

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

DEBBIE BONIDY, TAB BONIDY)
AND NATIONAL ASSOCIATION)
FOR GUN RIGHTS,)
)
) Plaintiffs,)
)
) vs.) 1:10-cv-02408-RPM
)
UNITED STATES POSTAL)
SERVICE, STEVE RUEHLE AND)
PATRICK DONOHUE,)
) Defendants.)

MOTION HEARING
TRANSCRIPT OF PROCEEDINGS

Proceedings held before the HONORABLE RICHARD P. MATSCH, U.S. District Judge for the District of Colorado, beginning at 1:59 p.m. on the 18th day of November, 2011 in Courtroom A, United States Courthouse, Denver, Colorado.

APPEARANCES

For the Plaintiffs: James M. Manley, Esq.
 Mountain States Legal Foundation
 2596 South Lewis Way
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For the Defendants: Lesley Rebecca Farby, Esq.
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P R O C E E D I N G S

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2 (At 1:59 p.m. on November 18, 2011, in the United States
3 District Court at Denver, Colorado, before the HONORABLE
4 RICHARD P. MATSCH, U.S. District Judge, with counsel for the
5 parties present, the following proceedings were had:)

6 THE COURT: Please be seated. We're here in Civil
7 10-CV-2408, Debbie Bondy and Tab--Bonidy, I think it is, and
8 Tab Bonidy, National Association for Gun Rights against the
9 United States Postal Service, John Potter and Steve Ruehle in
10 their roles as Postmaster General and Postmaster at Avon, on
11 the defendants' motion to dismiss the second amended
12 complaint.

13 So, Mr. Manley, for the plaintiffs, and Ms. Farby
14 for the defendants, good afternoon. Well, on the allegations
15 of the plaintiffs here, they live in the mountains, outside
16 of Avon, Colorado. They don't receive postal service at
17 their home; therefore, to get their mail they drive to Avon
18 and to the post office there. As I understand it, the post
19 office there has adjacent to it a public parking lot, but
20 it's under the ownership and control of the Postal Service,
21 and the regulation that is involved in the case prohibits a
22 firearm, carrying or having possession of a firearm, anywhere
23 on this property, which includes the parking lot. And the
24 plaintiffs say that this impinges on their rights protected
25 by the Second Amendment.

1 And in addressing the issue on motion to dismiss,
2 there are two claims here; one is the parking lot, one is the
3 building, and they may be different, but the defendant's
4 position, as I understand it, is that we should, as the Tenth
5 Circuit has done in connection with a different statute, the
6 criminal statute, 922, has stated that the Supreme Court--
7 their understanding of the Supreme Court view is that there
8 should be a two-step analysis. One is whether the regulation
9 is affecting conducting as protected by the Second Amendment,
10 and then the second is under whatever standard of review,
11 there is justification for that effect on the affected
12 conduct.

13 So, Ms. Farby, I'll hear from you in support of
14 your motion, and, you know, I recognize, as you do, that the
15 specific conduct involved in Heller was having a firearm in
16 their home for self-defense, but I don't understand you to be
17 arguing here, and maybe I'm mistaken, that you're limiting
18 the Second Amendment protection to the home, are you?

19 MS. FARBY: Well, Your Honor, the Court need not address
20 how far--whether the Second Amendment right extends outside
21 the home, and if so, how far it extends, because the Supreme
22 Court has made clear that however far that right extends, it
23 does not extend to sensitive places.

24 THE COURT: Well, I know, but the question of whether
25 this is a sensitive area or not is a question.

1 MS. FARBY: Yes, Your Honor, and the plaintiff's claims
2 that the United States Postal Service regulation violates
3 their Second Amendment right, fails for a number of reasons.
4 There's at least four reasons which I can briefly list, and
5 then I can explain each one in slightly more detail.

6 First, the plaintiff's claims are foreclosed by the
7 Supreme Court decision in Heller. The Court stated there
8 that--

9 THE COURT: Well, I don't agree with that. That's what
10 I was just talking about.

11 MS. FARBY: Well, Your Honor, what the Court there said
12 is that its opinion should not be taken to cast doubt on laws
13 forbidding firearms in sensitive places.

14 THE COURT: Right.

15 MS. FARBY: So--

16 THE COURT: I understand that. What is sensitive about
17 this parking lot? That's going to be the issue in the case,
18 isn't it?

19 MS. FARBY: Absolutely, Your Honor. I will jump to that
20 issue.

21 THE COURT: Yeah, okay.

22 MS. FARBY: The Court made clear that the specific
23 sensitive places that it listed in the Heller decision, which
24 was schools and government buildings--

25 THE COURT: Sure.

1 MS. FARBY: --were not the only kinds of sensitive
2 places, and the Court was specific that the places and the
3 kinds of regulations were not an exhaustive list. Many
4 Courts have upheld restrictions on firearms in sensitive
5 places beyond the inside of schools and government buildings.
6 But the Court need not decide the full scope of what might
7 constitute a sensitive place in order to conclude that Postal
8 property is a sensitive.

9 THE COURT: Well--

10 MS. FARBY: That's the approach that the Fifth Circuit
11 took in United States versus Dorrison (phonetic). The Fifth
12 Circuit there found that the Postal parking lot at issue
13 there was a sensitive place under Heller and it upheld the
14 exact regulation--

15 THE COURT: Well, that's an employee parking lot.

16 MS. FARBY: In that case, Your Honor, it was an employee
17 parking lot--

18 THE COURT: Right.

19 MS. FARBY: --but the decision said that the parking lot
20 there was used as a place of regular government business.

21 THE COURT: Sure. That's where the employees come to
22 park, and, you know, you can take judicial notice that
23 there's been employee, co-employee violence in Postal Service
24 places.

25 MS. FARBY: That's true, Your Honor.

1 THE COURT: That's not this case.

2 MS. FARBY: That is not this case, but the parking lot,
3 the public parking lot that's used by Postal patrons in this
4 case, is also a sensitive place.

5 THE COURT: This isn't limited to Postal patrons, is it?

6 MS. FARBY: The parking lot?

7 THE COURT: Yeah.

8 MS. FARBY: Well, employees may park there. I'm not
9 sure--

10 THE COURT: It isn't limited to Postal employees or
11 Postal patrons, is it?

12 MS. FARBY: No, Your Honor.

13 THE COURT: Okay, so it's a public parking lot.

14 MS. FARBY: It is a public parking lot but it is on
15 property that's under the charge and control of the Postal
16 Service.

17 THE COURT: I understand that.

18 MS. FARBY: It is--

19 THE COURT: That's not disputed.

20 MS. FARBY: It--the parking lot itself facilitates the
21 Postal function that Postal--to which Postal property is
22 dedicated.

23 THE COURT: But I'm understanding you could--a person
24 can park in this Postal-owned parking lot and do anything and
25 not just go to the post office, right?

1 MS. FARBY: I'm not sure about that, Your Honor.

2 THE COURT: Well, that's what the allegation is, and
3 we're stuck with the allegation. When it says public, to me
4 that means not restricted to Postal patrons.

5 MS. FARBY: The parking lot is certainly dedicated for
6 the use of Postal patrons.

7 THE COURT: That isn't the issue, though, Counsel, it's
8 who can park there.

9 MS. FARBY: The parking lot is designed to serve a
10 Postal function.

11 THE COURT: Who can park there? Anybody can--

12 MS. FARBY: Anybody. Anybody can park there, Your
13 Honor.

14 THE COURT: Okay.

15 MS. FARBY: At least we'll assume that for purposes of
16 this motion.

17 THE COURT: Right, we have to, because that's the
18 complaint.

19 MS. FARBY: Yes, Your Honor. The Postal parking lot,
20 like the Postal building itself, and all other property under
21 the charge and control of the Postal Service, is sensitive
22 for a number of different reasons. It is government property
23 that is used for a government purpose, just like the parking
24 lot that was at issue in Dorrison, and it is pursuant to the
25 Postal Service's constitutional and statutory authority to

1 provide Postal services and administer Postal property.

2 THE COURT: All right, what is providing Postal
3 services? It's providing them to the public--

4 MS. FARBY: Yes.

5 THE COURT: --right? Okay.

6 MS. FARBY: Because it is a government property used to
7 facilitate a government function, the government should be
8 able to able to assess the security needs of that property,
9 just as it should for courthouses, like this one, military
10 bases, Social Security offices, and the various other kinds
11 of government property that exists. As Your Honor
12 referenced, unfortunately, there is a history of violence on
13 Postal property--

14 THE COURT: Right.

15 MS. FARBY: --and that makes Postal property
16 particularly sensitive. Postal property is also a particular
17 category of government property where large numbers of people
18 congregate on a daily basis. I think it's instructive to
19 look at what the District Court said in The United States
20 versus Matzi Andaro case (phonetic), out of the Eastern
21 District of Virginia, which was subsequently affirmed by the
22 Fourth Circuit, and that case dealt with motor vehicles on
23 national parkland. But what the Court said, analyzing
24 Heller, was that the schools and government buildings are
25 sensitive places because, unlike homes, they are public

1 properties where large numbers of people, often strangers,
2 and including children, congregate, and, therefore, the
3 Second Amendment leaves the judgment of whether and how to
4 regulate firearms and other weapons to policy makers, not to
5 the judiciary.

6 The same is true of the Postal property that's at
7 issue here. But, unlike national parks, for example, Postal
8 property is location where monetary transactions routinely
9 take place. Those monetary transactions also make Postal
10 property sensitive. And it's the mail itself, the Postal
11 function, that makes Postal property sensitive. The Postal
12 Service is responsible for the--

13 THE COURT: Well, aren't all these things justifications
14 that I'm being asked to assume? I mean, this is a threshold
15 motion. This is a motion that says there's no claim for
16 relief stated. You're giving me a lot of support for the
17 regulation, but that isn't before me.

18 MS. FARBY: Well, Your Honor--

19 THE COURT: You're asking me to accept that, you know,
20 on its face, this absolute prohibition is justified. Well,
21 it's hard for me to do that under 12(b)(6).

22 MS. FARBY: Your Honor, the Supreme Court has made clear
23 that when the government is acting in its role as a
24 proprietor of property, not in its role as the regulator or
25 the licensor, which is often the case in some of these Second

1 Amendment decisions. But here the government is acting in
2 its role as proprietor of its own property, and in those
3 circumstances the Courts have made clear that the government
4 regulation is valid unless it is unreasonable--

5 THE COURT: Well--

6 MS. FARBY: --arbitrary or capricious, and so,
7 therefore--

8 THE COURT: --if this were a case in which the
9 government was--Postal Service was restricting what could be
10 on a bumper sticker, for example, parked in this public
11 parking lot, would that be justified, because it's
12 proprietary?

13 MS. FARBY: Not necessarily, Your Honor, but the
14 standard--

15 THE COURT: No, of course not.

16 MS. FARBY: --but the standard would be whether it was a
17 reasonable regulation, and so here too, because the
18 Postal--the Postal Service is acting in its proprietary
19 capacity, its actions--

20 THE COURT: But I'm--that's what I'm challenging, your
21 position that, because it's proprietary you can't look at
22 whether it affects any constitutionally protected activity.
23 You would agree, wouldn't you, that if somebody comes in
24 there with a bumper sticker that says, "I hate the Postal
25 Service," the Postal Service can't keep them out.

1 MS. FARBY: Yes, Your Honor, because that would likely
2 be an unreasonable regulation, but here--

3 THE COURT: Well--

4 MS. FARBY: --the Postal Service decision to prohibit
5 firearms on its property to further the interest in public
6 safety--

7 THE COURT: Well, isn't that the very question, whether
8 that is reasonable, whether there's no way in which, by a
9 permitting process or in any other fashion, like trigger
10 locks--you know, there are a lot of ways in which a firearm,
11 on this--at least the public parking lot, can be considered
12 inaccessible while it's on the public parking area. Right?

13 MS. FARBY: Right.

14 THE COURT: You could have a requirement that there be a
15 trigger lock, that it be in a glove compartment, locked. And
16 what would be wrong with that?

17 MS. FARBY: Well, the Supreme Court has made clear that
18 when--

19 THE COURT: Don't talk about the Supreme Court, I'm
20 talking about this case.

21 MS. FARBY: Okay. The Postal Service is not required to
22 enact the most reasonable, or the only reasonable,
23 regulation, so just because the Postal Service could have
24 imposed a standard that was less stringent than the one it
25 has imposed, does not mean that the standard it did impose is

1 unreasonable when it's acting in its proprietary capacity.
2 That's established case law. As long as the Postal Service
3 regulation is reasonable then it passes muster, and here the
4 Postal Service--

5 THE COURT: Well, how do I know whether it's reasonable?
6 That's the problem with this being considered on a motion to
7 dismiss. The reasonableness of it depends upon whether there
8 are any other alternatives.

9 MS. FARBY: Well, again, Your Honor, the Court has made
10 clear that the Postal Service is not limited to the least
11 restrictive means available to it to further its purpose.

12 THE COURT: What Court said that?

13 MS. FARBY: The Supreme Court, Your Honor.

14 THE COURT: In what?

15 MS. FARBY: I'll provide the cite, Your Honor.

16 (Pause.)

17 The case I'm referring to, and I believe that
18 language is found in many different cases, but the specific
19 language I'm referring to is in Board of Trustees of State
20 University of New York versus Fox, which is a 1989 Supreme
21 Court--

22 THE COURT: Yeah, which doesn't deal with the Postal
23 Service.

24 MS. FARBY: No, it doesn't deal with the Postal
25 Service--

1 THE COURT: No.

2 MS. FARBY: --but what it does deal with is the standard
3 for addressing the reasonableness of a government
4 regulation--

5 THE COURT: Yeah, and what--

6 MS. FARBY: --and that--

7 THE COURT: In what context did that come up?

8 MS. FARBY: Well, that was in the context of
9 intermediate scrutiny, Your Honor, and--

10 THE COURT: After what--not on a motion to dismiss,
11 right?

12 MS. FARBY: I'm not sure of the--

13 THE COURT: Yeah.

14 MS. FARBY: --posture of that case, Your Honor, but
15 numerous Courts have granted motions to dismiss,
16 challenging--where cases have challenged firearms
17 regulations.

18 THE COURT: I know, but there are a lot of cases before
19 Heller, and there are a lot of cases that were interpreting
20 the Second Amendment as not protecting any individual
21 liberty, right?

22 MS. FARBY: That's true.

23 THE COURT: I mean, that's the way the law was before
24 Heller, and, of course, that's why these cases before Heller
25 are difficult to apply, because they were all in the context

1 of what we used to think the law was as to the scope of the
2 Second Amendment, that it was a collective right, not an
3 individual right. Now that the Supreme Court has changed
4 course on that, we're all struggling with trying to define
5 what that right is. And, you know, we've got a lot of
6 post-Heller cases, and you and opposing counsel have cited
7 them, and there have been some since the briefing here, at
8 the District Court level. But the problem comes back to what
9 are the dimensions of this individually protected liberty
10 interest, that's--we're struggling with that.

11 MS. FARBY: I understand, Your Honor. I think it's
12 instructive to look at what the Supreme Court did say in
13 Heller, and what it said was that its decision should not be
14 taken to cast doubt on laws forbidding firearms in sensitive
15 places.

16 THE COURT: I understand that, but--

17 MS. FARBY: By requiring the government to submit
18 evidence at trial in order to justify its restrictions on
19 firearms in every single sensitive place, that inherently
20 would cast doubt on many of the regulations that the Supreme
21 Court--

22 THE COURT: Well, and--

23 MS. FARBY: --found shouldn't be cast into doubt.

24 THE COURT: --and to just accept your position that you
25 can't challenge this regulation casts doubt on whether there

1 is a Second Amendment.

2 MS. FARBY: No, Your Honor, that's not true.

3 THE COURT: Well, doesn't it?

4 MS. FARBY: The Second--the Postal Service regulation
5 here doesn't affect Second Amendment rights at all outside of
6 Postal property. It's a narrow regulation. All it does is
7 says you can't bring firearms onto Postal property, and the
8 regulation, of course, says nothing about any other place in
9 which the Bonidys or any other person might exercise their
10 Second Amendment right. It's a very narrow regulation.

11 THE COURT: Not when it comes to a public parking lot it
12 doesn't seem narrow to me.

13 MS. FARBY: It's narrow in the sense that it only
14 prohibits firearms on Postal property, which is a very
15 discrete place.

16 THE COURT: Okay. I think that's your argument, right?
17 You can't touch.

18 MS. FARBY: Well, it's a matter of common sense that the
19 regulation here is reasonably related to the Postal Service's
20 compelling interest in preventing violence on its property.
21 And the Supreme Court has upheld restrictions on
22 constitutionally protected rights based on common sense, even
23 in a strict--even under a strict scrutiny standard. So the
24 Supreme Court has said that the level of evidence that's
25 needed to justify a regulation varies up or down depending on

1 the novelty or plausibility of the justification.

2 THE COURT: Exactly right, and that is why, it seems to
3 me, in this case we have to consider the special
4 circumstances alleged in this second amended complaint, being
5 that these are folks who don't have postal service at home,
6 they live in a remote area, they have--and I don't know that
7 this changes the scope of the Second Amendment, but they have
8 a concealed carry permit, which, under Colorado law, permits
9 them to carry a firearm in public places, and they only can
10 access this Postal building when it's under the snow
11 ordinance in Avon through this parking lot, unless they park
12 somewhere remotely from this building. Now those are the
13 facts of the case, as alleged.

14 MS. FARBY: Those are the facts of the case as alleged,
15 and as alleged, the plaintiffs have not established--or, have
16 not even alleged that--have not alleged facts sufficient to
17 show that the Postal Service regulation imposes a substantial
18 burden on their constitutionally protected right.

19 THE COURT: Yeah, and, you know, this is not a facial
20 attack, this is an as-applied challenge--

21 MS. FARBY: Yes.

22 THE COURT: --and that's why these facts that I have
23 just referred to, that are alleged in the Second Amendment
24 complaint, seem to me to be significant for consideration
25 here.

1 MS. FARBY: Your Honor, even the facts as alleged in the
2 Second Amendment--in the second amended complaint, do not
3 allege--do not establish that the Postal Service regulation
4 substantially burdens the right--there may be an incident
5 burden on the Bonidys' purported constitutional right, but
6 incident burdens are not sufficient, Your Honor. There is no
7 substantial burden on their right, and that's what the--

8 THE COURT: Is there a right to receive mail?

9 MS. FARBY: There's not necessarily a constitutional
10 right to receive mail, but--

11 THE COURT: What is the--the Postal Service is supposed
12 to serve, right?

13 MS. FARBY: Yes.

14 THE COURT: It's supposed to serve the public.

15 MS. FARBY: Yes.

16 THE COURT: Supposed to deliver mail to the public.

17 MS. FARBY: Yes.

18 THE COURT: In cases where there's no home delivery,
19 there has to be access to the Postal Service office to get
20 the mail.

21 MS. FARBY: Yes, and there is that access here, Your
22 Honor.

23 THE COURT: How?

24 MS. FARBY: At--

25 THE COURT: If the access is unavailable to the

1 plaintiffs, if they claim that they can't get there without
2 having their guns in the car, here we are.

3 MS. FARBY: As alleged in the complaint, Your Honor,
4 they can park on the public street that's directly in front
5 of the post office--

6 THE COURT: Not on snow days.

7 MS. FARBY: On days--well, note, Your Honor, the
8 complaint does not allege anywhere that the Bonidys have ever
9 been precluded from parking on the public street. They
10 may--they alleged--

11 THE COURT: There's an ordinance that says you can't
12 park on this street when it's snowing. It had two inches of
13 snow. There it is.

14 MS. FARBY: What the ordinance says is that street
15 parking may be limited when there's an accumulation of
16 greater than two inches of snow.

17 THE COURT: Right.

18 MS. FARBY: The complaint does not allege that they have
19 ever been precluded from parking on the public street.

20 THE COURT: Have you ever been to Avon, Colorado?

21 MS. FARBY: I have not, Your Honor.

22 THE COURT: It snows a lot in Avon, Colorado.

23 MS. FARBY: I understand, Your Honor, and actually, in
24 our reply brief, we submitted statistics about the average
25 number of days with more than two inches of snow, but the

1 complaint is silent as to whether--or, whether the plaintiffs
2 have ever been precluded from parking on that public street.

3 THE COURT: Why does it have to allege a date when the
4 ordinance says you can't park here?

5 MS. FARBY: Because they have not been able--they have
6 not alleged that there has ever been a substantial--

7 THE COURT: Why would it make a difference whether
8 they've ever--I mean, it's--you said common sense. Common
9 sense is that when there's an ordinance that says you can't
10 park here when there's two inches of snow, and you're in
11 Avon, Colorado, they've had days when they can't park there.
12 That's common sense, agreed?

13 MS. FARBY: I agree with that, Your Honor, but in order
14 for the Court to even look at whether this regulation
15 infringes a constitutional right, there must be a substantial
16 infringement, and they have not alleged a substantial
17 infringement. That's--

18 THE COURT: What constitutes a substantial infringement,
19 more than one day? Does it have to be more than ten days?
20 What are you talking about?

21 MS. FARBY: I don't know, Your Honor.

22 THE COURT: Exactly.

23 MS. FARBY: It's not necessary to decide what the outer
24 limits of a substantial burden would be because they have not
25 alleged it here. They have not alleged that they have ever

1 been precluded from parking on the public street with their
2 firearm because of these--the snow ordinance. And in any
3 event, Your Honor, the snow would--the restrictions on
4 parking on the public street is likely just an incidental
5 burden. It's not attributable to the Postal Service
6 regulation itself. I mean, the Postal Services doesn't have
7 to provide parking to its patrons at all. There are plenty
8 of Postal--post offices in urban areas--

9 THE COURT: We're talking about Avon, Colorado, not
10 plenty of other areas. This case is factually specific.

11 MS. FARBY: Yes, Your Honor. Under the facts as alleged
12 by the plaintiffs, they have never been precluded from
13 parking on the public street in front of the Avon Post
14 Office.

15 THE COURT: Well, this--

16 MS. FARBY: It's not--it's--

17 THE COURT: --you know, you're going round and round. I
18 object that.

19 MS. FARBY: And--

20 THE COURT: Let me hear from the plaintiff. Mr. Manley.

21 I've been talking about the parking lot because it
22 seems to me to be qualitatively different from the building,
23 and you've got two claims. The first one is the building, so
24 it seems to me that the burden, as defendant's counsel wishes
25 to call it, on the protected interest under the Second

1 Amendment, is slight, if they can park in the public parking
2 lot immediately adjacent to the building and go into the
3 building without their firearms. Now, are you contending in
4 the first claim for relief that they must have the firearms
5 with them when they go in the building?

6 MR. MANLEY: In the first claim for relief? No, Your
7 Honor, the--it's--

8 THE COURT: Well, what are you claiming?

9 MR. MANLEY: In the first claim for relief we're simply
10 contending that the Bonidys have a constitutional right to
11 possess a firearm in their car in the parking lot.

12 THE COURT: Well--

13 MR. MANLEY: That's the first claim for relief.

14 THE COURT: --I thought the first claim for relief was
15 the building. Maybe I've got them reversed. You've got a
16 claim that they can go into the building.

17 MR. MANLEY: Yes, that's the second claim for relief,
18 Your Honor.

19 THE COURT: Okay, I've got them reversed.

20 MR. MANLEY: And, yes, the Second Amendment protects the
21 right to keep and bear arms for self-defense. And that right
22 has to be exercised wherever the person happens to be when
23 that--the need for self-defense arises, and so the burden on
24 the Bonidys, if they're in the post office and need to
25 exercise the right to self-defense, is total, it's complete.

1 The right is rendered--

2 THE COURT: So they could walk into this building with
3 their firearms?

4 MR. MANLEY: Well, no, I don't think so, Your Honor,
5 because this building is qualitatively different. The--this
6 building--

7 THE COURT: What's the difference? What's the
8 difference?

9 MR. MANLEY: Well, this building has security, it has
10 screening, and it has restricted access. There are metal
11 detectors at every entrance, and only individuals who have
12 been verified to be unarmed are allowed to enter the
13 building--

14 THE COURT: Okay.

15 MR. MANLEY: --and then when they're here, they're under
16 the--everyone in the building is under the protection of
17 the--

18 THE COURT: Now--

19 MR. MANLEY: --Security Service.

20 THE COURT: --the plaintiffs, when, you know, the fact
21 that there's a concealed carry permit, how does that affect
22 the claim--the case?

23 MR. MANLEY: Well, factually, Your Honor, it shows that
24 they're law-abiding individuals.

25 THE COURT: I know, but, you know, the Second Amendment

1 presumes everybody is law-abiding, unless you come within one
2 of their restrictions on having firearms, like 922 of Title
3 18. That's a different thing entirely, if you're a convicted
4 felon or illegal--all these other things. So, but I don't
5 see that the concealed carry--it just means that the Eagle
6 County Sheriff has granted them a permit under Colorado law,
7 but I don't think that affects the scope of the Second
8 Amendment, do you?

9 MR. MANLEY: I agree, Your Honor, and--

10 THE COURT: Okay.

11 MR. MANLEY: --and I think all it shows is that the--is
12 that the Bonidys aren't those people--

13 THE COURT: Yeah.

14 MR. MANLEY: --that are identified by 922.

15 THE COURT: So this right of self-defense is not
16 different for them than it is for any other person who is not
17 restricted from having possession of firearms, true?

18 MR. MANLEY: I think that's correct, Your Honor, yes.

19 THE COURT: Yeah, all right.

20 MR. MANLEY: I think it calls in the level of vetting
21 that the Bonidys have undergone through the sheriff, through
22 the background checks, indicates that perhaps the defendant's
23 interest in security are not connected to denying the Bonidys
24 the right to keep and bear arms. So it calls into the
25 question the rationale for the Postal ban--

1 THE COURT: You don't--

2 MR. MANLEY: --especially as applied to the Bonidys.

3 THE COURT: In Colorado you don't get a concealed carry
4 permit--do you have to show you have a particularized need
5 for protection?

6 MR. MANLEY: No, Your Honor.

7 THE COURT: Yeah, I didn't think so. You simply have to
8 show you know how to handle a firearm, that you don't have
9 any of the restrictions on your mental capacity and all those
10 things, and you have a clean record, and then you can get it.
11 So that's why, when we look at this question of the
12 protection of self--well, self-protection, insofar as Heller
13 was based on the need for self-protection as justification
14 for the individual right to have a firearm, you know, I think
15 that we have to look at this case as whether they had a
16 concealed carry permit or not, whether they have special
17 circumstances of being in an area where they may need
18 self-protection from animals, for that matter.

19 But what it seems to me is important here is their
20 access to their mail. Now I questioned Ms. Farby about the,
21 you know, what is the Postal Service. It's to serve and give
22 you access to mail addressed to you. They don't get mail
23 service at home, and that may be a special circumstance in
24 this case. Not everybody has to go to the post office to get
25 their mail.

1 Your contention, as I understand it then from what
2 I've heard you say here, and from what I saw in the papers
3 filed, is that given that the postal facility in Avon,
4 Colorado is not a secured area with--so that anybody inside
5 of it feels protected by the security measures that are in
6 place, that it ought to be, and, therefore, its public
7 access, you ought to be able to have self-protection there.
8 That's your contention.

9 MR. MANLEY: Yes, Your Honor. The Avon Post Office is
10 no different from a grocery store or a gas station or a bank
11 in Avon. They're all places that are open to the public,
12 that have no security measures in place, like a courthouse or
13 an airport, or other federal facilities that are similarly
14 protected.

15 THE COURT: Now we don't have any case authority for
16 that, do we?

17 MR. MANLEY: For that, that rule, Your Honor?

18 THE COURT: Yeah. For that distinction between public
19 buildings that are within a secure zone, so to speak, and
20 those that aren't. That's something that I'm not--that I
21 haven't seen in any of the cases that I've reviewed.

22 MR. MANLEY: I don't--I'm not familiar with any case
23 law, Your Honor.

24 THE COURT: All right.

25 MR. MANLEY: What I'm--what I do know is that the laws

1 of the states, for instance, Colorado, reflect that
2 distinction. A concealed carry permit in Colorado doesn't
3 authorize a person to carry into a public building that has a
4 metal detector, or a federal building where federal law
5 prohibits--

6 THE COURT: In that in a state statute, or--

7 MR. MANLEY: It is, Your Honor, yes.

8 THE COURT: Okay.

9 MR. MANLEY: And so the, you know, the laws of the
10 states reflect that, that distinction, and it seems to be an
11 objective distinction that's based on the character of the
12 building, it's based on the how the building is being
13 secured, rather than just an arbitrary whim of some
14 government official saying, "This place is sensitive for--"

15 THE COURT: Now that--

16 MR. MANLEY: "--for no objective reason."

17 THE COURT: The background of this case is that there
18 was an effort made here by the--is it Ba-needy (phonetic)?

19 MR. MANLEY: I think it's Bon-iddy (phonetic).

20 THE COURT: --that the Bonidys attempted to get some
21 kind of accommodation to permit--and agreed, for example, to
22 a locked glove compartment, is that right?

23 MR. MANLEY: That's correct.

24 THE COURT: I mean, that isn't in our complaint, but I'm
25 talking about the background.

1 MR. MANLEY: Well, the--we actually do allege in the
2 complaint that the Bonidys contacted--

3 THE COURT: Yeah, okay.

4 MR. MANLEY: --the post office and requested recognition
5 of their right to carry on the Postal property, either in the
6 car or, obviously, what they truly desire is to be able to
7 carry, you know, when they go into the building as well, but
8 they requested both of those--

9 THE COURT: Yeah.

10 MR. MANLEY: --accommodations.

11 THE COURT: So, as I understand this case then, if it
12 were to go forward, we would be looking at whether there are
13 means to, you know, the--the government interest here is
14 public safety, with respect to property that's under the
15 ownership and control of the Postal Service, an--I don't know
16 if the Postal Service is technically an agent, or agency of
17 the government anymore or not, but at any rate, your--as we
18 go forward, you would be looking at--and, of course, opposing
19 counsel says you don't have to have least restrictive. But,
20 as I understand your case, it is somewhat like a First
21 Amendment case, in terms of balancing, or attempting to
22 balance, the protected interests of the individual plaintiffs
23 versus the governmental interests in public safety, and,
24 therefore, as I--and tell me if I'm wrong in understanding
25 this, you're not averse to some reasonable accommodation in

1 balancing these interests. Is that true?

2 MR. MANLEY: Yes, Your Honor, I think there's--

3 THE COURT: Yeah.

4 MR. MANLEY: --there's a balance that needs to be
5 struck--

6 THE COURT: Yeah.

7 MR. MANLEY: --and where that balance lies is something
8 that we need to determine--

9 THE COURT: You're not--

10 MR. MANLEY: --based on the evidence.

11 THE COURT: --therefore, claiming an absolute right to
12 have these handguns in a holster, covered, and walk anywhere
13 you want to on the property.

14 MR. MANLEY: Well, no, certainly, and we're not claiming
15 that the Bonidys have a right to walk into the restricted
16 area of the post office, or the restricted parking lot if
17 there--I'm not sure that there is one at Avon, but I'd
18 imagine there is, where they stage the mail trucks. We're
19 not arguing with any of that, simply the public areas where
20 the general public is allowed--

21 THE COURT: Yeah. Now I--

22 MR. MANLEY: --to come and go freely.

23 THE COURT: --you know, I'm assuming that the--I've
24 never seen this post office, so I'm assuming there are boxes
25 or--is that right? They have a p.o. box and--

1 MR. MANLEY: That's right, Your Honor.

2 THE COURT: --they go and unlock it and take out--I
3 don't know if they do that anymore.

4 MR. MANLEY: No, that's right. Yes, the post office
5 provides the Bonidys with a post office box--

6 THE COURT: Yeah.

7 MR. MANLEY: --and that's how they get their mail.

8 THE COURT: So, and they rent a box?

9 MR. MANLEY: The box is provided free of charge because
10 the Postal Service--

11 THE COURT: Because there's no--

12 MR. MANLEY: --doesn't deliver to their home.

13 THE COURT: --home delivery. And I assume, given the
14 nature of Eagle County, that's true of a lot of folks up
15 there. There's limited home delivery.

16 MR. MANLEY: At the very least, the Bonidys' neighbors
17 fall into the same group.

18 THE COURT: So how would this case go forward? What are
19 you suggesting?

20 MR. MANLEY: Well, Your Honor, the defendants have the
21 burden to justify their regulation, and then the plaintiffs
22 would have to rebut any evidence that they offer. That's the
23 evidentiary procedure in the First Amendment context, and, as
24 you, I think, correctly point out, that this is like a First
25 Amendment case.

1 THE COURT: Okay. Thank you.

2 MR. MANLEY: Thank you.

3 THE COURT: Well, I think I've--I think I've got your
4 arguments, Ms. Farby, have I? You may--

5 MS. FARBY: Your Honor, can I briefly be heard--

6 THE COURT: Yeah, sure.

7 MS. FARBY: --to address some points raised?

8 THE COURT: Yeah.

9 MS. FARBY: Thank you. I'll be brief, Your Honor, I
10 just want to address a couple of points made by opposing
11 counsel. The Courts and Heller have made clear that
12 categorical restrictions are permitted, and so here the
13 Postal Service should not have to go property by property,
14 patron by patron, to determine whether that person or that
15 property should be restricted. Categorical prohibitions on
16 possession of firearms in sensitive places are permitted,
17 that's what the Supreme Court said in Heller.

18 THE COURT: I know, but the whole issue is what's a
19 sensitive place?

20 MS. FARBY: Right, Your Honor, and, again, the Court
21 there made clear that schools and government buildings are
22 not the only kinds of sensitive places.

23 THE COURT: I know that, but they don't tell us what
24 else is.

25 MS. FARBY: That's right, Your Honor, and counsel's

1 suggestion that only places that electronically screen
2 persons entering the property, that's just directly contrary
3 to Heller because there's many schools and government
4 buildings themselves that don't screen people walking into
5 the building, but under Heller--

6 THE COURT: Yeah.

7 MS. FARBY: --those are sensitive places where firearms
8 may be prohibited.

9 THE COURT: Well, you know, Heller raises more question
10 than it answers.

11 MS. FARBY: But it does provide guidance, Your Honor,
12 and--

13 THE COURT: Very little.

14 MS. FARBY: --the Tenth Circuit has taken the Court at
15 its word in finding that restrictions beyond those expressly
16 enumerated in Heller--

17 THE COURT: Criminal restrictions.

18 MS. FARBY: Yes, criminal restrictions--

19 THE COURT: Yeah.

20 MS. FARBY: --but other Courts outside of the Tenth
21 Circuit have found restrictions in sensitive places to be
22 within Heller, even though they're not schools or government
23 buildings.

24 THE COURT: And not a post office.

25 MS. FARBY: Well, Dorrison--

1 THE COURT: That's a restricted area.

2 MS. FARBY: It was a restricted area, Your Honor, but--

3 THE COURT: That's not this case.

4 MS. FARBY: It's not this case but the Court there
5 didn't limit its decision to the fact it was a restricted
6 area. What it said was it was used as a place of regular
7 government business--

8 THE COURT: Yes.

9 MS. FARBY: --and the parking lot--

10 THE COURT: By employees of the government.

11 MS. FARBY: But with the Court there's--

12 THE COURT: And you know the background of Postal
13 violence has been employee on employees, or ex-employees.

14 MS. FARBY: I believe that's true in part, I--

15 THE COURT: Yeah.

16 MS. FARBY: The public areas of the Postal--of the post
17 office and the parking lot are also sensitive because of the
18 mail. The mail is carried in the public areas and there is
19 often sensitive information and valuable material--

20 THE COURT: Well, sure--

21 MS. FARBY: --that goes--

22 THE COURT: --but there's also the public interest in
23 getting the mail.

24 MS. FARBY: That--that's--

25 THE COURT: The public's a part of the government

1 function here. This is a public building.

2 MS. FARBY: The notion that the Postal Service should
3 have to decide on an individual basis whether a person should
4 be permitted to bring firearms onto property would cast into
5 doubt a whole range of federal restrictions on--

6 THE COURT: Why? Why would that be true? Why can't
7 they just issue a permit to these people--

8 MS. FARBY: Well, nothing's--

9 THE COURT: --with restrictions?

10 MS. FARBY: Well, nothing would stop the next person
11 from seeking the same restriction. Nothing would stop
12 somebody from challenging the prohibition on firearms in this
13 building, Your Honor, and the government shouldn't have to
14 submit to go through an extensive process and trial where
15 they have to submit evidence to justify each and every
16 restriction--

17 THE COURT: Well--

18 MS. FARBY: --in each every government property.

19 THE COURT: --I'm denying--

20 MS. FARBY: Congress--

21 THE COURT: I'm going to deny your motion. We're going
22 to go forward. We're going to determine the reasonableness
23 of this under whatever standard we finally develop, probably
24 the intermediate scrutiny. So you're going to answer, and
25 we're going to have a scheduling conference--

1 MS. FARBY: Thank you.

2 THE COURT: --to determine what limits there should be
3 on discovery in the case, and questions of who goes forward
4 with what evidence. Those are things that are not clear to
5 me. But what is clear to me at this time is that this
6 regulation, as applied to these people, cannot just be
7 accepted because the government--the Postal Service says so.
8 And that's where we are. Now you're going to continue with
9 the case, I presume.

10 MS. FARBY: Yes, Your Honor.

11 THE COURT: And you have travel obligations--I mean, you
12 have a burden of travel.

13 MS. FARBY: Yes, Your Honor.

14 THE COURT: So what I'd like to do is set a scheduling
15 conference while you're here.

16 MS. FARBY: Okay.

17 THE COURT: I don't mean today, but, I mean, set a date
18 for it while you're here--

19 MS. FARBY: Okay.

20 THE COURT: --and, you know, it'll have to be in
21 January. So do you have a calendar with you then?

22 MS. FARBY: Yes, Your Honor.

23 THE COURT: Okay.

24 MS. FARBY: Give me a moment, please.

25 THE COURT: Well, let's talk about a date. And I

1 don't--I'm presuming that it would be easier for you to do it
2 in the morning?

3 MS. FARBY: Yes, Your Honor.

4 THE COURT: Yeah, instead of--here we are, you're out
5 here in--you may have to spend a weekend out here. Well,
6 that isn't so bad. But how about January 12th? That's a
7 Thursday. Let's say 10:00 o'clock, or 11:00 o'clock, I don't
8 know--

9 MS. FARBY: Your Honor, give me one moment to--

10 THE COURT: Sure.

11 MS. FARBY: --check to make sure--

12 THE COURT: Yeah.

13 MS. FARBY: --I don't have anything--

14 THE COURT: Of course.

15 MR. MANLEY: Your Honor, I do know that I'll be
16 traveling earlier in that week. I do intend to be back--

17 THE COURT: This is a Thursday.

18 MR. MANLEY: Yes, I intend to be back on Thursday, but I
19 don't know what my travel arrangements are at this point. I
20 may be traveling on Thursday, I don't know.

21 THE COURT: Well, we could go--I can't--I'd have to go
22 into the week of the 23rd then. What about the 26th, January
23 26th?

24 MS. FARBY: Your Honor, that's fine for me--

25 THE COURT: What time of day is best for you? I've got

1 that--

2 MS. FARBY: Thank you, Your Honor. I assume you want
3 the scheduling conference in person, and not--

4 THE COURT: Oh, yes, for sure. It's face to face here.

5 MS. FARBY: Thank you, Your Honor. The morning is
6 preferable, but, of course, I'll--whatever you--

7 THE COURT: Well, is 10:00 o'clock--

8 MS. FARBY: That's fine.

9 THE COURT: --suitable? How about you, Mr. Manley?

10 MR. MANLEY: I believe that works for me, Your Honor.

11 THE COURT: Okay. Ten o'clock, January 26th, for the
12 scheduling conference, and, of course, we'll need the answer
13 before then. And I have procedures that are posted with the
14 form of scheduling order and so forth that, Ms. Farby, you
15 may not yet be familiar with, but you will be. And it
16 provides that counsel attempt to meet and agree on a proposed
17 scheduling order, but it not be filed electronically, that it
18 be submitted in paper form, and it could come through Mr.
19 Manley then, since he's got better access than you do to the
20 courthouse. So you'll see all that, and we'll see where this
21 case goes. So, any questions then? We'll go forward and see
22 how we're going to address these interesting questions.
23 Okay? Court's in recess.

24 (2:45 p.m. - Whereupon, the proceedings were concluded.)

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TRANSCRIBER'S CERTIFICATE

I hereby certify that the foregoing has been transcribed by me to the best of my ability and constitutes a true and accurate transcript of the mechanically recorded proceedings in the above matter.

Dated at Aurora, Colorado this 1st day of December, 2011.

s/John Schasny
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