No._____

IN THE SUPREME COURT OF THE UNITED STATES

DARIO REYES-TORRES, PETITIONER

V.

UNITED STATES OF AMERICA

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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QUESTION PRESENTED FOR REVIEW

Whether resident undocumented immigrants are part of the people whose right to keep and bear arms for individual self-defense the second amendment protects.

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Dario Reyes Torres asks that a writ of certiorari issue to review the opinion and judgment entered by the United States Court of Appeals for the Fifth Circuit on January 6, 2021.

PARTIES TO THE PROCEEDING

The caption of the case names all parties to the proceedings in the court below.

OPINION BELOW

The opinion of the court of appeals, *United States v. Reyes-Torres,* is attached to this petition as Appendix A.

JURISDICTION OF THE SUPREME COURT OF THE UNITED STATES

The opinion and judgment of the court of appeals were entered on January 6, 2021. This petition is filed within 150 days after entry of judgment. Supreme Court Order of March 19, 2020 (extending deadlines because of Covid-19 pandemic). The Court has jurisdiction to grant certiorari under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

The second amendment to the U.S. Constitution provides that "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."

STATUTORY PROVISION INVOLVED

Title 18 U.S.C. § 922(g)(5) makes it "unlawful for any person" who is "an alien" "illegally or unlawfully in the United States" to "possess in or affecting commerce, any firearm or ammunition or to receive any firearm or ammunition, which has been shipped in interstate or foreign commerce."

STATEMENT

This case presents the Court with an opportunity to clarify who makes up "the people" guaranteed the right to keep and bear arms by the second amendment. In

District of Columbia v. Heller, 554 U.S. 570 (2008), this Court held that the Second Amendment codified and preserved an individual right to bear arms for self-defense that predated the amendment. Two years later, in *McDonald v. City of Chicago*, 561 U.S. 742 (2010), the Court found that individual right to be fundamental to the concept of ordered liberty and thus incorporated by the due process clause of the Fourteenth Amendment, which forbids the denial of liberty to any person without due process of law.

The courts of appeals, however, have been unable to agree on whether the fundamental individual right to keep and bear arms applies to immigrants resident in this country without sufficient documentation. The Seventh Circuit has held that undocumented immigrants with sufficient connections to the community are part of "the people" and are included by the Second Amendment. Three other courts of appeals–the Fourth, Fifth, and Eighth–have flatly rejected the idea that immigrants, though individuals, persons, and people possessed of a natural right and need for self-defense, have a right to bear arms that the Second Amendment protects. The Ninth and Tenth Circuits have assumed that resident immigrants are included within the Second Amendment, while observing that guidance from this Court would be helpful.

This case, in which a ranch hand in an isolated Texas town, a man with long and deep ties to the community was charged with possessing a weapon unlawfully solely because he was an undocumented immigrant, offers an excellent vehicle for the Court to consider the issue and to provide the clarity needed.

Dario Reyes Torres was brought to United States at age six. He grew up here and graduated from high school in Rankin, Texas. He went to Mexico after high school to take college classes, and then returned home to Texas to work. Since 2009, he has been a ranch hand for JRS Farms in Midkiff, Texas, fixing wells and herding sheep. While a hand at JRS, Reyes married, stayed out of trouble, and took care of his family as it grew to include three children. To protect his family and his flock from predators, Reyes kept two rifles and a shotgun.

On December 6, 2019, Reyes was driving a truck registered to the ranch along the access road of Interstate Highway 20 in Midland, Texas, the closest city of any size to Midkiff. A Texas Department of Public Safety trooper stopped the ruck because it had an expired registration sticker. Reyes and the two men riding with him all admitted that they lacked authorization to be in the United States. When asked, Reyes told the officers there was a hunting rifle behind the seat of the truck. The rifle and the truck were impounded; later, when Reyes spoke to the immigration agents, he told them he had another rifle and a shotgun at the ranch.

The government indicted Reyes for possession of a firearm by a person unlawfully in the United States in violation of 18 U.S.C § 922(g)(5).[1] Reyes moved to dismiss the charge, arguing that § 922(a)(5) impermissibly infringed upon his right under the Second Amendment of the U.S. constitution to keep and bear arms. Appendix B; *see* Fed. R. Crim. P. 12(b)(1). Reyes contended that the second

[1] The district court had jurisdiction over the prosecution under 18 U.S.C. § 3231.

amendment provided him with a right to "to possess hunting rifles and a shotgun in rural West Texas for the purposes of predator control necessary for his employment, defense of his family, lawful hunting and for other traditionally lawful purposes." Appendix B. He made three interwoven arguments. First, that the term "illegal alien" was unknown to the framers of the second amendment and thus they could not have intended to exclude immigrants lacking authorization from the right protected by the amendment. Second, that the term "the people" in the second amendment defined a national community of connections and Reyes's long-term presence, work, and family in the United States made him part of that community and thus entitled him to the protection of the Second Amendment. Third, that, as a whole and as applied to him, § 922(g)(5) violated the Second Amendment because it did not further a compelling governmental interest. ROA.30-41.

A U.S. magistrate judge recommended that the motion to dismiss be denied. Appendix C.. The magistrate judge concluded that the argument was foreclosed in the Fifth Circuit by *United States v. Portillo-Munoz,* 643 F.3d 437 (5th Cir. 2011), which held that persons unlawfully in the country are not part of "the people" within the meaning of the Second Amendment. Appendix C. Over Reyes's objections, the district court adopted the magistrate judge's recommendation regarding the meaning of "the people." Appendix D. The merits of Reyes's Second Amendment challenge to § 922(g)(5) were therefore not reached.

Reyes then waived his right to jury trial and consented to a stipulated bench trial to preserve his constitutional challenges to § 922(g)(5). The district court found Reyes guilty as charged, and sentenced him to a 15-month term of imprisonment.

Reyes appealed. He argued that the second amendment right to keep and bear arms was an individual right that belonged to all who lived in the country and belonged, at the least, to all those who had substantial connections to the national community. He also argued that, because the right to bear arms is a fundamental constitutional right, any statute impinging on that right had to be examined under the strict scrutiny standard, a standard it could not pass. Finally, Reyes argued that, even if intermediate scrutiny could be applied to § 922(g)(5)'s complete and categorical deprivation of the right to keep and bear arms, the statute was infirm because there was no reasonable fit between the complete prohibition of firearm possession by unauthorized immigrants who are part of the community and any important government objective. The government could not show that the statute's means (disarming peaceable but undocumented immigrants) was sufficiently fitted to the end (avoiding some possible theoretical illegal armed conflict).The Fifth Circuit did not reach these arguments. It affirmed the denial of the motion to dismiss on the ground that Reyes was not part of "the people to whom an individual right to bear arms for self-defense was protected by the Second Amendment. Appendix A.

REASONS FOR GRANTING THE WRIT

THE COURT SHOULD GRANT CERTIORARI TO CLARIFY WHO MAKES UP "THE PEOPLE" GUARANTEED THE RIGHT TO KEEP AND BEAR ARMS BY THE SECOND AMENDMENT.

The Second Amendment protects an individual right to keep and bear arms for defense of self and home. *District of Columbia v. Heller,* 554 U.S. 570 (2008); *McDonald v. City of Chicago,* 561 U.S. 742 (2010). This individual right existed before the Second Amendment; the Amendment was intended to codify the right and ensure that it would not be lost. *Heller,* 554 U.S. at 592-95. The individual right to keep and bear arms, the Court held in *McDonald*, is a fundamental one, necessary to the concept of ordered liberty guaranteed to all persons. 561 U.S. at 767-79; *see* U.S. CONST. amend. V and amend. XIV. Though the central, fundamental nature of the individual right has been delineated clearly by *Heller* and *McDonald,* exactly which individuals the right belongs to has not. The lack of a clear answer to that question has caused division and uncertainty in the courts of appeals.

The Fifth and Eighth Circuits have held that persons in the country without lawful immigration documents are not part of the "people," protected by the Second Amendment, no matter how long they have been here or how deep their involvement in the community. *United States v. Portillo-Munoz,* 643 F.3d 437 (5th Cir. 2011); *United States v. Flores,* 663 F.3d 1022 (8th Cir. 2011). The Fourth Circuit has excluded undocumented community members from the protection of the Second Amendment on a slightly different theory, seeing in *Heller* a specific limitation of the

individual right to keep and bear arms to those who are citizens or law-abiding. *United States v. Carpio-Leon,* 701 F.3d 974 (4th Cir. 2012).

The Seventh Circuit disagrees. It has held that undocumented immigrants who have sufficient connection to the national community are part of "the people." *United States v. Meza-Rodriguez,* 798 F.3d 664 (7th Cir. 2015) (citing *United States v. Verdugo-Urquidez,* 494 U.S. 259, 265 (1990)). The Seventh Circuit wrote that "[i]n the post-*Heller* world, where it is now clear that the Second Amendment right to bear arms is no second-class entitlement, we see no principled way to carve out the Second Amendment and say that the unauthorized (or maybe all noncitizens) are excluded. No language in the Amendment supports such a conclusion[.]" *Meza-Rodriguez,* 798 F.3d at 672.

The Ninth and Tenth Circuits have refrained from deciding the question, instead assuming that the right extends to undocumented immigrants while also voicing a need for guidance from the Court. *United States v. Torres,* 911 F.3d 1253 (9th Cir. 2019); *United States v. Huitron-Guizar,* 678 F.3d 1164, 1178 (10th Cir. 2012). In *Torres,* the Ninth Circuit could find no answer in *Heller* or *Verdugo-Urquidez.* It concluded that "the state of the law precludes us from reaching a definite answer on whether [undocumented] aliens are included in the scope of the Second Amendment right." 911 F.3d at 1262. The Tenth Circuit lamented that the question was "large and complicated" and that no adequate answer appeared in the Court's precedent. *Huitron-Guizar,* 678 F.3d at 1178.

The Court should take the opportunity this case provides to decide the issue and clarify the law. *Heller* determined that the right guaranteed by the Second Amendment was an individual right. 554 U.S. at 579-99. *Heller* did not determine who the people guaranteed the right to keep and bear arms for self-defense are. *See Heller,* 554 U.S. at 627 ("we do not undertake an exhaustive historical analysis today of the full scope of the Second Amendment[.]"; *Torres,* 911 F.3d at 1259 (observing "*Heller* did not resolve *who* had the Second Amendment right"). The resolution of that question is both necessary and significant.

It is significant because defining "the people" will delineate the extent of the right the Second Amendment guarantees and will provide courts with guidance as to the type of analyses they should conduct when a law is alleged to impinge on the right. If "the people" is a limited class, then laws regulating firearm possession by undocumented immigrants may not be subject to challenge at all because such measures would only "affect individuals or conduct unprotected by the right to keep and bear arms." *Binderup v. Attorney General,* 836 F.3d 336, 343 (3d Cir. 2016) (en banc). But such a limited reading of "the people" seems contrary to the history and the fundamental nature of the right to bear arms for self-defense and self-preservation. See *Heller,* 554 U.S. at 585, 593-94. By defining "the people" the Court will tell us whether we are "to understand gun ownership as among the private rights not generally denied aliens, like printing newspapers or tending a farm, or one of the rights tied to self-government, like voting and jury service, largely limited to citizens?" *Huiton-Guizar,* 678 F.3d at 1169.

Resolution of the issue is needed because of the fundamental importance of the individual right to self-defense protected by the Second Amendment. Resolution is also needed because the meaning of "the people" has important ramifications for the rights protected by the First, Fourth, and Ninth Amendments, which also use term to define who the rights belongs to. *See Heller,* 554 U.S. at 579-81.

A. The better reading of "the people" is that it includes all who reside here, including undocumented immigrants.

The term "people" used in the Second Amendment (as well as in other amendments in the Bill of Rights) points toward a definition that includes all persons living in the country who are part of the day-to-day community. So too does, the nature of the individual right protected by the Second Amendment: it would be strange for some residents to be summarily denied a right as basic as the right to self-preservation. *Cf. Heller,* 554 U.S. at 593-95 (recounting natural and basic nature of the Second right); *McDonald,* 561 U.S. at 767, 778-79 (right is fundamental).

The Court has discussed, but never decided how inclusive the term "the people" might be. The discussion in *Verdugo-Urquidez* intimated that resident undocumented immigrants connected to the community were included in the people. *Heller* quoted approvingly from *Verdugo-Urquidez* when analyzing the text of the Second Amendment, 554 U.S. at 579-81, suggesting that the connections test that *Verdugo-Urquidez* proposed accurately captured who falls within the term. *Cf. United States v. Meza-Rodriguez,* 798 F.3d at 670-72. Other language in *Heller,* however, has been read by some as proposing a narrow definition of "the people," one

that is limited to citizens or "Americans." *See, e.g., United States v. Carpio-Leon,* 701 F.3d 974 (4th Cir. 2012). That narrower definition does not well serve the right codified by the Second Amendment, and it does not well accord with the way immigration worked at the time of the country's founding.

Verdugo-Urquidez considered what, if any, Fourth Amendment rights a foreign national with no voluntary connection to the United States had when a search and seizure was conducted in a foreign country by U.S. agents. The Court concluded that the Fourth Amendment did not apply in that situation. 494 U.S. at 265-76.

In reaching that holding, the Court discussed what the term "the people" might mean. The people, the Court, observed was a term different from and somewhat narrower than the word "person," also used in the Bill of Rights. Person was a universal term that included all brought within the United States. *Verdugo-Urquidez,* 494 U.S. at 265-69. The Court also observed that the similar, though not identical, term "the People of the United States" in the preamble to the constitution suggested that "the people" was a less broad term than person and would seem to exclude those who neither lived here nor had no connections to the country. 494 U.S. at 265. On the whole, the Court thought the shorter term "the people" referred "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." 494 U.S. at 265.

The Court also thought that the history showing the purpose of the Fourth Amendment suggested a tie between the right and the people living in the

community. It pointed out that amendment's purpose was "to restrict searches and seizures which might be conducted by the United States in domestic matters." 494 U.S. at 266. In suggesting that residence and voluntary connections to the community made one part of the people, the Court acknowledged that resident non-citizens with such connections had rights under other constitutional provisions, so it would be entirely understandable that they also had rights as part of the people. *Verdugo-Urquidez*, 494 U.S. at 270-71 (citing *Plyler v. Doe,* 457 U.S. 202, 211-12 (1982) (illegal aliens protected by Equal Protection Clause); *Kwong Hai Chew v. Colding,* 344 U.S. 590, 596 (1953) (resident alien is a "person" within the meaning of the Fifth Amendment); *Wong Wing v. United States,* 163 U.S. 228, 238 (1896) (resident aliens entitled to Fifth and Sixth Amendment rights); *Yick Wo v. Hopkins,* 118 U.S. 356, 369 (1886) (Fourteenth Amendment protects resident aliens). The Court acknowledged that its statements in *INS v. Lopez-Mendoza,* 468 U.S. 1032 (1984) suggested that undocumented immigrants had Fourth Amendment rights when they "were in the United States voluntarily and presumably had accepted some societal obligations[.]" *Verdugo-Urquidez,* 494 U.S. at 272.

Justice Kennedy concurred in *Verdugo-Urquidez* to state that the dicta regarding "the people" should not be read as narrowing those who possessed rights among our community. That, he wrote would be contrary to history. To Justice Kennedy, "[g]iven the history of our Nation's concern over warrantless and unreasonable searches, explicit recognition of 'the right of the people' to Fourth Amendment protection may be interpreted to underscore the importance of the right,

rather than to restrict the category of persons who may assert it." 494 U.S. at 276 (Kennedy, J,. concurring). If the search had occurred within the United States, Justice Kennedy had "little doubt that the full protections of the Fourth Amendment would apply" to the non-citizen who was subject to the search and seizure. *Id.* at 278 (Kennedy, J., concurring).

Heller examined, but did not conclusively define the term "the people," during its exegesis on the nature of the right guaranteed to the people by the Second Amendment. The Court stated that "the Second Amendment, like the First and Fourth Amendments, codified a *pre-existing* right. 554 U.S. at 592 (emphasis in original), and that the use of the term "the people" as used in the First, Second, and Fourth Amendments "unambiguously refer[s] to individual rights, not "'collective"' rights[.] 554 U.S. at 579. The Court quoted from its prior discussion of "the people" in *Verdugo-Urquidez*, observing that "'the people' seems to have been a term of art employed in select parts of the Constitution . . . [that] 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." 554 U.S. at 580 (quoting 494 U.S. 259, 265 (1990)).[2] All of that suggested that *Heller* was in agreement with the analysis in the *Verdugo-Urquidez* dicta about who is included

[2] *Heller* also stated that its holding did not affect historically long-standing prohibitions on firearm possession by persons such as felons and the insane. 554 U.S. at 626-27 & n.26. Such individuals do not fall outside the people because of those prohibitions; rather, they are members of the people whose rights may be severely restricted because of the historically defined nature of the right protected by the Second Amendment. *See id.* Importantly, *Heller* pointed to no such historical definition regarding immigrants.

within the people. And that, in turn, strongly suggests that resident immigrants, documented or not, possess the right guaranteed by the Second Amendment. The Seventh Circuit so read *Heller* and *Verdugo-Urquidez* and held that resident undocumented immigrants with connections to the community are part of the people for Second Amendment purposes. *Meza-Hernandez,* 798 F.3d at 670-72.

The Fifth Circuit, however, read *Heller* as setting a new test for defining the people. *United States v. Portillo-Muniz,* 643 F.3d 437 (5th Cir. 2011). Pointing to *Heller's* use of the terms "members of the political community," "Americans," and "law-abiding, responsible citizens," the Fifth Circuit declared that that "aliens who enter or remain in this country illegally and without authorization" are not included within the common usage of those terms. 643 F.3d at 440.[3] The Fifth Circuit therefore concluded that, "[w]hatever else the term means or includes, the phrase 'the people' in the Second Amendment of the Constitution does not include aliens illegally in the United States." 643 F.3d at 442; *see also United States v. Flores,* 663 F.3d 1022 (8th Cir. 2011) (in three-sentence opinion, Eighth Circuit adopts Fifth Circuit analysis).

The Fourth Circuit acknowledged that *Heller* did not settle the definition of "the people," and instead found in *Heller*'s use of "Americans" and "citizen" a

[3] The Fifth Circuit also suggested that Congress's power to make laws about immigrants affected what Second Amendment rights resident immigrants have. *Portillo-Munoz,* 643 F.3d at 442. This appears to conflate the question whether immigrants have Second Amendment rights with the question how, and under what standard, may those rights be regulated. *Cf.* D. McNair Nichols Jr. *Guns and Alienage: Correcting a Dangerous Contradiction,* 73 Washington and Lee Law Review 2088, 2111 (2016).

workaround it felt obviated the need for a definition of the people. *United States v. Carpio-Leon,* 701 F.3d 974 (4th Cir. 2012) (citing *Heller,* 554 U.S. at 581, 595, 625, 635). The Fourth Circuit thought these words showed that the core Second Amendment right of self-defense belonged only to law-abiding citizens and that "[t]he *Heller* court reached the Second Amendment's connection to law-abiding citizens through a historical analysis, independent of its discussion about who constitutes 'the people.' " *Id.* at 978-79.

The Seventh Circuit's ruling in *Meza-Rodriguez* created a clear circuit split and rejected the reasoning of the Fourth and Fifth Circuits. 798 F.3d 664 (7th Cir. 2015). The Seventh Circuit squarely held that "the people" includes undocumented immigrants with sufficient connections to the community. *Id.* at 670-72. *Meza-Rodriguez* rejected the Fourth Circuit's idea that *Heller*'s use of "citizen" rendered "the people" an irrelevant term and rejected the Fifth Circuit's notion that the use of words citizen and Americans and law-abiding was meant to limn a restrictive definition of "the people." *Id.*[4]

That *Verdugo-Urquidez* and *Heller* do not settle the question is clear. That settling is necessary is also clear. The Seventh Circuit's reading seems the best reading for several reasons. First, it rests on the actual words of the Second Amendment. The Fourth Circuit's view removes the words "the people" from the

[4] The Tenth Circuit in *Huitron-Guizar* wrote that it could not conclude "the word 'citizen' was used deliberately to settle the question, not least because doing so would conflict with *Verdugo-Urquidez,* a case *Heller* relied on." 678 F.3d at 1168.

Second Amendment. The people, the Fourth Circuit, holds need not be considered or defined because, despite the plain text, the Second Amendment protects citizens, not the people. This cannot be. In fact, it reflects exactly the type of judicial "balancing" of the Second Amendment that the Court emphatically rejected in *Heller*. 554 U.S. at 634-35.

Second, a review of the language of the Second Amendment in the context of other parts of the constitution shows that the Fifth Circuit's view, while it avoids the Fourth Circuit problem of overtly reading "the people" out of relevance, still creates textual problems through excluding resident immigrants from the people in favor of citizens and law-abiding Americans. The people is a term of art. *Verdugo-Urquidez,* 494 U.S. at 265; *Heller,* 554 U.S. at 580. It is narrower, the Court has taught, than the term person, but it is not a term that is the same as the still narrower term citizen. The constitution shows that, when the framers wished to limit rights or privileges to citizens, they knew how to do so. They required citizenship for elected members of the House of Representatives. U.S. CONST. art. I, § 2. They limited the presidency to particular citizens, U.S. CONST. art. II § 1. They used the term citizen to help specify cases over which the federal courts have jurisdiction. U.S. CONST. Art. II § 2. In the Second Amendment, the framers did not use the term citizen. They chose the broader term "the people." The Fifth Circuit's interpretation negates that choice. *See* Pratheepan Gulasekaram *"The People" of the Second Amendment: Citizenship and the Right to Bear Arms,* 85 N.Y.U. L. Rev.1521, 1533 (2010). The Fourth and Fifth Circuits have read citizen into the Second Amendment, and in so doing have brought

themselves into conflict with the plain text of the amendment, the Seventh Circuit, and the Court's guidance in *Heller* and *Verdugo-Urquidez.*

Third, an emphasis on citizen in the Second Amendment context is anachronistic, as Professor Gulasekaram has pointed out. Immigration, also known as settlement of the country, was a daily fact of life and "citizenship in the founding era was not, as it is today, in opposition to legal categories such as permanent, temporary, and undocumented immigrants." Gulasekaram at 1534-35. Definitions of citizenship by statutory immigration categories that were creations of the 19th and 20th centuries cannot tell us who the people protected by the Second Amendment are. *Id.* at 1534-36.

Finally, as with the Fourth Amendment, the history and purpose of the right protected by the Second Amendment means that it is illogical to restrict the protected right to a small group when a broad term, the people, was used to denominate those holding the right. The inherent need for self-preservation and the right to self-defense are not functions of citizenship or immigration status. They are a fact of life. *See Heller,* 554 U.S. at 593-95, 599 (describing basic natural rights). As the Tenth Circuit asked "if the right's "central component," as interpreted by *Heller,* 554 U.S. at 599, is to secure an individual's ability to defend his home, business, or family (which often includes children who are American citizens), why exactly should all aliens who are not lawfully resident be left to the mercies of burglars and assailants? *Huitron-Guizar,* 678 F.3d at 1170; *see also* Gulasekaram at 1536-40 . (observing that right of self-defense an interpretation that attached to political rights of citizens, such as

voting and jury service, was difficult to reconcile with *Heller*'s holding that Second Amendment guaranteed broad and natural right of self-defense). Similarly, a restrictive reading of the people in the Second Amendment is difficult to reconcile with *Verdugo-Urquidez*'s focus on local and domestic rights invoked by the use of the term the people. *See* 494 U.S. at 266. It is difficult to conceive of a matter more inherently localized than the right of self-preservation and self-defense. And the Second Amendment right is directed, as is the Fourth Amendment right, against the threat that the government may violate the sanctity of the home or the integrity of the person. *See Heller,* 554 U.S. at 592-93 (right aimed at historical record of government trying to disarm people); Anjali Motgi *Of Arms and Aliens* 66 Stan. L. Rev. 1, 14 (2013) (*Heller*'s explication of the nature of the right of self-defense demonstrates that "'the people'" is best understood as an inclusive indicator of the scope of a right, rather than as grounds for exclusion, underscoring rather than circumscribing the protections afforded by the First, Second, and Fourth Amendments). The better textual, purposive, and historical reading of "the people" is that it includes all those who reside in the community.

B. *McDonald*'s incorporation analysis supports the conclusion that "the people" is a term of inclusion.

That the right affirmed in the Second Amendment was so natural, necessary, and basic led the *Heller* Court to declare that it was indisputably an individual right. 554 U.S. at 579-599. *Heller* emphasized that the "*central component* of the [Second Amendment] right itself" is self-defense. *Id.* at 599. Citing St. George Tucker, the Court observed that, at the time of the founding, it was understood that "[t]he right

to self defence is the first law of nature[,] *id.* at 606 (citing 2 Blackstone's Commentaries 143 (1803)) and that provisions codifying arms-bearing rights were "a recognition of the natural right of defense 'of one's person or house'" as Justice James Wilson of the Pennsylvania Supreme Court put it, *id.* at 585 (quoting 2 Collected Works of James Wilson 1142 (1790)). The Court explained that the "'right of self-preservation'" was understood as permitting a citizen to "'repe[l] force by force' when 'the intervention of society in his behalf, may be too late to prevent an injury.'" *Id.* at 595 (citing St. George Tucker 1 Blackstone's Commentaries 145–146, n. 42 (1803)).

In view of the nature of the right codified by the Second Amendment, it was unsurprising that, in *McDonald,* the Court declared the right a fundamental one that could not be denied to any person under the ordered liberty conferred by due process of law. 561 U.S. at 767-79. Incorporation of the Second Amendment right under due process demonstrated that the right was inclusive, for due process speaks in terms of persons, not just the people. *See* U.S. CONST. amend. XIV, U.S. CONST. amend. V. It would be inconsistent, after incorporation of the Second Amendment through a method focused on the universal category of persons, to hold that though persons have a right under the Second Amendment, "the people" do not include immigrant persons who reside here. Gulasekaram at 1540, 1547. Incorporation suggests that the ancient, natural, and individual right of self-preservation through the right of the people to keep and bear arms must extend to all residing in the United States.[5] "The

[5] Of course, as *Heller* reiterated, no right is unlimited, but that the Second Amendment right is not absolute does not mean that the people can be read as restricting the right of self-preservation through self-defense to only some

people" as used in the Second Amendment cannot, in light of *Heller*'s explanation of the right as an individual one and *McDonald*'s incorporation of the right into due process as fundamental be read as an exclusionary term that guarantees self-preservation for only a subset of the people living in our country and community.

C. The question presented is of great importance and this case presents a good vehicle for resolving it.

An answer is needed to the question whether "the people" as used in the Second Amendment includes resident undocumented immigrants. The answer to that question holds great significance. It is likely to determine not only whether undocumented immigrants residing in the United States retain the basic, natural right of self-defense, but also whether they have a right to be free of unreasonable searches and seizures. And it will provide important guidance for the courts as to how to analyze regulations that restrict the right of self-defense for resident immigrants.

Reyes's cases presents a good vehicle for resolving the issue and providing the guidance needed. Reyes was brought to this country as a small child. Small-town Texas life, its duties, its hardships, and its pleasures has been his life, has been his home, has been his way of belonging to the national community. Reyes attended school, found a job, started a family, tended the land and its creatures. He did so peacefully and in a law-abiding manner. He is undocumented, but he is not unattached. He is intimately connected to his local and our national community. He

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individuals. The decisions of the courts below that Reyes cannot challenge the restriction of § 922(g)(5) because he is not part of the people is simply wrong.

is part of the people, and, like the rest of us, entitled to preserve and defend himself under the Second Amendment. The Court should resolve the issue his case presents.

CONCLUSION

For these reasons, Petitioner asks that this Honorable Court grant a writ of certiorari and review the judgment of the court of appeals.

Respectfully submitted.

/s/ PHILIP J. LYNCH
Counsel for Petitioner

DATED: April 5, 2021.