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WHO ARE “THE PEOPLE”?: THE SEVENTH CIRCUIT EXTENDS SECOND AMENDMENT RIGHTS TO UNDOCUMENTED IMMIGRANTS

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INTRODUCTION

On January 31, 2012, 312,949,403 people lived in the United States.¹ Nearly eleven and a half million of those people were undocumented immigrants.² Whether the right to bear arms conferred to “the people” by the Second Amendment reaches those 11.4 million people depends on whether undocumented immigrants make up part of “the people.”

Placing human beings into figurative, linguistic boxes can be a fickle adventure. The Merriam-Webster Dictionary defines a human being as “a person.”³ At first blush, that contention does not present

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¹ *U.S. and World Population Clock*, U.S. CENSUS BUREAU, <http://www.census.gov/popclock/> (last updated Nov. 26, 2015).

² Brian Baker & Nancy Rytina, ESTIMATES OF THE UNAUTHORIZED IMMIGRANT POPULATION RESIDING IN THE UNITED STATES: JANUARY 2012, at 1 (2013), http://www.dhs.gov/sites/default/files/publications/ois_ill_pe_2012_2.pdf.

³ *Person*, MERRIAM-WEBSTER’S DICTIONARY, <http://www.merriam-webster.com/dictionary/person>.

much controversy. However, in the eyes of the law, human beings may not qualify as “persons.” And collectively, a group of persons may not make up “the people.”

The United States Constitution makes extensive use of the term “the people.” Elsewhere, the Constitution, presumably deliberately, uses other terms, such as “persons” or “citizens” or “Citizens.” Though the phrase “the people” appears throughout the Constitution, and though courts contrast the phrase with “persons” or “citizens,” who or what constitutes “the people” keeps legal scholars, courts, and students busy.

In the 2015 case *United States v. Meza-Rodriguez*,⁴ the United States Court of Appeals for the Seventh Circuit held that undocumented immigrants in the United States who have developed sufficient connections with the country are part of “the people” to whom the Second Amendment confers a right to bear arms. In so doing, the Seventh Circuit employed the sufficient connections test for defining “the people.” This decision is consistent with the U.S. Constitution and previous Second Amendment jurisprudence.

Part I of this article details relevant Supreme Court cases, including *District of Columbia v. Heller*, the landmark Second Amendment case, and *United States v. Verdugo-Urquidez*, which addressed “the people” protected by the Fourth Amendment. Part II examines *United States v. Meza-Rodriguez* factually and procedurally. It also discusses the Seventh Circuit’s majority opinion and Judge Flaum’s concurrence. Finally, Part III analyzes the circuit split on this Second Amendment issue as it pertains to undocumented immigrants, and explains why the Seventh Circuit’s approach in *Meza-Rodriguez* is superior to the approaches adopted by the Courts of Appeals for the Fourth, Fifth, and Eighth Circuits.

⁴ *United States v. Meza-Rodriguez*, 798 F.3d 664 (7th Cir. 2015).

BACKGROUND

A. *The Second Amendment and 18 U.S.C. § 922(g)(5)*

The Second Amendment provides that “the right of the people to keep and bear arms, shall not be infringed.”⁵ In *District of Columbia v. Heller*, the Supreme Court held that the Second Amendment confers an individual right to keep and bear arms.⁶ While the right to bear arms has been dubbed an “ancient right,”⁷ that right is not unlimited.⁸ 18 U.S.C. § 922(g) statutorily mandates restrictions on the possession of firearms for various groups of people, including: convicted felons; fugitives from justice; unlawful users of controlled substances; and the mentally ill, among others.⁹ The statute also restricts “any person . . . who, being an alien . . . is illegally or unlawfully in the United States” from possessing a firearm,¹⁰ the group of people addressed in *United States v. Meza-Rodriguez* and three other federal appellate court opinions. The Second Amendment confers a right to “the people,” but the Supreme Court has not addressed whether the undocumented immigrants restricted from firearm possession by 18 U.S.C. § 922(g)(5) are included in “the people.”

B. *District of Columbia v. Heller*¹¹

In *Heller*, the Supreme Court held that the Second Amendment confers an individual right to bear arms.¹² In *Heller*, a Washington, D.C., statute effectively served as a total ban on handgun possession.¹³

⁵ U.S. CONST. amend. II.

⁶ *Dist. of Columbia v. Heller*, 554 U.S. 570, 595 (2008).

⁷ *Id.* at 599.

⁸ *Id.* at 595.

⁹ 18 U.S.C. § 922(g) (2012).

¹⁰ *Id.* § 922(g)(5).

¹¹ 554 U.S. 570.

¹² *Id.* at 595.

¹³ *Id.* at 635.

A D.C. police officer brought suit seeking an injunction to prohibit Washington, D.C., from enforcing the ban.¹⁴ Justice Scalia delivered the opinion of the five to four majority.¹⁵ The Court did not seek to determine the “full scope” of the Second Amendment,¹⁶ and, therefore, *Heller* left open the question of Second Amendment rights of undocumented immigrants within the United States.

In a distinctly textual analysis, Justice Scalia first looked to the operative clause of the Second Amendment and focused on “the right of the people.”¹⁷ He highlighted the prevalence of “the people” throughout the Constitution and concluded that the First, Fourth, and Ninth Amendments refer to individual rights, not collective rights.¹⁸ Moreover, “the people” refers to “all members of the political community,”¹⁹ but Justice Scalia also stated in dicta that the right “belongs to all Americans,”²⁰ though he did not say the right belongs *only* to Americans. Moreover, Justice Scalia relied on *United States v. Verdugo-Urquidez* to reinforce the sufficient connections test: the Supreme Court views “the people” as referring to a “class of persons who are part of a national community or who have otherwise developed sufficient connection with this country to be considered part of that community.”²¹

It is also worth noting that Justice Scalia considered restrictions on the Second Amendment right to bear arms as permissible, stating that not all restrictions infringe on Second Amendment rights.²² However, the D.C. restriction was deemed “severe” and unconstitutional.²³

¹⁴ *Id.* at 575.

¹⁵ *Id.* at 595.

¹⁶ *Id.* at 627.

¹⁷ *Id.* at 579.

¹⁸ *Id.*

¹⁹ *Id.* at 580.

²⁰ *Id.* at 581.

²¹ *Id.* at 580.

²² *Id.* at 629.

²³ *Id.*

C. United States v. Verdugo-Urquidez²⁴

The Second Amendment is not the only amendment in the Bill of Rights that confers rights to “the people”; the First and Fourth Amendments also confer rights to “the people.” While the Supreme Court has not addressed whether undocumented immigrants are within “the people” to whom the Second Amendment confers a right to bear arms, the Court has considered the constitutional rights granted to undocumented immigrants by other amendments. In *United States v. Verdugo-Urquidez*, the Supreme Court addressed the issue of whether the Fourth Amendment protected undocumented immigrants outside the territory of the United States.²⁵ In *Verdugo-Urquidez*, a citizen and resident of Mexico involved in narcotics cartels was arrested in Mexico for cartel activities connected to the United States, and he was transported to the United States before his trial.²⁶ While he was in United States custody, U.S. law enforcement officers searched his home in Mexico without a search warrant.²⁷ The officers found evidence linking the defendant to the drug trade.²⁸ The defendant brought a motion to suppress the evidence recovered at the house in Mexico, arguing that the warrantless search violated his Fourth Amendment rights.²⁹ The district court agreed and suppressed the fruits of the warrantless search, and the United States Court of Appeals for the Ninth Circuit affirmed.³⁰ In reaching this decision, the Ninth Circuit relied on *INS v. Lopez-Mendoza*,³¹ where the Supreme Court

²⁴ 494 U.S. 259 (1990).

²⁵ *Id.* at 266.

²⁶ *Id.* at 262.

²⁷ *Id.*

²⁸ *Id.* at 262–63.

²⁹ *Id.* at 263.

³⁰ *United States v. Verdugo-Urquidez*, 856 F.2d 1214 (9th Cir. 1988).

³¹ 468 U.S. 1032 (1984).

assumed that the Fourth Amendment protected undocumented immigrants in the United States.³²

The Supreme Court reversed.³³ The Court initially looked to the Fifth Amendment,³⁴ which provides insight into the Fourth Amendment³⁵: both amendments carry a “scale of rights” that ascends with ties to the United States.³⁶ However, the Court found that the Fifth Amendment operated differently than the Fourth Amendment.³⁷ While Fifth Amendment violations occur during trial, a Fourth Amendment violation occurs at the time of the search.³⁸

The Court then turned to the meaning of “the people.”³⁹ The Court highlighted the idea that the phrase “the people” is found in the First, Second, Fourth, Ninth, and Tenth Amendments, as well as the Preamble and Article I.⁴⁰ The Court concluded that the proliferation of the phrase “suggests that ‘the people’ protected by the Fourth Amendment, and by the First and Second Amendments, and to whom rights and powers are reserved in the Ninth and Tenth Amendments, refers to a class of persons who are part of a national community or who have otherwise developed sufficient connection with this country to be considered part of that community.”⁴¹ This is known as the sufficient connections test,⁴² or the substantial connections test. The Court has only assumed, but never held, that Fourth Amendment rights attach to undocumented immigrants within the United States, and the

³² *Id.* at 1050.

³³ *Verdugo-Urquidez*, 494 U.S. at 275.

³⁴ “No person shall be held to answer for a . . . crime, unless on a presentment or indictment of a grand jury.” U.S. CONST. amend. V.

³⁵ “The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause.” U.S. CONST. amend. IV.

³⁶ *Verdugo-Urquidez*, 494 U.S. at 265, 269.

³⁷ *Id.* at 265.

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ *Id.* at 266.

⁴¹ *Id.*

⁴² *Id.* at 282 (Brennan, J., dissenting).

Court did not decide that question in *Verdugo-Urquidez*.⁴³ Applying the sufficient connections test to this case, the Court found that Verdugo-Urquidez would have failed the test because he “had no voluntary connection” with the United States that “might place him among ‘the people’ of the United States.”⁴⁴ Thus, the Court in *Verdugo-Urquidez*, at the very least, set forth the sufficient connections test for deciding who constitutes “the people” under the Fourth Amendment. In the process, it highlighted the prevalence of the phrase throughout the United States’ most sacred legal document.

Justice Kennedy’s concurrence promoted a broader reading of the Fourth Amendment right.⁴⁵ While he did not put weight into the phrase “the people,” Justice Kennedy highlighted that the phrase “may be interpreted to underscore the importance of the right, rather than to restrict” the potential group protected by the right.⁴⁶ In the dissent, Justice Brennan, joined by Justice Marshall, focused on two concepts: mutuality and fundamental fairness.⁴⁷ He admonished the majority’s “narrow construction” of “the people,” and would have held that the defendant was part of “the people” protected by the Fourth Amendment because he was part of “the governed.”⁴⁸

UNITED STATES V. MEZA-RODRIGUEZ

A. *Factual Background*

On August 24, 2013, Milwaukee police officers responded to a call concerning an armed person at a Milwaukee bar.⁴⁹ Bar surveillance captured video of a man pointing an object resembling a gun, and witnesses from the bar identified Mariano A. Meza-

⁴³ *Id.* at 271–72 (majority opinion).

⁴⁴ *Id.* at 273.

⁴⁵ *Id.* at 276 (Kennedy, J., concurring).

⁴⁶ *Id.* at 277.

⁴⁷ *Id.* at 284 (Brennan, J., dissenting).

⁴⁸ *Id.* at 287.

⁴⁹ *United States v. Meza-Rodriguez*, 798 F.3d 664, 666 (7th Cir. 2015).

Rodriguez as the person in the video.⁵⁰ Later that night, officers responding to a different report broke up a fight and recognized Mr. Meza-Rodriguez as the man from the bar video.⁵¹ Mr. Meza-Rodriguez was arrested by the Milwaukee police officers with a .22 caliber cartridge on his person.⁵² On October 9, 2013, a federal grand jury indicted Mr. Meza-Rodriguez on a single count of being an illegal alien in possession of ammunition under 18 U.S.C. § 922(g)(5).⁵³

B. Procedural Background

Mr. Meza-Rodriguez brought three motions before the court: (1) a motion to dismiss the indictment for failure to allege an element of the offense; (2) a motion to dismiss the indictment for violating Mr. Meza-Rodriguez's Second Amendment right to bear arms; and (3) a motion to suppress evidence.⁵⁴ Judge Randa of the United States District Court for the Eastern District of Wisconsin sent the case to Magistrate Judge Callahan to hear the motions.⁵⁵ Judge Callahan recommended that the district court deny all three motions.⁵⁶ Judge Randa adopted Magistrate Judge Callahan's recommendations on the motions *in toto*, as well as the rationale upon which the recommendations rested.⁵⁷

⁵⁰ *Id.*

⁵¹ *Id.*

⁵² *Id.*

⁵³ United States v. Meza-Rodriguez, No. 13-CR-192, 2014 WL 1406301, at *1 (E.D. Wis. Apr. 11, 2014).

⁵⁴ *Id.* at *2.

⁵⁵ *Id.* at *1.

⁵⁶ *Id.*

⁵⁷ *Id.*

1. District Court Adopts Magistrate Judge Callahan's Recommendations

Magistrate Judge Callahan analyzed Meza-Rodriguez's motion to dismiss by addressing his facial challenge of § 922(g)(5).⁵⁸ Judge Callahan started his analysis with a look to *Heller* to find that "the people" refers to all members of the political community and "belongs to all Americans."⁵⁹ He then distinguished this case from *Heller* by stating that *Heller* did not provide a comprehensive scope of the Second Amendment right and the Supreme Court had not addressed the issue as it pertains to undocumented immigrants.⁶⁰ For guidance, the court instead turned to the federal circuit court cases that have held that "the people" does not include undocumented immigrants within the United States.⁶¹ The court found these decisions persuasive. The court further rejected the *Verdugo-Urquidez* sufficient connections test by relying on the Fifth Circuit's rejection of the test in *United States v. Portillo-Munoz*.⁶² Accordingly, the court found that Second Amendment rights did not extend to Mr. Meza-Rodriguez.⁶³

After the denial of Mr. Meza-Rodriguez's motions, he pled guilty to violating 18 U.S.C. § 922(g)(5) while preserving the Second Amendment issue for appeal.⁶⁴ As the result of an interview with an Immigration and Customs Enforcement officer, removal proceedings were initiated against Mr. Meza-Rodriguez, and he was eventually deported to Mexico.⁶⁵ He filed a timely notice of appeal in the Seventh Circuit.⁶⁶

⁵⁸ *Id.* at *4–6.

⁵⁹ *Id.* at *1.

⁶⁰ *Id.* at *4.

⁶¹ *Id.* at *5.

⁶² *Id.*; *United States v. Portillo-Munoz*, 643 F.3d 437, 440 (5th Cir. 2011).

⁶³ *Meza-Rodriguez*, No. 13-CR-192, 2014 WL 1406301, at *6.

⁶⁴ *United States v. Meza-Rodriguez*, 798 F.3d 664, 667 (7th Cir. 2015).

⁶⁵ *Id.*

⁶⁶ *Id.*

C. *The Seventh Circuit's Panel Opinion*

1. Opinion of the Court

Chief Judge Wood, joined by Judge Easterbrook and in the judgment with Judge Flaum, held that the Second Amendment confers to undocumented immigrants within the United States a right to bear arms.⁶⁷ As a preliminary procedural matter, Chief Judge Wood held that Mr. Meza-Rodriguez appeal was not moot.⁶⁸ To not be rendered moot, an appeal must represent a case or controversy where the appellant ““must have suffered, or be threatened with, an actual injury traceable to the defendant and likely to be redressed by a favorable judicial decision.””⁶⁹ Chief Judge Wood found this requirement satisfied because an unfavorable decision would bar his admission to the United States and a favorable decision would leave open the possibility of admission.⁷⁰ The potential return to the United States constituted a tangible benefit and his inability to reenter constituted a concrete or continuing injury.⁷¹ Therefore, the appeal was not moot.⁷²

In reviewing the merits of the case *de novo*, Chief Judge Wood looked to *Heller*.⁷³ She confronted “passing references” in *Heller* that indicated a link between a Second Amendment right and “notions of ‘law-abiding citizens’ and ‘members of the political community.’”⁷⁴ However, she was “reluctant to place more weight on these passing references than the [*Heller*] Court itself did.”⁷⁵ Chief Judge Wood acknowledged that the three circuits to decide this issue held that, under *Heller*, the Second Amendment did not confer a right to

⁶⁷ *Id.* at 672.

⁶⁸ *Id.* at 667.

⁶⁹ *Id.*

⁷⁰ *Id.* at 668.

⁷¹ *Id.*

⁷² *Id.*

⁷³ *Id.* at 669.

⁷⁴ *Id.* (quoting *Dist. of Columbia v. Heller*, 554 U.S. 570, 580 (2008)).

⁷⁵ *Id.*

unlawful aliens to bear arms, and the Tenth Circuit declined to decide the issue because § 922(g)(5) passed intermediate scrutiny.

However, the court declined to follow the other circuits because “[t]he issue was not . . . before the Court in *Heller*.”⁷⁶ Instead, Chief Judge Wood looked to other language in *Heller* to arrive at a conclusion opposite the three other circuits.⁷⁷ As *Heller* pointed out, the Second Amendment is intimately linked to the First and Fourth Amendments,⁷⁸ and, therefore, those three amendments implicitly carry the same meaning for the phrase “the people,” which appears in all three.⁷⁹ Accordingly, the Second Amendment could be analyzed as a “package” with the other amendments and thus be interpreted similarly.⁸⁰

Chief Judge Wood then looked to *United States v. Verdugo-Urquidez*,⁸¹ the Fourth Amendment Supreme Court case involving an unauthorized alien.⁸² Recall that *Verdugo-Rodriguez* set forth a test for determining whether noncitizens receive Fourth Amendment protections. This test—the sufficient connections test—considers whether the undocumented immigrant is within the territory of the United States and whether she can show sufficient connections with the United States.⁸³ Chief Judge Wood applied this test in *Meza-Rodriguez*.⁸⁴ Chief Judge Wood determined that Mr. Meza-Rodriguez did have sufficient connections with the United States: he had been in the United States for over twenty years since the age of four or five, he

⁷⁶ *Id.*

⁷⁷ *Id.* (“[A]ll people, including non-U.S. citizens, whether or not they are authorized to be in the country, enjoy at least some rights under the Second Amendment.”).

⁷⁸ *Heller*, 554 U.S. at 592.

⁷⁹ *Meza-Rodriguez*, 798 F.3d at 669.

⁸⁰ *Id.* at 670.

⁸¹ 494 U.S. 259, 271 (1990) (“[A]liens receive constitutional protections when they have come within the territory of the United States and developed sufficient connections” with the United States).

⁸² *Meza-Rodriguez*, 798 F.3d at 670.

⁸³ *Id.*; accord *Verdugo-Urquidez*, 494 U.S. at 271.

⁸⁴ *Meza-Rodriguez*, 798 F.3d at 670–71.

attended public school in the United States, worked in the United States, and developed close relationships with people in the United States.⁸⁵ She buttressed her reasoning with *Plyler v. Doe*,⁸⁶ which held that “aliens receive constitutional protections when they have come within the territory of the United States and developed substantial connections with this country.”⁸⁷ Therefore, Mr. Meza-Rodriguez was entitled to constitutional protections because he was within the territory of the United States and had developed sufficient connections with the United States.⁸⁸ Accordingly, Mr. Meza-Rodriguez was part of “the people” to whom the Second Amendment right to bear arms applies.⁸⁹

However, in reaching this decision, the Seventh Circuit did recognize that Second Amendment rights are not unlimited; they are subject to certain restrictions, particularly under 18 U.S.C. § 922(g).⁹⁰ The Seventh Circuit therefore adopted an intermediate scrutiny standard of review to determine the constitutionality of § 922(g)(5).⁹¹ Thus, §922(g)(5) is constitutional if its restrictions are substantially related to an important governmental objective.⁹² Chief Judge Wood found that the governmental objective of § 922(g)(5) is to “‘keep guns out of the hands of presumptively risky people’ and to ‘suppress[] armed violence.’”⁹³ Chief Judge Wood reasoned that undocumented immigrants in the United States fit that group of presumptively risky people.⁹⁴ Accordingly, Chief Judge Wood held that Congress’ interest in restricting firearm possession of this difficult to track group is

⁸⁵ *Id.*

⁸⁶ 457 U.S. 202 (1982).

⁸⁷ *Id.* at 210.

⁸⁸ *Meza-Rodriguez*, 798 F.3d at 672.

⁸⁹ *Id.*

⁹⁰ *Id.*

⁹¹ *Id.*

⁹² *Id.*

⁹³ *Id.* at 673 (quoting *United States v. Yancey*, 621 F.3d 681, 683 (7th Cir. 2010)).

⁹⁴ *Id.*

“strong enough” to find that § 922(g)(5) does not impermissibly infringe Mr. Meza-Rodriguez’s Second Amendment rights.⁹⁵

2. Judge Flaum’s Concurring Opinion

Judge Flaum’s concurrence did not reach the Second Amendment conclusion.⁹⁶ Instead, he found § 922(g)(5) passes intermediate scrutiny,⁹⁷ He would have followed the Tenth Circuit’s⁹⁸ “prudential approach” of reserving resolution of whether the Second Amendment grants undocumented immigrants the right to bear arms to another case “that compels addressing it.”⁹⁹ While noting that the Second Amendment might extend to undocumented immigrants under *Verdugo-Urquidez*, Judge Flaum also expressed doubt as to whether the Second Amendment extends past citizens based on language in *Heller* referring to “members of the national community” and “law abiding, responsible citizens.”¹⁰⁰

3. Post-Decision Procedure

Because the Seventh Circuit’s holding in *Meza-Rodriguez* created a circuit split, all active Seventh Circuit judges received the opinion. However, no judge voted to hear the case *en banc*. On November 16, 2015, Mr. Meza-Rodriguez filed a petition for a writ of certiorari which remains pending as of the publication of this article.¹⁰¹

⁹⁵ *Id.*

⁹⁶ *Id.* at 674 (Flaum, J., concurring).

⁹⁷ *Id.*

⁹⁸ *United States v. Huitron-Guizar*, 678 F.3d 1164 (10th Cir. 2010).

⁹⁹ *Meza-Rodriguez*, 798 F.3d at 674 (Flaum, J., concurring).

¹⁰⁰ *Id.*

¹⁰¹ *Id.*, petition for cert. filed (Nov. 16, 2015) (No. 15-7017).

THE CIRCUIT SPLIT

A. United States v. Portillo-Munoz¹⁰²

Almost four years before the Seventh Circuit decided *Meza-Rodriguez*, the Fifth Circuit became the first circuit to examine whether the Second Amendment right to bear arms extends to unlawful aliens.¹⁰³ In *United States v. Portillo-Munoz*, a Mexican national residing in Texas was arrested for unlawfully carrying a weapon and possession of a controlled substance.¹⁰⁴ The defendant had been in the United States for eighteen months and worked as a ranch hand.¹⁰⁵ He also financially supported his girlfriend and her daughter¹⁰⁶ and paid rent.¹⁰⁷ Upon arrest, the defendant claimed that he possessed the gun to protect the ranch's chickens from coyotes.¹⁰⁸ The district court denied the defendant's motion to dismiss, and he pled guilty to being an alien unlawfully in the United States under 18 U.S.C. § 922(g)(5).¹⁰⁹ The defendant filed a timely notice of appeal.¹¹⁰

The Fifth Circuit started its “categorical approach,”¹¹¹ in the sense that it precludes all undocumented immigrants from constituting part of “the people” to whom the Second Amendment confers a right to bear arms, by establishing that language in *Heller* “provides some guidance” as to whether unlawful aliens are within the scope of “the people” protected by the Second Amendment.¹¹² The Fifth Circuit

¹⁰² 643 F.3d 437 (5th Cir. 2011).

¹⁰³ See generally *id.*

¹⁰⁴ *Id.* at 438–39.

¹⁰⁵ *Id.* at 439.

¹⁰⁶ *Id.* at 437.

¹⁰⁷ *Id.* at 443.

¹⁰⁸ *Id.* at 438.

¹⁰⁹ *Id.* at 439.

¹¹⁰ *Id.*

¹¹¹ *Id.*

¹¹² *Id.* at 440.

borrowed language from *Heller*, which Chief Judge Wood determined in *Meza-Rodriguez* was not conclusive,¹¹³ to presume that not only are unlawful immigrants not “law-abiding, responsible citizens” or “members of the political community,” unlawful immigrants are “not Americans as that word is commonly understood.”¹¹⁴

The Fifth Circuit also declined to apply the sufficient connections test from *Verdugo-Urquidez*.¹¹⁵ That court reasoned that the Supreme Court never actually held that Fourth Amendment protections extend to “a native and citizen of another nation who entered and remained in the United States illegally.”¹¹⁶

The court then addressed *Verdugo-Urquidez*.¹¹⁷ Unlike the Seventh Circuit in *Meza-Rodriguez*, the Fifth Circuit found that the Second and Fourth Amendments should be read differently.¹¹⁸ First, the Fifth Circuit highlighted the idea that the *Verdugo-Urquidez* Court did not expressly hold that the Fourth Amendment extends to natives and citizens of other nations who are in the United States illegally.¹¹⁹ The Fifth Circuit went on to say that even if undocumented immigrants hold Fourth Amendment protections that does not mean that Second Amendment protections attach as well.¹²⁰ The court focused on the different purposes of the two amendments; the Second Amendment confers an “affirmative right” whereas the Fourth Amendment confers a “protective right.”¹²¹ The Fifth Circuit reasoned that since affirmative rights do not extend so far as protective rights, the Second Amendment protects more limited groups than does the Fourth Amendment, and thus an extension of *Verdugo-Urquidez* to the

¹¹³ *United States v. Meza-Rodriguez*, 798 F.3d 664, 669 (7th Cir. 2015).

¹¹⁴ *Portillo-Munoz*, 643 F.3d at 440.

¹¹⁵ *Id.*

¹¹⁶ *Id.*

¹¹⁷ *Id.*

¹¹⁸ *Id.*

¹¹⁹ *Id.* at 441.

¹²⁰ *Id.*

¹²¹ *Id.* at 440–41.

Second Amendment realm was misguided.¹²² After distinguishing *Verdugo-Rodriguez*, the court highlighted the deference given to Congress in immigration matters, specifically highlighting the idea that undocumented immigrants could turn into political assassins if the prohibition on their gun rights did not exist.¹²³

1. Judge Dennis' Dissent

Judge Dennis penned a dissent that reads very closely to Chief Judge Wood's Seventh Circuit opinion in *Meza-Rodriguez*.¹²⁴ Judge Dennis found that the *Verdugo-Urquidez* sufficient connections test applied because *Heller* established that "the people" protected by the Second Amendment are the same as those also protected by the First and Fourth Amendments.¹²⁵ Applying the test, he found that the defendant "plainly satisfie[d] both criteria" because he was voluntarily present in the United States for eighteen months, paid rent, and financially supported his girlfriend and daughter.¹²⁶

He also cautioned against the majority's reading of "the people," highlighting the "far-reaching consequences" of its reading.¹²⁷ According to Judge Dennis, a reading that excluded undocumented immigrants from the protections of the Second Amendment could also exclude those immigrants, containing potentially millions of people, from First and Fourth Amendment protections.¹²⁸ Finally, Judge Dennis also found the majority's distinction between an affirmative right and a protective right "unpersuasive" since *Heller* described the Second Amendment right as a codification of a pre-existing right.¹²⁹

¹²² *Id.*

¹²³ *Id.*

¹²⁴ *See id.* at 442 (Dennis, J., dissenting).

¹²⁵ *Id.*

¹²⁶ *Id.* at 447.

¹²⁷ *Id.* at 443.

¹²⁸ *Id.* at 444.

¹²⁹ *Id.*

*B. United States v. Flores*¹³⁰

Like *Portillo-Munoz*, where the district court adopted the recommendation of a magistrate judge, the District of Minnesota adopted the recommendations of a magistrate judge, and concluded that unlawful aliens do not possess a Second Amendment right in *United States v. Flores*.¹³¹ The Eighth Circuit's *per curiam* opinion affirmed the district court without elaboration, agreeing with the Fifth Circuit's categorical approach in *Portillo-Munoz*.¹³²

In *Flores*, Magistrate Judge Janie S. Mayeron issued a report and recommendation on a 18 U.S.C. § 922(g)(5) case where an undocumented immigrant was charged after being found in possession of a handgun.¹³³ Magistrate Judge Mayeron recommended the denial of the defendant's motion to dismiss his indictment.¹³⁴

Judge Mayeron relied on *Heller* in making this determination.¹³⁵ She first found that undocumented immigrants are not part of the "national community" or "political community," and undocumented immigrants are "inherently not 'law-abiding'" because their "unsanctioned entry in the United States" is a crime.¹³⁶ She then cited to several United States district court cases from 2008 to 2010 that found that the Second Amendment did not extend to undocumented immigrants.¹³⁷ She then distinguished *INS v. Lopez-Mendoza*, which stated that undocumented immigrants held Fourth Amendment protections, by focusing on the idea that the United States did not

¹³⁰ 663 F.3d 1022 (8th Cir. 2011) (*per curiam*).

¹³¹ *Id.* at 1023.

¹³² *Id.*

¹³³ *United States v. Flores*, No. 10-178 (JNE/JSM), 2010 WL 4721069, at *1 (D. Minn. Sept. 17, 2010).

¹³⁴ *Id.* at *4.

¹³⁵ *Id.* at *2.

¹³⁶ *Id.*

¹³⁷ *Id.* at *3.

make a finding as to whether undocumented immigrants were afforded Fourth Amendment protections in this case.¹³⁸

She also distinguished *Verdugo-Urquidez*.¹³⁹ First, Magistrate Judge Mayeron acknowledged that in *Verdugo-Urquidez*, the Court noted that it had yet to determine whether undocumented immigrants retained Fourth Amendment protections.¹⁴⁰ However, she did acknowledge that the *Verdugo-Urquidez* Court insisted that Fourth Amendment protection would depend on whether the undocumented immigrant had accepted societal obligations.¹⁴¹ Accordingly, Magistrate Judge Mayeron could “envision” an undocumented immigrant who is involved in the community and law-abiding.¹⁴² However, the facts of *Flores* did not present that opportunity.¹⁴³ The District Court of Minnesota accepted Magistrate Judge Mayeron’s report and recommendation and denied the defendant’s motion to dismiss.¹⁴⁴ The Eighth Circuit emphatically affirmed in a *per curiam* decision.¹⁴⁵ The Supreme Court denied certiorari.¹⁴⁶

C. United States v. Carpio-Leon¹⁴⁷

The Fourth Circuit also considered this issue in *United States v. Carpio-Leon*.¹⁴⁸ In *Carpio-Leon*, a Mexican national was arrested for violating 18 U.S.C. § 922(g)(5) after a consensual search of his home

¹³⁸ *Id.* at *4.

¹³⁹ *Id.*

¹⁴⁰ *Id.*

¹⁴¹ *Id.*

¹⁴² *Id.*

¹⁴³ *Id.* at *4.

¹⁴⁴ *United States v. Flores*, No. 10-178 (JNE/JSM), 2010 WL 4720223, *2 (D. Minn. Nov. 15, 2010).

¹⁴⁵ *United States v. Flores*, 663 F.3d 1022, 1023 (8th Cir. 2011).

¹⁴⁶ *Flores v. United States*, 133 S. Ct. 28 (2012).

¹⁴⁷ 701 F.3d 974 (4th Cir. 2012).

¹⁴⁸ *Id.*

in the United States uncovered weapons.¹⁴⁹ The defendant had been in the United States for thirteen years, fathered three United States citizen children with his wife, had no criminal record, and filed tax returns.¹⁵⁰ However, he did use false social security documents to obtain a driver's license.¹⁵¹

The Fourth Circuit first examined whether the scope of the Second Amendment right to bear arms extends to undocumented immigrants.¹⁵² The court mentioned the *Verdugo-Urquidez* sufficient connections test, but also acknowledged that undocumented immigrants may never be part of the political community and, thus, not part of "the people" to whom the Second Amendment confers a right.¹⁵³ Ambiguously, the court left open the possibility that undocumented immigrants may be included in "the people" of the Second Amendment.¹⁵⁴

The court focused almost exclusively on the language from *Heller* that the courts in *Portillo-Munoz* and *Flores* relied on: "law-abiding, responsible citizens."¹⁵⁵ The Fourth Circuit reasoned that undocumented immigrants "do not belong" in a "class of law-abiding members of the political community" to whom the Second Amendment gives protection.¹⁵⁶ The Fourth Circuit reasoned that the "crime of illegal entry inherently" excludes undocumented immigrants from "the people."¹⁵⁷ The Fourth Circuit affirmed the district court's denial of the defendant's motion to dismiss his indictment,¹⁵⁸ and the Supreme Court denied certiorari.¹⁵⁹

¹⁴⁹ *Id.* at 975.

¹⁵⁰ *Id.*

¹⁵¹ *Id.*

¹⁵² *Id.* at 978.

¹⁵³ *Id.*

¹⁵⁴ *Id.*

¹⁵⁵ *Id.* at 979 (quoting *Dist. of Columbia v. Heller*, 554 U.S. 570, 635 (2008)).

¹⁵⁶ *Id.*

¹⁵⁷ *Id.* at 981.

¹⁵⁸ *Id.* at 983.

¹⁵⁹ *Carpio-Leon v. United States*, 134 S. Ct. 58 (2013).

D. United States v. Huitron-Guizar¹⁶⁰

The Tenth Circuit decided *United States v. Huitron-Guizar* in 2012, after *Portillo-Munoz* and *Flores* but before *Carpio-Leon* and *Meza-Rodriguez*. Instead of employing a categorical approach like the Fifth, Eighth, and Fourth circuits to hold that undocumented immigrants are not part of “the people” to whom the Second Amendment confers a right to bear arms, the Tenth Circuit employed a prudential approach¹⁶¹ similar to Judge Flaum’s concurrence in *Meza-Rodriguez*. The Tenth Circuit did not attempt to define “the people” or consider whether undocumented immigrants are part of that group. It found those questions “large and complicated.”¹⁶² Instead, the Tenth Circuit preferred to “avoid the constitutional question by *assuming*, for purposes of this case, that the Second Amendment, as a ‘right of the people,’ could very well include, in the absence of a statute restricting such a right, at least some unlawfully here.”¹⁶³ The Tenth Circuit held that 18 U.S.C. § 922(g)(5) passed intermediate scrutiny.¹⁶⁴ The Supreme Court denied certiorari.¹⁶⁵

THE SEVENTH CIRCUIT READING OF “THE PEOPLE” COMPORTS WITH PRECEDENT AND CONSISTENCY

Since 2011, four federal circuit courts have addressed whether the Second Amendment confers a right to bear arms to undocumented immigrants.¹⁶⁶ While the Supreme Court has left the issue open by

¹⁶⁰ 678 F.3d 1164 (10th Cir. 2012).

¹⁶¹ *Id.* at 1169.

¹⁶² *Id.*

¹⁶³ *Id.*

¹⁶⁴ *Id.* at 1170.

¹⁶⁵ *Huitron-Guizar v. United States*, 133 S. Ct. 289 (2012).

¹⁶⁶ See *United States v. Portillo-Munoz*, 643 F.3d 437 (5th Cir. 2011); *United States v. Flores*, 663 F.3d 1022 (8th Cir. 2011) (per curiam); *United States v. Carpio-Leon*, 701 F.3d 974 (4th Cir. 2012); *United States v. Meza-Rodriguez*, 798 F.3d 664 (7th Cir. 2015).

denying certiorari to the previous three decisions, the approach adopted by the Seventh Circuit in *Meza-Rodriguez* is superior because it aligns with precedent and provides a consistent reading of the constitutional amendments that mention “the people.”

First, the reading of the Second Amendment adopted by the Fifth, Eighth, and Fourth Circuits undervalues the emphasis the Supreme Court placed on the *Verdugo-Urquidez* sufficient connections test in *Heller*. The *Heller* Court did not attempt to outline an exhaustive list of who constitutes “the people” as defined by the Second Amendment.¹⁶⁷ Instead, the *Heller* Court looked to *Verdugo-Urquidez* to find that “the people” encompasses “all members of the political community, not an unspecified subset.”¹⁶⁸ Therefore, in *Heller*, a Second Amendment case, the Court invoked the definition of “the people” put forth in *Verdugo-Urquidez*, a Fourth Amendment case.¹⁶⁹ This suggests that the Supreme Court reads “the people” consistently “in all six other provisions of the Constitution that mention ‘the people.’”¹⁷⁰ By not employing the *Verdugo-Urquidez* sufficient connections test in the Second Amendment context, the Fifth, Eighth, and Fourth Circuits complicated an already vague and amorphous phrase. In contrast, the Seventh Circuit’s application of the sufficient connections test reflects a consistent reading of the Supreme Court’s cases that discuss who constitute “the people.”¹⁷¹ Indeed, the Seventh Circuit’s interpretation of the language of the Second Amendment “treat[s] identical phrasing the same way” and respects that the “first ten amendments were adopted as a package.”¹⁷²

The Fourth, Eighth, and Fifth circuits relied on other language in *Heller* that might suggest that *Heller* stood for the proposition that the Second Amendment right to bear arms is limited to “all Americans”¹⁷³

¹⁶⁷ Dist. of Columbia v. Heller, 554 U.S. 570, 580 (2008).

¹⁶⁸ *Id.*

¹⁶⁹ *Id.*

¹⁷⁰ *Id.*

¹⁷¹ *Meza-Rodriguez*, 798 F.3d 664.

¹⁷² *Id.* at 670.

¹⁷³ *Heller*, 554 U.S. at 581.

or to “law-abiding, responsible citizens.”¹⁷⁴ “All Americans”¹⁷⁵ is a vague term. People in the United States can surely be considered Americans; the United States is located in North America. However, Americans may also refer to human beings in Central America or South America. To take proprietary ownership of the term “Americans” ignores the fact that the United States is just one country out of many, including those located in Central and South America, that may refer to its people as “Americans.”

In addition, “law-abiding, responsible citizens”¹⁷⁶ is another phrase that promotes ambiguity. While it may seem easy enough to determine who is law-abiding and who is not, this is less clear in the immigration context. As the Seventh Circuit noted, many undocumented immigrants in the United States arrived in this country as young children and “were too young to form the requisite intent” to contravene the immigration laws of the United States.¹⁷⁷ While a person may become aware of her undocumented status as she grows older, new programs such as Deferred Action for Childhood Arrivals provides avenues to protect those persons from removal proceedings.¹⁷⁸ The Fifth Circuit in *Portillo-Munoz* did not take that idea into account; it stated plainly that “aliens who enter or remain in this country illegally are not Americans.”¹⁷⁹ Similarly, the Fourth Circuit in *Carpio-Leon* concluded, without elaborating, that “illegal aliens are not law-abiding members of the political community.”¹⁸⁰ In her report and recommendation to the United States District Court for the District of Minnesota, Magistrate Judge Mayeron stated that any person who enters the United States unlawfully is “inherently not

¹⁷⁴ *Id.* at 635.

¹⁷⁵ *Id.* at 581.

¹⁷⁶ *Id.* at 635.

¹⁷⁷ *United States v. Meza-Rodriguez*, 798 F.3d 664, 673 (7th Cir. 2015).

¹⁷⁸ *Consideration of Deferred Action for Childhood Arrivals*, U.S. CITIZENSHIP AND IMMIGRATION SERVICES, <http://www.uscis.gov/humanitarian/consideration-deferred-action-childhood-arrivals-daca> (last updated Aug. 3, 2015).

¹⁷⁹ *United States v. Portillo-Munoz*, 643 F.3d 437, 440 (5th Cir. 2011).

¹⁸⁰ *United States v. Carpio-Leon*, 701 F.3d 974, 979 (4th Cir. 2012).

‘law-abiding’¹⁸¹ and does not retain a Second Amendment right to bear arms.¹⁸² While those courts stress the “law-abiding, responsible citizens” language in *Heller*, that language was not controlling as to whether Second Amendment rights extend to undocumented immigrants. That type of analysis misses a crucial point in *Heller*: to determine who constitutes “the people” to whom the Second Amendment confers a right to bear arms, the *Heller* Court emphasized its sufficient connections test as laid out in *Verdugo-Urquidez*.¹⁸³ Instead of precluding undocumented immigrants from a Second Amendment rights by highlighting the vague language in *Heller* and ignoring the *Heller* Court’s emphasis on the *Verdugo-Urquidez* sufficient connections test, the Seventh Circuit correctly applied the test consistently.

Moreover, the Fifth Circuit’s attempt to disregard *Verdugo-Urquidez* through an attenuated distinction between the Fourth and Second Amendments presents a distinction without a difference. The Fifth Circuit in *Portillo-Munoz* stated that the two amendments carried different purposes: the Second Amendment confers an affirmative right, whereas the Fourth Amendment is protective.¹⁸⁴ This distinction is problematic in light of *Heller*. The *Heller* Court noted that the “Second Amendment, like the First and Fourth Amendment, codified a *pre-existing* right.”¹⁸⁵ *Heller* never refers to any “affirmative right” when discussing the Second Amendment or “protective right” when discussing the Fourth Amendment. Furthermore, the Fifth Circuit’s distinction between the Second and Fourth Amendments ignores the *Heller* Court’s insistence on consistency when interpreting identical language.¹⁸⁶ The *Heller* Court clarified that a reading of the Second Amendment that limited “the people” would not level with the other

¹⁸¹ *United States v. Flores*, No. 10-178 (JNE/JSM) 2010 WL 4721069, at*2 (D. Minn. Sept. 17, 2010).

¹⁸² *Id.*

¹⁸³ *Dist. of Columbia v. Heller*, 554 U.S. 570, 580 (2008).

¹⁸⁴ *Portillo-Munoz*, 643 F.3d at 440–41.

¹⁸⁵ *Heller*, 554 U.S. at 593 (emphasis in original).

¹⁸⁶ *See id.* at 580.

six constitutional provisions that contain “the people.”¹⁸⁷ It then immediately invoked *Verdugo-Urquidez*’s sufficient connections test to clarify the meaning of “the people.”¹⁸⁸ Instead of analyzing the issue consistently with *Heller* and *Verdugo-Urquidez*, the Fifth Circuit forged a new, meaningless path based on perceived amendment purposes, without further elaboration. It should also be noted that neither the Fourth nor the Eighth circuits, the only other appeals courts to hold similarly to *Portillo-Munoz*, have adopted a similar line of reasoning based on an amendment’s purpose. Conversely, the Seventh Circuit in *Meza-Rodriguez* appropriately followed *Heller* and *Verdugo-Urquidez*.¹⁸⁹ In so doing, the Seventh Circuit presented a line of reasoning that is consistent with Supreme Court cases, and that can serve as a superior model for other circuits.

CONCLUSION

While the Supreme Court has not addressed the issue, three federal circuit courts of appeals have held that undocumented immigrants fall outside “the people” to whom the Second Amendment confers a right to bear arms. In so doing, those circuits have undervalued, and even ignored, language in previous Supreme Court cases. The Seventh Circuit’s recent opinion in *United States v. Meza-Rodriguez* addressed the issue in a manner superior to the Fifth, Eighth, and Fourth Circuits. The Seventh Circuit followed Supreme Court reasoning on the Fourth Amendment to read identical language consistently and made a logical extension of the meaning of “the people” to *Meza-Rodriguez*. In so doing, the Seventh Circuit correctly determined that undocumented immigrants in the United States make up part of “the people” to whom the Second Amendment confers a right to bear arms.

¹⁸⁷ *Id.*

¹⁸⁸ *Id.*

¹⁸⁹ See *United States v. Meza-Rodriguez*, 798 F.3d 664, 669–70 (7th Cir. 2015).