UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

UNITED STATES OF AMERICA	)	
	)	
v.	)	Criminal No: 23-cr-10043-ADB
	)	
KEVIN L. JOHNSON,	)	
Defendant.	)	

GOVERNMENT'S OPPOSITION TO DEFENDANT'S MOTION TO DISMISS

Defendant Kevin Johnson has moved to dismiss the Indictment as unconstitutional. ECF No. 36. Relying on the United States Supreme Court's recent decision in New York State Rifle & Pistol Association, Inc. v. Bruen, 142 S. Ct. 2111, 2162 (2022), the Defendant argues that Section 922(g)(1) violates the Second Amendment to the U.S. Constitution. The United States of America hereby opposes the Motion to Dismiss filed by the Defendant. Nothing in Bruen casts new doubt on the constitutionality of Section 922(g)(1)—a statute long recognized as permissible under the Second Amendment. See District of Columbia v. Heller, 554 U.S. 570, 634-35 (2008); McDonald v City of Chicago, Ill., 561, U.S. 742, 786 (2010).

As an initial point, the Defendant – who is not a law-abiding citizen – cannot meet his burden to demonstrate that 18 U.S.C. § 922(g)(1) is facially invalid. The Supreme Court has established that the Second Amendment protects "the right of law-abiding, responsible citizens" and that nothing "should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons[.]" Heller, 554 U.S. at 634-35. Following the Heller decision, the First Circuit has addressed this issue and rejected the argument that prohibiting felons from possessing firearms is unconstitutional. United States v. Torres-Rosario, 658 F.3d 110 (1st Cir. 2011). The Defendant's argument that 922(g)(1) facially unconstitutional under Bruen, 142 S. Ct. at 2162 is incorrect. In Heller, the Court said that "nothing in our opinion should be taken to cast doubt on

longstanding prohibitions on the possession of firearms by felons," which is a "presumptively lawful regulatory measure[ ]." 554 U.S. at 626, 627 n.26. The Court has reiterated this assurance repeatedly, in McDonald, 561, U.S. at 786, and a majority of the Justices repeated it in Bruen, 142 S. Ct. at 2162 (2022) (Kavanaugh, J., concurring); see also United States v. Booker, 644 F.3d 12 (1st Cir. 2011); United States v. Rene E., 583 F.3d 8 (1st Cir. 2009). The First Circuit's rejection of this Second Amendment challenge to 922(g)(1) remains binding under the law of the circuit doctrine notwithstanding the intervening decision in Bruen. United States v. Bowers, 27 F.4th 130, 134 (1st Cir. 2022) (applying the law of the circuit doctrine); see also United States v. Trinidad, No. 21- CR-398, 2022 WL 10067519, at *3 (D.P.R. Oct. 17, 2022). Accordingly, the Indictment is sufficient and therefore, the Motion should be denied.

PROCEDURAL BACKGROUND

On February 22, 2023, the Defendant was charged by Indictment with being a felon in possession of a firearm and ammunition, in violation of 18 U.S.C. § 922(g)(1). ECF No. 1. The charges arose from a November 6, 2022 arrest of the defendant by the Boston Police Department ("BPD"), where the Defendant possessed a Smith & Wesson, .40 caliber pistol bearing serial number PBV4746 [1], loaded with 10 rounds of .40 caliber ammunition, which was located in the Defendant's pants shortly after BPD were called to the area for a person pulling out a firearm during an argument. At the time of the firearm arrest, the defendant was already on federal supervised release for a prior felony conviction for being a felon in possession of a firearm and ammunition, in violation of 18 U.S.C. § 922(g)(1), for which the defendant had been sentenced

[1] The government has previously informed counsel for the defendant that there is an error in the Indictment, and that the firearm is a "Model SW40VE, bearing serial number PBV4746," which the parties are amenable to correct before the Court.

to the maximum 120 months in federal prison, followed by 3 years of supervised release. This felony conviction was amongst several other of the Defendant's felony convictions in Massachusetts, including another prior felony conviction in 2007 for being a felon in possession of a firearm and ammunition, in violation of 18 U.S.C. § 922(g)(1), as well as possession of a firearm without an FID card in Massachusetts state court in 2005.

On March 3, 2023 the Defendant appeared before U.S. Chief Magistrate Judge Jennifer C. Boal and pleaded not guilty. ECF No. 7. On November 1, 2023, counsel for the Defendant filed a Motion to Dismiss requesting that the Court declare that 18 U.S.C. § 922(g)(1) is unconstitutional. ECF No. 36.

FACTUAL BACKGROUND

On November 6, 2022, BPD officers arrested the Defendant on several charges pertaining to the unlawful possession of a firearm and ammunition, following an incident in the area of Brunswick Street in Boston, Massachusetts.

On that date, at approximately 9:36pm, BPD officers responded to a 911 call at Brunswick Street in Boston, for a report of a black male wearing a black hoody pulling out a firearm during an argument in the street. Within a couple of minutes, BPD officers arrived on scene and observed an individual, later identified as the defendant, matching that description, outside of 51 Brunswick Street. As officers exited the vehicle, they immediately observed the defendant to be shocked by their presence, grab his waistband with his right hand and take off in a full sprint down Brunswick Street, with his sneakers falling off as he ran.

Officers pursued the defendant and observed him run into the front door of 55 Brunswick Street. Officers continued to follow the defendant into a first floor apartment. The defendant actively fought and resisted several police officers, who attempted to place him in handcuffs.

During the struggle, an officer felt a hard metallic object on the defendant's right leg, consistent with the shape and size of a firearm. That officer was able to remove a silver and black firearm from the defendant's sweatpants, which was secured.

The firearm was identified as a Smith & Wesson, .40 caliber semi-automatic firearm, loaded with 10 rounds of .40 caliber ammunition in the magazine, and bearing serial number PBV4746. Based upon a review of the firearm and ammunition by a Special Agent with the Bureau of Alcohol, Tobacco, Firearms and Explosives ("ATF"), it was confirmed that the firearm and ammunition all traveled in interstate or foreign commerce prior to their recovery in the Commonwealth of Massachusetts on November 6, 2022.

LEGAL ARGUMENT

I. The Defendant cannot meet his burden to demonstrate that 18 U.S.C. § 922(g)(1) is facially invalid

The Defendant argues that 18 U.S.C. § 922(g)(1) is unconstitutional because it fails to meet the standard recently clarified in Bruen. But in applying the constitutional framework laid out in Bruen, it is clear that the Defendant's challenge here is meritless. The conduct regulated by § 922(g)(1) falls outside the scope of the Second Amendment, which belongs only to "law-abiding, responsible citizens." Bruen, 142 S. Ct. at 2162 (quoting Heller, 554 U.S. at 635).

Following the decisions in Heller and McDonald, a number of Circuit Courts have considered the question of 18 U.S.C. § 922(g)(1)'s constitutionality and they have all come to the same conclusion. [2] Additionally, the Defendant cannot meet his heavy burden here to prevail on

[2] Well over 100 district court decisions have considered a post-Bruen challenge to the constitutionality of Section 922(g)(1). In both the courts of appeals and various district courts across the country, these challenges have been overwhelmingly rejected. See United States v. Harrison, No. 3:22-cr-455 (N.D. N.Y. July 20, 2023); United States v. Dobbs, No. 22-cr-20068 (E.D. Mi. July 18, 2023); United States v. Morgan, No. 8:23-cr-72 (M.D. Fla. July 17, 2023); United States v. Holmes, No. 23-cr-20075 (E.D. Mi. July 11, 2023); Parks, Jr. v. United States, No. 1:23-

cv-80 (S.D. Ga. July 7, 2023); United States v. Ray, No. 3:21-cr-57 (S.D. W.V. July 6, 2023); United States v. Mashburn, No. 22-190 (S.D. Al. July 6, 2023); United States v. Nicks, No. 5:23-cv-2 (W.D. N.C. July 5, 2023); United States v. Keels, No. 23-20085 (E.D. Mi. June 30, 2023); United States v. Robinson, No. 3:21-cr-159 (N.D. Tex. June 29, 2023); United States v. Jordan, No. 1:23-cr-159 (N.D. Ohio June 29, 2023); United States v. Nelson, No. 2:22-cr-20512 (E.D. Mi. June 29, 2023); United States v. Estrada, No. 1:22-cr-256 (D. Id. June 26, 2023); United States v. Barber, No. 3:22-cr-65 (D. Ak. June 23, 2023); United States v. Hernandez, No. 3:23-cr-56 (N.D. Tex. June 23, 2023); United States v. Hansen, No. 4:18-cr-3140 (D. Neb. June 22, 2023); United States v. Palmore, No. 7:23-cr-3 (M.D. Ga. June 16, 2023); United States v. Pineda, No. 6:21-cr-482 (D. Or. June 16, 2023); United States v. Garza, No. 22-51021 (5th Cir. June 15, 2023); United States v. Melendrez-Machado, No. 22-cr-634 (W.D. Tex. June 14, 2023); United States v. Alvin, No. 1:22-cr-20244 (S.D. Fl. June 13, 2023); United States v. Cunningham, No. 22-1080 (8th Cir. June 13, 2023); United States v. Bulltail, No. 22-cr-86 (D. Mon. June 12, 2023); United States v. Hampton, No. 21-cr-766 (S.D.N.Y. June 9, 2023); United States v. Kearney, No. 4:23-cr-29 (E.D. Va. June 9, 2023); United States v. Hale, No. 22-131 (E.D. La. June 6, 2023); United States v. Jackson, No. 22-2870 (8th Cir. June 2, 2023); United States v. Gallegos, No. 1:22-cr-16 (D. Id. June 2, 2023); United States v. Jackson, No. 2:22-cr-20628 (E.D. Mi. May 31, 2023); United States v. Giambro, No. 2:22-cr-44 (D. Me. May 30, 2023); United States v. Hickman, No. 3:22-cr-125 (W.D. Ky. May 26, 2023); United States v. Parker, No. 3:22-cr-82 (W.D. Ky. May 26, 2023); Montes v. United States, No. 5:18-cr-287 (S.D. Tex. May 26, 2023); United States v. Haywood, No. 22-cr-10417 (E.D. Mi. May 25, 2023); United States v. Martinez, No. 2:21-cr-219 (D. Nev. May 22, 2023); United States v. Alvin, No. 22-cr-20244 (S.D. Fl. May 22, 2023); United States v. Lowry, No. 1:22-cr-10031 (D. S.D. May 22, 2023); United States v. Ware, No. 22-cv-30096 (S.D. Ill. May 19, 2023); United States v. Johnson, No. 22-20300 (5th Cir. May 12, 2023); United States v. Meyer, No. 22-cr-10012 (S.D. Fl. May 9, 2023); United States v. Carter, No. 22-cr-20477 (E.D. Mi. May 9, 2023); United States v. Bluer, No. 22-cr-20557 (E.D. Mi. May 8, 2023); United States v. Hazley, No. 22-cr-2061 (E.D. Mi. May 5, 2023); United States v. Murphy, No. 22-cr-121 (N.D. Ill. May 3, 2023); United States v. Pickett, No. 22-11006 (5th Cir. May 2, 2023); United States v. Thompson, No. 22-cr-173 (E.D. La. April 27, 2023); United States v. Taylor, No. 22-cr-20315 (E.D. Mi. April 26, 2023); United States v. McIlwain, No. 2:23-cr-20012 (E.D. Mi. April 26, 2023); United States v. Roy, No. 22-10677 (5th Cir. April 25, 2023); United States v. Hickcox, No. 22-50365 (5th Cir. April 25, 2023); United States v. Thomas, No. 2:23-cr-20036 (E.D. Mi. April 25, 2023); United States v. Villalobos, No. 19-cr-40 (D. Id. April 21, 2023); United States v. Williams, No. 19-cr-66 (N.D. Ill. April 21, 2023); United States v. Cummings, No. 1:22-cr-51 (N.D. Ind. April 20, 2023); United States v. Payne, No. 4:22-cr-173 (S.D. Tex. April 12, 2023); United States v. Walker, No. 2:22-cr-17 (E.D. Cal. April 11, 2023); United States v. Guthery, No. 2:22-cr-173 (E.D. Cal. March 29, 2023); United States v. Finney, No. 2:23-cr-13 (E.D. Va. March 29, 2023); United States v. Dixon, No. 1:22-cr-140 (N.D. Ill. March 28, 2023); United States v. Pena, No. 2:22-cr-366 (C.D. Cal. March 21, 2023); United States v. Hoeft, No. 4:21-cr-40163 (D. S.D. March 21, 2023); United States v. Davis, No. 1:23-cr-10018 (D. Mass. March 17, 2023); United States v. Rice, No. 3:22-cr-36 (N.D. Ind. March 17, 2023); United States v. Davis, No. 1:21-cr-206 (E.D. Cal. March 14, 2023); United States v. Kilgore, No. 1:21-cr-277 (E.D. Cal. March 14, 2023); United States v. Lindsey, No. 4:22-cr-138 (S.D. Iowa March 10, 2023); United States v. Tribble, No. 2:22-cr-85 (N.D. Ind. March 10, 2023); Leonard v. United States, No. 1:22-cv-22670 (S.D. Fla. March 10, 2023); United States v. Therrien, No. 1:21-cr-10323 (D. Mass. March 6, 2023); United States v. Price, No. 1:19-cr-824 (N.D. Ill. March 3, 2023); United States v. Belin, No. 1:21-cr-10040 (D. Mass. March 2, 2023); United States v. Clark, No. 1:20-cr-49 (N.D. Ind. March 2, 2023); United States v. Braster, No. 1:20-cr-66 (N.D. Ind. March 2, 2023); United States v. Barnes, No. 1:22-cr-43 (S.D.N.Y. February 28, 2023); United States v. Beard, No. 4:22-cr-92 (S.D. Tex. February 27, 2023); United States v. Smith, No. 2:22-cr-20351 (E.D. Mich. February 24, 2023); United States v. Barber, No. 3:22-cr-65 (D. Ak. February 21, 2023); United States v. Ross, No. 2:22-cr-20049 (E.D. Mich. February 15, 2023); United States v. Price, No. 1:21-cr-164 (N.D. Ill. February 13, 2023); United States v. Gleaves, No. 3:22-cr-14 (M.D. Tenn. February 6, 2023); United States v. Bacchus, No. 2:22-cr-450 (C.D. Cal. Feb. 2, 2023); United States v. Isaac, No. 5:22-cr-117 (N.D. Ala. Jan. 31, 2023); United States v. Taylor, No. 3:22-cr-22 (E.D. Ky. Jan. 31, 2023); United States v. Barber, No. 4:20-cr-384 (E.D. Tex. Jan. 27, 2023); United States v. Hester, No. 1:22-cr-20333 (S.D. Fla. Jan. 27, 2023); United States v. Brown, No. 2:20-cr-260 (E.D. Pa. Jan. 26, 2023); United States v. Rush, No. 4:22-cr-40008 (S.D. Ill. Jan. 25, 2023); Davis v. United States, No. 5:22-cv-224 (E.D. Ky. Jan. 24, 2023); Battles v. United States, No. 4:23-cv-63 (E.D. Mo. Jan. 20, 2023); United States v. Gordon, No. 1:14-cr-312 (N.D. Ga. Jan. 20, 2023); Shipley v. Hijar, No. 3:23-cv-11 (W.D. Tex. Jan. 20, 2023); United States v. Smith, No. 2:19-cr-505 (C.D. Cal. Jan. 19, 2023); United States v. Serrano, No. 3:21-cr-1590 (S.D. Cal. Jan. 17, 2023); United States v.

Tucker, No. 2:22-cr-17 (S.D. W. Va. Jan. 17, 2023); United States v. Robinson, No. 4:22-cr-70 (W.D. Mo. Jan. 17, 2023); United States v. Whittaker, No. 1:22-cr-272 (D.D.C. Jan. 12, 2023); United States v. Spencer, No. 2:22-cr-561 (S.D. Tex. Jan. 12, 2023); United States v. Garrett, No. 1:18-cr-880 (N.D. Ill. Jan. 11, 2023); United States v. Moore, No. 3:20-cr-474 (D. Or. Jan. 11, 2023); United States v. Jordan, No. 3:22-cr-1140 (W.D. Tex. Jan. 11, 2023); Campiti v. Garland, No. 3:22-cv-177 (D. Conn. Jan. 10, 2023); United States v. Coleman, No. 3:22-cr-8 (N.D. W.Va. Jan. 6, 2023); United States v. Medrano, No. 3:21-cr-39 (N.D. W.Va. Jan. 6, 2023); United States v. Olson, No. 1:22-cr-20525 (S.D. Fla. Jan. 5, 2023); United States v. Good, No. 1:21-cr-180 (W.D. Mo. Nov. 18, 2022)' United States v. Wondra, No. 1:22-cr-99 (D. Idaho Dec. 27, 2022); United States v. Jones, No. 5:22-cr-376 (W.D. Okla. Dec. 23, 2022); United States v. Williams, No. 1:21-cr-362 (N.D. Ga. Dec. 22, 2022); United States v. Dawson, No. 3:21-cr-293 (W.D.N.C. Dec. 21, 2022); United States v. Goins, No. 5:22-cr-91 (E.D. Ky. Dec. 21, 2022); United States v. Mugavero, No. 3:22-cr-1716 (S.D. Cal. Dec. 19, 2022); United States v. Hunter, No. 1:22-cr-84 (N.D. Ala. Dec. 13, 2022); United States v. Spencer, No. 2:22-cr-106 (E.D. Va. Dec. 12, 2022); United States v. Dotson, No. 3:22-cr-1502 (S.D. Cal. Dec. 12, 2022); United States v. Tran, No. 3:22-cr-331 (S.D. Cal. Dec. 12, 2022); United States v. Fencl, No. 3:21-cr-3101 (S.D. Cal. Dec. 7, 2022); United States v. Perez-Garcia, No. 3:22-cr-1581 (S.D. Cal. Dec. 6, 2022); United States v. Walker, No. 2:19-cr-234 (E.D. Cal. Dec. 6, 2022); United States v. Grinage, No. 5:21-cr-399 (W.D. Tex. Dec. 5, 2022); United States v. Wagoner, No. 4:20-cr-18 (W.D. Va. Dec. 5, 2022); United States v. Gay, No. 4:20-cr-40026 (C.D. Ill. Dec. 5, 2022); Shelby-Journey-Egnis v. United States, No. 2:21-cr-20535 (E.D. Mich. Dec. 5, 2022); United States v. Glaze, No. 5:22-cr-425 (W.D. Okla. Dec. 1, 2022); United States v. Ford, No. 4:21-cr-179 (W.D. Mo. Nov. 29, 2022); United States v. Jones, No. 4:20-cr-354 (W.D. Mo. Nov. 29, 2022); United States v. Jacobs, No. 2:22-cr-160 (C.D. Cal. Nov. 28, 2022); United States v. Cage, No. 3:21-cr-68 (S.D. Miss. Nov. 28, 2022); United States v. Willis, No. 1:22-cr-186 (D. Colo. Nov. 23, 2022); United States v. Teerlink, No. 2:22-cr-24 (D. Utah Nov. 21, 2022); United States v. Brunson, No. 3:22-cr-149 (S.D. Cal. Nov. 18, 2022); United States v. Hill, No. 4:22-cr-249 (S.D. Tex. Nov. 17, 2022); United States v. Blackburn, No. 1:22-cr-209 (M.D. Pa. Nov. 17, 2022); United States v. Mitchell, No. 1:22-cr-111 (S.D. Ala. Nov. 17, 2022); United States v. Dumont, No. 1:22-cr-53 (D.N.H. Nov. 14, 2022); United States v. Baker, No. 2:20-cr-301 (D. Utah Nov. 10, 2022); United States v. Carpenter, No. 1:21-cr-86 (D. Utah Nov. 10, 2022); United States v. Gray, No. 1:22-cr-247 (D. Colo. Nov. 10, 2022); United States v. Moore, No. 2:21-cr-121 (W.D. Pa. Nov. 9, 2022); United States v. Reese, No. 2:19-cr-257 (W.D. Pa. Nov. 8, 2022); United States v. Young, No. 2:22-cr-54 (W.D. Pa. Nov. 7, 2022); United States v. Butts, No. 9:22-cr-33 (D. Mont. Oct. 31, 2022); United States v. Burton, No. 3:22-cr-362 (D. S.C. Oct. 28, 2022); United States v. Carleson, No. 3:22-cr-32 (D. Ak. Oct. 28, 2022); United States v. Grant, No. 3:22-cr-161 (D. S.C. Oct. 28, 2022); Walker v. United States, No. 3:20-cv-31 (S.D. Cal. Oct. 28, 2022); United States v. Law, No. 2:20-cr-341 (W.D. Pa. Oct. 27, 2022); United States v. Borne, No. 1:22-cr-83 (D. Wyo. Oct. 24, 2022); United States v. Minter, No. 3:22-cr-135 (M.D. Pa. Oct. 18, 2022); United States v. Melendrez-Machado, No. 3:22-cr-634 (W.D. Tex. Oct. 18, 2022); United States v. Raheem, No. 3:20-cr-61 (W.D. Ky. Oct. 17, 2022); United States v. Ridgeway, No. 3:22-cr-175 (S.D. Cal. Oct. 17, 2022); United States v. Trinidad, No. 3:21-cr-398 (D.P.R. Oct. 17, 2022); United States v. Carrero, No. 2:22-cr-30 (D. Utah Oct. 14, 2022); United States v. Ortiz, No. 3:21-cr-2503 (S.D. Cal. Oct. 14, 2022); United States v. Riley, No. 1:22-cr-163 (E.D. Va. Oct. 13, 2022); United States v. Price, No. 2:22-cr-97 (S.D. W.Va. Oct. 12, 2022); United States v. King, No. 7:21-cr-255 (S.D.N.Y. Oct. 6, 2022); United States v. Daniels, No. 1:03-cr-83 (W.D.N.C. Oct. 4, 2022); United States v. Charles, No. 7:22-cr-154 (W.D. Tex. Oct. 3, 2022); United States v. Williams, No. 3:21-cr-478 (S.D. Cal. Sept. 30, 2022); United States v. Harper, No. 5:21-cr-4085 (N.D. Iowa Sept. 9, 2022); United States v. Campbell, No. 5:22-cr-138, Dkt. No. 64 (W.D. Okla. Sept. 27, 2022); United States v. Siddoway, No. 1:21-cr-205, Dkt. No. 54, 2022 WL 4482739 (D. Idaho Sept. 27, 2022); United States v. Perez, No. 3:21-cr-508, Dkt. No. 78 (S.D. Cal. Sept. 26, 2022); United States v. Collette, No. 7:22-cr-141, Dkt. No. 66, 2022 WL 4476790 (W.D. Tex. Sept. 25, 2022); United States v. Delpriore, No. 3:18-cr-136 (D. Ak. Sept. 23, 2022); United States v. Coombes, No. 4:22-cr-189 (N.D. Okla. Sept. 21, 2022); United States v. Hill, No. 3:21-cr-107 (S.D. Cal. Sept. 20, 2022); United States v. Rojo, No. 3:21-cr-682 (S.D. Cal. Sept. 14, 2022); United States v. Cockerham, No. 5:21-cr-6 (S.D. Miss. Sept. 13, 2022); United States v. Jackson, No. 0:21-cr-51 (D. Minn. Sept. 13, 2022); United States v. Havins, No. 3:21-cr-1515 (S.D.Cal. Sept. 12, 2022); United States v. Patterson, No. 7:19-cr-231 (S.D.N.Y. Sept. 9, 2022); United States v. Doty, No. 5:21-cr-21 (N.D. W.Va. Sept. 9, 2022); United States v. Burrell, No. 3:21-cr-20395 (E.D. Mich. Sept. 7, 2022); United States v. Randle, No. 3:22-cr-20 (S.D. Miss. Sept. 6, 2022); United States v. Ingram, No. 0:18-cr-557 (D. S.C. Aug. 25, 2022); United States v. Nevens, No. 2:19-cr-774 (C.D. Cal. Aug. 15, 2022); United States v. Farris, No. 1:22-cr-149 (D. Colo. Aug. 12, 2022); United States v. Adams, No. 1:20-cr-628 (S.D.N.Y. Aug. 10, 2022); United States v. Ramos, No. 2:21-cr-395

a facial challenge – that "the statute lacks any plainly legitimate sweep." See Hightower v. City of Boston, 693 F.3d 61, 77-78 (1st Cir. 2012). Finally, § 922(g)(1)'s prohibition is consistent with this country's historical tradition of "disarm[ing] groups whom [the legislature] judged to be a threat to the public safety." Kanter v. Barr, 919 F.3d 437, 458 (7th Cir. 2019) (Barret, J., dissenting).

a. The statutory regulation and the Bruen decision

Section 922(g)(1) makes it unlawful for any person "who has been convicted in any court of a crime punishable by imprisonment for a term exceeding one year" to "ship or transport in interstate or foreign commerce, or possess in or affecting commerce, any firearm or ammunition; or to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce." 18 U.S.C. 922(g)(1). The original federal firearms prohibition, enacted in 1938, prohibited individuals convicted of certain "violent offenses," including "assault with a dangerous weapon, or assault with intent to commit any offense punishable by imprisonment for more than one year," from receiving firearms. Federal Firearms Act, c. 850, §§ 2(6), 2(f), 52 Stat. 1250, 1251. The law was broadened in the 1960s to its current form. United States v. Skoien, 614 F.3d 638, 640 (7th Cir. 2010) (en banc).

The Second Amendment to the Constitution provides that "[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. In Heller, the Supreme Court recognized that the Second and Fourteenth Amendments protect the right of law-abiding, responsible citizens to possess a handgun in the home for lawful purposes, like self-defense (emphasis added). 544 U.S.

(C.D. Cal. Aug. 5, 2022); United States v. Doss, No. 4:21-cr-74 (S.D. Iowa Aug. 2, 2022); United States v. Maurice, No. 7:22-cr-48 (S.D.N.Y. Jul. 14, 2022).

at 635. The Court thus held unconstitutional two District of Columbia laws that effectively banned handgun possession in the home and required all firearms within homes to be kept inoperable and so unavailable for self-defense. Id. at 628-34.

Following Heller, the First Circuit addressed the constitutionality of a gun ban in Rene E., 583 F.3d at 8. In that case, the defendant challenged the constitutionality of 18 U.S.C. § 922(x)(2), which generally prohibits juveniles from possessing handguns. The Court noted that Heller "left intact" laws "prohibiting the possession of firearms by felons," as well as "others similarly rooted in history." Rene E., 583 F.3d at 12. In analyzing the constitutionality of § 922(x)(2), the Court followed the framework of Heller and undertook three steps in its analysis. Id. First, it considered the contemporary federal restriction on firearm possession by juveniles and found that it contained important exceptions, including for hunting and national guard duty. Id. at 13-14. Next, it considered nineteenth-century state laws imposing similar restrictions, including an 1878 state supreme court opinion noting that restricting the sale of a pistol to a juvenile "did not violate the Second Amendment and was wise public policy." Id. at 14-15. Finally, it considered whether the Founders would have regarded the prohibition as consistent with the Second Amendment, finding that "the right to keep arms in the founding period did not extend to juveniles." Id. at 15-16. The Court noted a "longstanding practice of prohibiting" those "whose possession poses a particular danger to the public" from possessing firearms but acknowledged that historians debate "the extent" to which states used their power to regulate gun possession at the founding. Id. 15.

In United States v. Booker, 644 F.3d 12 (1st Cir. 2011), the First Circuit took up a similar challenge to the constitutionality of 18 U.S.C. § 922(g)(9), which prohibits gun possession by individuals convicted of a misdemeanor crime of domestic violence. The Court explained that

the "full significance" of Heller's language identifying certain gun prohibitions as presumptively valid is "far from self-evident." Id. at 23. It did, however, identify two "important points" from this language. First, the language makes clear that "the Second Amendment permits categorical regulation of gun possession by classes of persons—e.g., felons" and does not require restrictions to be imposed on an "individualized, case-by-case basis." Id. Second, that the legislature continues to play a role in determining appropriate categorical exclusions and that valid exclusions need not "'mirror limits on the books in 1791.'" Id. at 23-24 (quoting Skoien, 614 F.3d at 641). The Court noted that modern felon-in-possession laws have evolved over time to extend to non-violent offenders, and that laws prohibiting those convicted of a violent crime are "arguably more consistent with the historical regulation of firearms." Id. at 24. Regardless, the Court found that § 922(g)(9) is consistent with the "presumptively lawful" bans prohibiting felons from possessing firearms, particularly as it covers "only those with a record of violent crime." Id.

The First Circuit addressed the constitutionality of § 922(g)(1) in Torres-Rosario, 658 at 113. In that case, the defendant made an "as-applied challenge," claiming that the statute was unconstitutional as applied to him because he lacked a prior conviction for a violent felony. Id. The First Circuit noted that all circuits that have considered the constitutionality of the statute "post Heller have rejected blanket challenges to felon in possession laws." Id. The Torres-Rosario Court noted the "well-established" principle that "felons are more likely to commit violent crimes than are other law-abiding citizens," and explained that Heller's "presumptively lawful" language left the door open to claims that certain non-violent felonies cannot be the basis for a categorical gun ban. Id. Noting the "notorious" link between drug dealing and violence, the Court found that even if the Supreme Court finds "some felonies so tame and technical as to be

insufficient to justify the ban," the defendant's two serious drug convictions are "not likely to be among them." Id.

A decade after Booker and Torres-Rosario, the Supreme Court decided Bruen. There, the Court "made the constitutional standard endorsed in Heller more explicit." 142 S. Ct. at 2134. To determine whether a government regulation infringes on the Second Amendment, courts must first determine whether the "Second Amendment's plain text covers" the individual's conduct. Id. at 2129-30. The Bruen Court recognized that the first step of analyzing the "plain text" of the Second Amendment "is broadly consistent with Heller, which demands a test rooted in the Second Amendment's text, as informed by history." Id. at 2127. If the government demonstrates that a law regulates activity "falling outside the scope of the right as originally understood," the activity is not constitutionally protected. Id. at 2126-27. If the conduct falls within the Second Amendment's original scope (or if the evidence on this point is inconclusive), courts proceed to the second prong of the analysis.

Turning to the second step, the Court rejected the test that had developed among the circuit courts which analyzed whether a law that burdened a Second Amendment right was either narrowly tailored to, or substantially related to, a compelling government interest. Id. at 2126-27. Instead, Bruen requires the government to affirmatively demonstrate that a covered firearms regulation is "part of the historical tradition that delimits the outer bounds of the right to keep and bear arms." Id.

To determine whether a particular regulation is "consistent with the Nation's historical tradition of firearm regulation," courts should consider "whether 'historical precedent' from before, during, and even after the founding evinces a comparable tradition of regulation." Id. At 2131-32 (quoting Heller, 554 U.S. at 631). Courts need not find a "historical *twin*." Id. at 2133

(emphasis in original). Rather, courts should employ analogical reasoning to determine whether the government has identified "a well-established and representative historical *analogue*." Id. (emphasis in original). Courts must determine whether a historical regulation is a proper analogue for a modern regulation by determining whether the two regulations are "relatively similar," including "how and why the regulations burden a law-abiding citizen's right to armed self-defense." Id. at 2132-33 (internal quotation marks omitted). Self-defense lies at the core of the Second Amendment, so "whether modern and historical regulations impose a comparable burden on the right of armed self-defense and whether that burden is comparably justified are *central* considerations." Id. at 2133 (emphasis in original).

Applying this standard, the Bruen Court invalidated a state licensing law that allowed an individual to obtain a license to openly carry a gun outside the home only after proving "proper cause exists." Id. at 2123. The Court first found that the law fell within the Second Amendment's plain text because the petitioners were "ordinary, law-abiding, adult citizens" who sought to carry handguns publicly for self-defense. Id. at 2134. Next, the Court surveyed historical evidence from "medieval to early modern England" through "the late-19th and early-20th centuries" to determine whether the law squared with historical tradition. "[N]ot all history is created equal," and the Court noted that evidence closer in time to the founding carries more weight. Id. at 2136. Ultimately, the Court found that the government had not met its burden to identify an American tradition justifying this regulation. Id. at 2156.

b. The Second Amendment does not extend to the possession of firearms by convicted felons

The defendant's challenge to the constitutionality of 922(g)(1) fails to show that the Second Amendment right to keep and bear arms protects the prohibited conduct of possessing a

firearm by a convicted felon. As noted above, Heller defined the right to bear arms as belonging to "law-abiding, responsible citizens." Id. at 635. Consistent with that definition, the Court cautioned that "nothing in [its] opinion should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons." Id. at 626. The Court described such prohibitions as "presumptively lawful" and falling within "exceptions" to the protected right to bear arms. Id. at 627 n.26, 635. In McDonald, 561, U.S. at 786, a plurality of the Court repeated its "assurances" that Heller "did not cast doubt on such longstanding regulatory measures as 'prohibitions on the possession of firearms by felons.'" 561 U.S. at 786 (quoting Heller, 554 U.S. at 626).

Bruen reinforces the conclusion that the Second Amendment does not extend to possession of firearms by convicted felons. See 142 S.Ct. at 2162 (Kavanaugh, J., joined by Roberts, C.J., concurring) (reiterating that "longstanding prohibitions on the possession of firearms by felons" are constitutional). Bruen repeatedly described the Second Amendment as limited to "law-abiding" citizens. 142 S.Ct. at 2122, 2131, 2133, 2134, 2138, 2150, 2156. Consistent with that principle, Bruen approved "'shall-issue" licensing regimes that "require applicants to undergo a background check or pass a firearms safety course." Id. at 2139 n.9. (Kavanaugh, J., joined by Roberts, C.J., concurring) (""[S]hall-issue licensing regimes are constitutionally permissible[.]"). In doing so, the Court had no need to analyze the history of shall-issue licensing regimes. Such regimes generally pass constitutional muster because they "are designed to ensure only that those bearing arms…are, in fact 'law-abiding, responsible citizens.'" Id. at 2139 n.9. This reasoning underscores that 922(g)(1) – which aims to ensure that "those bearing arms" are "law-abiding," – accords with the Second Amendment. Id.

c. Section 922(g)(1) is constitutional

Even if the Court analyzes § 922(g)(1) under the test explained in Bruen, the Defendant's motion still fails. First, the activity regulated by § 922(g)(1) does not fall within "Second Amendment's plain text." Second, even if it did, the statute is consistent with the longstanding tradition of disarming persons considered a risk to society.

i. Section 922(g)(1) regulates activity outside the scope of the second amendment.

As several courts of appeals have recognized, offenses serious enough to satisfy 922(g)(1) – "crime[s] punishable by imprisonment for a term exceeding one year" - necessarily exclude the perpetrator from the class of law-abiding citizens protected by the Second Amendment. Folajtar v. AG of the United States, 980 F.3d 897, 901 (3d Cir. 2020); United States v. Rozier, 598 F.3d 768, 771 (11th Cir. 2010); United States v Scroggins, 599 F.3d 433, 451 (5th Cir. 2010) (reaffirming the Fifth Circuit's pre-Heller jurisprudence holding "that criminal prohibitions on felons (violent or nonviolent) possessing firearms did not violate the Second Amendment). The Second Amendment permits Congress to disarm individuals based on their status as convicted felons. Thus, Section 922(g)(1) does not burden a constitutional right, and it is facially constitutional.

Bruen reinforces the conclusion that the possession of firearms by felons does not fall within the Second Amendment's plain text. 142 S. Ct. at 2125 (noting that petitioners are "law-abiding, adult citizens."); id. at 2134 (noting that petitioners, "two ordinary, law-abiding, adult citizen," are "part of 'the people' whom the Second Amendment protects."); id. at 2138 (finding that "there is no historical tradition limiting public carry only to "those law-abiding citizens who demonstrate a special need."); id. at 2150 (noting that none of the historical limitations it

reviewed "operated to prevent law-abiding citizens with ordinary self-defense needs from carrying arms in public."); id. at 2156 (noting that American governments generally have not required "law-abiding, responsible citizens" to demonstrate a need to carry a firearm for self-protection in public.). The Bruen Court noted that Heller and McDonald recognized that the Second Amendment protects the rights of "ordinary, law-abiding citizens" to possess a handgun in the home. Id. at 2122. Indeed, it specifically stated that the Second Amendment "'surely elevates above all other interests the right of law-abiding, responsible citizens to use arms' for self-defense." Id. at 2131. Bruen repeatedly described the Second Amendment a right held by "law-abiding" citizens.

The Second Amendment's applicability to only "law-abiding" citizens is further bolstered by the Court's general approval of "shall-issue" licensing regimes, which "require applicants to undergo a background check or pass a firearms safety course." Id. at 2138, n.9. Because these "are designed to ensure only that those bearing arms are, in fact, 'law abiding, responsible citizens,'" they do not infringe upon the Second Amendment. Id. This reasoning reinforces Heller's conclusion that the Second Amendment protections extend only to "law-abiding" citizens.

Following Heller, the First Circuit found § 922(g)(1) to be constitutional in the context of an as-applied challenge, thus acknowledging that the statute is facially valid. Torres-Rosario, 658 F.3d at 113. Bruen did not overturn Heller's statement that bans prohibiting felons from possessing firearms are presumptively lawful. Rather, at least five justices indicated their explicit support for this conclusion. Justice Kavanaugh, joined by Chief Justice Roberts, wrote a concurring opinion to "underscore" that Bruen did not upset Heller's conclusion that the opinion should "not cast doubt on longstanding prohibitions on the possession of firearms by felons."

Bruen, 142 S. Ct. at 1261-62 (Kavanaugh, J., concurring). Justice Bryer, joined by Justices Kagan and Sotomayor, wrote that Bruen "cast[s] no doubt on" Heller's treatment of laws prohibiting firearms possessions by felons. Id. (Breyer, J., dissenting). Accordingly, First Circuit precedent finding § 922(g)(1) to be constitutional remains good law. The Court can deny the Defendant's motion on this ground alone.

ii. Section 922(g)(1) is consistent with longstanding tradition

Even if the Supreme Court had not defined the Second Amendment in a way that excludes the right of convicted felons to possess firearms, the defendant's facial challenge still fails because 922(g)(1) fits comfortably within the nation's longstanding tradition of disarming unvirtuous or dangerous citizens. As the Court has recognized, "'the right to bear arms was tied to the concept of a virtuous citizenry[;]…accordingly, the government could disarm 'unvirtuous citizens.'" Folajtar, 980 F.3d at 902 (quoting Binderup v. AG of the United States, 836 F.3d 336, 348 (3d Cir. 2016); see also United States v. Vongxay, 594 F.3d 1111, 1118 (9th Cir. 2010).

The historical record supports prohibiting convicted felons from possessing firearms "Heller identified as a 'highly influential' 'precursor' to the Second Amendment the Address and Reasons of Dissent of the Minority of the Convention of the State of Pennsylvania to Their Constituents." Skoien, 614 F.3d at 640. That document notes that "the people have a right to bear arms for the defence of themselves and their own state….and no law shall be passed for disarming the people or any of them, unless for crimes committed or real danger of public injury from individuals." Id. (quoting Bernard Schwartz, The Bill of Rights: A Documentary History 662, 665 (1971)). This proposal contemplated prohibiting those convicted of crimes from possessing weapons.

Scholars also tend to agree that the prohibition of possession of firearms by those deemed dangerous is supported by history. See, e.g., Lawrence Rosenthal, The Limits of Second Amendment Originalism and the Constitutional Case for Gun Control, 92 Wash. U.L. Rev. 1187, 1239 (2015) ("[H]istory suggests that when the legislature restricts the possession of firearms by discrete classes of individuals reasonably regarded as posing an elevated risk for firearms violence, prophylactic regulations of this character should be sustained."); Carlton F.W. Larson, Four Exceptions in Search of a Theory: District of Columbia v. Heller and Judicial Ipse Dixit, 60 Hastings L.J. 1371, 1377 (2009) (citing historical examples for the proposition that "any person viewed as potentially dangerous could be disarmed by the government without running afoul of the 'right to bear arms.'").

Samuel Adams offered an amendment at the Massachusetts convention to ratify the Constitution, recommending "that the said Constitution be never construed to authorize Congress…to prevent the people of the United States, who are peaceable citizens, from keeping their own arms." Schwartz, The Bill of Rights, 674-675, 681. In the same vein, "[m]any of the states, whose own constitutions entitled their citizens to be armed, did not extend this right to persons convicted of a crime." Skoien, 614 F.3d at 640. Put simply, as the Seventh Circuit has determined, "felons were not historically understood to have Second Amendment rights." Kanter, 919 F.3d at 445 (7th Cir. 2019). In this respect, the right to bear arms is analogous to civic rights that have historically been subject to forfeiture by individuals convicted of crimes, including the right to vote, Richardson v. Ramirez, 418 U.S. 24, 56 (1974), and the right to serve on a jury, 28 U.S.C. 1865(b)(5). See Binderup, 836 F.3d at 349 ("[P]ersons who have committed serious crimes forfeit the right to possess firearms in much the way 'they forfeit other civil liberties[.]'" (citation omitted). Just as Congress and the States have required persons convicted

of felonies to forfeit civic rights, 922(g)(1) permissibly imposes a firearms disability "as a legitimate consequence of a felony conviction." Tyler v. Hillsdale Cty. Sheriff's Dep't, 837 F.3d 678, 708 (6th Cir. 2016) (en banc) (Sutton, J., concurring).

The defendant's argument is neither complete nor persuasive. Statutes disarming persons considered a risk to society, such as convicted felons, are well known to the American legal tradition, including colonial-era law disarming those who defamed acts of Congress, failed to swear allegiance to the state, or refused to defend the colonies. Folajtar, 980 F.3d at 908 & n.11) (reviewing colonial laws from Connecticut, Pennsylvania, and Massachusetts). Moreover, "at their ratification conventions, several states proposed amendments limiting the right to bear arms to both law-abiding and 'peaceable' citizens." Id. at 908 (reviewing proposed amendments in Pennsylvania, New Hampshire, and Massachusetts). Accordingly, Section 922(g)(1) is consistent with the above-described longstanding tradition and the defendant's claim of Section 922(g)(1)'s unconstitutionality should be denied.

CONCLUSION

The Defendant is a multiple-time federally convicted felon. There is ample evidence that, in November of 2022, the Defendant knew that he had previously been convicted of a felony; he had been convicted of this same charge twice previously, including receiving the maximum 120 months in federal prison as a result, in the same Court, the United States District Court – District of Massachusetts, in 2012 and in 2007, respectively.

On February 22, 2023, the Indictment in this case was returned by a legally constituted and unbiased grand jury, and it is valid on its face. The Indictment is sufficiently pled, and informs the Defendant as to the nature of the charge against him. Moreover, Bruen is clear that the Second Amendment protects possession and use of firearms for lawful purposes by law-

abiding, responsible citizens. Convicted felons, however, are not included in this class of the law-abiding and responsible citizenry. The conduct prohibited by Section 922(g)(1), possessing a firearm as a convicted felony, is not protected conducted under the Constitution. Even if such conduct fell within the ambit of the Second Amendment, 922(g)(1) remains constitutionally permissible because it is consistent with the nation's historical tradition of firearm regulation. The defendant's motion to dismiss should be denied.

Respectfully submitted,

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Date: November 15, 2023

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I hereby certify that I submitted this document for electronic filing via the ECF system, which will send an electronic copy to all counsel of record who are identified on the notice of electronic filing.

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Date: November 15, 2023