WE THE PEOPLE, BUT NOT YOU: THE EIGHTH CIRCUIT SAYS UNDOCUMENTED IMMIGRANTS ARE NOT PART OF "THE PEOPLE" WHO MAY BEAR ARMS

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"[W]hy exactly should all aliens who are not lawfully resident be left to the mercies of burglars and assailants?"[1]

I. THE RICOCHET SHOT HEARD ROUND THE WORLD

José Inez García Zárate was homeless in the streets of San Francisco.[2] Zárate had just completed a prison sentence for his fifth illegal entry to the United States and was transferred to San Francisco to face a twenty-year-old marijuana charge that was ultimately dropped.[3] He was on a chair on Pier 14 when he noticed an object wrapped in a T-shirt underneath him.[4] Tragically, that object was a gun, and although Zárate pointed it towards the ground, the gun fired a bullet that traveled nearly eighty feet before hitting and killing Kate Steinle.[5] Zárate faced murder

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[1] United States v. Huitron-Guizar, 678 F.3d 1164, 1170 (10th Cir. 2012) (stating in full "[i]f the [Second Amendment's] 'central component,' as interpreted by *Heller*, is to secure an individual's ability to defend his home, business, or family (which often includes children who are American citizens), why exactly should all aliens who are not lawfully resident be left to the mercies of burglars and assailants?" (citation omitted) (quoting District of Columbia v. Heller, 554 U.S. 570 (2008))).

[2] *See* Richard Gonzales, *Jury Finds Undocumented Immigrant Not Guilty of Murder in Kate Steinle Shooting*, NPR (Nov. 30, 2017, 7:49 PM), https://www.npr.org/sections/thetwo-way/2017/11/30/567625700/jury-in-san-francisco-finds-accused-killer-of-kate-steinle-not-guilty-of-murder [https://perma.cc/WT67-L9AG] (identifying Zárate as a homeless undocumented Mexican immigrant).

[3] *See Man Sentenced to Time Served on Gun Charges Linked to 2015 Killing of Kate Steinle on San Francisco Pier*, CBS NEWS (June 6, 2022, 6:41 PM) [hereinafter *Man Sentenced to Time*], https://www.cbsnews.com/news/kate-steinle-shooting-jose-inez-garcia-zarate-sentenced-to-time-served-on-firearms-charges/ [https://perma.cc/TTM8-SK4V] (reporting "[p]rosecutors declined the case, but the San Francisco sheriff released him from jail despite a federal immigration request to detain him for at least two more days for deportation").

[4] *See id.* (finding Zárate did not know what he was picking up when he picked up an object wrapped in a T-shirt).

[5] *See* Office of the Public Defender, *José Inez García Zárate Is Just Another Innocent Man Who Pled Guilty to a Crime He Did Not Commit*, S.F. PUB. DEF.'S OFF. (Mar. 15, 2022),

charges and national outrage stemming from then-Presidential candidate Donald Trump.[6] The jury acquitted him because it found the gun—which had no manual trigger safety—was inadvertently fired, given that Zárate only had it for a matter of seconds and pointed it towards the ground.[7] Zárate has remained in custody since July 1, 2015, and faces deportation for the federal crime of being an undocumented immigrant in possession of a gun.[8] At Zárate's sentencing in federal court, Judge Chhabria told him, "Let this be your last warning: do not return to this country."[9]

18 U.S.C. § 922 (g)(5)(A) (the Statute) prohibits illegal undocumented immigrants in the United States from possessing, transporting, or receiving firearms.[10] The Second Amendment 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."[11] In *United States v. Verdugo-Urquidez*,[12] the Supreme Court held "the people" was a "term of art" the drafters of the Constitution used to refer to those among the "national community," or those who have otherwise established "sufficient connection" with the United States to be "considered a part of that community."[13] Twenty years later in *District of Columbia v. Heller*,[14] the Court held

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https://sfpublicdefender.org/news/2022/03/jose-inez-garcia-zarate-is-just-another-innocent-man-who-pled-guilty-to-a-crime-he-did-not-commit/ [https://perma.cc/7L8G-5SXR] (stating Zárate picked up the wrapped object and pointed it toward the ground before it fired a single bullet that struck the concrete pavement twelve feet away from Zárate and ricocheted another eighty feet, striking and killing Kate Steinle).

[6] *See* Gonzales, *supra* note 2 (noting Republican presidential nominee Trump "seized" on the killing as he criticized Mexican immigrants and campaigned to build a wall at the border). President Trump further claimed the victim was shot five times, although she was only shot once. *Id.* Kate's father, Brad Steinle, spoke out against this rhetoric on the grounds that Trump did not know his daughter. *Id.*

[7] *See* Office of the Public Defender, *supra* note 5 (identifying that the gun had been stolen by unknown individuals unrelated to Zárate a few days earlier from a federal agent who stored his firearm in a backpack).

[8] *See id.* ("[Zárate] has been in custody since July 1, 2015, after he was wrongfully accused of murder and manslaughter in the shooting death of Kathryn Steinle."); *Man Sentenced to Time*, *supra* note 3 (noting Zárate pled guilty to being an undocumented immigrant in possession of a firearm and that he will be transferred to Texas to face deportation proceedings).

[9] *Man Sentenced to Time*, *supra* note 3 ("'If you return to this country again and you are back in front of me, I will not spare you. Let this be your last warning: do not return to this country,' [Judge] Chhabria said before sentencing . . . Zárate to the time he has already served.").

[10] *See* 18 U.S.C. § 922 (g)(5)(A) (2024). The law recites:

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

Id.

[11] U.S. CONST. amend. II (emphasis added) (giving "the people" the right to "keep and bear [a]rms").

[12] 494 U.S. 259 (1990).

[13] *Id.* at 265. The Court stated:

> "[T]he people" protected by the Fourth Amendment, and by the First and Second Amendments, and to whom rights and powers are reserved in the Ninth and Tenth Amendments, refers to a class of persons who are part of a national community *or who have otherwise developed sufficient connection with this country to be considered part of that community*.

Id. (emphasis added).

[14] 554 U.S. 570 (2008).

there is an individual right of "the people" to bear arms because the Second Amendment at its core protects the right of self-defense.[15]

Circuit courts have taken differing approaches and have reached conflicting results as to whether undocumented immigrants can claim Second Amendment protections.[16] The Fourth, Fifth, and Eighth Circuits have found outright that undocumented immigrants are not afforded Second Amendment rights, while the Second, Seventh, Ninth, Tenth, and Eleventh Circuits have taken a "means-end" approach, ultimately determining that Congress, in passing 18 U.S.C. § 922 (g)(5)(A), lawfully exercised its power to maintain safety and order in banning undocumented immigrants from possessing firearms.[17]

In 2022, the Supreme Court decided *New York State Rifle & Pistol Ass'n, Inc. v. Bruen*,[18] in which Justice Thomas's majority opinion stated that a means-end approach is not appropriate in the Second Amendment context and that the analysis must focus on the text and history of the Second Amendment.[19] In 2023, *United States v. Sitladeen*[20] became the first case to emerge in this circuit split following the *Bruen* decision and reaffirmed the Eighth Circuit's position that undocumented immigrants are never part of "the people."[21]

This Note contends that the Eighth Circuit failed to properly interpret Supreme Court precedent, misapplied *Bruen* by failing to properly consider the scope of the Second Amendment at the time it was ratified, and misinterpreted constitutional text in concluding that all undocumented immigrants are not amongst "the people" protected by the Second Amendment.[22] Part II of this Note examines

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[15] *Id.* at 595 ("There seems to us no doubt . . . that the Second Amendment conferred an individual right to keep and bear arms.").

[16] *See infra* Section II.B (providing a more detailed discussion of the circuit split).

[17] *See id.* (providing further discussion distinguishing the circuit courts that have focused on a textual analysis of the Constitution from those that have focused on the practical aspects of undocumented immigrants possessing firearms).

[18] 142 S. Ct. 2111 (2022).

[19] *See id.* at 2127 (finding that "[d]espite the popularity of this two-step approach, it is one step too many" and that to conform with *Heller*, the test needs to be "rooted in the Second Amendment's text, as informed by history").

[20] 64 F.4th 978 (8th Cir. 2023).

[21] *See id.* at 987 (noting "the law of our circuit is that unlawful aliens are not part of 'the people' to whom the protections of the Second Amendment extend"). For a more in-depth analysis of the Eighth Circuit's decision in *Sitladeen*, see *infra* Part III.

[22] *See Sitladeen*, 64 F.4th at 987 (holding the Second Amendment does not protect undocumented immigrants); United States v. Verdugo-Urquidez, 494 U.S. 259, 271 (1990) (recognizing precedent has established "that aliens receive constitutional protections when they have come within the territory of the United States and developed substantial connections with this country"); District of Columbia v. Heller, 554 U.S. 570, 595 (2008) (holding "[t]here seems to us no doubt, on the basis of both text and history, that the Second Amendment conferred an individual right to keep and bear arms"); Bosse v. Oklahoma, 580 U.S. 1, 3 (2016) (per curiam) (relying on precedent that states "[o]ur decisions remain binding precedent until we see fit to reconsider them, regardless of whether subsequent cases have raised doubts about their continuing vitality" (quoting Hohn v. United States, 524 U.S. 236, 252–53 (1998))); *Bruen*, 142 S. Ct. at 2129–30 (noting the government must justify restrictions on Second Amendment protected conduct by showing "it is consistent with the Nation's historical tradition of firearm regulation"); United States v. Meza-Rodriguez, 798 F.3d 664, 669 (7th Cir. 2015) (finding language in *Heller* supports the conclusion "that all people, including non-U.S. citizens, whether or not they are authorized to be

Supreme Court precedent regarding constitutional understandings of "the people," the extent of the right to bear arms, and the ongoing circuit split over whether any undocumented immigrants are considered part of "the people." Part III examines the facts of *United States v. Sitladeen* and examines the Eighth Circuit's holding and analysis. Part IV argues that under Supreme Court precedent and *Bruen*'s framework, undocumented immigrants with "sufficient connection" to the United States are part of "the people" protected by the Second Amendment. Furthermore, it argues § 922(g)(5)(A) is unconstitutional because there is no historical or tangible evidence to support the government's unfounded fear-based claims that undocumented immigrants cannot be trusted with firearms. Part V concludes by discussing the impact the Eighth Circuit's holding has on other rights of undocumented immigrants and the self-defense rights of undocumented immigrants, their family members, and housemates who may be American citizens.

II. TRIGGERFINGER: "THE PEOPLE" WHO CAN SHOOT

Section A begins by briefly examining the history of the Second Amendment's ratification before turning its attention to Supreme Court jurisprudence regarding undocumented immigrants and the Second Amendment. Section B focuses on the three-sided circuit split over whether undocumented immigrants are part of "the people" and whether § 922(g)(5)(A) unlawfully infringes upon their Second Amendment rights.

A. *"The People" that Can Bear Arms*

The Second Amendment was codified contemporaneously with the other rights enumerated in the Bill of Rights.[23] Prior to the ratification of Bill of Rights, several states had their own versions of the Second Amendment that conferred the right to bear arms only to citizens, but the U.S. Constitution did not and instead conferred

in the country, enjoy at least some rights under the Second Amendment"); United States v. Portillo-Munoz, 643 F.3d 437, 443 (5th Cir. 2011) (Dennis, J., concurring in part and dissenting in part) (arguing individuals who "come to the United States voluntarily and accept[] some societal obligations" have developed sufficient connection and are part of "the people" as envisioned by the Supreme Court in *Verdugo-Urquidez*); Almeida-Sanchez v. United States, 413 U.S. 266 (1973) (discussing the Fourth Amendment rights of Mexican citizens visiting the United States); Pratheepan Gulasekaram, *"The People" of the Second Amendment: Citizenship and the Right to Bear Arms*, 85 N.Y.U. L. REV. 1521, 1527 (2010) (contending "the phrase 'the people' of the Second Amendment cannot be limited to citizens, except through interpretations at odds with an individualized, self defense-related conception of arms bearing"); Karen Nelson Moore, *Aliens and the Constitution*, 88 N.Y.U. L. REV. 801, 808 (2013) (stating "the idea that 'persons' and 'the people' identify a broader class of individuals than citizens—a class that would necessarily encompass aliens—is borne out in the Supreme Court's interpretation of 'the people' in *United States v. Verdugo-Urquidez*"). Judge Moore further acknowledged that the Bill of Rights makes no mention of citizens, contrary to the Constitution's emphasis on citizenship in connection with eligibility requirements for political office, and argued that this "conscious avoidance" of the word "citizen" in the Bill of Rights shows the founders intended for it to expand beyond citizens. *Id.* at 806–07. For further analysis of the Eighth Circuit's holding in *Sitladeen*, see *infra* Part IV.

[23] *See generally* U.S. CONST. amends. I–X (adopting all ten amendments contemporaneously in 1791).

the right to "the people."[24] The Founders did, however, use the word "citizen" in Articles I and II, and some state courts have interpreted the constitutional right to bear arms as belonging only to citizens.[25] In 1968, Congress passed the Gun Control Act, which included a blanket ban on undocumented immigrants' ability to possess firearms.[26] Notably, the act's legislative history lacks statistics to justify the ban.[27]

In *Plyler v. Doe*,[28] a case involving analysis of the Equal Protection Clause, the Supreme Court held that "aliens," regardless of their documented status, are "surely . . . 'person[s]' in any ordinary sense of [the] term."[29] The Court also held that the "Fourteenth Amendment extends to anyone, citizen or stranger, who *is* subject to the laws of a State, and reaches into every corner of a State's territory," and that its protection cannot be altered by one's illegal entry.[30] Judge Moore of the Sixth Circuit

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[24] *See* Pratheepan Gulasekaram, *The Second Amendment's "People" Problem*, 76 VAND. L. REV. 1437, 1494 (2023) (acknowledging "the people" not only appears in the First, Second, and Fourth Amendments, but the phrase is "unadorned by other limitations or descriptions"). Professor Gulasekaram is hesitant to conclude that "the people" is meant to be read uniformly but notes that, if it is, it should be "read in the broadest manner possible to avoid impractical legal procedures and inconsistent outcomes." *Id.* at 1496; *see also The Meaning(s) of "The People" in the Constitution*, 126 HARV. L. REV. 1078, 1093–94 (2013) (finding "several early state constitutions . . . guaranteed the right to bear arms to 'the citizens' or 'every citizen,' but none . . . granted this right to 'all persons,' 'any individual,' or an analogous phrase").

[25] *See* Moore, *supra* note 22, at 806–07 (noting the Constitution's references to citizenship in connection with the eligibility requirements it sets for political officials, including both members of Congress and the President); *The Meaning(s) of "The People" in the Constitution*, *supra* note 24, at 1094 (finding Michigan's Supreme Court in *United States v. Sheldon* held "that the federal Constitution grants 'the citizen the right to keep and bear arms'" (quoting United States v. Sheldon, 5 Blume Sup. Ct. Trans. 337, 346 (Mich. 1829))); Aymette v. State, 21 Tenn. (2 Hum.) 154, 160 (1840) (holding "[t]he citizens have the unqualified right to keep the weapon").

[26] See 18 U.S.C. § 922 (g)(5)(A) (2024); Gun Control Act of 1968, Pub. L. No. 90-618, § 101, 82 Stat. 1213–14 (1968). The purpose of this Act is not:

> to place any undue or unnecessary Federal restrictions or burdens on law-abiding citizens with respect to the acquisition, possession, or use of firearms appropriate to the purpose of hunting, trapshooting, target shooting, personal protection, or any other lawful activity, and that [Title I of this Act] is not intended to discourage or eliminate the private ownership . . . of firearms by law-abiding citizens for lawful purposes . . . .

Id.

[27] *See* Defendant-Appellant's Brief and Required Short Appendix at 10–14, United States v. Meza-Rodriguez, 798 F.3d 664 (7th Cir. 2015) (No. 14-3271), 2015 WL 636261 (noting the government failed to show that a complete prohibition on Second Amendment rights of undocumented immigrants is related to an important governmental interest, the legislative record lacks any such findings, and that if the reason for the prohibition is violence, the statute applies in an overly broad context); *infra* Section IV.C (discussing the lack of any legislative history).

[28] 457 U.S. 202 (1982).

[29] *Id.* at 209–10, 230 (holding that a Texas statute, which withheld state funds from local school districts for educating children who had entered the U.S. illegally and allowed districts to deny their enrollment, violated the Equal Protection Clause of the Fourteenth Amendment due to the lack of a substantial state interest). The Court noted that "[a]liens, even aliens whose presence in this country is unlawful, have long been recognized as 'persons' guaranteed due process of law by the Fifth and Fourteenth Amendments" and are further protected from "invidious discrimination by the Federal Government." *Id.* at 210.

[30] *Id.* at 215 (stating the phrase "'within its jurisdiction' . . . does not detract from, but rather confirms, the understanding that the protection of the Fourteenth Amendment extends to anyone, citizen or stranger, who *is* subject to the laws of a State, and reaches into every corner of a State's territory"). Even if one's initial entry is unlawful, and "for that reason [one can] be expelled," such

argues that this ideology reflects the views of James Madison, who supported the notion that when noncitizens are subject to the laws of the United States, they are also protected by the same laws.[31]

In *United States v. Verdugo-Urquidez*, a case concerning the Fourth Amendment's applicability to noncitizens, the Court held in relevant part that "the people" is a "term of art employed in select parts of the Constitution" and, notably, that it "contrasts with the word[] 'person' . . . used in Articles of the Fifth and Sixth Amendments."[32] The Court further explained that "the people," as used in the Bill of Rights, refers to those who are either a part of the national community or those who have developed "sufficient connection" with the United States to effectively become part of that community.[33] Judge Moore acknowledged that the holding raised questions in determining what connections are sufficient, as some courts have handled the question on a case-by-case basis while others have attempted categorical classification.[34]

In *District of Columbia v. Heller*, the majority held the Second Amendment protects the people's right to bear arms for "traditionally lawful purposes," not necessarily related to serving in a militia.[35] The Court cautioned that the right is "not

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entry "cannot negate the simple fact of [one's] presence within [a] State," and, as a result, one is subject to civil and criminal laws of that state. *Id.* Until one leaves, whether voluntarily or involuntarily, one "is entitled to the equal protection of the laws that [the] State may choose to establish." *Id.*

[31] *See* Moore, *supra* note 22, at 819 (reasoning Justice Brennan's recognition of the principle of reciprocity has been expressed in the past, particularly by James Madison); *see also Plyler*, 457 U.S. at 220 n.19, 223 (noting the rights of noncitizens are not unlimited and the fact undocumented immigrants are here illegally is not some "constitutional irrelevancy").

[32] United States v. Verdugo-Urquidez, 494 U.S. 259, 265–66 (1990) (distinguishing the phrase "the people," as used in the Fourth and Second Amendments, from the word "person," appearing in the Fifth and Sixth Amendments, to demonstrate the Framers' intent for two to have different meanings). The Court further distinguished the term "person" from "the people" because the Fifth and Sixth Amendments regulate procedure in criminal cases. *Id.* at 265–66.

[33] *See id.* at 265 (noting "[c]ontrary to the suggestion of *amici curiae* that the Framers used [the] phrase ['the people'] 'simply to avoid [an] awkward rhetorical redundancy,'" and concluding that the phrase "seems to have been a term of art employed in select parts of the Constitution" (fourth alteration in original) (quoting Brief for Amici Curiae American Civil Liberties Union, ACLU of Southern California, ACLU of San Diego and Imperial Counties, and Center for Constitutional Rights in Support of Respondent at 12, United States v. Verdugo-Urquidez, 494 U.S. 259 (1990) (No. 88-1353), 1989 WL 1127209, at *12 & n.4)). The majority opinion further underscored the Preamble of the Constitution's declaration "that the Constitution is ordained and established by 'the People of the United States.'" *Id.* (quoting U.S. CONST. pmbl.). Furthermore, the opinion stated, "[t]he Second Amendment protects 'the right of the people to keep and bear Arms,' and the Ninth and Tenth Amendments provide that certain rights and powers are retained by and reserved to 'the people.'" *Id.* (quoting U.S. CONST. amend. II). The Court admitted that while the textual similarities are not "conclusive," they do imply "the people" protected by the First, Second, Fourth, Ninth, and Tenth Amendments comprise "a class of persons who are part of a national community or who have otherwise developed sufficient connection with this country to be considered part of that community." *Id.*

[34] *See* Moore, *supra* note 22, at 840–41 (implying the holding of *Verdugo-Urquidez* creates more questions than answers). Moore highlights the Ninth Circuit's previous holding *Verdugo-Urquidez* as requiring courts to "treat[] resident aliens the same as resident citizens for purposes of constitutional analysis." *Id.* at 841 (quoting United States v. Juda, 46 F.3d 961, 967 (9th Cir. 1995)).

[35] *See* District of Columbia v. Heller, 554 U.S. 570, 577, 595 (2008) (holding the Second Amendment confers an individual right to bear arms). The Court used historical analysis to find

unlimited," and also quoted the "sufficient connection" holding from *Verdugo-Urquidez* to note that "the people" "refers to all members of the *political* community, not an unspecified subset."[36] The *Heller* Court provided a list of presumptively lawful regulations restricting Second Amendment rights, including laws banning possession of firearms by felons and the mentally ill, laws prohibiting the carrying of weapons in sensitive places, and laws regulating commercial sales.[37]

Many courts in the circuit split regarding § 922(g)(5)(A)'s ban on undocumented immigrants possessing firearms used a scrutiny-based approach for determining whether § 922(g)(5)(A) was an unjust infringement on Second Amendment rights.[38] In *Bruen*, however, the Supreme Court held that a scrutiny-based approach was improper for this analysis.[39] Rather, assuming the plain text of the Second Amendment protects the conduct in question, the Court held that *Heller* requires courts to assess whether the proposed regulation aligns with the nation's historical regulation of firearms by engaging in a historical analysis to determine if the restriction imposes an impermissible burden.[40] Justice Thomas, writing for the

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Blackstonian influences, the Pennsylvania and Vermont state bills of rights, and the words of legal scholars at the time all reveal a common understanding that the Second Amendment's original purpose was to protect an individual right unconnected with militia service. *Id.* at 582, 601, 605–06. Additionally, "19th-century cases that interpreted the Second Amendment universally support an individual right unconnected to militia service." *Id.* at 610. Furthermore, "of the nine state constitutional protections for the right to bear arms enacted immediately after 1789[,] at least seven unequivocally protected an individual citizen's right to self-defense." *Id.* at 603. Finally, "[i]t was plainly the understanding in the post-Civil War Congress that the Second Amendment protected an individual right to use arms for self-defense." *Id.* at 616.

[36] *Id.* at 580, 595 (emphasis added) (noting "[o]f course the right was not unlimited, just as the First Amendment's right of free speech was not"). The Court reasoned that the Second Amendment is not meant to be read as protecting the right of citizens to carry in any situation. *Id.* at 595. However, it emphasized that "in all six other provisions of the Constitution that mention 'the people,' the term unambiguously refers to all members of the political community, not an unspecified subset." *Id.* at 580. The Court then referred to its precedent in *Verdugo-Urquidez*, distinguishing the "militia" as a subset of "the people," and noted that interpreting the Second Amendment in order to protect only that subset does not work in concert "with the operative clause's description of the holder of that right as 'the people.'" *Id.* at 580–81.

[37] *See id.* at 626–27 (stating nothing in the holding should be considered as casting doubt on longstanding prohibitions on the possession of firearms by certain classes of people). In a footnote, the *Heller* Court further noted that this list of prohibitions is non-exhaustive. *Id.* at 627 n.26.

[38] *See infra* Section II.B (discussing the circuit split and the varying approaches of the different circuit courts).

[39] N.Y. State Rifle & Pistol Ass'n v. Bruen, 142 S. Ct. 2111, 2127 (2022) (reasoning that "despite the popularity of th[e] two-step scrutiny-based approach," the second step is inconsistent with the opinion of *Heller* because the case "do[es] not support applying means-end scrutiny in the Second Amendment context"). Rather, Justice Thomas wrote, "the government must affirmatively prove that its firearms regulation is part of the historical tradition that delimits the outer bounds of the right to keep and bear arms." *Id.* In this case, the regulation at issue concerned the right of individuals to carry a handgun outside the home for self-defense purposes. *Id.* at 2122.

[40] *See id.* at 2126. Specifically, the Court stated:

> To justify its regulation, the government may not simply posit that the regulation promotes an important interest. Rather, the government must demonstrate that the regulation is consistent with this Nation's historical tradition of firearm regulation. Only if a firearm regulation is consistent with this Nation's historical tradition may a court conclude that the individual's conduct falls outside the Second Amendment's "unqualified command."

Id. (quoting Konigsberg v. State Bar of Cal., 366 U.S. 36, 50 n.10 (1961)).

majority, indicated that the understanding of the Second Amendment at the time of ratification should be the main focus of the analysis.[41] But, he did caution against relying on English precedent that came long before the ratification of the Second Amendment or giving too much weight to subsequent regulations far removed from the ratification.[42]

B. *"Better Ask Questions Before You Shoot": Circuits Split on Who Constitutes "The People"*[43]

After *Heller*, nine cases emerged out of eight circuit courts regarding the Second Amendment rights of undocumented immigrants.[44] The Fifth and Eighth Circuits have held that undocumented immigrants are never a part of "the people" under the Second Amendment, while the Fourth Circuit has held that undocumented immigrants are not within the scope of individuals that *Heller* deemed entitled to Second Amendment rights.[45] The Second, Ninth, Tenth, and Eleventh Circuits have all held that even if undocumented immigrants are a part of "the people," 18 U.S.C. § 922 (g)(5)(A) survives intermediate scrutiny or is otherwise an acceptable restriction on Second Amendment rights.[46] The Seventh Circuit, in *United States v. Meza-Rodriguez*,[47] is the only circuit to have acknowledged that some undocumented

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[41] *See id.* at 2136 (reciting *Heller* to find that "[c]onstitutional rights are enshrined with the scope they were understood to have *when the people adopted them*," so regulations in effect at or near the time of the Second Amendment's ratification carry more weight in the analysis than those that came into existence long before or after that period (quoting *Heller*, 554 U.S. at 634–35)); Gulasekaram, *supra* note 24, at 1464–65 (stating "[n]ot surprisingly, *Bruen* does not clarify how future courts, including the lower courts, are supposed to engage in historical inquiry without the benefit of professional historians, expert amicus briefs, or judges trained in historiographical methods").

[42] *See Bruen*, 142 S. Ct. at 2136 ("As with historical evidence generally, courts must be careful when assessing evidence concerning English common-law rights."). Justice Thomas also found, "we must also guard against giving postenactment history more weight than it can rightly bear." *Id.*

[43] BRUCE SPRINGSTEEN, *Lonesome Day*, *on* THE RISING (Columbia Records 2002).

[44] *See infra* Sections II.B.1–3 (discussing the circuit split emerging in the wake of *Heller*).

[45] *See* United States v. Portillo-Munoz, 643 F.3d 437, 442 (5th Cir. 2011) (holding undocumented immigrants are not part of "the people" protected by the Second Amendment); United States v. Flores, 663 F.3d 1022, 1023 (8th Cir. 2011) (per curiam) (adopting the Fifth Circuit's holding in *Portillo-Munoz* in its entirety); United States v. Carpio-Leon, 701 F.3d 974, 981 (4th Cir. 2012) (concluding "illegal aliens do not belong to the class of law-abiding members of the political community to whom the protection of the Second Amendment is given").

[46] *See* United States v. Torres, 911 F.3d 1253, 1263 (9th Cir. 2019) ("For a challenged statute to survive intermediate scrutiny, it must have (1) a 'significant, substantial, or important' government objective; and (2) a reasonable fit between that objective and the conduct regulated" (quoting United States v. Chovan, 735 F.3d 1127, 1139 (9th Cir. 2013), *abrogated on other grounds by* New York Pistol & Rifle Ass'n v. Bruen, 142 S. Ct. 2111 (2022))); United States v. Huitron-Guizar, 678 F.3d 1164, 1167 (10th Cir. 2012) (finding for a challenged statute to survive rational basis review, it need only be shown there is a "rational relationship . . . between the classification and a legitimate government end," although ultimately applying intermediate scrutiny); United States v. Perez, 6 F.4th 448, 454–56 (2d Cir. 2021) (holding, as did the Ninth and Tenth Circuits, that even if undocumented immigrants are amongst "the people," § 922(g)(5)(A) survives intermediate scrutiny and is constitutional). *But see* United States v. Jimenez-Shilon, 34 F.4th 1042, 1044 (11th Cir. 2022) (holding that being a part of "the people" under the Second Amendment is necessary, but alone, is not sufficient to qualify illegal aliens for its protection).

[47] 798 F.3d 664 (7th Cir. 2015)

immigrants are a part of "the people," but it nonetheless found § 922 (g)(5)(A) constitutional.[48]

1. *Fourth and Fifth Circuits Deliver the Kill Shot*

The Fourth and Fifth Circuits have concluded that § 922(g)(5)(A) is constitutional, with the Fifth Circuit (whose opinion was adopted by the Eighth Circuit in a decision before *Sitladeen*) finding undocumented immigrants are not part of "the people" under the Second Amendment and the Fourth Circuit finding they are not within the scope of the rights guaranteed by the Second Amendment.[49] The Fifth Circuit in *United States v. Portillo-Munoz*[50] and the Fourth Circuit in *United States v. Carpio-Leon*[51] reasoned that the *Verdugo-Urquidez* Court never explicitly stated undocumented immigrants were part of "the people" protected by the Fourth Amendment.[52] Even if the Court found they were part of "the people," the Fifth Circuit justified its holding on the grounds that the Fourth Amendment is more extensive than the Second Amendment because the former grants a protective right while the latter grants an affirmative right.[53] The Fifth Circuit concluded Congress is allowed to pass laws applying to noncitizens that would be unconstitutional if applied to citizens.[54]

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[48] *See id.* at 672 (holding that although some undocumented immigrants are amongst "the people" of the Second Amendment, the Statute survives a legal analysis "akin to intermediate scrutiny").

[49] *See Portillo-Munoz*, 643 F.3d at 442 (holding "[w]hatever else the term means or includes, the phrase 'the people' in the Second Amendment of the Constitution does not include aliens illegally in the United States . . . , and we hold that section 922(g)(5) is constitutional under the Second Amendment"); *Flores*, 663 F.3d at 1023 (adopting the view of the Fifth Circuit that "the protections of the Second Amendment do not extend to aliens illegally present in this country"); *Carpio-Leon*, 701 F.3d at 975 (holding "the scope of the Second Amendment does not extend to provide protection to illegal aliens").

[50] 643 F.3d 437 (5th Cir. 2011).

[51] 701 F.3d 974 (4th Cir. 2012).

[52] *See Portillo-Munoz*, 643 F.3d at 440 (explaining how the defendant's argument of having "sufficient connections with the United States to be included in [the] definition of 'the people'" is countered by the notion that it has never been held at the highest level nor by the Fifth Circuit "that the Fourth Amendment extends to a native and citizen of another nation who entered and remained in the United States illegally"); *Carpio-Leon*, 701 F.3d at 978 (noting although the Supreme Court did not rule out that some undocumented immigrants have certain Fourth Amendment rights, it never held that undocumented immigrants were part of "the people"). The courts referred to the Fourth Amendment in these cases because *Verdugo-Urquidez* was a Fourth Amendment case. *See generally* United States v. Verdugo-Urquidez, 494 U.S. 259, 261 (1990) (deciding "whether the Fourth Amendment applies to the search and seizure by United States agents of property that is owned by a nonresident alien and located in a foreign country").

[53] *See Portillo-Munoz*, 643 F.3d at 440–41 (reasoning "[t]he purposes of the Second and Fourth Amendment[s] are different," in that the Second Amendment "grants an affirmative right to keep and bear arms," whereas the Fourth Amendment grants a "protective right" against abusive searches and seizures). Furthermore, the court found that because the Fourth Amendment is a protective right, its definition of "the people" covers a wider group. *Id.* at 441.

[54] *See id.* (stating "[n]either the overnight visitor, the unfriendly agent of a hostile foreign power, the resident diplomat, nor the illegal entrant, can advance even a colorable constitutional claim to a share in the bounty that a conscientious sovereign makes available to its own citizens and *some* of its guests" (alteration in original) (quoting Mathews v. Diaz, 426 U.S. 67, 80 (1976))). In *Lynch v. Cannatella*, the Fifth Circuit further held that "the Constitution does not forbid all

Judge Dennis of the Fifth Circuit dissented from the majority opinion in *Portillo-Munoz* because he felt undocumented immigrants with sufficient connection to the United States were among "the people" the Second Amendment is meant to protect.[55] He considered the defendant's work as a ranch-hand for an American employer, the rental payments he made to his American landlord, and the support he provided for his American girlfriend and daughter as evidence of his connection to the country.[56] Judge Dennis warned that the majority's decision allows millions of similarly situated residents of the United States to be labeled "non-persons" who are barred from enjoying constitutionally guaranteed rights.[57]

In the Fourth Circuit case of *Carpio-Leon*, the defendant raised both Second Amendment and Equal Protection challenges to § 922(g)(5)(A), arguing that the court should apply strict scrutiny because a fundamental liberty was at stake.[58] The Fourth Circuit took a unique approach, avoiding the question of whether undocumented immigrants can be considered part of "the people" because *Heller* was unclear on the matter.[59] Instead, the court employed a historical analysis and reasoned that when the Second Amendment was ratified, the right to bear arms was tied to "virtuous citizenry," thus allowing the government to "disarm" non-virtuous citizens.[60] The court found this history shows undocumented immigrants are not

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differences in governmental treatment between citizens and aliens, or between aliens who have been legally admitted to the United States and those who are present illegally." 810 F.2d 1363, 1373 (5th Cir. 1987).

[55] *See Portillo-Munoz*, 643 F.3d at 443, 445, 447 (Dennis, J., concurring in part and dissenting in part) (noting that because the *Verdugo-Urquidez* court found "the people" in the Fourth and Second Amendments to be the same, and because *Plyler* found "persons" to include aliens, it "would be strange" for the Framers to have contemplated different meanings when "'people' is merely the plural of 'person'").

[56] *See id.* at 447 (recognizing the defendant "is voluntarily present in the United States and has accepted several societal obligations").

[57] *See id.* at 443 (fearing the majority's determination that Portillo-Munoz is not part of "the people" will subject millions of similarly situated residents to unlawful searches and seizures and deny them the ability to "peaceably assemble or petition the government").

[58] *See* United States v. Carpio-Leon, 701 F.3d 974, 982 (4th Cir. 2012) (considering Carpio-Leon's argument that the Second Amendment provides a fundamental liberty and that the Statute impermissibly burdens undocumented workers' right to protect their homes and families).

[59] *See id.* at 978 ("*Heller* does not make clear . . . whether illegal aliens can ever be part of the political community and therefore be included in the class of persons labeled 'the people.'"). The Fourth Circuit acknowledged that *Heller* does make frequent connections between "arms-bearing and 'citizenship.'" *Id.* However, the court noted it "should be cautious . . . in assuming that the [*Heller*] Court defined 'the people' as excluding illegal aliens because the Court used *Verdugo–Urquidez* to explain the meaning of 'the people.'" *Id.*

[60] *See id.* at 978–79 (reasoning it did not have to determine the scope of "the people" because *Heller* concluded that the right of self-defense extends to law-abiding citizens, which in the court's view, cannot include undocumented immigrants). Furthermore, the Fourth Circuit noted that although *Heller* did not face a challenge about "a law prohibiting firearms possession by a particular class of persons," the historical analysis adopted by *Heller* could nonetheless be applied here. *Id.* at 979. When considering the opinions of scholars, the court noted that because "the right to bear arms was tied to the concept of virtuous citizenry . . . , the government could disarm 'unvirtuous citizens.'" *Id.* at 979 (quoting United States v. Yancey, 621 F.3d 681, 684–85 (7th Cir. 2010)). There are several examples of colonial governments barring "suspect populations" from possessing firearms, including when several states during the American Revolution passed laws providing for confiscation of weapons owned by people unwilling to swear allegiance to the United States. *Id.* at

amongst the law-abiding individuals to whom the *Heller* court found the Second Amendment is guaranteed, and therefore are not protected by the Second Amendment.[61]

After rejecting the defendant's argument under the Second Amendment, the Fourth Circuit turned to Carpio-Leon's contention that § 922(g)(5) violated his Fifth Amendment right to equal protection.[62] Having found that an illegal alien's right to bear arms does not constitute a fundamental liberty, the court employed rational basis review to determine whether the Statute violated Carpio-Leon's Fifth Amendment right.[63] Identifying "numerous legitimate reasons why it would be dangerous to permit illegal aliens to arm themselves," the court found a rational basis for the Statute's prohibition.[64] These legitimate reasons included the burden that firearm possession by undocumented immigrants has on commerce, the difficulty authorities face in tracing undocumented immigrants, and Congress's interest in keeping those who have shown disrespect for our laws from possessing firearms.[65]

2. *Second, Ninth, Tenth, and Eleventh Circuits Avoid Crossfire*

The Second, Ninth, Tenth, and Eleventh Circuits have held, assuming undocumented immigrants are part of "the people," that § 922(g)(5)(A) is constitutional because the law is "'substantially related' to an 'important' official

980. "Delegates asked the Massachusetts Ratifying Convention to recommend barring Congress from 'prevent[ing] the people of the United States, who are peaceable citizens, from keeping their own arms.'" *Id.* (alteration in original) (quoting 2 BERNARD SCHWARTZ, THE BILL OF RIGHTS, A DOCUMENTARY HISTORY 681 (Leon Friedman, Karyn Gulien Browne, Joan Tapper, Christine Pinches, Besty Nicolaus & Jeanne Brody eds., 1971)). Additionally, "the prefounding English right to bear arms . . . . allowed the government to disarm those it considered disloyal or dangerous." *Id.*

[61] *See id.* at 982 (holding "the . . . right to bear arms does not extend to *illegal* aliens"). The Fourth Circuit also emphasized that its holding was "limited" and did not mean that any person who commits a crime automatically loses their Second Amendment right. *Id.* at 981. Additionally, the court recognized the special deference Congress receives in these situations. *Id.* at 982.

[62] *See id.* (considering the defendant's claim that the statute "violate[d] his right to equal protection under the Due Process Clause of the Fifth Amendment").

[63] *See id.* (noting rational basis review applies when no fundamental right is at issue). For a discussion of the requirements of rational basis review, see *supra* note 46.

[64] *See id.* at 982–83 (highlighting the likelihood that illegal immigrants will engage in "further misfeasance" and "resort to illegal activities to maintain a livelihood" as giving rise to a legitimate government interest for restricting their right to bear arms (first quoting United States v. Huitron-Guizar, 678 F.3d 1164, 1170 (10th Cir. 2012), and then quoting United States v. Toner, 728 F.2d 115, 128–29 (2d Cir. 1984))).

[65] *See id.* (finding the defendant "cannot show that there is no rational relationship between prohibiting illegal aliens from bearing firearms and the legitimate government goal of public safety"). Some of the reasons courts have identified in the past for this relation include that illegal aliens are "harder to trace and more likely to assume a false identity," and that "Congress may have concluded that those who show a willingness to defy [the] law are candidates for further misfeasance." *Id.* at 983 (quoting *Huitron-Guizar*, 678 F.3d at 1170). Additionally, Congress has the power to "make rules as to aliens that would be unacceptable if applied to citizens." *Id.* (quoting Demore v. Kim, 538 U.S. 510, 522 (2003)). The Omnibus Crime Control and Safe Streets Act of 1968 further establishes a rational basis by noting that possession of firearms by illegal aliens would be "(1) a burden on commerce or threat affecting the free flow of commerce, (2) a threat to the safety of the President of the United States and Vice President of the United States," and, overall, "a threat to the continued and effective operation of the Government of the United States." *Id.* (quoting Omnibus Crime Control and Safety Act of 1968, Pub. L. No. 90-351, § 1201, 82 Stat. 236 (1968)).

end."[66] These circuits found *Heller*'s use of "citizens" inconclusive, and because the Statute was constitutional regardless of how "the people" is defined, deemed it unnecessary to address the issue themselves and instead opted to avoid the matter to prevent complicating their jurisprudence with difficult questions.[67] The Ninth Circuit in *United States v. Torres*[68] and the Tenth Circuit in *United States v. Huitron-Guizar*[69] found the Statute constitutional because the right to bear arms only extends to law-abiding citizens, and Congress has the power to "keep guns out of the hands of presumptively risky people."[70] Furthermore, along with the Second Circuit in *United States v. Perez*,[71] these courts reasoned that Congress has a legitimate interest in banning undocumented immigrants from possessing firearms because they live outside the formal system, making them untraceable.[72] Additionally, the

[66] *See Huitron-Guizar*, 678 F.3d at 1169–70 (concluding Congress's lawful "power to distinguish between citizens and non-citizens . . . and to ensure safety and order" withstands the defendant's challenges); United States v. Torres, 911 F.3d 1253, 1264–65 (9th Cir. 2019) (holding "[t]he present state of the law leaves us unable to conclude with certainty whether aliens unlawfully present in the United States" have Second Amendment rights, but that either way, "§ 922(g)(5) is a valid exercise of Congress's authority"); United States v. Perez, 6 F.4th 448, 456 (2d Cir. 2021) (finding "§ 922(g)(5) does not substantially burden any Second Amendment right to bear arms" as to the defendant); United States v. Jimenez-Shilon, 34 F.4th 1042, 1044 (11th Cir. 2022) (holding undocumented immigrants are lawfully restricted from exercising Second Amendment rights).

[67] *See Huitron-Guizar*, 678 F.3d at 1169 (refusing to read a citizens' only right into *Heller* because (1) the case addressed a "large and complicated" question, and (2) *Heller* was the "first in-depth examination of the Second Amendment" by the Supreme Court (quoting District of Columbia v. Heller, 554 U.S. 570, 635 (2008))). The Tenth Circuit did note, however, that the Supreme Court has traditionally focused on what the scope of the right was at ratification. *Id.* The Tenth Circuit highlighted that "the founders' notion of citizenship was less rigid than ours," but the court ultimately forfeited the opportunity to settle the debate over who "the people" are. *Id.*; *Perez*, 6 F.4th at 453 (stating that because *Heller* left a large swath of Second Amendment jurisprudence questions unanswered, the risk of "introducing difficult questions into [the circuit's] jurisprudence" was too high to justify an inquiry into whether Perez was among "the people" (quoting United States v. Jimenez, 895 F.3d 228, 234 (2d Cir. 2018))); *Jimenez-Shilon*, 34 F.4th at 1045 ("[h]appily" declining to answer whether the defendant was among "the people").

[68] 911 F.3d 1253 (9th Cir. 2019).

[69] 678 F.3d 1164 (10th Cir. 2012).

[70] *Torres*, 11 F.3d at 1263–64 (quoting United States v. Meza-Rodriquez, 798 F.3d 664, 673 (2015)) (finding the undocumented defendant "was not a 'law-abiding, responsible citizen'" that the Second Amendment protects and, as a result, he did not have the "asserted right to possess a firearm for self-defense" (quoting United States v. Chovan, 735 F.3d 1127, 1138 (9th Cir. 2013))). The court went on to agree with the government's arguments "that it has important 'interests in crime control and public safety,'" and acknowledged the government's interest in "ensuring the safety of both the public and its public officers." *Id.* at 1263 (quoting Mahoney v. Sessions, 871 F.3d 873, 882 (9th Cir. 2017)); *Huitron-Guizar*, 678 F.3d at 1168–70 (recognizing one of the main purposes of the Gun Control Act of 1968 was to keep firearms out of potentially dangerous hands and that the "alien-in-possession ban was incorporated from a predecessor statute by the 1986 Firearm Owners' Protection Act, [which] likewise [had the] purpose of keeping [firearms] away from those deemed irresponsible or dangerous" (citation omitted)).

[71] 6 F.4th 448 (2d Cir. 2021).

[72] *See id.* at 455–56 (finding the statute is "substantially related to the achievement of an important government interest" because "(1) preventing individuals who live outside the law from possessing guns, (2) assisting the government in regulating firearm trafficking by preventing those who are beyond the federal government's control from distributing and purchasing guns, and (3) preventing those who have demonstrated disrespect for our [Nation's] laws from possessing firearms" are all factors that further an interest in public safety (quoting N.Y. State Rifle & Pistol

Tenth Circuit found undocumented immigrants are not entitled to the "full panoply" of rights that American citizens possess.[73] The Ninth Circuit found the burden on the right to bear arms "tempered" because undocumented immigrants could theoretically become documented and be entitled to the rights of the Second Amendment.[74]

In *United States v. Jimenez-Shilon*,[75] the Eleventh Circuit examined constitutional text and history to determine "the people" is a narrower term than "persons" but a broader one than "citizens."[76] The court found that the English common law limited the right to bear arms to citizens, a viewpoint echoed in the Americas as gun laws did not originally apply to "all New World residents."[77] It further reasoned that

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Ass'n v. Cuomo, 804 F.3d 242, 261 (2d Cir. 2015))); *Huitron-Guizar*, 678 F.3d at 1700 (explaining that these individuals are harder to trace because they live "largely outside the formal system," and while "[i]t is surely a generalization to suggest . . . that unlawfully present aliens, as a group, pose a greater threat to public safety," controlling crime and keeping the public safe are "indisputably 'important' interests"); *Torres*, 911 F.3d at 1264 (finding "[unlawful aliens] often live 'largely outside the formal system of registration, employment, and identification, [and] are harder to trace and more likely to assume a false identity'" (alterations in original) (quoting *Meza-Rodriguez*, 798 F.3d at 673)).

[73] *See Huitron-Guizar*, 678 F.3d at 1170 ("Congress may have concluded that illegal aliens, already in probable present violation of the law, simply do not receive the full panoply of constitutional rights enjoyed by law-abiding citizens.").

[74] *See Torres*, 911 F.3d at 1263 (finding the burden "tempered . . . because there is nothing indicating that the prohibition on firearm possession extends beyond the time that an alien's presence in the United States is unlawful"). The court distinguished § 922(g)(9)'s prohibition from similar bans on those with a domestic violence misdemeanor because "[t]he factual condition triggering the prohibition in § 922(g)(9)—that a person '*has been* convicted' of a domestic violence demeanor—is phrased in the past tense," showing that that the ban is permanent after one commits domestic violence. *Id.* (quoting 18 U.S.C. § 922(g)(9), (5)). Thus, the court concluded that if one applies for and secures citizenship the ban no longer applies. *Id.*

[75] 34 F.4th 1042 (11th Cir. 2022).

[76] *See id.* at 1045 (noting "[t]he Constitution's text shows that when the Framers meant to limit a provision's application to '[c]itizen[s]' . . . , they did so expressly," and further that *Huitron-Guizar* shows that "the phrase 'the people' sits somewhere in between" the terms "citizens" and "persons" (third alteration in original) (first quoting U.S. CONST. art. 1 § 2, cl. 2; and then quoting *Huitron-Guizar*, 678 F.3d at 1168)). The court reasoned that *Heller* called for an examination of the Second Amendment's "text and history," and that "it was 'widely understood that the Second Amendment, like the First and Fourth Amendments, codified a *pre-existing* right' held by the colonists." *Id.* at 1046 (quoting District of Columbia v. Heller, 554 U.S. 570, 592 (2008)). Furthermore, the nation's "English ancestors drew a sharp distinction between" the rights and privileges of citizens as opposed to the alien. *Id.* at 1047. Citizens enjoyed "'a great[er] variety of rights,' including 'that of having arms for their [defense], suitable to their condition and degree.'" *Id.* (quoting 1 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 143, 371 (1765)). The rights of undocumented immigrants were "much more circumscribed," and as Blackstone took it, it was the power of nations "to take such measures about the admission of strangers as they [thought] convenient." *Id.* (alteration in original) (quoting BLACKSTONE, *supra* note 76, at 259, 371).

[77] *Id.* at 1047 (quoting JOYCE LEE MALCOLM, TO KEEP AND BEAR ARMS: THE ORIGINS OF AN ANGLO-AMERICAN RIGHT 140 (1994)) ("[S]everal colonies enacted 'complete bans on gun ownership' by slaves and Native Americans." (quoting Adam Winkler, Heller*'s Catch-22*, 56 UCLA L. REV. 1551, 1562 (2009))). Furthermore, "some of the colonies disarmed white aliens, who weren't members of the polity," and those unwilling to "support the Revolution were ordered to turn over their guns." *Id.* at 1047–48 (quoting ADAM WINKLER, GUN FIGHT: THE BATTLE OVER THE RIGHT TO BEAR ARMS IN AMERICA 116 (2011)).

the Second Amendment was codified to protect against the disarmament of citizens, but that such protection "did not extend . . . to persons outside the national polity."[78]

Several of these circuits concluded that by narrowing their holdings or expressing skepticism, their decisions would not impact the other rights undocumented immigrants enjoy—a result the Eleventh Circuit considered in *Jimenez-Shilon*.[79] Furthermore, the Tenth Circuit raised concerns about the tension between the Supreme Court's recognition of self-defense as the core of the Second Amendment and the fact that undocumented immigrants are prohibited from using firearms to protect themselves from dangerous individuals.[80]

3. *Almost the Lone Gun: Seventh Circuit Finds Some Undocumented Immigrants Are Part of "The People," but Gun Restrictions Are Lawful*

The Seventh Circuit is the only Federal Circuit to hold at least some undocumented immigrants have Second Amendment rights.[81] The court in *United States v. Meza-Rodriguez* found *Heller*'s usage of "citizens" to be inconclusive in determining the scope of "the people" protected under the Second Amendment.[82] The Seventh Circuit reasoned that by highlighting the similarities between the First, Second, and Fourth Amendments, the Supreme Court implied in *Heller* that "the people" means the same thing in all three amendments because they were "adopted

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[78] *Id.* at 1048–49 (quoting authority for the notion that the Second Amendment "seems to have codified [the] principle" that "Congress shall never disarm any Citizen unless such as are or have been in Actual Rebellion" (quoting THE COMPLETE BILL OF RIGHTS: THE DRAFTS, DEBATES, SOURCES, AND ORIGINS 275 (Neil H. Cogan ed., 2d ed. 2015)). However, for "persons outside the national polity[,] . . . the ability to keep and bear arms remained subject to governmental regulation." *Id.* at 1049.

[79] *See id.* at 1049–50 (warning nothing in the opinion "is to suggest that illegal aliens in the United States have no constitutional rights whatsoever," but that "consistent with the Second Amendment's text and history, they do not enjoy the right to keep and bear arms").

[80] *See Huitron-Guizar*, 678 F.3d at 1170 ("[C]ourts must defer to Congress as it lawfully exercises its constitutional power to distinguish between citizens and non-citizens, or between lawful and unlawful aliens, and to ensure safety and order."). Despite its holding, the court opined "[i]f the right's 'central component,' as interpreted by *Heller*, is to secure an individual's ability to defend his home, business, or family (which often includes children who are American citizens), why exactly should all aliens who are not lawfully resident be left to the mercies of burglars and assailants?" *Id.* (citation omitted) (quoting *Heller*, 554 U.S. at 599).

[81] *See* United States v. Meza-Rodriguez, 798 F.3d 664, 671–72 (7th Cir. 2015) (holding that because Meza-Rodriguez was able to show he had sufficient connection to the United States, he was entitled to Second Amendment protections). "[Defendant] Meza-Rodriquez was brought to [the U.S.] by his family when he was four or five years old," and "[w]ithout ever regularizing his status," he remained in the country from then on. *Id.* at 666. Until his removal due to his violation of the Statute, Meza-Rodriguez had resided in the United States for twenty years. *Id.* at 671. The court recognized the Meza-Rodriguez's "extensive ties with this country," acknowledging that he "attended public schools in Milwaukee, developed close relationships with family members and other acquaintances, and worked (though sporadically) at various locations." *Id.* at 670–71.

[82] *See id.* at 669 (beginning its analysis by questioning "whether the Second Amendment protects unauthorized non-U.S. citizens" in the country). After laying out the text of the Second Amendment and the holding of *Heller*, the court acknowledged the circuit split over whether the Second Amendment extends to undocumented immigrants and noted that *Heller* itself did not address the issue. *Id.*

as a package."[83] Additionally, the Seventh Circuit explained that the Framers used the word "citizens" as opposed to "people" when they wanted to in the Constitution.[84] The court turned to *Verdugo-Urquidez* as precedent and employed the sufficient connection test.[85]

In *Meza-Rodriguez*, the court found that the defendant developed a sufficient connection because he had lived in the United States nearly his entire life, but also that his "ability to invoke the Second Amendment [did] not resolve [the] case."[86] The court then applied heightened scrutiny to find Congress did not "impermissibly restrict" the defendant's Second Amendment rights.[87] The court found Congress acted appropriately in keeping guns away from untraceable noncitizens but questioned whether undocumented immigrants were inherently dangerous.[88]

III. "DON'T TAKE YOUR GUNS TO (AMERICA)": THE EIGHTH CIRCUIT

[83] *Id.* at 669–70 ("Other language in *Heller* supports the opposite result: that all people, including non-U.S. citizens, whether or not they are authorized to be in the country, enjoy at least some rights under the Second Amendment."). The Seventh Circuit underscored the Supreme Court's comparison of the First, Second, and Fourth Amendments, finding the Court's analysis to "imply[] that the phrase 'the people' . . . has the same meaning in all three provisions." *Id.* at 669. The court continued by stating that interpreting "the Second Amendment as consistent with the other amendments . . . has the advantage of treating identical phrasing in the same way" and appreciating that the Bill of Rights was "adopted as a package." *Id.* at 670.

[84] *See id.* at 669 (referring to the usage of the word "citizen" in Article I, section 2, paragraph 2, and Article II, section 1, paragraph 5 to conclude that that "the drafters of the Constitution used the word 'citizen' when they wanted to do so").

[85] *Id.* at 670 (quoting *Verdugo-Urquidez*, which stated, "'the people' protected by the Fourth Amendment, and by the First and Second Amendments, and to whom rights and powers are reserved in the Ninth and Tenth Amendments, refers to a class of persons who are part of a national community or who have otherwise developed sufficient connection with this country to be considered part of that community" (quoting United States v. Verdugo-Urquidez, 494 U.S. 259, 265 (1990))).

[86] *Id.* at 672 (finding Meza-Rodriguez clearly satisfied the sufficient connection test, and although his behavior "left much to be desired," it did not mean he lacked substantial connection with the United States). Furthermore, the Seventh Circuit looked to *Plyler* to find that the Supreme Court supports the notion that "even unauthorized aliens enjoy certain constitutional rights," and that post-*Heller*, there is no "principled way" to preclude unauthorized aliens from claiming rights under the Second Amendment and creating a second class of "people." *Id.*

[87] *See id.* at 672–73 ("The Supreme Court has steered away from prescribing a particular level of scrutiny that courts should apply to categorical bans on the possession of firearms by specified groups of people, though it has said that rational-basis review would be too lenient."). The Seventh Circuit noted that precedent informing its consideration of the Statute requires "'some form of strong showing' akin to intermediate scrutiny." *Id.* at 672 (quoting United States v. Skoien, 614 F.3d 638, 641 (7th Cir. 2010) (en banc)).

[88] *See id.* at 672–73 (agreeing with the position that unauthorized undocumented immigrants "live 'largely outside the formal system of registration, employment, and identification,'" which in itself is a strong showing that supports Congress's interest in "keep[ing] guns out of hands of presumptively risky people" (first quoting United States v. Huitron-Guizar, 678 F.3d 1164, 1170 (10th Cir. 2012), then quoting *United States v. Yancey*, 621 F.3d 681, 683–84 (7th Cir. 2010))). The government also tried to argue that "unauthorized immigrants are more likely to commit future gun-related crimes than . . . the general population," but the Seventh Circuit had doubts as to the accuracy of the government's claim. *Id.* at 673.

MISSES THE MARK AGAIN[89]

The Eighth Circuit further analyzed the scope of the Second Amendment as it related to undocumented immigrants in *United States v. Sitladeen*.[90] The court reaffirmed its past precedent with a much more detailed opinion that ultimately found that the plain text of the Second Amendment does not protect undocumented immigrants.[91] Finding no fundamental liberty at stake, the court applied rational basis review to assess the defendants' Fifth Amendment challenge and found Congress could have had a rational basis for § 922(g)(5)(A).[92] Section A discusses the factual background and procedural history of *Sitladeen*. Section B discusses the court's holding and reasoning for its decision.

A. *On the Run: Fast Facts of* United States v. Sitladeen

In January 2021, Dayne Sitladeen and Muzamil Addow were driving on a Minnesota highway at about 100 miles per hour.[93] They were pulled over and gave false identification and inconsistent statements to a state trooper.[94] The trooper smelled marijuana and the men gave the trooper consent to a partial search of the vehicle; the search turned up close to seventy guns and other gun paraphernalia.[95] Both men were arrested, and officers discovered both were Canadian and in the United States illegally.[96] Furthermore, there was a warrant out for the arrest of Sitladeen in Canada for murder and fentanyl trafficking.[97] Both men were indicted for "possession of a firearm by an alien unlawfully present in the United States in violation of § 922(g)(5)(A)."[98]

Sitladeen and Addow moved to dismiss the charges on several grounds, arguing that § 922(g)(5)(A) violated (1) their Second Amendment rights to keep and bear arms, and (2) their rights to equal protection under the Due Process Clause of the

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[89] JOHNNY CASH, *Don't Take Your Guns to Town*, *on* THE FABULOUS JOHNNY CASH (Columbia Records 1958).

[90] *See infra* Part III.

[91] *See* United States v. Sitladeen, 64 F.4th 978, 983–87 (8th Cir. 2023) (holding that undocumented immigrants are not part of "the people" entitled to Second Amendment rights); United States v. Flores, 663 F.3d 1022, 1022–23 (8th Cir. 2011) (per curiam) (providing no reasoning of its own, and simply adopting the Fifth Circuit's holding in *Portillo-Munoz* that undocumented immigrants are not part of "the people" to whom Second Amendment rights are guaranteed).

[92] *See Sitladeen*, 64 F.4th at 988–89 (finding the defendant was not part of a suspect class, nor was the Second Amendment a fundamental liberty as applied to him as an undocumented immigrant).

[93] *See id.* at 982 (describing the facts that led to the traffic stop).

[94] *See* United States v. Sitladeen, No. 21-CR-35, 2021 WL 3721850, at *1 (D. Minn. Aug. 23, 2021) [hereinafter *Sitladeen I*] ("Defendants gave false identification and inconsistent statements to the officer . . . .").

[95] *See id.* (recounting that Addow gave consent for a "partial search," and during the search, the officer found the contraband); *see also Sitladeen*, 64 F.4th at 982 (identifying the weapons recovered during the trooper's partial search).

[96] *See Sitladeen*, 64 F.4th at 982 (highlighting the defendants' nationality and their illegal presence within the U.S.).

[97] *See id.* (acknowledging the Canadian arrest warrant out for Sitladeen).

[98] *Id.* (discussing the indictment).

Fifth Amendment.[99] The district court denied the motions and held its prior decision in *United States v. Flores*[100] controlled, therefore concluding the Second Amendment did not apply to "illegally present" aliens.[101] In considering the Fifth Amendment challenge, the district court applied rational basis review and found that § 922(g)(5)(A) survives such scrutiny because there is a rational relationship between the statute and the government's interest in public safety.[102] Sitladeen then conditionally pled guilty, but reserved his right to appeal the denial of his motions to dismiss.[103]

B. *Shot Down: The Eighth Circuit Holds the Second Amendment Is Not a Fundamental Liberty for Undocumented Immigrants*

The Eighth Circuit reaffirmed its decision in *Flores* that "unlawful aliens" are not part of "the people" protected by the Second Amendment.[104] The court reasoned *Heller*'s language about "law-abiding, responsible citizens" presumptively excludes undocumented immigrants.[105] The court also highlighted that across this circuit split, every circuit has come to the same conclusion: that § 922(g)(5)(A) is constitutional regardless of whether undocumented immigrants are amongst "the people."[106]

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[99] *See id.* (stating the defendants' alleged grounds for dismissal); United States v. Sitladeen, No. 21-CR-35, 2021 WL 4046396, at *3 (D. Minn. Jun. 24, 2021) [hereinafter *Sitladeen II*] (same).

[100] 663 F.3d 1022 (8th Cir. 2011) (per curiam).

[101] *Sitladeen II*, 2021 WL 4046396, at *3 ("Under this controlling precedent, Defendants are simply not entitled to constitutional protections under the Second Amendment. Thus, the Court concludes that 18 U.S.C. § 922(g)(5) withstands Defendants' Second Amendment challenge."); *see also Flores*, 663 F.3d at 1023 (stating its holding).

[102] *See Sitladeen I*, 2021 WL 3721850, at *3 ("'[T]here is a rational relationship between Section 922(g)(5) and 'the legitimate government goal of public safety.'" (quoting United States v. Carpio-Leon, 701 F.3d 974, 982 (4th Cir. 2012))).

[103] *See id.* at *1 (noting Sitladeen's plea).

[104] *See Sitladeen*, 64 F.4th at 988–89 (applying rational basis review because there is no fundamental liberty at stake and holding "unlawful aliens" do not have Second Amendment rights). The court reasoned there was rational basis for § 922(g)(5)(A) because unlawfully present aliens are difficult to track, those unlawfully present in the United States are more likely to acquire guns through unlawful channels, and Congress is allowed to pass laws affecting aliens that would be unconstitutional if applied to citizens. *Id.* at 989 (quoting Demore v. Kim, 538 U.S. 510, 522 (2003)).

[105] *See id.* at 983–84 (defining the Second Amendment and noting *Heller*'s recognition of an individual's right under the Second Amendment to keep and bear arms). The court explained that although the *Flores* opinion was brief, there is no mistake the court in *Flores* considered whether the plain text of the Second Amendment made the statute permissible and determined "unlawfully present aliens" are not included in "the people." *Id.* at 985 ("[I]t is unmistakable that our holding in *Flores* is about the plain text of the Second Amendment . . . ."). Furthermore, Flores's challenge was the same as Sitladeen's. *Id.* The court again relied on *Portillo-Munoz*'s holding: "Whatever else the term means or includes, the phrase 'the people' in the Second Amendment of the Constitution does not include aliens illegally in the United States." *Id.* at 984 (quoting United States v. Portillo-Munoz, 643 F.3d 437, 442 (5th Cir. 2011)).

[106] *See id.* (noting its decision in *Flores* aligned with the Fifth Circuit's decision in *Portillo-Munoz*, and that several circuits parted ways with their interpretations that "the people" does not include undocumented immigrants). The court went on to explain that "[t]he Second, Ninth, and Tenth Circuits have assumed, without deciding, that the Second Amendment may apply to unlawfully present aliens but that § 922(g)(5)(A) is nonetheless constitutional because it satisfies some measure

After *Bruen* was decided, Sitladeen insisted the Eighth Circuit revisit its own precedent, but the court found *Bruen* first did not acknowledge the meaning of "the people" and then confirmed the scrutiny-based approach was improper for Second Amendment analyses.[107] Instead, the Eighth Circuit employed a historical test in light of *Bruen* that asked: (1) "whether the firearm regulation at issue governs conduct that falls within the plain text of the Second Amendment"; and if so, (2) whether "the government can 'identify an American tradition' justifying" the regulation.[108] If the court can answer both questions in the affirmative, the regulation in question will be upheld.[109]

The Eighth Circuit determined that moving to the second prong of the *Bruen* analysis was unnecessary because undocumented immigrants are not part of the people, and thus the conduct at issue did not fall within "the plain text" of the Second Amendment.[110] The court acknowledged that its "scope of the right" approach is unpopular with several other circuits and found that contrary to circuits that have applied *Bruen* by focusing on an individual's conduct rather than status, *Bruen* ought to focus on whether the conduct at issue is "'covered by' the Second Amendment's 'plain text,'" not the conduct of a particular individual.[111] The Eighth Circuit concluded that, absent a decision from its en banc court or the Supreme

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of means-end scrutiny." *Id.* Furthermore, it notes the Seventh Circuit upheld the statute using intermediate scrutiny, as opposed to the rational basis review. *Id.*

[107] *See id.* (stating Sitladeen and the government initially stipulated that the Eighth Circuit was bound by *Flores*). Additionally, after *Bruen*, both parties submitted supplemental briefs, through which Sitladeen contended that the case "'raise[d] serious questions about the continued validity' of *Flores*." *Id.* (quoting Faltermeier v. FCA US LLC, 899 F.3d 617, 621 (8th Cir. 2018)).

[108] *Id.* (quoting N.Y. State & Rifle Ass'n v. Bruen, 142 S. Ct. 2111, 2138 (2022)) (interpreting the majority opinion in *Bruen*). The Court in *Bruen* stated:

> [W]hen the Second Amendment's plain text covers an individual's conduct, the Constitution presumptively protects that conduct. To justify its regulation, the government may not simply posit that the regulation promotes an important interest. Rather, the government must demonstrate that the regulation is consistent with this Nation's historical tradition of firearm regulation. Only if a firearm regulation is consistent with this Nation's historical tradition may a court conclude that the individual's conduct falls outside the Second Amendment's "unqualified command."

Bruen, 142 S. Ct. at 2126 (quoting Konigsberg v. State Bar of Cal., 366 U.S. 36, 50 n.10 (1961)).

[109] *See Sitladeen*, 64 F.4th at 985 (outlining the court's process for analyzing firearm regulations in the wake of *Bruen*).

[110] *See id.* at 985 (reasoning that because *Flores* had answered the first question of the analysis in the negative, the analysis of the second question was unnecessary). In examining the reasoning in *Bruen*, the Eighth Circuit noted "the Second Amendment does not countenance 'any judge-empowering interest-balancing inquiry that asks whether the statute burdens a protected interest in a way or to an extent that is out of proportion to the statute's salutary effects upon other important governmental interests.'" *Id.* (quoting *Bruen*, 142 S. Ct. at 2129). Additionally, the Eighth Circuit explained that, in its view, using a consistent approach to *Bruen* leads to the conclusion that unlawfully present aliens are not entitled to Second Amendment rights. *Id.* (reasoning that because "[n]othing in *Bruen* casts doubt on [its] interpretation of this phrase," the Eighth Circuit "remain[ed] bound by *Flores*"). As the Eighth Circuit noted, the Supreme Court in *Bruen* stated, "[i]t is undisputed that petitioners Koch and Nash—two ordinary, law-abiding, adult citizens—are part of 'the people' whom the Second Amendment protects." *Id.* (quoting *Bruen*, 142 S. Ct. at 2134). Further, to support its holding, the Eighth Circuit cited to Justice Alito's concurrence in *Bruen*, in which he emphasized the case "decide[d] nothing about *who* may lawfully possess a firearm." *Id.* (alteration in original) (quoting *Bruen*, 142 S. Ct. at 2157 (Alito, J., concurring)).

[111] *See id.* at 986–87 (quoting *Bruen*, 142 S. Ct. at 2129–30) (acknowledging "some [district] courts have read *Bruen* as effectively requiring courts to look past the Amendment's text").

Court indicating otherwise, *Bruen* does not affect the court's interpretation of *Flores* or the extent to which the court remains bound by the decision.[112]

Turning to the Fifth Amendment equal protection argument, the court recognized undocumented immigrants are "persons" in this context, but held § 922(g)(5)(A) survived rational basis review.[113] The court found Sitladeen was able to establish he was treated differently from those similarly situated to him.[114] Although rational basis review typically applies in an equal-protection challenge, heightened scrutiny applies "where the challenged law 'burdens a fundamental right, targets a suspect class, or has a disparate impact on a protected class and was motivated by a discriminatory intent.'"[115] Sitladeen argued "(1) the statute deprives unlawfully present aliens of the benefit of armed self-defense, thus creating a disfavored and permanent 'caste,' and (2) the statute burdens the fundamental right to keep and bear arms."[116]

The court did not employ heightened scrutiny because it found "unlawfully present aliens . . . are not members of 'a suspect class'" and there was "no fundamental constitutional right . . . at stake" for Sitladeen.[117] The court reasoned "there is a rational relationship between prohibiting unlawfully present aliens from possessing firearms and achieving the legitimate goal[s] of public safety," protecting law enforcement, and preventing untraceable groups from possessing guns.[118] The court further underscored the Supreme Court's acknowledgment that Congress can pass laws as to aliens that would otherwise be unconstitutional if applied to citizens.[119]

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[112] *See id.* at 987 (explaining why the Eighth Circuit would not overturn its own precedent).

[113] *See id.* at 987–89 (recounting the Fifth Amendment's Due Process Clause "contains within it the prohibition against denying to any person the equal protection of the laws" (quoting United States v. Windsor, 570 U.S. 744, 774 (2013))). The court found there is a rational basis for the differential treatment of unlawfully present aliens. *Id.* at 989.

[114] *See id.* at 987 (stating "[t]he first step when evaluating an equal-protection challenge is to determine whether the challenger has demonstrated that he was treated differently than others who were similarly situated to him," and that once the challenger has done so, the court will "proceed to the next step: determining the level of scrutiny").

[115] *Id.* at 988 (quoting New Doe Child #1 v. United States, 901 F.3d 1015, 1027 (8th Cir. 2018)) (explaining when heightened scrutiny applies).

[116] *Id.* (reciting Sitladeen's arguments).

[117] *Id.* at 989 (first quoting Vasquez-Velezmoro v. INS, 281 F.3d 693, 697 (8th Cir. 2002); and then quoting United States v. Carpio-Leon, 701 F.3d 974, 982 (4th Cir. 2012)) (emphasizing that "a noncitizen's 'presence in this country in violation of federal law is not a constitutional irrelevancy'" and that "the responsibility for regulating the relationship between the United States and our alien visitors has been committed to the political branches of the Federal Government" (first quoting United States v. Plyer, 457 U.S. 202, 223 (1982); and then quoting Mathews v. Diaz, 426 U.S. 67, 81 (1976))).

[118] *See id.* at 989 (supporting its assertion by acknowledging the other circuits to have recognized a rational basis for the Statute's prohibition). The court then provided reasons why Congress may have established this relationship: (1) "Congress may well have concluded that unlawfully present aliens 'ought not to be armed when authorities seek them'—particularly where, as here, the alien enters the United States to evade prosecution for murder in another country"; (2) "those in the United States without authorization may be more likely to acquire firearms through illegitimate and difficult-to-trace channels"; and (3) unlawful aliens "are more likely to attempt to evade detection by assuming a false identity," like Sitladeen did here. *Id.*

[119] *See id.* (finding Supreme Court precedent permits Congress to restrict undocumented immigrants from rights that are inalienable to citizens).

IV. OFF TARGET: THE EIGHTH CIRCUIT FAILS TO RECOGNIZE SUFFICIENT CONNECTION

The Eighth Circuit erred in three respects when it determined all undocumented immigrants are without Second Amendment rights. Section A argues Supreme Court precedent in *Verdugo-Urquidez* was not overturned by *Heller*, and thus, those who have "otherwise developed sufficient connection" have a fundamental right under the Second Amendment.[120] Section B argues that because *Bruen* instructs a backwards looking history and tradition analysis, historical context and intra-textualism show the plain text of the Second Amendment was meant to provide protection to beyond citizens.[121] Section C argues that the government offers no statistical support for its reasoning that undocumented immigrants are inherently more of a threat than citizens.[122] Additionally, Section C suggests that a higher standard than rational basis should apply in future cases involving equal protection claims, as a heightened standard will avoid giving effect to improper legislative motives rooted in xenophobia.[123]

A. *Shot in the Dark: The Eighth Circuit's Holding Is Incongruous with* Verdugo-Urquidez

The Eighth Circuit was incorrect in finding all undocumented immigrants are not part of "the people" because Supreme Court precedent establishes that undocumented immigrants with sufficient connection to the United States are part of "the people."[124] In *Heller*, Justice Scalia acknowledged the complexity of the Second Amendment and that the Court's opinion should not be expected to "clarify the entire field."[125] Some commentators argue that *Heller* casts doubt on extending

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[120] *See* United States v. Verdugo-Urquidez, 494 U.S. 259, 265 (1990) (implying undocumented immigrants with sufficient connection to the United States are considered part of "the people"); District of Columbia v. Heller, 554 U.S. 570, 580 (2008) (referencing *Verdugo-Urquidez*'s "sufficient connection" test to help explain why the Second Amendment expands beyond the militia to "the people"). For further discussion of the Eighth Circuit's failure to properly interpret *Heller* in light of *Verdugo Urquidez*, see *infra* Section IV.A.

[121] *See* U.S. CONST. amends. I, II, & IV (referring to "the people," not citizens). *But see* U.S. CONST. art. I, § 2 cl. 2 (stating "[n]o Person shall be a Representative who shall not have . . . been seven Years a *Citizen* of the United States" (emphasis added)). Similar language can be found in Article II, section 1, clause 5 in relation to the qualifications for becoming President of the United States. U.S. CONST. art. II, § 1 cl. 5 (limiting eligibility for the Office of the President to "Person[s]" who are "natural born Citizen[s]"). For an historical analysis in light of *Bruen*, see *infra* Section IV.B.

[122] *See* Brief for Appellee at 33–40, United States v. Sitladeen, 64 F.4th 978 (8th Cir. 2023) (No. 22-1010), 2022 WL 1279228, at *33–40 (providing only speculative arguments as to why undocumented immigrants should not possess firearms). For further discussion of the lack of justification for § 922(g)(5)(A), see *infra* Section IV.C.

[123] For discussion of the type of scrutiny that applies in Equal Protection cases involving undocumented immigrants with sufficient connection, see *infra* IV.C.

[124] *See Sitladeen*, 6 F.4th at 987 (discussing the holding); *supra* note 22 (collecting main sources in support of argument); *infra* Sections IV.A–B (analyzing the Supreme Court's *Heller* and *Bruen* decisions).

[125] District of Columbia v. Heller, 554 U.S. 570, 635 (2008) (noting in response to Justice Breyer's concerns that the decision would leave the right to keep and bear arms in doubt for many, that "one should not expect it to clarify the entire field" because the case was the first to provide an "in-depth examination of the Second Amendment"). Justice Scalia further noted the Court has made similar cautionary statements before, as in when the Court first thoroughly examined the Free Exercise Clause in *Reynolds v. United States*, 98 U.S. 145 (1879). *Id.*

the Second Amendment to undocumented immigrants; the opinion's frequent use of terms "Americans" and "citizens" seems to support that argument.[126] However, in *Heller*, the Supreme Court reaffirmed *Verdugo-Urquidez's* principal holding by quoting its sufficient connection test to reason that the Second Amendment confers an individual right.[127] While commentators argue that the "spirit" of the opinion in *Heller* limits the right's scope to citizens and implicitly overturns the *Verdugo-Urquidez* holding, at least as to the Second Amendment, the Court later clarified that it is the "prerogative" of the Supreme Court, and *only* the Supreme Court, to overturn its own holdings.[128]

Furthermore, commentators and the Eighth Circuit reason that the *Heller* Court's references to the "political community" limit the right to bear arms to citizens because undocumented immigrants cannot vote or hold office.[129] However,

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[126] *See* John Cicchitti, Comment, *The Second Amendment and Citizenship: Why "The People" Does Not Include Noncitizens*, 30 GEO. MASON L. REV. 525, 528 (2023) (arguing "[a] thorough examination of precedent and history reveals that the Second Amendment's use of 'the people' does not include [undocumented immigrants]"). Furthermore, Cicchitti reasons the Second Amendment is "fundamentally different . . . from similarly worded provisions in the Bill of Rights," and that "the Supreme Court has already upheld state-level restrictions on noncitizen gun ownership" in *Patsone v. Pennsylvania*, 232 U.S. 138 (1914). *Id.* at 528 & n.23; *see also* Charlotte Nichols, Note, *Second Amendment Rights Come Second to Citizenship: Why Illegal Immigrants Are Not Included in "The People" of the Second Amendment*, 50 U. MEM. L. REV. 509, 524 (2019) (noting "[a]lthough *Heller* never specifically mentioned one's unlawful or lawful status in the country, Justice Scalia began the opinion by noting that there is 'a strong presumption that the Second Amendment right is exercised individually and belongs to all *Americans*'" (quoting *Heller*, 554 U.S. at 581)). Nichols points to similar language throughout the opinion, including that "'the people' . . . 'refers to all members of the political community' and to 'law-abiding, responsible citizens.'" *Id.* at 524–25 (quoting *Heller*, 554 U.S. at 580, 635)).

[127] *See Heller*, 554 U.S. at 580 (reasoning "in all six other provisions of the Constitution that mention 'the people,' the term unambiguously refers to all members of the political community, not an unspecified subset"). Justice Scalia then went on to quote *Verdugo-Urquidez*, which stated:

> "[T]he people" seems to have been a term of art employed in select parts of the Constitution . . . . "[T]he people" . . . refers to a class of persons who are part of a national community or who have otherwise developed sufficient connection with this country to be considered part of that community.

Id. (first and second alterations in original) (quoting United States v. Verdugo-Urquidez, 494 U.S. 259, 265 (1990)).

[128] *See* Bosse v. Oklahoma, 580 U.S. 1, 3 (2016) (per curiam) (relying on precedent stating, "[i]t is this Court's prerogative alone to overrule one of its precedents" (quoting United States v. Hatter, 532 U.S. 557, 567 (2001))); Cicchitti, *supra* note 126, at 553 (arguing "[t]here is a clear limitation on who constitutes 'the people' in *Heller*" and that "[t]he Supreme Court lays out a clear connection between the individual right to bear arms and a collective political need for defense in its discussion of the Second Amendment's prefatory clause"). Cicchitti further argues that the language in *Heller* "should supersede *Verdugo-Urquidez* in Second Amendment cases since *Heller* is the definitive case on Second Amendment rights." *Id.* at 553–54.

[129] *See* Pratheepan Gulasekaram, *Guns and Membership in the American Polity*, 21 WM. & MARY BILL RTS. J. 619, 635 (2012) (noting while *Heller* "recogniz[es] an individual's right to bear arms . . . [in] self-defense, . . . [it] exclud[es] felons, the mentally ill, and noncitizens from the Second Amendment"); *Sitladeen*, 64 F.4th at 983–84 (citing "favorably" the Fifth Circuit's decision in *Portillo-Munoz*, which found *Heller*'s language regarding "members of the political community" to exclude undocumented immigrants (quoting United States v. Portillo-Munoz, 643 F.3d 437, 442 (5th Cir. 2011))). *But see* Jared D. Arnold, Comment, *An Unqualified Right to Self-Defense: Alienage Restrictions and the Second Amendment*, 45 CAP. U. L. REV. 481, 486 (2017) (noting the "rights guaranteed . . . to "'the people' were exercised at the time of the founding by [undocumented

these are just two of many ways one can be a member of the "political community"; undocumented immigrants have also petitioned the government before the First Congress, played active roles in community tenant organizations, and held protests at state houses—all of which demonstrate their association with the country's political community.[130] Additionally, undocumented immigrants have engaged in nationwide protests and organized public actions in an effort to promote legislation like the DREAM Act.[131]

To adhere to Supreme Court precedent, lower courts must consider the connection the individuals have with the United States when determining whether undocumented immigrants have certain constitutional rights.[132] The Supreme Court has implied on multiple occasions, including in *Verdugo-Urquidez*, that it is open to the possibility of constitutional protections for undocumented immigrants based on their level of attachment to the United States.[133] Additionally, the Supreme Court

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immigrants]"); United States v. Huitron-Guizar, 678 F.3d 1164, 1168–69 (10th Cir. 2012) (reasoning *Heller*'s usage of "citizen" is inconclusive because the Supreme Court had also referenced citizens when discussing First Amendment rights in dicta, despite the common understanding that undocumented immigrants have at least some First Amendment rights).

[130] *See* Michael J. Wishnie, *Immigrants and the Right to Petition*, 78 N.Y.U. L. REV. 667, 696 (2003) (finding there is no "evidence in the legislative history of the Petition Clause that its framers sought to restrict the petitioning rights of immigrants," and in 1789, the "First Congress was considering a petition from an immigrant—on which it [later] granted relief"); Jamin B. Raskin, *Legal Aliens, Local Citizens: The Historical, Constitutional and Theoretical Meanings of Alien Suffrage*, 141 U. PA. L. REV. 1391, 1399 (1993) (discussing colonial laws, "which generally required only that voters be local 'inhabitants or residents,'" and underscoring that inhabitant aliens who were white men with property were afforded the right to vote (quoting CHILTON WILLIAMSON, AMERICAN SUFFRAGE FROM PROPERTY TO DEMOCRACY 15 (1960))); CAROL HARDY-FANTA, LATINA POLITICS, LATINO POLITICS: GENDER, CULTURE, AND POLITICAL PARTICIPATION IN BOSTON 120–21 (1993) (providing examples of political involvement, including noncitizens in Boston playing an active role in tenant organizations, going to state house for lobbying efforts, and leading social groups that provide a "blend[] of social, cultural, community, and political interaction[s] and education for noncitizens and undocumented residents").

[131] *See* Roberto G. Gonzales, *Left Out but Not Shut Down: Political Activism and the Undocumented Student Movement*, 3 N.W. J. L. & SOC. POL'Y 219, 220 (2008) (noting in 2006, undocumented immigrants mobilized a national effort to peacefully protest congressional bills aiming to strengthen security at the borders). Gonzales also highlights that long after these marches in the streets, undocumented immigrants have continued to educate their communities and advocate for policy change. *Id.* at 233. Furthermore, the central activity amongst immigrant student groups in the late 2000s was to advocate for the Development, Relief, and Education for Alien Minors Act (the DREAM Act), which allowed undocumented students to "participate in the political process" by "contacting legislators, mobilizing their various communities, and staging public actions." *Id.*

[132] *Verdugo-Urquidez*, 494 U.S. at 265. The Court stated:

> While this textual exegesis is by no means conclusive, it suggests that "the people" protected by the Fourth Amendment, and by the First and Second Amendments, and to whom rights and powers are reserved in the Ninth and Tenth Amendments, refers to a class of persons who are part of a national community or who have otherwise developed sufficient connection with this country to be considered part of that community.

Id.; see also 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, 1514 (2009) (arguing that the language in *Verdugo-Urquidez* and *Heller*'s reliance on it indicates that the Second Amendment extends to the "nation's lawful guests").

[133] *See Verdugo-Urquidez*, 494 U.S. at 265 (stating its "sufficient connection" test); Almeida-Sanchez v. United States, 413 U.S. 266, 274–75 (1973) (finding that the Fourth

has previously found that undocumented immigrants enjoy other rights guaranteed to "the people."[134] Thus, the holding of *Verdugo-Urquidez* reasonably supports the conclusion that those immigrants who are politically active through unions, marches, and other assemblies are part of the national and political community.[135]

B. *A Storm Is* Bruen*: When Considering the Founding Era, the Framers Intended the Bill of Rights to Expand Beyond Citizens*

The Eighth Circuit was incorrect in finding the plain text of the Second Amendment limits the right to bear arms to citizens because the Amendments comprising the Bill of Rights were adopted simultaneously and the founders were intentional with their use of "the people."[136] In *Bruen*, Justice Thomas stressed the

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Amendment rights of a Mexican citizen visiting the United States were violated and that "those lawfully within the country, entitled to use of the public highways, have a right to free passage without interruption or search unless there is . . . probable cause"); Plyler v. Doe, 457 U.S. 202, 215 (1982) (holding undocumented immigrant school children "may claim the benefit of the Fourteenth Amendment's guarantee of equal protection"); *see also* Moore, *supra* note 22, at 834–35 (noting "[t]he Supreme Court implicitly endorsed" the proposition that immigrants "are entitled to the Fourth Amendment's protections" in *Almeida-Sanchez v. United States*, where it held the "warrantless search and seizure of a Mexican citizen legally present in the United States violated the Fourth Amendment"); Arnold, *supra* note 129, at 489 (highlighting the Supreme Court's refusal to find sufficient connection as "indicat[ing] that the Court is open to the possibility that constitutional protections under the Bill of Rights may be extended to noncitizens, contingent upon the individual's degree of attachment to the United States"). Arnold further notes the Supreme Court did not explicitly state undocumented immigrants "who reside here voluntarily and accept some societal obligations[] have no rights the government is bound to respect." *Id.* (emphasis omitted).

[134] *See* Olesya A. Salnikova, Comment, *"The People" of* Heller *and Their Politics: Whether Illegal Aliens Should Have the Right to Bear Arms After* United States v. Portillo-Munoz, 103 J. CRIM. L. & CRIMINOLOGY 625, 645 (2013) (noting the Supreme Court has previously recognized noncitizens as having certain First, Fifth, Sixth, and Fourteenth Amendment rights). However, Salnikova ultimately argues that because the undocumented immigrants can become documented, the ban on their right to firearms is temporary, and thus, undocumented immigrants may be denied protection under the Second Amendment. *Id.* at 627. For further discussion of the Supreme Court's consideration of Amendments that apply to undocumented immigrants, *see supra* note 132.

[135] For further discussion of how undocumented immigrants can become part of the national and political community, see *supra* notes 129–134; *see also* Maria Stracqualursi, Note, *Undocumented Immigrants Caught in the Crossfire: Resolving the Circuit Split on "The People" and the Applicable Level of Scrutiny for Second Amendment Challenges*, 57 B.C. L. REV. 1447, 1476 (2016) (arguing undocumented immigrants who have been politically active and have remained in the U.S. for years and have managed to "become part of the fabric of American society" that the Court envisioned in *Verdugo-Urquidez*); Fatma E. Marouf, *Regrouping America: Immigration Policies and the Reduction of Prejudice*, 15 HARV. LATINO L. REV. 129, 177 (2012) (implying working in the United States can "increase [undocumented immigrants'] social status in the U.S., especially if they are unionized"); Jennifer Gordon & R.A. Lenhardt, *Rethinking Work and Citizenship*, 55 UCLA L. REV. 1161, 1218 (2008) (arguing "[t]he more migrants participate politically through unions, worker centers, and marches, the deeper their sense of belonging becomes").

[136] *See* United States v. Meza-Rodriguez, 798 F.3d 664, 669–70 (7th Cir. 2015) ("An interpretation of the Second Amendment as consistent with the other amendments passed as part of the Bill of Rights has the advantage of treating identical phrasing in the same way and respecting the fact that the first ten amendments were adopted as a package."); Moore, *supra* note 22, at 806–07 (considering the argument that the "conscious avoidance of the word 'citizen' [in the Bill of Rights] conveys the drafters' intention that the rights defined in the Bill of Rights extend beyond those with citizen status"); *The Meaning(s) of "The People" in the Constitution*, *supra* note 24, at 1088

importance of considering the understanding of rights as they were interpreted during the founding era.[137] The Eighth Circuit recognized Thomas's command but overstepped in concluding that "the people" could never include undocumented immigrants.[138] As Michael Wishnie notes, "uncertainties over the meaning of state and national citizenship," refusal to address the citizenship of Native Americans and African Americans, and noncitizens petitioning Congress with support of several Framers all pointed to the word "'citizen' lack[ing] settled meaning in the early United States."[139] Additionally, not all voters in early U.S. elections were citizens, and newspaper accounts of House debates reveal statements by James Madison that equate "the people" to "inhabitants."[140] Thus, the meaning of "the people" to the Framers was at the very least unclear and, as a result, the exclusion of undocumented immigrants from this group cannot be justified by constitutional text alone.[141]

The historical context surrounding the drafting and ratifying of the Constitution ultimately informs the meaning of its text; this context helps discern the different meanings the Framers had in mind when using the term "citizens" as opposed to "people."[142] In 1800, James Madison confirmed this idea:

> [I]t does not follow, because aliens are not parties to the Constitution, as citizens are parties to it, that whilst they actually conform to it, they have no right to its protection. Aliens are not more parties to the laws, than

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(noting "it is a standard principle of interpretation that 'identical words and phrases within the same statute should normally be given the same meaning,' though context matters" (quoting Powerex Corp. v. Reliant Energy Servs., Inc., 551 U.S. 224, 232 (2007))).

[137] *See* N.Y. Pistol & Rifle Ass'n v. Bruen, 142 S. Ct. 2111, 2127 (2022) ("*Heller* and *McDonald* do not support applying means-end scrutiny in the Second Amendment context. Instead, the government must affirmatively prove that its firearms regulation is part of the *historical tradition* that delimits the outer bounds of the right to keep and bear arms." (emphasis added)). For instance, Justice Thomas noted that in *Heller*, the Court "survey[ed] English history dating from the late 1600s, along with American colonial views leading up to the founding," to determine that without a doubt, "on the basis of both text and history, that the Second Amendment conferred an individual right to keep and bear arms." *Id.* (quoting District of Columbia v. Heller, 554 U.S. 570, 595 (2008)). Justice Thomas also noted that "[c]onstitutional rights are enshrined with the scope they were understood to have *when the people adopted them*." *Id.* at 2136 (quoting *Heller*, 554 U.S. at 634–35).

[138] *See* United States v. Sitladeen, 64 F.4th 978, 985 (8th Cir. 2023) (explaining its new test for Second Amendment matters in light of *Bruen*). For a further discussion of how the Eighth Circuit misinterpreted how the Framers saw noncitizens, see *infra* notes 139–143.

[139] *See* Wishnie, *supra* note 130, at 683–84, 692 (examining the history of petitioning by undocumented immigrants during the drafting of the Constitution and finding such a practice shows noncitizens exercised the right to bear arms). Wishnie further argues "the concept of 'citizenship,' like the degree of one's 'connection with this country,' was ambiguous at the Founding and did not function as the sort of classifier of rights claimed by the *Verdugo-Urquidez* Court." *Id.* at 684

[140] *See id.* at 697 (underscoring the fact that not all voters at the time of founding were citizens of the U.S. supports the notion that Congress did not intend to limit certain rights to citizens). Wishnie notes this conclusion is further supported by primary sources of the time. *Id.*

[141] *See* Gulasekaram, *supra* note 24, at 1467–68 (arguing the phrase "the people" and its relationship to citizenship is "murky," and excluding noncitizens without further justification beyond just the text is improper).

[142] *See* Moore, *supra* note 22, at 806–07 (noting that the Constitution makes two references to aliens and several to citizens, but that neither of these terms appear anywhere in the Bill of Rights, which "[s]ome have suggested that this silence . . . speaks volumes about the proper understanding of aliens' rights under the Constitution").

> they are parties to the Constitution; yet it will not be disputed, that as they owe, on one hand, a temporary obedience, they are entitled, in return, to their protection and advantage.[143]

While commentators argue historical context allows for different interpretations of "the people" across amendments, "modern canons of statutory interpretation" emphasize a "consistent meaning of phrases that appear multiple times within the same [document]."[144] The group of "the people" protected by the Bill of Rights are beyond just those with established citizenship, thus making "the people" a broader term than "citizens."[145] Although some argue the constitutional right to vote uses the terms "the people" and "citizens" interchangeably, voting rights were not adopted contemporaneously with the Bill of Rights.[146] The Framers carefully used the word "citizen" as opposed to "people," such as when describing the requirements for being a member of the House of Representatives or being President.[147]

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[143] *Id.* at 807 (alteration in original) (quoting David Cole, *Are Foreign Nationals Entitled to the Same Constitutional Rights as Citizens?*, 25 T. JEFFERSON L. REV. 367, 368 (2003)) (exemplifying how including non-citizens as members of "the people" is consistent with historical views on the importance of the Bill of Rights).

[144] *See* Stracqualursi, *supra* note 135, at 1473 (arguing the Constitution distinguishes "the people" from other groups, and that "modern canons of statutory interpretation dictate a consistent meaning of phrases that appear multiple times within the same statute, or in this instance, within the Bill of Rights"); *see also* Moore, *supra* note 22, at 806 (acknowledging the term "citizens," when referenced in the Constitution, "appear[s] overwhelmingly in eligibility requirements for political office," while the terms "the people" and "persons" are used generally). *But see The Meaning(s) of "The People" in the Constitution*, *supra* note 24, at 1092 (noting the presumption that phrases appearing multiple times in same document have the same meaning wherever used is upended when context or other sources of meaning suggest the terms were used to mean different things in different places); United States v. Portillo-Munoz, 643 F.3d 437, 440–41 (5th Cir. 2011) (arguing "[t]he purposes of the Second and Fourth Amendment are different" because "[t]he Second Amendment grants an affirmative right to keep and bear arms," whereas the Fourth Amendment grants a "protective right" against unreasonable search and seizures, so the latter therefore naturally extends to more people than the former); Cicchitti, *supra* note 126, at 528 (arguing historical context shows that the Second Amendment grants a "fundamentally different right" and, although similarly worded to other rights, Second Amendment rights extend only citizens).

[145] *See* Moore, *supra* note 22, at 808 (stating that "persons" and "the people" are broader terms than "citizens," as emphasized in the Supreme Court's interpretation of "the people" in *Verdugo-Urquidez*); *see also* Volokh, *supra* note 132, at 1514 (stating that "'the right of the people' should be read in the Second Amendment the same way it has been read into the First and Fourth Amendments: as including the nation's lawful guests," but not those who are "largely unconnected with the country" because they are, for example, "illegally present in the United States").

[146] *See* Cicchitti, *supra* note 126, at 540 (noting several areas of the Constitution where terms are comingled, including the Seventeenth Amendment's language stating "'the people' shall elect senators," while the "Fifteenth, Nineteenth, Twenty-fourth, and Twenty-sixth amendments all use the word 'citizen' to discuss voting rights").

[147] *See* United States v. Meza-Rodriguez, 798 F.3d 664, 669 (7th Cir. 2015) (noting there are several times where the drafters of the Constitution explicitly refer to "citizens," showing they used the term with purpose). The Seventh Circuit points to Article I, section 2, clause 2, which states that membership in the House of Representatives requires candidates to have been "Seven Years a Citizen." *Id* (quoting U.S. CONST. art. I, § 2, cl. 2). Additionally, Article II, section 1, clause 5, requires that the President be a "natural born Citizen, or Citizen of the United States, at the time of the Adoption of this Constitution." *Id.* (quoting U.S. CONST. art. II, § 1, cl. 5); Gulasekaram, *supra* note 22, at 1533 (stating "[t]he Constitution uses the words 'citizens,' 'persons,' and 'people[]' . . . for distinct, although not precisely defined, purposes").

Textualism also demonstrates that "the people" and "persons" refer to the same group.[148] The Supreme Court in *Plyler* states "[w]hatever his status under the immigration laws, an alien is surely a 'person' in any ordinary sense of that term."[149] As Judge Dennis argued in his dissent from the Fifth Circuit's decision in *Portillo-Munoz*, it would be odd for the Framers to have contemplated different meanings for the terms "people" and "person," given that "'people' is merely the plural of 'person.'"[150] He claims that the Fifth Circuit's holding not only makes a flawed constitutional analysis, but is "incongruous" with Supreme Court precedent in *Plyler*.[151]

C. *When Xenophobia Meets Hoplophobia: Section 922(g)(5)(A) Is Based on Unfounded Fear and Runs Counter to American Principles*

There is substantial support for the idea that undocumented immigrants are considered included in "the people," yet felons and children—two groups also considered part of "the people"—are also prohibited from possessing firearms.[152] Even though there is evidence that the Framers intended the right to protect more than citizens, the states have long regulated the usage of firearms amongst undocumented immigrants, as evidenced by the early state constitutions that expressly limited the right to keep and bear arms to "citizens."[153] Furthermore,

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[148] *See generally* Moore, supra note 22, at 807 (noting that the Bill of Rights "makes no mention of citizens," but rather "focuses on persons").

[149] Plyler v. Doe, 457 U.S. 202, 210 (1982) (finding unlawfully present aliens are "persons" under the Fifth Amendment).

[150] *See* United States v. Portillo-Munoz, 643 F.3d 437, 445 (5th Cir. 2011) (Dennis, J., concurring in part and dissenting in part) (finding it illogical that "people" and "person" would have different constitutional meanings).

[151] *See id.* (arguing the majority's "categorical conclusion" that "the people" does not include undocumented immigrants with sufficient connection to the United States is not supported by constitutional text or Supreme Court precedent).

[152] *See* District of Columbia v. Heller, 554 U.S. 570, 626 (2008) ("[N]othing in our opinion should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons and the mentally ill . . . ."); Nichols, *supra* note 126, at 533 (arguing although "all individuals in the United States have constitutional protections . . . there is a hierarchy to the levels of protection"). Nichols further argues that *Verdugo-Urquidez* is an example of such an "'ascending scale of rights' analysis" in that "[a]n immigrant . . . outside of the borders of the United States, as opposed to an immigrant on America soil, is clearly outside the realm of constitutional protections." *Id.*; *see also* Gillian Stevens, *U.S. Immigration Policy and the Language Characteristics of Immigrants*, 23 IN DEFENSE OF THE ALIEN 177, 179 (2000) (noting "[t]he general attitude towards . . . immigration [at the time of the founding] . . . was one of tolerance and even encouragement"). *But see* Justine Farris, Note, *The Right of Non-Citizens to Bear Arms: Understanding "The People" of the Second Amendment*, 50 IND. L. REV. 943, 957 (2017) (noting a "lack of definitive historical authority" suggesting "the people" is synonymous with "citizenship").

[153] *See* United States v. Jimenez-Shilon, 34 F.4th 1042, 1049 (11th Cir. 2022) (acknowledging "the phrasing of many early state constitutions, which—in the northern and southern states alike—expressly limited the right to keep and bear arms to 'citizens'"); Nichols, *supra* note 126, at 547 (recognizing "founding-era state constitutions . . . expressly limit[ed] the right to bear arms to 'citizens'"); Gulasekaram, *supra* note 22, at 1526–27 (considering the country's "long history of restricting gun ownership by non-American 'others,' including noncitizens, especially when citizenship is racially defined"); Cicchitti, *supra* note 126, at 543 (finding some state supreme courts have upheld such regulations, finding the provisions "valid under similar constitutional provisions to the Second Amendment").

individuals who did not swear allegiance to the United States were not given the "full panoply" of rights and protections that citizens had.[154]

However, under the *Bruen* framework such a ban is not comparably justified because the first restrictions on undocumented immigrant firearm possession came in the mid twentieth century, well after the founding era where regulations carry the most weight for historical analysis, and regulations against noncitizens in the late Eighteenth Century did not address gun usage.[155] The ban is further meritless on grounds that the legislative history behind § 922(g)(5)(A) lacks debate and statistics on the matter, making the government's argument in the circuit court cases, that undocumented immigrants are more likely to commit crimes involving firearms, speculative and based on unfounded fear.[156] In fact, close to sixty percent of mass shootings since 1982 have been committed by white men, some of whom have targeted migrant groups.[157] Undocumented immigrants are not analogous to the

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[154] *See Jimenez-Shilon*, 34 F.4th at 1049 (noting under eighteenth-century international law, an alien could not just move to another country and immediately gain access to all the liberties and afforded to the country's citizens). The Eleventh Circuit cites Blackstone to note that aliens were allowed to "settle and stay in the country" and in turn gained access to such rights, but that in the United States, this often required "temporary obedience" to its laws. *Id.*

[155] *See* Gulasekaram, *supra* note 24, at 1484 (stating "[t]he federal government did not begin to regulate firearms comprehensively until 1934, and specific prohibitions on immigrant possession appeared a few years later" (footnote omitted)). Additionally, Professor Gulasekaram notes that the Alien and Seditions Acts and the Alien Enemies Act of 1798 did not regulate the usage of firearms by noncitizens, and that for much of the following century, "the federal government did not regulate immigration in ways that are familiar today." *Id.* At 1477–78.

[156] *See* Volokh, *supra* note 132, at 1513 ("If bans on gun ownership by noncitizens are constitutional, they have to be constitutional on scope grounds."). Volokh argues the "danger reduction rationale" cannot justify the restriction of undocumented immigrants' right to bear arms because there is no evidence undocumented immigrants are inherently more dangerous than citizens. *Id.*; *see also* United States v. Meza-Rodriguez, 798 F.3d 664, 673 (7th Cir. 2015) (doubting the government's argument that § 922(g)(5) reflects the increased likelihood of undocumented immigrants committing "future gun-related crimes" because the government only points to the fact that they entered the country illegally, "show[ing] a willingness to defy our law"). *But see Constitutional Law — Second Amendment — Second Circuit Rules Prohibition of Firearms Possession by Undocumented Immigrants Passes Intermediate Scrutiny.* — United States v. Perez*, 6 F.4th 448 (2d Cir. 2021)*, 135 HARV. L. REV. 1156, 1165 (2022) (noting "[d]espite [a] lack of empirical evidence that undocumented immigrants are any more likely . . . to be involved in violent crime" than citizens, "there seems to be a deep discomfort" concerning undocumented immigrants possessing firearms); Gulasekaram, *supra* note 129, at 639 (finding "[a] spike in gun sales follow[ing] both 9/11 and President Obama's assumption of front-runner status in the 2008 election" to be illustrative of "the persistence of the fear of both racialized and foreign threats that have plagued the Republic from its inception to present day" (footnote omitted)).

[157] *See* Suzanne Schneider, *Why 'They' Seem More Violent Than 'We' Are*, WASH. POST (Feb. 16, 2018, 1:20 PM), https://www.washingtonpost.com/outlook/why-they-seem-more-violent-than-we-are/2018/02/16/9e6ca040-1290-11e8-9570-29c9830535e5_story.html [https://perma.cc/5VX5-5NCM] (providing statistics concerning gun violence in the United States); Engy Abdelkader, *Immigration in the Era of Trump: Jarring Social, Political, and Legal Realities*, 44 HARBINGER 76, 81 (2020) (noting many Latinos see "the El Paso mass shooting targeting 'Mexicans' . . . [as] a natural progression" from President Trump's 2020 campaign speech when he asked how to stop migrants from entering the country—to which a supporter answered, "shoot them," and President Trump grinned); *see also* Tim Arango, Nicholas Bogel-Burroughs & Katie Benner, *Minutes Before El Paso Killing, Hate-Filled Manifesto Appears Online*, N.Y. TIMES (Aug. 3, 2019), https://www.nytimes.com/2019/08/03/us/patrick-crusius-el-paso-shooter-manifesto.html [https://perma.cc/89GR-Y26N] (recounting that less than twenty minutes before the first 911 call

other categorically banned groups, such as felons and domestic abusers, because they are not inherently dangerous just by having entered the country illegally.[158]

Given that Supreme Court jurisprudence finds self-defense to be at the heart of the Second Amendment, drawing the line at citizenship and "allegiance" to the state runs counter to the idea that fundamental rights are "the ultimate protector from the authority of the state."[159] The government claims the statute prevents those who circumvent our laws from obtaining firearms, but it applies with equal force to those who were brought to the country as young children, contrary to Supreme Court principles that children should not have to suffer a discriminatory burden based on undocumented status they had little to no control over.[160] It would be incongruent for the Second Amendment to protect the possession of semiautomatic assault rifles, which have been the cause of tragedy in countless

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reporting the El Paso mass shooting, "a hate-filled, anti-immigrant manifesto appeared online" that "spoke of a 'Hispanic invasion of Texas'").

[158] *See Meza-Rodriguez*, 798 F.3d at 673 (admitting "[w]hile it is a misdemeanor to enter the country improperly," many undocumented immigrants come to the country as young children, and thus could not have "form[ed] the requisite intent to violate [§ 922 (g)(5)]" (citation omitted)); Stracqualursi, *supra* note 135, at 1480 (noting "[u]nlike felons, the mentally ill, domestic violent misdemeanants, and habitual drug users, undocumented immigrants are not dangerous simply because they illegally entered the United States"); Rubén G. Rumbaut, *Undocumented Immigration and Rate of Crime and Imprisonment: Popular Myths and Empirical Realities*, *in* THE ROLE OF LOCAL POLICE: STRIKING A BALANCE BETWEEN IMMIGRATION ENFORCEMENT AND CIVIL LIBERTIES 119, 132 (2009), https://www.policinginstitute.org/wp-content/uploads/2015/06/Appendix-D_0.pdf [https://perma.cc/D67X-GTPC] (providing statistics that show the immigrant population, particularly those from Mexico and Central America, have the lowest rate of incarceration for young men).

[159] Arnold, *supra* note 129, at 506 ("Conditioning the fundamental right of self-defense on a requirement of allegiance to the state would suggest, opposite of the holding in *Heller*, that the Second Amendment is not actually about individual self-defense of hearth and home, but about requiring loyalty to the state, and only by pledging loyalty to the state could one be protected under the Second Amendment. This logic not only runs contrary to the holding in *Heller*, but demeans the ideals of a fundamental right, protected by the Constitution, which serves as the ultimate protector from the authority of the state."); *see* N.Y. Pistol & Rifle Ass'n v. Bruen, 142 S. Ct. 2111, 2135 (2022) ("[C]onfining the right to 'bear' arms to the home would make little sense given that self-defense is 'the *central component* of the [Second Amendment] right itself.'" (second alteration in original) (quoting District of Columbia v. Heller, 554 U.S. 570, 599 (2008))). Justice Thomas further rationalized that "confrontation can surely take place outside the home," and many hazards occur outside the home rather than in it. *Id.*; *see also Heller*, 554 U.S at 627, 635 (holding the core fundamental right of the Second Amendment is the right to defense of self and home); Gulasekaram, *supra* note 22, at 1524 (arguing against the nation's backdrop of "maintain[ing] racial and citizenship-based supremacy," and that "in comparison to other rights associated with citizenship, the [*Heller*] right of armed self-defense . . . cannot coexist with the restriction of 'the people' of the Second Amendment to citizens"). Gulasekaram also notes that "immigrants seeking naturalization must swear to bear arms on behalf of the nation . . . before obtaining citizenship and are rewarded with a faster path to citizenship if they enlist" with the nation's armed forces. *Id.* (footnote omitted). She expresses concern that "while federal and state policies [restrict] noncitizen firearm possession in several ways, they also incentivize and encourage it," leaving the field at the very least muddled. *Id.* The author further worries that limiting a right to self-defense to citizens "is not actually about self-defense, but about state-defense." *Id.* at 1538.

[160] *See* Plyler v. Doe, 457 U.S. 202, 220 (1982) (noting it is "difficult to conceive of a rational justification for penalizing" children who were brought to the United States by their undocumented parents); United States v. Huitron-Guizar, 678 F.3d 1164, 1170 (10th Cir. 2012) (finding § 922(g)(5) applies equally to those that recently entered the country and to the defendant, who was brought to the United States when he was a toddler).

public spaces in our country, but not protect the core right of self-defense to undocumented immigrants.[161] Due to a lack of statistics to prove any danger that undocumented immigrants may posit, the Statute is just another in a long line of regulations on noncitizen ownership of firearms based on fear and prejudice.[162]

As stated, justifying § 922(g)(5)(A) on the grounds that undocumented immigrants are harder to trace and more likely to assume false identification is flawed because there is no basis for the argument in the Statute's legislative history.[163] Furthermore, the government has failed to provide support for its contention that undocumented immigrants are more likely to commit gun-related crimes.[164] Although undocumented immigrants may live outside the formal system, a ban based on that fact does not make sense under the Statute because the restriction also applies to those legally admitted with nonimmigrant visas.[165]

While the Eighth Circuit applied rational basis as to the equal protection challenge, such a weak standard is inappropriate because it allows for one justifiable reason to overwhelm numerous baseless justifications for the discriminatory ban.[166] Professor Gulasekaram argues that if courts apply a higher standard in cases revolving around "alien" classification, the "tailoring" prong of the test would help

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[161] *See* Anjali Motgi, Note, *Of Arms and Aliens*, 66 STAN. L. REV. ONLINE 1, 7–8 (2013) (noting the concurring timelines of the Sandy Hook shooting and the Fourth Circuit holding in *Carpio-Leon*); Volokh, *supra* note 132, at 1514 (arguing "[g]iven that the American constitutional tradition generally secures individual rights to citizens as well as noncitizens (though not to people in foreign countries), the Second Amendment right to bear arms in self-defense should be treated the same way").

[162] *See* Gulasekaram, *supra* note 22, at 1543 (contending the relationship between citizenship and guns is driven by "racial prejudice and xenophobic paranoia, motivated by a fear of a racialized or foreign 'Other' presenting danger to white[s]"); Schneider, *supra* note 157 (noting "a powerful narrative persists that immigrants are preternaturally violent," even though "the incarceration rate for native-born Americans is nearly twice that of undocumented immigrants" (emphasis omitted)); Rumbaut, *supra* note 158, at 136 (highlighting that, of young men, immigrants from Mexico and Central America have the lowest incarceration rates).

[163] *See* Stracqualursi, *supra* note 135, at 1479–80 (finding the idea that undocumented immigrants are difficult to track and have an interest in evading law enforcement is not articulated in the legislative history of § 922(g)(5)(A)); *see also* Volokh, *supra* note 132, at 1515 (noting it would be a mistake to disarm noncitizens on grounds that they are more dangerous than citizens).

[164] *See* Defendant-Appellant's Brief and Required Short Appendix at 24, United States v. Meza-Rodriguez, 798 F.3d 664 (7th Cir. 2015) (No. 14-3271), 2015 WL 636261, at *24 (reasoning there is no evidence to support the claim that undocumented immigrants are more likely to commit gun crimes in the future than citizens); *see also* Brief for Appellee at 33–40, United States v. Sitladeen, 64 F.4th 978 (8th Cir. 2023) (No. 22-1010), 2022 WL 1279228 at *33–40 (providing only speculative arguments as to why undocumented immigrants should not possess firearms, rather than showing actual danger).

[165] *See* Stracqualursi, *supra* note 135, at 1480 (arguing the Statute's rationale "do[es] not make sense in the full context of § 922(g)(5)[(A)]" because it "applies to noncitizens legally admitted with a nonimmigrant visa"). Thus, Stracqualursi contends that because the Statute includes "noncitizens legally admitted with a nonimmigrant visa," a blanket ban based on that reasoning makes no sense. *Id.*

[166] Pratheepan Gulasekaram, *Aliens with Guns: Equal Protection, Federal Power, and the Second Amendment*, 92 IOWA L. REV. 891, 951 (2007) (arguing heightened scrutiny should apply for cases revolving around alienage distinctions in part because "the tailoring requirement of equal protection induces courts to interrogate the government's justifications and factual basis before permitting uneven treatment of persons within the national sovereignty").

eliminate "improper legislative motives," such as xenophobia.[167] In the alternative, distinguishing undocumented immigrants with sufficient connection from people like Dayne Sitladeen, i.e. criminals on the run, would permit equal protection for those who are otherwise a part of the national community while ensuring the United States does not become a sanctuary for criminals.[168] Gulasekaram suggests undocumented immigrants who establish a sufficient connection to the United States in an individual hearing should be entitled to these constitutional protections.[169]

V. MIND YOUR SELF-DEFENSE

The Eighth Circuit's decision shows the disparate protections for undocumented immigrants between circuits; for example, in the Seventh Circuit, undocumented immigrants with sufficient connection to the United States are considered part of "the people," while in the Eighth Circuit, undocumented immigrants are never part of "the people."[170] Illinois, in the Seventh Circuit, is one of the most immigrant friendly states, whereas Iowa, in the Eighth Circuit, has some of the most repressive laws towards undocumented immigrants.[171] This policy divergence is alarming due to the physical proximity of these two states—an immigrant who finds sanctuary in Illinois could be arrested for crossing the border into Iowa if the Republican lawmakers of Iowa succeed in making illegal immigration a state crime.[172]

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[167] *See id.* (arguing "equal-protection methodology is necessary because the tailoring prong of the analysis helps root out improper legislative motives, such as racial animus, xenophobia, and other irrational prejudice").

[168] *See id.* ("[T]he equal-protection methodology is pliable. Since its utility is ensuring the appropriate fit between governmental goals and the means to achieve those goals, the equal-protection analysis can account for the values and justifications used in federal-power analysis."); Gulasekaram, *supra* note 24, at 1459 (arguing "protections for 'persons' in the Equal Protection and Due Process Clauses almost certainly would have to encompass, at minimum, unlawfully present persons with sufficient connections to the United States").

[169] Gulasekaram, *supra* note 24, at 1459 (suggesting "unlawfully present individuals could be able to establish their level of connectedness in an individualized hearing," after which time they could "seek protection under several provisions of the Constitution.").

[170] *Compare* United States v. Meza-Rodriguez, 798 F.3d 664, 670–71 (7th Cir. 2015) (finding, under *Verdugo-Urquidez*, undocumented immigrants with sufficient connection are part of "the people" protected under the Bill of Rights), *with* United States v. Sitladeen, 64 F.4th 978, 987 (8th Cir. 2023) (holding undocumented immigrants are not part of "the people" protected by the Second Amendment).

[171] *See* State Map on Immigration Enforcement, IMMIGR. LEGAL RES. CTR., https://www.ilrc.org/state-map-immigration-enforcement [https://perma.cc/V9CG-ZYT5] (last visited Nov. 9, 2024) (showing that Iowa, Texas, and Florida have the most stringent anti-immigration laws, whereas Illinois, Oregon, and New Jersey have the most favorable immigration laws).

[172] *See Meza-Rodriguez*, 798 F.3d at 673 (finding "unlawful presence in [the] country is not, without more, a crime"); *see also* Volokh, supra note 132, at 1515 (acknowledging the possibility that state laws restricting gun possession of undocumented immigrants are a violation of the Equal Protection Clause). *But see* Tom Barton, *Iowa GOP Lawmakers Advance Bill Making Illegal Immigration a State Crime; Opponents Say It Is Unconstitutional*, QUAD CITY TIMES (Feb. 8, 2024), https://qctimes.com/news/state-regional/government-politics/iowa-gop-lawmakers-advance-bill-making-illegal-immigration-a-state-crime-opponents-say-it-is/article_cd197e8a-c6d6-11ee-

The current divide in jurisprudence creates a perplexing and ever-changing scale of rights for undocumented immigrants depending not only on location, but also on the right at issue.[173] Because precedent shows that "the people" has the same meaning in the First, Second, and Fourth Amendments, undocumented immigrants in the Eighth Circuit are theoretically left prone to unconstitutional searches and seizures and without the right to peacefully assemble.[174] Furthermore, courts have inconsistently applied the sufficient connection test, leaving some who are more sufficiently connected than others vulnerable to constitutional violations without recourse.[175] Thus, not only do the holdings by the Fifth and Eighth Circuits leave other rights of the undocumented at risk, they also inconsistently determine who surpasses the sufficient connection threshold.[176]

The Eighth Circuit's decision limits the self-defense rights of undocumented immigrants and American citizens who live with them because the undocumented immigrant would be in "constructive possession" of any firearms in the home.[177] Undocumented immigrants often move to the United States to live with family already legally present or start families that include American citizens.[178] These immigrants risk deportation when they acquire firearms to protect their American

8891-ff201469806a.html [https://perma.cc/4X65-7LHX] ("State courts would be permitted to order the deportation of immigrants arrested in Iowa while in the country illegally, and local officials would be given legal immunity when assisting in immigration enforcement measures under a bill advanced in the Iowa Senate.").

[173] *See* United States v. Portillo-Munoz, 643 F.3d 437, 443 (5th Cir. 2011) (Dennis, J., concurring in part and dissenting in part) (stating that not only are others' rights at risk, but the majority's holding also fails to consider Supreme Court and circuit court precedent establishing that an undocumented immigrant's voluntary presence and accepting of societal obligations constitute sufficient connection to the United States); United States v. Jimenez-Shilon, 34 F.4th 1042, 1049 (11th Cir. 2022) (stating that nothing in the opinion implies undocumented immigrants have no rights at all).

[174] *See Portillo-Munoz*, 643 F.3d at 443 (Dennis, J., concurring in part and dissenting in part) (warning that the majority's holding leave undocumented immigrants prone to unjust intrusion on their other constitutional rights).

[175] *See id.* at 443, 447–48 (noting the inconsistency of a Fifth Circuit case where the undocumented immigrant was found to have sufficient connection because he made periodic visits to Texas to visit his aunt, whereas Portillo-Munoz who lived, worked, and had a girlfriend and daughter in the U.S. was found not to have a sufficient connection).

[176] *See id.* at 443 (noting the shortfalls of the application of the "sufficient connection" test); Gulasekaram, *supra* note 24, at 1459 (arguing that the Seventh Circuit's reliance on the sufficient connection test in *Meza-Rodriguez* is "inherently unpredictable," as evidenced by its application in the Fourth Amendment context).

[177] *See* United States v. Sitaldeen, 64 F.4th 978, 987 (2023) (stating the court's holding); Stracqualursi, *supra* note 135, at 1481 (reasoning that "[b]y banning undocumented immigrants from possessing firearms, the statute ultimately also burdens their American family members' Second Amendment rights"); *cf.* Volokh, *supra* note 132, at 1499 (reasoning felons, another group barred from possessing firearms, also have a need for self-defense, and that the ban on their possession of firearms burdens their law-abiding spouses and housemates because they might be found in constructive possession of any guns kept in their homes).

[178] *See Portillo-Munoz*, 643 F.3d at 447 (Dennis, J., concurring in part and dissenting in part) (noting that Portillo-Munoz had an American girlfriend and lived with her and her daughter); United States v. Perez, 6 F.4th 448, 450 (2d Cir. 2021) (noting that Perez had been in the United States for close to thirty years and lived with his girlfriend and son).

families, friends, or places of work.[179] Supreme Court precedent recognizes that undocumented children should not face unjust consequences due to their parents' illegal entry.[180] Thus, children of undocumented immigrants should not be left without parents who can protect them, and those undocumented immigrants who came here as young children should not be unequivocally stripped of their Second Amendment rights.[181]

The sufficient connection test, if applied reasonably and fairly, ensures criminals on the run like Dayne Sitladeen are not given Second Amendment rights, but hardworking family men and women are able to protect themselves and their American families.[182] Section 922(g)(5)(A) is an unconstitutional infringement on these rights because the government has not been able to establish that undocumented immigrants with a sufficient connection are any more dangerous than American citizens.[183] This denial of alien rights is especially pressing given that immigrants are frequently targeted in violent hate crimes.[184] The Statute effectively leaves a targeted class defenseless to the "mercies of burglars and assailants."[185]

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[179] *See Portillo-Munoz*, 643 F.3d at 439 (acknowledging Portillo-Munoz stated he had the firearm to protect the chickens at his American employer's ranch from coyotes); *Perez*, 6 F.4th at 450 (noting Perez had borrowed a firearm from an acquaintance to fire several bullets in the air in order to disperse a nearby gang fight involving machetes).

[180] *See* Plyler v. Doe, 457 U.S. 202, 220 (1982) (noting that while some undocumented immigrants might enter the country via "stealth and in violation of [the] law," and thus should face the consequences of doing so, their children "are not comparably situated" and their rights should not therefore be similarly restricted). The Court reasoned that parents can "remove themselves from the State's jurisdiction," but the children cannot change their parents' status or their own. *Id.*

[181] *See* Volokh, *supra* note 132, at 1534 (warning of the potential for storage requirements to inhibit adults from performing life-saving defensive actions on behalf of their children).

[182] *Compare* United States v. Sitaldeen, 64 F.4th 978 (2023) (detailing the facts, which showed the defendants were a criminal on the run), *with Portillo-Munoz*, 643 F.3d 437, 447 (Dennis, J., concurring in part and dissenting in part) (recognizing Portillo-Munoz had no criminal or arrest record, and noting many American citizens have done far worse but have nonetheless been protected as part of "the people").

[183] *See* Volokh, *supra* note 132, at 1515 (arguing it "would be a mistake" to conclude undocumented immigrants are more dangerous than citizens).

[184] *See 2022 Hate Crime Statistics*, U.S. DEP'T OF JUST., https://www.justice.gov/hatecrimes/hate-crime-statistics [https://perma.cc/7S7S-ZVRQ] (Sept. 25, 2024) (reporting approximately 53% of hate crimes committed in 2023 were motivated by racial, ethnic, or ancestry biases); Suzanne Gamboa & The Associated Press, *Rise in Reports of Hate Crimes Against Latinos Pushes Overall Number to 11-Year High*, NBC NEWS (Nov. 16, 2020 5:01 PM), https://www.nbcnews.com/news/latino/rise-hate-crimes-against-latinos-pushes-overall-number-highest-over-n1247932 [https://perma.cc/3P49-VGSK] (finding hate crimes against Latinos—including the shooting massacres in El Paso—increased in 2019, elevating the number of hate-motivated killings to the "highest level since data began being collected in the early 1990s").

[185] United States v. Huitron-Guizar, 678 F.3d 1164, 1170 (10th Cir. 2012) (underscoring the shortcomings of § 922(g)(5)(A)).