No. _____

In the Supreme Court of the United States

GERSON ARMANDO ROMERO SALAZAR,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

PETITION FOR WRIT OF CERTIORARI

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April 29, 2026

QUESTION PRESENTED

Whether 18 U.S.C. § 922(g)(5)(A), which prohibits the possession of firearms by aliens unlawfully present in the United States, violates the Second Amendment on its face.

a. Whether the *Bruen* analysis permits consideration of whether a class of persons is among "the people" prior to the Second Step in which the government bears the burden to demonstrate a historical tradition that would permit disarming that class.

b. Whether the Nation's historical tradition of firearms regulation permits the permanent disarmament of all illegal aliens based on their perceived lack of loyalty to the United States.

PARTIES TO THE PROCEEDINGS

Petitioner is Gerson Armando Romero Salazar, and he was the defendant and appellant in the proceedings below.

Respondent is the United States of America, and it was the plaintiff and appellee in the proceedings below.

RELATED PROCEEDINGS

The following proceedings are directly related to this petition:

District Court (*United States v. Salazar*, Case No. 24-CR-00125-JFH):

On June 11, 2024, the District Court entered its Opinion and Order denying Mr. Salazar's motion to dismiss the indictment. Dkt. No. 34 (*See* a004–a006) The District Court entered its Judgment and Commitment on March 13, 2025. Dkt No. 78 (*See* a007–a013).

United States Court of Appeals for the Tenth Circuit (Case No. 25-5035):

Mr. Salazar appealed the denial of his motion to dismiss the indictment. On January 29, 2026, the United States Court of Appeals for the Tenth Circuit affirmed the District Court's ruling. The Tenth Circuit's unpublished opinion may be accessed at 2026 WL 242261. (*See* a002–a003)

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

PETITION FOR WRIT OF CERTIORARI

Gerson Armando Romero Salazar respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Tenth Circuit in this case.

OPINION BELOW

The Order and Judgment of the Tenth Circuit is an unpublished decision that may be accessed at 2026 WL 242261. (Pet. App., a002–a003). The District Court's Opinion and Order Dismissing the Indictment and its Judgment of Dismissal are reproduced in the appendix. (*Id.* at a004–a013).

JURISDICTION

The Tenth Circuit entered judgment on January 29, 2026. Petitioner did not seek rehearing. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The statute of prosecution, 18 U.S.C. § 922(g)(5)(A), states:

> It shall be unlawful for any person . . . who, being an alien is illegally or unlawfully in the United States . . . to . . . possess in or affecting commerce, any firearm or ammunition. . . .

8 U.S.C. § 1101(a)(3) states:

> The term "alien" means any person not a citizen or national of the United States.

8 U.S.C. § 1101(a)(22) states:

> The term "national of the United States" means (A) a citizen of the United States, or (B) a person who, though not a citizen of the United States, owes permanent allegiance to the United States.

The Second Amendment to the United States Constitution declares:

> 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.

INTRODUCTION

Mr. Salazar asks this Court to grant his petition for writ of certiorari, vacate the decision of the Tenth Circuit, and remand for further proceedings. The Tenth Circuit's decision below was compelled by that Circuit's binding precedential decision issued a month earlier in *United States v. Duque-Ramirez*, 161 F.4th 1237 (10th Cir. 2025).

Since this Court's decision in *N.Y. State Rifle & Pistol Ass'n v. Bruen*, 597 U.S. 1 (2022), a troubling circuit split has developed concerning the precisely who is among "the people" to whom the Second Amendment grants rights. This circuit split is the result of an approach to *Bruen* analysis that is not supported by the plain language of *Bruen* and this Court's subsequent decision in *United States v. Rahimi*, 602 U.S. 680 (2024).

The Question Presented is split into two sub-parts. The first subpart asks whether, under the *Bruen* test, courts may properly rely upon an individual's status (whether as illegal alien, as a felon, or as a number of any other statuses) to hold at the first step that the Second Amendment does not apply to that person rather than proceeding to the second step and asking whether the Nation's historical tradition of firearms regulation permits Congress to limit the right to bear arms as to that person based upon their particular status.

The second subpart concerns the analysis used by various circuits that have reached the second prong of the *Bruen* test. That analysis typically relies upon historical circumstances that would, under any rational legal analysis today, be

patently unconstitutional. The Tenth Circuit's approach avoided explicit reliance on those problematic historical realities, and it emphasized the premise that "subjects" to the Crown (i.e., English citizens) were given a larger basket of rights than those of "aliens" whose allegiance may lie with another sovereign. This does not cure the problem. That rationale narrows the scope of the right to bear arms to "citizens" even though the Second Amendment itself declares the right belongs to "the people." Moreover, the Tenth Circuit's approach also treats the right to bear arms as a "civic" right, rather than an "individual" right, in direct contradiction to this Court's holding in *District of Columbia v. Heller*, 554 U.S. 570, 592–95 (2008).

For the reasons stated herein, Mr. Salazar respectfully requests this Court grant his petition for writ of certiorari to address the constitutionality of 18 U.S.C. § 922(g)(5)(A).

STATEMENT

A. Factual Background

On April 16, 2024, in Northern District of Oklahoma Case Number 24-CR-125-JFH, the United States charged Gerson Armando Romero Salazar by Indictment with a single count of violating 18 U.S.C. § 922(g)(5)(A): On February 1, 2024, Mr. Salazar allegedly knowingly possessed a firearm while being an alien illegally in the United States. The firearm at issue was a 9mm handgun. Specifically, a Taurus G2C with 6 rounds of 9mm ammunition.

Following entry of a guilty plea without a plea agreement, the District Court sentenced Mr. Salazar to eighteen months in the custody of the Bureau of Prisons, to run consecutively to any sentence imposed in Wagoner County, Oklahoma, Case No. CF-2024-26. (Pet. App'x at a007–a013).

B. Procedural History

Mr. Salazar filed a motion to dismiss the indictment for failure to state an offense under Federal Rule of Criminal Procedure 12(b)(3)(B)(v) on the basis that 18 U.S.C. § 922(g)(5)(A) was unconstitutional on its face.

Following briefing by both parties, and a hearing, the District Court denied Mr. Salazar's motion to dismiss after concluding that his arguments were foreclosed by the Tenth Circuit's pre-*Bruen* precedent, *United States v. Huitron-Guizar*, 678 F.3d 1164 (10th Cir. 2012), concluding that *Huitron-Guizar* was "not expressly overruled by *Bruen*." (Pet. App'x at a004–a006)

Mr. Salazar appealed that denial, challenging the constitutionality of his statute of conviction. While Mr. Salazar's appeal was pending, the Tenth Circuit rendered a decision in *United States v. Duque-Ramirez*, 161 F.4th 1237 (10th Cir. 2025). That decision concluded that the Nation's historical tradition of firearms regulation permits disarming illegal aliens. *Id.* at 1247–49. As a result of that decision, the Tenth Circuit was bound to rule against Mr. Salazar. It issued its unpublished Order and Judgment ruling against Mr. Salazar on January 29, 2026. (*See* Pet. App'x at a002–a003). Mr. Salazar did not seek rehearing.

REASONS FOR GRANTING THE PETITION

I. This Court should address whether the *Bruen* test permits courts to hold that an individual (or class of individuals) is outside the protection of the Second Amendment without first placing the burden on the government to demonstrate a historical tradition of denying access to firearms to that class of individuals.

"A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed." U.S. Const. amend. II.

In *N.Y. State Rifle & Pistol Ass'n v. Bruen*, this Court explained that determining the constitutionality of any provision touching upon Second Amendment rights requires application of a two-step framework: First, a court must ask whether "the Second Amendment's plain text covers an individual's conduct." 597 U.S. at 24. If the answer is yes, "the Constitution *presumptively* protects that conduct." *Id.* (emphasis added). Then, the Government bears the burden to overcome that presumption and establish a regulation's constitutional permissibility by "demonstrating that it is consistent with the Nation's historical tradition of firearm regulation." *Id.* Then, and only then, "may a court conclude that the individual's conduct falls outside the Second Amendment's *unqualified command*." *Id.* (internal quotation marks omitted and emphasis added).

While Mr. Salazar's challenge to 18 U.S.C. § 922(g)(5)(A) is a challenge to the statute on its face, that fact has little bearing on the outcome of his challenge. He asserts that a proper analysis of this issue leads to the conclusion that illegal aliens may not be disarmed merely because they are illegal aliens.

A. Lower courts have created a "Step Zero" that first asks whether a person (or class of persons) is among "the people" to whom the Second Amendment grants rights. This improperly shifts the historical burden to challengers. The right to bear arms belongs to all people; history and tradition define the scope of Congress's power to strip certain groups of that right.

Conspicuously absent from the *Bruen* test is any requirement to determine, at the outset, whether the individual whose conduct is at issue is among "the people" to whom the Second Amendment grants rights. Yet almost every circuit in the country requires that question be answered before ever reaching the *Bruen* framework. In essence, the circuits have created a "Step Zero" to *Bruen* analysis reminiscent of the "Step Zero" often employed in the now-defunct deference analysis under *Chevron U.S.A., Inc., N.R.D.C., Inc.*, 467 U.S. 837, 865 (1984).

Under the old *Chevron* analysis, the first question a court asked was whether *Chevron* applied at all. *See* Cass R. Sunstein*, Chevron Step Zero*, 92 Va. L. Rev. 187, 209–10 (2006). If not, then the *Chevron* two-step test did not apply to the issue before that court. *See, e.g.*, *Pugin v. Garland*, 19 F.4th 437, 441–44 (4th Cir. 2021) (applying *Chevron* Step Zero to determine if *Chevron* analysis applies).

Since this Court's decision in *Bruen*, the circuits have quietly created a *Bruen* "Step Zero" that, at its core, asks if *Bruen* even applies. In what looks like an effort to avoid applying the *Bruen* framework, courts begin by asking if the person challenging the statute (i.e., the person whose conduct is subject to limitation by a

statute) is among "the people" as referenced by the Second Amendment.[1] This is inappropriate for two reasons.

[1] The following is a list of cases from Circuit Courts of Appeals, in numerical circuit order, demonstrating that circuit treats whether a given class of persons are among "the people" as a threshold question:

Zherka v. Bondi, 140 F.4th 68, 75–77 (2d Cir. 2025); *Range v. Att'y Gen. United States*, 124 F.4th 218, 226 (3d Cir. 2024) (en banc); *United States v. Price*, 111 F.4th 392, 400 (4th Cir. 2024); *United States v. Escobar-Temal*, 161 F.4th 969, 975–78 (6th Cir. 2025); *United States v. Seiwert*, 152 F.4th 854, 862 (7th Cir. 2025); *Worth v. Jacobson*, 108 F.4th 677, 689–92 (8th Cir. 2024); *United States v. Alaniz*, 1124, 1128 (9th Cir. 2023); *Rocky Mountain Gun Owners v. Polis*, 121 F.4th 96, 113 (10th Cir. 2024);

The First Circuit has not explicitly resolved this question. *See, e.g.*, *United States v. Minor*, 165 F.4th 616, 621–22 (1st Cir. 2026) (assuming step one was satisfied); *United States v. Langston*, 110 f.4th 408, 419 (1st Cir. 2024) (applying plain error review and beginning with second step analysis).

The Fifth Circuit awkwardly contradicts itself. In *United States v. Diaz*, the Fifth Circuit held that considerations of whether an individual is among "the people" should be resolved at the second step of the *Bruen* test. 116 F.4th 458, 466 (5th Cir. 2024). But in *United States v. Medina-Cantu*, the Fifth Circuit held that illegal aliens are not among "the people" and therefore the *Bruen* analysis does not apply to their possession of firearms. 113 F.4th 537, 539 & 541 (5th Cir. 2024). The Fifth Circuit there considered itself bound by pre-*Bruen* precedent regarding the status of illegal aliens. *Id.* at 542.

The Eighth Circuit's analysis in *Worth v. Jacobson* begins with a discussion of whether 18-to-20-year-olds are among "the people," and it concludes they are. 108 F.4th 677, 689–92 (8th Cir. 2024). That circuit similarly declined to apply the *Bruen* analysis to illegal aliens on the basis that they are not among "the people" for purposes of the Second Amendment after concluding that "*Bruen* does not command us to consider only 'conduct' in isolation and simply assume that a regulated person is part of 'the people.' " *United States v. Sitladeen*, 64 F.4th 978, 983–84 & 986–87 (8th Cir. 2023).

In *United States v. Duarte*, the *en banc* Ninth Circuit quickly dispensed with the question of whether the challenger was among "the people," relying upon *District of Columbia v. Heller* to conclude that he was undoubtedly among "the people."137 F.4th 743, 752–53 (9th Cir. 2025) (en banc) (citing 554 U.S. 570, 580 (2008)). Previous decisions of the Ninth Circuit have adopted a three-part test identical to that

First, the *Bruen* test explicitly asks whether the *conduct* at issue is covered by the plain text of the Second Amendment. *Bruen*, 597 U.S. at 24. It does not ask about the person themselves. As the Fifth Circuit explained in *Diaz*, relying upon then-Judge Barrett's writings, there are two approaches to analyzing the constitutionality of firearms regulations: "[O]ne approach 'uses history and tradition to identify the scope of the right, and the other uses that same body of evidence to identify the scope of the legislature's power to take it away.' " 116 F.4th at 466 (quoting *Kanter v. Barr*, 919 F.3d 437, 452 (7th Cir. 2019) (Barrett, J., dissenting). The Fifth Circuit further correctly observed that "*Bruen* mandates the second approach." *Id.*

Second, the analysis of whether a given class is among "the people" often devolves into a historical inquiry.[2] The Tenth Circuit's approach to Step One, discussed below, reflects this premise. But this historical inquiry fails to provide the challenger with the protections offered by *Bruen*. Under the *Bruen* framework, if the conduct falls within the protections of the Second Amendment's plain text, the statute

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described by the Tenth Circuit in *Rocky Mountain Gun Owners*, which is discussed below. *See United States v. Alaniz*, 69 F.4th at 1128.

The Eleventh Circuit's decision in *Florida Comm'r of Agric. v. Att'y Gen. of the United States* ostensibly did not explicitly adopt an approach to *Bruen* analysis that asked whether challengers were among "the people." 148 F.4th 1307, 1317–18 (11th Cir. 2025). Although it does not expressly declare it to be so, the Eleventh Circuit appears to have utilized a purely-conduct-based approach to Step One of the *Bruen* analysis. *Id.*

[2] Judge Bumatay's concurrence in *United States v. Vazquez-Ramirez* demonstrates this point; his historical analysis spans nearly ten full pages as he explains why illegal aliens are not among "the people" whose rights the Second Amendment protects. 163 F.4th 706, 712–23 (9th Cir. 2026) (Bumatay, J., concurring).

is *presumptively unconstitutional*, and the government bears the burden of proving that history and tradition support disarming the class of persons to which the challenger belongs. *Bruen*, 597 U.S. at 24.

By creating a "Step Zero" that asks whether a given class of persons is among "the people," lower courts have shifted the historical burden to those challenging the statute instead of forcing the government to carry its burden to defend a presumptively unconstitutional statute.

The Tenth Circuit provides a prime example of this "Step Zero" in action, but it conceals the true nature of the analysis by turning Step One into a three-part test with the burden borne by the challenger. In *Rocky Mountain Gun Owners v. Polis*, the Tenth Circuit explained that it interpreted Step One to require the challenger to demonstrate "that the Second Amendment's explicit text, 'as informed by history,' encompasses the conduct they seek to engage in." 121 F.4th at 113. To meet this requirement, the statute's challenger must make three showings: (1) that the challenger "is part of the people whom the Second Amendment protects," (2) "the item at issue is an arm that is in common use today for self-defense," and (3) that "the proposed course of conduct falls within the Second Amendment." *Id.* at 113–14 (internal quotation marks omitted).

Thus, in the Tenth Circuit, the challenger bears the burden to make a showing, using historical tradition, that they are among "the people," that their firearm is an "arm" that is "in common use" and that their "conduct falls within the Second Amendment." *Id.* Meanwhile, this Court's *Bruen* framework merely required a

showing that the challenger's conduct was within the plain text of the Second Amendment. *Bruen*, 597 U.S. at 24.

Whether one frames these circuits' approach as a "Step Zero" or simply a broadening of the analysis of Step One, the approach is wrong under *Bruen*: "[A]ll people have the right to keep and bear arms[;] . . . history and tradition support Congress's power to strip certain groups of that right." *Kanter*, 919 F.3d at 452 (Barrett, J., dissenting) (acknowledging in following paragraph that this approach is a better way to resolving constitutional challenges). *Bruen* fundamentally adopts this same outlook by framing Step One as solely considering conduct rather than the person, and then turning to historical tradition to determine whether Congress may limit the person's right to engage in that conduct.

This Court should grant the petition for writ of certiorari so that it may clarify whether courts may consider a person's status (and who bears the burden as to the rights of those who bear such a status) before reaching Step Two of the *Bruen* analysis.

B. The circuits' "Step Zero" approach has troubling knock-on effects. Holding that a certain class of persons is not among "the people" under the Second Amendment risks extending that conclusion to rights granted to "the people" by the First and Fourth Amendments.

In *District of Columbia v. Heller*, this Court explained that in every provision of the United States Constitution in which the term "the people" is used, "the term unambiguously refers to all members of the political community, not an unspecified subset." 554 U.S. at 580. And prior to *Heller*, this Court stated in *United States v. Verdugo-Urquidez* that "the people" is a term of art applicable to the First, Second, Fourth, Ninth, and Tenth Amendments that "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." 494 U.S. 259, 265 (1990). It stands to reason, then, that if a person is not among "the people" for the purposes of the Second Amendment, they are also not among "the people" for purposes of the First or Fourth Amendments. Multiple courts of appeals have already concluded as much. *See United States v. Escobar-Temal*, 161 F.4th 969, 972–73 (6th Cir. 2025); *Range*, 124 F.4th at 226; *Rocky Mountain Gun Owners*, 121 F.4th at 115–16.

As the Tenth Circuit correctly observed in *Duque-Ramirez*, a holding in either direction as to illegal aliens has "far-reaching consequences." 161 F.4th at 1245 (internal quotation marks omitted). Unfortunately, some circuits have planted their flags firmly in the ground on the side declaring that illegal aliens are not among "the people."

The Fourth, Fifth, and Eighth Circuits have explicitly held that illegal aliens are categorically excluded from "the people" as that term applies to the Second Amendment. *United States v. Murillo-Lopez*, 151 F.4th 584, 591 (4th Cir. 2025) (upholding pre-*Bruen* precedent excluding illegal aliens from the class of people to whom the Second Amendment grants the right to bear arms); *Medina-Cantu*, 113 F.4th at 539 & 541 (upholding pre-*Bruen* precedent stating that "the people" referenced in the Second Amendment "does not include aliens unlawfully present in the United States"); *Sitladeen*, 64 F.4th at 987 (same).

The Eighth Circuit, in *Sitladeen*, even recognized the very problem that Mr. Salazar contends is at play in cases relying upon status classifications to determine if someone is among "the people": "The concern . . . is that determining at the outset that 'the people' excludes certain individuals seems to turn[ ] the typical way of conceptualizing constitutional rights on its head, and might enable some courts to manipulate the Second Amendment's plain text to avoid ever reaching *Bruen*'s historical tradition inquiry." 64 F.4th at 987 (internal quotation marks omitted).

At the absolute bare minimum, courts cannot categorically exclude illegal aliens from the protections granted by the Second Amendment on the basis that they are not among "the people." This Court's decisions in *Verdugo-Urquidez* and *Heller* confirm that, at a minimum, "the people," as mentioned in the Second Amendment, includes those with sufficient ties to the country such that they can be considered members of the national or political communities. 554 U.S. at 580; 494 U.S. at 265.

But Mr. Salazar believes the correct answer lies a step further. Courts should not be considering whether a particular class of persons is among "the people" at all in the *Bruen* analysis. The right to bear arms is fundamentally a right to self-defense. *Heller*, 554 U.S. at 599 (concluding that the right to bear arms for self-defense was "the *central component* of the right itself" (emphasis in original)), 616 ("It was plainly the understanding in the post-Civil War Congress that the Second Amendment protected an individual right to use arms for self-defense."), & 628 ("As the quotations earlier in this opinion demonstrate, the inherent right of self-defense has been central to the Second Amendment right."). And the right to self-defense is naturally and necessarily a right belonging to all people. The appropriate inquiry under *Bruen* is whether history and tradition support the premise that Congress may validly limit the scope of the right as it applies to certain classes of people.

Mr. Salazar respectfully requests this Court grant his petition for writ of certiorari to correct this flawed approach that short-circuits the *Bruen* analysis and shifts the historical burden to challengers.

II. This Court should grant the writ of certiorari to determine whether the historical evidence properly supports disarming illegal aliens as a class based upon the perception that they lack loyalty to the sovereign. The majority of courts that have employed this rationale have relied upon historical circumstances that would unequivocably be unconstitutional if they occurred today.

The *Bruen* analysis at Step Two is not easy. It is often messy, imprecise, and reliant on subjective interpretations of historical documents that, themselves, may not always tell the full story. While the government need not present "dead ringers" for historical precursors, it must identify "a well-established and representative historical analogue," *Bruen*, 597 U.S. at 30, for the disarmament of illegal aliens. This requires reasoning by analogy. *Id.* In *Rahimi*, this Court further explained Step Two of the *Bruen* analysis: "The appropriate analysis involves considering whether the challenged regulation is consistent with the principles that underpin our regulatory tradition." *Id.* at 692. "Why and how the regulation burdens the right are central to this inquiry." *Id.* Where laws at the founding were designed to address a specific problem, that serves as "a strong indicator that contemporary laws imposing similar restrictions for similar reasons fall within a permissible category of regulations." *Id.* On the other hand, even where a law might regulate firearms for permissible reasons, "it may not be compatible with the right if it does so to an extent beyond what was done at the founding." *Id.*

When courts have reviewed the constitutionality of 18 U.S.C. § 922(g)(5)(A), they often utilize two lines of reasoning. The first relies upon the disarmament of certain discrete groups in both English and American history, often because they were perceived as lacking loyalty to the sovereign. The other takes a broader view, focusing

on the bundles of rights granted to "citizens" as opposed to "aliens," but it too focuses on the concept of loyalty to the sovereign. Often, these two lines of reasoning are blended together. This petition will address each in turn.

Bruen's historical tradition analysis has led some courts to adopt a troubling approach to analyzing the limits the Second Amendment imposes upon Congress's authority. This approach has been most common in cases challenging the constitutionality of 18 U.S.C. § 922(g)(5)(A) to conclude that illegal aliens may, as a class, be disarmed. For these cases, courts have often found that the most analogous historical limitations on the right to bear arms are limitations that, if implemented today, would be egregious violations of the Constitution.

The Seventh Circuit's analysis in *Carbajal-Flores* is one example of this, but it is not the only one.[3] There, the Seventh Circuit relied upon the historical disarmament of Catholics in England and the colonies, as well as bans on firearm possession by slaves[4] and Native Americans to justify its conclusion that those perceived as lacking loyalty to the sovereign (whether the Crown or the United States) were prohibited from possessing firearms. Reliance upon these kinds of laws is flawed in two very important ways.

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[3] Other examples include *Vazquez-Ramirez*, 163 F.4th at 709–11; *Escobar-Temal*, 161 F.4th at 978–82; *United States v. Pierret-Mercedes*, 731 F. Supp. 3d 284, 303–12 (D.P.R. 2024).

[4] Some courts have noted that even free blacks were often disarmed in the early days of the republic. *See, e.g.*, *Heller*, 554 U.S. at 611–12; *Vazquez-Ramirez*, 163 F.4th at 720 (Bumatay, J., concurring); *Ortega v. Grisham*, 148 F.4th 1134, 1153–54 (10th Cir. 2025); *United States v. Carpio-Leon*, 701 F.3d 974, 978 n.* (4th Cir. 2012).

First, as noted above, these practices would violate the Constitution if they occurred today. To the Tenth Circuit's credit, it has disavowed the explicit reliance on historical laws and practices that would be unconstitutional if employed today. In *Ortega*, the State of New Mexico invited the Tenth Circuit to justify a waiting-period requirement on the purchase of firearms with historical class-based restrictions like those imposed on freedmen, black slaves, Native Americans, and other "disfavored" groups. 148 F.4th at 1153. The Tenth Circuit repudiated reliance upon such historical laws: "Relying on these analogues would commit us to consider a law trapped in amber—amber formed in an era when blatant racism escaped constitutional scrutiny." *Id.* at 1154 (internal quotation marks omitted). It explained that "proper originalist interpretation requires a comparison between people enjoying the same sets of rights," because "[c]omparing the Second Amendment rights of a citizen today with the Second Amendment rights of a slave before emancipation and reconstruction tells us nothing." *Id.*

The second problem bears on the *Bruen* analysis itself: the "why" for the regulations. Black people, whether free or enslaved, were viewed with distrust precisely because of the United States' practice of slavery. The colonists and the founders of the early Republic knew history well, and they would have known the story of Spartacus and his slave rebellion in Rome. It is likely John Brown also knew of Spartacus when he designed his plans to raid Harper's Ferry and arm the slaves. To allow black people, even free black people, to possess firearms was to risk an armed slave rebellion.

In English history, Catholics were distrusted not only because of their perceived allegiance to the Pope above King (or Queen) and Country, but because of the power struggles between Protestant and Catholic factions that each supported their own claimants to the throne of England. *See* C. Kevin Marshall, *Why Can't Martha Stewart Have a Gun?*, 32 Harv. J. L. & Pub. Pol'y 695, 721–23 (2009) ("Upon the accession of the Protestants William and Mary to the throne, being Roman Catholic was equated with supporting James II and thus with presumptive treason. Supporters of James II and his son moved to regain the throne as late as 1745. Thus, a law contemporaneous with the Declaration generally disarmed Roman Catholics—for the better secureing their Majestyes Persons and Government." (internal quotation marks omitted)).

In American history, Catholics were viewed with suspicion because of their "superstitio[us]" beliefs that might subvert the social order. *See generally* Elaine Breslaw, "Conflicting Views in Colonial Maryland's Anglican Population: Enlightenment vs. Toleration of Catholics," 88 *Anglican and Episcopal History* 117 (2019) (describing relationship Catholics had with other colonial groups in Maryland during the eighteen century) *accessible at* https://www.jstor.org/stable/26747936. In other words, Catholics in both England and America were not merely seen as having potential loyalties to another sovereign, they were viewed as potential enemies of the state with genuinely hostile motivations with aims to subvert the social order.

The disarmament of Native Americans is almost as straightforward as the disarmament of black people. The colonists (and later the westward-pushing

American migrants) were actively displacing Native Americans from their ancestral lands and generating extreme hostility. Prior to contact with Europeans, there are estimated to have been more than five million Native Americans living in the continental United States, and that population is estimated to have dropped to less than 250,000 by 1900, leading to their "near-annihilation." Benjamin Madley, "Reexamining the American genocide Debate: Meaning, Historiography, and New Methods," 120 *The American Historical Review* 98, 98–99 (2015). It goes without saying that the colonies and the young republic would have found it vital to disarm groups that it was forcibly (and violently) displacing from their homes to ensure they could not oppose the republic's expansion or harm the American migrants seeking new lands. Native Americans were, in a very practical sense, potential enemies of the state because the risk of rebellion or armed opposition was very real.

A similar problem arises when courts rely upon the disarmament of those believed to be British loyalists following the Revolutionary War. The danger they posed was akin to that of the Catholics in England. The United States had just enacted a massive regime change. Those loyal to King George III and the British Empire would rightly be viewed as presenting a genuine threat to the fledgling nation and its grand experiment with democracy. To allow them to possess firearms would risk an insurrection. Just like the Protestants sought to prevent the Catholics from rebelling against the new claimants to the Throne, the United States had a strong interest in preventing British loyalists from sabotaging the United States from within

or providing material armed assistance should the British ever return (as they did in the War of 1812).

In each of these cases, these groups were not disarmed merely because of their perceived disloyalty. The danger they posed would not have been mere inconveniences or trifles. As a group, their being armed created an existential threat to the ruling governments and the social orders of the time. While continued perceptions of Catholics might have been misguided, they derived from a very real and justified fear that Catholics sought to displace the Protestant ruler and install a Catholic monarch. For Native Americans, they faced genocide and cultural annihilation at the hands of the colonists and migrant Americans and had every reason to violently oppose any encroachment upon their lands. Black people, whether free or enslaved, could not be armed lest the colonies and early Americans court a slave rebellion likely to be more deadly than any the Romans faced. And British loyalists opposed the very existence of the republic.

Illegal aliens pose no such threat. Their status, on its own, says nothing about their loyalties or their motives. The vast majority genuinely want to be here and to live their lives peacefully because they have more opportunities in America than they do in their home countries. Most see America the same way that roughly 12 million immigrants passing through Ellis Island[5] likely viewed America: An opportunity to

[5] ELLIS ISLAND FOUNDATION, "Ellis Island," statueofliberty.org, *accessible at* https://www.statueofliberty.org/ellis-island/overview-history/ (last accessed August 7, 2025).

start a new life, with the hope that it would be a better, safer, more comfortable life for themselves and their families. Many, like Mr. Salazar, came here as children.

Thus, when courts rely upon these historical laws to disarm illegal aliens, they deviate too far from the true historical purpose behind the laws. They do not properly analogize because they divorce these laws from their historical reality and context. They give greater deference to the fact that the laws existed than to why the laws existed. And in doing so, they invite this Nation's most repugnant historical practices and antiquated laws to guide modern constitutional jurisprudence.

As noted above, there are two lines of reasoning employed by courts. The second line of reasoning seeks to avoid the flaws mentioned above, but it suffers from its own problems. Some courts have relied upon the premise that "subjects" to the Crown (i.e., English citizens) were given a larger basket of rights than those of "aliens" whose allegiance may lie with another sovereign, and those courts have determined that these same principles flowed to the colonies and the eventual States in their new laws and constitutions. *See, e.g., Vazquez-Ramirez*, 163 F.4th at 710–711; *Duque-Ramirez*, 161 F.4th at 1247; *Carbajal-Flores*, 143 F.4th at 883–84. In essence, these cases looked to history and concluded that gun ownership was a right granted to "citizens" whose loyalty, either by birth or by oath, were owed to the sovereign in whose land they resided. Some courts, like the Seventh and Ninth Circuits, have folded this reasoning in alongside the above-discussed rationale. *See Vazquez-Ramirez*, 163 F.4th at 710–11; *Carbajal-Flores*, 143 F.4th at 883–84. Others, like the Tenth Circuit, try to separate this reasoning from the more overtly problematic

histories of disarming blacks, Native Americans, and Catholics. *See Duque-Ramirez*, 161 F.4th at 1247–49.

The problem with this alternative line of reasoning is three-fold. First, it is difficult, if not impossible, to divorce the concept of loyalty as described in *Duque-Ramirez* from the United States' historical deprivation of rights and liberties regarding key groups as discussed above. Even *Duque-Ramirez* relies upon the premise that "Americans treated the right to bear arms as a 'civic right' limited to 'those members of the polity who were deemed capable of exercising it in a virtuous manner.'" *Id.* at 1248 (quoting Saul Cornell, *"Don't Know Much About History": The Current Crisis in Second Amendment Scholarship*, 29 N. KY. L. REV. 657, 671 (2002).[6] Any discuss of a virtuous citizenry or a responsible citizenry, and the limitation of rights to those groups, necessarily implicates the United States' historical practices of limiting the rights of politically disfavored groups like those discussed above.

Second, this rationale treats the right to bear arms as a "civic" rightthat belongs to a select group of "citizens," rather than an "individual" right that belongs to "the people." This Court has already rejected the premise that the Second Amendment's right to bear arms is a "civic" right; it has held beyond any shadow of a doubt that the right to bear arms is an individual right. *Heller*, 554 U.S. at 592–95.

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[6] The law review article cited by the Tenth Circuit explains in more detail that Pennsylvania (not Americans generally) aimed to "restrictively define citizenship to those capable of displaying the requisite virtue." Saul Cornell, "*Don't Know Much About History"*, 29 N. Ky. L. Rev. at 671. That article goes on to explain the author's belief that the Second Amendment's right to bear arms was a "civic" right and not an "individual" right. *Id.* at 671–72 & 680.

Thus, the Tenth Circuit's analysis suffers from an undeniable flaw in that it misconstrues the nature of the right conferred by the Second Amendment.

And third, the reasoning disregards the plain meaning of the Constitution and the Second Amendment. The Tenth Circuit, and others following this line of reasoning, treat the right to bears arms as one that historically belongs to "citizens." And yet the Second Amendment conspicuously protects the right of "the people" to bear arms. The Constitution and its Amendments consciously distinguish between "citizens" and "the people," using those words to mean different things. Had the Founders meant to limit the Second Amendment's reach to "citizens," it would have used that word. It did not. It used a broader term. And so reliance upon historical laws that treated the right as belonging to "citizens" (or "subjects") narrows the scope of the Second Amendment in a way not intended by the Founders.

At the time of the Constitution's adoption, the Bill of Rights was viewed as a limit on federal power, but it did not limit state power. Thus, states were free to impose tighter restrictions on arms possession than the federal government could impose. Some states chose to limit the right to bear arms to citizens. Had promulgators of state laws and constitutions understood the right to bear arms, as set forth in the Second Amendment, to apply only to citizens, they could have used the same language as that employed in the Second Amendment. Instead, they used more restrictive language because the Second Amendment created a broader right; a right not limited to "citizens," but granted to the "the people."

Therefore, when the Tenth Circuit and others rely upon historical "analogues" that limited the right to bear arms to "citizens," they effectively rewrite the Second Amendment and narrow its scope.

When these laws, and those unconstitutional practices of the past, are removed from the analysis, the historical analogues justifying the disarmament of illegal aliens as a class disappear.

Therefore, Mr. Salazar respectfully requests this Court grant his petition for writ of certiorari so that it may resolve the question of whether the Nation's historical tradition supports the disarmament of illegal aliens as a class.

CONCLUSION

For the reasons stated herein, this Court should grant the Petition for Writ of Certiorari and set a schedule for merits briefing in this matter.

Respectfully submitted,

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