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5 TORENCE HATCH

6 **UNITED STATES DISTRICT COURT**  
7 **SOUTHERN DISTRICT OF CALIFORNIA**  
8

9 UNITED STATES OF AMERICA,  
10

11 Plaintiff,

12 v.

13 TORENCE HATCH,

14 Defendant.

Case No. 23-CR-1201-CAB

**RENEWED MOTION TO DISMISS  
INDICTMENT**

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1 Defendant Torence Hatch (charged as Torrance Hatch), by and through his  
2 counsels of record, respectfully moves this Court for an order dismissing the indictment  
3 with prejudice pursuant to the Ninth Circuit’s published decision in *United States v.*  
4 *Duarte*, No. 22-50048, \_\_\_ F.4th.\_\_\_, No. 22-50048, 2024 WL 2068016 at \*1 (9th Cir.  
5 May 9, 2024). This motion is made pursuant to Fed. R. Crim. P. 12(b)(3) on the ground  
6 that the charged statute, § 922(g)(1), is unconstitutional as applied to Mr. Hatch. This  
7 Motion is based on the attached memorandum of points and authorities, all files and  
8 records in this case, and any further evidence that may be adduced at a hearing on this  
9 motion.

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11 Respectfully submitted,

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13 DATED: June 3, 2024

14 By /s/ Meghan Blanco

15 MEGHAN BLANCO  
16 Attorney for Torence Hatch

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1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **I. INTRODUCTION**

3 The Ninth Circuit recently decided that 18 U.S.C. § 922(g)(1) is unconstitutional,  
4 at least as applied to certain classes of defendants. *United States v. Duarte*, No. 22-  
5 50048, --- F.4th.---, No. 22-50048, 2024 WL 2068016 at \*1 (9th Cir. May 9, 2024).  
6 *Duarte* is directly applicable to this case, and, as the government has elsewhere agreed,  
7 is immediately binding on this Court. This Court should dismiss the indictment  
8 forthwith.

9 **II. BACKGROUND**

10 On June 21, 2023 an indictment was returned against Mr. Hatch, which charged  
11 him with being a felon in possession of a firearm, in violation of 18 U.S.C. § 922(g)(1).  
12 Dkt. No. 18. On July 14, 2023, Mr. Hatch moved to dismiss the indictment on grounds  
13 that the single charge is unconstitutional as applied to Mr. Hatch. Dkt. No. 37. The  
14 Court denied that motion on August 7, 2023. Dkt. No. 43.

15 **III. LEGAL STANDARD**

16 Federal Rule of Criminal Procedure 12(b)(3)(B) requires a defendant to file a  
17 pretrial motion to challenge a defect in the indictment if the basis for the motion is  
18 “then reasonably available and the motion can be determined without a trial on the  
19 merits.” A motion to dismiss is generally capable of determination “if it involves  
20 questions of law rather than fact.” *United States v. Shortt Accountancy Corp.*, 785 F.2d  
21 1448, 1452 (9th Cir. 1986). When ruling on the motion, “the district court is bound by  
22 the four corners of the indictment.” *United States v. Boren*, 278 F.3d 911, 914 (9th Cir.  
23 2002).

24 This Motion involves a question of law—the constitutionality of § 922(g)(1) as  
25 applied to Mr. Hatch. *See United States v. Carranza*, 289 F.3d 634, 643 (9th Cir. 2002)  
26 (noting that the “constitutionality of a statute is a question of law”). And based on the  
27 “four corners of the indictment,” § 922(g)(1) is unconstitutional as applied to Mr.  
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1 Hatch, as shown below. Accordingly, the Court should grant the renewed motion to  
2 dismiss.

#### 3 IV. ARGUMENT

4 The Ninth Circuit had previously held in *United States v. Vongxay*, 594 F.3d  
5 1111, 1118 (9th Cir. 2010), that the Second Amendment does not apply to convicted  
6 felons. But on May 9, 2024, the Ninth Circuit issued a published decision holding that  
7 in light of *New York State Rifle & Pistol Ass’n v. Bruen*, 597 U.S. 1, 18 (2022),  
8 *Vongxay* is no longer good law and that the Second Amendment applies to all citizens,  
9 felon or not. *Duarte*, 2024 WL 2068016, at \*14. The Court further held that *Vongxay*  
10 was overruled by *Bruen*’s required two-step analysis for Second Amendment  
11 challenges to firearm regulations: after *Bruen* (and contrary to *Vongxay*’s prior rule),  
12 courts assessing the constitutionality of a § 922(g)(1) charge must (1) first ask whether  
13 the plain text of the Second Amendment covers the defendant’s “person,” “arms,” and  
14 “conduct” and (2) if it does, must conduct *Bruen*’s “historically focused” second step,  
15 which “requires the Government to proffer Founding-era felony analogues that are  
16 ‘distinctly similar’ to [the defendant’s] underlying offenses and would have been  
17 punishable either with execution, with life in prison, or permanent forfeiture of the  
18 offender’s estate.” *Id.* at \*5, \*24.

19 After conducting *Bruen*’s two-step analysis, the Ninth Circuit first held that the  
20 plain text of the Second Amendment applies to Mr. Duarte because “the text of the  
21 Second Amendment confers an individual right to keep and bear arms that belongs to  
22 ‘all Americans,’ not an ‘unspecified subset.’” *Id.* at \*2 (quoting *Bruen*, 597 U.S. at 70).  
23 Next, the Ninth Circuit concluded that § 922(g)(1) is unconstitutional as applied to  
24 Duarte because the government failed to show a “distinctly similar” historical analogue  
25 to lifetime disarmament of individuals convicted of felonies, at least his predicate  
26 offenses. *Id.* at \*23-24.

27 That same analysis applies here, with the same result. Because Mr. Hatch is a  
28 U.S. citizen, he is of “the people” to whom the Second Amendment applies. And

1 because the government cannot meet its burden to show a historical analogue to Mr.  
2 Hatch’s predicate offenses that were punished with a similarly severe punishment to  
3 lifetime disarmament at the time of the Founding, § 922(g)(1) is unconstitutional as  
4 applied to him. Accordingly, this Court is left with no option under Ninth Circuit  
5 precedent: It must dismiss the § 922(g)(1) count with prejudice.

6 **A. *Bruen*’s first step is satisfied here because *Duarte* squarely held that the**  
7 **Second Amendment applies all U.S. citizens, which includes Mr. Hatch**

8 In *Duarte*, the court explained that the proper approach to determining the  
9 constitutionality of § 922(g)(1) is the two-step analysis found in *Bruen*. *Duarte*, 2024  
10 WL 2068016, at \*5. *Bruen*’s first step asks courts to decide “whether ‘the Second  
11 Amendment’s plain text covers’ (1) the individual, (2) the type of arm, and (3) the  
12 ‘proposed course of conduct’ that are at issue.” *Duarte*, 2024 WL 2068016, at \*9  
13 (quoting *Bruen*, 597 U.S. at 19, 31-32). If the Second Amendment covers all three, the  
14 Second Amendment “‘presumptively guarantees’” the defendant’s right “to possess a  
15 firearm for self defense.” *Id.* at 133 (quoting *Bruen*, 597 U.S. at 33, 44 n.11). As was  
16 found in *Duarte*, the Second Amendment applies in this case, where the issue is  
17 whether the Second Amendment extends to an American citizen’s conduct of  
18 possessing a firearm.

19 First, the Ninth Circuit reviewed the Second Amendment’s text and history, and  
20 held that “the original public meaning of ‘the people’ in the Second Amendment  
21 included, at a minimum, all Americans citizens.” *Id.* at \*9.<sup>1</sup> Thus, “because [Mr.  
22 Duarte] is an American citizen,” the Ninth Circuit emphatically held that he “is one of  
23 ‘the people’” covered by the Second Amendment—regardless of his prior felony  
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27 <sup>1</sup> The *Duarte* Court also based its decision on U.S. Supreme Court precedent. *See*  
28 *Duarte*, 2024 WL 2068016, at \*23 (“*Heller* resolved this textual question when it held  
that ‘the people’ includes ‘all Americans’ because they fall squarely within our  
‘national community.’” (quoting *District of Columbia v. Heller*, 554 U.S. 570, 580-81  
(2009)); *id.* (“*Bruen* expressly reaffirmed that reading.”) (citing *Bruen*, 597 U.S. at 70).

1 convictions. *Id.* at \*9, \*24. Likewise, here, Mr. Hatch is an American citizen, and  
2 therefore “one of ‘the people’” to whom the Second Amendment applies.

3 Second, the Ninth Circuit recognized that “it is undisputed that the Second  
4 Amendment protects the arm in this case (a handgun).” *Id.* at \*9. Because Mr. Hatch  
5 was charged with possession of a handgun, the Second Amendment applies to the gun  
6 in this case.

7 Third, the Ninth Circuit also recognized as undisputed the Second Amendment’s  
8 protection of the type of conduct involved here (simple possession). *Id.* at \*9.

9 Because step one is satisfied, the Second Amendment “‘presumptively  
10 guarantees’” Mr. Hatch’s “right to possess a firearm for self-defense.” *Id.* at \*13  
11 (quoting *Bruen*, 597 U.S. at 33, 44 n.11).

12 **B. Under *Duarte*, the government cannot carry its burden to show a**  
13 **historical analogue to the predicate offenses here that justify**  
14 **permanently depriving Mr. Hatch of his fundamental Second**  
15 **Amendment rights.**

16 At step two, the government “‘shoulder[s] the burden of demonstrating’ . . . that  
17 § 922(g)(1) ‘is consistent with the Second Amendment’s . . . historical scope.’” *Duarte*  
18 2024 WL 2068016, at \*13 (quoting *Bruen*, 597 U.S. at 44 n.11). The government “‘must  
19 prove that it ‘is consistent with this Nation’s historical tradition of firearm regulation’  
20 for Congress to ban permanently, by making it a felony, a non-violent offender like Mr.  
21 Hatch from possessing a firearm even after he has already served his terms of  
22 incarceration.” *Id.* at \*13 (quoting *Bruen*, 597 U.S. at 34).

23 Importantly, the government cannot meet its step-two burden by proffering  
24 evidence of how harshly felonies, in a general sense, were punished at the Founding;  
25 rather, the historical analogue must be based on the type and degree of punishment  
26 imposed at the Founding for specific offenses the government can show are distinctly  
27 similar to those of today. Concerned about the recent trend of modern legislatures  
28 liberally reclassifying minor crimes as felonies, the Ninth Circuit explicitly rejected the

1 government’s position that a person may be held criminally liable under § 922(g)(1)  
2 “‘simply because’” of a predicate offense that a modern legislature has labeled a felony.  
3 *Duarte*, 2024 WL 2068016, at \*23. To do so “‘expand[s]’ the historical felony category  
4 ‘far too broadly.’” *Id.* at 23 (quoting *Bruen*, 597 U.S. at 31). A “more faithful  
5 application of *Bruen* requires the Government to proffer Founding-era felony analogues  
6 that are ‘distinctly similar’ to [the defendant]’s underlying offenses and would have  
7 been punishable either with execution, with life in prison, or permanent forfeiture of the  
8 offender’s estate.” *Id.* at \*24 (quoting *Bruen*, 597 U.S. at 27). Therefore, the Ninth  
9 Circuit analyzed the government’s historical evidence (and lack thereof) for *each* of  
10 Mr. Duarte’s underlying felony convictions, which included vandalism, felon in  
11 possession of a firearm, drug possession, and evading a peace officer. *Id.* It concluded  
12 that the government failed to meet its burden in showing that those offenses “were, by  
13 Founding era standards, of a nature serious enough to justify permanently depriving him  
14 of his fundamental Second Amendment rights.” *Id.* Specifically, the Court held two of  
15 those predicate offenses—vandalism and felon in possession of a firearm under Cal.  
16 Penal Code § 29800(a)(1)—would either have been misdemeanors at the Founding  
17 (vandalism) or did not exist at the Founding (felon in possession of a firearm). It further  
18 held that Duarte’s two remaining prior felony convictions—for drug possession and  
19 evading a police officer—also could not support his conviction under § 922(g)(1)  
20 because the government had failed to proffer evidence that “either crime traces back to  
21 an analogous, Founding-era predecessor.” *Id.* at 24.

22 Similarly, here, because the government will be unable to show historical  
23 analogues that are “distinctly similar” to Mr. Hatch’s predicate offenses that were  
24 punished with execution, life in prison, permanent forfeiture of the offender’s estate, or  
25 lifetime disarmament (or any other punishment of a serious enough nature), § 922(g)(1)  
26 is unconstitutional as applied to him under *Bruen*.

1 **C. *Duarte* is binding precedent that “must be followed” without delay.**

2 Even though *Duarte* is a published opinion, the government might ask this Court  
3 can ignore it, or delay a decision, until the Ninth Circuit decides whether to rehear the  
4 case *en banc*, or until any en banc proceedings conclude. But, as the government  
5 conceded in its petition to rehear *Duarte* en banc, “The decision is precedential even  
6 before the mandate issues.” United States’ Petition for Rehearing En Banc, *United*  
7 *States v. Duarte*, Ninth Cir. No 22-50048, Dkt. No. 72 at 19. Indeed, the Ninth Circuit  
8 has explicitly held, under similar circumstances that “a published decision of this court  
9 constitutes binding authority ‘which must be followed unless and until overruled by a  
10 body competent to do so.’ *In re Zermeno-Gomez*, 868 F.3d 1048, 1052 (9th Cir. 2017)  
11 (quoting *Gonzalez v. Arizona*, 677 F.3d 383, 389 n.4 (9th Cir. 2012)). In other words, to  
12 argue that a decision is not binding until the mandate has issued is “mistaken.” *Id.*

13 *Duarte* is currently binding on this Court and compels the conclusion that the  
14 charge in this case violates the United States Constitution. The indictment should be  
15 dismissed forthwith.

16 **V. CONCLUSION**

17 For the foregoing reasons, § 922(g)(1) is unconstitutional as applied to Mr. Hatch  
18 and he respectfully requests that the Court dismiss the § 922(g)(1) charge.

19 Respectfully submitted,  
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22 DATED: June 3, 2024

By */s/ Meghan Blanco*

23 MEGHAN BLANCO  
24 Attorney for TORENCE HATCH  
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