No. 20-165

The Supreme Court of the United States

Seung-Woo Cho,

Petitioner,

versus

United States of America,

Respondent.

On Writ of Certiorari to the

United States Court of Appeals for the Fifteenth Circuit

Brief for Respondent

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QUESTIONS PRESENTED

1. Whether the term "the people" in the Second Amendment includes aliens "illegally or unlawfully in the United States."

2. If "the people" includes aliens "illegally or unlawfully in the United States":

    a. What level of scrutiny applies in Second Amendment Challenges to 18 U.S.C. § 922(g)(5)?

    b. Does 18 U.S.C. § 922(g)(5) violate the Second Amendment on its face or as applied to Petitioner, Seung-Woo Cho?

PARTIES TO THE PROCEEDINGS

Petitioner, Seung-Woo Cho, was the defendant before the United States District Court for the District of Euphoria, and the appellant before the United States Court of Appeals for the Fifteenth Circuit.

Respondent, the United States, was the plaintiff before the United States District Court for the District of Euphoria, and the appellee before the United States Court of Appeals for the Fifteenth Circuit.

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The opinion of the United States Court of Appeals for the Fifteenth Circuit is unreported. J.A. 65-73. The judgment of the United States District Court for the District of Euphoria is also unreported. J.A. 61-62.

STATEMENT OF JURISDICTION

The United States Court of Appeals for the Fifteenth Circuit entered judgement on November 15, 2019. J.A. 69. Petitioner timely filed a Petition for Writ of Certiorari, which this Court granted on December 31, 2020. J.A. 74. This Court's jurisdiction rests on 28 U.S.C. § 1254(1).

STANDARD OF REVIEW

This Court reviews the district court's findings of fact for clear error and its legal conclusions *de novo*.

PROVISIONS INVOLVED

"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." U.S. Const. amend. II.

"It shall be unlawful for any person . . . who, being an alien . . . illegally or unlawfully in the United States . . . to . . . possess in or affecting commerce, any firearm or ammunition." 18 U.S.C. § 922(g)(5).

STATEMENT OF THE CASE

A citizen of South Korea, Petitioner Seung-Woo Cho was admitted temporarily into the United States at age five on an F-1 visa. J.A. 5. This visa expired within eighteen months of its conferral, yet Petitioner remained in the United States illegally or unlawfully for roughly twenty more years, including eight years after reaching the age of majority. J.A. 4, 5. Petitioner then pursued a full course of education all while maintaining illegal status. J.A. 6. After twenty years undocumented, Petitioner finally acted and applied for a green card. J.A. 14. Unfortunately, however, his application remains unapproved and is pending to this day. *Id.*

On November 15, 2017, police discovered Petitioner possessing his wife's firearm during the course of a heated altercation that had arisen in their home. J.A. 2, 19-21. He was then placed under arrest for being an alien illegally or unlawfully in the United States in knowing possession of a loaded firearm. J.A. 56; 18 U.S.C. § 922(g)(5).

Petitioner responded to his indictment by filing a motion to dismiss which, after careful deliberation, was denied. J.A. 59. This denial was based upon the court's finding that Petitioner, being an alien illegally or unlawfully in the United States, engaged in conduct that the Second Amendment does not protect. *Id.* After trial, a jury found Petitioner guilty, and he was sentenced to a year in prison as punishment. J.A. 65, 67. Petitioner then appealed the district court's denial of his motion to dismiss claiming that § 922(g)(5) infringes on his Second Amendment rights. J.A. 65. After carefully considering Petitioner's appeal, the United States Court of Appeals for the Fifteenth Circuit affirmed the lower court's decision. J.A. 69. Employing intermediate scrutiny, the appellate court found § 922(g)(5) both constitutional on its face and as applied to Petitioner based on the finding that § 922(g)(5) helps the government achieve important interests

such as preventing violent crime, ensuring public safety, and protecting law and immigration enforcement. J.A. 68-69. This Court then granted a Petition for Writ of Certiorari, which is where today's case stands presently. J.A. 74.

SUMMARY OF THE ARGUMENTS

Applying the law as written, Petitioner is not entitled to unlimited Second Amendment rights due to his illegal and unlawful status. Congress is allowed to limit certain rights when constitutionally permissible, which is exactly what 18 U.S.C. § 922(g)(5) does. Section 922(g)(5) restricts all aliens illegally or unlawfully in the United States from possessing any firearm in or affecting interstate commerce. Each constitutional amendment serves its own purposes and comes with its own set of specifically tailored restrictions. This Court should not choose to sweepingly analogize every amendment that includes the term "the people" because each constitutional protection is prescribed and interpreted individually.

The judiciary has chosen to give "the people" a precise legal definition so that courts can apply the term's meaning with a sense of certainty, and Petitioner clearly falls outside of this definition. This Court has acknowledged that the Second Amendment specifically protects law-abiding, responsible citizens that are part of the political community as "the people." *See District of Columbia v. Heller*, 554 U.S. 570, 580, 635 (2008). Petitioner, being an alien illegally or unlawfully in the United States, falls squarely outside this Court's circumscribed definition. This Court should use the legal meaning given to "the people" because this definition is both publicly knowable and broad enough to effectively protect the rights of any qualifying American.

It is extremely common for laws to distinguish between citizens and aliens illegally or unlawfully present, which is why the limitation placed on Petitioner's Second Amendment right is tolerable. America upholds a system that initially limits the rights of certain aliens, yet many of these rights can be fully restored. The United States allows aliens several avenues to gain legal status and strengthen their connection to the nation, however, Petitioner has failed to take proper

advantage of these opportunities. Until Petitioner recaptures his legal status, he should remain subject to the longstanding dichotomies of treatment that guide the American legal system today.

Even if this Court deems Petitioner one of "the people," the facts of this case require the application of intermediate scrutiny. A court is obligated to employ intermediate scrutiny when a challenged law either does not burden a core right or is tempered. Section 922(g)(5) meets both of these criteria. The core of the Second Amendment protects law-abiding, responsible citizens. Petitioner, being a noncitizen who is illegally or unlawfully in the United States, belongs to a class who is patently unprotected by the core of the Second Amendment. Further, the burden imposed by § 922(g)(5) is fully tempered because any alien illegally or unlawfully in the United States has the ability to restore their Second Amendment right entirely by acquiring lawful status. The burden imposed by § 922(g)(5) is not nearly severe enough to warrant strict scrutiny, which is why intermediate scrutiny is the proper course of action.

Section 922(g)(5) is constitutional on its face because the statute's restrictions help the government more effectively control violent crime, ensure public safety, and protect law enforcement. Lower courts hold an opinion of near unanimity that § 922(g)(5) is constitutional on its face and that intermediate scrutiny should be applied to the statute's challenges. Due to the inherent dangers associated with unregulated firearm use, courts have found it permissible for Congress to pass legislation restricting certain suspect classes from enjoying uninhibited Second Amendment rights. Because aliens illegally or unlawfully in the United States live largely outside of the government's formal system of registration, many courts have ascertained that § 922(g)(5)'s restrictions legitimately further several important governmental interests. This Court should recognize this consensus of opinion and find § 922(g)(5) constitutional on its face.

As applied to Petitioner, the Second Amendment restrictions imposed by § 922(g)(5) remain constitutionally permissible due to his illegal and unlawful status. Petitioner has argued that his protection under the Deferred Action for Childhood Arrivals (DACA) policy entitles him to more leniency within the Court's scrutiny analysis, however, DACA confers no legal status to its recipients. Petitioner's unlawful status compels this Court to apply intermediate scrutiny. Section 922(g)(5) validly restricts Petitioner because he falls completely outside the class of individuals protected by the Second Amendment and the statute helps the government better protect and ensure domestic tranquility.

The crux of this case rests on Petitioner's status. Because he is illegally or unlawfully in the United States, Petitioner remains subject to any constitutionally permissible limitation placed on his rights, which is exactly what § 922(g)(5) is and does. Therefore, this Court should affirm the decision of the Fifteenth Circuit Court of Appeals and uphold § 922(g)(5)'s constitutionality.

ARGUMENTS

The Second Amendment protects an individual right to bear arms. U.S. Const. amend. II; *See District of Columbia v. Heller*, 554 U.S. 570, 580-81 (2008). Congress has made it illegal for aliens illegally or unlawfully in the United States to possess firearms. 18 U.S.C. § 922(g)(5). If a court finds that a challenged law burdens conduct protected by the Second Amendment, judicial scrutiny will be applied. *United States v. Chovan*, 735 F.3d 1127, 1138 (9th Cir. 2013); *United States v. Marzzarella*, 614 F.3d 85, 89 (3d Cir. 2010). The requisite level of scrutiny will depend on whether the law severely burdens a core right and whether that burden is tempered in any way. *See United States v. Torres*, 911 F.3d 1253, 1262 (9th Cir. 2019). To determine whether a law is constitutional, the court will then scrutinize the law in light of the governmental interests it promotes. *Id.* at 1263; *see Marzzarella*, 614 F.3d at 99; s*ee United States v. Huitron-Guizar*, 678 F.3d 1164, 1166-67 (10th Cir. 2012).

I. The Second Amendment does not protect aliens illegally or unlawfully in the United States as one of "the people."

The Second Amendment is a right reserved for "the people." U.S. Const. amend. II. According to this Court's previous findings, "the people" unambiguously refers to all members of the "political community" that may participate in our representative republic. *See Heller*, 554 U.S. at 580; Harvard Law Review, *The Meaning(s) of "The People" in the Constitution*, 126 Harv. L. Rev. 1078, 1087 (2013). Those who have developed a "sufficient connection" with that community may be considered one of the people. *See United States v. Verdugo-Urquidez*, 494 U.S. 259, 265 (1990). Voluntary presence and acceptance of societal obligations both suggest a connection between one and the United States. *Id*. at 273. The core of the Second Amendment protects the right of law-abiding, responsible citizens to use arms in defense of hearth and home. *Heller*, 554 U.S. at 635. Petitioner, who is illegally in the United States, is not fully protected as

one of "the people" because this Court has deliberately chosen to equate Second Amendment rights with citizenship. *See id.*

A. With respect to constitutional rights, "the people" has been given a carefully prescribed meaning by this Court that ought to be recognized.

The precise meaning of "the people" remains partially unsettled, however, case precedent strongly suggests that aliens are not automatically protected as one of the people. *See Verdugo-Urquidez,* 494 U.S. at 265. Petitioner has argued that "the people" in the First, Second, and Fourth Amendments are those who are part of a national community or who have otherwise developed sufficient connection with this country to be considered part of that community. *Id*; J.A. at 36. In *Verdugo-Urquidez,* the court solely dealt with a Fourth Amendment question. *See id*. at 264. Following the *Verdugo-Urquidez* decision, the Court in *Heller* explicitly limited Second Amendment protections to "law-abiding, responsible citizens." *Heller*, 554 U.S. at 635. This distinction offered by the Court shows that Second Amendment rights, though considered fundamental by some, are certainly not unlimited. *Id*. at 595; *see McDonald v. City of Chicago,* 561 U.S. 742, 778 (2010). The Court even adds that the class of persons protected by the First and Fourth Amendments are not so limited. *Heller*, 554 U.S. at 644 (Stevens, J., dissenting). The majority reminds us that "nothing" in their opinion should be taken to cast doubt on Congress's longstanding prohibitions on firearm possession. *Id.* at 626 (citing several subsections of 922(g) as examples). *Heller* states that Second Amendment rights are limited to "all Americans" who are part of the "political community." *See id.* at 580-81. Petitioner, being an alien illegally or unlawfully in the United States, should remain subject to these constitutionally permissible limitations placed on the Second Amendment. *See* J.A. at 5. By failing to obtain lawful residency status before the date of his arrest, Petitioner makes it clear that he has no standing as a member of the political community due to his continuously unlawful presence. J.A. at 14.

The First and Fourth Amendments both come with limitations, demonstrating that the Second Amendment can also be permissibly limited in situations of public necessity. For example, the First Amendment protects political speech to a greater degree than commercial speech. U.S. Const. amend. I; *see also* Akhil Reed Amar, *The Second Amendment: A Case Study in Constitutional Interpretation*, 2001 Utah L. Rev. 889, 906. Even the Fourth Amendment right can be superseded in situations where probable cause exists. *See* U.S. Const. amend. IV; *see e.g.*, *United States v. Grubbs*, 547 U.S. 90, 97-98 (2006). Even though the First, Second, and Fourth Amendments share the phrase "the people," each amendment comes with its own set of purposes and limitations, which is why the limitations imposed by § 922(g)(5) are permissible.

Congress has the authority to make laws governing the conduct of aliens that would be unconstitutional if applied to citizens. *United States v. Portillo-Munoz*, 643 F.3d 437, 441 (5th Cir. 2011). In *Portillo-Munoz*, the Fifth Circuit held that "the people" in the Second Amendment does not include aliens illegally in the United States because those aliens are not Americans as the word is commonly understood. *See id*. at 440, 442. Viewing the Second Amendment as an affirmative right and the Fourth Amendment as a protective right due to their different purposes, the court refused to analogize the two amendments based on *Heller's* guidance. *Id*. at 440-41. Even though the Second Amendment says the right to bear arms "shall not be infringed," this right can easily be viewed as affirmative given its extensive regulation. U.S. Const. amend. II; *see Heller*, 554 U.S. at 595. The Fourth Amendment, however, belongs in a category of indispensable freedoms because it comes with far less restriction. *See Almeida-Sanchez v. United States*, 413 U.S. 266 (1973). Each amendment serves a distinct purpose, which is why this Court should interpret each amendment individually.

Even unlawful aliens have been recognized as "persons" protected by the Fifth and Fourteenth Amendments, but the Second Amendment protects no person, only the people. *See Plyler v. Doe*, 457 U.S. 202, 210 (1982). The Fourteenth Amendment says that no state shall deny any person under its jurisdiction the equal protection of the laws, but it also recognizes privileges and immunities belonging to "citizens" and those "naturalized in the United States." U.S. Const. amend. XIV. Petitioner, being without permanent residency status, is far from the definition of a naturalized citizen. J.A. 14. Aliens are accorded an "ascending scale of rights" as they increase their identity with our society. *Johnson v. Eisentrager*, 339 U.S. 763, 770 (1950). At the top of this scale is the right to vote, a right limited to citizens. U.S. Const. amend. XV. Aliens illegally or unlawfully in the United States are noncitizens who have no right to vote. Without being able to participate in our democratic system of self-governance and popular sovereignty, aliens cannot be considered part of the political community. *See Heller*, 554 U.S. at 580. This Court should be hesitant to analogize the Fifth and Fourteenth Amendments with the Second Amendment given their significant differences in language and scope.

B. "The people" is a term of art defined by years of careful judicial guidance, not by its plain meaning.

This Court should rely on its crafted definition of "the people" because relying on the term's plain meaning would ignore decades of precedential guidance. In 1990, the court recognized "the people" as those part of a national community or those who have developed sufficient connection with this country to be considered part of its community. *Verdugo-Urquidez*, 494 U.S. at 265. Sufficient connection could be implied by one's voluntary presence and acceptance of societal obligations. *Id.* at 273. In 2008, the Court clarified its standard of interpretive guidance by stating that "the people" unambiguously refers to all members of the political community. *Heller*, 554 U.S. at 580. Lower courts rely on this Court's direction when

assessing who are "the people" deserving of certain constitutional protections. *See e.g.*, *Portillo-Munoz*, 643 F.3d at 440.

1. Lower courts have relied on this Court's guidance to conduct threshold tests that are both reasonable and knowable to the public.

Lower court findings demonstrate that the test at issue can be administered reasonably and in a way that gives special deference to case-specific facts. In *Carpio-Leon*, the Fourth Circuit held that the right to bear arms does not extend to illegal aliens. *United States v. Carpio-Leon*, 701 F.3d 974, 976 (4th Cir. 2012). This court relied on *Heller's* analysis in finding that illegal aliens are not law-abiding, responsible citizens and cannot be trusted with firearms. *See id*. at 978-79. The lower court made this decision in light of the fact that this Court has yet to declare whether aliens are one of "the people." *Id*. at 978. Like Petitioner, Carpio-Leon had lived in the U.S. for over a decade, filed tax returns, had no prior criminal record, and possessed a gun to protect his home and family. *Id*. at 976; *see* J.A. at 5, 7, 15, 21. Nevertheless, the Fourth Circuit refused to acknowledge that illegal aliens are included as one of "the people" deserving of full Second Amendment protection. *Id; contra id*. at 978 (the court was cautious to assume that the Supreme Court defined "the people" as excluding illegal aliens). Finally, the appellate court rejected incarceration rate data as a dispositive method to prove dangerousness. *See id.* at 983. Therefore, this Court should not give great weight to the incarceration rate data offered by Petitioner's expert witness. *See* J.A. at 25-30.

The Fifth Circuit tackles the threshold issue head on in *Portillo-Munoz*, holding again that "the people" in the Second Amendment does not include aliens illegally or unlawfully in the United States. *Portillo-Munoz*, 643 F.3d at 442. Here, the lower court does not even reach judicial scrutiny because Portillo-Munoz failed to qualify as one of "the people." *See id*. Despite

his voluntary presence and having fulfilled obligations like working for his employer, paying rent, and financially supporting his family, the Fifth Circuit, relying on the guidance of *Heller* and *Verdugo-Urquidez*, refused to recognize Portillo-Munoz's Second Amendment right. *See id.* at 447 (Dennis, J., dissenting).

In *Meza-Rodriguez*, the Seventh Circuit refused to support a *per se* exclusion of the unauthorized as one of "the people." *United States v. Meza-Rodriguez*, 798 F.3d 664, 672 (7th Cir. 2015). Meza-Rodriguez, who had lived in the U.S. since his childhood, shows us an example of an alien reaching judicial scrutiny. *Id*. at 666. The Seventh Circuit relies on *Plyler's* finding that even unauthorized aliens enjoy certain constitutional rights, namely the Fifth and Fourteenth Amendments. *See id.* at 671; *Plyler*, 457 U.S. at 210. The court then held that § 922(g)(5) validly restricts Meza-Rodriguez's Second Amendment right because of his illegal status. *See Meza-Rodriguez*, 798 F.3d at 672. Allowing aliens illegally or unlawfully in the United States past the threshold test is a minority approach because it only loosely follows this Court's interpretation of the Second Amendment. *See id*. at 671; *see Heller* 554 U.S. at 580, 635. Like Meza-Rodriguez, Petitioner grew up within the American education system all while maintaining undocumented status. J.A. at 5. If this Court declares a sufficient connection between Petitioner and the United States, it should still acknowledge the implications of his failure to gain legal status, one of the most basic obligations of membership in U.S. society. *See id.* at 671.

Precedent from the lower courts express a majority view that the protections of the Second Amendment do not extend to aliens illegally present in this country. *See Portillo-Munoz*, 643 F.3d at 442; *United States v. Flores*, 663 F.3d 1022 (8th Cir. 2011); *see also Carpio-Leon*, 701 F.3d at 976. Very rarely do courts find that illegal aliens are considered one of "the people" protected by the Second Amendment, and when they do, firearm restrictions are almost always

upheld. *See e.g., Meza-Rodriguez*, 798 F.3d at 672. This Court should reinforce the lower courts' understanding that illegal aliens are not considered one of "the people" deserving of uninhibited Second Amendment rights.

C. History tells us that the law's difference in treatment between citizens and aliens is nothing unusual.

Treating naturalized citizens different from aliens is a practice that has endured for centuries, and this Court should exercise caution before it fully departs from this custom. The Constitution does not prohibit Congress from making laws that distinguish between citizens and aliens and between lawful and illegal aliens. *Portillo-Munoz*, 643 F.3d at 442. When the United States was an English colony, the right to bear arms in England was a secondary right limited to protestant male subjects. *See* Bill of Rights Act 1689, 1 W. & M., c.2 (Eng.). Catholics, aliens, and even women were excluded from certain rights. *See id*. The English also recognized denizens, a middle state between aliens and natural born subjects. 1 WILLIAM BLACKSTONE, COMMENTARIES *374. To become a denizen, one had to acquire a letter patent authorized by the royal government, analogous to the United States' process of acquiring permanent residence status. *See id*. Denizens' rights were limited: they could not take inheritance, have any office of trust, or be capable of any grant of lands. *Id*. Petitioner, without lawful status, resembles an alien more than a denizen because his relationship with the government is lacking. J.A. at 14.

The rights of "subjects" in England were rooted in mutual obligations arising from the subject's allegiance. *Id*. at *144. Aliens' rights were restricted so their impact would not extend beyond their limited "local allegiance." *See id.* at *371-74. The English concept of "subject" later gave way to the American concept of "citizen" as an indication of membership in the political community. *See United States v. Wong Kim Ark*, 169 U.S. 649, 710 (1898). Even though

American law acknowledges an "ascending scale" of rights as one increases their connection with the U.S., the most key rights-endowing moment of mutual obligation occurs when an alien becomes a lawful resident, requests citizenship, and then becomes a citizen. *Eisentrager*, 339 U.S. at 770; *see also Huitron-Guizar*, 678 F.3d at 1166-67. Petitioner has not properly satisfied any of these obligations. *See* J.A. 5, 14. Without status as a lawful resident, Petitioner cannot show that he has fulfilled even the most basic obligation of becoming an American. J.A. at 14; *see also Meza-Rodriguez*, 798 F.3d at 671. This Court should recognize that it is permissible for the law to treat natural born citizens and aliens illegally or unlawfully in the United States differently when necessary. *See Portillo-Munoz*, 643 F.3d at 442.

Until legal status is acquired, Petitioner should not be considered one of "the people" deserving of unrestrained Second Amendment rights. Congress has the authority to limit certain Second Amendment rights, and this Court, through its interpretation, has created fair guidelines to help determine whose rights can be permissibly limited. *See Heller*, 554 U.S. at 595, 635. Therefore, this court should hold that Petitioner, being an alien illegally or unlawfully in the United States, is not one of "the people" fully protected by the Second Amendment.

II. Even if this Court considers aliens "illegally or unlawfully in the United States" as one of "the people," intermediate scrutiny is still the appropriate choice.

The Second Amendment protects the right of the people to keep and bear arms. U.S. Const. amend. II. Congress is given the power to limit certain Second Amendment rights. *Heller*, 554 U.S. at 626-27. If a challenged law burdens conduct which the Second Amendment protects, a court will apply judicial scrutiny. *Chovan*, 735 F.3d at 1138; *Marzzarella*, 614 F.3d at 89. Intermediate scrutiny, most fitting to this case, applies when the law in question does not burden a core right, or when the burden is tempered. *See Torres*, 911 F.3d at 1262. Strict scrutiny applies

when a law severely burdens a core right. *See id*. Lower courts have adopted an opinion of near unanimity that intermediate scrutiny is proper for laws like § 922(g)(5) which do not burden core Second Amendment rights. *See id*; *see Marzzarella*, 614 F.3d at 96. The statute in question has been found constitutional by several appellate divisions following the release of the *Heller* opinion, and a clear majority of these courts have held that intermediate scrutiny is the correct course of action. *See Meza-Rodriguez*, 798 F.3d at 669 ("based on the language in *Heller*, . . . the [Second] Amendment does not protect the unauthorized"); *see also Huitron-Guizar*, 678 F.3d at 1169; *Torres*, 911 F.3d at 1263 ("§ 922(g)(5) survives intermediate scrutiny"). This Court should similarly choose to apply intermediate scrutiny.

A. Petitioner falls outside the core of protections guaranteed by the Second Amendment due to his illegal status.

This Court should apply intermediate scrutiny because 18 U.S.C. § 922(g)(5) fails to implicate a core Second Amendment right. Intermediate scrutiny applies when a challenged law does not burden a core Second Amendment right or where the burden is not substantial. *Torres*, 911 F.3d at 1262. When assessing scrutiny, the court will examine (1) how close the law comes to the core of the right and (2) the severity of the law's burden on the right. *Id*; *Chovan*, 735 F.3d at 1138. The core of the Second Amendment is the right of law-abiding, responsible citizens to use arms in the defense of hearth and home. *Heller*, 554 U.S. at 635. If a law only affects some Second Amendment rights without burdening the core protected rights belonging to law-abiding, responsible citizens, intermediate scrutiny is required. *See Torres*, 911 F.3d at 1262; *Chovan*, 735 F.3d at 1138. To assess the severity of a law's burden, a court will scrutinize whether an entire class of individuals is restricted, whether the use of all weapons is barred, and whether the law's burden is tempered in any way. *See Chovan*, 735 F.3d at 1138; *Torres*, 911 F.3d at 1263; *Marzzarella*, 614 F.3d at 90.

By textual interpretation, Petitioner is squarely outside of the core protections guaranteed by the Second Amendment due to his unlawful presence in the United States. *See* J.A. 5, 14. To fall within the core, Petitioner must first show that he is a law-abiding, responsible citizen. *Heller*, 554 U.S. at 635. Petitioner is not a citizen of the United States, he is a citizen of South Korea. J.A. 5. Further, Petitioner claims to have never committed a crime before, yet he has allowed his visa to remain expired for roughly twenty years, including eight years after reaching the age of majority. J.A. 15, 56. In 2018, a jury convicted Petitioner for possessing his wife's firearm, thereby ratifying the legitimate consequences associated with his illegal presence. J.A. 56. Even if Petitioner were to restore his legal status, bringing him one step closer to qualifying as "law-abiding," his lack of citizenship keeps his Second Amendment rights limited. J.A. 5.; *See Heller*, 554 U.S. at 635. Petitioner's status remains unchanged; therefore, he remains illegally and unlawfully present. J.A. 50, 61. The facts clearly indicate that petitioner is neither "law-abiding" nor a "citizen." *See* J.A. 5, 14.

The core of the Second Amendment also protects the right of "responsible citizens" to use arms "in defense of hearth and home." *Heller*, 554 U.S. at 635. These terms appear more sympathetic to Petitioner than the others aforementioned. *See* J.A. 70. Petitioner pays taxes, employs others, and is attempting to obtain a green card. J.A. 7, 14. He is also a student who has achieved highly throughout course of his education. J.A. 31-33. Despite his responsible history, however, Petitioner remains a non-citizen who undoubtedly violated the statutory language of 18 U.S.C. § 922(g)(5). *See* J.A. 5, 61. To qualify as a responsible citizen, Petitioner must be both responsible *and* a citizen. *See Heller*, 554 U.S. at 635. At best, Petitioner only halfway meets the criteria. J.A. 5. Even if Petitioner defended his home in the most reasonable way possible, his unlawful status prohibits him from qualifying as a "law-abiding, responsible citizen." *See id*. It

should be noted, however, that Petitioner did not defend his home in the most reasonable way possible. *See* J.A. 18 (Petitioner chose not to call the police on the date of his arrest). Petitioner's justification defense even failed at the trial court level, illustrating that his behavior was neither reasonable nor worthy of protection. J.A. 66.

Even if the Court considers Petitioner as one of "the people," his conduct and status shows that he still falls outside of the core protections guaranteed by the Second Amendment. Therefore, this Court should recognize that intermediate scrutiny is the proper form of judicial scrutiny to employ for the present case.

1. Aliens are allowed to fully restore their Second Amendment rights through a well-established naturalization process, demonstrating that § 922(g)(5)'s restrictions are tempered.

Although § 922(g)(5) bars all aliens illegally or unlawfully in the U.S. from possessing any firearm, this right can be restored entirely, which is why intermediate scrutiny must be applied. The burden imposed by § 922(g)(5) can be overcome. *See Torres*, 911 F.3d at 1263 (holding that § 922(g)(5) does not implicate the core of the Second Amendment because its burden is tempered). There is nothing that indicates that § 922(g)(5)'s restriction extends beyond the time that an alien's presence in the United States is unlawful. *Id*. Aliens illegally or unlawfully in the United States can legally adjust their status by either obtaining or renewing a visa or by obtaining a green card. *See* USCIS Policy Manual Vol. 7 Ch. 2 (Adjustment of Status). When a challenged law's burden is tempered, courts are strongly inclined to apply intermediate scrutiny. *Torres*, 911 F.3d at 1263. An alien who has acquired unlawful status cannot relinquish that status until his application for adjustment of status is fully approved. *See United States v. Elrawy*, 448 F.3d 309, 314 (5th Cir. 2006). Petitioner was even trying to adjust his status before the date of his arrest, demonstrating both his knowledge and recognition of the naturalization

process. *See* J.A. 14. Despite his efforts, Petitioner's illegal status persists until the day his green card application is fully approved. J.A. 14. The tempered nature of § 922(g)(5) obliges courts to choose intermediate scrutiny. *See Torres*, 911 F.3d at 1263 ("because [§ 922(g)(5)'s] burden is tempered, we proceed to apply intermediate scrutiny"); *see also Meza-Rodriguez*, 798 F.3d at 672 (asserting that rational-basis review for § 922(g)(5) challenges is too lenient). This Court should apply intermediate scrutiny because § 922(g)(5) fails to implicate a core Second Amendment right and its burden is fully tempered.

B. Section 922(g)(5) satisfies intermediate scrutiny in all aspects because it promotes important governmental interests in preventing violent crime and ensuring public safety.

The restriction imposed on Petitioner's Second Amendment right is permissible because Congress has the power to limit certain rights, especially when an important governmental interest is at stake. *See Heller*, 554 U.S. at 626-27. Intermediate scrutiny requires a statute's restriction to be substantially related to the achievement of an important government objective. *Huitron-Guizar*, 678 F.3d at 1164; *Chovan*, 735 F.3d at 1139; *Torres*, 911 F.3d at 1263. A statute need not use the least restrictive means in achieving that governmental objective under intermediate scrutiny. *See Huitron-Guizar*, 678 F.3d at 1170. Important governmental interests in controlling crime and ensuring public safety have allowed courts to consistently uphold the constitutionality of § 922(g)(5). *See Torres*, 911 F.3d at 1263; *see also Huitron-Guizar*, 678 F.3d at 1170 ("crime control and public safety are indisputably 'important' interests"). This Court should similarly find that § 922(g)(5) survives intermediate scrutiny.

1. The subsections of § 922(g), including subsection (5), have been repeatedly found facially constitutional under intermediate scrutiny.

Lower courts have expressed an opinion of near unanimity that § 922(g)(5)'s restrictions are both constitutionally permissible and substantially related to preventing violent crime and

ensuring public safety. *See Torres*, 911 F.3d at 1263; *Huitron-Guizar*, 678 F.3d at 1170. Intermediate scrutiny requires the government to have an important interest that would be achieved less effectively absent the statute. *See Torres*, 911 F.3d at 1264. Congress's ability to regulate firearm use has often been found substantially related to its objective of ensuring public safety due to the inherent dangers associated with unregulated firearm use. *See Tyler v. Hillsdale Cnty. Sheriff's Dep't*, 837 F.3d 678, 693 (6th Cir. 2016); *Chovan*, 735 F.3d at 1150; *Torres*, 911 F.3d at 1263; *see also Huitron-Guizar*, 678 F.3d at 1170. This Court has acknowledged that Congress is within its powers in limiting certain Second Amendment rights. *Heller*, 554 U.S. at 626-27. The law restricts the rights of aliens illegally or unlawfully in the United States because they live mostly outside the government's formal system of registration and ought not be armed when sought by law enforcement. *Huitron-Guizar*, 678 F.3d at 1170. The government is simply trying to better protect its immigration officers from presumptively risky individuals. *See Torres*, 911 F.3d at 1263; *see Meza-Rodriguez*, 798 F.3d at 673. The District Court of Euphoria, after accepting all evidence as true, overruled both Petitioner's facial and as applied challenge on the grounds that no alien present in the United States, without authorization, has unlimited Second Amendment rights. J.A. 67. The Court of Appeals for the Fifteenth Circuit, after recognizing Petitioner's particularly sympathetic circumstance, deliberately chose intermediate scrutiny because § 922(g)(5) limited his possession not based on his conduct but based on the fact that he is illegally or unlawfully in the United States. J.A. 68. Intermediate scrutiny does not require a perfect fit between the government's interest and the regulatory scheme designed to achieve that interest. J.A. 69; *see Marzzarella*, 614 F.3d at 98. The Fifteenth Circuit rested its holding of § 922(g)(5)'s constitutionality based on this reasoning. J.A. 68. Thus, we ask the court to affirm the lower court's ruling that § 922(g)(5) is constitutional on its face.

It should also be noted that intermediate scrutiny is the standard of review for many of the other subsections of § 922(g) because unregulated firearm use poses a significant threat to society. Intermediate scrutiny gives Congress the flexibility it needs to regulate firearm use as a means to effectively deter violent crime. *Tyler*, 837 F.3d at 693. Allowing the legislature to clarify the limits of certain rights gives the government a more workable and realistic standard to justify its firearm regulations. *Id*. Firearm regulation is an effective way to ensure public safety, and many appellate courts agree that intermediate scrutiny should be used to assess Second Amendment challenges to the subsections of § 922(g). *See Tyler*, 837 F.3d at 693 ("§ 922(g)(4) is constitutional under intermediate-scrutiny review); *Chovan*, 735 F.3d at 1138 (holding that intermediate scrutiny applies to a § 922(g)(9) challenge); *Marzzarella*, 614 F.3d at 97 (claiming that § 922(k) would pass constitutional muster under any level of heightened scrutiny). Section 922(g)(5) is not an outlier with respect to intermediate scrutiny because the government has an important interest in controlling the dangers associated with unregulated firearm use. Section 922(g)(5) satisfies intermediate scrutiny because the statute enhances the government's ability to prevent violent crime and ensure public safety.

2. As applied, intermediate scrutiny remains satisfied, and Petitioner's DACA protection does nothing to confer him legal status.

Section 922(g)(5) survives intermediate scrutiny as applied to Petitioner because the statute is substantially related to the government's aforementioned objectives. Intermediate scrutiny requires a challenged law to be substantially related to the achievement of an important governmental interest. *Chovan*, 735 F.3d at 1135; *see Huitron-Guizar*, 678 F.3d at 1169. A statute satisfies intermediate scrutiny if the government's objectives would be achieved less effectively absent the statute. *See Torres*, 911 F.3d at 1264. The government, through § 922(g)(5), aims to prevent violent crime, ensure public safety, and protect its law enforcement

officers. *Id.* at 1263; *see Meza-Rodriguez*, 798 F.3d at 673. Congress instituted § 922(g)(5) to keep instruments of deadly force away from those deemed irresponsible and dangerous. S.Rep. No. 98-583, at 12 (1986). Aliens subject to removal enjoy restricted rights because they show a willingness to disrespect the law and have an incentive to evade law enforcement. *See Torres*, 911 F.3d at 1264.

Meza-Rodriguez provides a rare example where an alien illegally or unlawfully in the United States was allowed to reach the scrutiny portion of the court's analysis. *Meza-Rodriguez*, 798 F.3d at 672. Like Petitioner, Meza-Rodriguez entered the United States as a child and maintained illegal status throughout the majority of his life. *Id*. at 666. Meza-Rodriguez was similarly caught by the police possessing a firearm. *Id*. Relying on the guidance of *Verdugo-Urquidez*, the Seventh Circuit allowed Meza-Rodriguez to proceed to the scrutiny step of the court's analysis due to his voluntary presence and community connections. *Id*. at 671-72. Even though the court proceeded to judicial scrutiny, it refused to declare with certainty that aliens whose presence is unauthorized by law are one of "the people" deserving of uninhibited Second Amendment rights. *Id*. at 672. The Seventh Circuit then upheld § 922(g)(5)'s constitutionality because the statute advances Congress's interest in prohibiting those who are difficult to track and who have an incentive to evade law enforcement from possessing firearms. *Id*. at 673. The court found that aliens illegally or unlawfully in the United States are more difficult to keep tabs on than the general population because they have an interest in eluding law enforcement. *Id*. Petitioner, on the date of his arrest, chose not to alert the police after being notified that a hostile situation had arisen in his home. *See* J.A. 18-19. Instead, he decided to take matters into his own hands and ended up possessing his wife's firearm as a result. J.A. 20-21. Even though *Meza-Rodriguez* is an outlier in the sense that it allowed an alien illegally or unlawfully in the United

States to call on judicial scrutiny, the Seventh Circuit still adhered to consensus by declaring § 922(g)(5) a permissible restriction on Meza-Rodriguez's rights. *Id*. Even if this Court considers Petitioner one of "the people," § 922(g)(5) remains a constitutionally valid restriction.

Petitioner has also claimed that he is protected by DACA, however, DACA confers no substantive right, immigration status, or pathway to citizenship. Memorandum from Janet Napolitano, Sec'y, Dep't Homeland Sec., to David V. Aguilar, Acting Comm'r, U.S. Customs & Border Prot., et al. (June 15, 2012) (DACA Memo). DACA grants only temporary reprieve from deportation proceedings, not permanent status. *See id*. This court should recognize that DACA is executive memoranda, not law. *See id*. Petitioner might have partially availed himself to the government through this temporary policy, but until he acquires legal status, he continues to live outside the government's formal system of registration. J.A. 15; *see Huitron-Guizar*, 678 F.3d at 1170; *see United States v. Lopez*, 929 F.3d 783, 786 (6th Cir. 2019) (asserting that DACA does not alter one's status of being illegally or unlawfully in the United States).

In *United States v. Arrieta*, a violator of 18 U.S.C. § 922(g)(5)(A) who had overstayed his initially valid visa remained subject to criminal punishment even after factoring in his DACA protection. *United States v. Arrieta*, 862 F.3d 512, 515 (5th Cir. 2017). The Fifth Circuit interpreted "illegally or unlawfully in the United States" to mean an individual whose presence in the United States is not authorized "by law." *Id*. Petitioner's situation is quite similar. Petitioner allowed his initially valid visa to remain expired for roughly twenty years. J.A. 5, 6. Petitioner is also a DACA recipient. J.A. 15. Even if the *presence* of a DACA recipient is authorized by the Attorney General, no *status* has been authorized by law. *See United States v. Venegas-Vasquez*, 376 F. Supp. 3d 1094 (D. Or. 2019); DACA Memo (emphasis added).

DACA should not confer Petitioner any extra leeway with respect to his constitutional challenge because the memorandum lacks legislative backing. Congress, within its powers, deliberately chose to restrict firearm use among illegal and unlawful aliens. *Huitron-Guizar*, 678 F.3d at 1166. Because DACA does not change Petitioner's currently illegal status, this Court should find intermediate scrutiny satisfied because the statute is substantially related to the government's stated objectives. *See* J.A. 68-69; *see* DACA Memo. Thus, the Court should find intermediate scrutiny satisfied because § 922(g)(5) achieves important governmental interests and only burdens a subset who is not fully protected by the Second Amendment.

C. Section 922(g)(5) survives strict scrutiny on its face and as applied because it is narrowly tailored to prevent violent crime, ensure public safety, and protect law enforcement officers.

Section 922(g)(5) is narrowly tailored to help the government achieve its compelling objectives. The statute in question only restricts the Second Amendment rights of aliens who are illegally or unlawfully in the United States. *See* 18 U.S.C. § 922(g)(5). Strict scrutiny requires a challenged law to be narrowly tailored to a compelling governmental interest. *Marzzarella*, 614 F.3d at 99. Through § 922(g)(5), the government aims to prevent violent crime, ensure public safety, and protect law enforcement officers. *Torres*, 911 F.3d at 1264. The statute in question is specifically tailored in a way that helps the government achieve these compelling interests.

1. The application of strict scrutiny to a § 922(g)(5) facial challenge would be unprecedented.

Both controlling and persuasive precedent make it clear that strict scrutiny is not at all a common standard for reviewing Second Amendment challenges to § 922(g)(5) or its neighboring subsections. To warrant strict scrutiny, a law must severely burden a core right implicated by the Second Amendment. *See Chovan*, 735 F.3d at 1138. Because § 922(g)(5) is tempered and does not implicate a core Second Amendment right, strict scrutiny is inapplicable. *Torres*, 911 F.3d at

1263. Due to his illegal status, Petitioner cannot be afforded any advantages of strict scrutiny for his facial challenge because he is unqualified to call on these advantages. J.A. 5.

Courts have been hesitant to employ strict scrutiny to other subsections of 922(g) because doing so would detract from Congress's ability to regulate firearms as a way to prevent violent crime. *See Tyler*, 837 F.3d at 693. The Sixth Circuit Court of Appeals attempted to apply strict scrutiny to a § 922(g)(4) challenge due to the fundamental nature of the right to bear arms. *See Tyler v. Hillsdale Cnty. Sheriff's Dep't*, 775 F.3d 308, 331 (6th Cir. 2014), *vacated en banc*, 837 F.3d 678 (6th Cir. 2016). Section 922(g)(4) imposed a permanent firearm ban among the mentally ill, yet the court still chose to vacate its previous decision, saying that intermediate scrutiny ought to be applied instead of strict. *See Tyler*, 837 F.3d at 692. Intermediate scrutiny places the burden on the government to justify its restriction while also giving Congress ample flexibility to regulate firearm use. *Id*. Without solid precedent permitting strict scrutiny for these kinds of Second Amendment challenges, the Court should choose not to evaluate petitioner's facial challenge under strict scrutiny.

No precedent exists where § 922(g)(5) has been subjected to strict scrutiny. This is because § 922(g)(5) imposes a tempered burden on a class of persons not fully protected by the core of the Second Amendment. *See Torres*, 911 F.3d at 1263; *see Heller*, 554 U.S. at 635. The statute is tailored to restrict only the rights of aliens who are in the United States illegally or unlawfully, not all aliens. *See* 18 U.S.C. § 922(g)(5). Congress instituted § 922(g)(5) to keep firearms away from those deemed irresponsible and dangerous. S.Rep. No. 98-583, at 12 (1986). Unlawful aliens, who are subject to removal, have an incentive to evade law enforcement, which is why the government does not want them armed when sought by immigration officers. *See Torres*, 911 F.3d at 1264; *see Huitron-Guizar*, 678 F.3d at 1170. Congress's objective is to keep

firearms out of the hands of presumptively risky individuals. S.Rep. No. 90-1501, at 22 (1968). By restricting only those aliens who are illegally or unlawfully in the United States, Congress has narrowly tailored § 922(g)(5) in a way that helps achieve several of its compelling objectives.

2. As applied to Petitioner, § 922(g)(5) satisfies strict scrutiny because it is narrowly tailored to achieve compelling governmental objectives.

Section 922(g)(5) helps the government prevent violent crime, ensure public safety, and protect law enforcement officers, all of which are compelling interests. Strict scrutiny demands a challenged law to be narrowly tailored to a compelling governmental objective. *Marzzarella*, 614 F.3d at 99. Strict scrutiny is called for when a law's burden permanently extinguishes a core right. *See Tyler*, 837 F.3d at 691-92. Opposing counsel has argued that strict scrutiny should be applied to the present case, however, Petitioner lacks the requisite authority to support this request. *See* J.A. 68, 71.

Petitioner claims he has availed himself to the government through DACA. J.A. 15. Considering this, he may argue that § 922(g)(5) should be narrowly tailored to exclude DACA recipients because they represent a more responsible subset of the alien population. DACA, however, confers no substantive right, immigration status, or pathway to citizenship. *See* DACA Memo. The DACA Memorandum, without legislative backing, should not be able to dictate this Court's interpretation of the law. *See* DACA Memo; *see also Lopez*, 929 F.3d at 786. Narrowly tailoring § 922(g)(5) based on executive memoranda would be an unworkable solution, which is why this Court should allow Congress's tailored restriction to stand as is.

At the trial court level, Petitioner's expert witness argued that the undocumented population commits crimes less often than the native-born population, but the data presented was highly questionable and should by no means control the opinion of this Court. J.A. 24-26. Courts

can rely on text, history, empirical evidence, case law, and common sense to assess challenges under strict scrutiny. *See Tyler*, 775 F.3d at 331. Courts often refuse to declare any dispositions based on gun-related crime data. *See Meza-Rodriguez*, 798 F.3d at 673. Petitioner's expert pointed out an incarceration rate of 0.98 percent among DACA recipients compared to 1.12 percent among the native-born population in 2015, but that same study showed that illegal immigrants who were DACA-ineligible had an incarceration rate of 0.38 percent. J.A. 29. A 0.14 percent difference in incarceration between DACA recipients and the native-born population is not nearly statistically significant enough to justify a firm conclusion. *See id*. On top of that, the same study says that DACA recipients who are college graduates, like Petitioner, had an incarceration rate that was almost five times higher than the incarceration rate among native-born college graduates. J.A. 30. No strong dispositions can be reasonably drawn from the empirical findings presented at the trial court level, which is why the Court should not assign great weight to this kind of fallible data. *See* J.A. 29.

Aliens illegally or unlawfully in the United States fall outside the core of the Second Amendment. *See Heller*, 554 U.S. at 635. Additionally, the burden imposed by § 922(g)(5) is tempered. *Torres*, 911 F.3d at 1263. Both of these factors make it clear that intermediate scrutiny should be applied to Petitioner's constitutional challenge. This Court should hold that § 922(g)(5) passes constitutional muster because the statute regulates firearm use as a means to achieve important governmental interests like controlling crime and ensuring public safety. *Id*. at 1264; *see also Meza-Rodriguez*, 798 F.3d at 674 (Flaum, J., concurring) ("§ 922(g)(5) satisfies intermediate scrutiny and passes constitutional muster"). Alternatively, if this Court decides to apply strict scrutiny, the statute nevertheless survives review. *See Torres*, 911 F.3d at 1262. Since § 922(g)(5) passes any level of judicial scrutiny, the statute should be found constitutional.

CONCLUSION

For these reasons, Respondent respectfully asks this Court to affirm the decision of the Fifteenth Circuit Court of Appeals.

Respectfully submitted,

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CERTIFICATE OF SERVICE

Undersigned counsel for Respondent certifies that this brief has been prepared and served upon all opposing counsel in compliance with the Rules of the Supreme Court of the United States by certified mail on the 14th day of March, 2021 to:

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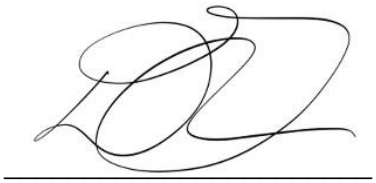

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