

No. 21-6120

IN THE SUPREME COURT OF THE UNITED STATES

JAVIER PEREZ, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND 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 (E.D.N.Y.):

United States v. Perez, No. 18-cr-220 (Mar. 13, 2019)

United States Court of Appeals (2d Cir.):

United States v. Perez, No. 19-620 (July 29, 2021)

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A2-A33) is reported at 6 F.4th 448. The memorandum and order of the district court is unreported.

JURISDICTION

The judgment of the court of appeals was entered on July 29, 2021. The petition for a writ of certiorari was filed on October 26, 2021. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a guilty plea in the United States District Court for the Eastern District of New York, petitioner was convicted of possessing a firearm as a noncitizen illegally in the United States, in violation of 18 U.S.C. 922(g)(5). Judgment 1. He was sentenced to 20 months of imprisonment, to be followed by three years of supervised release. Judgment 2-3. The court of appeals affirmed. Pet. App. A2-A33.

1. Petitioner is a citizen of Mexico who, at the time relevant to this case, was present in the United States without lawful status. Pet. App. A4-A5. In July 2016, petitioner saw a violent gang fight break out on a street in Brooklyn. Id. at A5. Petitioner, who had himself been "involved with [a] gang in his youth," borrowed a gun from an acquaintance, approached the fight, and fired several shots in the air. Id. at A4; see id. at A5. The gang members scattered, and petitioner returned the gun to his acquaintance. Id. at A5. Petitioner later admitted to law-enforcement officers "that he had borrowed a firearm, pulled it out, and fired it into the air in order to intimidate members of a rival gang." Pet. C.A. App. A46.

A grand jury indicted petitioner for possessing a firearm as a noncitizen illegally in the United States, in violation of 18 U.S.C. 922(g)(5). Indictment 1. Petitioner moved to dismiss the indictment on the ground that Section 922(g)(5) violates the Second Amendment, but the district court denied the motion. Pet. C.A.

App. A45-A54. The court assumed without deciding that the Second Amendment protects petitioner's right to keep and bear arms even though he is not lawfully present in the United States, but determined that Section 922(g)(5) is a permissible regulation of that right. Id. at A49.

Petitioner entered a conditional guilty plea that preserved his right to renew his constitutional challenge on appeal. Pet. App. A6. The district court sentenced him to 20 months of imprisonment, to be followed by three years of supervised release. Judgment 2-3.

2. The court of appeals affirmed. Pet. App. A2-A33. The court assumed without deciding that the Second Amendment applies to noncitizens who are illegally present in the United States. Id. at A11. The court determined, however, that petitioner's conduct lay outside "the core of the Second Amendment," because his possession of firearms was "neither in self-defense nor in the home" and because petitioner was not a "law-abiding, responsible citizen." Id. at A13-A14 (brackets omitted).

Applying intermediate scrutiny, the court of appeals concluded that Section 922(g)(5) complies with the Constitution. Pet. App. A15. The court observed that petitioner "concede[d] that public safety in the context of using firearms is an important governmental objective." Ibid. The court then determined that Section 922(g)(5) promotes that objective in three ways. Ibid. First, it "prevent[s] individuals who live outside the law from

possessing guns.” Ibid. Second, it “assist[s] the government in regulating firearm trafficking by preventing those who are beyond the federal government’s control from distributing and purchasing guns.” Ibid. Finally, it “prevent[s] those who have demonstrated disrespect for our laws from possessing firearms.” Ibid.

Judge Menashi concurred in the judgment. Pet. App. A20-A33. Judge Menashi would have held that “illegal aliens are not among ‘the people’ to whom the right to keep and bear arms under the Second Amendment belongs.” Pet. App. A28.

ARGUMENT

Petitioner contends (Pet. 11-22) that 18 U.S.C. 922(g)(5), which prohibits noncitizens who are illegally present in the United States from possessing firearms, violates the Second Amendment. The court of appeals correctly rejected that contention, and every other 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. See Reyes-Torres v. United States, 142 S. Ct. 125 (No. 20-7714) (2021); 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). The same result is warranted here. Indeed, this case

would be a poor vehicle for considering that issue even if it otherwise warranted review.

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. In Heller, this Court 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 (collecting 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); 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 "law-abiding, responsible citizens" protected by the Second Amendment. Heller, 554 U.S. at 635.

b. Even where it applies, 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) (en banc) (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 the 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 “show[n] a willingness to defy our law” by entering or remaining in the United States illegally. Pet. App. A18 (citation omitted). 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); see Pet. App. A16-A17. 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; see Pet. App. A18. 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 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 cites (Pet. 18-21) this Court's decisions in United States v. Verdugo-Urquidez, 494 U.S. 259 (1990), and Plyer v. Doe, 457 U.S. 202 (1982), but his reliance on those decisions 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. The Court 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 that term encompasses noncitizens who are unlawfully present in the United States. In addition, the conclusion that the Second Amendment

does not apply to noncitizens who are present in the country unlawfully rests not simply on the Second Amendment's reference to "the people," but also on the historical understanding of the scope of the right the Second Amendment codified. See p. 6, supra.

In Plyler, this Court held that the Equal Protection Clause of the Fourteenth Amendment -- which provides that "[n]o State shall * * * deny to any person within its jurisdiction the equal protection of the laws" -- protects noncitizens who are present in the United States illegally. 457 U.S. at 214-216. But that decision involved the meaning of the term "any person" in the Fourteenth Amendment, not the meaning of the distinct term "the people" in the Second Amendment, or the distinct history of the right to keep and bear arms. Id. at 214.

Verdugo-Urquidez and Plyler thus do not suggest that noncitizens who are unlawfully present in the United States are protected by the Second Amendment. And as discussed above, even if they were, Section 922(g)(5) would be a permissible regulation of the right to keep and bear arms. See pp. 6-9, supra.

2. Petitioner errs in asserting (Pet. 14-18) 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 destination: that Section 922(g)(5) complies with the Second Amendment.

Three courts of appeals, including the court below, 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 Pet. App. A15-A18; United States v. Torres, 911 F.3d 1253, 1261-1264 (9th Cir. 2019); Huitron-Guizar, 678 F.3d at 1168-1170 (10th Cir.). Three more courts of appeals have rejected constitutional challenges to Section 922(g)(5) on the ground that persons who are illegally present in the United States do not enjoy Second Amendment rights. See United States v. Carpio-Leon, 701 F.3d 974, 977-982 (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)). And 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.

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.”) (emphases omitted). “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.

3. This case also would be a poor vehicle for addressing petitioner's contention. The Second Amendment does not protect the right to possess arms “for any sort of confrontation”; rather, it protects the right to possess them for “lawful purposes like self-defense.” Heller, 554 U.S. at at 624. But “[petitioner's] possession was n[ot] in self-defense.” Pet. App. A14. And while petitioner asserts that he “used the gun in defense of another,” Pet. 4 (citation omitted), the court of appeals' and district court's descriptions of the facts do not support that assertion. The court of appeals stated that petitioner, who had been “involved with [a] gang in his youth,” “took a weapon not his own, charged down a residential street towards a gang fight, and shot the weapon several times in the air.” Pet. App. A4, A14. And the district court observed that petitioner had admitted to law-enforcement officers “that he had borrowed a firearm, pulled it out, and fired

it into the air in order to intimidate members of a rival gang.” Pet. C.A. App. A46; see Presentence Investigation Report ¶ 6.

The Second Amendment does not protect the right to brandish and discharge guns as part of a gang fight. At a minimum, the factual dispute about why petitioner possessed the gun makes this case an unsuitable vehicle for addressing the question presented.

4. Petitioner asks in the alternative (Pet. 26-27) that this Court hold the petition for a writ of certiorari pending its decision in New York State Rifle & Pistol Association, Inc. v. Bruen, No. 20-843 (argued Nov. 3, 2021). The Court should deny that request. The Court granted certiorari in New York State Rifle & Pistol Association to decide whether New York “violated the Second Amendment” by denying “concealed-carry licenses” to two law-abiding citizens who sought to carry firearms for “self-defense.” 141 S. Ct. 2566 (2021). That decision is unlikely to have any bearing on this case, which involves a noncitizen who is illegally present in the United States, whose “possession was n[ot] in self-defense,” Pet. App. A14, and who used the gun “to intimidate members of a rival gang,” Pet. C.A. App. A46. Even after granting review in New York State Rifle & Pistol Association, moreover, the Court denied (rather than held) a petition for a writ of certiorari in another case presenting the same question that is presented here. See Reyes-Torres, 141 S. Ct. 125 (No. 20-7714). The same course is warranted in this case.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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