No. 24-1435

In the Supreme Court of the United States

DANIEL WELLES, ATTORNEY GENERAL,
PETITIONER

v.

JOHN DOE

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE AMES CIRCUIT

BRIEF FOR THE PETITIONER

The Honorable Justice
Sandra Day O'Connor
Memorial Team

ARVIND ASHOK
EDWARD BLESS
ANDREW HAYES
EMILY MALPASS
RICHARD NEHRBOSS
DANIEL WASSERMAN

Counsel of Record

NOVEMBER 19, 2024
7:30 P.M.
AMES COURTROOM
AUSTIN HALL
HARVARD LAW SCHOOL
CAMBRIDGE, MASS.

Oral Argument

QUESTIONS PRESENTED

18 U.S.C. § 922(g)(5)(A), a longstanding federal firearm regulation, disarms noncitizens unlawfully present in the United States. The Second Amendment codifies "the right of the people to keep and bear Arms." The questions presented are:

I. Whether a noncitizen who has unlawfully entered and illegally resides in the United States is one of "the people" protected by the Second Amendment if he develops ties with this country.

II. Whether the government can disarm a noncitizen unlawfully present in the United States consistent with the nation's history and tradition of firearm regulation.

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OPINIONS BELOW

The opinion of the court of appeals is published as Case No. 23-3464 (Ames Cir. June 28, 2024). JA-3–12. The district court opinion is published as No. 1:23-cv-00183-VL (D. Ames June 5, 2022). JA-13.

JURISDICTION

The judgment of the court of appeals was entered on June 28, 2024. The petition for a writ of certiorari was granted on August 26, 2024. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL & STATUTORY PROVISIONS

This case concerns the Second Amendment of the United States Constitution and 18 U.S.C. § 922(g)(5)(A). Both are reproduced in the appendix.

STATEMENT

John Doe, a foreign citizen, illegally entered the United States and unlawfully remains in the country. He claims that this federal crime entitles him to assert constitutional rights, including the Second Amendment "right of the people to keep and bear Arms." U.S. Const. amend. II. He now challenges 18 U.S.C. § 922(g)(5)(A), a federal law barring "alien[s] … unlawfully in the United States"[1] from owning firearms, as inconsistent with the Second Amendment.

Common sense says otherwise. The text of the Second Amendment, the history clarifying its meaning, and the precedent guiding its application all confirm that John Doe is not part of "the people." Even if he were, unbroken traditions of firearm regulation from the Founding to the present confirm the power of the federal government to protect the public by disarming him. This Court should not overextend the protections of the Second Amendment nor dilute the regulatory power of the United States by invalidating the law that disarms John Doe.

Background

"Like most rights, the right secured by the Second Amendment is not unlimited." *District of Columbia v. Heller*, 554 U.S. 570, 626 (2008). This "right of the people to keep and bear Arms," U.S. Const. amend. II,

[1] This brief refers to "alien[s] … unlawfully in the United States" as "unlawful noncitizens."

codifies preexisting privileges derived from English common law. The scope of the English right was limited to those subjects who could use it to protect their "personal security, personal liberty, and private property" without endangering the public. 1 William Blackstone, *Commentaries* *141. From the Middle Ages to the American Revolution, the British Crown relied on this understanding to disarm classes of individuals that threatened public safety, including the mentally ill, children, criminals, and the disloyal.

When English colonists crossed the Atlantic, they "brought with them their rights" — and the attendant restrictions. Stephen Halbrook, *The Right to Bear Arms* 123 (2021). As in England, state and federal governments passed numerous laws before, during, and after the Founding to disarm individuals who committed crimes or lacked allegiance to the state.

Many similar restrictions remain in place today. "[T]o prohibit possession of firearms by criminals or other persons who have specific records or characteristics which raise serious doubt as to their probable use of firearms in a lawful manner," Congress passed Title VII of the Omnibus Crime Control and Safe Streets Act of 1968. 114 Cong. Rec. 16,298 (1968) (statement of Rep. Howard Pollock); Pub. L. 90-351, 82 Stat. 197, 236 (1968). The provision disarmed felons, drug addicts, dishonorably discharged veterans, Americans who renounced their

citizenship, and any "alien [who] is illegally or unlawfully in the United States." 82 Stat. at 236.

Each categorization embodied a legislative judgment that the disarmed classes of individuals "by their actions, have demonstrated that they are dangerous, or may become dangerous." 114 Cong. Rec. 14,773 (1968) (statement of Sen. Russell Long). Taken together, "[t]he purpose of these provisions, clearly, [was] to prevent firearms from falling into the hands of those most likely to misuse them." 114 Cong. Rec. 21,829 (1968) (statement of Rep. Jonathan Bingham).

Over the next fifty years, § 922(g) became the lodestar of an interstate framework that regulated the purchase, sale, and movement of firearms. Pub. L. 90-351, 82 Stat. 197, 227–35 (1968); 18 U.S.C. §§ 922(g)(1)–(4). Today, § 922(g) "does more to combat gun violence than any other federal law." *Rehaif v. United States*, 139 S. Ct. 2191, 2201 (2019) (Alito, J., dissenting).

The Second Amendment Quartet

The Court's Second Amendment jurisprudence is outlined in a recent quartet of opinions: First, in *Heller*, the Court determined that the Second Amendment entitled "law-abiding citizens" to bear arms in self-defense. 554 U.S. at 625. The opinion nonetheless confirmed that "longstanding prohibitions" — including multiple provisions of § 922(g) — were "presumptively lawful." *Id.* at 626.

Second, in *McDonald v. City of Chicago*, this Court found that the Fourteenth Amendment incorporated against the states the right of "law-abiding members" of the political community to keep and bear arms. 561 U.S. 742, 790 (2010). The Court again affirmed that its holding did not imperil "longstanding regulatory measures," including the provisions of § 922(g) explicitly referenced in *Heller*. *Id.* at 786.

Third, in *New York State Rifle & Pistol Ass'n v. Bruen*, this Court explained that regulations comply with the Second Amendment where they are "consistent with this Nation's historical tradition of firearm regulation." 142 S. Ct. 2111, 2126 (2022). The Court emphasized the continued permissibility of the types of restrictions referenced in *Heller* and *McDonald*. *Id.* at 2118, 2133. Justice Kavanaugh, joined by the Chief Justice, wrote separately to "underscore [the] important point[]" that "the Second Amendment allows a variety of gun regulations," including the laws *Heller* and *McDonald* identified as "presumptively lawful." *Id.* at 2161–62 (Kavanaugh, J., concurring) (cleaned up).

Finally, in *United States v. Rahimi*, this Court upheld a provision of § 922(g) disarming individuals subject to domestic violence restraining orders. 144 S. Ct. 1889 (2024). The Court reiterated that challenged regulations must "comport with the principles underlying the Second Amendment" by sharing a "relevantly similar" "why" and "how" with a Founding-era law. *Id.* at 1901 (quoting *Bruen*, 142 S. Ct. at 2132). Even

"when a challenged regulation does not precisely match its historical precursors," the Court noted, "it still may be analogous enough to pass constitutional muster." *Id.* at 1898. As the Court concluded, the principle animating § 922(g)(8) — disarming dangerous individuals to protect the public — made upholding the provision "common sense." *Id.* at 1901.

Factual History

In 2010, John Doe illegally entered the United States in violation of 8 U.S.C. § 1325(a). JA-21.

Doe has long been interested in owning a firearm. JA-18. To do so, he first purchased a firearm from a "friend" but, after learning that he had violated § 922(g)(5)(A), sold the firearm to "another friend." JA-18, 22, 24. No facts in the record indicate that he registered the firearm.

Doe still wants to own a firearm — but he now hopes to do so legally. He challenges § 922(g)(5)(A) as inconsistent with the Second Amendment as applied to him. JA-20. To substantiate this claim, he maintains that his employment, two American children, and his membership in a local church, softball league, and parent-teacher association entitle him to constitutional rights. JA-21–22. He still resides in Ames City, which has allowed noncitizens, including Doe, to vote in local elections. JA-23.

For the first time, Doe availed himself of the legal process. He asked the U.S. District Court for the District of Ames for a declaratory judgment and an injunction against Attorney General Daniel Welles barring enforcement of § 922(g)(5)(A) as applied to him. JA-19.

The district court granted the Attorney General's motion to dismiss the case with prejudice. The district court reasoned that Doe's challenge was foreclosed by *United States v. Traficante*, 989 F.3d 124, 130 (Ames Cir. 2017), which found that unlawful noncitizens could "categorically be excluded from firearm ownership without raising a Second Amendment issue." JA-5, 13.

Doe appealed. Eighteen days after the district court's ruling, this Court decided *Bruen*. This June, with Doe's appeal still pending, it decided *Rahimi*. After both opinions, the Court summarily vacated and reversed several conflicting lower court judgments; none of the cases involved § 922(g)(5).

In August, the Court of Appeals for the Ames Circuit reversed. JA-12. At the threshold, the Ames Circuit found that *Bruen* and *Rahimi* had invalidated the "old interest-balancing methodology" of *Traficante*. JA-5. Then, despite "candidly remain[ing] confused" about whether Doe could assert Second Amendment rights, the Ames Circuit concluded that Doe had "developed sufficient ties to this country to be a part" of some uncertain group that held Second Amendment rights. JA-

9. But the Ames Circuit never specified which ties qualified Doe to assert those rights. JA-4, 9. Without providing reasoning about the relationship between Founding-era laws and the principles motivating § 922(g)(5)(A), the court concluded that there was "no valid historical justification" to disarm John Doe. JA-9.

This Court immediately granted the Attorney General's petition for certiorari. JA-2.

SUMMARY OF ARGUMENT

History and precedent "confirm what common sense suggests": (1) unlawful noncitizens are not part of "the people," and (2) they may be disarmed consistent with the Second Amendment. *Rahimi*, 144 S. Ct. at 1901.

1. John Doe, an unlawful noncitizen, is not part of "the people" protected by the Second Amendment.

Properly understood, history and precedent confirm that "the people" includes only and exclusively citizens. Founding-era sources demonstrate that the rights of "the people" were synonymous with the rights of citizens. When drafting the Bill of Rights, the Founders deliberately used "the people" to restrict rights to citizens and signal that rights were intended for use against the government. And an overwhelming body of precedent — including the firearms quartet — resoundingly supports this interpretation. The Court has repeatedly restricted "the people" to

citizens by relating the term to the "political community," a group definitionally including only citizens.

The Ames Circuit erred when it departed from history and precedent to examine Doe's "sufficient connections" to the United States. Precedent forecloses this analysis: *Heller* modified earlier dicta in *Verdugo-Urquidez*, a Fourth Amendment case, to clarify that "the people" refers to the "political community," not those with "sufficient connection" to the "national community." In practice, this evaluation of noncitizens' "connections" would prove unworkable and would interfere with Congress's immigration policy.

Even if individuals with "sufficient connections" could constitute part of "the people," unlawful noncitizens cannot have "sufficient connections" because they lack lawful status. History at the Founding and precedent in the context of the First and Fourth Amendments confirm that only those noncitizens with lawful status could credibly claim the requisite "connections." Only this principle cabins the "sufficient connection" inquiry in a predictable and administrable fashion.

The history and precedent point to the same answer: Doe is not part of "the people" because he is not a citizen and has not engaged with the legal immigration process. The Ames Circuit's errors underscore that noncitizens' "connections" to the country cannot determine their Second Amendment rights.

2. Even if this Court holds that the Second Amendment extends to Doe, the Nation's historical tradition of firearm regulation confirms that unlawful noncitizens may be disarmed consistent with the Second Amendment.

At the threshold, this Court has stated that laws comply with the Second Amendment where they are relevantly similar to the principles underlying Founding-era regulations. This process of analogical historical reasoning does not lend itself to comparisons between an individual's circumstances and Founding-era principles or laws.

Two principles support the constitutionality of § 922(g)(5). *First*, the government may disarm lawbreakers to protect the public from firearm misuse. English statutes, Founding-era laws, and post-Founding regulations confirm that the government may disarm individuals who break the law, including for minor and nonviolent offenses. Consistent with this principle, the government may permissibly disarm unlawful noncitizens. As at the Founding, disarmament of lawbreakers — especially those who face deportation and may be unlikely to register their firearms — protects the public.

Second, the government may disarm individuals who do not owe allegiance to the sovereign. Before the Founding, English and colonial governments disarmed categories of individuals who did not demonstrate loyalty to the Crown. Since the Revolution, the federal

government has consistently disarmed similar categories of individuals on the basis of their perceived loyalty to the state, ranging from Loyalists to Native Americans to Confederates. To regain their ability to carry arms, these laws frequently allowed those who had been disarmed to formally swear allegiance to the sovereign. As an unlawful noncitizen, Doe owes no formal allegiance to the United States, and may therefore be disarmed.

Common sense resolves this case. Doe, an unlawful noncitizen, may not assert the right of "the people" to bear arms, enjoyed by citizens only. Even if he were able to do so, multiple principles underpinning this nation's historical regulatory tradition confirm that the government may disarm him consistent with the Second Amendment.

ARGUMENT

I. DOE IS NOT PART OF "THE PEOPLE" WITH SECOND AMENDMENT RIGHTS.

The text of the Second Amendment is clear: only "the people" may exercise the right to bear arms. And as history and precedent demonstrate, "the people" with Second Amendment rights are only citizens.

A definition of "the people" that relies on parsing "connections" to this country yields inconsistent and illogical results. Even if this Court were to conclude that "sufficient connections" were relevant for deciding who was part of "the people," history and this Court's precedent show that unlawful noncitizens must lack "sufficient connections."

Doe is not a citizen, and he does not have legal status. Any definition of "the people" excludes him.

A. Only citizens are "the people" with Second Amendment rights.

History and precedent confirm that the term "the people" in the Second Amendment refers to citizens only. Founding-era evidence, including state constitutions and proposals from state ratifying conventions, demonstrates that the Framers understood "the people" as synonymous with "citizens." And this Court's precedent has insistently affirmed that the Second Amendment refers to citizens only.

1. History shows that only citizens are "the people" with Second Amendment rights.

History provides the most direct and reliable insight into the fixed meaning of the term "the people" as understood by the authors of the Second Amendment. *Bruen*, 142 S. Ct. at 2130. And it suggests a simple, clear meaning: "the people" refers to citizens only.

The Second Amendment derives from the right of British subjects to bear arms to protect their civil liberties from the Crown. *See* Bill of Rights 1688, 1 W. & M. Sess. II, c.2 (Eng.). Blackstone observed that only "the subjects of England [were] entitled … to the right of having arms for self-preservation and defense." 1 Blackstone, *Commentaries* *140. Others cast the right of subjects as belonging to "the people" — the "bulwark of their liberties" that empowered them to hold their King to

the Constitution. Jean-Louis De Lolme, *The Constitution of England* 227 (1771).

After the American Revolution, the colonists rechristened "subjects" as "citizens." This shift reflected the republican ideal that American citizens' "sovereignty rests in [them]selves," while British subjects remained "in a state of dependence" to the Crown. David Ramsay, *An Oration, Delivered on the Anniversary of American Independence* 18, 19 (1794). Insistence on the term "citizens" is reflected in the 1783 Treaty of Paris, which made peace between the "subjects of Great Britain and the citizens of the United States." *See* Treaty of Paris arts. vii & viii, Sept. 3, 1783, 8 Stat. 80. The rights of subjects naturally became the rights of citizens. *See Orr v. Hodgson*, 17 U.S. (4 Wheat.) 453, 464 (1819).

The Founders uniformly treated "the people" as synonymous with "citizens." For example, debates at the Constitutional Convention described "a twofold relation in which *the people* would stand: (1) as Citizens of the General Government, (2) as Citizens of their particular State." 1 *Farrand's Records of the Federal Convention of 1787*, at 405–06 (1911) (cleaned up). As James Madison explained, "In a confederacy of states … *the people* operate, in one respect as citizens, and in another as forming political communities." 12 *The Papers of James Madison*, 373–82 (Charles Hobson & Robert Rutland eds., 1979) (emphasis added). And early Congressmen understood that "the people [are] the

acknowledged citizens" of the United States. 1 Annals of Cong. 406 (1789) (Joseph Gales ed., 1834) (statement of Rep. James Madison). These sources comport with the results of a corpus linguistics analysis, which indicates that the term "the people" was closely related to "citizens" at the time of the Founding and unrelated to "alien[s]" and "foreigner[s]."[2]

Founding-era state constitutions also illustrate that "the people" who possessed a right to bear arms were citizens. Before the ratification of the Second Amendment in 1791, state constitutions used the terms "the people" and "citizens" interchangeably. For instance, while the Pennsylvania Constitution of 1776 referred to "the right of the people" to bear arms, the 1790 version substituted "citizens" for "the people" without explanation. Pa. Const. of 1776, art. I, § XIII; Pa. Const. of 1790, art. IX, § XXI; *see also* N.C. Const. of 1776, art. I, § 17; Vt. Const. of 1777, ch. 1, § 15. State courts likewise understood these terms to have

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[2] Corpus linguistics examines "how particular combinations of words are used in a vast database of English prose." *Facebook, Inc. v. Duguid*, 141 S. Ct. 1163, 1174 (2021) (Alito, J., concurring in the judgment). In a database of 127,840 texts written between 1700 and 1800, "the people" is strongly correlated with "citizens" and "American" but weakly correlated with "alien" and "foreigner." Where the term "the people" appears, there is an eighteen percent chance that "citizens" appears within the surrounding dozen words, leading to an observed frequency more than thirty-one standard deviations from the mean. By contrast, if "people" or "the people" appear in a text, there is only a one percent chance that either the term "alien" or "foreigner" appears nearby. *See Corpus of Founding Era American English*, BYU L. Corpus Linguistics, http://law-corpus.byu.edu/cofea (last visited Oct. 14, 2024).

synonymous meanings. In *Bayard v. Singleton*, North Carolina's high court construed a "right of the people" guaranteed in the state's 1776 constitution as belonging to "every citizen" — but not "aliens." 1 N.C. (Mart.) 5, 7, 9 (1787).

After the ratification of the Second Amendment, state constitutions continued to use the terms interchangeably. In 1792, Kentucky protected "the right of the citizens to bear arms"; a decade later, Ohio did the same for "the people." Ky. Const. of 1792, art. XII, § 23; Ohio Const. of 1802, art. VIII, § 20. Shortly thereafter, Connecticut, Mississippi, and Alabama all enacted constitutions which provided that "[e]very citizen has a right to bear arms." Conn. Const. of 1818, art. I, § 17; Miss. Const. of 1817, art. I, § 23; Ala. Const. of 1819, art. I, § 23.

Proposals for the Bill of Rights from state ratifying conventions transposed the states' understanding of the right to bear arms into the federal context. These proposals, like the state constitutions, used the terms "the people" and "citizens" interchangeably. *Compare* Amendments Proposed by Pennsylvania Convention Minority (1787), *in* Edward Dumbauld, *The Bill of Rights* 174 (1957) ("That the people have a right to bear arms…."), *with* Amendments Proposed by New Hampshire Convention (1788), *id.* at 182 ("Congress shall never disarm any Citizen…."). In response to the state proposals, Congress's Select Committee

settled on "the people" for the final text of the Second Amendment. *Id.* at 211.

The use of "the people" instead of the synonymous term "citizens" was deliberate. "The people" signified the oppositional tension between "the rulers and the people" whereas "citizens" denoted the equal relationship of "citizens towards each other." Chief Justice Jesse Root, *Reports of Cases Adjudged in the Superior Court and Supreme Court of Errors*, at x (1798). The Declaration of Independence itself asserted the "right of the People" to rebel against a "destructive … Government." The Declaration of Independence para. 2 (U.S. 1776); *see also* Halbrook, *The Right to Bear Arms*, *supra*, at 185 (statement of George Mason) ("[T]he British Parliament … disarm[ed] the people … [as] the best and most effectual way to enslave them."). In keeping with this tradition, "the people" of the Second Amendment protected "the liberty of a free state" against government overreach. *Creating the Bill of Rights* 209 (statement of Samuel Nasson) (Helen E. Veit et al. ed., 1991).

Similarly, the Founders used "the people" instead of "persons" to restrict certain provisions to citizens only. Debates about the Alien and Sedition Acts demonstrate that the distinction between "the people" covered by the First Amendment and the "persons" covered by the Fifth was based on citizenship. As one representative contended, the Fifth Amendment's use of the term "person" meant that "an alien, [who] was a

'person,' … was therefore within this part of the Constitution." *Virginia Report of 1799-1800*, 91–92 (1850) (statement of Mr. Daniel). But because the First Amendment used the term "the people," he maintained, "the liberty of the press" was for "citizens" alone. *Id.* at 95–96; *see also id.* at 102 (statement of Mr. Cowan) (noting "rights to aliens" under the Fifth Amendment "rel[ied] much upon the word persons").

Three decades after the ratification of the Second Amendment, a former delegate to the Continental Congress found it clear that the Second Amendment "forb[ade] the legislature[s] to interfere with and to abrogate that all important right of the *citizens*." Halbrook, *The Right to Bear Arms*, *supra*, at 201 (statement of Tench Coxe) (emphasis added). It is as clear now as it was then: "the right of the people to bear arms" was restricted to citizens.

2. This Court's precedent confirms that only citizens are "the people" with Second Amendment rights.

The firearms quartet of *Heller*, *McDonald*, *Bruen*, and *Rahimi* provides a uniform definition of Second Amendment rightsholders: "the people" are "the political community," a category exclusively comprised of "citizens." *Heller*, 554 U.S. at 580. This Court's "repeated use of … term[s] … underscores" its "point[s]." *Wooden v. United States*, 142 S. Ct. 1063, 1075 (2022) (Kavanaugh, J., concurring).

Heller defined "the people" as "citizens" based on Founding-era history and precedent. The Court recognized that state constitutional

provisions from the Founding "enshrined a right of *citizens* to bear arms" and "unequivocally protected an individual *citizen*'s right to self-defense." 554 U.S. at 584, 603 (emphasis added). It additionally cited early state supreme court cases recognizing that the Second Amendment "grants to the citizen the right to keep and bear arms." *Id.* at 608, 612 (quoting *United States v. Sheldon*, 5 Blume Sup. Ct. Trans. 337, 346 (Mich. 1829); *Andrews v. State*, 50 Tenn. (3 Heisk.) 165, 183–84 (1871))). Throughout the opinion, the Court referred to "citizens" as Second Amendment rightsholders more than a dozen times. *Heller*, 554 U.S. at 595 ("[T]he Second Amendment … protect[s] the right of citizens."); *see also id.* at 599, 600, 602, 608, 619, 625, 629, 630, 635.

To derive the simple syllogism that "the people" were "citizens," the Court relied on earlier precedent that defined "the people" as the "political community," and, in turn, restricted the "political community" to "citizens." At the outset, the Court noted that "the People … unambiguously refers to all members of the political community." *Id.* at 580. In prior opinions, the Court had carefully restricted "the political community" to *only and exclusively* citizens. As this Court declared during Reconstruction, the "political community known as the 'People of the United States'" was the "citizens of the United States, and of their respective states." *The Civil Rights Cases*, 109 U.S. 3, 46 (1883). This definition remained constant over the next century. *See Maxwell v. Dow*,

176 U.S. 581, 608 (1900) (Harlan, J., dissenting) ("[T]he political community [was] known as the people of the United States … and every member of that political community was a citizen of the United States."); *United States v. Cruikshank*, 92 U.S. 542, 547 (1875) ("Citizens are the members of the political community to which they belong."); *Foley v. Connelie*, 435 U.S. 291, 295–96 (1978); *Cabell v. Chavez-Salido*, 454 U.S. 432, 438 (1982). *Heller* therefore organically supported its definition of "the people" by drawing on the well-defined concept of "the political community" as composed exclusively of "citizens."

This transposition — "the people" is "the political community," which is "citizens" — crystallized that *only* citizens have the right to bear arms because only citizens have political rights. Only "citizens" constitute the "political community" because "participation in [the state's] democratic political institutions … preserve[s] the basic conception of a political community." *Foley*, 435 U.S. at 295–96. This formulation conditions membership in the political community on the ability to exercise political rights — e.g., voting and officeholding — traditionally reserved to citizens. *See, e.g.*, U.S. Const. art. I, §§ 2, 3; *id.* art. II, § 1. After *Heller*'s explanation, the Court confidently referred to "the people" as "citizens" in all its subsequent Second Amendment opinions.

McDonald, *Bruen*, and *Rahimi* latched onto *Heller*'s definition of rightsholders and turned it into a refrain. As *McDonald* explained, "[t]he

right of *citizens* to keep and bear arms has justly been considered as the palladium of liberties of a republic." 561 U.S. at 770 (emphasis added) (quoting 3 Joseph Story, *Commentaries on the Constitution of the United States* § 1890, at 746 (1833)). By *Bruen*, this Court described the Second Amendment right to bear arms as "the very product of an interest balancing by *the people*," which "elevate[d] above all other interests the right of law-abiding, responsible *citizens* to use arms for self-defense." *Bruen*, 142 S. Ct. at 2122 (quoting *Heller*, 554 U.S. at 635) (emphasis added). This proposition was so uncontested that even the "petitioners and respondents agree[d] that … *citizens* have a … right to carry handguns." *Id.* at 2131; *see also id.* at 2133, 2150, 2152, 2156. *Rahimi*'s references to "citizens" as rightsholders under the Second Amendment hammered home the point. 144 S.Ct. at 1897, 1902, 1903; *id.* at 1907 (Gorsuch, J., concurring).

This precedent — and the hundreds of references to "citizens" in the opinions — cannot be squared with any understanding of "the people" that includes noncitizens. Drawing on this Court's guidance, the majority of circuits — and the only circuits to rule after *Bruen* — agree that "the people" cannot refer to unlawful noncitizens. *See, e.g.*, *United States v. Portillo-Munoz,* 643 F.3d 437, 440 (5th Cir. 2011) ("Illegal aliens are not law-abiding, responsible citizens or 'members of the political community.'"); *United States v. Medina-Cantu*, 113 F.4th 537, 539 (5th

Cir. 2024) (affirming *Portillo-Munoz*'s definition post-*Rahimi*); *United States v. Sitladeen,* 64 F.4th 978, 985 (8th Cir. 2023); *United States v. Carpio-Leon*, 701 F.3d 974, 981 (4th Cir. 2012). *But see United States v. Meza-Rodriguez*, 798 F.3d 664, 672–73 (7th Cir. 2015) (upholding § 922(g)(5)(A) pre-*Bruen*).

B. The Ames Circuit erred in considering whether a noncitizen had "sufficient connections" with this country.

The Ames Circuit deviated from history and this Court's precedent by relying on dicta in *United States v. Verdugo-Urquidez*, 494 U.S. 259 (1990), a case denying Fourth Amendment protections to a Mexican citizen searched in Mexico. *Verdugo-Urquidez* stated that "'the people' seems to have been a term of art employed in select parts of the Constitution" that "refers to a class of persons who are [1] part of a *national* community or [2] who have otherwise developed *sufficient connection* with this country to be considered part of that community." *Id.* at 265 (emphases added).

Two decades later, *Heller* quoted this passage from *Verdugo-Urquidez* to conclude that "the term [the people] unambiguously refers to all members of the *political* community." *Heller*, 554 U.S. at 580 (emphasis added). This community, in turn, contains only and exclusively citizens. *See supra* Part I.A.2. Examining the two opinions, the Ames Circuit admitted that it "candidly remain[ed] confused about" whether "the touchstone" was *Heller*, which restricted the "people" to "members

of the political community," or *Verdugo-Urquidez*, which suggested that the term included those with "sufficient connection" to the "national community." JA-8–9.

But this Court has been clear: only the "political community" constitutes "the people." The Ames Circuit misread *Heller* when it considered whether John Doe had a "sufficient connection" to an undefined community. First, *Heller* modified *Verdugo-Urquidez* to narrow its scope: after *Heller*, only "members of the political community" — not individuals with "sufficient connections" to the "national community" — constitute "the People." Further, lower courts' experience with *Verdugo-Urquidez* demonstrates that considering "sufficient connections" is inconsistent, subjective, and disruptive. Moreover, considering an individual's "sufficient connections" contradicts Congress's immigration policy judgment.

1. Precedent shows that "sufficient connections" do not define "the people."

Heller's modification of *Verdugo-Urquidez* has three implications: (1) *Verdugo-Urquidez*'s dicta carries no weight, so only *Heller* controls; (2) "the people" are the "political community," not the "national community"; and (3) "sufficient connections" are not relevant to an individual's membership in the political community, which is determined solely by citizenship.

Verdugo-Urquidez's "sufficient connection" test was dicta. As Chief Justice Rehnquist helpfully noted, his writing in that section of *Verdugo-Urquidez* constituted a "textual exegesis [that was] by no means conclusive," not precedential reasoning linked to a holding. *Id.* at 265. *Verdugo-Urquidez* explained that the Court decided only those propositions that it "expressly address[ed]," *id.* at 272, and whether "the people" included unlawful noncitizens was "simply irrelevant" and not "necessary to resolve" the case. *Id.* at 279 n. * (Stevens, J., concurring in the judgment). Moreover, this section of the opinion was joined in full by only three other Justices, with Justice Kennedy writing separately to underscore disagreement with this "exegesis." *Id.* at 276 (Kennedy, J., concurring). *Verdugo-Urquidez*'s discussion of "sufficient connections" therefore holds only the weight of inconclusive dicta in a plurality in an inapposite context — that is, none.

The Court's reference to "sufficient connections" was dicta because it functioned as an "antecedent" assumption unnecessary for the holding. *Id.* at 272. The Court often assumes the broadest possible definition of jurisdictional terms to decide a case on narrower substantive grounds. Before *Verdugo-Urquidez*, in *INS v. Lopez-Mendoza*, the court assumed without deciding that the Fourth Amendment protected "all persons," then declined to apply the exclusionary rule in deportation proceedings. 468 U.S. 1032, 1046 (1984). In *Verdugo-Urquidez*, the

Court name-checked *Lopez-Mendoza*, and then did the same. 494 U.S. at 272–73. It used "sufficient connections" to assume the Fourth Amendment applied as broadly as conceivable, then held that noncitizens outside the country still fell beyond its hypothetical scope. *See id.* at 271, 274. *Verdugo-Urquidez*'s broad assumption should not define "the people" in all contexts.

Heller superseded *Verdugo-Urquidez*'s interpretation of "the people" when it quoted the plurality's dicta with significant modifications. *Verdugo-Urquidez* assumed "the people" were both (1) the "national community" and (2) those "who have otherwise developed sufficient connection" to it. 494 U.S. at 265. *Heller* explicitly modified those words to refer "unambiguously" to "members of the political community," 554 U.S. at 580, and thereby transformed the "national community" into the "political community" — i.e., citizens. *Id.*

And *Heller* did not include a second category of individuals with "sufficient connections" to that community. Instead, its gloss of *Verdugo-Urquidez* referred *only* to the political community and eliminated the category of individuals with a "sufficient connection to the country." After *Heller*, the only inquiry necessary to determine whether an individual is part of "the people" is whether he is a member of the political community — and therefore whether he is a citizen.

2. Considering "sufficient connections" is unworkable.

In addition to lacking support in Court precedent, any approach that requires courts to make individualized determinations about whether noncitizens have "sufficient connections" to the United States is unworkable. This Court prefers "readily administrable rules" over "sensitive, case-by-case determinations" on complex constitutional questions, especially on threshold questions about the scope of a right. *Atwater v. City of Lago Vista*, 532 U.S. 318, 347 (2001). Evaluating "sufficient connections" produces inconsistent, subjective, and disruptive results.

Any test that tiers constitutional rights based on factors with undefined thresholds for sufficiency — like length of residence — results in inconsistency. For example, one district court found that twelve years of residency was not a "sufficient connection," then vacated its own opinion *sua sponte* before being summarily reversed by the Ninth Circuit. *See United States v. Guitterez*, No. CR 96-40075, 1997 U.S. Dist. LEXIS 16446, *18 (N.D. Cal. Oct. 16, 1997), *vacated,* 983 F. Supp. 905 (N.D. Cal. 1998), *rev'd without opinion* 203 F.3d 833 (9th Cir. 1999). Within a year, the same court decided in a separate case that four years of residency did establish sufficient "connections." *De Leon v. Reno*, 1998 WL 289321 (N.D. Cal. Mar. 26, 1998). Faced with a set of inconclusive factors, another court simply threw up its hands: "Are [a noncitizen's] two decades of residence in Florida enough? … Does it matter that he isn't living with [his] child? Or that he hasn't filed a formal tax return?"

United States v. Jimenez-Shilon, 34 F.4th 1042, 1046–48 (11th Cir. 2022). Lower courts' considerations of "sufficient connections" are consistent only in their confusion.

The root cause of courts' inconsistency is subjectivity. Because "Americans have widely divergent ideas about" subjective factors, courts struggle to administer tests based on assessments of character, family dynamics, or other civic engagement. *Range v. Attorney General*, 69 F.4th 96, 102 (3d Cir. 2023) (en banc); *see also Rahimi*, 144 S. Ct. at 1903 ("'Responsible' is a vague term."). For example, when considering a Mexican citizen's Fourth Amendment challenge, a court considered that his "grandmother would often cross the border into Mexico to care" for him. *Rodriguez v. Swartz*, 111 F. Supp. 3d 1025, 1036 (D. Ariz. 2015). Another judge argued that an individual's connections were "sufficient" because he "rais[ed] chickens" for his employer, "pa[id] rent" to his landlord, and "help[ed] to financially support" his girlfriend. *Portillo-Munoz*, 643 F.3d at 447 (Dennis, J., concurring in part and dissenting in part).

This brand of judicial analysis would also disrupt law enforcement. As this Court ruled in *Rehaif v. United States*, the government must prove that a noncitizen "knew he had the relevant [immigration] status" while owning a gun to convict him under § 922(g)(5)(A). 139 S. Ct. at 2194. Because of indeterminacy in what constitutes a "sufficient connection," the scienter requirement would make prosecuting *any*

unlawful noncitizens under § 922(g)(5)(A) prohibitively difficult. Under Doe's approach, every unlawful noncitizen with tenuous connections could plausibly claim that he did not know whether he had the "relevant status," and thus evade prosecution.

No example better demonstrates the inconsistent, subjective, and disruptive evaluation of a noncitizen's "connections" than the Ames Circuit's opinion. Without providing reasoning, the Ames Circuit credited some of Doe's connections — community engagement, length of residence, employment, and family ties — as entitling him to bear arms. JA-9. In doing so, the Ames Circuit never provided concrete guideposts for district courts to decide subsequent cases, raising the question of whether three years of residence, one child, or sporadic synagogue attendance would have been equally sufficient.

And the panel's reasoning disrupts the relationship between cities and the federal government. Without citing precedent, the panel treated Doe's *municipal* voting record as a justification to extend *federal* rights to him. JA-9. On this reasoning, Doe may own a gun only while he continues to reside in Ames City, where he is able to vote. This reasoning conflicts with binding Court precedent that prevents the decisions of local governments from interfering with its interpretation of terms in the Bill of Rights. *See Virginia v. Moore*, 553 U.S. 164, 173

(2008) (finding that a local statute cannot alter the meaning of "seizure" in the Fourth Amendment).

3. Examining "sufficient connections" conflicts with Congress's immigration policy judgment.

As a rule, the admission and exclusion of noncitizens is "so exclusively entrusted to the political branches of government as to be largely immune from judicial inquiry." *Harisiades v. Shaughnessy*, 342 U.S. 580, 588–589 (1952). Because Congress controls membership in the political community, courts cannot judge whether noncitizens are part of this community without interfering in "foreign policy matters." *Fiallo v. Bell*, 430 U.S. 787, 798 (1977).

Courts' individualized assessments would undermine congressional and executive determinations about whether noncitizens' connections qualify them for legal status. Guided by Congress's bright-line rules, the Executive Branch examines noncitizens' circumstances to determine whether applicants are entitled to status adjustments. *See, e.g.*, 8 U.S.C. § 1229b; *id.* § 1255(i). Congress has explicitly delegated this determination to the Executive — not the courts — by making the Executive's factual assessments and policy judgments judicially unreviewable. *See* 8 U.S.C. § 1252(a)(2)(B); *Patel v. Garland*, 142 S. Ct. 1614, 1619 (2022).

Absurd asymmetry would result if courts judicially second-guessed noncitizens' alleged connections. A court could allow a

noncitizen to possess a firearm based on his "connections," yet still be required to defer to the Executive's determination that the same noncitizen cannot remain in the United States. Only the Executive and Congress should examine Doe's connections — not courts.

By considering whether noncitizens have "sufficient connections," the Ames Circuit departed from this Court's precedent, implemented an unworkable standard, and undermined Congress's policy judgment. This Court should not endorse the Ames Circuit's approach and should instead follow its own precedent and the history of the Second Amendment. Both prove that "the people" includes only citizens.

C. Even if this Court were to consider noncitizens' "connections," unlawful noncitizens lack "sufficient connections" because they do not have lawful status.

Even if this Court held that noncitizens with "sufficient connections" were part of "the people," the only noncitizens that could credibly claim the requisite connections are those who formally engaged with United States naturalization or immigration process. History and this Court's precedents would still exclude unlawful noncitizens that lack lawful status. Unlike the Ames Circuit's inquiry into "sufficient connections," only this principle properly defers to Congress's power over naturalization and immigration.

1. Founding-era history supports that lawful status was required to assert rights.

At the Founding, aliens were afforded no rights of citizens by the federal government. Instead, at the discretion of the states, some aliens were granted limited rights when they complied with federal naturalization procedures. Although such a discretionary grant of rights has never meant that noncitizens were considered part of "the people," this history instead demonstrates that the only noncitizens invested with any of the rights of citizens have always been those who formally complied with naturalization procedures.

Before the ratification of the Constitution, state naturalization procedures required aliens to take formal legal steps to secure preliminary rights. Aliens who wished to access the rights of citizens had to publicly take an "oath or affirmation of allegiance" in a formal proceeding. Pa. Const. of 1776 § 42 (allowing aliens to become "denizens" and then "citizens" over three years); Vt. Const. of 1777, § 38; Act of Aug. 5, 1782, *in* 19 *Colonial Records of Georgia*, pt. ii, 162–66 (Allen Candler ed., 1911).

After the ratification of the Constitution, the federal government determined naturalization criteria. U.S. Const. art. I, § 8, cl. 4. The naturalization process required aliens to publicly swear allegiance at recorded ceremonies and reside in the country for designated time periods. *See* 1 Stat. 103, ch. 3 (1790); 1 Stat. 414, ch. 20 (1795) (requiring a second

oath and waiting period); 1 Stat. 570, ch. 58 (1798) (providing licenses for aliens trying to avoid deportation); 2 Stat. 153, ch. 28 (1802). This process "was the surest standard" to measure a noncitizen's connection to the country because "it was action, and not declaration; it was fact and not theory." 7 Annals of Cong. 576 (1803) (Joseph Gales ed., 1834) (statement of Rep. Michael Leib).

The states exercised their discretion by granting rights according to the concrete federal naturalization process. Alexander Hamilton advocated for states to extend rights to aliens in "parts" according to their progress and compliance with federal "[n]aturalization … solemnities." Alexander Hamilton, 6 *The Works of Alexander Hamilton* 776–77 (Henry Cabot Lodge ed., 1885). Following Hamilton's advice, New Jersey, for instance, required aliens to "declare … their intention to become … citizens, agreeably to the existing laws of the United States." Act of Nov. 7, 1806, *Laws of the State of New Jersey* 172 (Joseph Bloomfield ed., 1811); *accord* Act of Dec. 18, 1799, *in* 2 *Resolutions of the General Assembly of the State of South-Carolina* 273 (1808).

Thus, at the Founding, noncitizens demonstrated formal engagement with the naturalization process to be granted privileges by the states. Even then, this engagement allowed noncitizens to access only a subset of the rights of citizens. If this Court were to define "the people" as broader than "citizens," the history cannot justify including

noncitizens who have not engaged with the naturalization and immigration process.

2. Precedent suggests lawful status is a prerequisite for a noncitizen to demonstrate "sufficient connections."

Unlawful noncitizens cannot violate the law to assert its protections. As this Court has repeatedly noted, an alien "does not become one of the people to whom [rights] are secured by our Constitution by an attempt to enter, forbidden by law." *United States ex rel. Turner v. Williams*, 194 U.S. 279, 284–90 (1904). The Court continued, "[t]o appeal to the Constitution is to concede that this is a land governed by that supreme law." *Id.* Since the Constitution confers the power to exclude noncitizens, "those who are excluded cannot assert [constitutional] rights" based on connections acquired by violating the law. *Id.* The government therefore "does not offend the Constitution" by depriving a noncitizen of Second Amendment rights "[w]hen an alien's continuing presence in this country is in violation of the immigration laws." *Reno v. Am.-Arab Anti-Discrimination Comm.*, 525 U.S. 471, 491–92 (1999).

Even if noncitizens could assert the rights of "the people," engagement with the immigration process would be a prerequisite. In *Johnson v. Eisentrager*, this Court explained that though "[m]ere lawful presence in the country creates an implied assurance of safe conduct," a noncitizen's rights "become more extensive and secure when he makes preliminary declaration of his intention to become a citizen, and they expand

to those of full citizenship upon naturalization." 339 U.S. 763, 770 (1950). Thus, he "must lawfully enter[] and reside[] in this country" to be "invested with the rights guaranteed by the Constitution to all people within our borders." *Bridges v. Wixon*, 326 U.S. 135, 161 (1945) (Murphy, J., concurring in the judgment). But until he formally engages with the legal immigration process, "the Bill of Rights is a futile authority for the alien." *Id.*

The Court has outlined this principle in the context of the First and Fourth Amendments, which each protect rights of "the people." It has suggested that only individuals with lawful status may begin to assert these rights.

This is true in the First Amendment context. In *Turner*, for example, the Court barred an anarchist who "entered [the country] in violation of law" from asserting First Amendment protections to avoid deportation. 194 U.S. at 289. Similarly, the Court repeatedly upheld the deportation of communists who resided in the United States for extended periods but never applied for legal status. *Galvan v. Press*, 347 U.S. 522, 529 (1954); *Shaughnessy*, 342 U.S. at 595. On the other hand, in *Bridges v. Wixon*, this Court suggested without holding that lawful permanent residents possessed First Amendment rights. *See* 326 U.S. at 148; *see also Am.-Arab Anti-Discrimination Comm.*, 525 U.S. at 491–92.

This Court has similarly declined to extend Fourth Amendment rights to unlawful noncitizens. In *Verdugo-Urquidez* itself, the Court explicitly withheld Fourth Amendment protections from "aliens outside the … United States." 494 U.S. at 269. In so doing, the Court "implicitly suggest[ed] that the Fourth Amendment may not protect illegal aliens in the United States." *Id.* at 283 n.6 (Brennan, J., dissenting); *see also id.* at 279 (Stevens, J., concurring in the judgment) ("In my opinion aliens who are *lawfully present* in the United States are among those 'people' who are entitled to the protection of the Bill of Rights." (emphasis added)). Directly after employing the "sufficient connection" language, the Court stated that an "excludable alien" is not part of "the people" because "an attempt to enter forbidden by law" cannot secure rights. *Id.* at 265 (quoting *Turner*, 194 U.S. at 292). To accentuate this point, the Court quoted from another case highlighting that the constitutional analysis changes when "*an alien lawfully enters … this country*," itself italicizing that phrase for emphasis. *Id.* at 271 (quoting *Kwong Hai Chew v. Colding*, 334 U.S. 590, 596 n.5 (1953)).

This principle — only individuals who have engaged with the immigration process may assert constitutional rights of "the people" — has proven administrable by lower courts. The Third Circuit, for instance, has used this principle to conclude that noncitizens who have developed "a substantial legal relationship with the United States" by

participating in the "congressionally defined" immigration process have "sufficient connections" to the country. *Osorio-Martinez v. Attorney General*, 893 F.3d 153, 158, 163, 168 (3d Cir. 2018). In *Osorio-Martinez*, the court permitted two noncitizens to assert constitutional rights because they successfully petitioned a state court, USCIS, and the Secretary of Homeland Security. *See id.* at 169–70. Their compliance with "[a]ll of these requirements attest[ed] to … [their] relationship to the United States." *Id.* at 170. On the other hand, "physical presence alone … cannot be sufficient to establish that an alien is entitled to constitutional protections." *Id.* at 166–68.

D. Because Doe does not have citizenship, or even lawful status, he is not part of "the people."

John Doe — a noncitizen who unlawfully entered the United States — has never engaged with the legal immigration process. Doe cannot access Second Amendment rights because he does not have citizenship. But even if "the people" extended beyond citizens alone to those with "sufficient connections," it would extend only to those who have legal status. Doe lacks this as well.

II. SECTION 922(G)(5)(A) IS CONSISTENT WITH THE SECOND AMENDMENT.

Historical traditions of firearm regulation demonstrate that unlawful noncitizens may be disarmed consistent with the Second Amendment. To determine whether regulations comply with the Second Amendment, this Court compares the principles underlying historical

regulations to modern-day counterparts. History shows that the state disarmed lawbreakers and the disloyal before, during, and after the Founding. Similarly, § 922(g)(5)(A) disarms people who commit the crime of illegal entry and those who lack formal allegiance to the United States.

As with all provisions of § 922(g), the plaintiff must rebut the presumption of § 922(g)(5)(A)'s constitutionality. Though the government typically bears the burden of proof, *see Bruen*, 142 S. Ct. at 2130, this Court has provided a "not … exhaustive" list of "presumptively lawful" regulations, including "longstanding prohibitions" on felons in § 922(g)(1) and the mentally ill in § 922(g)(4). *Heller*, 554 U.S. at 627 n.26; *see also Rahimi*, 144 S. Ct. at 1898 (upholding § 922(g)(8)). Section 922(g)(5) was passed alongside these sections and similarly disarms a class of individuals.

Because John Doe cannot refute the longstanding historical tradition supporting § 922(g)(5), the government may disarm him consistent with the Second Amendment.

A. Second Amendment analysis requires historical analogies about categories of individuals.

This Court's precedents provide a clear rule: regulations are consistent with the Second Amendment where they comport with the historical tradition of firearm regulation. This rule does not permit case-by-case consideration of an individual's circumstances.

1. The government may enact regulations consistent with the historical tradition of firearm regulation.

Firearm regulations comply with the Second Amendment where they are "consistent with the principles that underpin our regulatory tradition." *Rahimi*, 144 S. Ct. at 1898. This inquiry requires courts to "ascertain whether [a] new law is relevantly similar to laws that our tradition is understood to permit." *Id.* (cleaned up). The challenged provision and a historical regulatory tradition are "relevantly similar" when they share a common "why" and "how." *Id.* at 1898, 1903. Regulations share a "why" when they address the same "particular problem[]" as a Founding-era law and a "how" when they "impose a comparable burden" on the right. *Id.* at 1897–98.

The focus on a conceptual fit between the "why" and "how" emphasizes that principles, not laws, matter. The inquiry does not require that the government produce a "precise[] match," "dead ringer," or "historical twin" for the challenged provision. *Id.* at 1898. Instead, the government may point to multiple historical regulations that, "[t]aken together," provide evidence of broad principles at the Founding. *Id.* at 1901–02.

Historical regulations before, during, and after the Founding illustrate the Second Amendment's scope. Because the Founders "codified a pre-existing right," courts consider regulations from before the Founding. *Bruen*, 142 S. Ct. at 2127 (citation omitted). And, since

"[c]onstitutional rights are enshrined with the scope they were understood to have when the people adopted them," courts also examine Founding-era evidence. *Id.* at 2136 (quoting *Heller*, 554 U.S. at 634–35). Finally, courts analyze the "public understanding of a legal text in the period after its enactment" because "longstanding" traditions are probative of original meaning. *Heller*, 554 U.S. at 605, 626 (emphasis omitted).

2. Courts cannot consider individualized circumstances when drawing historical analogies.

The historical inquiry required by this Court's Second Amendment jurisprudence does not lend itself to case-by-case carve-outs from generally applicable laws. As the Eighth Circuit explained post-*Rahimi*, "history demonstrates that there is no requirement for an individualized determination … as to each person in a class of prohibited persons" in § 922(g). *United States v. Jackson*, 110 F.4th 1120, 1128 (8th Cir. 2024). This is because "[l]egislatures historically prohibited possession by categories of persons based on a conclusion [about] the category as a whole." *Id.* at 1128. Five other circuits have rejected case-by-case determinations about provisions of § 922(g). *See United States v. Rozier*, 598 F.3d 768, 772 (11th Cir. 2010) ("The [defendant's] circumstances … are irrelevant."); *Medina v. Whitaker*, 913 F.3d 152, 160 (D.C. Cir. 2019) (rejecting "painstaking case-by-case assessment"); *United States v. Skoien,* 614 F.3d 638, 641 (7th Cir. 2010); *In re United States*, 578 F.3d 1195, 1200

(10th Cir. 2009); *United States v. Torres-Rosario*, 658 F.3d 110, 113 (1st Cir. 2011).

Individualized assessments are nonsensical under any approach that treats Founding-era evidence as persuasive. As *Rahimi* recently confirmed, this historical inquiry requires the apples-to-apples comparison of Founding-era and modern-day regulatory principles. But Doe's request for individualized consideration would require courts to compare "apples" — generally applicable laws from the Founding — to "watermelons" — Doe's present circumstances. *Tandon v. Newsom*, 141 S. Ct. 1294, 1298 (2021) (per curiam) (Kagan, J., dissenting). *Rahimi*'s reasoning provides no principled way to distinguish between similarly situated individuals based on Founding-era regulatory principles.

Entertaining Doe's challenge could unleash widespread uncertainty about the validity of generally applicable laws. Doe effectively requests that every unlawful noncitizen who wants to own a gun begin separate judicial proceedings to determine whether § 922(g)(5)(A) applies to him. Others disarmed under the remaining subsections of § 922(g) — including domestic abusers like Rahimi — would follow suit. This case-by-case approach, "applied to countless variations in individual circumstances, would obviously present serious problems of administration, consistency and fair warning." *Torres-Rosario*, 658 F.3d at 113.

B. The government may disarm unlawful noncitizens because they have violated the law.

The Second Amendment incorporates a common-law tradition that permits the government to disarm criminals and lawbreakers. Since the Founding, the government has disarmed individuals who are not "law-abiding" — and this Court has repeatedly endorsed its ability to do so. *Heller*, 554 U.S. at 625, 635; *Bruen*, 142 S. Ct. at 2122, 2125, 2131, 2133, 2134, 2138, 2139 n.9, 2150, 2156; *id.* at 2157, 2158, 2159, 2161 (Alito, J., concurring); *id.* at 2161 (Kavanaugh, J., concurring).

1. Historical traditions show that the government could disarm all individuals who violated the law.

Unbroken regulatory traditions from the Middle Ages to the present demonstrate that the state may disarm lawbreakers to protect the public. At common law, lawbreaking was itself classified as dangerous because it "disrupted the 'public order' and 'le[d] almost necessarily to actual violence.'" *Rahimi*, 144 S. Ct. at 1901 (quoting *State v. Huntly*, 25 N.C. (3 Ired.) 418, 421–22 (1843) (per curiam)). To protect the public, states therefore traditionally disarmed criminals, whose failure to follow the law justified restrictions on their Second Amendment rights. Don Kates & Clayton Cramer, *Second Amendment Limitations & Criminological Considerations*, 60 Hastings L.J. 1339, 1363–64 (2009). A millennium of history demonstrates that the government's power to disarm lawbreakers — no matter how violent or serious their crimes — has been widely understood and rarely questioned.

Pre-Founding. By the late Middle Ages, English law permitted the state to disarm lawbreakers, who were considered "dangerous citizens." *See* Robert Churchill, *Gun Regulation, the Police Power, and the Right to Keep Arms in Early America*, 25 Law & Hist. Rev. 139, 164 (2007). In 1328, the Statute of Northampton clarified that individuals who committed statutory misdemeanors, like "go[ing or] rid[ing] armed," could be disarmed. 10 *Halsbury's Laws of England* 583 (3d ed. 1955). During and after the English Civil War, Parliament empowered officials to seize weapons and confiscate firearms from "dangerous" persons, individuals who went armed "offensively," or disturbers of the "public peace." Militia Act 1662, 14 Car. 2 c. 3, § 13 (1662); 6 *Calendar of State Papers, Domestic Series, of the Reign of William III*, at 234 (Edward Bateson ed., 1937). Extending this authority, in 1780, Parliament authorized the widespread confiscation of weapons from London street rioters, distinguishing the "disorderly" "mob" from "citizens of character" who remained entitled to bear arms. Joyce Lee Malcolm, *To Keep and Bear Arms* 130–31 (1994).

Founding era. The Framers adopted the common-law presumption that the state could categorically disarm lawbreakers, including those who had committed minor offenses. Like many states, Massachusetts disarmed "rioters, disturbers or breakers of the peace" who had confessed or sustained other "legal conviction[s]." Act of Nov. 1, 1692, 1

Acts and Resolves, Public and Private, of the Province of the Massachusetts Bay 52–53, ch. 18, § 6 (1869); *see also* Act of 1708, *in Laws of New Hampshire* 1–2 (1759); 1786 Va. Acts 33, ch. 21; Act of Jan. 29, 1795, *in* 2 *Laws of the Commonwealth of Massachusetts* 652–53, § 2 (1807); 1768 N.C. Laws 775, ch. 13. Other states penalized fraud and forgery by requiring lawbreakers to forfeit all their "goods and chattels" — including weapons — for public use. *See, e.g.*, 1717 Md. Laws 139; 1715 Md. Laws 78–79 (punishing counterfeiting, embezzlement, and fraud); 1779 Vt. Acts & Resolves 93–96 (similar). Even where left implicit, the government's power to disarm lawbreakers was universally understood. *See* Stephen Halbrook, *The Founders' Second Amendment* 273 (2008).

State ratifying conventions corroborate the consensus that the government could disarm lawbreakers. At the Pennsylvania ratifying convention, drafters proposed "highly influential" text prohibiting disarmament "unless for crimes committed, or real danger of public injury." *Heller*, 554 U.S. at 604; Amendments Proposed by Pennsylvania Convention Minority (1787), *reprinted in* Dumbauld, *supra*, at 174. Shortly after, at the Massachusetts convention, Samuel Adams proposed an amendment to prevent Congress from disarming "the people of the United States, who are peaceable citizens." Halbrook, *The Founders' Second Amendment*, *supra*, at 205. The Second Amendment ultimately

earned the support of these delegations because it was understood to allow such disarmaments. *See id.* at 273.

Read together, the history speaks to the plenary power of the state to disarm all lawbreakers, not only "serious" ones or convicts. The Founders allowed citizens to bear arms while "honest and lawful" and "peaceable" but disarmed lawbreakers "for crimes committed" and "public injury." The history therefore suggests that the Founders treated "disrespect for the law[s]" of the polity as grounds for disarmament, regardless of its severity or the penalty attached. *Rozier*, 598 F.3d at 771 & n.5 (quoting *Heller*, 554 U.S. at 635). Moreover, convictions were unnecessary to disarm lawbreakers, as shown by several laws allowing for on-the-spot disarmament. *See United States v. Goins*, 2024 WL 4441462, at *3 (6th Cir. Oct. 8, 2024) (collecting statutes). The phrase "real danger of public injury" clearly contemplated disarming individuals yet to be convicted. Because "the order and security of society took precedence," the state could disarm individuals who posed a threat of disorder, lawlessness, or violence. Lawrence Cress, *An Armed Community*, 71 J. Am. Hist. 22, 34 (1984).

Post-Founding. Subsequent laws reflected the general principle that the right to bear arms was limited to "law-abiding" citizens. Operating under this principle, numerous states disarmed criminals because they posed an ongoing danger of misusing firearms. Massachusetts and

Maine, for instance, disarmed criminals alongside "common drunkards" and "vagabonds," while New York grouped "habitual criminals" with "disorderly persons." 1837 Mass. Acts 273; 1839 Me. Laws 421, 424; 1881 N.Y. Laws 126, 126–127.

2. Unlawful noncitizens have violated the law.

Doe's disarmament is consistent with the Second Amendment. As Doe admits, he violated federal law by illegally entering the country. 8 U.S.C. § 1325(a). While unlawfully present, he confessed to violating § 922(g)(5)(A) by illegally purchasing and selling an unregistered firearm. 18 U.S.C. § 922(d)(5)(A); JA-24. Doe's facts powerfully illustrate why governments have disarmed criminals, including unlawful noncitizens, since the Founding. Section 922(g)(5)(A) promotes public safety by disarming individuals who (1) pose a threat of misusing firearms and (2) complicate efforts to track and register firearms.

First, just like historical laws enacted since the Founding, § 922(g)(5)(A) disarms criminals to protect the public. When crafting federal gun control laws, Congress "rul[ed] broadly to keep guns out of the hands of those who have demonstrated that they may not be trusted to possess a firearm without becoming a threat to society." *Scarborough v. United States*, 423 U.S. 212, 218 (1976). As one congressman noted, § 922(g) was designed to disarm those with "specific records or characteristics which raise serious doubt as to their probable use of firearms

in a lawful manner." 114 Cong. Rec. 16,298 (1968) (statement of Rep. Howard Pollock).

It additionally reflects a rational judgment that unlawful noncitizens subject to automatic detention and deportation by federal law enforcement officials "ought not to be armed when authorities seek them." *United States v. Huitron-Guizar*, 678 F.3d 1164, 1170 (10th Cir. 2012). Granting "illegal aliens the ability lawfully to arm themselves precisely at the moment the government commences its effort to remove them from the country" would endanger law enforcement officials and the public. *United States v. Atandi*, 376 F.3d 1186, 1190 n.9 (10th Cir. 2004). Since all unlawful noncitizens may be motivated to resist arrest and deportation, the rationale underlying § 922(g)(5)(A) "applies with equal force to those who entered yesterday and those who" arrived decades ago. *Sitladeen*, 64 F.4th at 989.

Second, just like historical laws limiting firearm misuse, § 922(g)(5)(A) furthers the delicate federal regulatory scheme concerning the registration, movement, and use of deadly weapons. As Congress has noted, "the ease with which any person" — including "criminals" — "can acquire firearms is a significant factor in the prevalence of lawlessness." Pub. L. No. 90-351, 82 Stat. 225 (1968). In response, Congress administers a "comprehensive [regulatory] scheme," including registration requirements, to disarm "criminals and others who should not have"

firearms and "assist law enforcement authorities in investigating serious crimes." *Abramski v. United States*, 573 U.S. 169, 180 (2014). The key is consistency: uniform federal rules prevent interstate trafficking of unregistered guns used in crimes.

Categorical disarmament of unlawful noncitizens effectuates this regulatory scheme by promoting registration. As numerous circuits have found, "those in the United States without authorization may be more likely to acquire firearms through illegitimate and difficult-to-trace channels, making § 922(g)(5)(A)'s prohibition … reasonable." *Sitladeen*, 64 F.4th at 989. Indeed, unlawful noncitizens 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) (internal quotation marks omitted); *see also Carpio–Leon*, 701 F.3d at 982–83. Crucially, unlawful noncitizens' status as automatically deportable — and not § 922(g)'s disability — makes them unlikely to report personal information to a federal database to register a gun. For instance, even absent § 922(g)(5)(A), Doe's deportable status makes him unlikely to provide the government with truthful identifying information.

C. The government may disarm unlawful noncitizens because they do not owe allegiance to the United States.

The Second Amendment "helped to secure the ideal of a citizen militia, which might be necessary to oppose an oppressive military force if the constitutional order broke down." *Heller*, 554 U.S. at 599. To accomplish this, those who wield weapons must have an "undivided allegiance" to the United States. Churchill, *supra*, at 157. Consequently, the history of firearm regulation shows that the government could disarm individuals "on the ground of alienage or lack of allegiance to the sovereign." *Jimenez-Shilon*, 34 F.4th at 1047 (cleaned up). Consistent with the Second Amendment, § 922(g)(5)(A) disarms foreign citizens who have entered the country illegally because they do not owe formal allegiance to the United States.

1. Historical traditions show that the government could disarm those who lacked allegiance to the sovereign.

History before, during, and after the Founding demonstrates an unbroken tradition of disarming those who lacked loyalty to the state.

English history. English law disarmed those who lacked allegiance to the Crown or were loyal to other sovereigns. For example, Parliament disarmed the Welsh and Scottish in response to the Glyndŵr and Jacobite uprisings. 2 Henry IV ch. 12 (1400–01); Highland Services Act 1715, 1 Geo. 1. Stat. 2. c. 54. Similarly, every British government from James I to George I disarmed Catholics based on their presumed allegiance to Rome, reasoning that such ties made them "potentially

disloyal and seditious." Nicholas Johnson et al., *Firearms Law and the Second Amendment* 133 (2d ed. 2017); *see, e.g.*, 1 *Stuart Royal Proclamations: Royal Proclamations of King James I 1603–1625*, at 247–48 (June 2, 1610) (James Larkin & Paul Hughes eds., 1973); 2 Geo. I, ch. 9 (1715). By the same token, Parliament routinely disarmed other groups of "dangerous" and "disaffected persons, who disown his Majesty's government." 27 *Calendar of State Papers, Domestic Series, of the Reign of Charles II*, at 26–27, 83–85, 102 (F.H. Blackburne Daniell & Francis Bickley eds., 1938); 5 *Calendar of State Papers, Domestic Series, of the Reign of William III*, at 79–80 (Edward Bateson ed., 1937).

Because the principle motivating these disarmaments was "disloyal[ty] to the current government," a demonstration of allegiance to the state was sufficient to restore the right to bear arms. Joseph Greenlee, *The Historical Justification for Prohibiting Dangerous Persons from Possessing Arms*, 20 Wyo. L. Rev. 249, 259 (2020). For example, suspected "Papists" could recite a declaration "set down and expressed in an Act of Parliament" to exempt themselves from disarmament. 1 W. & M. ch. 15 (1688); *accord* 30 Car. II ch. 1 (1678). Similarly, "gentlemen" who swore an oath of allegiance to the Crown could bear arms for hunting or self-defense. *See* 7 Will. III ch. 5 (1695).

Colonial era. British legal traditions that permitted disarming those without allegiance to the sovereign crossed the Atlantic. Among

these colonial restrictions were laws barring members of Native tribes from owning, purchasing, or carrying firearms in the colonies. In 1639, for instance, Massachusetts commanded "that no man … shall sell or give to any Indian … any … gun." Order of May 17, 1637, *in* 1 *Records of the Governor & Company of the Massachusetts Bay in New England* 195 (Nathaniel Shurtleff ed., 1853). Similarly, Rhode Island ordered that "the Indians … shall [be] forthwith disarmed," while New York "forb[ade] the admission of any Indians with a gun or other weapon" into the state. *See* 2 *Records of the Colony of Rhode Island and Providence Plantations, in New England* 191, 193 (John Russell Bartlett ed., 1857); 1656 N.Y. Laws 234–35; *see also* Joseph Blocher & Caitlan Carberry, *Historical Gun Laws Targeting 'Dangerous Groups' and Outsiders*, *in New Histories of Gun Rights* 131, 136–40 (Joseph Blocher et al. eds., 2023) (surveying restrictions).

As in England, other colonial laws disarmed Catholics for their perceived disloyalty to the government. Virginia, for example, deemed it "dangerous at this time to permit Papists to be armed" and therefore charged justices of the peace disarming known or suspected "Papists." Act of March 1756, *in* 7 *Hening's Statutes at Large* 35 (1820) (Virginia); *see also* Act of May 22, 1756, *in* 52 *Archives of Maryland* 454 (1756); Act for Forming and Regulating the Militia (1757), *in* 3 *Pennsylvania Archives* 120, 131 (Samuel Hazard ed., 1853). Because the restrictions

were implemented "on the basis of allegiance, not on the basis of faith," Churchill, *supra,* at 157, the colonies frequently allowed Catholics to retain their arms if they sufficiently proved their loyalty through an oath. For instance, Virginia's 1756 restriction exempted Catholics from disarmament if they took "the oaths appointed by act of parliament." 7 *Hening's Statutes at Large* 36.

Founding era. Founding-era statutes continued to disarm individuals who lacked allegiance to the fledgling United States. In 1776, the Second Continental Congress recommended that all colonies "immediately" disarm Loyalists "notoriously disaffected to the cause of America, or who have not associated and refuse to associate to defend by arms these United Colonies." 4 *Journals of the Continental Congress* 205 (Worthington Chauncey Ford ed., 1906). Though the "Loyalists were neither criminals nor traitors, American legislators had determined that permitting these persons to keep and bear arms posed a potential danger." *Nat'l Rifle Ass'n of Am. v. ATF*, 700 F.3d 185, 200 (5th Cir. 2012).

By implementing the Continental Congress's recommendations, state statutes demonstrate that disarming the disloyal was consistent with the Founding-era conception of the right to bear arms. Numerous states, including Pennsylvania and North Carolina, had already protected "the right to bear arms" in their state constitutions. Pa. Const. of 1776, art. I, § 13; N.C. Const. of 1776, art. I, § 17. Yet these same states

still implemented the Continental Congress's recommendation and ordered that "every person" who had not affirmed his allegiance to the state "shall be disarmed." 1777 Pa. Laws 61, 62–63; *accord* 1777 N.C. Sess. Laws 41, 43–44; 1777 N.J. Laws 84, 90.

Other laws specifically disarmed those who refused to swear oaths of allegiance to the United States. Many states systematically disarmed those who refused to "renounce … all allegiance to George the Third" and "bear true allegiance to … [the] free and independent state." Act of June 13, 1777, ch. 756, §§ 1, 3, & 5, *in* 9 *The Statutes at Large of Pennsylvania* 110–13 (James Mitchell & Henry Flanders eds., 1903); *accord* Act of May 5, 1777, ch. 3, *in* 9 *Hening's Statutes at Large* 281, 281–82 (1821) (Virginia); 1777 N.C. Sess. Laws 41, 43–44; 1778 S.C. Acts 31. Massachusetts, in particular, disarmed those who refused to demonstrate their loyalty by "subscrib[ing] a printed or written declaration," but later allowed those who fought against the state to regain their arms by swearing allegiance. 1775–1776 Mass. Acts 31–32, 35; 1787 Mass. Acts 555, 555–56.

To the extent that the Second Amendment prohibited certain disarmaments, it was designed to prevent disarmaments similar to those orchestrated by British colonial governors against American patriots. For instance, after Lexington and Concord, the military governor of Massachusetts ordered all inhabitants of Boston to deposit their arms

at Faneuil Hall. Halbrook, *The Right to Bear Arms*, *supra*, at 142. It was the fresh memory of these events — as well as the importance of arms-bearing to militia service — that inspired early Americans to jealously guard their right to bear arms. No evidence suggests that the Second Amendment changed the scope of the right to bear arms so dramatically as to outlaw commonplace restrictions that the Founders reenacted and extended.

Post-Founding. Later firearm restrictions continued to disarm those who lacked allegiance to the United States. In keeping with colonial regulations, federal law — and numerous territorial laws — prohibited the purchase and sale of firearms from or to Native Americans. *See, e.g.*, 4 Stat. 729, 730 (1834); 1853 Or. Laws 257; Act of Dec. 15, 1868, § 1, *in The Compiled Laws of the Territory of Arizon*a 99 (John Hoyt ed., 1877). Other laws similarly disarmed rebels, ranging from participants in Shay's Rebellion to former Confederates. *See, e.g.*, Act of Feb. 16, 1787, *in* 1 *Private and Special Statutes of the Commonwealth of Massachusetts from 1780–1805*, at 145–48 (1805); General Order No. 1, § 16, *in* Edward McPherson, *A Handbook of Politics for 1868*, at 36, 36–37 (1868). And immediately after the United States developed a formal immigration system, numerous states barred firearm possession by noncitizens, regardless of legal status. *See, e.g.*, 1909 Pa. Laws 466; 1915 N.J.

Laws 662–63; 1922 Mass. Acts 563; 1923 N.Y. Laws 140–141; 1923 Conn. Pub. Acts 3708–09; 1931 Cal. Stat. 2316–17.

These loyalty-based laws were distinguishable from race-based laws that disarmed Black individuals regardless of their loyalty to the state. *Compare* 1804 Miss. Laws 90 (enslaved persons), *with* 1851 Ky. Acts 296 § 12 (freedmen); 1860–61 N.C. Sess. Laws 68 (same); 1863 Del. Laws 332 (same). For example, Mississippi's 1865 law disarmed even Black veterans of the Union Army while allowing white former Confederates to remain armed. *See McDonald*, 561 U.S. at 771–72. These shameful race-based laws were the mirror opposite of conduct-based laws disarming those disloyal to the state and came from a distinct regulatory tradition not analogous to § 922(g)(5).

2. Unlawful noncitizens do not owe allegiance to the United States.

Section 922(g)(5) shares a "why" and a "how" with historical laws disarming individuals who lacked allegiance to the United States. Consistent with historical traditions of disarming the disloyal, unlawful noncitizens may be categorically disarmed.

Like Founding-era laws, § 922(g)(5) disarms citizens of other sovereigns who have not sworn allegiance to the United States. Noncitizens — legal or otherwise — have not demonstrated their loyalty to the United States until they have been "releas[ed] from their allegiance" to another country and "claimed as citizens" of this one. *McIlvaine v. Coxe's*

Lessee, 8 U.S. (4 Cranch) 209, 215 (1808). Since 1790, the federal government has required noncitizens completing naturalization to take an oath promising to "abjure all allegiance" to foreign states and "bear true faith and allegiance" to the United States. 8 C.F.R. § 1337.1; 66 Stat. 258 (1952); 1 Stat. 103 (1790); *see also* 18 U.S.C. § 922(g)(7) (disarming individuals who renounce their citizenship). As this Court has observed, Congress has plenary authority to define who has "sufficiently manifested allegiance" to the United States. *Plyler v. Doe*, 457 U.S. 202, 218 n.19 (1982). In keeping with traditions disarming Loyalists and members of Native tribes, § 922(g)(5) bars a class of noncitizens who have not formally certified their allegiance to the country from owning firearms.

In this respect, the "how" of § 922(g)(5) mirrors the litany of historical restrictions at the Founding that disarmed individuals who lacked allegiance to the United States. Just as states disarmed Catholics, Loyalists, and Native Americans based on their allegiance to another sovereign, the federal government may disarm alien citizens of other countries today. At the Founding, these groups could often follow formal procedures to swear allegiance to the United States and thereby gain the ability to bear arms. Today, unlawful noncitizens may undergo the formal naturalization process and swear allegiance to the United States to do so as well.

D. These principles show that the government may disarm Doe consistent with the Second Amendment.

Either principle demonstrates the constitutionality of § 922(g)(5) — but together they resolve all doubt. As *Rahimi* demonstrates, courts may combine strands of regulatory traditions to accurately capture Founding-era principles. *Rahimi*, 144 S. Ct. at 1901. Section 922(g)(5) disarms individuals who have committed the crime of illegal entry and who have failed to swear loyalty to the United States. Section 922(g)(5) is therefore relevantly similar to dozens of historical categorical disarmament laws that protected the public. "Taken together," the traditions of disarming lawbreaking noncitizens "confirm what common sense suggests": the federal government may disarm unlawful noncitizens consistent with the Second Amendment. *Id.* at 1901.

CONCLUSION

This Court should reverse the judgment of the court of appeals.

October 14, 2024 Respectfully submitted,

The Honorable Justice Sandra Day O'Connor Memorial Team

/s/ Arvind Ashok
/s/ Edward Bless
/s/ Andrew Hayes
/s/ Emily Malpass
/s/ Richard Nehrboss
/s/ Daniel Wasserman

APPENDIX

U.S. Const. amend. II

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.

18 U.S.C. § 922(g)

(g) It shall be unlawful for any person—

(1) who has been convicted in any court of, a crime punishable by imprisonment for a term exceeding one year;

(2) who is a fugitive from justice;

(3) who is an unlawful user of or addicted to any controlled substance (as defined in section 102 of the Controlled Substances Act (21 U.S.C. 802));

(4) who has been adjudicated as a mental defective or who has been committed to a mental institution;

(5) who, being an alien—

(A) is illegally or unlawfully in the United States; or

(B) except as provided in subsection (y)(2), has been admitted to the United States under a nonimmigrant visa (as that term is defined in section 101(a)(26) of the Immigration and Nationality Act (8 U.S.C. 1101(a)(26)));

(6) who has been discharged from the Armed Forces under dishonorable conditions;

(7) who, having been a citizen of the United States, has renounced his citizenship;

(8) who is subject to a court order that—

(A) was issued after a hearing of which such person received actual notice, and at which such person had an opportunity to participate;

(B) restrains such person from harassing, stalking, or threatening an intimate partner of such person or child of such intimate partner or person, or engaging in other conduct that would place an intimate partner in reasonable fear of bodily injury to the partner or child; and

(C)

(i) includes a finding that such person represents a credible threat to the physical safety of such intimate partner or child; or

(ii) by its terms explicitly prohibits the use, attempted use, or threatened use of physical force against such intimate partner or child that would reasonably be expected to cause bodily injury; or

(9) who has been convicted in any court of a misdemeanor crime of domestic violence,

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.