No. _____

In The
Supreme Court of the United States

TAB BONIDY AND NATIONAL ASSOCIATION FOR GUN RIGHTS,

Petitioners,

v.

UNITED STATES POSTAL SERVICE, *ET AL.*,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the "presumptively lawful regulatory measures" mentioned in *District of Columbia v. Heller*, 554 U.S. 570 (2008), burden the right to keep and bear arms, as some circuits have ruled, or whether those measures are categorical exceptions to the Second Amendment right, as the circuit below and others have ruled.

2. Whether a nationwide United States Postal Service regulation that prohibits a law-abiding, responsible citizen from safely storing his handgun inside a locked vehicle parked in a rural post office parking lot while he picks up his mail violates the Second Amendment.

PARTIES TO THE PROCEEDINGS

Petitioners, Tab Bonidy and the National Association for Gun Rights, were plaintiffs in the district court and appellees/cross-appellants before the court of appeals.

Respondents, the United States Postal Service, Patrick Donahoe, Postmaster General, and Michael Kervin, Acting Postmaster, Avon, Colorado, were defendants in the district court and appellants/cross-appellees in the court of appeals.

Debbie Bonidy was a plaintiff in the district court. The parties stipulated to the dismissal of Ms. Bonidy's claims with prejudice prior to the district court's decision on the merits.

Steve Ruehle, former Postmaster, Avon, Colorado, was a defendant in the district court and was automatically substituted for by Mr. Kervin.

CORPORATE DISCLOSURE STATEMENT

Petitioner, National Association for Gun Rights, is a non-profit corporation that has no parent corporation and has never issued any stock. No publicly held company owns 10 percent or more of its stock.

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PETITION FOR WRIT OF CERTIORARI

Tab Bonidy and the National Association for Gun Rights respectfully petition for a writ of certiorari to review the judgment of the U.S. Court of Appeals for the Tenth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals is reported at 790 F.3d 1121, and is reproduced at Petitioners' Appendix ("App.") 1a-49a. The opinion of the district court is unreported, but is available at 2013 WL 3448130, and is reproduced at App. 52a-67a.

STATEMENT OF JURISDICTION

The judgment of the court of appeals was entered on June 26, 2015. App. 50a-51a. A petition for rehearing en banc and/or panel rehearing was timely filed. That petition was denied on September 9, 2015. App. 70a-71a. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND REGULATORY PROVISIONS INVOLVED

The Second Amendment provides: "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.

The United States Postal Service ("Postal Service") regulation at issue provides:

> 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*).

STATEMENT OF THE CASE

I. LEGAL BACKGROUND.

Congress charged the Postal Service with "provid[ing] prompt, reliable, and efficient services to patrons in all areas. . . ." 39 U.S.C. § 101(a). To that end, the Postal Service is to "establish and maintain postal facilities of such character and in such locations, that postal patrons throughout the Nation will . . . have ready access to essential postal services." 39 U.S.C. § 403(b)(3). The Postmaster General "may prescribe regulations necessary for the protection of property owned or occupied by the Postal Service and persons on the property" that "include reasonable penalties" for violations. 18 U.S.C. §§ 3061(c)(4)(A), (B). Under the auspices of that authority, the Postal

Service promulgated a regulation in 1972, which provided:

> No person while on [postal] property shall carry firearms, other dangerous or deadly weapons, or explosives, either openly or concealed, except for official purposes.

37 Fed. Reg. 24,346, 24,347 (Nov. 16, 1972). The Postal Service last amended this regulation in 2007, 72 Fed. Reg. 12,565 (Mar. 16, 2007), to provide:

> 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*). A violation of this regulation may result in a fine, imprisonment up to thirty days, or both. 39 C.F.R. § 232.1(p)(2).

II. PARTIES AND PROCEEDINGS BELOW.

Tab Bonidy is a law-abiding, responsible citizen who has been issued a permit to carry a concealed handgun in the State of Colorado.[1] App. 4a, 65a.

[1] Under Colorado's Concealed Carry Act, C.R.S. § 18-12-201 *et seq*., those seeking a concealed carry permit must satisfy various criteria, including age, residency, and handgun competency requirements, and pass a background check that confirms the individual: (1) is eligible to possess a firearm under federal

(Continued on following page)

Bonidy lives in a rural area of Colorado near the Town of Avon, and regularly carries a handgun for self-defense. App. 4a. The Town of Avon has a population of 6,365 and is located "high in the Rocky Mountains. . . ." App. 54a. Because of the rural nature of the area, the Avon Post Office does not provide home mail delivery; instead, it provides free post office boxes to local residents. App. 54a. In order to receive mail, Bonidy must drive approximately 10 miles round trip to access his post office box, which is in an area of the Avon Post Office building that is open to the public at all times.[2] C.A. App. A17; App. 54a. The Avon Post Office building is a free-standing structure with two adjacent, outdoor parking lots: a restricted-access, employee lot[3] and a customer lot. App. 54a; *see* App. 48a (aerial photograph of the Avon Post Office building and customer parking lot). No security personnel or devices monitor the Avon Post Office building or the customer parking lot. App. 54a.

In July 2010, counsel for Bonidy sent a letter to the Postmaster General asking whether Bonidy would be prosecuted under 39 C.F.R. § 232.1(*l*) if he

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law; (2) is not subject to a protection order; (3) has not committed perjury; and (4) does not abuse alcohol or unlawfully use drugs. C.R.S. § 18-12-203.

[2] In contrast, the customer service counter in the Avon Post Office building "opens and closes on a regular schedule." App. 54a.

[3] The restricted-access, employee parking lot is not at issue in this case.

either carried his handgun (open or concealed) into the post office building while he picks up his mail or safely stored it in his locked vehicle in the customer parking lot. App. 55a; C.A. App. A17-18. The Postal Service's General Counsel replied in the affirmative, stating that "'the regulations governing Conduct on Postal Property prevent [Mr. Bonidy] 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.'" App. 55a (quoting C.A. App. A20). In October 2010, Petitioners filed this case asserting that, as applied, 39 C.F.R. § 232.1(*l*) violated Bonidy's Second Amendment right to the extent that it prohibited him from: (1) carrying his handgun (openly or concealed) in the Avon Post Office building; and (2) safely storing his handgun in his locked vehicle parked in the Avon Post Office customer parking lot while he picks up his mail. C.A. App. A2, A14-15. The district court had jurisdiction under 28 U.S.C. § 1331.

On cross-motions for summary judgment, the district court held 39 C.F.R. § 232.1(*l*) constitutional as applied to Bonidy carrying (openly or concealed) inside the Avon Post Office building. App. 55a-58a, 67a. The district court concluded, consistent with most courts that have answered the question, that the Second Amendment protects the right to carry a firearm outside the home. App. 56a-58a, 66a. In light of circuit precedent, however, the district court ruled that the right to carry outside the home did not

include the right to carry a concealed firearm. App. 57a (citing *Peterson v. Martinez*, 707 F.3d 1197, 1201 (10th Cir. 2013)). Based upon this Court's statement in *District of Columbia v. Heller*, 554 U.S. 570, 626-27 and 627 n.26 (2008), that "laws forbidding the carrying of firearms in sensitive places such as schools and government buildings," are "presumptively lawful regulatory measures[,]" the district court ruled that the Avon Post Office building was a "sensitive place," and that Bonidy had not rebutted the "presumption of validity" of 39 C.F.R. § 232.1(*l*) vis-à-vis open carry inside the Avon Post Office building. App. 58a.

As to the customer parking lot, the district court held 39 C.F.R. § 232.1(*l*) unconstitutional as applied to Bonidy's request to safely store his handgun in his locked vehicle while he picks up his mail.[4] App. 58a-67a. The district court first rejected the Postal Service's argument that all government property is a "sensitive place," because "constitutional freedoms do not end at the government property line[,]" and there "is more to a sensitive place analysis than mere government ownership." App. 58a-59a. The district court then analyzed whether the Avon Post Office parking lot possessed "indicia of sensitiv[ity.]" App. 60a. The district court first distinguished the parking lot from "schools, post offices, and courthouses[,]"

[4] Under Colorado law, no permit is required to legally possess a handgun in a private vehicle for self-defense, C.R.S. § 18-12-105(2)(b), and such possession is considered open carry. C.R.S. § 18-12-204(3)(a)(I).

because a "core government function is not performed . . . in the parking lot; rather, except for the presence of a few mailboxes, the lot merely facilitates the government function taking place inside [the building] by giving patrons a place to park." App. 60a (quotation omitted). The district court then noted that the Postal Service had "offered no evidence that a substantial number of people congregate or are present in the parking lot." App. 60a. The district court also emphasized that the Postal Service had "fail[ed] to present evidence showing that this particular parking lot had been the site of [criminal] activity." App. 61a. Because the Avon Post Office parking lot lacked any "indicia of sensitiv[ity]" and posed no specific public safety issues, the district court ruled that the parking lot was not a "sensitive place" and thus, there was no "presumption" that 39 C.F.R. § 232.1(*l*)'s prohibition on Bonidy safely storing his handgun in his locked vehicle while he picks up his mail was constitutional. App. 61a.

With the presumption of constitutionality off the table, the district court applied means-ends scrutiny to 39 C.F.R. § 232.1(*l*)'s prohibition. App. 61a-66a. Seemingly constrained by circuit precedent, the district court eschewed strict scrutiny in favor of intermediate scrutiny. App. 61a (citing *United States v. Reese*, 627 F.3d 792, 802 (10th Cir. 2010)). Recognizing that the Postal Service's "objective in preserving and promoting public safety in the Avon Post Office parking lot is important[,]" App. 61a, the district court noted that the inquiry boiled down to

whether the Postal Service had proven that 39 C.F.R. § 232.1(*l*)'s prohibition was "substantially related to that objective" under the facts in this case. App. 61a.

The Postal Service's evidence largely consisted of a declaration by a Postal Service employee that argued the need for a uniform, nationwide regulation. *See* App. 61a-64a. As described by the district court, this declaration "recit[ed] a history of firearm violence on postal property based on a study of workplace violence, and ma[de] broad, conclusory statements" regarding public safety concerns with respect to post office parking lots in other areas of the country. App. 61a-64a. The district court suggested that this declaration may have been sufficient "if this were an Administrative Procedure Act [case] attacking [39 C.F.R. § 232.1(*l*)] as arbitrary and capricious[,]" but found that it was completely insufficient in this as-applied, constitutional challenge because it ignored "Bonidy's interest in protecting himself[,]" which "is the core concern of the Second Amendment." App. 64a. In light of the Postal Service's failure to show that its "'one-size-fits-all' approach serve[d] any purpose other than administrative convenience and saving expenses[,]" App. 64a, the district court ruled that 39 C.F.R. § 232.1(*l*)'s prohibition on Bonidy safely storing his handgun in his locked vehicle in the Avon Post Office parking lot while he picks up his mail was "not substantially related" to the Postal Service's "public safety interest." App. 66a. Specifically, the district court found that 39 C.F.R. § 232.1(*l*)'s prohibition "sweeps too far" in that it "makes no

accommodation[s]" for law-abiding, responsible citizens, like Bonidy, and a "small-town, low-use postal facility[,]" like the Avon Post Office. App. 64a-66a; *see* App. 64a-65a (district court noting that "[p]resumably, a police officer could not pick up his personal mail without disarming himself before entering the parking lot at the Avon facility"). The district court further noted that the Postal Service's public safety concerns could be achieved through less restrictive means that ensure Bonidy will "have ready access to essential postal services provided by the Avon Post Office while also exercising his right to self-defense." App. 66a (quotation omitted). Accordingly, the district court ordered the Postal Service to "take such action as is necessary to permit . . . Bonidy to use the public parking lot adjacent to the Avon Post Office Building with a firearm authorized by his Concealed Carry Permit secured in his car in a reasonably prescribed manner. . . ." App. 66a. The Postal Service appealed this aspect of the district court's judgment and Bonidy cross-appealed the district court's judgment regarding carrying inside the Avon Post Office building. App. 5a.

On appeal, the panel majority affirmed the district court's judgment as to the Avon Post Office building based solely upon *Heller*'s statement that "laws forbidding the carrying of firearms in sensitive places such as schools and government buildings" are "presumptively lawful regulatory measures." App. 6a-9a. According to the panel majority, this statement means that "the Second Amendment right to

carry firearms does not apply to federal buildings, such as post offices."[5] App. 9a.

As to the parking lot, the panel majority reversed the district court's ruling that 39 C.F.R. § 232.1(*l*) was unconstitutional as applied to Bonidy. App. 9a-18a. The panel majority first concluded "that the parking lot should be considered as a single unit with the postal building itself" because the parking lot facilitates use of the building and has drive-by, drop-off boxes for outgoing mail. App. 9a; *see* App. 55a. After melding the building and the customer parking lot into a "single unit[,]" the majority then deemed the parking lot a "sensitive place" where – under its reading of *Heller* – the Second Amendment did not apply. App. 9a.

In the alternative, and assuming that the right to keep and bear arms applies outside the home, the panel majority reviewed 39 C.F.R. § 232.1(*l*)'s prohibition vis-à-vis the parking lot under a form of intermediate scrutiny. App. 9a-18a. To the panel majority, "[i]ntermediate scrutiny makes sense in the Second Amendment context" because "[t]he risk inherent in firearms and other weapons distinguishes the Second Amendment right from other fundamental rights that have been held to be evaluated under a strict scrutiny test. . . ." App. 10a-11a. Then, instead of requiring the Postal Service to prove that 39 C.F.R. § 232.1(*l*)'s

[5] This Petition does not seek review of the court of appeals' ruling regarding carrying inside the Avon Post Office building.

prohibition was substantially related to the Postal Service's stated public safety interest, the panel majority accepted the Postal Service's arguments at face value. App. 11a-18a.

The panel majority first acquiesced to the Postal Service's argument that an agency has greater ability to infringe on constitutional rights "when it is acting as a proprietor (such as when it manages a post office) than when it is acting as a sovereign (such as when it regulates private activity unconnected to a government service)." App. 11a. The panel majority also accepted the Postal Service's stated need for a uniform, nationwide handgun ban on all postal property, notwithstanding the as-applied nature of Bonidy's challenge. App. 15a-16a ("We do not second-guess the wisdom of the [Postal Service's] determination that its business operations will be best served by a simple rule banning all private firearms from postal property. . . ."). Based upon this deferential posture, the panel majority ruled that 39 C.F.R. § 232.1(*l*)'s prohibition satisfied its form of intermediate scrutiny. App. 16a-18a.

Judge Tymkovich concurred in the panel majority's opinion regarding the Avon Post Office building, but dissented from its opinion regarding the parking lot. App. 18a-20a. He stated that he would hold – as opposed to assume – that the Second Amendment applies outside the home. App. 19a. He explained that *Heller, McDonald v. City of Chicago*, 561 U.S. 742 (2010), historical sources, and decisions from other courts of appeals, all lead to the unmistakable

conclusion that the Second Amendment applies outside the home. App. 19a-26a.

Judge Tymkovich also disagreed with the panel majority's conclusion that "laws forbidding the carrying of firearms in sensitive places such as schools and government buildings" do not burden the right to keep and bear arms. App. 36a n.7 ("To say the right has not been extended to government buildings is to imply no plaintiff could ever successfully challenge a restriction in any government buildings. That goes too far."). He recognized that "[b]y explicitly listing [schools and government buildings] as examples of sensitive places, *Heller* placed a thumb on the scale in favor of considering them sensitive and thus presumptively regulable." App. 35a-36a. Yet, he acknowledged that the "thumb on the scale" may be "overcome depending on the qualities of the particular school or government building." App. 36a. Based upon this particular government building, Judge Tymkovich concluded that the "thumb on the scale" had not been overcome and, thus, the Avon Post Office building was a "sensitive place," where it is presumed that the right to keep and bear arms may be regulated. App. 44a-45a. Although he recognized that it was a "close call" with respect to the building, he concluded that Bonidy had not rebutted the presumption of validity that must be accorded to 39 C.F.R. § 232.1(*l*)'s prohibition in light of *Heller*'s statement regarding "sensitive places." App. 44a-45a.

As *Heller* did not list parking lots as "sensitive places," Judge Tymkovich refused to place a "thumb

on the scale" in favor of treating the customer parking lot as a "sensitive place." App. 35a-37a. Instead, he placed the burden of proof on the Postal Service to show that this particular parking lot was a "sensitive place." *See* App. 28a, 39a-40a. Because the Postal Service failed to produce any evidence that this particular parking lot posed any "unique" public safety concerns, App. 28a, Judge Tymkovich concluded that the Postal Service had not carried its burden of proof. App. 39a ("[t]he Avon Post Office parking lot represents a subcategory of post office parking lots implicating no objectives beyond general public safety objectives"). He also rejected the panel majority's suggestion that the parking lot was a sensitive place simply because it was adjacent to the Avon Post Office building. App. 44a-45a n.10. ("Proximity to a government building, without more, cannot be sufficient to exempt a location from the Second Amendment."). With no presumption to apply, Judge Tymkovich determined that a straight-forward, means-ends analysis was required. *See* App. 38a-47a.

Although seemingly compelled by circuit precedent to apply intermediate scrutiny, App. 18a, Judge Tymkovich acknowledged that Bonidy had brought an as-applied challenge, where the "particular circumstances of the case" matter. App. 27a (quotation omitted). He further noted that in Second Amendment challenges, the relevant facts are "the restraints" the challenged law "places on *who* may carry a firearm and *where* he may carry it." App. 27a-28a (emphasis in original). To avoid treating Bonidy's

case as a facial challenge, Judge Tymkovich determined that the "who" is a subcategory of law-abiding, responsible citizens who are authorized to carry a concealed handgun for self-defense. App. 28a. The "where" is "a run-of-the-mill post office parking lot in a Colorado ski town[,]" App. 20a, that poses no "unique" public safety concerns for the Postal Service. App. 28a. Because the subcategory of persons represented by Bonidy pose no public safety risks and because the Postal Service failed to prove any "unique" public safety concerns vis-à-vis this parking lot, Judge Tymkovich concluded that, as applied, 39 C.F.R. § 232.1(*l*)'s prohibition did not survive intermediate scrutiny:

> [F]irearms restrictions on government property, in general, bear some relation to the government's interest in preserving public safety on its property. But our cases require *substantial* relation. The government presents general information about postal property, which might bear on a facial challenge. Yet it offers no information bearing on the particular facts of this as-applied challenge. And while it undoubtedly matters that the government is acting as proprietor here, I believe the majority incorrectly treats that fact as more or less conclusive. Indeed, the tenor of the majority's analysis would seem to give the government free rein to restrict Second Amendment rights based on little more than showing that it owns the property at issue. At the very least, intermediate scrutiny demands more. And while the government's

> justifications might suffice to uphold this regulation on rational-basis review, *Heller* demands more.

App. 46a-47a (emphasis in original) (citing *Heller*, 554 U.S. at 628 n.27).

REASONS FOR GRANTING THE PETITION

I. THE PANEL MAJORITY'S DECISION FURTHER EXACERBATES THE CONFLICT AMONG THE CIRCUITS REGARDING THE "PRESUMPTIVELY LAWFUL REGULATORY MEASURES" MENTIONED IN *HELLER*.

In *Heller*, this Court ruled that the Second Amendment codified a pre-existing, individual right "to possess and carry weapons in case of confrontation." *Heller*, 554 U.S. at 592. This Court further elaborated that the "inherent right of self-defense [is] central to the Second Amendment right." *Id*. at 628. Two years later, this Court acknowledged the fundamental nature of the right to keep and bear arms. *McDonald*, 561 U.S. at 778 (principal opinion) ("it is clear that the Framers and ratifiers of the Fourteenth Amendment counted the right to keep and bear arms among those fundamental rights necessary to our system of ordered liberty").

Although *Heller* conclusively established that the Second Amendment guarantees the individual right to keep and bear arms for self-defense, this Court did

not "undertake an exhaustive historical analysis . . . of the full scope of the [right]. . . ." *Heller*, 554 U.S. at 626. Instead, this Court left that inquiry to future cases. *Id*. at 635 ("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"). This Court did, however, make clear that the scope of the Second Amendment should be determined based upon the text, history, and tradition of the Amendment. *Id*. at 595 ("There seems to us no doubt, on the basis of both text and history, that the Second Amendment conferred an individual right to keep and bear arms."); *id*. at 626-27 (relying on history and tradition to note that "the right secured by the Second Amendment is not unlimited" and does not include a right to carry "dangerous and unusual weapons" (quotation omitted)). This Court also stated:

> [N]othing in our opinion should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons and the mentally ill, or laws forbidding the carrying of firearms in sensitive places such as schools and government buildings, or laws imposing conditions and qualifications on the commercial sale of arms.

Id. at 626-27. In a footnote immediately following this statement, this Court wrote: "We identify these presumptively lawful regulatory measures only as examples; our list does not purport to be exhaustive." *Id*. at 627 n.26. In *McDonald*, this Court repeated

Heller's statement regarding "presumptively lawful regulatory measures." 561 U.S. at 786 (principal opinion).

Heller's statement regarding "presumptively lawful regulatory measures" has generated a substantial amount of controversy. *Heller*, 554 U.S. at 721-22 (Breyer, J., dissenting) (suggesting that the statement regarding "presumptively lawful regulatory measures" was "judicial *ipse dixit*"); Lawrence Rosenthal, *The Limits of Second Amendment Originalism and the Constitutional Case for Gun Control*, 92 Wash. U. L. Rev. 1187, 1194 (2015) (suggesting that *Heller*'s "discussion of presumptively lawful gun-control measures is in considerable tension with its conclusions regarding the original meaning of the Second Amendment's operative clause"); Nelson Lund, *Second Amendment Standards of Review in A Heller World*, 39 Fordham Urb. L.J. 1617, 1621 (2012) ("Unfortunately, [*Heller*'s] approval of various regulations not at issue in the case . . . created a mist of uncertainty and ambiguity."). This statement has also confounded the lower courts, which have issued varied and inconsistent interpretations as they grapple with restrictions on the right to keep and bear arms. For example, three circuits seemingly presume that *any* "longstanding" firearms restriction does not burden the right to keep and bear arms.[6] *Heller v. District of Columbia*, 670 F.3d 1244,

[6] Originally promulgated in 1972, the challenged Postal Service regulation is only 3 years older than the restrictions this

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1253 (D.C. Cir. 2011) ("*Heller II*") ("[A] regulation that is "longstanding," which necessarily means it has long been accepted by the public, is not likely to burden a constitutional right; concomitantly the activities covered by a longstanding regulation are presumptively not protected from regulation by the Second Amendment."); *Drake v. Filko*, 724 F.3d 426, 440 (3d Cir. 2013) (New Jersey's "longstanding" requirement that residents demonstrate a "justifiable need" to publicly carry a handgun for self-defense "does not burden conduct within the scope of the Second Amendment's guarantee."); *Nat'l Rifle Ass'n of Am. v. Bureau of Alcohol, Tobacco, Firearms, & Explosives*, 700 F.3d 185, 196 (5th Cir. 2012) ("a longstanding, presumptively lawful regulatory measure – whether or not it is specified on *Heller*'s illustrative list – would likely fall outside the ambit of the Second Amendment").

In contrast, at least four circuits recognize that *Heller*'s "presumptively lawful regulatory measures" burden conduct protected by the Second Amendment because they have entertained as-applied challenges

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Court categorically struck down in *Heller*. That the regulation may have existed for 38 years without being challenged cannot create a presumption of constitutionality, especially considering that this Court did not rule that the Second Amendment protects an individual right until 2008. Moreover, as the first "post office[s] consisted of a desk or counter in a store, tavern, or coffeehouse[,]" *Initiative & Referendum Inst. v. U.S. Postal Serv.*, 685 F.3d 1066, 1072 (D.C. Cir. 2012), it is doubtful that history and tradition would support the challenged regulation.

to those measures. For example, as to 18 U.S.C. § 922(g)(1), which generally bars most felons from possessing firearms (and which likely prompted the inclusion of "prohibitions on the possession of firearms by felons" on the list of "presumptively lawful regulatory measures"), the Seventh Circuit explained:

> *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). The First and Fourth Circuits have also recognized that 18 U.S.C. § 922(g)(1) burdens the right to keep and bear arms by entertaining as-applied challenges. *United States v. Torres-Rosario*, 658 F.3d 110, 112-13 (1st Cir. 2011) (entertaining, but rejecting, an as-applied challenge to 18 U.S.C. § 922(g)(1)); *United States v. Moore*, 666 F.3d 313, 319-20 (4th Cir. 2012) (same). In fact, the United States itself has recognized that *Heller*'s "presumptively lawful regulatory measures" burden the right to keep and bear arms because it conceded that 18 U.S.C. § 922(g)(1) is subject to an as-applied challenge:

> *As the Government concedes*, *Heller*'s statement regarding the presumptive validity of felon gun dispossession statutes does not foreclose Barton's as-applied challenge. By

> describing the felon disarmament ban as "presumptively" lawful . . . , the Supreme Court implied that the presumption may be rebutted.

United States v. Barton, 633 F.3d 168, 173 (3d Cir. 2011) (emphasis added); *Binderup v. Holder*, No. 13-cv-06750, 2014 WL 4764424, at **22-33 (E.D. Pa. 2014) (holding 18 U.S.C. § 922(g)(1) unconstitutional as applied), *appeals pending*, Nos. 14-4549, 14-4550 (3d Cir.).

On the other hand, four circuits, including the circuit below, treat *Heller*'s "presumptively lawful regulatory measures" as categorical exceptions to the Second Amendment. *New York State Rifle & Pistol Ass'n v. Cuomo*, 804 F.3d 242, 258 n.76 (2d Cir. 2015) ("we think it likely that the *Heller* majority identified these 'presumptively lawful' measures in an attempt to clarify the scope of the Second Amendment's reach"); *United States v. Vongxay*, 594 F.3d 1111, 1115 (9th Cir. 2010) ("felons are categorically different from the individuals who have a fundamental right to bear arms"); *United States v. Rozier*, 598 F.3d 768, 771 (11th Cir. 2010) (per curiam) (*Heller* "suggests that statutes disqualifying felons from possessing a firearm under any and all circumstances do not offend the Second Amendment."). For example, in the instant case, the panel majority ruled that laws forbidding the carrying of firearms in sensitive places, such as government buildings, do not burden the right to keep and bear arms. App. 9a. The panel majority then melded the building and the customer

parking lot into a "single unit." App. 9a; *but see United States v. Rodriguez*, 460 F. Supp. 2d 902, 911 (S.D. Ind. 2006) ("The plain and ordinary meaning of the word 'building' does not include a parking lot."). After melding the building and the parking lot into a "single unit," the panel majority held that the parking lot is a "sensitive place" where – under its reading of *Heller* – the Second Amendment does not apply.[7] App. 9a; *but see*, *Nordyke v. King*, 563 F.3d 439, 460 (9th Cir. 2009) (noting that it would "seem[ ] odd" to consider a parking lot a "sensitive place"), *vacated on reh'g en banc*, 611 F.3d 1015 (9th Cir. 2010); App. 35a (Judge Tymkovich noting that the panel majority's reading of *Heller* "would give the government untrammeled power to restrict Second Amendment rights in any place even plausibly considered 'sensitive.' "). In short, under the panel majority's opinion,

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[7] The panel majority's broad interpretation of "sensitive places" could be used to ban the right to keep and bear arms from all government property. *See* App. 47a (Judge Tymkovich noting that the panel majority seemingly treated government-ownership of the parking lot as "conclusive"); *see also* Postal Service C.A. Br. at 13 (arguing that "[t]he right protected by the Second Amendment does not extend to government property"). At a minimum, the panel majority's interpretation could be used to create buffer-zones around all government buildings. *See* App. 44a n.10 (Judge Tymkovich suggesting that, under the panel majority's opinion, "a government field otherwise low on the sensitivity scale could be transformed into a location where firearms [are] forbidden . . . by the erection of a public bathroom."); *but see Palmer v. District of Columbia*, 59 F. Supp. 3d 173, 179-83 (D.D.C. 2014) (striking down the District of Columbia's ban on carrying handguns in public).

all future challenges to the "presumptively lawful regulatory measures," within the Tenth Circuit, will be summarily disposed of because the Second Amendment is not implicated. *See United States v. McCane*, 573 F.3d 1037, 1047 (10th Cir. 2009) (summarily rejecting a challenge to 18 U.S.C. § 922(g)(1), in light of *Heller*'s "presumptively lawful regulatory measures"); *but see id*. at 1047-50 (Tymkovich, J., concurring) (explaining how summarily rejecting challenges to *Heller*'s "presumptively lawful regulatory measures" stymies constitutional scrutiny of those measures).

The net result of these conflicting interpretations of *Heller*'s statement regarding "presumptively lawful regulatory measures" is that the right to keep and bear arms varies from circuit to circuit. For example, a non-violent felon in Pennsylvania may be able to keep and bear arms, *see Binderup*, 2014 WL 4764424, at **21-33; whereas, a non-violent felon in Wyoming may be permanently barred from possessing a handgun for self-defense. *See McCane*, 573 F.3d at 1048-50 (Tymkovich, J., concurring). Likewise, a law-abiding, responsible citizen may be able to store his handgun in his locked vehicle parked in a government-owned, parking lot in Montana, *see Nordyke*, 563 F.3d at 460; whereas, a similar law-abiding, responsible citizen may be prevented from doing so in Colorado. *See* App. 9a. The ability to exercise a fundamental right cannot depend on where an individual lives. *See McDonald*, 561 U.S. at 805-58 (Thomas, J., concurring in part and concurring in judgment). Accordingly, this Court's

review is warranted to clear up the confusion in the circuits surrounding *Heller*'s statement regarding "presumptively lawful regulatory measures" and to bring nationwide uniformity to the scope of the fundamental right to keep and bear arms.

II. THE PANEL MAJORITY'S DECISION EXEMPLIFIES HOW THE CIRCUITS ARE TURNING THE RIGHT TO KEEP AND BEAR ARMS INTO A SECOND-CLASS RIGHT.

In *Heller*, this Court struck down the District of Columbia's ban on law-abiding, responsible citizens possessing handguns in the home for self-defense. 554 U.S. at 628-29. Because *Heller* was "this Court's first in-depth examination of the Second Amendment," it did not precisely identify how restrictions on the right to keep and bear arms should be analyzed. *Id*. at 635. Instead, in light of the draconian nature of the District of Columbia's ban, this Court simply ruled that it would flunk "any of the standards of scrutiny" that have been "applied to enumerated constitutional rights." *Id*. at 628-29. Although this Court avoided addressing how less draconian restrictions on the right to keep and bear arms should be analyzed, it established two principles. First, restrictions on the right to keep and bear arms are not subject to only rational-basis review. *Id*. 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."). Second, courts should not apply a "judge-empowering 'interest balancing inquiry[:]'"

> We know of no other enumerated constitutional right whose core protection has been subjected to a freestanding "interest-balancing" approach. The very enumeration of the right takes out of the hands of government – even the Third Branch of Government – the power to decide on a case-by-case basis whether the right is *really worth* insisting upon. A constitutional guarantee subject to future judges' assessments of its usefulness is no constitutional guarantee at all. . . .

Id. at 634 (emphasis in original). The lower courts, however, have ignored these principles, and have set upon a course of action that will render the right to keep and bear arms a second-class, home-bound right.

Most circuits, including the circuit below, have adopted a "two-step" test. *New York State Rifle & Pistol Ass'n*, 804 F.3d at 254 n.49 (Second Circuit listing cases from the Third, Fourth, Fifth, Sixth, Seventh, Ninth, Tenth, Eleventh, and D.C. Circuits, that, like itself, have applied a "two-step" test). Under this test, most courts purport to examine whether the challenged restriction burdens the Second Amendment right; if so, they choose a level of scrutiny to apply. *See*, *e.g*., *United States v. Chester*, 628 F.3d 673, 680 (4th Cir. 2010); *Ezell v. City of Chicago*, 651 F.3d 684, 702-03 (7th Cir. 2011). A few courts properly

required the government to prove that the challenged restriction does not burden the right to keep and bear arms. *See*, *e.g.*, *Ezell*, 651 F.3d at 702-03. Others dodge the issue by assuming that the Second Amendment is implicated, like the panel majority did below. App. 9a (Our "alternative holding *assumes* that the right to bear arms recognized in *Heller* in the home would also apply, although with less force, outside the home." (emphasis in original)). Yet, assuming the Second Amendment right is implicated – rather than precisely articulating the scope of the right – allows these courts to easily decide that the challenged restriction survives the level of scrutiny they choose to apply. *See Heller II*, 670 F.3d at 1261 ("We need not resolve th[e] [first] question, however, because even assuming [the challenged restrictions] do impinge upon the right protected by the Second Amendment, we think intermediate scrutiny is the appropriate standard of review and the prohibitions survive that standard."); *Woollard v. Gallagher*, 712 F.3d 865, 876 (4th Cir. 2013) (assuming that the right to keep and bear arms applies outside the home "because the [challenged law] passes constitutional muster under . . . the applicable standard – intermediate scrutiny").

At step two, the lower courts generally choose intermediate scrutiny. Some courts try to justify their choice by finding that the challenged restriction does not substantially burden the Second Amendment

right.[8] *Jackson v. City & Cnty. of San Francisco*, 746 F.3d 953, 965 (9th Cir. 2014) (applying a form of intermediate scrutiny to a firearms restriction nearly identical to a restriction struck down in *Heller* because it did "not impose a substantial burden on conduct protected by the Second Amendment"). Other courts choose intermediate scrutiny because of their fear of firearms. *E.g.*, App. 10a-11a ("[t]he risk inherent in firearms . . . distinguishes the Second Amendment right from other fundamental rights that have been held to be evaluated under a strict scrutiny test").

This Court, however, generally applies strict scrutiny when any constitutional right is at stake. *See*, *e.g.*, *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 339-40 (2010) (principal opinion); *Washington v. Glucksberg*, 521 U.S. 702, 721 (1997) (strict scrutiny applies to "fundamental" liberty interests); *Poe v. Ullman*, 367 U.S. 497, 548 (1961) (Harlan, J., dissenting) ("[E]nactment[s] involv[ing] . . . fundamental aspect[s] of 'liberty' . . . [are] subjec[t] to 'strict scrutiny.' "). Because no constitutional right is "less 'fundamental' than" others, there is simply "no principled basis" upon which the lower courts may "create . . . a hierarchy of constitutional values" so that a disfavored constitutional right may be subject to only

[8] The Second Circuit – in direct defiance of *Heller* – applies rational-basis review unless the restriction "substantially burdens" the right to keep and bear arms. *New York State Rifle & Pistol Ass'n*, 804 F.3d at 257-60.

intermediate scrutiny.[9] *Valley Forge Christian Coll. v. Ams. United for Separation of Church & State, Inc.*, 454 U.S. 464, 484 (1982); *Ullmann v. United States*, 350 U.S. 422, 428-29 (1956) ("To view a particular provision of the Bill of Rights with disfavor inevitably results in a constricted application of it. This is to disrespect the Constitution."). Nor may the fundamental right to keep and bear arms be "treat[ed]" as a "second-class right, subject to an entirely different body of rules than the other Bill of Rights guarantees" simply because it has "public safety implications" and some factions of society fear firearms. *McDonald*, 561 U.S. at 778-83 (principal opinion); *see also Heller*, 554 U.S. at 636 ("We are aware of the problem of handgun violence in this country. . . . But the enshrinement of constitutional rights necessarily takes certain policy choices off the table."). Indeed, the drafters of the Second Amendment believed "the people," could safely "keep and bear arms" despite

[9] A few opinions have been faithful to this Court's precedents by applying a higher level of scrutiny or utilizing a *Heller*-like categorical approach. *E.g.*, *Ezell*, 651 F.3d at 708 (ruling that a level of scrutiny higher than intermediate scrutiny was required, "if not quite 'strict scrutiny' "); *Moore v. Madigan*, 702 F.3d 933, 936-42 (7th Cir. 2012) (utilizing a *Heller*-like categorical approach to strike down Illinois's ban on public carry); *Palmer*, 59 F. Supp. 3d at 179-83 (utilizing a *Heller*-like categorical approach to strike down the District of Columbia's ban on carrying handguns in public); *Morris v. U.S. Army Corps of Eng'rs*, 60 F. Supp. 3d 1120, 1122 (D. Idaho 2014) (utilizing a *Heller*-like categorical approach to strike down a firearms ban on recreational lands), *appeal pending sub nom. Nesbitt v. U.S. Army Corps of Eng'rs*, No. 14-36049 (9th Cir.).

public safety concerns. U.S. Const. Amend. II; *see* David B. Kopel, *The Samurai, The Mountie, And The Cowboy* 420 (1992).

If applying intermediate scrutiny to restrictions on the right to keep and bear arms were not bad enough, the form of intermediate scrutiny many of the lower courts have applied further relegates the Second Amendment to the status of a "poor relation" vis-à-vis the other freedoms in the Bill of Rights. *See Dolan v. City of Tigard*, 512 U.S. 374, 392 (1994). To pass constitutional muster under intermediate scrutiny, the government has the burden of demonstrating that the challenged restriction is substantially related to an important government interest. *See Clark v. Jeter*, 486 U.S. 456, 461 (1988). And, to be substantially related, this Court requires that the challenged restriction actually advance the government's interest in a meaningful way and not burden more protected conduct than necessary. *Turner Broad. Sys., Inc. v. F.C.C.*, 512 U.S. 622, 661-62 (1994) ("*Turner I*").

No one disputes that, if adequately proven, public safety can be an important government interest. But most courts simply accept the government's assertion of a public safety interest. *See United States v. Skoien*, 614 F.3d 638, 651-52 (7th Cir. 2010) (en banc) (Sykes, J., dissenting) (criticizing the majority for relieving the government of its burden of proving an important interest). This is an abdication of the judicial role because if the mere assertion of a public safety interest were sufficient, then there would be no

point in ever evaluating the government's interest when the fundamental right to keep and bear arms is at stake. Only rarely have courts sought to ensure that the government is not using the assertion of public safety as an excuse to disarm individuals by requiring the government to produce "meaningful evidence, not mere assertions," of its public safety interest. *Heller II*, 670 F.3d at 1259. Even more troubling is that only a few courts have required the government to produce "actual, reliable evidence" that the challenged restriction will advance the government's asserted public safety interest. *See Ezell*, 651 F.3d at 709. The rest of the courts simply take the government's word for it. *See*, *e.g.*, *Kachalsky v. Cnty. of Westchester*, 701 F.3d 81, 97 (2d Cir. 2012); *Drake*, 724 F.3d at 439.

The end result is that the lower courts are applying a watered-down form of intermediate scrutiny that strongly resembles the "judge-empowering interest-balancing test" rejected by this Court in *Heller*. Allen Rostron, *Justice Breyer's Triumph in the Third Battle over the Second Amendment*, 80 Geo. Wash. L. Rev. 703, 706-07 (2012) (The lower courts have "effectively embraced the sort of interest-balancing approach that [*Heller*] condemned, [by] adopting an intermediate scrutiny test and applying it in a way that is highly deferential to legislative determinations and that leads to all but the most drastic restrictions on guns being upheld."). This pattern, if allowed to continue, will ultimately limit *Heller* to its facts. Accordingly, this Court's review is warranted to prevent the lower

courts from rendering the fundamental right to keep and bear arms a second-class, home-bound right.

III. THE PANEL MAJORITY'S APPLICATION OF A DEFERENTIAL FORM OF INTERMEDIATE SCRUTINY VIOLATES *HELLER* AND OTHER DECISIONS OF THIS COURT REGARDING HOW INFRINGEMENTS ON FUNDAMENTAL RIGHTS SHOULD BE ANALYZED.

Even if some restrictions that marginally touch on the Second Amendment right may be subject to only intermediate scrutiny, 39 C.F.R. § 232.1(*l*)'s prohibition on Bonidy safely storing his handgun in his locked vehicle in the Avon Post Office parking lot while he picks up his mail is not one of them. The combined effect of the Avon Post Office's failure to provide home mail delivery and 39 C.F.R. § 232.1(*l*)'s prohibition, means that, in order to receive communications by mail, Bonidy must relinquish his Second Amendment right to carry a handgun for self-defense and drive approximately 10 miles round trip to the Avon Post Office unarmed.[10] C.A. App. A17. This

[10] Contrary to the panel majority's opinion, the burden on Bonidy's Second Amendment right is not limited to only the parking lot, *see* App. 12a-13a; rather, the burden extends everywhere Bonidy travels before and after picking up his mail. *See* App. 55a. The restricted public parking on the street adjacent to the Avon Post Office parking lot does not lessen this burden. *See* App. 54a (street parking is "prohibited when there are more than 2 inches of snow on the ground").

burden on Bonidy's right to carry his handgun for self-defense demonstrates that strict scrutiny should have been applied. *Heller*, 554 U.S. at 628 ("the inherent right of self-defense [is] central to the Second Amendment right"); *see Jackson v. City & Cnty. of San Francisco*, 135 S. Ct. 2799, 2801 (2015) (Thomas, J., dissenting from denial of certiorari) ("[W]hen a law burdens a constitutionally protected right, we have generally required a higher showing than [intermediate scrutiny]."); *see also*, David B. Kopel, *The Natural Right of Self-Defense: Heller's Lesson for the World*, 59 Syracuse L. Rev. 235, 247 (2008) ("the time that is most appropriate for rigorous judicial review is when a government infringes on one of the natural rights[,]" such as the natural right of self-defense).

Not to be ignored is the concomitant infringement upon Bonidy's First Amendment right to receive communications by mail. *Blount v. Rizzi*, 400 U.S. 410, 416 (1971) ("The United [States] may give up the Post Office when it sees fit, but while it carries it on the [use] of the mails is almost as much a part of free speech as the right to use our tongues. . . ." (quotation omitted)); *see Lamont v. Postmaster Gen.*, 381 U.S. 301, 307 (1965) (requirement that recipient request in writing that "communist political propaganda" be delivered to him was a violation of the recipient's First Amendment rights.). It is axiomatic that strict scrutiny applies when a challenged restriction requires a person to choose between two fundamental rights. *Dunn v. Blumstein*, 405 U.S. 330, 342-43

(1972) (applying strict scrutiny to a state law that forced a person to choose between the fundamental right to travel and the fundamental right to vote); *see Shapiro v. Thompson*, 394 U.S. 618, 634 (1969) (A classification that "serves to penalize the exercise of [a fundamental right], unless shown to be necessary to promote a compelling governmental interest, is unconstitutional."); *cf. Frost & Frost Trucking Co. v. Railroad Comm'n of Cal.*, 271 U.S. 583, 593-94 (1926) ("[T]he power of the state . . . is not unlimited, and one of the limitations is that it may not impose conditions [on the acceptance of its favors] which require the relinquishment of constitutional rights."). In short, the decision of the court below to apply a form of intermediate scrutiny cannot be squared with this Court's precedents when two fundamental rights are at stake.

What is even more questionable than the failure to apply strict scrutiny is the deferential form of intermediate scrutiny utilized. The panel majority first suggested "[t]he government often has more flexibility to regulate when it is acting as a proprietor . . . than when it is acting as a sovereign. . . ." App. 11a. No one disputes that the government, like any proprietor, has the right to manage its property and has the right to exclude trespassers. *Adderley v. Florida*, 385 U.S. 39, 47-48 (1966). Yet, as Judge Tymkovich noted, "the tenor of the majority's analysis would seem to give the government free rein to restrict Second Amendment rights based on little more than showing that it owns the property at issue."

App. 47a. Moreover, this Court has emphasized that the government does not have carte blanche to infringe on constitutional rights when acting as a proprietor. *See United States v. Kokinda*, 497 U.S. 720, 725 (1990) (plurality opinion) ("The Government, even when acting in its proprietary capacity, does not enjoy absolute freedom from First Amendment constraints, as does a private business. . . ."); *see* App. 58a (district court noting that "constitutional freedoms do not end at the government property line" (citing *Initiative & Referendum Inst. v. U.S. Postal Serv*., 417 F.3d 1299 (D.C. Cir. 2005))). This is especially true when the government not only invites, but – as in this case – compels the public to use its property. *Cf. United States v. Apel*, 134 S. Ct. 1144, 1154 (2014) (Ginsburg, J., concurring) ("When the Government permits the public onto part of its property . . . its 'ability to permissibly restrict expressive conduct is very limited.'" (quoting *United States v. Grace*, 461 U.S. 171, 177 (1983))).

At most, government ownership of the property may weigh in favor of finding that the asserted government interest is important. *See* App. 38a. But, in an as-applied challenge, government ownership of the property alone cannot establish that the asserted interest is important or *ipso facto* prove that the challenged restriction is substantially related to that interest. *See Turner Broad. Sys., Inc. v. F.C.C.*, 520 U.S. 180, 229 (1997) ("*Turner II*") (O'Connor, J., joined by Scalia, Thomas, and Ginsburg, JJ., dissenting) (under intermediate scrutiny, "we have an independent

duty to . . . examine the fit between" the means and the ends). By essentially treating government ownership of the property as dispositive, the panel majority never analyzed whether the restriction, as applied to the facts in this case, actually advanced the Postal Service's asserted public safety interest.

Instead, the panel majority simply deferred to the Postal Service's claim that 39 C.F.R. § 232.1(*l*)'s prohibition vis-à-vis the parking lot was related to its asserted public safety interest. App. 16a ("[w]e do not second-guess the wisdom of the [Postal Service's] determination that its business operations will be best served by a simple rule banning all private firearms from postal property"). Such deference to an executive agency may be appropriate in conducting a "rational-basis" review. *See* App. 47a. But in analyzing infringements on fundamental rights, such deference is prohibited. *See Turner I*, 512 U.S. at 671 n.2 ("[F]actual findings accompanying economic measures that are enacted by Congress itself and that have only incidental effects on speech merit greater deference than . . . *restrictions imposed by administrative agencies*. . . ." (emphasis added) (internal citations omitted)); *Landmark Communications, Inc. v. Virginia*, 435 U.S. 829, 843 (1978) ("Deference to a legislative finding cannot limit judicial inquiry when First Amendment rights are at stake."); *cf. Richmond v. J.A. Croson Co.*, 488 U.S. 469, 501 (1989) ("blind judicial deference to legislative or executive pronouncements . . . has no place in equal protection analysis").

Making matters worse, the panel majority seemingly gave the Postal Service a free pass because anything short of a nationwide regulation would have inconvenienced the agency.[11] App. 13a-14a. Administrative convenience, however, can never justify the infringement of a fundamental right. *See I.N.S. v. Chadha*, 462 U.S. 919, 944 (1983) ("the fact that a given law or procedure is efficient, convenient, and useful in facilitating functions of government, standing alone, will not save it if it is contrary to the Constitution"); *United States v. Nat'l Treasury Employees Union*, 513 U.S. 454, 474 (1995) ("[a] blanket burden on . . . speech . . . requires a much stronger justification than the Government's dubious claim of administrative convenience"). Just as "[b]road prophylactic rules in the area of free expression are suspect[,]" *NAACP v. Button*, 371 U.S. 415, 438 (1963), so too is a Postal Service regulation that fails to recognize the difference between a post office parking lot in "midtown Manhattan" and a "small-town, low-use" post office parking lot "high in the Rocky Mountains of Colorado." App. 54a, 65a.

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[11] Contrary to the panel majority's suggestion, *U.S. Postal Serv. v. Council of Greenburgh Civic Ass'ns*, 453 U.S. 114 (1981), does not stand for the proposition that all nationwide Postal Service regulations are immune from as-applied, constitutional attacks. *See* App. 15a-16a. In that case, this Court upheld *Congress*'s nationwide approach under a reasonableness review because the statute had only a *de minimis* effect on speech in a non-public forum. *Council of Greenburgh Civic Ass'ns*, 453 U.S. at 127-34.

Moreover, as Judge Tymkovich explained, 39 C.F.R. § 232.1(*l*)'s prohibition is not substantially related to the Postal Service's asserted public safety interest. App. 38a-43a. First, the prohibition is far too broad because it completely disarms Bonidy and an entire subcategory of law-abiding, responsible citizens like him who have been issued permits to carry a concealed handgun for self-defense and who pose no public safety risks.[12] App. 28a, 38a-42a; *see Ezell*, 651 F.3d at 708 ("the plaintiffs *are* the 'law-abiding, responsible citizens' whose Second Amendment rights are entitled to full solicitude under *Heller*. . . ." (emphasis in original)); *see also Ward v. Rock Against Racism*, 491 U.S. 781, 799 (1989) (to satisfy intermediate scrutiny the challenged regulation cannot burden substantially more constitutional conduct than is necessary to further the government's important interest). Second, because the Postal Service failed to prove that there are any "unique" public safety concerns vis-à-vis the Avon Post Office parking lot, the only way that 39 C.F.R. § 232.1(*l*)'s burden on Bonidy's Second Amendment right could be remotely related to the Postal Service's asserted public safety interest is to speculate that someone might break into Bonidy's vehicle and steal his handgun.[13] *See* App.

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[12] Congress has recognized that this subcategory of law-abiding, responsible citizens pose no public safety risks by exempting them from the federal ban on possessing firearms in school zones. 18 U.S.C. § 922(q)(2)(B).

[13] That the Avon Post Office parking lot does not pose any "unique" public safety concerns for the Postal Service does not

(Continued on following page)

39a-41a. As Judge Tymkovich noted, the same kind of speculative risk did not save the handgun ban in *Heller*. App. 41a. In any event, mere speculation cannot justify the infringement of a fundamental right. *Edenfield v. Fane*, 507 U.S. 761, 770-71 (1993) (the government cannot justify a burden on speech "by mere speculation or conjecture; rather, [it] . . . must demonstrate that the harms it recites are real and that its restriction will in fact alleviate them to a material degree"). Finally, as both the district court and Judge Tymkovich recognized, the availability of less restrictive means undercuts any suggestion that 39 C.F.R. § 232.1(*l*)'s prohibition satisfies intermediate scrutiny. App. 66a (district court noting that an exception to 39 C.F.R. § 232.1(*l*) could be made so that Bonidy – a law-abiding, responsible citizen with a Colorado concealed carry permit – could safely store his handgun in his locked vehicle while he picks up his mail); App. 42a-43a (Judge Tymkovich noting that the Postal Service could amend its regulation to authorize the granting of individual exceptions for law-abiding, responsible citizens to safely store their handguns in their locked vehicles while picking up their mail in low crime areas).

In sum, this court's review is warranted because the panel majority's application of a deferential form of intermediate scrutiny violates *Heller* and other decisions of this court regarding how infringements

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diminish Bonidy's interest in personal safety or his right to keep and bear arms for self-defense.

on fundamental rights should be analyzed. This is especially true considering that the deferential form of intermediate scrutiny applied was akin to rational-basis review, which *Heller* expressly prohibited.

CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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