

No. 11-_____

IN THE
SUPREME COURT OF THE UNITED STATES

Armando Portillo-Munoz — PETITIONER
(Your Name)

VS.

United States of America — RESPONDENT(S)

MOTION FOR LEAVE TO PROCEED *IN FORMA PAUPERIS*


The petitioner asks leave to file the attached petition for a writ of certiorari without prepayment of costs and to proceed *in forma pauperis*.

Petitioner has previously been granted leave to proceed *in forma pauperis* in the following court(s):

5th Circuit - pursuant to 18 U.S.C. § 3006A (Criminal Justice Act)

Petitioner has **not** previously been granted leave to proceed *in forma pauperis* in any other court.

Petitioner's affidavit or declaration in support of this motion is attached hereto.



(Signature)

No. 11-

IN THE
Supreme Court of the United States

ARMANDO PORTILLO-MUÑOZ,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

**On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Fifth Circuit**

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the Fifth Circuit erred in holding that all illegal aliens fall outside the meaning of “the people” in the Second Amendment, without regard for voluntary presence or substantial connections, despite this Court’s prior determination that the phrase “the people” has the same meaning in the First, Second, and Fourth Amendments, and includes all aliens who are voluntarily present and who have developed substantial connections with this country.

PARTIES TO PROCEEDING

Petitioner is Armando Portillo-Munoz, defendant-appellant below. Respondent is the United States of America, plaintiff-appellee below.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Armando Portillo-Munoz respectfully seeks a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit.

OPINIONS BELOW

The opinion of the court of appeals is reported at *United States v. Portillo-Munoz*, 643 F.3d 437 (5th Cir. 2011). The slip opinion is reprinted in the Appendix to this petition. Pet. App. 1a–20a. The district court denied Petitioner’s motion to dismiss the indictment without an opinion, but its order denying the motion is reprinted in the Appendix. Pet. App. 22a.

JURISDICTION

The court of appeals entered judgment on June 13, 2011. Pet. App. 21a. Petitioner filed a timely request for rehearing en banc, which was denied on August 4, 2011. Pet. App. 23a. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

The Second Amendment to the United States Constitution provides:

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

Title 18, section 922(g)(5)(A) of the United States Code provides:

(g) It shall be unlawful for any person . . . (5) who, being an alien – (A) is illegally or unlawfully in the United States . . . to ship or transport in interstate or foreign commerce, or possess in or affecting commerce, any firearm or ammunition; or to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce.

Title 18, section 924(a)(2) provides, in pertinent part:

Whoever knowingly violated subsection . . . (g) . . . of section 922 shall be fined as provided in this title, imprisoned not more than 10 years, or both.

INTRODUCTION

The Second Amendment, like the First and Fourth Amendments, embodies an individual, pre-existing “right of the people” that “shall not be infringed.” *District of Columbia v. Heller*, 554 U.S. 570, 592 (2008). This Court has recognized that the phrase “the people” has the same meaning in the First, Second, and Fourth Amendments. *Heller*, 554 U.S. at 580 (quoting *United States v. Verdugo-Urquidez*, 494 U.S. 259, 265 (1990)). Prior to the decision below, federal circuit judges uniformly adopted this understanding. See *Parker v. District of Columbia*, 478 F.3d 370, 381–82 (D.C. Cir. 2007); *United States v. Emerson*, 270 F.3d 203, 227–28 (5th Cir. 2001) (“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.”); *Nordyke v. King*, 364 F.3d 1025, 1028–29 (9th Cir. 2004) (Gould, J., dissenting from denial of

rehearing en banc) (“[I]t is hard to imagine that the drafters of the Constitution meant ‘the people’ in the Second Amendment to take on a meaning different from the meaning ascribed to that term throughout the rest of the Bill of Rights.”).

Heller did not address the question whether unauthorized immigrants are included among “the people” protected by the Second Amendment, but this Court has previously addressed noncitizens’ ability to invoke “the right[s] of the people.” See *Verdugo-Urquidez*, 494 U.S. at 264–75; *id.* at 275–77 (Kennedy, J., concurring); *id.* at 279 (Stevens, J., concurring in the judgment); *id.* at 279–93 (Brennan, J., dissenting); and *id.* at 297 (Blackmun, J., dissenting). While no majority view emerged from *Verdugo-Urquidez*, the opinions were clear that the “right[s] of the people” extended to any alien if his presence here was voluntary and he had “developed substantial connections with this country.” *Id.* at 271.

Here, the Fifth Circuit departed from *Verdugo-Urquidez* in favor of a rule that denied *all* Second Amendment protection to *all* undocumented immigrants. The court first rejected the argument “that the Fourth Amendment extends to a native and citizen of another nation who entered and remained in the United States illegally.” Pet. App. 5a. It then concluded (contrary to all previous decisions by this Court and the courts of appeals) that “the people” of the Second Amendment and “the people” of the Fourth Amendment do not “cover exactly the same groups of people.” Pet. App. 5a. The Fifth Circuit’s holding—that the protections of the Second Amendment do not extend to Petitioner or any other illegally present alien, regardless of the reason for his presence, the length of his stay, or the strength of his connections to the nation—could be reached only

after the court disregarded two principles arising from *Verdugo-Urquidez*: (1) “the people” means the same thing in the First, Second, and Fourth Amendments, and (2) it includes (at a minimum) all aliens who are voluntarily present and who have established substantial connections with this nation.

This Court should grant this petition and settle this important constitutional question. The decision below directly affects over two million immigrants, leaving them in a state of constitutional uncertainty.¹ Granting the petition and reversing the decision below would settle the meaning and extent of the phrase “the people,” and restore the uniform and sensible understanding that “the people” means the same thing in the Second Amendment as it does in the First and Fourth Amendments.

STATEMENT OF THE CASE

Petitioner is a Mexican native who “came to and remained in the United States of his own volition” for eighteen consecutive months and “accepted several societal obligations.” Pet. App. 18a (Dennis, J., dissenting). Petitioner first came to work in Texas in 2005, and he returned in January of 2009 to live

¹ According to the Department of Homeland Security, over 15% of unauthorized immigrants living in the United States resided in Texas in 2010, which then had an estimated population of 1.8 million undocumented immigrants. Michael Hofer, Nancy Rytina, and Bryan C. Baker, *Estimates of Unauthorized Immigrant Population Residing in the United States: January 2010*, Dep’t of Homeland Sec., Office of Immigration Statistics at 4 (Feb. 2011). The Pew Research Center cited a similar number, finding that in 2010, approximately 2.5 million undocumented immigrants lived in the three states comprising the Fifth Circuit. See Pew Research Center, *Unauthorized Immigrant Population: National and State Trends, 2010*, at 23, Table A3 (Feb. 2011).

there indefinitely. Pet. App. 2a. Like millions of others, he found employment as an agricultural laborer. He first worked at a dairy farm in 2009, and, in January 2010, he took a job as a ranch hand in Dimmit, Texas. He was responsible for planting and harvesting crops and raising chickens. Pet. App. 2a, 18a. With the money he earned, Petitioner paid rent for his home and provided financial support for his girlfriend and her daughter. Pet. App. 18a. When officers encountered Petitioner in July 2010, he had lived in the United States for eighteen consecutive months, and had no criminal history. Pet. App. 2a.

On July 10, 2010, the Castro County Sheriff's Department responded to a complaint about a man riding a motorcycle at the rodeo arena in Dimmit. Pet. App. 1a. Upon investigating, an officer found a .22 caliber handgun in the center console of a four-wheeler driven by Portillo-Munoz. He explained that he had the gun to protect himself—and the chickens on the ranch—from coyotes. Pet. App. 1a.

Federal authorities indicted Petitioner under 18 U.S.C. § 922(g)(5), which prohibits aliens who are unlawfully present in the United States from possessing a firearm. Petitioner filed a motion to dismiss the indictment, arguing that the statute violated his Second Amendment right to keep and bear arms and his Fifth Amendment due process and equal protection rights. The district court denied the motion without written opinion.

Petitioner entered a conditional guilty plea, reserving his right to appeal the denial of his motion to dismiss. He admitted that he is a native of Mexico who entered the United States illegally, and that he knowingly possessed a firearm. He was sentenced to ten months of imprisonment and three years of supervised release.

On appeal, Petitioner argued that 18 U.S.C. § 922(g)(5) violated his Second Amendment right to keep and bear arms. A divided panel rejected this claim without engaging in any Second Amendment scrutiny. Instead, the majority held that Petitioner had no Second Amendment right because he lacked legal permission to live in the United States. Pet. App. 7a (“Whatever else the term means or includes, the phrase ‘the people’ in the Second Amendment of the Constitution does not include aliens illegally in the United States such as Portillo.”)

As stated previously, the panel majority rejected two core principles from *Verdugo-Urquidez*. It did “not find that the use of ‘the people’ in both the Second Amendment and the Fourth Amendment mandates a holding that the two amendments cover exactly the same groups of people.” Pet. App. 5a. The majority rejected this well-settled rule because, in its words, the identically-worded Amendments have different “purposes.” Pet. App. 5a. The Second Amendment is “an affirmative right,” but the Fourth Amendment is “at its core a protective right.” Pet. App. 5a. The majority deemed it “reasonable that an affirmative right would be extended to fewer groups than would a protective right.” Pet. App. 5a–6a.

The *Portillo-Munoz* majority also declined to follow the *Verdugo-Urquidez* standard which established that the group of “people” whose rights are protected by the First, Second and Fourth Amendments includes, at a minimum, all aliens who are voluntarily present and who have established substantial connections with this nation. In doing so, it retreated from prior Fifth Circuit cases adopting *Verdugo*’s substantial connections test and categorically rejected the principle “that the Fourth Amendment extends to a native and citizen of

another nation who entered and remained in the United States illegally.” Pet. App. 5a.

Judge Dennis dissented. He quoted the circuit’s previous decision in *Emerson*: “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.” Pet. App. 12a (Dennis, J., dissenting) (quoting *Emerson*, 270 F.3d at 227–28). His dissent also emphasized that the majority ignored this Court’s holding that the rights protected by the First, Second and Fourth Amendments extend to the same group of “people.” Pet. App. 12a (citing *Heller*, 554 U.S. at 580, and *Verdugo-Urquidez*, 494 U.S. at 265).

Judge Dennis also concluded that Petitioner satisfied the “substantial connections” test: “Portillo-Munoz clearly satisfies the criteria given by the Supreme Court and our court for determining whether he is part of ‘the people’: he has come to the United States voluntarily and accepted some societal obligations.” Pet. App. 11a. Noting that the majority’s decision “effectively nullifies the rights of countless others,” Judge Dennis would have held that aliens with substantial connections to this country, such as Petitioner, are entitled to Second Amendments rights and would have remanded the question of the constitutionality of the statute to the district court. Pet. App. 20a.

The Fifth Circuit denied Petitioner’s petition for rehearing en banc. Pet. App. 23a.

REASONS FOR GRANTING THE PETITION**I. THIS COURT SHOULD GRANT THE PETITION BECAUSE THE DECISION BELOW CONFLICTS WITH SETTLED DOCTRINE THAT “THE PEOPLE” MEANS THE SAME THING IN THE FIRST, SECOND, AND FOURTH AMENDMENTS.****A. The Text, Structure, And History Of The Amendments All Demonstrate That “The People” Has The Same Meaning In Each Amendment.**

The contemporaneously ratified First, Second, and Fourth Amendments all protect a “right of the people.” The First Amendment provides, in pertinent part, “Congress shall make no law . . . abridging . . . *the right of the people* peaceably to assemble, and to petition the government for a redress of grievances.” U.S. Const. amend. I (emphasis added). The Second Amendment states that “*the right of the people* to keep and bear Arms shall not be infringed.” U.S. Const. amend. II (emphasis added). Finally, the Fourth Amendment states, “*The right of the people* to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated.” U.S. Const. amend. IV (emphasis added). The use of identical phrasing is not a coincidence. “The people” means the same thing each time it appears.

The amendments also display parallel structure. Each identifies a right and forbids governmental interference with that right. The operative language of *each* of these amendments, not merely the Fourth, serves to protect individuals “against abuses by the government.” Pet. App. 5a; see *Heller*, 554 U.S. at 592. The First Amendment prohibits any law that

would “abridg[e]” the people’s right to peaceful assembly and petition. The Second Amendment prohibits any law that would “infring[e]” the people’s right to bear arms. And the Fourth Amendment proscribes any action that would “violat[e]” the people’s right to security in their bodies and property.

The history of these three rights—their origin and modern application—confirms their congruence. Each predated the Bill of Rights, and all three rights have evolved in tandem. In *Heller*, this Court rejected the argument that the Second Amendment only protected those arms in existence in the 18th century by drawing an analogy with the First and Fourth Amendments:

We do not interpret constitutional rights that way. Just as the First Amendment protects modern forms of communications, *e.g.*, *Reno v. American Civil Liberties Union*, 521 U.S. 844, 849 (1997), and the Fourth Amendment applies to modern forms of search, *e.g.*, *Kyllo v. United States*, 533 U.S. 27, 35–36 (2001), the Second Amendment extends, *prima facie*, to all instruments that constitute bearable arms, even those that were not in existence at the time of the founding.

Heller, 554 U.S. at 582.

In sum, the text, structure, and history of the First, Second, and Fourth Amendments require that the phrase “the people” in the Second Amendment be read *in pari materia* with the First and Fourth. The amendments were ratified at the same time; use identical phrasing (“right of the people”); display parallel structure (forbidding governmental interference with the right); share a common law origin; and developed alongside one another.

**B. This Court's Precedent Confirms That
"The People" Means The Same Thing In
The First, Second, And Fourth
Amendments.**

In *Verdugo-Urquidez*, the Court stated that “the people’ seems to have been a term of art employed in select parts of the Constitution,” and that it refers to those who are “protected by the Fourth Amendment, and by the First and Second Amendments.” 494 U.S. at 265. This Court reaffirmed that understanding in *Heller*, 554 U.S. at 580.

Until now, lower courts have likewise embraced this textual reading. See *Emerson*, 270 F.3d at 227–28 (“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.”); *accord*, *Parker*, 478 F.3d at 381–82; *Nordyke*, 364 F.3d at 1028–29 (Gould, J., dissenting from denial of rehearing en banc) (“[I]t is hard to imagine that the drafters of the Constitution meant ‘the people’ in the Second Amendment to take on a meaning different from the meaning ascribed to that term throughout the rest of the Bill of Rights.”).

**C. There Is No Distinction In The
"Purpose" Of The Amendments.**

The Fifth Circuit departed from this longstanding and logical understanding of the Constitution’s text based upon a purported distinction between “[t]he purposes of the Second and Fourth Amendments.” Pet. App. 5a. “The Second Amendment grants an

affirmative right to keep and bear arms,” the panel majority held, “while the Fourth Amendment is at its core a protective right against abuses by the government.” Pet. App. 5a. The court cited no authority for its perceived distinction, and Petitioner has not located any.

Contrary to the conclusion reached below, the First, Second, and Fourth Amendments serve parallel purposes. Each identifies a preexisting right and then forbids unwarranted government intrusion. Each amendment could be described in “affirmative” terms: the people have the right to assemble and to petition the government; the people have the right to keep and bear arms; and the people have the right to freely move about while maintaining control over their own bodies and their possessions. But each amendment could also be described in defensive or “protective” terms: the First Amendment protects the people from abridgement of the right to assemble and petition; the Second Amendment protects the people from infringement of the right to bear arms; and the Fourth Amendment protects the people from violation of “the right to be secure in their persons, houses, papers, and effects.”

Indeed, as *Heller* explained, the reason the Second Amendment was included in the Bill of Rights was to protect the people from governmental abuse:

history showed that the way tyrants had eliminated a militia consisting of all the able-bodied men was not by banning the militia but simply by taking away the people's arms, enabling a select militia or standing army to suppress political opponents. This is what had occurred in England that prompted codification of the right to have arms in the English *Bill of Rights*.

Heller, 554 U.S. at 598.

The Fifth Circuit’s distinction between the Second and the Fourth Amendments is baseless. All of these considerations indicate that the meaning of “the people” in the First, Second, and Fourth Amendments is the same.

II. THIS COURT SHOULD GRANT THE PETITION TO CLARIFY THE REQUIREMENTS NECESSARY FOR A NONCITIZEN TO ASSERT THE RIGHTS OF “THE PEOPLE.”

While the Fifth Circuit certainly erred in holding that all illegal aliens were *categorically* precluded from asserting the rights of “the people,” the precise legal requirements for noncitizen invocation are far from certain. This case presents an ideal opportunity to clarify the jurisprudence and provide guidance to the lower courts.

A. In *Verdugo-Urquidez*, Eight Justices Embraced A Rule That Would Benefit Petitioner.

In *Verdugo-Urquidez*, the Court directly confronted a noncitizen’s attempt to invoke the protections promised to “the people.” There, the Court held that the search of a Mexican national’s home in Mexico, conducted shortly after the defendant was involuntarily brought into the United States, did not implicate the Fourth Amendment. 494 U.S. at 250, 262–64.

Five justices joined the principal opinion, which held that “aliens receive constitutional protections when they have come within the territory of the United States and developed substantial connections with this country.” *Id.* at 271. The Court further

stated that an alien establishes “substantial connections” when he (1) is voluntarily present in the United States and (2) “accept[s] some societal obligations.” *Id.* at 273.

Justice Kennedy joined the majority opinion, but wrote separately to express some disagreement. He “[did] not believe” his views “depart[ed] in fundamental respects” from the majority opinion, but he specifically disagreed with the majority’s conclusion that an alien must demonstrate “substantial connections” before invoking the Fourth Amendment:

For somewhat similar reasons, I cannot place any weight on the reference to “the people” in the Fourth Amendment as a source of restricting its protections. With respect, I submit these words do not detract from its force or its reach. Given the history of our Nation’s concern over warrantless and unreasonable searches, explicit recognition of “the right of the people” to Fourth Amendment protection may be interpreted to underscore the importance of the right, rather than to restrict the category of persons who may assert it.

Id. at 276 (Kennedy, J. concurring).

Like Justice Kennedy, Justices Brennan, Marshall, and Blackmun embraced a standard that would permit even more aliens to invoke the rights of the people. They would not even have required voluntary presence; any defendant prosecuted under U.S. law could claim the constitutional protections. *Id.* at 282–86 (Brennan, J., dissenting), 297 (Blackmun, J., dissenting). Given that Justices Kennedy, Brennan, Marshall, and Blackmun’s interpretation of “the people” was *more* expansive than the Court’s

“substantial connection” articulation, a total of eight justices essentially concluded that substantial ties to the United States were *sufficient* for a noncitizen to enjoy Fourth Amendment rights, even if those ties are not actually necessary. See *Martinez-Aguero v. Gonzalez*, 459 F.3d 618, 624 (5th Cir. 2006) (noting the tension between the fact that Justice Kennedy joined the majority opinion, which would provide “five votes for the proposition that ‘aliens receive constitutional protections when they have come within the territory of the United States *and* developed substantial connections with the country,’” and the fact that he wrote separately to question that proposition (quoting *Verdugo-Urquidez*, 494 U.S. at 271)).

Only one justice—Justice Stevens—placed decisive weight on the lawfulness of the defendant’s presence. *Verdugo-Urquidez*, 494 U.S. at 279 (Stevens, J., concurring in the judgment). But he did not rule out a claim such as Petitioner’s; Justice Stevens believed “comment on illegal aliens’ entitlement to the protections of the Fourth Amendment” was not “necessary to resolve” the case. *Id.* at n.*.

B. *Heller* Created Confusion About The Scope Of “The People.”

In *Heller*, this Court did not have the opportunity to address noncitizens’ ability to invoke the rights of “the people.” The Court reaffirmed its earlier conclusion in *Verdugo-Urquidez* that the First, Second, and Fourth Amendments used the term “the people” interchangeably. *Heller*, 554 U.S. at 580. Like the First and Fourth Amendments, the Court reasoned, the Second Amendment applies broadly, and its protections were not limited to an “unspecified subset” of the national community. *Id.* This much is clear.

Even so, the *Heller* majority used several different phrases to describe the group of rights-holders: “national community,” “all members of the political community,” “Americans,” “citizens,” and “law-abiding citizens.” *Heller*, 554 U.S. at 580, 581, 625, 629. These terms were used in support of the Court’s conclusion that the right to bear arms was an individual right, not a collective right. Some of those phrases would exclude noncitizens, but none were intended to define the scope of the Second Amendment right. At no time did *Heller* address whether an alien—regardless of immigration status—is protected by the Second Amendment because petitioners were United States citizens and the question did not arise. Furthermore, the Court emphasized that *Heller*’s holding was limited: “since this case represents this Court’s first in-depth examination of the Second Amendment, one should not expect it to clarify the entire field.” *Id.* at 635.

With respect, *Heller* clouds the resolution of the current inquiry: while it reaffirmed *Verdugo-Urquidez*’s conclusions that the First, Second, and Fourth Amendments extended to the same “people,” and that “substantial connections” established entitlement to those rights, it also suggested that the rights of “the people” are the rights of Americans or citizens. The latter language in *Heller* has been used to limit the scope of the Second Amendment right, including by the majority below. See Pet. App. 4a (stating that the *Heller* majority’s use of the terms “citizens,” “Americans,” and “members of the political community” to describe holders of the Second Amendment right “invalidates Portillo’s attempt to extend the protections of the Second Amendment to illegal aliens”).

This application of *Heller* should not be endorsed. Substituting “citizens” for “the people” as the right-holders of the Second Amendment is inconsistent with the text of the Second Amendment, which expressly recognizes that the right belongs to “the people.” The Constitution employs the term “citizens” elsewhere in its text, see, *e.g.*, U.S. Const. art. I, §§ 2, 3; *id.* art. II, § 1 (requiring citizenship of Presidential candidates and candidates for federal public office), which suggests that the framers intended “the people” referenced in the First, Second and Fourth Amendments to mean something different than “citizens.”

Moreover, *McDonald v. City of Chicago, Ill.*, 130 S. Ct. 3020, 3036–38 (2010), emphasized that the right to bear arms in self defense protected by the Second Amendment is both “fundamental to *our* scheme of ordered liberty” and “deeply rooted in this Nation’s history and tradition.” The due process right to self-defense is not grounded in the Fifth or Fourteenth Amendment “standing on its own bottom”; it is grounded in the Second Amendment right made applicable to the states—and made available to all “person[s]”—by the due process clauses of the Fifth and Fourteenth Amendments. *Id.* at 3048. *McDonald* therefore demonstrates that the Second Amendment right is much more than a political right belonging to “members of the political community”: it is a fundamental right that is essential to ordered liberty.

This Court did not alter the meaning of “the people” as defined by *Verdugo-Urquidez* in *Heller*, and *Heller*’s references to “citizens,” “Americans” or “members of the political community” do not affect *Verdugo-Urquidez*’s standard. Given the ambiguous language used in *Heller*, and the splintered opinion in *Verdugo-Urquidez*, this Court should articulate the

prerequisites a noncitizen must satisfy in order to assert a “right of the people.” As mentioned, over two million people await a response.

III. RESOLUTION OF THE QUESTION PRESENTED IS A CONSTITUTIONAL ISSUE OF SIGNIFICANT NATIONAL IMPORTANCE.

A. This Case Presents An Ideal Vehicle To Resolve The Question Presented Because It Is Undisputed That Petitioner Had Voluntarily Established Substantial Connections With The United States.

An alien establishes “substantial connections” when he (1) is voluntarily present in the United States and (2) “accept[s] some societal obligations.” *Verdugo-Urquidez*, 494 U.S. at 273. As the dissent below recognized, Petitioner “came to and remained in the United States of his own volition” and he “has also accepted several societal obligations, a fact that is uncontested by the government.” Pet. App. 18a (Dennis, J., dissenting). The obligations Petitioner undertook in the United States are numerous and include holding a steady job as a ranch hand;² working at a dairy farm; paying rent for his home; and financially supporting his girlfriend and her daughter. Pet. App. 18a. The circuit court did not doubt that these connections were established. Thus, this case presents a purely legal question.

² In fact, Portillo-Munoz obtained the firearm that is central to this case in order to protect his employer’s chickens from coyotes. Pet. App. 2a, 18a.

Because of the pure legal nature of the question presented, this case is ideally suited to resolve the significant constitutional issue.

B. The Decision Below Exposes Millions Of People To Deprivation Of The Right To Carry Arms And, In All Likelihood, To Interference With Their First And Fourth Amendment Rights.

The “millions of aliens who are unlawfully present in the United States are part of American society.” *Plyler v. Doe*, 457 U.S. 202, 219 (1982). Many illegal immigrants are parents or relatives of United States citizens and contribute to American society by undertaking gainful employment, participating in local communities, churches, and schools, and contributing to local economies. As *Plyler* stated, denying illegal aliens who have become a part of American society the “benefits that our society makes available to citizens and lawful residents” creates a problem “for a Nation that prides itself on adherence to principles of equality under law.” *Plyler*, 457 U.S. at 219.

But the opinion below relegates them to a questionable status. Over two million immigrants are directly affected by the Fifth Circuit’s decision because they live in Texas, Louisiana or Mississippi. See Pew Research Center, *supra*, n. 1 (estimating that 2.5 million unauthorized immigrants live in the states governed by the Fifth Circuit).

While the deprivation of these people’s Second Amendment rights is enough to warrant this Court’s intervention,³ the adverse consequences of the

³ It is also important to note that lower courts have issued split opinions on this issue and are in need of guidance. For

decision below go much further. In light of the opinion below, undocumented aliens' Fourth Amendment protections are now in question. Indeed, the panel majority explicitly disavowed the proposition that illegal aliens have Fourth Amendment rights. Pet. App. 5a (“[N]either this court nor the Supreme Court has held that the Fourth Amendment extends to a native and citizen of another nation who entered and remained in the United States illegally.”); see also Pet. App. 10a–11a (Dennis, J., dissenting) (“The majority’s determination that Portillo-Munoz is not part of ‘the people’ effectively means that millions of similarly situated residents of the United States are ‘non-persons’ who have no rights to be free from unjustified searches of their homes and bodies and other abuses.”). This position is inconsistent with the Fourth Amendment holdings of the vast majority of courts. At the time *Verdugo-Urquidez* was decided, “Numerous lower courts . . . ha[d] held that illegal aliens in the United States are protected by the Fourth Amendment, and not a single lower court

example, the Fourth Circuit has already declined an opportunity to follow the opinion of the majority below, but instead faithfully applied this Court’s precedent in its unpublished decision in *United States v. Guerrero-Leco*, No. 09-4920, 2011 WL 4037059 (4th Cir. Sept. 13, 2011) (per curiam). The district court in *Guerrero-Leco*, interpreting *Heller*, held that “[n]othing in the opinion purports to extend the Second Amendment’s protection to those outside the American political community like the defendant who allegedly entered and remained unlawfully in the country.” *United States v. Guerrero-Leco*, No. 3:08-CR-118, 2008 WL 4534226, at *1 (W.D.N.C. Oct. 6, 2008). The Fourth Circuit vacated the district court’s decision and reversed, refusing to follow the majority’s decision in *Portillo-Munoz*. *Guerrero-Leco*, 2011 WL 4037059, at *1.

ha[d] held to the contrary.” *Verdugo-Urquidez*, 494 U.S. at 283 n.6 (Brennan, J., dissenting).

Further, the Fifth Circuit’s narrow definition of “the people” could deprive these aliens of their right to assemble and petition the government for redress. Pet. App. 10a–11a (Dennis, J., dissenting) (“The majority’s determination that Portillo-Munoz is not part of ‘the people’ effectively means that millions of similarly situated residents of the United States are ‘non-persons’ who have no rights . . . to peaceably assemble or petition the government.”). Judge Dennis spoke to this deprivation:

There are countless persons throughout Texas, Louisiana, and Mississippi, who, like Portillo-Munoz, work for employers, pay rent to landlords, and support their loved ones, but are unlawfully residing in the United States. The majority’s reasoning renders them vulnerable—to governmental intrusions on their homes and persons, as well as interference with their right to assemble and petition the government for redress of grievances—with no recourse.”

Pet. App. 14a (Dennis, J., dissenting). Such a result would be inconsistent with this Court’s prior treatment of the rights of aliens to assemble and speak freely. “It has been explicitly and repeatedly affirmed by this Court, without a dissenting voice, that freedom of speech and of assembly for any lawful purpose are rights of personal liberty secured to all persons, *without regard to citizenship*.” *Hague v. Comm. for Indus. Org.*, 307 U.S. 496, 519 (1939) (Stone, J.) (emphasis added). The Third Circuit has similarly stated, “Freedom of worship, freedom of speech, freedom of the press, and the right of assembly . . . [are] constitutionally recognized and confirmed as attributes of liberty incident to all

persons under the Constitution and laws of the United States *regardless of their citizenship.*” *Douglas v. City of Jeanette, Pa.*, 130 F.2d 652, 656 (3d Cir. 1942) (emphasis added).

This Court’s precedent recognizes that any alien who establishes substantial connections possesses the “right[s] of the people,” with no exception for those who lack a valid immigrant visa. The Fifth Circuit should have followed that precedent and addressed the constitutionality of § 922(g)(5) under the appropriate level of Second Amendment scrutiny, remanding to the district court if necessary.

CONCLUSION

This Court should grant the petition for a writ of certiorari.

Respectfully submitted,

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November 2, 2011

* Counsel of Record

RULE 33.1(h) CERTIFICATE OF COMPLIANCE

No. 11-

Armando Portillo-Munoz,
Petitioner,

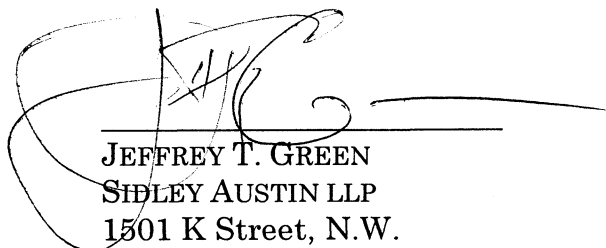
v.

United States of America,
Respondent.

As required by Supreme Court Rule 33.1(h), I, Jeffrey T. Green, certify that the Petition for a Writ of Certiorari in the foregoing case contains 5,245 words, excluding the parts of the document that are exempted by Supreme Court Rule 33.1(d).

I declare under penalty of perjury that the foregoing is true and correct.

Executed on November 2, 2011



JEFFREY T. GREEN
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November 2, 2011

CERTIFICATE OF SERVICE

No. 11-

Armando Portillo-Munoz,
Petitioner,

v.

United States of America,
Respondent.

I, Jeffrey T. Green, do hereby certify that, on this second day of November, 2011, I caused one copy of the Petition for a Writ of Certiorari in the foregoing case to be served by first class mail, postage prepaid, on the following parties:

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United States Department of Justice
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Petition Appendix

REVISED JUNE 29, 2011
IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

United States Court of Appeals
Fifth Circuit

FILED

June 13, 2011

Lyle W. Cayce
Clerk

No. 11-10086

UNITED STATES OF AMERICA

Plaintiff-Appellee

v.

ARMANDO PORTILLO-MUNOZ

Defendant-Appellant

Appeal from the United States District Court
for the Northern District of Texas

Before GARWOOD, GARZA, and DENNIS, Circuit Judges.

GARWOOD, Circuit Judge:

FACTS AND PROCEEDINGS BELOW

On July 10, 2010, the Castro County, Texas, Sheriff's department was notified that a person at the Rodeo Arena in Dimmit, Texas, was "spinning around" on a red motorcycle with a gun in his waistband. A Dimmit Police Officer arrived at the scene and found a .22 caliber handgun in the center console of a four-wheeler driven by defendant-appellant Armando Portillo-Munoz. Portillo indicated to the officers present that the gun was for killing coyotes. After searching his person, officers found a dollar bill in Portillo's pocket with a white powder substance inside the folds. Portillo was arrested and

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booked in the Castro County jail for unlawfully carrying a weapon and for possession of a controlled substance. He admitted to being a native and citizen of Mexico illegally present in the United States. According to Portillo's Presentence Report (PSR), he first came to the United States in 2005 but left after six months. Portillo illegally reentered the United States in 2009 and had been present for one year and six months before this incident. At the time of his arrest, he was working as a ranch hand in Dimmit. He stated that he obtained the firearm to protect the chickens at the ranch from coyotes. He had been employed there since January 2010, prior to which he had worked at a dairy farm in Hereford, Texas. His PSR did not report any prior criminal history, arrests, or previous encounters with immigration officials.

Portillo was indicted on August 31, 2010 for one count of Alien, illegally and unlawfully present in the United States, in Possession of a Firearm under 18 U.S.C. § 922(g)(5). His attorneys filed a motion to dismiss, alleging that conviction under the statute would violate the Second Amendment and the Due Process Clause of the Fifth Amendment. The district court denied Portillo's motion to dismiss. Portillo then entered a conditional guilty plea on January 12, 2011. He admitted that he is a citizen and native of Mexico illegally present in the United States and that he knowingly possessed a firearm in or affecting commerce which had been shipped or transported in interstate commerce. The district court sentenced him to ten months imprisonment followed by three years of supervised release. Portillo filed a timely notice of appeal.

DISCUSSION

I.

Second Amendment

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Portillo raises two arguments on appeal: that his conviction under 18 U.S.C. § 922(g)(5) for being an illegal alien in possession of a firearm violates the Second Amendment and that his conviction violates the Fifth Amendment's Due Process Clause. We address the Second Amendment argument first.

We review *de novo* the constitutionality of federal statutes. *United States v. Anderson*, 559 F.3d 348, 352 (5th Cir. 2009). Portillo clearly reserved the right to appeal the denial of his motion to dismiss on Second Amendment grounds in his conditional guilty plea.

Under the laws of the United States, “[i]t shall be unlawful for any person . . . who, being an alien . . . illegally or unlawfully in the United States . . . to ship or transport in interstate or foreign commerce, or possess in or affecting commerce, any firearm or ammunition; or to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce.” 18 U.S.C. § 922(g)(5). There is no question that Portillo's conduct violated this statute. We are only asked to decide if Portillo's conviction under this statute violates the United States Constitution. Whether the protections contained in the Second Amendment extend to aliens illegally present in this country is a matter of first impression in this circuit. Several district courts have previously considered the constitutionality of this statute, but none of our sister circuits have done so.

The text of the Second Amendment reads: “A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed.” U.S. const. amend. II. In 2008, the Supreme Court held in *District of Columbia v. Heller* that the Second Amendment guarantees an individual right to possess and carry weapons. 128 S.Ct. 2783

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(2008). The individual laying claim to the Second Amendment’s protections in *Heller* was a United States citizen, so the question of whether an alien, illegal or legal, has a right to bear arms was not presented, and the Court took care to note that it was not purporting to “clarify the entire field” of the Second Amendment. *Id.* at 2821. However, the Court’s language does provide some guidance as to the meaning of the term “the people” as it is used in the Second Amendment. The Court held the Second Amendment “surely elevates above all other interests the right of law-abiding, responsible citizens to use arms in defense of hearth and home.” *Id.* Furthermore, the Court noted that “in all six other provisions of the Constitution that mention ‘the people,’ the term unambiguously refers to all members of the political community, not an unspecified subset” before going on to say that “[w]e start therefore with a strong presumption that the Second Amendment right is exercised individually and belongs to all Americans.” *Id.* at 2790-91. The Court’s language in *Heller* invalidates Portillo’s attempt to extend the protections of the Second Amendment to illegal aliens.¹ Illegal aliens are not “law-abiding, responsible citizens” or “members of the political community,” and aliens who enter or remain in this country illegally and without authorization are not Americans as that word is commonly understood.

Prior to its decision in *Heller*, the Supreme Court interpreted the meaning of the phrase “the people” in the context of the Fourth Amendment and indicated that the same analysis would extend to the text of the Second Amendment. In *United States v. Verdugo-Urquidez*, the Court held that its analysis of the

¹And, nothing in *McDonald v. City of Chicago*, 130 S.Ct. 3020 (2010), suggests otherwise.

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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.” 110 S.Ct. 1056, 1061 (1990). Portillo relies on *Verdugo-Urquidez* and argues that he has sufficient connections with the United States to be included in this definition of “the people,” but neither this court nor the Supreme Court has held that the Fourth Amendment extends to a native and citizen of another nation who entered and remained in the United States illegally.²

Moreover, even if there were precedent for the proposition that illegal aliens generally are covered by the Fourth Amendment, we 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. The purposes of the Second and the Fourth Amendment are different. 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. Attempts to *precisely* analogize the scope of these two amendments is misguided, and we find it reasonable that an affirmative right would be extended to fewer

²Portillo cites to this court’s decision in *Martinez-Aguero v. Gonzalez* as holding that a non-citizen illegally present in the United States was protected by the Fourth Amendment. 459 F.3d 618 (5th Cir. 2006). The alien in that case, Martinez-Aguero, was a Mexican national who visited the United States on a monthly basis using a visitor’s visa. Prior to the incident at issue in the case, during which she was subjected to excessive force by a border-patrol agent, Martinez-Aguero had applied for an updated visa and was incorrectly told by United States immigration officials that she could use her old card in the interim period. The court did not implicitly or explicitly hold that illegal aliens as a class are covered by the Fourth Amendment, and the facts of the case are so very dissimilar from those in Portillo’s case that we do not find the court’s decision especially persuasive here.

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groups than would a protective right. The Second Circuit laid out compelling reasons for why an illegal alien could not claim that a predecessor statute to section 922(g)(5) violated the Fifth Amendment right to equal protection by saying that “illegal aliens are those who . . . are likely to maintain no permanent address in this country, elude detection through an assumed identity, and – already living outside the law – resort to illegal activities to maintain a livelihood.” *United States v. Toner*, 728 F.2d 115, 128-29 (2d Cir. 1984). The court went on to approvingly quote the district court’s statement that “one seeking to arrange an assassination would be especially eager to hire someone who had little commitment to this nation’s political institutions and who could disappear afterwards without a trace . . .” *Id.* at 129 (internal quotation marks omitted).

Additionally, the Supreme Court has long held that Congress has the authority to make laws governing the conduct of aliens that would be unconstitutional if made to apply to citizens. In *Matthews v. Diaz*, the appellees were lawful resident aliens challenging a federal law that limited eligibility to Medicare Part B to aliens who had been admitted for permanent residence and had also resided in the United States for at least five years. 96 S.Ct. 1883 (1976). The Supreme Court upheld both conditions as constitutional against a challenge under the Due Process Clause. The Court pointed out in its opinion that the crucial question was whether discrimination among different types of aliens was permissible, as contrasted with discrimination between aliens and citizens and held that “[n]either the overnight visitor, the unfriendly agent of a hostile foreign power, the resident diplomat, nor the illegal entrant, can advance even a colorable constitutional claim to a share in the bounty that a

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conscientious sovereign makes available to its own citizens and *some* of its guests.” *Id.* at 1891 (emphasis in original). The Court went on to say that “[i]n the exercise of its broad power over naturalization and immigration, Congress regularly makes rules that would be unacceptable if applied to citizens.” *Id.*

The Court, in several cases striking down state laws restricting otherwise lawful activities in which aliens could engage, has emphasized that the rights thus protected were those of aliens who were *lawful* inhabitants of the states in question. In 1915, the Supreme Court held in *Truax v. Raich* that the complainant, a native of Austria admitted for residency in the United States, was entitled to equal protection under the 14th Amendment because he was “lawfully an inhabitant of Arizona.” 36 S.Ct. 7, 9 (1915). *See also id.* at 10 (states cannot “deny to lawful inhabitants . . . the ordinary means of earning a livelihood.”). *See also Kwong Hai Chew v. Colding*, 73 S.Ct. 472, 477 & n.5 (1953); *Torao Takahashi v. Fish and Game Comm’n*, 68 S.Ct. 1138, 1142, 1143 (1948). This court noted in *Lynch v. Cannatella* that “the Constitution does not forbid all differences in governmental treatment between citizens and aliens, or between aliens who have been legally admitted to the United States and those who are present illegally.” 810 F.2d 1363, 1373 (5th Cir. 1987).

The courts have made clear that the Constitution does not prohibit Congress from making laws that distinguish between citizens and aliens and between lawful and illegal aliens. We find that analysis persuasive in interpreting the text of the Second Amendment. Whatever else the term means or includes, the phrase “the people” in the Second Amendment of the Constitution does not include aliens illegally in the United States such as Portillo, and we hold that section 922(g)(5) is constitutional under the Second

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Amendment.³**II.****Due Process Violation**

Portillo argues that 18 U.S.C. § 922(g)(5) violates his Fifth Amendment due process rights, both on its face and as applied. We hold that Portillo waived the right to challenge the constitutionality of the statute on Fifth Amendment grounds. Portillo's conditional guilty plea explicitly says that Portillo is entitled to appeal the denial of his motion to dismiss "only as it relates to whether the statute in question 18 U.S.C. § 922(g)(5), violates the defendant's Second Amendment right to keep and bear arms and to self-defense." At Portillo's arraignment hearing, the court again said that Portillo was reserving his right to appeal the order denying his motion to dismiss "as it relates to the statute in question, that is, 18 U.S.C. § 922(g)(5), in which you contend that the statute violates your Second Amendment right to keep and bear arms and to self defense." We hold that the text of the conditional guilty plea only reserves Portillo's right to appeal on the grounds that the statute violates the Second Amendment, thus we do not reach the merits of whether Portillo's due process rights were violated.⁴

³This case does not involve, and we do not speak to, the constitutional trial, personal bodily integrity, privacy or speech rights of illegal aliens; we speak only to whether the Second Amendment precludes Congress from limiting the actual, affirmative conduct of aliens while they are illegally present within this country. This is a pure question of law which the district court has correctly answered.

⁴If we were to reach the merits of Portillo's due process claim, we would find his arguments wholly unconvincing. The statute in question is a federal law, not a state law, and thus the Bill of Rights applies directly to the statute without need for incorporation. Since the Second Amendment explicitly provides for a constitutional right to bear arms, Portillo cannot look to the due process clause as an additional source of protection for a right to keep and bear arms. *See Graham v. Connor*, 109 S.Ct. 1865, 1871 (1989).

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CONCLUSION

For the foregoing reasons, we **AFFIRM** the district court's denial of Portillo's motion to dismiss.

AFFIRMED

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DENNIS, Circuit Judge, concurring in part and dissenting in part:

I concur in the majority's dismissal of the Fifth Amendment claim in this case, because I agree that the defendant, Armando Portillo-Munoz, waived his right to argue that 18 U.S.C. § 922(g)(5) violates his Fifth Amendment due process rights.

However, I respectfully dissent from the majority's dismissal of Portillo-Munoz's Second Amendment claim. The majority concludes that Portillo-Munoz, a ranch hand who has lived and worked in the United States for more than 18 months, paid rent, and helped supported a family — but who committed the misdemeanor of illegally crossing the border — is not part of “the people.” Supreme Court and Fifth Circuit precedent recognize that the phrase “the people” has the same meaning in the First,¹ Second,² and Fourth³ Amendments. The majority's determination that Portillo-Munoz is not part of “the people” effectively means that millions of similarly situated residents of the United States are “non-persons” who have no rights to be free from

¹The First Amendment states: “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of *the people* peaceably to assemble, and to petition the Government for a redress of grievances.” U.S. Const. amend. I (emphasis added).

²The Second Amendment states: “A well regulated Militia, being necessary to the security of a free State, the right of *the people* to keep and bear Arms, shall not be infringed.” U.S. Const. amend. II (emphasis added).

³The Fourth Amendment states: “The right of *the people* to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.” U.S. Const. amend. IV (emphasis added).

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unjustified searches of their homes and bodies and other abuses, nor to peaceably assemble or petition the government. In my view, Portillo-Munoz clearly satisfies the criteria given by the Supreme Court and our court for determining whether he is part of “the people”: he has come to the United States voluntarily and accepted some societal obligations. *See United States v. Verdugo-Urquidez*, 494 U.S. 259, 271 (1990) (“[A]liens receive constitutional protections when they have come within the territory of the United States and developed substantial connections with this country”); *Martinez-Aguero v. Gonzalez*, 459 F.3d 618, 625 (5th Cir. 2006) (“[A]liens with substantial connections are those who are in this country ‘voluntarily and presumably [have] accepted some societal obligations.’” (second alteration in original) (quoting *Verdugo-Urquidez*, 494 U.S. at 273)).

Of course, whether 18 U.S.C. § 922(g)(5) violates the Second Amendment is a separate question from whether Portillo-Munoz is part of “the people” who have First, Second, and Fourth Amendment rights. I would remand for the district court to consider in the first instance the applicable level of scrutiny under the Second Amendment, and whether the provision passes muster under that level of scrutiny.⁴

⁴Since *District of Columbia v. Heller*, 554 U.S. 570 (2008), courts of appeal have taken various approaches to scrutinizing laws regarding firearms. *See, e.g., Nordyke v. King*, No. 07-15763, 2011 WL 1632063, at *5 (9th Cir. May 2, 2011) (applying a “substantial burden” test to determine whether to apply heightened scrutiny to county ordinance); *United States v. Chester*, 628 F.3d 673, 682-83 (4th Cir. 2010) (applying intermediate scrutiny to review of § 922(g)(9)); *United States v. Reese*, 627 F.3d 792, 801-02 (10th Cir. 2010) (applying intermediate scrutiny to review of § 922(g)(8)); *United States v. Williams*, 616 F.3d 685, 692-94 (7th Cir. 2010) (applying intermediate scrutiny to review of § 922(g)(1)); *United States v. Skoien*, 614 F.3d 638, 641-42 (7th Cir. 2010) (en banc) (declining to label the level of scrutiny being applied, but upholding § 922(g)(9) because “logic and data establish a substantial relation between” the subsection and an “important governmental objective”); *United States v. Marzarella*, 614 F.3d 85, 96-98 (3d Cir. 2010)

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A.

The majority's interpretation of the "the people" has far-reaching consequences: as the Supreme Court recognized in *District of Columbia v. Heller*, 554 U.S. 570 (2008), and *Verdugo-Urquidez*, the same set of "people" protected by the Second Amendment are also protected by the First and Fourth Amendments. *See Heller*, 554 U.S. at 580 (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." (quoting *Verdugo-Urquidez*, 494 U.S. at 265) (quotation marks omitted)). Indeed, the author of today's majority opinion recognized as much in *United States v. Emerson*, 270 F.3d 203 (5th Cir. 2001). In *Emerson*, this court concluded, as the Supreme Court would, several years later in *Heller*, that the Second Amendment confers an individual rather than collective or quasi-collective right to bear arms. 270 F.3d at 260. One of the rationales the *Emerson* court gave for adopting the "individual rights model" was that "[i]t gives the same meaning to the words 'the people' as used in the Second Amendment phrase 'the right of the people' as when used in the exact same phrase in the contemporaneously submitted and ratified First and Fourth Amendments." *Id.* at 227. The court further explained:

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

(applying a sliding scale test to determine the appropriate level of scrutiny for evaluating § 922(k)).

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people” have precisely the same meaning within the Second Amendment as without.

Id. at 227-28.

In view of these precedents, I find the majority’s attempt, in dicta, to limit its reasoning to the Second Amendment context to be unconvincing. The majority labels the Second Amendment an “affirmative right” and the Fourth Amendment a “protective right.” Maj. Op. 5. This distinction, unfortunately, is unpersuasive. The majority’s characterization of the Second Amendment as an affirmative right is contradicted by *Heller*: “[I]t has always been widely understood that the Second Amendment, like the First and Fourth Amendments, codified a pre-existing right. The very text of the Second Amendment implicitly recognizes the pre-existence of the right and declares only that it ‘shall not be infringed.’” 554 U.S. at 592. Both the Second and Fourth Amendments plainly refer to the right of “the people” to be free from unwarranted governmental intrusion — whether in the form of unreasonable searches or seizures, or in the form of infringements on the right to bear arms. *See* U.S. Const. amend. II (stating that “the right of the people to keep and bear Arms *shall not be infringed*” (emphasis added)); U.S. Const. amend. IV (“The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, *shall not be violated*, and no Warrants shall issue, but upon probable cause” (emphasis added)). Moreover, the majority’s reasoning implicates not only the Fourth Amendment, but also the First Amendment, which similarly prohibits Congress from “*abridging* . . . the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.” U.S. Const. amend. I (emphasis added).

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There are countless persons throughout Texas, Louisiana, and Mississippi, who, like Portillo-Munoz, work for employers, pay rent to landlords, and support their loved ones, but are unlawfully residing in the United States. The majority's reasoning 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.

The majority's categorical conclusion that persons like Portillo-Munoz are not part of "the people" is also incongruous with the holding of the Supreme Court in *Plyler v. Doe*, 457 U.S. 202 (1982): "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." *Id.* at 210 (citing cases). It would be strange for the same founders who contemporaneously adopted the First, Second, Fourth, and Fifth⁵ Amendments to have intended for the Fifth Amendment to cover a different class of persons than the other three amendments, considering that "people" is merely the plural of "person."

B.

The sole basis for the majority's conclusion that Portillo-Munoz should not be considered part of "the people" is that he is unlawfully present in the United States. However, this rationale is wholly unsupported by the applicable precedents.

As the majority acknowledges, *Heller* did not address the question of

⁵The Fifth Amendment states in relevant part: "No person shall . . . be deprived of life, liberty, or property, without due process of law." U.S. Const. amend. V.

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whether noncitizens, lawfully or unlawfully present in the United States, have Second Amendment rights. Importantly, in both *Heller* and *Verdugo-Urquidez*, a Fourth Amendment case, the Supreme Court indicated that “the people” includes people who have developed “sufficient connection” with the United States. The *Heller* Court, reiterating the analysis given in *Verdugo-Urquidez*, explained:

“[T]he people” seems to have been a term of art employed in select parts of the Constitution. . . . [Its uses] sugges[t] that “the people” protected by the Fourth Amendment, and by the First and Second Amendments, and to whom rights and powers are reserved in the Ninth and Tenth Amendments, refers to a class of persons who are part of a national community *or who have otherwise developed sufficient connection with this country to be considered part of that community*.

Heller, 554 U.S. at 580 (alterations in original) (emphasis added) (quoting *Verdugo-Urquidez*, 494 U.S. at 265) (quotation marks omitted); *see also Verdugo-Urquidez*, 494 U.S. at 271 (“[A]liens receive constitutional protections when they have come within the territory of the United States and developed substantial connections with this country”). In *Verdugo-Urquidez*, the Court reasoned that an alien establishes substantial connections with this country when she or he (1) is voluntarily present in the United States and (2) “accept[s] some societal obligations.” 494 U.S. at 273; *see also Martinez-Aguero*, 459 F.3d at 625 (“[A]liens with substantial connections are those who are in this country ‘voluntarily and presumably [have] accepted some societal obligations.’” (second alteration in original) (quoting *Verdugo-Urquidez*, 494 U.S. at 273)).⁶

⁶Although he joined and provided the fifth vote for the majority opinion in *Verdugo-Urquidez*, Justice Kennedy also appeared to depart from its reasoning regarding the

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In *Verdugo-Urquidez*, the Supreme Court concluded that an alien who was brought to the United States against his will, for the sole purpose of subjecting him to a criminal prosecution, was not entitled to Fourth Amendment protections because he “had no voluntary connection with this country that might place him among ‘the people’ of the United States,” and thus that the warrantless search of his properties by United States government agents in Mexico did not violate the Fourth Amendment. 494 U.S. at 273. Nothing in *Verdugo-Urquidez* requires that the alien must be lawfully present in the United States in order to establish substantial connections. In fact, the Court expressly assumed for the sake of argument that aliens who are unlawfully present in the United States are protected by the Fourth Amendment. *Id.* (declining to decide the issue because “such a claim [was not] squarely before us,” but explaining that “assuming that [illegal] aliens would be entitled to Fourth Amendment protections,” such

substantial connections test, explaining:

I cannot place any weight on the reference to “the people” in the Fourth Amendment as a source of restricting its protections. With respect, I submit these words do not detract from its force or its reach. Given the history of our Nation’s concern over warrantless and unreasonable searches, explicit recognition of “the right of the people” to Fourth Amendment protection may be interpreted to underscore the importance of the right, rather than to restrict the category of persons who may assert it.

494 U.S. at 276 (Kennedy, J., concurring). Rather, “Justice Kennedy appeared to indicate that the key factor in his decision was the extraterritorial application of the Fourth Amendment: ‘If the search had occurred in a residence within the United States, I have little doubt that the full protections of the Fourth Amendment would apply.’” *Martinez-Aguero*, 459 F.3d at 624 (quoting *Verdugo-Urquidez*, 494 U.S. at 278). Our court, in *Martinez-Aguero*, declined to decide whether the substantial connections test was controlling, because it determined that the alien satisfied the test, which was “more demanding” than any other potentially applicable test. *Id.* at 625. Likewise, in this case, for the reasons given below, Portillo-Munoz has also shown that he has substantial connections with this country.

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aliens would be different from the alien in *Verdugo-Urquidez*, provided that they “were in the United States voluntarily and presumably had accepted some societal obligations”). The Court also suggested that if the alien’s presence in the country, even if involuntary, had been “prolonged” for more than “a matter of days” when the search occurred, he could perhaps have been eligible to “claim the protection of the Fourth Amendment.” *Id.* at 272.

In *Martinez-Aguero*, this court held that an alien who attempted to enter the United States in an unlawful manner was part of “the people” under the purposes of the Fourth Amendment. 459 F.3d at 625. The alien, who did not reside in the United States but regularly crossed the border to visit family, attempted to enter with an expired visa, which American consular officials had incorrectly told her would suffice for her border crossings. *Id.* at 620. This court held that the alien’s “regular and lawful entry of the United States pursuant to a valid border-crossing card and her acquiescence in the U.S. system of immigration constitute her voluntary acceptance of societal obligations.” *Id.* at 625 (footnote omitted). The *Martinez-Aguero* court never indicated that attempting to comply with United States immigration laws is the only way that an alien can accept some societal obligations. On the contrary, the opinion suggested that the standard for establishing substantial connections is not high and that there would be few, if any, cases where an alien who was voluntarily within the United States would be unable to establish such connections. *Id.* (“There *may be* cases in which an alien’s connection with the United States is *so tenuous* that he cannot reasonably expect the protection of its constitutional guarantees” (emphases added)).

In the present case, Portillo-Munoz plainly satisfies both criteria of the

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substantial connections test under *Verdugo-Urquidez* and *Martinez-Aguero*: he is voluntarily present in the United States and has accepted several societal obligations. First, Portillo-Munoz came to and remained in the United States of his own volition. By contrast, in *Verdugo-Urquidez*, the Court concluded that the alien was not voluntarily present in the United States, because he had been brought to the country by the United States Marshals. 494 U.S. at 273.

Portillo-Munoz has also accepted several societal obligations, a fact that is uncontested by the government. First, Portillo-Munoz has accepted and fulfilled obligations to his American employers. At the time of his arrest, he had been working a steady job for six months, as a ranch hand in Dimmitt, Texas, where he was responsible for planting and harvesting crops, as well as raising chickens. Portillo-Munoz obtained his firearm in order to protect his employer's chickens from coyotes. Prior to his employment at the ranch, Portillo-Munoz worked at a dairy farm in Hereford, Texas, where he fed cattle and ensured that their feed was properly stored. Second, Portillo-Munoz accepted and fulfilled obligations to his landlord by paying rent for his home. Third, he accepted and fulfilled obligations to his girlfriend and her daughter by helping to financially support them. Finally, aside from unlawfully entering the United States (a misdemeanor punishable by fine or imprisonment of up to six months, 8 U.S.C. § 1325(a)), Portillo-Munoz has no criminal record or history of arrests. Many United States citizens have committed far more serious crimes, yet they still receive the constitutional protections given to "the people."⁷

⁷ See, e.g., *Dawson v. Delaware*, 503 U.S. 159, 167 (1992) (holding that the "First Amendment rights" of a defendant, who had convicted of murder, "were violated by the

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Moreover, Portillo-Munoz's place in United States society resembles that of many others. The Supreme Court recognized in *Plyler* that millions of aliens who are unlawfully present in the United States are part of American society: "The Attorney General [William French Smith, who served under President Ronald Reagan] recently estimated the number of illegal aliens within the United States at between 3 and 6 million. . . . [T]he Attorney General noted that this subclass is largely composed of persons with a permanent attachment to the nation [describing them as] 'millions of illegal aliens, many of whom have become, in effect, members of the community.'" 457 U.S. at 219 n.17 (quoting J. Hearing before the Subcomm. on Immigration, Refugees, and Int'l Law of the H. Comm. on the Judiciary and the Subcomm. on Immigration and Refugee Policy of the S. Comm. on the Judiciary, 97th Cong., 1st Sess., 9 (1981) (testimony of William French Smith)).

If an alien who undertook "periodic visits [to the United States] to assist her aunt with retrieving her Social Security check" has substantial connections to this country, *Martinez-Aguero*, 459 F.3d at 625, then surely Portillo-Munoz does, as well. He has voluntarily come to the United States and resided here for over 18 months, developing substantial connections with this country by fulfilling societal obligations to his employers, his landlord, his girlfriend and her daughter. He is "in effect, [a] member[] of the community" like the aliens described in *Plyler*. 457 U.S. at 219 n.17.

admission [in the sentencing phase] of [evidence of his membership in] the Aryan Brotherhood . . . because the evidence proved nothing more than [the defendant's] abstract beliefs"); *United States v. Webster*, 162 F.3d 308, 333 (5th Cir. 1998) ("[The defendant's] experience in police procedure, resulting from his lengthy criminal record, belies the assertion that he was unaware of his [Fourth Amendment] rights").

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Therefore, he is part of “the people,” and is entitled to the protections of the Bill of Rights, including not only the Second Amendment, but also the First and Fourth Amendments.

C.

Finally, the majority cites a number of cases that are inapposite to the question presented in this case: whether Portillo-Munoz is part of “the people.” The majority reasons that the cases it cites support the proposition “that the Constitution does not prohibit Congress from making laws that distinguish between citizens and aliens and between lawful and illegal aliens.” Maj. Op. 7. Those cases may be relevant to whether 18 U.S.C. § 922(g)(5) violates the Second Amendment. This dissent does not discuss that question, because, as explained above, I would remand for the district court to answer it in the first instance.

However, that is a distinct issue from the question which the majority purports to answer, and which accordingly is the focus of this dissent: whether aliens such as Portillo-Munoz are part of “the people,” and have any rights at all, under the First, Second, and Fourth Amendments. Because Portillo-Munoz has substantial connections with this country, and because the majority’s holding effectively nullifies the rights of countless others like him, I dissent from the majority’s dismissal of Portillo-Munoz’s Second Amendment claim.

United States Court of Appeals
Fifth Circuit

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

FILED
June 13, 2011

Lyle W. Cayce
Clerk

No. 11-10086

D.C. Docket No. 2:10-CR-42-1

UNITED STATES OF AMERICA,

Plaintiff - Appellee

v.

ARMANDO PORTILLO-MUNOZ, also known as Armando Portillo Munoz,

Defendant - Appellant

Appeal from the United States District Court for the
Northern District of Texas, Amarillo

Before GARWOOD, GARZA, and DENNIS, Circuit Judges.

J U D G M E N T

This cause was considered on the record on appeal and was argued by counsel.

It is ordered and adjudged that the judgment of the District Court is affirmed.

DENNIS, Circuit Judges, concurs in part and dissents in part.

ISSUED AS MANDATE:

A True Copy
Attest

Clerk, U.S. Court of Appeals, Fifth Circuit

By: _____
Deputy

New Orleans, Louisiana

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS

AMARILLO DIVISION

UNITED STATES OF AMERICA,	§	
	§	
vs.	§	CRIMINAL ACTION NUMBER
	§	2:10-CR-042
ARMANDO PORTILLO-MUÑOZ,	§	

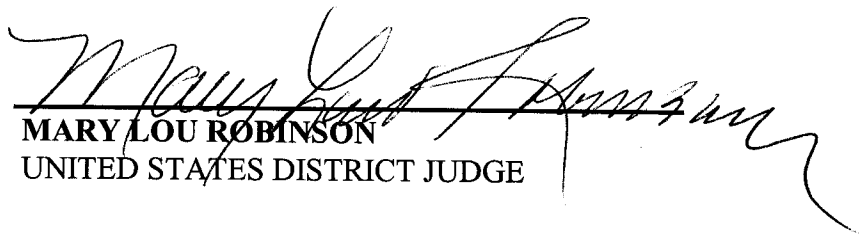
AMENDED ORDER DENYING DEFENDANT'S MOTION TO DISMISS INDICTMENT

Before the Court is Defendant's motion, filed September 20, 2010, to dismiss the indictment against him because the statute in question, 18 U.S.C. § 922(g)(5), violates his Second Amendment rights to keep and bear arms and to self-defense, and the government's response in opposition to that motion.

Defendant's motion to dismiss is denied.

It is SO ORDERED.

Signed this the 8th day of October, 2010.


 MARY LOU ROBINSON
 UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 11-10086

UNITED STATES OF AMERICA,

Plaintiff - Appellee

v.

ARMANDO PORTILLO-MUNOZ, also known as Armando Portillo Munoz,

Defendant - Appellant

Appeal from the United States District Court for the
Northern District of Texas, Amarillo

ON PETITION FOR REHEARING EN BANC

(Opinion 6/30/11, 5 Cir., _____, _____, F.3d _____)

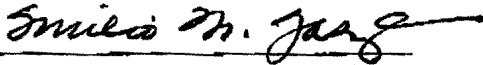
Before GARWOOD, GARZA, and DENNIS, Circuit Judges.

PER CURIAM:

- (✓) Treating the Petition for Rehearing En Banc as a Petition for Panel Rehearing, the Petition for Panel Rehearing is DENIED. No member of the panel nor judge in regular active service of the court having requested that the court be polled on Rehearing En Banc (FED. R. APP. P. and 5TH CIR. R. 35), the Petition for Rehearing En Banc is DENIED.
- () Treating the Petition for Rehearing En Banc as a Petition for Panel Rehearing, the Petition for Panel Rehearing is DENIED. The court

having been polled at the request of one of the members of the court and a majority of the judges who are in regular active service and not disqualified not having voted in favor (FED. R. APP. P. and 5TH CIR. R. 35), the Petition for Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:



United States Circuit Judge

*On account of his death on July 14, 2011, Judge Garwood did not participate in this decision.