IN THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

APPEAL NO. 23-1932

UNITED STATES
Appellee

v.

MORENO VIZCAÍNO-PEGUERO
Defendant - Appellant

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF PUERTO RICO

BRIEF FOR APPELLEE

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JURISDICTIONAL STATEMENT

This is an appeal stemming from a guilty plea in the District of Puerto Rico in Criminal Case No. 22-169.[1] The district court had original jurisdiction pursuant to 18 U.S.C. § 3231. This Court has appellate jurisdiction over direct appeals of final decisions by the district court. *See* 28 U.S.C. § 1291. Defendant-appellant Vizcaíno filed a timely notice of appeal. *See* Fed. R. App. 4 (b); (AA 9-10; AD 1-7).

[1] Citations to the record will be as follows: DE (Docket Entry or Entries); (Appellant's Brief); AA (Appellant's Appendix); SA (Appellant's Sealed Appendix); SAD (Appellant's Sealed Addendum).

STATEMENT OF THE ISSUE ON APPEAL

Whether the federal law prohibiting the possession of firearms by aliens illegally in the United States—18 U.S.C. § 922(g)(5)—fits comfortably within the Second Amendment framework that the Supreme Court adopted in *Bruen*?

STATEMENT OF THE CASE

I. Offense Conduct

In the spring of 2022, law enforcement executed a search warrant at Vizcaíno's residence. (SA 88). During the search, agents found: one Glock pistol (model 27, .40 caliber), one Glock pistol (model 22, .40 caliber), 57 rounds of .40 caliber ammunition, 17 rounds of 9mm caliber ammunition, one Glock magazine (.40 caliber, 16-round capacity), one Glock magazine (.40 caliber, 9-round capacity), one Glock magazine (.40 caliber, 13 round capacity), one Glock magazine (.40 caliber, 22-round capacity), one Glock magazine (.40 caliber, 17-round capacity), $2,470, one Verizon e-Talk cellphone, and seven iPhone cellphones. (*Id*.). Vizcaíno told agents that he possessed the firearms and ammunition for his protection. (*Id*.). Vizcaíno also acknowledged that he knew that he could not possess the firearms because he was not lawfully in the United States. (*Id*.).

II. Procedural History

A grand jury charged Vizcaíno with the unlawful possession of firearms and ammunition by an illegal alien in violation of 18 U.S.C. § 922(g)(5)(A). (AA 16). Vizcaíno moved to dismiss the indictment, claiming the statute violated the Second Amendment. (SA 1-84). Vizcaíno first argued

he was part of "the people" whom the Second Amendment was meant to protect. (*Id.*). Then he claimed the statute was overbroad as it applied to all aliens living in the United States. (*Id.*).

The government opposed. (AA 18-34). First, it argued that as an undocumented immigrant, Vizcaíno was not part of the people protected by the Second Amendment. (*Id.*). Furthermore, the government posited that § 922(g)(5)(A) was consistent with historical practice around firearms regulation. (*Id.*).

The district court denied Vizcaíno's motion to dismiss in a written opinion and order. (SAD 1-12). The district court assumed without deciding that the Second Amendment applies to individuals like Vizcaíno. (*Id.*). The court ultimately, however, determined § 922(g)(5)(A) was a constitutionally sound limit on firearm possession. (*Id.*).

Vizcaíno entered a straight plea of guilty. (DE 49). The district court imposed a Guidelines sentence of 30 months' imprisonment. (DE 57). This appeal ensued.

SUMMARY OF THE ARGUMENT

Vizcaíno's conviction for possession of a firearm by an alien illegally present in the United States is constitutional under the Second Amendment and the Supreme Court's decision in *New York State Rifle & Pistol Ass'n, Inc. v. Bruen*, 597 U.S. 1 (2022). For starters, Vizcaíno is not part of "the people" to whom the Second Amendment applies. The Second Amendment provides only for "the right of *the people* to keep and bear Arms." U.S. Const. amend. II (emphasis added). The Supreme Court, including in *Bruen,* has repeatedly framed the scope of this right as protecting the rights of American "citizens;" Vizcaíno is not a U.S. citizen. *See, e.g., District of Columbia v. Heller,* 554 U.S. 570, 635 (2008) (holding that the Second Amendment protects "the right of law-abiding, responsible citizens to use arms in defense of hearth and home"); *McDonald v. City of Chicago*, 561 U.S. 742, 768 (2010) (describing *Heller* as holding that "citizens must be permitted 'to use [handguns] for the core lawful purpose of self-defense'" (quoting *Heller*, 554 U.S. at 630). The historical understanding of the Second Amendment, which did not extend the right to bear arms to those outside of the political community, is consistent with this understanding of "the people" as limited to citizens. The

scope of the Second Amendment's text itself is sufficient to deny Vizcaíno's challenge to § 922(g)(5)(A).

But if this Court were to consider the question, Vizcaíno fares no better. In *Heller*, the Supreme Court held that the Second Amendment guarantees the right of "law-abiding, responsible citizens" to possess arms for self-defense. 554 U.S. at 635. The Court cautioned, however, that the right to keep and bear arms "is not unlimited" and that the right remains subject to "lawful regulatory measures." *Id*. at 626, 627 n.26. Section 922(g)(5)(A) constitutes one such lawful regulatory measure.

Section 922(g)(5)(A) is consistent with the nation's historical tradition of firearm regulation. Non-members of the political community and unlawful individuals historically have been denied the right to firearms possession, making § 922(g)(5)(A)'s restriction consistent with historical firearms restrictions. Thus, even if unlawfully present non-citizens are part of "the people," § 922(g)(5)(A) is consistent with historical restrictions.

In short, nothing in the Supreme Court's recent Second Amendment cases, all of which concerned restrictions on the ability of law-abiding citizens to keep and bear arms, should cause this Court to reconsider the unanimous consensus of appellate courts upholding the constitutionality of

§ 922(g)(5)(A)'s restriction on undocumented immigrants' firearm possession.

ARGUMENT

As an unlawful alien, Vizcaíno is not part of "the people" covered by the Second Amendment. And even if he were, prohibiting unlawful aliens from possessing firearms is consistent with this Nation's historical tradition of firearm regulation.

Issue

Vizcaíno claims the district court erred in determining § 922(g)(5)(A) was constitutional. (AB 11-50). Although the district court forwent the question of whether aliens unlawfully in the United States are part of "the people" for Second Amendment purposes, Vizcaíno argues that they are. (*Id*. at 15-25). Moreover, he posits that § 922(g)(5)(A) is not consistent with the history of firearms regulation, making it unconstitutional. (*Id*. at 15-50).[2]

Standard of Review

Questions of law stemming from the district court's denial of a motion to dismiss an indictment are reviewed de novo. *United States v. Doe*, 741 F.3d 217, 227 (1st Cir. 2013).

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[2] The government agrees that Vizcaíno's guilty plea does not bar him from challenging the constitutionality of § 922(g)(5)(A) on direct appeal. *See Class v. United States*, 583 U.S. 174, 178 (2018).

Discussion

A. The Second Amendment under *Heller* and *Bruen*

The Second Amendment provides as follows: "A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed." U.S. Const. amend. II. In *Heller*, the Supreme Court held that the Second Amendment protects the right of "law-abiding, responsible citizens" to keep firearms in their homes for self-defense. 554 U.S. 635. *Heller* clarified that, "[l]ike most rights, the right secured by the Second Amendment is not unlimited" and is "not a right to keep and carry any weapon whatsoever in any manner whatsoever and for whatever purpose." *Id*. at 626.

In *Bruen*, the Court again considered the meaning of the Second Amendment in connection with a New York licensing scheme which allowed authorities to deny concealed carry permits even to those who met threshold criteria. There, the Court held that the Second Amendment protects the right of "ordinary, law-abiding citizens" to "carry a handgun for self-defense outside the home." *Bruen*, 597 U.S. at 8-10. *Bruen* struck down the New York law because it "prevent[ed] law-abiding citizens with

ordinary self-defense needs from exercising their right to keep and bear arms." *Id*. at 8-10, 71.

Bruen then clarified the "standard for applying the Second Amendment." *Bruen*, 597 U.S. at 24. First, "[w]hen the Second Amendment's plain text covers an individual's conduct, the Constitution presumptively protects that conduct." *Id*. Second, when a regulation burdens such presumptively protected conduct, "[t]he government must … justify its regulation by demonstrating that it is consistent with the Nation's historical tradition of firearm regulation." *Id*. The Court explained that the relevant "metrics" for assessing a regulation's constitutionality are "how and why the regulations burden a law-abiding citizen's right to armed self-defense." *Id*. at 29.

The Supreme Court issued its most recent Second Amendment decision, *United States v. Rahimi*,144 S.Ct. 1889 (2024), after Vizcaíno filed his opening brief. In *Rahimi*, the Court held that 18 U.S.C. § 922(g)(8), which prohibits a person from possessing a firearm while subject to a domestic-violence restraining order, is constitutional because "[a]n individual found by a court to pose a credible threat to the physical safety of another may be temporarily disarmed consistent with the Second Amendment." *Id*. at 1903.

Rahimi explained that "the Second Amendment permits more than just those regulations identical to ones that could be found in 1791." *Id*. at 1897-98. And it faulted the Fifth Circuit for "read[ing] *Bruen* to require a 'historical twin' rather than a 'historical analogue'" at the second step of the Second Amendment inquiry. *Id*. at 1903 (quotation omitted).[3]

Importantly, the Court made clear that it did "not suggest that the Second Amendment prohibits the enactment of laws banning the possession of guns by categories of persons thought by a legislature to present a special danger of misuse." *Id*. at 1901 (citing *Heller*, 554 U.S. at 626). And it reiterated that "many . . . prohibitions [on firearm possession], like those on the possession of firearms by 'felons and the mentally ill,' are 'presumptively lawful.'" *Id*. at 1902 (quoting *Heller*, 554 U.S. at 626, 627 & n.26); accord *id*. at 1916 (Kavanaugh, J., concurring) (reiterating that "'longstanding

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[3] Vizcaíno's brief relies heavily on the district court opinion *United States v. Sing-Ledezma*, 2023 WL 8587896 (W.D. Tex. Dec. 11, 2023), finding § 922(g)(5) unconstitutional. *Sing-Ledezma* relied heavily on the Fifth Circuit's opinion in *United States v. Rahimi*, 61 F.4t 443 (5th Cir. 2023), which the Supreme Court reversed.

prohibitions on the possession of firearms by felons and the mentally ill . . .' are presumptively constitutional" (quoting *Heller*, 554 U.S. at 626-27)).

Even after *Bruen*, § 922(g)(5)(A) remains a permissible restriction on firearms possession unencumbered by the Second Amendment. Every circuit to have analyzed § 922(g)(5)(A) both before and after *Bruen* has determined that it is a lawful restriction on the Second Amendment. *See United States v. Sitladeen*, 64 F.4th 978 (8th Cir. 2023); *United States v. Jimenez-Shilon*, 34 F.4th 1042, 1043-47 (11th Cir. 2022); *United States v. Perez*, 6 F.4th 448, 456 (2d Cir. 2021); *United States v. Torres*, 911 F.3d 1253 (9th Cir. 2019); *United States v. Meza-Rodriguez*, 978 F.3d 664 (7th Cir. 2015); *United States v. Carpio-Leon*, 701 F.3d 974 (4th Cir. 2012); *United States v. Huitron-Guizar*, 678 F.3d 1164 (10th Cir. 2012); *United States v. Portillo-Munoz*, 643 F.3d 437 (5th Cir. 2011); *United States v. Flores*, 663 F.3d 1022, 1023 (8th Cir. 2011).

As discussed below, under *Bruen's* first line of inquiry, unlawful noncitizens do not fall within the textual purview of the Second Amendment. And even if they did, § 922(g)(5)(A) would still be

constitutionally permissible because, under *Bruen's* second line of inquiry, the statute is consistent with the historical regulation of firearms.[4]

B. Vizcaíno is not among "the people" protected by the plain text of the Second Amendment.

By its terms, the Second Amendment protects the right of "the people" to keep and bear arms. U.S. Const. amend. II. In *Heller*, the Supreme Court explained that "the term ['the people'] unambiguously refers to … members of the political community." *Heller*, 554 U.S. at 580. The Court has observed

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[4] Since *Bruen*, the Supreme Court has not addressed the constitutionality of 18 U.S.C. § 922(g)(5)(A). And the only Court of Appeals to do so has found that it does not violate the Second Amendment. *See Sitladeen*, 64 F.4th at 978. In addition, at least 12 district courts have also held it constitutional. *See United States v. Bernabe-Martínez*, No. 22-cr-276, 2024 WL 778114 (D. Idaho Feb. 26, 2024), *United States v. Deborba*, No, 22-cr-5139, 2024 WL 342546 (W.D. Wash. Jan. 30, 2024); *United States v. Vazquez-Ramirez*, No. 23-cr-87, 2024 WL 115224 (E.D. Wash. Jan. 10, 2024); *United States v. De Los Santos-Santana*, No 23-cr-311, 2024 WL 98556 (D.P.R. Jan. 8, 2024); *United States v. Gil-Solano*, No. 23-cr-18, 2023 WL 6810864 (D. Nev. Oct. 16, 2023); *United States v. Morales-Gonzales*, No. 23-CR-129, 2023 WL 6612480 (N.D. Okla. Oct. 10, 2023); *United States v. Pineda-Guevera*, F.Supp.3d 380 (S.D. Miss. 2023); *United States v. Andrade-Hernandez*, No. 23-CR-26, 2023 WL 4831408 (S.D. Miss. July 27, 2023); *United States v. D'Luna-Mendez*, No. 22-CR-367, 2023 WL 4879837 (W.D. Tex. July 28, 2023) (adopting Report and Recommendation, 2023 WL 4535718 (W.D. Tex. July 13, 2023)); *United States v. Escobar-Temal*, No. 22-cr-393, 2023 WL 4112762 (M.D. Tenn. June 21, 2023); *United States v. Leveille*, No. 18-cr-02945, 659 F.Supp.3d 1279, (D.N.M. 2023); *United States v. Carbajal-Flores*, No. 20-cr-00613, 2022 WL 17752395 (N.D. Ill. Dec. 19, 2022).

elsewhere that "citizenship" is a required part of "membership in the political community" and that "[a]liens are by definition … outside of this community." *Cabell v. Chavez-Salido*, 454 U.S. 432, 438–40 (1982); *cf.* U.S. Const. Preamble ("WE THE PEOPLE of the United States … do ordain and establish this CONSTITUTION for the United States of America.").

Accordingly, after analyzing the phrase "right of the people," the Court in *Heller* determined that "the Second Amendment right is exercised individually and belongs to … *Americans*." *Heller*, 554 U.S. at 581 (emphasis added). The rest of the opinion likewise reflects the Court's understanding that the right to keep and bear arms belongs to "citizens." *See id.* at 595 ("right of citizens"); *id.* at 603 ("an individual citizen's right"); *id.* at 608 (right "enjoyed by the citizen"); *id.* at 625 ("weapons not typically possessed by law-abiding citizens"); *id.* ("possession of firearms by law-abiding citizens"); *id.* at 635 ("law-abiding, responsible citizens").

Nothing in *Bruen* changed this. *See Sitladeen*, 64 F.4th at 985 ("Nothing in *Bruen* casts doubt on our interpretation of ['the people' to exclude unlawfully present aliens.]"). In *Bruen*, the Supreme Court confirmed—explicitly and repeatedly—that the right to keep and bear arms belongs only to ordinary, law-abiding citizens. *See Bruen*, 597 U.S. at 8-9 (stating that *Heller*

"recognized that the Second and Fourteenth Amendments protect the right of an ordinary, law-abiding citizen to possess a handgun in the home for self-defense" (emphasis added)); *id*. at 15 ("law-abiding, adult citizens"); *id*. at 26 (quoting *Heller's* statement that the Second Amendment protects "'the right of law-abiding, responsible *citizens* to use arms' for self-defense" (emphasis added)); *id*. at 29 (stating that the historical inquiry should consider "how and why the regulations burden a law-abiding *citizen's* right to armed self-defense" (emphasis added)); *id*. at 31 ("ordinary, law-abiding, adult citizens"); *id*. at 33 n.8 ("law-abiding citizens"); *id*. at 38 ("law-abiding citizens"); *id*. at 38 n.9 ("law-abiding, responsible citizens") (citation omitted); *id*. at 60 ("law-abiding citizens"); *id*. at 71 (holding that New York's licensing law violates the Second Amendment because "it prevents law-abiding citizens with ordinary self-defense needs from exercising their right to keep and bear arms" (emphasis added)). That deliberate phrasing cannot be ignored, regardless of whether it is dicta. This Court is "bound by the Supreme Court's considered dicta almost as firmly as by the Court's outright holdings." *See LaPierre v. City of Lawrence*, 819 F.3d 558, 563-64 (1st Cir. 2016) (quoting *Cuevas v. United States*, 778 F.3d 267, 272-73 (1st Cir. 2015)).

Vizcaíno's argument that the government has injected a new requirement into *Bruen* ignores *Bruen's* mandate to consider the plain text. (AB 13-15). The first step in *Bruen* addresses whether "the Second Amendment's plain text covers an individual's conduct." *Id*. at 24. It is not error, therefore, to analyze whether the plain text of the Second Amendment applies to the case at bar. In fact, that is precisely what the Supreme Court did in *Bruen.*

The Supreme Court began the analysis by noting it was "undisputed" that the petitioners in that case were "two ordinary, law-abiding adult citizens" and therefore part of "the people" protected by the Second Amendment. *Bruen,* 597 U.S. at 31-32; *see also Sitladeen*, 64 F.4th at 978 ("*Bruen* does not command us to consider only 'conduct' in isolation and simply assume that a regulated person is part of 'the people.'"). Because it was undisputed that the petitioners were part of "the people," the Court then analyzed "whether the plain text of the Second Amendment protects [the petitioner's] proposed course of conduct—carrying handguns publicly for self-defense. *Id*. Analysis of whether a person falls under the Second

Amendment's scope of "the people" is part of the *Bruen* framework.[5] Vizcaíno, of course, is not an American citizen. Vizcaíno admitted that he was unlawfully present in the United States. (SA 89).[6] Under the Second Amendment's plain text, Vizcaíno's possession of a firearm is therefore not constitutionally protected.

This Court has yet to consider this issue. But the majority of Courts of Appeals to answer the question have determined that unlawfully present

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[5] Although Vizcaíno criticizes the government's analysis of whether he is among "the people" as part of *Bruen*, (AB 13-15), he relies on a Third Circuit opinion that specifically stated that "[a]fter *Bruen*, we must first decide whether the text of the Second Amendment applies to a person and his proposed conduct." *Range v. Att'y Gen.*, 69 F.4th 96, 101 (3d Cir. 2023). (*See* AB 23). *Range* did not answer whether aliens were among "the people" but instead analyzed whether a felon (whose legal status in this country was not an issue) was part of the people.

[6] Vizcaíno also acknowledged that he knew he could not possess a firearm due to his immigration status, another example of his failure to abide by the laws. (SA 89). Puerto Rico only issues Firearms Licenses to individuals that are citizens or lawful residents. *See* 25 L.P.R.A. § 462a. Vizcaíno acted unlawfully when he procured and possessed the firearms seized. As Justice Kavanaugh noted in his concurrence to *Bruen*, "the Court's decision does not prohibit States for imposing licensing requirements for carrying a handgun for self-defense" but instead addressed the unusual discretionary licensing regimes such as the New York regime that granted open-ended direction to licensing officials. *Bruen*, 597 U.S. at 79. Justice Kavanaugh went on to explain that the non-discretional regimes, which he referred to as the shall-issue regimes, were constitutionally permissible. *Id*. at 80.

immigrants are not among "the people" or part of the "political community" to whom the Second Amendment applies. *See Sitladeen*, 64 F.4th at 985 (explaining "the people" in the Second Amendment does not include unlawfully present aliens); *Carpio-Leon,* 701 F.3d at 978, 981, 978 (noting *Heller's* use of the term "Americans" frequently connects arms-bearing and "citizenship" and concluding "that illegal aliens do not belong to the class of law-abiding members of the political community to whom the Second Amendment gives protection");. *Flores*, 663 F.3d at 1023 ("the protections of the Second Amendment do not extend to aliens illegally present in this country"); *Portillo-Munoz*, 643 F.3d at 442 ("Whatever else the term means or includes, the phrase 'the people' in the Second Amendment of the Constitution does not include aliens illegally in the United States."); *cf. United States v. Singh*, 979 F.3d 697, 724 (9th Cir. 2020) (rejecting challenge to § 922(g)(5)(B) and noting that "those unlawfully present . . . are neither citizens nor members of the political community").[7]

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[7] Although the Seventh Circuit in *United States v. Meza-Rodriguez*, 798 F.3d 664 (7th Cir. 2015) upheld the constitutionality of § 922(g)(5), it held that noncitizens are within "the people" protected by the Second Amendment. Because *Meza-Rodriguez* was decided before *Bruen*, it was necessarily decided without the benefit of *Bruen's* repeated use of "Americans" and

Even if this Court were to determine that *Heller* and *Bruen* do not resolve whether Vizcaíno is part of "the people," the historical discussion later in this brief demonstrates unlawful aliens are not part of "the people" referenced in the Second Amendment.[8] Vizcaíno does not fall within the class of persons to whom the Second Amendment's protection applies. *See Sitladeen*, 64 F.4th at 983–87; *Carpio-Leon*, 701 F.3d at 979; *Portillo-Munoz*, 643 F.3d at 442. Vizcaíno is a noncitizen who was present in the United States unlawfully when he was found in possession firearms. Because the Second

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"law-abiding citizens" to describe the scope of the Second Amendment, as detailed above. Given the frequency with which *Bruen* employed these phrases, they cannot be fairly characterized as passing references; they should instead be afforded the weight that a deliberate choice of language deserves in order to conclude that the Second Amendment's use of the phrase "the people" excludes unlawful non-citizens like Vizcaíno.

[8] Vizcaíno criticizes the government for analyzing history in both steps of the *Bruen* analysis. (AB 14). However, when analyzing exactly who the Founders were referring to in the Second Amendment's phrase "the people," it is impossible to not view the historical context of when the Amendment was written. In fact, it is precisely what the Supreme Court did when analyzing the various phrases in the Second Amendment in *Heller*. *See Heller*, 554 U.S. at 577-620. And if more were needed, Vizcaíno himself devotes a significant portion of his brief to history in his attempt to include himself as part of the people. (AB 15-23). Including references to history in both steps of the *Bruen* analysis is not error. Because the historical analysis of "the people" and the relevant historical practice around firearm regulation overlap, the government will not repeat it here.

Amendment does not reach unlawful immigrants like Vizcaíno, his challenge fails.

Vizcaíno's attempt to forego this conclusion by arguing that the term "the people" in the Second Amendment must be consistent with its use elsewhere in the Constitution or other similar terms gets him nowhere. For instance, noncitizens are not among "the people" who may vote in congressional elections. *See* U.S. Const. Art. I § 2 cl. 1 ("The House of Representatives shall be composed of Members chosen every second Year by the People of the several States") (emphasis added)); 18 U.S.C. § 611 (excluding aliens from voting in elections for federal offices). Moreover, the Supreme Court has expressly declined to decide whether "the Fourth Amendment applie[s] to illegal aliens in the United States." *United States v. Verdugo-Urquidez*, 494 U.S. 259, 272 (1990). So even assuming the term "the people" bears the same meaning as in the Second and Fourth Amendments, *Verdugo-Urquidez* would not establish that that term encompasses noncitizens who are unlawfully present in the United States. *See Portillo-Munoz*, 643 F.3d at 440-41 (recognizing that "[t]he purposes of the Second and the Fourth Amendment are different" and thus "the use of 'the people' in both" amendments need not "cover exactly the same groups of people").

And while the Supreme Court held that the Equal Protection Clause of the Fourteenth Amendment—which provides that "[n]o State shall . . . deny to any person within its jurisdiction the equal protection of the laws"—protects noncitizens who are present in the United States illegally, *Plyer v. Doe*, 457 U.S. 202, 214-16 (1982), that does not help Vizcaíno. For starters, the *Plyer* decision involved the meaning of the term "any person" in the Fourteenth Amendment, not the meaning of the distinct term "the people" in the Second Amendment, or the distinct history of the right to keep and bear arms. *Id*. at 214; *see also Jimenez-Shilon*, 34 F.4th at 1045 (distinguishing *Plyler* on this basis). In short, no binding authority suggests that noncitizens who are unlawfully present in the United States are part of "the people" protected by the Second Amendment.

Moreover, Vizcaíno's reliance on *Fletcher v. Haas*, 851 F. Supp. 2d 287 (D. Mass 2012) is misplaced because in that case the district court analyzed whether "lawful permanent resident aliens" are among "the people" for whom the Second Amendment provides a right to bear arms. So even if this Court were to adopt such reasoning, Vizcaíno fails to show how his status as an unlawful alien would still be protected as part of "the people."

Vizcaíno is not a member of "the people" and does not have a Second Amendment right to keep and bear arms.

C. Section 922(g)(5)(A) is consistent with historical precedent.

Even if this Court were to conclude or assume that the Second Amendment covers Vizcaíno, § 922(g)(5)(A) is constitutional because it is consistent with historical precedent. Under *Bruen*, even where the plain text of the Second Amendment applies, the government may justify a challenged restriction by showing "that its firearms regulation is part of the historical tradition that delimits the outer bounds of the right to keep and bear arms." 597 U.S. at 19. Because § 922(g)(5)(A) is in keeping with this nation's historical traditions, this Court should not declare it unconstitutional.

I. Section 922(g)(5)(A) is consistent with the relevant historical practice around firearms regulation.

Section 922(g)(5)(A) is consistent with historical firearms regulation. The historical record supports the conclusion that the Second Amendment was understood to extend the right to bear arms only to citizens—and, indeed, only to specific categories of citizens—at the time of its ratification.

Under the English Bill of Rights, the right to keep and bear arms was not "available to the whole population" but was instead expressly limited to

"'Subjects.'" *Heller*, 554 U.S. at 593 (quoting English Bill of Rights 1689, 1 W. & M., ch. 2, § 7, in 3 Eng. Stat. at Large 441)); *see id*. ("By the time of the founding, the right to have arms had become fundamental for English subjects.") (emphasis added)). "[T]he right to own guns in eighteenth-century England was statutorily restricted to the landed gentry," and under "English common law[,] … 'aliens [were] incapacitated to hold lands.'" *Jimenez-Shilon*, 34 F.4th at 1046 (internal citations omitted)).

"The English view carried across the Atlantic, where it was well understood that the right to bear arms 'did not extend to all New World residents.'" *Id*. at 1047 (quoting Joyce Lee Malcolm, To Keep and Bear Arms: The Origins of an Anglo-American Right 140 (1994)). Colonial-era statutes did not extend the right to bear arms to those who were, at the time, not considered part of the political community. Massachusetts and Virginia, for example, forbade the arming of Native Americans, and Virginia also prohibited Catholics from owning arms unless they swore "allegiance to the Hanoverian dynasty and to the Protestant succession." Robert H. Churchill, *Gun Regulation, the Police Power, and the Right to Keep Arms in Early America: The Legal Context of the Second Amendment*, 25 L. & Hist. Rev. 139, 157 (2007). Indeed, while "[a]lien men" in colonial America "could speak, print,

worship, enter into contracts, hold personal property in their own name, sue and be sued, and exercise sundry other civil rights," they "typically could not vote, hold public office, or serve on juries" and did not have "the right to bear arms" because these "were rights of members of the polity." Akhil Reed Amar, *The Bill of Rights: Creation and Reconstruction* 48 (1998); *see also Perez*, 6 F.4th at 462 (Menashi, J., concurring in the judgment).

During the American Revolution, colonial governments disarmed those who refused to "swear an oath of allegiance to the state or the United States." Saul Cornell & Nathan DeDino, *A Well Regulated Right: The Early American Origins of Gun Control*, 73 Fordham L. Rev. 487, 506 (2004); *see id*. at 506 nn.128–29 (compiling statutes); *see also* Churchill, *supra*, 25 L. & Hist. Rev. at 159 ("[T]he new state governments … framed their police power to disarm around a test of allegiance.").

The Bill of Rights codified the principle that membership in the political community is a prerequisite for the right to bear arms. *See McDonald*, 561 U.S at 769–70 ("The right of *the citizens* to keep and bear arms has justly been considered, as the palladium of the liberties of a republic; since it offers a strong moral check against the usurpation and arbitrary power of rulers; and will generally, even if these are successful in the first

instance, enable the people to resist and triumph over them." (quoting 3 J. Story, Commentaries on the Constitution of the United States § 1890, p. 746 (1833)) (emphasis added)). Indeed, "Framing-era sources 'refer to arms-bearing as a citizen's right' that was closely associated with national fealty and membership in the body politic." *Jimenez-Shilon*, 34 F.4th at 1048 (collecting sources and quoting Note, *The Meaning(s) of "The People" in the Constitution*, 126 Harv. L. Rev. 1078, 1093 (2013)). Accordingly, "many early state constitutions … expressly limited the right to keep and bear arms to 'citizens.'" *Id*. at 1049 (citing Alabama, Connecticut, Kentucky, Maine, Mississippi, and Pennsylvania constitutions); *Perez*, 6 F.4th at 463 & n.6 (Menashi, J., concurring in the judgment) (discussing the same constitutions).

In addition, the Second Amendment is connected to the concept of "a well organized militia." However, "the conception of the militia at the time of the Second Amendment's ratification was the body of all citizens capable of military service." *Heller*, 554 U.S. at 628 (emphasis added). *See Perez*, 6 F.4th at 462 (Menashi, J., concurring in the judgment) (explaining the history that "non-citizens . . . were neither expected, nor usually allowed, to participate in the militia" (quotation marks omitted)); *Jimenez-Shilon*, 34 F.4th

at 1047-48 (describing history of "disarmament of groups associated with foreign elements," including "on the ground of alienage" (quotation marks omitted)).[9] There was no suggestion that any states were viewed at the time as lacking the authority to exclude noncitizens from the right to bear arms. *See Bruen*, 597 U.S. at 30 (where there were "no disputes regarding the lawfulness of [certain] prohibitions," one "can assume it settled" that those prohibitions are "consistent with the Second Amendment").

In sum, § 922(g)(5)(A) disarms noncitizens who are unlawfully present in the United States. It does not "burden a law-abiding *citizen's* right to armed self-defense" in a manner inconsistent with historical precedent. *Bruen*, 597 U.S. at 29 (emphasis added). Instead, the statute fits squarely within a historical tradition that limited Second Amendment rights to law-abiding citizens.

II. Section 922(g)(5)(A) is sufficiently analogous to historic exclusions to firearms possession.

Although § 922(g)(5)(A) is not identical to the historical regulations described above, the statute is still sufficiently analogous to early gun

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[9] Currently, citizens and legal permanent residents can only join the military. 10 U.S.C. § 504(b).

restrictions to support a conclusion that the possession of firearms by unlawful noncitizens is not part of this country's historical tradition. *See Rahimi*, 144 S. Ct. at 1901 ("Section 922(g)(8) is by no means identical to these founding era regimes, but it does not need to be.").

Bruen's call for analogical reasoning requires only that the government identify a well-established and representative historical analogue, not "a historical twin." 597 U.S. at 30. Courts may "determin[e] whether a historical regulation is a proper analogue for a distinctly modern firearm regulation" by assessing "whether the two regulations are 'relevantly similar.'" *Id.* at 29-30. When assessing whether regulations are "relatively similar" under the Second Amendment, this Court must consider the "how and why the regulations burden a law-abiding citizen's right to armed self-defense." *Id.* at 29. "So even if a modern-day regulation is not a dead ringer for historical precursors, it still may be analogous enough to pass constitutional muster." *Id*. at 30.

Two historical markers carry salience with respect to noncitizens who are present in the United States unlawfully. First, there is abundant precedent before, during, and after the American Revolution for disarming individuals who were not members of the political community. *See* pp. 23-

26, *supra*; *see also Perez*, 6 F.4th at 462 n.4 (Menashi, J., concurring in the judgment) ("[A]rms bearing and suffrage were intimately linked two hundred years ago and have remained so." (quotation marks omitted)). In particular, laws barring Native Americans, Catholics, and Loyalists from bearing arms demonstrate that the right to bear arms was understood to be limited to those within the political community.[10]

Second, history shows that legislatures may disarm persons who have disrespected the rule of law and threatened social order. *Range v. Att'y Gen.*, 53 F.4th 262, 279 (3d Cir. 2022) (per curiam) *reh'g en banc granted, opinion vacated sub nom. Range v. Atty. Gen.*, 56 F.4th 992 (3d Cir. 2023), and *on reh'g en banc sub nom. Range v. Atty. Gen.*, 69 F.4th 96 (3d Cir. 2023), *cert. granted, judgment vacated sub nom. Garland v. Range*, No. 23-374, 2024 WL 3259661 (U.S. July 2, 2024). "[M]ost scholars of the Second Amendment agree that the right to bear arms was tied to the concept of a virtuous citizenry and that,

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[10] Federal law illustrates that illegal aliens are not part of the political community. "Illegal aliens may not hold federal elective office, U.S. Const. art. I, § 2, cl. 2; *id.* art. I § 3, cl. 3; *id.* art. II, § 1, cl. 5, are barred from voting in federal elections, 18 U.S.C. § 611(a), may not serve on federal juries, 28 U.S.C. § 1865(b)(1), and are subject to removal from the United States at any time, 8 U.S.C. § 1227(a)." *Perez*, 6 F.4th at 463.

accordingly, the government could disarm 'unvirtuous citizens.'" *United States v. Yancey*, 621 F.3d 681, 684–85 (7th Cir. 2010) (quoting *United States v. Vongxay*, 594 F.3d 1111, 1118 (9th Cir. 2010), Glenn Harlan Reynolds, *A Critical Guide to the Second Amendment*, 62 TENN. L. REV. 461, 480 (1995), and Don B. Kates, Jr., *The Second Amendment: A Dialogue, Law & Contemp. Probs.*, Winter 1986, at 143, 146 (1986)). "Historians have long recognized that the Second Amendment was strongly connected to the republican ideologies of the Founding Era, particularly the notion of civic virtue." Saul Cornell & Nathan DeDino, *A Well Regulated Right: The Early American Origins of Gun Control*, 73 Fordham L. Rev. 487, 491-492 (2004).

While immigration is hardly a new phenomenon, illegal immigration at the federal level is essentially a phenomenon that began in the late 19th century. *See United States v. Muñoz-De La O*, 586 F. Supp. 3d 1032, 1036 (E.D. Wash. 2022) ("The federal government first forayed into the realm of immigration legislation during the 1870s. One decade later, the 1882 Chinese Exclusion Act prohibited Chinese laborers from entering the United States for ten years.") (*citing* Supreme Court cases that upheld the exclusion law on the basis that illegal immigrants could be removed at any time*); see also* U.S. Citizenship and Immigration Services, Early American Immigration

Policies, https://www.uscis.gov/about-us/our-history/overview-of-ins-history/early-american-immigration-policies (July 30, 2020) ("Americans encouraged relatively free and open immigration during the 18th and early 19th centuries, and rarely questioned that policy until the late 1800s."). When viewed in light of the colonial restrictions on firearms, the laws prohibiting illegal immigrants from bearing arms suggest a long-standing understanding that the Second Amendment does not extend to such unlawfully present immigrants.

The *Bruen* Court recognized that courts should be mindful of changing societal conditions in evaluating how closely a challenged regulation must conform to historical precedent. "While the historical analogies here and in *Heller* are relatively simple to draw, other cases implicating unprecedented societal concerns or dramatic technological changes may require a more nuanced approach." *Bruen*, 597 U.S. at 27. Given that illegal immigration is an issue that substantially postdates the Second Amendment, the Government need not identify "a dead ringer for historical precursors," but rather must identify only "a well-established and representative historical analogue." *Id*. at 30. The Government has done precisely that here, pointing to laws disarming individuals who lacked membership in the political

community or who were unwilling to comply with the law. While many of these Founding era classifications are abhorrent and of course would be unconstitutional today under other constitutional provisions, *Drummond v. Robinson Twp.*, 9 F.4th 217, 228 n.8 (3d Cir. 2021) (quotation marks omitted), they nevertheless show that the right to bear arms was understood to be subject to the government's limitation of that right to those within the political community, i.e., law-abiding citizens.

Section 922(g)(5)'s prohibition of unlawful aliens possessing firearms is analogous to the historical regulation of firearms, fulfilling the how and why of *Bruen's* historical analogue test. *Bruen*, 597 at 29. The *how* is a blanket prohibition on possession by unlawful noncitizens. Section 922(g)(5) prohibits firearm possession by unlawful aliens just as Founding-era law barred certain groups from bearing arms. And the *why* is readily apparent. If a noncitizen is unlawfully in the United States, he or she is already defying the nation's laws. "[T]he government has an obvious interest in prohibiting the possession of firearms by those who are not, as *Heller* put it 'law-abiding.'" *Perez*, 6 F.4th 456; *see United States v. Perez-Garcia*, 96 F.4th 1166, 1188 (9th Cir. 2024) ("Precursors to the Second Amendment proposed in state ratifying conventions also suggest that the founding generation

believed legislatures could disarm individuals deemed dangerous or unlikely to follow the sovereign's laws.").

But there is more. "[U]nauthorized noncitizens often live 'largely outside the formal system of registration, employment, and identification, [and] are harder to trace and more likely to assume a false identity.'" *Meza-Rodriguez*, 798 F.3d at 673 (quoting *Huitron-Guizar*, 678 F.3d at 1170). Unlawful noncitizens are "more difficult to keep tabs on than the general population" and "have an interest in eluding law enforcement." *Id*. Disarming of those who circumvent the nation's legal system is consistent with the Second Amendment. After all, the Second Amendment only extends its protections to those who are "law-abiding." *Bruen*, 597 U.S. at 8-10. The historical markers identified above—disarming individuals who lacked membership in the political community or who were unwilling to comply with the law—plainly align with § 922(g)(5)(A)'s prohibition.

In sum, even if this Court were to find that Vizcaíno, as a non-law-abiding and undocumented noncitizen, is among "the people" to whom the Second Amendment guarantees the right to bear arms, § 922(g)(5)(A)'s prohibition on the possession of firearms by undocumented immigrants is consistent with, and analogous to, this Nation's historical practice of

denying the right to possess firearms to unlawful individuals deemed outside the political community.

CONCLUSION

Based on the forgoing, this Court should affirm Vizcaíno's conviction and sentence.

RESPECTFULLY SUBMITTED.

In San Juan, Puerto Rico, this 29th day of August 2024.

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UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

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I HEREBY CERTIFY that on August 29, 2024, I electronically filed the brief with the Clerk of the Court using the CM/ECF system, which will send notification to counsel for appellants.

/s/ Julia M. Meconiates
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