CASE NO. 20-165

# In The
# Supreme Court of the United States

SEUNG-WOO CHO,
*Petitioner*,

v.

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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**March 14, 2021**

## QUESTIONS PRESENTED

I. Whether the terms "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?

## 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, United States of America, 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The District Court for the District of Euphoria's order denying petitioner's motion to dismiss is unpublished. J.A. at 56. The District Court for the District of Euphoria's judgment is unpublished. *Id.* The United States Court of Appeals for the Fifteenth Circuit affirming the lower court's decisions on different grounds is unpublished. *Id.* at 65-67.

## STATEMENT OF JURISDICTION

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

## STANDARD OF REVIEW

This Court reviews a district court's finding 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 ship or transport in interstate or foreign

commerce, or possess in or affecting commerce, any firearm or ammunition; or to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce." 18 U.S.C. § 922(g)(5)(A).

## STATEMENT OF THE CASE

Petitioner is a Korean citizen who came to the United States under a student visa at approximately six years old. J.A. at 5, a common practice for Korean families, who prize English fluency in a culture where such fluency is one determinant of future successes. *Id.* at 27. Petitioner and his mother willingly and intentionally overstayed their nonimmigrant visas shortly after arriving. *Id.* at 5. Petitioner has maintained his unlawful immigration status within the United States for more than twenty years and has been a DACA recipient for eight years. *Id.* at 13.

DACA is merely a tool to determine deportation priority; it does not grant immigration status or citizenship. Memorandum from Janet Napolitano, Sec'y of Homeland Sec. on *Exercising Prosecutorial Discretion with Respect to Individuals Who Came to the United States as Children* to David V. Aguilar, Acting Comm'r, U.S. CBP., Alejandro Mayorkas, Dir. USCIS, and John Morton, Dir. ICE (June 15, 2012), https://www.dhs.gov/xlibrary/assets/s1-exercising-prosecutorial-discretion-individuals-who-came-to-us-as-children.pdf (DACA Memorandum). The Constitution grants exclusive power over naturalization to Congress, not an executive agency. U.S. Const. art. 1, § 8, cl. 4.

Title 18, United States Code, section 922(g)(5) ultimately originates from the Omnibus Crime Control and Safe Streets Act, a Congressional effort to help

prevent crime. Pub. L. No. 90-351, Title VII, § 1201(5), 82 Stat. 197, 236 (1968). In its present form, the statute includes a provision that prohibits illegal or unlawful aliens from possessing firearms or ammunition:

> It shall be unlawful for any person-- who, being an alien-- is illegally or unlawfully in the United States . . . to ship or transport in interstate or foreign commerce, or possess in or affecting commerce, any firearm or ammunition; or to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce.

18 U.S.C. § 922(g)(5)(A). The statute protects law enforcement officers and helps law enforcement prevent crimes, because it prevents aliens illegally or unlawfully in the United States from possessing firearms or ammunition. *Id.* The statute is also historically consistent with preventing individuals with questionable allegiances from possessing firearms, including former citizens who have renounced their citizenship. *Id.* § 922(g)(7).

The grand jury for the District of Euphoria charged petitioner with violating § 922(g)(5). J.A. 2. The United States District Court for the District of Euphoria tried and convicted petitioner and dismissed petitioner's challenge that the statute violated his Second Amendment rights because petitioner is not "of the people" and under an alternate theory of intermediate scrutiny. *Id.* at 58-61. Petitioner timely appealed to the United States Court of Appeals for the Fifteenth Circuit. *Id.* at 63.

The United States Court of Appeals for the Fifteenth Circuit affirmed the lower court, holding § 922(g)(5) does not violate petitioner's Second Amendment rights on its face or as applied under intermediate scrutiny. *Id.* at 69. The dissent in the Court of Appeals' decision relies on a partial reading of this Court's decision in *Heller*, ignoring the citizenship requirement essential to the Second Amendment to reach a preferred policy outcome inconsistent with Congress's constitutional authority and this Court's precedents. *E.g.*, *District of Columbia v. Heller*, 554 U.S. 570, 635 (2008).

This Court issued a writ of certiorari to the United States Court of Appeals for the Fifteenth Circuit on December 31, 2020. J.A. at 74.

## SUMMARY OF THE ARGUMENT

The Second Amendment provides that "the right of the people to keep and bear [a]rms shall not be infringed." The Constitution affords "the people" many rights and privileges not extended to an unspecified "person" or group of "persons." Indeed, separation of the rights and privileges of "the people" from those of citizens, such as the privilege of voting or the right to govern as an elected official in Congress, would undo the foundational role of citizens in the United States.

This Court has twice interpreted "the people" as a term of art that refers to either a political community or a "national community" and persons with sufficient

connections to be "part" of the "national community." Both the "political" and "national" community are comprised of citizens and stem from Congress's constitutional authority to define the political and national community. This Court's broader interpretation of the "national community" includes persons close to, but separate from, the "national community" and affords some non-citizens protection under the Fourth Amendment. But the threshold for such extended Fourth Amendment protections depends upon accepting essential societal obligations and is a threshold petitioner fails to clear because he has not accepted one of the most fundamental societal obligations, lawful residence within the United States.

Because petitioner and other aliens illegally or unlawfully in the United States are not among "the people" in the Constitution, this Court should decline to apply scrutiny and affirm the United States District Court for the District of Euphoria's opinion that petitioner is not one of "the people."

However, if the Court proceeds to the scrutiny test, intermediate scrutiny is appropriate. The challenged statute does not burden the Second Amendment's core right, which protects a citizen's right to bear arms in lawful self-defense, because petitioner is not a citizen, so the right to bear arms in self-defense does not apply to him. But petitioner was not even acting in self-defense; the so-called threat petitioner perceived did not have possession of the gun. Indeed, the "threat"

willingly moved away from the gun and began to argue with petitioner's brother-in-law.

Further, opportunities to obtain lawful immigration status or apply for a waiver tempers the statute's burden. Still further yet, 18 U.S.C. § 922(g)(5) is narrowly tailored to achieve a compelling government interest. Therefore, while intermediate scrutiny is appropriate, the challenged statute would withstand both intermediate and strict scrutiny against petitioner's facial and as-applied challenges.

## ARGUMENT

The Constitution protects the rights and privileges of "the people" and limits the government's powers. *See* U.S. Const. amends. I, II. The Second Amendment states that "the right of the people to keep and bear Arms, shall not be infringed." U.S. Const. amend. II. Aliens who are illegally or unlawfully in the United States may not possess firearms. 18 U.S.C. § 922(g)(5)(A). Petitioner has challenged 18 U.S.C. § 922(g)(5) as unconstitutional on its face and as applied to petitioner. J.A. at 35. Second Amendment cases require a two-step inquiry: (1) ask if the rule burdens conduct the Second Amendment protects, and (2) if it does, apply the correct level of scrutiny. *United States v. Chovan*, 735 F.3d 1127, 1134 (9th Cir. 2013).

This Court's precedent holds that "the people" of the Second Amendment is a term of art that refers to the political community, *see Heller*, 554 U.S. at 580, or the "national community," *United States v. Verdugo-Urquidez*, 494 U.S. 259, 265 (1990). Petitioner is not a citizen or a lawful resident alien of the United States and is therefore not one of "the people" under the Constitution. J.A. at 5.

This Court should apply intermediate scrutiny if it concludes petitioner has Second Amendment rights just as every Court of Appeals has done to avoid upsetting a settled field of jurisprudence. Because § 922(g)(5) does not implicate the Second Amendment's core right and imposes a tempered burden, intermediate scrutiny is appropriate. *See United States v. Torres*, 911 F.3d 1253, 1262 (9th Cir. 2019). A law must be a reasonable fit between the prohibited action and an important government interest to withstand intermediate scrutiny. *Id.* at 1263. However, § 922(g)(5) is narrowly tailored to achieve a compelling government interest and would satisfy even the highest level of judicial scrutiny. *See Miller v. Johnson*, 515 U.S. 900, 920 (1995). Therefore, because the statute is narrowly tailored to achieve a compelling government interest, 18 U.S.C. § 922(g)(5) withstands petitioner's facial and as-applied challenge under both intermediate and strict scrutiny. *Id.*

## I. Petitioner is not one of "the people" protected under the Second Amendment.

The text of the Constitution, this Court's precedent, and congressional policy authority bar petitioner from challenging 18 U.S.C. § 922(g)(5) as unconstitutional under the Second Amendment, because petitioner is not one of "the people" the Constitution protects. The Constitution extends rights and privileges to "the people" and "citizens" who make up the political community. *See* U.S. Const. amends. I, II. The Constitution does not extend the same rights and privileges to "persons" generally. *See id.* art. 1, § 2, cl. 2 (requiring citizenship for membership in the House of Representatives). Further, this Court has intricately connected citizenship to the political community, s*ee United States v. Cruikshank*, 92 U.S. 542, 549 (1875), and the "national community," or a broader community that encompasses those close to the "national community," *see Verdugo-Urquidez*, 494 U.S. at 265. Petitioner fails under all these formulations and is therefore not one of "the people" under the Constitution. Accordingly, this Court should affirm the United States District Court for the District of Euphoria's opinion.

### A. Petitioner is not a citizen, and therefore is not one of "the people," and thus has no Second Amendment right.

The Constitution is the foundational law of this country. "The People of the United States" "ordain[ed] and establish[ed]" the Constitution. U.S. Const. pmbl. The Constitution limits the powers of government and protects the rights of "the

people." *See, e.g., id.* amends. I, II. The text of the Constitution recognizes numerous and distinct privileges and rights reserved to "the people," not an unspecified "person" or "persons." *Id.* Most importantly, "the people" elect members of the House of Representatives, *id.* art. 1, § 2. cl. 1, a privilege generally reserved for citizens, *see Harisiades v. Shaughnessy*, 342 U.S. 580, 586 n.10 (1952). Further, only citizens may serve as members of the House of Representatives, U.S. Const. art. 1, § 2, cl. 2, or as members of the Senate, *id.* art. 1, § 3, cl. 3. Citizens maintain the exclusive right to govern. *See Foley v. Connelie*, 435 U.S. 291, 297 (1978) (stating the right to govern is "*reserved*" to citizens (emphasis added)).

Citizenship is not a ceremonial privilege or idle distinction; it is foundational to this country; it is through citizenship that a person joins a "[n]ation," a "people distinct from others." *Foley*, 435 U.S. at 295. Indeed, citizenship grants entry to the "polity," *id.*, a "*politically organized* body or *community*," *Polity, Black's Law Dictionary* (11th ed. 2019) (emphasis added), or in other words, a "political community," with the "right to govern" and the right to "be governed by [his or her] *citizen peers*," *Foley*, 435 U.S. at 296 (emphasis added), not an unspecified group of "person" peers. *Id.* Thus, to be one of "the people of the United States," under the Constitution, with the rights and privileges reserved to "the people," an individual must be a citizen. *Id.*

The "people of the United States" and "citizens" are synonymous and mean "the same thing." *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393, 404 (1857), *superseded in part by constitutional amendment*, U.S. Const. amend. XIV; *see also Boyd v. State of Nebraska*, 143 U.S. 135, 159-61 (1892). Indeed, through citizenship, an individual "becomes a member of a nation" and joins a "people distinct from others." *Foley*, 435 U.S. at 295. Citizenship is the defining feature of this country; it is part of a "cooperative affair," the citizens are the country, and the country is its citizenry. *Afroyim v. Rusk*, 387 U.S. 253, 268 (1967). Therefore, it is through citizenship that a "person" becomes one of "the people" recognized in the Constitution and essential to the "cooperative affair" of governing. *Id.*

Further, the Constitution does not afford as many rights to a "person" or "persons." A "person" may not be a member of the House of Representatives unless he or she is a citizen. U.S. Const. art. 1, § 2, cl. 2. The Constitution imposes the same burden upon any "person" who would be a Senator. *Id.* art. 1, § 3, cl. 3. Congress may even prohibit the migration of "persons,"[1] *id.* art. 1, § 9, cl. 1; *see also Lopez v. U.S. I.N.S.*, 758 F.2d 1390, 1392 (10th Cir. 1985), but Congress may not prohibit the travel or migration of citizens, *Saenz v. Roe*, 526 U.S. 489, 503-04

[1] While historically, this provision is a reminder of Congress's power over slavery and the repugnant injustices done under that system, slaves were not "citizens" at the time and could not move freely between the states. A potent reminder of the benefits of being one "of the people" compared to a mere "person."

(1999). Indeed, the Bill of Rights only recognizes the right of a "person" in the Due Process Clause. U.S. Const. amend. V.

The rights and privileges of "the people," *e.g.*, U.S. Const. amend. II, and the restrictions and limitations on any "person" or "persons," *e.g.*, *id.* art. 1, § 2, cl. 2, show clearly that the Framers considered "the people" and "persons" separate and distinct groups. Indeed, the Framers reserved to "persons" only due process. *Id.* amend. V.

Petitioner is not among "the people" of the Constitution because he is not a citizen. J.A. at 5. Therefore, he has no Second Amendment rights. Petitioner is merely a DACA recipient, *id.* at 13, and at best a "person" within the country, entitling him to due process, a right of which petitioner has availed himself throughout these proceedings. U.S. Const. amend. V.

### B. This Court's precedent has inextricably linked "the people" and citizens.

This Court has held that "the people" is a "term of art" in the Constitution that refers to a class of "persons" who are part of a "national community" or who have developed "sufficient connections" with the country to become part of that community. *Verdugo-Urquidez*, 494 U.S. at 265. In *Heller*, this Court held that the term "the people" "unambiguously" refers to all members of the "political community." 554 U.S. at 580. Both interpretations of the "term of art" rely inescapably on citizenship. *Id.*

### 1. Petitioner is not a member of the political community because he is not a citizen.

This Court, as early as 1875, defined the "political community" as citizens. *See Cruikshank*, 92 U.S. at 549. The Court reaffirmed this view in *Foley*, recognizing that a person becomes a member of the political community after obtaining citizenship. 435 U.S. at 295-96. Indeed, part of a "sovereign's obligation to preserve the basic conception of a political community" is to exclude aliens from its democratic political institutions. *Id.* Therefore, citizenship and the privilege of participating in governing define the political community. *Id.*

Further, *Heller* makes numerous references connecting "the people" of the Second Amendment—which refers "unambiguously" to members of the political community, *Heller*, 554 U.S. at 580—to citizenship. *E.g.*, *id.* at 630 (holding that the District's regulation was unconstitutional because it prevented "*citizens*" from using handguns in self-defense (emphasis added)); *see also id.* at 635 (noting the right of law-abiding, responsible "*citizens*" to use arms in defense of hearth and home (emphasis added)). Thus, because petitioner is not a citizen, J.A. at 5, with a right to participate in governing—or, in other words, a member of the political community—he is not one of "the people," *Foley*, 435 U.S. at 295.

### 2. The "national community" relies on citizenship or sufficient connections to it.

The "national community" contemplated in *Verdugo-Urquidez*, on its surface, seems to be a broader interpretation of "the people" and contains "a class of persons who are part of a national community" or those who have "developed sufficient connections with this country" to be a part of that community. 494 U.S. at 265. *United States ex rel. Turner v. Williams*, *Verdugo-Urquidez*'s primary source for the proposition of a national community and its members, and other precedents of this Court, show that the "national community" test refers primarily to citizens. 194 U.S. 279, 292 (1904).

*U.S. ex rel. Turner* states that those excluded from the country cannot "assert the rights" obtained in a land to which "they do not belong as citizens or otherwise." *Id.* But the responsibility for defining and preserving the important historical benefits of citizenship—or "preserv[ing] the basic conception of a political community"—falls to the sovereign. *Foley*, 435 U.S. at 295-96. The Constitution places the responsibility of defining the political community, the citizens, to Congress. U.S. Const. art. 1, § 8, cl. 4; *see also Smith v. Turner*, 48 U.S. 283, 492 (1849) (Daniel, J., dissenting) (stating that the federal government establishes "one people" and that the citizens of the federal government form one community). Congress, therefore, defines the "national community" through its

powers over citizenship and makes all citizens members of the "national community." *Foley*, 435 U.S. at 295-96.

This Court has provided a narrow exception to what would otherwise be the citizens of the "national community," in which Fourth Amendment protections extend to a class of "persons" who have developed "sufficient connections" with this country, *Verdugo-Urquidez*, 494 U.S. at 265, and have accepted some "societal obligations," *id.* at 273. This exception is consistent with this Court's opinion that the "alien has been accorded a generous and ascending scale of rights as he increases his identity with our society," *Johnson v. Eisentrager*, 339 U.S. 763, 770 (1950). However, even the accordance of such a "generous and ascending scale of rights" is dependent on, and begins with, "mere lawful presence." *Id.* But even this broader interpretation of the "national community" does not afford all the rights associated with citizenship, and petitioner has not obtained the full "scale of rights" attendant with citizenship. *Id.* Indeed, petitioner has failed to accept the most basic obligation of lawful residence in the country. J.A. at 5. Therefore, petitioner cannot claim the protections of the Second Amendment under the broader interpretation of the "national community" because petitioner has neither attained citizenship and its attendant rights and privileges, *id.*, nor has petitioner accepted the most basic of societal obligations to be close enough to the national community, mere lawful residence, *Eisentrager*, 339 U.S. at 770.

Therefore, whether this Court applies the test of a political community or a "national community," petitioner is not one of "the people." Petitioner is not a citizen, J.A. at 5, and may not vote, *see, e.g.*, *Harisiades*, 342 U.S. at 586 n.10. He cannot run for the House of Representatives, U.S. Const. art. 1, § 2, cl. 2, or Senate, *id.* § 3, cl. 3. This excludes petitioner from membership in the political community, defined as citizens. *Cruikshank*, 92 U.S. at 549. Likewise, under a narrow interpretation of the "national community," petitioner fails because he is not a citizen. J.A. at 5. But beyond petitioner's right to due process as a "person," U.S. Const. amend. V, relying on *Eisentrager*'s holding, petitioner is at best afforded some protections against unreasonable search and seizure under the Fourth Amendment—a dubious assertion—because the accordance of an "ascending scale of rights" begins with "mere lawful presence." 339 U.S. at 770. Thus, petitioner is not one of "the people" under the Constitution and has no Second Amendment right. *Id.*

### 3. Petitioner's lack of citizenship implies uncertain allegiance, a historical basis for disarming suspect classes of persons.

Disarming persons with questionable and uncertain allegiance has a long history in both English and American law. Blackstone's *Commentaries* notes the historical distinctions between a natural-born subject's unlimited allegiance to the king and the limited nature of an alien's allegiance. 1 William Blackstone, *Commentaries* *366, *369-70. The degree of allegiance to the sovereign directly

correlated with the broad scope of a citizen's rights compared to an alien's limited rights. *See id.* at *371-73. Indeed, Parliament's concern with allegiance was so acute that Parliament "calculated" a new oath of allegiance to undermine the pope's authority, *id.* at *368, and reserved only to Protestants, who had no allegiance to the pope, the right to possess arms. *See* Bill of Rights Act, 1688, 1 W. & M., c.2 (Eng.).

Citizenship is a high privilege, *Eisentrager*, 339 U.S. at 770; it both signals a new citizen's implied oath of allegiance to, and forms a bond with, the political community a new citizen joins, *Luria v. United States*, 231 U.S. 9, 13 (1913). But historical precedent shows that even colonial governments disarmed those citizens who participated in armed rebellions and violated their oath of allegiance to the government. *See, e.g.*, *United States v. Carpio-Leon*, 701 F.3d 974, 980 (4th Cir. 2012) (noting that a pardon for participating in Shay's Rebellion required an oath of allegiance and giving up arms for three years). Section 922(g)'s concern with historical questions of allegiance is apparent where it prohibits even former citizens of the United States who have renounced their citizenship from possessing arms. 18 U.S.C. § 922(g)(7). Rebellious citizens, and those who have renounced their citizenship, have necessarily violated the implied oath of allegiance that accompanied their citizenship and therefore lost the right to possess arms.

This country has not yet abolished the long-recognized "*inherent*" distinctions between citizens and aliens. *Eisentrager*, 339 U.S. at 769 (emphasis added). Indeed, citizenship carries with it an implied oath of allegiance, *Luria*, 231 U.S. at 13, but in contrast, an alien "*withholding his allegiance*" from the United States leaves open "foreign calls" on his or her loyalty. *See Harisiades*, 342 U.S. at 585-86 (emphasis added). Therefore, prohibiting aliens with uncertain allegiance from possessing arms is historically consistent with Parliament allowing only Protestants, with no allegiance to the pope, to bear arms, s*ee* Bill of Rights Act, 1688; colonial governments disarming rebellious persons, *see Carpio-Leon*, 701 F.3d at 980; and former citizens who have renounced their citizenship, 18 U.S.C. § 922(g)(7), and therefore citizenship's implied oath of allegiance, *Luria*, 231 U.S. at 13.

However, an oath of allegiance is not enough to put an alien among the people because an oath of allegiance does not carry citizenship; the government must accept an alien's "*renunciation*" of his or her previous allegiance before the alien may join the citizenry. *See Elk v. Wilkins*, 112 U.S. 94, 101 (1884) (emphasis added). Neither petitioner's DACA protections and pending green card, J.A. at 15, nor his employment of U.S. citizens, *id.* at 8, nor even his marriage to a U.S. citizen, *id.* at 16, are renunciations of a previous allegiance. But more importantly, Congress has never accepted petitioner's renunciation of allegiance and made him

a member of the citizenry. *See Osborn v. Bank of U.S.*, 22 U.S. (9 Wheat.) 738, 827 (1824), *superseded in part by statute*, 28 U.S.C. § 1331. Only after naturalization does the Constitution take up a naturalized citizen and put him on equal footing with a natural-born citizen, distinguishable only where the Constitution makes a distinction. *Id.* at 827-28. Therefore, because petitioner remains an alien who Congress has not made a citizen with an implied oath of allegiance, *Luria*, 231 U.S. at 13, petitioner remains among those classes of persons that historically have not possessed a right to bear arms due to uncertain allegiance. *Harisiades*, 342 U.S. at 585-86.

### C. The treatment of aliens is a policy question entrusted to Congress.

Congress has broad powers over naturalization and immigration. *See Mathews v. Diaz*, 426 U.S. 67, 79-80 (1976). This power is deeply connected with Congress's power over policies related to foreign powers and maintenance of a republican form of government and is "largely immune from judicial inquiry or interference." *See Harisiades*, 342 U.S. at 588-89. Congress may terminate its hospitality, including alien residence, at any moment. *Id.* at 587. Congress may also extend this country's benefits as an alien's ties to the country grow stronger. *Mathews*, 426 U.S. at 80.

### 1. Petitioner is not one of "the people" defined pursuant to Congress's powers over immigration and naturalization.

Congress's powers over immigration are broad, *Mathews*, 426 U.S. at 79, and granted exclusively to it, U.S. Const. art. 1, § 8, cl. 4; *id.* § 9, cl. 1. Excluding aliens from the country's democratic institutions is Congress exercising its powers to define the "the people," part of the sovereign's obligation to preserve the "basic conception of a political community." *See Foley*, 435 U.S. at 295-96.

The treatment of aliens, however, goes beyond the power to simply exclude or welcome persons. Policies related to aliens are so "vitally and intricately woven" with questions "exclusively entrusted to the political branches" of government, *Harisiades*, 342 U.S. at 588-89, that in the exercise of its broad powers, Congress "regularly" makes rules that would be "unacceptable if applied to citizens," *Mathews*, 426 U.S. at 80. Therefore, petitioner has no basis for claiming a right to bear arms under the Second Amendment, because petitioner is not a citizen, J.A. at 5, and he is subject to rules that would be "unacceptable if applied to citizens," *Mathews*, 426 U.S. at 80.

### 2. Petitioner failed to reenter the United States legally and therefore is entitled only to due process.

Even if this Court would usurp Congress's power over immigration and create some new class of "the people," petitioner would still not be within the United States' boundaries. Petitioner's parole into the country, J.A. at 13, does not

affect legal status; parole is only a device to avoid needless confinement, *see Leng May Ma v. Barber*, 357 U.S. 185, 190 (1958). Therefore, petitioner is not "within" the United States because parole into the country does not grant such a status. *Id.*

Because petitioner is a foreign, non-citizen alien who is not "within" the United States and is not a naturalized citizen, petitioner is subject to Congress's broad powers to regulate the conduct of aliens before naturalization, *see Takahashi v. Fish and Game Comm'n*, 334 U.S. 410, 419 (1948), which may otherwise be unacceptable if applied to citizens, *Mathews*, 26 U.S. at 80. However, such treatment of aliens is the supreme law of the land derived from the national government's exclusive powers over foreign policy. *Cf. Hines v. Davidowitz*, 312 U.S. 52, 62–63 (1941), *superseded in part by statute*, 8 U.S.C. § 1324a(a)(1)(A) (stating that when the national government, by treaty or statute, touches the right of "aliens, as such" it is the supreme law of the land).

Therefore, petitioner is not one of "the people" under the Constitution, as demonstrated through the numerous rights and privileges reserved to "the people" and the lack of such rights reserved to other "persons." U.S. Const. amends. II, V. Further, Petitioner is not one of "the people" under any of the "communities" this Court contemplates in either *Heller*, 554 U.S. at 580, or *Verdugo-Urquidez*, 494 U.S. at 265. Further, because petitioner is not a citizen, J.A. at 5, and citizenship carries an implied oath of allegiance, *Luria*, 231 U.S. at 13, petitioner remains

among the class of persons historically disarmed due to uncertain allegiance, *see Harisiades*, 342 U.S. at 585-86. Finally, when Congress passes statutes that touch aliens' rights, it is the supreme law of the land, *see Davidowitz*, 312 U.S. at 62-63, and largely immune from judicial review, *see Harisiades*, 342 U.S. at 588-89. Further, petitioner's parole, J.A. at 13, did not grant petitioner entry into the country, *Leng May Ma*, 357 U.S. at 190, and petitioner's conduct is still subject to congressional regulation, *see Takahashi*, 334 U.S. at 19. Thus, this Court should affirm the United States District Court for the District of Euphoria and decline to find petitioner a member of "the people."

## II. Even if petitioner is one of the people, the challenged statute is constitutional on its face and as applied to petitioner.

The appropriate level of scrutiny in Second Amendment cases is a two-part test that depends on: (1) how close the law comes to the core of the Second Amendment right and (2) the severity of the law's burden on the right. *See Torres*, 911 F.3d at 1262. If the law does not "implicate a core Second Amendment right" or does not place a substantial burden on the right, intermediate scrutiny is appropriate. *Id.* Unsurprisingly, because § 922(g)(5) imposes only a tempered burden on persons outside the Second Amendment's core right, all Courts of Appeals apply intermediate scrutiny.

The core of the Second Amendment protects the right of citizens to use firearms in lawful self-defense. *Heller*, 554 U.S. at 630. Petitioner is not a citizen,

J.A. at 5, and therefore the core of the Second Amendment is not burdened, and the highest level of judicial scrutiny is inappropriate, *see Torres*, 911 F.3d at 1263. Further, because obtaining lawful immigration status tempers the burden under 18 U.S.C. § 922(g)(5), it does not impose a substantial burden on any claimed right. *Id.* Therefore, because § 922(g)(5) does not implicate the Second Amendment's core right and imposes a tempered burden, this Court should apply intermediate scrutiny and avoid upsetting a settled field of jurisprudence across the nation. *Id.*

### A. Intermediate scrutiny is consistent with a uniform and settled field of jurisprudence across the nation.

Circuit courts uniformly apply intermediate scrutiny to constitutional challenges of § 922(g). *See, e.g.*, *Torres*, 911 F.3d at 1263 (applying intermediate scrutiny to § 922(g)(5)); *see also United States v. Chester*, 628 F.3d 673, 683 (4th Cir. 2010) (applying intermediate scrutiny to § 922(g)(9)); *United States v. Williams*, 616 F.3d 685, 692 (7th Cir. 2010) (applying intermediate scrutiny to § 922(g)(1)). Indeed, the field is so settled that in *Tyler v. Hillsdale Cnty. Sheriff's Dep't*, the United States Court of Appeals for the Sixth Circuit overturned its previous application of strict scrutiny in favor of intermediate scrutiny. 837 F.3d 678, 691-92 (6th Cir. 2016) (en banc) (collecting cases and applying intermediate scrutiny).

Petitioner's request for the highest level of judicial scrutiny would unnecessarily and violently disrupt a settled field of jurisprudence and elevate the

non-existent core right of an alien who is unlawfully in the United States above the right of citizens who have otherwise lost their core Second Amendment rights, such as reformed felons, 18 U.S.C. § 922(g)(1), or even the mentally ill, who may have never committed a crime, *id.* § 922(g)(4). Such an outcome would be abhorrent under a Constitution that protects the rights of citizens.

### B. Intermediate scrutiny applies because petitioner has no core Second Amendment right, and § 922(g)(5) imposes a tempered burden.

The appropriate level of scrutiny depends on how close the law comes to the core of the Second Amendment right and the severity of the law's burden on the right. *See Torres*, 911 F.3d at 1262. Section 922(g)(5) imposes only a tempered burden on persons outside the Second Amendment's core. Therefore, because petitioner is not a citizen and was not acting in self-defense, this Court should apply intermediate scrutiny.

#### 1. Section 922(g)(5) does not burden the core Second Amendment right because petitioner is not a citizen, nor did he act in self-defense.

*Heller*'s holding is clear that the Second Amendment's core right is the right of citizens to bear arms in lawful self-defense. 554 U.S. at 630. This Court's analysis in *Heller* first established that self-defense "had been" a critical component of the Second Amendment. *Id.* at 628. Second, what made the District of Columbia's regulation unconstitutional was not that it burdened the right of self-

defense of an undefined person; what made the regulation unconstitutional was that it infringed on a *citizen's* right of self-defense. *Id.* at 630. Therefore, this Court defined the bounds of the Second Amendment's core right not merely as self-defense but as the right of citizens to possess firearms for lawful self-defense. *Id.* Thus, this Court should apply intermediate scrutiny because petitioner is not a citizen and was not acting in self-defense. *Id.*

This Court's tracing of the historical right of self-defense back to its English roots establishes that the inherent right of self-defense "has been central to the Second Amendment right." *Id.* at 628. But this Court did not state that the right of self-defense is the Second Amendment right, only that it has been a central component to the right. *Id.*; *see also McDonald v. City of Chicago*, 561 U.S. 742, 767 (2010) (stating that self-defense is the "*central component*" of the Second Amendment right (emphasis in original)). This Court's clear recognition is that the core of the Second Amendment right is related to, but distinct from, self-defense. Indeed, self-defense is only one of two components that together establish the core of the Second Amendment right. *Heller*, 554 U.S. at 628.

Had this Court been satisfied with the conclusion that the right the Second Amendment protects and a right of self-defense were the same, it need not have gone further in *Heller*. But this Court did not stop there. The District of Columbia's regulation in *Heller* was not unconstitutional because it interfered with

some unassociated right to self-defense; it was unconstitutional because the regulation "made it impossible for *citizens* to use [handguns]" for the core lawful purpose of self-defense. *Id.* at 630 (emphasis added). Thus, this Court linked two components, citizenship, and self-defense, to define the bounds of the Second Amendment's core right as the right of citizens to bear arms in lawful self-defense. *Id.* at 630; *see also id.* at 635.

Because the Second Amendment's core protects only a citizen's right to bear arms in lawful self-defense, it is appropriate to proceed to the first step in the two-step test to determine the proper level of scrutiny to apply. In the first step, courts ask how close the law comes to the core of the right. *Torres*, 911 F.3d at 1262. Petitioner was not acting in self-defense and is not a citizen; therefore, § 922(g)(5) does not burden the Second Amendment's core right. *Id.* at 1263.

**a. Petitioner is an unlawful alien and is therefore outside the scope of the Second Amendment's core right.**

Section 922(g)(5) does not implicate the Second Amendment's core right; the statute applies exclusively to certain non-citizen aliens. Congress has defined an alien as "any person not a citizen or national of the United States." 8 U.S.C. § 1101(a)(3). Therefore, the statute applies exclusively to aliens illegally or unlawfully in the United States who are not citizens or nationals of the United States. 18 U.S.C. § 922(g)(5)(A). Thus, because the statute only prohibits the actions of non-citizens who are illegally or unlawfully in the United States, it does

not implicate the core right for citizens to use arms in lawful self-defense that the Second Amendment protects. *Heller*, 554 U.S. 630.

**b. Petitioner was not acting in self-defense.**

Section 922(g)(5) did not burden the Second Amendment's core right, because there was never a threat to petitioner or his home. Petitioner's wife claims that Mr. Martineau appeared to be a threat in their home that caused her to ask petitioner to come home quickly. J.A. at 19. However, there is no suggestion in the record that Mr. Martineau was ever an actual threat to petitioner or his wife; Mr. Martineau's only possible threat was an offensive comment about petitioner's wife, which led to an "electric" standoff between petitioner and Mr. Martineau. *Id.* at 70. However, Mr. Martineau willingly walked away from the firearm in the room, allowed petitioner to take control of the firearm, and never attempted to dislodge petitioner from his position or take control of the firearm. *Id.* at 20-21. Mr. Martineau's actions do not suggest any knowledge of the gun's location or an intent to harm petitioner or petitioner's wife. Indeed, Mr. Martineau exclusively directed his alleged violent actions towards petitioner's brother-in-law. *Id.* Mr. Martineau's actions suggest he was an erratic individual who made petitioner uncomfortable but was never a threat. Petitioner, therefore, had no reason to take possession of a firearm in a non-threatening, non-violent encounter between

himself and Mr. Martineau. Thus, § 922(g)(5) does not burden petitioner's core right because he is neither a citizen nor did he act in self-defense.

**2. Section 922(g)(5) imposes a tempered burden.**

The second step in the two-step process for deciding the appropriate level of scrutiny requires determining the severity of the burden the law imposes. *Torres*, 911 F.3d at 1263. A law imposes a tempered burden when it affords a means to escape a categorical prohibition and is evaluated under intermediate scrutiny. *Id.* Congress has provided for exceptions to § 922(g)(5)'s burden, such as for hunting, 18 U.S.C. § 922(y)(2)(A), or through a waiver process, *id.* § 922(y)(3). Further, beyond the exceptions that Congress provided, obtaining lawful immigration status eliminates the statute's burden. *Id.* § 922(g)(5)(A). Thus, intermediate scrutiny is appropriate because § 922(g)(5) imposes a burden tempered with multiple pathways to escape the prohibition. *See id.* § 922(y)(3).

Therefore, because the Second Amendment's core right protects the right of citizens to use arms for the lawful purpose of self-defense, *Heller*, 554 U.S. at 630, and petitioner is neither a citizen nor did he act in lawful self-defense, and any burden under 18 U.S.C. § 922(g)(5) is tempered through multiple pathways to escape it, this Court should apply intermediate scrutiny.

### C. Section 922(g)(5) withstands both intermediate and strict scrutiny on its face and as applied to petitioner.

A law must further an important government interest and be a reasonable fit between the prohibited action and the important government interest to withstand intermediate scrutiny. *See Torres*, 911 F.3d at 1263. To satisfy strict scrutiny, a law must be narrowly tailored to achieve a compelling government interest. *See Miller*, 515 U.S. at 920. The government bears the burden of proving both elements under judicial scrutiny. *See United States v. Huitron-Guizar*, 678 F.3d 1164, 1169 (10th Cir. 2012). Section 922(g)(5) withstands both standards of judicial scrutiny as a narrowly tailored statute that achieves a compelling government interest. Under a facial challenge, petitioner bears the "heavy burden" of proving there is no set of circumstances under which the law would be valid. *United States v. Salerno*, 481 U.S. 739, 745 (1987). Section 922(g)(5) is narrowly tailored to prevent only aliens from possessing firearms and furthers the government's compelling interest in preventing crime. As the Court will see below, petitioner's as-applied challenge will fail under both standards of scrutiny because the traditional justifications for disarming aliens illegally or unlawfully in the United States apply to petitioner. *See Binderup v. Att'y Gen.*, 836 F.3d 336, 347 (3d Cir. 2016) (en banc). Further, because the statute applies to petitioner, he lacks standing to bring a facial challenge, *New York v. Ferber*, 458 U.S. 747, 767 (1982), and fails to prove there is no set of circumstances under which the law would operate constitutionally,

*Salerno*, 481 U.S. 745. Therefore, the statute withstands intermediate and strict scrutiny both on its face and as applied to petitioner.

### 1. Petitioner has no standing to challenge the statute as unconstitutional on its face or as applied.

To successfully mount a facial challenge, a challenger must establish that there are no circumstances under which a legislative act is constitutional, and this Court has not recognized an "overbreadth" doctrine outside of a limited First Amendment context. *See id.* at745. This Court's "traditional rule" is that if a law may apply to a person constitutionally, that person may not challenge the law because it "may conceivably" apply unconstitutionally to others not before the Court. *Ferber*, 458 U.S. at 767. As the Court will see below, § 922(g)(5) applies to petitioner constitutionally, and his facial challenge is not within the limited First Amendment context this Court considers under *Ferber*, and therefore petitioner has no standing to challenge the statute as unconstitutional on its face. *Id.*

### 2. The statute achieves a compelling government interest.

Congress has a compelling interest in preventing crime. *See Salerno*, 481 U.S. at 749; *see also United States v. Marzzarella*, 614 F.3d 85, 99 (3rd Cir. 2010). Because Congress must rely on law enforcement agencies to enforce the law and prevent crimes, protecting law enforcement officers' safety must be a compelling interest because it necessarily assists law enforcement. *Cf. id.* (holding that preservation of serial numbers is a compelling interest because it assists law

enforcement). Indeed, without providing for law enforcement officers' safety, Congress could not ensure enforcement of the law. *See Torres*, 911 F.3d at 1264. Therefore, when Congress assists law enforcement, Congress is furthering its compelling interest in preventing crime. *Cf. Marzzarella*, 614 F.3d at 99.

Section 922(g)(5) is a part of a regulatory scheme that prevents criminals and other individuals who Congress can reasonably expect to interact with law enforcement officers from possessing firearms. *See* 18 U.S.C. § 922(g)(1) (preventing felons from possessing firearms); *id.* § 922(g)(9) (preventing those convicted of misdemeanor domestic violence from preventing firearms); *see also id.* § 922(g)(5)(A) (preventing aliens illegally or unlawfully in the United States from possessing firearms). The statute, on its face then, applies not to all persons within the United States, but only to a narrowly tailored list of persons who have already violated the laws of the United States and are therefore likely to interact with law enforcement officers as the officers carry out Congress's compelling interest in preventing crimes. *Id.* § 922(g). Such persons "ought not be armed" when authorities—such as law enforcement—seek them. *Huitron-Guizar*, 678 F.3d at 1170.

Congress took additional steps to narrowly tailor the statute when it provided exemptions for lawful nonimmigrant aliens, who are otherwise subject to Congress's broad powers to regulate the conduct of aliens before naturalization,

*Takahashi*, 334 U.S. at 419, through a waiver process under 18 U.S.C. § 922(y)(3). Further, there is nothing in the record to suggest that petitioner has even attempted to show that there is no set of circumstances under which § 922(g)(5) is constitutional. However, such a showing would make it unconstitutional for Congress to prevent an alien who illegally or unlawfully enters the United States to harm citizens from bearing arms, a repugnant outcome under any standard of scrutiny and irreconcilable with Congress's compelling interest in preventing crime. Therefore, petitioner has no standing to challenge the statute as unconstitutional on its face. *See Ferber*, 458 U.S. at 767.

Therefore, because the statute is part of a broader regulatory structure that prevents only criminals or other public safety threats who are likely to interact with law enforcement—in this instance, aliens illegally or unlawfully in the United States who have already violated U.S. law, J.A. at 59—and provides for waivers that allow other lawful aliens to possess arms, 18 U.S.C. § 922(y)(3), the statute is narrowly tailored and achieves the important and compelling government interest of protecting law enforcement officers. Thus, the statute withstands intermediate and strict scrutiny and is constitutional on its face, despite petitioner's lack of standing to challenge the law.

### 3. Petitioner is an unlawful alien, and therefore section 922(g)(5) is constitutional as applied to petitioner.

A statute will survive both intermediate and strict scrutiny if it is narrowly tailored to achieve a compelling government interest. *See Miller*, 515 U.S. at 920. The government bears the burden of proving both elements. *See Huitron-Guizar*, 678 F.3d at 1169. As demonstrated above, § 922(g)(5) is a narrowly tailored statute that helps law enforcement achieve Congress's compelling interest in preventing crimes. Petitioner's characteristics place him precisely within the class of persons who Congress may expect to interact with law enforcement, and do not, contrary to petitioner's claims, separate him from that class. J.A. at 59. Therefore, § 922(g)(5) is constitutional as applied to petitioner.

#### a. Petitioner's characteristics are the same as those of the criminals Congress intends to keep from bearing arms.

To maintain his as-applied challenge, petitioner must show the traditional justifications for disarming a class of persons do not apply to him. *See Binderup*, 836 F.3d at 347 (en banc). As the United States District Court for the District of Euphoria correctly recognized, petitioner cannot do this. J.A. at 59. Petitioner has unlawfully resided within the United States for more than twenty years, *id.* at 13, since he and his mother intentionally overstayed their visas, *id.* at 5. As a DACA recipient, *id.* at 15, and a DREAMer, *id.* at 25, petitioner's circumstances necessarily place him within the class of aliens illegal or unlawfully in the United

States burdened under the statute, *id.* at 59. Therefore, petitioner's as-applied challenge falls short, because as an alien illegally or unlawfully in the United States, the traditional justifications necessarily apply to petitioner. *Id.*

**b. The statute is narrowly tailored to achieve a compelling government interest.**

Congress has a compelling interest in preventing crime. *Salerno*, 481 U.S. at 749. But Congress must rely on law enforcement agencies to accomplish its compelling interest, and therefore, congressional acts that assist law enforcement are equally compelling. *See Marzzarella*, 614 F.3d at 99. As described above, the challenged statute is part of a broader regulatory structure that generally prevents criminals from possessing firearms. 18 U.S.C. § 922(g). Congress can reasonably expect criminals to interact with law enforcement. Ensuring criminals are not armed when law enforcement officers seek them both assists law enforcement and directly supports the government's compelling interest in preventing crime. *See Marzzarella*, 614 F.3d at 99. Therefore, 18 U.S.C. § 922(g)(5) is narrowly tailored to achieve a compelling government interest.

**c. The statute is neither overinclusive nor underinclusive.**

An underinclusive statute fails to capture a larger class of similarly positioned persons; an overinclusive statute, in contrast, applies too strongly against a broad class to which it can serve no end. *See Dandridge v. Williams*, 397

U.S. 471, 529 (1970) (Marshall, J., dissenting). Any claim that § 922(g)(5) is underinclusive or overinclusive reflects a willful misreading of the statute in its proper context.

Section 922(g)(5) is not underinclusive because it applies only to aliens generally, and in petitioner's case, only those aliens who are illegally or unlawfully in the United States. 18 U.S.C. § 922(g)(5)(A). The statute equally burdens all illegal or unlawful aliens within the United States, including petitioner. Other nonimmigrant aliens, who are legally and lawfully within the United States, are similarly prohibited from possessing a firearm, *id.* § 922(g)(5)(B), but may apply for a waiver, *id.* § 922(y)(3). This waiver provision underscores Congress's clear recognition of this Court's holding in *Eisentrager* that affords aliens a generous scale of ascending rights, but the protections begin with "mere lawful presence." 339 U.S. at 770. Because petitioner has maintained his unlawful presence in the United States, he is not one of the aliens granted the ascending scale of rights, and the statute is not underinclusive. J.A. at 5.

Likewise, the statute is not overinclusive for the same reason described above. It does not apply to a broad class. The statute applies to an extremely narrow class of aliens—those who are illegally or unlawfully in the United States, 18 U.S.C. § 922(g)(5)(A)—precisely the class of aliens to which petitioner belongs, J.A. at 13. Every single alien within this narrow class may foreseeably

interact with law enforcement officers and ought not possess firearms during such interactions. *Huitron-Guizar*, 678 F.3d at 1170.

Further, petitioner's DACA status does not exclude him from the class of aliens unlawfully in the United States but instead places him squarely within it. J.A. at 59. The DACA memorandum's very terms provide no *immigration status*, *substantive rights*, *nor citizenship*, as doing so would usurp Congress's exclusive constitutional powers. DACA memorandum, *supra* at 13. Therefore, the statute burdens only a narrow class of aliens and is not overinclusive.

Therefore, because the statute is neither overinclusive nor underinclusive and is narrowly tailored to achieve a compelling government interest, the statute withstands petitioner's facial and as-applied challenges under both intermediate and strict scrutiny, and this Court should uphold the statute as constitutional.

## CONCLUSION

For the foregoing reasons, this Court should affirm the judgment of the United States District Court for the District of Euphoria, or in the alternative, affirm the judgment of the Court of Appeals for the Fifteenth Circuit.

## 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 March 14, 2021.

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