No. 23-12151791

In the Supreme Court of the United States

Dayne Adrian Sitladeen, *PETITIONER*, v.

United States, *RESPONDENT*

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

James Patterson McBaine Honors Moot Court Competition

2024 Record

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RECORD INSTRUCTIONS

The judicial opinions contained in this packet have been edited for purposes of the 2024 James Patterson McBaine Moot Court Competition. While you may access and read the full opinions online, you need only be familiar with the material contained in the excerpts below. You are not expected to be familiar with or to address the arguments and parts of the case that have been removed.

This packet also includes "Questions Presented" based on the Petitioner's petition for writ of certiorari. For your brief, you may choose to edit the questions presented as you see fit, though their substance should remain the same. Outside of the material in this packet, you should not attempt to access the underlying briefs or petitions from ***these cases or any other related case,*** in accordance with the rules of the competition.

A NOTE ON LANGUAGE USE

The record uses the term "alien" to refer to persons with the immigration status involved in this case. We recognize that the term "alien" can be exclusionary and that language can impact peoples' lives. However, we have decided to retain the original language from the lower court opinions. While we have preserved the language in the record, competitors may use alternative terms in their written briefs and oral arguments if they prefer.

QUESTIONS PRESENTED

1. Is a federal law that prohibits aliens unlawfully present in the United States from possessing firearms constitutional under the Second Amendment?

2. Is a federal law that prohibits aliens unlawfully present in the United States from possessing firearms constitutional under the Fifth Amendment?

64 F.4th 978

United States Court of Appeals, Eighth Circuit.

UNITED STATES of America, Plaintiff—Appellee,

v.

Dayne Adrian SITLADEEN, also known as Dante Peterson, Defendant—Appellant.

No. 22-1010

|

FILED April 4, 2023

Procedural Posture(s): Appellate Review; Pre-Trial Hearing Motion.
Opinion: Raymond W. Gruender, Circuit Judge:

***982** Dayne Sitladeen, a Canadian citizen, conditionally pleaded guilty to violating 18 U.S.C. § 922(g)(5)(A), which prohibits any alien who is unlawfully present in the United States from possessing a firearm. The district court[1] sentenced him to 78 months' imprisonment. On appeal, he argues that § 922(g)(5)(A) is unconstitutional under the Second and Fifth Amendments. He also raises various challenges to his sentence. We affirm.

I.

On a January evening in 2021, Dayne Sitladeen and Muzamil Addow were speeding down a Minnesota highway in a pickup truck at nearly one hundred miles per hour. After stopping the truck, a state trooper asked for and received consent to search it. The trooper discovered sixty-seven guns and over a dozen high-capacity pistol magazines. Sitladeen and Addow were arrested. Officers soon discovered that, though both were carrying false identification, Sitladeen and Addow were Canadians without permission to be in the United States. Officers also learned that Sitladeen was the subject of a Canadian arrest warrant for murder and fentanyl trafficking. The following month, Sitladeen and Addow were each indicted for possession of a firearm by an alien unlawfully present in the United States in violation of § 922(g)(5)(A).

Sitladeen moved to dismiss the indictment, contending that § 922(g)(5)(A) violates both the Second Amendment's right to keep and bear arms and the Fifth Amendment's guarantee of equal protection. The district court denied the motion. On the Second Amendment challenge, the court concluded that our decision in *United States v. Flores*, 663 F.3d 1022 (8th Cir. 2011), made clear that the Second Amendment does not apply to unlawfully present aliens. As for the equal-protection challenge, the court determined that only rational-basis scrutiny applied, which the statute satisfied because it was rationally related to the government's interest in public safety. Sitladeen then conditionally pleaded guilty, reserving the right to appeal the denial of his motion to dismiss. *See* Fed. R. Crim. P. 11(a)(2).

[*Discussion of Sitladeen's sentencing has been omitted*]

Sitladeen appeals.

II.

We first consider Sitladeen's argument that the district court erred in denying his motion to dismiss the indictment. Our review is *de novo*. *See United States v. Anderson*, 771 F.3d 1064, 1066-67 (8th Cir. 2014).

A.

We begin with Sitladeen's contention that § 922(g)(5)(A) violates the Second Amendment. 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." In *District of Columbia v. Heller*, the Supreme Court recognized that this Amendment "conferred an individual right to keep and bear arms." 554 U.S. 570, 595, 128 S.Ct. 2783, 171 L.Ed.2d 637 (2008). In *McDonald v. City of Chicago*, the Court held that this individual right is also a "fundamental" right incorporated against the states by the Fourteenth Amendment's Due Process Clause. 561 U.S. 742, 791, 130 S.Ct. 3020, 177 L.Ed.2d 894 (2010).

Shortly after *Heller* and *McDonald*, we decided *Flores*, 663 F.3d at 1023. In that case, the appellant made the same argument that Sitladeen raises in this appeal: that unlawfully present aliens are part of "the people" who have the Second Amendment right to keep and bear arms and that § 922(g)(5)(A) is therefore unconstitutional. We tersely disposed of this argument in a four-sentence opinion, holding that "the protections of the Second Amendment do not extend to aliens illegally present in this country." *Id.* Although *Flores* offered little analysis of its own, we cited favorably the Fifth Circuit's decision in *United States v. Portillo-Munoz*, 643 F.3d 437 (5th Cir. 2011). In *Portillo-Munoz*, an unlawfully present alien argued that § 922(g)(5)(A) violates the Second Amendment on the basis that "the people" to whom the right is guaranteed "refers to a class of persons who are part of a national community or who have otherwise developed sufficient connection with this country to be considered part of that community." *Id.* at 440 (citing *United States v. Verdugo-Urquidez*, 494 U.S. 259, 265, 110 S.Ct. 1056, 108 L.Ed.2d 222 (1990)). The alien, who had lived and worked in the United States for more than eighteen months, paid rent, and helped support a family, contended that he ***984** fell within this definition of "the people." *Id.* at 439. Guided by *Heller*'s references to "law-abiding, responsible citizens" and "members of the political community," the Fifth Circuit rejected his argument, declaring: "Whatever else the term means or includes, the phrase 'the people' in the Second Amendment of the Constitution does not include aliens illegally in the United States ...." *Id.* at 440-42.

Several of our sister circuits have parted ways with the reasoning of *Flores* and *Portillo-Munoz*, though none have found § 922(g)(5)(A) to be unconstitutional. The Second, Ninth, and Tenth Circuits have

assumed, without deciding, that the Second Amendment may apply to unlawfully present aliens but that § 922(g)(5)(A) is nonetheless constitutional because it satisfies some measure of means-end scrutiny. *See United States v. Perez*, 6 F.4th 448, 453 (2d Cir. 2021), *cert. denied*, —— U.S. ——, 142 S. Ct. 1133, 212 L.Ed.2d 20 (2022); *United States v. Torres*, 911 F.3d 1253, 1257 (9th Cir. 2019); *United States v. Huitron-Guizar*, 678 F.3d 1164, 1169 (10th Cir. 2012); *see also United States v. Jimenez-Shilon*, 34 F.4th 1042, 1046-48 (11th Cir. 2022) (assuming that "the people" includes unlawfully present aliens but concluding that the right codified by the Second Amendment is a "citizen's right"). *But see United States v. Carpio-Leon*, 701 F.3d 974, 981 (4th Cir. 2012) ("[I]llegal aliens do not belong to the class of law-abiding members of the political community to whom the protection of the Second Amendment is given ...."). The Seventh Circuit is the only circuit that has held that at least some unlawfully present aliens are included within "the people" of the Second Amendment. *See United States v. Meza-Rodriguez*, 798 F.3d 664, 672-73 (7th Cir. 2015) (ultimately upholding § 922(g)(5)(A) under intermediate scrutiny).

Initially, Sitladeen and the Government agreed that we were bound by *Flores*, though Sitladeen insisted we revisit it. After briefing ended, however, the Supreme Court decided *N.Y. State Rifle & Pistol Ass'n v. Bruen*, 597 U.S. ——, 142 S. Ct. 2111, 213 L.Ed.2d 387 (2022). We then requested supplemental briefing to address whether *Bruen* affects our analysis of Sitladeen's Second Amendment challenge. According to Sitladeen, *Bruen* "raises serious questions about the continued validity" of *Flores*. *See Faltermeier v. FCA US LLC*, 899 F.3d 617, 621 (8th Cir. 2018).

In *Bruen*, the Court held that New York's proper-cause requirement for carrying a firearm outside one's home violated the Second Amendment right to keep and bear arms, as incorporated by the Fourteenth Amendment. 142 S. Ct. at 2156. *Bruen* does not address the meaning of "the people," much less the constitutionality of criminal firearm statutes like § 922(g)(5)(A). *Bruen* does, however, clarify how a court must assess a Second Amendment challenge in general:

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

Id. at 2126 (internal quotation marks omitted). *Bruen* thus repudiates the sort of means-end scrutiny employed by our sister circuits in *Perez*, *Torres*, *Huitron-Guizar*, and *Meza-Rodriguez*. *See id.* at 2129. As ***985** the Court explained, the Second Amendment does not countenance "any judge-empowering interest-balancing inquiry that asks whether the statute burdens a protected interest in a way or to an extent that is out of proportion to the statute's salutary effects upon other important governmental interests." *Id.* (quoting *Heller*, 554 U.S. at 634, 128 S.Ct. 2783) (internal quotation marks omitted).

Following *Bruen*, instead of analyzing "how close the law comes to the core of the Second Amendment right and the severity of the law's burden on that right," a court must begin by asking whether the firearm regulation at issue governs conduct that falls within the plain text of the Second Amendment. *Id.* at 2126. If the regulation does govern such conduct, the court will uphold it so long as the government can "identify an American tradition justifying" the regulation. *Id.* at 2138. For the government to make this showing, it need not point to a "historical *twin*," but only an analogous, i.e., "relevantly similar," historical regulation that imposed "a comparable burden on the right of armed self-defense" and that was "comparably justified." *Id.* at 2132-33. Nevertheless, *Bruen* cautions that "not all history is created equal." *Id.* at 2136. Because "[c]onstitutional rights are enshrined with the scope they were understood to have *when the people adopted them*," regulations in effect at or near the time of the Second Amendment's ratification carry more weight in the analysis than those that existed long before or after that period. *Id.*

Accordingly, to assess Sitladeen's challenge, we must first ask whether § 922(g)(5)(A) governs conduct that falls within the plain text of the Second Amendment. *See id*. at 2126. Only if the answer is yes do we proceed to ask whether § 922(g)(5)(A) fits within America's historical tradition of firearm regulation. *See id*.[2] In our view, *Flores* already answers the first question, and its answer is no.

Though the opinion is short on explanation, it is unmistakable that our holding in *Flores* is about the plain text of the Second Amendment—about what is meant by the phrase, "the people." *See* 663 F.3d at 1023. Unlike the Second, Seventh, Ninth, and Tenth Circuits, we did not reach our conclusion that § 922(g)(5)(A) is constitutional by engaging in means-end scrutiny or some other interest-balancing exercise. *See id.* Rather, as the unqualified language of the opinion and the citation to *Portillo-Munoz* make clear, we reached our conclusion by considering—consistent with what *Bruen* now requires—whether the conduct regulated by § 922(g)(5)(A) was protected by the plain text of the Second Amendment. And we determined that it was not, as unlawfully present aliens are not within the class of persons to which the phrase "the people" refers. Nothing in *Bruen* casts doubt on our interpretation of this phrase. *See* 142 S. Ct. at 2134 ("It is undisputed that petitioners Koch and Nash—two ordinary, law-abiding, adult citizens—are part of 'the people' whom the Second Amendment protects."). Indeed, *Bruen* "decide[d] nothing about *who* may lawfully possess a firearm." *Id.* at 2157 (Alito, J., concurring) (emphasis added). Therefore, we remain bound by *Flores*. *See* ***986** *Young v. Hayes*, 218 F.3d 850, 853 (8th Cir. 2000) (discussing the prior-panel rule).[3]

We recognize that other courts both before and after *Bruen* have criticized *Flores*'s so-called "scope of the right" approach, insisting that a textual analysis of "the people" is not the right starting point when deciding whether a firearm regulation violates the Second Amendment. *See, e.g.*, *United States v. Rahimi*, 61 F.4th 443, 451-53 (5th Cir. 2023); *Kanter v. Barr*, 919 F.3d 437, 452-53 (7th Cir. 2019) (Barrett, J., dissenting) ("[O]ne [approach] uses history and tradition" to "say that certain people fall outside the Amendment's scope," while "the other uses that same body of evidence to identify the scope of the legislature's power to take it away. In my view, the latter is the better way to approach the problem." (emphasis removed)); *United States v. Goins*, No. 22-cr-00091-GFVT-MAS-1, —— F.Supp.3d ——, —— , 2022 WL 17836677, at *6 (E.D. Ky. Dec. 21, 2022). *But see Binderup v. Attorney General*, 836 F.3d 336, 357 (3d Cir. 2016) (Hardiman, J., concurring in part) ("[T]he Founders understood that not everyone possessed Second Amendment rights. These appeals require us to decide who count among 'the people'

entitled to keep and bear arms."). Rather than beginning, as in *Flores*, with the question of who "the people" includes, these courts construe the phrase broadly at the outset of the analysis and then consider whether history and tradition support the government's authority to impose the regulation. *See Kanter*, 919 F.3d at 453 (Barrett, J., dissenting) ("[T]he question is whether the government has the power to disable the exercise of a right that they otherwise possess, rather than whether they possess the right at all."); *Goins*, —— F.Supp.3d at ——, 2022 WL 17836677, at *7 ("[T]he Court will assess history relative to the burden placed upon Mr. Goins's right to bear a firearm ... rather than relative to whether he is one of the people entitled to claim the Second Amendment."). Indeed, some of these courts have read *Bruen* as effectively requiring courts to look past the Amendment's text and instead focus narrowly on "an individual's conduct, rather than status, to decide if Second Amendment protection exists." *See United States v. Kays*, No. CR-22-40-D, —— F.Supp.3d ——, —— & n.4, 2022 WL 3718519, at *2 & n.4 (W.D. Okla. Aug. 29, 2022) ("[A]n individual's Second Amendment rights are not predicated on their classification, but rather, their conduct."); ***987** *United States v. Quiroz*, 22-CR-00104-DC, 2022 WL 4352482, at *3 (W.D. Tex. Sept. 19, 2022) ("[T]ake 18 U.S.C. § 922(g)'s proscription against felons possessing firearms. The conduct is possession—which the Government admits falls under 'keep.' Therefore, whether the Government can restrict that specific conduct for a specific group would fall under *Bruen*'s second step: the historical justification for that regulation." (footnote omitted)). *But see Range v. Attorney General*, 53 F.4th 262, 266 (3d Cir. 2022) (holding, post-*Bruen*, that § 922(g)(1) does not violate the Second Amendment because felons are not part of "the people"), *vacated and reh'g granted*, 56 F.4th 992 (3d Cir. 2023).

Essentially, the concern with *Flores*'s "scope of the right" approach is that determining at the outset that "the people" excludes certain individuals seems to "turn[ ] the typical way of conceptualizing constitutional rights on its head," *Rahimi*, 61 F.4th at 453, and might enable some courts to manipulate the Second Amendment's "plain text" to avoid ever reaching *Bruen*'s "historical tradition" inquiry. Whether or not this concern is justified, we do not think that *Bruen* addresses it.

Bruen does not command us to consider only "conduct" in isolation and simply assume that a regulated person is part of "the people." To the contrary, *Bruen* tells us to begin with a threshold question: whether the person's conduct is "covered by" the Second Amendment's "plain text." *See* 142 S. Ct. at 2129-30. And in *Flores*, we did exactly that when we determined that the plain text of the Amendment does not cover *any* conduct by unlawfully present aliens. *See* 663 F.3d at 1023. Thus, just as *Bruen* does not cast doubt on *Flores*'s interpretation of "the people," neither does it disavow *Flores*'s "scope of the right" approach.

In sum, *Flores* is undisturbed by *Bruen*, and we therefore remain bound by it. *See Owsley v. Luebbers*, 281 F.3d 687, 690 (8th Cir. 2002). *Flores*'s textual interpretation may or may not be correct. But until the Supreme Court or our *en banc* court determines otherwise, the law of our circuit is that unlawful aliens are not part of "the people" to whom the protections of the Second Amendment extend. Therefore, Sitladeen's contention that § 922(g)(5)(A) violates the Second Amendment cannot prevail.

B.

We next take up Sitladeen's equal-protection argument. Unlike his Second Amendment challenge, his contention that § 922(g)(5)(A) deprives him of equal protection under the Fifth Amendment presents an issue of first impression for our court.

The Fifth Amendment's Due Process Clause "contains within it the prohibition against denying to any person the equal protection of the laws." *United States v. Windsor*, 570 U.S. 744, 774, 133 S.Ct. 2675, 186 L.Ed.2d 808 (2013). Unlawfully present aliens are "person[s]" under the Fifth Amendment. *Plyler v. Doe*, 457 U.S. 202, 210, 102 S.Ct. 2382, 72 L.Ed.2d 786 (1982). The first step when evaluating an equal-protection challenge is to determine whether the challenger has demonstrated that he was treated differently than others who were similarly situated to him. *Adam & Eve Jonesboro, LLC v. Perrin*, 933 F.3d 951, 959 (8th Cir. 2019). Sitladeen has done so. Section 922(g)(5)(A) deprives individuals of the right to possess a firearm on the basis of their unlawful presence in the United States. We therefore proceed to the next step: determining the level of scrutiny. *See Huitron-Guizar*, 678 F.3d at 1167 (reaching the question of scrutiny in an equal-protection challenge to § 922(g)(5)(A)).

***988** Ordinarily, we apply rational-basis scrutiny in an equal-protection challenge, rejecting the challenge so long as the legislative classification "bears a rational relation to some legitimate end." *Schmidt v. Ramsey*, 860 F.3d 1038, 1047 (8th Cir. 2017). But where the challenged law "burdens a fundamental right, targets a suspect class, or has a disparate impact on a protected class and was motivated by a discriminatory intent," we apply heightened scrutiny. *New Doe Child #1 v. United States*, 901 F.3d 1015, 1027 (8th Cir. 2018). Sitladeen contends that heightened scrutiny applies to our review of § 922(g)(5)(A) for two separate reasons: (1) the statute deprives unlawfully present aliens of the benefit of armed self-defense, thus creating a disfavored and permanent "caste" and (2) the statute burdens the fundamental right to keep and bear arms. Neither is persuasive.

First, consistent with *Plyler*, we have held that unlawfully present aliens like Sitladeen are not members of "a suspect class, or otherwise entitled to heightened scrutiny." *See Vasquez-Velezmoro v. INS*, 281 F.3d 693, 697 (8th Cir. 2002) (citing *Plyler*, 457 U.S. at 223, 102 S.Ct. 2382). Simply put, a noncitizen's "presence in this country in violation of federal law is not a constitutional irrelevancy." *Plyler*, 457 U.S. at 223, 102 S.Ct. 2382 (internal quotation marks omitted); *see also Mathews v. Diaz*, 426 U.S. 67, 81, 96 S.Ct. 1883, 48 L.Ed.2d 478 (1976) ("For reasons long recognized as valid, the responsibility for regulating the relationship between the United States and our alien visitors has been committed to the political branches of the Federal Government."). Accordingly, the mere fact that § 922(g)(5)(A) treats unlawfully present aliens differently from others does not provide a basis for applying heightened scrutiny.

And second, heightened scrutiny is not applicable on the ground that § 922(g)(5)(A) burdens a fundamental right. Certainly, the right to keep and bear arms is properly regarded as "fundamental." *McDonald*, 561 U.S. at 778, 130 S.Ct. 3020. But Sitladeen's argument assumes too much. According to him, even if the Second Amendment does not extend to unlawfully present aliens, the broader,

fundamental right to keep and bear arms recognized in *Heller* and *McDonald* does. He argues, in other words, that the right that § 922(g)(5)(A) burdens is not "tied solely to the Second Amendment." *See generally Dobbs v. Jackson Women's Health Org*., 597 U.S. ——, 142 S. Ct. 2228, 2242, 2246-47, 213 L.Ed.2d 545 (2022) (explaining that, for an unenumerated putative right to be "fundamental," it must be "deeply rooted in this Nation's history and tradition" and "implicit in the concept of ordered liberty"). We disagree. Because the Second Amendment "provides an explicit textual source of constitutional protection against a particular sort of government behavior, that Amendment," not some other, unenumerated right to keep and bear arms, must guide our analysis of Sitladeen's equal-protection challenge. *See Albright v. Oliver*, 510 U.S. 266, 273, 114 S.Ct. 807, 127 L.Ed.2d 114 (1994) (plurality opinion) (internal quotation marks omitted); *see also Portillo-Munoz*, 643 F.3d at 442 n.4; *United States v. Carey*, 602 F.3d 738, 741 n.2 (6th Cir. 2010) (declining to consider claims that "conflate the enumerated Second Amendment right with Equal Protection and Due Process protections under the Fifth Amendment"). As explained above, the Second Amendment does not apply to Sitladeen. *See Flores*, 663 F.3d at 1023. We therefore agree with the Fourth Circuit that "no fundamental constitutional right is at stake" under § 922(g)(5)(A) that would trigger heightened ***989** scrutiny. *Carpio-Leon*, 701 F.3d at 982.

Because heightened scrutiny does not apply, Sitladeen's equal-protection argument fails so long as § 922(g)(5)(A)'s differential treatment of unlawfully present aliens is supported by some rational basis. *See Schmidt*, 860 F.3d at 1047. We conclude that it is. As other circuits have recognized, there is a rational relationship between prohibiting unlawfully present aliens from possessing firearms and achieving the legitimate goal of public safety. *See Huitron-Guizar*, 678 F.3d at 1170. In enacting § 922(g)(5)(A), Congress may well have concluded that unlawfully present aliens "ought not to be armed when authorities seek them"—particularly where, as here, the alien enters the United States to evade prosecution for murder in another country. *See id.* Moreover, those in the United States without authorization may be more likely to acquire firearms through illegitimate and difficult-to-trace channels, making § 922(g)(5)(A)'s prohibition all the more reasonable. *See Carpio-Leon*, 701 F.3d at 982-83. Indeed, Congress could have rationally determined that unlawfully present aliens themselves are more likely to attempt to evade detection by assuming a false identity—again, as Sitladeen did. *See id.* Further, we find it significant that the Supreme Court has "firmly and repeatedly endorsed the proposition that Congress may make rules as to aliens that would be unacceptable if applied to citizens." *Demore v. Kim*, 538 U.S. 510, 522, 123 S.Ct. 1708, 155 L.Ed.2d 724 (2003). In short, Sitladeen has not demonstrated that Congress acted without reason in deciding that unlawfully present aliens should not be allowed to possess firearms. Thus, § 922(g)(5)(A) survives rational-basis scrutiny, and Sitladeen's equal-protection argument fails.

* * *

Accordingly, the district court did not err in denying Sitladeen's motion to dismiss the indictment.

III.

[*Discussion of Sitladeen's challenges to his sentence has been omitted*]

IV.

For the foregoing reasons, we affirm Sitladeen's conviction and sentence.

Footnotes

1 The Honorable Nancy E. Brasel, United States District Judge for the District of Minnesota.

2 None of our sister circuits have yet applied *Bruen* in a Second Amendment challenge to § 922(g)(5), though three district courts have, each concluding that the statute is constitutional. *United States v. Leveille*, No. 18-cr-02945-WJ, —— F.Supp.3d ——, 2023 WL 2386266 (D.N.M. Mar. 7, 2023); *United States v. Carbajal-Flores*, No. 20-cr-00613, 2022 WL 17752395 (N.D. Ill. Dec. 19, 2022); *United States v. DaSilva*, 21-CR-267, 2022 WL 17242870 (M.D. Pa. Nov. 23, 2022).

3 In his supplemental brief, Sitladeen ably engages in the sort of historical analysis prescribed by *Bruen*'s second step, marshalling various Framing-era evidence that he says demonstrates the Government's inability to carry its burden of placing § 922(g)(5)(A) within "this Nation's historical tradition of firearm regulation." *See* 142 S. Ct. at 2126. For instance, he cites to scholarly sources suggesting that alienage-based firearm restrictions were not widespread in the United States until the twentieth century. *See, e.g.*, Patrick J. Charles, *The Fugazi Second Amendment:* Bruen*'s Text, History, and Tradition Problem and How To Fix It*, 71 Clev. St. L. Rev. (forthcoming, 2023). The Government counters with sources suggesting that firearm restrictions on persons disdainful of the law (including, presumably, unlawfully present aliens) were in regular force at the time the Second Amendment was adopted. *See, e.g.*, *Jimenez-Shilon*, 34 F.4th at 1048 (collecting various Framing-era sources that "refer to arms-bearing as a *citizen's* right that was closely associated with national fealty and membership in the body politic" (internal quotation marks omitted)). But whatever the answer to this difficult historical debate, we need not resolve it. Because *Flores* already answers *Bruen*'s threshold textual inquiry in the negative, the Government bears no burden of showing that prohibiting illegally present aliens from possessing firearms is "consistent with this Nation's historical tradition of firearm regulation." *See Bruen*, 142 S. Ct. at 2126.

4 [Omitted]

5 [Omitted]

2021 WL 3721850

United States District Court, D. Minnesota.

UNITED STATES of America, Plaintiff,

v.

Dayne Adrian SITLADEEN (1) and Muzamil Aden Addow (2), Defendants.

Case No. 21-CR-35 (NEB/LIB)

|

Signed 08/23/2021

Procedural Posture(s): Motion to Dismiss

ORDER ACCEPTING REPORT AND RECOMMENDATION

NANCY E. BRASEL, UNITED STATES DISTRICT JUDGE

***1** Defendants Dayne Adrian Sitladeen and Muzamil Aden Addow were indicted for being illegal aliens in possession of firearms in violation of Title 18, United States Code, Sections 922(g)(5) and 924(a)(2). Sitladeen and Addow jointly moved to dismiss the Indictment. In a Report and Recommendation, United States Magistrate Judge Leo I. Brisbois recommends denying Defendants' motion. (ECF No. 76 ("R&R").) For the reasons below, the Court accepts the R&R and denies Defendants' motion.

BACKGROUND

In January 2021, Defendants, who are both Canadian citizens unlawfully in the United States, were pulled over for speeding. (ECF No. 1-1 ¶¶ 5, 17.) Defendants gave false identification and inconsistent statements to the officer, and the officer smelled marijuana. (*Id.* ¶¶ 6–11.) Addow consented to a partial search of the vehicle, and the officer found a bag that contained roughly a dozen firearms. (*Id.* ¶¶ 12–13.) The officers searched the other bags in Defendants' vehicle and found sixty-seven firearms in total. (*Id.* ¶ 14.)

Defendants were each indicted on one count of firearm possession by an alien illegally in the United States in violation of Title 18, United States Code, Section 922(g)(5)(A). (ECF No. 19.) Defendants filed several motions, including a motion to dismiss the Indictment as unconstitutional. (ECF No. 57.) Both Defendants later agreed to conditionally plead guilty pending the outcome of their motion to dismiss and withdrew all other motions. (ECF Nos. 67, 69.) Judge Brisbois issued an R&R, recommending that the Court deny Defendants' motion. (R&R at 8.) Defendants objected. (ECF No. 78 ("Obj.").) The Court reviews de novo the parts of the R&R to which Defendants object. 28 U.S.C. § 636(b)(1); *Hudson v. Gammon*, 46 F.3d 785, 786 (8th Cir. 1995).

ANALYSIS

Section 922(g)(5)(A) prohibits any "alien [who] is illegally or unlawfully in the United States" from possessing a firearm or ammunition. 18 U.S.C. § 922(g)(5)(A). Defendants contend that Section 922(g)(5)(A) violates the Second Amendment's right to bear arms and the Fifth Amendment's guarantee of equal protection.[1] The Court concludes that the statute is constitutional.

I. Second Amendment

The Second Amendment protects an individual's right "to keep and bear Arms." U.S. Const. amend. II; *District of Columbia v. Heller*, 554 U.S. 570, 595 (2008). Defendants claim this right should extend to illegal aliens, but readily admit that Eighth Circuit precedent forecloses their argument. In *United States v. Flores*, the defendant made the same argument. 663 F.3d 1022 (8th Cir. 2011) (per curiam), *cert. denied,* 567 U.S. 938 (2012). The district court determined that illegal aliens do not have a Second Amendment right to bear arms, and even if they did, Section 922(g)(5) would be constitutional as a "presumptively lawful regulatory measure." *United States v. Flores*, No. 10-CR-178 (JNE/JSM), 2010 WL 4721069, at *2–4 (D. Minn. Sept. 17, 2010), *report and recommendation adopted*, 2010 WL 4720223, at *1 (D. Minn. Nov. 15, 2010). The Eighth Circuit affirmed and noted that "the protections of the Second Amendment do not extend to aliens illegally present in this country." *Flores*, 663 F.3d at 1023 (citation omitted). Thus, under controlling Eighth Circuit precedent, Defendants' Second Amendment challenge to the Indictment fails.[2]

II. Equal Protection

***2** The Fifth Amendment's Due Process Clause includes a "prohibition against denying to any person the equal protection of the laws." *United States v. Windsor*, 570 U.S. 744, 774 (2013) (citations omitted). Defendants claim that Section 922(g)(5)(A) violates this prohibition by discriminating against illegal aliens.

A. Level of Scrutiny

The first step in resolving Defendants' equal protection challenge is to determine the applicable level of scrutiny. Rational basis review is ordinarily applied to an equal protection challenge unless the "law burdens a fundamental right, targets a suspect class, or has a disparate impact on a protected class and was motivated by a discriminatory intent." *New Doe Child #1 v. United States*, 901 F.3d 1015, 1027 (8th Cir. 2018) (citations omitted). Defendants claim that a heightened level of scrutiny should apply for two reasons: (1) because Section 922(g)(5)(A) implicates a fundamental right; and (2) relying on *Plyler v. Doe*, 457 U.S. 202 (1982), because Section 922(g)(5)(A) risks making illegal aliens an "underclass" by denying them "access to a key aspect of society." (Obj. at 4–7.) Neither argument is persuasive, so the Court applies rational basis review.

As discussed above, illegal aliens do not have a Second Amendment right to possess firearms, *Flores*, 663 F.3d at 1023, so it follows that illegal aliens do not have a "fundamental right" to possess firearms. Several circuit courts of appeal have declined to apply a heightened level of scrutiny to an equal protection challenge to Section 922(g)(5), with at least one explicitly holding that Section 922(g)(5) does

not implicate a fundamental right. *See United States v. Carpio-Leon*, 701 F.3d 974, 982 (4th Cir. 2012) (holding that "no fundamental constitutional right is at stake" in an equal protection challenge to Section 922(g)(5)); *see also United States v. Mirza*, 454 F. App'x 249, 258 (5th Cir. 2011) (applying rational basis review to an equal protection challenge to Section 922(g)(5)); *United States v. Huitron-Guizar*, 678 F.3d 1164, 1167 (10th Cir. 2012) (same). Defendants do not have a fundamental right to possess firearms, so their challenge does not trigger strict scrutiny on this basis.

Nor is Defendants' *Plyler* argument convincing. In *Plyler*, the Supreme Court applied a heightened level of scrutiny to a Texas law that permitted school districts to deny admission to illegal aliens. 457 U.S. at 205, 223–24. Defendants contend the same heightened scrutiny should apply here, because Section 922(g)(5) poses the same risks the Supreme Court was concerned with in *Plyler*—that depriving illegal aliens the right to possess a firearm will relegate them to a "permanent caste" that is " 'denied the benefits that our society makes available to citizens and lawful residents.' " (Obj. at 6 (quoting *Plyler*, 457 U.S. at 218–19).) But there is a key difference: *Plyler* involved a state law that discriminated against illegal aliens, whereas Defendants are challenging a federal statute. The Supreme Court has explained that an equal protection challenge to a state law that makes an alienage classification "involves significantly different considerations" than an equal protection challenge to a federal law that makes a similar classification. *Mathews v. Diaz*, 426 U.S. 67, 84–85 (1976). Based on the federal government's powers over immigration, it routinely and permissibly classifies people based on citizenship, but a similar classification by a state "has no apparent justification." *Id.* at 85; *see also Plyler*, 457 U.S. at 219 n. 19 ("[A]lienage classifications may be intimately related to the conduct of foreign policy, to the federal prerogative to control access to the United States, and to the plenary federal power to determine who has sufficiently manifested his allegiance to become a citizen of the Nation. No State may independently exercise a like power."); *City of Chicago v. Shalala*, 189 F.3d 598, 605 (7th Cir. 1999) (recognizing the distinction between a federal and state alienage classification and refusing to apply *Plyler* to a federal law making such a classification). Thus, Defendants' reliance on *Plyler* is misplaced.

***3** And even beyond the distinction between federal and state laws, courts have been reluctant to extend *Plyler* to factual scenarios not involving the same "unique circumstances" present in that case. *LeClerc v. Webb*, 419 F.3d 405, 420–21 (5th Cir. 2005) (refusing to apply *Plyler*'s heightened scrutiny when plaintiffs entered the country voluntarily and "face[d] no hurdle as debilitating as denial of primary and secondary education"); *Uriostegui v. Ala. Crime Victims Comp. Comm'n*, No. 2:10-cv-1265-PWG, 2010 WL 11613802, at *19 (N.D. Ala. Nov. 16, 2010) ("[F]ederal courts have generally declined to extend[ ] *Plyler*'s use of heightened scrutiny to illegal immigrant classifications ....") (collecting cases) *report and recommendation adopted,* 2011 WL 13285298 (N.D. Ala. Jan. 12, 2011).

In their objection, Defendants claim that *Diaz*'s distinction between state laws and federal laws is a distinction without a difference. Acknowledging that Congress's ability to treat illegal aliens differently from citizens is rooted in the federal government's control over immigration, Defendants claim that this distinction is irrelevant here because Section 922(g)(5) is not an immigration law. (Obj. at 6–7.) But the case law gives no indication that Congress can only classify illegal aliens in laws directly relating to immigration. To the contrary, the federal government may "regulate the conditions of entry *and residence* of aliens." *Diaz*, 426 U.S. at 84 (emphasis added); *see also Rodriguez ex rel. Rodriguez v. United States*, 169 F.3d 1342, 1348–1349 (11th Cir. 1999) (rejecting the argument that rational basis review only applies to federal laws related to naturalization and aliens' entry and exit of the country).

Defendants also claim that the *Diaz* distinction is inapplicable because, unlike in *Diaz*, Section 922(g)(5) does not regulate a benefit. (Obj. at 7.) But Defendants' only support for this argument is a passage from *Plyler* explaining that the right to education, while not guaranteed by the Constitution, is more than a mere public benefit. (*Id.* (quoting *Plyler*, 457 U.S. at 221).) Even accepting Defendants' contention that the right to possess a firearm is more important than entitlement to a public benefit, (*i.e.,* that it is more akin to a constitutional right than a public benefit), the Court has already determined that Defendants do not have the right to possess a firearm, so their argument fails. The principle remains that "Congress may make rules as to aliens that would be unacceptable if applied to citizens"—whether or not they involve public benefits. *Demore v. Kim*, 538 U.S. 510, 522 (2003) (citations omitted).

B. Rational Basis Review

Because Defendants' arguments for a heightened level of scrutiny fail, and because alienage classifications are generally given rational basis review, the Court will uphold Section 922(g)(5)(A) " 'if there is any reasonably conceivable state of facts that could provide a rational basis for the classification.' " *Brikova v. Holder*, 699 F.3d 1005, 1008 (8th Cir. 2012) (citation omitted). In other words, a law is valid when there is a "plausible policy reason for the classification, the legislative facts on which the classification is apparently based rationally may have been considered to be true by the governmental decisionmaker, and the relationship of the classification to its goal is not so attenuated as to render the distinction arbitrary or irrational." *Nordlinger v. Hahn*, 505 U.S. 1, 11 (1992) (citations omitted).

Section 922(g)(5)(A) survives rational basis review. As the Fourth Circuit has explained, there is a rational relationship between Section 922(g)(5) and "the legitimate government goal of public safety." *Carpio-Leon*, 701 F.3d at 982. For one, illegal aliens are more difficult for the government to track[3] and may be more likely to assume a false identity. *Id.* at 983 (citing *Huitron-Guizar*, 678 F.3d at 1170); *see generally* S. Rep. No. 90-1501, at 22 (1968) ("The ready availability, that is, the ease with which any person can anonymously acquire firearms (including criminals, juveniles, without the knowledge or consent of their parents or guardians, narcotic addicts, mental defectives, armed groups who would supplant duly constituted public authorities, and others whose possession of firearms is similarly contrary to the public interest) is a matter of serious national concern.").

***4** Defendants acknowledge that Congress passed firearms legislation with an interest in "combating the increasing prevalence of crime," but maintain that this interest bears no relationship to the prohibition for illegal aliens.[4] (Obj. at 8 (quoting S. Rep. No. 90-1097, at 2144, 90th Cong. 2d Sess. (Apr. 29, 1968)).) As noted above, the Court finds a rational relationship between Section 922(g)(5) and the goal of public safety. Congress rationally concluded that prohibiting illegal aliens from possessing firearms would protect public safety. *See* Omnibus Crime Control and Safe Streets Act of 1968, Pub. L. No. 90-351, § 1201, 82 Stat. 197, 236 (1968) (finding and declaring that allowing illegal aliens to possess firearms would, among other things, be a threat to the safety of the President and Vice President and to the "continued and effective operation of" state and federal government).

Defendants also claim that Section 922(g)(5)(A) fails rational basis review because it is based on stereotypes about illegal aliens that empirical research has proven to be incorrect. (Obj. at 8–9.) Although the supposition that illegal aliens pose a greater threat to public safety may rest on a generalization, "general laws deal in generalities," and that does not defeat the fact that Congress rationally concluded

that barring illegal aliens from possessing firearms would yield public safety benefits. *Huitron-Guizar*, 678 F.3d at 1170.

CONCLUSION

Based on the foregoing and on all the files, records, and proceedings herein, IT IS HEREBY ORDERED THAT:

1. The Report and Recommendation (ECF No. 76) is ACCEPTED; and

2. Defendants' motion to dismiss (ECF No. 57) is DENIED.

Footnotes

1 Several sentences in Defendants' briefing suggest that they are challenging Section 922(g)(5)(A) both on its face and as applied. (Obj. at 2; ECF No. 58 at 1, 7.) Despite this, the Court discerns only facial challenges in Defendants' arguments. In an as-applied challenge, the plaintiff challenges the law only as-applied to him or herself. *Phelps-Roper v. Ricketts*, 867 F.3d 883, 896 (8th Cir. 2017) (internal quotation and citation omitted). But Defendants are not challenging Section 922(g)(5)(A) "because of the way it was applied to the particular facts of [their] case," but are instead claiming that the statute that they were indicted under is unconstitutional on its face. *Id.* (citation omitted).

2 Defendants acknowledge that this argument was destined to fail but believe that *Flores* is "ripe for reconsideration" so they seek to preserve this issue for appeal. (ECF No. 58 at 10–11; Obj. at 12.) As Defendants acknowledge, the Court is bound by the Eighth Circuit's holding in *Flores*. (Obj. at 12); *Hood v. United States*, 342 F.3d 861, 864 (8th Cir. 2003).

3 Defendants contend that the comparative difficulty of tracking illegal aliens is not a valid basis to uphold the law because federal law prohibits tracking firearm purchasers. (Obj. at 10 (citing 18 U.S.C. § 926).) To the contrary, federal law requires importers, manufacturers, and dealers to record firearms sales, among other things. 18 U.S.C. § 923(g)(1)(A). The statutory language that Defendants cite—the flush language of Title 18, United States Code, Section 926(a)—merely prohibits the Attorney General from promulgating any rules or regulations that would establish a "system of registration of firearms, firearms owners, or firearms transactions or dispositions." 18 U.S.C. § 926(a) (flush language). Courts have interpreted this provision to "clearly" reflect "Congress' concern about any attempt by [Bureau of Alcohol, Tobacco, and Firearms] to establish a national firearms registry." *RSM, Inc. v. Buckles*, 254 F.3d 61, 67 (4th Cir. 2001). The Firearm Owners' Protection Act reaffirmed that firearm dealers must track the disposition of firearms they sell. Firearm Owners' Protection Act, Pub. L. No. 99-308, §§ 103(7), 106(4). In certain circumstances, including "in the course of a bona fide criminal investigation," the Attorney General may inspect these records. 18 U.S.C. § 923(g)(1)(B)(iii); *see also id.* §§ 923(g)(1)(A)–(B) (permitting inspection of these records in other scenarios). Because federal law requires sellers to track firearms they sell, and because the government may inspect these records in the course of a criminal investigation, the government has an interest in ensuring that firearm

purchasers are traceable. Congress could have determined that illegal immigrants are more difficult to track and that barring them from possessing firearms would benefit public safety.

4 Defendants also seem to argue that Section 922(g)(5) cannot survive any level of review because it was hastily enacted "with little discussion, no hearings, and no report." (Obj. at 8 (citing David T. Hardy, *The Firearms Owners' Protection Act: A Historical and Legal Perspective*, 17 Cumb. L. Rev. 585, 627 n.231 (1987)).) This part of the law review article is referring to the Omnibus Crime Control and Safe Streets Act of 1968, the enactment in which Section 922(g)(5)(A) originated. Regardless of the manner in which this statute was enacted, Congress still determined that firearm possession by certain people (specifically those "whose possession of such weapons is ... contrary to the public interest") contributed to "lawlessness and violent crime in the United States." Omnibus Crime Control and Safe Streets Act of 1968, Pub. L. No. 90-351, § 901(a)(2), 82 Stat. 197, 225 (1968). It also specifically found that firearm possession by illegal aliens threatened public safety. *Id.* § 1201, 82 Stat. 197, 236. Although the legislative history relating to Section 922(g)(5)(A) is sparse, such evidence is not required to pass rational basis review. On rational basis review, the Court questions whether there is "any reasonably conceivable state of facts that could provide a rational basis for the classification," but does not ask whether that reason actually motivated Congress. *F.C.C. v. Beach Commc'ns., Inc.*, 508 U.S. 307, 313 (1993) (citations omitted). For that reason, and because Congress need not articulate its reasons for enacting a law, "the absence of legislative facts explaining the distinction on the record has no significance in rational-basis analysis." *Id.* (cleaned up).

2021 WL 4046396

United States District Court, D. Minnesota.

UNITED STATES of America, Plaintiff,

v.

Dayne Adrian SITLADEEN (1) and Muzamil Aden Addow (2), Defendants.

Case No. 21-CR-35 (NEB/LIB)

|

Signed 06/24/2021

Procedural Posture(s): Motion to Dismiss

REPORT AND RECOMMENDATION

LEO I. BRISBOIS, UNITED STATES MAGISTRATE JUDGE

This matter comes before the undersigned United States Magistrate Judge pursuant to a general assignment, made in accordance with the provisions of Title 28 U.S.C. § 636 and Local Rule 72.1, upon Defendants Dayne Adrian Sitladeen and Muzamil Aden Addow's Joint Motion to Dismiss. [Docket No. 57]. The Court held a Motions Hearing on June 7, 2021, regarding the parties' pretrial motions. At the conclusion of the June 7, 2021, Motions Hearing, the Court took Defendants' Motion to Dismiss under advisement on the written submissions of the parties.

For reasons discussed herein, the Court recommends that Defendants' Motion to Dismiss, [Docket No. 57], be DENIED.

I. Background

Defendants are charged with one count of "Firearm Possession by Aliens Illegally in the United States" in violation of 18 U.S.C. §§ 922(g)(5) and 924(a)(2). (Indictment [Docket No. 19]). Specifically, the Indictment alleges that Defendants "each aiding and abetting the other, and each being aliens illegally and unlawfully in the United States, and each knowing they were an alien illegally and unlawfully in the United States, did knowingly possess, in and affecting interstate commerce," sixty-seven firearms as described in the Indictment. (Id.).

Title 18 U.S.C. § 922(g)(5)(A) provides that it is "unlawful for any person ... who, being an alien ... is illegally or unlawfully in the United States," "to ship or transport in interstate or foreign commerce, or possess in or affecting commerce, any firearm or ammunition; or to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce." Title 18 U.S.C. § 924(a)(2) describes the possible penalties for a violation of § 922(g).

II. Defendants' Motion to Dismiss. [Docket No. 57].

Defendants argue that the present Indictment should be dismissed because "the statute with which [they] have been indicted is unconstitutional." (Defs.' Mot. [Docket No. 57]). Specifically, Defendants contend that 18 U.S.C. § 922(g)(5)(A) violates "the Fifth Amendment's due process guarantee of equal protection and the Second Amendment's right to bear arms." (Defs.' Mem., [Docket No. 58], at 1).

A. Second Amendment

Defendants argue that the Indictment should be dismissed because § 922(g)(5)(A) is "facially unconstitutional and unconstitutional as applied to" Defendants because it "eliminates Second Amendment protections as to [an] entire class of individual[s]—unauthorized aliens," such as Defendants, and "[a]liens are within 'the people' protected by the Second Amendment." (Defs.' Mem., [Docket No. 58], at 7–8). Defendants acknowledge that Eighth Circuit precedent provides that " 'the protections of the Second Amendment do not extend to aliens illegally present' in the United States, and that that holding is binding on this Court." (Id. at 9) (quoting United States v. Flores, 663 F.3d 1022, 1023 (8th Cir. 2011) (per curiam)).

Defendants contend, however, that "there are reasons to question the Flores holding," that "Flores is ripe for reconsideration," and Flores "should be overruled." (Defs.' Mem., [Docket No. 58], at 7–10). Defendants base their argument on their interpretation of previous caselaw from the Eighth Circuit Court of Appeals and the United States Supreme Court, as well as, what the Defendants describe as "a growing weight of appellate authority" from Circuit Courts other than the Eighth Circuit Court of Appeals recognizing "that unauthorized aliens are or may be protected by the Second Amendment." (Id. at 10).

*2 Despite Defendants argument they also acknowledge "that this Court may be bound by Flores," but they raised the argument in the present Motion to "preserve for appeal the issue of whether unauthorized aliens are among 'the people' protected by the Second Amendment." (Id. at 11).

In Flores, the Eighth Circuit Court of Appeals specifically held that "the Second Amendment do[es] not extend to aliens illegally present in" the United States. United States v. Flores, 663 F.3d 1022, 1023 (8th Cir. 2011) (per curium).[1] The Flores decision has not been overturned. Even if this Court was persuaded by Defendants' argument, which it is not, this Court is bound by Eighth Circuit precedent as found in Flores. See, e.g., Hood v. United States, 342 F.3d 861, 864 (8th Cir. 2003) ("The District Court, however, is bound, as are we, to apply the precedent of this Circuit."); Beaulieu v. Preece, No. 14-cv-552 (DWF/JSM), 2014 WL 1338791, at *3 n.2 (D. Minn. Apr. 3, 2014) (explaining that even where there is a split in the law between the various Circuits' Courts of Appeals, the Courts in the District of Minnesota are bound by controlling precedent from the Eighth Circuit Court of Appeals); United States v. Dotstry, No. 99-cr-383 (JRT/FLN), 2019 WL 1976430, at *2 (D. Minn. May 3, 2019), aff'd, 792 F. App'x 415 (8th Cir. 2020); United States v. Koech, No. 18-cr-182 (DWF/LIB), 2018 WL 4905602, at *1 (D. Minn. Oct. 9, 2018), aff'd, 992 F.3d 686 (8th Cir. 2021); Barney v. Eng., No. 11-cv-166 (ADM/LIB), 2011 WL 832476, at *1 (D. Minn. Mar. 3, 2011); United States v. Bevins, No. 14-cr-123 (RHK/LIB), 2014 WL 12693887, at *5 (D. Minn. July 29, 2014), report and recommendation adopted, 2014 WL 12693898 (D. Minn. Sept. 16, 2014).[2]

*3 Based on controlling Eighth Circuit precedent, Defendants' Second Amendment based argument fails. See, United States v. Flores, 663 F.3d 1022, 1023 (8th Cir. 2011). Under this controlling precedent, Defendants are simply not entitled to constitutional protections under the Second Amendment. Thus, the Court concludes that 18 U.S.C. § 922(g)(5) withstands Defendants' Second Amendment challenge.

B. Equal Protection

Defendants also argue that "[c]riminalizing all unauthorized aliens who possess firearms violates the Due Process clause's guarantee of equal protection of the laws." (Defs.' Mem., [Docket No. 58], at 7). Specifically, Defendants contend that the strict scrutiny standard applies because the Second Amendment's right to bear arms is a fundamental right, and 18 U.S.C. § 922(g)(5) cannot withstand the strict scrutiny standard. (Defs.' Mem., [Docket No. 58], at 4–7). Defendants, in large part, base this contention on their assertion that "[a] categorical ban on all unauthorized aliens possessing firearms does not further the Government's interest in preventing crime in a sufficiently tailored manner, if at all." (Id. at 6).

"The Equal Protection Clause of the Fourteen Amendment provides that no state shall deny to any person within its jurisdiction the equal protection of the laws, and it applies to the federal government though the Due Process Clause of the Fifth Amendment." New Doe Child #1 v. United States, 901 F.3d 1015, 1027 (8th Cir. 2018) (citations and internal quotation marks omitted). "The Equal Protection Clause demands that similarly situated individuals be treated alike." Id.; see, Am. Family Ins. v. City of Minneapolis, 836 F.3d 918, 921 (8th Cir. 2016).

"Unless a law burdens a fundamental right, targets a suspect class, or has a disparate impact on a protected class and was motivated by a discriminatory intent, [Courts] apply rational basis scrutiny to the challenged law." New Doe Child #1, 901 F.3d at 1027. To withstand rational basis review, "the classification must only be rationally related to a legitimate government interest." Am. Family Ins., 836 F.3d at 921. "Under rational basis review, [t]he government's different treatment of persons will be upheld against equal protection challenge if there is any reasonably conceivable state of facts that could provide a rational basis for the classification." Brikova v. Holder, 699 F.3d 1005, 1008 (8th Cir. 2012) (alteration in original) (internal quotations omitted).

In the present case, Defendants are not members of a "suspect class." In fact, Defendants do not argue that they are members of a suspect class. (Defs.' Mem. [Docket No. 58]). And the United States Supreme Court has "reject[ed] the claim that 'illegal aliens' are a 'suspect class.' " Plyler v. Doe, 457 U.S. 202, 219 n.19 (1982).

Defendants argue that 18 U.S.C. § 922(g)(5)(A) burdens a fundamental right. The Court finds Defendants argument unpersuasive because applicable caselaw demonstrates that 18 U.S.C. § 922(g)(5)(A) does not burden or implicate a fundamental right because § 922(g)(5)(A) applies only to persons to whom the Second Amendment does not extend. Assuming solely for the sake of argument the Second Amendment's right to bear arms is a fundamental right, § 922(g)(5)(A) on its face applies only to "alien[s]" who are "illegally or unlawfully in the United States," and as discussed above, an "alien" who is "illegally or unlawfully in the United States" is not entitled to the constitutional rights provided for in the Second Amendment. The Eighth Circuit Court of Appeals has specifically held that "the Second Amendment

do[es] not extend to aliens illegally present in" the United States. United States v. Flores, 663 F.3d 1022, 1023 (8th Cir. 2011) (per curium). Because § 922(g)(5)(A) is applicable only to persons to whom the Second Amendment does not extend, it cannot be said that § 922(g)(5)(A) burdens the rights provided for in the Second Amendment.

*4 Because Defendants "are not members of a suspect class and their claims do not involve a fundamental right, their federal equal protection claim is subject to rational basis review." Am. Fam. Ins. v. City of Minneapolis, 836 F.3d 918, 921 (8th Cir. 2016) (quoting Ganley v. Minneapolis Park & Recreation Bd., 491 F.3d 743, 747 (8th Cir. 2007)).[3] Thus, to pass constitutional muster, § 922(g)(5)(A) need only be rationally related to a legitimate government interest. Am. Fam. Ins., 836 F.3d at 921.[4]

Defendants fail to argue that § 922(g)(5)(A) cannot survive a rational basis review. On the other hand, the Government identifies legitimate government interests in § 922(g)(5)(A) noting that "[p]ersons not legally in the United States ... are 'harder to trace and more likely to assume a false identity," and the Government further asserts that "Congress may have concluded that those who show a willingness to defy our laws are candidates for further misfeasance or at least a group that ought not be armed when authorities seek them." (Gov't's Mem., [Docket No. 61], at 15–16) (quoting United States v. Huitron-Guizar, 678 F.3d 1164, 1170 (10th Cir. 2012)).

"The 'principal purposes' of the Gun Control Act of 1968 are to 'make it possible to keep firearms out of the hands of those not legally entitled to possess them because of age, criminal background, or incompetency, and to assist law enforcement authorities in the States and their subdivisions in combating the increasing prevalence of crime." United States v. Huitron-Guizar, 678 F.3d 1164, 1169–70 (10th Cir. 2012) (quoting S. Rep. No. 90-1097, at 22 (1968), 196 U.S.C.C.A.N. 2112, 2113–14)). As relevant to the present action, "[t]he alien in possession ban was incorporated from a predecessor statute by the 1986 Firearm Owner's Protection Act, ... likewise with [the] purpose of keeping instruments of deadly force away from those deemed irresponsible or dangerous." United States v. Huitron-Guizar, 678 F.3d 1164, 1169–70 (10th Cir. 2012) (quoting S. Rep. 98-583, at 12 (1986)).

*5 As the Tenth Circuit Court of Appeals previous noted when discussing the constitutionality of § 922(g)(5)(A), "Congress may have concluded that illegal aliens, already in probable present violation of the law, simply do not receive the full panoply of constitutional rights enjoyed by law-abiding citizens"; "that such individuals, largely outside the formal system of registration, employment, and identification, are harder to trace and more likely to assume a false identity"; or "that those who show a willingness to defy our laws are candidates for further misfeasance or at least a group that ought not be armed when authorities seek them." Huitron-Guizar, 678 F.3d at 1170. The Court here finds this rationale to be persuasive.

While "it is surely a generalization to suggest, as courts do, that unlawfully present aliens, as a group, pose a greater threat to public safety, ... general laws deal in generalities." Id. (citations omitted). The generalities in § 922(g)(5)(A) are similar to the generalities in § 922(g)(1) which applies prohibitions to a "class of convicted felons," including "non-violent offenders." Huitron-Guizar, 678 F.3d at 1170. "The bottom line is that crime control and public safety are indisputably 'important' interest." Huitron-Guizar, 678 F.3d at 1170.

On the record now before the Court, the Government has provided more than a "reasonably conceivable state of facts that" provides a "rational basis for the classification" of persons in § 922(g)(5)(A). As apparent from the above discussion, other Courts have reached this same conclusion. See, United States v. Huitron-Guizar, 678 F.3d 1164, 1170 (10th Cir. 2012). On this basis, the Court finds that 18 U.S.C. § 922(g)(5) withstands Defendants' Equal Protection challenge.

III. Conclusion

Therefore, based on the foregoing and all the files, records, and proceedings herein, IT IS HEREBY RECOMMENDED THAT Defendants' Motion to Dismiss, [Docket No. 57], be DENIED.

NOTICE

Filing Objections: This Report and Recommendation is not an order or judgment of the District Court and is therefore not appealable directly to the Eighth Circuit Court of Appeals.

Under Local Rule 72.2(b)(1), "A party may file and serve specific written objections to a magistrate judge's proposed findings and recommendation within 14 days after being served with a copy of the recommended disposition[.]" A party may respond to those objections within 14 days after being served a copy of the objections. LR 72.2(b)(2). All objections and responses must comply with the word or line limits set forth in LR 72.2(c).

Under Advisement Date: This Report and Recommendation will be considered under advisement 14 days from the date of its filing. If timely objections are filed, this Report and Recommendation will be considered under advisement from the earlier of: (1) 14 days after the objections are filed; or (2) from the date a timely response is filed.

All Citations

Slip Copy, 2021 WL 4046396

Footnotes

1 The Eighth Circuit Court of Appeals is not the only Circuit Court to have reached this same conclusion. See, United States v. Portillo-Munoz, 643 F.3d 437, 439–42 (5th Cir. 2011), cert. denied 566 U.S. 963 (2012); United States v. Carpio-Leon, 701 F.3d 974, 975–82 (4th Cir. 2012).

2 Moreover, even assuming solely for the sake of argument that the protections of the Second Amendment did extend to Defendants, the Court still finds Defendants argument to be unpersuasive. Defendants argue that § 922(g)(5)(A) cannot withstand constitutional scrutiny because it must withstand "some form of heightened scrutiny, whether intermediate or strict." (Defs.' Mem., [Docket No. 58], at 11). Defendants' argument is, however, waylaid by the very cases to which they cite. See, United States v. Huitron-Guizar, 678 F.3d 1164 (10th Cir. 2012). In Huitron-Guizar, the Court assumed, without deciding, that defendant—an unauthorized alien—was entitled to the protections of the Second Amendment, and the Huitron-Guizar Court analyzed 18 U.S.C. § 922(g)(5) under the lesser intermediate scrutiny standard. In contrast to Defendants' argument here, the Huitron-Guizar Court concluded that §

922(g)(5) withstood constitutional muster under the intermediate scrutiny standard. United States v. Huitron-Guizar, 678 F.3d 1164, 1165–70 (10th Cir. 2012). The Huitron-Guizar Court noted that "courts must defer to Congress as it lawfully exercises its constitutional power to distinguish citizens from non-citizen, or between lawful and unlawful aliens, and to ensure safety and order." Id. at 1170.

3 Defendants heavily rely on Plyler v. Doe, 457 U.S. 202 (1982), for their assertion that a heightened level of scrutiny must apply in the present case. (Defs.' Mem., [Docket No. 58], at 4–5). This reliance is misplaced. Plyer involved the constitutionality of a Texas state law which categorized persons based on their immigration status. See, Plyler v. Doe, 457 U.S. 202 (1982). Such an analysis is inapplicable to the current action involving a federal law which distinguishes persons based on their immigration status. See, Mathews v. Diaz, 426 U.S. 67, 84–87 (1976). The Supreme Court of the United States has noted that an "equal protection analysis," like the one in Plyler, "involves significantly different considerations because it concerns the relationship between aliens and the States rather than between aliens and the Federal Government." Diaz, 426 U.S. at 84–85. "[A] division by a State of the category of persons who are not citizens of that State into subcategories of United States citizens and aliens has no apparent justification, whereas, a comparable classification by the Federal Government is a routine and normally legitimate part of its business." Id. at 85. In addition, "whereas the Constitution inhibits every State's power to restrict travel across its own borders, Congress is explicitly empowered to exercise that type of control over travel across the borders of the United States." Id.

4 This conclusion is not at odds with District of Columbia v. Heller, 554 U.S. 570 (2008), as Defendants imply because Heller involved a citizen of the United States as opposed to an "alien" who "is illegally or unlawfully in the United States."