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 PETITIONER

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QUESTIONS PRESENTED

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

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

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United States v. Carpio-Leon, 701 F.3d 974 (4th Cir. 2012) 20

United States v. Escobar-Temal, No. 3:22-cr-00393, 2023 WL 4112762 (M.D. Tenn. June 21, 2023) 30

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Other Authorities

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Abby Budiman, *Key findings about U.S. immigrants*, Pew Research Center (Aug. 20, 2020), https://www.pewresearch.org/short-reads/2020/08/20/key-findings-about-u-s-immigrants/ 24

Angela R. Riley, *Indians and Guns*, 100 Geo. L. J. 1675 (2012) 31, 32

Angelo Fichera, *Immigrants pay taxes and housing costs, regardless of status*, AP News (Sept. 21, 2023, 1:49 PM), https://apnews.com/article/fact-check-immigrants-taxes-rent-vaccine-requirements-983035929946 39

Benjy Sarlin, *San Francisco allows undocumented immigrants to vote in school elections*, NBC News (July 20, 2018, 1:09 PM), https://www.nbcnews.com/politics/immigration/san-francisco-allows-undocumented-immigrants-vote-school-elections-n893221 24

Early American Immigration Policies, U.S. Citizenship and Immigration Services (July 30, 2020), https://www.uscis.gov/about-us/our-history/explore-agency-history/overview-of-agency-history/early-american-immigration-policies 27, 28

Eugene Volokh, *Implementing the Right to Keep and Bear Arms for Self-Defense: An Analytical Framework and a Research Agenda*, 56 UCLA L.R. 1443 (2009) . 39, 40

Glenn H. Reynolds, *A Critical Guide to the Second Amendment*, 62 Tenn. L. Rev. 461 (1995) 27

Jens Hainmueller et al., *A randomized controlled design reveals barriers to citizenship for low-income immigrants*, 115 Proc. Nat'l Acad. Scis. U.S. 939 (2017) 30

Michael T. Light et al., *Comparing crime rates between undocumented immigrants, legal immigrants, and native-born US citizens in Texas*, 117 Proc. Nat'l Acad. Scis. U.S. 32340 (2020) 39

Pratheepan Gulasekaram, *"The People" of the Second Amendment: Citizenship and the Right to Bear Arms*, 85 N.Y.U.L. Rev. 1521 (2010) 23, 28, 34, 37

Profile of the Unauthorized Population: United States, Migration Policy Institute, https://www.migrationpolicy.org/data/unauthorized-immigrant-population/state/US (last visited Dec. 13, 2023) 24

Smuggling of migrants: the harsh search for a better life, U.N. Off. on Drugs & Crime, https://www.unodc.org/toc/en/crimes/migrant-smuggling.html (last visited Dec. 14, 2023) 35

Vivian Yee et al., *Here's the Reality About Illegal Immigrants in the United States*, N.Y. Times (Mar. 6, 2017), https://www.nytimes.com/interactive/2017/03/06/us/politics/undocumented-illegal-immigrants.html 38

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INTRODUCTION

Undocumented immigrants play a critical role in American society, living and working alongside citizens and legal residents. Despite their unlawful status in the country, undocumented immigrants fill various valuable roles in our economy, in our schools, and in our lives. Some noncitizens arrived here as adults, attempting to escape persecution and violence in their home countries, while others were brought here as children, their parents wanting to give them a better chance at life. Regardless of how they got here or how long they have been here, to many noncitizens, America is their home.

Despite this, the government seeks to deprive unlawfully present noncitizens of one of the most fundamental rights enshrined in our Constitution: the right to keep and bear arms. This Court should reverse the Eighth Circuit's decision and hold that a blanket prohibition on the possession of firearms by unlawfully present noncitizens is unconstitutional under the Second and Fifth Amendments.

STATEMENT OF THE CASE

I. Factual Background

In January 2021, Dayne Sitladeen and Muzamil Addow were pulled over on a highway in Minnesota for speeding. R. at 13. The state trooper who pulled them over asked for permission to search the car after Mr. Sitladeen and Mr. Addow gave false identification and made inconsistent statements. R. at 13. Mr. Addow consented to the search. R. at 13. Upon searching the car, the officer found various bags containing sixty-seven firearms in total. R. at 13. Mr. Sitladeen and Mr.

Addow were both arrested. R. at 5. After they were arrested, officers determined that Mr. Sitladeen and Mr. Addow were both Canadian citizens who were unlawfully present in the United States. R. at 5. Mr. Sitladeen and Mr. Addow were indicted for possession of a firearm by a noncitizen unlawfully present in the United States in violation of 18 U.S.C. § 922(g)(5)(A). R. at 5.

II. Procedural History

A. The Magistrate Recommended Denial of Mr. Sitladeen's Motion to Dismiss the Indictment.

Mr. Sitladeen filed a motion to dismiss the indictment as unconstitutional on Second Amendment and Fifth Amendment grounds. R. at 20. Mr. Sitladeen agreed to conditionally plead guilty pending the outcome of his motion to dismiss. R. at 13. The magistrate recommended that Mr. Sitladeen's motion to dismiss be denied. R. at 19.

On the Second Amendment issue, the court rejected Mr. Sitladeen's argument that the Second Amendment applied to unlawfully present noncitizens. R. at 20. The court relied on a four-sentence per curiam Eighth Circuit decision to determine that Mr. Sitladeen was "simply not entitled to constitutional protections under the Second Amendment." R. at 21; *United States v. Flores*, 663 F.3d 1022 (8th Cir. 2011). As such, the magistrate concluded that § 922(g)(5)(A) was constitutional. R. at 21.

The magistrate also rejected Mr. Sitladeen's Fifth Amendment argument. R. at 23. For an equal protection challenge, the court explained rational basis would apply unless the law burdened a fundamental right, targeted a suspect class, or had

a disparate impact on a protected class and was motivated by a discriminatory intent. R. at 21. The magistrate determined that unauthorized noncitizens were not a suspect class. R. at 21. The magistrate also determined that § 922(g)(5)(A) did not burden a fundamental right, explaining that because the Second Amendment did not apply to unlawfully present noncitizens, and § 922(g)(5)(A) only applied to unlawfully present noncitizens, it could not be said to burden the Second Amendment right. R. at 21-22. The court then decided that the statute passed rational basis review, because the law was meant to keep firearms "away from those deemed irresponsible or dangerous," and people illegally present in our country have already shown a willingness to defy our laws. R. at 22 (quoting *United States v. Huitron-Guizar*, 678 F.3d 1164, 1169-70 (10th Cir. 2012)).

B. The District Court Denied Mr. Sitladeen's Motion to Dismiss the Indictment.

Mr. Sitladeen objected to the magistrate's Report and Recommendation; however, the District Court of Minnesota accepted the magistrate's recommendation and denied the motion to dismiss. R. at 13.

As the magistrate did, the district court denied Mr. Sitladeen's Second Amendment claim, citing Eighth Circuit precedent for the proposition that the Second Amendment did not extend to unlawfully present noncitizens. R. at 14.

In determining which level of scrutiny to apply for the Fifth Amendment claim, the district court ruled that Mr. Sitladeen did not have a fundamental right to possess firearms. R. at 15. Since undocumented immigrants did not have a Second Amendment right to possess firearms, they did not have a fundamental

right to do so, either, said the court. R. at 14. The district court also rejected Mr. Sitladeen's argument that heightened scrutiny should apply because the statute risked making noncitizens an underclass in society. R. at 14. While states are not always free to classify based on alienage, the federal government's power over immigration allowed it to do so. R. at 15. The court then upheld the statute under rational basis, reasoning that there was a rational relationship between § 922(g)(5)(A) and the government's goal of public safety. R. at 16. Unauthorized immigrants were more difficult for the government to track and may be more likely to assume a false identity, so the court explained it was rational for Congress to conclude that keeping firearms out of their hands would promote public safety. R. at 16. Mr. Sitladeen asserted that this perpetuates stereotypes about noncitizens, but the court countered that the fact that the law rested on a generalization did not upset Congress's rational conclusion. R. at 16-17.

C. The Eighth Circuit Affirmed the Denial of Mr. Sitladeen's Motion to Dismiss Despite the Intervening *Bruen* Decision.

Mr. Sitladeen appealed the denial of his motion to dismiss to the Eighth Circuit. R. at 5. After briefing ended, this Court decided *New York State Rifle & Pistol Association v. Bruen*, 597 U.S. 1 (2022), so supplemental briefing occurred. R. at 7. As the circuit court explained, *Bruen* addressed how courts ought to assess a Second Amendment challenge. R. at 7. To assess a challenge to a firearm regulation, the court must first ask whether the regulation governs conduct falling within the plain text of the Second Amendment. R. at 8. If the regulation does so,

the regulation can only be upheld if the government identifies a historical tradition justifying the regulation. R. at 8.

The circuit court relied on pre-*Bruen* decisions to determine under the first prong that § 922(g)(5)(A) did not govern conduct falling within the plain text of the Second Amendment. R. at 8. The text of the Second Amendment states: "A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed." R. at 6; U.S. Const. amend. II. The reason that § 922(g)(5)(A) did not govern conduct falling within the plain text of the Second Amendment, the court explained, was that unlawfully present noncitizens were not part of "the people" to which the Second Amendment referred. R. at 8. *Bruen* did not say anything about who may possess a firearm, so precedents like *Flores* remained undisturbed in the court's view. R. at 8. The court discounted the view of other courts that the first prong only addressed conduct, not status, stating that *Bruen* did not discuss this distinction. R. at 24. Not reaching the second step of the *Bruen* inquiry, the Eighth Circuit held § 922(g)(5)(A) constitutional. R. at 9.

Although the court agreed that § 922(g)(5)(A) treats individuals differently based on their legal status, the court nevertheless applied rational basis and found the statute constitutional under the Fifth Amendment. R. at 10-11. The court reasoned, based on Supreme Court and circuit precedent, that unlawfully present noncitizens were not a suspect class. R. at 10. The court also stated that the statute did not burden a fundamental right. R. at 10-11. It explained that because the

Second Amendment provided an explicit textual source for the right to bear arms, the analysis must be focused on that right, not some other unenumerated right to keep and bear arms. R. at 11. Since the Second Amendment didn't apply to noncitizens like Mr. Sitladeen, there was no fundamental right at stake. R. at 11.

Like the magistrate and district court determined, the circuit court ruled that there was a rational relationship between prohibiting unlawfully present noncitizens from possessing firearms and protecting public safety. R. at 11. It would have been reasonable for Congress to conclude that unlawfully present individuals should not be armed when immigration authorities seek them, or that they may be more likely to acquire firearms through difficult-to-trace channels due to their unlawful status. R. at 11. Because Mr. Sitladeen did not show that Congress acted without reason in enacting § 922(g)(5)(A), the circuit court upheld the statute against the equal protection challenge. R. at 11.

Mr. Sitladeen subsequently petitioned this Court for a writ of certiorari, and this Court granted the writ. R. at 1.

SUMMARY OF ARGUMENTS

First, this Court should reverse the Eighth Circuit's decision and hold that § 922(g)(5)(A) violates the Second Amendment. In *Bruen*, the Court clarified that standard courts ought to use in assessing challenges to firearm regulations under the Second Amendment. If the statute regulates conduct falling within the plain text of the Second Amendment, the statute is presumptively unlawful. The

government can only rebut this presumption by proving that the statute is part of our nation's historical tradition of firearm regulation.

The Eighth Circuit improperly applied the *Bruen* test. Instead of starting with the first question, whether § 922(g)(5)(A) governs conduct falling within the scope of the Second Amendment, the court instead asked whether Mr. Sitladeen was part of "the people" to whom the right extends. This conflates the first and second steps of the *Bruen* analysis. If the Second Amendment has historically been thought to extend only to certain groups and not others, that will be reflected in the historical tradition of firearm regulation, which is addressed in the second step. The Eighth Circuit got ahead of itself and should only have asked whether the conduct regulated by § 922(g)(5)(A) falls within the scope of the Second Amendment. Because the conduct that § 922(g)(5)(A) regulates is possessing a firearm, it regulates conduct falling within the scope of the Second Amendment.

If there is a "step zero" to the *Bruen* test and the Court must first address who "the people" under the Second Amendment are, unlawfully present noncitizens can easily fall into that group. This Court has defined "the people" as the national community, or those with sufficient connections to the country to be a part of that community. Undocumented immigrants can create substantial connections to the U.S., as many noncitizens have lived here since a young age, and many have lived here for over a decade. Undocumented immigrants work alongside us and attend our schools, integrated into our communities and American life. Undocumented immigrants can be part of "the people."

In the second step of the *Bruen* analysis, the burden is on the government to provide substantial historical evidence to prove that § 922(g)(5)(A) is part of the American tradition of firearm regulation. The government will be unable to provide such evidence. The government needs to point to historical statutes that regulate the right to bear arms in a similar manner and for a similar reason. It may point to 17th century English laws that disarmed Catholics; however, those laws often provided exceptions for self-defense, which § 922(g)(5)(A) does not. The government may also try to analogize § 922(g)(5)(A) to early American laws requiring individuals to take loyalty oaths. These laws disarmed those who sympathized with the British Crown. Under these laws, individuals could regain their arms if they took the loyalty oath, making it different from § 922(g)(5)(A). Citizenship status is not a sufficient proxy for loyalty to the country because undocumented immigrants pose no real threat to the sovereignty of the nation, while British loyalists did pose such a threat. Last, the government may attempt to compare § 922(g)(5)(A) to laws which restricted the firearm rights of Native Americans, slaves, and Catholics. The Court should be hesitant to rely on laws which would certainly be unconstitutional today. Nevertheless, these laws often did not pose total bars on possession like § 922(g)(5)(A) does and are insufficient to show a tradition of firearm regulation like § 922(g)(5)(A). Thus, the statute is unconstitutional.

Second, this Court should reverse the Eighth Circuit's decision and hold that § 922(g)(5)(A) is unconstitutional as a violation of the equal protection component of the Fifth Amendment. Heightened scrutiny should apply to this analysis for two

reasons. First, the statute risks perpetuating the status of undocumented immigrants as an underclass in society. Court decisions refusing to scrutinize federal classifications based on alienage have ignored the realities of undocumented immigrants. Second, the statute burdens the fundamental right to possess firearms for self-defense. This right has been described as a basic, natural, and inherent right. All persons have a right to defend themselves, their families, and their homes. The nature of the decision in *McDonald* further shows that this right is fundamental. If the right to bear arms is incorporated into the Due Process Clause, it is fundamental and undocumented immigrants must possess that right.

No matter what level of scrutiny is applied, § 922(g)(5)(A) is unconstitutional. The stated purpose of § 922(g)(5)(A) is crime control, but it does not even rationally relate to that purpose. The statute is overinclusive as most undocumented immigrants present no risk of committing crimes with a firearm. There is no reason to believe that noncitizens present any particular danger to the public, more so than citizens. Similarly, there is no reason to believe that noncitizens are more likely to misuse firearms than citizens. Because of this, the statute violates the equal protection component of the Fifth Amendment.

ARGUMENT

I. 18 U.S.C. § 922(g)(5)(A) Violates the Second Amendment Right to Keep and Bear Arms.

The Second Amendment protects "the right of the people to keep and bear Arms." U.S. Const. amend. II. Mr. Sitladeen and other noncitizens are entitled to

the Second Amendment's protections. Because § 922(g)(5)(A) does not have a basis in our nation's tradition of firearm regulation, the statute is unconstitutional.

A. *Bruen* Clarified the Standard for Second Amendment Review.

In 2022, this Court issued its landmark opinion in *Bruen*. For one, *Bruen* reaffirmed the Court's previous holdings that the Second Amendment protects the individual right to possess firearms for self-defense. 597 U.S. at 9-10. But *Bruen* also articulated the standard courts ought to use in assessing Second Amendment challenges, repudiating the means-end scrutiny test applied by lower courts and instead formulating a test centered on the country's history and tradition. *Id.* at 17.

1. *Heller* and *McDonald* asserted the importance of an individual's right to possess firearms.

In *District of Columbia v. Heller*, this Court interpreted the Second Amendment to "guarantee the individual right to possess and carry weapons in case of confrontation." 554 U.S. 570, 592 (2008). In *Heller*, the plaintiff challenged D.C.'s effective prohibition on handgun possession as violating the Second Amendment. *Id.* at 573-75. The Court had to decide whether the Second Amendment protected a collective right, the right to possess firearms in connection with militia service, or if it protected an individual right, the right of an individual to possess a firearm for lawful purposes. *Id.* at 577. The Court determined that the operative clause of the Second Amendment, speaking of a "right of the people to keep and bear Arms," plainly contemplated an individual right to possess and carry weapons for self-defense. *Id.* at 592; U.S. Const. amend II. The Court explained that the prefatory clause, speaking of the militia, just announced the purpose of the Second

Amendment, which was to prevent the elimination of the militia. *Heller*, 554 U.S. at 599. It was not meant to suggest that the preservation of the militia was the only reason Americans valued the "ancient right" codified by the Second Amendment. *Id.* at 599. That may have been the reason the Framers felt it important to codify the right, but that did not change the fact that self-defense "was the *central component* of the right itself." *Id.* The Court supported this interpretation with various Founding-era sources, such as state constitutions, post-ratification commentary, and pre-Civil War cases. *Id.* at 601-616.

In light of this interpretation of the Second Amendment, the Court held that D.C.'s handgun ban failed any standard of scrutiny and was thus unconstitutional. *Id.* at 628-29. In ruling as much, the Court found that there were no comparable laws in the country's history burdening self-defense in such a way. *Id.* at 631-32. The Court also criticized the interest-balancing approach advanced by Justice Breyer's dissent. *Id.* 634-35. The Court recognized the problem of gun violence in America but concluded that "the enshrinement of constitutional rights necessarily takes certain policy choices off the table." *Id.* at 636.

In *McDonald v. City of Chicago, Illinois*, the Court reviewed the laws of two Illinois cities which prohibited handgun possession. 561 U.S. 742, 750 (2010). The issue in this case was whether the Second Amendment applied to the states, and the Court ruled that the Second Amendment was incorporated against the states through the Due Process Clause of the Fourteenth Amendment. *Id.* Only rights that are "included in the conception of due process of law" are incorporated against the

states, and the right codified by the Second Amendment was one of those rights. *Id.* at 760, 767 (quoting *Twining v. New Jersey*, 211 U.S. 78, 99 (1908)). Self-defense is a "basic right" that has been recognized by legal systems throughout history, and self-defense was "the *central component*" of the Second Amendment right. *McDonald*, 561 U.S. at 768 (quoting *Heller*, 554 U.S. at 599). In analyzing the history of the Second and Fourteenth Amendments, the Court concluded that "the right to keep and bear arms [is] among those fundamental rights necessary to our system of ordered liberty." *McDonald*, 561 U.S. at 778.

In the wake of *Heller* and *McDonald*, lower courts began using a two-part test to assess Second Amendment challenges to gun regulations. *Bruen*, 597 U.S. at 18. First, courts assessed whether the challenged law was justified as regulating "activity falling outside the scope of the right as originally understood." *Id.* (quoting *Kanter v. Barr*, 919 F.3d 437, 441 (7th Cir. 2019)). The original scope of the Second Amendment was determined by looking at its historical meaning and interpretation. *Bruen*, 597 U.S. at 18. If the conduct fell outside the scope of the Second Amendment, the regulation was constitutional. *Id.* If the conduct fell within the scope of the Second Amendment, or if the historical evidence was inconclusive, courts would proceed to the second step, which asked "how close the law [came] to the core of the Second Amendment right and the severity of the law's burden on that right." *Id.* (quoting *Kanter*, 919 F.3d at 441). If the "core" of the right was burdened, strict scrutiny would apply; otherwise, courts would analyze the law using intermediate scrutiny. *Bruen*, 597 U.S. at 18-19.

2. *Bruen* articulated the proper test, based on America's history and tradition, to assess challenges to firearm regulations.

In *Bruen*, the Court explained that the lower courts' test had "one step too many." *Id.* at 19. The Court explained that the first step of the lower courts' test was consistent with *Heller*, "which demands a test rooted in the Second Amendment's text, as informed by history." *Id.* But, the Court explained, *Heller* and *McDonald* did not approve of the means-end scrutiny applied in the second step. *Id.* Rather, the test was solely based on history and tradition. *Id.* Neither *Heller* nor *McDonald* relied on any sort of interest-balancing; in fact, both decisions expressly rejected such an inquiry. *Id.* at 22-23. The Court declined to adopt such a test because "the very enumeration of the right takes out of the hands of government—even the Third Branch of Government—the power to decide on a case-by-case basis whether the right is *really worth* insisting upon." *Id.* at 23 (quoting *Heller*, 554 U.S. at 634). In the Court's words, "a constitutional guarantee subject to future judges' assessments of its usefulness is no constitutional guarantee at all." *Bruen*, 597 U.S. at 23 (quoting *Heller*, 554 U.S. at 634).

The proper test was articulated as follows:

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

Bruen, 597 U.S. at 17 (citation omitted). The Court set forth some principles to aid lower courts in applying this standard. For example, if a law addressed a societal

problem that has existed since the Second Amendment's adoption, "the lack of a distinctly similar historical regulation addressing that problem is relevant evidence that the challenged regulation is inconsistent with the Second Amendment." *Id.* at 26. On the other hand, if a law was aimed at new societal problems, the inquiry will involve "reasoning by analogy" and finding historical regulations that are "relevantly similar." *Id.* at 28-29. In this inquiry, regulations would be considered similar if they "impose a comparable burden on the right of armed self-defense" and if they are "comparably justified." *Id.* at 29. Additionally, the Court cautioned against "giving postenactment history more weight than it can rightly bear." *Id.* at 35. The meaning of the Second Amendment is best discerned by examining historical evidence surrounding its ratification in 1791, and while evidence from later eras may confirm the interpretation of the Second Amendment, courts should be wary in letting that evidence control. *Id.* at 36-37.

The Court then applied this test to New York's discretionary handgun licensing regime. *Id.* at 31. In the first step of the inquiry, the Court easily determined that the regulation covered conduct within the Second Amendment's plain text: the public carry of handguns for self-defense. *Id.* at 32. The Second Amendment guaranteed the right to possess and carry weapons for self-defense, and made no distinction between the home and public, so the plain text covered the conduct. *Id.* The Court then compared and contrasted New York's law to proposed historical analogs, with particular emphasis on the historical evidence at the time of the Second Amendment's ratification and the Fourteenth Amendment's ratification.

Id. at 34-35. While historical regulations may have limited things like the intent for which one could publicly carry weapons or the manner of public carry, there was not a widespread tradition of broadly prohibiting the public carry of firearms for self-defense, so the government had not met its burden and the law was struck down. *Id.* at 70.

B. § 922(g)(5)(A) Fails to Meet the Standard for Constitutional Firearm Regulations.

Mr. Sitladeen was charged with a violation of § 922(g)(5)(A). R. at 5. § 922(g) prohibits various classes of people from possessing firearms that have been transported in interstate commerce, and § 922(g)(5)(A) specifically prohibits "alien[s] . . . illegally or unlawfully in the United States" from possessing firearms. 18 U.S.C. § 922(g). In light of *Bruen*, the constitutionality of § 922(g)(5)(A) ought to be assessed as follows: first, the Court must determine whether the Second Amendment's plain text covers the conduct regulated by § 922(g)(5)(A). *See Bruen*, 597 U.S. at 24. If so, the burden is then on the government to justify § 922(g)(5)(A) by demonstrating that it is consistent with America's historical tradition of firearm regulation. *See id.* Because the conduct regulated by the statute falls within the Second Amendment and the statute is not consistent with the nation's history and tradition of firearm regulation, § 922(g)(5)(A) is unconstitutional.

1. The Eighth Circuit's framework conflates the first and second steps of the *Bruen* analysis.

The first and second steps of the *Bruen* analysis are meant to be distinct: only if the conduct regulated by the challenged law falls within the scope of the plain text of the Second Amendment does the government then have to justify the

law by pointing to history and tradition. *See id.* at 24. If the challenged law does not regulate conduct falling within the scope of the Second Amendment, naturally the conclusion is that the Constitution does not protect that conduct. *See id.* The Eighth Circuit, like some other lower courts in the wake of *Bruen*, conflated the two steps by analyzing whether the phrase "the people" in the Second Amendment has been interpreted to include people like Mr. Sitladeen. R. at 8; *see, e.g., United States v. Pineda-Guevara*, No. 5:23-CR-2-DCB-LGI, 2023 WL 4943609, at *5 (S.D. Miss. Aug. 2, 2023). This is something that should be analyzed in the second step of the analysis, not the first. *United States v. Harrison*, 654 F. Supp. 3d 1191, 1198 (W.D. Okla. 2023). In other words, there is no "step zero" of the *Bruen* analysis. *United States v. Sing-Ledezma*, No. EP-23-CR-823(1)-KC, 2023 WL 8587869, at *5 (W.D. Tex. Dec. 11, 2023).

The first step of the *Bruen* analysis is solely based on whether the plain text of the Second Amendment "covers an individual's *conduct*." 597 U.S. at 17 (emphasis added); *see also Harrison*, 654 F. Supp. 3d at 1198. For example, in *United States v. Quiroz*, the court analyzed 18 U.S.C. § 922(n), which prohibits receipt of a firearm while under felony indictment. 629 F. Supp. 3d. 511, 516 (W.D. Tex. 2022). The government there argued that the relevant conduct was "buying a gun while under felony indictment." *Id.* However, the court stated that adding "while under felony indictment" to the alleged "conduct" conflated the first step of *Bruen* with its second. *Id.* Instead, the relevant conduct was solely receipt of a firearm, and the second step of the analysis would account for whether restricting

the conduct by persons under felony indictment was allowed. *Id.* The court in *Quiroz* even drew an analogy to § 922(g), describing how the conduct prohibited under the statute is possession of a firearm. *Id.* "[W]hether the Government can restrict that specific conduct for a specific group would fall under *Bruen*'s second step: the historical justification for that regulation." *Id.*; *see also Sing-Ledezma*, 2023 WL 8587869, at *6.

The divergence in the approaches to *Bruen*'s first step can be analogized to the two options laid out by then-Judge Barrett in her dissent in *Kanter*. 919 F.3d at 451-52 (Barrett, J., dissenting). Judge Barrett explained that there were two ways of approaching constitutional challenges to dispossession laws. *Id.* at 451. On the one hand, one could say that there were certain groups of people, like violent felons, who fell outside the scope of the Second Amendment. *Id.* On the other hand, one could say that all people fell within the scope of the Second Amendment, but that "history and tradition support[ed] Congress's power to strip certain groups of that right." *Id.* at 452. Judge Barrett viewed the second approach as the preferrable one, and this Court should adopt such an approach. *Id.* Using this approach would prevent people from falling within the right on one day, then out of it the next, leading to analytical confusion. *Id.* Judge Barrett provided an example:

> [I]magine that a legislature disqualifies those convicted of crimes of domestic violence from possessing a gun for a period of ten years following release from prison. . . . After fifteen years pass, a domestic violence misdemeanant challenges a handgun ban identical to the one that the Court held unconstitutional in *Heller*. Despite the legislative judgment that such a person could safely possess a gun after ten years, a court would still have to determine whether the person has standing to assert a Second Amendment claim. If the justification for the initial deprivation is that the person falls

> outside the protection of the Second Amendment, it doesn't matter if the statutory disqualification expires. If domestic violence misdemeanants are out, they're out.

Id. (citation omitted). In other words, if the status as a domestic violence offender removes someone from the scope of the right, that status remains with them even if the statutory disqualification lapses. *Id.* The second approach avoids this difficulty. Everyone is within the scope of the right, but there are some things for which the state can disarm people; however, if the state does not disarm those people, they may still possess firearms. *Id.* at 453. "In other words, a person[, for example,] convicted of a qualifying crime does not automatically lose his right to keep and bear arms, but instead becomes *eligible* to lose it." *Id.* Judge Barrett compared this to felon voting rights: "a state can disenfranchise felons, but if it refrains from doing so, their voting rights remain constitutionally protected." *Id.* This approach is analytically sound and prevents difficulties like the one Judge Barrett suggested. *Id.* at 452.

Bruen implies than an individual's conduct, not their status, is what determines if Second Amendment protection exists. *United States v. Kays*, 624 F. Supp. 3d 1262, 1265 (W.D. Okla. 2022); *see also United States v. Bullock*, No. 3:18-CR-165-CWR-FKB, 2023 WL 4232309, at *20 (S.D. Miss. June 28, 2023) ("*Bruen* step one requires us to look at the 'conduct' being regulated, not the status of the person performing the conduct."). The regulated conduct here is firearm possession, not possession by an unlawfully present noncitizen. *Sing-Ledezma*, 2023 WL 8587869, at *7. The Eighth Circuit erred by including Mr. Sitladeen's status as an unauthorized noncitizen in determining whether his "*conduct* . . . falls within the

plain text of the Second Amendment." R. at 8 (emphasis added). The Second Amendment protects the right to "keep and bear Arms." U.S. Const. amend. II. Because "keeping" and "bearing" arms naturally encompasses the possession and carrying of firearms, § 922(g)(5)(A)'s ban on possessing a firearm regulates conduct falling within the scope of the Second Amendment. *See Bruen*, 597 U.S. at 32.

2. Even using the Eighth Circuit's framework, noncitizens are part of "the people" and the conduct governed by § 922(g)(5)(A) falls within the scope of the Second Amendment.

Even if it is proper to consider the scope of "the people" in the first step of the inquiry, Mr. Sitladeen falls within that scope. The Eighth Circuit relied on its decision in *Flores* to determine that unlawfully present noncitizens were not part of "the people" included in the Second Amendment. R. at 8. In *Flores*, the Eighth Circuit issued a four-sentence per curiam opinion, upholding § 922(g)(5)(A) against a Second Amendment challenge. 663 F.3d 1022, 1022-23. The Eighth Circuit simply stated it was agreeing with another circuit which stated that the Second Amendment's protections did not extend to unlawfully present noncitizens, without further explanation. *Id.* at 1023.

The decision the Eighth Circuit was agreeing with was the Fifth Circuit's decision in *United States v. Portillo-Munoz*, 643 F.3d 437 (5th Cir. 2011). In *Portillo-Munoz*, the Fifth Circuit upheld the constitutionality of § 922(g)(5)(A). *Id.* at 442. The Fifth Circuit noted how in *Heller*, the Court described the Second Amendment right as one belonging to "law-abiding, responsible citizens." *Id.* at 440 (citing *Heller*, 554 U.S. at 635). Because unlawfully present noncitizens were neither law-abiding nor citizens, they could not claim the protections of the Second

Amendment, according to the Fifth Circuit. *Portillo-Munoz*, 643 F.3d at 440. The Fifth Circuit also described how *Heller* defined "the people" as "all members of the political community, not an unspecified subset." *Id.* (citing *Heller*, 554 U.S. at 580). Without explaining why, the Fifth Circuit said that undocumented immigrant are not members of our political community and are thus not part of "the people." *Portillo-Munoz*, 643 F.3d at 440. The Fourth Circuit also agreed with this interpretation in *United States v. Carpio-Leon*, 701 F.3d 974, 975 (4th Cir. 2012).

In *Heller*, the Court's discussion of "the political community" stemmed from a case interpreting the Fourth Amendment, *United States v. Verdugo-Urquidez*, 494 U.S. 259 (1990). *Heller*, 554 U.S. at 580. The Court in *Verdugo-Urquidez* was tasked with determining the scope of "the people" who were entitled to Fourth Amendment protections. 494 U.S. at 261. The issue there was whether the Fourth Amendment's protections applied to the search of a property in Mexico, belonging to a Mexican citizen, who was involuntarily brought into the United States. *Id.* at 261-62. The Fourth Amendment protects the right of "the people" to be free from unreasonable searches and seizures by the government. U.S. Const. amend. IV. The phrase "the people" is similarly used in the First and Second Amendments. U.S. Const. amend. I (protecting "the right of the people to peaceably assemble"); U.S. Const. amend. II (protecting "the right of the people to keep and bear Arms"). The Court concluded that "the people" in all three of these amendments "refers to a class of persons who are part of a national community or who have otherwise developed sufficient connection with this country to be considered part of that community." *Verdugo-*

Urquidez, 494 U.S. at 265. Mr. Verdugo-Urquidez, a noncitizen who was involuntarily in the United States, did not have sufficient connections with the country to be considered a part of the national community. *Id.* at 274-75.

Heller perhaps suggested a slightly narrower definition of "the people," defining it as the *political* community instead of the *national* one. 554 U.S. at 580. But, immediately after its reference to the political community, the Court quoted the definition of "the people" from *Verdugo-Urquidez* as referring to the national community. *Id. Heller* should not be taken to narrow the definition of "the people" from the national community to the political one. First, it appears that the Court used the terms interchangeably, as shown by its reference to both within a single page. *See id.* Second, this issue was not squarely in front of the Court in *Heller*, as the issue "was not the scope of the term 'the people,' but whether the Second Amendment protected a collective or an individual right." *Fletcher v. Haas*, 851 F. Supp. 2d 287, 297 (D. Mass. 2012).

Similarly, the statements in *Heller*, as well as in *McDonald* and *Bruen*, that the Second Amendment extends to "law-abiding, responsible citizens," should not be viewed as conclusive on this issue. *Heller*, 554 U.S. at 635; *see also McDonald*, 561 U.S. at 790; *Bruen*, 597 U.S. at 26. "*Heller* [did] not purport to define the full scope of the Second Amendment." *Friedman v. City of Highland Park, Ill.*, 784 F.3d 406, 410 (7th Cir. 2015). The statuses of the plaintiffs as either law-abiding or as citizens in *Heller*, *McDonald*, and *Bruen* were not at issue, so these statements were dicta and should not be taken as established law. *Range v. Attorney General*, 69 F.4th 96,

101 (3d Cir. 2023) ("[W]e are careful not to overread it as we and other circuits did with *Heller*'s statement that the District of Columbia firearm law would fail under any form of heightened scrutiny."). None of these three Court opinions engaged in an analysis of whether the Second Amendment extended to noncitizens, so they shouldn't be read as asserting as much. *See Fletcher*, 851 F. Supp. 2d at 298. It would also be untenable if "law-abiding, responsible citizens" was the definition of "the people." For example, if someone receives a speeding ticket, or negligently forgets to set out a "wet floor" sign after mopping, they are not "law-abiding" or "responsible," but it would be absurd if one lost their Second Amendment rights for these actions. *United States v. Hicks*, 649 F. Supp. 3d 357, 361-62 (W.D. Tex. 2023).

When the Framers wanted to limit rights to citizens, they did so expressly. *Fletcher*, 851 F. Supp. 2d at 295. The right to hold federal public office is explicitly limited to citizens in the Constitution. *Id.* This Court has upheld other citizens-only restrictions on rights, "but has never declared them to be mandated by the Constitution." *Id.* For example, voting and jury service are generally restricted to citizens. *Id.* at 295-96. What makes these rights different that the right to bear arms, though, is that those rights are inherently linked to self-governance. *Id.* As then-Judge Kavanaugh explained, "the Supreme Court has drawn a fairly clear line: The government may exclude foreign citizens from activities 'intimately related to the process of democratic self-government." *Bluman v. Fed. Election Comm'n*, 800 F. Supp. 2d 281, 287 (D.D.C. 2011), *aff'd* 565 U.S. 1104 (2012), (citations omitted).

The Second Amendment right is distinct from these rights, at it is not a collective right about maintaining the public good; rather, as explicitly adopted in *Heller*, it is an "individual right to possess and carry weapons." 554 U.S. at 592. *Heller* explicitly rejected the argument that the right to bear arms was solely a right to participate in the militia and protect against tyranny; the emphasis was placed on the nature of it as an "*individual* right." *Id.* at 595, 599-600 (emphasis added). If the Second Amendment right was about state-defense and not self-defense, the right could be conditioned on "an intimate tie to the state," but the Court has rejected this interpretation since *Heller*. Pratheepan Gulasekaram, *"The People" of the Second Amendment: Citizenship and the Right to Bear Arms*, 85 N.Y.U.L. Rev. 1521, 1538 (2010). Rights can only be limited to citizens when the nature of the right is public-oriented, and since this is not the case for the Second Amendment, it cannot be limited to citizens. *Id.* at 1571.

This Court should consider noncitizens as able to fall within the scope of "the people," assuming the noncitizen has sufficient connections to our country, regardless of their legal status. *See Verdugo-Urquidez*, 494 U.S. at 265. Many noncitizens "work for employers, pay rent to landlords, and support their loved ones, but are unlawfully residing in the United States." *Portillo-Munoz*, 643 F.3d at 444 (Dennis, J., concurring in part and dissenting in part). The majority of undocumented children in America are enrolled in school, while the majority of undocumented adults in the U.S. are employed. *Profile of the Unauthorized Population: United States*, Migration Policy Institute,

https://www.migrationpolicy.org/data/unauthorized-immigrant-population/state/US (last visited Dec. 13, 2023). In 2017, the U.S. labor force included an estimated 7.6 million unauthorized immigrant workers. Abby Budiman, *Key findings about U.S. immigrants*, Pew Research Center (Aug. 20, 2020), https://www.pewresearch.org/short-reads/2020/08/20/key-findings-about-u-s-immigrants/. A majority of Americans believe immigrants strengthen our country "because of their hard work and talents." *Id.* In some cities, undocumented immigrants have been allowed to vote in local elections, like elections for the school board. Benjy Sarlin, *San Francisco allows undocumented immigrants to vote in school elections*, NBC News (July 20, 2018, 1:09 PM), https://www.nbcnews.com/politics/immigration/san-francisco-allows-undocumented-immigrants-vote-school-elections-n893221. Undocumented immigrants are becoming more and more integrated into our communities, showing how they can become a part of American society.

This approach was adopted by the Seventh Circuit in *United States v. Meza-Rodriguez*, where § 922(g)(5)(A) was challenged. 798 F.3d 664, 672 (7th Cir. 2015). Because the Court was not faced with deciding whether noncitizens could fall within the scope of the Second Amendment in *Heller*, the Seventh Circuit did not take the Court's statements about "law-abiding citizens" and "members of the political community" as determinative. *Id.* at 669. Because the Court *was* faced with defining the scope of "the people" in *Verdugo-Urquidez*, the Seventh Circuit found it proper to use the definition stated in that case. *Id.* at 670. Mr. Meza-Rodriguez,

while undocumented, was in the United States voluntarily, had lived in the country for over twenty years after being brought here as a toddler, attended public schools, and worked in the country. *Id.* at 670-71. In determining if he was part of "the people," "the only question [was] whether the alien [had] developed substantial connections as a resident in the country," and the court ruled Mr. Meza-Rodriguez had done so. *Id.* at 671. While the Seventh Circuit upheld § 922(g)(5)(A) in applying means-end scrutiny, it still agreed that the *Verdugo-Urquidez* formulation is the proper one to determine if noncitizens are part of "the people."[1] *Id.* at 672-73. *Meza-Rodriguez*'s holding on this point is still good law after *Bruen*. *United States v. Carbajal-Flores*, No. 20-cr-00613, 2022 WL 17752395, at *3 (N.D. Ill. Dec. 19, 2022).

This Court should reject the Eighth Circuit's approach and instead follow the Seventh Circuit's approach, consistent with *Verdugo-Urquidez*, and rule that noncitizens can be part of the national community. *Meza-Rodriguez*, 798 F.3d at 672. Because § 922(g)(5)(A) regulates noncitizens' ability to possess firearm, it regulates conduct falling within the scope of the Second Amendment. *Bruen*, 597 U.S. at 32. As such, the government must justify the statute as consistent with America's historical tradition of firearm regulation. *Id.* at 17.

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[1] Several circuits have assumed, without deciding, that the Second Amendment applies to undocumented immigrants. *See United States v. Perez*, 6 F.4th 448, 453 (2d Cir. 2021); *United States v. Torres*, 911 F.3d 1253, 1261 (9th Cir. 2019); *Huitron-Guizar*, 678 F.3d at 1168-69.

3. § 922(g)(5)(A) is not consistent with the country's historical tradition of firearm regulation.

The burden is not on Mr. Sitladeen to demonstrate that § 922(g)(5)(A) is inconsistent with the nation's historical tradition of firearm regulation; instead, "the government must demonstrate that the regulation is consistent with this Nation's historical tradition of firearm regulation." *Id.* Neither is the Court required to parse the historical materials itself to determine whether there are sufficient historical analogs; it is the government's burden to affirmatively present sufficient historical evidence to sustain the law. *Id.* at 60. If a challenged law addresses a problem that has existed since 1791, the lack of similar historical regulations addressing the problem suggests the law is inconsistent with the Second Amendment. *Id.* at 26. If a challenged law addresses a newer societal problem, the government must point to historical analogs that burden the Second Amendment right in a similar way and for a similar reason. *Id.* at 29. *Bruen* was not clear how many historical analogs the government must identify to meet its burden, but found that three colonial statutes and a handful of post-ratification statutes were not enough. *Id.* at 46, 59.

Another wrinkle is whether the government may point to historical *state* laws to justify a challenged *federal* law, as is the case here. *Bullock*, 2023 WL 4232309, at *2. States were not subject to the Bill of Rights for much of our history, and the Second Amendment specifically was not applied to the states until *McDonald*. *Range*, 69 F.4th 96, 108-09 (Porter, J., concurring). States, until *McDonald*, were thus "free to regulate the possession and use of weapons in

whatever ways they thought appropriate," subject, of course, to however their state constitutional provisions were interpreted. *Id.* at 108. Thus, looking to early state laws may not tell us much about the historical interpretation of the federal Second Amendment, and the Court should be wary of giving these historical analogs too much weight, as relying too heavily on these laws "seeks to effectively reverse-incorporate state law into federal constitutional law." *Id.* at 108-09. Doing so would risk under-protecting the Second Amendment right to keep and bear arms. *Id.* at 109.

The earliest form of the federal prohibition at issue here was not enacted until 1968, as part of the Gun Control Act. Gun Control Act of 1968, Pub. L. No. 90-618, 82 Stat. 1213 . While the Act included many other provisions besides only § 922(g), the stated purpose of the Act as a whole was "to provide support to Federal, State, and local law enforcement officials in their fight against crime and violence." *Id.* State laws targeted at preventing noncitizens from possessing firearms did not proliferate until the early 20th century, as political leaders felt threatened by the waves of immigrants coming to America at this time. Glenn H. Reynolds, *A Critical Guide to the Second Amendment*, 62 Tenn. L. Rev. 461, 494 (1995). This is true even though immigration has been a phenomenon since the Founding. *Early American Immigration Policies*, U.S. Citizenship and Immigration Services (July 30, 2020), https://www.uscis.gov/about-us/our-history/explore-agency-history/overview-of-agency-history/early-american-immigration-policies. Noncitizens have been coming to our country since the Founding, and if the "general

societal problem" at which § 922(g)(5)(A) is aimed is keeping guns away from noncitizens, the fact that there were not similar restrictions at the time suggests the statute is inconsistent with the Second Amendment. *See Bruen*, 597 U.S. at 26; *see also United States v. Stambaugh*, 641 F. Supp. 3d 1185, 1193 (W.D. Okla. 2022) (stating that, in addressing the constitutionality of § 922(n), "[i]f restricting such persons from receiving firearms was part of our 'historical tradition,' *some* analogue would exist—and likely a close one").

The government may try to frame this as a more modern societal problem, specifically in regard to *undocumented* immigrants, as tight restrictions on immigration to the U.S. were not put in place until the late 19th century, meaning there were likely fewer people here unlawfully. *Early American Immigration Policies*, *supra*. The government would still need to identify sufficient historical analogs, similar to § 922(g)(5)(A) in how and why they burden the right to armed self-defense. *Bruen*, 597 U.S. at 29.

Before comparing to historical laws, it will be useful to first discern the "how" and "why" of § 922(g)(5)(A). The "how" is simple: the statute makes it a criminal offense for unlawfully present noncitizens to possess firearms, thus imposing a complete bar on possession. 18 U.S.C. § 922(g)(5)(A). The "why" can generally be stated, as mentioned above, as crime control. Gun Control Act of 1968, Pub. L. No. 90-618, 82 Stat. 1213. But does preventing undocumented immigrants from having guns truly help prevent crime and violence, or is that justification reliant on "racialized and xenophobic fears"? Gulasekaram, *supra*, at 1543-44. Even if the

stated justification for the law is to serve crime control purposes, the Court should be wary to accept such a justification. *See People v. Rappard*, 28 Cal. App. 3d 302, 305 (1972) ("Any classification which treats all aliens as dangerous and all United States citizens as trustworthy rests upon a very questionable basis.").

The government may attempt to analogize to 17th century English laws that disarmed religious dissenters, like Catholics. *Range*, 69 F.4th at 121 (Krause, J., dissenting). The reason for these English laws and § 922(g)(5)(A) may be similar, in that they target groups that are not trusted to submit to the government, but these English laws often included an exception for self-defense. *Id.* Section 922(g)(5)(A), on the other hand, wholly prohibits undocumented immigrants from having firearms, so while these English laws did not impose a total burden on the right to self-defense, § 922(g)(5)(A) does, and this comparison falls flat. *See Bruen*, 597 U.S. at 29-30.

The government may also attempt to analogize to colonial and Founding-era laws that disarmed British loyalists or those who refused to take loyalty oaths. *United States v. Gil-Solano*, No. 3:23-cr-00018-MMD-CLB, 2023 WL 6810864, at *3 (D. Nev. Oct. 16, 2023). During the Revolutionary War, those who refused to take an oath of loyalty to the emerging government were often disarmed. *United States v. Prince*, No. 22 CR 240, 2023 WL 7220127, at *7 (N.D. Ill. Nov. 2, 2023). However, these individuals could regain their firearms by taking the required oath. *Id.* This fact shows how loyalty oath requirements are not comparable to § 922(g)(5)(A). If the comparable form of a loyalty oath today is acquiring legal status in the U.S.,

that is not something that is at all easy for noncitizens to do, as the process can be expensive and take years. Jens Hainmueller et al., *A randomized controlled design reveals barriers to citizenship for low-income immigrants*, 115 Proc. Nat'l Acad. Scis. U.S. 939, 939 (2017). This is the case even though most immigrants do want to become U.S. citizens; if given the chance to take something like a loyalty oath, many of them would likely do so. *See id.* This makes the comparison to § 922(g)(5)(A) inadequate. Additionally, British loyalists were "actively denying the legitimacy of, and often fighting . . . against, the United States," and thus posed an actual threat to the emerging government, while undocumented immigrants do not pose a similar threat. *United States v. Escobar-Temal*, No. 3:22-cr-00393, 2023 WL 4112762, at *5 (M.D. Tenn. June 21, 2023). These loyalty oath requirements were enacted in the name of preventing the overthrow of the government, while § 922(g)(5)(A) was enacted to promote crime control, meaning the "why" is different. *Sing-Ledezma*, 2023 WL 8587869, *15. Even more, the laws operate in different ways. While § 922(g)(5)(A) provides for criminal punishment and acts as a total bar to firearm possession, the loyalty oath laws only seemed to require forfeiture of guns without further punishment, and some states even allowed individuals to retain weapons necessary for self-defense. *Hicks*, 649 F. Supp. 3d at 362-63.

The government may further try to analogize § 922(g)(5)(A) to colonial and early American laws which disarmed groups viewed as untrustworthy or dangerous, like Native Americans, slaves, and Catholics. *Gil-Solano*, 2023 WL 6810864, at *3. These laws would be blatantly unconstitutional today, so they should not be used as

a basis for upholding § 922(g)(5)(A). *Id.*; *see also Range*, 53 F.4th 276, n.18 ("The status-based regulations of this period are repugnant (not to mention unconstitutional), and we categorically reject the notion that distinctions based on race, class, and religion correlate with disrespect for the law or dangerousness."). Even so, these historical laws were not categorical bars to firearm possession by these groups. *Prince*, 2023 WL 7220127, at *7. Catholics who swore allegiance to the U.S. or a particular state would be allowed to retain their weapons. *Id.* Slaves were allowed to possess weapons with permission from their master. *Id.* State legislatures usually outlawed the sale of firearms to Native Americans, but not possession of firearms by Native Americans. *Id.* This weakens the comparison to § 922(g)(5)(A), which is a complete bar to possession. 18 U.S.C. § 922(g)(5)(A).

Looking at the laws regarding Native Americans show how weak the comparison is. *United States v. Leveille*, No. 1:18-cr-02945-WJ, 2023 WL 2386266, at *3, n.3 (D.N.M. Mar. 7, 2023). The district court in *Leveille* explained:

> Native Americans, were, of course, already present on the North American Continent before any Europeans arrived, and there was an element of direct conflict between colonists and Native Americans that is not present in present-day interactions between the United States Government and undocumented immigrants in the United States illegally.

Id. Virtually all early gun laws, including those addressing Native Americans, were state laws, not federal ones. Angela R. Riley, *Indians and Guns*, 100 Geo. L. J. 1675, 1696 (2012). Even so, it does not appear there was uniformity in the laws and practices across the nation to consider this a tradition of disarming a certain group; for example, "guns were often given as gifts by white ruling elites to indigenous leaders as a show of respect and good faith." *Id.* at 1698. The laws that did exist

were largely ignored, as the arms trade with tribes proved to be too beneficial. *Id.* at 1700-01. Thus, there is not a sufficient "historical tradition" to compare to here. *See Bruen*, 597 U.S. at 17.

Ultimately, many historical laws the government will likely point to will not have a sufficiently consistent history to be considered a tradition. *See id.* Additionally, many of these laws were specifically targeted at those engaging in "terroristic or riotous behavior" and disarming those "*adjudicated* to be a threat." *United States v. Rahimi*, 61 F.4th 443, 459 (5th Cir. 2023), *cert. granted*, 143 S. Ct. 2688 (2023) (emphasis added). Because there is not a historical tradition to support prohibiting the possession of firearms by undocumented immigrants, § 922(g)(5)(A) is unconstitutional.

II. 18 U.S.C. § 922(g)(5)(A) Violates the Fifth Amendment Guarantee of Equal Protection.

The Fifth Amendment prevents anyone from being "deprived of life, liberty, or property without due process of law." U.S. Const. amend. V. The Due Process Clause of the Fifth Amendment "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 (2013). Claims brought pursuant to the equal protection component of the Fifth Amendment are subject to the same analysis as those brought under the Equal Protection Clause of the Fourteenth Amendment. *Buckley v. Valeo*, 424 U.S. 1, 93 (1976).

Unlawfully present noncitizens are "persons" protected by the Fifth Amendment. *Mathews v. Diaz*, 426 U.S. 67, 77 (1976). The Fifth Amendment

requires similarly situated persons to be treated alike, so the first step in the inquiry is to determine whether § 922(g)(5)(A) does as much. *See Plyler v. Doe*, 457 U.S. 202, 216 (1982). If it does, the next step is to determine the requisite level of scrutiny and apply it to the challenged law. *City of Cleburne, Tex. v. Cleburne Living Center*, 473 U.S. 432, 439-40 (1985). Under the Fifth Amendment analysis, § 922(g)(5)(A) is unconstitutional.

A. § 922(g)(5)(A) Treats Unlawfully Present Noncitizens Differently Than Those Similarly Situated.

As the Eighth Circuit found, § 922(g)(5)(A) plainly treats those like Mr. Sitladeen differently from others who are similarly situated. R. at 10. Noncitizens can be similar in all aspects while only differing in their legal status; some are documented, and some are not. *Gil-Solano*, 2023 WL 6810864, at *6. The only reason undocumented noncitizens cannot possess firearms while documented noncitizens can is due to their legal status, so § 922(g)(5)(A) treats similarly situated persons differently. *Id.*

B. Heightened Scrutiny Applies to the Review of § 922(g)(5)(A).

The next step in the inquiry is to determine the requisite level of scrutiny. When economic or social legislation is challenged, rational basis generally applies, and the law "will be sustained if the classification drawn by the statute is rationally related to a legitimate state interest." *City of Cleburne*, 473 U.S. at 440. However, when a law classifies by race, alienage, or national origin, strict scrutiny will generally apply, and the law "will be sustained only if they are suitably tailored to serve a compelling state interest." *Id.* Additionally, if the classification burdens a

fundamental right, strict scrutiny applies. *Shapiro v. Thompson*, 394 U.S. 618, 638 (1969), *overruled on other grounds by Edelman v. Jordan*, 415 U.S. 651 (1974).

1. Prohibiting undocumented immigrants from possessing firearms risks perpetuating their status as an underclass in society.

Restrictions on the possession of firearms by noncitizens have functioned closely with, or as a proxy for, racial discrimination, which makes these classifications suspect and means strict scrutiny applies. *See* Gulasekaram, *supra*, at 1527; *see also Pers. Adm'r of Mass. v. Feeney*, 442 U.S. 256, 272 (1979) ("This rule applies as well to a classification that is ostensibly neutral but is an obvious pretext for racial discrimination.").

While this Court has held that *state* classifications based on citizenship are invidious and suspect to heightened scrutiny, it has also said that *federal* classifications based on citizenship are not invidious. *Compare Graham v. Richardson*, 403 U.S. 365, 371-72 (1971), *with Mathews*, 426 U.S. at 78-80. But should this be true in all types of federal classifications based on citizenship? *Mathews* dealt with whether Congress could establish a residency requirement to participate in a federal public benefit program. 426 U.S. at 69. This case deals with a right so crucial to our nation that it is enshrined in our Constitution. U.S. Const. amend. II. This point overlaps with the discussion below, but it is a point worth considering. *Mathews* said that this kind of classification by the federal government is not invidious due to its broad powers over naturalization and immigration. 426 U.S. at 79-80. While the federal government does have this power, perhaps this

should not affect the *level of scrutiny* used, but instead whether the justification and tailoring *satisfy* that level of scrutiny.

Plyler also discussed the constitutional status of undocumented immigrants. 457 U.S. at 219-20. This Court explained that while adults who are unlawfully present in the country are here because of their own unlawful conduct, undocumented children brought here by their parents had no choice in the matter and shouldn't be punished for that. *Id.* While the point about children is true, this argument fails to address the reality of undocumented immigrants in America. A majority of undocumented immigrants have been in the U.S. for at least ten years, meaning many now-adults were likely brought here as kids but have stayed in the country. *See Profile of the Unauthorized Population*, *supra*. Many undocumented immigrants come to the U.S. through illegal means in order to pursue a better life for themselves and their children, after being unable to access legal channels of immigration. *Smuggling of migrants: the harsh search for a better life*, U.N. Off. on Drugs & Crime, https://www.unodc.org/toc/en/crimes/migrant-smuggling.html (last visited Dec. 14, 2023). Many undocumented immigrants are "escaping from poverty, natural disasters, violence, armed conflict or persecution" when fleeing their home countries. *Id.* Thus, the decision to come to the U.S. illegally may not be as free of a choice as the Court implied in *Plyler*. 457 U.S. at 219-20.

Allowing Congress to deny an important right to this "shadow population" risks perpetuating their status as an "underclass" in society, despite the integral

role noncitizens play in American life. *See id.* at 218-19. As such, heightened scrutiny should apply to this classification.

2. § 922(g)(5)(A) burdens the fundamental right to bear arms for self-defense.

Alternatively, heightened scrutiny should apply because § 922(g)(5)(A) burdens a fundamental right. The right to bear arms is not fundamental because it is enshrined in the Second Amendment; rather, it was enshrined in the Second Amendment because it is fundamental. *See Heller*, 554 U.S. at 592 ("[T]he Second Amendment . . . codified a *pre-existing* right. The very text of the Second Amendment implicitly recognizes the pre-existence of the right and declares only that it 'shall not be infringed.'"). The Eighth Circuit ignored this fact, instead arguing that because the Second Amendment does not apply to Mr. Sitladeen, it is not a fundamental right. R. at 11. This ignores the history of the right to bear arms.

Blackstone described the right to bear arms as fundamental, tying it to "the natural right of resistance and self-preservation." *Heller*, 554 U.S. at 593-94 (quoting 1 William Blackstone, Commentaries *136, *139). Colonial and early American commentators spoke of a natural right to keep weapons for self-defense. *Heller*, 554 U.S. at 594; *see also Rahimi*, 61 F.4th at 462 (Ho, J., concurring) ("Our Founders firmly believed in . . . the fundamental right to keep and bear arms . . . .").

As explained in *McDonald*, a right is only incorporated against the states if it is "of such a nature that [it is] included in the conception of due process of law"; in other words, a right is incorporated if it is fundamental. 561 U.S. at 759 (citations omitted). Because self-defense is a basic, inherent right, the Court applied the

Second Amendment to the states. *Id.* at 767-68. The same logic applies here. If the right to bear arms for self-defense is "included in the conception of due process of law," and unlawfully present citizens are entitled to due process of law, this right is equally fundamental for them. *See id.* at 759 (citations omitted). "Every man . . . should have the right to bear arms for the defense of himself and family and his homestead," and this is true for undocumented immigrants, too. *See id.* at 775 (citations omitted); *see also* Gulasekaram, *supra*, at 1540 ("[O]nce a right is deemed fundamental for self-preservation, a distinction based on citizenship status would appear to be irrational, unless noncitizens were proven to be the specific and unique source of danger to citizens."). Because the right to bear arms is fundamental, and § 922(g)(5)(A) burdens that right, strict scrutiny applies.

C. § 922(g)(5)(A) Does Not Satisfy the Requirements of Strict Scrutiny.

Under strict scrutiny, the government must show that the challenged law is narrowly tailored to serve a compelling government interest. *City of Cleburne*, 473 U.S. at 440. Congress's purpose in enacting § 922(g)(5)(A) was to aid law enforcement in crime control, and public safety is a compelling state interest. *See Sing-Ledezma*, 2023 WL 8587869, at *8. But, § 922(g)(5)(A) is not narrowly tailored to serve that interest.

There is no reason to believe that being foreign-born makes an individual more dangerous than a U.S. citizen, meaning the law is overinclusive. *See State v. Ibrahim*, 164 P.3d 292, 297 (Wash. Ct. App. 2011). The government may argue that undocumented immigrants have already shown a willingness to disobey our laws by entering our country illegally and may thus be more likely to commit further crime.

Meza-Rodriguez, 798 F.3d at 673. While it is a misdemeanor to enter the country improperly, the circumstances surrounding one's entry vary wildly, and it is not a crime in and of itself for an unlawfully present noncitizen to remain in the country. *Id.* Additionally, the link between undocumented immigrants and crime is too weak for this to be narrowly tailored: of the estimated 11 million unauthorized immigrants in the country in 2017, only 7.5% of them had been convicted of any crime, while only 2.7% of them had been convicted of a felony. Vivian Yee et al., *Here's the Reality About Illegal Immigrants in the United States*, N.Y. Times (Mar. 6, 2017), https://www.nytimes.com/interactive/2017/03/06/us/politics/undocumented-illegal-immigrants.html. As such, § 922(g)(5)(A) cannot be justified in this way.

The government may also argue that undocumented immigrants are harder to track, so the statute serves public safety by keeping firearms out of their hands. *Gil-Solano*, 2023 WL 6810864, at *8. However, this assumes undocumented immigrants who would like to acquire firearms will use them for criminal purposes, yet as stated above, fewer than 10% of unlawfully present noncitizens have been convicted of any crime, violent or nonviolent. Yee, *supra*. Additionally, not all undocumented immigrants are "untraceable" by the government; for example, undocumented workers are required to pay federal taxes and are issued Individual Taxpayer Identification Numbers by the IRS. Angelo Fichera, *Immigrants pay taxes and housing costs, regardless of status*, AP News (Sept. 21, 2023, 1:49 PM), https://apnews.com/article/fact-check-immigrants-taxes-rent-vaccine-requirements-

983035929946. Again, this shows how the law is overinclusive, so it is not narrowly tailored and fails strict scrutiny.

D. Even if Rational Basis Applies, § 922(g)(5)(A) Is Unconstitutional.

Even if this Court applies rational basis, § 922(g)(5)(A) is unconstitutional. Under rational basis, a statute will be upheld if the statute's classification is rationally related to a legitimate state interest. *City of Cleburne*, 473 U.S. at 440. Public safety is a legitimate state interest, but a blanket prohibition on firearm possession by all undocumented immigrants does not rationally relate to this interest. *Rappard*, 28 Cal. App. 3d at 304 ("[T]here are no rational grounds for believing that all residents who are not also citizens are ipso facto uncommitted to peaceful and lawful behavior."). For example, a 2020 study of crime rates in Texas found that citizens were two times more likely to be arrested for violent crimes, two and a half times more likely to be arrested for drug crimes, and over four times more likely to be arrested for property crimes than undocumented immigrants. Michael T. Light et al., *Comparing crime rates between undocumented immigrants, legal immigrants, and native-born US citizens in Texas*, 117 Proc. Nat'l Acad. Scis. U.S. 32340, 32342 (2020). There is no basis for asserting that undocumented immigrants with guns are more likely to misuse them than citizens with guns. Eugene Volokh, *Implementing the Right to Keep and Bear Arms for Self-Defense: An Analytical Framework and a Research Agenda*, 56 UCLA L.R. 1443, 1513 n.292 (2009) ("If anything, noncitizens face a slightly greater deterrent than citizens do, because they risk deportation as well as criminal punishment if they misuse their guns."). "Noncitizens with guns are no more dangerous than citizens with guns," so

this classification is not rational. *Id.* Because of this, § 922(g)(5)(A) is unconstitutional.

CONCLUSION

The millions of undocumented immigrants within our borders do not deserve to live in the shadows. Just because an individual is without legal status does not mean they do not play a valuable and integral role in American society, and does not mean they should not be able to enjoy our country's most valued rights. Consistent with modern Second Amendment jurisprudence, this Court should reverse the Eighth Circuit's decision and grant Mr. Sitladeen's motion to dismiss the indictment. Additionally, the Court should reverse the Eighth Circuit's decision on Fifth Amendment grounds and grant the motion to dismiss.

Respectfully submitted,

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Dated: December 16, 2023

APPENDIX

CONSTITUTIONAL PROVISIONS

Second Amendment to the United States Constitution

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.

Fifth Amendment to the United States Constitution

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

STATUTORY PROVISIONS

18 U.S.C. § 922(g)(5)(A)

(g) It shall be unlawful for any person—

. . .

(5) who, being an alien—

(A) 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.