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## Undocumented Immigrants Caught in the Crossfire: Resolving the Circuit Split on “The People” and the Applicable Level of Scrutiny for Second Amendment Challenges

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# UNDOCUMENTED IMMIGRANTS CAUGHT IN THE CROSSFIRE: RESOLVING THE CIRCUIT SPLIT ON “THE PEOPLE” AND THE APPLICABLE LEVEL OF SCRUTINY FOR SECOND AMENDMENT CHALLENGES

**Abstract:** The circuits are currently split as to whether undocumented immigrants are entitled to Second Amendment rights. In 2015, the U.S. Court of Appeals for the Seventh Circuit in *U.S. v. Meza-Rodriguez* became the first circuit to explicitly hold that undocumented immigrants are part of “the people” referred to in the U.S. Constitution. This case added to the recent explosion in Second Amendment jurisprudence, in which courts have toiled with the scope of the right and what level of scrutiny to apply to constitutional challenges. This Note argues that the U.S. Supreme Court erred in failing to grant certiorari for *Meza-Rodriguez* to clarify that undocumented immigrants are entitled to Second Amendment protections when they have established substantial connections to the United States. This Note discusses the shift in Second Amendment interpretation that has occurred in the last decade and how it applies to undocumented immigrants. Given similar language within the Amendments, the resolution of this circuit split has potential implications for the First and Fourth Amendments, which protect millions of undocumented immigrants from government abuse.

## INTRODUCTION

Nicolas Carpio-Leon had lived in the United States without immigration status for at least thirteen years.<sup>1</sup> He was a father to three American-born children.<sup>2</sup> He filed his income tax returns and had no criminal record.<sup>3</sup> He did, however, own a rifle, a pistol, and ammunition that he kept in his home to protect his family.<sup>4</sup> On February 24, 2011, Immigration and Customs Enforcement agents found the firearms while conducting a consensual search of Carpio-Leon’s home in Orangeburg, South Carolina.<sup>5</sup> He was charged with violating 18 U.S.C. § 922(g)(5), which prohibits unlawfully present immigrants from owning or pos-

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<sup>1</sup> *United States v. Carpio-Leon*, 701 F.3d 974, 975 (4th Cir. 2012).

<sup>2</sup> *Id.*

<sup>3</sup> *Id.*

<sup>4</sup> *Id.*

<sup>5</sup> *Id.* The search occurred during a Drug and Enforcement Administration and Immigration and Customs Enforcement interview with Carpio-Leon and his wife at their home. Brief of Appellee at 5, *United States v. Carpio-Leon*, No. 11-5063 (4th Cir. Apr. 12, 2012).

sessing firearms, and 8 U.S.C. § 1325(a)(2), which prohibits illegal entry.<sup>6</sup> He pled guilty but appealed, asserting that § 922(g)(5) impermissibly infringed his Second Amendment right to bear arms and violated the Due Process Clause of the Fifth Amendment.<sup>7</sup> The U.S. Court of Appeals for the Fourth Circuit determined that Carpio-Leon, and the millions of other undocumented people living in the United States, was not entitled to Second Amendment rights and affirmed the findings of the district court.<sup>8</sup>

The Second Amendment provides: “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.”<sup>9</sup> But who are “the people” to whom the Bill of Rights refers?<sup>10</sup> For the last decade, scholars and courts have struggled to define the scope of the Second Amendment, including whether undocumented immigrants are entitled to keep and bear arms.<sup>11</sup> The conclusion has potential implica-

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<sup>6</sup> 8 U.S.C. § 1325(a)(2) (2012); 18 U.S.C. § 922(g)(5) (2012); *Carpio-Leon*, 701 F.3d at 975. Section 922(g)(5) prohibits ownership or possession of firearms and ammunition by unlawfully present immigrants. 18 U.S.C. § 922(g)(5)(A). Section 1325(a)(2) provides for fines or imprisonment for aliens who enter the United States without examination or inspection by immigration officers. 8 U.S.C. § 1325(a)(2).

<sup>7</sup> *Carpio-Leon*, 701 F.3d at 975, 982.

<sup>8</sup> *Id.* at 982–83. The court determined that the scope of the Second Amendment does not extend to protect illegal aliens and that prohibiting illegal aliens, as a class, from possessing firearms is rationally related to Congress’s legitimate interest in public safety. *Id.* at 975, 982.

<sup>9</sup> U.S. CONST. amend. II (emphasis added); see *McDonald v. City of Chicago*, 561 U.S. 742, 749–50 (2010) (holding the Second Amendment right to keep and bear arms fully applicable to the States through the Fourteenth Amendment); *District of Columbia v. Heller*, 554 U.S. 570, 595 (2008) (concluding that Second Amendment provides for a limited individual right to keep and bear arms).

<sup>10</sup> Compare Olesya A. Salnikova, “*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, 661 (2013) (arguing that undocumented immigrants are not included within the Second Amendment’s “the people”), with Pratheepan Gulasekaram, “*The People*” of the *Second Amendment: Citizenship and the Right to Bear Arms*, 85 N.Y.U. L. REV. 1521, 1580 (2010) (suggesting that applying “the people” only to U.S. citizens is doctrinally unsound given the traditional means of analyzing constitutional language).

<sup>11</sup> See *Carpio-Leon*, 701 F.3d at 975, 982–83 (concluding that Supreme Court precedent is unclear as to whether undocumented immigrants are part of “the people” in the Second Amendment, but determining that the core of the Second Amendment is its protection of law-abiding citizens’ right to self-defense); *United States v. Flores*, 663 F.3d 1022, 1023 (8th Cir. 2011) (holding that undocumented immigrants are not protected by the Second Amendment); *United States v. Portillo-Munoz*, 643 F.3d 437, 442 (5th Cir. 2011) (explaining that undocumented immigrants are clearly not part of “the people” in the Second Amendment and that it is constitutional to prohibit their possession of firearms); LAW CTR. TO PREVENT GUN VIOLENCE, POST-*HELLER* LITIGATION SUMMARY 3 (2014), <http://smartgunlaws.org/wp-content/uploads/2013/09/Post-Heller-Litigation-Summary-November-2014.pdf> [hereinafter POST-*HELLER* LITIGATION] [<https://perma.cc/6USY-9SSV>] (noting the minimal guidance provided by the Supreme Court in analyzing the scope of the Second Amendment and the lower courts’ varying interpretations). The U.S. Supreme Court’s landmark 2008 decision in *District of Columbia v. Heller* reformulated the Second Amendment as an individual rather than a collective right, but left many questions open, including the level of scrutiny that should be applied and how far the right extends. See 554 U.S. at 595 (holding unconstitutional a federal statute banning the registration of handguns and the requirement that guns kept in the home remain disassembled or nonfunction-

tions for other constitutional rights that share similar language, including the right to be free from unreasonable searches and seizures and the rights to assemble and petition.<sup>12</sup>

Prior to August 20, 2015, the Fifth and Eighth Circuit Courts of Appeals had opined that undocumented immigrants are not part of “the people” entitled to Second Amendment protections.<sup>13</sup> In 2015, the Seventh Circuit in *United States v. Meza-Rodriguez* created a circuit split when it held that undocumented immigrants are included in “the people.”<sup>14</sup> The U.S. Supreme Court was in a position to conclusively define the scope of the Second Amendment in regard to undocumented immigrants before it denied certiorari in *Meza-Rodriguez*.<sup>15</sup> Accordingly, this Note argues that the Court should have granted certiorari and held first that undocumented immigrants are part of “the people” in the Bill of Rights, and second that intermediate scrutiny is the appropriate standard for analyzing a complete ban on possession of firearms by undocumented immigrants.<sup>16</sup> The deny First and Fourth Amendment rights—which many consider inherent—to

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al); Stephen Kiehl, *In Search of a Standard: Gun Regulations After Heller and McDonald*, 70 MD. L. REV. 1131, 1141 (2011) (commenting that neither *Heller* nor *McDonald* clarified the standard of review); Stacey L. Sobel, *The Tsunami of Legal Uncertainty: What’s a Court to Do Post-McDonald?*, 21 CORNELL J.L. & PUB. POL’Y 489, 499 (2012) (same).

<sup>12</sup> See *Portillo-Munoz*, 643 F.3d at 444–45 (Dennis, J., dissenting) (explaining that not including undocumented immigrants in the Second Amendment’s “the people” will leave them vulnerable to violations of their First and Fourth Amendment rights); *Gun Rights Win a Major Victory in Federal Court, and That’s Actually a Good Thing*, THINKPROGRESS (Aug. 21, 2015), <http://thinkprogress.org/justice/2015/08/21/3693788/gun-rights-win-a-major-victory-in-federal-court-and-thats-actually-a-good-thing> [<https://perma.cc/Y6T8-L857>] (describing the dire consequences for undocumented immigrants’ First and Fourth Amendment rights if they are not considered to be members of “the people”). But see Note, *The Meaning(s) of “The People” in the Constitution*, 126 HARV. L. REV. 1078, 1098 (2013) [hereinafter *The Meaning(s) of “The People”*] (suggesting that “the people” in the Second Amendment has a different meaning from the same phrase used in the First and Fourth Amendments).

<sup>13</sup> See *Flores*, 663 F.3d at 1023 (concurring with the Fifth Circuit that undocumented immigrants do not possess Second Amendment rights); *Portillo-Munoz*, 643 F.3d at 442 (holding that undocumented immigrants are not included in the Second Amendment’s “the people”).

<sup>14</sup> *United States v. Meza-Rodriguez*, 798 F.3d 664, 672 (7th Cir. 2015), cert. denied, 136 S. Ct. 1655 (2016). The Fifth Circuit in 2011 had held that undocumented immigrants are not part of “the people” for Second Amendment purposes. *Portillo-Munoz*, 643 F.3d at 442. The Eighth Circuit the same year agreed with the Fifth Circuit’s decision that undocumented immigrants are not covered under the Second Amendment, but failed to provide further explanation. *Flores*, 663 F.3d at 1023. The Fourth and Tenth Circuits had declined to address the issue of whether undocumented immigrants are included under the Second Amendment’s “the people” because of conflicting language in Supreme Court cases. *Carpio-Leon*, 701 F.3d at 978; *United States v. Huitron-Guizar*, 678 F.3d 1164, 1168–69 (10th Cir. 2012).

<sup>15</sup> See *Meza-Rodriguez*, 798 F.3d at 669 (noting that the U.S. Supreme Court has not addressed the issue of whether noncitizens—either authorized or unauthorized—are among “the people” who receive Second Amendment protection); *Gun Rights Win a Major Victory in Federal Court*, supra note 12 (noting that the issue is likely to end up in front of the Supreme Court given the circuit split).

<sup>16</sup> See *infra* notes 141–191 and accompanying text.

undocumented immigrants risks pushing a “shadow population” further into isolation.<sup>17</sup>

Part I of this Note provides an overview of undocumented immigration in the United States and the recent shift in Second Amendment jurisprudence.<sup>18</sup> It also discusses the debate surrounding the phrase “the people” in the U.S. Constitution and relevant cases in the circuit courts.<sup>19</sup> Part II reviews the lower court and the Seventh Circuit’s decisions in *Meza-Rodriguez* and compares them with the other conflicting circuit decisions.<sup>20</sup> Finally, Part III argues that the Seventh Circuit’s holding in *Meza-Rodriguez* that undocumented immigrants are entitled to Second Amendment rights most appropriately interprets the Constitution and case law.<sup>21</sup> It also argues that courts should apply intermediate scrutiny to the statute prohibiting undocumented immigrants from possessing firearms, and that the government must be held to its burden of proving that this constitutional restriction furthers a compelling government interest.<sup>22</sup>

## I. THE EVOLUTION OF THE SECOND AMENDMENT AND THE CONSTITUTIONAL RIGHTS OF UNDOCUMENTED IMMIGRANTS

In the last ten years, the Second Amendment has received more analysis and review than it had in the previous two hundred years.<sup>23</sup> A radical shift in the interpretation of the Second Amendment from a collective right to a fundamental, individual right led to the question of whether millions of undocumented immigrants living within our nation’s borders should be entitled to protection under the Second Amendment.<sup>24</sup> This Part provides an overview of the

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<sup>17</sup> *Plyler v. Doe*, 457 U.S. 202, 218–19 (1982); see David Cole, *Are Foreign Nationals Entitled to the Same Constitutional Rights as Citizens?*, 25 T. JEFFERSON L. REV. 367, 374 (2003) (highlighting the broad international consensus that fundamental rights should apply regardless of citizenship).

<sup>18</sup> See *infra* notes 23–79 and accompanying text.

<sup>19</sup> See *infra* notes 80–107 and accompanying text.

<sup>20</sup> See *infra* notes 108–140 and accompanying text.

<sup>21</sup> See *infra* notes 146–168 and accompanying text.

<sup>22</sup> See *infra* notes 169–191 and accompanying text.

<sup>23</sup> See John Paul Stevens, *The Five Extra Words That Can Fix the Second Amendment*, WASH. POST (Apr. 11, 2014), [https://www.washingtonpost.com/opinions/the-five-extra-words-that-can-fix-the-second-amendment/2014/04/11/f8a19578-b8fa-11e3-96ae-f2c36d2b1245\\_story.html](https://www.washingtonpost.com/opinions/the-five-extra-words-that-can-fix-the-second-amendment/2014/04/11/f8a19578-b8fa-11e3-96ae-f2c36d2b1245_story.html) [<https://perma.cc/7GQK-M98H>]; Cass R. Sunstein, *How the Gun Lobby Rewrote the Second Amendment*, BLOOMBERGVIEW (Oct. 7, 2015, 2:56PM), <http://www.bloomberglaw.com/articles/2015-10-07/how-the-gun-lobby-rewrote-the-second-amendment> [<https://perma.cc/9VVY-GG9L>].

<sup>24</sup> See *Meza-Rodriguez*, 798 F.3d at 672 (holding that at least some undocumented immigrants are entitled to Second Amendment rights); *Carpio-Leon*, 701 F.3d at 982 (holding that undocumented immigrants do not have Second Amendment rights); *Flores*, 663 F.3d at 1023 (holding that undocumented immigrants are not protected by the Second Amendment); *Portillo-Munoz*, 643 F.3d at 442 (holding that “the people” in the Second Amendment does not include undocumented immigrants); *McDonald*, 561 U.S. at 778 (concluding that the right to keep and bear arms is incorporated in the concept of due process given that the right is fundamental to our scheme of ordered liberty); *Heller*

central issues involved in Second Amendment challenges by undocumented immigrants and then discusses the federal appellate cases that have examined these issues.<sup>25</sup> Section A presents a summary of the flow of unauthorized immigration and the integration of these immigrants into the national community.<sup>26</sup> Section B discusses the changes in the interpretation of the Second Amendment that have occurred in recent years.<sup>27</sup> Section C discusses the debate over who constitutes “the people” in the First, Second, and Fourth Amendments.<sup>28</sup> Section D introduces the status of the law regarding undocumented immigrants’ entitlement to Second Amendment rights prior to *Meza-Rodriguez*.<sup>29</sup>

### *A. Illegal Immigration and the Political Integration of the Undocumented Population*

For the first century of its existence, the United States welcomed immigrants with few, if any, restrictions; there was no “illegal immigration.”<sup>30</sup> After years of immigrants flowing into the country, the clash of cultures created rampant racism and xenophobia among Americans frustrated with competition with foreign workers.<sup>31</sup> Congress responded by passing the Chinese Exclusion Act of 1882 that prohibited the immigration of Chinese laborers and provided for the deportation of any Chinese laborers who entered the United States after a certain date.<sup>32</sup> The Chinese, however, continued to enter the country as undocumented immigrants.<sup>33</sup> Litigation involving undocumented immigrants led to U.S. Supreme Court decisions in which the Court determined that undocumented immigrants have constitutional rights, including the rights to equal protection under the Fourteenth Amendment and the rights to due process under the Fifth and Sixth Amendments.<sup>34</sup> Although the Chinese Exclusion Act was

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554 U.S. at 595 (holding after a textual and historical analysis that the Second Amendment confers a limited individual, rather than collective, right to keep and bear arms).

<sup>25</sup> See *infra* notes 30–107 and accompanying text.

<sup>26</sup> See *infra* notes 30–48 and accompanying text.

<sup>27</sup> See *infra* notes 49–79 and accompanying text.

<sup>28</sup> See *infra* notes 80–96 and accompanying text.

<sup>29</sup> See *infra* notes 97–107 and accompanying text.

<sup>30</sup> Galia Avramov et al., *Going Global*, 80 MICH. BAR J. 46, 48 (2001), <http://www.michbar.org/file/barjournal/article/documents/pdf4article810.pdf> [<https://perma.cc/86LP-AQFU>].

<sup>31</sup> See *id.* (describing the United States’ shift from an open door policy to the enactment of the Chinese Exclusion Act); Emily Ryo, *Through the Back Door: Applying Theories of Legal Compliance to Illegal Immigration During the Chinese Exclusion Era*, 31 LAW & SOC. INQUIRY 109, 110 (2006) (explaining that Chinese immigrants were considered “undesirable” immigrants).

<sup>32</sup> Chinese Exclusion Act, 22 Stat. 58 (1882). Avramov et al., *supra* note 30.

<sup>33</sup> Ryo, *supra* note 31.

<sup>34</sup> See *Kaoru Yamataya v. Fisher*, 189 U.S. 86, 100–01 (1903) (holding that an undocumented immigrant has the right to due process of law including a hearing prior to deportation); *Wong Wing v. United States*, 163 U.S. 228, 238 (1896) (concluding that sentencing an undocumented immigrant to hard labor and deportation without a jury trial is a violation of the Fifth and Sixth Amendments); *Yick Wo v. Hopkins*, 118 U.S. 356, 373–74 (1886) (holding that law prohibiting an undocumented Chinese

repealed in 1943, restrictive immigration laws have resulted in a continued flow of illegal immigration.<sup>35</sup>

In 2014, the United States was home to approximately 11.3 million undocumented immigrants.<sup>36</sup> Drastic growth in the number of undocumented immigrants in the United States occurred from 1990 to 2007, when the population of undocumented immigrants increased from 3.5 million to 12.2 million individuals.<sup>37</sup> Undocumented immigration declined following stricter immigration enforcement and economic decline in the late 2000s but has leveled off since 2010, with undocumented immigrants comprising 3.5% of the country's population.<sup>38</sup> Between 2000 and 2012, the number of undocumented adult immigrants who have lived in the United States for ten or more years increased twofold, rising from thirty-five percent to sixty-two percent.<sup>39</sup>

The Supreme Court has suggested that "the people" protected by the Second Amendment refers to members of the political community.<sup>40</sup> Although undocumented immigrants are unable to participate in the formal political process by voting or running for office, they have found ways to be politically engaged.<sup>41</sup> Hometown associations have developed as safe spaces for undocumented immigrants to become civically engaged in their communities and politi-

immigrant from owning a laundry was discriminatory and therefore a violation of equal protection under the Fourteenth Amendment).

<sup>35</sup> Avramov et al., *supra* note 30; see Jane Hong, Op-Ed, *The Law That Created Illegal Immigration*, N.Y. TIMES, Oct. 2, 2015, available at <http://www.latimes.com/opinion/op-ed/la-oe-1002-hong-1965-immigration-act-20151002-story.html> [<https://perma.cc/XUV8-LB2G>] (explaining how the 1965 Hart-Celler Immigration Act's quotas on Latin American countries and the termination of the bracero guest worker program increased illegal immigration from Latin America, whereas the scarcity of visas increased illegal immigration from Asia).

<sup>36</sup> Jeffrey S. Passel & D'Vera Cohn, *Unauthorized Immigrant Population Stable for Half a Decade*, PEW RES. CTR. (July 22, 2015), <http://www.pewresearch.org/fact-tank/2015/07/22/unauthorized-immigrant-population-stable-for-half-a-decade/> [<https://perma.cc/92BL-45PJ>].

<sup>37</sup> *Id.*

<sup>38</sup> TOMÁS R. JIMÉNEZ, MIGRATION POL'Y INST., IMMIGRANTS IN THE UNITED STATES: HOW WELL ARE THEY INTEGRATING INTO SOCIETY? 4 (2011), <http://www.migrationpolicy.org/research/immigrants-united-states-how-well-are-they-integrating-society> [<https://perma.cc/7JYK-FS4K>]; Jens Manuel Krogstad & Jeffrey S. Passel, *5 Facts About Illegal Immigration in the U.S.*, PEW RES. CTR. (Nov. 19, 2015), <http://www.pewresearch.org/fact-tank/2015/11/19/5-facts-about-illegal-immigration-in-the-u-s/> [<https://perma.cc/M757-M629>].

<sup>39</sup> Passel & Cohn, *supra* note 36.

<sup>40</sup> *Heller*, 554 U.S. at 580.

<sup>41</sup> See CAROL HARDY-FANTA, *LATINA POLITICS, LATINO POLITICS: GENDER, CULTURE, AND POLITICAL PARTICIPATION IN BOSTON* 120 (1993) (explaining that legal status is not required for political activism and mobilization); Jiménez, *supra* note 38, at 14–15 (explaining how undocumented immigrants engage in hometown associations and protest immigration policies); William Perez et al., *Civic Engagement Patterns of Undocumented Mexican Students*, 9 J. OF HISPANIC HIGHER EDUC. 245, 258 (2010) (explaining that undocumented young people have high levels of civic engagement, including tutoring; activism; and community service involving maintenance work, administrative work, and assisting people in need).

cally empowered.<sup>42</sup> Undocumented immigrants have also used mass protests as a means of having their voice heard by the U.S. government.<sup>43</sup> In 2006, undocumented immigrants mobilized a national effort to peacefully protest anti-immigrant congressional bills that would have increased security at the border and criminalized assisting illegal border crossing.<sup>44</sup> The last decade has also involved informal political engagement by both American-born children of undocumented immigrants and undocumented youth.<sup>45</sup> Children who are citizens have advocated on behalf of their undocumented parents and encouraged them to participate in demonstrations against punitive immigration policies, creating a link between undocumented immigrants and the political process.<sup>46</sup> Young undocumented immigrants have also communicated with legislators, organized public actions, and established coalitions in an effort to promote such legislation as the Development, Relief, and Education for Alien Minors Act or “DREAM Act.”<sup>47</sup>

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<sup>42</sup> S. Karthick Ramakrishnan & Celia Viramontes, *Civic Spaces: Mexican Hometown Associations and Immigrant Participation*, 66 J. OF SOC. ISSUES 155, 157 (2010). Hometown associations are civic groups that raise money for needs in the immigrants’ country of origin, in addition to offering services for immigrants, such as voter registration, legal and social services, and language and cultural classes. Manuel Orozco & Rebecca Rouse, *Migrant Hometown Associations and Opportunities for Development: A Global Perspective*, MIGRATION POL’Y INST. (Feb. 1, 2007), <http://www.migrationpolicy.org/article/migrant-hometown-associations-and-opportunities-development-global-perspective> [<https://perma.cc/QF8Y-RQJP>].

<sup>43</sup> See Roberto G. Gonzales, *Left Out but Not Shut Down: Political Activism and the Undocumented Student Movement*, 3 NW. J. L. & SOC. POL’Y 219, 220 (2008) (describing the organization of hundreds of thousands of protesters in 2006, including undocumented immigrants, protesting across the nation in defense of immigrant workers and students’ rights).

<sup>44</sup> *Id.* at 220 & 220 n.4.

<sup>45</sup> See *id.* at 225, 233 (chronicling the undocumented student movement involving reaching out to lawmakers and organizing hunger strikes and other public displays engaging the larger community); Jiménez, *supra* note 38, at 14–15 (describing research that shows children of immigrants who were born in the United States participate in protesting immigration laws that would negatively affect their parents).

<sup>46</sup> Jiménez, *supra* note 38, at 14–15.

<sup>47</sup> Gonzales, *supra* note 43, at 233. The DREAM Act is a legislative proposal that would provide a pathway to citizenship for individuals who were brought into the United States illegally at a young age. Elisha Barron, *The Development, Relief, and Education for Alien Minors (DREAM) Act*, 48 HARV. J. ON LEGIS. 623, 626–27 (2011). The bill would provide conditional resident status to individuals who entered the United States before the age of sixteen, have lived in the country for at least five years, graduated from a U.S. high school or obtained their general education development certificate, and fulfilled other requirements. *Id.* at 627. Those receiving conditional resident status could apply for permanent residency after nine years. *Id.* at 629. The bill was first introduced in the Senate in 2001 and though it has been reintroduced several times, the bill has failed to pass. *Id.* at 632–33; S. 952, 112th Cong., GOVTRACK.US, <https://www.govtrack.us/congress/bills/112/s952> [<https://perma.cc/4NJT-SQKR>]. President Obama issued an executive order in 2012 that created the Deferred Action for Childhood Arrivals (“DACA”) program, which permits young people to remain in the United States temporarily and to legally work. Lauren Gilbert, *Obama’s Ruby Slippers: Enforcement Discretion in the Absence of Immigration Reform*, 116 W. VA. L. REV. 255, 259–60 (2013).



Through these advocacy efforts, undocumented immigrants continue to develop a political voice and identity.<sup>48</sup>

### *B. A Fundamental Individual Right: The Shift in Second Amendment Interpretation*

Second Amendment jurisprudence in the last decade has deviated substantially from two centuries of interpretation as a collective right related to military activities.<sup>49</sup> 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.”<sup>50</sup> Prior to the last few decades, the majority of courts interpreted the amendment as requiring the possession or use of a firearm to have a reasonable relationship to military action.<sup>51</sup> In the late 1990s and early 2000s, however, the debate over the scope of the Second Amendment gained

<sup>48</sup> See Fatma E. Marouf, *Regrouping America: Immigration Policies and the Reduction of Prejudice*, 15 HARV. LATINO L. REV. 129, 178–79 (2012) (suggesting that high visibility advocacy efforts such as the 2006 immigrant rights marches not only help to defeat the stigma attached to undocumented status but also give voice to those who cannot participate in formal political processes).

<sup>49</sup> Stevens, *supra* note 23; see *United States v. Miller*, 307 U.S. 174, 178 (1939) (concluding that the Second Amendment does not guarantee the right to possess and use a shotgun with a barrel less than eighteen inches long where there is no reasonable relationship to the preservation or efficiency of a well regulated militia); *Silveira v. Lockyer*, 312 F.3d 1052, 1092 (9th Cir. 2002) (“[T]he Second Amendment affords only a collective right to own or possess guns or other firearms”), *abrogated by* *Mehl v. Blanas*, 532 F. App’x. 752 (9th Cir. 2013).

<sup>50</sup> U.S. CONST. amend. II. The ratification of the Second Amendment was based at least partially on the Founders’ fear that the federal government would disarm the people’s militia, oppress the people, and destroy democracy. *Heller*, 554 U.S. at 598–99; see Don B. Kates, Jr., *Handgun Prohibition and the Original Meaning of the Second Amendment*, 82 MICH. L. REV. 204, 212 (1983) (explaining the states’ rights interpretation of the Second Amendment which contends that the amendment was intended to place state militias outside of the power of the federal government to disarm); Nelson Lund, *The Past and Future of the Individual’s Right to Arms*, 31 GA. L. REV. 1, 30–33 (1996) (suggesting the Framers’ purposes in establishing the Second Amendment were to deter tyranny and enable the individual to defend himself against criminals). Despite viewing the Second Amendment for the previous two centuries as a collective right to bear arms that was related to state militia service, *Heller* reinterpreted the text as securing a private and individual right to bear arms. See 554 U.S. at 595 (concluding that historical and textual analysis demonstrate that the Second Amendment confers an individual right to keep and bear arms); *United States v. Chester*, 628 F.3d 673, 674–75 (4th Cir. 2010) (highlighting *Heller*’s textual interpretation of the Second Amendment and its effect on Second Amendment jurisprudence); Andrew R. Gould, *The Hidden Second Amendment Framework Within District of Columbia v. Heller*, 62 VAND. L. REV. 1535, 1536–37 (2009) (noting that *Heller* clarified that the Second Amendment protects an individual, rather than a collective right to possess firearms for lawful purposes).

<sup>51</sup> *Miller*, 307 U.S. at 178; *Gillespie v. Indianapolis*, 185 F.3d 693, 710–11 (7th Cir. 1999); *Stevens v. United States*, 440 F.2d 144, 149 (6th Cir. 1971); *United States v. Haney*, 264 F.3d 1161, 1165 (10th Cir. 2001). *But see* *United States v. Emerson*, 270 F.3d 203, 260 (5th Cir. 2001) (“[The Second Amendment] protects the right of individuals, including those not then actually a member of any militia or engaged in active military service or training, to privately possess and bear their own firearms . . . that are suitable as personal, individual weapons and are not of the general kind or type excluded by *Miller*.”).

momentum.<sup>52</sup> During this time, legislation was passed that limited the sale and use of firearms, academic works were published that favored a revised view of the Second Amendment, and the National Rifle Association (“NRA”) increased its lobbying efforts.<sup>53</sup> The Supreme Court ultimately resolved this tension in favor of a revised view of the Second Amendment as a fundamental, individual right.<sup>54</sup>

### 1. The Battle Over Collective Right Versus Individual Right Interpretations of the Second Amendment

Supporters of the traditional collective rights model asserted that the Second Amendment provided state and federal governments with the authority to limit or prohibit the use and possession of weapons as long as the legislation did not violate other constitutional rights such as due process and equal protection.<sup>55</sup> The individual rights model encouraged by the NRA and gun rights proponents posited that the Second Amendment guaranteed individual private citizens a right to possess and use firearms with limited government regulation.<sup>56</sup>

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<sup>52</sup> See *Silveira*, 312 F.3d at 1060 (describing how the debate over the meaning of the Second Amendment has become more contentious following greater public fears of gun violence, the enactment of laws limiting sales and use of firearms, and lobbying by gun-rights supporters led by the National Rifle Association (“NRA”)); John Bainbridge Jr., *Fearing an Armed Public*, MD. B.J., Sept.–Oct. 2015, at 8 (2015) (describing the intensified debate in the 1990s); David Yassky, *The Second Amendment: Structure, History, and Constitutional Change*, 99 MICH. L. REV. 588, 592 & 592 n.14 (2000) (citing the considerable press attention given to the debate).

<sup>53</sup> *Silveira*, 312 F.3d at 1060; see Andrew D. Herz, *Gun Crazy: Constitutional False Consciousness and Dereliction of Dialogic Responsibility*, 75 B.U. L. REV. 57, 145 (1995) (explaining that gun-rights organizations pushed to publish scholarly articles promoting the individual view of the Second Amendment); Yassky, *supra* note 52, at 591 (explaining how the revisionist interpretation of the Second Amendment increased in popularity following the publication of Sanford Levinson’s *Yale Law Journal* article in 1989). The Gun Free School Zones Act of 1990 established criminal penalties for possessing or firing a firearm in a school zone. Pub. L. No. 101–647, § 1702(b)(3), 104 Stat 4844 (1990). The Brady Handgun Violence Prevention Act, passed in 1994, created a new background checking system and required that gun importers, manufacturers, and dealers impose a five-day waiting period and background check prior to selling a handgun to an unlicensed person. Pub. L. No. 103–159, 107 Stat. 1536 (1993). The following year, the Violent Crime Control and Law Enforcement Act of 1994 (VCCA) outlawed the manufacture, importation, and possession of semiautomatic assault weapons and large capacity ammunition feeding devices for civilian use. Pub. L. 103–322, §§ 110102, 110103, 108 Stat. 1796 (1994). The VCCA also made it illegal for juveniles to possess or sell handguns. *Id.* § 110201.

<sup>54</sup> See *McDonald*, 561 U.S. at 778 (affirming that the Framers and ratifiers of the Fourteenth Amendment considered the Second Amendment rights to be fundamental); *Heller* 554 U.S. at 595 (determining that the Second Amendment provides for an individual right to keep and bear arms).

<sup>55</sup> *Silveira*, 312 F.3d at 1060. The collective right theory purported that the right was granted to the collective body of “the people” as part of the militia in order to maintain a free state, rather than a right that could be exercised individually. Roger I. Roots, *The Approaching Death of the Collective Right Theory of the Second Amendment*, 39 DUQ. L. REV. 71, 73 (2000).

<sup>56</sup> *Silveira*, 312 F.3d at 1060; see Robert J. Spitzer, *Gun Law, Policy, and Politics*, N.Y. ST. B.J., July–Aug. 2012, at 36–37 (describing the pro-individual rights model advanced by the NRA during the Bush Administration). In 2001, the U.S. Court of Appeals for the Fifth Circuit in *United States v.*

The Supreme Court resolved this debate in 2008 in *United States v. Heller*, when the Court concluded that the Second Amendment confers an individual right to bear arms.<sup>57</sup> The Court compared the Second Amendment to the First and Fourth Amendments, which likewise reference “the people,” and found that all three codified pre-existing rights that do not require collective exercise.<sup>58</sup> The Second Amendment right as explicated in *Heller*, however, is limited in the types of arms permitted, where they may be possessed, and the classes of individuals who may possess them.<sup>59</sup> The Second Amendment only protects weapons commonly possessed by law-abiding citizens for lawful purposes.<sup>60</sup> Questions remain following *Heller* as to the full scope of the Second Amendment’s protections; there is still no consensus among courts whether and to what extent the Second Amendment protects a right to keep and bear arms outside of the home.<sup>61</sup> The Second Amendment also does not protect the right to possess fire-

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*Emerson* rejected the collective rights model and held that the Second Amendment protects the right of individuals, even those who are not members of a militia or engaged in active military service or training, to privately possess and use their own firearms when they are suitable as personal, individual weapons. 270 F.3d at 260.

<sup>57</sup> *Heller*, 554 U.S. at 595; see Spitzer, *supra* note 56, at 37 (explaining the historic significance of *Heller* as both the first time a federal court held a gun law to be unconstitutional as well as the adoption of a new “individualist” interpretation of the Second Amendment). The Court separated the prefatory clause and purpose for “a well regulated militia, being necessary to the security of a free State,” from the operative clause and actual right bestowed, “the right of the people to keep and bear Arms,” which is not limited to situations involving militia service. *Heller*, 554 U.S. at 576–78, 592.

<sup>58</sup> *Heller*, 554 U.S. at 592. The Court acknowledged that the Second Amendment “is not a right granted by the Constitution. Neither is it in any manner dependent upon that instrument for its existence.” *Id.* (quoting *U.S. v. Cruikshank*, 92 U.S. 542, 553 (1876)). The Court considered that the language in the Second Amendment—that the right to keep and bear arms “shall not be infringed”—indicates the existence of the right prior to the writing of the Constitution. *Id.* The Court also described self-defense as an inherent right central to the Second Amendment. *Id.* at 628.

<sup>59</sup> *Id.* at 626–27 (noting that the Court’s opinion does not invalidate longstanding laws prohibiting felons and the mentally ill from possessing firearms and prohibiting carrying firearms in sensitive places, including schools and government buildings, or laws restricting the commercial sale of firearms); see *Huitron-Guizar*, 678 F.3d at 1166 (“The right to bear arms, however venerable, is qualified by what one might call the ‘who,’ ‘what,’ ‘where,’ ‘when,’ and ‘why.’”); *Chester*, 628 F.3d at 676 (interpreting *Heller* as recognizing the limitations and regulation of the Second Amendment right); 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, 1475–1542 (2009) (analyzing restrictions on gun possession using a “who,” “what,” “where,” “when,” and “how” framework); Jeff Golimowski, *Pulling the Trigger: Evaluating Criminal Gun Laws in a Post-Heller World*, 49 AM. CRIM. L. REV. 1599, 1615–17 (2012) (describing permissible “forfeiture” and “time, place, and manner” restrictions that fall outside of the Second Amendment right).

<sup>60</sup> *Heller*, 554 U.S. at 625, 627. Handguns fall into this category, as they are “the most popular weapon for domestic self-defense in the United States, but short-barreled shotguns do not. *Id.* at 625, 629. In 2012, in *United States v. Zaleski*, the U.S. Court of Appeals for the Second Circuit relied on *Heller* to uphold a conviction for a possession of a machine gun. 489 F. App’x. 474–75 (2d Cir. 2012).

<sup>61</sup> See *Woollard v. Gallagher*, 712 F.3d 865, 882 (4th Cir. 2013) (declining to explicitly extend the Second Amendment to protect a right outside the home, but upholding Maryland’s concealed carry permit law); *Peterson v. Martinez*, 707 F.3d 1197, 1211 (10th Cir. 2013) (concluding that the Second

arms in sensitive places, including schools and government buildings.<sup>62</sup> Additionally, not everyone has the right to possess arms, because some categorical disqualifications are constitutionally permissible.<sup>63</sup> Courts have, for example, upheld laws that ban possession of firearms by felons, domestic violence misdemeanants, the mentally ill, and drug addicts.<sup>64</sup>

## 2. Fundamental Right Without the Usual Scrutiny

The expansion of Second Amendment rights continued in 2010 in *McDonald v. City of Chicago*, in which the Supreme Court held that the right to self-defense, protected by the Second Amendment, was a “basic right.”<sup>65</sup> In answering the question of whether Chicago’s strict gun laws, which essentially banned the possession of handguns around the city and in the home, were unconstitu-

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Amendment does not provide a right to carry a concealed weapon); *Moore v. Madigan*, 702 F.3d 933, 935–36 (7th Cir. 2012) (holding that the Second Amendment right to bear arms implies the right to carry a loaded firearm outside one’s home); *Kachalsky v. County of Westchester*, 701 F.3d 81, 89 (2d Cir. 2012) (assuming that the Second Amendment must sometimes apply to public possession of firearms). See generally Michael P. O’Shea, *Modeling the Second Amendment Right to Carry Arms (I): Judicial Tradition and the Scope of “Bearing Arms” for Self-Defense*, 61 AM. U.L. REV. 585, 588 (2012) (concluding that following a historical analysis and review of judicial precedent, the Second Amendment encompasses a right to possess a gun for self-defense outside the home); Darrell A.H. Miller, *Guns as Smut: Defending the Home-Bound Second Amendment*, 109 COLUM. L. REV. 1278, 1303–04 (2009) (differentiating between the home and the public in the applicability of Second Amendment rights). The Court in *Heller* established that the Second Amendment applied to defense of the home but was vague on the full scope of the right. See 554 U.S. at 635 (“[W]hatever else [the Second Amendment] leaves to future evaluation, it surely elevates above all other interests the right of law-abiding, responsible citizens to use arms in defense of hearth and home.”).

<sup>62</sup> *Heller*, 554 U.S. at 626. The Court did not define a “sensitive place,” resulting in confusion among legal scholars. See Brian C. Whitman, *In Defense of Self-Defense: Heller’s Second Amendment in Sensitive Places*, 81 MISS. L.J. 1987, 1989, 1991 (2012) (arguing that sensitive places should be defined as areas consisting of “sensitive information, material, activities, or personnel”).

<sup>63</sup> See *Heller*, 554 U.S. at 626; see also Volokh, *supra* note 59, at 1497 (explaining how complete bans on the possession of guns by a class of people must be justified by arguing either that the Second Amendment explicitly or implicitly excludes that category of people or that those people are “so unusually dangerous” that it is constitutional to entirely prohibit their possession of firearms).

<sup>64</sup> See *United States v. Chovan*, 735 F.3d 1127, 1142 (9th Cir. 2013) (affirming federal ban on firearm possession by individuals convicted of domestic violence); *United States v. Pruess*, 703 F.3d 242, 246 (4th Cir. 2012) (upholding federal prohibition of firearms possession by felons); *United States v. Yancey*, 621 F.3d 681, 687 (7th Cir. 2010) (concluding prohibition on current illegal drug users from possessing weapons is constitutional); see also *Powell v. Tompkins*, 926 F. Supp. 2d 367, 387 (D. Mass. 2013), *aff’d*, 783 F.3d 332 (1st Cir. 2015) (upholding Massachusetts’ ban against granting firearm carry licenses to individuals under the age of twenty-one); *United States v. Laurent*, 861 F. Supp. 2d 71, 87, 105 (E.D.N.Y. 2011) (holding constitutional a statute prohibiting shipping, transporting, or receiving a firearm while under indictment for a crime punishable by more than one year in prison).

<sup>65</sup> *McDonald*, 561 U.S. at 767. *McDonald* was filed the same day that the Supreme Court decided *Heller*. See *Heller*, 554 U.S. at 570 (decided June 26, 2008); Complaint at 1, *McDonald v. City of Chicago*, No. 08-CV-03645, 2008 WL 2571757 (N.D. Ill. Dec. 4, 2008) (complaint filed on June 26, 2008).

tional, the Court had to determine whether the Second Amendment is applicable to the States through the Due Process Clause in the Fourteenth Amendment.<sup>66</sup> The Court held that the Second Amendment guarantees a fundamental right and thus applies to the states and local governments.<sup>67</sup> The Court cited *Heller*'s conclusion that the "inherent right of self-defense has been central to the Second Amendment right," and also conducted a historical analysis from which it determined that the Founders considered the right to keep and bear arms to be fundamental.<sup>68</sup>

In the wake of *Heller* and *McDonald*, more than nine hundred Second Amendment cases have been filed in district courts nationwide.<sup>69</sup> Courts have upheld the challenged gun law in nearly all of these cases.<sup>70</sup> The majority of circuits have adopted some type of two-step analysis in considering Second Amendment claims.<sup>71</sup> Generally, the courts first examine whether and to what

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<sup>66</sup> *McDonald*, 561 U.S. at 767; see U.S. CONST. amend. XIV, § 1 ("No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States . . . nor deny to any person within its jurisdiction the equal protection of the laws.").

<sup>67</sup> *McDonald*, 561 U.S. at 767, 791. The Court determined that a right is covered under the Equal Protection Clause if it is "fundamental to [the Nation's] scheme of ordered liberty" or "deeply rooted in this Nation's history and tradition." *Id.* at 767 (citing *Washington v. Glucksberg*, 521 U.S. 702, 721 (1997); *Duncan v. Louisiana*, 391 U.S. 145, 149 (1968)). The Court also noted that there was evidence that the popular consensus at the time believed that the Second Amendment right was fundamental. *Id.* at 789.

<sup>68</sup> *McDonald*, 561 U.S. at 767–78. The Court concluded that the Constitution's Framers and ratifiers considered the Second Amendment right to be fundamental. *Id.* at 778. The Court, however, noted that fundamental rights are not absolute. *Id.* at 802.

<sup>69</sup> POST-*HELLER* LITIGATION, *supra* note 11, at 1.

<sup>70</sup> *Id.* at 2. Of the more than one thousand cases challenging the constitutionality of firearm legislation following the *Heller* court's decision, ninety-four percent of the lower courts upheld the challenged law. LAW CTR. TO PREVENT GUN VIOLENCE, PROTECTING STRONG GUN LAWS: THE SUPREME COURT LEAVES LOWER COURT VICTORIES UNTOUCHED (Aug. 2, 2016), <http://smartgunlaws.org/protecting-strong-gun-laws-the-supreme-court-leaves-lower-court-victories-untouched> [<https://perma.cc/3PW3-KJVQ>]; see, e.g., *Kwong v. Bloomberg*, 723 F.3d 160, 172 (2d Cir. 2013) (upholding New York City handgun licensing fee); *Kachalsky*, 701 F.3d at 101 (upholding New York statute that required an applicant to show good cause in order to be issued a concealed carry permit); *Zaleski*, 489 F. App'x at 475 (upholding federal ban on personal possession of machine guns); *United States v. Reese*, 627 F.3d 792, 804 (10th Cir. 2010) (upholding federal law banning individuals subject to domestic violence restraining orders from possessing guns); *United States v. Dorosan*, 350 F. App'x 874, 876 (5th Cir. 2009) (upholding Postal Service's regulatory prohibition of handguns on its property). The Supreme Court has not granted certiorari to a Second Amendment case since *McDonald* in 2010. POST-*HELLER* LITIGATION, *supra* note 11, at 3.

<sup>71</sup> See, e.g., *Chovan*, 735 F.3d at 1136, 1142 (applying two step process to resolve a Second Amendment challenge); *Drake v. Filko*, 724 F.3d 426, 429–30 (3d Cir. 2013) (same); *Peterson*, 707 F.3d at 1208–09 (same); *Schrader v. Holder*, 704 F.3d 980, 988–89 (D.C. Cir. 2013) (same); Nat'l Rifle Ass'n of Am., Inc. v. Bureau of Alcohol, Tobacco, Firearms, & Explosives, 700 F.3d 185, 194–95 (5th Cir. 2012) (same); *United States v. Greeno*, 679 F.3d 510, 518, 520 (6th Cir. 2012) (same); *Ezell v. City of Chicago*, 651 F.3d 684, 702–03, 710 (7th Cir. 2011) (same). This approach is, essentially, the interest-balancing analysis that Justice Breyer explicated in his *Heller* dissent and that the majority had explicitly rejected. See *Heller*, 554 U.S. at 634–35 (arguing that a constitutionally guaranteed right that is subject to an interest balancing test by future judges is not truly a guaranteed right);

extent the challenged law burdens rights protected by the Second Amendment.<sup>72</sup> If the courts determine that the law only burdens conduct outside of the original protected scope of the Second Amendment, then the law will be upheld.<sup>73</sup> If the law burdens conduct to which the individual has a right, however, the courts will next assess whether the government has a satisfactory public policy basis for this restriction.<sup>74</sup>

The combination of the *Heller* Court's intentional decision not to conclusively state which level of scrutiny should be used to evaluate Second Amendment restrictions and the *McDonald* Court's failure to clarify the issue has left courts struggling to determine the applicable level of scrutiny in Second Amendment challenge.<sup>75</sup> Moreover, the full scope of the Second Amendment

Allen Rostron, *Justice Breyer's Triumph in the Third Battle Over the Second Amendment*, 80 GEO. WASH. L. REV. 703, 706–07, 756–57 (2012) (explaining how the lower courts have accepted a form of the interest-balancing method that the majority rejected in *Heller* by applying intermediate scrutiny that is deferential to what Congress decides should be protected).

<sup>72</sup> Allen Rostron, *The Continuing Battle Over the Second Amendment*, 78 ALB. L. REV. 819, 823 (2015). The court examines whether the restricted conduct would historically have been protected during the Constitution's ratification. *Id.*

<sup>73</sup> *Id.* at 824.

<sup>74</sup> *Id.* When a law allegedly discriminates against certain protected classes of people or burdens a fundamental right, a court conducts an inquiry to determine whether the law is constitutional. Adam Bryan Wall, *Justice for All?: The Equal Protection Clause and Its Not-So-Equal Application to Legal Aliens*, 84 TUL. L. REV. 759, 761–62 (2010). This inquiry involves applying one of three levels of scrutiny to the law: rational basis review, intermediate scrutiny, or strict scrutiny. *Id.* Laws that significantly burden fundamental rights are generally subject to strict scrutiny. See *Roe v. Wade*, 410 U.S. 113, 155 (1973) (applying strict scrutiny to a law burdening the fundamental right to an abortion); *Shapiro v. Thompson*, 394 U.S. 618, 638 (1969) (applying strict scrutiny to a law burdening the fundamental right to interstate travel); *Loving v. Virginia*, 388 U.S. 1, 11 (1967) (applying strict scrutiny to a law burdening the fundamental right to marriage). *But see* Adam Winkler, *Fundamentally Wrong About Fundamental Rights*, 23 CONST. COMMENT. 227, 227, 233–34 (2006) (arguing that the commonly taught doctrine that fundamental rights receive strict scrutiny is inaccurate, and claiming that within the Bill of Rights, only First and Fifth Amendment claims sometimes receive strict scrutiny). Under a strict scrutiny analysis, the government must prove that the challenged statute uses narrowly tailored means to further a compelling government interest. *Citizens United v. FEC*, 558 U.S. 310, 340 (2010); *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 227 (1995); *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 280 (1986). Intermediate scrutiny, in contrast, requires only that the government show that the law advances an important government objective through a means substantially related to that objective. See *Turner Broad. Sys., Inc. v. FCC*, 520 U.S. 180, 213–14 (1997) (applying intermediate scrutiny to must-carry regulations imposed on cable television stations); *Clark v. Jeter*, 486 U.S. 456, 461, 464 (1988) (applying intermediate scrutiny to a law disallowing child support for an illegitimate child that is unable to establish paternity within six years of the child's birth). The lowest level of scrutiny, rational basis review, places the burden on the individual challenging the law to demonstrate either that the government lacks any legitimate interest in the law or that there is no reasonable or rational nexus between the restricted interest and the law at issue. *Romer v. Evans*, 517 U.S. 620, 631–32 (1996); *FCC v. Beach Commc'ns, Inc.*, 508 U.S. 307, 313–15 (1993); *U.S. Dep't of Agric. v. Moreno*, 413 U.S. 528, 533 (1973).

<sup>75</sup> See *Heller*, 554 U.S. at 634 (noting Justice Breyer's dissent criticizing the majority's decision not to establish the appropriate level of scrutiny for Second Amendment claims); *United States v. Marzzarella*, 614 F.3d 85, 92 (3d Cir. 2010) (noting that the Second Amendment's scope is still unsettled); Rostron, *supra* note 71, at 752–53 (describing the varying levels of scrutiny applied by lower

and what aspects of the Amendment are fundamental remain unclear.<sup>76</sup> In spite of *McDonald's* holding that the right to keep and bear arms, at least within the home for the purpose of self-defense, is fundamental, multiple federal appellate courts have explicitly adopted intermediate scrutiny as the appropriate level of scrutiny for evaluating Second Amendment challenges.<sup>77</sup> Other courts have even embraced a more nuanced, hybrid approach, suggesting the use of strict scrutiny for laws severely burdening the core Second Amendment right of law-abiding citizens to armed defense of the home and intermediate scrutiny for laws burdening rights outside of this core.<sup>78</sup> In analyzing whether 18 U.S.C. § 922(g)(5), the

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courts following *Heller*, though noting that most have chosen to apply intermediate scrutiny); Sobel, *supra* note 11, at 504 (explaining that although the *McDonald* Court established that the right to bear arms for the purpose of self-defense is fundamental, it failed to address whether that meant that courts should apply strict scrutiny as the standard of review). It is clear, however, that rational basis review is not the appropriate standard of scrutiny for Second Amendment challenges. *See Heller*, 554 U.S. at 628 n.27 (“If all that was required to overcome the right to keep and bear arms was a rational basis, the Second Amendment would be redundant with the separate constitutional prohibitions on irrational laws, and would have no effect.”). The *Heller* majority also rejected Justice Breyer’s proposal of substituting the traditional levels of scrutiny with an interest-balancing test that would weigh the statutory burden on a protected interest against the statute’s effect on an important government interest. 554 U.S. at 634–35.

<sup>76</sup> *See McDonald*, 561 U.S. at 923 (Breyer, J., dissenting) (enumerating the several questions left unanswered by the majority, including whether aliens can possess guns of any kind); *Heller*, 554 U.S. at 626–27 (explaining that the Court did not intend to address the full scope of the Second Amendment, but affirming lawfulness of longstanding categorical prohibitions, such as the possession of firearms by felons and the mentally ill, carrying firearms in sensitive places, and conditions on the commercial sale of arms); TINA MEHR & ADAM WINKLER, AM. CONSTITUTION SOC’Y, THE STANDARDLESS SECOND AMENDMENT 7 (2010), [https://www.acslaw.org/sites/default/files/Mehr\\_and\\_Winkler\\_Standardless\\_Second\\_Amendment.pdf](https://www.acslaw.org/sites/default/files/Mehr_and_Winkler_Standardless_Second_Amendment.pdf) [<https://perma.cc/ARJ9-57FK>] (questioning whether *Heller* and *McDonald* intended to limit the Second Amendment to the home or whether the scope of the right covers public possession).

<sup>77</sup> *McDonald*, 561 U.S. at 778; *see Heller v. District of Columbia*, 670 F.3d 1244, 1257 (D.C. Cir. 2011) (deciding that intermediate scrutiny to be the appropriate level of scrutiny to apply to gun registration laws); *Reese*, 627 F.3d at 802 (applying intermediate scrutiny to an as-applied challenge to prohibition of firearm possession by individual subject to a domestic protection order); *see also* Fredrick E. Vars, *Self-Defense Against Gun Suicide*, 56 B.C. L. REV. 1465, 1489–91 (2015) (describing the application of intermediate scrutiny to mandatory waiting periods to purchase firearms); Kiehl, *supra* note 11, at 1141 (identifying the trend in lower courts applying intermediate scrutiny). *But see* Kolbe v. Hogan, 813 F.3d 160, 179 (4th Cir. 2016) (adopting strict scrutiny to analyze bans on semi-automatic rifles and magazines holding more than ten rounds); Mance v. Holder, 74 F. Supp. 3d 795, 807 (N.D. Tex. 2015) (using strict scrutiny to analyze challenge to federal interstate handgun transfer ban); *United States v. Engstrum*, 609 F. Supp. 2d 1227, 1231 (D. Utah 2009) (applying strict scrutiny to federal ban on possession of firearms by domestic violence misdemeanor).

<sup>78</sup> *See Nat’l Rifle Ass’n of Am., Inc. v. McCraw*, 719 F.3d 338, 348 (5th Cir. 2013) (determining that Texas statutory scheme prohibiting eighteen to twenty year olds from carrying handguns in public does not burden the core of the Second Amendment); *United States v. Masciandaro*, 638 F.3d 458, 471 (4th Cir. 2011) (suggesting strict scrutiny for laws burdening self-defense in the home by law-abiding citizens and intermediate scrutiny for firearms outside the home); *Chester*, 628 F.3d at 682–83 (holding intermediate scrutiny is appropriate for law burdening the Second Amendment rights of domestic violence misdemeanants whereas strict scrutiny may be appropriate where a law burdens the core right of law-abiding responsible citizens).

federal law that makes it a crime for immigrants to possess firearms, is unconstitutional, appellate courts have applied intermediate and even rational basis scrutiny.<sup>79</sup>

### C. Defining “the People” of the Second Amendment

The First and Fourth Amendments include the same ambiguous phrase “the people” which is found in the Second Amendment.<sup>80</sup> The stakes of defining “the people” as encompassing undocumented immigrants are high, as these Amendments provide numerous protections, including the rights to self-expression and freedom from police misconduct.<sup>81</sup> The question of who is included under “the

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<sup>79</sup> 18 U.S.C. § 922(g)(5) (2012); see *Carpio-Leon*, 701 F.3d at 982 (applying rational basis review); *Huitron-Guizar*, 678 F.3d at 1169 (applying intermediate scrutiny). In *Carpio-Leon*, the Fourth Circuit applied rational basis review after concluding that undocumented immigrants do not possess a Second Amendment right. 701 F.3d at 982. In *Huitron-Guizar*, the Tenth Circuit applied intermediate scrutiny based on a previous case’s use of intermediate scrutiny to analyze a Second Amendment challenge by a U.S. citizen who was prohibited from possessing firearms because he was subject to a domestic protection order. 678 F.3d at 1169. The court determined that intermediate scrutiny should be applied, assuming that the undocumented immigrant was entitled to exercise a Second Amendment right because he had lived in the United States for decades and the law completely eliminates this right for a class of persons. *Id.*

<sup>80</sup> U.S. CONST. amends. I, II, IV; see *The Meaning(s) of “The People,” supra* note 12, at 1078 (explaining the conflict between the Supreme Court’s analyses of “the people” in *Verdugo* and *Heller* and questioning whether the phrase in fact indicates particular individuals, who these individuals include, and these individuals are the same across the amendments). The grouping “the people” has been distinguished as encompassing a narrower group compared to “the accused” in the Sixth Amendment and the “persons” in the Fifth Amendment and Fourteenth Amendments. See *Huitron-Guizar*, 678 F.3d at 1167–68 (acknowledging that undocumented immigrants are protected under the Fifth and Sixth Amendments); Thomas P. Crocker, *The Political Fourth Amendment*, 88 WASH. U.L. REV. 303, 356–57 (2010) (explaining the difference between “the people” and a more expanded body of individuals, including women and noncitizens, in “persons”). In the context of criminal prosecutions, the Sixth Amendment protects the “accused,” which can be read to cover all people within the United States regardless of their immigration status. See *Wong Wing v. United States*, 163 U.S. 228, 238 (1896) (holding that even noncitizens unlawfully present within U.S. territory enjoy the protections of the Fifth and Sixth Amendments); see also *Padilla v. Kentucky*, 559 U.S. 356, 374 (2010) (opining that legal counsel must warn undocumented immigrants of the immigration consequences of guilty pleas). Furthermore, the Fifth and Fourteenth Amendments guarantee due process to all persons. U.S. CONST. amend. V, XIV; see *Plyler*, 457 U.S. at 229–30 (holding that unauthorized noncitizens possess the right of equal protection under the Fourteenth Amendment, which is violated when a state refuses public education to undocumented children); *United States v. Mendoza-Lopez*, 481 U.S. 828, 841–42 (1987) (concluding that undocumented immigrants possess a Fifth Amendment right to due process in which a determination made in an administrative proceeding will play a critical role in a collateral criminal charge); *Wong Yang Sung v. McGrath*, 339 U.S. 33, 49–50 (1950) (concluding that deportation proceedings for unlawful immigrants must include a fair hearing before an impartial tribunal).

<sup>81</sup> See *Portillo-Munoz*, 643 F.3d at 444–45 (Dennis, J., concurring in part and dissenting in part) (explaining that the majority’s definition of “the people” that excludes undocumented immigrants makes “countless persons . . . vulnerable [] to governmental intrusions on their homes and persons, as well as interference with their rights to assemble and petition the government for redress of grievances—with no recourse”); *Gun Rights Win a Major Victory in Federal Court, supra* note 12 (describing the conse-



people” in the Constitution has been hotly debated, particularly in the Second Amendment context.<sup>82</sup> Courts and scholars disagree as to whether “the people” has the same meaning in the Second Amendment as it does in the First and Fourth Amendments.<sup>83</sup> If “the people” has a different meaning in the Second Amendment context, then judicial precedent acknowledging undocumented immigrants’ rights to First and Fourth Amendment protections would not apply to an analysis of the right to bear arms.<sup>84</sup>

Fourth Amendment jurisprudence makes clear that immigrants, including some undocumented immigrants, possess the rights enumerated therein.<sup>85</sup> In 1990, in *United States v. Verdugo-Urquidez*, the U.S. Supreme Court provided

quences on Fourth and First Amendment protections for undocumented immigrants if they are not considered part of “the people” under the Second Amendment).

<sup>82</sup> See Gulasekaram, *supra* note 10, at 1527 (arguing that “the people” protected by the Second Amendment are not limited to American citizens); Salnikova, *supra* note 10, at 627 (contending that undocumented immigrants are not part of “the people” within the context of the Second Amendment); *The Meaning(s) of “The People,” supra* note 12, at 1098–99 (rejecting *Heller*’s analysis of “the people” as limited to citizens).

<sup>83</sup> See *Meza-Rodriguez*, 798 F.3d at 670 (concluding that the Second Amendment has the same meaning across the Bill of Rights given that the First, Second, and Fourth Amendments all codify pre-existing rights and were adopted together); *Portillo-Munoz*, 643 F.3d at 440–41 (asserting that “the people” in the Second and Fourth Amendments are not necessarily the same, especially where the Second Amendment grants an affirmative right to keep and bear arms whereas the Fourth Amendment protects against government abuse); *The Meaning(s) of “The People,” supra* note 12, at 1099 (arguing that the different origins, purposes, and consequences of the amendments suggest they have distinct meanings).

<sup>84</sup> See *Huitron-Guizar*, 678 F.3d at 1168 (considering what can be inferred about “the people” based on *Verdugo*’s analysis of the Fourth Amendment and *Heller*’s analysis of the Second Amendment). The majority in *Portillo-Munoz* distinguished the Second Amendment from the First and Fourth Amendments as granting an affirmative right, rather than a protective right, against government abuse. 643 F.3d at 440–41 (noting that the Second Amendment and Fourth Amendment have different purposes and that it is reasonable to conclude that they would apply to different groups of people). At least one author has cautioned against defining rights as affirmative or protective and using such categorization to determine who is entitled to those rights. See Mathilda McGee-Tubb, *Sometimes You’re in, Sometimes You’re Out: Undocumented Immigrants and the Fifth Circuit’s Definition of “The People” in United States v. Portillo-Muñoz*, 53 B.C.L. REV. E-SUPP. 75, 87 (2012), [http://bclawreview.org/files/2012/02/06\\_mcgee-tubb.pdf](http://bclawreview.org/files/2012/02/06_mcgee-tubb.pdf) [<https://perma.cc/3253-RHHP>] (suggesting that this method diminishes the courts’ power to assess the constitutionality of statutes and defeats the intention of the Bill of Rights to protect a wide range of rights).

<sup>85</sup> See *United States v. Quintana*, 623 F.3d 1237, 1239 (8th Cir. 2010) (explaining that undocumented immigrants’ Fourth Amendment rights must be upheld during arrests); *Martinez-Aguero v. Gonzalez*, 459 F.3d 618, 625 (5th Cir. 2006) (holding that an undocumented immigrant with substantial connections to the United States has Fourth Amendment rights). *But see Reno v. Am.-Arab Anti-Discrimination Comm.*, 525 U.S. 471, 488, 492 (1999) (holding an alien unlawfully present in the U.S. can be deported for ties to international terrorist and communist organizations). Before the 1990 Immigration Act was passed, the Immigration and Nationality Act (“INA”) allowed for the deportation of noncitizens who advocated or taught communist or anarchist doctrine. 8 U.S.C. § 1251(a)(6)(A)–(H) (1988) (repealed 1990). Although membership to a totalitarian or communist party may still be the basis of a denial of admission, the 1990 Immigration Act eradicated these other deportation provisions. *Id.* § 1182(a)(3)(B), (D)(i) (Supp. V 1993). The revised act also added provisions that permitted the deportation of noncitizens who had engaged in terrorist activity. *Id.* § 1182(a)(3)(B) (1993).

some guidance on the meaning of the “the people” within the context of the Fourth Amendment.<sup>86</sup> The Court explained that “the people” is a term of art and shares the same meaning in the First, Second, and Fourth Amendments and signifies a group of people who belong to a national community or who have sufficient connection to the United States.<sup>87</sup> The Court had previously implicitly suggested that undocumented immigrants have Fourth Amendment rights.<sup>88</sup> The majority in *Verdugo-Urquidez*, however, disagreed with that assumption and questioned whether undocumented immigrants as a class, though “person[s]” protected by the Fifth and Sixth Amendments, were part of “the people” in the Fourth Amendment.<sup>89</sup> The Court declined to decide the issue but explained that if it was assumed that undocumented immigrants are included in “the people,” they may be able to exercise these rights as long as they were present in the United States of their own volition and had accepted some societal obligations.<sup>90</sup>

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<sup>86</sup> *United States v. Verdugo-Urquidez*, 494 U.S. 259, 265 (1990).

<sup>87</sup> *Id.* *Verdugo-Urquidez* requires that the noncitizen’s presence in the United States be voluntary, which in this context means that the noncitizen was not brought to the United States against his or her will. *Id.* at 271–72. On the other hand, the Court in *Plyler* held that undocumented immigrant children were entitled to a public school education in part because the children’s unlawful status was involuntary, as it was their parents’ decision to disregard the law. 457 U.S. at 220, 226. *But see* Linda S. Bosniak, *Membership, Equality, and the Difference That Alienage Makes*, 69 N.Y.U. L. REV. 1047, 1122 n.319 (1994) (suggesting that the assumption that adult undocumented immigrants’ status is voluntary is problematic because the need to escape government persecution or poverty frequently causes illegal immigration).

<sup>88</sup> *See* *INS v. Lopez-Mendoza*, 468 U.S. 1032, 1050–51 (1984) (noting that the Court’s holding may be different if there was evidence of frequent Fourth Amendment abuses by INS officers in detaining undocumented immigrants); *see also* *Abel v. United States*, 362 U.S. 217, 233–34, 241 (1960) (assuming that noncitizens are entitled to proper administrative searches as protected by the Fourth Amendment). The Supreme Court’s 1984 decision in *Immigration and Naturalization Services v. Lopez-Mendoza* arguably suggests that undocumented immigrants have Fourth Amendment rights in the civil setting if the transgressions by INS officers are widespread or so egregious that they offend notions of fundamental fairness or undermine the evidence’s probative value. 468 U.S. at 1050–51; *see* D. Carolina Núñez, *Inside the Border, Outside the Law: Undocumented Immigrants and the Fourth Amendment*, 85 S. CAL. L. REV. 85, 97–98 (2011) (describing the Court’s suggestion that the Fourth Amendment protects undocumented immigrants, including four justices in the dissent stating explicitly that undocumented immigrants have Fourth Amendment rights); Stella Burch Elias, “*Good Reason to Believe*”: *Widespread Constitutional Violations in the Course of Immigration Enforcement and the Case for Revisiting Lopez-Mendoza*, 2008 WIS. L. REV. 1109, 1111–12 (explaining situations enumerated in *Lopez-Mendoza* in which the exclusionary rule would apply to immigrants).

<sup>89</sup> *Verdugo-Urquidez*, 494 U.S. at 272–273; *see* James G. Connell, III & René L. Valladares, *Search and Seizure Protections for Undocumented Aliens: The Territoriality and Voluntary Presence Principles in Fourth Amendment Law*, 34 AM. CRIM. L. REV. 1293, 1304 (1997) (indicating apprehension that *Verdugo-Urquidez*’s dictum threatens the Fourth Amendment protection of undocumented immigrants and could lead to police abuse).

<sup>90</sup> *Verdugo-Urquidez*, 494 U.S. at 272–73. *Verdugo-Urquidez*’s holding elaborated on previous statements from *Johnson v. Eisentrager*, specifically that, as an immigrant bolsters her identity within American society, she is given more rights. *Johnson v. Eisentrager*, 339 U.S. 763, 770 (1950). The Eighth Circuit, however, has explicitly held that the Fourth Amendment applies to arrests of illegal aliens, suggesting that all undocumented immigrants may be protected without requiring substantial connections. *Quintana*, 623 F.3d at 1239.

Courts have since applied the *Verdugo-Urquidez* test to determine whether the Fourth Amendment protects an undocumented immigrant.<sup>91</sup> Questions still remain, nevertheless, as to what qualifies as a substantial connection and acceptance of societal obligations, as the court has yet to establish a bright-line rule.<sup>92</sup>

*Heller* has added further confusion to deciphering the meaning of “the people” with its inconsistent interpretation of *Verdugo-Urquidez*.<sup>93</sup> Whereas *Heller* approvingly cited *Verdugo-Urquidez*’s interpretation of “the people” as “persons who are part of a national community,” Justice Scalia, writing for the majority in *Heller*, articulated in the same paragraph that the term “the people” “unambiguously refers to all members of the political community.”<sup>94</sup> The *Heller* Court also noted that they began their analysis with a strong presumption that all Americans are entitled to Second Amendment rights, ultimately determining that “whatever else it leaves to future evaluation, [the Second Amendment] surely elevates above all other interests the right of law-abiding, responsible citizens to use arms in defense of hearth and home.”<sup>95</sup> Although some circuit courts have used this new language to justify excluding undocumented immigrants from Second Amendment protections, others have determined that the language in *Heller* was simply precautionary and should not be interpreted as intending to answer the question of who is included under “the people.”<sup>96</sup>

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<sup>91</sup> See *Ibrahim v. Dep’t of Homeland Sec.*, 669 F.3d 983, 996 (9th Cir. 2012) (deciding that studying for several years as a Ph.D. student at an American university was sufficient to establish substantial voluntary connection); *Martinez-Aguero*, 459 F.3d at 625 (concluding that the appellee’s periodic visits to her aunt through regular and legal entry into the United States with a valid border crossing card demonstrated her voluntary acceptance of societal obligations such that it constituted substantial connections with the United States).

<sup>92</sup> See Brief and Short Appendix of Plaintiff-Appellee at 8, *United States v. Meza-Rodriguez*, No. 14-3271, 2015 WL 2064443 (7th Cir. Apr. 28, 2015) (arguing that Meza-Rodriguez did not have substantial connections to the United States because he had not accepted society’s obligations given his criminal acts, trouble holding down a job, lack of paying child support, and failure to file a tax return); Karen Nelson Moore, *Aliens and the Constitution*, James Madison Lecture (Oct. 2012), in 88 N.Y.U. L. REV. 801, 840–41 (2013) (describing how some courts inquire about the connections of each individual immigrant whereas others have made categorical determinations for classes of noncitizens); Douglas I. Koff, *Post-Verdugo-Urquidez: The Sufficient Connection Test—Substantially Ambiguous, Substantially Unworkable*, 25 COLUM. HUM. RTS. L. REV. 435, 455 (1994) (explaining that *Verdugo-Urquidez* did not clarify how substantial immigrant’s connections must be in order to receive Fourth Amendment protections).

<sup>93</sup> *The Meaning(s) of “The People,” supra* note 12, at 1083, 1085–86.

<sup>94</sup> *Heller*, 554 U.S. at 580 (emphasis added). It is unclear whether this word substitution was an intentional effort on the part of the Court to restrict the rights of noncitizens. See Gulasekaram, *supra* note 10, at 1536–39 (noting that Scalia joined the majority opinion in *Verdugo-Urquidez* and delivered the majority opinion in *Heller*).

<sup>95</sup> *Heller*, 554 U.S. at 581, 635 (emphasis added).

<sup>96</sup> See *Portillo-Munoz*, 643 F.3d at 440 (concluding that the Second Amendment does not extend to undocumented immigrants because they are not law-abiding, responsible citizens, members of the political community, or Americans); *Huitron-Guizar*, 678 F.3d at 1168–69 (explaining decision not to infer from *Heller* that undocumented immigrants are excluded from “the people” because of conflict-

#### *D. Status of Undocumented Immigrant's Second Amendment Rights Pre-Meza-Rodriguez*

Prior to *Meza-Rodriguez*, all of the circuit courts that addressed challenges to § 922(g)(5) either concluded that undocumented immigrants are not part of “the people” or declined to address that particular issue.<sup>97</sup> In 2011, in *United States v. Portillo-Munoz*, the Fifth Circuit Court of Appeals explicitly held that undocumented immigrants are not included in “the people” for Second Amendment purposes.<sup>98</sup> The Fifth Circuit concluded that the purposes of the Second and Fourth Amendments differ because the Second Amendment grants an affirmative right to keep and bear arms, whereas the Fourth Amendment is a protective right from government abuse.<sup>99</sup> Thus, the majority asserted that it would be reasonable for “the people” in the Second Amendment to apply to fewer people than the Fourth Amendment.<sup>100</sup> Also in 2011, in *United States v. Flores*, the Eighth Circuit Court of Appeals agreed that the Second Amendment does not extend its protection to undocumented immigrants but did not offer a separate explanation for its holding.<sup>101</sup> In 2012, the Fourth Circuit Court of Appeals in *United States v. Carpio-Leon* and the Tenth Circuit Court of Appeals in *United States v. Huitron-Guizar* chose not to opine on whether undocumented immigrants are included under “the people” in the Second Amendment due to the Su-

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ing language with previous U.S. Supreme Court precedent, including *Verdugo-Urquidez*); *United States v. Skoien*, 614 F.3d 638, 639–40 (7th Cir. 2010) (rejecting government argument that the Second Amendment does not protect people convicted of domestic violence because they are neither law-abiding nor responsible citizens). The Seventh Circuit warned “not to treat *Heller* as containing broader holdings than the [Supreme] Court set out to establish: that the Second Amendment creates individual rights, one of which is keeping operable handguns at home for self-defense.” *Skoien*, 614 F.3d at 640.

<sup>97</sup> See *infra* notes 98–102 and accompanying text.

<sup>98</sup> *Portillo-Munoz*, 643 F.3d at 442. A majority of the *Portillo-Munoz* court determined that an immigrant illegally present in the United States for over a year and working as a ranch hand was not covered under the Second Amendment. *Id.* at 439, 442. Armando Portillo-Munoz, the appellant, claimed that he had obtained the firearm to protect the chickens at the ranch on which he worked from coyotes. *Id.* at 439.

<sup>99</sup> *Id.* at 440–41. In his dissent, Judge Dennis criticized the majority’s reading of “the people” as having distinct meanings in the Second and Fourth Amendment. *Id.* at 444 (Dennis, J., dissenting). He determined that this characterization contradicted the *Heller* decision, which held that the First, Second, and Fourth Amendments each codified a pre-existing right. *Id.* (citing *Heller*, 554 U.S. at 592). Moreover, the Fifth Circuit’s decision contradicted its own precedent in *United States v. Emerson*, in which the court explained that there was no evidence in the Constitution that the phrase “the people” has a different meaning within the Second Amendment than in the other Amendments in which it is found. 270 F.3d at 227; see *Portillo-Munoz*, 643 F.3d at 439–41.

<sup>100</sup> *Portillo-Munoz*, 643 F.3d at 441. In analyzing the Second Amendment claim, the Fifth Circuit noted persuasive Supreme Court precedent, specifically that Congress has the authority to make laws governing the conduct of aliens that would be unconstitutional if they were applied to citizens. *Id.* at 441–42; see also *Mathews v. Diaz*, 426 U.S. 67, 79–80 (1976) (explaining that this type of legislation is permissible through Congress’s exercise of its broad naturalization and immigration powers when such disparate treatment is not invidious).

<sup>101</sup> *Flores*, 663 F.3d at 1023.

preme Court's conflicting language and failure to directly address the issue in regard to undocumented immigrants in *Heller* and *Verdugo-Urquidez*.<sup>102</sup>

The Fourth and Tenth Circuits were also split as to what level of scrutiny should apply when analyzing an undocumented immigrant's Second Amendment challenge.<sup>103</sup> In *Carpio-Leon*, the Fourth Circuit concluded that the scope of the Second Amendment does not extend its protection to undocumented immigrants because they are not law-abiding members of the political community.<sup>104</sup> Since a fundamental constitutional right was thus not at stake, the court applied rational-basis review and concluded that a prohibition on undocumented immigrants as a class from possessing firearms is rationally related to Congress's legitimate goal of public safety.<sup>105</sup> On the other hand, the Tenth Circuit in *Huitron-Guizar* assumed that if some undocumented immigrants possessed a Second Amendment right, then intermediate scrutiny would be the appropriate standard of review for those individuals.<sup>106</sup> Despite all of the circuits ultimately upholding § 922(g)(5) as constitutional, their reasoning varied and failed to establish the appropriate level of scrutiny to apply in Second Amendment challenges.<sup>107</sup>

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<sup>102</sup> *Carpio-Leon*, 701 F.3d at 978–79; *Huitron-Guizar*, 678 F.3d at 1168–69. The court in *Carpio-Leon* explained that *Heller* failed to explicitly state whether undocumented immigrants could ever be part of the political community such that they could become part of “the people.” *Carpio-Leon*, 701 F.3d at 978. The court also noted that *Verdugo-Urquidez* did not dismiss the possibility of certain undocumented immigrants being included in “the people.” *Id.* The court in *Huitron-Guizar* reasoned that *Heller* was only intended to rule on whether the Second Amendment was an individual or a collective right, not whether undocumented immigrants are protected. *Huitron-Guizar*, 678 F.3d at 1168. The court expressed concern that accepting the conflicting language in *Heller* would require holding that the Second Amendment would not protect people entitled to Fourth Amendment protections, despite the Amendments' shared purposes in protecting sacred space of the home from intrusion. *Id.*

<sup>103</sup> *Carpio-Leon*, 701 F.3d at 982; *Huitron-Guizar*, 678 F.3d at 1169.

<sup>104</sup> *Carpio-Leon*, 701 F.3d at 981. The court conceded in an asterisk that its historical analysis was broad and not limited to the scope of the phrase “the people” because it is unlikely that women, Native Americans, and blacks were considered members of the political community when the Constitution was drafted, even though they are unquestionably included in the modern interpretation of “the people.” *Id.* at 978.

<sup>105</sup> *Id.* at 982.

<sup>106</sup> *Huitron-Guizar*, 678 F.3d at 1169. The Tenth Circuit's decision to apply intermediate scrutiny was based on its precedent in *United States v. Reese*, in which the court had used intermediate scrutiny to assess a citizen's Second Amendment challenge to 18 U.S.C. § 922(g)(8), the provision forbidding firearms to those subject to a domestic-protection order. *Id.*; *Reese*, 627 F.3d at 802.

<sup>107</sup> See *Carpio-Leon*, 701 F.3d at 982 (affirming the constitutionality of § 922(g)(5) because it passes rational basis review); *Huitron-Guizar*, 678 F.3d at 1169 (concluding that § 922(g)(5) is constitutional because it passes intermediate scrutiny); *Flores*, 663 F.3d at 1023 (upholding the constitutionality of § 922(g)(5) because the Second Amendment does not protect undocumented immigrants); *Portillo-Munoz*, 643 F.3d at 441 (holding that § 922(g)(5) is constitutional because undocumented immigrants are not part of “the people” in the Second Amendment); see also Moore, *supra* note 92, at 842–45 (summarizing the differences in reasoning among the circuits).

II. *UNITED STATES V. MEZA-RODRIGUEZ* CREATES A CIRCUIT SPLIT  
IN THE CONSTITUTIONAL INTERPRETATION OF “THE PEOPLE”  
IN THE SECOND AMENDMENT

After being indicted for violating 18 U.S.C. § 922(g)(5), a federal law that makes it illegal for noncitizens to possess firearms or ammunition, Mariano Meza-Rodriguez filed a motion to dismiss based on the unconstitutionality of the statute.<sup>108</sup> His constitutional challenge made its way to the U.S. Court of Appeals for the Seventh Circuit where, in 2015, the court became the first circuit to explicitly hold that undocumented immigrants like Meza-Rodriguez are part of “the people” in the Second Amendment.<sup>109</sup> Despite ultimately upholding a law that functionally prevents undocumented immigrants from exercising their Second Amendment rights, the court preserved the possibility for the U.S. Supreme Court to explicitly acknowledge that undocumented immigrants possess First and Fourth Amendment rights.<sup>110</sup> Section A of this Part reviews the pretrial motions for *United States v. Meza-Rodriguez*.<sup>111</sup> Section B examines the Seventh Circuit’s holding that undocumented immigrants are part of “the people” and

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<sup>108</sup> *United States v. Meza-Rodriguez*, 798 F.3d 664, 666–67 (7th Cir. 2015). Under the statute, it is illegal for any alien, either with or without lawful status, “to ship or transport in interstate or foreign commerce, or possess in or affecting commerce, any firearm or ammunition; or to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce.” 18 U.S.C. § 922(g) (2012). Title 18, § 922(g) of the United States Code, part of the amended Gun Control Act of 1968, forbids gun possession by nine classes of individuals: felons, fugitives, addicts or users of controlled substances, the mentally ill, illegal and non-immigrant aliens, the dishonorably discharged, renouncers of their citizenship, those subject to court orders for harassing, stalking, or threatening partners or their children, and those convicted for misdemeanor domestic violence. *Id.* Following reports of an armed man at a bar, police chased and ultimately apprehended Meza-Rodriguez. *Meza-Rodriguez*, 798 F.3d at 666. The arresting officer discovered a .22 caliber cartridge of ammunition in Meza-Rodriguez’s shorts pocket while conducting a pat down. *Id.* Following system checks and an interview at the Milwaukee County Jail, officials began to suspect that Meza-Rodriguez was in the United States illegally. *United States v. Meza*, No. 13-CR-192, at \*8 (E.D. Wis. Apr. 11, 2014), 2014 WL 1406301.

<sup>109</sup> *Compare Meza-Rodriguez*, 798 F.3d at 672 (concluding that unauthorized status does not result in per se exclusion from “the people” because undocumented immigrants who have developed substantial, voluntary connections with the United States receive constitutional protections), *with United States v. Carpio-Leon*, 701 F.3d 974, 975 (4th Cir. 2012) (concluding that the Second Amendment does not extend to undocumented immigrants because they are not law-abiding, responsible citizens, members of the political community or Americans), *United States v. Huitron-Guizar*, 678 F.3d 1164, 1168–69 (10th Cir. 2012) (declining to determine whether undocumented immigrants may be included in “the people” because it is not necessary to find § 922(g)(5) constitutional under intermediate scrutiny), *and United States v. Portillo-Munoz*, 643 F.3d 437, 442 (5th Cir. 2011) (holding that the phrase “the people,” at least within the Second Amendment, does not include undocumented immigrants).

<sup>110</sup> *See Meza-Rodriguez*, 798 F.3d at 672–73 (upholding the constitutionality of § 922(g)(5) but also concluding that undocumented immigrants are part of “the people”); *Gun Rights Win a Major Victory in Federal Court*, *supra* note 12 (suggesting that the issue of whether “the people” in the First, Second, and Fourth Amendment is ripe for the Supreme Court to address).

<sup>111</sup> *See infra* notes 114–123 and accompanying text.

thus protected by the Second Amendment.<sup>112</sup> This Section also looks at the Seventh Circuit's determination that a ban on undocumented immigrants possessing firearms does not infringe their Second Amendment right because it passes intermediate scrutiny.<sup>113</sup>

### A. Procedural Posture of *U.S. v. Meza-Rodriguez*

Meza-Rodriguez filed a motion to dismiss the indictment arguing the unconstitutionality of 18 U.S.C. § 922(g)(5).<sup>114</sup> He first asserted a facial challenge, contending that the statute's total prohibition of all undocumented immigrants possessing firearms was overbroad and therefore unconstitutional under the Second Amendment.<sup>115</sup> He also argued an as-applied constitutional challenge on the basis that the statute violated his personal Second Amendment rights.<sup>116</sup>

In holding § 922(g)(5) constitutional, the U.S. District Court for the Eastern District of Wisconsin pointed to Seventh Circuit and other circuit court decisions upholding bans on firearm possession for certain categories of people without violating their Second Amendment right.<sup>117</sup> The district court also reasoned that the ban was not unconstitutionally overbroad because the Seventh Circuit and scholars had determined that the government could disarm "unvirtuous citizens."<sup>118</sup> The court ultimately rejected Meza-Rodriguez's facial challenge after determining that undocumented immigrants are neither virtuous nor citizens,

<sup>112</sup> See *infra* notes 124–135 and accompanying text.

<sup>113</sup> See *infra* notes 136–140 and accompanying text.

<sup>114</sup> *Meza*, 2014 WL 1406301, at \*1, \*4. The defendant also moved to dismiss the indictment for failure to allege an element of the offense and to suppress statements. *Id.* at \*1. The court rejected Meza's argument that the indictment failed to allege that he possessed the requisite mens rea as to the facts establishing his prohibited status, and that he only knew that he was in possession of ammunition. *Id.* at \*2, \*4. The court further recommended denying the motion to suppress statements made to police because the interview did not constitute an interrogation and Miranda warnings were unnecessary. *Id.* at \*12.

<sup>115</sup> *Id.* at \*4. A facial challenge asserts that there is no way in which that law could be applied that would be constitutional. Alex Kreit, *Making Sense of Facial and As-Applied Challenges*, 18 WM. & MARY BILL RTS. J. 657, 657 (2010) (quoting *Sabri v. United States*, 541 U.S. 600, 609 (2004)).

<sup>116</sup> *Meza*, 2014 WL 1406301, at \*6–7. In an as-applied challenge, the plaintiff argues that the law, though generally constitutional, is unconstitutional when applied to him on account of the specific facts and circumstances of his case. Kreit, *supra* note 115, at 657 (citing *Tex. Workers' Comp. Comm'n v. Garcia*, 893 S.W.2d 504, 518 (Tex. 1995)).

<sup>117</sup> *Meza*, 2014 WL 1406301, at \*5; see also *United States v. Yancey*, 621 F.3d 681, 687 (7th Cir. 2010) (upholding § 922(g)(3)'s prohibition of users of unlawful controlled substances from possessing weapons); *United States v. Williams*, 616 F.3d 685, 694 (7th Cir. 2010) (upholding § 922(g)(1)'s bar on possession of firearms by felons); *United States v. Skoien*, 614 F.3d 638, 645 (7th Cir. 2010) (upholding § 922(g)(9)'s prohibition on possession of firearms by domestic violence misdemeanants).

<sup>118</sup> *Meza*, 2014 WL 1406301, at \*5 (quoting *Yancey*, 621 F.3d at 685). This is in line with the Fourth Circuit's logic that the right to keep and bear arms is restricted to law-abiding, responsible citizens. *Carpio-Leon*, 701 F.3d at 979 (quoting *District of Columbia v. Heller*, 554 U.S. 570, 635 (2008)).

and that Congress' broad powers over immigration and naturalization permit it to make laws that would be improper if applied to citizens.<sup>119</sup>

The court also rejected Meza-Rodriguez's as-applied constitutional challenge after applying intermediate scrutiny to the § 922(g)(5) ban.<sup>120</sup> The court determined that prohibiting him from possessing a firearm was substantially related to the government's important objective of keeping firearms away from presumptively risky people in order to suppress gun violence.<sup>121</sup> The court identified his criminal history, as well as fake personal information that he had provided to the police during his arrest, as evidence that he was a risky person of the type the statute was intended to prevent from possessing weapons.<sup>122</sup> Meza-Rodriguez entered into an agreement with the government that allowed him to

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<sup>119</sup> *Meza*, 2014 WL 1406301, at \*5–6. Congress has near plenary power to make laws governing immigration and naturalization. Judy C. Wong, *Egregious Fourth Amendment Violations and the Use of the Exclusionary Rule in Deportation Hearings: The Need for Substantive Equal Protection Rights for Undocumented Immigrants*, 28 COLUM. HUM. RTS. L. REV. 431, 435–36 (1997). This power is derived from the Commerce Clause, naturalization powers, war powers, the Migration and Importation Clause, foreign affairs powers and inherent sovereign power. See *Kleindienst v. Mandel*, 408 U.S. 753, 770 (1972) (explaining that the courts will defer to the executive branch's discretion in exercising its powers to make policies and rules regarding the exclusion of aliens as long as it demonstrates facially legitimate and bona fide reasoning); *Harisiades v. Shaughnessy*, 342 U.S. 580, 588–89 (1952) (opining that immigration policies are so entwined with policymaking dedicated to the executive and legislative branches concerning foreign relations, war, and preservation of a sovereign republican state that the courts should generally not question or interfere with related issues that arise); *Fong Yue Ting v. United States*, 149 U.S. 698, 711 (1893) (explaining that, given that the power to exclude and expel aliens affects international relations, it is reserved for the political branches with very limited judiciary intervention); Wong, *supra* (describing how the political branches' plenary power to regulate immigration law is based on its foreign affairs power, commerce regulation power, war power, and sovereignty power). Although Congress may not discriminate invidiously against aliens, the legislature often passes laws that would be impermissible if applied to citizens when exercising this power. *Mathews v. Diaz*, 426 U.S. 67, 79–80 (1976). The Court is thus highly deferential to federal laws that discriminate on the basis of alienage. See *id.* at 81–82 (describing how the political branches of the Federal Government are entrusted with the regulation of the relationship between the United States and aliens, and that the courts should limit their review of immigration and naturalization laws); *Fiallo v. Bell*, 430 U.S. 787, 792 (1977) (emphasizing Congressional power over the admission and exclusion of aliens as a fundamental sovereign power removed from judicial interference).

<sup>120</sup> *Meza*, 2014 WL 1406301, at \*6–7; see also *Williams*, 616 F.3d at 692 (applying intermediate scrutiny); *Skoien*, 614 F.3d at 641–42 (avoiding adoption of a particular standard but using “some form of strong showing” as the standard of scrutiny after the government conceded that as its burden). The court acknowledged that *Heller* had not laid out the appropriate standard of scrutiny but had plainly rejected the rational-basis review. *Meza*, 2014 WL 1406301, at \*6.

<sup>121</sup> *Meza*, 2014 WL 1406301, at \*6. The court explained that undocumented immigrants are presumptively risky because they “are likely to maintain no permanent address in this country, elude detection through an assumed identity, and—already living outside the law—resort to illegal activities to maintain a livelihood.” *Id.* (quoting *Portillo-Munoz*, 643 F.3d at 441).

<sup>122</sup> *Id.* at \*7. *Meza*'s criminal record included a conviction for resisting or obstructing an officer, in addition to pending charges of two counts of resisting or obstructing an officer and two counts of disorderly conduct. *Id.* During his arrest, Meza gave false information with regard to his place of birth and social security number. *Id.*



plead guilty while also preserving for appeal the issue of the constitutionality of the statute on his Second Amendment rights.<sup>123</sup>

*B. Seventh Circuit Holds That Undocumented Immigrants Are Included  
in “The People,” and § 922(g)(5) Is a Permissible  
Restriction on the Right to Bear Arms*

On appeal, the Seventh Circuit first sought to determine whether “the people” referenced in the Second Amendment includes undocumented immigrants.<sup>124</sup> The court acknowledged that no Supreme Court decision, including *Heller*, had yet decided this issue, although other circuits had concluded, based on the language in *Heller*, that the Second Amendment does not cover undocumented immigrants.<sup>125</sup> The Seventh Circuit, however, explained that the issue in *Heller* did not involve unauthorized immigrants.<sup>126</sup> Consequently, despite connecting the Second Amendment with law-abiding citizens and members of the political community, the Supreme Court did not intend to decide the meaning of “the people” within the context of undocumented immigrants.<sup>127</sup> The Seventh Circuit considered that *Heller* had recognized that the Second, First, and Fourth Amendments share characteristics in the nature of the right and the language used, which may signify that “the people” has the same meaning across all three Amendments.<sup>128</sup> The court also reasoned that the Bill of Rights was adopted as a package and thus it would make sense that the meaning of an identical phrase would be consistent throughout.<sup>129</sup>

The court then turned to *Verdugo-Urquidez* to glean its meaning of the phrase “the people”; namely whether the Court included undocumented immigrants.<sup>130</sup> The court recognized that, although the Fourth Amendment was at issue in *Verdugo-Urquidez* and the Court had concluded that the First, Second, and Fourth Amendments should be read consistently, the Seventh Circuit could use the language in *Verdugo-Urquidez* to analyze whether Meza-Rodriguez had Sec-

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<sup>123</sup> *Meza-Rodriguez*, 798 F.3d at 667. The district court sentenced Meza-Rodriguez to time served without supervised release and Meza-Rodriguez was ultimately deported to Mexico. *Id.*

<sup>124</sup> *Id.* at 669.

<sup>125</sup> *Id.*

<sup>126</sup> *Id.*

<sup>127</sup> *Heller*, 554 U.S. at 635.

<sup>128</sup> *Meza-Rodriguez*, 798 F.3d at 669.

<sup>129</sup> *Id.* at 670; see *United States v. Emerson*, 270 F.3d 203, 227 (5th Cir. 2001) (noting that different words and phrases are used in the Constitution to denote different powers possessed by different groups of people, thus suggesting that “the people” has the same meaning throughout); *The Meaning(s) of “The People,” supra* note 12, at 1088 (explaining that the same words and phrases in the same statute generally mean the same thing; that the amendments were drafted, passed, and ratified at the same time by the same people as a reaction to the same political concerns; and that the Bill of Rights may have specifically chosen to use “the people” because it denoted something different than the words “citizen” and “person” in the original Constitution).

<sup>130</sup> *Meza-Rodriguez*, 798 F.3d at 670.

ond Amendment rights.<sup>131</sup> Applying *Verdugo-Urquidez*, the Seventh Circuit reasoned that Meza-Rodriguez's voluntary presence in the United States, his residency in the country since the age of four or five until his removal, his attendance at Milwaukee public schools, his sporadic work, and his close relationships with family members and other acquaintances, were sufficient connections to meet the requirements for constitutional protection.<sup>132</sup>

The court rejected the government's argument that Meza-Rodriguez's unsavory traits, including his criminal record, failure to file taxes, and sporadic employment, were proof that he had not adequately accepted the obligations of living in American society.<sup>133</sup> The court emphasized that only the noncitizen's substantial connections, not the immorality of his behavior, were relevant to determining whether the constitutional protections applied.<sup>134</sup> The court concluded that the right to bear arms is not a second-class entitlement and that it could not see a principled way to find that undocumented immigrants, or possibly even all noncitizens, are not included under the Second Amendment.<sup>135</sup>

The Seventh Circuit also upheld § 922(g)(5) as a permissible restriction on undocumented immigrants' Second Amendment rights.<sup>136</sup> The court, noting a line of precedent in the Seventh Circuit and other circuits, elected to use some form of strong showing akin to intermediate scrutiny to analyze whether the statute is a constitutional restriction on the right to bear arms.<sup>137</sup> The court cited

<sup>131</sup> *Id.*

<sup>132</sup> *Id.* at 670–71. The court noted that Meza-Rodriguez possessed many more connections than other circuits have previously found to be adequate. *Id.* at 671; see *supra* note 91 and accompanying text. In his dissent in *Portillo-Munoz*, Judge Dennis asserted that the appellant satisfied the criteria from *Verdugo-Urquidez* in that he had come to the U.S. voluntarily and had accepted the societal obligations by maintaining employment, paying rent to his landlord, helping to financially support his girlfriend and daughter who were U.S. citizens, and not engaging in any criminal activity. *Portillo-Munoz*, 643 F.3d at 447 (Dennis, J., dissenting).

<sup>133</sup> *Meza-Rodriguez*, 798 F.3d at 671. The court reasoned that a test requiring an examination of the criminal history of each noncitizen seeking constitutional protection would be hard to administer and would mean that noncitizens who acted in a criminal or immoral manner could be dispossessed of constitutional protections to which they were formerly entitled. *Id.*

<sup>134</sup> *Id.* The majority also cited *Plyler v. Doe*, a U.S. Supreme Court decision from 1982, for the proposition that even undocumented immigrants enjoy certain constitutional rights, and thus the fact that they are here illegally does not mean that they are per se excluded from “the people” under the Second Amendment's protection. *Id.* at 671–72 (citing *Plyler v. Doe*, 457 U.S. 202, 210 (1982)).

<sup>135</sup> *Id.* at 672–73.

<sup>136</sup> *Id.* at 673. In his concurrence, Justice Flaum declined to address whether undocumented immigrants are included under the Second Amendment, but determined that addressing this issue was unnecessary to determine that § 922(g)(5) passes intermediate scrutiny and thus is not a constitutional violation. *Id.* at 673–74 (Flaum, J., concurring).

<sup>137</sup> *Meza-Rodriguez*, 798 F.3d at 672; see *Yancey*, 621 F.3d at 683 (applying intermediate strict scrutiny to § 922(g)(3)); *Williams*, 616 F.3d at 692 (applying intermediate scrutiny to § 922(g)(1)); *Skoien*, 614 F.3d at 641–42 (declining to opine on the “levels of scrutiny” quagmire” but observing that § 922(g)(9) furthers an important governmental objective and that there is a substantial relationship between the statute and this objective); see also *United States v. Chester*, 628 F.3d 673, 683 (4th

precedent that Congress had sought to keep guns out of the hands of presumptively risky people and to suppress armed violence when they passed § 922(g).<sup>138</sup> Agreeing with the government's argument that banning unauthorized immigrants from possessing firearms is substantially related to the statute's general objective, the court held that undocumented immigrants are more likely to elude law enforcement because their employment and identification are difficult to trace given that they are generally living off the books and may adopt a false identity.<sup>139</sup> The court questioned the government's argument that unauthorized immigrants are more likely than the general population to commit gun-related crimes in the future, but held that the government did have a strong interest in prohibiting people who had already shown disrespect for the law from possessing firearms.<sup>140</sup>

### III. UNDOCUMENTED IMMIGRANTS ARE PART OF "THE PEOPLE" AND INTERMEDIATE SCRUTINY SHOULD BE APPLIED TO POSSESSION OF FIREARMS OUTSIDE OF THE HOME

The Seventh Circuit Court of Appeals' decision in *Meza-Rodriguez* created a circuit split on whether undocumented immigrants are included in "the people" in the Second Amendment, as well as on the level of scrutiny that should be applied to § 922(g)(5) challenges.<sup>141</sup> On April 18, 2016, the U.S. Supreme Court denied *Meza-Rodriguez*'s petition for certiorari.<sup>142</sup> This Part argues that the Supreme Court should have granted this petition in order to clarify the major constitutional questions of who is included under "the people" in the Second Amendment, and the appropriate level of scrutiny to apply to Second Amendment challenges.<sup>143</sup> Section A asserts that undocumented immigrants are included in "the people" if they have formed substantial, voluntary connections with the United States.<sup>144</sup> Section B argues that intermediate scrutiny is the appropriate level of scrutiny to apply to § 922(g)(5) and that the government failed to meet its burden of evidence to demonstrate that prohibiting undocumented

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Cir. 2010) (applying intermediate scrutiny to § 922(g)(9)); *United States v. Reese*, 627 F.3d 792, 802 (10th Cir. 2010) (applying intermediate scrutiny to § 922(g)(8)).

<sup>138</sup> *Meza-Rodriguez*, 798 F.3d at 673 (quoting *Yancey*, 621 F.3d at 683–84).

<sup>139</sup> *Id.* (quoting *Huitron-Guizar*, 678 F.3d at 1170).

<sup>140</sup> *Id.*

<sup>141</sup> *United States v. Meza-Rodriguez*, 798 F.3d 664, 672 n.1 (7th Cir. 2015), *cert. denied*, 136 S. Ct. 1655 (2016) (acknowledging the circuit split created by the decision); *United States v. Carpio-Leon*, 701 F.3d 974, 982 (4th Cir. 2012) (applying rational-basis review); *United States v. Flores*, 663 F.3d 1022, 1023 (8th Cir. 2011) (*per curiam*) (concluding that Second Amendment does not cover undocumented immigrants); *United States v. Portillo-Munoz*, 643 F.3d 437, 442 (5th Cir. 2011) (holding undocumented immigrants are not part of "the people" in the Second Amendment).

<sup>142</sup> *Meza-Rodriguez* 136 S. Ct. at 1655.

<sup>143</sup> See *infra* notes 146–191 and accompanying text.

<sup>144</sup> See *infra* notes 146–168 and accompanying text.

immigrants from possessing firearms furthers a compelling government interest.<sup>145</sup>

*A. Undocumented Immigrants Are Part of “The People” if They Have Substantial Connections to the United States*

The phrase “the people” has the same meaning in the Second Amendment as it does in the First and Fourth Amendments, and thus applies to undocumented immigrants who have substantial connections with the United States.<sup>146</sup> The U.S. Supreme Court missed an opportunity to explicitly reach this conclusion, as there is significant evidence that points to a consistent definition across all three Amendments.<sup>147</sup> The First, Second, and Fourth Amendments were drafted, passed, and ratified contemporaneously as part of the Bill of Rights.<sup>148</sup> The Bill of Rights and the rest of the Constitution distinguish between “persons,” “the people,” and “citizens,” further supporting the idea that when the Framers intended to shift the group of people to which they were referring, they would utilize a separate term.<sup>149</sup> Additionally, 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.<sup>150</sup> This logic and textual interpretation are consistent with the Supreme Court’s decision in *Verdugo-Urquidez* to group the amendments together when analyzing what class of persons would be covered by the phrase.<sup>151</sup> Thus the Supreme Court should have

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<sup>145</sup> See *infra* notes 169–191 and accompanying text.

<sup>146</sup> *Meza-Rodriguez*, 798 F.3d at 670; see *Portillo-Munoz*, 643 F.3d at 444 (Dennis, J., dissenting) (explaining that both the Second and Fourth Amendments refer to a right of “the people” to be free from unwarranted government intrusion); *United States v. Emerson*, 270 F.3d 203, 227–28 (5th Cir. 2001) (asserting that the Constitution’s text strongly suggests that the phrase “the people” is consistent across the document).

<sup>147</sup> See *District of Columbia v. Heller*, 554 U.S. 570, 580, 592 (2008) (noting that the same language in the First, Second, and Fourth Amendments all refer to individual, pre-existing rights); *United States v. Verdugo-Urquidez*, 494 U.S. 259, 265 (1990) (defining “the people” protected by the First, Second, and Fourth Amendments as a class of persons who are part of a national community or have established substantial connections with the United States); Kenneth A. Klukowski, *Armed by Right: The Emerging Jurisprudence of the Second Amendment*, 18 GEO. MASON U. CIV. RTS. L.J. 167, 181 (2008) (arguing that “the people” should be read with a consistent definition across the Bill of Rights); Ronald S. Resnick, *Private Arms as the Palladium of Liberty: The Meaning of the Second Amendment*, 77 U. DET. MERCY L. REV. 1, 12 (1999) (asserting a lack of evidence that “the people” means different things across the Bill of Rights).

<sup>148</sup> *Emerson*, 270 F.3d at 227; *The Meaning(s) of “The People,” supra* note 12, at 1088; Resnick, *supra* note 147, at 16–17 (citing *United States v. Cruikshank*, 92 U.S. 542, 552 (1875)).

<sup>149</sup> Gulasekaram, *supra* note 10, at 1533; *The Meaning(s) of “The People,” supra* note 12, at 1090.

<sup>150</sup> *Powerex Corp. v. Reliant Energy Servs., Inc.*, 551 U.S. 224, 232 (2007); *Ratzlaf v. United States*, 510 U.S. 135, 143 (1994).

<sup>151</sup> See *Verdugo-Urquidez*, 494 U.S. at 265 (stating that “‘the people’ protected by the Fourth Amendment, and by the First and Second Amendments . . . refers to a class of persons who are part of

agreed with the majority in *Meza-Rodriguez* and explicitly concluded that “the people” has the same meaning across the Bill of Rights.<sup>152</sup>

The Supreme Court should have granted certiorari to elucidate that undocumented immigrants are covered under the Second Amendment protections when they have substantial and voluntary connections with the United States, as described in *Verdugo-Urquidez*.<sup>153</sup> This is consistent with the idea, which the Supreme Court has embraced, that as noncitizens increase their identity with American society, their rights increase as well.<sup>154</sup> Applying the substantial connections test, *Meza-Rodriguez* should have Second Amendment rights given that he has lived in the United States for over twenty years.<sup>155</sup> Further, he attended Milwaukee public schools, his two daughters and mother lived in the city, and he

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a national community or who have otherwise developed sufficient connection with this country to be considered part of that community”).

<sup>152</sup> See *Meza-Rodriguez*, 798 F.3d at 670 (deciding that “the people” maintains the same meaning throughout the Bill of Rights); *Portillo-Munoz*, 643 F.3d at 444 (Dennis, J., dissenting) (explaining that both the Second and Fourth Amendments refer to a right of “the people” to be free from unwarranted government intrusion); *supra* notes 148–151 and accompanying text.

<sup>153</sup> *Verdugo-Urquidez*, 494 U.S. at 271. Additionally, given that the Supreme Court has referred to the basic right of self-defense as a central component of the Second Amendment and a right that is inherent, ancient, and pre-existing, it seems that the right of self-defense should not be tied to citizenship, but rather should apply to all people, regardless of whether they had substantial connections with the United States or not. *McDonald v. City of Chicago*, 561 U.S. 742, 767 (2010); *Heller*, 554 U.S. at 592; *Cruikshank*, 92 U.S. at 553. The Court’s reliance on self-defense as one of the core purposes of the Second Amendment would seem to contradict some of the categorical exclusions of people that *Heller* assumed would be constitutional. See Adam Winkler, *Heller’s Catch-22*, 56 UCLA L. REV. 1551, 1568 (2009) (questioning why convicted felons shouldn’t share in the right to self-defense, especially given that they have already served their sentences and may be more likely to live in high-crime neighborhoods). There is no reason to believe that undocumented immigrants do not share the same interest in defending their self, family, and property within their homes. *Id.* After the *Verdugo-Urquidez* decision, however, it seems unlikely that the court will extend the right this broadly. See 494 U.S. at 273 (declining Fourth Amendment rights to undocumented immigrants who lack voluntary connections to the United States). *But see id.* at 288 (Brennan, J., dissenting) (arguing that the Fourth Amendment right of security against unreasonable searches and seizures is a pre-existing right and that “[b]estowing rights and delineating protected groups [is] inconsistent with the Drafters’ fundamental conception of a Bill of Rights as a limitation on the Government’s conduct with respect to all whom it seeks to govern”).

<sup>154</sup> *Johnson v. Eisentrager*, 339 U.S. 763, 770 (1950)

<sup>155</sup> *Meza-Rodriguez*, 798 F.3d at 671; Brief of Defendant-Appellant at 15, *United States v. Meza-Rodriguez*, No. 14-3271 (7th Cir. Feb. 5, 2015), 2015 WL 636261. It may be relevant that the Supreme Court in *Plyler* held a state’s denial of public school education to undocumented immigrants is unlawful. *Plyler v. Doe*, 457 U.S. 202, 230 (1982). The Court noted that children who were brought to the United States by their parents should not bear the discriminatory burden based on their illegal status over which they have little control. *Id.* at 220. Arguably, however, the fact that *Meza-Rodriguez* was not brought to the country of his own accord cuts against the voluntariness requirement. Brief of Defendant-Appellant at 3, *supra*; see *Verdugo-Urquidez*, 494 U.S. at 273 (concluding that the respondent’s lack of voluntary connections with the United States, given that he was transported to the United States by U.S. marshals, foreclosed the possibility that he was part of “the people”).

maintained intermittent employment.<sup>156</sup> These connections are more substantial than those that some circuit courts have previously found to be sufficient.<sup>157</sup>

The Supreme Court should, however, clarify the expectations for what is required to form substantial connections with the United States and to voluntarily accept societal obligations, as well as the harm of criminal activity.<sup>158</sup> As the law currently stands, *Verdugo-Urquidez* did not articulate that a criminal record would prevent someone from accepting other responsibilities, such as contributing to his or her family and working.<sup>159</sup> Thus, the Seventh Circuit was correct in finding that Meza-Rodriguez had formed substantial connections with the United States, despite his criminal record.<sup>160</sup> In clarifying the substantial connections test, however, the Court should look to the discretionary factors enumerated by the Board of Immigration Appeals in *In re C-V-T* for legal permanent residents' cancellation of removal, which include, in addition to criminal record, family ties within the United States, length of residence in the United States, service in the Armed Forces, history of employment, possession of property or a business, value and service to the community, and good character.<sup>161</sup> Even if Meza-Rodriguez does not meet this standard, it is very possible that other un-

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<sup>156</sup> Brief of Defendant-Appellant, *supra* note 155, at 3, 15.

<sup>157</sup> See *supra* note 91 and accompanying text.

<sup>158</sup> See *Meza-Rodriguez*, 798 F.3d at 670–71; Moore, *supra* note 92, at 840–41 (explaining that some courts assess the sufficiency of connections based on each unique set of facts whereas others have made broader decisions about certain groups of undocumented immigrants); Núñez, *supra* note 87, at 105–08 (discussing how lower courts have interpreted and applied *Verdugo*'s substantial connections test to cases involving the Fourth Amendment, some of which have categorically excluded felons). It is possible that some guidance could be gleaned from civil procedure and the requirement of a substantial connection for personal jurisdiction. See *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 475–76 (1985) (holding jurisdiction is proper where contacts proximately result from the defendant's actions that create substantial connections with the forum State). This concept also incorporates the idea of voluntariness present in *Verdugo-Urquidez*, in that the defendant must deliberately engage in significant activities within a State or create continuing obligations between himself and the residents in the State. 494 U.S. at 271; *Burger King Corp.*, 471 U.S. at 475–76.

<sup>159</sup> See *Verdugo-Urquidez*, 494 U.S. at 272–73 (concluding respondent had not developed substantial connections because his presence was involuntary and failing to mention the impact of his narcotics offenses on the substantial connections test); Brief of Defendant-Appellant, *supra* note 155, at 15 (arguing that Meza-Rodriguez met the substantial connections test because he lived in the United States for more than two decades, attended elementary through high school at American public school, and has relationships with his immediate family who live in the United States). Some courts, however, have categorically excluded undocumented immigrants, noting that they cannot establish substantial connections with the United States until they legally enter the country. *Kwong Hai Chew v. Colding*, 344 U.S. 590, 596 n.5 (1953); *United States v. Ullah*, No. 04-CR-30A(F), 2005 WL 629487, at \*30 (W.D.N.Y. Mar. 17, 2005), *aff'd in part, adopted in part*, No. 04-CR-030A, 2006 WL 1994678 (W.D.N.Y. July 14, 2006).

<sup>160</sup> *Meza-Rodriguez*, 798 F.3d at 671; see *Verdugo-Urquidez*, 494 U.S. at 272–73; Brief of Defendant-Appellant, *supra* note 155, at 15.

<sup>161</sup> See *In re C-V-T*, 22 Immigration & Naturalization Dec. No. 3342 7, 11 (B.I.A. 1998) (describing positive and negative factors that an immigration judge may consider when evaluating a request for cancellation of removal under INA § 240(A)).

documented immigrants may still be entitled to the protections of the Second Amendment.<sup>162</sup>

As immigrants continue to be politically active through unions, marches, and civic organizations, their sense of national belonging intensifies.<sup>163</sup> Despite lacking American citizenship, these individuals have become part of what *Verdugo-Urquidez* envisioned as our national community.<sup>164</sup> Undocumented immigrants, many of whom have been in the United States for many years, have become part of the fabric of American society, through their cultural and political contributions as well as through their major contributions to the nation's economy.<sup>165</sup> As undocumented immigrants have further integrated into American society, it has become increasingly difficult to view them as outsiders.<sup>166</sup> Interpreting the language of *Heller* to exclude undocumented immigrants would potentially deny the millions of undocumented immigrants living in the United States the right to be free from unjustified searches and seizures or the right to peaceably assemble and petition the government.<sup>167</sup> Such disenfranchisement of such a large population, composed in part by individuals who

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<sup>162</sup> See *Portillo-Munoz*, 643 F.3d at 447 (Dennis, J., dissenting) (concluding that Portillo-Munoz had satisfied the criteria of the substantial connections test because he was present voluntarily and had accepted and fulfilled obligations to his American employer and girlfriend and had no criminal record); *In re C-V-T*, 22 I&A Dec. 33427, at 11 (B.I.A. 1998) (outlining factors for immigration judges to consider when determining whether undocumented immigrants have substantial connections to the United States).

<sup>163</sup> Marouf, *supra* note 48, at 177; see Jiménez, *supra* note 32, at 4 (explaining that part of the undocumented immigrants' integration into American society is tied at least in part to their political participation).

<sup>164</sup> *Verdugo-Urquidez*, 494 U.S. at 265. Some undocumented immigrants could even be included in our political community if our conception of such a community were expanded from those eligible to vote and hold political office to those who participate in informal political processes such as lobbying and community activism. See *The Meaning(s) of "The People," supra* note 12, at 1087 (noting that *Heller* did not explain who is included in the political community and that the phrase does not have an obvious meaning). Although noncitizens cannot exercise some core political rights, it is statutes and state constitutions, rather than the federal Constitution, that limit such rights as serving on a jury and running for state office to citizens. Gulasekaram, *supra* note 10, at 1537. Furthermore, it is clear that undocumented immigrants have engaged in the political process by protesting, lobbying Congress, and joining local civic groups. See *supra* notes 34–41 and accompanying text.

<sup>165</sup> See *Plyler*, 457 U.S. at 218 n.17 (acknowledging that the Attorney General has stated that most undocumented immigrants are permanently attached to the United States); Marouf, *supra* note 48, at 175 (explaining that undocumented immigrants are embedded in American society and their economic contributions as workers not only undercut their stereotype as outsiders and criminals but also helps them earn political legitimacy). Pew Research Center studies show that undocumented immigrants constitute 5.1% of the American workforce. Krogstad & Passel, *supra* note 38.

<sup>166</sup> Marouf, *supra* note 48, at 175, 177. Also, when migrants are viewed as hard workers as opposed to drains on public benefits, they simultaneously are seen as more legitimate members of the political community. *Id.* at 175.

<sup>167</sup> See *Portillo-Munoz*, 643 F.3d at 443 (Dennis, J., dissenting) (expressing concern that by holding that an undocumented immigrant with substantial connections to the United States is not part of "the people" effectively means that millions of people become "non-persons" without the right to be free from government abuse).

have lived in the United States since they were children, would likely only serve to further marginalize a major segment of our society from the American rule of law.<sup>168</sup>

*B. No Documentation on the Danger of Undocumented Immigrants: Intermediate Scrutiny Is Appropriate and § 922(g)(5) Fails*

Given the confusion in the courts over which standard of scrutiny should be applied to Second Amendment claims, the Supreme Court would have been prudent to use *Meza-Rodriguez* as a chance to resolve the question of what standard of scrutiny is appropriate.<sup>169</sup> This resolution requires a reexamination of the scope of the right that is considered fundamental.<sup>170</sup> The Court in *Heller* identified the core of the Second Amendment as the right of law-abiding citizens to possess common types of firearms for the purpose of defending their home.<sup>171</sup> Strict scrutiny is applied in cases in which a law restricts the core, fundamental right, whereas intermediate scrutiny is applied in cases restricting the general individual right.<sup>172</sup>

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<sup>168</sup> *Plyler*, 457 U.S. at 218–19; see Bosniak, *supra* note 87, at 1054 n.18 (discussing how denying undocumented immigrants civil rights does not deter them from immigrating unlawfully and that increased social marginalization of undocumented immigrants may cause them to be more appealing to U.S. employers); Salnikova, *supra* note 10, at 636 (citing Alisa A. Johnson & Thomas D. Edmonson, *Fifth Circuit Declares That Illegal Aliens Lack Second Amendment Right to Bear Arms*, 80 U.S. L. WK. 8 (2011)) (describing the concern that excluding undocumented immigrants under “the people” in the Second Amendment would create the possibility for denial of other constitutional rights and “‘make illegal aliens further strangers to American law’”); Jie Zong & Jeanne Batalova, *Frequently Requested Statistics on Immigrants and Immigration in the United States*, MIGRATION POL’Y INST. (Feb. 26, 2015), <http://www.migrationpolicy.org/article/frequently-requested-statistics-immigrants-and-immigration-united-states-4#UnauthorizedImmigration> [<https://perma.cc/5VC3-2WRH>] (estimating that 1.49 million undocumented young people—approximately 13% of the undocumented population—are eligible to apply for DACA).

<sup>169</sup> See Rostron, *supra* note 71, at 705–06 (describing the importance of the scrutiny standard that should be used but that was left unanswered by *Heller* and *McDonald* and is now being decided using a variety of different approaches by the lower courts).

<sup>170</sup> See *United States v. Masciandaro*, 638 F.3d 458, 467 (4th Cir. 2011) (explaining that the scope of the right to keep and bear arms outside of the home and the extent to which the government may restrict this right remains unclear); *United States v. Marzarella*, 614 F.3d 85, 92 (3d Cir. 2010) (noting that the Second Amendment’s full scope is still uncertain).

<sup>171</sup> *Heller*, 554 U.S. at 627, 635; *Marzarella*, 614 F.3d at 92; Kiehl, *supra* note 11, at 1137; Mehr & Winkler, *supra* note 76, at 5–6.

<sup>172</sup> See *Masciandaro*, 638 F.3d at 471 (assuming that strict scrutiny would be the appropriate standard for laws burdening a law-abiding citizen’s fundamental right of self-defense within the home and that the distinction between inside and outside of the home is directly related to the appropriate level of scrutiny, namely that Second Amendment rights are more limited outside of the home); *United States v. Chester*, 628 F.3d 673, 680 (4th Cir. 2010) (explaining that a domestic violence misdemeanant’s right to keep a firearm in his home for self-defense is not a core right of the Second Amendment, which *Heller* explains protects the right of law-abiding, responsible citizens, and concluding, therefore, that intermediate scrutiny is the appropriate standard of review).



Under an alternative hybrid approach, laws such as § 922(g)(5) would not be analyzed using strict scrutiny because undocumented immigrants are not law-abiding citizens.<sup>173</sup> Instead, the government would be required to make a lesser showing of intermediate scrutiny in order to demonstrate the constitutionality of eliminating an undocumented immigrant's right bear arms.<sup>174</sup> The Supreme Court in *Heller* acknowledged that the need to be able to defend one's self, family, and property is most acute in the home, and there is no reason to doubt that undocumented immigrants share this same inherent need of and right to security.<sup>175</sup> The stakes in regard to Second Amendment protections are high, and the government should be held to its burden of intermediate scrutiny, which it failed to meet in *Meza-Rodriguez*.<sup>176</sup>

Once intermediate scrutiny is adopted as the appropriate standard, the question then becomes the amount of evidence required in order to support the government's contention that the restriction on the Second Amendment right furthers a compelling government interest.<sup>177</sup> Although courts are generally averse

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<sup>173</sup> See *Portillo-Munoz*, 643 F.3d at 440 (opining that undocumented immigrants are not law-abiding, responsible citizens whom *Heller* stated the core of the Second Amendment protects); *Chester*, 628 F.3d at 682–83 (holding that intermediate scrutiny is the appropriate standard of review as the core of the Second Amendment only protects law-abiding citizens and not domestic violence misdemeanants).

<sup>174</sup> *Masciandaro*, 638 F.3d at 471; see *Chester*, 628 F.3d at 683 (holding that because an individual's claim does not fall within *Heller*'s core Second Amendment right, the law will be subject to intermediate rather than strict scrutiny, in which the government must show that there is a reasonable fit between the challenged regulation and a substantial government objective). Since the statute involves the complete ban on a constitutional right, the government may not discriminate regardless of its plenary immigration powers. See *Fong Yue Ting v. United States*, 149 U.S. 698, 713 (1893) (holding immigration powers must be exercised within the bounds of the Constitution and the judiciary must intervene to enforce this); see also *Ill. Migrant Council v. Pilliod*, 540 F.2d 1062, 1068 n.5 (7th Cir. 1976) (concluding that, although Congress has broad powers over immigration, such powers must not be construed so broadly that aliens present in the United States are denied Fourth Amendment protections).

<sup>175</sup> *Heller*, 554 U.S. at 628. Moreover, scholar David Kopel has suggested that protection of the home is internationally considered a fundamental human right. David B. Kopel et al., *The Human Right of Self-Defense*, 22 *BYU J. PUB. L.* 43, 147, 175 (2007).

<sup>176</sup> See *Heller v. District of Columbia*, 670 F.3d 1244, 1259 (D.C. Cir. 2011) (explaining that the studies and data that the government offered were simply assertive rather than meaningful evidence demonstrating the substantial evidence between the contested registration requirements and an important government interest that the court could use in its judicial review); *Chester*, 628 F.3d at 683 (holding that government did not meet its burden under intermediate scrutiny where it presented multiple possible reasons but failed to provide sufficient evidentiary support on the record that substantially related a prohibition on domestic violence misdemeanants' possession of firearms to an important government interest).

<sup>177</sup> *Mehr & Winkler*, *supra* note 76, at 5. There is tension between courts holding the government to its burden of proof in a scrutiny analysis and showing deference to congressional wisdom and legislative power. See *United States v. Huitron-Guizar*, 678 F.3d 1164, 1170 (10th Cir. 2012) (expressing doubt that *Heller*'s interpretation securing an individual's ability to defend himself and his home should not apply to undocumented immigrants, but ultimately determining that the courts should be deferential to the legislative branch's exercise of its immigration powers); *McDonald*, 561 U.S. at

to reviewing significant amounts of empirical data, some evidence is necessary in order to ensure that constitutional rights are not being excessively and unjustifiably restricted.<sup>178</sup> The government has previously articulated that Congress's objective in passing § 922(g) was "to keep guns out of the hands of presumptively risky people" and to "suppress[] armed violence."<sup>179</sup> To apply this purported purpose to § 922(g)(5), however, requires an assumption that undocumented immigrants are presumptively risky or dangerous people, an assumption refuted by several studies.<sup>180</sup> The government in *Meza-Rodriguez* offered no evidence to support its assertion that unauthorized immigrants are more likely to commit crimes involving firearms in the future than individuals in the general population.<sup>181</sup> The legislative history of § 922(g)(5)(A) is devoid of statistics, data, or

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924–26 (Breyer, J., dissenting) (describing the competing interest in courts relying on empirical data in their review of gun regulations but acknowledging the difficulty for judges in evaluating this data, the ability of legislators to gather data and make their own conclusions, and the preference for legislative rather than judicial solutions).

<sup>178</sup> *McDonald*, 561 U.S. at 924–26; see *Chester*, 628 F.3d at 683 (holding that, despite providing possible justifications for ban, government failed to show sufficient evidence that substantially related the ban on domestic violence misdemeanants' firearm possession with a valid government interest). In analyzing First Amendment challenges, the U.S. Supreme Court has determined that judicial review should ensure that Congress is making reasonable inferences based on substantial evidence. *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 666 (1994) (holding government had not met its burden of evidence in intermediate scrutiny to show negative impact on broadcast television from must carry provisions such that the laws were narrowly tailored to promote an important government interest).

<sup>179</sup> *United States v. Yancey*, 621 F.3d 681, 683–84 (7th Cir. 2010) (citing S. REP. NO. 90-1501, at 22 (1968)); see also *Scarborough v. United States*, 431 U.S. 563, 572 (1977) (quoting 114 CONG. REC. 14773 (1968) (determining that Congress enacted legislation prohibiting particular classes of people from possessing firearms in order to keep guns out of the hands of those who had shown that "they may not be trusted to possess a firearm without becoming a threat to society"); *Huitron-Guizar*, 678 F.3d at 1169–70 (noting that § 922(g)'s purposes are to assist law enforcement in combating crime and to keep weapons away from those deemed dangerous or irresponsible).

<sup>180</sup> See Anjali Motgi, *Of Arms and Aliens*, 66 STAN. L. REV. ONLINE 1, 7 (2013), <https://www.stanfordlawreview.org/online/of-arms-and-aliens/> [<https://perma.cc/TC98-VKU6>] (arguing that, assuming the Second Amendment protects a fundamental individual right, then the government needs to provide greater justification for why undocumented immigrants are categorically denied this right and that as it stands, the law may be overbroad given that it prohibits possession by undocumented immigrants without a criminal record or who were brought to the United States as young children); RUBEN G. RUMBAUT, THE ROLE OF LOCAL POLICE: STRIKING A BALANCE BETWEEN IMMIGRATION ENFORCEMENT AND CIVIL LIBERTIES: APPENDIX D: UNDOCUMENTED IMMIGRATION AND RATES OF CRIME AND IMPRISONMENT: POPULAR MYTHS AND EMPIRICAL REALITIES, POLICE FOUNDATION 136 (2009), [http://www.policefoundation.org/wp-content/uploads/2015/06/Appendix-D\\_0.pdf](http://www.policefoundation.org/wp-content/uploads/2015/06/Appendix-D_0.pdf) [<https://perma.cc/SH8J-UEXX>] (pointing to data that shows that the immigrant population, particularly Mexicans, Salvadorans, and Guatemalans who constitute the majority of the undocumented population, has the lowest rate of incarceration for young men); *Does Immigration Increase Crime?*, KELLOGGINSIGHT (June 2, 2014), [http://insight.kellogg.northwestern.edu/article/does\\_immigration\\_increase\\_crime](http://insight.kellogg.northwestern.edu/article/does_immigration_increase_crime) [<https://perma.cc/J3YA-GRYB>] (reporting on a study that refuted a relationship between violent crime and the immigrant population); see also Gulasekram, *supra* note 10, at 1578 (suggesting that the regulation of immigrant firearm possession may relate to "hyperbolized and stereotypical conceptions of noncitizen and nonwhite aggression" given the lack of empirical evidence showing dangerousness of undocumented immigrants possessing firearms).

<sup>181</sup> *Meza-Rodriguez*, 798 F.3d at 673.

debate, rendering fairly speculative the government's articulated reasons in the circuit court cases addressing the statute's constitutionality.<sup>182</sup> Unlike felons, the mentally ill, domestic violent misdemeanants, and habitual drug users, undocumented immigrants are not dangerous simply because they illegally entered the United States.<sup>183</sup> The government's other arguments, that § 922(g)(5) was also aimed at prohibiting firearm possession by those who are difficult to track, have an interest in evading law enforcement, and have already disrespected the law, are also flawed.<sup>184</sup> In addition to the fact that these purposes are not articulated in the legislative history, they do not make sense in the full context of § 922(g)(5), given that the statute also applies to noncitizens legally admitted with a nonimmigrant visa.<sup>185</sup> Furthermore, individuals who were brought to the United States as children, like Meza-Rodriguez, cannot be said to have intended to break the law when they entered the country.<sup>186</sup> The statute is thus overinclud-

<sup>182</sup> Brief of Defendant-Appellant, *supra* note 155, at 5.

<sup>183</sup> See *United States v. Dugan*, 657 F.3d 998, 999 (9th Cir. 2011) (concluding that, especially when under the influence, habitual drug users, similar to felons and the mentally ill, are more likely to have issues with self-control and it is therefore dangerous for them to possess firearms); *United States v. Skoien*, 614 F.3d 638, 643 (7th Cir. 2010) (citing several studies showing that people who have been convicted of domestic violence are likely to reoffend); Brief of Defendant-Appellant, *supra* note 155, at 26–27 (citing multiple studies demonstrating that an increase in the undocumented population has actually resulted in a decrease in crime); RUMBAUT, *supra* note 180, at 119 (concluding that empirical evidence show increased immigration is correlated with lower rates of crime and incarceration). The public may be best protected by universal gun restrictions that recognize guns as dangerous weapons, rather than regulating based on dangerous categorizations of persons. See Katherine L. Record & Lawrence O. Gostin, *Dangerous People or Dangerous Weapons: Keeping Arms Away from the Dangerous in the Wake of an Expansive Reading of the Second Amendment*, 37 ADMIN. & REG. L. NEWS 8, 9 (2012) (describing the difficulty lawmakers face in balancing public safety with individual rights when utilizing categorical restrictions, particularly among the mentally ill). Courts have upheld bans on convicted felons possessing guns, even when acknowledging that these laws may be overly broad by including nonviolent felons who do not necessarily pose a greater danger of violence. See *United States v. Williams*, 616 F.3d 685, 693 (7th Cir. 2010) (acknowledging that prohibiting felons from possessing guns may eventually be challenged as overbroad given its inclusion of non-violent felons); *United States v. Schultz*, No. 1:08-CR-75-TS, at \*3 (N.D. Ind. Jan. 5, 2009), 2009 WL 35225 (upholding constitutionality of ban on felon possessing a firearm for failing to pay child support); *United States v. Westry*, No. 08-20237, at \*2 (E.D. Mich. Sept. 9, 2008), 2008 WL 4225541 (recognizing that *Heller* did not distinguish between nonviolent and violent felonies); Alexander C. Barrett, *Taking Aim at Felony Possession*, 93 B.U. L. REV. 163, 194–96 (2013) (explaining that the complete prohibition on firearm possession by felons may be overbroad given recent scholarship suggesting that, historically, felons were not banned from firearm possession); Conrad Kahn, *Challenging the Federal Prohibition on Gun Possession by Nonviolent Felons*, 55 S. TEX. L. REV. 113, 114 (2013) (asserting that blanket prohibitions on felon firearm possession which include nonviolent felons are illogical and biased given the law's intent to deter violent crime).

<sup>184</sup> *Meza-Rodriguez*, 798 F.3d at 673; see *infra* notes 185–187 and accompanying text.

<sup>185</sup> 18 U.S.C. § 922(g)(5)(B) (2012); Brief of Defendant-Appellant, *supra* note 155, at 5.

<sup>186</sup> *Meza-Rodriguez*, 798 F.3d at 673; *Plyler*, 457 U.S. at 220. The court in *Meza-Rodriguez* acknowledged that undocumented immigrants may have been too young to form the intent necessary to violate immigration statutes, but the court still determined that the government had a strong interest in preventing people who have disrespected the law from possessing firearms. *Meza-Rodriguez*, 798 F.3d at 673.

sive in that it prevents individuals who are at no more risk of engaging in gun violence than the general population from possessing firearms for the constitutional purpose of defending themselves and their home.<sup>187</sup>

By banning undocumented immigrants from possessing firearms, the statute ultimately also burdens their American family members' Second Amendment rights.<sup>188</sup> Such individuals may be unable to keep a gun in their home because their undocumented family member could be found in constructive possession of the firearm.<sup>189</sup> Thus, the government burdens the right of undocumented immigrants and their families to defend their homes without any empirical evidence that their possession is a greater threat to public safety than any other individual who is entitled to Second Amendment rights.<sup>190</sup> Unless the government is able to present data showing that undocumented immigrants as a class are presumptively risky people, such overbroad legislation should not survive intermediate scrutiny.<sup>191</sup>

## CONCLUSION

The case law surrounding the Second Amendment is unclear at best and contradictory at worst. The U.S. Supreme Court in *District of Columbia v. Heller* put off clarifying the full scope of the Second Amendment and justifying the categorical exclusion of certain classes of persons from the right. The current Court erred in denying certiorari in *United States v. Meza-Rodriguez* and taking the opportunity to reevaluate the scope of the Second Amendment given the unique circumstance of undocumented immigrants and the effect of this decision on their First and Fourth Amendment rights. Moving forward, courts in circuits that are unresolved on these issues should look to the Seventh Circuit Court of Appeals' decision in *Meza-Rodriguez* as a guide. Given the large immigrant population, issues involving § 922(g)(5) are virtually certain to arise again. The Supreme Court should take the next opportunity to establish that undocumented

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<sup>187</sup> See Richard H. Fallon, Jr., *Strict Judicial Scrutiny*, 54 UCLA L. REV. 1267, 1328 (2007) (describing the over inclusive inquiry when assessing constitutionality under strict scrutiny).

<sup>188</sup> Volokh, *supra* note 59, at 1499.

<sup>189</sup> See *Aybar-Alejo v. INS*, 230 F.3d 487, 488–89 (1st Cir. 2000) (concluding that a noncitizen was in either actual or constructive possession of a gun found in her home during a search and thus served as grounds for deportation); *United States v. Smith*, 930 F.2d 1081, 1086 (5th Cir. 1991) (holding control and dominion over a premises is sufficient to constitute possession by a felon in violation of § 922(g)(1)).

<sup>190</sup> *Meza-Rodriguez*, 798 F.3d at 673; see Volokh, *supra* note 59, at 1499 (describing how the ban on felons' possession of firearms also burdens their household members' Second Amendment rights).

<sup>191</sup> See *Turner Broad. Sys., Inc.*, 512 U.S. at 666 (explaining that although the courts give significant deference to legislative decisions, it does not mean that the government is shielded from judicial review that ensures that Congress has drawn reasonable inferences based on substantial evidence); *Chester*, 628 F.3d at 683 (opining that the government must provide sufficient evidence, or more than simply plausible reasons, to demonstrate a substantial relationship between the restrictive law and an important government interest).

immigrants are part of “the people” under the First, Second, and Fourth Amendments if they possess substantial connections with the United States. This comports with both judicial precedent and canons of interpretation. The Court should also hold the government to a showing of sufficient evidence that restricting this right serves a compelling government interest. To do otherwise would be to create a subclass of people denied basic rights that a nation raised on the backs of immigrants consider fundamental.

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