No. 23-12151791

In the Supreme Court of the United States

DAYNE ADRIAN SITLADEEN,

Petitioner,

v.

UNITED STATES,

Respondent.

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

BRIEF FOR RESPONDENT

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QUESTIONS PRESENTED

I. Whether the Second Amendment provides every person the right to bear arms, including noncitizens unlawfully present in the United States?

II. Whether the Fifth Amendment prohibits Congress from making it unlawful for unauthorized noncitizens to possess a firearm?

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INTRODUCTION

This Nation has a long history and tradition of restricting the right to bear arms to citizens that dates back to the founding era. During the Revolution, many colonies disarmed any person who did not pledge allegiance to the newly-constituted government. The earliest state constitutions expressly limited the right to bear arms to citizens. As the Nation matured, different jurisdictions continued to disarm foreigners and other dangerous persons. Eventually, Congress enacted the Gun Control Act of 1968 and established a uniform law governing noncitizens' possession of firearms. The Act allows immigrant noncitizens possession on the same terms as citizens, but still disarms all unauthorized noncitizens.

18 U.S.C. § 922(g)(5)(A), which prohibits unauthorized noncitizen possession of a firearm, is consistent with history and, importantly, Congress' plenary power over immigration.[1] The statute reflects Congress' reasoned judgment that doing so is necessary for public safety and accords with the basic constitutional principle that Congress routinely and legitimately classifies on the basis of citizenship status. Indeed, this Court has consistently recognized that "Congress may make rules as to aliens that would be unacceptable if applied to citizens." *Demore v. Kim*, 538 U.S. 510, 522 (2003).

Petitioner Sitladeen is an unauthorized noncitizen who state authorities caught in possession of sixty-seven firearms while evading arrest on suspicion of murder and fentanyl trafficking. He invites this Court to hold that every person in the United States possesses the Second Amendment right to bear arms, even if they illicitly sneak into the country with malintent. He also asks that this Court to strike down on equal protection grounds

[1] In the interest of brevity and fairness, we refer to people subject to 18 U.S.C. § 922(g)(5)(A) as "unauthorized noncitizens" throughout the brief. At times, we also use the phrase "noncitizens unlawfully present" for clarity and effectiveness. However, we have retained this Court's and other courts' use of the term "aliens," especially considering the term appears on the face of the statute.

Section 922(g)(5)(A), which would require a radical departure from every court to consider the issue.

The United States urges this Court to reject all of Mr. Sitladeen's constitutional arguments and uphold 18 U.S.C. § 922(g)(5)(A).

STATEMENT OF THE CASE

I. Minnesota state troopers stop and arrest Canadian fugitives in possession of sixty-seven firearms.

One late night in January 2021, Minnesota state troopers pulled over Defendants Dayne Adrian Sitladeen and Muzamil Aden Addow for speeding in a pickup truck at nearly one hundred miles per hour. R. at 5. The defendants gave false identification and inconsistent statements to the officer, and the officer smelled marijuana. R. at 13. A state trooper asked for and received consent to conduct a partial search of the truck. R. at 5. During the search of the truck, the trooper found bags containing sixty-seven firearms and over a dozen high-capacity magazines. R. at 5, 13. After further investigation, the officers discovered that Sitladeen was the subject of a warrant for murder and fentanyl trafficking. R. at 5. They further learned that Sitladeen and Addow were Canadian citizens unlawfully present in the United States. R. at 13.

II. Relevant Procedural History

A. Defendants are indicted under 18 U.S.C. § 922(g)(5)(A) for possessing a firearm while unlawfully present in the United States.

Defendants were each indicted on one count of firearm possession by an alien unlawfully present in the United States in violation of 18 U.S.C. §§ 922(g)(5)(A) and 924(a)(2). R. at 19. Section 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." R. at 19. Section 924(a)(2) explains the possible penalties for a Section 922(g) violation. R. at 19.

B. The lower courts dismiss Defendants' arguments that Section 922(g)(5)(A) violates the Second Amendment's right to bear arms and Fifth Amendment's equal protection guarantee.

As relevant here, Defendants moved to dismiss the indictment, arguing that Section 922(g)(5)(A) violates the Second Amendment right to bear arms and the Fifth Amendment's equal protection guarantee on its face. R. at 20. They conditionally pled guilty pending the outcome of their constitutional claims. R. at 13.

Following the Report and Recommendation (R&R) of a magistrate judge, the district court rejected Defendants' constitutional claims and upheld Section 922(g)(5)(A). R. at 13, 19. The district court quickly dispatched Defendants' Second Amendment argument, citing controlling Eighth Circuit precedent, *United States v. Flores*, which held that the Second Amendment "[does] not extend to aliens illegally present in this country." R. at 14 (quoting 663 F.3d 1022, 1023 (8th Cir. 2011)); see R. at 20-21. With respect to Defendants' equal protection arguments, the district court concluded that Section 922(g)(5)(A) passes rational basis review. R. at 16-17.

Defendant Sitladeen appealed. During the pendency of his appeal, this Court decided *N.Y. State Rifle & Pistol Ass'n v. Bruen*, 597 U.S. 1 (2022). R. at 7. Sitladeen argued that *Bruen* "raises serious questions about the continued validity" of *Flores*, but the Eighth Circuit disagreed. R. at 7, 8-9. The court explained that *Flores* did not apply the means-end scrutiny repudiated by *Bruen*, but rather interpreted the plain text of the Second Amendment, which was consistent with *Bruen*. R. at 8-9. The Eighth Circuit concluded that *Flores* correctly determined that "the plain text of the Amendment does not cover *any* conduct by unlawfully present aliens," and that "[n]othing in *Bruen* casts doubt on [*Flores'*] interpretation." R. at 8, 9. Accordingly, the court did not reach *Bruen*'s "second step," which requires the Government to place

Section 922(g)(5)(A) within "this Nation's historical tradition of firearm regulation." R. at 12 n.3 (quoting *Bruen*, 597 U.S. at 17).

Turning to Sitladeen's equal protection claim, the Eighth Circuit concluded that rational basis review applies. The court reasoned that, under *Plyler v. Doe*, unlawfully present noncitizens are not a suspect class or otherwise entitled to heightened scrutiny. R. at 10 (citing 457 U.S. 202, 223 (1982)). It reiterated that Section 922(g)(5)(A) does not burden a fundamental right because unauthorized noncitizens do not have a Second Amendment right to possess firearms. R. at 10-11.

Agreeing with the other circuits to consider an equal protection claim to Section 922(g)(5)(A), the Eighth Circuit recognized that "a rational relationship" exists between the statute and Congress' "legitimate goal of public safety." R. at 11 (citing *United States v. Huitron-Guizar*, 678 F.3d 1164, 1170 (10th Cir. 2012) and *United States v. Carpio-Leon*, 701 F.3d 974, 982-83 (4th Cir. 2012)). Specifically, Congress reasonably decided that unauthorized noncitizens are more likely to (1) pose a danger to law enforcement officials seeking to remove them from the country and (2) acquire firearms through illicit, difficult-to-track channels and (3) evade detection. R. at 11.

Sitladeen appealed to this Court, which granted certiorari to resolve the Second and Fifth Amendment issues presented. R. at 4.

SUMMARY OF ARGUMENT

The Eighth Circuit correctly held that 18 U.S.C. § 922(g)(5)(A) is constitutional.

First, unauthorized noncitizens do not have a Second Amendment right to bear arms. The plain text of the Second Amendment limits the right to bear arms to "the people." U.S. Const. amend. II. The founding generation commonly understood the phrase "the people" to be a term

of art referring to citizens acting in their capacity as sovereigns. Consistent with that understanding, the historical evidence demonstrates that the right to bear arms attached to citizenship. At the founding, not every person in the New World possessed the right to bear arms. Rather, the earliest state constitutions expressly limited the right to bear arms to citizens without constitutional issue. And when Congress sought to secure the right to bear arms for newly free Black people after the Civil War, it spoke predominantly in terms of the rights of citizenship.

Even assuming the Second Amendment extends to noncitizens, this Nation has a long history and tradition of disarming unauthorized noncitizens or otherwise disloyal and dangerous people. Besides the express limits in state constitutions, the historical record provides well-representative historical analogues to Section 922(g)(5)(A). Since the Revolutionary era, the government has similarly disarmed (1) people who refused to take an oath of allegiance to the country and (2) people who pose a danger to the community beyond the ordinary individual. Section 922(g)(5)(A) fits well within both of those traditions of gun regulation and thus passes Second Amendment scrutiny under *N.Y. State Rifle & Pistol Ass'n v. Bruen*, 597 U.S. 1 (2022).

Second, Section 922(g)(5)(A) does not violate the Fifth Amendment's equal protection guarantee. As an initial matter, this Court should apply rational basis scrutiny, which only requires that a legislative classification be "rationally related to a legitimate governmental interest." *U.S. Dep't of Agric. v. Moreno*, 413 U.S. 528, 533 (1973). Section 922(g)(5)(A) "neither burdens a fundamental right nor targets a suspect class." *Romer v. Evans*, 517 U.S. 620, 631 (1996). The fundamental right analysis is largely subsumed by the Second Amendment analysis. Unauthorized noncitizens simply do not have a fundamental right to bear arms. And this Court held over forty years ago in *Plyler v. Doe* that unauthorized noncitizens are not a suspect class. 457 U.S. 202, 223 (1982). Applying rational basis scrutiny is consistent with *Plyler*, but

also with this Court's deference to Congress' exercise of its plenary power over immigration and inherent power to define the national community.

Although we urge this Court to apply rational basis review, Section 922(g)(5)(A) passes even heightened scrutiny. As the circuit courts have recognized, disarming unauthorized noncitizens is substantially related to Congress' important interest in public safety and stemming the flow of illegal weapons. The Gun Control Act established a comprehensive firearm regulatory regime that depends on firearm buyers and sellers to provide factual and complete information to achieve its law enforcement goals. Due to their removable status, unauthorized noncitizens are more likely to provide incomplete or false information or avoid licensed dealers altogether and purchase illicit firearms on the secondary market. Congress' public safety goals would be less effectively achieved if not for Section 922(g)(5)(A).

This Court should affirm the Eighth Circuit and uphold the constitutionality of Section 922(g)(5)(A).

STANDARD OF REVIEW

Courts review constitutional questions de novo. *See Cooper Indus., Inc. v. Leatherman Tool Grp., Inc.*, 532 U.S. 424, 436 (2001). In a facial challenge, this Court asks whether a statute "could never be applied in a valid manner." *Members of City Council of City of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789, 798 (1984). In other words, because Petitioner urges this Court to strike down Section 922(g)(5)(A) on its face, they must establish "that no set of circumstances exists under which [the statute] would be valid." *United States v. Salerno*, 481 U.S. 739, 745 (1987).

ARGUMENT

I. Section 922(g)(5)(A) is a constitutional regulation under the Second Amendment.

The Second Amendment right to keep and bear arms is "deeply rooted in this Nation's history and tradition," *McDonald v. City of Chicago, Ill.*, 561 U.S. 742, 768 (2010), as is the disarmament of unauthorized noncitizens. *See United States v. Jimenez-Shilon*, 34 F.4th 1042, 1046 (11th Cir. 2022). The historical evidence surrounding the ratification of the Second Amendment and the Fourteenth Amendment demonstrates that the government could disarm noncitizens or otherwise disloyal and dangerous people. *See* discussion *infra* Part I.A-B. Section 922(g)(5)(A), which prevents unauthorized non-citizens from possessing firearms, is derivative of that history and tradition and therefore passes constitutional scrutiny.

Heller set forth, and *Bruen* reiterated, a two-step test for analyzing Second Amendment challenges to modern firearm regulations. *See District of Columbia v. Heller*, 554 U.S. 570, 595 (2008); *N.Y. State Rifle & Pistol Ass'n v. Bruen*, 597 U.S. 1, 24 (2022). *First*, courts must determine whether the "plain text" of the Second Amendment covers the conduct at issue. *Bruen*, 597 U.S. at 24. This step focuses on the "'normal and ordinary' meaning of the Second Amendment's language" as it would have been understood at the time of the founding. *Id.* at 20 (quoting *Heller*, 554 U.S. at 576-77). *Second*, if the plain text covers the conduct at issue, *see Bruen*, 597 U.S. at 24, the government must demonstrate that its regulation is "consistent with the Nation's historical tradition of firearm regulation," by pointing to a "well-established and representative historical analogue." *Id.* at 17, 30. To survive this second step, the government need not identify a "historical twin," but it can analogize to regulations that imposed a "comparable burden" or ones that were "comparably justified." *Id.* at 29-30.

Petitioner's arguments that Section 922(g)(5)(A) violates the Second Amendment fail at each step. *See* R. at 5. *First*, unauthorized aliens like Mr. Sitladeen are not part of "the people" who enjoy an individual right to bear arms. The founding generation used the phrase "the people" to refer to people acting in their capacity as sovereigns—that is, as citizens of a democratic nation. From the colonial period through Reconstruction, the historical evidence shows that the right to bear arms belonged to citizens and excluded noncitizens. *Second*, Congress' decision to disarm unauthorized non-citizens is "distinctly similar" to the deeply-rooted history and tradition of disarming (1) people who refused to pledge allegiance to the country and (2) dangerous citizens.

This Court should uphold the constitutionality of Section 922(g)(5)(A) on the ground adopted by the Court of Appeals below—that unauthorized non-citizens "are not part of 'the people' to whom the protections of the Second Amendment extend." R. at 9. It would be consistent with the original public meaning of the Second Amendment that this Court explicated in *Heller*, *McDonald*, and *Bruen*. *See Heller*, 554 U.S. at 635; *McDonald*, 561 U.S. at 768-74; *Bruen*, 597 U.S. at 31-32. But if the Court disagrees, it should nevertheless uphold Section 922(g)(5)(A)'s constitutionality because disarming unauthorized noncitizens is "consistent with the Nation's historical tradition of firearm regulation." *See Bruen*, 597 U.S. at 17.

A. The text and history of the Second Amendment demonstrate that the right to keep and bear arms does not extend to noncitizens.

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." U.S. Const. amend. II. The Amendment's plain text, as informed by history and this Court's precedents, explains that the right to keep and bear arms attaches to citizenship.

1. The natural and historical meaning of "the people" excludes noncitizens.

The most natural reading of "the people" is one coextensive with citizens. *See Heller*, 554 U.S. at 581-88 (analyzing the "natural meaning" of "bear arms"). The Preamble to the Constitution invokes the power of "We the People of the United States" to establish the supreme law of the land. U.S. Const. pmbl. Every state, besides New Hampshire and Virginia, similarly invokes the authority of "the people" of the State to ordain and establish their respective constitutions.[2] A preamble that reads, "Persons, grateful to Almighty God for our liberties, do ordain this Constitution," does not evoke the same meaning as "We the People of the State of Arizona, grateful to Almighty God for our liberties, do ordain this Constitution." *See* Ariz. Const. pmbl. The phrase "the people" appropriately raises notions of the relationship between government and the governed, between representatives and the citizens who elect them.

The historical meaning of "the people" is consistent with the natural meaning of "the people" which excludes noncitizens. *See Heller*, 554 U.S. at 584-95 (finding the historical meaning of "bear arms" consistent with the "natural meaning"). The term "the people" as used by the founding generation was intrinsically tied to the idea of popular sovereignty, or rule by "the people." *See* Bernard Bailyn, *The Ideological Origins of the American Revolution* 198-229 (Belknap Press of Harvard University Press 2017) (1992) (describing the "theory of an ultimate supremacy in the people" animating the Revolution). In 1774, James Wilson, an influential delegate to the federal Constitutional Convention and later Supreme Court Justice, wrote at length of the "natural right[]" of "the people" to hold their representatives accountable. James

[2] *See* Preambles to state constitutions, Ballotpedia (Dec. 15, 2023, 9:30 PM), https://ballotpedia.org/Preambles_to_state_constitutions.

Wilson, *Considerations on the Nature and Extent of the Legislative Authority of the British Parliament* (1774), *reprinted in* 1 *Collected Works of James Wilson* (K. Hall and M.D. Hall eds. 2007).[3] During the 1787 Constitutional Convention in Philadelphia he declared: "[The supreme power] resides in the people, as the fountain of government . . . I view the states as made for the people, as well as by them." *Id.*

Linking "the people" to citizenship does not require "reading between the lines" of this Court's Second Amendment jurisprudence. *See United States v. Huitron-Guizar*, 678 F.3d 1164, 1168 (10th Cir. 2012). Both *Heller* and *Bruen* consistently claimed the right belonged to "law-abiding citizens." *See Heller*, 554 U.S. at 635 (explaining that the Second Amendment "elevates above all other interests the right of law-abiding, responsible citizens"); *Bruen*, 597 U.S. at 31-32 (reasoning that the Second Amendment's plain text covered the petitioners because they were "two ordinary, law-abiding, adult citizens" and therefore part of "the people"). Certainly, neither *Heller* nor *Bruen* contemplated exactly whether noncitizens were part of "the people" for purposes of the Second Amendment. At the very least, their discussion of the scope of the right highlights the natural symmetry between "the people" and "citizens."

2. The right to bear arms at the Founding attached to citizenship.

The specific history of the right to bear arms is further proof that the Second Amendment does not extend to noncitizens. *See Brue*n, 597 U.S. at 21-22 (looking to the historical understanding of the Second Amendment to mark the boundaries of the right to bear arms). At

[3] The full quote reads: "At the expiration of every parliament, the people can make a distinction between those who have served them well, and those who have neglected or betrayed their interest: they can bestow, unasked, their suffrages upon the former in the new election; and can mark the latter with disgrace, by a mortifying refusal. The constitution is thus frequently renewed, and drawn back, as it were, to its first principles; which is the most effectual method of perpetuating the liberties of a state. The people have numerous opportunities of displaying their just importance, and of exercising, in person, these natural rights. The representatives are reminded whose creatures they are; and to whom they are accountable for the use of that power, which is delegated unto them. The first maxims of jurisprudence are ever kept in view—that all power is derived from the people—that their happiness is the end of government."

English common law, noncitizens or "aliens" were not considered to be members of "the people" and did not share with citizens the right to keep and bear arms. *See Jimenez-Shalon*, 34 F.4th at 1046-49. In eighteenth-century England, the right to own a gun was restricted to the landed gentry, which excluded noncitizens. *See id.* at 1046 (surveying English history and finding that aliens did not share the fundamental right with British subjects); *Bayard v. Singleton*, 1 N.C. (Mart.) 5, 9 (1787) (explaining that, at English common law, "aliens [were] incapacitated to hold lands" and, in the colonies, "an alien enemy" did not have any political rights).

Similarly, in colonial America, "the right to keep and bear arms 'did not extend to all New World residents.'" *United States v. Perez*, 6 F.4th 448, 462 (2d Cir. 2021) (Menashi, J., concurring) (quoting Joyce Lee Malcolm, *To Keep and Bear Arms: The Origins of an Anglo-American Right* 140 (1996) [hereinafter Malcolm]). As noncitizens, American Indians were not entitled to the rights of citizens and "'their inability to legally own guns . . . confirmed their status as outsiders' to the political community." *Id.* (quoting Malcolm, at 141); *see also* Angela R. Riley, *Indians and Guns*, 100 Geo. L. J. 1675, 1679 (2012) (explaining that the colonial prohibitions on Indians from owning guns was due to their status as members outside the polity). Like Indian Americans, enslaved Black people were categorically excluded from the right to keep and bear arms. *See* Adam Winkler, *Heller's Catch-22*, 56 UCLA L. Rev. 1551, 1562 (2009). At the time of the founding, they written out of "the people" entirely and enjoyed none of the fundamental liberties that white Americans enjoyed. *See* Pratheepan Gulasekaram, *"The People" of the Second Amendment: Citizenship and the Right to Bear Arms*, 85 N.Y.U. L. Rev. 1521, 1548–49 (2010) [hereinafter Gulasekaram]. Some of the colonies similarly disarmed white male noncitizens because they were not members of "the people." *See* Akhil Reed Amar, *The Bill of Rights: Creation and Reconstruction* 48 (1998) [hereinafter Amar] (explaining that even white

aliens "typically could not vote, hold public office, or serve on juries" and didn't have "the right to bear arms," because these "were rights of members of the polity").

After the Revolution, the early Framers incorporated the citizen/noncitizen distinction into state constitutions. Pennsylvania, led by James Wilson, amended its original 1776 Bill of Rights from protecting the right of "the people . . . to bear arms" to protecting the right of "citizens . . . to bear arms." *See* Stephen P. Halbrook, *The Founders' Second Amendment* 290-95 (2007).[4] Delegates did not protest to the change; instead, the debates largely centered on whether to add a conscientious objector clause to the amendment or whether Pennsylvania needed a state analogue at all, given the federal Constitution's protection. *See id.* Pennsylvania was not unique: Between 1776 and 1820, six of the thirteen original states adopted state constitution analogues to the Second Amendment expressly limiting the right to "citizens." *See Heller*, 554 U.S. at 602.[5] The ratification debates in states ultimately protecting the right of "citizens" as opposed to "the people" contain no evidence of a material difference or disagreement over the two terms. *See id.* at 279-98 (surveying the debates during the adoption of state constitutional amendments).

Other founding-era sources continued to refer to *the citizen*'s right to bear arms. Alexander Hamilton in Federalist Papers No. 28 & No. 29 framed the use of arms by "citizens" as a safeguard of individual liberties against standing armies. The Federalist No. 28, at 138

[4] *Compare* Pa. Declaration of Rights, cl. XIII (1776) with Pa. Const. art. 1, § 21 (1790).

[5] The six are Ala. Const. art. I, § 27 (1819) ("That every citizen has a right to bear arms in defence of himself and the state."); Conn. Const. art. I, § 15 (1818) ("Every citizen has a right to bear arms in defence of himself and the state.); Ky. Const. art. XII, cl. 23 (1792) ("That the rights of the citizens to bear arms in defence of themselves and the State shall not be questioned."); Me. Const. art. I, § 16 (1819) ("Every citizen has a right to keep and bear arms for the common defence; and this right shall never be questioned."); Miss. Const. art. I, § 23 (1817) ("Every citizen has a right to bear arms in defence of himself and of the State."); Pa. Const. art. 1, § 21 (1790) ("The right of the citizens to bear arms in defence of themselves and the State shall not be questioned."). The other state provisions used the phrase "the people" in place of citizens. *See, e.g.,* Mass. Const. pt. 1, art. 17 (1780) ("The people have a right to keep and to bear arms for the common defence."); Vt. Declaration of Rights, ch. 1, § X ("That the people have a right to bear arms for the defence of themselves and the State . . .").

(Hamilton) (Yale University Press, 2009); The Federalist No. 29, at 142-44 (Hamilton) (Yale University Press, 2009). And in his treatise on the Constitution that was cited favorably in *Heller*, *see* 554 U.S. at 597, Joseph Story traced the origins of the Second Amendment to the Founding-era belief that "[t]he right of the *citizens* to keep and bear arms [is] the palladium of the liberties of a republic; since it offers a strong moral check against usurpation and arbitrary power of rulers." Joseph Story, 3 *Commentaries on the Constitution of the United States* § 1890, at 746 (1833) (emphasis added).

In sum, the founding generation's discussion and enactment of the Second Amendment clarifies that the right to bear arms originally belonged to citizens, not noncitizens.

3. During Reconstruction, Congress reinvigorated the right to bear arms by appealing to the rights of citizenship.

The original meaning of the Second Amendment persisted into the nineteenth century. While not every person possessed the right to bear arms in the colonies or early America, as time went on, Congress fought for the right of new citizens to bear arms. By the mid-nineteenth century, many considered freed Black people to be among "the people." *See McDonald v. City of Chicago, Ill.*, 561 U.S. 742, 849 (2010) (Thomas, J., concurring in part and concurring in the judgment) (describing the arguments of abolitionists in the antebellum era). Nevertheless, the Southern States "routinely disarmed" freedmen through the Black Codes—legislation that abolitionists argued infringed the privileges and immunities of citizenship. *See Heller*, 554 U.S. at 615. For example, in 1866, the Alabama legislature passed a law banning any "freedman, mulatto, or free person of color" from possessing a firearm. *See* Cong. Globe, 39th Cong., 1st Sess. 1838 (Apr. 7, 1866) (reprinting the Alabama law). Many in Congress were outraged, including Rep. Clarke who argued that Alabama's law infringed Black citizens' Second Amendment rights. *See id.* (statements of Rep. Clarke of Kansas).

As a result, immediately after the Civil War, Congress passed legislation to secure the right of "all citizens to keep and bear arms." *McDonald*, 561 U.S. at 774. In 1866, Congress passed the Freedmen's Bureau Act, which "explicitly guaranteed that 'all *the citizens*' . . . would have 'the constitutional right to bear arms'" regardless of race or previous condition of slavery. *McDonald*, 561 U.S. at 773 (quoting 14 Stat. 176-177 (1866)) (emphasis added); *see Heller*, 554 U.S. at 615 (quoting the same). The Civil Rights Act of 1866, considered at the same time as the Freedman's Bureau Act, "similarly sought to protect the right of all citizens to keep and bear arms." *McDonald*, 561 U.S. at 774; *see* 14 Stat. 27-30 (1866). As this Court exhaustively detailed in *McDonald*, the Reconstruction-era Congress ultimately thought these legislative remedies insufficient and moved to enshrine the equal right of citizens to keep and bear arms, among other fundamental rights, in the Fourteenth Amendment. *See* 561 U.S. at 775 (citing Amar, at 264-265) (stating that one of the "core purposes of the Civil Rights Act of 1866 and of the Fourteenth Amendment was to redress the grievances" of freedmen who had been stripped of their arms and to "affirm the full and equal right of every citizen to self-defense").[6]

The Reconstruction-era history that Justice Thomas covers in his *McDonald* concurrence provides strong support for the proposition that the right to bear arms belonged to citizens. *See McDonald*, 561 U.S. at 813-58 (Thomas, J., concurring in part and concurring in the judgment). He examined, for instance, the statements made by members of Congress during the debates on the Fourteenth Amendment and said in summary: "Both proponents and opponents of this Act described it as providing the 'privileges' of citizenship to freedmen, and defined those privileges

[6] One reason members of Congress thought normal legislation was insufficient to protect the rights of newly freedmen is that state courts in the Reconstruction South declared the Civil Rights Acts of 1866 and similar laws unconstitutional. *See* David B. Kopel, *The First Century of Right to Arms Litigation*, 14 Geo. J.L. & Pub. Pol'y 127, 158-160 (2016) (describing a Mississippi state court's ruling striking down the Civil Rights Act of 1866).

to include constitutional rights, such as the right to keep and bear arms." *See id.* at 833. Turning to the public understanding of the Fourteenth Amendment post-ratification, he cited congressional debates, legislation, and contemporary judicial decisions—all supporting the conclusion that "the right to bear arms was understood to be a privilege of American citizenship." *See id.* at 838; *see also Heller*, 554 U.S. at 616 (quoting H.R. Rep. No. 37, 41st Cong., 3d Sess., 7–8 (1871) (explaining that the Civil Rights Act of 1871 was "intended to enforce the well-known constitutional provision guaranteeing the right of the citizen to keep and bear arms"). Justice Thomas concluded that the Framers of the Fourteenth Amendment, consistent with the founding generation, understood the right to bear arms as a "privilege of American citizenship." *McDonald*, 561 U.S. at 806 (Thomas, J., concurring).

In total, the historical evidence from before, during, and after the passage of the Second Amendment and the Fourteenth Amendment demonstrates that the right to bear arms attached to citizenship. "The people" is a "term of art" that incorporates and reflects this historical meaning. *See Heller*, 554 U.S. at 580 (citation omitted).

4. This Court should adhere to the original public meaning of "the people" because the Second Amendment codified a pre-existing right.

Admittedly, the plain text of "the people"—divorced from all historical meaning—is ambiguous. The Constitution refers separately to "citizens," "persons," and "the people."[7] Moreover, in some instances the phrase "the people" in the Constitution excludes non-citizens, while in others it may include a broader population.[8] That ambiguity is deepened by *Heller*'s

[7] *See* U.S. Const. art I, sec. 2, cl. 2 (stating that a Representative must be "seven Years a Citizen of the United States"); art. II, sec. I., cl. 5 ("No Person except a natural born Citizen, or a Citizen of the United States, at the time of the Adoption of this Constitution, shall be eligible to the Office of President.").

[8] *Compare* U.S. Const. art. I, sec. 2, cl. 1 ("The House of Representatives shall be composed of Members chosen . . . by the People of the several States") *and* amend. X (reserving undelegated powers to "the State respectively, or to the people") *with* amend. IV (protecting "the right of the people . . . against unreasonable searches and seizures").

suggestion that "all six other provisions of the Constitution that mention 'the people'" refer to the same group. *See* 554 U.S. at 580.

But the historical meaning of "the people," outlined above, should control this Court's interpretation because the Second Amendment "was not intended to lay down a novel principle but rather codified a right inherited from our English ancestors." *Heller*, 554 U.S. at 599 (cleaned up). As this Court stated in *Bruen* and *Heller*, "[c]onstitutional rights are enshrined with the scope they were understood to have *when the people adopted them*." *Bruen*, 597 U.S. at 34 (quoting *Heller*, 554 U.S. at 634-35). This is why *Heller* "began with a textual analysis focused on the normal and ordinary meaning of the Second Amendment's language" and then "assessed whether [its] initial conclusion was confirmed by the historical background of the Second Amendment." *Bruen*, 597 U.S. at 20 (cleaned up). Just like the Court in *Heller* looked to the "original understanding of the Second Amendment" to determine the meaning of "keep and bear arms," so too should this Court adhere to the original public meaning of "the people," which excluded noncitizens. *See Heller*, 554 U.S. at 625.

5. Petitioner cannot succeed in his facial challenge to Section 922(g)(5)(A) even if he could demonstrate a "substantial connection" with this country.

Turning away from the history, Petitioner argues that unauthorized noncitizens may have a Second Amendment right to bear arms *if* they demonstrate sufficient connections to this country. *See* R. at 6; *see United States v. Meza-Rodriguez*, 787 F.3d 664, 672 (7th Cir. 2015) (holding that an unauthorized noncitizen who "lived continuously in the United States for nearly all his life" was part of "the people" as defined by *Heller*). He finds some support in *Heller*, which explained that "the people" are "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." 554 U.S. at 580 (quoting *United States v. Verdugo–Urquidez*, 494 U.S. 259,

265 (1990)). In other words, Petitioner suggests that, because some unauthorized noncitizens may demonstrate "sufficient connections" with this country, Section 922(g)(5)(A) should be struck down on its face. *See* R. at 6.

His argument is unavailing for four reasons. *First*, Petitioner overreads *Heller*. *Heller* "did not resolve *who* had the Second Amendment right." *See United States v. Torres*, 911 F.3d 1253, 1259 (9th Cir. 2019). All *Heller* held was that the Second Amendment protects an individual right, as opposed to the collective right of a subset of people. *See* 554 U.S. at 580-81. In fact, Heller went on to explain that the Second Amendment right is "exercised individually and belongs to *all Americans*." *Id.* at 581 (emphasis added).

Second, the "sufficient connections" test is not supported by the historical record, at least with respect to the right to bear arms. *See United States v. Esparza-Mendoza*, 265 F. Supp. 2d 1254, 1267-69 (D. Utah 2003) (explaining that "the historical materials suggest the Framers were doing everything possible to exclude [criminal noncitizens] from the national community"). As detailed above, many groups who had a substantial connection to the country were not afforded the right to bear arms because they were not considered among "the people." *See* discussion *supra* Part I.A.2. Because *Bruen* explicitly required the scope of the Second Amendment to "comport[] with history and tradition," the "sufficient connections" test must give way. *See* 597 U.S. at 22.

Third, even accepting that noncitizens who demonstrate sufficient connections to this country are among "the people" and presumptively possess the right to keep and bear arms, *unlawfully present* noncitizens categorically cannot demonstrate the type of connections necessary to meet that standard. *See Kwong Hai Chew v. Colding*, 344 U.S. 590, 598 n.5 (1953) ("But once an alien *lawfully enters* and resides in this country he becomes invested with the

rights guaranteed by the Constitution to all people within our borders."). Under the eighteenth-century Law of the Nations, persons who entered a country without permission of the sovereign could not "expect to receive all the rights and protections of the citizenry." *Jimenez-Shilon*, 34 F.4th at 1049. Thus, while unauthorized noncitizens gain some constitutional protection by dint of their personhood, *see Plyler v. Doe*, 457 U.S. 202, 210 (1982), they cannot claim all the privileges afforded lawful residents and citizens as part of "the people." *See United States v. Portillo-Munoz*, 643 F.3d 437, 440-41 (5th Cir. 2011), as revised (June 29, 2011) (recognizing that the Fourth Amendment does not extend to noncitizens who have entered unlawfully and applying that reasoning to the Second Amendment).

Fourth and finally, this Court can avoid the constitutional issue by construing Section 922(g)(5)(A) to only apply to unauthorized noncitizens who do not have sufficient connections to this country. *See DeBartolo Corp. v. Florida Gulf Coast Trades Council*, 485 U.S. 568, 575 (1988) ("[T]he elementary rule is that every reasonable construction must be resorted to in order to save a statute from unconstitutionality.") (citation omitted). Petitioner's argument implicitly concedes that *some* applications of Section 922(g)(5)(A) are constitutional—mainly those that disarm unauthorized noncitizens without sufficient connections to bring them within the protection of the Second Amendment. *See* R. at 7. Thus, Petitioner cannot say that "no set of circumstances exists under which the Act would be valid." *United States v. Salerno*, 481 U.S. 739, 745 (1987).

The facts in this case are instructive. State troopers stopped Dayne Sitladeen and Muzamil Addow for speeding and, during a consent search of their vehicle, discovered sixty-seven guns and over a dozen high-capacity pistol magazines. R. at 5. Presumably, Sitladeen and Addow were in the United States as fugitives, because the trooper also discovered Sitladeen was

the subject of an arrest warrant for murder and fentanyl trafficking. R. at 5. It would be unreasonable to suggest an unauthorized noncitizen like Sitladeen established any legitimate or substantial connection with this country, unlike the plaintiff in *United States v. Meza-Rodriguez*, who was an undocumented immigrant that "lived continuously in the United States for nearly all his life." *See* 798 F.3d at 670-72. A narrowing construction would follow the well-established rules of constitutional interpretation and, importantly, recognize the principle that noncitizens possess "a generous and ascending scale of rights as [they] increase[] [their] identity with our society." *Johnson v. Eisentrager*, 339 U.S. 763, 770 (1950).

B. Even if the Second Amendment covers unauthorized noncitizens, Section 922(g)(5)(A) is squarely within America's historical tradition of firearm regulation.

Assuming that the Second Amendment confers on unauthorized noncitizens the right to keep and bear arms, Section 922(g)(5)(A) is squarely within America's "historical tradition of firearm regulation." *Bruen*, 597 U.S. at 17. As the previous Section showed, the historical evidence preventing noncitizens from owning firearms is overwhelming. The constitutional inquiry is "fairly straightforward" because states have expressly limited the right to bear arms to citizens since the eighteenth century. *See id.* at 26 (reasoning that, for "societal problems that persisted since the 18th century," the lack, and presumably fact, of a "distinctly similar" historical analogue is relevant). Of the thirteen state constitutional protections for the right to bear arms adopted between 1787 and 1820, six protected only the rights of "citizens" to keep and bear arms. *See Heller*, 554 U.S. at 602-603 (looking to analogous arms-bearing rights in state constitutions adopted between 1787 and 1820).[9] Section 922(g)(5)(A) is a "lineal descendant" of that limitation. *See Kanter*, 919 F.3d at 464-65 (Barrett, J., dissenting).

[9] *See* relevant statutes, *supra* note 2.

Besides the direct historical evidence surveyed above, we identify two "relevantly similar" historical analogues: (1) laws disarming disloyal citizens and (2) laws disarming dangerous persons.

1. Laws disarming disloyal citizens

The colonial and early-republic era laws disarming disloyal citizens are a "well-established and representative" historical analogue to Section 922(g)(5)(A). *See Bruen*, 597 U.S. at 30.

In the colonies, people "unwilling to affirm [their] allegiance to the British Crown [were prohibited] from collecting firearms." *See Jimenez-Shilon*, 34 F.4th at 1048 (quoting Adam Winkler, *Gun Fight: The Battle Over the Right to Bear Arms in America* 116 (2011)). For example, in 1754, Virginia "ordered the disarmament of all those refusing the test of allegiance." Robert H. Churchill, *Gun Regulation, the Police Power, and the Right to Keep Arms in Early America: The Legal Context of the Second Amendment*, 25 L. & Hist. Rev. 139, 157 (2007) [hereinafter Churchill]. The oath required all who wanted to be a member of the British body politic to swear allegiance to the "Hanoverian dynasty and the Protestant succession." *Id.* Virginia's loyalty requirement was not an outlier: in the British colonies, the right to bear arms was contingent on an "individual's undivided allegiance to the sovereign." *Jimenez-Shilon*, 34 F.4th at 1048 (cleaned up).

After the Revolution, the newly-constituted United States continued to disarm British loyalists and others who refused to swear an oath of allegiance to the newly formed government. *See* Churchill, at 159; Gulaskarem, at 1548-49 (describing an "early feature of the emerging republic" as the selective "disarmament of groups associated with foreign elements"). In 1776, the first Continental Congress recommended that the states "disarm all [notoriously disaffected]

persons." Churchill, at 159 n.49. Pennsylvania responded by passing the Test Act of 1777, which disarmed all people who did not swear allegiance to the Commonwealth and disavow the British monarchy. Act of June 13, 1777, § 1 (1777), 9 The Statutes at Large of Pennsylvania from 1652–1801, at 110-11 (William Stanley Ray ed., 1903); *see* Churchill, at 159.

Other states followed suit and implemented their own loyalty oath requirements to bearing arms. In 1777, Maryland instituted a loyalty oath requirement and those who refused to take the oath were barred from keeping and bearing arms. *See* Churchill, at 160 (citing An Act for the Better Security of the Government, ch. XX, Md. Laws (1777); An Act to Prevent and Suppress Insurrections, Md. Laws (1778); An Act to Raise Two Battalions of Militia for Reinforcing the Continental Army, Md. Sess. Laws (1781). North Carolina also barred people who refused the oath "from basic liberties including the keeping of arms" until they relented. *See id.* (citing An Act for Directing the Method of Appointing Jurors, N.C. Sess. Laws (1777)). Rhode Island, Virginia, Massachusetts, and New Jersey passed similar laws. *See United States v. Jackson*, 69 F.4th 495, 503 (8th Cir. 2023) (collecting relevant Revolutionary-era statutes). In total, more than half of the states and the Continental Congress prohibited possession of firearms by disloyal people.

The weight of authority post-*Bruen* agrees that loyalty laws are a "relevantly similar" historical analogue to Section 922(g)(5)(A). Every court to consider the issue has found that the early American laws conditioning the right to bear arms on an oath of loyalty imposed a comparable burden for a comparable reason.[10] They have uniformly rejected the argument that

[10] *See, e.g., United States v. Gil-Solano,* No. 3:23-cr-00018-MMD-CLB, 2023 WL 6810864, at *5 (D. Nev. Oct. 16, 2023) (accepting loyalty laws as an appropriate historical analogue to Section 922(g)(5)(A)); *United States v. Leveille*, No. 1:18-CR-02945-WJ, 2023 WL 2386266, at *4 (D.N.M. Mar. 7, 2023) (upholding the constitutionality of Section 922(g)(5)(A) as "sufficiently similar" to loyalty laws); *United States v. Escobar-Temal*, No. 3:22-CR-00393, 2023 WL 4112762, at *5-6 (M.D. Tenn. June 21, 2023) (same); *United States v. DaSilva*, No. 3:21-CR-267, 2022 WL 17242870, at *12 (M.D. Pa. Nov. 23, 2022) (finding a "substantial historical and traditional basis" in loyalty laws, among others, which provide "well-established and representative historical analogues" to Section

today's immigration system is not analogous to the historical restrictions on individuals who refused loyalty oaths. *See Leveille*, 2023 WL 2386266, at *4; *see also Escobar-Temal*, 2023 WL 4112762, at *6 n.7 (reasoning that both operate as "civic demarcations"). In *Leveille*, the District Court of New Mexico recognized that "[t]oday's immigration system functions as an attempt to define the nation's members and nonmembers." *Id.* at *4. The court noted that the system is "imperfect" at separating those who would profess loyalty to the state because some noncitizens would, given the chance, become citizens. *Id.* But it explained that the current system is "analogous nonetheless" since it functions as the modern-day "proxy" for allegiance. *Id.* Looking for the same system, the court argued, is the exact quest for a "historical twin" that *Bruen* disavowed. *See id.* (quoting *Bruen*, 597 U.S. at 30).

Their reasoning is sound: the eighteenth-century laws disarming disloyal citizens track "how and why" the Government bans unauthorized citizens from possessing firearms. *See Bruen*, 597 U.S. at 29 (explaining that comparing "how and why the regulations burden a law-abiding citizen's right to self-defense" should guide courts' analogical inquiry). Like the many States in the early republic, Congress limits the possession of weapons to those who have sworn allegiance to the United States. *See Jimenez-Shilon*, 34 F.4th at 1049-50 (holding that the history of loyalty laws, together with state constitutions restricting the right to "citizens" and the "fundamental tenets of eighteenth-century international law," confirm that unauthorized noncitizens could be disarmed consistent with the Constitution).[11]

922(g)(5)(A)); *United States v. Pineda-Guevara*, No. 5:23-CR-2-DCB-LGI, 2023 WL 4943609, at *6 (S.D. Miss. Aug. 2, 2023) (same); *United States v. Trinidad-Nova*, No. CR 22-419 (FAB), 2023 WL 3071412, at *4-5 (D.P.R. Apr. 25, 2023) (finding analogues in Founding-era laws disarming for lack of allegiance and due to perceived untrustworthiness).

[11] The Naturalization Oath of Allegiance to the United States reads: "I hereby declare, on oath, that I absolutely and entirely renounce and abjure all allegiance and fidelity to any foreign prince, potentate, state, or sovereignty, of whom or which I have heretofore been a subject or citizen; that I will support and defend the Constitution and laws of the United States of America against all enemies, foreign and domestic; that I will bear true faith and allegiance to

2. Laws disarming dangerous people

Section 922(g)(5)(A) can also be viewed as part of the historical effort to disarm presumptively dangerous people. *See United States v. Jackson*, 69 F.4th 495, 504 (8th Cir. 2023) (upholding the felon-in-possession statute using dangerousness as an analogy). As Justice Barrett explained when she was a judge on the Seventh Circuit, the history of firearm regulation in early America shows that "the state can take the right to bear arms away from a category of people it deems to be dangerous." *Kanter v. Barr*, 919 F.3d 437, 464 (7th Cir. 2019) (Barrett, J., dissenting). From the seventeenth to the twentieth century, Congress and other legislatures have disarmed "felons, foreigners, and other dangerous persons," including children, intoxicated persons, and the mentally unfit. Robert J. Spitzer, *Gun Law History in the United States and Second Amendment Rights*, 80 L. and Contemp. Probs., 55, 72 (2017). The dangerousness rationale is so pervasive and long-standing that some scholars have declared dangerousness to be the "touchstone of disarmament laws." Joseph G.S. Greenlee, *Disarming the Dangerous: The American Tradition of Firearm Prohibitions*, 16 Drexel L. Rev. __ (forthcoming 2023) [hereinafter Greenlee]; *see Binderup v. Atty. Gen. United States of America*, 836 F.3d 336, 357 (3d. Cir. 2016) (en banc) (Hardiman, J., concurring in part and concurring in the judgments) ("The most cogent principle that can be drawn from traditional limitations on the right to keep and bear arms is that dangerous persons likely to use firearms for illicit purposes were not understood to be protected by the Second Amendment.")

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the same; that I will bear arms on behalf of the United States when required by the law; that I will perform noncombatant service in the Armed Forces of the United States when required by the law; that I will perform work of national importance under civilian direction when required by the law; and that I take this obligation freely, without any mental reservation or purpose of evasion; so help me God." Immigration and Naturalization Act, 8 U.S.C. § 1448.

Beginning in seventeenth- and eighteenth-century England, officers of the Crown "had the power to disarm anyone they judged to be 'dangerous to the Peace of the Kingdom.'" *Kanter*, 919 F.3d at 456 (Barrett, J., dissenting) (quoting Militia Act of 1662, 13 & 14 Car. 2, c. 3, § 13 (1662)); *see United States v. Carpio-Leon*, 701 F.3d 974, 980 (4th Cir. 2012) ("In England, the right to bear arms allowed the government to disarm those it considered disloyal or dangerous."). That tradition carried into the colonies. *See* Joseph G.S. Greenlee, *The Historical Justification for Prohibiting Dangerous Persons from Possessing Arms*, 20 Wy. L. Rev. 249, 261-65 (2020) (noting that the colonists adopted the British tradition of disarming dangerous persons). Most colonies prohibited arming Native Americans, slaves, and Catholics for fear of revolt, attack, or imminent danger.[12]

The founding generation largely accepted the dangerousness justification. *See Binderup*, 836 F.3d at 367 (citing Stephen P. Halbrook, *The Founders' Second Amendment* 190–215 (2007)) (surveying the debates at the ratifying conventions and highlighting the commonplace understanding that "dangerous persons could be disarmed"); *see also Bruen*, 597 U.S. at 36 (noting that courts should rely on historical evidence "where a governmental practice has been open, widespread, and unchallenged since the early days of the Republic") (citation omitted). In what *Heller* identified as an "highly influential" precursor to the Second Amendment, *see Heller*, 554 U.S. at 604, anti-Federalists proposed that the people should have a right to bear arms "unless for crimes committed, or real danger of public injury from individuals." *See Jackson*, 69 F.4th at 503 (citing 2 Bernard Schwartz, *The Bill of Rights: A Documentary History* 665 (1971)).

[12] *See, e.g.,* An Act to Prohibit the Selling of Guns, Gunpowder or Other Warlike Stores to the Indians, § 1, Pa. Laws 319 (1763); An Act for Prohibiting all Trade with the Indians, for the Time Therein Mentioned, ch. 4, § 3, Md. Acts 53 (1763); An Act For Preventing Lending Guns, Ammunition etc. to the Indians, Conn. Acts 292 (1723); 1731-43 S.C. Acts 168, § 23 (prohibiting any slave from carrying firearms without license); 7 William Walter Henning, The Statutes at Large; a Collection of all the Laws of Virginia 35 (ed. 1820) (1756 statute prohibiting Catholics from being armed that began with the preamble "it is dangerous at this time to permit Papists to be armed").

In Massachusetts, Samuel Adams proposed that its people ratify an amendment guaranteeing that "the said constitution be never construed . . . to prevent the people of the United States who are peaceable citizens, from keeping their own arms." Greenlee, at 265-66 (citation omitted); *see Kanter*, 919 F.3d at 454-58 (Barrett, J., dissenting) (agreeing that these proposals evince a common concern about "violence and the risk of public injury").

During the nineteenth and twentieth centuries, the patently discriminatory applications of the dangerousness justification receded but the rationale continued to animate laws prohibiting children, intoxicated persons, and the mentally unfit. *See Heller*, 554 U.S. at 626 (discussing the "longstanding prohibitions on the possession of firearms by felons and the mentally ill"). For example, while the founding generation generally understood minors to be unfit to carry a weapon without adult supervision, laws restricting minor possession did not proliferate until the late-nineteenth century. *See Nat'l Rifle Ass'n of Am. v. Bureau of Alcohol, Tobacco, Firearms, & Explosives* (*BAFTE*), 700 F.3d 185, 202-03 & n.14 (5th Cir. 2012) (collecting statutes). The Omnibus Crime Control and Safe Streets Act of 1968 raised the age of majority from 18 to 21, largely to "curb crime by keeping firearms out of the hands" of people thought to be a danger to the public interest. *See* BAFTE, 700 F.3d at 199 (reviewing the statutory history of Pub. L. No. 90-351, 82 Stat. 197, 225 (1968)).

Section 922(g)(5)(A) is part of the tradition of Congress disarming classes of people who present a danger to the public beyond the ordinary person. *See Ball v. United States*, 470 U.S. 856, 863 n.13 (1985) (identifying the high-profile assassinations of President John F. Kennedy, Martin Luther King Jr., and Robert F. Kennedy as the motivating factor behind the list of prohibited persons).[13]

[13] The legislative history of Section 922(g)(5)(A) is complex. *See* R. at 17-18 nn.3-4. The specific provision disarming unauthorized noncitizens originated in Title VII of the Omnibus Crime Control and Safe Streets Act of

Indeed, *Barrett v. United States* recognized that "[t]he very structure of the Gun Control Act demonstrates that Congress . . . sought broadly to keep firearms away from the persons Congress classified as potentially irresponsible and dangerous." 423 U.S. 212, 218 (1976); *see Dickerson v. New Banner Inst., Inc.*, 460 U.S. 103, 119 (1983) (agreeing that Congress enacted the Gun Control Act to curb crime by keeping firearms "away from persons . . . who might be expected to misuse them"). To that end, Congress also limits firearm possession by juveniles, felons, fugitives, users of controlled substances, the mentally unfit, and people subject to domestic violence restraining orders. *See* 18 U.S.C. § 922(g), (x)(2).

Dangerousness is not a blank check allowing Congress to disarm anyone they please. *See United States v. Daniels*, 77 F.4th 337, 353 (5th Cir. 2023) (recognizing the need for a limiting principle on dangerousness). Many of the historic classifications of dangerousness are patently unconstitutional today on equal protection grounds. *See Binderup*, 836 F.3d at 368 (Hardiman, J., concurring) (noting that provisions disarming by race are now unconstitutional). Other non-invidious classifications must be rationally related to a legitimate government purpose. *See Romer v. Evans*, 517 U.S. 620, 631 (1996). And, more fundamentally, the modern applications of the dangerousness principle must be guided by analogical reasoning to history and tradition. *See Bruen*, 597 U.S. at 28-31.

1968. *See* Pub. L. No. 90-351, § 1202(a)(5), 82 Stat. 197, 236 (1968). Title VII "filled the gaps in and expanded the coverage of Title IV," but created redundancies and incongruencies in the federal code. *Ball v. United States*, 470 U.S. 856, 863 (1985); *see* David T. Hardy, *The Firearms Owners' Protection Act: A Historical and Legal Perspective*, 17 Cumb. L. Rev. 585, 639-42 (1987). A few months later, Congress amended and reenacted Titles IV and Title VII as part of the Gun Control Act of 1968. *See* Pub. L. No. 90-618, 82 Stat. 1213 (1968) (codified as amended at 18 U.S.C. §§ 921-934). In response to conflicting interpretations of Title IV and Title VII, Congress passed the Firearms Owners' Protection Act of 1986, which repealed Title VII and folded its provisions, including the provision barring unauthorized noncitizen possession, into the Gun Control Act. *See* Pub. L. No. 99-308, 100 Stat. 449, 452 (1986).

In some cases, it might be worth scrutinizing the fit of the burden or justification with the historical analogue.[14] This case does not present one of those "close questions at the margins" that makes applying constitutional principles to novel modern conditions "difficult." *See Bruen*, 597 U.S. at 31 (citation omitted). Before, during, and after the founding, the government disarmed noncitizens because they posed a distinct danger. *See Carpio-Leon*, 701 F.3d at 980 (describing how the pre- and post-founding, the government disarmed "potential subversives," "suspect populations," and those who did not swear an oath of allegiance). And Section 922(g)(5)(A), which is derivative of that deeply-rooted tradition, is not merely reasonable; the government's purpose in public safety "would be achieved less effectively" were it not for the provision disarming unauthorized noncitizens. *See United States v. Torres*, 911 F.3d 1253, 1264 (9th Cir. 2019) (upholding Section 922(g)(5)(A) under intermediate scrutiny before *Bruen*).

Congress acted in accordance with history and tradition when it passed Section 922(g)(5)(A). *See United States v. Huitron-Guizar*, 678 F.3d 1164, 1170 (10th Cir. 2012) (reasoning that Section 922(g)(5)(A) was enacted "with the purpose of keeping instruments of deadly force away from those deemed irresponsible or dangerous"). Accordingly, the statute does not violate the Second Amendment.

II. Section 922(g)(5)(A) is a Constitutional Regulation Under the Fifth Amendment

The Due Process Clause of the Fifth Amendment prohibits the federal government from "denying to any person the equal protection of laws." *United States v. Windsor*, 570 U.S. 744,

[14] Consider *Bruen*'s discussion of "sensitive places." *Bruen*, 597 U.S. at 30-31. *Bruen* rejected the government's argument that cities were "sensitive places . . . simply because [they are] crowded and protected generally." *Id.* at 31. *Bruen* did not explicitly define what characteristic was "relevantly similar" to be a "sensitive place," but it suggested looking to traditional applications that were not disputed, like "legislative assemblies, polling places, and courthouses." *See id.* at 30-31.

774 (2013).[15] In general, when "a law neither burdens a fundamental right nor targets a suspect class," the law is presumed to be valid and will be upheld "so long as it bears a rational relation to some legitimate end." *Romer v. Evans*, 517 U.S. 620, 631 (1996). Otherwise, a law must pass either heightened or strict scrutiny. *See City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 439-40 (1985) (explaining that a heightened standard applies to equal protection claims based on membership in a protected class or unequal burdening of a fundamental right).

Because Section 922(g)(5)(A) neither burdens a fundamental right nor targets a suspect class, this Court should apply the deferential rational basis review standard to analyze Petitioner's equal protection claim. *See supra* Part I (explaining that unauthorized noncitizens do not possess a right to bear arms); *Plyler v. Doe*, 457 U.S. 202, 223 (1982) (holding that unauthorized noncitizens are not a suspect class). More fundamentally, applying anything but rational basis review to Section 922(g)(5)(A) would erode Congress' plenary power over immigration and its inherent power to determine the boundaries of the political community. *See Trump v. Hawaii*, 138 S.Ct. 2392, 2418-19 (2018) (explaining that legislative classifications involving Congress' power over immigration are "largely immune from judicial control") (quoting *Fiallo v. Bell*, 430 U.S. 787, 792 (1977)). While this Court has protected the rights of lawfully permanent residents under heightened scrutiny when a *state* classification conflicts with Congress' objectives, *see e.g.*, *Graham v. Richardson*, 403 U.S. 365, 367 (1971), it has never applied heightened scrutiny to a federal classification targeting unauthorized noncitizens, as Section 922(g)(5)(A) does.

[15] The Fifth Amendment provides: "No person shall . . . be deprived of life, liberty, or property without due process of law." U.S. Const. amend. V. This Court has explained that the Due Process Clause contains an equal protection guarantee substantively equivalent to the Fourteenth Amendment's. See *Weinberger v. Wiesenfeld*, 420 U.S. 636, 638 n.2 (1975); see also *Buckley v. Valeo*, 421 U.S. 1, 93 (1976) ("Equal protection analysis in the Fifth Amendment area is the same as that under the Fourteenth Amendment.").

But even if this Court were to apply heightened scrutiny, Section 922(g)(5)(A) passes review. Congress enacted the Gun Control Act and the Safe Streets Act to further its important interest in public safety and limiting the number of illegal firearms in interstate commerce. *See Barrett*, 423 U.S. at 218. Section 922(g)(5)(A) substantially furthers that important interest because, as the circuit courts have recognized, unauthorized noncitizens are (1) harder to trace because they are more likely to provide false identifying information to the government and (2) more likely to purchase unregistered firearms on the unregulated secondary market to avoid detection. *See United States v. Perez*, 6 F.4th 448, 455-56 (2d Cir. 2021), cert. denied, 142 S.Ct. 1133 (2022); *Torres*, 911 F.3d at 1263-64; *Portillo-Munoz*, 643 F.3d at 441.

A. Rational basis review applies to Section 922(g)(5)(A).

1. Section 922(g)(5)(A) does not burden a "fundamental right."

Section 922(g)(5)(A) does not burden a "fundamental right." After all, unauthorized noncitizens do not possess a Second Amendment right to keep and bear arms. *See supra* Part I; *United States v. Carpio-Leon*, 701 F.3d 974, 982 (4th Cir. 2012) (holding that there is "no fundamental constitutional right at stake" in an equal protection challenge to Section 922(g)(5)(A)).

The fundamental right equal protection analysis is simple in this case. "[If] the Equal Protection challenge is based on the Second Amendment's fundamental right to bear arms . . . that challenge is subsumed in the Second Amendment inquiry above." *Pena v. Lindley*, 898 F.3d 969, 986 (9th Cir. 2018); *accord Kwong v. Bloomberg*, 723 F.3d 160, 170 n.19 (2d Cir. 2013) (explaining that a law burdens a fundamental right to bear arms under the equal protection clause only if it violates the Second Amendment). The Government has already shown that Section 922(g)(5)(A) does not violate the Second Amendment. *See supra* Part I. Thus, rational

basis review applies to Section 922(g)(5)(A), unless petitioner can prove the statute targets a suspect classification, which they cannot. *See infra* Part II.A.2.[16]

Petitioner's last-ditch effort to save their Second Amendment argument by shoehorning it into a substantive due process claim is futile. R. at 10-11. Petitioner argues that, in the event unauthorized noncitizens are not "covered" by the Second Amendment, substantive due process protects an unenumerated right to bear arms "deeply rooted in this Nation's history and tradition." *Id.* (citing *Dobbs v. Jackson's Women's Health Org.*, 142 S.Ct. 2228, 2260 (2022)). But the Second Amendment "provides an explicit textual source of constitutional protection" for the right to bear arms and so "that Amendment, not . . . substantive due process, must be the guide for analyzing [the constitutional claim]." *Albright v. Oliver*, 510 U.S. 266, 273-74 (1994) (plurality op.) (citing *Graham v. Connor*, 490 U.S. 386, 395 (1989)) (cleaned up); *see United States v. Lanier*, 520 U.S. 259, 272 n.7 (1997) ("*Graham* requires that if a constitutional claim is 'covered' by a specific provision . . . the claim must be analyzed under the standard appropriate to that provision, not under the rubric of substantive due process."). Accordingly, Petitioner may not look to substantive due process as an additional source of constitutional protection for the right to bear arms. *See Portillo-Munoz*, 643 F.3d at 442 n.4 (rejecting a Fifth Amendment due process challenge to Section 922(g)(5)(A) for the same reason).

2. This Court already held in *Plyler* that unauthorized noncitizens are not a suspect class.

Over forty years ago, *Plyler v. Doe* held that unauthorized noncitizens "cannot be treated as a suspect class because their presence in this country in violation of federal law is not a 'constitutional irrelevancy.'" 457 U.S. 202, 223 (1982); *see id.* at 219 n.19 ("We reject the claim

[16] Even if this Court does not agree with the lower courts that the analysis is the same under both the Second Amendment and the Fifth Amendment, the Government incorporates its arguments in Part I by reference here to show that Section 922(g)(5)(A) does not burden a fundamental right.

that 'illegal aliens' are a suspect class."). The lower courts have taken *Plyler* at its word and applied rational basis review to classifications involving unauthorized noncitizens, so long as the classification is pursuant to a federal law or a state law consistent with the federal scheme. *See, e.g.*, *Estrada v. Becker*, 917 F.3d 1298, 1312 (11th Cir. 2019) (upholding Georgia's policy that prevented undocumented students from attending certain universities under rational basis review); *McLean v. Crabtree*, 132 F.3d 1176, 1185 n.11 (9th Cir. 1999) (explaining that "judicial scrutiny of alienage classifications is relaxed to a 'rational basis' standard" in cases where "federal interests predominate").

Nothing in *Plyler* or this Court's precedents compels applying heightened scrutiny to Section 922(g)(5)(A). *Plyler* invalidated a Texas law barring the children of unauthorized noncitizens from attending public schools. *See* 457 U.S. at 230. After holding that unauthorized noncitizens are not a suspect class, *see id.* at 223, and reaffirming that education was not a fundamental right, *see id.*, *Plyler* recognized the "special constitutional sensitivity" presented by a law depriving children, "through no fault of their own, access to a basic education." *Id.* at 226. Indeed, *Plyler* stressed the unique harms caused by depriving children of a basic education: the denial of opportunity, the denial of means to become a productive member of society, and the lasting stigmatic harm. *Id.* at 222 (noting the "inestimable toll of [the deprivation] on the social economic, intellectual, and psychological well-being" of the children).

Section 922(g)(5)(A) raises no comparable concern. Disarming unauthorized noncitizens is nowhere near analogous to depriving children of a basic education. Losing access to a weapon, unlike an education, does not mean losing access to the tools necessary for economic advancement, democratic participation, and self-actualization. *See Plyler*, 457 U.S. at 222. In fact, federal law *already prohibits* minors from possessing a handgun, with limited exceptions.

See § 922(x)(2). Moreover, twenty-two states and the District of Columbia impose minimum age requirements on possession of rifles and shotguns. *See Has the State Raised the Minimum Age For Purchasing Firearms?*, Everytown for Gun Safety (Jan. 12, 2023), https://everytownresearch.org/rankings/law/minimum-age-to-purchase/. Stripping children of an education denies them "the basic tools" of life, but disarming certain individuals is necessary to protect the public and the individuals themselves. *See Plyler*, 457 U.S. at 221.

Following *Plyler*, this Court should apply rational basis to Section 922(g)(5)(A) because it neither burdens a fundamental right nor targets a suspect class.

3. Given Congress' plenary power over immigration, rational basis is the appropriate standard to review Congress' treatment of unauthorized noncitizens.

Besides being consistent with this Court's precedent, applying rational basis review to Section 922(g)(5)(A) is necessary to preserve Congress' plenary power over immigration and its inherent power to define the national community. *See Plyler*, 457 U.S. at 219 n.19 ("[Federal] alienage 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.").

This Court has long recognized that Congress holds "broad power over naturalization and immigration," which allows it to "make[] rules that would be unacceptable if applied to citizens." *Mathews v. Diaz*, 426 U.S. 67, 80 (1976). The Constitution explicitly grants Congress the power to "establish a uniform Rule of Naturalization." Art. I, § 8, cl. 4. That plenary power over immigration, combined with the sovereign's inherent power "to preserve the basic conception of a political community," has tempered judicial scrutiny, except when state law conflicts with the federal scheme. *Foley v. Connelie*, 435 U.S. 291, 296 (1978) (cleaned up); *see Fiallo v. Bell*, 430

U.S. 787, 792 (1977) (citations omitted) (explaining that Congress' "power over aliens is of a political character and therefore subject only to narrow judicial review").

Because of its plenary power over immigration, Congress may treat different types of noncitizens differently without triggering heightened scrutiny. *See Mathews*, 426 U.S. at 78-80 ("[T]he class of aliens is itself a heterogeneous multitude of persons with a wide-ranging variety of ties to this country . . . Congress may decide that as an alien's tie grows stronger, so does the strength of his claim to an equal share of that munificence."). *Mathews* applied rational basis review to uphold the constitutionality of a welfare benefit scheme that "discriminated within the class of aliens." *Id.* at 80, 82-84. Petitioners challenged the requirement that Medicare beneficiaries must be 1) permanent residents 2) who have resided in the U.S. for five years. *Id.* at 82-83. This Court explained that it was "unquestionably reasonable for Congress to make an alien's eligibility depend on both the character and the duration of his residence." *Id.* It emphasized that dividing noncitizens into subcategories "is a routine and normally legitimate part of [the federal government's] business." *Id.* at 85. In fact, a "host of constitutional and statutory provisions rest on the premise that a legitimate distinction between citizens and aliens may justify attributes and benefits for one class not accorded to the other." *Id.* at 78-79 & 78 n.12 (compiling statutes that distinguish between noncitizens and citizens).

Of course, as *Plyler* recognized, the *federal* government's plenary power over immigration does not warrant narrow judicial review for *state* regulations that conflict with the federal immigration scheme. *See Plyler*, 457 U.S. at 225-26. In *Graham v. Richardson*, a lawfully admitted resident noncitizen (or LPR) challenged her denial of state benefits under Arizona's assistance program. 403 U.S. 365, 367 (1971). *Graham* explained that Arizona's 15-year durational residency requirement failed "close judicial scrutiny" since it was "inconsistent

with federal policy" and "encroach[ed] upon exclusive federal power." *Id.* at 372, 380. In *Nyquist v. Mauclet*, this Court applied "close judicial scrutiny" and struck down a New York law that prevented LPRs from receiving state financial assistance for higher education. 432 U.S. 1, 7, 12 (1977). *Nyquist* similarly noted that New York has "no power to interfere" with the Federal Government's power over immigration. *Id.* at 10. As this Court later explained, the state laws in *Graham* and *Nyquist* "struck at the noncitizens' ability to exist in the community, a position seemingly inconsistent with the congressional determination to admit the alien to permanent residence." *Foley*, 435 U.S. at 295.

Those concerns are not present where, as here, the challenged statute is a federal one. Rather, Congress, drawing on its plenary and inherent power, has articulated a "uniform rule" governing noncitizens' possession of firearms. *See* 18 U.S.C. § 922; *see Maine Forest Prods. Council v. Cormier*, 586 F.Supp.3d 22, 51-53 (D. Maine 2022) (describing lower courts' acknowledgement and application of *Plyler*'s "uniform rule" doctrine). Accordingly, this Court should apply rational basis scrutiny.

B. Even assuming heightened scrutiny applies, Section 922(g)(5)(A) passes review.

While we urge the Court to use rational basis review to evaluate Petitioners' equal protection claim, Section 922(g)(5)(A) passes heightened scrutiny as well.[17] Under heightened, or intermediate, scrutiny, a statute is valid if it substantially furthers an important governmental objective. *See Craig v. Boren*, 429 U.S. 190, 197 (1976). Applying that standard, Section

[17] A legislative classification passes rational basis review is it is "rationally related to a legitimate governmental interest." *U.S. Dep't of Agric. v. Moreno*, 413 U.S. 528, 533 (1973). Rational basis review is a highly deferential standard under which a challenged law will be upheld "if there is any reasonably conceivable state of facts that could provide a rational basis for the classification." *Fed. Commc'n Comm'n* (*FCC*) *v. Beach Communications, Inc.*, 508 U.S. 307, 313 (1993). This Court has "admonished that 'rational-basis review in equal protection analysis is not a license for courts to judge the wisdom, fairness, or logic of legislative choices.'" *City of Chicago v. Shalala*, 189 F.3d 598, 605 (7th Cir. 1999) (quoting *Heller v. Doe*, 509 U.S. 312, 319 (1993). Moreover, Congress has "no obligation to produce evidence to sustain the rationality of a statutory classification." *See Heller*, 509 U.S. at 320.

922(g)(5)(A) passes review because preventing unauthorized noncitizens from possessing firearms is substantially related to Congress' important interests in public safety and limiting the flow of illegal weapons. The few courts of appeals to apply intermediate scrutiny in the context of a Second Amendment challenge unanimously agree. Their well-reasoned holdings should guide this Court's analysis.

As Part I.B surveyed above, Congress enacted the Gun Control Act to promote the government's important interest in public safety and crime prevention. *See United States v. Meza-Rodriguez*, 787 F.3d 664, 673 (7th Cir. 2015) (noting that Section 922(g) aimed to "keep guns out of the hands of presumptively risky people and suppress armed violence") (cleaned up); *see also Huitron-Guizar*, 678 F.3d at 1169-70 (stating that the "principal purposes" of Section 922(g) were, in part, to "to assist law enforcement in combating crime" and "[to keep] weapons away from those deemed dangerous or irresponsible") (cleaned up). The GCA helps law enforcement agencies solve and prevent violent crimes by regulating the sale and purchase of firearms.[18] All federal firearm licensees (FFLs) must mark or serialize each firearm and maintain records of any sale or transfer. *See* NFCTA, Introduction, at 2. The marking and record-keeping requirements enable the Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF) to trace the transactional history of a gun. *Id.* While investigating a firearm-related crime, law enforcement agencies utilize a process called "crime gun tracing" to gather critical information. *Id.* Crime gun tracing, however, is "inherently dependent upon the completeness and accuracy of FFL records." *Id.* at 3.

[18] Bureau of Alcohol, Tobacco, Firearms and Explosives, U.S. Dep't of Just., *Introduction to National Firearms Commerce and Trafficking Assessment (NFCTA) Crime Gun Intelligence and Analysis Volume Two* (2023), https://www.atf.gov/firearms/docs/report/nfcta-volume-ii-intro/download [hereinafter NFCTA, Introduction].

Unauthorized noncitizens, who are sometimes referred to as "undocumented" immigrants, are highly incentivized to provide false or incomplete information to FFLs due to their removable status. *See Meza-Rodriguez*, 798 F.3d at 673. They remain "largely outside the formal system of registration, employment, and identification," making them harder to trace. *Huitron–Guizar*, 678 F.3d at 1170. As a result, unauthorized noncitizens are more likely to evade detection by law enforcement. *See Perez*, 6 F.4th at 455 (reasoning that unauthorized noncitizens are "harder to trace" and their behavior is "harder to regulate" as a result of their undocumented status); *Torres*, 911 F.3d at 1264 (agreeing that unauthorized noncitizens "are difficult to monitor due to an inherent incentive to falsify information and evade law enforcement").

Consider the relationship of unauthorized noncitizens to the census. For decades, census officials have struggled to count—let alone track—the undocumented population. *See, e.g.,* J. David Brown, et. al., *Noncitizen Coverage and Its Effects on U.S. Population Statistics*, Center for Economic Studies, U.S. Census Bureau (Aug. 2023), at 4 (describing the undocumented population as "particularly difficult to enumerate"); R. Warren & J. S. Passel, *A Count of the Uncountable: Estimates of Undocumented Aliens Counted in the 1980 United States Census*, 24 Demography 375, 375-76 (1987) (discussing the wide-ranging estimates of the undocumented population in the 1970s and 1980s). As former Census Bureau directors explained, unauthorized noncitizens generally distrust any governmental attempt to collect demographic data related to citizenship. *See* Brief for Former Directors of the U.S. Census Bureau as Amicus Curiae Supporting Respondents at 23-26, *Evenwel v. Abbott*, 578 U.S. 54 (2016) (No. 14-940) (arguing that a citizenship question would lead to "reduced response rates and inaccurate responses," especially by undocumented immigrants). If census officials find unauthorized noncitizens'

suspicion complicating their work, law enforcement authorities tasked with conducting background checks on would-be firearm purchasers will face even greater resistance.

Preventing unauthorized noncitizens from possessing weapons also furthers Congress' substantial interest in limiting the flow of illegal firearms. *See Perez*, 6 F.4th at 455-56. Congress enacted Section 922 in part to stem the tide of "military surplus weapons of other nations" flooding into the United States. Omnibus Crime Control and Safe Streets Act of 1968, Pub. L. No. 90-351, § 901(a)(7), 82 Stat. 226 (1968). While the federal scheme covers FFLs, the secondary market is largely unregulated. Guns purchased on the secondary are "largely impossible" for law enforcement to trace. Fearing discovery, unauthorized noncitizens are more likely to purchase firearms on the secondary market, "where sellers are not required to conduct background checks or maintain transfer records under federal law." *Perez*, 6 F.4th at 456.

Because Section 922(g)(5)(A) substantially furthers Congress' important interest in public safety by disarming a population that is likely to evade law enforcement detection and purchase firearms on the illicit secondary market, this Court should reject Petitioner's equal protection claim.

CONCLUSION

Congress' power to regulate noncitizens within its borders derives from multiple constitutional sources, including its plenary power over immigration, its broad authority over foreign affairs, and its sovereign inherent power to preserve the political community. *See Toll v. Moreno*, 458 U.S. 1, 10 (1982) (surveying the textual basis for Congress' "preeminent role" in regulating noncitizens). Section 922(g)(5)(A) rests comfortably within within that constitutional exercise of Congressional power. Nothing in this Nation's long history of disarming noncitizens or this Court's precedents dictates otherwise. The United States thus urges this Court to affirm the Eighth Circuit Court of Appeals and uphold the constitutionality of Section 922(g)(5)(A).

Date: December 16, 2023

Respectfully Submitted,

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