No. 20-7714

IN THE SUPREME COURT OF THE UNITED STATES

DARIO REYES-TORRES, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether 18 U.S.C. 922(g)(5), which prohibits the possession of firearms by noncitizens who are "illegally or unlawfully in the United States," violates the Second Amendment.

ADDITIONAL RELATED PROCEEDINGS

United States District Court (W.D. Tex.):

United States v. Reyes-Torres, No. 19-cr-270 (June 8, 2020)

United States Court of Appeals (5th Cir.):

United States v. Reyes-Torres, No. 20-50476 (Jan. 6, 2021)

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OPINION BELOW

The opinion of the court of appeals (Pet. App. A1-A2) is not published in the Federal Reporter but is reprinted at 832 Fed. Appx. 890.

JURISDICTION

The judgment of the court of appeals was entered on January 6, 2021. The petition for a writ of certiorari was filed on April 5, 2021. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a bench trial in the United States District Court for the Western District of Texas, petitioner was convicted of possessing a firearm as a noncitizen illegally or unlawfully in the United States, in violation of 18 U.S.C. 922(g)(5). Judgment 1.* Petitioner was sentenced to 15 months of imprisonment, to be followed by three years of supervised release. Judgment 2-3. The court of appeals affirmed. Pet. App. A1-A2.

1. In December 2019, Texas troopers pulled over petitioner's pickup truck because the car's registration had expired. C.A. App. 339-340. Upon learning that petitioner and the other occupants of the car were in the country illegally, the troopers called federal agents for assistance and arrested the occupants. Id. at 340. During a search of petitioner's vehicle, investigators found a hunting rifle, as well as ammunition for the rifle and for several other firearms. Ibid. During a subsequent search of petitioner's home, investigators found several additional firearms. Ibid.

2. A grand jury indicted petitioner for possessing a firearm as a noncitizen illegally or unlawfully in the United States, in violation of 18 U.S.C. 922(g)(5). Pet. App. A1. Petitioner moved to dismiss the indictment, arguing that Section 922(g)(5) violates the Second Amendment. Id. at B1. A magistrate

* This brief uses 'noncitizen' as equivalent to the statutory term 'alien.' See Barton v. Barr, 140 S. Ct. 1442, 1446 n.2 (2020) (quoting 8 U.S.C. 1101(a)(3)).

judge recommended denying petitioner's motion, explaining that the Fifth Circuit had rejected a similar constitutional challenge to Section 922(g)(5) in United States v. Portillo-Munoz, 643 F.3d 437 (2011), cert. denied, 566 U.S. 963 (2012). Pet. App. C1-C4. The district court adopted the magistrate judge's report and recommendation. Id. at D1-D5.

Petitioner was convicted after a bench trial. See C.A. R.E. 263-271, 334-336. The district court sentenced him to 15 months of imprisonment, to be followed by three years of supervised release. Pet. App. A1; C.A. R.E. 179-180.

3. The court of appeals granted the government's motion for summary affirmance. Pet. App. A1-A2. The court explained that petitioner's constitutional challenge was foreclosed by the court's earlier decision in Portillo-Munoz, in which it had held that "the Second Amendment's protections regarding the right to carry and possess firearms d[o] not extend to aliens illegally or unlawfully present in the United States." Id. at A2.

ARGUMENT

Petitioner contends (Pet. 10-20) that the Second Amendment protects noncitizens who reside in the United States without lawful status and that 18 U.S.C. 922(g)(5) accordingly violates the Constitution. The court of appeals correctly rejected that contention, and its decision does not conflict with any decision of this Court. Further, every court of appeals to consider the question has agreed that Section 922(g)(5) complies with the

Constitution. This Court has repeatedly denied petitions for writs of certiorari presenting the issue of Section 922(g)(5)'s constitutionality, and the same result is warranted here. See Meza-Rodriguez v. United States, 136 S. Ct. 1655 (2016) (No. 15-7017); Carpio-Leon v. United States, 571 U.S. 831 (2013) (No. 12-9291); Huitron-Guizar v. United States, 568 U.S. 893 (2012) (No. 12-5078); Bravo Flores v. United States, 567 U.S. 938 (2012) (No. 11-9452); Portillo-Munoz v. United States, 566 U.S. 963 (2012) (No. 11-7200).

1. The Second Amendment provides: "A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed." In District of Columbia v. Heller, 554 U.S. 570 (2008), this Court held that the Second Amendment guarantees the right of "law-abiding, responsible citizens" to possess arms for self-defense. Id. at 635. The Court cautioned, however, that the right to keep and bear arms "is not unlimited" and that the right remains subject to "lawful regulatory measures." Id. at 626, 627 & n.26. Section 922(g)(5) constitutes one such lawful regulatory measure.

a. The Second Amendment, by its terms, protects the right of "the people" to keep and bear arms. In Heller, this Court explained that "the term ['the people'] unambiguously refers to * * * members of the political community." 554 U.S. at 580. The Court has observed elsewhere that "citizenship * * * determin[es] membership in the political community" and that "[a]liens are by

definition * * * outside of this community." Cabell v. Chavez-Salido, 454 U.S. 432, 438-440 (1982). Accordingly, after analyzing the phrase "right of the people," the Court in Heller determined that "the Second Amendment right is exercised individually and belongs to * * * Americans." 554 U.S. at 581 (emphasis added). The rest of the Court's opinion likewise reflects the understanding that the right to keep and bear arms belongs to citizens. See id. at 595 ("right of citizens"); id. at 603 ("an individual citizen's right"); id. at 608 (right "enjoyed by the citizen") (citation omitted); id. at 613 ("citizens ha[ve] a right to carry arms"); id. at 625 ("weapons not typically possessed by law-abiding citizens"); ibid. ("possession of firearms by law-abiding citizens"); id. at 635 ("law-abiding, responsible citizens").

The historical record supports that understanding. Under the English Bill of Rights, the right to keep and bear arms was expressly limited to "Subjects." Heller, 554 U.S. at 593 (quoting Bill of Rights 1689, 1 W. & M., ch. 2, § 7, Eng. Stat. at Large 441)); see ibid. ("By the time of the founding, the right to keep and bear arms had become fundamental for English subjects.") (emphasis added)). Similarly, during the American Revolution, colonial governments disarmed persons who refused to "swear an oath of allegiance to the state or the United States." Saul Cornell & Nathan DeDino, A Well Regulated Right: The Early American Origins Of Gun Control, 73 Fordham L. Rev. 487, 506 (2004); see id. at 506 nn.128-129 (compiling statutes). And during

the ratification debates, the New Hampshire ratification convention proposed an amendment stating that "Congress shall never disarm any Citizen unless such as are or have been in Actual Rebellion," while delegates urged the Massachusetts convention to propose a similar amendment guaranteeing "peaceable citizens" the right to keep arms. 2 Bernard Schwartz, The Bill of Rights: A Documentary History 681, 761 (1971) (emphases added); see Heller, 554 U.S. at 604 (considering ratification conventions' proposals).

Section 922(g)(5) disarms noncitizens who are unlawfully present in the United States. Such persons, by definition, are not "citizens" of the United States -- much less "law-abiding, responsible citizens." Heller, 554 U.S. at 635.

b. Even with respect to persons covered by the term "the people," the Second Amendment permits limitations on the right to keep and bear arms that are "fairly supported by * * * historical tradition." Heller, 554 U.S. at 627; see, e.g., id. at 626-627 & n.26 (emphasizing that "nothing in [the Court's] opinion should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons and the mentally ill," and stating that these "presumptively lawful regulatory measures" were identified "only as examples" and not as an "exhaustive" list). As relevant here, history shows that legislatures may disarm persons who pose a "real danger of public injury." United States v. Skoien, 614 F.3d 638, 640 (7th Cir. 2010) (citation omitted), cert. denied, 562 U.S. 1303 (2011); see Kanter v. Barr, 919 F.3d 437, 451 (7th Cir. 2019)

(Barrett, J., dissenting) (explaining that "legislatures have the power to prohibit dangerous people from possessing guns"). In England, for example, officers of the Crown had the power to disarm persons who were "dangerous to the Peace of the Kingdom." Kanter, 919 F.3d at 456 (Barrett, J., dissenting) (citation omitted). And in the American colonies, legislatures often "categorically disarmed groups whom they judged to be a threat to public safety." Id. at 458.

Section 922(g)(5) fits within that historical tradition. See, e.g., Kanter, 919 F.3d at 466 (Barrett, J., dissenting); United States v. Meza-Rodriguez, 798 F.3d 664, 673 (7th Cir. 2015), cert. denied, 136 S. Ct. 1655 (2016). Noncitizens without lawful status have, by definition, "already violated a law of this country" by entering or remaining in the United States illegally. United States v. Toner, 728 F.2d 115, 128 (2d Cir. 1984). Further, noncitizens without lawful status may be less likely to comply with the identification and recordkeeping requirements associated with owning firearms, because they often live "largely outside the formal system of registration, employment, and identification" and can be "harder to trace and more likely to assume a false identity." United States v. Huitron-Guizar, 678 F.3d 1164, 1170 (10th Cir.), cert. denied, 568 U.S. 893 (2012). Noncitizens without lawful status also "have an interest in eluding law enforcement," creating a risk that they could misuse firearms against immigration authorities attempting to apprehend them.

Meza-Rodriguez, 798 F.3d at 673; cf. 18 U.S.C. 922(g)(2) (disarming fugitives). Congress could reasonably conclude that the noncitizens who fall within this "narrowly defined" provision are especially "likely to misuse" firearms and thus should be disarmed. Kanter, 919 F.3d at 465-466 (Barrett, J., dissenting).

c. Reinforcing the foregoing conclusions, courts owe Congress significant deference in matters relating to citizenship and immigration. "[T]he responsibility for regulating the relationship between the United States and our alien visitors" -- determinations about which noncitizens should be allowed to enter and remain in the United States and the terms and conditions imposed upon such noncitizens while they are here -- is "committed to the political branches" of government. Mathews v. Diaz, 426 U.S. 67, 81 (1976). In exercising that power, "Congress regularly makes rules that would be unacceptable if applied to citizens." Id. at 80. And because Congress's "power over aliens is of a political character," its exercise of that power is "subject only to narrow judicial review." Hampton v. Mow Sun Wong, 426 U.S. 88, 101-102 n.21 (1976); see Shaughnessy v. United States ex rel. Mezei, 345 U.S. 206, 210 (1953) (holding that congressional power over noncitizens is "largely immune from judicial control"). Congress was entitled to determine that noncitizens who are unlawfully present in the United States, and are therefore potentially subject to removal, should not be permitted to possess firearms while they are here.

d. Petitioner's reliance (Pet. 10-18) on this Court's decision in United States v. Verdugo-Urquidez, 494 U.S. 259 (1990), is misplaced. In Verdugo-Urquidez, this Court held that the Fourth Amendment -- which protects "[t]he right of the people" against unreasonable search and seizure, U.S. Const. Amend. IV -- does not apply to "the search and seizure by United States agents of property that is owned by a nonresident alien and located in a foreign country." 494 U.S. at 261. For three reasons, that decision cannot bear the weight petitioner places on it. First, Verdugo-Urquidez involved the Fourth Amendment rather than the Second Amendment. Second, the Court in Verdugo-Urquidez expressly declined to decide whether "the Fourth Amendment applie[s] to illegal aliens in the United States." Id. at 272. Even assuming that the term "the people" bears the same meaning in the Second and Fourth Amendments, then, Verdugo-Urquidez would not establish whether that term encompasses noncitizens who are unlawfully present in the United States. Third, as shown above, regardless of whether the term "the people" encompasses noncitizens such as petitioner, Section 922(g)(5) constitutes a permissible regulation of the right to keep and bear arms. See pp. 6-8, supra.

2. Petitioner errs in asserting (Pet. 7-10) that the question presented is the subject of a circuit conflict that warrants this Court's review. Although courts of appeals have followed different analytical paths, they have uniformly arrived

at the same final destination: that Section 922(g)(5) complies with the Second Amendment.

Three courts of appeals, including the court below, have rejected constitutional challenges to Section 922(g)(5) on the ground that persons who are present illegally in the United States do not enjoy Second Amendment rights. See United States v. Carpio-Leon, 701 F.3d 974, 977-981 (4th Cir. 2012), cert. denied, 571 U.S. 831 (2013); United States v. Flores, 663 F.3d 1022, 1023 (8th Cir. 2011) (per curiam), cert. denied, 567 U.S. 938 (2012); United States v. Portillo-Munoz, 643 F.3d 437, 439-442 (5th Cir. 2011), cert. denied, 566 U.S. 963 (2012)). One court of appeals, the Seventh Circuit, stated that noncitizens who are unlawfully in the United States can form part of the "people" protected by the Second Amendment, but then determined that Section 922(g)(5) is constitutional because it permissibly advances the government's interest in protecting public safety. Meza-Rodriguez, 798 F.3d at 673. Two further courts of appeals, the Ninth and Tenth Circuits, have assumed without deciding that the Second Amendment applies to noncitizens without lawful status, and have then upheld Section 922(g)(5) on the ground that it permissibly advances the government's interest in protecting public safety. See United States v. Torres, 911 F.3d 1253, 1261-1264 (9th Cir. 2019); Huitron-Guizar, 678 F.3d at 1168-1170 (10th Cir.).

This Court "reviews judgments, not statements in opinions." Black v. Cutter Laboratories, 351 U.S. 292, 297 (1956); see McClung

v. Silliman, 19 U.S. (6 Wheat.) 598, 603 (1821) ("The question before an appellate Court is, was the judgment correct, not the ground on which the judgment professes to proceed."). "The fact that [the lower court] reached its decision through analysis different than" another court "might have used does not make it appropriate for this Court to rewrite the [lower] court's decision." California v. Rooney, 483 U.S. 307, 311 (1987) (per curiam). Accordingly, given that every court of appeals to consider the issue has agreed that Section 922(g)(5) complies with the Second Amendment, the fact that the courts have invoked different arguments in making that determination does not establish a conflict that warrants this Court's review.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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JUNE 2021