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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because doing so would have been impossible, and that the statute he is charged with violating has been implicitly repealed.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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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

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[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.