Case No. 20-165

In the Supreme Court of the United States

SEUNG-WOO "ERIC" CHO,

Petitioner

v.

UNITED STATES OF AMERICA,

Respondent

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

No. 20-165
Hon. John G. Roberts

BRIEF FOR PETITIONER

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Questions Presented

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

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The United States District Court for the District of Euphoria's Judgment denying Petitioner's Motion to Dismiss the Indictment to the United States Court of Appeals for the Fifteenth Circuit is unpublished. Joint Appendix at 65. The United States Supreme Court's Order Granting Petition for Writ of Certiorari is unpublished. J.A. at 74.

Statement of Jurisdiction

The United States Court of Appeals for the Fifteenth Circuit entered judgment on November 15, 2019. J.A. at 61. Petitioner timely filed a Petition for Writ of Certiorari which this Court granted on December 31, 2020. J.A. at 74. This Court's jurisdiction rests on 28 U.S.C. § 1254(1).

Standard of Review

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

Provisions Involved

"A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed." U.S. Const. amend. II.

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

Statement of the Case

Seung-Woo "Eric" Cho, a South Korean national, entered the United States legally in the summer of 1996 at the age of five on an F-1 visa to study at Euphoria City Country Day School. Joint Appendix at 5. Eric's mother was also admitted legally into the United States on an F-1 visa for educational purposes. *Id.* Eric's father stayed in South Korea to financially support Eric and his mother. *Id.* After the Korean debt crisis of 1997, Cho's father's company went bankrupt and he committed suicide, leaving Cho and his mother without a means of financial support. *Id.* Cho's mother stayed with her son in the United States although she could have returned to Korea. *Id.* These tragic events resulted in Eric's transfer to public school, the loss of his F-1 visa, and an illegal status ensued. *Id.* Cho was only seven at the time his mother decided that they would stay in the United States. J.A. at 6. Cho had no family left in Korea, did not speak the language, and shortly remembered nothing of his birth country. J.A. at 15. After some years, Cho felt no allegiance to South Korea, and he stayed in the United States in constant pursuit of becoming a legal citizen. J.A. at 16.

Eric Cho has been granted protection from deportation since Deferred Action for Childhood Arrivals (DACA)'s inception in 2012. J.A. at 65. DACA protection is extended to those with an unblemished criminal record and only after a background check. J.A. at 42. In 2016, after marrying American citizen, Tiffany Keller (now Tiffany Cho), he filed a Form I-485, Application to Register Permanent Residence or Adjust Status. *Id.* This application was pending when Cho was convicted for violating 18 U.S.C. § 922(g)(5). *Id.*

In the late afternoon of November 15, 2017, Tiffany Cho surreptitiously texted Eric Cho to return home immediately as she felt she was in grave danger. J.A. at 71. Tiffany had admitted to her home her brother and his associate, both of whom have a criminal history. *Id.* The associate's erratic and threatening behavior frightened Tiffany. *Id.* She retrieved a handgun which she owned prior to her marriage from the nightstand and waited for her husband to return home. *Id.* Two Euphoria City police officers responded to a neighbor's call complaining of an altercation at Tiffany Cho's townhome, and hearing noises that suggested one or more persons in the residence was in danger, the two officers entered. J.A. at 66. Eric was attempting to calm everyone down

when the police walked in and found him near the chair with the gun underneath. *Id.* Neither officer ever saw Cho holding the gun. *Id.* Nevertheless, officers placed Cho under arrest, and the grand jury for the District of Euphoria indicted Cho on one count of possessing a firearm while being an alien illegally or unlawfully in the United States in violation of 18 U.S.C. § 922 (g)(5). *Id.*

The District Court for the District of Euphoria denied Cho's Motion to Dismiss the Indictment. J.A. at 59. Cho was found guilty at trial and appealed the District Court's denial of his Motion to Dismiss to the United States Court of Appeals for the Fifteenth Circuit. J.A. at 63. The Fifteenth Circuit affirmed the District Court's denial of the Motion to Dismiss the Indictment, and Eric Cho appealed that decision. J.A. at 69.

Summary of the Argument

The right to keep and bear arms for the purpose of self-defense is a preexisting, fundamental, and personal right guaranteed to "the people" by the Second Amendment of the United States Constitution. It is among those fundamental rights necessary to our system of ordered liberty. *McDonald v. City of Chicago*, 561 U.S. 742, 778 (2010). The Supreme Court has recognized that "the people" is a term of art, used in

select sections of the Constitution, referring to those who are "protected by the Fourth Amendment, and by the First and Second Amendments." *United States v. Verdugo-Urquidez*, 494 U.S. 259, 265 (1990). However, this Court has not clarified whether that right extends to noncitizens residing in this country.

When the Second Amendment was drafted, the Framers could not have envisioned the plight of people deemed "illegal" in our society today. The *Heller* Court relied on the use of "the people" in the First and Fourth Amendments to find that the phrase confers an individual right, rather than a collective right. *District of Columbia v. Heller*, 554 U.S. 570, 579 (2008). In all other provisions of the Constitution, the phrase "the people," refers to all members of the political community, and not an unspecified subset. *Id.* at 580. The Court has noted that aliens receive constitutional protections when they have come within the territory and develop substantial connections with the United States. *Verdugo-Urquidez*, 494 U.S. at 270. It follows that noncitizens with significant community connection should also be considered members of "the people" which the Second Amendment protects.

The government's arguments in opposition to noncitizens Second Amendment rights are flawed. The government contends that noncitizens are not included in the Constitution's reference to "the people." But the government offers no defense for the proposition that noncitizens are covered by the First and Fourth Amendments, but not by extension the Second Amendment. If one interprets "the people" as the government argues, as excluding those unlawfully residing in the United States from the protections of the Second Amendment, this renders undocumented persons vulnerable to abuse and inequitable treatment. It does not make sense that "the people" has a different meaning when applied to a noncitizen versus citizen.

If this Court does not extend the Second Amendment rights to all members of the American public, then it should follow the Supreme Court in *Verdugo-Urquidez* and apply the substantial connections test in determining whether a noncitizen possesses Second Amendment rights. *Verdugo-Urquidez*, 494 U.S. at 270. Due to Eric Cho's substantial connection to the United States and this national community, he had a core protected right to defend himself, his wife, and his home from known criminals which greatly outweighs the

government's purported interest of crime control and public safety. Self-defense is a central component entrenched within the Second Amendment and any attempt to impede that right violates the Constitution.

To determine the constitutionality of a challenged law which allegedly discriminates against certain protected classes of people or burdens a fundamental right, the Court applies a two-step inquiry. *United States v. Chovan*, 735 F.3d 1127, 1136 (9th Cir. 2013). The first step when analyzing if a regulation violates core protected Second Amendment conduct is to determine whether and to what extent the challenged law imposes a burden on the rights protected by the Second Amendment. *Id.* If a burden is imposed, the second step directs the Court to apply the appropriate level of means-end scrutiny. *Id.*

The government cannot justify 18 U.S.C. § 922(g)(5) on its face under an appropriately robust heightened judicial scrutiny. Additionally, the government cannot justify applying 18 U.S.C. § 922(g)(5) to Eric Cho under strict scrutiny. Strict scrutiny burdens the government with showing that the law is achieving a compelling interest while being narrowly tailored to promote that interest. *United*

States v. Marzzarella, 614 F.3d 85, 100 (3d Cir. 2010). To be narrowly tailored, the law must be the least restrictive means of serving that governmental interest and the burdening of a significant amount of conduct not implicating that interest is evidence the regulation is insufficiently tailored. *Id*. at 100. The government argues prohibiting noncitizens from possessing firearms is aimed at a compelling government interest of crime control and public safety. Although the interest of keeping firearms out of the hands of presumptively risky individuals might be compelling, the government has failed to make a showing that either all "aliens illegally or unlawfully in the United States" or Eric Cho specifically are of the "presumptively risky" category. The statute at issue is therefore unconstitutional on its face and as applied to Eric Cho. The statute 18 U.S.C. § 922(g)(5) unquestionably infringes on the Second Amendment's core fundamental right and fails strict scrutiny.

Even if the Court applied intermediate scrutiny, the government fails to prove there is a reasonable fit between the interest of crime control and public safety and the conduct regulated by the Second Amendment. *See Chovan*, 735 F.3d at 1139. Therefore, Cho's right to

protect his hearth and home in an emergency situation greatly outweighs any purported government interest and fails intermediate scrutiny. Accordingly, 18 U.S.C. § 922(g)(5) infringes on Cho's Second Amendment right under intermediate scrutiny and is unconstitutional.

Argument

I. Eric Cho is one of "the people" protected by the Second Amendment.

The Second Amendment of the United States Constitution states "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 challenged law in this case, 18 U.S.C. § 922(g)(5), provides that it is unlawful for a person who is illegally or unlawfully in the United States to possess a firearm.

History, text, and precedent indicate that Eric Cho is one of "the people" whose right to keep and bear arms is protected by the Second Amendment.

A. Historically, the Founders understood noncitizens as included within "the people."

Historically, the Founders understood noncitizens as included within "the people" referenced throughout the Constitution. During the

Founding period of this country, "the people" was used as a term of art and each amendment was designed and intended to protect the same group of "persons." *Verdugo-Urquidez*, 494 U.S. at 265. The Framers of the Constitution allotted rights to protect "the people." At the time of the framing, there were no "unlawful" aliens, so it would be refutable to conclude that the Framers had the foresight to exclude such a category of persons. *Id.* at 260. At that time, the United States was often referenced as a melting pot with many cultures and nationalities moving here to begin life anew.

For the first century of existence, the United States welcomed immigrants. As immigration continued through the years, cultural shifts and discrimination created conflicts among Americans frustrated with competition from this influx of new workers. Galia Avramov et al., *Going Global*, Mich. B.J. 46, 46–48 (2001). Litigation involving noncitizens led to U.S. Supreme Court decisions in which the Court determined that undocumented immigrants have constitutional rights. *Yamataya v. Fisher*, 189 U.S. 86, 100-01 (1903).

The phrase "the people" is mentioned throughout the Constitution, particularly in the First, Second, Fourth, Ninth and Tenth

Amendments. The Second Amendment protects "the right of the people to keep and bear arms"; the Ninth and Tenth Amendments provide that certain rights and powers are retained by and reserved to "the people"; and the First and Fourth Amendments protect noncitizens who enter lawfully and reside in the United States. *See, e.g.*, *Almeida-Sanchez v. United States*, 413 U.S. 266, 267-73 (1973); *Bridges v. California*, 314 U.S. 252, 264 (1941); *INS v. Lopez-Mendoza*, 468 U.S. 1032, 1041-50 (1984); *Bridges v. Wixon*, 326 U.S. 135, 161 (1945).

The Court distinguished many cases holding that noncitizens have constitutional rights. For example, in *Bridges v. Wixon*, the Court held the First Amendment protects resident aliens when the government uses an individual's speech against him in potential deportation proceedings. *Wixon*, 326 U.S. at 154. In *Plyler v. Doe*, the Court held the Fourteenth Amendment protects illegal alien child students from the denial of a free public education on account of their immigrant status. *Plyler v. Doe*, 457 U.S. 202, 211-12 (1982). In *Kwong Hai Chew v. Colding*, the Court held a person's due process rights under the Fifth Amendment include resident aliens who have a right to notice and hearing of the allegations alleged before conviction and deportation.

Kwong Hai Chew v. Colding, 344 U.S. 590, 596 (1953). In *Wong Wing v. United States*, the Court held the Fifth and Sixth Amendments protect resident aliens not afforded due process from the threat of imprisonment and hard labor. *Wong Wing v. United States*, 163 U.S. 228, 238 (1896). In *Yick Wo v. Hopkins*, the Court found the Fourteenth Amendment protects resident aliens finding that although the wording of the challenged law was impartial on its face, the law as applied to Yick Wo resulted in biased, unequal enforcement, and thus a discriminatory denial of equal protection. *Yick Wo v. Hopkins*, 118 U.S. 356, 369 (1886).

The Constitution codified rights that preceded this nation's recent complex immigration policy disputes. Therefore, history and precedent show that noncitizens, including Eric Cho, are protected under the Constitution, most importantly here, the Second Amendment.

B. The plain meaning of the phrase "the people" includes noncitizens.

The Second Amendment of the United States Constitution says an individual who is part of "the people" has the right to keep and bear arms. U.S. Const. amend. II. The plain meaning of the phrase indicates that it encompasses individuals who are illegally or unlawfully in the

United States. The first definition of "people" in Black's Law Dictionary is "men, women, and children generally; persons." *People*, Black's Law Dictionary (11th ed. 2019). Undocumented immigrants, including Cho, certainly fall within this definition. In common parlance, "people" is simply a plural form for "person."

There has been debate as to whether "the people" has the same meaning in the Second Amendment as it does in the First and Fourth Amendments. *See United States v. Meza-Rodriguez*, 798 F.3d 664, 670 (7th Cir. 2015). In *Meza-Rodriguez*, the Court decided that the Second Amendment does have the same meaning across the Bill of Rights stating that the First, Second, and Fourth Amendments all codify pre-existing rights and were adopted together. *Id*. The Court in *Verdugo-Urquidez* explained that "the people" is a term of art and shares the same meaning in the First, Second, and Fourth Amendments including people who belong to a national community or who have sufficient connection to the United States. *Verdugo-Urquidez*, 494 U.S. at 265.

Interpreting statutes require a consistent meaning of phrases that appear multiple times within the same statute, or in this case the Bill of Rights. *See Powerex Corp. v. Reliant Energy Servs., Inc.,* 551 U.S. 224,

232 (2007). This logic of textual interpretation is consistent with the Supreme Court's decision in *Verdugo-Urquidez* which groups the amendments together when analyzing what class of persons would be covered by the phrase. *See Verdugo-Urquidez*, 494 U.S. at 265. Therefore, textual construction principles support the plain language reading of the Second Amendment's "the people" to include noncitizens within the protection of the Second Amendment's right to keep and bear arms.

C. Eric Cho has developed substantial connections to the United States as to be considered a part of the national community.

Eric Cho has established substantial connections with the United States as to be considered a part of the national community. As noncitizens increase identity and involvement in their communities, their rights will increase as well. *Johnson v. Eisentrager*, 339 U.S. 763, 770 (1950). Second Amendment protections should be provided to noncitizens when they develop substantial and voluntary connections with the United States. *Verdugo-Urquidez*, 494 U.S. at 260. In *Verdugo-Urquidez*, the judge maintained that a noncitizen establishes "sufficient connections" with the country when he or she is (1) in the United States

"voluntarily" and (2) has accepted "societal obligations." *Id.*; *see also United States v. Portillo-Munoz*, 643 F.3d 437, 443 (5th Cir. 2011) (Dennis, J., concurring in part). However, *Verdugo-Urquidez* did not articulate exactly what an individual must do to meet the above requirements.

Applying the substantial connections test, the Court found Second Amendment rights should have been afforded Meza-Rodriguez given he had lived in the United States for over twenty years. *See Meza-Rodriguez*, 798 F.3d at 670. He attended Milwaukee public schools, his family lived in the city, and he maintained sporadic employment. *Id.* The Court rejected the government's argument that Meza-Rodriguez's questionable traits, including his criminal record, failure to file taxes, and sporadic employment were proof that he had not adequately accepted the obligations of American society. *Id.* at 671. In *Ibrahim v. Department of Homeland Security*, the Court held a Malaysian citizen doctoral student studying at an American University for many years was sufficient to establish substantial voluntary connection to the United States to assert claims against defendants for prospective relief under the First and Fifth Amendments. *Ibrahim v. Dep't of Homeland*

Sec., 669 F.3d 983, 999 (9th Cir. 2012). And in *Martinez-Aguero v. Gonzales*, Maria Martinez-Aguero was a Mexican national who made monthly visits to her aunt through regular and legal entry into the United States with a valid border crossing card. *Martinez-Aguero v. Gonzalez*, 459 F.3d 618, 620 (5th Cir. 2006). The Court held the nature and duration of Martinez-Aguero's contacts with the United States demonstrated her voluntary acceptance of societal obligations such that it constituted substantial connections with the United States to confer Fourth Amendment rights. *Id.* at 625.

In contrast, Verdugo-Urquidez, a Mexican citizen and resident, was involved in the traffic of narcotics. *See Verdugo-Urquidez*, 494 U.S. at 262. He tortured and murdered Drug Enforcement Agent Enrique Camarena Salazar. *Id.* Verdugo-Urquidez was arrested, and his Mexican home searched with authorization by the Director General of the Mexican Federal Judicial Police, but no search warrant from a United States magistrate was received. *Id.* The Court found that the Fourth Amendment concerns "the people" who are part of the national community as contrasted with noncitizens without any substantial connection to the United States. *Id.* at 259. The Court concluded

substantial connections were not proved because Verdugo-Urquidez's presence was involuntary. *Id.* at 271. He had been brought to the United States from Mexico under extradition. *Id.* The Court also failed to mention the impact of Verdugo-Urquidez's narcotics offenses on application of the substantial connections test.

The Board of Immigration Appeals in *In re C-V-T* listed discretionary factors used when reviewing a legal permanent residents cancellation of removal. *In re C-V-T*, 22 Immigration & Naturalization Dec. No. 3342 7, 11 (B.I.A. 1998). The Board notes positive and negative factors that an immigration judge uses in a request for cancellation of removal under INA § 240A. *Id.* These factors include in addition to the criminal record, family ties within the United States, length of residence in the United States, service in the Armed Forces, history of employment, possession of property or business, value and service to the community, and good character. *Id.* As there is no one size fits all approach to the substantial connections and voluntariness test, the above criteria elucidate factors a noncitizen might provide to a court to prove substantial connections and voluntary acceptance of societal obligations.

Eric Cho has established more than sufficient connections with the United States to be considered part of the national community. Cho entered the United States legally and resided here voluntarily for more than twenty years. J.A. at 70. He made constant effort to keep his DACA current while also having a pending green card application. *Id.* Cho has proved an outstanding citizen while living in the United States by developing substantial education, business, professional and family connections. Cho graduated as valedictorian of his Ronald Reagan High School in 2007 and received a full tuition scholarship to Euphoria City University, one of the nation's most prestigious liberal arts universities. *Id.* After graduating high school, Cho started a small business which employs numerous people in the local community. *Id.* He consistently pays federal and state taxes for the business, and individually. *Id.* He has been an active member in his church community by serving in lay ministry roles for many years. *Id.* Cho married his college sweetheart in 2016 and filed a Form I-485, Application to Register Permanent Residence or Adjust Status, almost immediately after the wedding. J.A. at 56. Cho was awarded a full scholarship to the University of Euphoria School of Law, attending part time while he maintained his business,

and earned a spot as the Editor-in-Chief of the law journal and captain of the nationally award-winning Moot Court team. J.A. at 15. He was in his final year when this arrest occurred. *Id*. With the exception of this case, Cho has no criminal record. *Id*.

When a noncitizen can prove substantial and voluntary connection to the United States, an individual should enjoy Second Amendment protection. Cho is significantly involved in American society; thus, Second Amendment rights should apply given his commitment to his American identity and community.

II. The Statute 18 U.S.C. § 922(g)(5) does not withstand strict scrutiny and is unconstitutional.

The Statute 18 U.S.C. § 922(g)(5) does not withstand strict scrutiny and is unconstitutional. In *Heller*, the Court found that the "inherent right of self-defense" is central to the Second Amendment right and conducted a historical analysis from which it determined that the Founders considered the right to keep and bear arms as fundamental. *Heller*, 554 U.S. at 628. After *Heller*, the majority of courts adopted a two-step framework in considering Second Amendment claims. *Chovan*, 735 F.3d at 1136. The two-step Second Amendment inquiry asks whether and to what extent the challenged

law burdens rights protected by the Second Amendment. *Id*. If the law burdens conduct to which the individual has a right, the Court will assess whether the government has a satisfactory public policy basis for the restriction and applies the appropriate level of means-end scrutiny. *Id*. If the government cannot establish that 18 U.S.C. § 922(g)(5) regulates activity that falls outside the scope of the Second Amendment right as it *was understood at the time of the Framing*, then an inquiry into the strength of the government's justification for restricting the exercise of core constitutional rights must be made. *Ezell v. City of Chicago*, 651 F.3d 684, 702–03 (7th Cir. 2011) (emphasis added).

Strict scrutiny applies to Second Amendment challenges to 18 U.S.C. § 922(g)(5). The appropriate level of scrutiny depends on the nature of the regulated conduct and the degree to which the challenged law gets to the core of an individual Second Amendment right. *United States v. Torres*, 911 F.3d 1253, 1262 (9th Cir. 2019). The core right of the Second Amendment is the right of law-abiding, responsible citizens to use arms in defense of hearth and home. *Heller*, 554 U.S. at 635. The burden on that regulated conduct is severe if the individual cannot remove it. *See Torres*, 911 F.3d at 1263.

Laws that significantly burden fundamental rights have generally been subject to strict scrutiny. *See Loving v. Virginia*, 388 U.S. 1 (1967) (applying strict scrutiny to a law burdening the fundamental right to marriage); *Roe v. Wade*, 410 U.S. 113 (1973) (applying strict scrutiny to a law burdening the fundamental right to an abortion); *Brown v. Board of Education*, 347 U.S. 483 (1954) (applying strict scrutiny to a law burdening the fundamental right to equal protection); *Shapiro v. Thompson*, 394 U.S. 618 (1969) (applying strict scrutiny to a law burdening the fundamental right to interstate travel); *City of Boerne v. Flores*, 521 U.S. 507 (1997) (applying strict scrutiny to a law burdening the fundamental right to free exercise of religion). As strict scrutiny applies in cases restricting core, fundamental rights such as these, an individual's defense of hearth and home demands core protection as well.

As the need to be able to defend one's self, family, and property is most acute in the home, the Court acknowledged the core of the Second Amendment is the right of persons to possess common types of firearms for the purpose of defending their home. See *Heller*, 554 U.S. at 627, 635. Thus, strict scrutiny is applied in cases in which a law restricts

this core, fundamental right of self-defense within the home. *See United States v. Masciandaro*, 638 F.3d 458, 467 (4th Cir. 2011).

A. The Statute 18 U.S.C. § 922(g)(5) burdens the core right of the Second Amendment because noncitizens are law abiding.

The Statute 18 U.S.C. § 922(g)(5) burdens the core right of the Second Amendment because noncitizens are law abiding. The *Heller* analysis began with a strong presumption that *all* individuals are entitled to Second Amendment rights as "persons who are part of a *national* community." *Heller*, 554 U.S. at 580 (emphasis added). In nuanced wording, the *Heller* Court indicated that whatever else it leaves to future evaluation, [the Second Amendment] surely elevates above all other interests "the right of law-abiding, responsible citizens to use arms in defense of hearth and home." *Id.* at 635.

"Citizen" is used colloquially to refer to any person. *Heller* itself indicated that the Court does not interpret the Second Amendment to protect the right of citizens to carry arms for *any* sort of confrontation, just as the First Amendment is not interpreted to protect the right of citizens to speak for *any* purpose. *Heller*, 554 U.S. at 595. The Supreme Court has recognized that the First Amendment has long been read as

applying to noncitizens. *Id.*; *see also Wixon*, 326 U.S. at 148 (the Court holding that freedom of speech and press is accorded to noncitizens residing in the United States); *Bridges*, 314 U.S. at 282 (the Court noting that the assurance of First Amendment rights is "everyone's concern"). Similarly, courts discuss the Sixth Amendment as "protecting a right of citizens" just as "accused" references noncitizen criminal defendants as well as citizens. *See United States v. Gouveia*, 467 U.S. 180, 195 (1984). Thus, the Court may reference the rights of "citizens," in cases in which citizenship status is not at issue, without limiting the right to citizens and excluding noncitizens. *See* Eugene Volokh, *Implementing the right to Keep and Bear Arms for Self-Defense: An Analytical Framework and a Research Agenda*, 56 UCLA L. Rev. 1443, 1475-1542 (2009).

The Court in *Heller* identified the right of *law-abiding* citizens, who are part of the political community, to possess common types of firearms for the purpose of defending their home. *Heller*, 554 U.S. at 635 (emphasis added). The Court in *Carpio-Leon* concluded the class of law-abiding members of the political community to whom the Second Amendment gives protection, should not include illegal aliens. *See*

United States v. Carpio-Leon, 701 F.3d 974, 979 (4th Cir. 2012). The opinion, however, confirmed a limited holding indicating illegal aliens by nature of their particular relationship to the United States cannot be considered law-abiding. *Id.* Thus, the Court decided immigrants could not be considered part of the political community. *Id.* "Illegal aliens" were law breakers by their nature and were not guaranteed the right to bear arms. *Id.* The Court held the power to expel or exclude aliens is a "fundamental sovereign attribute exercised by the government's political departments." *Id.; see also Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206, 210 (1953). The *Carpio-Leon* Court reiterated over no conceivable subject is the legislative power of Congress "more complete than it is over the admission of aliens." *Carpio-Leon*, 701 F.3d at 979 (*citing Fiallo v. Bell* 430 U.S. 787, 792 (1977)). Thus, Carpio-Leon holds only that illegal aliens do not fall in the *class* of persons classified as law-abiding members of the political community for Second Amendment purposes and left the decision regarding status to the legislative process.

Heller indicated that use of "the people" within the context of the Second Amendment confers an individual right, rather than a collective

right, and is distinguished from Carpio-Leon which did not address noncitizen individual rights. *See Heller*, 554 U.S. at 579 (emphasis added). This difference is important as most noncitizens are law abiding and have every incentive to act responsibly or risk deportation. Treating all noncitizens as members of a class with no hope of gaining an identity as law-abiding is the very antithesis of our Constitution.

The link between noncitizens and the disarmament of dangerous people is tenuous. A study conducted by the American Immigration Council discovered that although the number of unauthorized immigrants in the United States had tripled from 1990 to 2013, there had been a concurrent reduction in violent crime by forty-eight percent. Walter A Ewing, Daniel E. Martinez & Ruben G. Rumbaut, *The Criminalization of Immigration in the United States,* 1-2 (2015). The study found American citizens more likely to engage in violent crime versus noncitizens. *Id*. It was concluded that noncitizens typically were law-abiding members of their community. *Id*.

Noncitizens have found ways to engage in their communities in the past several decades. They are involved in local political processes, homeowners associations have developed comfortable environments for

noncitizens to be civilly engaged, and churches offer safe venues often providing legal, social services, and language classes. *See* S. Karthick Ramakrishnan & Celia Viramontes, *Civic Spaces: Mexican Hometown Associations and Immigrant Participation*, 66 J. of Soc. Issues 155, 157 (2010). In addition, American-born children of noncitizens having been educated in the United States, are increasingly politically active than in previous years. *Id.*

It is inconceivable that the Court does not intend to include all law-abiding individuals in this important constitutional protection in defense of hearth and home regardless of race, creed, religion, sex, or status. A court's analysis should include a case-by-case review of each individual and whether the person has an established responsible, law abiding connection to their respective community. It is therefore reasonable to extend to a law-abiding noncitizen, such as Cho, the same Second Amendment protections as every other American.

B. The burden on the Second Amendment imposed by 18 U.S.C. 922(g)(5) is severe because it bars noncitizens from exercising their fundamental right of defending hearth and home.

An individual right to keep and bear arms for self-defense is significantly burdened whenever an individual is entirely barred from

owning a gun. Strict scrutiny applies when government action severely burdens the core of the Second Amendment right. *See Torres*, 911 F.3d at 1263. This burden is severe if the regulated conduct is indefinite in time and cannot be removed. *Id*. Some of the statuses that trigger gun laws–minority, being indicted, domestic violence abusers, being a felon in a state with civil rights restoration after conviction–are temporary and may expire in years or even months. *See Chovan,* 735 F.3d at 1142. But denying people the ability to defend themselves with firearms indefinitely remains a severe burden on defense of self, hearth, and home. *See Heller*, 554 U.S. at 592. A noncitizen may have temporary rights to reside or work in this country, but the government has prevented noncitizens this core Second Amendment right despite the lawful temporary status. In some instances, noncitizens are never able to achieve permanent lawful status, yet this bar remains. Noncitizens who have obtained DACA protection and have a pending application to register permanent residence or adjust status, should not be denied their Second Amendment right merely because the government has failed to take action in a timely manner. This is what the government has done to Cho. The right to bear arms is in part aimed at self-defense,

something valuable to all people. Given that the American constitutional tradition generally secures individual rights to citizens as well as noncitizens, the Second Amendment right to bear arms in defense of self, hearth and home, should be treated in the same way.

If complete gun bans on noncitizens in defense of hearth and home are constitutional, they must be constitutional based on their scope. Volokh, *supra* at 1513. There is no more danger imposed by a noncitizen with a gun than a citizen. *Id*. Noncitizen's risk deportation as well as criminal punishment if they possess or misuse a gun. *Id*. Some justifications on who has the right to possess a gun stems from a perception that some people are not trustworthy to possess a firearm. *Id*. With the exception of terrorists who have no problem evading gun laws, few noncitizens pose security risks. *Id*. The challenged law at issue here imposes a complete ban on possession of firearms by noncitizens. This ban must be justified by either showing noncitizens are so unusually dangerous that it is constitutional to entirely prohibit their possession of firearms, or that the Second Amendment excludes noncitizens merely due to their status. Absent this proof, an absolute

permanent ban on noncitizen possession places an extreme burden on the Second Amendment right.

It is a struggle to draw lines that allow governments to serve what is identified as a public interest without allowing undue suppression of individual liberties. However, this total ban on an individual's possession of a gun in defense of hearth and home as in 18 U.S.C. § 922(g)(5), severely burdens central Second Amendment conduct, and when subjected to strict scrutiny fails as unconstitutional.

C. The Statute 18 U.S.C. § 922 (g)(5) fails strict scrutiny on its face and as applied.

For a law to survive strict scrutiny, the government must show a compelling government interest to be addressed and the law must be narrowly tailored to achieve that interest. *Marzzarella,* 614 F.3d at 99. To be narrowly tailored, the law must be the least restrictive means of serving that governmental interest and the burdening of a significant amount of conduct not implicating that interest, is evidence the regulation is insufficiently tailored. *Id.* at 100. The law cannot be overinclusive or underinclusive. *See Citizens United v. Fed. Election Comm'n,* 558 U.S. 310, 362 (2010) (the Court holding the law allowing the government to ban political speech even of media corporations is

both underinclusive and overinclusive). The statute 18 U.S.C. § 922(g)(5) fails strict scrutiny on its face and as applied to Eric Cho.

1. The Statute 18 U.S.C. § 922(g)(5) is facially unconstitutional because it is grossly overinclusive and is not narrowly tailored to a compelling government interest.

The Statute 18 U.S.C. § 922(g)(5) is facially unconstitutional as it is overinclusive and not narrowly tailored to the governmental interest of crime control and public safety. To be narrowly tailored, means the government could not prove a less discriminatory alternative existed, equally or more effectively in accomplishing its legitimate end. *See Marzzarella,* 614 F.3d at 100. The categorical ban on firearm possession by all noncitizens is overinclusive because it prevents noncitizens who are at no more risk of engaging in gun violence than the general population from possessing firearms for the constitutional purpose of defending their hearth and home. The government has the burden to prove that unlawful aliens are more dangerous or commit more crimes than citizens, and they have failed to make such a showing through empirical data and legislative evidence. Justifying 18 U.S.C. § 922(g)(5) under heightened scrutiny is a "demanding" burden and requires legal authority, empirical evidence, or common sense but not mere anecdotes

or supposition. *Binderup v. Att'y Gen.*, 836 F.3d 336, 353–54 (3d Cir. 2016).

The government cannot prove that disarming all noncitizens is the least restrictive means of achieving their objective of crime control. The Court in *Heller*, referred to the basic right of self-defense as a central component of the Second Amendment. *Heller*, 554 U.S. at 592. A right that is inherent, ancient, and pre-existing. *Id*. The Court indicating the right of self-defense should not be tied to citizenship, but rather should be applied to all people, regardless of whether they had substantial connections with the United States or not. *Id*. The Court's reliance on self-defense as one of the core purposes of the Second Amendment would seem to contradict some of the categorical exclusions of people that *Heller* assumed would be constitutional. Noncitizens share the same interest in defending their self, family, and property within their homes. *Id*. at 570. They may be more likely than citizens to be faced with a dangerous situation in which self-defense is necessary. Noncitizens may not be able or willing to seek help from law enforcement due to a legitimate fear of being detained or removed from the United States and perhaps even separated from family. Courts have

recognized an issue arises when noncitizens are in immediate need of protection. *See United States v. Huitron-Guizar*, 678 F.3d 1164, 1170 (2012) (asking "(W)hy exactly should all aliens who are not lawfully resident be left to the mercies of burglars and assailants?") There is no indication that the *Heller* Court intended such a broad deprivation of rights. Therefore, the government must prove that this complete ban is the least restrictive means of achieving their interest of crime control and public safety, and they have provided no such proof.

The legislative history of 18 U.S.C. § 922(g)(5) does not reflect the justifications cited for enforcement against noncitizens given the fact that the statute also applies to noncitizens legally admitted with a nonimmigrant visa. *Meza-Rodriguez,* 798 F.3d at 667. Children who were brought to the United States cannot have intended to break the law when they entered the country. *Id.* at 673. The *Meza-Rodriguez* Court acknowledged that noncitizens may have been too young to form the requisite intent to violate immigration laws. *Id.*

It has been noted that a noncitizen who has been extended DACA protection several times, requiring routine background checks, is not considered of the "risky category." *See generally* Memorandum from

Janet Napolitano, Sec'y, Dep't Homeland Sec., to David V. Aguilar, Acting Comm'r, U.S. Customs & Border Prot., et al. (June 15, 2012). During Appellant's Motion to Dismiss Indictment Hearing, Dr. Joshua Nuñez, Distinguished Professor of Sociology in the School of Social Sciences at the University of Euphoria and the Director of its Center for Migration and Development, testified regarding migration studies. J.A. at 22. Having researched immigration patterns, criminal conduct, interaction with law and immigration enforcement, and demographic shifts in the United States populations, Dr. Nuñez provided data from his research on international migration and refugee movements. *Id*. Citing from the United States Census Bureau's American Community Survey (ACS), Dr. Nuñez reported the number of incarcerated legal and illegal immigrants, and native-born Americans from prison populations in 2016. *Id*. Nuñez indicated, "the incarceration rate for native-born Americans was 1,521 per 100,000, the rate for illegal immigrants was 800 per 100,000, and the rate for legal immigrants was 325 per 100,000." J.A. at 24-25. He maintained noncitizens are approximately forty-seven percent less likely to be incarcerated than natives. *Id*. In addition, Nuñez noted that rates of criminality among the Deferred

Action for Childhood Arrivals (DACA) and The Development, Relief, and Education for Alien Minors Act (DREAMers) populations, both of which include Eric Cho, is very low. *Id*. The same ACS survey research estimated DREAMers had an incarceration rate of .98 percent in 2015 compared to the rate of 1.12 percent among those native-born. J.A. at 25.

The government has produced no evidence sufficient to make a showing that disarming all noncitizens is the least restrictive means of achieving their compelling purpose. Nor can the government prove that all individuals illegally or unlawfully in the United States are dangerous persons and in the "presumptively risky" category to justify such an overly broad policy decision. Thus, on its face, 18 U.S.C. § 922 (g)(5) is overinclusive and the government has not proved the least restrictive means necessary to justify a compelling objective which demands strict scrutiny.

2. The Statute 18 U.S.C. § 922 (g)(5) is unconstitutional as applied to Eric Cho and cannot survive strict scrutiny.

The statute, 18 U.S.C. 922(g)(5), is not narrowly tailored as it applies to Eric Cho to serve the stated compelling government interest of crime control and public safety, as would be necessary to burden his

core protected conduct. The traditional justification for 18 U.S.C. § 922(g)(5) was to "suppress armed violence" by keeping firearms out of the hands of "presumptively risky individuals" who tend to "evade law enforcement" and "pose a greater threat to public safety." *See United States v. Yancey*, 621 F.3d 681, 683–84 (7th Cir. 2010); *see also Meza-Rodriguez*, 798 F.3d at 664; *Huitron-Guizar*, 678 F.3d at 1170. To justify the intended purpose of the challenged statute and apply it to Cho requires his permanent disarmament merely because of his unlawful status or the assumption that Eric Cho is presumptively risky or dangerous. To permanently disarm Cho due to his status is patent racial discrimination. In addition, the government has produced no evidence that Eric Cho specifically should be classified as risky or dangerous. J.A. at 72. These purported purposes the government uses to justify a total gun ban on Cho fails as a severe burden on his Second Amendment rights and cannot survive strict review.

Cho is a DACA recipient who lives within established systems for registration, employment, and identification. J.A. at 69. Eric's core protected Second Amendment conduct allotted him the right to defend himself, his American citizen wife, and his home from known criminals.

J.A. at 41. Eric made constant effort to keep his DACA protection active while in the process of adjusting his citizenship status. *Id*. Cho was not using the firearm recreationally, rather, he was defending his hearth and home, a core right which should not be stripped from him. *Heller*, 554 U.S. at 630-35. Cho should not be penalized by this criminal conviction due to the government's delay in acting on his pending application. A potential prison term for such conduct during an emergency situation such as the facts present, when Eric's immigration status was immutable, would severely burden this Second Amendment right.

In the dissent history of this case, Chief Judge Phyllida Erskine-Brown articulated this point eloquently when she stated, "constitutional rights protect individuals from majoritarian conduct, and the Second Amendment protects individuals from disarmament by the majority." J.A. at 71. Stated another way, the Constitution does not allow for such an overly broad infringement on Second Amendment protections. Here, placing such a significant infringement on Cho's rights while his immigration status was pending, severely burdens his Second Amendment right. Cho should not be penalized for the government's

delays in approving his application. Thus, 18 U.S.C. 922(g)(5), is not narrowly tailored as it applies to Eric Cho to serve the stated compelling government interest of crime control and public safety.

D. Even if the Court determines that Intermediate Scrutiny applies, the Statute 18 U.S.C. § 922 (g)(5) is unconstitutional on its face and as applied to law-abiding individuals such as Cho.

Even if the Court applied the less demanding intermediate scrutiny, the statute would nevertheless fail facially and as applied to law-abiding individuals such as Cho. For a law to survive intermediate scrutiny, the government must show a substantial or significant government interest to be addressed and there must be a reasonable fit between that interest and the conduct regulated by the law. *Chovan,* 735 F.3d at 1139. In Second Amendment challenges, intermediate scrutiny burdens the government with establishing that the regulation imposed by 18 U.S.C. § 922(g)(5) is related to the government's purported interest in crime control and public safety, and there is a reasonable fit between the challenged regulation and the governmental objective. The government has not and cannot make such a showing.

Strict scrutiny is applied in cases in which a law restricts the core, fundamental right, whereas intermediate scrutiny is applied in cases

restricting the *general* individual right. *See Masciandaro*, 638 F.3d at 467 (emphasis added). If *Heller* stands for the proposition that only law-abiding *citizens* are afforded the core protection rights of the Second Amendment defense of hearth and home, intermediate scrutiny would be the appropriate standard for laws burdening the right of defense of hearth and home for a noncitizen. *See Carpio-Leon*, 701 F.3d at 979; *see also Portillo-Munoz*, 643 F.3d at 440 (emphasis added). Courts have indicated that the government has a significant interest in banning possession of firearms by a *class of people* who purposefully evade detection by law enforcement. *Meza-Rodriguez*, 798 F.3d at 673; *see also Torres* 911 F.3d at 1264 (emphasis added). In *Portillo-Munoz*, the Court concluded the Second Amendment does not extend to undocumented immigrants because they are not law-abiding, responsible citizens, members of the political community or Americans. *Portillo-Munoz*, 643 F.3d at 440. In *Meza-Rodriguez,* the Court held Congress's interest in prohibiting persons who may be difficult to track and who have an interest in eluding law enforcement is strong enough to support the conclusion that the government's interest is substantial. *Meza-Rodriguez*, 798 F.3d at 673. Despite providing summary police power

justifications for the ban, the government fails to show any evidence that substantially relates the complete ban on firearm possession by Cho or any other law-abiding individual in defense of home as a reasonable restriction. To identify every noncitizen as a threat to law enforcement or public safety is not reasonable and is nothing more than discrimination against a class of persons.

Intermediate scrutiny requires the government show the law advances an important government objective through a means reasonably fit to that objective. *Chovan,* 735 F.3d at 1139. Reasonable fit does not require the least restrictive means of achieving the purpose, but only that the "significant interest would be achieved less effectively absent the regulation." *Fyock v. Sunnyvale*, 779 F.3d 991, 1000 (9th Cir. 2015). The Court cannot intend to provide citizens the protection of the Second Amendment while noncitizens sit vulnerable within their homes. The home is the individual's sanctuary. There is not a reasonable fit between the immense burden on the individual noncitizen's conduct and the governmental interest in crime control and public safety. This unequal treatment of individuals living within the United States is precisely what the Constitution seeks to prevent.

The government argues disarming Cho is related to controlling crime, ensuring public safety, or protecting law and immigration enforcement officers. But the government produced no proof that Cho is in any way dangerous merely due to his immigration status, race or membership in a class of persons identified as alien. Therefore, Cho cannot be categorically prohibited from possessing firearms in defense of his home absent a showing by the government that such a prohibition furthers a substantial interest, and this statute is reasonably fit to the achievement of that interest. The government cannot prove a reasonable fit merely by creating a class of individuals and arguing the nature of their status serves the objective of crime prevention.

Cho has been an exemplary member of the communities in which he has lived since coming to the United States. At the age of five, Cho legally came to this country with his mother on an F-1 visa. J.A. at 56. At the age of seven, Cho's father lost his business and committed suicide leaving Cho and his mother without the financial resources to support their life in the United States. J.A. at 69. As a result, their visas expired, but Cho and his mother remained in the United States, hopeful to become citizens. J.A. at 70. Cho graduated as Valedictorian

from his high school and university. J.A. at 30-31. The process of becoming a citizen inspired him to attend law school where he has proved to be an outstanding student. J.A. at 14. Cho has maintained gainful employment including owning a business, employing several Americans, and paying federal and state taxes. J.A. at 37. He has close relationships with American citizen family members and other acquaintances. J.A. at 70. Cho has no criminal history with exception of this charge. J.A. at 15. His is the resume of an upstanding citizen, proving insufficient causal connection between this statute's restrictions and the government's interest in public safety.

Cho respects the law and has lived his life to be regarded a responsible, law-abiding individual. The government has provided neither evidence nor data supporting their overbroad, prejudicial generalizations, and as such seem to discriminate against Cho based on nothing other than race. The right to bear arms is not a second-class entitlement and even under intermediate scrutiny, 18 U.S.C. § 922 (g)(5) cannot be a permissible restriction on Mr. Cho's Second Amendment rights.

Conclusion

For the foregoing reasons, Eric Cho prays this Court reverse the Fifteenth Circuit's Order and remand with instructions to vacate the Judgment as Cho should have the constitutional protections afforded him by the Second Amendment.

Respectfully submitted,

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Certificate of Service

Undersigned Counsel for Petitioner 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 14th day of March 2021 to:

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