

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF TEXAS  
MIDLAND-ODESSA DIVISION

UNITED STATES OF AMERICA,  
Plaintiff,

V.

DARIO REYES-TORRES  
Defendant.



Case Number MO:19-CR-270

**DEFENDANT’S MOTION TO DISMISS THE INDICTMENT**

DARIO REYES-TORRES, the defendant, files this Motion to Dismiss the Indictment and in support would show:

I.

Mr. Reyes-Torres is charged by Indictment with violating 18 U.S.C. § 922(g)(5), “knowing he [the defendant] is an alien illegally and unlawfully in the United States, knowingly possessed firearms, to wit: a Remington Model 788 Rifle, a Springfield Savage Model 67F Shotgun and a Remington Model 742 Rifle, and the firearms were in and affecting commerce.” Dkt. No. 7. This statute violates the Second Amendment, both facially<sup>1</sup> and as applied to Mr. Reyes-Torres.

---

<sup>1</sup> Mr. Reyes Torres acknowledges *United States v. Portillo-Munoz*, 643 F.3d 437 (5<sup>th</sup> Cir. 2011) (Dennis, J. dissenting), *cert. denied Portillo-Munoz v. United States*, 2012 U.S. LEXIS 3243 (U.S., Apr. 23, 2012), holding that Section 922(g)(5) is not facially unconstitutional under the Second Amendment. Mr. Reyes-Torres asserts that Judge Dennis’ dissent correctly analyzes and states the law and he preserves these issues for further review.

II.

Section 922(g)(5) makes it unlawful for any person who is illegally or unlawfully in the United States to “possess . . . any firearm . . . which has been shipped or transported in interstate or foreign commerce.” 18 U.S.C. § 922(g)(5).

III.

The Second Amendment provides: “A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed.” U.S. CONST. amend. II.

IV.

“The Constitution was written to be understood by the voters; its words and phrases were used in their normal and ordinary as distinguished from their technical meaning.” *United States v. Sprague*, 282 U. S. 716, 731 (1931); *see also Gibbons v. Ogden*, 22 U. S. 1 (1824). “Normal meaning” may of course include “an idiomatic meaning,” but it excludes language or meanings “that would not have been known” to the America’s Founding Fathers. *District of Columbia v. Heller*, 544 U. S. 570, 576-77 (2008). At the time the Second Amendment was ratified in December 1791, the term “alien being illegally or unlawfully in the United States” was unknown to our Founders and such persons in 1791 were not excluded from Second Amendment protection. Indeed, the new Government

---

needed and encouraged persons to settle into the territories, without first seeking permission to enter. *See* Naturalization Act of 1790 (Act March 26, 1790, c.3. 1 Stat. 103). As such, the Founders understood that the constitutional right to bear arms would extend to every free person who resided in the United States, including recent immigrants.<sup>2</sup> In other words, the Fathers of our young Republic would have afforded Second Amendment protection to persons like Mr. Reyes-Torres, an immigrant of over 14 years, married and the father to 3 native-born American children, no criminal history, an active participant in his community and his children's school activities, with residence on a ranch in rural Texas where rifles and shotguns are used for self-defense and predator control associated with his employment as a ranch-hand,<sup>3</sup> "traditionally lawful purposes." *Heller*, 544 U. S. at 577.

## V.

The Supreme Court identified general categories on firearms laws that would survive Second Amendment scrutiny:

Although we do not undertake an exhaustive historical analysis today of the full scope of the Second Amendment, nothing in our opinion should be taken to case doubt on the *longstanding prohibitions on the*

---

<sup>2</sup> "Given the political dynamic of the day, the wording of the Second Amendment is exactly what would have been expected. The Federalists had no qualms with recognizing the individual right of [the people] to bear arms." *United States v. Emerson*, 270 F.3d 203, 259 (5<sup>th</sup> Cir. 2001).

<sup>3</sup> Sheep are raised on the ranch. Mr. Reyes-Torres duties include killing coyotes that prey on the sheep.

*possession of firearms by felons and the mentally ill, or laws forbidding the carrying of firearms in sensitive places such as schools and government buildings, or laws imposing conditions and qualifications on the commercial sale of arms.*

*Id.* at 626-27 (emphasis supplied). However, Congress’ passage of a *total ban* on firearm possession by undocumented aliens, the Omnibus Crime Control and Safe Streets Act of 1968, Pub. L. 90-351 § 1202(a)(5), 82 Stat. 197, 236 (1968) – now codified at 18 U.S.C. § 922(g)(5) – is not “longstanding” and cannot fall within *Heller’s* exception to the individual right to bear arms.<sup>4</sup> Similar to the *Heller* respondent, Mr. Reyes-Torres argues that the Second Amendment protects his right to possess a rifle and shotgun, unconnected with service in a militia, for self-defense, “to use that arm for traditionally lawful purposes” including but not limited to hunting and predator control while residing and working on a ranch in rural West Texas. *Heller*, 544 U. S. at 577.

---

<sup>4</sup> The prohibition for felon possession is generally presumed to be much older. “Colonial and English societies of the eighteenth century, as well as their modern counterparts, have excluded infants, idiots, lunatics, and felons [from possessing firearms].” *Emerson*, 270 F.3d at 227 n.21 (quoting Robert Dowlut, *The Right to Arms: Does the Constitution or the Predilection of Judges Reign?*, 36 OKLA L. REV. 65, 96 (1983); *but see* C. Kevin Marshall, *Why Can’t Martha Stewart Have a Gun?*, 32 HARV. J.L. & PUB. POL’Y 695, 709-10 (Spring 2009) (challenging Dowlut’s conclusion).

## VI.

The Second Amendment codifies a “right of the people.” *Id.* at 579. The unamended Constitution and the Bill of Rights use the same phrase “right of the people” two other times, in the First Amendment’s Assembly-and-Petition Clause and in the Fourth Amendment’s Search-and-Seizure Clause. *Id.* The Ninth Amendment uses very similar terminology (“The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people”). *Id.* This Second Amendment right provided to “the people” includes Mr. Reyes-Torres. *See Emerson*, 270 F.3d at 259 (recognizing the individual right to keep and bear arms).

## VII.

In *Heller*, Justice Scalia made clear that the term “the people” refers to all member of the “community.” *Id.* at 579. Justice Scalia clarified:

The people seems to be a term of art employed in select parts of the Constitution. . . . [Its uses] sugges[t] that ‘the people’ protected by the Fourth Amendment, and by the First and Second Amendments, and to whom rights and powers are reserved in the Ninth and Tenth 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.

*Id.*, citing to *United States v. Verdugo-Urquidez*, 494 U. S. 259, 265 (1990).

## VIII.

Mr. Reyes-Torres is “part of that community” and “has substantial connections” in Upton County, Texas and is among “the people” for which the Second Amendment protects one’s right to possess a rifle and shotgun for self-defense, predator control and hunting. *Id.* at 588, 592 (to “bear arms” includes “killing game” and “for personal defence”). “By the time of the founding, the right to have arms had become fundamental” . . . “the natural right of resistance and self-preservation.” *Id.* at 593-94. Mr. Reyes-Torres, age 33, has resided in Upton County, Texas for over 14 years, is the father of 3 minor children – all born in the United States, has no criminal history preventing him from lawful possession of a rifle or shotgun, is an active participant in his community and his children’s school activities, and resides on a ranch in rural Upton County, Texas where he is employed as a ranch-hand and where use of a rifle for predator control and defense of the ranch is part and parcel of his employment duties.

## IX.

As applied to Mr. Reyes-Torres, Section 922(g)(5) is unconstitutional under the Second Amendment. *See Binderup v. Attorney General*, 836 F.3d 336 (3<sup>rd</sup> Cir. 2016) (en banc) (holding 18 U.S.C. § 922(g)(1) violative of the Second Amendment as applied to convicted felons whose state convictions for misdemeanors met the federal definition of felonies but were not serious or violent

crimes and there was no showing that banning the challengers' possession of firearms promoted the government's interest in the responsible use of firearms), *cert. denied sub nom.*, *Sessions v. Binderup*, 137 S. Ct. 2323 (2017), and *cert. denied sub nom.*, *Binderup v. Sessions*, 137 S. Ct. 2323 (2017). Section 922(g)(5) as applied to Mr. Reyes-Torres, akin to *Binderup*, violates his Second Amendment right 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. Under Fifth Circuit precedent, an alien such as Mr. Reyes-Torres with many community ties and without any prior criminal history, is entitled to Second Amendment protection if he is voluntarily in the United States, which Mr. Reyes-Torres is. "Once aliens become subject to liability under United States law, they also have the right to benefit from its protection." *United States v. Cortes*, 588 F.2d 106, 110 (5<sup>th</sup> Cir. 1979). Mere possession of a hunting rifle or shotgun by Mr. Reyes-Torres to carry out his duties of employment<sup>5</sup> violates the statute, and yet the Second Amendment explicitly protects "the right of the people to keep and bear arms." Mr. Reyes-Torres "clearly satisfies the criteria given by the Supreme Court and this Court

---

<sup>5</sup> While working, Mr. Reyes-Torres driving a ranch-owned pickup truck when stopped by a Department of Safety trooper for an expired registration sticker. Mr. Reyes-Torres volunteered to the trooper that there was a hunting rifle behind the front seat of the pickup for predator control and that he had a rifle and shotgun at his residence on the ranch for self-defense, hunting and predator control. The seizure of these firearms initiated this case. Dkt. No. 1.

[the Fifth Circuit] for determining whether he is part of “the people”: he has come to the United States voluntarily and accepted societal obligations.” *Portillo-Munoz*, 643 F.3d. at 443 (Dennis, J. dissenting). While the Supreme Court nor the Fifth Circuit have identified the level of scrutiny applicable to Section 922(g)(5), something more than a rational basis is required: “Obviously, the [rational basis] test could not be used to evaluate the extent to which a legislature may regulate a specific, enumerated right, be it freedom of speech, the guarantee against double jeopardy, the right to counsel, or the right to keep and bear arms.” *Heller*, 544 U. S. at 628 n.27. Because possession of a firearm for self-defense is an enumerated right under the Second Amendment, and because § 922(g)(5) is directed specifically at the “core” conduct protected by the Second Amendment, strict scrutiny may be applicable given Mr. Reyes-Torres’ ethnicity. *See Adarand Constructors v. Pena*, 515 U. S. 200, 222 (1995) (applying strict scrutiny standard “to any official action that treats a person differently because of his racial or ethnic criteria”). Even aliens whose presence in this country is unlawful have long been recognized as “persons” guaranteed due process of law by the Fifth and Fourteenth Amendments. *Plyer v. Doe*, 457 U. S. 202, 210 (1982), citing *Shaughnessy v. Mezei*, 345 U. S. 206, 212 (1953); *Wong Wing v. United States*, 163 U. S. 228, 238 (1896).



The Fifth Circuit has suggested that strict scrutiny may accompany a § 922 challenge under the Second Amendment.

Although, as we held, the Second Amendment does protect individual rights, that does not mean that those rights may never be made subject to any *limited, narrowly tailored* specific exceptions or restrictions for particular cases that are reasonable and not inconsistent with the right . . . to individually keep and bear their private arms *as historically understood in this country*.

*Emerson*, 270 F.3d at 261 (emphasis supplied). To survive strict scrutiny, Section 922(g)(5) “must serve a compelling government interest and must be *tailored* to further that interest.” *Adarand Constructors* 515 U. S. at 235 (emphasis supplied). A total Second Amendment ban for all undocumented aliens is not “tailored” to prevent or discourage dangerousness or unlawful use of firearms, as applied to Mr. Reyes-Torres. While one may argue that Section 922(g)(5) is race/ethnic neutral, persons prosecuted under (g)(5) since *Heller* overwhelmingly appear to be of Hispanic, Mexican, Cuban or Central American surname, ethnicity or Latin America origin, like Mr. Reyes-Torres, a citizen of Mexico. *See Portillo-Munoz, supra*; *United States v. Torres*, 911 F.3d 1253 (9<sup>th</sup> Cir. 2016); *United States v. Carpio-Leon*, 701 F.3d 974 (4<sup>th</sup> Cir. 2012); *United States v. Huitron-Guizar*, 678 F.3d 1164 (10<sup>th</sup> Cir. 2012); *United States v. Guerrero-Leco*, No. 3:08cr118, 2008 U.S. Dist. LEXIS 103448 (W.D.N.C. 2008); *United States v. Martinez-Guillen*, No. 2:10cr192-MEF, 2011 U.S. Dist. LEXIS 12691 (M.D. Ala. 2011); *United*

*States v. Yanez-Vasquez*, No. 09-40056-01-SAC, 2010 U.S. Dist. LEXIS 8166 (D. Kan. 2010); *United States v. Boffil-Rivera*, No. 08-20437-CR, 2008 U.S. Dist. LEXIS 84633 (S.D. Fla. 2008); *United States v. Ramirez-Hernandez*, No. 5:08-CR-112-KKC, 2012 U.S. Dist. LEXIS 73728 (E.D. Ky. 2012); *United States v. Mirza*, 454 Fed. Appx. 249, 2011 WL 5042211 (5th Cir. 2011); *United States v. Solis-Gonzalez*, No. 3:08-CR-145, 2008 U.S. Dist. LEXIS 110133, 2008 WL 4539663 (W.D.N.C. Sept. 26, 2008); *United States v. Flores*, No. 10-178, 2010 U.S. Dist. LEXIS 120847 (D. Minn. 2010); *United States v. Ramirez-Hernandez*, No. 5:08-CR-112-KKC, 2012 U.S. Dist. LEXIS 73728 (E.D. Ky. 2012); *United States v. Luviano-Vega*, No. 5:10-CR-184, 2010 U.S. Dist. LEXIS 98432, 2010 WL 3732137 (E.D.N.C. Sept. 20, 2010); *United States v. Lara-Mondragon*, No. 2:11-CR-010-RWS-SSC, 2011 U.S. Dist. LEXIS 160539 (N.D. Ga. 2011); *United States v. Flores-Higuera*, No. 1:11-CR-182-TCB-CCH, 2011 U.S. Dist. LEXIS 84934 (N.D. Ga. 2011); and *United States v. Adame-Najera*, 2010 U.S. Dist. LEXIS 142716, 2010 WL 6529643 (N.D. Ga. Nov. 24, 2010), *approved*, 2011 U.S. Dist. LEXIS 42261, 2011 WL 1497889. While the list above is not exhaustive of all § 922(g)(5) cases post-*Heller*, the names of the defendants speak for themselves. As applied to Mr. Reyes-Torres, § 922(g)(5) is unconstitutional under the Second Amendment.

X.

In sum, Mr. Reyes-Torres is protected by the Second Amendment. The reference to “the people” in the Amendment’s text exists to demonstrate the importance of that right to our nation’s Founders, and the right’s individual character. Mr. Reyes-Torres voluntarily came to Texas from Mexico over 14-years ago; he is raising 3 minor children, all citizens of the United States, along with his wife in Upton County, Texas; he is active in his children’s school activities in the Rankin Independent School District; he is gainfully employed as a ranch-hand and pays his federal income taxes; and he resides with his wife and children on their home on his employer’s ranch in Upton County, Texas. Mr. Reyes-Torres has voluntarily established substantial connections to make him a member of the national community and may benefit from this nation’s laws, including the Second Amendment.

PRAYER FOR RELIEF

FOR THESE REASONS, Dario Reyes-Torres, the defendant, respectfully requests that this Court dismiss the Indictment with prejudice. The defendant prays for general relief, at law and in equity.

Respectfully submitted,

*Stephen W. Spurgin*

STEPHEN W. SPURGIN

Texas Bar No. 18974350  
Drawer 1471  
Marfa, Texas 79843  
T (432) 729-3731  
F (432) 729-3730  
E [stephen@spurginlaw.com](mailto:stephen@spurginlaw.com)

**El Paso Office:**

310 North Mesa, Suite 300  
*Cortez on the Plaza*  
El Paso, Texas 79901  
T (915) 779-2800  
F (915) 779-2801

**CERTIFICATE OF CONFERENCE**

The undersigned attorney has communicated with AUSA Shane Chriesman regarding this motion and has been advised that the Government is opposed.

**CERTIFICATE OF SERVICE**

I hereby certify that on the 7th day of January 2020, I electronically filed the foregoing Motion to Dismiss the Indictment with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the following:

Shane Chriesman  
Assistant United States Attorney  
Midland, Texas

**Stephen W. Spurgin**  
STEPHEN W. SPURGIN