UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

UNITED STATES OF AMERICA v. KOBE SMITH	Criminal No. 22-cr-10157-FDS

GOVERNMENT'S OPPOSITION TO MOTION TO DISMISS

Defendant Kobe Smith has moved to dismiss the indictment which charges him with one count of conspiracy to violate § 922(a)(3), on grounds that Section 922(a)(3) is facially unconstitutional and unconstitutional as applied to Smith under the United States Supreme Court's decision in *New York State Rifle & Pistol Ass'n. Inc. v. Bruen*, 142 S. Ct. 2111 (2022). These arguments fail.

As an initial matter, the defendant's motion should be denied as untimely because it was filed four months after the filing deadline for dispositive motions. Alternatively, it should be denied because it is in essence a motion for reconsideration of the Court's decision denying his co-defendant's motion to dismiss, which does not meet the standard for reconsideration. Moreover, if the Court addresses the merits, under the holdings and logic of *Bruen, Heller,* and *McDonald,* Section 922(a)(3) is constitutional facially and as applied to Smith. The prohibition on importation of firearms from other states without a federal firearms license found in Section 922(a)(3) does not abridge an individual's right to lawfully bear arms in self-defense and therefore does not implicate the Second Amendment. Even if it did, it fits within this country's historical tradition of firearms regulation—including historical restrictions on the sale of firearms and gunpowder. And Section 922(a)(3) is constitutional as applied to Smith – someone who was not

"carrying" or "possessing" firearms interstate for his own protection, but rather someone who was engaged in a conspiracy to purchase and transport firearms in and affecting interstate commerce in order to evade Massachusetts gun laws and to distribute to individuals engaged in street violence in and around Boston.

Accordingly, Smith's Motion to Dismiss should be denied.

FACTS

I. The Offense Conduct

Smith, along with three other co-defendants, Brandon Moore, Jarmori Brown, and Jahquel Pringle, was charged by indictment in July 2022. Dkt. No. 3. Smith was charged with one count of conspiracy to commit illegal transportation or receipt in state of residency of firearm purchased or acquired outside of state of residency (*i.e.*, a conspiracy to violate Section 922(a)(3)), in violation of 18 U.S.C. § 371. Dkt. No. 3.

The indictment alleges that between at least January 2020 and May 2021, Smith, Pringle, and Brown conspired with Moore to obtain no fewer than 24 firearms from Moore in Alabama, where Moore resided, and to transport them back to Massachusetts, where Smith, Pringle, and Brown resided for their own use *and for distribution to their associates*.[1] Dkt. No. 3, ¶¶ 1-5. None of them had licenses to possess firearms. *Id.* ¶ 7. The indictment further alleges that Pringle and Smith would place orders for the firearms, and that Pringle and Brown would travel to Alabama to pick them up and transport them back to Boston via commercial bus. *Id.* ¶¶ 8-10. It further alleges that Smith, Pringle, and Brown kept some of these firearms for themselves and also

[1] Smith's allegation that he was simply placing an order from a friend for one or two guns to use in his own self-defense is inconsistent with the allegations of the Indictment, which must be taken as true for purposes of deciding a motion to dismiss. *United States v. Dunbar,* 367 F. Supp. 2d 59, 60 (D. Mass. 2005) (citing *Boyce Motor Lines, Inc. v. United States,* 342 U.S. 337, 343 n. 16 (1952). Accordingly, for purposes of this motion, the Court must assume that Smith was, in fact, conspiring to bring dozens of firearms into Massachusetts for his own use and that of his co-conspirators, as well as for distribution to their associates. The Court is not limited to considering only the overt acts that Smith is alleged to have committed, as Smith urges the Court to do. Motion at 5.

distributed these firearms to their associates in Boston. *Id.* ¶ 12(f). At least 6 firearms have been recovered in and around Boston that were purchased by Brandon Moore's straw purchaser, some in the possession of felons and gang members; one was in Brown's possession. *See* Dkt. No. 56 at 2-3, n.3. One gun that Pringle brought from Alabama into Boston early in the morning of July 17, 2020 was recovered at the scene of a shooting in Boston later that same day. Dkt. No. 56 at 2.

II. Smith's Status[2]

Smith, YOB 1999, was 20 years old at the time the conspiracy began in January 2020. Although he was eligible to apply for a Massachusetts firearm identification card (FID), he did not have such a card and therefore could not lawfully possess a firearm in Massachusetts at the time of the offense – a fact set forth in the indictment and therefore one this Court can indisputably consider. Dkt. No. 3 ¶ 7. Moreover, although he has no felonies on his record, he has – and had, at the time of the offense (arraignment date June 1, 2020, *i.e.,* before his co-conspirators' two trips

[2] The government provides this information in response to the defendant's argument that the as-applied challenge looks different for him, as he is not a felon. Neither his status as a non-felon nor the fact of his open gun case were alleged in the indictment.

In most instances, the Court cannot consider information outside the indictment in ruling on a Rule 12 motion. *See United States v. Poulin*, 588 F.Supp.2d 58 (D. Me. 2008) (quoting Federal Practice and Procedure, stating, "Although Rule 47 permits affidavits in support of motions, neither it nor Rule 12 was designed to permit 'speaking motions,' that is, motions that require consideration of facts outside the pleadings." However, because Smith has argued that Section 922(a)(3) is unconstitutional as applied to a defendant without a felony conviction whose intent in purchasing a firearm was allegedly self-defense, and suggested that he fits within that category (an allegation that is not supported by the indictment), Motion at 19, the government includes information about his criminal history to demonstrate that there is reason to doubt his allegation that he is a law-abiding person with a lawful purpose for obtaining a firearm. The Court does not need to consider this information in order to deny both Smith's facial and as-applied challenges.

The Third Circuit in *Range v. Attorney Gen*., 69 F.4th 96, 101-102 (3d Cir. 2023), considered facts about the defendant's criminal history (or relative lack thereof), likely because he brought a civil action for injunctive relief, so additional facts were before the Court than are typically contained in indictments.

to Alabama described in the indictment) – an open (felony) gun case in the Boston Municipal Court – Dorchester Division, Docket No. 2007CR001308. *See* Dkt. No. 56-7 (Dorchester docket).

III. Procedural History

At the status conference on June 27, 2023, Judge Dein ordered, "The defendants shall file any dispositive motions by August 15, 2023." Dkt. No. 90, ¶ 3. On August 15, Smith's co-defendant Pringle filed a Motion to Dismiss the Indictment, which charged Pringle with conspiracy to violate Section 922(a)(3), as well as substantive violations of Section 922(a)(3) and 18 U.S.C. § 922(g)(1). Dkt. No. 102. That motion was fully briefed and argued, and, in October 2023, denied. *See* Dkt. No. 119. Thereafter, on December 19, 2023, without any motion for leave to permit a late filing, Smith filed his own Motion to Dismiss ("Motion," Dkt. No. 122), which largely recites the same arguments previously addressed by this Court and seeks reconsideration of the Court's prior decision that Section 922(a)(3) is constitutional.

ARGUMENT

I. This Court Should Summarily Deny Smith's Motion to Dismiss as Untimely or Alternatively As an Unsupported Motion for Reconsideration; He Cites No New Evidence, New Law, Nor Manifest Error of Law or Fact Justifying Reconsideration

This Court should deny Smith's Motion to Dismiss because it is untimely. Pursuant to Fed. R. Crim. P. 12(c)(1), the court may set a deadline for Rule 12(b) motions to be filed. If a party does not meet the deadline for making a Rule 12(b)(3) motion, the motion is untimely." Fed. R. Crim. P. 12(c)(3). Nonetheless, a court "court may consider the defense, objection, or request if the party shows good cause." *Id.* Here, on June 27, 2023, Judge Dein ordered that all dispositive motions be filed by August 15, 2023. Pringle adhered to that deadline, and his motion has been fully litigated. Now, four months after the filing deadline, at a point in the case where the parties should be proceeding to disposition or trial, without a showing of good cause and

without a motion for excusable delay, Smith has filed a motion to dismiss on grounds that were fully known on the filing deadline. His Motion should be dismissed as untimely. *See United States v. Jaafar*, 636 F. Supp. 3d 266, 267 (D. Mass. 2022) (Gorton, J.) (denying motion to dismiss as untimely, among other grounds); *United States v. Zayas*, No. 92-1654, 92-1879, 1992 U.S. App. LEXIS 30181, at *7 (1st Cir. Aug. 28, 1992) (affirming denial of untimely motion to reconsider affirmed as "unassailable" given defendant's many failures to comply with deadlines).

Alternatively, this Court should deny Smith's Motion to Dismiss because it is, at its core, a motion for reconsideration for which he does not have proper standing (as he did not join the previous motion) and for which does not have a proper basis. Indeed, Smith states in his Motion that he "doubles down on the above argument by re-presenting a parallel argument already advanced by Smith's alleged co-conspirator - Mr. Jahquel Pringle" regarding how laws regulating methods of receipt and transportation of firearms necessarily infringe upon the right to possess firearms. Dkt. No. 122 at 10. Likewise he expressly asks the Court "reconsider the holding" regarding whether a regulation that has a *de minimis* impact on Second Amendment rights nonetheless must progress to step 2 of the *Bruen* analysis. *Id.* at 11.

The court in *United States v. Villa-Guillén* summarized the law in the First Circuit regarding motions for reconsideration in criminal cases as follows:

> The Federal Rules of Criminal Procedure do not explicitly provide for motions for reconsideration. *See United States v. Ortiz*, 741 F.3d 288, 292 n.2 (1st Cir. 2014) (citation omitted). The First Circuit Court of Appeals applies, however, Federal Rule of Civil Procedure 59(e) ("Rule 59(e)") to motions for reconsideration arising in the criminal context. *See, e.g., United States v. Allen*, 573 F.3d 42, 53 (1st Cir. 2009) (applying Rule 59(e) to a motion for reconsideration in a criminal case).
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> Pursuant to Rule 59(e), a district court will alter its original order only if it "evidenced a manifest error of law, if there is newly discovered evidence, or in certain other narrow situations." *Biltcliffe v. CitiMortgage, Inc*., 772 F.3d 925, 930 (1st Cir. 2014) (citation omitted). A motion for reconsideration does "not provide a vehicle for a party to undo its own procedural failures [or] allow a party [to]

> advance arguments that could and should have been presented to the district court prior to judgment." *Iverson v. City of Bos.*, 452 F.3d 94, 104 (1st Cir. 2006) (citation omitted). "Rule 59(e) does not exist to allow parties a second chance to prevail on the merits . . . [and] is not an avenue for litigants to reassert arguments and theories that were previously rejected by the Court." *Johnson & Johnson Int'l v. P.R. Hosp. Supply, Inc.*, 322 F.R.D. 439, 441 (D.P.R. 2017) (Besosa, J.) (citations omitted). In deciding a motion for reconsideration, the reviewing court has considerable discretion. *Venegas-Hernandez v. Sonolux Records*, 370 F.3d 183, 190 (1st Cir. 2004). "As a general rule, motions for reconsideration should only be exceptionally granted." *Villanueva-Méndez v. Nieves-Vázquez*, 360 F. Supp. 2d 320, 323 (D.P.R. 2005) (Domínguez, J.).

414 F. Supp. 3d 248, 249 (D.P.R. 2019). Applying this standard here, Smith's Motion must be denied. Smith does not cite a single case or argument that was not available to him as of August 15, 2023. Instead, he uses his Motion as "a vehicle for a party to undo its own procedural failures" and to "advance arguments that could and should have been presented to the district court prior," *Iverson*, 452 F.3d at 104, and to "reassert arguments and theories that were previously rejected by the Court." *Johnson & Johnson Int'l*, 322 F.R.D. at 441. Accordingly, Smith's Motion should be denied on that ground as well.

If the Court were to consider the merits of Smith's Motion, the Court should deny it for the same reasons it previously denied Pringle's, because Section 922(a)(3) is constitutional on its face and as applied to Smith.

II. 18 U.S.C. § 922(a)(3) Is Constitutional Facially

Section 922(a)(3) is constitutionally valid on its face. Section 922(a)(3) generally makes it unlawful "for any [unlicensed] person . . . to transport into or receive in the State where he resides . . . any firearm purchased or otherwise obtained by such person outside that State," subject to certain exceptions not applicable here.

As an initial matter, and as discussed in the government's Opposition to Pringle's Motion to Dismiss (Dkt. No. 113), incorporated herein by reference, in *District of Columbia v. Heller,* 554 U.S. 570 (2008), the Supreme Court emphasized that "nothing in our opinion should be taken to

cast doubt on," *inter alia*, "laws imposing conditions and qualifications on the commercial sale of arms." *Id*. at 626-27. As the Court noted, it "identif[ied] these presumptively lawful regulatory measures only as examples; our list does not purport to be exhaustive." *Id*. at 627 n.26. Two years later, the Court "repeat[ed] th[e] assurances" that it had "made . . . clear in *Heller*." *McDonald v. City of Chicago*, 561 U.S. 742, 786 (2010). These assurances were repeated by six justices in their *Bruen* opinions. *See Bruen*, 142 S. Ct. at 2157 (Alito, J., concurring) ("Nor have we disturbed anything that we said in *Heller* or *McDonald* . . . , about restrictions that may be imposed on the possession or carrying of guns."); *id.* at 2162 (Kavanaugh, J., joined by Roberts, C.J., concurring) ("Properly interpreted, the Second Amendment allows a 'variety' of gun regulations," including the "longstanding prohibitions on the possession of firearms by felons" discussed in *Heller* and *McDonald* (quoting *Heller*, 554 U.S. at 626)); *id.* at 2189 (Breyer, J., joined by Sotomayor and Kagan, JJ., dissenting) ("I understand the Court's opinion today to cast no doubt on that aspect of *Heller*'s holding" that permitted "laws imposing conditions and qualifications on the commercial sale of arms").

With that backdrop, Smith's facial challenge applies for at least two reasons. First, as a minor restriction on the unlicensed commercial sale and interstate transport of firearms, Section 922(a)(3) does not burden the individual right to bear arms in self-defense and therefore does not implicate the Second Amendment. Second, even if the Second Amendment is implicated, Section 922(a)(3) falls comfortably within this nation's historical tradition of firearm regulation.

A. The Second Amendment's Text Does Not Cover Interstate Importation of Firearms

As this Court previously found in denying Pringle's Motion to Dismiss the indictment on the same basis, the Second Amendment's text does not apply to the conduct forbidden by 18 U.S.C. § 922(a)(3). Dkt. No. 119 at 8. In assessing whether the Second Amendment's text covers an individual's conduct, a court must consider the "textual elements" of the Second Amendment's "operative clause," *i.e.*, "the right of the people to keep and bear Arms, shall not be infringed." *Bruen*, 142 S. Ct. at 2134. In referring to "the right," the Second Amendment "codif[ied] a pre-existing right," *id.* at 2130, one that "is not unlimited" and is "not a right to keep and carry any weapon whatsoever in any manner whatsoever and for whatever purpose." *Heller*, 554 U.S. at 626. The individual's "proposed course of conduct" must be something "the plain text of the Second Amendment protects," *i.e.,* the conduct must constitute "keep[ing]" or "bear[ing]" arms. *Id.* at 2134-35. The key right protected is "the individual right to possess and carry weapons in case of confrontation." *Bruen*, 142 S. Ct. at 2134 (quoting *Heller*, 554 U.S. at 592). Because nothing in Section 922(a)(3) infringes upon an individual's ability to lawfully possess and carry weapons in self-defense, the Second Amendment's text does not apply to this statute.

Contrary to Smith's argument (repeating Pringle's argument) that Section 922(a)(3) is "fundamentally, about possession" (Motion at 10), Section 922(a)(3) makes no restriction on a person's ability to possess a firearm for self-defense. This Court rightly found that argument "unpersuasive" when presented by Pringle. Dkt. No. 119 at 6. As the Second Circuit has explained (pre-*Bruen*, but unaffected by *Bruen*), Section 922(a)(3) "does nothing to keep someone from purchasing a firearm in her home state, which is presumptively the most convenient place to buy anything." *United States v. Decastro,* 682 F.3d 160, 168 (2d Cir. 2012). Section 922(a)(3) likewise "does not bar purchases from an out-of-state supplier if the gun is first transferred to a

licensed gun dealer in the purchaser's home state." *Id.*; *cf. United States v. Focia*, 869 F.3d 1269, 1286 (11th Cir. 2017) (denying Second Amendment challenge to Section 922(a)(5), which "prohibits only the transfer of a firearm by an unlicensed person to any other unlicensed person who resides in a different state than the state in which the transferor resides" and thus "does not operate to completely prohibit [the defendant] or anyone else, for that matter, from selling or buying firearms"). Indeed, at the time of Smith's conduct in July 2020, there were 597 FFLs in Massachusetts. *See* Bureau of Alcohol, Tobacco, Firearms and Explosives, State Federal Firearms Listings, https://www.atf.gov/firearms/listing-federal-firearms-licensees/state?field_ffl_date_value%5Bvalue%5D%5Byear%5D=2020&ffl_date_month%5Bvalue%5D%5Bmonth%5D=7&field_state_value=MA (last accessed Jan. 15, 2024).

The Supreme Court has repeatedly recognized that certain "conditions and qualifications on the commercial sale of arms" do not fall within the protections of the Second Amendment's text. *Heller*, 554 U.S. at 626-27; *see also United States v. McNulty,* No. 22-10037-WGY, 2023 U.S. Dist. LEXIS 129888 (D. Mass. July 27, 2023) (upholding the constitutionality of Section 922(a)(1) post-*Bruen*, noting, "the *Bruen* Court seemed to caution against reading its decision as one that alters the framework regulating firearm commerce"). Section 922(a)(3) is one such presumptively constitutional regulation on the commercial sale of firearms. Although Section 922(a)(3) regulates the transport of firearms across state lines, it "only minimally affects the ability to acquire a firearm." *Decastro*, 682 F.3d at 164; *see also Mance v. Sessions*, 896 F.3d 699, 709 (5th Cir. 2018) (denying Second Amendment challenge to Section 922(a)(3) and noting that "[t]he delay incurred if a handgun is purchased out of state and transferred to an in-state FFL is *de minimis*"). Such a *de minimis* condition on the manner in which a firearm may be acquired does not infringe upon the right of armed self-defense. *See Focia*, 869 F.3d at 1286 (upholding Section

922(a)(5), which "only minimally affects the ability to acquire a firearm"); *United States v. Flores*, No. H-20-427, 2023 WL 361868, at *5 (S.D. Tex. Jan. 23, 2023) (holding that "a *de minimis* burden on downstream possession rights" fails to "trigger *Bruen* scrutiny" in a Section 922(a)(1)(A) case); *see also, e.g., United States v. Tita*, No. RDB-21-0334, 2022 WL 17850250, at *7 (D. Md. Dec. 22, 2022) (rejecting an argument that export controls on firearms implicated the Second Amendment in a Section 922(k) case); *United States v. King*, No. 22 Cr. 215, 2022 WL 17668454, at *3 (E.D. Pa. Dec. 14, 2022) (rejecting an argument that commercially "buying and selling firearms . . . is protected by the Second Amendment'" in a Section 922(a)(1)(A) case).

This *de minimis* burden on the method of acquisition of a firearm is far less than that imposed by other regulations that *Bruen* indicated do not infringe upon an individual's Second Amendment right, such as the "shall-issue" firearm-carry licensing schemes that existed in 43 states.[3] 142 S. Ct. at 2138 n.9. Justice Kavanaugh emphasized in his concurrence (joined by Chief Justice Roberts) that states can constitutionally require license applicants to "undergo fingerprinting, a background check, a mental health records check, and training in firearms handling and in laws regarding the use of force, among other possible requirements." *Id.* at 2162 (Kavanaugh, J., concurring). If such administrative burdens on the carrying of firearms are permissible, then Section 922(a)(3)'s prohibition on unlicensed importation of out-of-state firearms similarly falls outside of the Second Amendment's text because it does not "deny ordinary

[3] Smith argues that even if a statute implicates the Second Amendment a *de minimis* amount, the Court must move on to step 2 of the *Bruen* test and look at historical analogues. Motion at 11. That is not *Bruen*'s holding. Notably, the defendant cites inapposite First Amendment law for this proposition. Motion at 13. Moreover, this Court did not find that Section 922(a)(3) implicates the Second Amendment even a *de minimis* amount; rather, it held that "Sections 922(a)(3) and (2) *do not* burden an individual's Second Amendment 'right to keep and bear arms for self-defense.'" Dkt. No. 119 at 8 (emphasis added; citation omitted).

Smith's argument that the Court somehow engaged in prohibited means-ends scrutiny in its *Pringle* decision, Motion at 14-18, is incorrect and misses the fact that the Court actually found that Section 922(a)(3) does not burden an individual's Second Amendment right.

citizens their right to public carry." *Id*. at 2138 n.9 (majority opinion). *See also U.S. v. Lucha El Libertad,* No. 22-cr-644, 2023 WL 4378863, at *13 (S.D.N.Y. July 3, 2023) ("Like the 'shall-issue' state-licensing regimes held out by the *Bruen* majority opinion and Kavanaugh concurrence as putatively lawful on their face, § 922(a)(3) therefore does not on its face operate to prevent anyone from keeping or bearing arms; it merely prescribes and proscribes particular modes of acquiring guns, so as 'to ensure only that those bearing arms in the jurisdiction are, in fact, law-abiding, responsible citizens'") (quoting *Bruen,* 142 S.Ct. at 2138 n. 9).

Likewise, post-*Bruen*, many courts that have analyzed whether conditions on the sale and receipt of firearms fall within the Second Amendment's text have held that they do not. *See, e.g., McNulty,* 2023 U.S. Dist. LEXIS 129888, at *14 (holding that Section 922(a)(1)(A)'s prohibition on selling firearms without a license does not fall within the Second Amendment's text or protections); *Flores*, 2023 WL 361868, at *3–5 (same); *King*, 2022 WL 17668454, at *3 (same); *United States v. Gonzales*, No. 22 Cr. 54, 2022 WL 17583769, at *2 (D. Utah Dec. 12, 2022) (same for Section 922(a)(1)(A)'s regulation of the sale of firearms and Section 924(n)'s prohibition on traveling to other states to acquire firearms in order to violate Section 922(a)(1)(A)); *Tita*, 2022 WL 17850250, at *7 (same for Section 922(k)'s prohibition on transporting, shipping, receiving, or possessing firearms with removed, altered, or obliterated serial numbers); *United States v. Reyna*, No. 21 Cr. 41, 2022 WL 17714376, at *3-5 (N.D. Ind. Dec. 15, 2022) (same); *United States v. Holton*, No. 21 Cr. 482-B, 2022 WL 16701935, at *3-4 (N.D. Tex. Nov. 3, 2022) (same). This Court held the same as to Section 922(a)(3) in its ruling in *Pringle* in October, and it should hold the same here.

Moreover, firearms purchased from out of state through illegitimate channels are "not typically possessed by law-abiding citizens for lawful purposes" and for that additional reason fall

outside the Second Amendment's text. *Heller*, 554 U.S. at 625. As Congress found in enacting Section 922(a)(3), the traffic of guns through mail order common carriers and non-resident sources "is a means which affords circumvention and contravention of State and local laws governing the acquisition of [firearms]." S. Rep. No. 90-1097, at 49 (1968), *reprinted in* 1968 U.S.C.C.A.N. 2112, 2166. And studies suggest that guns purchased from out-of-state are more likely to quickly be involved in criminal activity, as occurred here. *See* David M. Kennedy et al., *Youth Violence in Boston: Gun Markets, Serious Youth Offenders, and a Use-Reduction Strategy*, 59 Law & Contemp. Probs. 147, 174 (1996). There is little reason why a law-abiding citizen, seeking a gun for law-abiding purposes, would not purchase a firearm through a licensed dealer in his home state, "which is presumptively the most convenient place to buy anything." *Decastro*, 682 F.3d at 168. Here, of course, one of Smith's reasons for seeking firearms outside of Massachusetts was because he personally could not purchase them in Massachusetts because he had no FID card, Pringle could not due to his criminal history, and Brown could not due to his age. Regulations such as this, which are aimed at ensuring that firearms do not fall into the hands of criminals, do not generally violate the Second Amendment. *Cf. Reyna*, 2022 WL 17714376, at *5 (holding that although Section 922(k)'s prohibition on possessing firearms with obliterated serial numbers "reduces the pool of guns available" to law-abiding citizens, it does not fall within the Second Amendment's text because such guns are "useful for criminal activity" and "not typically possessed by law-abiding citizens for lawful purposes" (internal quotation marks omitted)).

The Second Amendment protects the right to keep and bear arms; it does not protect a right to import them or to acquire them without restriction. Section 922(a)(3)'s prohibition on unlicensed importation of firearms does not meaningfully affect, let alone infringe upon, the right to armed self-defense. And because illegally imported firearms are not typically possessed by law-

abiding citizens for lawful purposes, the Second Amendment does not protect such weapons or their possession. Accordingly, Section 922(a)(3) does not implicate Smith's Second Amendment rights, and his facial challenge should be denied without further historical inquiry.

B. Section 922(a)(3) Fits Within This Nation's Historical Tradition of Firearms Regulation

Even if the Second Amendment did apply to it, Section 922(a)(3) remains constitutional because it "is consistent with the Nation's historical tradition of firearm regulation." *Bruen*, 142 S. Ct. at 2130. Since the time of the founding, states have regulated how firearms and gunpowder can be traded and transported, particularly across state lines; Section 922(a)(3) is simply another example of this type of permissible regulation.

First and most notably, "colonial governments substantially controlled the firearms trade." *Teixeira v. County of Alameda*, 873 F.3d 670, 685 (9th Cir. 2017) (en banc); *see generally Bruen*, 142 S. Ct. at 2127 (noting significance of "American colonial views leading up to the founding"). At least two American colonies prohibited the sale of firearms outside jurisdictional bounds. "Connecticut banned the sale of firearms by its residents outside the colony." *Teixeira*, 873 F.3d at 685 (citing 1 Trumbull, *Public Records of the Colony of Connecticut*, 138-39, 145-46). And while Virginia law provided that all persons were at "'liberty to sell armes and ammunition to any of his majesties loyall subjects inhabiting *this colony*,'" this liberty "did not, however, extend to sales to others." *Id.* at 685 n.18 (quoting Laws of Va., Feb., 1676-77, Va. Stat. at Large, 2 William Waller Hening, *The Statutes at Large: Being a Collection of All the Laws of Virginia, from the First Session of the Legislature, in the Year 1619*, at 403 (1823)). In particular, "under Virginia law, any person found within an Indian town or more than three miles from an English plantation with arms or ammunition above and beyond what he would need for personal use would be guilty of the crime of selling arms to Indians, even if he was not actually bartering, selling, or otherwise

engaging with the Indians." *Id.* at 685 (citing Acts of Assembly, Mar. 1676-77, 2 Hening, *supra* at 336-37). And at least six colonies made it a crime (with severe penalties) to sell or provide firearms or ammunition to Native Americans. *Id*. at 685 (citing 17th-century laws from Massachusetts, Connecticut, Maryland, and Virginia); *see also* 6 Statutes at Large of Pennsylvania from 1682 to 1801, at 319-320 (1899) (1763 law); Laws and Ordinances of New Netherland, 1638-1674, at 18-19 (1868) (1639 ordinance), 47 (1645 ordinance), 278 (1656 ordinance). Although not an exact analogy[4] to Section 922(a)(3), these laws show that colonial legislatures were concerned about the movement of firearms between private parties and the dangers of firearms falling into what they deemed the wrong hands. Additionally, several states had laws restricting the import and sale of gunpowder, which "was essential to the operation of firearms at that time," meaning that gunpowder regulations "necessarily affected the ability of gun owners to use firearms for self-defense." *Miller v. Bonta*, No. 3:19 Civ. 1537 (S.D. Cal. 2022) (Dkt. 137-3, at 22) (Declaration of Prof. Saul Cornell); *cf. Bruen*, 142 S. Ct. at 2149 (citing article by Cornell). In 1795, Pennsylvania enacted a law requiring gunpowder stored in the public magazine to be proved and marked and prohibiting importation, transfer, or sale of any gunpowder that was not appropriately marked. 3 *Laws of the Commonwealth of Pennsylvania, from the Fourteenth Day of October, One Thousand Seven Hundred* 240-44 (1810). Similarly, Massachusetts and Connecticut prohibited the export of gunpowder without a license. *See Colonial Laws of Massachusetts Reprinted from the Edition of 1672*, at 126 (1890) (1651 statute) ("no person . . . shall transport any Gun-powder out of this Jurisdiction, without license first obtained from some two of the Magistrates"); 15 The Public Records of the Colony of Connecticut 191 (1890) (1775 statute) (no "gun-powder made and manufactured . . . shall be exported out of the [Colony] without . . . license"). The city of

[4] *Bruen* made clear that the government need only identify a "historical analogue, not a historical twin." *Id*. at 2133.

Providence, meanwhile, prohibited the sale *within* Providence of gunpowder without a license—a historical precedent for Section 922(a)(3)'s requirement that firearms from out-of-state be sold through FFLs. *See The Charter and Ordinances of the City of Providence, with the General Assembly Relating to the City* 37 (1835) (1821 law) (prohibiting selling gunpowder within the town of Providence "without having a license therefor"). Providence's law was similar to England's 1638 Gunmaker's Law and subsequent legislation, which required all firearms manufactured domestically or imported to be inspected and approved by licensed entities of the state. *See* James Whisker, *The Gunsmith's Trade* 68-69 (1992); *accord* Lois Schoewer, *Gun Culture in Early Modern England* 4-25 (2016). Although these statutes are not identical to Section 922(a)(3), they are "relevantly similar." *Bruen*, 142 S. Ct. at 2132. Again, *Bruen* made clear that the government need only identify a "historical analogue, not a historical twin." *Id*. at 2133.

The ultimate question is "whether modern and historical regulations impose a comparable burden on the right of armed self-defense and whether that burden is comparably justified," *id.*, and in this case, the answer is yes. As explained above, Section 922(a)(3) imposes a minimal "burden on the right of armed self-defense" because firearms are readily available within Massachusetts through licensed dealerships. Section 922(a)(3) is also "comparably justified." *Bruen*, 142 S. Ct. at 2133. The historical regulations on commerce in firearms were designed to keep firearms out of the hands of those who might be dangerous, such as (in the view of legislators at the time) Native Americans. And the laws restricting sale of gunpowder without licenses were designed to protect citizens from explosions and render effective states' regulation of gunpowder manufacturers. Section 922(a)(3) serves similar purposes by preventing criminals from circumventing federal and state regulations on firearms purchases and firearms dealers. See *Mance*, 896 F.3d at 706 (noting Congress's conclusion that there was a "serious problem of

individuals going across State lines to procure firearms which they could not lawfully obtain or possess in their own State," and these interstate purchases were accomplished "without the knowledge of . . . local authorities" (quoting S. Rep. No. 89-1866, at 19 (1966))); *accord Decastro*, 682 F.3d at 168. Although Section 922(a)(3) does not reflect precisely the same legislative priorities as these historical regulations, it nevertheless imposes a "comparable burden" that is "comparably justified." *Bruen*, 142 S. Ct. at 2133.

Accordingly, Section 922(a)(3) is constitutional on its face.

III. 18 U.S.C. § 922(a)(3) Is Constitutional As Applied to Smith

Even if there were some set of facts under which Section 922(a)(3) could be deemed unconstitutional, where Smith was engaged in a conspiracy to import weapons into Massachusetts in order to avoid Massachusetts gun restrictions that applied to himself, his co-conspirators, and their associates, some of which were then promptly used for criminal activity including a shooting incident, the statute is constitutional as applied to him. *Heller* – which *Bruen* did not disturb – made clear that the Second Amendment does not protect the right to keep and bear arms for an "unlawful" or "unjustifiable purpose." *Heller*, 554 U.S. at 608, 612, 627; *see also United States v. Bryant*, 711 F.3d 364, 370 (2d Cir. 2013) ("[T]he Second Amendment does not protect the unlawful purpose of possessing a firearm [in violation of 18 U.S.C. § 924(c)]").

Smith's entire argument that Section 922(a)(3) is unconstitutional as applied to him is based on a fallacy – the argument that, as a "law-abiding" non-felon, he was simply purchasing a firearm from a friend for his own self-defense. Motion at 19. The allegations of the indictment, which must be taken as true for purposes of determining a motion to dismiss, are that Smith conspired to transport at least 24 firearms into Massachusetts for his use, for the use of co-

conspirators (including at least one who was a felon), and for distribution to their associates.[5] Dkt. No. 3 ¶¶ 5, 11. Under those facts, it is particularly clear that Section 922(a)(3) does not infringe the right to bear arms for self-defense and is constitutional as applied to Smith.[6]

Moreover, although he makes much of the fact that he is not a felon, Motion at 19, that fact is not particularly relevant to his Section 922(a)(3) challenge. The fact that he could have lawfully bought guns in Massachusetts, had he adhered to the regulatory requirements to do so and obtained a FID card (which he had not), does not mean that he may lawfully buy any kind of gun, any time, anywhere, without restrictions. As set forth above, *Bruen* explicitly contemplates that some pre-requisites or minor burdens on ownership are permitted, including background checks. Thus, the minor restrictions that Section 922(a)(3) imposes regarding the manner in which out-of-state gun purchases and transportation can and cannot take place – meant to ensure that people did not evade those constitutional regulations within their states – does not infringe on law-abiding citizens' Second Amendment rights and thus does not infringe on Smith's rights. This would be so even if he qualifies as a law-abiding citizen for purposes of the analysis, which he should not, given the allegations of the indictment regarding his intended purpose of evading Massachusetts gun laws. Dkt. No. 3 ¶ 11.

[5] Although Smith argues that the eventual distribution of firearms has nothing to do with the conspiracy to violate Section 922(a)(3), in fact the indictment alleges that it was one of the objects and purposes of the conspiracy.

[6] Indeed, even under Smith's version of the facts, Section 922(a)(3) would be constitutional as a valid restriction on the method of the interstate sale and transportation of guns, which does not infringe a law-abiding citizen's right to bear arms, and which is consistent with the nation's historical tradition.

CONCLUSION

For the foregoing reasons, 18 U.S.C. § 922(a)(3) does not infringe on the Second Amendment either on its face or as applied to Smith (via the conspiracy statute). Accordingly, Smith's motion to dismiss should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that this document filed through the ECF system will be sent electronically to the registered participants as identified on the Notice of Electronic Filing (NEF).

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