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 10 UNITED STATES OF AMERICA

11 UNITED STATES DISTRICT COURT

12 FOR THE CENTRAL DISTRICT OF CALIFORNIA

13 UNITED STATES OF AMERICA,
 14 Plaintiff,
 15 v.
 16 NERSES NICK BRONSOZIAN,
 17 Defendant.

No. CR 16-196-SVW

GOVERNMENT'S OPPOSITION TO MOTION
 TO DISMISS INDICTMENT FOR LACK OF
 JURISDICTION

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 19 Plaintiff United States of America, by and through its counsel
 20 of record, the United States Attorney for the Central District of
 21 California and Assistant United States Attorneys George E. Pence and
 22 Khaldoun Shobaki, hereby files its Opposition to Defendant's Motion
 23 to Dismiss Indictment for Lack of Jurisdiction.

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1 This motion is based upon the attached memorandum of points and
2 authorities, the files and records in this case, and such further
3 evidence and argument as the Court may permit.

4 Dated: November 22, 2016

Respectfully submitted,

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10 /s/ George E. Pence

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1 MEMORANDUM OF POINTS AND AUTHORITIES

2 I. INTRODUCTION

3 Defendant has filed a motion to dismiss the indictment, which
4 charges him with possession of an unregistered firearm in violation
5 of the Title 26, United States Code, section 5861(d). Defendant's
6 motion finds no support in law or fact and should be denied.

7 Defendant's motion raises two constitutional challenges to the
8 charge against him. First, defendant claims that "the constitutional
9 premise for section 5861(d) has been eliminated," due to the
10 enactment of Title 18, United States Code, section 922(o), which
11 generally makes machinegun possession unlawful. (Mot. at 1.) Second,
12 defendant argues that section 5861(d) "violates the Due Process
13 Clause of the United States Constitution because it punishes citizens
14 for failing to do something that is impossible to do," that is,
15 register a machinegun. (Id.)

16 These arguments fly in the face of binding Ninth Circuit
17 precedent, namely Hunter v. United States, 73 F.3d 260, 261 (9th Cir.
18 1996) (per curiam). In that case, which is directly on point, the
19 Ninth Circuit rejected both of the constitutional claims defendant
20 has advanced in his motion.

21 Defendant attempts to end-run Hunter by arguing that the
22 decision is no longer good law after the United States Supreme
23 Court's decision in National Federation of Independent Business v.
24 Sebelius, 132 S.Ct. 2566 (2012) ("Sebelius"), which upheld part of
25 the Patient Protection and Affordable Care Act of 2010 ("ACA"),
26 Pub.L. No. 111-148, 124 Stat. 119 (2010). (Mot. at 9-14.) But this
27 argument fails. The Supreme Court's decision in Sebelius is neither
28 closely related to, nor is it clearly irreconcilable with, the Ninth

1 Circuit's decision in Hunter. Accordingly, this Court is bound to
2 follow Hunter as the law of this Circuit.

3 Finally, defendant argues, without citation to any authority,
4 that section 5861(d) has been "implicitly repealed." (Mot. at 1, 14
5 n.2.) Defendant is wrong. Sections 5861(d) and 922(o) are not clearly
6 irreconcilable, nor is there any evidence Congress intended the
7 latter to replace the former. Therefore, defendant's "implicit
8 repeal" argument falls far short of the mark.

9 **ARGUMENT**

10 **A. The Ninth Circuit's Decision in Hunter Bars Defendant's
11 Constitutional Challenges to the Indictment.**

12 The National Firearms Act ("NFA"), which was enacted in 1934,
13 establishes a regulatory structure for taxing "firearms," a narrow
14 class of weapons that includes machineguns. 26 U.S.C. § 5845(a),(b).
15 Section 5861(d), which is part of the NFA, requires that all such
16 firearms be registered with the National Firearms Registration and
17 Transfer Record. 26 U.S.C. § 5861(d) (making it unlawful for a person
18 "to receive or possess a firearm which is not registered to him" in
19 that database). Later acts of Congress restricted machinegun
20 ownership, and it is - and has been since before defendant committed
21 the crime charged in this case - generally unlawful for any person to
22 transfer or possess a machinegun. See 18 U.S.C. § 922(o).

23 Against this background, defendant first argues that because he
24 cannot possibly comply with section 5861(d)'s registration
25 requirement, it would be unfair and a violation of his due process
26 rights to punish him for his lack of compliance. Defendant next
27 argues that because section 5861(d) was enacted pursuant to Congress'
28 taxing power, see U.S.C. Const. Article I, § 8, cl. 1, and section

1 5861(d) no longer generates any tax revenue because private
2 possession and transfer of machineguns is prohibited under section
3 922(o), section 5861(d) is void. (Mot. at 12.) These arguments cannot
4 save defendant because the Ninth Circuit rejected them both in
5 Hunter.

6 In Hunter, defendant pled guilty to possession of an
7 unregistered machinegun in violation of section 5861(d). Defendant
8 subsequently filed a section 2255 motion to vacate his sentence,
9 making the very same arguments defendant advances in this case in
10 support of his motion to dismiss. The district court denied that
11 section 2255 motion and the Ninth Circuit affirmed.

12 The Ninth Circuit rejected defendant's due process argument,
13 citing United States v. Jones, 976 F.2d 176 (4th Cir. 1992) and
14 United States v. Gann, 732 F.2d 714 (9th Cir. 1984), as follows:

15 In U.S. v. Jones, 976 F.2d 176 (4th Cir. 1992), the Fourth
16 Circuit reasoned that the registration requirement is not
17 unfair, even as to machine guns made illegal under
18 § 922(o), because individuals "can comply with both acts by
19 refusing to deal in newly-made machine guns," 976 F.2d at
20 183. Although the passage of § 922(o) effectively rendered
21 the possession of a machine gun a violation of both
§ 5861(d) and § 922(o), the Constitution does not forbid
making the same conduct illegal under two statutes, and the
government is permitted to prosecute under either one. See
id.; United States v. Ross, 9 F.3d 1182, 1194 (7th Cir.
1993); see also United States v. Ardoin, 19 F.3d 177, 180
(5th Cir. 1994).

22 In U.S. v. Gann, 732 F.2d 714 (9th Cir. 1984), we rejected
23 an argument identical to that advanced by Hunter. Gann was
24 convicted both of possession of a firearm by a felon and
25 possession of an unregistered firearm. Id. at 721. Just as
26 Hunter asserts it was unfair to charge him with possession
of an unregistered machine gun since he could not register
it, Gann argued that "since a felon cannot register a
firearm, it is unfair to charge him with a separate crime
for failing to do so." Id. We rejected that argument. Id.
27 Hunter, 73 F.3d at 261-62.

1 The Court also dismissed defendant's argument that section
2 5861(d) was no longer within Congress's power to tax after the
3 enactment of section 922(o). In this respect, the Ninth Circuit
4 held:

5 We adopt the rationale of Jones, that requiring those who
6 possess machine guns to register them is in aid of the
7 taxing power even if the government no longer taxes
8 possession. The manufacture of machine guns continues to be
9 taxed, and knowing the chain of possession of a firearm
10 would help the government determine who made it; thus,
11 requiring registration for possession still facilitates
12 taxation.

13 Hunter, 73 F.3d at 262.

14 Hunter is consistent with numerous other Court of Appeals
15 decisions, in addition to Jones, rejecting constitutional challenges
16 to section 5861(d). See, e.g., United States v. Ardoin, 19 F.3d 177
17 (5th Cir. 1994) (statute constitutional even if possession and
18 transfer not taxed); United States v. Copus, 93 F.3d 269 (7th Cir.
19 1996) (statute is valid under power to tax); United States v. Rivera,
20 58 F.3d 600 (11th Cir. 1995) (conviction under statute did not
21 violate due process, even though registration of firearm to
22 defendant, a convicted felon, was precluded by law).

23 The Ninth Circuit's decision in Hunter controls here and
24 forecloses defendant's claim that the indictment should be dismissed
25 because the Court lacks jurisdiction.

26 **B. The Supreme Court's Decision in Sebelius Is Neither Closely
27 Related to, Nor Is It Clearly Irreconcilable With, The
28 Ninth Circuit's Decision in Hunter.**

Defendant argues that the Supreme Court's decision in Sebelius
requires this Court to reevaluate and reject the Ninth Circuit's
decision in Hunter. Defendant is mistaken.

1 It is well-established that "[a] district court bound by
2 circuit authority has no choice but to follow it, even if convinced
3 that such authority was wrongly decided.'" Hatter v. Dyer, 154 F.
4 Supp. 3d 940, 950 (C.D. Cal. 2015) (punctuation omitted) (quoting
5 Hart v. Massanari, 266 F.3d 1155, 1175 (9th Cir. 2001)). A district
6 court, however, may reexamine the holding of a prior Ninth Circuit
7 decision in light of an inconsistent decision by the Supreme Court
8 "on a closely related, but not identical issue" where the Supreme
9 Court has "undercut the theory or reasoning underlying the prior
10 circuit precedent in such a way that the cases are clearly
11 irreconcilable." Miller v. Gammie, 335 F.3d 889, 899, 900 (9th Cir.
12 2003) (en banc) (quoted in In re Deitz, 760 F.3d 1038 (9th Cir.
13 2014)); see also Lair v. Bullock, 697 F.3d 1200, 1206 (9th Cir.
14 2012).

15 It is not enough "for there to be 'some tension' between the
16 intervening higher authority and prior circuit precedent, or for the
17 intervening higher authority to 'cast doubt' on the prior circuit
18 precedent." Lair, 697 F.3d at 1207 (internal citation omitted). The
19 district court remains bound by "prior [Ninth Circuit] precedent if
20 it can be reasonably harmonized with the intervening authority." In
21 re Flores, 692 F.3d 1021, 1030 (9th Cir. 2012), overruled on other
22 grounds, 735 F.3d 855 (9th Cir. 2013).

23 Sebelius is plainly distinguishable from Hunter, and thus does
24 not permit reexamination of that decision. In Sebelius, the Supreme
25 Court upheld the individual mandate of the ACA in part because the
26 mandate was, on its face, a revenue generating measure. 132 S. Ct. at
27 2594 ("The exaction the Affordable Care Act imposes on those without
28 health insurance looks like a tax in many respects"). In Hunter, the

1 Ninth Circuit weighed in on a different issue, that is, whether a
2 statute that Congress properly enacted pursuant to its tax power can
3 later fall afoul of the Constitution simply because other legislative
4 acts result in that statute generating no tax revenue. That question
5 was not addressed in Sebelius. Because Sebelius is distinguishable
6 from Hunter, those decisions can be "reasonably harmonized," and the
7 Court remains bound by both of them, In re Flores, 692 F.3d at 1030.

8 This case is similar to United States v. Alcantar, 733 F.3d 143
9 (5th Cir. 2013), in which defendant argued that his conviction under
10 18 U.S.C. § 922(g) for felon in possession of a firearm should be
11 vacated, because the Supreme Court's decision in Sebelius undermined
12 the Fifth Circuit's longstanding precedent that section 922(g)(1)
13 constituted a valid exercise of Congressional authority under the
14 Commerce Clause. The Fifth Circuit rejected defendant's argument,
15 holding:

16 Whatever the merits of Alcantar's argument on this point,
17 we are not at liberty to overrule our settled precedent
18 because the Supreme Court's decision in [Sebelius] did not
19 overrule it. [Sebelius] involved, in relevant part, a
20 challenge to the "individual mandate" portion of the [ACA].
21 It did not address the constitutionality of § 922(g)(1),
22 and it did not express an intention to overrule the
23 precedents upon which our cases—and numerous other cases in
24 other circuits—relied in finding statutes such as
25 § 922(g)(1) constitutional.

26 Alcantar, 733 F.3d at 146.

27 The Fifth Circuit's reasoning in Alcantar applies with equal
28 force here. In Sebelius, the Supreme Court expressed no intention to
overrule section 5861(d); indeed, there's no mention of the statute
in that case. Therefore, this Court, like the Fifth Circuit in
Alcantar should continue to apply the settled precedent of this

1 Circuit, namely Hunter, which bars defendant's constitutional
2 challenges to the indictment in this case.¹

3 **C. Congress Has Not Impliedly Repealed Section 5861(d).**

4 Defendant has cited no authority for his claim that, with
5 section 922(o), Congress impliedly repealed section 5861(d). This
6 claim is plainly mistaken.

7 First, the two statutes are not "in irreconcilable conflict." In
8 re Glacier Bay, 944 F.2d 577, 581 (9th Cir. 1991) (stating test for
9 repeals by implication). Section 5861(d) requires machineguns to be
10 registered to the extent they are not contraband, and section 922(o)
11 provides that machineguns are, with some exceptions set forth in that
12 section, contraband. There is no "irreconcilable conflict" between
13 these statutes; indeed, as the Ninth Circuit observed in Hunter, a
14 person could "comply with both acts by refusing to deal in newly made
15 machineguns." 73 F.3d at 261-62.

16 Second, the government is unaware of any evidence that Congress
17 "clearly intended" section 922(o) as a substitute for 5861(d)." In re
18 Glacier Bay, 944 F.2d at 581. The Ninth Circuit has repeatedly
19 emphasized that "[r]epeals by implication are not favored and will
20 only be found when the new statute is clearly repugnant, in words or
21 purpose, to the old statute." Id. (collecting cases) (punctuation
22 omitted). Defendant has cited no such indicia of implied repeal, and
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25 ¹ Here, even if the tax ruling in Sebelius does impact title 26
26 gun crimes, those criminal statutes should be deemed valid exercises
27 of Congressional power under the Commerce Clause. See United States
28 v. Hale, 978 F.2d 1016, 1018 (8th Cir. 1992) (section 5861(d)
constitutes a valid exercise of Congressional authority under the
Commerce Clause); United States v. O'Mara, 827 F. Supp. 1468, 1472
(C.D. Cal. 1993) (same); see also Minor v. United States, 396 U.S.
87, 98 n.13 (1969).

1 the government is aware of none. Accordingly, defendant's argument
2 that section 922(o) implied repealed section 5861(d) must fail.

3 **II. CONCLUSION**

4 For the foregoing reasons, the government respectfully requests
5 that this Court deny defendant's motion to dismiss the indictment for
6 lack of jurisdiction.

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