No. 20-7714

IN THE SUPREME COURT OF THE UNITED STATES

DARIO REYES-TORRES, PETITIONER

V.

UNITED STATES OF AMERICA

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

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Dario Reyes asks the Court to take his case to resolve whether resident undocumented immigrants are part of the people whose right to keep and bear arms for individual self-defense the second amendment protects. He points out that the courts of appeal have divided over the answer to this question, with the Fourth, Fifth and Eighth Circuits excluding such immigrants from the people and the Seventh Circuit ruling that those immigrants are part of the people.

In its response, the government substitutes an entirely different question, BIO I, proclaims that no circuit split exists on its substituted question, BIO 3-4, and downplays, BIO 9-11, the significance of the divide that does exist on the constitutional question the actual question that Reyes's petition presents to the Court, *see* Pet. i, 7-8. *Compare United States v. Portillo-Munoz,* 643 F.3d 437 (5th Cir. 2011) (undocumented immigrants not people within meaning of Second Amendment) *with United States v. Meza-Rodriguez,* 798 F.3d 664 (7th Cir. 2015) (no language in Second Amendment excludes undocumented immigrants from scope of people). The question Reyes presents is an important one. Its resolution will provide guidance as to who holds the right protected by the Second Amendment, guidance that at least two courts of appeals have specifically requested. Its resolution will also bring needed clarity to Second Amendment jurisprudence and will provide a key component of an analytical framework that will better enable the courts to evaluate constitutional challenges to firearm statutes.

The Fifth Circuit's ruling squarely address the question Reyes's petition presents.

The government wishes this case to be about 18 U.S.C. § 922(g)(5), and, hoping to fulfill its own wish, writes a question presented about that statute. BIO I. But this case is not about that government-substituted § 922(g)(5) question. True, Reyes attempted a constitutional challenge to § 922(a)(5), but he was halted at the threshold. The courts declared him not part of the people and barred from even attempting his challenge.

The only issue that the magistrate judge, the district court, and the court of appeals considered and ruled on in this case was whether "the people," as used in the Second Amendment, included undocumented immigrants. Appendices A, C, D to Reyes's petition. The magistrate judge, the district court, and the court of appeals all ruled that the Second Amendment did not include such immigrants. Appendices A, C, D.

The government's attempt to deflect attention from that actual and only issue is unavailing. If anything, the government's declination to directly take on the question highlights its importance. The question the government substitutes and then minimizes is not in this case and indeed could not be in this case. The judgment of the Fifth Circuit was clear: Reyes had no right to bring a Second Amendment challenge because, as an undocumented immigrant, he is not a part of the "people" whose rights are protected by the amendment. Appendix A (citing *United States v.*

Portillo-Munoz, 643 F.3d 437, 439-42 (5th Cir. 2011)). The question Reyes's petition raises is squarely presented and should be resolved.

The circuit split on the question is well-established and ripe for review. The brief in opposition claims that there is not a circuit split about the § 922(g)(5) it wishes were presented. BIO 3-4. That is not the point. A circuit split undeniably exists over the question actually presented. And two circuits that have elided decision on that question have requested guidance from the Court on the question presented.

Heller taught us that the right of the people protected by the Second Amendment was an individual right. It did not tell us who the individuals who made up the people were.

The Fifth and Eighth Circuits hold that, for Second Amendment purposes, resident undocumented immigrants are not part of "the people." *United States v. Portillo-Munoz,* 643 F.3d 437 (5th Cir. 2011); *United States v. Flores,* 663 F.3d 1022 (8th Cir. 2011); *see also* Appendix A. The Fourth Circuit holds that resident undocumented community members, because they are not U.S. citizens, are not part of the Second Amendment people. *United States v. Carpio-Leon,* 701 F.3d 974 (4th Cir. 2012). These rulings directly oppose the Seventh Circuit's holding 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 split is entrenched and will not be resolved without a decision from the Court.

Two other courts of appeals have called for the clarification that only the Court can provide. In *United States v. Torres,* the Ninth Circuit looked at *Verdugo-Urquidez* and *Heller* as well as cases from its sister circuits. It then admitted that "the state of the law precludes us from reaching a definite answer on whether unlawful aliens are included in the scope of the Second Amendment right." 911 F.3d 1253, 1258-61 (9th Cir. 2019). The Tenth Circuit too could find no answer. *United States v. Huitron-Guizar,* 678 F.3d 1164, 1168-70 (10th Cir. 2012). Even if another circuit were now to venture a new entry explaining why undocumented immigrants fall within, or without, the people protected by the Second Amendment, such a decision could not resolve the circuit split. Only this Court can do that. Further percolation of the issue therefore is not useful.

Resolution would be. It would clarify to whom the right belongs. And it would help to set an analytical framework for evaluating laws alleged to impinge on the Second Amendment right, among them the question never reached below concerning 922(g)(5) and the ban on possession of a firearm by all felons found in 922(g)(1) and many state laws. *Cf. Kanter v. Barr,* 919 F.3d 437 (7th Cir. 2019) (Barrett, J., dissenting).

The ruling of the Fifth Circuit is wrong on the merits and hampers analysis of Second Amendment questions.

The Fifth Circuit's decision that resident undocumented immigrants are never part of "the people" is an excluding reading that is at odds with Framers choice of the term. That excluding reading also engenders a less-than-useful analytical approach. A sounder approach would be to read "the people" inclusively to comprise resident undocumented immigrants (and other groups, such as felons or the mentally ill) and then determine how and when the right protected for all of these people may be restricted in particular circumstances.

A broader, inclusive reading is more consistent with what this Court has stated in dicta about the meaning of "the people" in the Second and Fourth Amendments. *Verdugo-Urquidez*, a Fourth Amendment case, suggested that residence and voluntary connections to the national community made one part of the people. 494 U.S. at 264-65. *Heller* quoted approvingly from *Verdugo-Urquidez* , signaling that the connections test it had proposed accurately captured who falls within the people, and *Heller* emphasized that "the people" informed us that the right to bear arms for self-defense was an individual right. 554 U.S. at 580-81. Language signaling that the right belonged to individuals is not language that excludes large groups or categories of individuals.

It is true that *Heller* also used the terms "citizen" and "Americans" at times in discussing the Second Amendment right. Neither term, of course, appears in the Second Amendment, 554 U.S. at 580, and neither term was identified by the Court

as defining the term of art, "the people." Where "citizen" appears in the constitution it has a narrower meaning than can reasonably be given to "the people," so it is not possible that the people in the Second Amendment means citizens. *See* Pet. 16-17 (citing U.S. CONST. art. I, § 2; U.S. CONST. art. II § 1; U.S. CONST. Art. II § 2.) *Heller*'s use of Americans was not necessarily restrictive. 554 U.S. at 581 ("We start therefore with a strong presumption that the Second Amendment right is exercised individually and belongs to all Americans"); *id.* at 594 (Americans used to refer to and include persons in the colonies). Neither term, contrary to the suggestion by the government, BIO 5-7, can be used in place of the people or to narrow "the people" beyond the full membership of those with ties and connections to the community.

McDonald, though it does not address the issue, also strongly indicates that the people was an inclusive, not an excluding term. This is so because the Court declared the right a fundamental one for purposes of due process, 561 U.S. at 767-79, and due process applies to individual persons, including documented and undocumented aliens, *Mathews v. Diaz,* 426 U.S. 67, 81 (1976) (citing *Wong Yang Sung v. McGrath,* 339 U.S. 33, 48-51 (1950) and *Wong Wing v. United States,* 163 U.S. 228, 238 (1896)). In light of McDonald, it is difficult to see how the right to keep and bear arms for self-defense can belong to individual persons but not to those same individual persons when they are referred to as a group. Thus the rule followed by the Fourth, Fifth and Eighth Circuits that, for Second Amendment purposes, the people do not include persons who are resident undocumented immigrants is wrong.

Determining that "the people" of the second amendment is a broad term that includes resident undocumented immigrants accords best with what this Court has written about "the people" in *Verdugo-Urquidez* and *Heller*. It best accords with the recognition in *Heller* and *McDonald* that the Second Amendment reflects a fundamental right of self-defense belonging to individuals. The right it protected for those individual persons living in the community was not, contrary to the government's assertion, BIO 4-5, a matter of political self-government.[1] *Cf. Kleindienst v. Mandel,* 408 U.S. 753, 765-66 (1972); *Kanter,* 919 F.3d at 462-63 (*Heller* "expressly rejects the argument that the Second Amendment protects a purely civic right") (Barrett, J., dissenting). It was, as *Heller* and *McDonald* make clear a fundamental right of individual self-defense of hearth and home. *Heller,* 554 U.S. at 635; *McDonald,* 561 U.S. at 749. The government's power to make rules for

[1] The government cites *Cabel v. Chavez-Salido,* 454 U.S. 432, 438-40 (1982) for the proposition that citizenship determines membership in the political community and undocumented immigrants therefore fall outside that community. BIO 4-5. It continues that "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." BIO 5 (quoting 554 U.S. at 581).

The connection asserted between *Cabel* and Heller does not exist. *Cabel* was not cited in *Heller,* as it would not have been apt. *Cabel* was an equal protection challenge to a California statute that required California peace officers, including probation officers, to be U.S. citizens. The court upheld the statute concluding that it served a "political function for the establishment and operation of" the state's government. 454 U.S. at 438-39 (citing *Sugarman v. Dougall,* 413 U.S. 634, 648 (1973)). *Cabel* tells us nothing about who "the people" are or how a fundamental non-political right, such as self-defense, may be burdened.

naturalization, U.S. Const. Art. I, sec. 8, cl. 4, does not allow the government to strip those living here of fundamental natural rights. *Cf. Diaz,* 426 U.S. at 78-80.

The right protected by the Second Amendment was protected within the practical context of settlers and community members, each of whom had an individual right to self-defense. *Cf. Huitron-Guizar,* 678 F.3d at 1170 (asking why undocumented residents should be "left to the mercies of burglars and assailants? "). Indeed, even the revolutionary era disarming that the government cites in its response, BIO 5-6, supports a conclusion that "the people" is an inclusive phrase. First, that disarming was needed shows how widespread the keeping of arms was in the colonial community. Arms for self-defense were part of day-to-day life, and only in an actual war were some people disarmed because they did not support the American side in the war for independence. Second, the revolutionary-era disarming predates, of course, the Second Amendment, and the Amendment's broad reaffirmance of the right to self-defense was likely thought needed in part because of the disarming that had occurred in a time of struggle, lest the precedent be set that the government could routinely take away arms.

An inclusive definition of "the people" protects the fundamental right of individual self-defense, as the Framers intended. *Cf. Heller,* 554 U.S. at 593-95, 599; *McDonald,* 561 U.S. at 767-68. Clarifying that "the people" is an inclusive definition will also aid the development of a useful analytical framework for considering which restrictions on the right are permitted and which are too restrictive, or too broad. Obviously, the right protected by the Second Amendment is not absolute. *Heller,* 580

U.S. at 595. An inclusive reading of "the people" puts the emphasis where it belongs, not on who might be carved out of the people, but on what restrictions on the people's fundamental right are justified.

The excluding definition that focuses on who has the right as a member of "the people" is at odds with the basic right of self-defense of an individual. Potentially disarmable persons do not lack a right of self-defense. Potentially disarmable persons do not fall without the community entirely. Potentially disarmable persons do engage in conduct or suffer from an affliction that renders them dangerous when armed, even for self-defense. The excluding definition of people adopted by the Fourth, Fifth, and Eight Circuits fails to focus on these facts. In so doing, the circuits have created a framework that begins with the proposition that, for some people, the Second Amendment right of self-defense never existed. That proposition seems unreconcilable with the fundamental right identified in *Heller* and *McDonald*. That proposition means that no matter how draconian the restriction, no matter how arbitrary the restriction, no matter how inapt the disarming, the restriction is permissible because, for some categories of persons, the right has been declared to never have existed or to have been erased. *Cf. Kanter,* 919 F.3d 452-53 (Barrett, J., dissenting).

The inclusive definition of "the people" provides a better and more logical framework. It acknowledges that all those who live here and have connections to the

community are part of the people[2] and then asks "whether the government has the power to disable the exercise of a right that" those community members possess. *Kanter,* 919 F.3d at 453; *see id.* at 465 (government has power to disarm dangerous persons). This framework allows challenges to be brought, and allows them to be resolved. It allows the courts to apply the appropriate level of scrutiny to the removal of a fundamental, and constitutionally guaranteed, natural right by a legislature. The people, including undocumented immigrants who share our community, have the right to self-defense, and they have the right to challenge withdrawal of that right. *Cf. Heller,* 554 U.S. at 635-36; *Diaz,* 426 U.S. at 78-81 (aliens have right to challenge even statutory restrictions). The definition of the people adopted by the Fifth Circuit deprived Reyes of both his right and his chance for a remedy.

CONCLUSION

FOR THESE REASONS, as well as those in his petition, Reyes asks that the Court grant a writ of certiorari and review the judgment of the court of appeals.

Respectfully submitted.

/s/ PHILIP J. LYNCH
Counsel for Petitioner

July 8, 2021

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[2] As set out in the petition, 20-21, Reyes is a long-time resident of his small town, a father, husband, and trusted ranch hand. He has made the life of his community his, and he lives in a place that, when a threat to him or his family arises, help, if it arrives may be too late. His case thus presents a good vehicle for resolving the issue presented.