No. 21-____

In the
Supreme Court of the United States

Javier Perez,

Petitioner,

v.

United States of America,

Respondent.

On Petition for a Writ of Certiorari to
The United States Court of Appeals
For the Second Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether an undocumented immigrant like Javier Perez, who came to the United States over 15 years ago and developed substantial ties to this country during that time, is among "the people" who possess the "inherent" and "preexisting" right of armed self-defense codified in the Second Amendment, District of Columbia v. Heller, 554 U.S. 570, 628 (2008), a question on which the Circuits are split.

2. Whether the Second Circuit flouted Heller by reviewing the constitutionality of 18 U.S.C. § 922(g)(5), barring undocumented immigrants from possessing a firearm in any circumstance, under a deferential "interest-balancing" test and then by upholding the law despite acknowledging its substantial overbreadth and lack of empirical basis. Alternatively, whether this petition should be held pending the Court's decision in New York State Rifle & Pistol Association v. Bruen, No. 20-843 (argument set for November 3, 2021), raising the same complaint concerning the Second Circuit's review (and upholding) of a New York law barring persons from publicly carrying firearms.

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The opinion of the United States Court of Appeals for the Second Circuit is reported at 6 F.4th 448 (2d Cir. July 29, 2021) and appears at Pet. App. 02-33.

JURISDICTION

The district court had jurisdiction under 18 U.S.C. § 3231 and entered a judgment of conviction on March 13, 2019. The Second Circuit had jurisdiction under 28 U.S.C. § 1291 and affirmed on July 29, 2021. This Court has jurisdiction under 28 U.S.C. § 1254(1). This petition, filed October 26, 2021, is timely under Supreme Court Rule 13.1.

RELEVANT STATUTORY PROVISIONS

The Second **Amendment** to the United States Constitution 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.

18 U.S.C. § 922(g)(5) states in relevant part:

> (g) It shall be unlawful for any person --
> . . .
> (5) who, being an alien --
>
> (A) is illegally or unlawfully in the United States; or
>
> (B) except as provided in subsection (y)(2), has been admitted to the United States under a nonimmigrant visa (as that term is defined in section 101(a)(26) of the Immigration and Nationality Act (8 U.S.C. 1101(a)(26))) . . .

> 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.

STATEMENT OF THE CASE

1. Overview

Javier Perez was born in Mexico and came to this country as a child. He then resided here continuously over the next decade and a half, working as a carpenter and siring two children, both U.S. citizens. He has no prior record.

In July 2016 Mr. Perez was picnicking with friends when he saw a gang of teens attacking a young rival with bats and machetes. A friend handed Mr. Perez a pistol, which he fired several times into the air to disperse the assailants. They ran, and he returned the gun.

The Government charged Mr. Perez with violating 18 U.S.C. § 922(g)(5), barring undocumented immigrants from possessing a firearm in any circumstance.

Mr. Perez moved to dismiss the indictment on the ground that the law violated the Second Amendment. The district court denied the motion. He pleaded guilty pursuant to an agreement preserving his right to appeal the court's denial.

The court sentenced Mr. Perez to 20 months' imprisonment and three years' supervised release. He timely appealed.

The Second Circuit affirmed on July 29, 2021. Pet. App. 02-33. The majority (Walker and Carney, Circuit Judges) assumed without deciding that undocumented

migrants are part of "the people" protected by the Second Amendment – as this was a "difficult" question that had split the Circuits, id. 10-11 – and then concluded that § 922(g)(5) survived intermediate scrutiny. Even though § 922(g)(5) was "overbroad" (as "many undocumented immigrants have never committed a crime of violence and . . . could be trusted with a firearm," id. 18), it comported with the Constitution because Congress had the right "to make sensitive public policy judgments" about who should be allowed to have guns in order to promote public safety, id. 17-18.

Circuit Judge Menashi concurred in the judgment, but criticized the majority for "afford[ing] so much deference to legislative judgments about restricting gun ownership as to subject such restrictions only to rational basis review." Pet. App. 23-24. Rejecting the majority's "excessive[ly] deferen[tial]" approach, which "risks undermining the Second Amendment across the board," id. 28 & 24, Judge Menashi would rule instead that § 922(g)(5) is valid because "illegal aliens are not among 'the people' to whom the right to keep and bear arms under the Second Amendment belongs," id. 28.

2. Personal background

"Javier Perez was born in rural Mexico in 1989" and entered the United States without authorization when he was 13. Pet. App. 4. Over the next 16 years, he resided continuously in this country and was "self-employed as a carpenter." Id. "He has two children, who were born in the United States and are living with their mother in Brooklyn, and whom he visits and helps support financially." Id.

Mr. Perez had no criminal history prior to this case. Although he was involved with a gang "in his youth," he had not been a member for at least seven years. In any event, "[h]e has not been convicted of – or even charged with – any violent crime." Pet. App. 28.

3. Offense conduct

On July 23, 2016, Mr. Perez was attending a barbeque in Brooklyn with friends "when a violent fight broke out down the street." Pet. App. 5. "Several young men wielding bats and machetes were attacking a member of a rival gang. At some point . . . Perez borrowed a firearm from an acquaintance, approached the fight, and fired several shots into the air." Id. The assailants "scattered, and Perez returned to the barbeque and gave the gun back to his acquaintance." Id.

Mr. Perez "thus used the gun in defense of another." Pet. App. 23-24. As Judge Menashi put it, he "took possession of and fired the gun to deter" people who were "attacking a boy from a rival gang." Id.

4. Proceedings in district court

A grand jury returned a single-count indictment charging Mr. Perez with being an "alien in possession of a firearm," in violation of 18 U.S.C. § 922(g)(5): "On or about July 23, 2016, within the Eastern District of New York, the defendant JAVIER PEREZ, while an alien who was illegally and unlawfully in the United States, did knowingly and intentionally possess in and affecting commerce a firearm, to wit: a .380 caliber Davis Industries semiautomatic pistol, and

ammunition, to wit,: one .380 caliber Winchester cartridge case." The statute carries a 10-year maximum term of imprisonment.

Defense counsel moved to dismiss the indictment on Second Amendment grounds. Relying on District of Columbia v. Heller, 554 U.S. 570 (2008), counsel argued that undocumented noncitizens like Mr. Perez, deeply connected to this country through lengthy continuous residence and many social-economic ties, possessed the "preexisting," "inherent" right to bear arms in self-defense recognized by that Amendment -- they are among "the people" mentioned therein. And § 922(g)(5)'s total, exceptionless ban violated Mr. Perez's right under either strict scrutiny or intermediate scrutiny, as there is no evidence that undocumented immigrants are, as a class, more dangerous than the population at large.

The district court denied Mr. Perez's motion. Assuming without deciding that the Second Amendment applied to undocumented immigrants, the court concluded that § 922(g)(5) survived intermediate scrutiny. Though the law was overbroad, the court ruled, Congress could conclude that keeping guns from such persons, who are "are difficult to track and [] have an interest in eluding law enforcement," promoted public safety.

Mr. Perez then pleaded guilty pursuant to a plea agreement preserving his right to appeal the court's denial of his motion to dismiss. See Fed. R. Crim. P. 11(a)(2).

In February 2019 District Judge Amon imposed a principal sentence of 20 months' imprisonment followed by three years' supervised release.

5. The Second Circuit's decision

Mr. Perez timely appealed to the Second Circuit. He argued that § 922(g)(5) was unconstitutional as applied to him, in light of his connections to this country and the law's evisceration of his inherent right to armed self-defense.

The Second Circuit affirmed in a published opinion on July 29, 2021. The majority, Judges Walker and Carney, followed the district court's path: They assumed for the sake of argument that the Second Amendment applied to undocumented migrants like Mr. Perez, and then concluded that § 922(g)(5) survived intermediate scrutiny. Pet. App. 02-19. Judge Menashi concurred in the judgment, but criticized the majority's watered-down version of intermediate scrutiny. He would rule instead that the law was constitutional because persons like Mr. Perez are not part of "the people" of the Second Amendment. Id. 20-33.

A. The majority opinion

Judge Walker's opinion acknowledged that "at least some non-citizens are covered by the Second Amendment." Pet. App. 9. It pointed to the disjunctive definition set forth in United States v. Verdugo-Urquidez, 494 U.S. 259, 265 (1990), stating that "'the people' protected by the Fourth Amendment, and by the First and Second Amendments, . . . refers to a class of persons who are part of a national community or who have otherwise developed sufficient connections with this

country to be considered part of that community." Pet. App. 9. Moreover, "person" (the singular form of "people") "as used in the Fifth and Fourteenth Amendments, has 'long been recognized' to include unlawful aliens and confer on them due process rights." Id. 10 (quoting Plyler v. Doe, 457 U.S. 202, 210 (1982)).

The majority recognized that "various of our sister courts" have answered differently the "difficult question[]" of whether undocumented migrants possess the Second Amendment right. While some circuits "conclude that undocumented aliens like Perez are not entitled to Second Amendment protections," Pet. App. 10 (citing decisions from the Fourth, Fifth, and Eighth Circuits), "other circuits have held or assumed that unauthorized aliens are included in 'the people'" (but nonetheless "concluded that § 922(g)(5) is a permissible restriction"). Id. 11 (citing decisions from the Seventh, Ninth, and Tenth Circuits).

The majority decided to avoid that question because "even assuming that Perez has a constitutional right to possess firearms, we find that § 922(g)(5) is a permissible restriction when applied to the facts of this case." Pet. App. 12.

It began by concluding that intermediate rather than strict scrutiny was warranted. This was so because, despite § 922(g)(5)'s "insurmountable" and "categorical ban on the possession of firearms by undocumented immigrants like Perez, . . . his interest in possessing firearms [] is not at the core of the Second Amendment right . . . ." Pet. App. 14. He "does not qualify as a 'law-abiding, responsible citizen,'" id. (quoting Heller, 554 U.S. at 635), because "however he may

choose to live his life in the United States, his presence is unlawful." Id. "We do not consider Perez's interest in possessing guns at all similar to that of a 'law-abiding, responsible' person pursuing self-defense." Id.

The majority next acknowledged that "[t]o withstand intermediate scrutiny, [a] law must be substantially related to the achievement of an important governmental interest." Pet. App.15. But scrutiny is more deferential for laws restricting gun possession because "regulation of firearms has always been more robust than governmental measures affecting other constitutional rights . . . ." Thus, "our only role is to ensure that Congress formulated the challenged regulation 'based on substantial evidence.'" Id.

The majority concluded that § 922(g)(5) passes intermediate scrutiny because it is substantially related to the important interest of public safety. Pet. App. 15-18. The law promoted public safety, the majority explained, by "(1) preventing individuals who live outside the law from possessing guns, (2) assisting the government in regulating firearm trafficking by preventing those who are beyond the government's control from . . . [having] guns, and (3) preventing those who have demonstrated disrespect for our laws from possessing firearms." Id. 15.

The majority acknowledged that "§ 922(g)(5) is overbroad . . . [because] many undocumented immigrants have never committed a crime of violence and [] many could be entrusted with a firearm." Pet. App. 18. But that was irrelevant because "Congress is better equipped than the judiciary to make sensitive public policy

judgments regarding the dangers posed by firearm possession and how to mitigate those risks." Id.

B. Judge Menashi's concurrence

Judge Menashi concurred in the result but criticized the majority's "water[ed]-down" version of intermediate scrutiny, tantamount to "a form of rational basis review." Pet. App. 20. He instead would uphold § 922(g)(5) because undocumented migrants have no rights under the Second Amendment. Id.

Judge Menashi criticized the majority for "afford[ing] so much deference to legislative judgments about restricting gun ownership as to subject such restrictions only to rational basis review." Pet. App. 23-24. As he summarized, "the court upholds a categorical ban on firearm ownership by affording deference to the exercise of Congress's power 'to make sensitive public policy judgments' based on facts that it had 'every right to conclude' were true – but, as far as the court is concerned, might very well be false." Id. 24. "This sort of perfunctory analysis, accepting speculation in place of record evidence, does not amount to intermediate scrutiny." Id. 26.

The majority's approach "'treat[s] the right recognized in Heller as a second-class right, subject to an entirely different body of rules than the other Bill of Rights guarantees.'" Pet. App. 28 (quoting McDonald v. City of Chicago, 561 U.S. 742, 780 (2010)). It "simply accepts the government's assertions about [its] interests [in prohibiting undocumented migrants from having guns] without scrutiny" and

"makes no effort to consider whether evidence supports [the government's] claims . . . or whether the court's speculation about the relationship between illegal aliens and [the private] market [for guns] has any basis in fact." Id. 25. This "indulgent" and "respectful" deference, Judge Menashi pointed out, "resembles rational basis review rather than intermediate scrutiny," which "must be sufficiently skeptical and probing to provide the rigorous protection that constitutional rights deserve." Id. 24.

In his view, the majority should not have taken this roundabout approach. Pet. App. 27. Rather, the court should have ruled straightforwardly that § 922(g)(5) is constitutional because "illegal aliens are not among 'the people' to whom the right to keep and bear arms under the Second Amendment belongs." Id. 28. Quoting Heller, he argued that "'the people' within the context of the Second Amendment 'unambiguously refers to all members of the political community.'" Id. 29 (emphasis in original). And "illegal aliens" by definition "remain outside the political community," as they "are barred from voting in federal elections," "may not hold federal elective office, "may not serve on federal juries," and "are subjected to removal from the United States at any time." Id. 32.

Finally, Judge Menashi pointed out that this was ultimately the majority's position as well. After all, "the court decides to apply intermediate scrutiny . . . because [the defendant] 'does not qualify as . . . law-abiding' due to his 'unlawful' presence in the country," and "then relies on that same justification to hold that

intermediate scrutiny is satisfied." Pet. App. 26 (emphasis in original). "[B]ecause Perez's immigration status both determines the level of scrutiny and satisfies that scrutiny" under the majority's analysis, "the court ultimately arrives at the conclusion it strains to avoid: illegal aliens – by virtue of their immigration status alone – are not protected under the Second Amendment." Id. 27.

REASONS FOR GRANTING THE WRIT

The Court should grant the writ for two reasons.

First, the Court should take this case to answer a critical question concerning whether undocumented immigrants like Javier Perez are among "the people" protected by the Second Amendment, a question on which the Circuit Courts of Appeals have split. The conflict is long-standing and further delay will not resolve it.

Moreover, as the Constitution's text confirms and as this Court recognized in United States v. Verdugo-Urquidez, 494 U.S. 259, 265 (1990), the same "term of art" -- "the people" -- appears in the First and Fourth Amendments. Thus, whether undocumented immigrants with substantial ties to this country – over 10 million people[1] – possess rights under those amendments is implicated here as well.

And the Court should intervene because the Second Circuit erred in concluding – indirectly, as the majority; or directly, as the concurrence – that such persons do not possess the natural right of armed self-defense, a right embodied in

[1]https://www.migrationpolicy.org/data/unauthorized-immigrant-population/state/US

the Second Amendment but predating the American republic. Whether a person is part of the "political community" is irrelevant, because the Second Amendment right is not a political, collective, or civic one. Rather, as Heller recognized, the "core component" of the Amendment is the right to armed self-defense, a "natural" right "inherent" to individuals that "preexist[s]" the Founding. Text, history, precedent, and logic confirm that aliens with longstanding ties to this country possess the same inherent right to defend themselves that citizens possess.

Second, the Court should grant the writ because the court below – like many other lower courts – undermined Heller by treating the Second Amendment right as a "second-class" privilege that the legislature can override with little justification. Instead of according this enumerated, fundamental right its deserved respect, the Second Circuit used an interest-balancing test -- expressly rejected by Heller, 554 U.S. at 689 -- that deferred excessively to legislative judgment and overlooked § 922(g)(5)'s substantial overbreadth in upholding it. As Heller warned, "[a] constitutional guarantee subject to future judges' assessments of its usefulness is no constitutional guarantee at all." Id. at 634-35.

Alternatively, the Court should hold Mr. Perez's petition pending the decision in New York State Rifle & Pistol Association v. Bruen, No. 20-843 (argument set for November 3, 2021), concerning whether a New York law barring the carrying of firearms in public violates the Second Amendment, and then dispose of it in light of that decision. There, as here, petitioner seeks vacatur of a decision by the Second

Circuit that deferred excessively to legislative judgment in upholding a law infringing on the right of armed self-defense. See 818 F. App'x 99 (2d Cir. 2020). There, as here, petitioner argues that "the Second Circuit's analysis is nothing more than the kind of 'interest-balancing' that Heller rejected," one that relegates the Second Amendment to "second-class status." Pet. Br. 46 & 48, No. 20-843.

I. Courts are divided over whether undocumented immigrants with substantial ties to this country, like Javier Perez, are among "the people" protected by the Second Amendment.

A. Heller did not answer this question.

Heller resolved a longstanding dispute about whether the Second Amendment "protects only the right to possess and carry a firearm in connection with militia service," or whether "it protects an individual right to possess a firearm unconnected with service in a militia, and to use that arm for traditionally lawful purposes, such as self-defense within the home." 554 U.S. at 577. After canvassing text, history, and tradition, the Court concluded that the latter was correct: The Second Amendment "guarantee[s] the individual right to possess and carry weapons in case of confrontation." Id. at 592.

The Court ruled that the Second Amendment "codified a pre-existing right," which Blackstone described as "'the natural right of . . . having and using arms for self-preservation and defense.'" Id. at 592 & 594 (emphasis in original). Thus, the D.C. law challenged in Heller, which "totally bans handgun possession in the

home," was unconstitutional because it directly infringed upon "the inherent right of self defense," the "central component" of the Amendment. Id. at 628.

Heller did not rule that only American citizens possessed this right. Respondent Heller was a citizen, so the Amendment's applicability to non-citizens was not at issue. Although the Court remarked that the Amendment "surely elevates above all other interests the right of law-abiding, responsible citizens to use arms in defense of hearth and home," id. at 635, therefore, it did not mean (or have occasion to mean) that only such persons were protected by the Second Amendment. Similarly, though the Court noted that the constitutional text (in particular the expansive term "the people") signaled that "[w]e start [the analysis] with a strong presumption that the Second Amendment . . . belongs to all Americans," id. at 581, the phrase "all Americans" was meant to contrast with "a subset" thereof, such as those serving in "the militia," not with non-Americans. Id. at 580-81.

As to persons who did not possess the Second Amendment right, Heller mentioned only "felons" and "the mentally ill": "[N]othing in our opinion should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons and the mentally ill." Id. at 627. Heller says nothing about immigrants.

B. The Circuits disagree over whether undocumented immigrants are among "the people" of the Second Amendment.

Heller's silence as to whether non-citizens like Mr. Perez possess the right of armed self-defense has caused a disagreement in the lower courts. Responding to

defendants challenging § 922(g)(5) on Second Amendment grounds, the Circuits have split over whether undocumented immigrants are among "the people" of the Second Amendment.

Three Circuits have held that undocumented immigrants have no rights under the Amendment because they do not belong to "the people" -- and thus § 922(g)(5) does not violate the Constitution. See United States v. Portillo-Munoz, 643 F.3d 437, 442 (5th Cir. 2011); United States v. Flores, 663 F.3d 1022, 1023 (8th Cir. 2011); United States v. Carpio-Leon, 701 F.3d 974, 977 (4th Cir. 2012). The leading case is the Fifth Circuit's Portillo-Munoz, which relies principally on "[t]he Court's language in Heller [to] invalidate[] [defendant's] attempt to extend the protections of the Second Amendment to illegal aliens." 643 F.3d at 440. As the majority opinion explained, quoting from Heller, "Illegal aliens are not 'law-abiding, responsible citizens' or 'members of the political community,' and . . . [they] are not [']Americans['] as that word is commonly understood." Id.

Judge Dennis dissented. Relying on the definition of "the people" from Verdugo-Urquidez, he concluded that "Portillo-Munoz clearly satisfies the criteria given by the Supreme Court . . . for determining whether he is part of 'the people': he has come to the United States voluntarily and accepted some societal obligations." 643 F.3d at 443. Judge Dennis pointed out that the majority's exclusion of undocumented immigrants from "the people" contradicts Plyler v. Doe, 457 U.S. 202, 210 (1982), holding that "[a]liens, 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." "It would be strange for the same founders who contemporaneously adopted the First, Second, Fourth, and Fifth Amendments," the dissent explained, "to have intended for the Fifth Amendment to cover a different class of persons than the other three amendments, considering that 'people' is merely the plural of 'person.'" 643 F.3d at 445.

The Seventh Circuit agrees with Judge Dennis's dissent, holding in United States v. Meza-Rodriguez, 798 F.3d 664 (7th Cir. 2015), that undocumented immigrants are among "the people" protected by the Second Amendment.[2] Judge Wood's majority opinion[3] rejected the other circuits' reliance on Heller in reaching the opposite conclusion, as "[t]his issue was not [] before the Court in Heller." Id. at 669.

The Seventh Circuit relied on history and text. Because "immigration in the late 18th century was a common phenomenon," and because "the drafters of the Constitution used the word 'citizen' when they wanted to do so," the Framers' choice of the broader term "the people" for the Second Amendment indicated that "all people, including non-U.S. citizens, . . . enjoy at least some rights under the Second Amendment." Id.

[2] The court then applied intermediate scrutiny to § 922(g)(5) and concluded that it passed constitutional muster. 798 F.3d at 672-73.

[3] Judge Flaum concurred in the judgment, but would have "reserv[ed] resolution of this challenging constitutional question" – whether undocumented immigrants are included in "the people" – "for a case that compels addressing it." 798 F.3d at 674.

The court further pointed out that (1) undocumented migrants with substantial connections to this country are included among "the people" under Verdugo-Urquidez's definition; and (2) ruling otherwise would contradict Plyler's extension of Due Process rights to such "person[s]." Id. at 669-72. The court thus concluded: "In 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." Id. at 672.

Between these opposing poles are three Circuits (including the majority below) that upheld § 922(g)(5) but declined to answer whether undocumented immigrants are among "the people" of the Second Amendment. See United States v. Huitron-Guizar, 678 F.3d 1164 (10th Cir. 2012); United States v. Torres, 911 F.3d 1253 (9th Cir. 2019); Perez, 6 F.4th 448 (2d Cir. 2021). All assumed that such persons possessed Second Amendment rights, but concluded that § 922(g)(5) passes constitutional muster under intermediate scrutiny.

Beneath the veneer, though, these courts essentially adopted the majority view that undocumented migrants are not protected by the Second Amendment. As Judge Menashi pointed out in his concurrence below, "the court decides to apply intermediate scrutiny . . . because [the defendant] 'does not qualify as . . . law-abiding' due to his 'unlawful' presence in the country," and "then relies on that same justification to hold that intermediate scrutiny is satisfied." Pet. App. 8

(emphasis in original). "[B]ecause Perez's immigration status both determines the level of scrutiny and satisfies that scrutiny" under the majority's analysis, therefore, "the court ultimately arrives at the conclusion it strains to avoid: illegal aliens – by virtue of their immigration status alone – are not protected under the Second Amendment." Id. at 8; see Huitron-Guizar, 678 F.3d at 1169-70; Torres, 911 F.3d at 1262-64.

C. The Court should take this case and hold that undocumented immigrants possess the "inherent" right of armed self-defense.

This split is longstanding and will not be resolved without this Court's intervention.

The Court should also grant the writ because the court below erred in failing to extend Second Amendment protection to undocumented immigrants like Javier Perez: They are among "the people" of the Second Amendment under Heller and Verdugo-Urquidez, and in light of text and history. No sound reason exists to deprive the more than 10 million people here without authorization, many of whom (like Mr. Perez) have children or spouses who are U.S. citizens,[4] of the "preexisting," "inherent," and "natural" right to use armed "force in defense of self and [] others." Pet. App. 22.

Heller leads to the answer, both as to precedent and as to text. The Court noted that the "right of the people" is used "two other times" in the Bill of Rights –

[4] https://www.migrationpolicy.org/data/unauthorized-immigrant-population/state/US (35% of undocumented immigrants live with at least one U.S.-born child under 18 and 21% are married to a U.S. citizen or lawful permanent resident).

"in the First Amendment's Assembly-and-Petition Clause and in the Fourth Amendment's Search-and-Seizure Clause." Id. at 579. Heller then remarked that the term "the people" "unambiguously refers to all members of the political community, not an unspecified subset," and turned to the Court's earlier decision in Verdugo-Urquidez, 459 U.S. 259 (1990), to flesh out this "term of art." 554 U.S. at 580. That decision dealt with the Fourth Amendment, but equated "the people" there with "the people" in the other two Amendments.

Heller quoted the following from Verdugo-Urquidez, concerning whether a Mexican national forcibly brought to the United States for prosecution could challenge the Government's warrantless search of his Mexican residence under the Fourth Amendment:

> "[T]he people" seems to have been a term of art employed in selected parts of the Constitution . . . . [Its uses] sugggest[] 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.

554 U.S. at 580 (quoting Verdugo-Urquidez, 494 U.S. at 265).

Heller then used this definition to show that the Second Amendment right belonged to a broad class of persons, not just those serving in a "militia," which was "a [mere] subset of 'the people.'" Id. at 580-81. For present purposes, though, the critical point is Heller's recognition that Verdugo-Urquidez supplies the relevant definition.

Persons like Mr. Perez are among "the people" under that case's disjunctive formula. Though not members of the "national community" – presumably what Heller meant by "political community" -- they "have otherwise developed sufficient connection with this country to be considered part of that community." As Verdugo-Urquidez explained, the Court had assumed in an earlier case that noncitizens who "were in the United States voluntarily and presumably had accepted some societal obligations" were part of "the people." 494 U.S. at 273 (discussing INS v. Lopez-Mendoza, 468 U.S. 1032 (1984)). Thus, although aliens like Verdugo-Urquidez, who had no ties to the United States (other than being forcibly brought here to stand trial), are not part of "the people," "aliens receive constitutional protections when they have come within the territory of the United States and developed substantial connections with this country." Id. at 271.

Javier Perez is therefore among "the people" of the Second Amendment. He entered "the United States voluntarily" more than 15 years ago and has "accepted some societal obligations" through continuous residency, employment, and his U.S.-born children, for instance.

Plyler v. Doe, 457 U.S. 202, 210 (1982), holding that unauthorized immigrants are "persons" within the meaning of the Due Process and Equal Protection Clauses, confirms this conclusion: "Aliens, 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." If unauthorized aliens

are constitutional "persons," they are among the constitutional "people" as well. "It would be strange for the same founders who contemporaneously adopted the First, Second, Fourth, and Fifth Amendments to have intended for the Fifth Amendment to cover a different class of persons than the other three amendments, considering that 'people' is merely the plural of 'person.'" Portillo-Munoz, 643 F.3d at 445 (Dennis, J., dissenting).

The historic and textual evidence is in accord. "[I]mmigration in the late 18th century was a common phenomenon" – there were a lot of noncitizens in the United States in the late 1780s. Meza-Rodriguez, 798 F.3d at 669. Had the Framers intended to exclude such persons from "the people" of the First, Second, and Fourth Amendments, they would have said so.

The Framers were not shy about excluding noncitizens, as the Constitution uses the word "citizen" in several places. For instance, Article I limits membership in the House of Representatives to persons who have been "seven Years a citizen," U.S. Const. Art. I, § 2, and Article II requires the President to be "a natural born Citizen or a Citizen of the United States, at the time of the Adoption of the Constitution," Id. Art. II, § 1; see also id. Art. I, § 3 (person must have "been nine years a citizen of the United States" to be a Senator); id. Art. III, § 2 (referring to "citizens" several times in discussing federal-court jurisdiction). "Given the drafters' use of the term 'citizen' in other constitutional provisions, use of the phrase 'the people' rather than 'citizen' demonstrates the conscious and clear intention that the

phrase 'the people' includes more than just those individuals with citizenship status." Justine Farris, Note, The Right of Non-Citizens to Bear Arms: Understanding "the People" of the Second Amendment , 50 Ind. L. Rev. 943, 957 (2017).

Finally, logic and fairness demand this result: It makes no sense to deprive someone of the "inherent" and "natural" right of armed self-defense on the basis of immigration status. Heller, 554 U.S. at 592 & 594. The Second Amendment right is at its core an individual's right to self-preservation when confronted by deadly force. This is not a collective, civic, or political right. See, e.g., Kanter v. Barr, 919 F.3d 437, 463 (7th Cir. 2019) (Barrett, J., dissenting) ("Heller [] expressly rejects the argument that the Second Amendment protects a purely civic right . . . and emphasizes that the Second Amendment is rooted in the individual's right to defend himself – not in his right to serve in a well-regulated militia."). This is an "inherent" and "natural" right, belonging to individuals, a right that "preexist[s]" the Constitution and the American republic. 554 U.S at 628. Given Heller's depiction of the Second Amendment right as one whose "central component" is "self-preservation," rather than "state- or civic-preservation," in sum, "a distinction based on citizenship status" would be "irrational." Pratheepan Gulasekaram, "The People" of the Second Amendment: Citizenship and the Right to Bear Arms, 85 N.Y.U. L. Rev. 1521, 1539-40 (2010). Undocumented immigrants like Mr. Perez therefore possess the inherent right to armed self-defense.

II. The Second Circuit flouted Heller by using a deferential interest-balancing test to uphold § 922(g)(5) despite its substantial overbreadth, thus treating the Second Amendment right as a mere privilege readily overridden by legislative preference. The same court took the same approach in upholding the law challenged in New York State Rifle & Pistol Association v. Bruen, 818 F. App'x 99 (2d Cir. 2020), pending before this Court in No. 20-843.

The Court should also grant the writ because the decision below exemplifies a common error among the lower courts after Heller. Like its sister courts, the Second Circuit undermined Heller by treating the Second Amendment right as a "second-class" one that the legislature can override with little justification. Instead of according this right its deserved respect – an enumerated right "deeply rooted in this Nation's history and tradition" and "fundamental to our scheme of ordered liberty," McDonald v. City of Chicago, 561 U.S. 742, 767-68 (2010) -- the court used an "interest-balancing inquiry" that deferred excessively to legislative judgment in upholding § 922(g)(5).

This approach contradicts Heller, which expressly rejected the use of an "interest-balancing" test. 554 U.S. at 634. As the Court explained, "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. A constitutional guarantee subject to future judges' assessments of its usefulness is no constitutional guarantee at all." Id. at 634-35 (emphasis in original).

Heller did not specify the type of scrutiny courts should use to evaluate laws like § 922(g)(5), but barred the use of rational-basis review: "If all that was required to overcome the right to keep and bear arms was a rational basis, the Second Amendment would be redundant with the separate constitutional prohibitions on irrational laws, and would have no effect." Id. at 630. And though the majority below claimed that it was applying intermediate scrutiny, it upheld the law despite a lack of empirical bases and despite acknowledging that the law was substantially overbroad. See supra. As Judge Menashi criticized in his concurrence, the majority "affords so much deference to legislative judgments about restricting gun ownership as to subject such restrictions only to rational basis review." Pet. App. 23-24.

Upholding "a categorical ban on firearm ownership by affording deference to the exercise of Congress's power 'to make sensitive public policy judgments' based on facts that it had 'every right to conclude' were true – but, as far as the court is concerned, might very well be false," as the majority did here, "does not amount to intermediate scrutiny." Pet. App. 24 & 26. "This sort of perfunctory analysis, accepting speculation in place of record evidence" and "mak[ing] no effort to consider whether evidence supports [the government's] claims," id. 25, "resembles rational basis review rather than intermediate scrutiny," which "must be sufficiently skeptical and probing to provide the rigorous protection that constitutional rights deserve." Id. 24.

Intermediate scrutiny "does not require that [laws] be the least restrictive means of achieving their ends[. But] it does require that they be narrowly tailored to achieve the government's asserted interests." Americans for Prosperity Foundation v. Bonta, __ S. Ct. __, 2021 WL 2690268, at *7 (U.S. July 1, 2021). Section 922(g)(5) as applied to someone like Mr. Perez does not survive this test.

Even the majority conceded that the law's total, exception-free ban on the right to armed self-defense was substantially overbroad -- "many undocumented immigrants have never committed a crime of violence and [] many could be entrusted with a firearm." Pet. App. 18. And the law's underlying assumption -- that undocumented immigrants commit crimes at a higher rate than the broader public -- is wrong. See generally Rombaut & Ewing, The Myth of Immigrant Criminality and the Paradox of Assimilation: Incarceration Rates Among Native and Foreigh-Born Men 1, 4 (American Immigration Law Foundation 2007). That the Second Circuit nonetheless upheld § 922(g)(5) proves that it did not deploy heightened scrutiny.

What the Second Circuit did is not unusual: Many lower courts have upheld laws restricting gun possession with hardly any scrutiny. Although Heller "explicitly rejected the invitation to evaluate Second Amendment challenges under an 'interest-balancing inquiry,' with the interests protected by the Second Amendment on one side and the governmental public-safety concerns on the other," Justice Thomas recently complained, "the application of the test adopted by the

courts of appeals has devolved into just that." Rogers v. Grewal, 140 S. Ct. 1865, 1867 (2020) (dissenting from denial of cert., joined by Justice Kavanaugh). Indeed, as a survey of lower-court caselaw since Heller concluded, the "interest-balancing approach has ultimately carried the day, as lower courts systemically ignore the Court's actual holding in Heller." Id. (citing Rostron, Justice Breyer's Triump in the Third Battle Over the Second Amendment, 80 Geo. Wash. L. Rev. 703 (2012)); see, e.g., Kanter, 919 F.3d at 465-66 (Barrett, J., dissenting) (criticizing majority's deferential approach in upholding law barring non-violent felon from possessing a gun).

"Whatever one may think about the proper approach to analyzing Second Amendment challenges," therefore, "it is clearly time for [the Court] to resolve the issue." 140 S. Ct. at 1868; see United States v. Chester, 628 F.3d 673, 688-89 (4th Cir. 2010) (lamenting that Heller "left in its wake a morass of conflicting lower court opinions regarding the proper analysis to apply to challenged firearms regulations").

Alternatively, the Court should hold this petition pending its decision in New York State Rifle & Pistol Association v. Bruen, No. 20-843 (argument set for November 3, 2021), concerning whether a New York law barring the carrying of firearms in public violates the Second Amendment, and then dispose of it in light of that decision. There as here, petitioner there seeks reversal of a Second Circuit decision (818 F. App'x 99 (2d Cir. 2020)) that upheld a law infringing on the right of

armed self-defense "by employing a form of scrutiny that is heightened in name only and is alien to 'any of the standards that' this Court has 'applied to enumerated constitutional rights.'" Pet. Br. 44-45, No. 20-843 (quoting Heller, 554 U.S. at 628-29). There as here, petitioner complains that "the Second Circuit's analysis is nothing more than the kind of 'interest-balancing' that Heller rejected" -- a test that "substantia[lly] defer[s] to the legislature," requires "virtually no tailoring," and relegates the Second Amendment to "second-class status." Id. at 47-48.

Thus, because this Court may resolve the same question in that case – whether the Second Circuit's deferential approach in evaluating the constitutionality of a law restricting Second Amendment rights comports with Heller – the Court should consider holding Mr. Perez's petition pending the resolution of New York State Rifle & Pistol Association v. Bruen, No. 20-843.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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