No. _____

IN THE
Supreme Court of the United States

NERSES NICK BRONSOZIAN,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for Writ of Certiorari
To The United States Court of Appeals
for the Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

When the National Firearms Act ("NFA") was passed in 1934, the sole constitutional authority for the law was Congress's power to tax under U.S. Const. Article I, § 8, cl. 1. Congress recognized that it did not have the power to ban disfavored firearms outright. So instead, it passed a law that required certain "noxious" firearms, including machineguns, be registered and taxed. *See* 26 U.S.C. § 5861(d).

Fifty-two years later, however, Congress passed the Firearms Owner Protection Act ("FOPA"). Enacted under Congress's newly expanded Commerce Clause power, the FOPA banned the possession of all previously unregistered machineguns. *See* 18 U.S.C. § 922(o). Since the passage of § 922(o), the government has steadfastly refused to register or tax the possession of previously unregistered machineguns under the NFA. But, it continues to prosecute and imprison individuals for failing to register those machineguns.

Does Congress's power to tax give it the power to punish the possession of unregistered machineguns under § 5861(d) of the NFA, even though it is impossible to register and pay tax on those machineguns, the law generates no revenue, and the only enforcement mechanism is prosecution?

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The decision of the Ninth Circuit Court of Appeals is unreported. It is reproduced in the Appendix at App. 2. The district court's relevant prior decisions in the case are unreported; they are reproduced at App. 3.

JURISDICTION

The Court of Appeals entered judgment on April 15, 2019 (App. 2) and denied Petitioner's timely petition for rehearing on July 10, 2019 (App. 1). This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

Constitution of the United States, Article I, Section 8, Clause 1:

The Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States; but all Duties, Imposts and Excises shall be uniform throughout the United States[.]

INTRODUCTION

The regulation of firearms was and continues to be primarily a state and local concern. Congress's only legislative action on firearms for the first 150 years of the Republic was the Second Amendment to the Constitution, which recognized the right to keep and bear arms. U.S. Const. Amend. 2 ("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.").

Even as Congress promulgated the NFA, it recognized that it was encroaching on the power traditionally reserved to the states. As Attorney General Homer S. Cummings explained to the House of Representatives in hearings leading up to the 1934 bill, "[w]e have no inherent police power to go into certain localities and deal with local crime."[1] But Congress found a loophole in Article I, Section 8, Clause I: Rather than ban the possession of certain firearms outright, it would impose a prohibitive tax.[2] During the Ways and Means Committee's hearing on the NFA, Congressman Sumners asked: [if] "[t]his is a revenue measure . . . [then don't] you have to make it possible at least in theory for these things to move in order to get internal revenue?" Attorney General Cummings replied, "That is the answer exactly."[3] He went on to explain that "[i]f we had a statute absolutely forbidding any human being to have a machine gun, you might say there is some constitutional question involved. But when you say, 'we will tax the machine gun …' you are easily within the law." *Id*. at 19.

Faithful to that requirement, the NFA imposed a $200 tax on the making and transferring of certain firearms, including machineguns. *See* 27 C.F.R. § 479.61.

The NFA was challenged in *Sonzinsky v. United States*, 300 U.S. 506, 512 (1937) on the ground that its "levy is not a true tax, but a penalty imposed for the purpose of suppressing traffic in a certain noxious type of firearms…." This Court rejected that argument because at that time the NFA's firearms regulations were not "treated as criminal" and "on its face" the NFA was "only a taxing measure."

> The case is not one where the statute contains regulatory provisions related to a purported tax in such a way as has enabled this Court to say in other cases that the latter is a penalty resorted to as a means of enforcing the regulations…. Nor is the subject of the tax described or treated as criminal by the taxing statute. . . . Here section 2 contains no regulation other than the mere registration provisions, which are obviously supportable as in aid of a revenue purpose. On its face it is only a taxing measure....

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[1] National Firearms Act: Hearings Before the House Committee on Ways and Means, 73rd Cong., 2d Sess., 8 (1934).

[2] Rept. No. 1780, Committee on Ways and Means, U.S. House of Representatives, 73rd Cong., 2d Sess. 2 (1934); Rept. No. 1444, Committee on Finance, U.S. Senate, 73rd Cong., 2d Sess. 1 (1934).

[3] National Firearms Act: Hearings Before the House Committee on Ways and Means, 73rd Cong., 2d Sess., 8 (1934).

Id. at 513 (citation omitted). This Court refused to look beyond the NFA's stated purpose as a taxation measure because the law, in fact, derived at least some revenue:

> Here the annual tax of $200 is productive of some revenue. We are not free to speculate as to the motives which moved Congress to impose it . . . since it operates as a tax, it is within the national taxing power.

Id. at 513-514.

That paradigm changed, at least with respect to machineguns, when Congress passed the FOPA. FOPA banned the transfer or possession of any machinegun that was not previously registered as of May 19, 1986. *Id*; *see* 18 U.S.C. § 922(o). Since the passage of the FOPA, the Bureau of Alcohol, Tobacco and Firearms ("ATF") will not accept applications to transfer, register, or pay the $200 tax on those machineguns. 27 C.F.R. § 479.105. As a result, the ban on machineguns generates no revenue.

Now that the government refuses to collect taxes on the possession of unregistered machineguns, the sole constitutional justification for the NFA's prohibition on machinegun possession has been eliminated. The Department of Justice has recognized as much. The United States Attorneys' Manual ("USAM") acknowledges that because it is impossible for a firearm owner to comply with the NFA's registration requirement for machineguns made after 1986, United States Attorneys should charge defendants under Title 18 instead of the NFA:

> Section 922(o) of Title 18 makes it unlawful to transfer or possess a machine gun made after May 19, 1986. In addition, under the NFA, it is unlawful to manufacture or possess a machine gun without first registering it with the Secretary of the Treasury and paying applicable taxes. 26 U.S.C. §§ 5822, 5861. As a result of the enactment of 18 U.S.C. § 922(o), the Secretary of the Treasury no longer will register or accept any tax payments to make or transfer a machine gun made after May 19, 1986. Accordingly, because it is impossible to comply with the registration and taxation provisions in the NFA, prosecutors should charge the unlawful possession or transfer of a machine gun made after May 19, 1986 under § 922(o).

U.S. Attorneys' Manual 9-63.516, Charging Machinegun Offenses Under 18 U.S.C. S 922(o) Instead of Under the National Firearms Act, 1999 WL 33219894, at *1. Nonetheless, the government continues to prosecute and imprison individuals like Mr. Bronsozian under the NFA.

The Tenth Circuit struck down the NFA as unconstitutional as applied to the possession of unregistered machineguns in 1992, holding (as Petitioner argues here)

that the government's refusal to register or collect taxes on machineguns undercut the sole Constitutional justification for the law.[4] *United States v. Dalton*, 960 F.2d 121 (10th Cir. 1992). The same year, the Fourth Circuit came to the opposite conclusion. *United States v. Jones*, 976 F.2d 176 (4th Cir. 1992). *Jones* held that even though the NFA's ban on machinegun possession generates no revenue, it was nonetheless valid because "knowing the chain of possession and transfer assists in determining who made the firearm and hence is 'supportable as in aid of a revenue purpose.'" *Jones*, 976 F.2d. at 184. A version of the Fourth Circuit's flawed logic has been adopted by several other Circuits, including the Ninth. *See United States v. Ardoin*, 19 F.3d 177 (5th Cir. 1994); *United States v. Grier*, 354 F.3d 210 (3d Cir. 2003); *Hunter v. United States*, 73 F.3d 260 (9th Cir. 1996) (*per curiam*).

The circuit split has persisted for nearly 27 years.

Meanwhile, this Court has reinforced the notion that a law premised on Congress's power to tax must have the "essential feature of any tax . . . [that it] produce[] at least some revenue for the Government." *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 2594 (2012) ("*NFIB*") (quoting *United States v. Kahriger*, 345 U.S. 22, 28 (1953)). The NFA's prohibition on machinegun possession fails this test.

This Court's intervention is needed in order to resolve the entrenched circuit split and reconcile the decisions of the lower courts with this Court's precedent.

[4] The NFA's prohibition on the possession of unregistered machineguns is codified at 26 U.S.C. § 5861(d).

STATEMENT OF THE CASE

Petitioner Nerses Nick Bronsozian was charged with possession of an unregistered machinegun in violation of 26 U.S.C. § 5861(d). Bronsozian did not deny that he possessed the machinegun, or that it was not registered.

Petitioner moved to dismiss the indictment on the ground that Congress did not have authority to impose criminal penalties for possession of unregistered machineguns under 26 U.S.C. § 5861(d) because the law generated no revenue and was enforced only as a punitive measure. App. 4.

The district court denied the motion, relying on the Ninth Circuit's *per curiam* decision in *Hunter*, 73 F.3d 260. *Hunter*, in turn, relied on the Fourth Circuit's decision in *Jones*.

At trial, the government proved that Bronsozian possessed the machinegun in 2012. App. 3. An ATF Specialist testified that if Mr. Bronsozian had attempted to register the machinegun, he would not have been permitted to do so. He clarified that the machinegun would be "922[o] restricted." App. 5. He further explained that "Individuals could not register a machine gun that was manufactured after May 19, 1986." App. 5.

The Ninth Circuit affirmed Bronsozian's conviction, holding that the outcome was compelled by *Hunter*. *United States v. Bronsozian*, 764 F. App'x 633, 634 (9th Cir. 2019).

REASONS FOR GRANTING THE WRIT

The NFA's prohibition on the possession of unregistered machineguns under § 5861(d) is the law of the land in the Third, Fourth, Fifth, and Ninth Circuits, but not the Tenth. The circuit split has persisted in the lower courts for nearly 27 years and there is little chance that it will resolve without this Court's intervention.

Moreover, the lower court's decision conflicts with *NFIB*, which identified the criteria that a law must satisfy in order to be justified under Congress's taxation power. As this Court has emphasized, a law passed based on Congress tax power must generate "at least some revenue." The NFA's prohibition on machinegun possession fails that test.

This case presents an ideal vehicle to resolve the split. The record is fully developed that Bronsozian possessed a machinegun in 2012, long after the date it could have been registered under the NFA, and the government concedes that he could not have paid the applicable tax.

I. There is a 27-Year Old Circuit Split on Whether Congress Has Authority to Ban Machinegun Possession under the NFA

The NFA's prohibition on machinegun possession, codified at 26 U.S.C. § 5861(d), has been challenged in nearly every federal circuit. At least five circuit courts – the Third, Fourth, Fifth, Ninth, and Tenth -- have ruled on the issue. Those circuits have reached divergent conclusions. Although defendants challenging the NFA have made several overlapping arguments, Petitioner advances only some of them here: That the sole constitutional authority for the NFA's ban of the possession of unregistered machineguns – Congress's Article I power to tax -- has been eliminated because the government refuses to register or collect taxes on those machineguns. *See Dalton*, 90 F.2d at 124-25.

a. *Dalton* (Tenth Circuit)

In *Dalton*, an attorney accepted a firearm from his client in lieu of a fee for his services. *Id*. at 122. The client had converted the firearm into a machinegun in 1989, several years after the FOPA banned the possession of all previously unregistered machineguns in 1986. *Id*.

Dalton was convicted of a violation of 26 U.S.C. § 5861(d) and (e). The government conceded that it would have been impossible for Dalton to register his machinegun. And Dalton conceded that the government could have charged him under 18 U.S.C. § 922(o), which banned the possession of *any* machinegun made after 1986. But, the government "instead chose to proceed under section 5861." *Id*. at 123.

Citing *United States v. Rock Island Armory*, 773 F. Supp. 117 (C.D. Ill. 1991), Dalton argued that "because the possession of machineguns made after 1986 is illegal under section 922(o) and the government will therefore no longer register and tax them, and because the registration requirements are solely in aid of collecting the tax, the constitutional base for those requirements—i.e., the power to tax—has disappeared." The Tenth Circuit agreed, holding that "section 922(o) has 'removed the constitutional legitimacy of registration as an aid to taxation[.]'" *Id*. at 124-25 (internal citations omitted). "[A] provision which is passed as an exercise of the taxing power no longer has that constitutional basis when Congress decrees that the subject of that provision can no longer be taxed." *Id*.

The government argued that § 5861(d) should be upheld, even with respect to its application to machinegun possession, because the NFA continued to produce revenue from taxing the *making* of machineguns. *Id*. The Tenth Circuit disagreed. "The fact that some revenue may be generated by taxing the illegal making of a

machinegun does not legitimize the registration requirements for possession and transfer at issue in the instant case." *Id.*[5]

b. *Jones* (Fourth Circuit)

The same year *Dalton* was decided, the Fourth Circuit rejected its reasoning in *United States v. Jones*, 976 F.2d 176 (4th Cir. 1992). In *Jones*, a mechanical engineer had invented a method to convert semi-automatic shotguns into machineguns using small pieces of metal and a spring in the trigger assembly. *Id.* at 181. Jones was charged with violations of the NFA relating to manufacturing a machinegun without permission, 26 U.S.C. § 5822, possessing a firearm that was manufactured in violation of the act, 26 U.S.C. § 5861(c), transportation of unregistered firearms, 26 U.S.C. § 5861(j), and transferring a firearm in violation of the act, 26 U.S.C. § 5861(e). He argued that "the National Firearms Act cannot be enforced because it has lost its constitutional basis as a taxing provision." *Id.* at 183.

The Fourth Circuit disagreed and adopted the same argument that the Tenth circuit rejected in *Dalton*. It held that "[n]otwithstanding the effective ban on machine guns made after 1986, the *making* of even illegal machine guns continues to be taxed." *Id.* at 183 (emphasis added). The Court reasoned that Dalton's distinction between a tax on the making and the possession of machineguns was "too crabbed a view." The Court also concluded that "knowing the chain of possession and transfer assists in determining who made the firearm and hence is 'supportable as in aid of a revenue purpose.'" *Id.* at 184 (quoting *Sonzinsky*, 300 U.S. at 513).

c. *Ardoin* (Fifth Circuit)

The Fifth Circuit adopted the analysis in *Jones* in a split decision. *See United States v. Ardoin*, 19 F.3d 177 (5th Cir. 1994). Ardoin was a gun collector and dealer who was convicted of twelve counts of conspiracy to violate various provisions of the NFA, including § 5861(d), for making and transferring several machineguns to a local police department without filing the appropriate forms with ATF. *Id.* at 179. Ardoin argued, like Jones, that § 5861(d)'s application to machinegun possession was unconstitutional because it was "originally based on Congress's taxing power." *Id.* Because the government now "refuses to accept applications to register or to pay the tax on such weapons," he argued, "the constitutional authority for provisions of the NFA dealing with the registration and taxing of post-1986 machineguns is gone." *Id.*

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[5] Several lower courts have agreed with Dalton's analysis. *See United States v. Gambill*, 912 F. Supp. 287 (S.D. Ohio 1996), aff'd at 129 F.3d 1265 ("It is hard to understand how any circuit could find such a conviction permissible when the provisions of the NFA have been totally eclipsed by section 922(o)."); *United States v. Ferguson*, 788 F. Supp. 580, 581 (D.D.C. 1992) ("To the extent section 922(o) applies, therefore, the registration requirement is now unconstitutional").

Recognizing it as a "novel constitutional issue," the majority disagreed. The Court noted that "the prohibition of post-1986 machineguns does not mean that Congress cannot tax them." The Court acknowledged that ATF "chooses not to allow tax payments or registration" but noted that "it still has the authority to do so." *Id*. Thus, the Court concluded, "the basis for ATF's authority to regulate—the taxing power—still exists; it is merely not exercised." *Id*.

Judge Wiener vigorously dissented, skewering the majority's "unexercised tax authority" rationale. *Id*. at 183 (Wienert, J. dissenting). He lamented that the majority had elected to join "the legally inferior side of a pre-existing circuit split on this issue." He agreed with the Tenth Circuit's holding in *Dalton* that because "the [ATF] no longer registers or accepts tax payments for privately-owned machine guns manufactured after May 19, 1986, the NFA provisions at issue cannot possibly raise any revenues from private citizens (unless criminal fines are considered revenues). Such provisions have therefore ceased to be valid manifestations of Congress' power to tax." *Id*. at 187.

d. *Hunter* (Ninth Circuit)

The Ninth Circuit initially sided with the Tenth. In a published decision, the Court noted that the government "made a clear choice to proceed under § 5861, even though it could have proceeded under 18 U.S.C. § 922(o)", and even though "compliance with the requirements of § 5861(d) [was] impossible." *United States v. Kurt*, 988 F.2d 73, 75 (9th Cir. 1993). The Court noted the analysis in *Dalton* "with favor," but it did not decide whether § 5861(d) was constitutional because it was not clear whether the weapon in that case was first purchased or converted into a machinegun after May 19, 1986, the date the FOPA first applied.

However, the Ninth Circuit reversed course in *Hunter*, a *per curiam* decision. 73 F.3d 260. The decision contains no recitation of the facts other than the fact that Hunter pled guilty to a violation of § 5861(d) based on his possession of an unregistered machinegun. *Id*. The Court did no independent analysis. It simply "adopt[ed] the rationale of *Jones*, that requiring those who possess machine guns to register them is in aid of the taxing power even if the government no longer taxes possession. The manufacture of machine guns continues to be taxed, and knowing the chain of possession of a firearm would help the government determine who made it; thus, requiring registration for possession still facilitates taxation." *Id*. at 262 (citing *Jones*, 976 F.2d at 183–84; *Ardoin*, 19 F.3d at 180).

e. *Grier* (Third Circuit)

The defendant in Grier was manufacturing and selling homemade, machineguns from his home. *Grier*, 354 F.3d at 212. He was charged with conspiracy to possess, transfer, and make machineguns in violation of §§ 5861(c), (e), and (f); making

firearms in violation of § 5861(f); possessing firearms in violation of § 5861(c); transferring firearms in violation of § 5861(e); and possessing firearms by a convicted felon in violation of 18 U.S.C. § 922(g)(1). He was not charged with possession of an unregistered machinegun under § 5861(d).

Citing *Dalton*, Grier argued that "with the enactment of § 922(o) the NFA's function as a revenue generating scheme was eliminated and, in the process, the constitutional legitimacy of the NFA was destroyed." *Id.* at 215. The Fifth Circuit rejected that argument, adopting the reasoning in *Ardoin*. *Id.* The Court held that the ATF still had the authority to allow tax payments for machineguns, even though it chooses not to exercise it. Moreover, the Court noted, the statute "still retains some revenue generating capacity" because "to the extent that it remains lawful under § 922(o) to transfer machineguns manufactured before May 1986, those transfers require the payment of tax." *Id.*

II. The Split Is Unlikely to Resolve on Its Own

The Tenth Circuit has been presented with multiple opportunities to revisit or limit its holding in *Dalton* in light of conflicting authority from other circuits. In each case, the Tenth Circuit has recognized the validity of *Dalton*, at least in cases involving machineguns. *See United States v. McCollom*, 12 F.3d 968 (10th Cir. 1993) (distinguishing *Dalton* and affirming conviction for possession of sawed-off shotgun because there was "no statutory ban on the registration of short-barreled shotguns") (citation omitted); *United States v. Cox*, 906 F.3d 1170 (10th Cir. 2018) (distinguishing *Dalton* and affirming conviction for possession and transfer of unregistered silencers, noting that "the constitutional infirmity in Dalton's convictions resulted from 18 U.S.C. § 922(o)'s prohibition of the firearm at issue, which removed 26 U.S.C. § 5861's constitutional footing by making registration 'a literal and legal impossibility.'") (quoting *McCollom*, 12 F.3d at 971)).

III. The Third, Fourth, Fifth and Ninth Circuits Rely on Flawed Logic and False Premises

The Courts that have rejected *Dalton* either (1) involved *different* provisions of the NFA that regulate conduct that the government *still taxes*, or (2) blindly adopted the reasoning of *Jones* without recognizing that distinction.

The original mistake was in *Jones* itself. The defendant in that case was not charged with the simple possession of an unregistered machinegun under 26 U.S.C. § 5861(d). Rather, he was charged with *other violations of the NFA* that prohibit manufacturing, transporting, and transferring of machineguns under 26 U.S.C. § 5822, § 5861(c), § 5861(j), and § 5861(e). *Jones*, 976 F.2d at 176. A defendant charged with *manufacturing* or *transporting* a machinegun is in no better position to argue that the NFA is unconstitutional than a defendant charged with possession of an

unregistered silencer or short-barreled shotgun. Just as silencers and short-barreled shotguns can still be legally possessed and are subject to taxation under the NFA, machineguns may be legally manufactured and transferred under certain circumstances. *See* 27 C.F.R. § 479.105(a) ("[N]o application to make, transfer, or import a machine gun will be approved *except as provided by this section*.") (emphasis added). For example, a machinegun may be made and transferred "for the benefit of a Federal, State or local government entity." 27 C.F.R. § 479.105(e). And insofar as machineguns are manufactured and transported according to that regulation, the government can and does tax those transactions.

That isn't the case with respect to the simple possession of an unregistered machinegun by a civilian like Mr. Bronsozian. The government banned that conduct outright in 18 U.S.C. § 922(o), and ATF regulations prohibit the registration or taxation of previously unregistered machineguns because possession of such weapons puts the possessor in violation of the law. *See* 27 C.F.R. § 479.105(a).

The *Jones* court glossed over that distinction, finding that "the making of even illegal machine guns continues to be taxed." *Jones*, 976 F.2d at 183 (citing 26 U.S.C. § 5821). But § 5821 applies only to the *maker* of a machinegun, not one who merely possesses it. 26 U.S.C. § 5821(b).

The *Jones* decision also relied on the reasoning that "knowing the chain of possession and transfer assists in determining who made the firearm and hence is 'supportable as in aid of a revenue purpose.'" *Jones*, 976 F.2d at 184 (quoting *Sonzinsky*, 300 U.S. at 513). That may well have been the case with respect to the NFA provisions at issue in *Jones*, which concerned the *manufacture*, *transportation*, and *transfer* of machineguns. But, the NFA's ban on the *simple possession* of unregistered machineguns provides no information about the chain of custody of those firearms because the government refuses to register or tax them.

The Third Circuit indulged similarly flawed logic in *Grier*, noting that "the NFA . . . still retains some revenue generating capacity" because "to the extent that it remains lawful under § 922(o) to transfer machineguns manufactured before May 1986, those transfers require the payment of tax." 354 F.3d at 215. Again, it's true that the NFA generates revenue by taxing the transfer of previously registered machineguns. But, registering and taxing transfers of previously registered machineguns provides no information to the government about the chain of possession of unregistered machineguns, so that cannot justify the application of § 5861(d) to punish those who fail to register.

The Fifth Circuit also cited *Jones* for the nonsensical proposition that "ATF has the authority to tax now-illegal machineguns[,]" but it simply "chooses not to allow tax payments or registration." *Ardoin*, 19 F.3d at 180. But ATF regulations *prohibit* the registration of machineguns if the possession of that machinegun "would place

the maker or transferee in violation of law." 27 C.F.R. § 479.105. That's why the government refuses to register and tax them.[6]

IV. The Third, Fourth, Fifth and Ninth Circuits Conflict with this Court's Decision in *NFIB*

The decisions of the Third, Fourth, Fifth, and Ninth Circuit endorse a dangerous expansion of Congress's taxation power in an area that has traditionally been entrusted to the states. It is undisputed that the ban on the possession of unregistered machineguns generates no revenue. That fact alone is fatal for a law premised on Congress's power to tax.

In *NFIB*, this Court examined its precedent to identify the features that a law must have to be justified under Congress's tax power.

First, the Court held, a tax law must actually raise some revenue. *Id.* at 2594 (the "essential feature of any tax . . . [is that it] produces at least some revenue for the Government.") (quoting *United States v. Kahriger*, 345 U.S. 22, 28 (1953).

Second, the Court held, a tax cannot be a "penalty." *Id.* at 2595-96. "In distinguishing penalties from taxes, this Court has explained that 'if the concept of penalty means anything, it means punishment for an unlawful act or omission.'" *Id.* (quoting *United States v. Reorganized CF & I Fabricators of Utah, Inc.*, 518 U.S. 213, 224 (1996); *see also Bailey v. Drexel Furniture Co.* (U.S. Reports Title: Child Labor Tax Case), 259 U.S. 20, 38 (1922) ("there comes a time in the extension of the penalizing features of the so-called tax when it loses its character as such and becomes a mere penalty, with the characteristics of regulation and punishment."). The Court drew on its precedent in *Drexel Furniture* to determine three practical characteristics that distinguish a prohibited "penalty" from a permissible "tax." First, a tax must not impose an "exceedingly heavy" burden. Second, penalties are traditionally imposed only on knowing violators of the statute. "[S]cienter requirements are typical of punitive statutes, because Congress often wishes to punish only those who intentionally break the law." *Id.* at 2595. Third, courts should look to the enforcement mechanism. One detail that revealed the "tax" in *Drexel Furniture* as a penalty was that it was enforced in part by the Department of Labor, an agency "responsible for punishing violations of labor laws, not collecting revenue." *Id.*

Applying that criteria, this Court held that the shared responsibility payment of the Affordable Care Act ("ACA") did not constitute a "penalty." It generated plenty of revenue. In fact it was "expected to raise about $4 billion per year by 2017." Id. at 2594. It was not excessive, because it was required by law to be less than the cost of the alternative of purchasing insurance. *Id.* at 2595. There was no scienter

[6] Taken to its logical extreme, the "unused taxation authority" argument would support any legislation, no matter how punitive, so long as it were accompanied by an "unused" provision providing for the payment of a tax.

requirement. *Id.* And finally, the shared responsibility payment was collected by the IRS "through the normal means of taxation" as opposed to a criminal prosecution. *Id.*

In contrast, Section 5861(d) cannot be justified under Congress's power to tax. It generates no revenue from the taxation of the possession of unregistered machineguns. And it has all the hallmarks of a prohibited penalty. A person possessing an unregistered machinegun cannot pay the applicable tax. The *sole means* of enforcing § 5861(d) to machinegun possession is criminal prosecution. Moreover, there is a heightened scienter requirement under § 5861(d). In *Staples v. United States*, 511 U.S. 600, 616 (1994), this Court held that in order to be found guilty of violating the statute the accused must know of the specific features of a firearm that bring it within the prohibition of the act. *Id.* at 619. Finally, the statute is enforced by the ATF, a branch of the Department of Justice overseen by the Attorney General and responsible for enforcing and punishing criminal laws, not collecting revenue. As this Court stated in reference to the taxation of liquor after prohibition: "[E]ven though the statute was not adopted to penalize violations of the amendment, it ceased to be enforceable at the date of repeal, if, in fact, its purpose is to punish rather than to tax." *United States v. Constantine*, 296 U.S. 287, 294 (1935).

CONCLUSION

Since the passage of 18 USC 922(o) in 1986, Section 5861(d) has not, and cannot, raise any revenue as applied to the possession of unregistered machineguns. This fact led the Tenth Circuit to find Section 5861(d) unconstitutional in 1992. Four other circuits (including the Ninth Circuit in this case) disagree, but the reasoning in support of those decisions is flawed and illogical. Moreover, the lower court's decision cannot be reconciled with this Court's decision in *NFIB*, which clarifies the essential elements a law must satisfy in order to be justified under Congress's power to tax.

This should grant the petition for a writ of *certiorari* to resolve the 27-year old circuit split on this important constitutional issue, reconcile the lower court's decision with *NFIB*, and preserve the delicate balance of power between the federal government and the states.

October 4, 2019

Respectfully submitted

JOHN L. LITTRELL
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APPENDIX

CERTIFICATE OF COMPLIANCE

No. _____

NERSES NICK BRONSOZIAN,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

As required by Supreme Court Rule 33.1(h), I certify that the petition for a writ of certiorari contains 5785 words, excluding the parts of the petition that are exempted by Supreme Court Rule 33.1(d).

I declare under penalty of perjury that the foregoing is true and correct

Execute on October 4, 2019

JOHN L. LITTRELL
COUNSEL OF RECORD
BIENERT | KATZMAN PC
COUNSEL FOR PETITIONER

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FILED

JUL 10 2019

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. NERSES NICK BRONSOZIAN, Defendant-Appellant.	No. 17-50197 D.C. No. 2:16-cr-00196-SVW-1 Central District of California, Los Angeles ORDER

Before: GRABER and BYBEE, Circuit Judges, and HARPOOL,* District Judge.

The panel has voted to deny Appellant's petition for panel rehearing. Judges Graber and Bybee have voted to deny Appellant's petition for rehearing en banc, and Judge Harpool has so recommended.

The full court has been advised of the petition for rehearing en banc, and no judge of the court has requested a vote on it.

Appellant's petition for panel rehearing and rehearing en banc is DENIED.

* The Honorable M. Douglas Harpool, United States District Judge for the Western District of Missouri, sitting by designation.

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FILED

APR 15 2019

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. NERSES NICK BRONSOZIAN, Defendant-Appellant.	No. 17-50197 D.C. No. 2:16-cr-00196-SVW-1 MEMORANDUM*

Appeal from the United States District Court
for the Central District of California
Stephen V. Wilson, District Judge, Presiding

Submitted April 10, 2019**
Pasadena, California

Before: GRABER and BYBEE, Circuit Judges, and HARPOOL,*** District Judge.

* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

** The panel unanimously concludes that this case is suitable for decision without oral argument. Fed. R. App. P. 34(a)(2).

*** The Honorable M. Douglas Harpool, United States District Judge for the Western District of Missouri, sitting by designation.

A jury found Defendant Nerses Nick Bronsozian guilty of possessing an unregistered firearm in violation of 26 U.S.C. § 5861(d). He timely appeals his conviction, and we affirm.

1. Defendant argues that:

(a) Congress lacks the constitutional authority to punish the possession of an unregistered machine gun because § 5861(d) "is punitive in nature and it generates no tax revenue";

(b) the statute violates the Due Process Clause because Defendant cannot be punished for possessing a machine gun that was impossible for him to register; and

(c) 18 U.S.C. § 922(o), which bans the possession of all machine guns, implicitly repealed § 5861(d).

We rejected all of those claims in Hunter v. United States, 73 F.3d 260 (9th Cir. 1996) (per curiam). As a three-judge panel, we may depart from Hunter only if it is clearly irreconcilable with a later Supreme Court or en banc decision. Miller v. Gammie, 335 F.3d 889, 892–93 (9th Cir. 2003) (en banc). Defendant argues that Hunter is fatally undermined by National Federation of Independent Business v. Sebelius ("NFIB"), 567 U.S. 519 (2012), at least with respect to his first argument. We disagree.

NFIB characterized the "penalty" in the Patient Protection and Affordable Care Act ("ACA") as a "tax" and, from that premise, reasoned that the ACA permissibly exercised Congress's taxing power. Id. at 561–63. By contrast, here, Congress expressly delegated the taxing power. Moreover, Hunter addressed (among other issues) whether § 5861(d), which was enacted in aid of a firearms tax provision, remained constitutional in light of the federal agency's decision to deny the licensing and registration applications that would have triggered the taxable event. NFIB did not address that issue in any way, even indirectly. Finally, NFIB emphasized that it was not making new law, but merely applying longstanding principles to decide whether a "penalty" was really a "tax." Id. at 565–66.

2. Defendant next argues that the government withheld material exculpatory evidence in violation of Brady v. Maryland, 373 U.S. 83 (1963). The claimed violation pertains to statements that a Bureau of Alcohol, Tobacco, Firearms and Explosives ("ATF") agent made to prosecutors in a different case, concerning the violence of the Vagos gang. On de novo review, United States v. Antonakeas, 255 F.3d 714, 725 (9th Cir. 2001), we hold that Defendant suffered no prejudice, which is a necessary element for his claim to succeed, Strickler v. Greene, 527 U.S. 263, 282 (1999).

The only disputed issue at trial was whether Defendant knew that the firearm he sold to the ATF agent was, in fact, a fully automatic machine gun. The violence of the Vagos gang was relevant only to the extent that it could explain away Defendant's own recorded statements about the machine gun's fully automatic characteristics. To support his theory that he said the firearm was fully automatic to satisfy an intimidating person, rather than to describe what he actually knew, he had to show his own knowledge about the gang. The agent's knowledge was, at best, marginally relevant. And there already was extensive evidence offered at trial to show the Vagos gang's violent tendencies. See Benn v. Lambert, 283 F.3d 1040, 1053 (9th Cir. 2002) ("Evidence is deemed prejudicial, or material, only if it undermines confidence in the outcome of the trial.").

3. Finally, Defendant argues that the ATF agent's testimony was false, thus violating the principles of Napue v. Illinois, 360 U.S. 264, 269 (1959). We have carefully reviewed the record and conclude that the testimony complained of was neither false nor incongruent with testimony offered in a different case. See Jackson v. Brown, 513 F.3d 1057, 1075 (9th Cir. 2008) ("Napue applies whenever a prosecution 'knew or should have known that the testimony was false.'" (quoting Hayes v. Brown, 399 F.3d 972, 984 (9th Cir. 2005) (en banc))).

AFFIRMED.

United States Court of Appeals for the Ninth Circuit

Office of the Clerk
95 Seventh Street
San Francisco, CA 94103

Information Regarding Judgment and Post-Judgment Proceedings

Judgment

- This Court has filed and entered the attached judgment in your case. Fed. R. App. P. 36. Please note the filed date on the attached decision because all of the dates described below run from that date, not from the date you receive this notice.

Mandate (Fed. R. App. P. 41; 9th Cir. R. 41-1 & -2)

- The mandate will issue 7 days after the expiration of the time for filing a petition for rehearing or 7 days from the denial of a petition for rehearing, unless the Court directs otherwise. To file a motion to stay the mandate, file it electronically via the appellate ECF system or, if you are a pro se litigant or an attorney with an exemption from using appellate ECF, file one original motion on paper.

Petition for Panel Rehearing (Fed. R. App. P. 40; 9th Cir. R. 40-1)
Petition for Rehearing En Banc (Fed. R. App. P. 35; 9th Cir. R. 35-1 to -3)

(1) A. Purpose (Panel Rehearing):

- A party should seek panel rehearing only if one or more of the following grounds exist:
  - ► A material point of fact or law was overlooked in the decision;
  - ► A change in the law occurred after the case was submitted which appears to have been overlooked by the panel; or
  - ► An apparent conflict with another decision of the Court was not addressed in the opinion.
- Do not file a petition for panel rehearing merely to reargue the case.

B. Purpose (Rehearing En Banc)

- A party should seek en banc rehearing only if one or more of the following grounds exist:

- ► Consideration by the full Court is necessary to secure or maintain uniformity of the Court's decisions; or
- ► The proceeding involves a question of exceptional importance; or
- ► The opinion directly conflicts with an existing opinion by another court of appeals or the Supreme Court and substantially affects a rule of national application in which there is an overriding need for national uniformity.

(2) Deadlines for Filing:

- A petition for rehearing may be filed within 14 days after entry of judgment. Fed. R. App. P. 40(a)(1).
- If the United States or an agency or officer thereof is a party in a civil case, the time for filing a petition for rehearing is 45 days after entry of judgment. Fed. R. App. P. 40(a)(1).
- If the mandate has issued, the petition for rehearing should be accompanied by a motion to recall the mandate.
- *See* Advisory Note to 9th Cir. R. 40-1 (petitions must be received on the due date).
- An order to publish a previously unpublished memorandum disposition extends the time to file a petition for rehearing to 14 days after the date of the order of publication or, in all civil cases in which the United States or an agency or officer thereof is a party, 45 days after the date of the order of publication. 9th Cir. R. 40-2.

(3) Statement of Counsel

- A petition should contain an introduction stating that, in counsel's judgment, one or more of the situations described in the "purpose" section above exist. The points to be raised must be stated clearly.

(4) Form & Number of Copies (9th Cir. R. 40-1; Fed. R. App. P. 32(c)(2))

- The petition shall not exceed 15 pages unless it complies with the alternative length limitations of 4,200 words or 390 lines of text.
- The petition must be accompanied by a copy of the panel's decision being challenged.
- An answer, when ordered by the Court, shall comply with the same length limitations as the petition.
- If a pro se litigant elects to file a form brief pursuant to Circuit Rule 28-1, a petition for panel rehearing or for rehearing en banc need not comply with Fed. R. App. P. 32.

- The petition or answer must be accompanied by a Certificate of Compliance found at Form 11, available on our website at www.ca9.uscourts.gov under *Forms.*
- You may file a petition electronically via the appellate ECF system. No paper copies are required unless the Court orders otherwise. If you are a pro se litigant or an attorney exempted from using the appellate ECF system, file one original petition on paper. No additional paper copies are required unless the Court orders otherwise.

Bill of Costs (Fed. R. App. P. 39, 9th Cir. R. 39-1)

- The Bill of Costs must be filed within 14 days after entry of judgment.
- See Form 10 for additional information, available on our website at www.ca9.uscourts.gov under *Forms.*

Attorneys Fees

- Ninth Circuit Rule 39-1 describes the content and due dates for attorneys fees applications.
- All relevant forms are available on our website at www.ca9.uscourts.gov under *Forms* or by telephoning (415) 355-7806.

Petition for a Writ of Certiorari

- Please refer to the Rules of the United States Supreme Court at www.supremecourt.gov

Counsel Listing in Published Opinions

- Please check counsel listing on the attached decision.
- If there are any errors in a published opinion, please send a letter **in writing within 10 days** to:
  - ► Thomson Reuters; 610 Opperman Drive; PO Box 64526; Eagan, MN 55123 (Attn: Jean Green, Senior Publications Coordinator);
  - ► and electronically file a copy of the letter via the appellate ECF system by using "File Correspondence to Court," or if you are an attorney exempted from using the appellate ECF system, mail the Court one copy of the letter.

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Form 10. Bill of Costs

Instructions for this form: http://www.ca9.uscourts.gov/forms/form10instructions.pdf

9th Cir. Case Number(s)

Case Name

The Clerk is requested to award costs to (*party name(s)*):

I swear under penalty of perjury that the copies for which costs are requested were actually and necessarily produced, and that the requested costs were actually expended.

Signature **Date**

*(use "*s/[typed name]*" to sign electronically-filed documents)*

COST TAXABLE	**REQUESTED** *(each column must be completed)*			
DOCUMENTS / FEE PAID	No. of Copies	Pages per Copy	Cost per Page	TOTAL COST
Excerpts of Record*			$	$
Principal Brief(s) *(Opening Brief; Answering Brief; 1st, 2nd , and/or 3rd Brief on Cross-Appeal; Intervenor Brief)*			$	$
Reply Brief / Cross-Appeal Reply Brief			$	$
Supplemental Brief(s)			$	$
Petition for Review Docket Fee / Petition for Writ of Mandamus Docket Fee				$
			TOTAL:	$

***Example:** Calculate 4 copies of 3 volumes of excerpts of record that total 500 pages [Vol. 1 (10 pgs.) + Vol. 2 (250 pgs.) + Vol. 3 (240 pgs.)] as:*
No. of Copies: 4; Pages per Copy: 500; Cost per Page: $.10 (or actual cost IF less than $.10);
TOTAL: 4 x 500 x $.10 = $200.

Feedback or questions about this form? Email us at forms@ca9.uscourts.gov

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United States District Court
Central District of California

UNITED STATES OF AMERICA vs. **Docket No.** 2:16-cr-00196-SVW

Defendant Nerses Nick Bronsozian **Social Security No.** 4 8 8 9

akas: None (Last 4 digits)

JUDGMENT AND PROBATION/COMMITMENT ORDER

In the presence of the attorney for the government, the defendant appeared in person on this date.

MONTH	DAY	YEAR
05	22	2017

COUNSEL **John Lewis Littrell, appointed**
(Name of Counsel)

PLEA [X] **GUILTY,** and the court being satisfied that there is a factual basis for the plea. [ ] **NOLO CONTENDERE** [ ] **NOT GUILTY**

FINDING There being a finding/verdict of **GUILTY,** defendant has been convicted as charged of the offense(s) of:
Possession of an Unregistered Firearm in violation of 26 U.S.C. § 5861(d), 26 U.S.C. § 5871 as charged in Count 1 of the Indictment

JUDGMENT AND PROB/ COMM ORDER The Court asked whether there was any reason why judgment should not be pronounced. Because no sufficient cause to the contrary was shown, or appeared to the Court, the Court adjudged the defendant guilty as charged and convicted and ordered that: Pursuant to the Sentencing Reform Act of 1984, it is the judgment of the Court that the defendant is hereby committed to the custody of the Bureau of Prisons to be imprisoned for a term of:

ONE (1) YEAR and ONE (1) DAY

Upon release from imprisonment, the defendant shall be placed on supervised release for a term of three years under the following terms and conditions:

1. The defendant shall comply with the rules and regulations of the United States Probation Office and General Order 05-02.

2. The defendant shall refrain from any unlawful use of a controlled substance. The defendant shall submit to one drug test within 15 days of release from custody and at least two periodic drug tests thereafter, not to exceed eight tests per month, as directed by the Probation Officer.

3. The defendant shall participate in an outpatient substance abuse treatment and counseling program that includes urinalysis, breath and/or sweat patch testing, as directed by the Probation Officer. The defendant shall abstain from using alcohol and illicit drugs, and from abusing prescription medications during the period of supervision.

4. The defendant shall cooperate in the collection of a DNA sample from the defendant.

5. The defendant shall submit his person, and any property, residence, and vehicle to search at any time, with or without warrant, by any law enforcement or Probation Officer with reasonable suspicion concerning a violation of a condition of supervised release or unlawful conduct by the defendant, and by any Probation Officer in the lawful discharge of the officer's supervision function.

It is ordered that the defendant shall pay to the United States a special assessment of $100, which is due immediately.

Pursuant to Guideline § 5E1.2(a), all fines are waived as the Court finds that the defendant has established that he is unable to pay and is not likely to become able to pay any fine.

It is further ordered that the defendant surrender himself/herself to the institution designated by the Bureau of Prisons on or before 12 noon, July 24, 2017 . In the absence of such designation, the defendant shall report on or before the same date and time, to the United States Marshal located at:

USA vs. Nerses Nick Bronsozian Docket No.: 2:16-cr-00196-SVW

Roybal Federal Building
255 East Temple Street
Los Angeles, California 90012

The bond is exonerated upon self-surrender.

In addition to the special conditions of supervision imposed above, it is hereby ordered that the Standard Conditions of Probation and Supervised Release within this judgment be imposed. The Court may change the conditions of supervision, reduce or extend the period of supervision, and at any time during the supervision period or within the maximum period permitted by law, may issue a warrant and revoke supervision for a violation occurring during the supervision period.

May 25, 2017
Date

STEPHEN V. WILSON, U. S. District Judge

It is ordered that the Clerk deliver a copy of this Judgment and Probation/Commitment Order to the U.S. Marshal or other qualified officer.

Clerk, U.S. District Court

May 25, 2017
Filed Date

By Paul M. Cruz
Deputy Clerk

The defendant shall comply with the standard conditions that have been adopted by this court (set forth below).

STANDARD CONDITIONS OF PROBATION AND SUPERVISED RELEASE

While the defendant is on probation or supervised release pursuant to this judgment:

1. The defendant shall not commit another Federal, state or local crime;
2. the defendant shall not leave the judicial district without the written permission of the court or probation officer;
3. the defendant shall report to the probation officer as directed by the court or probation officer and shall submit a truthful and complete written report within the first five days of each month;
4. the defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;
5. the defendant shall support his or her dependents and meet other family responsibilities;
6. the defendant shall work regularly at a lawful occupation unless excused by the probation officer for schooling, training, or other acceptable reasons;
7. the defendant shall notify the probation officer at least 10 days prior to any change in residence or employment;
8. the defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any narcotic or other controlled substance, or any paraphernalia related to such substances, except as prescribed by a physician;
9. the defendant shall not frequent places where controlled substances are illegally sold, used, distributed or administered;
10. the defendant shall not associate with any persons engaged in criminal activity, and shall not associate with any person convicted of a felony unless granted permission to do so by the probation officer;
11. the defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view by the probation officer;
12. the defendant shall notify the probation officer within 72 hours of being arrested or questioned by a law enforcement officer;
13. the defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court;
14. as directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics, and shall permit the probation officer to make such notifications and to conform the defendant's compliance with such notification requirement;
15. the defendant shall, upon release from any period of custody, report to the probation officer within 72 hours;
16. and, for felony cases only: not possess a firearm, destructive device, or any other dangerous weapon.

USA vs. Nerses Nick Bronsozian Docket No.: 2:16-cr-00196-SVW

☐ The defendant will also comply with the following special conditions pursuant to General Order 01-05 (set forth below).

STATUTORY PROVISIONS PERTAINING TO PAYMENT AND COLLECTION OF FINANCIAL SANCTIONS

The defendant shall pay interest on a fine or restitution of more than $2,500, unless the court waives interest or unless the fine or restitution is paid in full before the fifteenth (15th) day after the date of the judgment pursuant to 18 U.S.C. §3612(f)(1). Payments may be subject to penalties for default and delinquency pursuant to 18 U.S.C. §3612(g). Interest and penalties pertaining to restitution, however, are not applicable for offenses completed prior to April 24, 1996.

If all or any portion of a fine or restitution ordered remains unpaid after the termination of supervision, the defendant shall pay the balance as directed by the United States Attorney's Office. 18 U.S.C. §3613.

The defendant shall notify the United States Attorney within thirty (30) days of any change in the defendant's mailing address or residence until all fines, restitution, costs, and special assessments are paid in full. 18 U.S.C. §3612(b)(1)(F).

The defendant shall notify the Court through the Probation Office, and notify the United States Attorney of any material change in the defendant's economic circumstances that might affect the defendant's ability to pay a fine or restitution, as required by 18 U.S.C. §3664(k). The Court may also accept such notification from the government or the victim, and may, on its own motion or that of a party or the victim, adjust the manner of payment of a fine or restitution-pursuant to 18 U.S.C. §3664(k). See also 18 U.S.C. §3572(d)(3) and for probation 18 U.S.C. §3563(a)(7).

Payments shall be applied in the following order:

1. Special assessments pursuant to 18 U.S.C. §3013;
2. Restitution, in this sequence (pursuant to 18 U.S.C. § 3664(i), all non-federal victims must be paid before the United States is paid):
   Non-federal victims (individual and corporate),
   Providers of compensation to non-federal victims,
   The United States as victim;
3. Fine;
4. Community restitution, pursuant to 18 U.S.C. §3663(c); and
5. Other penalties and costs.

SPECIAL CONDITIONS FOR PROBATION AND SUPERVISED RELEASE

As directed by the Probation Officer, the defendant shall provide to the Probation Officer: (1) a signed release authorizing credit report inquiries; (2) federal and state income tax returns or a signed release authorizing their disclosure; and (3) an accurate financial statement, with supporting documentation as to all assets, income and expenses of the defendant. In addition, the defendant shall not apply for any loan or open any line of credit without prior approval of the Probation Officer.

The defendant shall maintain one personal checking account. All of defendant's income, "monetary gains," or other pecuniary proceeds shall be deposited into this account, which shall be used for payment of all personal expenses. Records of all other bank accounts, including any business accounts, shall be disclosed to the Probation Officer upon request.

The defendant shall not transfer, sell, give away, or otherwise convey any asset with a fair market value in excess of $500 without approval of the Probation Officer until all financial obligations imposed by the Court have been satisfied in full.

These conditions are in addition to any other conditions imposed by this judgment.

USA vs. Nerses Nick Bronsozian Docket No.: 2:16-cr-00196-SVW

RETURN

I have executed the within Judgment and Commitment as follows:

Defendant delivered on _____ to _____

Defendant noted on appeal on _____

Defendant released on _____

Mandate issued on _____

Defendant's appeal determined on _____

Defendant delivered on _____ to _____

at _____

the institution designated by the Bureau of Prisons, with a certified copy of the within Judgment and Commitment.

United States Marshal

By _____

Date Deputy Marshal

CERTIFICATE

I hereby attest and certify this date that the foregoing document is a full, true and correct copy of the original on file in my office, and in my legal custody.

Clerk, U.S. District Court

By _____

Filed Date Deputy Clerk

FOR U.S. PROBATION OFFICE USE ONLY

Upon a finding of violation of probation or supervised release, I understand that the court may (1) revoke supervision, (2) extend the term of supervision, and/or (3) modify the conditions of supervision.

These conditions have been read to me. I fully understand the conditions and have been provided a copy of them.

(Signed) _____ _____

Defendant Date

_____ _____

U. S. Probation Officer/Designated Witness Date

A4

HILARY POTASHNER (Bar No. 167060)
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Attorneys for Defendant
NERSES BRONSOZIAN

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

WESTERN DIVISION

UNITED STATES OF AMERICA,

Plaintiff,

v.

NERSES BRONSOZIAN,

Defendant.

CASE NO. CR 16-196-SVW

NOTICE OF MOTION; MOTION TO DISMISS INDICTMENT FOR LACK OF JURISDICTION BECAUSE STATUTE EXCEEDS CONGRESS' POWER TO LEGISLATE UNDER ARTICLE I, SECTION 8, CLAUSE 1 AND ENFORCING IT HERE VIOLATES DUE PROCESS

TO PLAINTIFF UNITED STATES OF AMERICA, AND ITS COUNSEL OF RECORD, ASSISTANT UNITED STATES ATTORNEY GEORGE PENCE:

PLEASE TAKE NOTICE that defendant Nerses Bronsozian, by and through his attorneys of record, will and hereby does move this Court for an order dismissing the indictment on the ground that the underlying statute is unconstitutional because it exceeds the boundaries of Congress' power to legislate as a means to lay and collect taxes, that it would violate the Due Process Clause to punish Mr. Bronzozian for failing to register his firearm because doing so would have been impossible, and that the statute he is charged with violating has been implicitly repealed.

This motion is made pursuant to Article I, § 8, cl. 1 of the United States Constitution, the Fifth and Tenth Amendments to the United States Constitution, the attached Memorandum of Points and Authorities, all files and records in the case, and such evidence and argument as may be presented at the hearing.

Respectfully submitted,

HILARY POTASHNER
Federal Public Defender

DATED: November 15, 2016 By */s/ John Littrell*

JOHN LITTRELL
Deputy Federal Public Defender

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MISCELLANEOUS

I. INTRODUCTION

Nerses Bronsozian is charged in a single count indictment with possession of a machinegun which had not been registered to him in the National Firearms Registration and Transfer Record. (Dkt. No. 1.) The weapon is alleged to be a Military Armaments Corp. ("MAC") model Ingram M10A1 .45 caliber machinegun. *Id.* According to the government, the gun was originally manufactured as semi-automatic, but subsequent modifications to the disconnector and bolt made it a fully automatic weapon.

The National Firearms Act ("NFA") was enacted by congress in 1934 in an effort to tax the making and possession of certain firearms, including machine guns. The Supreme Court has held that the government acted within the enumerated powers set forth in U.S. Const. Article I, § 8, cl. 1 when it originally require citizens to register their weapons because this registration was a means by which taxes could be collected. But subsequent congressional acts such as the Gun Control Act of 1968 ("GCA") and the Firearm Owners Protection Act ("FOPA") modified the way in which the National Firearms Act operates and is enforced. As a result of the latter's ban on machine guns (codified at 18 U.S.C. § 922(o)), it is no longer possible to register or remit taxes on machine guns that were not already registered as of the passage of the FOPA in 1986.

Therefore, as to unregistered machine guns possessed after May 19, 1986, including the one involved in this case, the constitutional premise for the 26 U.S.C. § 5861(d) has been eliminated. Because the statute has no revenue-generating purpose or even potential with respect to previously unregistered machineguns, the statute cannot be justified as a valid exercise of Congress' power to tax set forth in Article I, § 8, cl. 1. Moreover, as to previously unregistered machine guns possessed after May 19, 1986, § 5861(d) violates the Due Process Clause of the United States Constitution because it punishes citizens for failing to do something that is impossible to do. Third, § 5861(d) cannot be enforced because it was implicitly repealed by 18 U.S.C. § 922(o).

II. RELEVANT HISTORY OF THE NATIONAL FIREARMS ACT

The National Firearms Act (NFA), codified under the Internal Revenue Code, I.R.C. Ch. 53 § 5801 et seq. was enacted June 26, 1934. Although the NFA was enacted by Congress based on its constitutional authority to levy taxes, the true purpose of the law was unrelated to revenue collection.[1] The bill was a response to the "gangland" crimes of that era, including the notorious St. Valentine's Day massacre. The NFA was intended to "curtail, if not prohibit" transactions involving particularly dangerous weapons that were used primarily by criminals. *Id.* But as Attorney General Homer S. Cummings explained in hearings leading up to the 1934 bill, "[w]e have no inherent police power to go into certain localities and deal with local crime." National Firearms Act: *Hearings Before the House Committee on Ways and Means*, 73rd Cong., 2d Sess., 8 (1934). Congress' means of achieving these goals were to follow the formula of the Harrison Narcotics Tax Act of 1914, which sought to impose restrictions on the sale and distribution of opium and coca leaves through Congress' power to tax. UNITED STATES STATUTES AT LARGE, 63 Cong. Ch. 1, December 17, 1914, 38 Stat. 785. Article I, § 8, s. 1 of the Constitution provides: "The Congress shall have power to lay and collect taxes, duties, imposts, and excises. . . ." Upholding the Narcotics Act in *Nigro v. United States*, 276 U.S. 332 (1928), the Court held:

> In interpreting the act, we must assume that it is a taxing measure, for otherwise it would be no law at all. If it is a mere act for the purpose of regulating and restraining the purchase of the opiate and other drugs, it is beyond the power of Congress and must be regarded as invalid...."

Id. at 341. Accordingly, both the House Ways and Means Committee Report and the Senate Finance Committee Report justified the basis for the NFA using the same wording: "In general this bill follows the plan of the Harrison Anti–Narcotic Act and

---

[1] *National Firearms Act Handbook*, chapter 1, p. 1, U.S. Dept. of Justice, Bureau of Alcohol, Tobacco Firearms and Explosives, Office of Enforcement Program Services, ATF E–Publication 5320.8, http:// www.atf.gov/publications/firearms/nfa-handbook/ (Revised April 2009) (viewed October 5, 2016).

adopts the constitutional principle supporting that act in providing for the taxation of fire-arms and for procedure under which the tax is to be collected." Rept. No. 1780, Committee on Ways and Means, U.S. House of Representatives, 73rd Cong., 2d Sess. 2 (1934); Rept. No. 1444, Committee on Finance, U.S. Senate, 73rd Cong., 2d Sess. 1 (1934). The constitutional rationale of the 73rd Congress is also revealed by a discussion during the Ways and Means Committee's hearing on the National Firearms Act in which Congressman Sumners asked, "This is a revenue measure and you have to make it possible at least in theory for these things to move in order to get internal revenue?" to which Attorney General Cummings replied, "That is the answer exactly." National Firearms Act: *Hearings Before the House Committee on Ways and Means*, 73rd Cong., 2d Sess., 8 (1934). Attorney General Cummings went on to say, "If we had a statute absolutely forbidding any human being to have a machine gun, you might say there is some constitutional question involved. But when you say, "we will tax the machine gun," … you are easily within the law." *Id.* at 19.

Relying on the power to raise revenue enumerated in article I, the NFA imposed a tax of $200 on the making and transferring of firearms as well as a special occupational tax on anyone engaging in the business of importing, manufacturing or dealing in NFA firearms. *National Firearms Act Handbook, supra*. "Firearms" as it was defined in 1934 "included shotguns and rifles having barrels less than 18 inches in length, certain firearms described as "any other weapons" [meaning concealable pistols such as a pen, knife, or umbrella gun], machine guns, and firearm mufflers and silencers." *Id.* In order to facilitate this tax and ensure that it was collected with each transfer, the NFA required that any person transferring NFA firearms or possessing an unregistered firearm must register them with the Secretary of the Treasury, who would proceed to collect the duty. *Id.* It provided for criminal sanctions for those who did not follow the registration requirements. 26 U.S.C.A. § 5861.

The NFA was first challenged in *Sonzinsky v. United States*, 300 U.S. 506, 512 (1937). The defendant claimed that its "present levy is not a true tax, but a penalty

imposed for the purpose of suppressing traffic in a certain noxious type of firearms…."

The Supreme Court found that on its face, the NFA was a revenue measure:

> The case is not one where the statute contains regulatory provisions related to a purported tax in such a way as has enabled this Court to say in other cases that the latter is a penalty resorted to as a means of enforcing the regulations…. Nor is the subject of the tax described or treated as criminal by the taxing statute. *Compare United States v. Constantine*, 296 U.S. 287, 56 S.Ct. 223, 80 L.Ed. 233. Here section 2 contains no regulation other than the mere registration provisions, which are obviously supportable as in aid of a revenue purpose. On its face it is only a taxing measure...

Id. at 513. The Court held that the act was valid because it was a revenue measure only, refusing to look beyond the stated purpose of the act into the motives behind it:

> Inquiry into the hidden motives which may move Congress to exercise a power constitutionally conferred upon it is beyond the competency of the courts.... They will not undertake, by collateral inquiry as to the measure of the regulatory effect of a tax, to ascribe to Congress an attempt, under the guise of taxation, to exercise another power denied by the Federal Constitution....
>
> Here the annual tax of $200 is productive of some revenue. We are not free to speculate as to the motives which moved Congress to impose it, or as to the extent to which it may operate to restrict the activities taxed. As it is not attended by an offensive regulation, and since it operates as a tax, it is within the national taxing power.

Id. at 513-514. The NFA was challenged again in *Haynes v. United States*, 390 U.S. 85, 88 (1968), this time on the basis of it that it violated gun owners' right against self-incrimination because registration information could be passed on to state authorities who could then prosecute gun owners under state weapons laws. The Court noted throughout the opinion that the NFA was justified as a means to collect taxes:

- The National Firearms Act is "an interrelated statutory system for the taxation of certain firearms." *Id.* at 87
- "All these taxes are supplemented by comprehensive requirements calculated to assure their collection…every person possessing such a firearm is obliged to register his possession with the Secretary…." *Id.* at 88-89.

- Citing to *Sonzinsky*, "We do not doubt, as we have repeatedly indicated, that this Court must give deference to Congress's *taxing powers*, and to measures reasonably incidental to their exercise…." *Id.* (emphasis added).

To address the flaws found by the Court in *Haynes*, the NFA was amended by Title II of the Gun Control Act ("GCA"). Gun Control Act of 1968, Pub. L. 90-618 (October 22, 1968). The amendments did away with the requirement that gun owners register their unregistered firearms, yet it maintained the illegality of possessing an unregistered firearm. 26 U.S.C. § 5861; *see also United States v. Freed*, 401 U.S. 601 (1971). There was no mechanism to register a previously unregistered NFA firearm already possessed by the person. *See National Firearms Act Handbook*, *supra* at 24.

The NFA was then expanded once more with the Firearm Owner's Protection Act (FOPA) in 1986. *National Firearms Act Handbook*, *supra*. FOPA not only added to the NFA's definition of "silencer" any part or combinations of parts, it also amended the Gun Control Act so that under 18 U.S.C.A. § 922(o), the GCA prohibits the transfer or possession of *any* machine gun that was not registered as of May 19, 1986. *Id.*

Since the passage of 18 U.S.C.A. § 922(o), the Bureau of Alcohol, Tobacco and Firearms does not accept applications to transfer, register, or pay the $200 tax on any machine gun that was not previously registered as of May 19, 1986. 27 C.F.R. § 479.105. Thus, as to all machineguns that were not registered as of the date of the passage of FOPA, it is impossible to either register them or pay the applicable tax.

III. POST-1986 CHALLENGES TO SECTION 5861(D)

The Tenth Circuit has held that 26 U.S.C. § 5861(d) cannot be enforced with respect to machineguns possessed after 1986. *United States v. Dalton*, 960 F.2d 121 (10th Cir. 1992). In *Dalton*, an attorney accepted a firearm from his client in lieu of a fee for his services. The client had converted the firearm into a machinegun in 1989. Dalton was convicted with a violation of 26 U.S.C. § 5861(d) and (e). The Tenth Circuit reversed

the convictions on two grounds. First, it held that it was a violation of due process to punish the defendant for failing to perform an act – the registration of a firearm that had been modified into a machinegun in 1989 – that was impossible for him to perform. The Court reasoned that the gravamen of the offense was not the mere possession of a machinegun, but the possession of an *unregistered* machinegun. *Dalton*, 960 F.2d at 123 (*citing Haynes*, 390 U.S. at 93) ("[T]he possession of a firearm and a failure to register are equally fundamental ingredients."). Because the defendant could not have registered the machinegun at the time he possessed it, the court found that the application of the law to him was fundamentally unfair. *Id.* at 124 (*citing* 1 W. LaFave & A. Scott, Jr., *Substantive Criminal Law* § 3.3(c) at 291 (1986) ("one cannot be criminally liable for failing to do an act which he is physically incapable of performing"). Second, the Court held that the statute was invalid because it was not within Congress' enumerated power to lay and collect taxes under Article I, § 8. Although the statute originally was a valid tax measure because it generated revenue when passed, it could no longer be justified as to machineguns possessed after 1986 because the government refused to accept registration or tax payments for them. *Id.* at 124-25 ("[B]ecause the registration requirements of the National Firearms Act were passed pursuant to the taxing power, and because after the enactment of section 922(o) the government will no longer register or tax machineguns, section 922(o) has 'removed the constitutional legitimacy of registration as an aid to taxation.'"); *Id.* at 125 ("To put the proposition as plainly as we are able: a provision which is passed as an exercise of the taxing power no longer has that constitutional basis when Congress decrees that the subject of that provision can no longer be taxed."). Several courts have agreed with the Tenth Circuit's holding in *Dalton*. *See*, *United States v. Ferguson*, 788 F. Supp. 580, 581 (D.D.C. 1992) ("To the extent section 922(o) applies, therefore, the registration requirement is now unconstitutional"); *United States v. Rock Island Armory, Inc.*, 773 F. Supp. 117 (C.D. Ill. 1991); *United States v. Gambill*, 912 F. Supp. 287, 289-90 (S.D. Ohio 1996), *aff'd*, 129 F.3d 1265 (6th Cir. 1997) ("It is hard to

understand how any circuit could find such a conviction permissible when the provisions of the NFA have been totally eclipsed by section 922(o).").

The Fourth Circuit rejected the reasoning in *Dalton* in *United States v. Jones*, 976 F.2d 176 (4th Cir. 1992). In *Jones*, a mechanical engineer had invented a method to convert semi-automatic shotguns into machineguns. *Id.* at 181. He was charged with violations of the NFA relating to manufacturing a machinegun without permission, 26 U.S.C. § 5822, possessing a firearm that was manufactured in violation of the act, 26 U.S.C. § 5861(c), transportation of unregistered firearms, 26 U.S.C. § 5861(j), and transferring a firearm in violation of the act, 26 U.S.C. § 5861(e). He was not charged with mere possession of an unregistered machinegun under 26 U.S.C. § 5861(d). Jones challenged his conviction on the ground that the government should have charged him under 18 U.S.C. § 922(o), rather than 26 U.S.C. § 5861(d). He noted that following the passage of the FOPA it was "impossible for him to receive the authorizations required under the National Firearms Act." *Id.* at 182. Therefore, either the law had been "implicitly repealed" or enforcing the law against him was fundamentally unfair. He also argued, like the defendant in *Dalton*, that the law had "lost its constitutional basis" because the government refused to register machineguns after 1986. Characterizing both arguments as due process challenges, the court disagreed. It held that the NFA was not repealed by the FOPA and that it was not fundamentally unfair to punish the defendant for possession of an unregistered machinegun, even though registration was impossible, because one "can comply with both acts by refusing to deal in newly-made machine guns," *Id*. at 183. Finally, the Court held that the statute was valid as a tax measure because the *making* of illegal machineguns continues to be taxed after FOPA. *Id.* at 183. The Court reasoned that "knowing the chain of possession and transfer assists in determining who made the firearm and hence is 'supportable as in aid of a

revenue purpose.'" *Id.* at 184 (*quoting Sonzinsky*, 300 U.S. at 513). Several circuits have agreed with the reasoning in *Jones*. *See, e.g.*, *United States v. Ardoin*, 19 F.3d 177 (5th Cir. 1994); *United States v. Grier*, 354 F.3d 210 (3d Cir. 2003).

The Ninth Circuit initially praised the Tenth Circuit's decision in *Dalton*. In *United States v. Kurt*, 988 F.2d 73 (9th Cir. 1993), the defendant was charged with simple possession of an unregistered machinegun under 26 U.S.C. § 5861(d). Like the defendant in *Dalton*, he argued that application of the statute to him was unconstitutional because it was premised on Congress' power to tax under Article I, Section 8, but the government refused to accept registration or tax payments for the possession of machine guns starting in 1986. *Id.* at 75-76. He also contended, like the defendant in *Dalton*, that it would be fundamentally unfair to convict him for possessing an unregistered machinegun after 1986 because it would have been impossible for him to register it then. *Id.* The court noted "with favor" the reasoning in *Dalton*, but found it unnecessary to its decision because the defendant had not established that he first possessed the machine gun at some point after May 19, 1986. "Since § 5861 could constitutionally be applied to a person who purchased a machine gun prior to May 19, 1986, it was Kurt's burden to show that he was a member of the class arguably unconstitutionally affected by the statute." *Id.*

However, in 1996, the Ninth Circuit rejected the reasoning in *Kurt* as dicta and adopted the reasoning of *Jones* in a *per curiam* decision. *Hunter v. United States*, 73 F.3d 260 (9th Cir. 1996). The Ninth Circuit, like the Fourth, reasoned that it was not fundamentally unfair to punish the defendant for possession of an unregistered machinegun, even though registration was impossible, because "individuals could comply with both acts by refusing to deal in newly-made machine guns." *Id.* at 262 (*quoting Jones*, 976 F.2d at 183). It also repeated *Jones'* reasoning that § 5861(d) was within Congress' power to tax because "[t]he manufacture of machine guns continues to be taxed, and knowing the chain of possession of a firearm would help the government determine who made it; thus, requiring registration for possession still

facilitates taxation." *Hunter* 73 F.3d at 262 (*citing Jones*, 976 F.2d at 184).

The Ninth Circuit's reasoning in *Hunter* is fundamentally flawed. When it adopted the reasoning of *Jones* without meaningful analysis, it ignored a crucial distinction between the subsections of the NFA at issue in *Jones* (26 U.S.C. § 5822, 26 U.S.C. § 5861(c), (e), and (j)), and the subsection at issue in that case (26 U.S.C. § 5861(d)). *Jones* was prosecuted for *manufacturing* and *transferring* machineguns, whereas the defendant in *Hunter* (like the defendant in *Dalton*, and like Mr. Bronsozian in this case) was charged only with possession. Whereas the *making* of machineguns and *transfer* of previously registered machineguns can continue to generate revenue, the mere possession of a previously unregistered machinegun cannot. Moreover, a tax on the *making* of machineguns cannot aid in determining the chain of possession for machineguns that were not previously registered as of May 19, 1986, because the government will no longer accept applications to register those firearms.

The Ninth Circuit has not revisited the issue since its decision in *Hunter*. But intervening case law from the United States Supreme Court has interpreted the Article I power to tax in a way that undermines and supersedes that decision.

IV. THE AFFORDABLE CARE ACT DECISION

In *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566 (2012), the Supreme Court evaluated the constitutionality of two subsections of the Affordable Care Act, one of which was the individual mandate to purchase health insurance on the private market. The individual mandate also called for a "shared responsibility payment" for those who did not purchase private health insurance. The Court held that the individual mandate of the ACA was not justified under Congress' power to regulate interstate commerce, but considered an alternative argument that the challenged portions were valid under Congress' power to tax. The Court examined its precedent to identify the essential features that a law must include in order to be justified under the tax power.

First, the Court held, a valid tax law must actually raise some revenue. *Id.* at 2594 (the "essential feature of any tax . . . [is that it] produces at least some revenue for the Government.") (*quoting United States v. Kahriger*, 345 U.S. 22, 28 (1953); *see also United States v. Ross*, 458 F.2d 1144, 1145 (5th Cir.1972) ("The test of validity is whether on its face the tax operates as a revenue generating measure and the attendant regulations are in aid of a revenue purpose."), *In re Bradford*, 534 B.R. 839, 860 (Bankr. M.D. Ga. 2015) ("Congress need not intend for the regulation to produce revenue so long as does so in fact."); *Farmer v. Higgins*, 907 F.2d 1041, 1042-44 (11th Cir. 1990). The Court held that the individual mandate of the ACA met this requirement because it imposed a "shared responsibility payment" that was enforced by the IRS, and that was expected to raise about $4 billion per year by 2017." *Id.* at 2594.

Second, the Court held, a tax cannot be a "penalty." *Id.* at 2595-96. "In distinguishing penalties from taxes, this Court has explained that 'if the concept of penalty means anything, it means punishment for an unlawful act or omission.'" *Id.* (*quoting United States v. Reorganized CF & I Fabricators of Utah, Inc.*, 518 U.S. 213, 224 (1996); *See also Bailey v. Drexel Furniture Co.* (U.S. Reports Title: Child Labor Tax Case), 259 U.S. 20, 38 (1922) ("there comes a time in the extension of the penalizing features of the so-called tax when it loses its character as such and becomes a mere penalty, with the characteristics of regulation and punishment."). The Court drew on its precedent in *Drexel Furniture* to determine three practical characteristics that distinguish a prohibited "penalty" from a permissible "tax." First, a tax must not impose an "exceedingly heavy" burden. The tax in *Drexel Furniture* imposed a fee of 10 percent of a company's net annual income on those who employed children, regardless of how many children were employed, which the Supreme Court held to be excessive. Second, penalties can be distinguished from taxes because they are imposed only on knowing violators of the statute. "Such scienter requirements are typical of punitive statutes, because Congress often wishes to punish only those who intentionally break the law." *Id.* at 2595. Third, courts could look to the enforcement mechanism

for the fee to determine its nature. One detail that revealed the "tax" in *Drexel Furniture* as a penalty was that it enforced in part by the Department of Labor, an agency "responsible for punishing violations of labor laws, not collecting revenue." *Id.*

Applying those criteria, the Supreme Court held that the shared responsibility payment did not constitute a "penalty." It was not excessive, because it was required by law to be less than the cost of the alternative of purchasing insurance. *Id.* at 2595. There was no scienter requirement. *Id.* And the payment was collected by the IRS "through the normal means of taxation." *Id.* The Court emphasized that in collecting the shared responsibility payment "the Service is not allowed to use those means most suggestive of a punitive sanction, such as criminal prosecution." *Id.* Failure to comply with the law carried no stigma, nor the threat of prosecution. "[I]f someone chooses to pay rather than obtain health insurance, they have fully complied with the law," and "[n]either the Act nor any other law attaches negative legal consequences to not buying the health insurance, beyond requiring a payment to the IRS." *Id.* at 2597.

Sebelius represents a significant clarification of the law governing the limits of Congress' power to regulate under Article I, § 8. It cannot be reconciled with the flawed holdings of *Hunter* and *Jones*. Therefore, this Court is bound by the decision in *Sebelius*. *See Miller v. Gammie*, 335 F.3d 889, 900 (9th Cir. 2003) (Where Supreme Court precedent "undercut[s] the theory or reasoning underlying the prior circuit precedent in such a way that the cases are clearly irreconcilable" district courts "should consider themselves bound by the intervening higher authority and reject the opinion of [the circuit court] as having been effectively overruled.'" Under *Sebelius*, it is clear that Section 5861(d) cannot be justified under Congress' power to tax, and the Ninth Circuit's *per curiam* decision in *Hunter* has been effectively overruled.

V. § 5861(D) IS CLEARLY UNCONSTITUTIONAL AFTER *SEBELIUS*

A. 5861(d) Generates No Revenue

It is undisputed that § 5861(d) generates no revenue. That fact, standing on its own, invalidates the statute as a tax measure. The Justice Department has acknowledged as much in the United States Attorneys' Manual:

> Section 922(o) of Title 18 makes it unlawful to transfer or possess a machine gun made after May 19, 1986. In addition, under the NFA, it is unlawful to manufacture or possess a machine gun without first registering it with the Secretary of the Treasury and paying applicable taxes. 26 U.S.C. §§ 5822, 5861. As a result of the enactment of 18 U.S.C. § 922(o), the Secretary of the Treasury no longer will register or accept any tax payments to make or transfer a machine gun made after May 19, 1986. Accordingly, because it is impossible to comply with the registration and taxation provisions in the NFA, prosecutors should charge the unlawful possession or transfer of a machine gun made after May 19, 1986 under § 922(o).

9-63.516 Charging Machine Gun Offenses Under 18 U.S.C.A. § 922(o), Instead of Under the National Firearms Act, United States Attorneys' Manual, http://www.justice.gov/usao/eousa/foia_reading_room/usam/title9/63mcrm.htm#9-63.516 (visited Aug 3, 2016). In fact, the Government opposed *certiorari* in *Jones*, the leading precedent for § 5861's continued viability, because the Department of Justice had instructed U.S. Attorneys that any case involving the possession of a machine gun made after 1986 should be charged under 18 U.S.C.A. § 922(o) rather than 26 U.S.C.A. § 5861. *Jones v. United States*, 508 U.S. 914 (1993), Br. in Opp. 11.

B. 5861(d) Is A Penalty

§ 5861(d) also has all of the hallmarks of a prohibited penalty as that concept is described in *Sebelius*. First, regarding the "burden" of the tax, since 1986, no tax payments have been collected on the possession of previously unregistered firearms. Instead, the only possible consequence is a criminal prosecution. Whereas a person who did not care to purchase an individual health plan has the option to simply pay a shared responsibility payment, a person possessing an unregistered machinegun after

1986 has no such choice. He or she cannot pay the applicable tax even if he wanted to because the government will not accept it. The lack of any legal options to escape the punitive nature of § 5861(d) renders it a penalty. As Chief Justice Roberts explained:

> By contrast [to its power to regulate interstate commerce], Congress's authority under the taxing power is limited to requiring an individual to pay money into the Federal Treasury, no more. If a tax is properly paid, the Government has no power to compel or punish individuals subject to it. We do not make light of the severe burden that taxation—especially taxation motivated by a regulatory purpose—can impose. But imposition of a tax nonetheless leaves an individual with a lawful choice to do or not do a certain act, so long as he is willing to pay a tax levied on that choice.

Id. at 2600. Whereas criminal prosecution was explicitly ruled out as a means of enforcing the ACA's individual mandate, it is the sole means of enforcing § 5861(d).

Second, there is a heightened scienter requirement for establishing liability under § 5861(d). In *Staples v. United State*s, 511 U.S. 600, 616 (1994), the Supreme Court held that in order to be found guilty of violating the statute the accused must know of the specific features of a firearm that bring it within the prohibition of the act. *Id.* at 619. A similar scienter requirement convinced the Supreme Court to find the tax on employing child labor to be a penalty because it singled out only knowing violators of the law. *See Drexel* 259 U.S. at 38. Conversely, the lack of a scienter requirement convinced the court that the "shared responsibility payment" provided for by the ACA was not a penalty. And whereas there is no stigma associated with choosing to pay a shared responsibility payment rather than purchase an individual health plan, the stigma of a felony conviction cannot be overstated. *C.f. Dep't of Revenue of Montana v. Kurth Ranch*, 511 U.S. 767, 782 (1994) (holding that a tax on goods "the taxpayer never lawfully possessed has an unmistakable punitive character.").

Third, the "tax" is enforced by the Bureau of Alcohol, Tobacco, and Firearms, which is a branch of the Department of Justice, overseen by the Attorney General and responsible for enforcing and punishing criminal laws, not collecting revenue. And as noted above, the only enforcement mechanism is prosecution, as it is impossible to pay.

As the Supreme Court stated in reference to the federal taxation of liquor following prohibition: "[E]ven though the statute was not adopted to penalize violations of the amendment, it ceased to be enforceable at the date of repeal, if, in fact, its purpose is to punish rather than to tax." *United States v. Constantine*, 296 U.S. 287, 294 (1935).

VI. CONCLUSION

May 19, 1986 was the last day that 26 U.S.C. § 5861(d) had the potential to generate revenue. Since that point, it has generated only criminal prosecutions. Because the statute now imposes a penalty, rather than a tax, it cannot be justified under Congress' enumerated power under Article I, § 8, cl. 1 to lay and collect taxes. For the foregoing reasons, the Court should dismiss the indictment with prejudice.[2]

Respectfully submitted,

HILARY POTASHNER
Federal Public Defender

DATED: November 15, 2016

By */s/ John Littrell*
JOHN LITTRELL
Deputy Federal Public Defender

[2] Mr. Bronsozian also maintains that it would violate the Due Process clause to punish him for failing to register an unregistered machinegun because doing so would be impossible, *see Dalton*, 960 F.2d at 124, and that 26 U.S.C. § 5861(d) has been implicitly repealed by 18 U.S.C. § 922(o), and is therefore unenforceable against him.

A5

A. That's correct.
Q. They're not banned under federal law?
A. Are grenades banned under federal law? No, sir.
Q. And rocket launchers, for example, that's something that you'd have to registered with the NFRTR?
A. That would be classified as a destructive device, yes, sir.
Q. They're not banned; right?
A. No.
Q. You can actually go register them with the NFRTR?
A. Yes, sir.
Q. But -- and machine guns are also required to be registered under the NFRTR; correct?
A. NFA, yes, sir.
Q. NFA. And yet in 2011, the ATF refused to accept registration of any machine gun by a civilian who had not previously registered that weapon as of 1986; is that correct?
MR. PENCE: Objection. Calls for speculation.
THE COURT: Do you know?
THE WITNESS: Any weapon that was not registered prior to May 19, 1986 by an individual, uh, that is not licensed to manufacture would not be allowed. It would be 9220 restricted so there would be restrictions placed on it. Individuals could not register a machine gun that was

manufactured after May 19, 1986.
BY MR. LITTRELL:
Q. And so you checked the records to determine whether this, um, whether there was any registration for a machine gun under Mr. Bronsozian's name; right?
A. That's correct.
Q. And found none?
A. That's correct.
Q. You also checked to see if that gun had been registered to anybody else; right?
A. That's correct.
Q. You found that it had not?
A. It had not been registered to anyone, no.
Q. So if Mr. Bronsozian in 2011 had presented that firearm to the ATF and asked to pay the registration fee, he would have been turned away?
A. Uh, he would have been in violation of possession of a firearm that is not registered.
Q. And he would not have been allowed to register it?
A. It's contraband.
Q. But destructive devices and grenades --
THE COURT: You're arguing with him.
MR. LITTRELL: Very well.
THE COURT: Thank you, sir. You may step down.
Okay. I think we've finished a good part of the