

**IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
BROWNSVILLE DIVISION**

UNITED STATES OF AMERICA,	§	
<i>Plaintiff,</i>	§	
	§	
VS.	§	CASE NO. 1:14-CR-876-1
	§	
KEVIN LYNDEL MASSEY,	§	
<i>Defendant.</i>	§	

MEMORANDUM OPINION AND ORDER

The Court has before it Defendant Massey’s Second Opposed Motion to Dismiss the Indictment [Doc. No. 119]. The Indictment charges Massey in four counts with violations of Title 18, United States Code, Sections 922(g)(1) and 924(a)(2), which prohibit a convicted felon from possessing firearms [Doc. No. 26].¹ Massey’s Second Motion to Dismiss alleges that Section 922(g)(1), which makes it a crime for a person who has previously been convicted 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,” violates the Tenth Amendment. 18 U.S.C. § 922(g)(1). For the following reasons, the Court denies Defendant’s Second Opposed Motion to Dismiss the Indictment.

1. Standing

First, the Court will address the Government’s claim that Massey lacks standing to challenge Section 922(g)(1)’s constitutionality under the Tenth Amendment. The Supreme Court held in *Bond v. United States (Bond I)* that an individual “can assert injury from governmental

¹ This Court recounted the facts behind these charges in detail in its Order on Defendant’s Motion to Suppress [Doc. No. 98] and sees no need to repeat them here. Further, this Court earlier denied Massey’s initial Motion to Dismiss and need not discuss those rulings again. Mem. Op. and Order [Doc. No. 99].

action taken in excess of the authority that federalism defines.” 131 S. Ct. 2355, 2363-64 (2011). The petitioner in *Bond I* was charged under a federal statute that implemented a treaty ratified by the United States. *Id.* at 2360. She asserted that this statute violated the Tenth Amendment, arguing that her actions were “‘local in nature’ and ‘should be left to local authorities to prosecute’ and that congressional regulation of that conduct ‘signals a massive and unjustifiable expansion of federal law enforcement into state-regulated domain.’” *Id.* at 2366 (quoting Record in No. 2:07-cr-00528-JG-1 (E.D. Pa.), Doc. 27, pp. 6, 19). Since the petitioner had alleged “‘actual or imminent harm that is concrete and particular, fairly traceable to the conduct complained of, and likely to be redressed by a favorable decision,’” the Supreme Court found that she had standing to challenge the statute on Tenth Amendment grounds. *Id.* Massey makes a similar claim—that Section 922(g)(1), as applied to him, impermissibly regulates intrastate activity. Therefore, he has standing to challenge Section 922(g)(1).

2. The Tenth Amendment Argument

Massey argues that the Indictment should be dismissed because 18 U.S.C. § 922(g)(1) unconstitutionally infringes on the power reserved to the states by the Tenth Amendment of the Constitution. The Tenth Amendment states that “[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people.” U.S. Const. amend. X.

The Fifth Circuit has foreclosed Massey’s argument. It has “‘repeatedly held that ‘the constitutionality of § 922(g) is not open to question.’” *United States v. Gipson*, 182 F. App’x 340, 340 (5th Cir. 2006) (quoting *United States v. Daugherty*, 264 F.3d 513, 518 (5th Cir. 2001)). Section 922(g)(1) is a “‘valid exercise of the congressional authority to regulate interstate commerce.” *United States v. Darrington*, 351 F.3d 632, 634 (5th Cir. 2003). As such, the Tenth

Amendment “in no way inhibits” its enforcement. *Id.* Any holding to the contrary is foreclosed by circuit precedent.² *Id.* at 633.

Massey focuses most of his discussion on Justice Thomas’ concurrence in *Printz v. United States*, 521 U.S. 898 (1997). This case concerned a federal law that required “state law enforcement officers to participate . . . in the administration of a federally enacted regulatory scheme” concerning the sale of firearms. *Id.* at 904. The Supreme Court held that this law unconstitutionally violated state sovereignty because it required state officers to enforce a federal regulatory program. *Id.* at 935.

Justice Thomas in his concurrence questioned the validity of the federal regulation of “wholly *intra* state, point-of-sale transactions.” *Id.* at 937 (Thomas, J. concurring). He claimed that the federal government lacks “the underlying authority to regulate the intrastate transfer of firearms.” *Id.* In the discussion that Massey cites, Justice Thomas assumed for the sake of his argument that Congress has the authority to regulate “intrastate transactions that ‘substantially affect’ interstate commerce.” *Id.* He then proposed that the Second Amendment confers a “*personal* right to ‘keep and bear arms.’” *Id.* at 938. If the Constitution protects this personal right, he argued, a “colorable argument exists” that the government’s regulatory scheme violates it, “at least as” the scheme “pertains to the purely intrastate sale or possession of firearms.” *Id.* at 938. As this Court has discussed, the Supreme Court in *District of Columbia v. Heller*, 554 U.S.

² Other federal courts have upheld the constitutionality of Section 922(g) provisions against Tenth Amendment challenges as well. *See United States v. Meade*, 175 F.3d 215, 225 (1st Cir. 1999) (stating that § 922(g)(8), which affects individuals who have state court orders against them for harassment, is “totally devoid of Tenth Amendment implications”); *United States v. Minnick*, 949 F.2d 8, 10-11 (1st Cir. 1991) (holding that § 922(g)(1) does not violate the Tenth Amendment because it applies to individuals, not states); *United States v. Rothacher*, 442 F. Supp. 2d 999, 1007 (D. Mont. 2006) (emphasizing that the Commerce Clause can “trump” the Tenth Amendment when “an intrastate issue that invokes state constitutional provisions” is involved “so long as the regulated activity has significant economic value”); *Nat’l Ass’n of Gov’t Emps., Inc. v. Barrett*, 968 F. Supp. 1564, 1577 (N.D. Ga. 1997) (“Because § 922(g)(9) is a valid exercise of Congress’ commerce authority, it cannot violate the Tenth Amendment.”).

570 (2008), recognized this personal right and noted that it is subject to limitations, including those provided by Section 922(g). Mem. Op. and Order 1-6 [Doc. No. 99]. Since the Fifth Circuit has acknowledged Section 922(g)'s validity under the Second and Tenth Amendments, this Court must reject Massey's challenge.³

3. The "Purely Intrastate" Claim

Massey contends that Section 922(g) impermissibly regulates his "purely intrastate" possession of a firearm. The Government argues that this claim is premature, as it bears the burden of proving the interstate commerce nexus required by statute at trial. It cites *United States v. Bass*, which considered a defendant's conviction under a federal statute that punished any person who had been convicted of a felony and "receives, possesses, or transports in commerce or affecting commerce . . . any firearm." 404 U.S. 336, 338 (1971). The Government in that case had not attempted to prove that the defendant had possessed firearms "in commerce or affecting commerce." *Id.* The Supreme Court held that the Government had "failed to show the requisite nexus with interstate commerce" that the statute required. *Id.* at 347. Section 922(g) has the same element: a defendant's firearm possession must be "in or affecting commerce." 18 U.S.C. § 922(g). Since the Government bears the burden of proving this element, and since the trial has yet to be held, the facts upon which Massey's claim stands have not yet been established one way or the other. Until evidence has been presented, the Court is unable to evaluate this claim.

³ In so ruling, the Court acknowledges the Seventh Circuit's recent opinion that held that illegal aliens have Second Amendment rights. *United States v. Meza-Rodriguez*, No. 14-3271, 2015 WL 4939943 (7th Cir. Aug. 20, 2015). While this Court recognizes that this case contains some language which by analogy is helpful to Massey's argument, this Court cannot grant the relief requested by Massey solely on the basis of this new case for several reasons. First, the Second Amendment discussion in *Meza-Rodriguez* is dicta, since the opinion upholds Section 922(g)'s limitation on illegal aliens' gun possession using a review standard of intermediate scrutiny. *Id.* at *8. Second, in that opinion, the Seventh Circuit recognizes that "the government has an [sic] strong interest in preventing people who already have disrespected the law (including . . . felons. . .) from possessing guns." *Id.* Third, and most importantly for this Court, the Fifth Circuit has held, after *Heller*, that neither illegal aliens nor felons can assert Second Amendment rights. *United States v. Portillo-Munoz*, 643 F.3d 437, 442 (5th Cir. 2011); *United States v. Anderson*, 559 F.3d 348, 352 (5th Cir. 2009).

Therefore this argument is denied without prejudice because it is not yet ripe. Massey may reassert it at trial should he conclude that the evidence supports this claim.

4. Conclusion

For the aforementioned reasons, Defendant Massey's Second Motion to Dismiss the Indictment is hereby denied.

Signed this 23rd day of September, 2015.

A handwritten signature in black ink, appearing to read "A. S. Hanen", written over a horizontal line.

Andrew S. Hanen
United States District Judge