No. 20-165

IN THE

SUPREME COURT OF THE UNITED STATES

Seung-woo CHO,

Petitioner,

versus

UNITED STATES OF AMERICA,

Respondent.

On Writ of Certiorari to the
United States Court of Appeals for the
Fifteenth Circuit

BRIEF FOR RESPONDENT

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March 14, 2021

QUESTIONS PRESENTED

1. Does the term "the people" in the Second Amendment include aliens "illegally or unlawfully in the United States"?
2. If "the people" includes aliens "illegally or unlawfully in the United States":
    a. What level of scrutiny applies in Second Amendment challenges to 18 U.S.C. § 922(g)(5)?
    b. Does 18 U.S.C. § 922(g)(5) violate the Second Amendment on its face or as applied to Petitioner, Seung-woo Cho?

PARTIES TO THE PROCEEDING

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

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

STATEMENT OF JURISDICTION

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

STANDARD OF REVIEW

This Court reviews 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 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.A. § 922(g)(5) (West).

STATEMENT OF THE CASE

On November 15, 2017, two City of Euphoria police officers responded to a call regarding an altercation at the home of Tiffany Cho, which resulted in the arrest of Petitioner Seung-woo Cho, who, being illegally or unlawfully in the United States, did knowingly possess a firearm in violation of 18 U.S.C. § 922(g)(5). J.A. 56. Cho was found in possession of a loaded 9mm Smith & Wesson MP Shield handgun while in confrontation with his brother-in-law and one of his brother-in-law's associates, both of whom have a criminal history. J.A. 56, 66.

Cho, age thirty, is a citizen of South Korea and has resided in the United States illegally and unlawfully for the past twenty-three years, ever since his visa expired in 1998. J.A. 4, 56. He accompanied his mother into the country as a boy, but he has spent his entire adult life as an alien illegally or unlawfully in the United States. J.A. 5-6, 56. After reaching the age of majority, Cho sensed that his mother wanted to return to Korea, but he did not consider this lawful option; he chose instead to continue living in violation of United States immigration laws. J.A. 12, 15. Cho's first steps toward lawful immigration status did not come until 2016 when he married an American citizen and applied for permanent residency. J.A. 14, 56, 65-66. This application was still pending at the time of his arrest and subsequent indictment by the Grand Jury for the District of Euphoria. J.A. 66, 2.

The United States District Court for the District of Euphoria, finding that § 922(g)(5) does not violate the Second Amendment, denied the Petitioner's motion to dismiss the indictment. J.A. 59. The court first concluded that Cho had not met his burden of establishing that the indictment is invalid on its face and then also concluded that § 922(g)(5) falls squarely within Congress's power to ban non-law-abiding aliens from possessing firearms. *Id.* After a jury

trial in the United States District Court for the District of Euphoria, Cho was subsequently convicted of violating § 922(g)(5). J.A. 61.

On appeal, the United States Court of Appeals for the Fifteenth Circuit affirmed the district court's decision after applying the traditional two-pronged framework used when evaluating constitutional challenges to various sections of § 922(g). J.A. 67. The court ultimately held that § 922(g)(5) withstands appropriate scrutiny for constitutionality both on its face and as applied to Seung-woo Cho. J.A. 69. This Court granted certiorari to review whether aliens illegally or unlawfully in the United States are included among "the people" afforded Second Amendment protection, to decide the appropriate level of scrutiny to apply to Second Amendment challenges to 18 U.S.C. § 922(g)(5), and to determine if the statute violates the Second Amendment on its face or as applied to the Petitioner. J.A. 74.

SUMMARY OF THE ARGUMENT

The United States of America, in recognition of the fact that people from around the world enter this country in search of opportunity and improved circumstances, does not prohibit those who remain in the country without authorization from attending school, getting married, or owning property. What the government does not allow, however, is for such individuals to possess lethal firearms.

Title 18 U.S.C. § 922(g)(5) prohibits aliens who are illegally or unlawfully in the United States from possessing firearms in or affecting commerce. This statute does not violate the Second Amendment of the Constitution which sets forth, "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." The reason is plain: "the people" protected by the Second Amendment do not include aliens illegally or unlawfully in the United States.

In order to invoke Second Amendment protection over their right to bear arms, "the people" must be citizens of the United States of America. In *District of Columbia v. Heller*, the Court held that the individual right to keep and bear arms for self-defense is not extended to all groups of people and clearly described this right as belonging to citizens. Aliens who are illegally or unlawfully in the United States simply do not qualify because they are not citizens of this country. They also do not qualify as members of this country's "political community," which, according to *Heller*, is an additional requirement for inclusion among "the people" who are safeguarded by the Second Amendment. Aliens illegally or unlawfully in the United States are not afforded political privileges and thus are not part of "the people." *Heller* still further narrowed this field by concluding that the core right of the Second Amendment belongs to citizens who are "law-abiding." Because individuals illegally or unlawfully in the United States have not received authorization to remain in the country, they are not, by definition, law-abiding, and therefore they are not afforded Second Amendment rights.

Additionally, the *Heller* Court's notion of "the people" as a term of art used throughout the Constitution may deceptively lead to the idea that because individuals illegally or unlawfully in the United States have, in the past, been afforded First and Fourth Amendment protections, this group is meant for inclusion under Second Amendment protection as well. However, "the people" as a term of art is used to define those persons entitled to exercise named rights as individuals, as opposed through participation in a collective body. The Constitution's use of the term in multiple amendments does not mean that those amendments are meant to protect the same groups of individuals.

Finally, aliens who are illegally or unlawfully in the United States and seek Second Amendment protection will not find it by means of the suggested "sufficient connection" test that

allegedly offers a pathway to Constitutional rights. This test requires voluntary presence in the United States and the acceptance of some societal obligations. However, use of this test has not been validated with regard to the Second Amendment. Even if it had, illegal aliens are rendered unable to accept the societal obligations necessary to pass such a test by virtue of their unlawful status alone.

Because aliens illegally and unlawfully in the United States are not included in "the people" afforded Second Amendment protection, there is no need to conduct a scrutiny analysis of § 922(g)(5). Nonetheless, even upon such analysis, the statute withstands heightened constitutional scrutiny. If the analysis proceeds, the Court should apply intermediate scrutiny to § 922(g)(5) because the statute does not burden the core of the Second Amendment. It presents a legal contradiction for a law affecting aliens illegally or unlawfully in the United States to burden a core right that belongs only to law-abiding citizens. Moreover, because individuals in this class can adjust immigration status so that they no longer fall within the reaches of § 922(g)(5), any perceived burden placed by the statute is tempered, thereby making intermediate scrutiny the correct choice for a constitutional analysis.

However, 18 U.S.C. § 922(g)(5) is constitutional under all levels of heightened scrutiny, both on a facial challenge and as applied to the Petitioner. For a statute to survive intermediate scrutiny, it must be substantially related to serving an important government interest. Here, the government seeks to track weapon ownership to achieve important objectives concerning public safety, police and immigration officer safety, and crime control. Section 922(g)(5) prohibits the possession of firearms by individuals who live largely outside the formal government system of identification and who put a great onus upon government authorities seeking to apprehend them after firearm criminality or misuse. The statute provides a perfectly reasonable fit between the

activity proscribed and the government's interests. These interests are not altered when considering the Petitioner's as-applied challenge. No matter how impressive a single unlawful alien's record might be, Congress has determined with its constitutionally granted authority that these important objectives can only be achieved by restricting every unlawful alien from firearm possession.

Furthermore, 18 U.S.C. § 922(g)(5) remains constitutionally steadfast even if subjected to strict scrutiny, which requires that a law is narrowly tailored to achieve a compelling government interest. Indeed, protecting communities from crime is not only an important, but a compelling interest, and the government has a no less restrictive way to regulate firearm misuse than by prohibiting untraceable individuals from possessing them. The statute offers a bright-line, categorical approach to firearms prohibition that is narrowly tailored to achieve the government's aim. Therefore, because the challenger falls into the class of persons illegally or unlawfully in the United States, § 922(g)(5) will stand under strict scrutiny both on a facial and an as-applied challenge.

A reversal of the lower court's decision in this case would pave the way for a litany of case-by-case litigation brought forth by unlawful aliens alleging infinitely varied reasons for firearm possession, requiring a judicial sorting of mammoth proportions, and more importantly severely compromising the government's ability to achieve its objectives in a manner that is uniform, consistent, and fair.

ARGUMENT

I. The term "the people" in the Second Amendment does not include aliens "illegally or unlawfully in the United States."

The Second Amendment asserts that "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. The Petitioner, Seung-woo Cho, violated the law of the United States because he is an alien who is illegally or unlawfully in the United States who possessed a firearm in or affecting commerce. 18 U.S.C.A. § 922(g)(5) (West). The protection of the Second Amendment does not extend to him because he is not one of "the people." The right to keep and bear arms is considered to be a preexisting individual right, but it is not unlimited. *District of Columbia v. Heller*, 554 U.S. 570, 592, 626-27 (2008). Moreover, *Heller* defined the core of the Second Amendment as the right of law-abiding, responsible citizens to use arms in defense of hearth and home. *Id.* at 635. Thus, the term "the people," as used in the Second Amendment, does not extend to individuals who are illegally or unlawfully in the United States.

A. "The people" of the Second Amendment are citizens of the United States who are part of the political community.

Heller made clear that the term "the people," as used in the Second Amendment, refers to citizens of the United States. The Court recognized that while the central component of the Second Amendment is the individual right to keep and bear arms for self-defense, this right does not belong to every individual. *Id.* at 599, 627. The Court named felons and the mentally ill as examples of groups who are excluded from Second Amendment protection. *Id.* at 627. *Heller* did not name illegal aliens as an excluded class along with these other groups because it was not necessary to do so; *Heller* made numerous references to the Second Amendment as one that protects the right of *citizens* to bear arms. *See id.* at 595 (asserting that the Second Amendment does not protect the right of citizens to carry arms in every sort of confrontation); *id.* at 600 (explaining that if petitioners are correct, the Second Amendment protects the rights of citizens to use a gun); *id.* at 615 (exploring the significance of the Freedman's Bureau Act of 1866 which gave free black men the right to bear arms because, as citizens, they are entitled to rights "secured to and enjoyed by all the citizens").

Heller's resolution of its own issue at bar also depended on the interpretation of "the people" as citizens. The Court denounced the idea that the right to bear arms belongs to a designated governmental military force and explained that the Second Amendment was born out of the desire to arm the body of all citizens capable of militia duty. *See id.* at 627. Furthermore, *Heller* opined that the statute at issue made it "impossible for citizens" to use firearms for the core purpose of self-defense. *Id.* at 630. *Heller* also held that weapons protected by the Second Amendment must be possessed by law-abiding citizens for lawful purposes. *See id.* at 625. According to *Heller*, "the people" is synonymous with "citizens," and the Court did not specifically name illegal aliens as falling outside Second Amendment protection because to do so was redundant and unnecessary.

Providing additional clarification with regard to "the people," *Heller* ruled that the term "unambiguously refers to all members of the political community" and that the Second Amendment right "belongs to all Americans." *Id.* at 580-81. The Constitution grants privileges of political participation to citizens of the United States of America. *See* U.S. CONST. amends. XIV, XV, XIX, XXVI (limiting voting rights to citizens); U.S. CONST. art. I, § 2, cl. 2 (citizenship requirement for Representatives); U.S. CONST. art. I, § 3, cl. 3 (citizenship requirement for Senators); U.S. CONST. art. II, § 1, cl. 5 (the President must be a "natural born Citizen"). Therefore, "the people" protected by the Second Amendment are those same American citizens who have been granted by the Constitution the privilege of participating in the political process and are thereby part of the "political community."

Here, the Petitioner is not a citizen of the United States of America but of South Korea. J.A. 5. He claims to be American "in every way other than carrying a U.S. passport." J.A. 16. Regrettably however, feeling American in his heart does not grant him the privilege of entry into

the political community and does not allow him recognition as one of "the people" afforded protection by the Second Amendment.

B. "The people" protected by the Second Amendment are law-abiding.

Even if *Heller* intended to include non-citizens under the umbrella of Second Amendment protection, the Petitioner is still excluded due to a further requirement specified by the Court: the Second Amendment protects individuals who are law-abiding. *Heller* interpreted *United States v. Miller* to mean that the Second Amendment does not protect those weapons not typically possessed by law-abiding citizens. *See Heller*, 554 U.S. at 625 (discussing *United States v. Miller*, 307 U.S. 174 (1939)). The Court concluded that the core right of the Second Amendment is the right of self-defense by "law-abiding, responsible citizens." *Id.* at 635.

An individual who is "illegally or unlawfully in the United States" is "in the United States without authorization." *United States v. Elrawy*, 448 F.3d 309, 312-13 (5th Cir. 2006). Such individuals cannot be considered law-abiding. *United States v. Torres*, 911 F.3d 1253, 1263 (9th Cir. 2019); *see United States v. Carpio-Leon*, 701 F.3d 974, 982 (4th Cir. 2012) (explaining that entry into the class of illegal aliens is itself a crime (quoting *Plyler v. Doe*, 457 U.S. 202, 219 n.19 (1982))). Therefore, illegal aliens cannot be included among "the people" whose right to bear arms is protected by the Second Amendment. *See Carpio-Leon*, 701 F.3d at 979 (conducting a historical analysis of the Second Amendment and finding that illegal aliens do not belong to the class of law-abiding members of the political community to whom the Second Amendment gives protection); *United States v. Portillo-Munoz*, 643 F.3d 437, 440 (5th Cir. 2011) (holding that illegal aliens are not "law-abiding, responsible citizens" and are not Americans as that word is commonly understood); *United States v. Flores*, 663 F.3d 1022, 1023 (8th Cir. 2011) (echoing the Fifth Circuit's holding in *Portillo-Munoz*). Indeed, failure to live in

accordance with the law is a common thread uniting groups such as felons and domestic violence misdemeanants who "may not be trusted to possess a firearm" because of their inability or unwillingness conduct themselves in conformity with the responsibilities of citizenship. *See Binderup v. Att'y Gen.*, 836 F.3d 336, 390 (3d Cir. 2016) (Fuentes, J., concurring in part and dissenting in part). *Heller* underscored that these "longstanding prohibitions" on possession of firearms by these groups of people are not in doubt. *See Heller*, 554 U.S. at 626.

In *Carpio-Leon*, the petitioner was an alien illegally or unlawfully in the United States, who like Cho, was convicted of violating § 922(g)(5). *See Carpio-Leon*, 701 F.3d at 975. Also like Cho, Carpio-Leon was in the country for over a decade, paid taxes, and had no prior criminal record. *See id.*; J.A. 5, 7, 15. He argued that his class of persons is not included among the "longstanding prohibitions" referenced in *Heller* because the Founders did not intend to deny immigrants the ability to defend themselves as they settled frontier areas and that historically "attitudes toward immigration were the reverse of today's attitudes." *See Carpio-Leon*, 701 F.3d at 980-81. Whatever the Founders' intentions regarding the rights of naturalized immigrants to possess firearms may have been, Carpio-Leon's argument does not change the fact that the right to bear arms was only guaranteed to individuals who were considered to be part of the political community and who followed the community's rules. *See id.* at 981. By maintaining illegal statuses throughout their years in the United States, both Carpio-Leon and Cho failed to meet these vital requirements. *See id.*; J.A. 5.

Here, the Petitioner entered the United States on an F-1 visa in 1996. J.A. 5. This visa expired sometime in 1998 when he was seven years old, rendering his status illegal. J.A. 5-6, 56. While the Petitioner cannot be faulted for his childhood status, the fact remains that he continued to stay beyond the period of authorization even after he reached the age of majority in 2008. *See*

J.A. 4, 15. Therefore, as an illegal and unlawful alien, the Petitioner cannot be considered as one of the law-abiding, responsible individuals included in "the people" of the Second Amendment.

C. "The people" of the Second Amendment differ from "the people" in the First and Fourth Amendments.

The Petitioner retorts that despite its definition of "the people" in the Second Amendment as law-abiding citizens, the *Heller* Court included illegal and unlawful aliens within the definition when it reasserted its notion of "the people" as a term of art used not only in the Second Amendment, but throughout the Constitution. J.A. 36; *see Heller*, 554 U.S. at 580 (citing *United States v. Verdugo-Urquidez*, 494 U.S. 259, 265 (1990)). The Petitioner claims that if the courts have offered the protection of the First and Fourth Amendments to illegal aliens in the past, then they must be part of "the people" and should be afforded Second Amendment protection as well. J.A. 36.

However, this conclusion misconstrues the *Heller* Court's distinct purpose in recalling the use of "the people" throughout the Constitution. Whenever the term is used in amendments that codify preexisting rights, "the people" refers to individuals who are afforded those rights as such, as opposed to being permitted to exercise them only through participation in a collective body. *See Heller*, 554 U.S. at 580. *Heller* explained that just as "the people" in the First and Fourth Amendments refers to single individuals entitled to each amendment's respective named right, so does the Second, which does not limit the right to bear arms to membership in an organized militia. *Id.* In other words, when "the people" is used as a term of art in these amendments, it is for the purpose of clarifying that each person is entitled to exercise the named right as an individual and that membership in a collective body, militia or otherwise, is not necessary. It was not the Court's intention to declare that all amendments protect the same groups of individuals. *See Portillo-Munoz*, 643 F.3d at 440 (finding that the use of "the people"

in both the Second and the Fourth Amendments does not mandate a holding that the two amendments cover the same groups of people). Because the purposes served by the amendments vary, it stands to reason that the scope of their protection varies as well. *See id.* at 441 (concluding that the Second Amendment, as an affirmative right to keep and bear arms, could reasonably extend to fewer groups than the Fourth Amendment, which is a protective right against abuses by the government); *see also Heller*, 554 U.S. at 644 (Stevens, J., dissenting) (explaining that the class of persons protected by the First and Fourth Amendments includes felons and irresponsible citizens who are not enabled to invoke Second Amendment protection); *Mathews v. Diaz*, 426 U.S. 67, 78 (1976) (holding that even if all persons, aliens and citizens alike, are protected by the Due Process Clause, all aliens are not necessarily entitled to enjoy all advantages of citizenship).

The Petitioner's argument relies on *United States v. Verdugo-Urquidez,* where the Court employed a "sufficient connection" test to determine if an alien defendant was entitled to Fourth Amendment protection from unreasonable search and seizure. *See Verdugo-Urquidez*, 494 U.S. at 265 (suggesting that "the people" refers to a class of persons who have developed sufficient connection with this country). This test suggests that if aliens illegally and unlawfully in the United States prove such sufficient connection, they may be afforded Fourth Amendment rights. *See id.* at 271-72. However, as previously explained, a defendant deemed "connected" enough to fall under Fourth Amendment protection may not see the same result when dealing with the Second Amendment.

Furthermore, the Court in *Verdugo-Urquidez* determined that its defendant failed the sufficient connection test but did not articulate the requirements of passing the test beyond a vague attempt to distinguish its defendant from those in past cases. *See id.* at 282 (Brennan, J.,

concurring) (critiquing the Court's imprecisely drawn contours of the sufficient connection test); *see also id.* at 272-73 (recalling illegal aliens who presumably had accepted societal obligations that placed them among "the people," possibly accounting for the implication that they were afforded some Fourth Amendment rights (discussing *INS v. Lopez-Mendoza*, 468 U.S. 1032 (1984))). However, the Court in *Verdugo-Urquidez* was careful to note that *Lopez-Mendoza* limited its discussion to civil deportation proceedings and did not encompass whether the protection of the Fourth Amendment extends to illegal aliens. *See Verdugo-Urquidez*, 494 U.S. at 272. Therefore, the path toward equating a sufficient connection requirement for illegal aliens regarding Fourth Amendment protection with one regarding Second Amendment protection is muddied not only by incongruity between the amendments but by lack of precision concerning how the Court would apply such a test. *See id.* (explaining that it was unknown whether the connections of the defendants in *Lopez-Mendoza* were sufficient enough to pass the test because the issue was not before the Court); *see also Portillo-Munoz*, 643 F.3d at 440 (recognizing that this Court has never held that the Fourth Amendment extends to a citizen of another nation who remained in the United States illegally). However, *Heller* clarified the *Verdugo-Urquidez* test by equating the latter's reference to "national community" with "political community," and held that sufficient connection, at least regarding the Second Amendment, means citizenship. *See Heller*, 554 U.S. at 580, 625. Thus, the Petitioner's attempt to pass this test is rendered sufficiently moot.

D. "The people" with sufficient connections do not include illegal aliens.

The vague contours of the sufficient connection test suggest that aliens may have such connections with the United States if they are present in the country voluntarily and if they have accepted some societal obligations. *Verdugo-Urquidez*, 494 U.S. at 272; *see Martinez-Aguero v.*

Gonzalez, 459 F.3d 618, 625 (5th Cir. 2006) (holding that a Mexican citizen had sufficient connection with the United States, thereby affording her Fourth Amendment protection against excessive force at the border); *Ibraham v. Dep't of Homeland Sec.*, 669 F.3d 983, 999 (9th Cir. 2012) (finding that a noncitizen pursuing Ph.D. in the United States had established significant voluntary connections to invoke the First and Fifth Amendments). Nevertheless, this test falters as a method for determining if an illegal alien is one of "the people" protected by the Second Amendment. Moreover, even if this test was applied, illegal aliens would fail. Their unlawful status simply renders them unable to accept the societal obligations necessary to pass such a test. *See* J.A. 58 (citing *Carpio-Leon*, 701 F.3d at 981); *see also Carpio-Leon*, 701 F.3d at 981 (opining that despite nine years presence in the United States, an "excluded" alien lived "in theory of law at the boundary line and had gained no foothold in the United States" (quoting *Kaplan v. Tod*, 267 U.S. 228, 230 (1925))).

Differences in these individual "footholds," or lack thereof, serve as the underlying reasons for the varied levels of rights and privileges offered to citizens and aliens. These differences were recognized by the venerable British legal scholar Sir William Blackstone who compared the permanent nature of a citizen's allegiance to a nation with the temporary nature of an alien's allegiance. An alien's priority will always be to fulfill the obligations of his own country before those of the foreign country where he resides. 1 WILLIAM BLACKSTONE, COMMENTARIES *371. Congress is vested by the Constitution with the authority to pass laws offering different rights and privileges to citizens and aliens based on this loyalty factor or any other criterion it deems appropriate. *See Mathews*, 426 U.S. at 79-80; *see also Johnson v. Eisentrager*, 339 U.S. 763, 770 (1950) (discussing the ascending scale of rights granted to aliens, granted first to those lawfully present in the country).The Second Amendment protects not only

the right of self-defense, but also a citizen's right to possess firearms for the preservation of national security and suppression of tyranny. *See Heller*, 554 U.S. at 577-90, 599-600, 628. By passing 18 U.S.C. § 922(g)(5), Congress determined that illegal aliens do not have sufficient connections with the United States to allow them the privilege of possessing firearms for these purposes.

To conclude, the term "the people" in the Second Amendment does not include aliens illegally or unlawfully in the United States because "the people" must be law-abiding citizens of the United States who are part of the political community. Although aliens illegally or unlawfully in the United States may have found past protection under the First or Fourth Amendments, individuals protected under those amendments are not necessarily protected under the Second Amendment. Finally, "the people" with sufficient connection to the United States cannot and does not include illegal aliens. Sympathies may be extended to the Petitioner, whose intentions toward the United States appear positive and genuine, for the circumstances that have led to this tribunal. However, those sympathies must not interfere with applying the law, which clearly leads to the conclusion that aliens illegally or unlawfully in the United States are not among "the people" included under the protection of the Second Amendment.

II. If the Court finds that aliens illegally or unlawfully in the United States are among "the people" afforded Second Amendment protection, 18 U.S.C. § 922(g)(5) should be analyzed under intermediate scrutiny, after which the statute will be found constitutional both on its face and as applied to the Petitioner.

Because Second Amendment protection is not unlimited, statutes that regulate the possession of firearms, such as 18 U.S.C. § 922(g)(5), may fall outside of the scope of that protection. Once the Court finds that the law in question does fall outside the limits of Second Amendment protection, the Court may cease its constitutional inquiry. *See United States v. Reese*, 627 F.3d 792, 800-01 (10th Cir. 2010). The majority of decisions involving Second

Amendment challenges to § 922(g)(5) that have come down since *Heller* have indeed stopped at this point. *See Portillo-Munoz*, 643 F.3d at 442; *Flores*, 663 F.3d at 1023; *Carpio-Leon*, 701 F.3d at 979. However, even upon further analysis, § 922(g)(5) withstands heightened constitutional scrutiny, both on a facial challenge and as applied to the Petitioner.

A. The Court must apply intermediate scrutiny to Second Amendment challenges to 18 U.S.C. § 922(g)(5).

In the event of further analysis, the Court must apply intermediate scrutiny because § 922(g)(5) does not burden the core of Second Amendment protection. *Heller* explicitly declined to specify which level of heightened scrutiny should apply to laws challenged under the Second Amendment. *Heller*, 554 U.S. at 627. The appropriate level of scrutiny depends on: (1) how close the burden placed on conduct comes to the core of the Second Amendment; and (2) the severity of the law's burden on that right. *Torres*, 911 F.3d at 1262. If no severe burden is found, intermediate scrutiny applies. *Id*.

1. Title 18 U.S.C. § 922(g)(5) does not burden the core of the Second Amendment, which is the right of law-abiding, responsible citizens to bear arms.

Heller identified the core of the Second Amendment as the right of law-abiding, responsible citizens to bear arms. *Heller*, 554 U.S. at 635. Thus, § 922(g)(5) can be said not to burden the core of the Second Amendment because the statute applies to those in the United States "illegally or unlawfully" and who therefore cannot be considered law-abiding. *Torres*, 911 F.3d at 1263. In both *United States v. Huitron-Guizar* and *United States v. Torres*, the courts sidestepped the issue of whether their illegal and unlawful alien defendants were considered part of "the people" protected by the Second Amendment and moved on with the second step of the § 922(g)(5) constitutional analysis, determining that intermediate scrutiny was appropriate under the circumstances. *See United States v. Huitron-Guizar*, 678 F.3d 1164, 1168-69 (10th Cir.

2012); *Torres*, 911 F.3d at 1261-63; *see also United States v. Singh*, 979 F.3d 697, 725 (9th Cir. 2020) (following the lead of *Torres* by skipping the first step of the analysis and applying intermediate scrutiny to § 922(g)(5)). Even *United States v. Meza-Rodriguez*, alone in its holding that illegal and unlawful aliens are included in "the people" protected by the Second Amendment, proceeded to analyze the constitutionality of § 922(g)(5) under intermediate scrutiny and found it stalwart. *See United States v. Meza-Rodriguez*, 798 F.3d 664, 672-73 (7th Cir. 2015).

Cases scrutinizing different subsections of § 922(g) have made similar interpretations. *See United States v. Chovan*, 735 F.3d 1127, 1138 (9th Cir. 2013) (concerning domestic violence misdemeanants who violate § 922(g)(9)); *Reese*, 627 F.3d at 801 (concerning individuals subject to domestic protection orders covered by § 922(g)(8)); *Binderup*, 836 F.3d at 347 (concerning convicted felons who violate § 922(g)(1)). Finding that the statutes in question do not strike at the core of the Second Amendment as laid out in *Heller*, these cases applied intermediate scrutiny. *See Chovan*, 735 F.3d at 1138; *Reese*, 627 F.3d at 801; *Binderup*, 836 F.3d at 347. Post-*Heller*, there has been "near unanimity" in applying intermediate scrutiny to regulations that fall within the scope of the Second Amendment. *Torres*, 911 F.3d at 1262.

2. Any burden that might be placed by 18 U.S.C. § 922(g)(5) on the core right of the Second Amendment is tempered.

The severity of a law's burden on a fundamental right is measured both by the totality of the restriction and by available opportunities to temper the burden. *Id.* For example, § 922(g)(9) places a lifetime firearms ban on domestic violence misdemeanants, but its burden is tempered by exemptions for expunged convictions. *See Chovan*, 735 F.3d at 1138. The *Chovan* court therefore held that intermediate scrutiny is appropriate. *Id. United States v. Marzzarella* also applied intermediate scrutiny, finding that § 922(k)'s prohibition of firearms with obliterated

serial numbers merely regulates the manner in which one may exercise Second Amendment rights, leaving a person free to possess any otherwise lawful firearm he chooses. *United States v. Marzzarella*, 614 F.3d 85, 97 (3d Cir. 2010).

Heller explained that an additional core prong of the Second Amendment is the right to possess arms for defense of hearth and home. *Heller*, 554 U.S. at 635. Even under the assumption that § 922(g)(5) burdens the core of the Second Amendment due to the restriction it places on illegal aliens from possessing firearms in any circumstance, intermediate scrutiny is still appropriate because that burden is tempered. The law will not apply after immigration status is adjusted to lawful. *Torres*, 911 F.3d at 1263.

Therefore, because § 922(g)(5) does not fully implicate the core of the Second Amendment, as the statute applies to individuals illegally and unlawfully in the United States and not to the "law-abiding, responsible citizens" designated in *Heller*, and because any detectable burden is tempered by the ability of an unlawful alien to rectify immigration status, intermediate scrutiny must apply to any Second Amendment challenge invited by the statute.

B. Title 18 U.S.C. § 922(g)(5) is constitutional under all levels of heightened scrutiny when applied to both a facial challenge and the Petitioner's as-applied challenge.

When intermediate scrutiny is applied to § 922(g)(5), the government maintains that the law meets the standard necessary to pass constitutional muster. Intermediate scrutiny requires the government to prove that the law in question is substantially related to serving an important government interest. *Binderup*, 836 F.3d at 341. The government need not prove that the law is the only means necessary for achieving this interest, but that its interest would be achieved less effectively absent the regulation. *Torres*, 911 F.3d at 1263.

1. When analyzed under intermediate scrutiny, 18 U.S.C. § 922(g)(5) is constitutional both on its face and as applied to the petitioner.

For a challenged statute to survive intermediate scrutiny, it must be substantially related to serving an important government interest. *Id.* Title 18 U.S.C. § 922(g)(5) has its earliest roots in the Omnibus Crime Control and Safe Streets Act of 1968, by which Congress declared that possession of firearms by felons, dishonorably discharged veterans, mentally incompetent individuals, and illegal aliens constituted the following: a threat affecting the free flow of commerce; a threat to the safety of the President and Vice President; an impediment or threat to the exercises of free speech and religion; and a threat to the continued and effective operation of the government of the United States and the government of each State. Omnibus Crime Control and Safe Streets Act of 1968, Pub. L. No. 90-351, §§ 1201-02, 82 Stat. 197, 236.

Today's version of § 922(g)(5) evolved directly from the Firearms Owners' Protection Act of 1986. *Huitron-Guizar*, 678 F.3d at 1169-70. The law's stated purpose was to curb crime by keeping firearms from those not legally entitled to possess them because of age, criminal background, or incompetency. *Torres*, 911 F.3d at 1264. The government has an important interest, as reflected in various subsections of § 922(g), in preventing people already in violation of the law from possessing firearms in order to achieve the stated objectives. *Id.* at 1263-64.

By prohibiting the possession of firearms by unlawful aliens, § 922(g)(5) focuses on individuals able to purposefully evade law enforcement's detection by living largely outside the formal governmental system of registration and identification. *Huitron-Guizar*, 678 F.3d at 1170. The government's interest in public safety makes tracking and controlling weapon ownership important; as such, § 922(g)(5) substantially relates to this interest by keeping firearms from individuals who are subject to removal, difficult to monitor, and unwilling to conform their conduct to the laws of the country. *Torres*, 911 F.3d at 1264. In particular, the government seeks to prevent unlawful aliens from posing a threat to immigration or other law enforcement officers

who may attempt to apprehend and remove them. *Id. See also Huitron-Guizar*, 678 F.3d at 1170. The government thereby presents a reasonable fit; the goal of tracking weapon ownership in the important interest of public safety, police officer safety, and crime control would be less effectively achieved absent § 922(g)(5). *Id*. Therefore, § 922(g)(5) passes intermediate scrutiny and its constitutionality should be upheld.

These important government interests do not change or lessen when considering the Petitioner's as-applied challenge to 18 U.S.C. § 922(g)(5), and the statute remains substantially related to serving those interests. This Court has long held that Congress has the authority to enact laws governing the conduct of aliens that would be unconstitutional if applied to citizens. *Portillo-Munoz*, 643 F.3d at 441 (citing *Mathews*, 426 U.S. at 80). The discretion to restrict all unlawful aliens, including the Petitioner, from possessing firearms has been given to Congress, which has the constitutional power to distinguish between citizens and non-citizens, or between lawful and unlawful aliens, and to ensure safety and order. *Huitron-Guizar*, 678 F.3d at 1170.

The Petitioner here claims that his exemplary life record places him in a category beyond the reaches of Congress's discretion. In 1984, the Second Circuit addressed such concerns about § 922(g)(5)'s predecessor statute. The court explained that "not all illegal aliens (or ex-felons for that matter) are disreputable, or unworthy of society's trust," but that Congress intended for the statute to strike broadly. *United States v. Toner*, 728 F.2d 115, 128 (2d Cir. 1984). With its constitutionally granted authority, Congress has drawn a line prohibiting the possession of firearms by every alien unlawfully present in the United States in order to achieve the important objectives of free flow of commerce; safety of elected officials and government agents; the effective operation of government; public safety; and crime control.

Even the Petitioner's status under the Deferred Action for Childhood Arrivals memorandum does not place him on the side of the line he seeks. The DACA policy gives immigration law enforcement agencies prosecutorial discretion pertaining to certain young people who were brought to this country as children and have remained here. *See generally* Memorandum from Janet Napolitano, Sec'y, Dep't of Homeland Sec., to David V. Aguilar, Acting Comm'r, U.S. Customs & Border Prot., et al. (June 15, 2012) (DACA Memorandum) https://www.dhs.gov/xlibrary/assets/s1-exercising-prosecutorial-discretion-individuals-who-came-to-us-as-children.pdf. Individuals who meet specific requirements may receive deferred action in order to prevent them from being deported. *Id.* However, DACA "confers no substantive right, immigration status, or pathway to citizenship." *Id.*

Regarding the status and treatment of DACA recipients under § 922(g)(5), *United States v. Arrieta* held that even though the defendant was a DACA recipient, he "lacks lawful status, and the absence of such status is controlling." *United States v. Arrieta*, 862 F.3d 512, 516 (5th Cir. 2017). The court ruled that temporary authorization to be in the country for some purposes does not offer immunity to prosecution under § 922(g)(5). *Id.* at 515; *see United States v. Lopez*, 929 F.3d 783, 786 (6th Cir. 2019) (holding that grant of deferred action under DACA did not change defendant's unlawful status for purposes of § 922(g)(5)). Concerning how a pending adjustment of legal status may affect conviction under § 922(g)(5), *United States v. Elrawy* held that the defendant's unlawful status did not change merely by filing the application for adjustment, and therefore he is not insulated from prosecution under § 922(g)(5). *Elrawy*, 448 F.3d at 314.

Therefore, no unlawful alien, regardless of DACA status or pending immigration status adjustment, is exempt from the constitutionality of § 922(g)(5). The statute holds up under

intermediate scrutiny to the Petitioner's as-applied challenge, as the Petitioner does not have lawful immigration status and is therefore not beyond the reach of Congress's constitutional authority to prohibit firearm possession.

2. When analyzed under strict scrutiny, 18 U.S.C. § 922(g)(5) is constitutional both on its face and as applied to the petitioner.

However, even if the Court departs from the decisions of every circuit court having previously analyzed a Second Amendment constitutional challenge, the government maintains that § 922(g)(5) also holds up under strict scrutiny, which requires that a law is narrowly tailored to achieve a compelling government interest. *See Binderup*, 836 F.3d at 341. Protecting the community from crime is not only an important, but a compelling government interest. *Tyler v. Hillsdale Cnty. Sheriff's Dep't*, 775 F.3d 308, 331 (6th Cir. 2014), *vacated en banc*, 837 F.3d 678 (6th Cir. 2016)(citing *Schall v. Martin*, 467 U.S. 253, 264 (1984)); *see United States v. Salerno*, 481 U.S. 739, 749 (1987) (holding that the government's interest in preventing crime is both legitimate and compelling). In *Marzzarella*, the court found that because the tracing of firearms by serial numbers assists law enforcement in carrying out its duties, the preservation of that system via § 922(k) is not only substantial but a compelling interest and that § 922(k) is narrowly tailored to achieve it. *See Marzzarella*, 614 F.3d at 99. Although the court applied intermediate scrutiny to the Second Amendment challenge, it found that even if strict scrutiny were to apply, the statute would pass muster. *Id.*

Here, § 922(g)(5) deserves similar treatment. There is no less restrictive way for the government to regulate firearm misuse in the interest of preventing violent crime, especially against immigration officers, than by prohibiting untraceable aliens who are illegally and unlawfully in the United States from possessing them. *See Torres*, 911 F.3d at 1264. Assisting law enforcement officers in preventing crime and protecting them from harm when they

apprehend illegal and unlawful aliens is a compelling government interest, and § 922(g)(5) is narrowly tailored to achieve it.

The Petitioner here calls upon empirical studies in order to claim that undocumented workers are no more dangerous to society than native born citizens, thus arguing that § 922(g)(5) does not impose a necessary restriction. *See Carpio-Leon*, 701 F.3d at 983. However, the court in *Carpio-Leon* found that the usefulness of such studies is limited because they do not focus on the class of *illegal* aliens. *Id.* Such studies compare incarceration rates based on a person's place of birth, not on a person's immigration status. *Id.* The Petitioner's own expert witness was obliged to admit that these types of studies only estimate the number of incarcerated illegal immigrants because local and state governments and prison officials rarely record if prisoners are in the country legally or illegally. J.A. 25. Such studies can be questioned due to the very elusiveness of statistics involving untraceable individuals; therefore § 922(g)(5) offers a bright-line, categorical approach to firearms prohibition that is narrowly tailored to achieve the government's aim. Thus, § 922(g)(5) is constitutional on its face when analyzed under strict scrutiny.

Unlike a facial challenge, an as-applied challenge does not argue that the law is unconstitutional per se, but rather that its individual application deprived that person of a constitutional right. *Binderup*, 836 F.3d at 345. To win an as-applied challenge to a firearms regulation, one must first identify the traditional justifications for excluding his class of people from Second Amendment protection, and then present facts that distinguish his circumstances from those of most persons in that class. *Id.* at 347.

The Petitioner points to ways he can distinguish himself from those who live "largely outside the formal system of registration." *See Huitron-Guizar*, 678 F.3d at 1170. He entered the country legally. J.A. 5. He exhibited exemplary behavior throughout high school, excelled in

college, and now attends law school. *See* J.A. 6-7, 9, 15. He owns an incorporated business, pays taxes, has DACA protection, and has filed for permanent residency. *See* J.A. 7, 13-14. However, the one way he cannot distinguish himself is the only way that matters: the Petitioner's immigration status is unlawful and has been for twenty-three years. *See* J.A. 5.

Furthermore, Congress has the authority to establish categorical prohibitions on firearm possession and "is not limited to case-by-case exclusions." *United States v. Skoien*, 614 F.3d 638, 641 (7th Cir. 2010). When the *Heller* Court ruled that no doubt should be cast on "longstanding prohibitions" on firearm possession, it meant that statutory prohibitions on the possession of weapons by some groups of people are proper and that elected representatives can enact them in ways that best fulfill government objectives. *See id.* at 640 (applying *Heller* to § 922(g)(9) and finding that a categorical prohibition on domestic violence misdemeanants is not unconstitutional). Additionally, the Fifteenth Circuit explained when deciding the case at bar today that the Constitution does not require opening the floodgates to case-by-case evaluations of individual circumstances in every prosecution under § 922(g). J.A. 69.

Thus, the compelling reasons put forth by Congress for keeping firearms out of the hands of unlawful aliens apply to the Petitioner. The judiciary should not and cannot judge individual unlawful aliens to determine if each shall be beyond the reach of § 922(g)(5). In *Mathews v. Diaz*, the Court clarified that Congress "may decide" that as an alien's tie to this country grows stronger, his claim to the country's bounty may grow as well. *Mathews*, 426 U.S. at 80. As of today, however, Congress has opted not to make that decision regarding § 922(g)(5) and its categorical prohibition stands. Unlawful status renders the Petitioner vulnerable to the kind of elusive life that § 922(g)(5) seeks to counterbalance, and therefore the Petitioner is unable to show that traditional justifications for disarming the class do not apply to him. Even upon strict

scrutiny following the Petitioner's as-applied challenge, 18 U.S.C. § 922(g)(5) will be found constitutional because it is narrowly tailored to achieve a compelling government interest.

To conclude, because 18 U.S.C. § 922(g)(5) does not burden the core of the Second Amendment right, this Court should apply intermediate scrutiny and determine that the statute passes constitutional muster both on a facial challenge and as applied to the Petitioner. However, even if the Court applies strict scrutiny, § 922(g)(5) will survive constitutional analysis on both challenges because the law is narrowly tailored to achieve a compelling government interest. Therefore, because the challenger falls into the class of persons illegally or unlawfully in the United States, the statute will pass any level of judicial scrutiny and will be found constitutional.

CONCLUSION

For the foregoing reasons, the Respondent respectfully requests the Court affirm the judgment of the United States Court of Appeals for the Fifteenth Circuit.

Respectfully submitted,

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CERTIFICATE OF SERVICE

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

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