

The Second Amendment and Aliens Unlawfully Present in the United States

September 25, 2026

Congressional Research Service

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R49360



R49360

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The Second Amendment to the Constitution protects “the right of the people to keep and bear Arms.” In *New York State Rifle and Pistol Ass’n v. Bruen*, 597 U.S. 1, 17 (2022), the Supreme Court explained that courts examining whether a law infringes on this right should look first to whether the text of the Second Amendment covers the regulated conduct—for example, whether an item covered by the regulation is covered by the term “Arms”—and, if it does, courts should then determine whether the law is consistent with the historical tradition of firearm regulation in the United States. If the law is not consistent with that tradition, then it is considered an unconstitutional infringement of the Second Amendment.

This two-step framework has been applied by the Supreme Court and federal courts of appeals to numerous firearms regulations, including a federal statute, 18 U.S.C. § 922, that prohibits possession of firearms by nine categories of persons. One of the provisions in that statute, 18 U.S.C. § 922(g)(5)(A), bars possession of firearms by aliens “illegally or unlawfully in the United States.” The Supreme Court has not addressed that provision with respect to the Second Amendment directly, but it has interpreted how other constitutional provisions apply to aliens unlawfully present in the United States. Some of these provisions have been interpreted as applying to aliens regardless of the legality of their presence in the United States, but the Supreme Court has nevertheless qualified the protection offered by those provisions, explaining that the “plenary” power that Congress generally enjoys over matters of immigration empowers it to legislate with respect to aliens in a manner that it could not with respect to citizens, at least in some circumstances. *See Mathews v. Diaz*, 426 U.S. 67, 80 (1976). In other cases, the Supreme Court has analyzed whether aliens are included within the scope of a constitutional provision at all, specifically, whether they should be considered among “the people” when that term is used in the Constitution. *See United States v. Verdugo-Urquidez*, 494 U.S. 259, 265 (1990).

Although not offering a definitive answer to this question, these cases have served as guideposts for lower courts in assessing whether the statutory provision prohibiting possession of firearms by unlawfully present aliens is consistent with the Second Amendment. All ten of the federal courts of appeals that have considered this question have agreed that 18 U.S.C. § 922(g)(5)(A) is constitutional, but they have not agreed on the analytical path to get to this result. Some of these courts have concluded that unlawfully present aliens are among “the people,” but that disarming them is also within the historical tradition of the United States, rendering the provision constitutional. *See, e.g., United States v. Escobar-Temal*, 161 F.4th 969, 978, 984 (6th Cir. 2025). Others have rejected inclusion of unlawfully present aliens among “the people” in the first instance, making their possession of firearms entirely unprotected by the Second Amendment. *See, e.g., United States v. Murillo-Lopez*, 151 F.4th 584, 591 (4th Cir. 2025). A third category of courts have decided that they should not determine whether unlawfully present aliens are included among “the people” because it is sufficient to find that, included or not, they may be disarmed consistent with the historical tradition of the United States. *United States v. Vizcaino-Peguero*, 175 F.4th 34, 40 (1st Cir. 2026).

These varying approaches reflect the complexity surrounding the constitutional rights of aliens in the United States and a recurring thread that, even when courts find that they are included within the scope of a constitutional provision, aliens may not enjoy the same degree of constitutional protection that is accorded to U.S. citizens. Should the Supreme Court choose to clarify the meaning of “the people” as to unlawfully present aliens under the Second Amendment, it would have significant consequences with respect to the constitutional protections that such aliens could claim and the coordinate scope of Congress’s plenary power over aliens unlawfully present in the United States.

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The Second Amendment of the U.S. 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.”¹ In *New York State Rifle and Pistol Ass’n v. Bruen*, the Supreme Court set forth the modern framework for analyzing whether statutes regulating firearm possession are consistent with the Second Amendment.² Drawing on its previous decision in *District of Columbia v. Heller*, the *Bruen* Court described a history-focused, two-step inquiry.³ A court analyzing a challenged law must first determine whether the “plain text” of the Second Amendment “covers” the regulated conduct.⁴ If it does, then the Second Amendment “presumptively protects” the conduct, and the government has the burden of demonstrating that the statutory restriction of that conduct “is consistent with the Nation’s historical tradition of firearm regulation.”⁵ That inquiry, in turn, requires consideration of “whether modern and historical regulations impose a comparable burden on the right of armed self-defense and whether that burden is comparably justified.”⁶ As the Court later elaborated, “[w]hy and how the regulation burdens the right are central to this inquiry.”⁷

Since *Bruen* was decided, numerous criminal defendants have raised Second Amendment challenges to charges that they have violated 18 U.S.C. § 922(g), the federal statutory provision criminalizing possession of firearms by nine categories of individuals. These challenges have met with varying degrees of success. In 2024, the Supreme Court, in *United States v. Rahimi*, upheld the prohibition in § 922(g)(8) barring firearm possession by persons subject to a domestic violence restraining order.⁸ In contrast, in 2026, the Court applied *Bruen* in *United States v. Hemani* to find § 922(g)(3), which prohibits possession of firearms by anyone “who is an ‘unlawful user of’ or ‘addicted to’ a ‘controlled substance,’” unconstitutional when applied to a person that only “uses marijuana a few times a week.”⁹ Federal courts of appeals have divided over the constitutionality of § 922(g)(1), which prohibits the possession of a firearm by a person convicted of a felony, and the Supreme Court has thus far declined to hear those cases.¹⁰ Litigants have continued to file petitions seeking Supreme Court review of the constitutionality of § 922(g)(1), and the Supreme Court is considering one such petition for the October 2026 term filed by the United States requesting the Court’s review of a lower court decision finding § 922(g)(1) unconstitutional as applied to an individual with a previous felony conviction for drug possession.¹¹

Lower appellate courts have also been divided as to how to analyze another categorical ban found in § 922(g)(5)(A), which prohibits possession of firearms by any “alien [who] is illegally or

¹ U.S. CONST. amend. II.

² 597 U.S. 1, 17 (2022).

³ *N.Y. State Rifle & Pistol Ass’n v. Bruen*, 597 U.S. 1, 17 (2022); see *District of Columbia v. Heller*, 554 U.S. 570 (2008).

⁴ *Bruen*, 597 U.S. at 17; see also *United States v. Hemani*, 146 S. Ct. 1677, 1685 (2026).

⁵ *Hemani*, 146 S. Ct. at 1687 (quoting *Bruen*, 597 U.S. at 24).

⁶ *Bruen*, 597 U.S. at 29.

⁷ *United States v. Rahimi*, 602 U.S. 680, 692 (2024).

⁸ *Id.* at 690.

⁹ *Hemani*, 146 S. Ct. at 1684, 1693 (quoting 18 U.S.C. § 922(g)(3)).

¹⁰ See CRS Legal Sidebar LSB11108, *The Second Amendment at the Supreme Court: Challenges to Federal Gun Laws*, by Dave S. Sidhu (2026); see also CRS Report R48846, *The U.S. Courts of Appeals: Background and Circuit Splits from 2025*, coordinated by Michael John Garcia (2026).

¹¹ Petition for Writ of Certiorari, *United States v. Hembree*, No. 25-1219 (U.S. Apr. 24, 2026); see also CRS Legal Sidebar LSB11170, *The Department of Justice Asks the Supreme Court to Review Constitutionality of Federal Prohibition on Felons Possessing Firearms*, by Dave S. Sidhu (2026).

unlawfully in the United States.”¹² Second Amendment challenges raised by aliens unlawfully present in the United States and charged with violating this provision after *Bruen* have raised complex questions for courts to resolve. In challenges to other provisions of § 922(g), where the Supreme Court has offered elaboration on *Bruen*, there has been relatively little question of whether the terms of the Second Amendment “cover” the conduct, since § 922(g) generally works to “ban[] a class of people . . . from possessing essentially any firearm for any purpose.”¹³ With respect to § 922(g)(5)(A), however, courts have been confronted with the threshold question of whether unlawfully present aliens are among “the people” having “the right . . . to keep and bear Arms” at all, an issue that has also been raised with respect to disarmament of felons and, in the state law context, those under 21 years of age.¹⁴ Although no federal court of appeals has found § 922(g)(5)(A) unconstitutional, they have adopted different approaches to this question. These several approaches reflect the varying strands of analysis the Supreme Court has employed with respect to determining the rights of aliens under the Constitution, and the *Bruen* inquiry in particular reveals the uncertainty that continues to surround this issue. Further, the approach courts choose to ascertain whether unlawfully present aliens have a right to keep and bear arms may have substantial consequences for whether such aliens are protected under other provisions of the Constitution, which in turn may affect Congress’s ability to exercise its plenary power over immigration.

This report discusses the legal frameworks that the Supreme Court has applied in evaluating whether unlawfully present aliens may be accorded constitutional protections. It then situates the Second Amendment claims of aliens after *Bruen* within these frameworks through an examination of the approaches that various courts of appeals have taken when addressing this issue. The report concludes with a discussion of the possible consequences for both the Second Amendment and other constitutional provisions.

The Varying Constitutional Rights of Aliens Unlawfully Present in the United States

The provisions of the Constitution conferring rights or privileges vary in scope and in the terminology used to reference covered individuals. For example, the Constitution specifies that Representatives and Senators must be “Citizens of the United States”¹⁵ and that the President must be a “natural born Citizen.”¹⁶ Other constitutional provisions do not expressly cabin their

¹² 8 U.S.C. § 922(g)(5)(A). An alien is defined by the Immigration and Nationality Act as “any person not a citizen or national of the United States.” *Id.* § 1101(a)(3). Section 922(g)(5)(A) does not define what is required for an alien to be “illegally or unlawfully in the United States.” Although the Supreme Court has not offered a definitive interpretation of this phrase, lower courts have understood it “to refer to one ‘whose presence within the United States is forbidden or not authorized by law.’” *United States v. Arrieta*, 862 F.3d 512, 515 (5th Cir. 2017) (quoting *United States v. Orellana*, 405 F.3d 360, 366 (5th Cir. 2005)). This report generally uses “unlawfully present” to refer to those aliens covered by § 922(g)(5)(A).

A second provision, in § 922(g)(5)(B), prohibits possession of firearms by aliens “admitted to the United States under a nonimmigrant visa,” with some exceptions. The constitutional considerations attending this provision are generally outside the scope of this report, although there may be overlap in analytical approaches. *See infra* note 113.

¹³ *Hemani*, 146 S. Ct. at 1686.

¹⁴ *United States v. Williams*, 113 F.4th 637, 649 (6th Cir. 2024) (holding that the Second Amendment does not distinguish “between felons and non-felons”); *Rocky Mountain Gun Owners v. Polis*, 121 F.4th 96, 114 (10th Cir. 2024) (analyzing whether “18- to 20-year-olds fall within ‘the people,’” as used in the Second Amendment and concluding that the plaintiff, “an ordinary, law-abiding citizen under the age of 21” was included among “the people”).

¹⁵ U.S. CONST. art. I, § 2 (Representatives); *id.* art. I, § 3 (Senators).

¹⁶ *Id.* art. II, § 1.

application to U.S. citizens. Amendments in the Bill of Rights refer variously to “person[s],”¹⁷ “the people,”¹⁸ and “the accused”¹⁹ as the recipients of their protections or are framed as general commands restricting governmental action.²⁰ The same variance occurs in subsequent constitutional amendments, including the Reconstruction Amendments.²¹ These differences have at times required the Supreme Court to consider whether particular individuals, including aliens, are within the scope of a given constitutional provision.

With respect to whether aliens may assert constitutional rights, the Supreme Court has long drawn a geographical distinction, explaining that “[i]t is well established that certain constitutional protections available to persons inside the United States are unavailable to aliens outside of our geographic borders.”²² The Supreme Court has not identified a categorical rule that would comprehensively include or exclude unlawfully present aliens from the express protections of the Constitution. Instead, the Court has accorded different constitutional provisions different scopes based on their texts, which, as noted above, can vary from provision to provision, and, in the case of aliens, the Court has also paid particular attention to the traditional power wielded by the sovereign over immigration. This more individualized approach to constitutional rights has led to some constitutional protections being identified as “universal”—formally embracing unlawfully present aliens within their text—but nevertheless qualified in the extent of the protection that they offer to an alien in particular. Other constitutional protections, by contrast, have been found less clearly applicable to unlawfully present aliens in the first instance.

The “Universal” Provisions of the Constitution and the Qualified Protections Afforded to Aliens Under Those Provisions

Some of the Supreme Court’s longest-standing statements regard the due process and equal protection rights of aliens under the Fifth Amendment and the Fourteenth Amendment, both of which use “person” to describe the recipient of the rights they confer.²³ In a landmark 1886 case, *Yick Wo v Hopkins*, the Court considered a Fourteenth Amendment challenge brought by Chinese immigrants concerning their imprisonment under a state law they alleged to be unequally enforced against them.²⁴ The Court rejected any supposition that the rights of the Chinese immigrants were of any “less” application because they were “aliens and subjects of the emperor

¹⁷ *Id.* amend. V (“[N]or shall any person . . . be deprived of life, liberty, or property, without due process of law.”).

¹⁸ *Id.* 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.”).

¹⁹ *Id.* amend. VI (“In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial.”).

²⁰ *Id.* amend. VIII (“Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.”).

²¹ *Id.* amend. XIII (“Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States”); *Id.* amend. XIV (“[N]or shall any State deprive any person of life, liberty, or property, without due process of law.”); *Id.* amend. XV (“The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude.”).

²² *Zadvydas v. Davis*, 533 U.S. 678, 693 (2001).

²³ U.S. CONST. amend. V; *id.* amend. XIV, § 1. The due process protections of the Fifth Amendment apply against actions by the federal government, see *Dobbs v. Jackson Women’s Health Org.*, 597 U.S. 215, 237 (2022), while the Fourteenth Amendment expressly prohibits states from denying persons the equal protection of laws. The Supreme Court has found that the principles that inhere in the latter prohibition also apply to the federal government through the Fifth Amendment’s Due Process Clause. See *Bolling v. Sharpe*, 347 U.S. 497, 499 (1954) (holding that racial discrimination in the District of Columbia’s public school system violates the Fifth Amendment’s Due Process Clause, just as racial discrimination by state public school systems violates the Equal Protection Clause).

²⁴ 118 U.S. 356 (1886).

of China.”²⁵ The Court recited the text of the Fourteenth Amendment and its command that no state shall “deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.”²⁶ The Court declared “these provisions are universal in their application, to all persons within the territorial jurisdiction” of the United States, and it accordingly characterized the question before it “as involving the rights of every citizen of the United States equally with those of the strangers and aliens who now invoke the jurisdiction of the court.”²⁷ The Court found that the challenged law was predicated on “hostility to the race and nationality to which the petitioners belong” and therefore in violation of the Fourteenth Amendment.²⁸ A decade later, in *Wong Wing v. United States*, the Court expressly applied *Yick Wo*’s language of “universal . . . application” to the Fifth Amendment’s protections for “any person” and the Sixth Amendment’s guarantees of certain procedural protections to “the accused” in any criminal prosecution, holding that “all persons within the territory of the United States are entitled to the protection guaranteed by those amendments.”²⁹

The application of these constitutional provisions to all persons “within the territory of United States” has not meant that aliens are necessarily accorded the full scope of their protections, however. The Supreme Court has instead described constitutional protections accorded to an alien in the United States in terms of an “ascending scale of rights.”³⁰ For the alien in that conception,

[m]ere lawful presence in the country creates an implied assurance of safe conduct and gives him certain rights; they become more extensive and secure when he makes preliminary declaration of intention to become a citizen, and they expand to those of full citizenship upon naturalization.³¹

Even at the higher end of this scale, an alien’s constitutional protections may be qualified. In *Mathews v. Diaz*, decided nearly a century after *Yick Wo*, in 1976, the Supreme Court stated that anyone “whose presence in this country is unlawful, involuntary, or transitory is entitled to” the protections accorded by the Fifth and Fourteenth Amendments against governmental “deprivation of life, liberty, or property without due process of law.”³² At the same time, the Court qualified these procedural protections, declaring that “[t]he fact that all persons, aliens and citizens alike, are protected by the Due Process Clause does not lead to the further conclusion that all aliens are entitled to enjoy all the advantages of citizenship or, indeed, to the conclusion that all aliens must be placed in a single homogeneous legal classification.”³³ The Court further explained that there are a number of constitutional provisions that rest on “the premise that a legitimate distinction between citizens and aliens may justify attributes and benefits for one class not accorded to the other; and the class of aliens is itself a heterogeneous multitude of persons with a wide-ranging variety of ties to this country.”³⁴ For the Court, these legal and factual distinctions had implications for the scope of congressional power over aliens, specifically that “[i]n the exercise

²⁵ *Id.* at 368.

²⁶ *Id.* (quoting U.S. CONST. amend. XIV).

²⁷ *Id.* at 369.

²⁸ *Id.* at 374.

²⁹ 163 U.S. 228, 238 (1896).

³⁰ *Johnson v. Eisentrager*, 339 U.S. 763, 770 (1950).

³¹ *Id.*

³² *Mathews v. Diaz*, 426 U.S. 67, 77 (1976).

³³ *Id.* at 78.

³⁴ *Id.* at 78–79 (footnote omitted).

of its broad power over naturalization and immigration, Congress regularly makes rules that would be unacceptable if applied to citizens.”³⁵

These cases thus reflect one strand of constitutional protections for aliens: There may be no substantial question of their formal inclusion within the scope of a constitutional provision that is broadly applicable to “any person,” but that inclusion comes with unique qualifications arising from their “status and circumstance.”³⁶

***United States v. Verdugo-Urquidez* and “Sufficient Connections”**

This historical application of constitutional protections was a crucial context for *United States v. Verdugo-Urquidez*, in which the Court in 1990 took a different tack.³⁷ Specifically, in *Verdugo-Urquidez*, the Court considered the degree to which an alien may be considered to have a claim to any constitutional right in the first instance.³⁸ *Verdugo-Urquidez* involved Fourth Amendment claims brought by a nonresident alien with respect to “property . . . owned by [the] nonresident alien and located in a foreign country.”³⁹ The alien had been arrested abroad and brought to the United States for trial, and he alleged that the government violated his Fourth Amendment rights by searching his home in Mexico without a warrant.⁴⁰ At the outset of its analysis, the Court drew an express textual contrast between those individuals afforded protections under the Fifth and Sixth Amendments and those afforded protections under the Fourth Amendment.⁴¹ It explained that the Fourth Amendment⁴² refers to a right of “the people,” which it described as “a term of art employed in select parts of the Constitution.”⁴³ According to the Court, “the people” contemplates a narrower range of application for the Fourth Amendment than the Fifth and Sixth Amendments because these latter amendments use, respectively, “the relatively universal term” “person” and the term “accused” to describe the holders of the rights they confer.⁴⁴ Though disclaiming a “conclusive” textual interpretation, the Court indicated 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.”⁴⁵

The *Verdugo-Urquidez* Court did not elaborate on this conception of “national community” or the criteria for a “sufficient connection,” such that an alien would enjoy Fourth Amendment rights. The Court’s analysis suggested, however, that voluntary presence in the country was a minimally necessary, if not sufficient, condition. The Court distinguished *Yick Wo* and *Wong Wing*, supplementing its earlier textual analysis with the observation that those and other cases “establish only that aliens receive constitutional protections when they have come within the

³⁵ *Id.* at 80.

³⁶ *Zadvydas v. Davis*, 533 U.S. 678, 694 (2001).

³⁷ 494 U.S. 259 (1990).

³⁸ *Id.*

³⁹ *Id.* at 261.

⁴⁰ *Id.* at 263.

⁴¹ *Id.* at 264–65.

⁴² U.S. CONST. amend. IV.

⁴³ *Verdugo-Urquidez*, 494 U.S. at 265.

⁴⁴ *Id.* at 269.

⁴⁵ *Id.* at 265.

territory of the United States and developed substantial connections with this country.”⁴⁶ The Court did not specify whether “substantial connections” was distinct from “sufficient conditions” but determined in any event that such connections were not established when an alien is lawfully present but was involuntarily brought into the United States for trial, had been present only “a matter of days,” and “had no previous significant voluntary connection with the United States.”⁴⁷

As with other constitutional protections historically given to aliens, the approach of *Verdugo-Urquidez* makes an alien’s connections to the United States relevant for assessing a constitutional right, but instead of those connections going to the contours of that right, they appear to go to whether the alien is a member of “the people” to whom the right applies at all.

***District of Columbia v. Heller* and Membership in the “Political Community”**

The Supreme Court returned to the meaning of “the people” in *District of Columbia v. Heller*, a 2008 case involving a Second Amendment challenge to a restriction on handgun possession in the home.⁴⁸ There, the question was not whether aliens were included within the term “the people,” but more broadly whether the right of “the people” to possess firearms was limited by a necessary “connection with militia service.”⁴⁹ The Court reviewed the various instances in which “the people” appeared in the Constitution, including the First Amendment and the Fourth Amendment, and stated that “in all six other provisions of the Constitution that mention ‘the people,’ the term unambiguously refers to all members of the political community.”⁵⁰ Citing this usage and *Verdugo-Urquidez*’s discussion of the “the people,” the Court identified “a strong presumption that the Second Amendment . . . belongs to all Americans.”⁵¹

The Court did not elaborate on the meaning of “political community” other than to distinguish it from the term “militia,” which the Court explained “consisted of a subset of ‘the people’—those who were male, able bodied, and within a certain age range.”⁵² In other parts of its discussion, in addition to “all Americans,” the Court referred to the right of “citizens” to bear arms and asserted that the Second Amendment “surely elevates above all other interests the right of law-abiding,

⁴⁶ *Id.* at 271.

⁴⁷ *Id.* at 271–72, 274–75. The Court also noted that these circumstances distinguished the alien before it from the aliens in *Immigration & Naturalization Service v. Lopez-Mendoza*, 468 U.S. 1032 (1984). *Id.* at 273. As an initial matter, the Court in *Verdugo-Urquidez* said that *Lopez-Mendoza* did not “encompass whether the protections of the Fourth Amendment extend to illegal aliens in this country.” *Id.* at 272. The Court also recounted that the unlawfully present aliens in *Lopez-Mendoza* “were in the United States voluntarily and presumably had accepted some societal obligations,” in contrast to the alien before it in *Verdugo-Urquidez*, who “had no voluntary connection with this country that might place him among ‘the people’ of the United States.” *Id.* at 273. These statements could reflect that “societal obligations” and “voluntary presence” amount to legally important criteria for ascertaining whether an unlawfully present alien can be counted among “the people.” Indeed, one court of appeals understood this passage, as discussed in greater detail below, to “indicate[] that substantial connections could include entering voluntarily and accepting some societal obligations.” *United States v. Escobar-Temal*, 161 F.4th 969, 973 (6th Cir. 2025); see *infra* “Approach One: Unlawfully Present Aliens Can Be Among ‘the People’ Covered by the Second Amendment.”

⁴⁸ *District of Columbia v. Heller*, 554 U.S. 570, 573 (2008).

⁴⁹ *Id.* at 577.

⁵⁰ *Id.* at 580. The Court explained that “[t]he unamended Constitution and the Bill of Rights use the phrase ‘right of the people’” in the First, Second, and Fourth Amendments. *Id.* at 579; see U.S. CONST. amend. I; *id.* amend. II; *id.* amend. IV. The Court further noted that “[t]hree provisions of the Constitution refer to ‘the people’ in a context other than ‘rights’”: the Preamble, Section 2 of Article 1, and the Tenth Amendment. *Heller*, 554 U.S. at 579; U.S. CONST. pmbl.; *id.* art. I, § 2; *id.* amend. X.

⁵¹ *Heller*, 554 U.S. at 581.

⁵² *Id.* at 580.

responsible citizens to use arms in defense of hearth and home.”⁵³ These statements did not expressly characterize citizenship as either a necessary or a merely sufficient condition of inclusion within “the people.” There appeared to be little question that citizens, like the one that brought the challenge in *Heller*, were part of “the political community,” but the Court left unexplained what, if any, other characteristics might serve to establish membership in the “political community.”

In *United States v. Rahimi*, the Supreme Court acknowledged that at least some of its earlier descriptions in *Heller* were not meant to draw out the boundary of “the people.”⁵⁴ There, the government argued that § 922(g)(8) could be upheld as applied because, among other things, the criminal defendant was not “responsible,” at least as that term was used in *Heller* (and later, in *Bruen*), because he posed a danger with respect to firearms.⁵⁵ The *Rahimi* Court, however, specifically rejected this contention.⁵⁶ Although it acknowledged that those opinions “used the term ‘responsible’ to describe the class of ordinary citizens who undoubtedly enjoy the Second Amendment right,” it disclaimed the significance of that usage, stating that “those decisions did not define the term and said nothing about the status of citizens who were not ‘responsible.’”⁵⁷ *Rahimi* may thus provide some indication that not all of the terms used in *Heller* were intended to define the outer scope of the Second Amendment, a view echoed in opinions of courts of appeals that have similarly found “law-abiding” to not require elimination of felons from “the people.”⁵⁸

Second Amendment Rights of Aliens Unlawfully Present in the United States

Verdugo-Urquidez and *Heller* suggest that only those aliens who have “sufficient connections with [the United States]” or who are part of the “political community” should be considered part of the “the people” with the “right to bear Arms.” Federal courts of appeals have drawn on these cases in applying the *Bruen* framework to Second Amendment challenges raised by aliens to § 922(g)(5)(A). In doing so, they have adopted three different approaches. These approaches reflect disagreement regarding the first step of *Bruen*, which concerns whether the Second Amendment’s plain text “cover[s]” the defendant’s conduct. Some courts of appeals have found that an unlawfully present alien, under *Verdugo-Urquidez*, has, at least in certain circumstances, a Second Amendment right to bear arms that satisfies the first step in the *Bruen* inquiry. In contrast, other courts of appeals have found that such aliens should not be considered part of the “political community” under *Heller*, thereby placing them outside the protections of the Second Amendment and rejecting their challenges at the first step of *Bruen*. A third group of courts of appeals have avoided this disagreement and assumed, over objections by the government, that unlawfully present aliens are within the scope of the Second Amendment. These courts of appeals, along with those affirmatively finding that unlawfully present aliens are protected by the Second Amendment, have then moved to the second step of *Bruen* and scrutinized whether the government has carried its burden of demonstrating that § 922(g)(5) “is consistent with the

⁵³ *Id.* at 595, 635.

⁵⁴ 602 U.S. 680 (2024).

⁵⁵ Transcript of Oral Argument at 6–11, *United States v. Rahimi*, 602 U.S. 680 (2024) (No. 22-915); *see Heller*, 554 U.S. at 635; *see also Bruen*, 597 U.S. at 59.

⁵⁶ *Rahimi*, 602 U.S. at 701.

⁵⁷ *Id.* at 701–02.

⁵⁸ *Range v. Att’y Gen.*, 124 F.4th 218, 226 (3d Cir. 2024) (en banc).

Nation’s historical tradition of firearm regulation.” These courts have all answered in the affirmative.

Although these various appellate courts have not agreed analytically, they have thus all concluded that § 922(g)(5)(A) constitutionally disarms unlawfully present aliens. A major element of their analytical disagreement goes to whether a historical record of aliens being disarmed by the government goes to the first or second step of *Bruen*; that is, whether it is evidence that an unlawfully present alien is not among “the people” or whether it is evidence that the alien may be disarmed despite falling within the formal bounds of constitutional protection. This dispute, driven by the *Bruen* inquiry and nominally centering on *Verdugo-Urquidez* and *Heller*, also reflects the divergence in the approaches taken over the years by the Supreme Court with respect to other constitutional protections. In particular, those courts finding (or assuming) that the Second Amendment protects unlawfully present aliens but that they may be disarmed recall the Supreme Court’s invocation of an “ascending scale” of protections even within a broadly applicable constitutional provision.

Approach One: Unlawfully Present Aliens Can Be Among the “the People” Covered by the Second Amendment

Section 922(g)(5)(A) prohibits firearm possession by an alien “illegally or unlawfully in the United States.” The U.S. Court of Appeals for the Sixth Circuit (Sixth Circuit)⁵⁹ is one of two federal courts of appeals, and the only post-*Bruen* appellate court, to have determined as a matter of first impression that an alien covered by § 922(g)(5)(A) can be among “the people” having the right to “keep and bear Arms.”⁶⁰ In *United States v. Escobar-Temal*, decided in 2025, an alien who entered the country unlawfully more than a decade earlier and who had since married and had children pled guilty to violating § 922(g)(5)(A) after his effort to dismiss his indictment on Second Amendment grounds failed.⁶¹ On appeal challenging the statute’s constitutionality, “[b]oth parties agree[d] that the Second Amendment” covered the alien’s conduct—“keeping firearms inside the home”—but the government argued that the Second Amendment did not cover the alien himself because “individuals not lawfully present in the United States are not part of ‘the people’ and do not, therefore, have Second Amendment rights.”⁶² The alien’s argument should thus, according to the government, fail at the first step of *Bruen*.

In making this argument, the government relied on *Heller*’s statement that “the people” “unambiguously refers to . . . members of the political community.”⁶³ The government urged that the references in *Heller* to the Second Amendment’s conferral of a right on “citizens” (a formulation also used in *Bruen*) and “Americans” demonstrated “the Court’s understanding that

⁵⁹ For purposes of brevity, references in this report (e.g., the Fourth Circuit) refer to the U.S. Court of Appeals for that circuit (e.g., the U.S. Court of Appeals for the Fourth Circuit).

⁶⁰ *United States v. Escobar-Temal*, 161 F.4th 969, 973 (6th Cir. 2025). The U.S. Court of Appeals for the Seventh Circuit (Seventh Circuit) had reached the same conclusion in a pre-*Bruen* case, finding that, under *Verdugo-Urquidez*, at least some unlawfully present aliens are among “the people.” See *United States v. Meza Rodriguez*, 798 F.3d 664, 672 (7th Cir. 2015). Returning to that precedent after *Bruen*, the Seventh Circuit found that “no intervening Supreme Court precedent requires . . . reassess[ing]” it, and so it continued to *Bruen*’s second step to analyze the constitutionality of § 922(g)(5)(A), ultimately finding that the government had carried its burden in demonstrating the provision’s constitutionality. *United States v. Carbajal-Flores*, 143 F.4th 877, 882 (7th Cir. 2025).

⁶¹ *Escobar-Temal*, 161 F.4th at 971. In his motion to dismiss, the alien argued that the statute is facially unconstitutional under the Second Amendment. *Id.* at 970. The district court denied the motion. *Id.* at 971.

⁶² *Id.* at 972.

⁶³ Brief on Behalf of Plaintiff-Appellee at 14, *Escobar-Temal*, 161 F.4th 969 (No. 24-5668) (quoting *Dist. of Columbia v. Heller*, 554 U.S. 570, 580 (2008)).

the right to keep and bear arms does not belong to noncitizens.”⁶⁴ In addition to these textual arguments, the government also adduced historical evidence of aliens being denied the right to bear arms.⁶⁵ Although stopping short of arguing that only citizens have that right, the government argued that its textual and historical evidence was sufficient for the court to reject the constitutional challenge by an unlawfully present alien under the first step of *Bruen*.⁶⁶

A majority of the Sixth Circuit panel disagreed. A substantial component of that skepticism was grounded in the language of *Verdugo-Urquidez*. While acknowledging that “Supreme Court precedent indicates that an individual’s mere presence in the United States is not sufficient to confer First, Second, and Fourth Amendment rights when she unlawfully entered the country,” the majority interpreted *Verdugo-Urquidez* to contemplate “that substantial connections could include entering voluntarily and accepting some societal obligations.”⁶⁷

The Sixth Circuit majority cited two further reasons to reject the government’s arguments at *Bruen*’s first step. First, it found the references to “citizens” in *Heller* and elsewhere to mean only that citizenship was a sufficient, but not necessary, condition of being included in “the people”; in other words, “[t]he fact that the Second Amendment certainly encompasses all U.S. citizens does not mean that it excludes those who are not.”⁶⁸ Second, the majority did not believe that the “litany of historical sources” cited by the government should go to the first step of *Bruen*.⁶⁹ In support, the majority cited a dissent by then-Seventh Circuit judge Amy Coney Barrett in a pre-*Bruen* challenge to § 922(g)(1).⁷⁰ That dissent distinguished between “competing ways of approaching the constitutionality of gun dispossession laws.”⁷¹ One such approach “uses history and tradition to identify the scope of the right, and the other uses that same body of evidence to identify the scope of the legislature’s power to take it away.”⁷² The Barrett dissent argued that, although these approaches may typically be coterminous, “the latter is the better way to approach the problem,” not least because it would be “unusual” to conceptualize deprivation of a constitutional right based on the status of a person rather than a state action taken against that person.⁷³ Such a conceptualization, according to the Barrett dissent, would risk having a person drop in or out of protection under the Second Amendment based on changes in their status, even if the state had otherwise refrained from affirmatively prohibiting their possession of a firearm.⁷⁴

The Sixth Circuit majority in *Escobar-Temal* adopted the second approach identified by the Barrett dissent (which it found implicitly supported by *Rahimi*), concluding that

the Government’s ample historical evidence does not demonstrate that unlawfully present individuals are excluded from “the people.” Rather, it relates to the second step of our

⁶⁴ *Id.*

⁶⁵ *Id.* at 16–18.

⁶⁶ *Id.* at 20.

⁶⁷ *Escobar-Temal*, 161 F.4th at 973. In this formulation, the Sixth Circuit drew on the language used by the Supreme Court in *Verdugo-Urquidez* to distinguish *Immigration & Naturalization Service v. Lopez-Mendoza*. *United States v. Verdugo-Urquidez*, 494 U.S. 259, 271–72, 273 (1990) (discussing *Immigr. & Naturalization Servs. v. Lopez-Mendoza*, 468 U.S. 1032 (1984)); *see also supra* note 47.

⁶⁸ *Escobar-Temal*, 161 F.4th at 974.

⁶⁹ *Id.* at 975.

⁷⁰ *Id.*

⁷¹ *Kanter v. Barr*, 919 F.3d 437, 451 (7th Cir. 2019) (Barrett, J., dissenting), *abrogated by* *N.Y. State Rifle & Pistol Ass’n v. Bruen*, 597 U.S. 1 (2022).

⁷² *Id.* at 452.

⁷³ *Id.*

⁷⁴ *Id.* at 453.

analysis: whether the Government has met its burden of showing that disarming individuals unlawfully present in the United States is consistent with our nation's tradition of firearm regulation.⁷⁵

With the historical evidence of disarmament of unlawfully present aliens cabined to the second step of *Bruen*, the majority undertook the textual analysis required at *Bruen*'s first step through a brief historical examination of the Second Amendment's use of "the people," which it found to confirm that the Second Amendment "encompasses unlawfully present individuals with sufficient connections to the national community."⁷⁶ That conclusion, in turn, led the majority to examine whether the alien had such connections, and the majority found that he had, "given that he voluntarily moved here, has no criminal convictions, held a job, and established a family."⁷⁷ The court thus held that his possession of a firearm was thus "presumptively protected" under *Bruen*'s first step.

In the second *Bruen* step, the historical evidence of disarmament came back to the fore, and the majority identified "a substantial history of governmental disarmament of noncitizens and other political or demographic groups seen as lacking a regulable relationship to the government."⁷⁸ This history, according to the majority, included disarmament apart from any specific consideration of danger or violence, either as a class or individually.⁷⁹ Based on the historical record, the majority held that an unlawfully present alien, even with substantial connections, could be disarmed by the government on the grounds of the alien's unlawful status.⁸⁰

In an opinion concurring in judgment but dissenting otherwise, the remaining panelist in *Escobar-Temal* disagreed with the meaning accorded by the majority to "the people."⁸¹ In the concurrence's view, the Second Amendment analysis should end at the first *Bruen* step because, "[p]lain and simple, 'the people' refers to the American citizens who consented to the government of the United States. Since illegal aliens aren't citizens, they can't assert 'the right of the people to keep and bear arms.'"⁸² The concurrence's view, shared in this respect by other judges writing for themselves in similar cases,⁸³ illustrates both the different textual approach to this portion of the *Bruen* analysis and the potential consequences of that approach.

⁷⁵ *Escobar-Temal*, 161 F.4th at 975.

⁷⁶ *Id.* at 975, 977.

⁷⁷ *Id.* at 977 (footnote omitted).

⁷⁸ *Id.* at 978.

⁷⁹ *Id.* at 985.

⁸⁰ In a case following *Escobar-Temal*, a district court in the Sixth Circuit considered how that precedent applied to a juvenile alien who had entered the United States illegally but had since applied for and received "Special Immigration Juvenile" status, which confers on aliens "the ability to adjust their status, access federally funded education programs, and to receive preferential status when seeking an employment-based visa." *United States v. Aranda*, 831 F. Supp. 3d 486, 487, 490 (E.D. Ky. 2026). Although the government suggested that the alien should nevertheless be treated as an individual illegally in the United States and "maintain[ed] the position" that such aliens are not among "the people," the district court disagreed. It found that, under the approach taken in *Escobar-Temal* with respect to the first step of *Bruen*, there were "sufficient connections" for the alien to be considered covered by the Second Amendment. *Id.* at 489. Under the second step of *Bruen*, it found that the alien's particular immigration status, though limited in some respects, "create[d] a formal, regulable relationship with the United States government," and the government had not carried its burden to show a historical tradition of disarming persons with such status. *Id.* at 490. The district court therefore held § 922(g)(5)(A) unconstitutional as applied to that alien and dismissed the indictment. *Id.* at 491. The government ultimately voluntarily dismissed its appeal. *See id.*, *appeal dismissed*, No. 26-5218 (6th Cir. May 11, 2026).

⁸¹ *Escobar-Temal*, 161 F.4th at 986 (Thapar, J., dissenting in part and concurring in the judgment).

⁸² *Id.*

⁸³ *United States v. Vazquez-Ramirez*, 163 F.4th 706, 712 (9th Cir. 2026) (Bumatay, J. concurring in the judgment); *United States v. Perez*, 6 F.4th 448, 457 (2d Cir. 2021) (Menashi, J., concurring in the judgment).

After detailing the historical record at length, the concurrence criticized the majority's approach of tying that evidence to step two of *Bruen*, arguing that "[w]hen our historical tradition supports the exclusion of an objectively identifiable group, courts can and should make this determination at Step 1."⁸⁴ The concurrence also criticized the majority's use of the dissent written by then-Judge Barrett, characterizing that dissent as focused only on the "pragmatic" issues that would attend "excluding individuals based on subjective and shifting statuses," a characterization it rejected as to unlawfully present aliens.⁸⁵

The concurring judge then expressed skepticism that past decisions protecting unlawfully present aliens under the First and Fourth Amendments could support extending protection under the Second Amendment. In particular, the concurrence disagreed with the premise, arguing that, as "[o]riginally understood, neither the First nor Fourth Amendment clearly extends to noncitizens."⁸⁶ The concurrence distinguished *Verdugo-Urquidez*'s language concerning substantial connections as "an extraneous statement" and "untenable" when "examined against the historical record."⁸⁷ The concurrence also argued that

Heller's switch from "national" to "political" community underscores that illegal aliens cannot be part of "the people" with Second Amendment rights. Even if aliens are part of the geographic "national community," they lack the civic rights that belong to American citizens who participate in the political community.⁸⁸

In sum, the concurrence took the view that *Heller* certainly excludes unlawfully present aliens from "the people."⁸⁹ It further applied this view across the First and Fourth Amendments. As to the First Amendment, it asserted that "the 'right of the people peaceably to assemble, and to petition the Government for a redress of grievances' is restricted to American citizens."⁹⁰ As to "the right of the people" under the Fourth Amendment, the concurrence similarly argued that "the founders inherited this right from the British and excluded illegal aliens from its guarantees."⁹¹ Accordingly, the concurrence saw "the people" as "a term of art to refer to the collective body of citizens," with consequences beyond just the Second Amendment.⁹²

Approach Two: Unlawfully Present Aliens Cannot Be Among the "the People" Covered by the Second Amendment

Three courts of appeals have determined, both before and after *Bruen*, that unlawfully present persons are not "the people" protected by the Second Amendment and have accordingly upheld § 922(g)(5)(A) against constitutional challenges. A 2023 decision by the Eighth Circuit, *United States v. Sitladeen*, highlights the other side of the conceptual issue surrounding the appropriate use of the historical record that was also highlighted in *Escobar-Temal*.⁹³ In *Sitladeen*, the Eighth Circuit noted that a pre-*Bruen* circuit precedent "tersely" held "that 'the protections of the Second

⁸⁴ *Escobar-Temal*, 161 F.4th at 994 (Thapar, J., dissenting in part and concurring in the judgment).

⁸⁵ *Id.*

⁸⁶ *Id.* at 997.

⁸⁷ *Id.* at 1004, 1005.

⁸⁸ *Id.* at 1005.

⁸⁹ *See id.*

⁹⁰ *Id.* at 997.

⁹¹ *Id.* at 999.

⁹² *Id.* at 989.

⁹³ *United States v. Sitladeen*, 64 F.4th 978 (8th Cir. 2023).

Amendment do not extend to aliens illegally present in this country.”⁹⁴ The Eighth Circuit characterized that precedent as engaging in what is now required by the first step of *Bruen* in examining the plain text of the Second Amendment.⁹⁵ According to the court, that plain text analysis yielded the conclusion that “unlawfully present aliens are not within the class of persons to which the phrase ‘the people’ refers.”⁹⁶ The *Sitladeen* court recognized that a variety of cases and the Barrett dissent in the Seventh Circuit in particular criticized this “scope of right” approach on the grounds that “a textual analysis of ‘the people’ is not the right starting point when deciding whether a firearm regulation violates the Second Amendment.”⁹⁷ Notwithstanding these critiques, the court ultimately concluded that *Bruen* had not changed the applicability of the precedent and the court “remain[ed] bound by it.”⁹⁸ Accordingly, it held § 922(g)(5)(A) to be constitutional without needing to go beyond the first step of *Bruen*.⁹⁹

In *United States v. Medina-Cantu*, decided in 2024, the Fifth Circuit similarly affirmed its pre-*Bruen* precedent holding “that the Second Amendment’s plain text does not cover the conduct of aliens who are unlawfully present in the United States.”¹⁰⁰ That precedent had examined the language used in *Heller* to describe the scope of the Second Amendment and found it sufficiently instructive to conclude that “[i]llegal 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.”¹⁰¹ In *Medina-Cantu*, the court acknowledged certain weaknesses in its prior opinion, including that there was no “historical analysis” and that *Rahimi*’s rejection of “responsible” as a determinative criterion might suggest that the Supreme Court would also “reject other arguments that the Second Amendment’s reference to ‘the people’ excludes certain individuals.”¹⁰² Nevertheless, given its status as circuit precedent and absent “clearer indication that [it had] been abrogated,” the Fifth Circuit found its precedential decision mandated that § 922(g)(5)(A) be upheld under the first step of *Bruen*.¹⁰³

In 2025, the Fourth Circuit followed a similar pattern in *United States v. Murillo-Lopez*.¹⁰⁴ An earlier opinion of that court interpreted *Heller* to have found “that the core right historically protected by the Second Amendment is the right of self-defense” specifically by “law-abiding, responsible citizens.”¹⁰⁵ That opinion then identified sufficient “historical evidence supporting the notion that the government could disarm individuals who are not law-abiding members of the political community,” including laws permitting the disarmament of the “unvirtuous.”¹⁰⁶ On the basis of this evidence, the Fourth Circuit concluded that “illegal aliens do not belong to the class

⁹⁴ *Id.* at 983 (quoting *United States v. Flores*, 663 F.3d 1022, 1023 (8th Cir. 2011) (per curiam)).

⁹⁵ *Id.* at 985.

⁹⁶ *Id.*

⁹⁷ *Id.* at 986.

⁹⁸ *Id.* at 987.

⁹⁹ *Id.*

¹⁰⁰ 113 F.4th 537, 541 (5th Cir. 2024), *cert. denied*, 145 S. Ct. 1318 (2025) (mem.).

¹⁰¹ *Id.* at 540 (alteration in original) (quoting *United States v. Portillo-Munoz*, 643 F.3d 437, 440 (5th Cir. 2011), *cert. denied*, 566 U.S. 963 (2025) (mem)).

¹⁰² *Id.* at 542.

¹⁰³ *Id.*

¹⁰⁴ 151 F.4th 584 (4th Cir. 2025).

¹⁰⁵ *United States v. Carpio-Leon*, 701 F.3d 974, 979 (4th Cir. 2012) (quoting *United States v. Carter*, 669 F.3d 411, 416 (4th Cir. 2012)).

¹⁰⁶ *Id.* at 980 (citing Glenn Harlan Reynolds, *A Critical Guide to the Second Amendment*, 62 TENN. L. REV. 461, 480 (1995)).

of law-abiding members of the political community to whom the protection of the Second Amendment is given.”¹⁰⁷ The court also noted it was not concluding that criminal conduct alone would result in the outcome that one “automatically loses the protection of the Second Amendment.”¹⁰⁸ Instead, the court limited its holding to “illegal aliens” based on “their particular relationship to the United States” and the heightened power of the political branches to regulate entry into the United States.¹⁰⁹ Although this earlier Fourth Circuit decision repeatedly quoted the “responsible” language from *Heller* that was later disclaimed in *Rahimi*, the *Murillo-Lopez* court nevertheless contended that its prior opinion “conducted precisely the sort of textual and historical analysis that *Bruen* and *Rahimi* require.”¹¹⁰ As a result, the court in *Murillo-Lopez* determined that its precedent was consistent with those Supreme Court cases and it rejected the alien’s Second Amendment challenges to § 922(g)(5)(A).¹¹¹

Approach Three: Assuming Unlawfully Present Aliens Can Be Among “the People” Covered by the Second Amendment, They Can Be Disarmed

A 2026 decision by the First Circuit, *United States v. Vizcaino-Peguro*, reflects the third approach,¹¹² which has also been taken by at least four other U.S. Courts of Appeals.¹¹³ As with *Escobar*, the government urged the First Circuit to resolve the case at the first step of *Bruen* by finding that *Heller*’s use of “political community” excludes unlawfully present aliens, particularly in light of the Supreme Court opinion’s later use of “Americans” and “citizens.”¹¹⁴ The circuit panel declined to do so, however, finding that these latter “references concern only whom the phrase ‘the people’ includes, not whom that phrase excludes.”¹¹⁵ It also determined that the principle of “constitutional avoidance” counseled against resolving the question at the first step of *Bruen* in favor of resolving it at the second step.¹¹⁶ The circuit panel acknowledged that its application of constitutional avoidance was not typical inasmuch as “resolving [the] appeal at *Bruen*’s second step also necessarily decides a question of constitutional law,” and therefore was not truly avoiding a constitutional question.¹¹⁷ Nevertheless, the circuit panel noted that resolving the question under *Bruen*’s first step could go to the meaning of “several” constitutional

¹⁰⁷ *Id.* at 981.

¹⁰⁸ *Id.*

¹⁰⁹ *Id.*

¹¹⁰ *Id.* at 976–82; *United States v. Murillo-Lopez*, 151 F.4th 584, 591 (4th Cir. 2025).

¹¹¹ *Murillo-Lopez*, 151 F.4th at 591–92.

¹¹² *United States v. Vizcaino-Peguro*, 175 F.4th 34 (1st Cir. 2026).

¹¹³ See *United States v. Vazquez-Ramirez*, 163 F.4th 706, 709 (9th Cir. 2026). *United States v. Duque-Ramirez*, 161 F.4th 1237, 1245 (10th Cir. 2025). The U.S. Courts of Appeals for the Second and the Eleventh Circuits have also adopted a similar approach, but they did so before *Bruen*. See *United States v. Jimenez-Shilon*, 34 F.4th 1042, 1046 (11th Cir. 2022); *United States v. Perez*, 6 F.4th 448, 453 (2d Cir. 2021). On September 1, 2026, the U.S. Court of Appeals for the Third Circuit issued an opinion also adopting this approach to analyze the constitutionality of § 922(g)(5)(B), which prohibits firearm possession by alien who “has been admitted to the United States under a nonimmigrant visa.” *United States v. Aleman-Lozano*, No. 25-3012, 2026 WL 2579867, at *3–4 (3d Cir. Sep. 1, 2026). That decision featured a concurrence that objected to the “needless assumption” that “all nonimmigrant visa holders are part of ‘the people,’” and called for resolution of the case by finding that at least some lawfully present aliens holding temporary nonimmigrant visas are not covered by the Second Amendment at the first step of *Bruen*. *Id.* at *8.

¹¹⁴ *Vizcaino-Peguro*, 175 F.4th at 38.

¹¹⁵ *Id.* at 39.

¹¹⁶ *Id.*

¹¹⁷ *Id.* at 40.

amendments, and it believed that “prudence guide[d]” it to instead “focus [on] the meaning of one constitutional amendment.”¹¹⁸ In resolving the case at the second *Bruen* step, the panel expressly relied on the critical distinction the Sixth Circuit discussed in *Escobar-Temal*: “a group may be historically excluded from the right to bear arms while, nonetheless, being part of ‘the people.’”¹¹⁹ Having done so, the First Circuit found, like the other federal appellate courts to have reached the second *Bruen* step, that the government had offered sufficient evidence of analogous historical firearms regulations “along both the ‘why’ and the ‘how’ dimensions” to carry its burden.¹²⁰

Considerations for Congress

The Supreme Court has thus far denied petitions for writs of certiorari with respect to cases upholding § 922(g)(5)(A) in each of the three categories above.¹²¹ As a consequence, the applicability of certain constitutional protections to unlawfully present aliens remains substantially undefined, even as *Bruen* and its progeny have raised questions in the courts of appeals about whether *Bruen* requires them to interpret the applicability of the Second Amendment to such aliens and, if the Second Amendment does apply, what protections it offers. Because these courts have nevertheless agreed that § 922(g)(5)(A) is constitutional, there may not be a perceived immediate need to clarify whether unlawfully present aliens are among “the people,” at least when it comes to the validity of the federal statute disarming them.

Outside of the statutory context, the decisions and concurrences finding that unlawfully present aliens, and, in some cases, perhaps all aliens,¹²² are not included in “the people” may have consequences for how courts interpret other constitutional provisions that reference “the people.” In particular, those decisions may cast substantial doubt on whether unlawfully present aliens are covered by provisions in the First Amendment, which protect “the right of the people peaceably to assemble, and to petition the Government for a redress of grievances,”¹²³ and by the Fourth Amendment, which protects “[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures.”¹²⁴ The ultimate scope of those protections may not be certain even in the circuits finding that unlawfully present aliens are among the “people” to whom the Second Amendment applies. Because those appellate courts have found that such aliens are covered by the Second Amendment at the first step of *Bruen* but are ultimately not protected by the Second Amendment at the second *Bruen* step, their analysis mirrors the long-standing position taken by other Supreme Court precedent: Even where unlawfully present aliens can claim certain coverage under a constitutional provision, the actual

¹¹⁸ *Id.*

¹¹⁹ *Id.* (quoting *United States v. Escobar-Temal*, 161 F.4th 969, 975 (6th Cir. 2025)).

¹²⁰ *Id.* at 48.

¹²¹ See *Petition for Writ of Certiorari, Perez v. United States*, 142 S. Ct. 1133 (2022) (No. 21-6120); *Petition for Writ of Certiorari, Medina-Cantu v. United States*, 145 S. Ct. 1318 (2025) (No. 24-647); *Petition for Writ of Certiorari, Carbajal-Flores v. United States*, 146 S. Ct. 826 (2025) (No. 25-469).

¹²² See *Escobar-Temal*, 161 F.4th at 985 (Thapar, J., dissenting in part and concurring in the judgment) (“Properly read, our text, history, and tradition . . . reveal that “the people” refers to the citizens of the United States who consented to its government.”).

¹²³ U.S. Const. amend. I.

¹²⁴ U.S. Const. amend. IV. See, e.g., *City of El Cenizo v. Texas*, 890 F.3d 164, 187 n.20 (5th Cir. 2018) (“We pretermitted the question whether the Fourth Amendment even applies to many aliens subject to [Immigration and Customs Enforcement’s] detainer requests.”). For more information on Fourth Amendment implications as related to searches and seizures at the border, see CRS Report R46601, *Searches and Seizures at the Border and the Fourth Amendment*, by Hillel R. Smith and Kelsey Y. Santamaria (2021).

protection they are afforded may still vary as a matter of their “status and circumstance.”¹²⁵ That varying degree of protection may then affect the scope of Congress’s plenary power over aliens in the United States.

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¹²⁵ *Zadvydas v. Davis*, 533 U.S. 678, 694 (2001).