.C. § 1a-7b, the statute cited by Plaintiffs. See Pl. Opp. at 46. In fact, if anything, Congress' decision to limit the Secretary of Interior's authority to promulgate or enforce regulations prohibiting the possession of firearms on National Park land, while leaving intact the Postal Service's authority to prohibit firearms on Postal Service property, suggests that Congress views the security concerns on National Park land and on Postal Service property differently.

In short, even if the articles cited by Plaintiffs were reliable, Plaintiffs have failed to rebut the substantial fit between the USPS regulation and the Postal Service's compelling governmental interests of protecting public safety and preventing armed violence on its property. Therefore, even if the Court were to apply heightened scrutiny, it should uphold the regulation.

## CONCLUSION

For the reasons set forth in their Motion for Summary Judgment and above, Defendants respectfully request that the Court grant their motion, deny Plaintiffs' cross-motion for summary judgment, and enter judgment in Defendants' favor on all claims.

Dated: November 28, 2012

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I hereby certify that on November 28, 2012, I electronically filed the foregoing with the Clerk of Court using the ECF system, which will electronically send notice to:

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