

IN THE

Supreme Court of the United States

Seung-woo Cho,

Petitioner,

v.

United States of America,

Respondents.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTEENTH CIRCUIT

BRIEF FOR RESPONDENT

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March 14, 2021

Questions Presented

I. Whether the term “the people” in the Second Amendment includes aliens “illegally or unlawfully in the United States.”

II. 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?

List of Parties to the Proceeding

Petitioner, Seung-woo Cho, 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.

Respondents, United States, were the defendants before the United States District Court for the District of Euphoria, and the appellants before the United States Court of Appeals for the Fifteenth Circuit.

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Citations to the Opinions Below

The opinion of the United States Court of Appeals for the Fifteenth Circuit is unreported but may be found at J.A. at 65. The judgment of the United States District Court for the District of Euphoria is also unreported but may be found at J.A. at 61.

Statement of Jurisdiction

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

Standard of Review

This Court reviews a 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—is illegally or unlawfully in the United States to . . . possess in or affecting commerce, any firearm or ammunition.” 18 U.S.C. § 922(g)(5).” 18 U.S.C. § 922(g)(5).

Statement of the Case

On February 12, 2018, a Grand Jury indicted Petitioner, Seung-woo Cho, for violating 18 U.S.C. § 922(g)(5); the statute makes it a felony for illegal aliens to possess a firearm. J.A. at 56. In 1968, Congress enacted this statute to keep firearms out of the hands of potentially risky people and to help law enforcement fight crime. J.A. at 51.

Petitioner was born in South Korea. J.A. at 5. In 1996, he entered the United States with a non-immigrant visa. J.A. at 5. In 1998, Petitioner's non-immigrant visa expired but he did not return to Korea. J.A. at 6. Instead, he remained illegally in the country for twenty-three years. J.A. at 7-16. Although he was granted Deferred Action for Childhood Arrivals (DACA) in 2012, he does not have legal status and remains illegally or unlawfully in the United States. J.A. at 13.

On November 15, 2017, Petitioner's neighbor made a noise complaint with the Euphoria City Police. J.A. at 56. Police officers arrived and questioned Petitioner about his immigration status, but he did not cooperate. J.A. at 56. They arrested him because he possessed a loaded firearm. J.A. at 2.

The Grand Jury for the United States District Court for the District of Euphoria indicted Petitioner for violating § 922(g)(5). J.A. at 65. On November 15, 2018, a jury trial found Petitioner guilty. J.A. at 65. Petitioner challenged the constitutionality of the statute; the Fifteenth Circuit Court of Appeals affirmed the lower court's decision. J.A. at 69. Petitioner filed a petition for certiorari with this Court. J.A. at 74. This Court granted certiorari on December 31, 2020. J.A. at 74.

Summary of the Arguments

The Second Amendment grants the right of the people to bear arms. In *Heller*, this Court determined that the core right is for the defense of hearth and home. Although this is a fundamental right, it is not unlimited. This Court specified that the core right applies to law-abiding, responsible citizens.

This Court determined that “the people” is a term of art and has not applied the plain and ordinary meaning which includes all people; the Second Amendment regards a narrower group that does not include those illegally or unlawfully in the United States.

The people refer to the “political community” that can participate in electing its own government. No precedent holds that the Second Amendment protects aliens illegally or unlawfully in the United States. Historically, the right to bear arms is afforded to citizens of the sovereign who have an inherent allegiance. Illegal aliens are not American citizens with an established mutuality with the Government. Illegal aliens are not within “the people” of the Second Amendment. Therefore, Petitioner cannot challenge the constitutionality of § 922(g)(5).

If this Court determines that the people include illegal aliens, it should apply intermediate scrutiny to Petitioner’s challenge. Most circuits have applied intermediate scrutiny when challenging the constitutionality of § 922(g)(5). Circuit courts have unanimously determined that the statute does not burden the core right on its face; courts follow the precedent of this Court which specifies that this right applies to law-abiding citizens. Illegal aliens are not law-abiding because they break

immigration laws. The statute also withstands the as applied challenge under intermediate scrutiny because status is not permanent, it is not a total possession ban. Petitioner can adjust his status and be granted this right.

Section 922(g)(5) will withstand intermediate scrutiny. The statute reasonably serves a substantial interest in public safety because illegal aliens are presumed to live outside the formal system of registration and are more difficult to trace.

Facially, 18 U.S.C. § 922(g)(5) survives intermediate scrutiny because it meets the objective of disarming presumptively dangerous people like illegal aliens who evade law enforcement. As applied, the statute survives because Petitioner cannot distinguish himself from this class and remains among the class of persons who Congress can regulate. Therefore, it is sufficiently tailored.

This Court should affirm the Circuit Court's decision and hold § 922(g)(5) constitutional.

Arguments

The Second Amendment grants “the people” the right to keep and bear arms. U.S. Const. amend. II. Although this is a fundamental right, it is not unlimited. *See District of Columbia v. Heller*, 554 U.S. 570, 626 (2008). Congress can regulate where, when, and who can assert this right. *United States v. Huitron-Guizar*, 678 F.3d 1164, 1165-66 (10th Cir. 2012). The core of the Second Amendment confers an individual’s right to bear arms for the protection of hearth and home. *Heller*, 554 U.S. at 635. Under 18 U.S.C. § 922(g)(5), it is unlawful for any person who is unlawfully or illegally in the United States to be in possession of a firearm. 18 U.S.C. § 922(g)(5).

Courts determine the appropriate level of scrutiny to Second Amendment challenges under a two-step framework. *See, e.g., Gould v. Morgan*, 907 F.3d 659, 668-69 (1st Cir. 2018). The first step determines whether the relevant statute burdens the core of the Second Amendment; the statute is valid if it does not. U.S. Const. amend. II; *Morgan*, 907 F.3d at 668-69. If the statute burdens the core right, the court moves to the second step which analyzes the severity of the burden: a tempered burden triggers intermediate while a severe burden employs strict scrutiny. *Id.*

I. **“THE PEOPLE” OF THE SECOND AMENDMENT DOES NOT INCLUDE ILLEGAL ALIENS.**

The Second Amendment states, “the right of *the people* to keep and bear arms, shall not be infringed.” U.S. Const. ament. II (emphasis added). “The people” is a term of art that is presumptively exercised individually and applies to all Americans who are “law-abiding, responsible citizens.” *District of Columbia v. Heller*, 554 U.S. 570, 635 (2008). Although the term is used in six other provisions of the Constitution, the people in the Second Amendment refers to the political community. *Heller*, 554 U.S. at 580. Under the Second Amendment, the term narrows this class to those who are law-abiding, lawful, responsible, Americans and those who follow the community’s rules. *Heller*, 554 U.S. at 580; *See United States v. Carpio-Leon*, 701 F.3d 974, 976 (4th Cir. 2012).

Consistent with the canons of construction, the Court initially interprets a term by its plain and ordinary meaning. *See, e.g., Conn. Nat’l Bank v. German*, 503 U.S. 249, 253-54 (1992). If the Court decides the term is ambiguous and needs further interpretation, then it will interpret the term by determining the purpose and history of the Second Amendment. *Id.*

A. The plain and ordinary meaning of the people does not apply to Second Amendment challenges.

The Court has interpreted the people of the Second Amendment independent of its plain meaning because it regards a narrow group of people—not a broad class of persons.

The Court did not apply the plain and ordinary meaning when it established that the Second Amendment is an individual right. *Heller*, at 579-80. Instead, it determined that “the people” is a term of art that is employed to confer individual rights to law-abiding citizens—not exclusive to a militia. *Heller*, at 599. In fact, the Constitution utilizes persons, a broader class, to confer rights that are “primarily collective in nature.” *Heller*, at 645; *e.g.*, *Plyler v. Doe*, 457 U.S. 202, 212 (1985). In dispensing of its plain and ordinary meaning, the utility of the people narrows the group to law-abiding citizens. *Heller*, at 635.

Although the plain meaning includes all people, the Second Amendment regards a narrower group that does not expressly include those illegally or unlawfully in the United States. *See Heller*, at 645, 579-80. Illegal aliens are persons who are collectively protected in some ways but are generally excluded in the narrower meaning of the people. *Heller*, at 645; *e.g.*, *Plyler*, 457 U.S. at 212. The term dispenses of those who are not expressly protected to exercise individual rights. *See U.S. Const. amend. II; Heller*, at 580. Illegal Aliens are persons, but they are not the people who are included in those exclusive protections. *See U.S. Const. amend. II; Heller*, at 580. Likewise, Petitioner is an illegal alien—he is neither law-

abiding nor an American—and belongs only to the broader class of persons who have limited rights. *See* U.S. Const. amend. II; *Heller*, at 580.

Therefore, the Court should not give the people its ordinary meaning in the Second Amendment because this term is narrower and does not include Petitioner.

B. The people refers to the political community, per *Heller*, and aliens illegally or unlawfully in the United States are not members.

The people of the Second Amendment refers to the political community that can participate in electing its own government. Those who are illegally or unlawfully in the United States are not part of the political community, because they cannot participate in the foundation of self-governance.

Although “the people” is a term of art that is used in other parts of the Constitution, the Second Amendment unambiguously refers to members of the political community. *Heller*, 554 U.S. at 580. The term is first used in the preamble of the Constitution to establish its purpose of “form[ing] a more perfect union.” U.S. Const. pmbl. The introductory phrase, “[w]e, the people,” is ubiquitous to elections because it establishes representation enforcement. U.S. Const. art. I, § 2; amend. XVII. The term refers to the “political community” that can participate in American self-government. *See* U.S. Const. amend. II; *Heller*, 554 U.S. at 580; *see also* Akhil Reed Amar, *The Bill of Rights: Creation and Reconstruction* 48, 74-76 (1998). Electing its government, such as representatives, senators, and the president, is an exclusive right afforded to native or naturalized citizens. U.S. Const. art. I, § 2; amend. XVII.

Heller cites the *Verdugo-Urquidez* decision and references the people both as the national and political community, the Court does not distinguish between the two terms suggesting it did not intend to reference to two different groups of people. *United States v. Verdugo-Urquidez*, 494 U.S. 259, 264 (1990); *Heller*, 554 U.S. at 580. Furthermore, this Court states that the people “unambiguously refers to all members of the political community.” *United States v. Verdugo-Urquidez*, 494 U.S. 259, 264 (1990); *Heller*, 554 U.S. at 580.

In *Dunn*, a Tennessee resident challenged the constitutionality of a Tennessee voting statute that precluded him from voting in the state. *Dunn v. Blumstein*, 405 U.S. 330 (1972). The Court held that the State could make bona fide voting restrictions; however, it determined that this statute was unconstitutional because voting was “necessary to preserve the basic conception of a political community.” *Id.* This holding suggests that the political community is the voting community. *See id.*

Illegal aliens do not delegate the power that is necessary for self-governance. *See* U.S. Const. art. I, sec. 2. Illegal aliens do not have the ability of participating in elections—a right exclusive to American citizens—and have no membership in the political community. *See* U.S. Const. art. I, sec. 2; amend. XVII; *District of Columbia v. Heller*, 554 U.S. 573, 580 (2008). The ability to participate in elections is determinative of the people because the United States is a republic where its citizens allow themselves to be governed by choosing representation. *Id.* The preamble and the Second Amendment does not regard

illegal aliens, or Petitioner, because they are not allowed the unique responsibility of electing who is to govern and uphold those rights. *See* U.S. Const. pmb.; U.S. Const. art. I, § 2. American citizens who can vote generally enjoy the exclusive protections of the Bill of Rights; protections of the Second Amendment rights are no different. *See* U.S. Const. pmb.; U.S. Const. art. I, § 2.

Therefore, those illegally or unlawfully in the United States are not protected by the Second Amendment because they do not exercise voting power or participate in self-governance and popular sovereignty. Consequently, they do not have membership in the political community that constitutes “the people.”

C. Precedent does not hold the Second Amendment protects aliens illegally or unlawfully in the United States. Additionally, the Amendments have different purposes which justify different interpretations.

Precedent does not hold that the Fourth and Second Amendment protects aliens illegally or unlawfully in the United States. Additionally, these Amendments have different purposes which justify different interpretations.

The Second and Fourth Amendments serve distinct purposes: The Fourth Amendment is a protective right of the people to be secure in their homes while the Second Amendment grants an affirmative right to keep and bear arms. *United States v. Portillo-Munoz*, 643 F.3d 437, 441-42 (5th Cir. 2011). Protective rights protect people from government abuses. *Id.* However, the Second Amendment grants an affirmative right; affirmative rights apply to fewer groups of people. *Id.* Importantly, the Constitution does not restrict Congress’s legislative power when distinguishing between lawful and illegal aliens. *See Portillo-Munoz*, 643 F.3d at 440, 442; *Carpio-Leon*, 701 F.3d at 976.

In *Verdugo-Urquidez*, a Mexican national was arrested in Mexico by Mexican police for smuggling narcotics. *Verdugo-Urquidez*, 494 U.S. at 264. Verdugo-Urquidez argued that the Drug Enforcement Administration agents unlawfully searched his home in violation of the Fourth Amendment. *Id.* The *Verdugo-Urquidez* decision alluded to the rights aliens could be afforded as part of the national community should they develop substantial connections with the United States. *Id.* Because this case concerned a non-resident alien—not an unauthorized alien—and regarded the Fourth Amendment, it did not establish any precedent that would afford Second Amendment rights to those illegally or unlawfully in the United States. *Id.*

Congress can determine that those illegally or unlawfully in the United States are not within the people of the Second Amendment. *See Portillo-Munoz*, 643 F.3d at 440-42; *Carpio-Leon*, 701 F.3d at 976. It can afford and restrict certain rights to illegal aliens; nothing indicates that the Government has afforded those unlawfully or illegally in the United States Second Amendment rights. *See id.* Unauthorized persons have not been legitimized as a class of people within the Second Amendment who can develop sufficient, lawful connections in this country. *See Verdugo-Urquidez*, 494 U.S. at 264; *United States ex. rel. Turner v. Williams*, 194 U.S. 279, 292 (1904) (excluding illegal aliens from certain rights based on their lack of status). Congress has asserted its constitutional authority to determine which rights are exclusive to the people and which ones can apply to illegal aliens. . *See Verdugo-Urquidez*, 494 U.S. at 264. Similarly, Petitioner has no more rights under

the Second Amendment than people outside of the United States because he lacks legal status. *Id.*

There is no precedent that establishes that the purpose of the Second Amendment protects aliens illegally or unlawfully in the United States. The Second Amendment grants affirmative rights that Congress has not extended to illegal aliens. Therefore, Petitioner—an unauthorized alien—is not recognized by Congress within the people who enjoy this affirmative right.

D. English and early American law extensively regulated firearms based on “civic virtue” and allegiance.

Illegal aliens are not recognized as “the people” by the government because they lack allegiance and the mutuality of civic virtue that is established through citizenship. English and early American law extensively regulated firearms based on these virtues.

The Constitution grants Congress the power to restrict the relationship between the government and those who are unlawfully present in the United States. *See Portillo-Munoz*, 643 F.3d at 440, 442; *Carpio-Leon*, 701 F.3d at 976. This Court has likened Second Amendment rights with citizenship. *See Heller*, 554 U.S. at 595.

When the first Congress enacted the Bill of Rights, its Founders termed “the people” in reference to the English “subject[s].” *See* 1 William Blackstone, *Commentaries* *144. A historical distinction between aliens and “natural-born subjects” indicates that the foundation of individual rights was determinative by the “allegiance” to the sovereign. Blackstone, *supra*, *370. Natural allegiance was

established through birth; “natural-subjects” were granted a “great variety of rights,” while aliens were granted restrictive ones under the monarch’s discretion. Blackstone, *supra*, *370. Although aliens could become “subjects” through “local allegiance,” that relationship was contingent upon the alien’s loyalty towards the monarch. Blackstone, *supra*, *370. Suspect allegiance to the sovereign influenced later restrictions of those who might be disloyal. *See* Bill of Rights Act 1689, 1 W. & M., c.2 (Eng.). In fact, the English explicitly refused the right to bear arms to Catholics because of their perceived disloyalty towards the government relative to the Church. *Id.*

In *Carpio-Leon*, an undocumented man was indicted for possessing firearms in violation of 18 U.S.C. § 922(g)(5). *Carpio-Leon*, 701 F.3d at 979. Carpio-Leon used a historical analysis of the “attitudes toward immigration” at the time of Bill of Right’s ratification. *Id.* He argued that the Second Amendment could have included illegal aliens; however, the Fourth Circuit determined that history does not suggest the right to bears arms extends to those not following the “community’s rules.” *Id.* at 981 Additionally, the court held that those “who cannot be trusted with firearms” based on suspect behavior or loyalties can have no right to possess them. *Id.* at 979.

Similarly, those illegally or unlawfully in the United States are not in a relationship of mutual obligation with the United States because they lack status. *See* 1 Blackstone, *supra* *144; *see also Huitron-Guizar*, 678 F.3d at 1166-67. Although adjusting status could effectuate loyalty towards the government, they are currently not privy to the rights afforded to the people. *See* 1 Blackstone, *supra*

*144; *see also Huitron-Guizar*, 678 F.3d at 1166-67. Obtaining legal status formalizes allegiance to the United States. *See* 1 Blackstone, *supra* *144; *see also Huitron-Guizar*, 678 F.3d at 1166-67. Petitioner has not formalized this allegiance—regardless of his honorable accomplishments in this country—he is not recognized by the United States and is not historically among the people conferred the right to bear arms. *See* 1 Blackstone, *supra* *144.

Illegal aliens evade immigration laws that regulate the relationship between aliens and the government. *Portillo-Munoz*, 643 F.3d at 440, 442; *see Carpio-Leon*, 701 F.3d at 976. Aliens without status are not recognized by the government because they do not follow the rules that would establish their citizenship. *See Carpio-Leon*, 701 F.3d at 979.

The people who are intended to enjoy the protections of the Second Amendment are American citizens who are recognized by their government. The Constitution affords Congress the discretion to distinguish between those who are illegally or unlawfully in the United States and its loyal citizens. Unauthorized aliens are not American Citizens as they have not been recognized by the government—therefore, they are not within “the people” of the Second Amendment.

“The people” is a term of art that includes fewer groups of people as determined by Congress. Aliens illegally or unlawfully in the United States are not among this narrower group because they are not within the law-abiding political community that this Court has referenced. The essence of the Second Amendment to confer an affirmative right is exclusive to American citizens. Consequently, §

922(g)(5) is within the constitutional power of Congress to restrict the access of firearms of those who do not have this right. This Court should find that moving on to the second step is unnecessary because the Second Amendment does not apply to illegal aliens like Petitioner and, therefore, should uphold the Fifteenth Circuit Court's decision.

II. IF THE PEOPLE INCLUDE ILLEGAL ALIENS, THE STATUTE SURVIVES ANY LEVEL OF SCRUTINY BECAUSE IT DOES NOT PLACE A BURDEN ON ANY PROTECTED SECOND AMENDMENT RIGHTS.

This Court has not mandated an applicable heightened level of scrutiny for Second Amendment challenges. *Morgan*, 907 F.3d at 668-69. However, Circuit courts have unanimously applied intermediate scrutiny to laws that do not burden the core of the Second Amendment. *Id.*

Courts apply a two-step framework in analyzing these claims. *Id.* The first step determines whether the law burdens the core right of the Second Amendment. *Id.* The law is valid if it does not burden the core right. *Id.* However, if it does, the courts then look at the severity of the burden to determine the appropriate level of scrutiny and whether it survives the facial and as-applied challenges. *Id.* at 669.

A. Intermediate scrutiny should apply to Second Amendment claims raised by illegal aliens challenging the constitutionality of the statute.

Section 922 (g)(5) does not burden the core right because it protects law-abiding citizens; intermediate scrutiny should apply. *See United States v. Torres*, 911 F.3d 1253, 1263 (9th Cir. 2019). Intermediate scrutiny looks for the law to have (1) a substantial government objective; and (2) a reasonable fit between that objective and the conduct regulated. *Id.* If the law burdens the right to protect the heart and home, then the Court should analyze the severity of that burden. *Id.* at 1262. A burden that is not severe will again trigger intermediate scrutiny; the latter will trigger strict scrutiny. *Id.* Strict scrutiny analyzes the law's purpose to serve a compelling government interest and ensures that it is narrowly tailored to serve that interest. *Trefelner ex rel Trefelner v. Burrel Sch. Dist.*, 655 F.Supp.2d 581, (W.D. Pa. 2009).

1. On its face, the statute does not burden any core protected right, so intermediate scrutiny is appropriate.

Unauthorized aliens have violated immigration law; consequently, they cannot be afforded the right to bear arms because it is privy to law-abiding, responsible citizens. Intermediate scrutiny applies in this Second Amendment challenge to 18 U.S.C. § 922(g)(5). The statute does not burden the Second Amendment, much less its core, because this class of persons do not have this right.

Intermediate is the appropriate level of scrutiny when the law does not burden the core of the Second Amendment. *United States v. Marzzarrella*, 614 F.3d 85, 90-92 (3d Cir. 2010). The core right applies to “law-abiding, responsible citizens” for the protection of their homes. *Heller*, 554 U.S. at 634-35. Congress has the

discretion to determine that people “illegally or unlawfully” in the United States are not law-abiding citizens. *See Heller*, 554 U.S. at 635; *Portillo-Munoz*, 643 F.3d at 440, 442; *Carpio-Leon*, 701 F.3d at 976.

In *Marzzarella*, a man was indicted for violating § 922(k) which prohibits possessing a firearm with an obliterated serial number. *Marzzarella*, 614 F.3d at 90-92. The statute was designed to regulate firearm possession of potentially dangerous people. *Id.* Marzzarella argued that the statute violated his Second Amendment right to bear arms. *Id.* The court held that the statute was presumptively justified because it did not apply to the core right. *Id.* The court then identified intermediate as the appropriate level of scrutiny. *Id.*

Section 922(g)(5) makes it unlawful for any person who is in the United States illegally or unlawfully to possess a firearm. 18 U.S.C. § 922(g)(5). The statute falls within the government’s presumptively lawful power to regulate what, when, and who can possess a firearm. *Heller* at 626-27; *see Huitron-Guizar*, F.3d at 1165-66.

Under a facial challenge, § 922(g)(5) does not burden this core right because illegal aliens are not law-abiding citizens who are afforded the core right of the Second Amendment. *Id.* The objective of the statute is to keep guns out of the hands of presumptively risky people who might evade law enforcement. S. Rep. 90-1097 (1968), *as reprinted in* 1968 U.S.C.C.A.N. 2112, 2113-14; *see also* Gun Control Act of 1968, Pub. L. No. 90-618, Title I, § 101, 82 Stat. 1213, 1213-14 (1968). Illegal aliens are in the country without legal documentation and perpetually violate

immigration laws. S. Rep. No. 98-583, at 12 (1986). They are not easily traceable; their livelihood and ability to remain in the United States generally depends on living undetected. *Id.* Not only is the statute within the Government's authority to regulate possession of firearms, but it also rightfully includes those inherently flying under the radar. *See United States v. Meza-Rodriguez*, 798 F.3d 664, 673 (7th Cir. 2015). Importantly, being in the country without documentation disregards the vetting process of lawful immigration; this evasion suggests that this class of persons is unwilling to follow the laws of this country. *See Torres*, 911 F.3d at 1264.

Under 18 U.S.C. § 922(g)(5), Congress asserts its constitutional power to restrict unauthorized aliens at large from possessing firearms because they are not law-abiding, responsible citizens. Unauthorized aliens lack status to be among the class of persons expressly protected by the Constitution. Therefore, the Court should apply intermediate scrutiny to the facial challenge because the Second Amendment does not confer the core right to a class of persons who violate laws.

2. The statute does not burden any core protected right enjoyed by Petitioner because he is not a law-abiding citizen.

Although the statute bans Petitioner from firearm possession, its application is not a severe burden because it is tempered. Petitioner can exercise Second Amendment protections when he abides by the immigration law of the United States. The statute's temporary burden therefore triggers intermediate scrutiny.

The core right applies to law-abiding citizens. *District of Columbia v. Heller*, 554 U.S. 570, 626-27 (2008). Any challenges outside that scope are only subject to intermediate scrutiny. *See Torres*, 911 F.3d at 1262. The lack of status is not a

permanent condition that is expressly protected by the Constitution. *See Torres*, 911 F.3d 1253.

In *Torres*, an illegal alien was convicted of possessing a firearm in violation of § 922(g)(5). *Torres*, 911 F.3d at 1253. *Torres* argued that the statute severely burdened the core of the Second Amendment because it imposes a total prohibition on firearm possession. *Id.* Nothing indicated that the statute applied beyond the time he was without legal status; this temporary application employed intermediate scrutiny as the appropriate level. *Id.*

Aliens who are illegally or unlawfully in the United States are not “law-abiding citizens” within the Second Amendment but can obtain the right by adjusting status. *See Id.* Petitioner arrived in the United States through a non-immigrant visa but never obtained legal-permanent status. J.A. at 7-16. He is now a DACA recipient, this authorizes him to legally work but it does not grant him legal status. Memorandum from Janet Napolitano, Sec’y of Homeland Sec., U.S. Dep’t of Homeland Sec., to David V. Aguilar, Acting Comm’r, U.S. Customs and Border Prot., Alejandro Mayorkas, Dir., U.S. Citizen and Immigr. Servs., and John Morton, Dir., U.S. Immigr. and Customs Enft (Jun. 15, 2012). DACA is an application for prosecutorial discretion; it allowed Petitioner to ask the Federal Government not to deport him, but in doing so, he has conceded that he is not authorized in the United States. *Id.* This discretion is on account of his violation of the law. *Id.*

Although DACA did not alter Petitioner’s status, he filed an I-485 application which can adjust his status to a lawful resident. J.A. at 13. This application for

adjustment is an available avenue for him to join the class of law-abiding citizens, that the Second Amendment unequivocally protects. *See Torres*, 911 F.3d at 1262. This is not the only avenue, though it indicates § 922(g)(5) is not a permanent burden on Petitioner. J.A. at 13; *see Heller*, 554 U.S. at 627.

Intermediate scrutiny is appropriate to the as applied challenge because the statute temporarily applies to Petitioner. Eighteen U.S.C. § 922(g)(5) does not severely burden the core right of the Second Amendment because it does not apply beyond the time he continues to violate the law. He can obtain the right to possess a firearm once he is no longer violating immigration law. Therefore, the Court should find that intermediate scrutiny is the appropriate level to apply to Petitioner's challenge to § 922(g)(5).

B. Eighteen U.S.C. § 922(g)(5) does not violate the Second Amendment on its face or as applied to Petitioner.

The Court must uphold the law because it is reasonably related to the important interest of public safety and the safety of law enforcement officers. The government's stated objectives in enacting 18 U.S.C. § 922(g)(5) are undeniably compelling: those of reducing crime and the safety of law and immigration enforcement.

Under intermediate scrutiny, this law stands because it has (1) a "significant, substantial, or important" government objective; and (2) a reasonable fit between that objective and the conduct regulated. *Torres*, 911 F.3d at 1263.

1. **On its face, the statute is substantially related to the government's stated interest objectives of public safety and the safety of law enforcement officers.**

Facially, 18 U.S.C. § 922(g)(5) survives intermediate scrutiny because it meets the substantial objective of disarming presumptively dangerous people and protecting public safety.

Intermediate scrutiny requires a substantial government objective, and a reasonable fit between that objective and the conduct regulated; however, the statute need not be the least restrictive means of accomplishing this objective. *Torres*, 911 F.3d at 1253. The Second Amendment is not unlimited; it can be regulated to control crime and promote public safety. *Heller*, 554 U.S. at 570. The statute reasonably serves a substantial interest because unauthorized aliens are presumed to live outside the formal system of registration and are more difficult to trace. *See Meza-Rodriguez*, 798 F.3d at 673. The principal purpose of the Gun Control Act of 1968 is to keep firearms out of criminals and to assist law enforcement in reducing crime. S. Rep. No. 90-501, at 22 (1968).

In *Huitron-Guizar*, an unauthorized alien was arrested for violating 18 U.S.C. § 922(g)(5) after officers discovered three firearms in his home. *Huitron-Guizar*, 678 F.3d at 1164. Although *Huitron-Guizar* lived in the United States since he was three, the court held that the statute is valid because it serves the important interest of Congress to control crime and ensure public safety. *Id.* Additionally, the court deferred to Congress to distinguish between lawful and unlawful aliens when pursuing these interests. *Id.*

Although some data may suggest that immigrants commit less crime compared to the native born, state and local governments do not always record immigration status within their police departments. J.A. at 26. In fact, aliens without status have the advantage in evading law enforcement because they live outside the formal systems of registration. *See id.* Aliens illegally or unlawfully in the United States have broken the law by illegally entering the country or disregarding their visa's expiration; they are presumed to be difficult to trace should they need to face justice after committing a crime. S. Rep. No. 90-1097, (1968). Section 922 (g)(5) was enacted for this purpose; it serves to keep firearms out of the hands of those deemed irresponsible or dangerous and to directly assist law enforcement in combating crime. H.R. Rep. No. 90-495, at 1 (1986).

Generalizing unauthorized aliens to potentially be a public threat is not enough to suggest that they will break other laws; however, courts have not suggested that the statute requires this consideration. *See Huitron-Guizar*, 678 F.3d at 1169. In fact, the statute restricts non-violent and violent felons alike because Congress has the remarkable responsibility to ensure public safety. *Id.* Furthermore, it is undoubtedly within the authority of Congress to identify suspect classes of persons who may jeopardize the safety of the United States; the precision of the government's effort does not need to be exact when they serve such substantial interest. *Id.* Although subsets of people within the targeted class may not actually be a threat, Congress restricts the possession of firearms of non-violent

felons and unauthorized aliens who might not commit crimes beyond their presence with the same constitutional authority and purpose. *Id.*

The statute survives the facial challenge because it is Congress' duty to serve the well-being of the American people and it should use its legislative power to aid law enforcement's efforts to maintain public safety. It is settled that Congress has the power to regulate who can possess firearms; in light of this precedent, the Court should find that the statute is substantially related to the government's substantial interests and is therefore fundamentally permissible.

2. The statute satisfies the as applied challenge of intermediate scrutiny because Petitioner cannot set himself apart from the class of persons the statute was enacted to regulate possession, and therefore is sufficiently tailored.

Section 922(g)(5) does not unconstitutionally apply to Petitioner because his status has not changed and is therefore part of those illegally or unlawfully present in the United States. Petitioner can only distinguish himself through status—not his accomplishments or the well-management of his overstay in the country—and remains among the class of persons who Congress constitutionally regulates.

The core of the Second Amendment right applies to law-abiding, responsible citizens. *Heller*, 554 U.S. at 634-35. An as applied challenge analyzes the application of a statute to a particular person. *See Binderup v. Att'y Gen.*, 836 F.3d 336, 347 (3d Cir. 2016). To survive the as applied challenge under intermediate scrutiny, the law does not have to be the least restrictive means. *Id.* at 341. The law is overly restrictive if Petitioner can distinguish his circumstance from the class of persons who Congress has deemed presumptively risky for breaking the law. *See id.*

In *Binderup*, two men in Pennsylvania were charged with multiple misdemeanors. *Binderup v. Att’y Gen.*, 836 F.3d 336, 351 (3d Cir. 2016). Due to a state statute’s technicality, the misdemeanors amounted to felonies. *Id.* Consequently, the men were barred from possessing firearms. *Id.* The men challenged the constitutionality of the Pennsylvania law as applied to them. *Id.* In an opinion specifically targeting the state’s insufficient justification, the Third Circuit allowed the men to present facts that would set them apart from those who have been permissibly barred. *Id.* Finding their facts sufficient, the court held that they were unconstitutionally deprived of their Second Amendment right. *Id.*

Unlike in *Binderup*, Petitioner cannot distinguish himself because he is still an alien who is illegally or unlawfully present in the United States. J.A. at 7-16; *Binderup*, 836 F.3d at 351. Although he entered the United States legally, he used a non-immigrant visa that was never intended to grant him permanent stay in the United States. J.A. at 5. The Government has never granted him permanent status and does not recognize him as a lawful or legal citizen despite his accomplishments. *See id.* Petitioner enjoyed the benefits of this country in complete disregard of its immigration standards. *Id.*

The alien-in-possession ban substantially relates to safety objectives because Congress has identified those illegally or unlawfully present in the United States among the class who may evade law enforcement’s efforts when fighting crime. *See Torres*, 911 F.3d at 1253. Congress has dutifully identified this suspect class and determined they should not be armed because they pose a public safety threat. *See*

Huitron-Guizar, 678 F.3d at 1170; *Marzzarella*, 614 F.3d at 91 (treating the “presumptively lawful regulatory measures” listed in *Heller* as “exceptions to the right to bear arms”). Congress has determined that like felons or the mentally ill, unauthorized foreigners pose a substantial threat because they are difficult to trace. *Marzzarella*, 614 F.3d at 91-93.

Section 922 (g)(5) is sufficiently tailored to survive intermediate scrutiny; this level of scrutiny does not require the statute to anticipate persecutorial discretion granted to Petitioner. *See* Memorandum from Janet Napolitano, Sec’y of Homeland Sec., U.S. Dep’t of Homeland Sec., to David V. Aguilar, Acting Comm’r, U.S. Customs and Border Prot., Alejandro Mayorkas, Dir., U.S. Citizen and Immigr. Servs., and John Morton, Dir., U.S. Immigr. and Customs Enf’t (Jun. 15, 2012). It is substantially tailored because DACA does not alter anyone’s immigration status—the statute applies based on status—and Petitioner lacks status. *Id.* Law enforcement can subject any unauthorized alien, including Petitioner, to removal proceedings; he is unequivocally part of those who are unlawfully or illegally in the United States. *Id.*

Not only can Petitioner not distinguish himself from those illegally or unlawfully present in the United States, the suggestion of a case-by-case subdivision that would exclude Petitioner from the statute’s application is generally not afforded to other classes affected. *See Binderup*, 836 F.3d at 336. Making an exception for Petitioner devalues the utility of the statute because it complicates divisions among the unlawful class. *Id.* Petitioner cannot distinguish himself as a

law-abiding citizen because his very presence in the United States breaks the law.
Id.

If this Court made an exception for Petitioner, it would risk the statute's utility to litigation and restrain Congress' ability to help law-enforcement fight crime. Therefore, the application of the statute survives intermediate scrutiny because Petitioner cannot set himself apart from the identifying characteristic—immigration status—which makes illegal aliens a presumptively risky class. The Court should find that Congress' efforts would be less effective absent the statute.

Alternatively, if this Court finds strict scrutiny to be the appropriate level, Petitioner must show he is not among the class of persons the statute was designed to prevent from possessing firearms. *See Torres*, 911 F.3d at 1263. Strict Scrutiny analyzes the law's purpose to serve a compelling government interest and ensures that it is narrowly tailored to serve that interest. *Trefelner ex rel Trefelner v. Burrel Sch. Dist.*, 655 F.Supp.2d 581, (W.D. Pa. 2009). The core of the Second Amendment right is for the protection of hearth and home; this right is “elevate[d] above all other interest” and applies to law-abiding, responsible citizens. *Heller*, 554 U.S. at 635.

Petitioner is not an American citizen—he is a Korean national who entered under a nonimmigrant visa. J.A. at 24-27. When his visa expired, he remained in the United States in violation of immigration law. *Id.* Although he applied to adjust to permanent resident, he remains without legal status. *Id.* Importantly, Petitioner knowingly and intentionally possessed a loaded firearm when he should not have.

J.A. at 2. He was then indicted and charged for violating a federal alien-in-possession ban. *Id.* His disregard of immigration laws and the United States criminal code indicates an unwillingness to abide by the laws of this country. *See* J.A.; *Heller*, 554 U.S. at 635.

Additionally, Dr. Nuñez provided expert testimony regarding the crime rates of both legal and unauthorized aliens. J.A. at 36. The data provides some evidence that immigrants commit crimes at lower rates than native-born people, but it is notable that DACA recipients specifically have much similar crime rates to those of native-born people. *Id.* Unlike American citizens, however, DACA recipients, like Petitioner, have the advantage of potentially using their lack of status to evade law enforcement. *See* S. Rep. No. 90-1097, (1968).

Although Petitioner is otherwise a decent man, his actions do not suggest § 922 (g)(5) unconstitutionally overextends to him. *See* H.R. Rep. No. 99-495, at 1 (1986). In fact, regulating Petitioner's unlawful conduct is within the Government's authority to aid law enforcement and serves the compelling interest to keep firearms from potentially dangerous people. *See id.*

Petitioner's challenge to the statute undercuts the Government's efforts in keeping firearms out of the hands of people living outside the law; this is consistent with ensuring public safety. Should the Court fail to recognize this, lower courts will be required to have discretion when finding illegal aliens guilty of violating § 922(g)(5). This is not necessary; this statute is tailored sufficiently narrow to effectuate its compelling interest because DACA did not make Petitioner a lawful

American. It should find that Petitioner is within the unlawful class who the statute intended to regulate. Therefore, the Court should recognize the government's compelling interests of keeping Americans safe necessary to uphold the statute's constitutionality. This Court should affirm the Circuit Court's judgment.

CONCLUSION

For the foregoing reasons, this Court is urged to affirm the Fifteenth Circuit Court of Appeals' judgment, which upheld the constitutionality of 18 U.S.C. § 922(g)(5).

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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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