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## You Can Build a Wall or Deport Them, But You Can't Take Away Their Guns: An Analysis of Why Non-U.S. Citizens are "The People" Under the Second Amendment

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**YOU CAN BUILD A WALL OR DEPORT THEM, BUT YOU CAN'T TAKE  
AWAY THEIR GUNS: AN ANALYSIS OF WHY NON-U.S. CITIZENS ARE  
"THE PEOPLE" UNDER THE SECOND AMENDMENT**

Andrew Figueroa\*

The Bill of Rights is a futile authority for the alien seeking admission for the first time to these shores. But once an alien lawfully enters and resides in this country he becomes invested with the rights guaranteed by the Constitution to all people within our borders.<sup>1</sup>

—Supreme Court Justice Douglas

**INTRODUCTION**

The Constitution emphatically begins with a display of supremacy, “We the people.”<sup>2</sup> The phrase “the people” appears in several constitutional clauses and most notably, appears in five amendments within the Bill of Rights.<sup>3</sup> Who are “the people?” Does the phrase “the people” refer to a specific class of individuals or does it refer to all people within the United States? Does “the people” carry the same meaning throughout the Constitution or is the phrase defined differently in the context of the particular clause in which it is textually located? The uncertainty of the definition of “the people” was revisited in a recent circuit split regarding the Second Amendment.<sup>4</sup> The Second Amendment 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.”<sup>5</sup> This amendment is arguably the most controversial and misunderstood provision of the Bill of Rights.<sup>6</sup> With the more pressing questions of interpretations of the Second Amendment, the courts have not gotten around to extending consideration

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<sup>1</sup> Bridges v. Wixon, 326 U.S. 135, 161 (1945) (Douglas, J., for the court).

<sup>2</sup> Note, *The Meaning(s) of “The People” in the Constitution*, 126 HARV. L. REV. 1078, 1078 (2013) (quoting U.S. CONST. pmb.).

<sup>3</sup> *Id.*

<sup>4</sup> See generally United States v. Meza-Rodriguez, 798 F. 3d 664 (7th Cir. 2015).

<sup>5</sup> U.S. CONST. amend. II.

<sup>6</sup> Nelson Lund, *The Past and Future of the Individual’s Right to Arms*, 31 GA. L. REV. 1, 1 (1996); see also Sanford Levinson, *The Embarrassing Second Amendment*, 99 YALE L.J. 637, 640–41 (1989) (writing that the Second Amendment is the most ignored patch of text in the Constitution, outside the Third Amendment, and is not at the forefront of scholarly discussion).

to what class of individuals is afforded the right to bear arms.<sup>7</sup>

On August 20, 2015, the United States Court of Appeals for the Seventh Circuit held that illegal aliens<sup>8</sup> and non-U.S. citizens are afforded the protections of the Second Amendment as they are considered part of “the people.”<sup>9</sup> This decision created a circuit split as the Fourth, Fifth, and Eighth Circuits held that illegal aliens are not part of “the people” and thus, not afforded the protections of the Second Amendment.<sup>10</sup> Certainly, banning illegal aliens and non-U.S. citizens from possessing firearms seems reasonable in the current context of the many tragic shootings and the related gun debate. However, constitutional protections that are embedded in our history and traditions should be carefully analyzed before a blanket restriction is imposed on an entire class of individuals. Specifically, there must be more to the discussion of their Second Amendment claims rather than imposing an all-inclusive ban that is grounded on unspecified fear and prejudice.

Since the beginning of the United States, the interpretation of the Second Amendment has been highly controversial and deeply controverted.<sup>11</sup> However, the debate continues and after a review of Supreme Court precedent and historical traditions, it is clear that the Second Amendment’s reference to “the people” reaches beyond citizens of the United States. Although uncertainty remains, this Comment concludes that non-U.S. citizens and illegal aliens, who have established substantial connections<sup>12</sup> with the community and have accepted societal obligations,

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<sup>7</sup> Pratheepan Gulasekaram, *“The People” of the Second Amendment: Citizenship and the Right to Bear Arms*, 85 N.Y.U. L. REV. 1521, 1530–31 (2010).

<sup>8</sup> See *Arizona v. United States*, 132 S. Ct. 2492, 2495 (2012) (Federal law specifically categorizes aliens based on their registered status); see also BRYAN A. GARNER, *A DICTIONARY OF MODERN LEGAL USAGE* 899 (2d ed. 1987) (writing that the term illegal alien is not an “opprobrious epithet” because it describes an individual who entered the country in violation of immigration laws).

<sup>9</sup> See *Meza-Rodriguez*, 798 F. 3d at 672 (noting the conviction under 18 U.S.C. § 922(g)(5) was upheld because the statute passed intermediate scrutiny).

<sup>10</sup> See *United States v. Carpio-Leon*, 701 F. 3d 974 (4th Cir. 2012); *United States v. Flores*, 663 F. 3d 1022 (8th Cir. 2011); *United States v. Portillo-Munoz*, 643 F. 3d 437 (5th Cir. 2011); see also *United States v. Huitron-Guizar*, 678 F. 3d 1164 (10th Cir. 2012) (The Tenth Circuit declined to address the question, but held on other grounds that this class of individuals were prohibited from possessing firearms.).

<sup>11</sup> Allen Rostron, *Symposium: A Loaded Debate: The Continuing Battle over the Second Amendment*, 78 ALB. L. REV. 819, 828–30 (2015).

<sup>12</sup> See *United States v. Verdugo-Urquidez*, 494 U.S. 259, 265–66, 271 (1990) (The Court made references to “sufficient connections,” “substantial connections,” and “previous significant voluntary connection[s],” however, this Comment will follow the language of the Seventh Circuit’s “substantial-connections.”); see also Hon. Karen Nelson Moore, *Madison Lecture: Aliens and the Constitution*, 88 N.Y.U. L. REV. 801, 836 (2013) (noting that lower courts have used “sufficient, substantial, and significant connections interchangeably” and there is no indication that the *Verdugo-Urquidez* Court used these expressions to set out different standards).

are part of “the people” under the Second Amendment and thus, are afforded the right to keep and bear arms.

This Comment has a narrow scope as it only addresses whether non-U.S. citizens and illegal aliens are considered part of “the people” under the Second Amendment.<sup>13</sup> This Comment will not analyze the constitutionality of statutes that regulate the right to possess firearms for non-U.S. citizens and illegal aliens or the constitutional scrutiny that ought to be applied to such regulations. Also, this Comment will not attempt to address the current laws in relation to the existing gun debate. Those issues are left to others.

This Comment is broken down into four sections: (1) a brief discussion of the history of the Second Amendment, with an analysis of the scope of the *District of Columbia v. Heller* and *McDonald v. City of Chicago* decisions and the influences of these holdings on the circuit split; (2) a review of Supreme Court precedent regarding the definition of “the people” within the Bills of Rights; (3) a summary of the decisions of the courts of appeals with an emphasis on the Seventh Circuit’s opinion; (4) and an analysis of why the Seventh Circuit is constitutionally correct and to be preferred over the contrary decisions of the other circuits.<sup>14</sup>

## I. BACKGROUND

### A. HISTORY OF THE SECOND AMENDMENT

One of the most well-established and controversial American traditions is recognized in the Second Amendment, the individual right of “the people” to keep and bear arms.<sup>15</sup> Much of the Second Amendment scholarship raises conflicting views of who is afforded the right to bear arms,<sup>16</sup> and the amendment seems to have numerous faces, “each casting its gaze in a different direction.”<sup>17</sup> The historical uncertainty continues because there is inconsistency among the courts of appeals as to who are the

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<sup>13</sup> See Defendant-Appellant’s Brief and Required Short Appendix at 8, *United States v. Meza-Rodriguez*, 798 F. 3d 664 (7th Cir. 2015) (No. 14-3271), 2015 WL 636261 (writing, “The Second Amendment encompasses undocumented aliens because they are, and always have been, part of ‘the people’”) [hereinafter Defendant-Appellant’s Brief and Required Short Appendix].

<sup>14</sup> See *Huitron-Guizar*, 678 F. 3d at 1165–70 (Although upholding the gun restrictions on an illegal alien, the Tenth Circuit provided valuable insight on how to interpret the other circuit court of appeals and the *Heller* Court.).

<sup>15</sup> U.S. CONST. amend. II.

<sup>16</sup> Gulasekaram, *supra* note 7, at 1542–43.

<sup>17</sup> WILLIAM W. VAN ALSTYNE, SECOND AMENDMENT (UPDATE) ENCYCLOPEDIA OF AMERICAN CONSTITUTION 2347 (Kenneth L. Karst & Leonard W. Levy eds., 2d ed. 2000).

specific rightsholders entitled to this protection.<sup>18</sup> However, no matter how controversial the meaning of the Second Amendment is today, it was clear enough to the drafters of the United States Constitution that the amendment guaranteed “the people” the right to possess their private arms.<sup>19</sup> In fact, James Madison favored this interpretation and once assured the people that they shall not fear the new federal government because of “the advantage of being armed, which [they] possess over the people of almost every other nation.”<sup>20</sup>

The right for people to bear arms is an American tradition with deep Anglo-Saxon roots.<sup>21</sup> During the colonial period, American culture embraced the principle of private gun ownership.<sup>22</sup> Much of this tradition was brought from English values, traditions, and legal concepts.<sup>23</sup> In fact, as indicated by Sir William Blackstone in his Commentaries, “[t]he subjects of England are entitled . . . to the right of having and using arms for self-preservation and defense.”<sup>24</sup> This right was integrated in America as it was the policy of most colonies to pass laws requiring all males to possess arms and to serve in the local militia.<sup>25</sup> The term “militia,” as used in the colonial context, should take the meaning of all able-bodied men themselves.<sup>26</sup> The coextensive use of the term “militia” and all able-bodied men is due to the necessity for each man to possess a firearm in order to report for duty and achieve the security of the free state.<sup>27</sup> As tensions developed between the British Parliament and the colonies, the First Continental Congress condemned Parliament’s actions and called upon the colonists to arm themselves in defense against the British.<sup>28</sup>

After declaring independence from Great Britain and during the American Revolution, Americans turned their focus to the task of drafting state constitutions and declarations of individual rights for the new state

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<sup>18</sup> See Moore, *supra* note 12, at 801.

<sup>19</sup> DON B. KATES, SECOND AMENDMENT ENCYCLOPEDIA OF AMERICAN CONSTITUTION 2346 (Kenneth L. Karst & Leonard W. Levy eds., 2d ed. 2000).

<sup>20</sup> Don B. Kates & Alice Marie Beard, *Murder, Self-Defense, and the Right to Arms*, 45 CONN L. REV. 1685, 1695 (2013) (quoting THE FEDERALIST NO. 46, 269 (James Madison) (A.B.A. ed., 2009)).

<sup>21</sup> CONSTITUTIONAL AMENDMENTS: FROM FREEDOM OF SPEECH TO FLAG BURNING (2d ed. 2008) [hereinafter FROM FREEDOM OF SPEECH TO FLAG BURNING].

<sup>22</sup> *Id.*

<sup>23</sup> *Id.*

<sup>24</sup> WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND: A FACSIMILE OF THE FIRST EDITION OF 1765–1769 (1979).

<sup>25</sup> FROM FREEDOM OF SPEECH TO FLAG BURNING, *supra* note 21.

<sup>26</sup> Levinson, *supra* note 6, at 647.

<sup>27</sup> LAURIE DIMAURO, GUN CONTROL: RESTRICTING RIGHTS OR PROTECTING PEOPLE? INFORMATION PLUS REFERENCE SERIES 2 (2013 ed. 2013).

<sup>28</sup> FROM FREEDOM OF SPEECH TO FLAG BURNING, *supra* note 21.

governments.<sup>29</sup> Many of these state constitutions and declarations of rights explicitly ensured their people the right to keep and bear arms.<sup>30</sup> Beginning in 1776, one month prior to the signing of the Declaration of Independence, the state of Virginia pronounced in its state constitution, "A well regulated Militia, composed of the body of the people, trained to arms, is the proper, natural, and safe defence of a free State."<sup>31</sup> Additionally, Pennsylvania's Constitution guaranteed, "That the people have a right to bear arms, for the defence of the State. . . ."<sup>32</sup> Recognizing the importance of individuals bearing arms, other states followed Virginia and drafted similar clauses in their state constitutions.<sup>33</sup> Specifically, Kentucky, Massachusetts, North Carolina, Pennsylvania, and Vermont guaranteed the right to bear arms in their Bill of Rights.<sup>34</sup> However, state constitutions varied from declaring bearing arms as a "right" of "the people" versus calling it a "duty" of all able-bodied men to defend society.<sup>35</sup> In fact, Indiana, Kentucky, Missouri, Ohio, Pennsylvania, and Vermont spoke of the right as a guarantee for "defense of themselves and the State."<sup>36</sup> The emphasis on these states adopting analogues, prior to the ratification of the Bill of Rights, provides a historical narrative that the Federal Second Amendment bestowed an individual right to keep and to bear arms.<sup>37</sup>

The next step was the drafting of the Second Amendment to the Constitution, a document full of compromises and concessions.<sup>38</sup> In 1787, thirty-nine delegates, from twelve of the thirteen states, gathered to sign the newly written Constitution.<sup>39</sup> Initially, the politics of ratification was highly contested because a majority of Americans and states expressed opposition to the Constitution.<sup>40</sup> In fact, three delegates were reluctant to sign without a Bill of Rights and in particular, protested that Congress "at their pleasure may arm or disarm all or any part of the freemen of the United States."<sup>41</sup>

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<sup>29</sup> Steven J. Heyman, *Natural Rights and the Second Amendment*, 76 CHI-KENT L. REV. 237, 260 (2000).

<sup>30</sup> FROM FREEDOM OF SPEECH TO FLAG BURNING, *supra* note 21.

<sup>31</sup> *Id.*

<sup>32</sup> DIMAURO, *supra* note 27, at 3.

<sup>33</sup> FROM FREEDOM OF SPEECH TO FLAG BURNING, *supra* note 21.

<sup>34</sup> Eugene Volokh, *The Commonplace Second Amendment*, 73 N.Y.U. L. REV. 793, 810 (1998).

<sup>35</sup> FROM FREEDOM OF SPEECH TO FLAG BURNING, *supra* note 21.

<sup>36</sup> Volokh, *supra* note 34, at 812.

<sup>37</sup> *District of Columbia v. Heller*, 554 U.S. 570, 601–03 (2008).

<sup>38</sup> MICHAEL A. BELLESILES, *THE SECOND AMENDMENT IN ACTION, THE SECOND AMENDMENT IN LAW AND HISTORY* 48–71, at 51 (Carl T. Bogus ed., 2000).

<sup>39</sup> DIMAURO, *supra* note 27, at 3.

<sup>40</sup> Michael Nelson, *Constitutional Beginnings*, in *GUIDE TO THE PRESIDENCY* 45 (Michael Nelson ed., 4th ed.) [hereinafter *Constitutional Beginnings*].

<sup>41</sup> DIMAURO, *supra* note 27, at 3.

After Delaware became the first state to ratify the Constitution in December 1787, Pennsylvania followed five days later, but expressed considerable doubts at the state's ratifying convention because of the absence of a Bill of Rights.<sup>42</sup> After similar complaints followed from other states, James Madison and the Federalists promised to consider amendments to the Constitution during the First Congress.<sup>43</sup> Ultimately, in reliance on the promise, several states ratified and New Hampshire became the ninth state to ratify, which meant the United States Constitution was enacted.<sup>44</sup> James Madison, in a remarkable political action at the time, kept his word and presented the drafted Bill of Rights to the First Congress.<sup>45</sup>

James Madison's drafting of the Second Amendment was particularly influenced by the ratifying state conventions that offered similar suggestions about the right to bear arms.<sup>46</sup> Specifically, calling upon the states to ratify the Constitution, New York offered fifty amendments and included the following, "That the People have a right to keep and bear Arms; that a well regulated Militia, including the body of the People capable of bearing Arms, is the proper, natural and safe defence of a free State." Additionally, Maryland and Virginia consolidated amendments and emphasized, "That the people have a right to keep and bear arms. . . ."<sup>47</sup> With these influences, the Second Amendment assimilated the following basic values: "[T]he right of the individual to possess arms, the fear of a professional army, the dependence on militias regulated by the individual states, and the control of the military by civilians."<sup>48</sup>

The inclusion of the Second Amendment in the Bill of Rights was a result of an ongoing debate over the relationship between military balance and the newly established system.<sup>49</sup> With this debate over the power of militias and suggestions to reform the structure of the Constitution, several states proposed provisions to protect the necessary right to bear arms proscribed in the Second Amendment.<sup>50</sup> Ultimately, the First Congress concluded the debate by declaring the vital importance of the individual-right amendments and proposed the Second Amendment.<sup>51</sup> The importance

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42 *Constitutional Beginnings*, *supra* note 40, at 45.

43 *Id.*

44 *Id.* at 46.

45 BELLESILES, *supra* note 38, at 51.

46 DIMAURO, *supra* note 27, at 3.

47 *Id.*

48 *Id.*

49 Thiago Luiz Blundi Sturzenegger, *The Second Amendment's Fixed Meaning and Multiple Purposes*, 37 S. ILL. U. L.J. 337, 384 (2013).

50 *Id.*

51 *Id.*

of the Second Amendment in American constitutionalism is irrefutable proof that the right to bear arms was "the true palladium of liberty."<sup>52</sup>

### B. *HELLER*, *MCDONALD*, AND THE SECOND AMENDMENT

An extensive and growing debate has focused on the operative clause of the Second Amendment. Scholars and courts have entirely overlooked thorny questions unanswered by the Supreme Court and the Constitution.<sup>53</sup> The unambiguous language of the operative clause of the Second Amendment, which states with unmistakable clarity, "the right of the people to keep and bear Arms, shall not be infringed."<sup>54</sup>

The Second Amendment is a quintessential example of unsettled constitutional law.<sup>55</sup> After nearly two centuries of being largely ignored by the Supreme Court of the United States,<sup>56</sup> the Justices addressed the substantive meaning of the Second Amendment in *District of Columbia v. Heller*.<sup>57</sup> Although *Heller* factually dealt with the District of Columbia's severe restrictions on the possession of handguns,<sup>58</sup> the Court was called to interpret the meaning of the right to bear arms.<sup>59</sup> This case originated when *Heller* challenged the District of Columbia's statute that made it unlawful to carry unregistered handguns and required lawfully owned firearms to be kept at home unloaded and disassembled or bound by a trigger safety mechanism.<sup>60</sup> The precise issue before the Court was whether to interpret the Second Amendment as affording a private citizen the individual right to possess a firearm or only affording individuals the right as a member of the militia or its equivalent.<sup>61</sup> In a landmark 5–4 decision, the Court struck down the District of Columbia's firearm ban and emphasized, "[t]here seems to us no doubt, on the basis of both text and history, that the Second

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<sup>52</sup> Saul Cornell, *St. George Tucker and the Second Amendment: Original Understandings and Modern Misunderstandings*, 47 WM. & MARY L. REV. 1123, 1123 (2006).

<sup>53</sup> Lund, *supra* note 6, at 1–2.

<sup>54</sup> Sturzenegger, *supra* note 49, at 384.

<sup>55</sup> *But see* CARL T. BOGUS, THE HISTORY AND POLITICS OF SECOND AMENDMENT SCHOLARSHIP: A PRIMER, THE SECOND AMENDMENT IN LAW AND HISTORY I (Carl T. Bogus ed., 2000).

<sup>56</sup> Lund, *supra* note 6, at 1.

<sup>57</sup> Lawrence B. Solum, *District of Columbia v. Heller and Originalism*, 103 NW. U. L. REV. 923, 925 (2009).

<sup>58</sup> John Sousanis, *Second Amendment*, in GALE ENCYCLOPEDIA OF AMERICAN LAW 55 (Donna Batten ed., 3d ed. 2010).

<sup>59</sup> Solum, *supra* note 57, at 925.

<sup>60</sup> *District of Columbia v. Heller*, 554 U.S. 570, 574–76 (2008).

<sup>61</sup> *Id.* at 577.



Amendment conferred an individual right to keep and bear arms.”<sup>62</sup>

The Court’s reasoning focused on a crucial distinction of the textual components of the amendment<sup>63</sup> and noted that “[t]he Second Amendment is naturally divided into two parts: its prefatory clause and its operative clause.”<sup>64</sup> The emphasis of the operative clause is important because “[t]he first salient feature of the operative clause is that it codifies a ‘right of the people.’”<sup>65</sup> Emphasizing the importance of a historical interpretation of the text, Justice Scalia, for the court in *Heller*, indicated that the Court is guided by the principle that “[t]he Constitution was written to be understood by the voters; its words and phrases were used in their normal and ordinary meaning as distinguished from their technical meaning.”<sup>66</sup> Justice Scalia explained that the historical backdrop clearly substantiates the interpretation of the operative clause when defining the meaning of the Second Amendment.<sup>67</sup> The *Heller* decision was a narrow one and did not undertake an “exhaustive historical analysis . . . of the full scope of the Second Amendment.”<sup>68</sup> Specifically, Justice Scalia recognized that earlier Supreme Court decisions failed to address the specific meaning of the Second Amendment and emphasized that the *Heller* ruling stands only to establish the amendment as a protection of an individual right.

Coming less than two years after *Heller*,<sup>69</sup> the Supreme Court revisited the Second Amendment in *McDonald v. City of Chicago*.<sup>70</sup> In *McDonald*, five justices ruled the Second Amendment right to bear arms, as interpreted in *Heller*, is incorporated into the Fourteenth Amendment and now extends

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<sup>62</sup> *Id.*

<sup>63</sup> Kristen L. DeBoise, *Constitutional Law—the Second Amendment—D.C. Statute Prohibiting the Possession of A Useable Handgun in the Home and Restricting Handgun Possession Is Unconstitutional*, 39 CUMB. L. REV. 323, 327 (2009).

<sup>64</sup> *Heller*, 554 U.S. at 575.

<sup>65</sup> *Id.* at 579; *see also* *Marbury v. Madison*, 5 U.S. 137, 174 (1803) (writing, “It cannot be presumed that any clause in the constitution is intended to be without effect”).

<sup>66</sup> *District of Columbia v. Heller*, 554 U.S. 570, 576 (2008) (quoting *United States v. Sprague*, 282 U.S. 716, 731 (1931)); *see also* *Solum*, *supra* note 57, at 924 (writing, “the opinions in *Heller* represent the most important and extensive debate on the role of original meaning in constitutional interpretation among the members of the contemporary Supreme Court”).

<sup>67</sup> Andrew R. Gould, *The Hidden Second Amendment Framework Within* *District of Columbia v. Heller*, 62 VAND. L. REV. 1535, 1545 (2009).

<sup>68</sup> JOHN E. NOWAK & RONALD D. ROTUNDA, *CONSTITUTIONAL LAW* § 10.2(b) (8th ed. 2010) (quoting *Heller*, 554 U.S. at 626).

<sup>69</sup> Patrick J. Charles, “*Arms for Their Defence*”? *An Historical, Legal, and Textual Analysis of the English Right to Have Arms and Whether the Second Amendment Should Be Incorporated in McDonald v. City of Chicago*, 57 CLEV. ST. L. REV. 351, 352 (2009).

<sup>70</sup> Olesya A. Sahnikova, “*The People*” of *Heller* and Their Politics: *Whether Illegal Aliens Should Have the Right to Bear Arms After United States v. Portillo-Munoz*, 103 J. CRIM. L. & CRIMINOLOGY 625, 642–43 (2013); *see generally* *McDonald v. City of Chicago*, 561 U.S. 742 (2010).

to state and local government actions.<sup>71</sup> However, four justices ruled that the amendment was incorporated into the Fourteenth Amendment’s Due Process Clause, while Justice Thomas believed that the Second Amendment should be incorporated into the Fourteenth Amendment’s Privileges or Immunities Clause.<sup>72</sup> The plurality’s due process incorporation profoundly affects the ability to limit the right to bear arms to only citizens.<sup>73</sup> Specifically, the incorporative mythology is significant because the Due Process Clause speaks to “persons,”<sup>74</sup> which is broader than the Privileges or Immunities Clause<sup>75</sup> because it includes both citizens and non-citizens within the United States.<sup>76</sup> In fact, the Due Process Clause’s “persons” is “presumably the broadest formulation of those to whom constitutional rights inure.”<sup>77</sup> However, *McDonald* “is a fractured opinion,”<sup>78</sup> and the decision did not make a difference in the court of appeals’ analysis on alien gun rights.<sup>79</sup> Neither *Heller* nor *McDonald* mentioned illegal aliens or non-U.S. citizens, but the *Heller* decision ultimately had the more significant impact on how the court of appeals confronted the issue of alien gun rights.<sup>80</sup>

## II. THE SUPREME COURT AND “THE PEOPLE” OF THE FIRST, SECOND, AND FOURTH AMENDMENTS

Given the *Heller* and *McDonald* decisions, the Second Amendment’s operative clause still had one significant undefined phrase, “the people.”<sup>81</sup> The Court has only once previously attempted to scrutinize the phrase “the people” and considered it in the context of aliens (illegal or not) within the Fourth Amendment.<sup>82</sup> In *United States v. Verdugo-Urquidez*, the Court was confronted with this uncertain phrase and ultimately resisted to constrict “the people” to a citizen-only class.<sup>83</sup>

<sup>71</sup> 2 RONALD D. ROTUNDA & JOHN S. NOWAK, TREATISE ON CONST. L. § 14.2(a) (2016).

<sup>72</sup> *Id.*

<sup>73</sup> Gulasekaram, *supra* note 7, at 1539.

<sup>74</sup> *Id.*

<sup>75</sup> See U.S. CONST. amend. XIV (“No State shall make or enforce any law which shall abridge the privileges or immunities of *citizens* of the United States.”) (emphasis added).

<sup>76</sup> ROTUNDA & NOWAK, *supra* note 71, at § 14.2(a).

<sup>77</sup> Gulasekaram, *supra* note 7, at 1540.

<sup>78</sup> *Id.*

<sup>79</sup> See Salmikova, *supra* note 70, at 656–57.

<sup>80</sup> *Id.* at 643.

<sup>81</sup> Moore, *supra* note 12, at 842.

<sup>82</sup> *United States v. Huitron-Guizar*, 678 F. 3d 1164, 1167 (10th Cir. 2012).

<sup>83</sup> Gulasekaram, *supra* note 7, at 1534.

*Verdugo-Urquidez* is a crucial decision as the Supreme Court's holding affected the interpretation of the First and Fourth Amendments and subsequently, the Second Amendment.<sup>84</sup> In this case, Mr. Verdugo-Urquidez, a Mexican citizen and resident, was suspected of being a leader of a violent and large organization that smuggled narcotics into the United States.<sup>85</sup> As a result of the narcotics related activities, local Mexican police officers arrested Mr. Verdugo-Urquidez in Mexico and transported him to a California border patrol station.<sup>86</sup> Following his arrest, DEA agents arranged for the searches of Mr. Verdugo-Urquidez's Mexican residences.<sup>87</sup> Subsequently, American and Mexican authorities searched the homes without a warrant and obtained incriminating evidence.<sup>88</sup> Mr. Verdugo-Urquidez moved to suppress the evidence on the basis that the warrantless search was a violation of his Fourth Amendment rights.<sup>89</sup>

The question before the Court was whether the Fourth Amendment protections against unreasonable searches and seizures extends to nonresident aliens.<sup>90</sup> The Court started its analysis on the text of the Fourth Amendment and highlighted that the amendment "extends its reach only to 'the people.'"<sup>91</sup> Despite arguments that the framers used the phrase "the people" to "simply . . . avoid [an] awkward rhetorical redundancy,"<sup>92</sup> the Court correctly emphasized that "the people" is a term of art that is particularly employed in select parts of the Constitution.<sup>93</sup> This deliberate use of "the people" contrasts with the phrases "persons" and "citizens" used in other clauses of the Constitution.<sup>94</sup> Ultimately, the Court held, "[T]he text of the Fourth Amendment, its history, and our cases discussing the application of the Constitution to aliens and extraterritorially require rejection of [Mr. Verdugo-Urquidez's] claim."<sup>95</sup> However, the Court did

<sup>84</sup> *The Meaning(s) of "The People" in the Constitution*, *supra* note 2, at 1081.

<sup>85</sup> *United States v. Verdugo-Urquidez*, 494 U.S. 259, 262 (1990)

<sup>86</sup> *Id.*

<sup>87</sup> *Id.*

<sup>88</sup> *Id.*

<sup>89</sup> *Id.* at 263.

<sup>90</sup> *Id.* at 261.

<sup>91</sup> *United States v. Verdugo-Urquidez*, 494 U.S. 259, 265 (1990).

<sup>92</sup> Brief for Amici Curiae American Civil Liberties Union, ACLU of Southern California, ACLU of San Diego and Imperial Counties, and Center for Constitutional Rights in Support of Respondent at 12, n.4, *United States v. Verdugo-Urquidez*, 494 U.S. 259 (1990) (No. 88-1353), 1989 WL 1127209.

<sup>93</sup> *Verdugo-Urquidez*, 494 U.S. at 265-66.

<sup>94</sup> *Id.*; see Gulasekaram, *supra* note 7, at 1532-33 (writing, "The Constitution uses the words 'citizens,' 'persons,' and 'people,' and does so, presumably, for distinct, although not precisely defined purposes"); see also Moore, *supra* note 12, at 807 (writing, "the Bill of Rights makes no mention of citizens; instead, it focuses on persons (and specific categories of persons) and the people").

<sup>95</sup> *Verdugo-Urquidez*, 494 U.S. at 274.

not make this determination solely based on the fact that Mr. Verdugo-Urquidez was a nonresident alien.<sup>96</sup> Instead, the Court employed a sufficient connections<sup>97</sup> test to make the determination that might place an illegal alien among "the people" of the United States.<sup>98</sup> Chief Justice Rehnquist, writing for the court, concluded:

[The text of the Constitution] suggests 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 connection with this country to be considered part of that community.<sup>99</sup>

Although the Court did not reach a definitive holding as to who qualified as part of "the people,"<sup>100</sup> Chief Justice Rehnquist's opinion clearly states that "aliens receive constitutional protections when they have come within the territory of the United States and developed substantial connections with this country."<sup>101</sup> Thus, to determine if illegal aliens are entitled to constitutional protections, courts must analyze whether the individual voluntarily entered this country and has accepted some societal obligations.<sup>102</sup>

In concurring and dissenting opinions, the Supreme Court Justices reiterated that illegal aliens should not be categorically barred from the protections of the Bill of Rights.<sup>103</sup> Justice Stevens, writing a concurring opinion, recognized that aliens, who are lawfully present in the United States, are entitled to the protections of the Bill of Rights because these individuals are among "the people."<sup>104</sup> Additionally, while dissenting with the Court's decision, Justice Brennan wrote, "Fundamental fairness and the ideals underlying our Bill of Rights compel the conclusion that when we impose 'societal obligations,' . . . we in turn are obliged to respect certain

<sup>96</sup> *Id.*

<sup>97</sup> *United States v. Verdugo-Urquidez*, 494 U.S. 259, 273 (1990) (noting that the court used the term sufficient connections coextensively with substantial connections).

<sup>98</sup> *Id.* at 273.

<sup>99</sup> *Id.* at 265.

<sup>100</sup> Defendant-Appellant's Brief and Required Short Appendix, *supra* note 13, at 8.

<sup>101</sup> *United States v. Verdugo-Urquidez*, 494 U.S. 259, 271 (1990).

<sup>102</sup> *Id.* at 260; *see* Defendant-Appellant's Brief and Required Short Appendix, *supra* note 13, at 14–15 (citing to *Martinez-Aguero v. Gonzalez*, 459 F. 3d 618, 625 (5th Cir. 2006) (applying the *Verdugo-Urquidez* test)); *United States v. Portillo-Munoz*, 643 F. 3d 437, 442–43 (5th Cir. 2011) (Dennis, J., concurring in part, dissenting in part) (applying the *Verdugo-Urquidez* test).

<sup>103</sup> *Verdugo-Urquidez*, 494 U.S. at 259–60.

<sup>104</sup> *Id.* at 279.

correlative rights.”<sup>105</sup> Justice Brennan’s notion of mutuality is essential to his point and ultimately concluded, “When we tell the world that we expect all people . . . to abide by our laws, we cannot in the same breath tell the world that our law enforcement officers need not do the same . . . we cannot expect others to respect our laws until we respect our Constitution.”<sup>106</sup> The touchstone of this case was not the question of whether the individual was a citizen, but the specific inquiry of the extent of one’s connections with the United States.<sup>107</sup>

Although *Verdugo-Urquidez* interpreted “the people” within the Fourth Amendment, the case is important to understanding the Seventh Circuit’s decision and the opposing decisions of the Fourth, Fifth, and Eighth Circuits.<sup>108</sup> Specifically, emphasized by the *Verdugo-Urquidez* Court, the text of the Constitution suggests that the phrase “the people” used in the First, Second, and Fourth Amendments should carry the same meaning because of the similarity of the worded amendments.<sup>109</sup> The Supreme Court declared that it is widely understood that the First, Second and Fourth Amendments codify a pre-existing right of “the people.”<sup>110</sup> Ratified at the same time, each of these amendments contains the phrase “the people” within its text.<sup>111</sup> Specifically, each of the amendments provides as follows: First Amendment: “[c]ongress shall make no law . . . abridging . . . the right of *the people* peaceably to assemble, and to petition the government for a redress of grievances;”<sup>112</sup> Second Amendment: “[t]he right of *the people* to keep and bear Arms shall not be infringed;”<sup>113</sup> Fourth Amendment: “[t]he right of *the people* to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated. . . .”<sup>114</sup> Realizing the textual analysis of “the people” is the same

<sup>105</sup> *Id.* at 284.

<sup>106</sup> *Id.* at 297 (Brennan, J., dissenting).

<sup>107</sup> *The Meaning(s) of “The People” in the Constitution*, *supra* note 2, at 1078.

<sup>108</sup> Gulasekaram, *supra* note 7, at 1536.

<sup>109</sup> Matthew Blair, *Constitutional Cheap Shots: Targeting Undocumented Residents with the Second Amendment*, 9 SETON HALL CIRCUIT REV. 159, 177 (2012).

<sup>110</sup> District of Columbia v. Heller, 554 U.S. 570, 592 (2008) (noting that the First, Second, and Fourth Amendments protects rights that predated the Bill of Rights).

<sup>111</sup> United States v. Meza-Rodriguez, 798 F. 3d 664, 670 (7th Cir. 2015); *see also* United States v. Emerson, 270 F. 3d 203, 227–28 (5th Cir. 2001) (noting, “[T]he people’ have precisely the same meaning within the Second Amendment as without. And, as used throughout the Constitution.”); Florida Dep’t of Revenue v. Piccadilly Cafeterias, Inc., 554 U.S. 33, 39 (2008) (emphasizing that “identical words used in different parts of the same act are intended to have the same meaning”).

<sup>112</sup> Defendant-Appellant’s Brief and Required Short Appendix, *supra* note 13, at 9 (quoting the U.S. CONST. amend. I).

<sup>113</sup> *Id.* (quoting the U.S. CONST. amend. II).

<sup>114</sup> *Id.* (quoting the U.S. CONST. amend. IV).

throughout each of the amendments, the *Heller* Court could not have possibly intended to reinterpret the meaning of “the people” and remove non-U.S. citizens and illegal aliens from the protections of the Bill of Rights.<sup>115</sup> This interpretation would result in far-reaching constitutional implications of already established constitutional rights that are afforded to this class of individuals.

The *Verdugo-Urquidez* decision justifies why the *Heller* Court’s holding should only be regarded as deciding the individual right versus the collective right question.<sup>116</sup> First, Justice Scalia, the author of the *Heller* decision, joined the majority opinion in *Verdugo-Urquidez* and must have been clearly aware that the interpretation of “the people” had left open the possibility that the Second Amendment would extend beyond the citizenry.<sup>117</sup> This justifies the main argument of this Comment, the *Heller* Court did not definitively attempt to clarify the rightsholders of the Second Amendment. Second, Justice Scalia’s numerous references to citizens and law-abiding members in *Heller* must not be held to formulate a new interpretation of “the people.”<sup>118</sup> In fact, this new formulation would explicitly contradict *Verdugo-Urquidez*, the same decision the *Heller* Court cites to in its decision.<sup>119</sup> Specifically, in citing to *Verdugo-Urquidez*, the *Heller* Court adopted that “[‘the people’ is] a term of art employed in select parts of the Constitution . . . [and its uses] suggest that ‘the people’ protected by the Fourth Amendment, and by the First and Second Amendments” refers to a class of persons who have developed sufficient connections with this country.<sup>120</sup> Justice Scalia’s formulation of “the people” in *Heller* clearly contradicts *Verdugo-Urquidez*, but also purportedly affirms its definition and the sufficient connections test.<sup>121</sup> Ultimately, courts must recognize that the phrase “the people” is a concept explicitly found in the First, Second, and Fourth Amendments, with the framers deliberately employing the limiting terminology of “citizen” in other distinct parts of the Constitution.<sup>122</sup>

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<sup>115</sup> Blair, *supra* note 109, at 176.

<sup>116</sup> Gulasekaram, *supra* note 7, at 1536.

<sup>117</sup> *Id.*

<sup>118</sup> *Id.*

<sup>119</sup> *Id.*

<sup>120</sup> *District of Columbia v. Heller*, 554 U.S. 570, 580 (2008) (quoting *United States v. Verdugo-Urquidez*, 494 U.S. 259, 265 (1990)).

<sup>121</sup> Gulasekaram, *supra* note 7, at 1536.

<sup>122</sup> *Id.* at 1536–37.

### III. THE CIRCUIT SPLIT

The Supreme Court has consistently found that non-U.S. citizens and illegal aliens are entitled to constitutional rights.<sup>123</sup> Although the Seventh Circuit's decision is contrary to four other circuits, the decision is constitutionally correct as non-U.S. citizens and illegal aliens are part of "the people" under the Second Amendment.<sup>124</sup> The decisions opposed to the Seventh Circuit are based on flawed reasoning. Specifically, the courts misconstrued the meaning of "the people" by misinterpreting Supreme Court precedent, the Bill of Rights, and historical traditions.

With a constitutional right at stake in their decisions, the Fourth, Fifth, and Eighth Circuits incorrectly interpreted that illegal aliens are not part of "the people" and thus, not afforded the protections of the Second Amendment. Specifically, the Fourth, Fifth, and Eighth Circuits expanded the scope of *Heller* by focusing on Justice Scalia's amorphous nouns and dicta used when discussing the people's individual right to bear arms.<sup>125</sup> Justice Scalia makes references in *Heller* to "all members of the political community," "all Americans," "citizens," "Americans," and "law-abiding citizens;" however, the opinion is incorrectly interpreted to suggest that Justice Scalia was reformulating and defining "the people" protected by the Second Amendment.<sup>126</sup> In fact, the *Heller* decision did not purport to define the term "the people;" instead, the Court focused on one specific question: whether the right to bear arms is an individual right to self-defense or a collective right connected with the militia or its equivalent.<sup>127</sup> Specifically, Justice Scalia emphasized that *Heller* was the first "in-depth

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<sup>123</sup> See Brief of Appellant at 6, *United States v. Flores*, 663 F. 3d 1022 (8th Cir. 2011) (No. 11-1550), 2011 WL 2310104 (noting these precedent decisions and holdings, *Plyler v. Doe*, 457 U.S. 202, 211–12 (1982) (the Equal Protection Clause extends to undocumented aliens) [hereinafter Brief of Appellant]; *Kwong Hai Chew v. Colding*, 344 U.S. 590, 596 (1953) (the Fifth Amendment "person" extends to resident aliens); *Bridges v. Wixon*, 326 U.S. 135, 148 (1945) (First Amendment extends protection to resident aliens); *Wong Wing v. United States*, 163 U.S. 228, 238 (1896) (Fifth and Sixth Amendment protections extend to resident aliens); *Yick Wo v. Hopkins*, 118 U.S. 356, 369 (1896) (the Fourteenth Amendment "persons" extends to resident aliens)).

<sup>124</sup> See generally *United States v. Meza-Rodriguez*, 798 F. 3d 664, 664 (7th Cir. 2015).

<sup>125</sup> *Heller*, 554 U.S. at 645 (Breyer, J., dissenting) (noting that the *Heller* Court overlooked the significance of how the Framers use "the phrase" in different contexts within constitutional provisions).

<sup>126</sup> See *id.* at 625 (Scalia, J., for the Court); see also Blair, *supra* note 109, at 168 (noting that Justice Scalia's opinions "reveal a pattern of similar rhetoric, in which 'citizen' does not denote anything other than a simple inhabitant of the United States").

<sup>127</sup> See *Friedman v. City of Highland Park*, 784 F. 3d 406, 410 (7th Cir. 2015) (noting that "*Heller* does not purport to define the full scope of the Second Amendment."); *The Meaning(s) of "The People" in the Constitution*, *supra* note 2, at 1087 (noting that the *Heller* Court expressly declined to address many Second Amendment uncertainties and the decision should not be identified as purporting to clarify the entire field).

examination of the Second Amendment” and therefore, “one should not expect it to clarify the entire field.”<sup>128</sup>

At the heart of these Second Amendment cases<sup>129</sup> is an issue that is broader than the mere possession of a firearm.<sup>130</sup> The issue is whether illegal aliens and non-U.S. citizens are afforded the right to bear arms and the right to defend themselves in their homes.<sup>131</sup> Ultimately, Supreme Court precedent and historical traditions established that the Second Amendment is a pre-existing right that is extended to all people, including illegal aliens and non-U.S. citizens, who have established substantial connections with the community and accepted some societal obligations.<sup>132</sup>

### A. UNITED STATES V. PORTILLO-MUNOZ - (5TH CIR. 2011)

The Fifth Circuit was the first circuit to address the question of whether unauthorized aliens are considered part of “the people” under the Second Amendment.<sup>133</sup> On July 10, 2010, Mr. Armando Portillo-Munoz, a Mexican native, who resided in the United States for one-year and six months, was arrested for possessing a .22 caliber handgun in Texas.<sup>134</sup> On the day of the arrest, Mr. Portillo-Munoz was working on a dairy farm when police responded to a call regarding an individual “spinning around” on a motorcycle with a gun in their waistband.<sup>135</sup> As police approached, Mr. Portillo-Munoz acknowledged using the firearm to protect the ranch’s chickens from coyotes and admitted to being illegally present in the United States.<sup>136</sup> Subsequently, Mr. Portillo-Munoz was indicted and convicted of possessing a firearm.<sup>137</sup> Prior to this indictment, there were no reports that Mr. Portillo-Munoz had a prior criminal history, arrests, or encounters with immigration officials and law enforcement.<sup>138</sup>

Mr. Portillo-Munoz challenged his conviction by arguing that the statute violated the United States Constitution because he was afforded the

<sup>128</sup> District of Columbia v. Heller, 554 U.S. 570, 635 (2008).

<sup>129</sup> Each of the defendants in these Second Amendment cases were indicted under 18 U.S.C. § 922(g)(5)(A), which made it unlawful for unauthorized aliens to possess firearms or ammunition.

<sup>130</sup> Defendant-Appellant’s Reply Brief at 1, United States v. Meza-Rodriguez, 798 F. 3d 664 (7th Cir. 2015) (No. 14-3271), 2015 WL 3383302.

<sup>131</sup> *Id.*

<sup>132</sup> *Id.*

<sup>133</sup> United States v. Portillo-Munoz, 643 F. 3d 437, 439 (5th Cir. 2011).

<sup>134</sup> *Id.* at 438.

<sup>135</sup> *Id.*

<sup>136</sup> *Id.*

<sup>137</sup> *Id.*

<sup>138</sup> *Portillo-Munoz*, 643 F. 3d at 438.



right to bear arms under the Second Amendment.<sup>139</sup> Relying on the decision in *Heller*, the Fifth Circuit affirmed the conviction by emphasizing that the “language in *Heller* invalidates Portillo’s attempt to extend the protections of the Second Amendment to illegal aliens.”<sup>140</sup> The court focused its analysis on Justice Scalia’s numerous references in *Heller* of “law-abiding, responsible citizens” and “members of a political community” and concluded that “aliens who enter or remain in this country illegally and without authorization are not Americans as that word is commonly understood.”<sup>141</sup> Despite the *Heller* Court specifically stating that its decision was not purporting to “clarify the entire field,”<sup>142</sup> the Fifth Circuit held that *Heller*, in fact, did formulate the meaning of “the people” within the Second Amendment.<sup>143</sup>

In contrast, Mr. Portillo-Munoz argued, relying on the Supreme Court’s decision in *Verdugo-Urquidez*, that he had established sufficient connections with the United States to be considered part of “the people” under the Second Amendment.<sup>144</sup> Addressing Mr. Portillo-Munoz’s argument, the Fifth Circuit acknowledged that Supreme Court precedent has emphasized that the same analysis should be applied and followed to define the meaning of “the people” in the context of the Fourth Amendment, to the Second Amendment.<sup>145</sup> However, the Fifth Circuit, incorrectly and misguidedly, failed to analogize the Second and Fourth Amendment and concluded, “[W]e do not find that the use of ‘the people’ in both the Second and the Fourth Amendment mandates a holding that the two amendments cover exactly the same groups of people.”<sup>146</sup> The court relied on the fact that the purposes of the Second and Fourth Amendment are different as the “Second Amendment grants an affirmative right to keep and bear arms, while the Fourth Amendment is at its core a protective right against abuses by the government.”<sup>147</sup> Based on a broad reading of the *Heller* decision, as well as the perceived distinction of the Second and Fourth Amendments,<sup>148</sup> the Fifth Circuit refused to apply Supreme Court precedent and held that “the phrase ‘the people’ in the Second Amendment

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<sup>139</sup> Appellant’s Initial Brief at 10, *United States v. Portillo-Munoz*, 643 F. 3d 437 (5th Cir. 2011) (No. 11-10086), 2011 WL 2115675.

<sup>140</sup> *United States v. Portillo-Munoz*, 643 F. 3d 437, 440 (5th Cir. 2011).

<sup>141</sup> *Id.*

<sup>142</sup> *District of Columbia v. Heller*, 554 U.S. 570, 635 (2008).

<sup>143</sup> *Portillo-Munoz*, 643 F. 3d at 440.

<sup>144</sup> *Id.*

<sup>145</sup> *Id.*

<sup>146</sup> *United States v. Portillo-Munoz*, 643 F. 3d 437, 440 (5th Cir. 2011)

<sup>147</sup> *Id.* at 441.

<sup>148</sup> Blair, *supra* note 109, at 175–76.

of the Constitution does not include aliens illegally in the United States.”<sup>149</sup>

Disagreeing with the majority’s dismissal of Mr. Portillo-Munoz’s Second Amendment claim, Circuit Judge Dennis realized that the Fifth Circuit’s decision would have far-reaching constitutional consequences for illegal aliens.<sup>150</sup> Specifically, the dissent emphasized that “[t]he majority’s reasoning renders [illegal aliens] vulnerable—to governmental intrusions on their homes and persons, as well as interference with their rights to assemble and petition the government for redress of grievances—with no recourse.”<sup>151</sup> One of the most powerful arguments for the dissent is the fact that the Fifth Circuit’s reasoning and conclusion is incongruous and wholly unsupported by the Supreme Court’s and Fifth Circuit’s precedent, which may lead to the elimination of already established constitutional protections afforded to illegal aliens and non-U.S. citizens.<sup>152</sup>

### B. UNITED STATES V. FLORES - (8TH CIR. 2011)

The next court to address this Second Amendment question was the Eighth Circuit. On May 13, 2010, Joaquin Flores was arrested after an executed search warrant discovered a .22 caliber Intertech model, Tek 22.<sup>153</sup> Mr. Flores resided in the United States since his teenage years, was involved in a relationship with an American citizen, and had two U.S. citizen children.<sup>154</sup> While Mr. Flores had been deported on numerous occasions, he maintained a home in Minnesota, held close ties with his immediate family in the United States, and earned gainful employment for the benefit of his family.<sup>155</sup> The Eighth Circuit dismissed the case without independently addressing Mr. Flores’ Second Amendment claim.<sup>156</sup> The

<sup>149</sup> *Portillo-Munoz*, 643 F. 3d at 442.

<sup>150</sup> *Id.* at 448 (Dennis, J., concurring in part, dissenting in part).

<sup>151</sup> *Id.* at 444–45.

<sup>152</sup> *United States v. Portillo-Munoz*, 643 F. 3d 437, 445 (5th Cir. 2011); *see* *District of Columbia v. Heller*, 554 U.S. 570, 580 (2008) (quoting *United States v. Verdugo-Urquidez*, 494 U.S. 259, 265 (1990)) (specifically explaining that “‘the people’ seems to have been a term of art employed in select parts of the Constitution,” and that the phrase refers to those who are “protected by the Fourth Amendment, and by the First and Second Amendments”); *see also* *Emerson*, 270 F. 3d at 227–28 (writing, “There is no evidence in the text of the Second Amendment, or any other part of the Constitution, that the words ‘the people’ have a different connotation within the Second Amendment than when employed elsewhere in the Constitution. In fact, the text of the Constitution, as a whole, strongly suggests that the words ‘the people’ have precisely the same meaning within the Second Amendment as without.”).

<sup>153</sup> Brief of Appellant, *supra* note 123, at 1.

<sup>154</sup> *Id.* at 8.

<sup>155</sup> *Id.* at 8–9.

<sup>156</sup> *United States v. Flores*, 663 F. 3d 1022, 1023 (8th Cir. 2011).

court's holding and reasoning cannot be discussed in detail as the court failed to address the merits of Mr. Flores' Second Amendment claim. Specifically, in a *per curiam* decision, the court simply "[a]gree[d] with the Fifth Circuit that the protections of the Second Amendment do not extend to aliens illegally present in this country."<sup>157</sup> The merits of Mr. Flores' claim warranted detailed consideration rather than a misguided reliance on unpersuasive authority and an erroneous, "agreeing with the Fifth Circuit."<sup>158</sup>

Mr. Flores' argument relied heavily on the *Verdugo-Urquidez* substantial connection test and also presented a number of Supreme Court cases that established constitutional protections for illegal aliens. Asking the court to recognize his right to possess firearms under the Second Amendment, Mr. Flores petitioned that "[the United States] is where the most important people in his life live, this is where he had a home, [and] this is where he had a job and employers and friends."<sup>159</sup> Further, Mr. Flores reiterated his connection with the United States by pleading about his involved relationship with a U.S. citizen and their two U.S. citizen children.<sup>160</sup> With this substantial connection with the United States, Mr. Flores stressed the importance of the Eighth Circuit to follow the holding in *Verdugo-Urquidez* and find that "[h]e is a member of 'the people' as that term is used in the Second Amendment to the United States Constitution."<sup>161</sup> Instead of addressing Mr. Flores' merits and his relationship with the country, the Eighth Circuit confined its analysis by relying on *Portillo-Munoz* and affirmed the decision on the grounds that the Second Amendment does not extend to illegal aliens present in the United States.<sup>162</sup>

### C. UNITED STATES V. HUITRON-GUIZAR - (10TH CIR. 2012)

Nearly one-year after the Fifth and Eighth Circuit's decisions, the Tenth Circuit was faced with the same vexing Second Amendment challenge.<sup>163</sup> However, the Tenth Circuit sidestepped the constitutional question of the Second Amendment<sup>164</sup> and reached the same conclusion by

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<sup>157</sup> *Id.*

<sup>158</sup> *United States v. Portillo-Munoz*, 643 F. 3d 437, 445 (5th Cir. 2011).

<sup>159</sup> Brief of Appellant, *supra* note 123, at 9.

<sup>160</sup> *Id.* at 8.

<sup>161</sup> *Id.* at 9.

<sup>162</sup> *United States v. Flores*, 663 F. 3d 1022, 1023 (8th Cir. 2011).

<sup>163</sup> *United States v. Huitron-Guizar*, 678 F. 3d 1164, 1167 (10th Cir. 2012).

<sup>164</sup> *Id.* at 1169.

undergoing an intermediate scrutiny analysis.<sup>165</sup> In March 2011, officers executed a search warrant at Mr. Huitron-Guizar's family's home and recovered three firearms.<sup>166</sup> Mr. Huitron-Guizar's was a twenty-four year-old Mexican citizen, who had resided in the United States for years.<sup>167</sup> Subsequently, Mr. Huitron-Guizar was indicted for being an illegal alien in possession of a firearm and entered a guilty plea.<sup>168</sup> The long-lasting effect of this conviction was that Mr. Huitron-Guizar was to be transported to an immigration official for deportation.<sup>169</sup>

On appeal, the Tenth Circuit upheld the conviction of Mr. Huitron-Guizar by dancing around the Second Amendment challenge of the appellant.<sup>170</sup> However, refraining from expanding the scope of *Heller*, the Tenth Circuit correctly emphasized that "aliens were not part of the calculus" of the *Heller* decision.<sup>171</sup> Specifically, the court noted that neither the *Heller* majority nor dissenters mention the phrases "aliens," "immigrants," or "non-citizens."<sup>172</sup> The court further refused to read into *Heller* an all-encompassing interpretation of the Second Amendment because "[this] question seems large and complicated."<sup>173</sup>

The Tenth Circuit's decision properly recognized that *Heller* did not purport to clearly define the full scope of the Second Amendment.<sup>174</sup> Despite the Fifth Circuit's broad interpretation of *Heller*, the Tenth Circuit outright refuted the interpretation<sup>175</sup> and hesitated to infer a rule from *Heller* that categorically prohibited non-citizens and illegal aliens from the right to bear arms.<sup>176</sup> Specifically, the court noted that the use of the term "citizen" by the *Heller* majority was not deliberate because it would directly conflict with *Verdugo-Urquidez*, a case the *Heller* majority relied on.<sup>177</sup> The court emphasized that relying on the use of "citizen" in *Heller* "would require [this court] to hold that the same 'people' who receive Fourth Amendment protections are denied Second Amendment protections, even though both rights seem at root concerned with guarding the sanctity of the home

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<sup>165</sup> Blair, *supra* note 109, at 164.

<sup>166</sup> *Huitron-Guizar*, 678 F. 3d at 1165.

<sup>167</sup> *Id.*

<sup>168</sup> *Id.*

<sup>169</sup> *Id.*

<sup>170</sup> Rostron, *supra* note 11, at 827.

<sup>171</sup> *United States v. Huitron-Guizar*, 678 F. 3d 1164, 1168 (10th Cir. 2012).

<sup>172</sup> *Id.*

<sup>173</sup> *Id.* at 1169.

<sup>174</sup> *Id.* at 1168.

<sup>175</sup> Blair, *supra* note 109, at 164.

<sup>176</sup> *Huitron-Guizar*, 678 F. 3d at 1168.

<sup>177</sup> *Id.*

against invasion.”<sup>178</sup>

Instead of reaching a conclusion on the Second Amendment challenge, the court upheld Mr. Huitron-Guizar’s conviction by applying intermediate scrutiny to 18 U.S.C. § 922(g)(5)(A) and concluded that “courts must defer to Congress as it lawfully exercises its constitutional power . . . to ensure safety and order.”<sup>179</sup> Although the Tenth Circuit avoided the constitutional question of the Second Amendment, the court’s opinion provided valuable insight on how to interpret the amendment.<sup>180</sup> Specifically, the court emphasized the need to follow a historical approach; however, in the present case, neither party addressed this textual-history inquiry of gun ownership and citizenship and thus, the court “abstain[ed] on [the] question [with] such far-reaching dimensions without [the] full record and adversarial argument.”<sup>181</sup>

#### D. UNITED STATES V. CARPIO-LEON - (4TH CIR. 2012)

The Fourth Circuit was the last circuit to wrongfully deny a class of individuals Second Amendment protections. On February 24, 2011, Immigration and Customs Enforcement arrested Nicolas Carpio-Leon, a citizen of Mexico, for possessing a .22 caliber Marlin rifle, a 9 mm Hi-Point model C pistol, and ammunition following a consensual search.<sup>182</sup> Up until the date of the arrest, Mr. Carpio-Leon had lived in the United States for thirteen years with his three children, each of whom were born in the United States, and had no prior criminal record.<sup>183</sup> Subsequently, Mr. Carpio-Leon moved to dismiss the indictment as a violation of his Second Amendment right to bear arms.<sup>184</sup> The district court denied his motion, finding that “[*Heller*] and other Supreme Court precedent foreclose[d] [his] argument that aliens illegally present in the United States are among those protected by the Second Amendment.”<sup>185</sup>

On appeal, the Fourth Circuit rejected Mr. Carpio-Leon’s Second Amendment challenge and held that the amendment does not afford protections to illegal aliens.<sup>186</sup> Relying on the *Heller* decision and

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178 *Id.*

179 *Id.* at 1170.

180 *Id.* at 1169.

181 *Id.*

182 *United States v. Carpio-Leon*, 701 F. 3d 974, 975 (4th Cir. 2012).

183 *Id.*

184 *Id.*

185 *Id.* at 976.

186 *Id.* at 975.

undergoing a historical analysis, the court reasoned that "illegal aliens do not fall in the class of persons who are classified as law-abiding members of the political community for the purpose of defining the Second Amendment's scope."<sup>187</sup> The court improperly relied on the term "law-abiding, responsible citizens"<sup>188</sup> because Justice Scalia's amorphous references were not intended to redefine the scope of "the people" within the Second Amendment. Additionally, the Fourth Circuit went on to question how an unauthorized alien is law-abiding by characterizing their particular relationship to the United States.<sup>189</sup> Specifically, the court asserted, "[T]he crime of illegal entry inherently carries this additional aspect that leaves an illegal alien's status substantially unprotected by the Constitution in many respects."<sup>190</sup> The distinct analysis of this court is incorrect as it completely misconstrued and broadened the holding of *Heller*.

In contrast, Mr. Carpio-Leon disputed the government's historical analysis of the Second Amendment and argued that the "Second Amendment could not have been intended to exclude illegal aliens from its scope."<sup>191</sup> Mr. Carpio-Leon reasoned that "[historical] attitudes toward immigration were the reverse of today's attitudes' and that '[c]onsidering the country's need for immigrants to settle frontier areas[,] . . . denying immigrants the right to defend themselves and their families would have been unthinkable."<sup>192</sup> Although the Fourth Circuit accurately noted that the Supreme Court was not clear on whether "the people" extended to illegal aliens, the court dismissed Mr. Carpio-Leon's historical claim because it "does not controvert the historical evidence supporting the notion that the government could disarm individuals who are not law-abiding members of the political community."<sup>193</sup> The Fourth Circuit overemphasized the historical discussion in *Heller* and misguidedly stressed that the Second Amendment exclusively and unequivocally protects law-abiding members of the political community.<sup>194</sup> The court then recited, "most scholars of the Second Amendment agree that the right to bear arms was tied to the concept of a virtuous citizenry and that, accordingly, the

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<sup>187</sup> *Id.* at 981; see also *The Meaning(s) of "The People" in the Constitution*, *supra* note 2, at 1099 (emphasizing "that courts should not adopt [a] strong reading of *Heller*").

<sup>188</sup> *United States v. Carpio-Leon*, 701 F. 3d 974, 979 (4th Cir. 2012);

<sup>189</sup> *Id.* at 981.

<sup>190</sup> *Id.*

<sup>191</sup> *Id.* at 976.

<sup>192</sup> *Id.* at 980–81.

<sup>193</sup> *Id.* at 980.

<sup>194</sup> *United States v. Carpio-Leon*, 701 F. 3d 974, 979 (4th Cir. 2012).

government could disarm ‘unvirtuous citizens.’”<sup>195</sup>

Furthermore, the court relied heavily on the significance of the illegal status of Mr. Carpio-Leon.<sup>196</sup> Specifically, the court emphasized Mr. Carpio-Leon’s particular relationship as an illegal alien with the United States<sup>197</sup> and limited its analysis to a wrongful application of *Heller*.<sup>198</sup> Judge Niemeyer, writing for the court, stressed:

[W]e need not limit our analysis to the scope of the term “the people” and thereby become enmeshed in the question of whether “the people” includes illegal aliens or whether the term has the same scope in each of its constitutional uses. This is because *Heller* concludes, through a distinct analysis, that the core right historically protected by the Second Amendment is the right of self-defense by “law-abiding, responsible citizens” . . . [to which is a class that] illegal aliens do not belong.<sup>199</sup>

### E. UNITED STATES V. MEZA-RODRIGUEZ - (7TH CIR. 2015)

The Seventh Circuit was the most recent Circuit Court of Appeals to be confronted with the question of defining “the people” within the Second Amendment.<sup>200</sup> Mariano Meza-Rodriguez, a Mexican citizen, was brought to the United States when he was four or five years old and has remained in the country since that time.<sup>201</sup> In August 2013, Mr. Meza-Rodriguez’s trouble began when a bar fight broke out and witnesses identified him as an individual carrying a firearm.<sup>202</sup> Subsequently, Mr. Meza-Rodriguez was arrested and convicted for carrying a .22 Caliber cartridge.<sup>203</sup> Although Mr. Meza-Rodriguez was arrested for the possession of a firearm cartridge, the issue before the Seventh Circuit was what he did not possess—documentation showing that he was lawfully in the United States.<sup>204</sup> At the trial court, Mr. Meza-Rodriguez moved to dismiss the conviction and asserted that the statute unconstitutionally infringed on his Second

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<sup>195</sup> *Id.* at 979–980 (quoting *United States v. Vongxay*, 594 F. 3d 1111, 1118 (9th Cir. 2010)).

<sup>196</sup> *Id.* at 981.

<sup>197</sup> *Id.*

<sup>198</sup> Anjali Motgi, *Of Arms and Aliens*, 66 STAN. L. REV. ONLINE 1, 2 (2013).

<sup>199</sup> *Carpio-Leon*, 701 F. 3d at 978–79.

<sup>200</sup> *United States v. Meza-Rodriguez*, 798 F. 3d 664, 666 (7th Cir. 2015).

<sup>201</sup> *Id.*

<sup>202</sup> *Id.*

<sup>203</sup> *Id.*

<sup>204</sup> *Id.*

Amendment right to bear arms.<sup>205</sup>

Although upholding Mr. Meza-Rodriguez’s conviction, the Seventh Circuit held that unauthorized non-citizens have the constitutional right to invoke the Second Amendment.<sup>206</sup> The court properly recognized that the identical phrasing of “the people” throughout the Bill of Rights must carry the same meaning because the amendments were adopted as a package.<sup>207</sup> Reluctant to put more weight on the *Heller* decision, the court identified that neither *Heller* nor any other Supreme Court decision has addressed whether non-U.S. citizens or illegal aliens are part of “the people” under the Second Amendment.<sup>208</sup> Specifically, the court noted that *Heller*’s rhetoric of referencing “law-abiding members” and “members of the political community” did not reflect the Court defining the meaning of “the people.”<sup>209</sup> However, the Seventh Circuit relied on the opinion in *Heller* in certain regards when it noted the “similarities between the Second Amendment and the First and Fourth Amendments, [which] impl[ies] that the phrase ‘the people’ (which occurs in all three) has the same meaning in all three provisions.”<sup>210</sup>

After recognizing that “the people” in the First, Second, and Fourth Amendments carried the same meaning throughout, the court turned its focus on defining the phrase “the people.”<sup>211</sup> The Seventh Circuit employed the *Verdugo-Urquidez*’s substantial connection test.<sup>212</sup> Relying on the recognition that “the people” should be defined consistently, the Seventh Circuit emphasized that the Second Amendment analysis must apply the same substantial connection analysis, as applied to the Fourth Amendment, to determine if unauthorized aliens and non-U.S. citizens are part of “the people.”<sup>213</sup>

In contrast, the government’s argument countered the substantial connections test by focusing on Mr. Meza-Rodriguez’s immigration status and “unsavory traits.”<sup>214</sup> First, the government argued that unauthorized non-U.S. citizens cannot accept the basic obligations of society because these individuals are illegal under the law.<sup>215</sup> Second, the government

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205 *Id.*

206 *United States v. Meza-Rodriguez*, 798 F. 3d 664, 672 (7th Cir. 2015).

207 *Id.* at 670.

208 *Id.* at 669.

209 *Id.*

210 *Id.*

211 *Id.* at 670.

212 *United States v. Meza-Rodriguez*, 798 F. 3d 664, 670 (7th Cir. 2015).

213 *Id.*

214 *Id.* at 671.

215 *Id.*



questioned Mr. Meza-Rodriguez's moral character by introducing his multiple interactions with law enforcement to allude that Mr. Meza-Rodriguez has not accepted the basic obligations of living in American society.<sup>216</sup> Ultimately, the court rejected the government's argument and emphasized that this factual inquiry of the individual would cause a case-by-case analysis that would be difficult to implement.<sup>217</sup> Specifically, the case-by-case analysis would subject non-citizens to the potential of losing previously held constitutional rights simply because the non-citizen or illegal immigrant began to behave in a criminal or immoral way.<sup>218</sup> The court emphasized that the Second Amendment is "not limited to such on-again, off-again protection."<sup>219</sup> Instead, the court declared that "the only question is whether the alien has developed substantial connections as a resident in this country."<sup>220</sup>

Furthermore, the Seventh Circuit then addressed the question of whether unauthorized aliens are to be considered part of "the people" for constitutional purposes.<sup>221</sup> Relying on Supreme Court precedent, the Seventh Circuit noted that "*Plyler* shows that even unauthorized aliens enjoy certain constitutional rights, and so unauthorized status (reflected in the lack of documentation) cannot support a per se exclusion from 'the people' protected by the Bill of Rights."<sup>222</sup> In fact, Supreme Court precedent has long recognized that unauthorized aliens and non-citizens are protected under the Bill of Rights when they have developed substantial connections with this country.<sup>223</sup>

Although Mr. Meza-Rodriguez's behavior was not commendable, the Seventh Circuit held that he was entitled to the protections of the Second Amendment.<sup>224</sup> Chief Judge Wood, writing for the court, 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

<sup>216</sup> *Id.*

<sup>217</sup> *Id.*

<sup>218</sup> *United States v. Meza-Rodriguez*, 798 F. 3d 664, 671 (7th Cir. 2015).

<sup>219</sup> *Id.*

<sup>220</sup> *Id.*

<sup>221</sup> *Id.*

<sup>222</sup> *Id.* at 672; *see also Plyler*, 457 U.S. at 210 (writing, "Whatever his status under the immigration laws, an alien is surely a 'person' in any ordinary sense of that term. 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").

<sup>223</sup> *Meza-Rodriguez*, 798 F. 3d at 671 (quoting *United States v. Verdugo-Urquidez*, 494 U.S. 259, 260 (1990)).

<sup>224</sup> *United States v. Meza-Rodriguez*, 798 F. 3d 664, 672 (7th Cir. 2015).

Second Amendment and say that the unauthorized (or maybe all noncitizens) are excluded. No language in the Amendment supports such a conclusion, nor, as we have said, does a broader consideration of the Bill of Rights.<sup>225</sup>

Again, this case is bigger than the cartridge that Mr. Meza-Rodriguez possessed.<sup>226</sup> This case is about the Seventh Circuit accurately interpreting Supreme Court precedent<sup>227</sup> and holding that the Second Amendment protects unauthorized aliens and non-U.S. citizens.<sup>228</sup> After the court held that Mr. Meza-Rodriguez could invoke the protections of the Second Amendment, the court then analyzed whether the statute was a permissible restriction on the right to bear arms.<sup>229</sup>

#### IV. THE IMPACT AND ANALYSIS OF THE CIRCUIT COURT DECISIONS

With little guidance from the Supreme Court defining “the people” in the Second Amendment,<sup>230</sup> this Comment supports the approach utilized by the Seventh Circuit in the *Meza-Rodriguez* decision. There are countless individuals who work for their families, accept societal obligations, and maintain ties in the United States, but are not entitled to the constitutional protections of the Second Amendment because of their illegal status or not attaining U.S. citizenship. Making a determination based on the reasoning that simply because individuals are not citizens, they are not part of “the people” is an unwarranted intrusion on constitutional rights with far-reaching implications. Specifically, the constitutional implications will render these individuals vulnerable to government violations of the Bill of Rights with no recourse.<sup>231</sup> Dating back to this nation’s founding and continuing today, courts have struggled to clearly define the constitutional

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<sup>225</sup> *Id.*

<sup>226</sup> Defendant-Appellant’s Reply Brief, *supra* note 130, at 14.

<sup>227</sup> *Meza-Rodriguez*, 798 F. 3d at 664.

<sup>228</sup> *Id.* at 671; *see also* *Mathews v. Diaz*, 426 U.S. 67, 77 (1976) (“Even one whose presence in [the United States] is unlawful, involuntary, or transitory is entitled to . . . protection” under the Fifth and Fourteenth Amendments, from deprivation of life, liberty or property without due process of law.).

<sup>229</sup> *Meza-Rodriguez*, 798 F. 3d at 672.

<sup>230</sup> *United States v. Huitron-Guizar*, 678 F. 3d 1164, 1167 (10th Cir. 2012) (emphasizing, “The only Supreme Court case to scrutinize the phrase [the people] is *United States v. Verdugo-Urquidez*”).

<sup>231</sup> *See United States v. Portillo-Munoz*, 643 F. 3d 437, 444–45 (5th Cir. 2011) (Dennis, J., concurring in part, dissenting in part) (noting the Fifth Circuit’s reasoning that unauthorized aliens are not part of the people “renders them vulnerable—to governmental intrusions on their homes and persons, as well as interference with their rights to assemble and petition the government for redress of grievances—with no recourse”).

rights and protections associated with illegal aliens and non-U.S. citizens.<sup>232</sup> Instead of foreclosing constitutional rights solely based on a status, courts must undergo an in-depth analysis of the specific text of the United States Constitution and the precedents set forth by the Supreme Court.

The Second Amendment has been the source of a never-ending debate that has added uncertainty and tension to the amendment's interpretation and meaning.<sup>233</sup> The right to bear arms is not an unlimited right<sup>234</sup> and courts are reluctant to grant this right to non-U.S. citizens and illegal aliens because of unspecified fear and prejudice. In fact, the contrary circuits have held that individuals, who have lived here peacefully, though undocumented and illegal, are constitutionally prohibited from the protections of the right to keep and bear arms.<sup>235</sup> The right to protect oneself and home is a fundamental right deeply rooted in historical traditions and courts are subjecting non-U.S. Citizens and illegal aliens to the vulnerabilities of non-protection. The opposing circuits' reluctance to recognize these individuals' constitutional right is unsound and unsupported because each circuit relies on overly broad interpretations of dicta in *Heller* and refuses to recognize that *Verdugo-Urquidez* is still controlling precedent. Specifically, the reasoning of the Fourth, Fifth, and Eighth Circuits is flawed because each court relies on a proposition that the *Heller* Court did not definitively attempt to clarify or define. Certain policy decisions may warrant prohibitions against these individuals to possess firearms, but these policy choices must not supplant the constitutional right of these individuals to keep and bear arms.

The Fifth Circuit was the first court to wrongly decide that illegal aliens are not considered part of "the people" under the Second Amendment.<sup>236</sup> This decision was flawed because it focused on an expanded interpretation of the *Heller* decision. Specifically, the Fifth Circuit incorrectly concentrated on Justice Scalia's numerous references of the different classes of individuals to imply that *Heller* narrowed the definition of "the people." In fact, it is well noted that *Heller* was primarily concerned with the question of deciding whether the Second Amendment is an individual right or a collective right, not the precise identity of "the

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<sup>232</sup> Moore, *supra* note 12, at 803; see also *The Meaning(s) of "The People" in the Constitution*, *supra* note 2, at 1099 (concluding, "it may be possible to view *Heller* as a commentary on the meaning of 'the people' in the First and Fourth Amendments, this interpretation is at odds with the Court's precedents, the Constitution's purposes, and this country's principles").

<sup>233</sup> Salnikova, *supra* note 70, at 637.

<sup>234</sup> See generally *District of Columbia v. Heller*, 554 U.S. 570, 570 (2008).

<sup>235</sup> Defendant-Appellant's Brief and Required Short Appendix, *supra* note 13, at 29.

<sup>236</sup> See *Portillo-Munoz*, 643 F. 3d at 439.

people.”<sup>237</sup> Based on this reasoning, the Fifth Circuit’s conclusion overreaches because it is not supported or founded in the holding of *Heller*.<sup>238</sup> The Fifth Circuit’s reliance on Justice Scalia’s amorphous nouns affords too much weight to these inadvertent references<sup>239</sup> and thus, leads to a misguided interpretation of the meaning of “the people” in the Second Amendment. This unsupported position taken by the Fifth Circuit is misguided because it leads to a narrow interpretation that the Second Amendment proffers a citizen only right.<sup>240</sup> Implying that “the people” equates to “citizen” within the Second Amendment ultimately implies that the Bill of Rights is a citizen only entitlement, which is contrary to already established Supreme Court precedent.

Additionally, the Fifth Circuit’s interpretation is misguided because the Supreme Court has widely recognized the different terms of art employed in the Constitution. Indeed, if the drafters intended to proffer the Bill of Rights as a citizen only right, then why not specifically use “citizen,” which is explicitly employed in other distinct parts of the United States Constitution? What was most surprising of the Fifth Circuit’s analysis of *Heller* was its acknowledgment that the *Heller* decision did not purport “to clarify the entire field” of the Second Amendment,<sup>241</sup> but then expanded the reading of Justice Scalia’s noun usage to define and clarify unresolved issues. This analysis and proposition is counterintuitive and ultimately leads to an overreaching holding with neither supporting precedent nor historical foundation.

Another flaw of the Fifth Circuit’s decision was its analysis of distinguishing the Second and Fourth Amendment by emphasizing that the interpretation of “the people” within each amendment should not be identical.<sup>242</sup> The Fifth Circuit noted that the Supreme Court has held that the meaning of “the people” in the Fourth Amendment should be interpreted in the same context as the Second Amendment; however, the Fifth Circuit deviated from this precedent and created an alternative analysis by focusing between the difference of a protected right (Fourth Amendment) and an affirmative right (Second Amendment).<sup>243</sup> This is the most contradictory part of the Fifth Circuit’s analysis as the same decision

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<sup>237</sup> *The Meaning(s) of “The People” in the Constitution*, *supra* note 2, at 1085.

<sup>238</sup> *See* *District of Columbia v. Heller*, 554 U.S. 570, 570 (2008).

<sup>239</sup> *Id.*

<sup>240</sup> Gulasekaram, *supra* note 7, at 1571.

<sup>241</sup> *See* *United States v. Portillo-Munoz*, 643 F. 3d 437, 440 (5th Cir. 2011).

<sup>242</sup> *See id.* at 441.

<sup>243</sup> *See* Blair, *supra* note 109, at 185 (writing that this affirmative versus passive right test finds little support in precedent and is unlikely to be followed by other courts addressing this rule).

it has relied on throughout its opinion, *Heller*, quotes *Verdugo-Urquidez*'s unambiguous language that "the people" protected by the Fourth Amendment, are also protected by the First and Second Amendment.<sup>244</sup> This selective choice of dicta and precedent leads to a flawed analysis and decision. Specifically, it is clear that the *Heller* Court's citing to *Verdugo-Urquidez* strongly indicates that the Court supports and adopts this interpretation of "the people."<sup>245</sup> However, the Fifth Circuit failed to recognize this aspect of *Heller* and ultimately, deprived illegal aliens and non-U.S. citizens of the protections of the Second Amendment.

The Fifth Circuit was a divided court and the dissent clearly rejected the majority's dismissal of the Second Amendment claim.<sup>246</sup> The dissent supported the viewpoint of this Comment, that the Supreme Court's interpretation of "the people" in *Verdugo-Urquidez* is the correct analysis to be applied to the Second Amendment.<sup>247</sup> Although the Supreme Court has not resolved this prevailing issue, the Fifth Circuit's decision overreached and misguidedly expanded the *Heller* decision through its refusal to recognize the clear criteria settled in *Verdugo-Urquidez*—still controlling precedent.<sup>248</sup> The court's failure to recognize the *Verdugo-Urquidez* interpretation of "the people" creates a lingering threat to other constitutional rights proffered to this class of individuals.<sup>249</sup> This picking and choosing of rights afforded to citizens is based on arbitrary analysis that will ultimately strip away protections already afforded to non-U.S. Citizens and illegal aliens.<sup>250</sup> In fact, the Fifth Circuit's lack of textual support,<sup>251</sup> other than inadvertent nouns used by Justice Scalia in *Heller*,<sup>252</sup> supports the conclusion that the Second Amendment protections extend beyond the citizenry.

The Eighth Circuit was the next circuit to address the interpretation of "the people" and did little to clarify the analysis and interpretation set forth

<sup>244</sup> See *District of Columbia v. Heller*, 554 U.S. 570, 580 (2008).

<sup>245</sup> Gulasekaram, *supra* note 7, at 1536.

<sup>246</sup> *United States v. Portillo-Munoz*, 643 F. 3d 437, 442 (5th Cir. 2011) (Dennis, J., concurring in part, dissenting in part).

<sup>247</sup> *Id.*

<sup>248</sup> See *United States v. Verdugo-Urquidez*, 494 U.S. 259, 265–66 (1990).

<sup>249</sup> *Constitutional Law—Second Amendment—Fifth Circuit Holds That Undocumented Immigrants Do Not Have Second Amendment Rights.*—*United States v. Portillo-Munoz*, 643 F. 3d 437 (5th Cir. 2011), 125 HARV. L. REV. 835, 836 (2012) (writing, "it was unfortunate because the [*Portillo-Munoz*] [C]ourt implied that undocumented immigrants may not have Fourth Amendment rights when, in fact, that matter remains unresolved. Such dicta can have important consequences") [hereinafter *Fifth Circuit Holds That Undocumented Immigrants Do Not Have Second Amendment Rights*].

<sup>250</sup> Blair, *supra* note 109, at 185.

<sup>251</sup> *Id.* at 168.

<sup>252</sup> *The Meaning(s) of "The People" in the Constitution*, *supra* note 2, at 1089.

in the Fifth Circuit's decision.<sup>253</sup> The court's *per curiam* decision, which simply affirmed the decision of the Fifth Circuit, was in part due to the minimal persuasive authority of Mr. Flores' brief. Although Mr. Flores' brief utilized the substantial connection test, the brief did little to exploit the Fifth Circuit's irrational approach of expanding the scope of the *Heller* decision. The correct approach to challenging an incorrect interpretation of "the people" is to justify the use of the substantial connection test by emphasizing that Supreme Court precedent supports this position and *Verdugo-Urquidez* is still controlling authority. This is accomplished by differentiating the specific question addressed in *Heller* and the Second Amendment question addressed in these cases. This is where the appellant failed, which ultimately led to the Eighth Circuit's *per curiam* decision. However, one portion of Flores' brief warranted the court's consideration. Specifically, Mr. Flores' reiterated that it has been widely held that non-U.S. citizens and illegal aliens have been afforded and are entitled to the protections of the Constitution.<sup>254</sup> The fact that these individuals must oblige to our legal system follows that they ought to be entitled to the extensions of the United States Constitution.<sup>255</sup> In fact, James Madison supported this position and declared,

[I]t does not follow, because aliens are not parties to the Constitution, as citizens are parties to it, that whilst they actually conform to it, they have no right to its protection. Aliens are not more parties to the laws, than they are parties to the Constitution; yet it will not be disputed, that as they owe, on one hand, a temporary obedience, they are entitled, in return, to their protection and advantage.<sup>256</sup>

Ultimately, the Eighth Circuit's decision was misguided because it relied on the flawed decision of the Fifth Circuit. However, not to discredit the court, Mr. Flores' brief provided unpersuasive support for his Second Amendment claim and did little to challenge the preceding opinion of the Fifth Circuit.<sup>257</sup> Strong and persuasive arguments emphasize that the *Heller* Court's use of the word "citizen" and "law-abiding members" did not intentionally proscribe a constitutional test for the identity of "the people"

<sup>253</sup> See *United States v. Flores*, 663 F. 3d 1022, 1023 (8th Cir. 2011).

<sup>254</sup> See generally *supra* note 123 (noting Supreme Court cases discussing constitutional protections extended to illegal aliens and non-U.S. citizens).

<sup>255</sup> David Cole, *Are Foreign Nationals Entitled to the Same Constitutional Rights As Citizens?*, 25 T. JEFFERSON L. REV. 367, 371 (2003).

<sup>256</sup> *Id.*

<sup>257</sup> See Brief of Appellant, *supra* note 123, at 4–10.

under the Second Amendment.<sup>258</sup> The slicing and dicing of the *Heller* opinion is not the proper analysis to impose a restriction on the constitutional rights of non-U.S. citizens and illegal aliens.

The Tenth Circuit was another court to uphold the Second Amendment ban on illegal alien's possession of firearms. The court did not specifically decide "the people" question of this Comment, but offered correct insight on how to interpret the *Heller* decision and the Second Amendment.<sup>259</sup> The Tenth Circuit's main proposition was that the Fifth and Eighth Circuits read too far in-depth into an unwritten holding of the *Heller* Court.<sup>260</sup> This is the precise point as of why the analysis is flawed in the Fourth, Fifth, and Eighth Circuits. The Tenth Circuit addressed why Justice Scalia's numerous references should not be taken to scrutinize "the people." Specifically, the Tenth Circuit noted that the *Heller* Court also referred to the First Amendment and citizens,<sup>261</sup> which we surely can conclude that Justice Scalia did not establish that the First Amendment requires U.S. citizenship to speak for any purpose.<sup>262</sup> The Fifth and Eighth Circuits' creative reading of *Heller* incorrectly leads to a narrower interpretation of "the people" and essentially overrules the foundational reading of the phrase established by the Supreme Court.<sup>263</sup> Specifically, the *Verdugo-Urquidez* decision laid the foundation that "people" is a term of broader content than "citizen."<sup>264</sup>

Courts must recognize that the *Heller* decision left an open door on other Second Amendment questions and must not partake in a slicing and dicing of the *Heller* opinion to introduce broader holdings with constitutional implications. The *Heller* Court answered a narrow question of the individual right afforded under the Second Amendment; therefore, Justice Scalia's noun references cannot be held as a deliberate attempt to settle the difficult question of defining "the people."<sup>265</sup> The Court has

<sup>258</sup> Blair, *supra* note 109, at 169 (writing, "[p]atriotically spirited as the word 'citizen' may be, it should not be read literally as a constitutional test").

<sup>259</sup> See *United States v. Huitron-Guizar*, 678 F. 3d 1164, 1169 (10th Cir. 2012).

<sup>260</sup> *Id.*

<sup>261</sup> See *District of Columbia v. Heller*, 554 U.S. 570, 595 (2008) (Scalia, J., opined "we do not read the Second Amendment to protect the right of citizens to carry arms for any sort of confrontation, just as we do not read the First Amendment to protect the right of citizens to speak for any purpose") (emphasis in original).

<sup>262</sup> *Huitron-Guizar*, 678 F. 3d at 1168–69 (emphasizing, "Heller also spoke of the First Amendment rights of 'citizens,' though we know that that amendment extends in some degree to resident aliens, too"); see also *Bridges v. Wixon*, 326 U.S. 135, 147–48 (1945) (ruling that the First Amendment extends to resident aliens in some degree).

<sup>263</sup> Defendant-Appellant's Brief and Required Short Appendix, *supra* note 13, at 17.

<sup>264</sup> *Huitron-Guizar*, 678 F. 3d at 1168.

<sup>265</sup> *United States v. Huitron-Guizar*, 678 F. 3d 1164, 1168–69 (10th Cir. 2012).

explicitly cautioned against expansive reading of statements of decisions that address issues not before the Court.<sup>266</sup> Specifically, the Court declared, “[our] job [is] to decide particular legal issues while assuming without deciding the validity of antecedent propositions . . . and such assumptions . . . are not binding in future cases that directly raise the questions.”<sup>267</sup> Although upholding the Second Amendment ban on other grounds, the Tenth Circuit correctly recognized that courts should not read into *Heller* an unwritten holding; therefore, the Court did not declare a citizenry only test for the protections of the Second Amendment.

Additionally, the Fourth Circuit addressed the question and observed the decisions of the Fifth and Eighth Circuits.<sup>268</sup> After undergoing a “distinct analysis” of *Heller*, the Fourth Circuit emphasized the numerous nouns of Justice Scalia’s opinion to declare that the Second Amendment requires a law-abiding, citizenry test to determine who is afforded the protections of the amendment.<sup>269</sup> This approach of expanding the *Heller* decision is constitutionally incorrect and the various references to “citizens” and “law-abiding members” should not be taken as a literal interpretation of “the people.” However, the Fourth Circuit introduced another aspect to this debate by highlighting the title undocumented individuals hold as “illegal.”<sup>270</sup> The Fourth Circuit emphasized the title to reflect a historical approach that limits Second Amendment rights to individuals who are law-abiding members of the community.<sup>271</sup> The Fourth Circuit cites persuasive authority for its position that this right correlates with law-abiding individuals, but it fails to persuasively distinguish a law-abiding individual to someone who could be law-abiding, but merely entered the country illegally.<sup>272</sup> Specifically, an individual can be a law-abiding, undocumented member of this country; however, the Fourth Circuit’s test of law-abiding is simply based on the title “illegal” rather than the relationship and connection with the community emphasized in its cited authority.<sup>273</sup>

To clarify the Fourth Circuit’s incorrect analysis: the court first relied on an expanded interpretation of *Heller*, then focused on the *Heller* language of law-abiding citizens to interpret “the people” in the Second

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<sup>266</sup> *Id.*

<sup>267</sup> Defendant-Appellant’s Brief and Required Short Appendix, *supra* note 13, at 17.

<sup>268</sup> *See* United States v. Carpio-Leon, 701 F. 3d 974, 976–77 (4th Cir. 2012).

<sup>269</sup> *Id.* at 980.

<sup>270</sup> *Id.* at 979.

<sup>271</sup> *Id.* at 980.

<sup>272</sup> *See id.* at 979 (emphasizing that the Second Amendment is not tied to individuals declared as “unvirtuous citizens,” those who are not a law-abiding member of the community, but fails to acknowledge a law-abiding non-citizen in its analysis).

<sup>273</sup> *Id.* at 980.



Amendment, to ultimately conclude that undocumented individuals are non-citizens and not law-abiding because they hold the title of “illegal.” The Fourth Circuit’s approach is a complete misapplication of precedent and incorrectly applies the historical traditions this country was founded upon. First, the “law-abiding citizenry” test the court applied did not consider the historical relationship between this class of individuals and the community. Specifically, it must be clear that “the founders’ notion of citizenship was less rigid than ours, largely tied to the franchise, which itself was often based on little more than a period of residence and being a male with some capital.”<sup>274</sup> Second, the position that undocumented individuals are not law-abiding simply based on a title is an improper categorization that is prejudicial and inaccurate. Because whatever the class or title illegal aliens hold and belong to, these individuals are surely a part of “the people,” capable of being law-abiding, and must be afforded the protections of the Second Amendment. Indeed, the text of the Constitution implies “protection[s] for [aliens] in the way it distinguishes citizens, persons, and the people.”<sup>275</sup> This country has an established tradition of distinguishing between alien enemies from alien friends,<sup>276</sup> and the Fourth Circuit’s focus on a classification title is improper with far-reaching implications on individuals who are already considered part of “the people” under our Constitution.

Disregarding the other circuits holdings that illegal aliens and non-U.S. citizens are not part of “the people,” the Seventh Circuit is the only circuit to correctly interpret and extend the protections of the Second Amendment to this class of individuals. The key component of the decision was the criticism of the other circuits’ unsound assumption that the terms “the people” and “citizen” must equate to the same meaning. This per se exclusion of illegal aliens and non-U.S. citizens cannot be justified by Supreme Court precedent and the historical traditions of this country. Also, the Seventh Circuit did not engage in an overly broad interpretation of *Heller* and rebuked the notion of a citizenry only Second Amendment right. The primary flaw in each of these earlier circuits is the fact that each court selected indistinct parts of the *Heller* opinion to justify their positions. When in fact, looking at the *Heller* opinion as a whole, other language of the decision actually supports the opposite result. Specifically, *Heller* recognized the similarities of the phrase “the people” found in the Second

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<sup>274</sup> United States v. Huitron-Guizar, 678 F. 3d 1164, 1169 (10th Cir. 2012) (quoting 2 COLLECTED WORKS OF JAMES WILSON 839–43 (Kermit L. Hall & Mark David Hall eds., 2007)).

<sup>275</sup> Moore, *supra* note 12, at 810.

<sup>276</sup> *Id.*; see also United States v. Chase, 281 F. 2d 225, 227 (7th Cir. 1960) (emphasizing, “[T]he Constitution is for the despicable as well as for the admirable”).

Amendment and the First and Fourth Amendments, which suggests that the identical phrasing must be interpreted the same throughout.<sup>277</sup> Indeed, nothing suggests that our framers intended this entitlement to be a citizen only pre-existing right.

The *Meza-Rodriguez* court also correctly respected the fact that the term "citizen" appears in other distinct parts of the Constitution compared to "the people" within the Bill of Rights. Therefore, these terms must not be treated as synonymous when each term has been distinctly used in different clauses of the Constitution.<sup>278</sup> The distinct uses of the terms "citizens" and "non-citizens" is "constitutionally important in no less than [eleven] instances in a political document noted for its brevity."<sup>279</sup> These distinct uses suggest that the extension of the Bill of Rights was to reach further than the ordinary citizen. Specifically, the Bill of Rights makes no mention of "citizen" and focuses on the broader terms of "people" and "persons."<sup>280</sup> The framers' conscious avoidance to not encompass the term "citizen" in the Bill of Rights must be interpreted that the drafters conveyed a purpose to extend these rights to a broader class of individuals.<sup>281</sup>

Furthermore, there is wide-spread criticism related to the case-by-case analysis courts may undergo to apply the substantial connections test; however, this criticism remains unanswered as the Supreme Court has only once attempted to define "the people" within the Bill of Rights. Justice Brennan, dissenting in *Verdugo-Urquidez*, declared that the "precise contours" of the test remain unclear and criticized the interchangeable references of "sufficient connections," "substantial connections," and "accepting societal obligations" when applying these tests to make a determination of whether an illegal alien or a non-U.S. citizen is part of "the people."<sup>282</sup> Although courts will continue to be confronted with these difficult questions, they must recognize that the Supreme Court has established precedent, one that was textually incorporated in *Heller*, to interpret the identical phrasing of "the people" within the First, Second, and Fourth Amendments the same way. Courts must respect the fact that *Verdugo-Urquidez* addressed the specific question of defining "the people" and observed the principles of fundamental fairness. Specifically, the Bill

277 *United States v. Meza-Rodriguez*, 798 F. 3d 664, 669 (7th Cir. 2015).

278 *See Cole*, *supra* note 255, at 368 (writing, "[b]ecause the Constitution expressly limits to citizens only the rights to vote and to run for federal elective office, equality between non-nationals and citizens would appear to be the constitutional rule").

279 *Sugarman v. Dougall*, 413 U.S. 634, 651 (1973) (Rehnquist, J., dissenting).

280 *Moore*, *supra* note 12, at 806.

281 *Id.*

282 *United States v. Verdugo-Urquidez*, 494 U.S. 259, 282–83 (1990) (Brennan, J., dissenting).

of Rights protections extend beyond the citizenry.<sup>283</sup> As Second Amendment jurisprudence continues to develop, courts should limit their interpretation of *Heller* and focus on the undisturbed constitutional interpretation of “the people.”

Although the Seventh Circuit decision was in direct conflict with other circuits, the application of the substantial connection test to the Second Amendment is the only appropriate interpretation of how to define “the people.” Supreme Court precedent and scholars have made it clear that the *Heller* decision was the first in-depth consideration of the Second Amendment and therefore, a broad interpretation should not be basis for a full-fledged prohibition on all members of a class. Ultimately, relying on Justice Scalia’s amorphous references to “citizens” or “law abiding members” regarding “the people” is not a sufficient basis to restrict constitutional rights of non-U.S. citizens and illegal aliens.<sup>284</sup> Courts addressing a Second Amendment challenge must look to the *Heller* decision as a whole, and not one phrase or word at a time. The *Meza-Rodriguez* court correctly distinguished the purported individual right issue answered in *Heller* versus the specific question of defining “the people” within the Second Amendment. With little precedent in clearly defining “the people,” courts must look to *Verdugo-Urquidez* and apply the substantial connections test as opposed to a complete prohibition based on dicta and unspecified fear and prejudice of non-U.S. citizens and illegal aliens possessing firearms.

## CONCLUSION

*Heller* and *McDonald* are landmark decisions that exacerbated confusion of gun laws throughout the United States.<sup>285</sup> But it is clear what these cases did not do, they did not strip away the Second Amendment protections of non-U.S. citizens and illegal aliens.<sup>286</sup> In fact, the Seventh Circuit correctly held that the term “the people” has the same meaning throughout the Bill of Rights<sup>287</sup> and thus, non-U.S. citizens and illegal aliens are afforded the protections when the *Verdugo-Urquidez* substantial connections test is satisfied. Ultimately, the *Verdugo-Urquidez* is the primary standard to determine who is among “the people” protected by the

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<sup>283</sup> *Id.* at 282.

<sup>284</sup> See *United States v. Huitron-Guizar*, 678 F. 3d 1164, 1168–69 (10th Cir. 2012).

<sup>285</sup> Pratheepan Gulasekaram, *Guns and Membership in the American Polity*, 21 WM. & MARY BILL RTS. J. 619, 622 (2012).

<sup>286</sup> Blair, *supra* note 109, at 190.

<sup>287</sup> See *Meza-Rodriguez*, 798 F. 3d at 664.

Bill of Rights.<sup>288</sup> Therefore, the Second Amendment right to bear arms must not be stripped away based on erroneous interpretations of *Heller* dicta.<sup>289</sup> The opposing circuits' decisions require considerable revision because precedent and historical traditions clearly exemplify that gun ownership is not connected to citizenship status.<sup>290</sup>

With the tragic events and the related gun debate, Congress may choose to enact reasonable restrictions upon these individuals. However, the restrictions must undergo a strict analysis of the right at issue and the "prohibitions which that right has long accommodated."<sup>291</sup> The Second Amendment's individual right discussion raises tensions, and even contradictions, but non-U.S. citizens and illegal aliens have developed deeply ingrained ties and are entitled to constitutional protections.<sup>292</sup> These cases are bigger than the mere possession of a gun, they are about fundamental fairness for those who are protected by the Bill of Rights.

Depriving a class of individuals of a fundamental right, based on an overly broad extension of dicta, warrants considerable reconsideration because non-U.S. Citizens and illegal aliens "are protected by the nation's core foundational and governing document."<sup>293</sup> These individuals must be able to utilize their right to bear arms consistent with the original political understanding of the Second Amendment, to protect and maintain the integrity of this nation.<sup>294</sup> Beginning with the founding of this country, non-U.S. citizens and illegal aliens have developed and maintained substantial connections with this country, but often fail to obtain the title of "legal" or "citizen." The title of "citizen" is the most cherished and proudest accomplishment of millions of immigrants who enter this country. However, the title of U.S. citizen should not be the centerpiece for their inclusion to the Second Amendment.

The specific identity of "the people" within the Second Amendment has yet to be addressed by the Supreme Court; however, with reliance on decisions of the Court, the constitutional phrase "the people" does not only extend to citizens, but history and precedent clearly incorporates illegal aliens and non-U.S. citizens as part of "the people" of this country.<sup>295</sup> This

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<sup>288</sup> Blair, *supra* note 109, at 190.

<sup>289</sup> *Id.*

<sup>290</sup> Gulasekaram, *supra* note 7, at 1579.

<sup>291</sup> *Fifth Circuit Holds That Undocumented Immigrants Do Not Have Second Amendment*

*Rights*, *supra* note 249, at 840.

<sup>292</sup> Moore, *supra* note 12, at 876.

<sup>293</sup> *Id.*

<sup>294</sup> Pratheepan Gulasekaram, *Aliens with Guns: Equal Protection, Federal Power, and the Second Amendment*, 92 IOWA L. REV. 891, 911 (2007) [hereinafter *Aliens with Guns*].

<sup>295</sup> Michael J. Wishnie, *Immigrants and the Right to Petition*, 78 N.Y.U. L. REV. 667, 712

“cycle of citizen paranoia and alien fear” will continue to plague these unauthorized individuals and infringes on their essential right to protect themselves and family.<sup>296</sup> We must accept that our country has always and will continue to afford the people within our borders the protections of the United States Constitution.

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(2003) (writing, “History strongly suggests that the use of the word “people” . . . was not in any way intended to exclude noncitizens from the rights safeguarded therein”).

<sup>296</sup> *Aliens with Guns*, *supra* note 294, at 919.