CONSTITUTIONAL LAW — SECOND AMENDMENT — SECOND CIRCUIT RULES PROHIBITION OF FIREARMS POSSESSION BY UNDOCUMENTED IMMIGRANTS PASSES INTERMEDIATE SCRUTINY. — *United States v. Perez*, 6 F.4th 448 (2d Cir. 2021).

Second Amendment litigation has flooded the lower courts in the wake of the Supreme Court's 2008 ruling in *District of Columbia v. Heller*.[1] Among the many ambiguities left in *Heller*'s wake is the question of coverage: Who, exactly, is included in "the people" whose rights shall not be infringed? This uncertainty has inevitably raised issues around citizenship and alienage. Recently, in *United States v. Perez*,[2] the Second Circuit declined to answer whether undocumented immigrants were covered by the Second Amendment, instead holding that, even assuming they were, 18 U.S.C. § 922(g)(5)'s prohibition on their possessing firearms passed intermediate scrutiny.[3] It might seem an easy question, given that every other circuit to address this issue has upheld § 922(g)(5) as constitutional.[4] But the *Perez* court's reasoning demonstrates that doing so forces courts into a difficult methodological choice with ripple effects in other areas of Second Amendment doctrine and constitutional law more broadly. The court could have concluded that undocumented immigrants are not covered by the Second Amendment at all — but that would risk jeopardizing their coverage under other provisions of the Bill of Rights. On the other hand, the court could have concluded that undocumented immigrants are covered but that the law nonetheless satisfies intermediate scrutiny — which would water down the Second Amendment rights of a broad swath of individuals apart from undocumented immigrants. The *Perez* court chose the latter path.

Javier Perez entered the United States from Mexico at age thirteen without authorizing documentation.[5] He built a life in the United States, working as a self-employed carpenter, securing his own apartment, and fathering two children whom he financially supported.[6] In July 2016, while Perez was attending a barbeque, a fight between rival gang members broke out down the street.[7] Borrowing a handgun from an acquaintance, Perez broke up the fight by firing shots into the air.[8] He then returned the firearm.[9] The police arrested Perez several months

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[1] 554 U.S. 570 (2008); *see* Eric Ruben & Joseph Blocher, *From Theory to Doctrine: An Empirical Analysis of the Right to Keep and Bear Arms After* Heller, 67 DUKE L.J. 1433, 1455 (2018).

[2] 6 F.4th 448 (2d Cir. 2021).

[3] *Id.* at 450.

[4] *See infra* pp. 1161–62.

[5] *Id.* at 450.

[6] *Id.*

[7] *Id.*

[8] *Id.*

[9] *Id.*

later for a separate offense, and Perez admitted to being the shooter in the July 2016 incident.[10] He was indicted in 2018 for violating 18 U.S.C. § 922(g)(5), which makes it unlawful for "an alien . . . illegally or unlawfully in the United States" to possess firearms or ammunition.[11]

During his trial in the United States District Court for the Eastern District of New York, Perez moved to dismiss the indictment, arguing that the statute's "categorical bar on the possession of firearms by individuals . . . illegally . . . in the United States" violated "the Second Amendment to the United States Constitution."[12] The court denied the motion after applying the common two-step framework for Second Amendment claims.[13] This framework requires courts to first ask whether the law "burdens conduct protected by the Second Amendment,"[14] and if it does, to determine and apply the level of scrutiny appropriate to evaluate its constitutionality.[15] Following the Second Circuit practice of "assum[ing] that the Second Amendment applies to a given application of a firearms (or ammunition) regulation in order to determine whether the law being challenged would withstand the requisite level of scrutiny,"[16] the court proceeded to decide whether to apply strict or intermediate scrutiny.[17] The Second Circuit employs two factors in answering this question: first, "how close the law comes to the 'core' of the Second Amendment right," and second, "the severity of the law's burden on that right."[18] The court determined that intermediate scrutiny was appropriate because, though Perez's presumed rights were substantially burdened, they did not lie at the "core" of the Second Amendment's protection of "law abiding and responsible citizens."[19]

The court held that § 922(g)(5) survived intermediate scrutiny.[20] First, it was "beyond dispute" that the government had a substantial "interest[] in public safety and crime prevention."[21] Second, § 922(g)(5)

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[10] *Id.*

[11] *Id.* at 450–51 (quoting 18 U.S.C. § 922(g)(5)).

[12] Memorandum & Order at 2, United States v. Perez, No. 18-CR-220 (E.D.N.Y. Mar. 13, 2019) (quoting Memorandum of Law at 1, *Perez*, No. 18-CR-220).

[13] *Id.* at 1, 3.

[14] *Perez*, 6 F.4th at 451 (citing N.Y. State Rifle & Pistol Ass'n v. Cuomo, 804 F.3d 242, 254 (2d Cir. 2015)).

[15] Memorandum & Order, *supra* note 12, at 3 (quoting United States v. Jimenez, 895 F.3d 228, 232 (2d Cir. 2018)).

[16] *Id.* at 4 (quoting *Jimenez*, 895 F.3d at 234).

[17] *Id.* at 5. Strict scrutiny requires "that the challenged law serves a compelling governmental interest and is narrowly tailored to achieve that interest," *Perez*, 6 F.4th at 453 (citing Gratz v. Bollinger, 539 U.S. 244, 270 (2003)), while intermediate scrutiny demands "only that the law be 'substantially related to the achievement of an important governmental interest,'" *id.* (quoting *N.Y. State Rifle & Pistol Ass'n*, 804 F.3d at 261).

[18] Memorandum & Order, *supra* note 12, at 5 (quoting *Jimenez*, 895 F.3d at 234).

[19] *Id.* at 6–7 (quoting *Jimenez*, 895 F.3d at 235).

[20] *Id.* at 7 (quoting *Jimenez*, 895 F.3d at 236).

[21] *Id.* at 7–8 (quoting *N.Y. State Rifle & Pistol Ass'n*, 804 F.3d at 261).

was substantially related to this interest. Undocumented immigrants, the court stated, "live largely outside the formal system of registration, employment, and identification,"[22] making them difficult to trace and giving them an incentive to evade law enforcement.[23] The court also observed that Congress, in passing § 922(g)(5), may have concluded that those who show a "willingness to defy our law" should not be armed.[24] Finally, the court rejected as irrelevant Perez's argument that the government could not prove that undocumented immigrants as a class were "more violent than the population at large."[25] It was enough, the court declared, that the "law substantially relate[d] to public safety and crime prevention."[26] And *Heller* recognized that categorical prohibitions could be valid.[27] Perez was sentenced to twenty months of imprisonment and three years of supervised release.[28]

The Second Circuit affirmed the district court's denial of Perez's motion to dismiss, finding § 922(g)(5) constitutional as applied to Perez.[29] Writing for the panel majority, Judge Walker[30] mirrored the district court's analysis of the purported Second Amendment violation. Though the Second Amendment's use of "the people" "presumably" covers some noncitizens, such as permanent residents,[31] Perez's argument that it covered him as well "oversimplifie[d] a question of some complexity."[32] Under Supreme Court precedent, the court would have to determine whether Perez had established sufficient connections with the United States to qualify as a member of the national or political community.[33] Observing that Perez's inability to "participate[] in our democratic political institutions" complicated this inquiry, and noting the circuit split on this question, Judge Walker declared that analyzing it "risk[ed] 'introducing difficult questions into our jurisprudence.'"[34] Therefore, Judge Walker followed the sequence used by the district court and assumed the Second Amendment applied.[35] He then proceeded to examine whether § 922(g)(5) would "withstand the appropriate level of scrutiny."[36]

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[22] *Id.* at 8 (quoting United States v. Meza-Rodriguez, 798 F.3d 664, 673 (7th Cir. 2015)).
[23] *Id.*
[24] *Id.* (quoting United States v. Huitron-Guizar, 678 F.3d 1164, 1170 (10th Cir. 2012)).
[25] *Id.* at 9 (quoting Memorandum of Law, *supra* note 12, at 8).
[26] *Id.*
[27] *Id.*
[28] *Perez*, 6 F.4th at 450.
[29] *Id.* at 450, 451 n.1.
[30] Judge Walker was joined by Judge Carney.
[31] *Perez*, 6 F.4th at 452 (quoting United States v. Jimenez, 895 F.3d 228, 233 n.1 (2d Cir. 2018)).
[32] *Id.*
[33] *Id.*
[34] *Id.* at 452–53 (quoting *Jimenez*, 895 F.3d at 234).
[35] *Id.* at 453.
[36] *Id.* (citing *Jimenez*, 895 F.3d at 234).

As did the district court, Judge Walker found that intermediate scrutiny applied. Section 922(g)(5) imposed a categorical ban on the possession of firearms by undocumented immigrants, and so the burden on Perez's presumed Second Amendment rights was "insurmountable."[37] However, his interest in possessing firearms was not at the "core" of the Second Amendment's protections.[38] He neither used a firearm "in self-defense nor in the home," and he did not qualify as a "'law-abiding, responsible citizen[]' because, however he may choose to live his life in the United States, his presence here [was] unlawful."[39] Intermediate scrutiny therefore applied.[40]

Because Perez conceded that advancing public safety regarding firearms was an important government objective, under intermediate scrutiny, the court needed to decide only whether § 922(g)(5) bore a "substantial relation" to that objective.[41] The court recognized three rationales for such a relation. First, undocumented immigrants "liv[e] outside the law" and their behavior is therefore "harder to regulate in some respects."[42] Second, "[§] 922(g)(5) aids Congress's efforts in suppressing the illicit market in firearms and regulating interstate commerce in firearms."[43] Finally, because undocumented immigrants are by definition not "law-abiding," Congress could conclude that they would have a tendency for future malfeasance and thus should not be armed.[44] Giving as examples felons and the mentally ill, who may be categorically barred from firearms possession even when they have not committed a violent offense, Judge Walker dismissed Perez's argument that § 922(g)(5)'s blanket prohibition was overbroad.[45]

Judge Menashi concurred in the judgment but disapproved of the majority's reasoning. He would have simply held that, as a noncitizen, Perez was not included in "the people" covered by the Second Amendment.[46] The text and history of the Second Amendment limited its protections to "members of the political community," and undocumented immigrants did not qualify as such.[47] By instead relying on

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[37] *Id.* at 454.

[38] *Id.*

[39] *Id.* (first alteration in original).

[40] *Id.* at 455.

[41] *Id.*

[42] *Id.* (alteration in original) (quoting United States v. Toner, 728 F.2d 115, 129 (2d Cir. 1984)).

[43] *Id.* at 456.

[44] *Id.* (first quoting District of Columbia v. Heller, 554 U.S. 570, 625 (2008); and then quoting United States v. Huitron-Guizar, 678 F.3d 1164, 1170 (10th Cir. 2012)).

[45] *Id.*

[46] *Id.* at 461 (Menashi, J., concurring in the judgment).

[47] *Id.* (quoting *Heller*, 554 U.S. at 580); *see id.* at 461–63. In arriving at this conclusion, Judge Menashi reasoned that undocumented immigrants "may not hold federal elective office, are barred from voting in federal elections, may not serve on federal juries, and are subject to removal from the United States at any time." *Id.* at 463 (citations omitted).

Perez's failure to be law-abiding — rather than his immigration status per se — to categorically divest him of the right to bear arms, the majority laid down a rationale that could apply to anyone a court held to be non-law-abiding, even those who, like Perez, had not committed any violent offense.[48]

In addition, Judge Menashi criticized the majority's application of intermediate scrutiny on multiple fronts. Importantly, he argued that under the majority's rationale, "the same reason intermediate scrutiny applies is the reason that such scrutiny is overcome."[49] The majority applied intermediate scrutiny in the first place in part because Perez was not "law-abiding," thereby falling outside the core of the Second Amendment right.[50] It then used that same rationale to hold that intermediate scrutiny was *satisfied* by the government's interest in keeping firearms away from those who are not "law-abiding."[51] Altogether, Judge Menashi argued that in indirectly, rather than directly, reaching the conclusion that undocumented immigrants lack Second Amendment protections and "watering down . . . intermediate scrutiny . . . into a form of rational basis review,"[52] the majority undermined those protections for a potentially much broader swath of individuals.

The Second Circuit is far from the first to examine the thorny issue of Second Amendment coverage for undocumented immigrants. The Fourth, Fifth, Seventh, Eighth, Ninth, and Tenth Circuits have previously confronted this exact question and have generally rooted their differing analyses in the minute details of *Heller*. *Perez* follows this trend and, in assigning determinative weight to its analysis of who counts as "law-abiding," illustrates a key tension that has divided the circuits. Though it avoided handing down an opinion that would implicate the rights of undocumented immigrants in other contexts, the *Perez* court instead expanded the category of non-law-abiding people whose ability to possess arms can more easily be banned. *Perez* thereby demonstrates the difficulties associated with upholding § 922(g)(5)'s blanket prohibition: it is impossible to limit such a ruling's effects to just Second Amendment rights possessed by just undocumented immigrants. Rather, upholding § 922(g)(5) necessitates a choice between two types of analysis that threatens either broader categories of rights or broader categories of rights holders.

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[48] *Id.* at 460–61. Judge Menashi also disputed the majority's argument that Perez's use of a firearm in defense of another was not within the core of the Second Amendment, because "[t]he law generally draws no distinction between the use of force in defense of self and in defense of others." *Id.* at 458.

[49] *Id.* at 460.

[50] *Id.*

[51] *Id.* (quoting *id.* at 456 (majority opinion)).

[52] *Id.* at 457.

The circuit courts' resolution of the undocumented immigrant question can generally be said to hinge upon the relative weight they assign to language from *Heller*. Specifically, the *Heller* Court approvingly cited *United States v. Verdugo-Urquidez*,[53] a Fourth Amendment opinion in which the Supreme Court suggested that the term "the people" referred "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," and indicated that the term should be read consistently throughout the Bill of Rights.[54] This interpretation would potentially open the door for undocumented immigrants who had developed "sufficient connection" with the United States to enjoy Second Amendment coverage. At the same time, *Heller* repeatedly referred to the rights of "law-abiding *citizens*"[55] and stated that the Second Amendment "surely elevates above all other interests the right of law-abiding, responsible citizens to use arms in defense of hearth and home."[56]

Courts that have categorically denied undocumented immigrants Second Amendment coverage have homed in on *Heller*'s choice of words rather than its citation to *Verdugo-Urquidez*. For example, the Fifth Circuit in *United States v. Portillo-Munoz*[57] flatly stated that "[t]he Court's language in *Heller* invalidate[d] [Armando Portillo-Munoz]'s attempt to extend the protections of the Second Amendment to illegal aliens."[58] In rejecting *Verdugo-Urquidez*'s implication, the court argued that the Second Amendment confers an "affirmative right," while the Fourth Amendment grants a "protective right" against government abuses.[59] It was "reasonable," the court observed, "that an affirmative right would be extended to fewer groups than would a protective right."[60] The Fourth Circuit took a slightly different route in *United States v. Carpio-Leon*,[61] placing great weight on *Heller*'s use of the term "law-abiding" to conclude that undocumented immigrants were categorically excluded from Second Amendment protection.[62]

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[53] 494 U.S. 259 (1990).

[54] District of Columbia v. Heller, 554 U.S. 570, 580 (2008) (quoting *Verdugo-Urquidez*, 494 U.S. at 265); *see Verdugo-Urquidez*, 494 U.S. at 265 (arguing that "the people" is a term of art used in the First, Second, Fourth, Ninth, and Tenth Amendments).

[55] *Heller*, 554 U.S. at 625 (emphasis added).

[56] *Id.* at 635.

[57] 643 F.3d 437 (5th Cir. 2011).

[58] *Id.* at 440.

[59] *Id.* at 441.

[60] *Id.*

[61] 701 F.3d 974 (4th Cir. 2012).

[62] *Id.* at 979–81; *see also* Karen Nelson Moore, Judge, U.S. Ct. of Appeals for the Sixth Cir., Madison Lecture, Aliens and the Constitution (Oct. 16, 2012), *in* 88 N.Y.U. L. REV. 801, 844 (2013) (discussing *Carpio-Leon*). This approach contrasts with *Perez*, where the Second Circuit's use of

The Seventh Circuit went the opposite way. In *United States v. Meza-Rodriguez*,[63] the court decided to take *Verdugo-Urquidez*'s suggestion seriously in holding that, as was the case for Fourth Amendment rights, the Second Amendment applied to undocumented immigrants with substantial connections to the United States.[64] This interpretation had the advantage of treating the same term used throughout the Bill of Rights the same way.[65] However, the court upheld § 922(g)(5) under intermediate scrutiny as it "substantially related to the statute's general objectives because such persons are able purposefully to evade detection by law enforcement."[66]

The third route courts have taken is to skip analyzing the first question of coverage to hold that, even assuming undocumented immigrants are covered, § 922(g)(5) withstands intermediate scrutiny. The Tenth Circuit was the first court to follow this sequence in *United States v. Huitron-Guizar*,[67] where it decided to apply intermediate scrutiny because it had previously done so for a different provision of 18 U.S.C. § 922(g).[68] The Ninth Circuit in *United States v. Torres*[69] put a slight spin on this approach, relying on undocumented immigrants' status as non-law-abiding to hold that their right to possess firearms fell outside the core of the Second Amendment's protection and thus required only intermediate scrutiny.[70] Although it did not emphasize the resemblance, the *Perez* court largely followed the Ninth Circuit's approach.[71] Applying the Second Circuit's test for deciding the appropriate level of scrutiny, the court engaged in its "law-abiding" inquiry and found that Perez's putative rights fell outside of the core Second Amendment protection.

There are likely several considerations at play in the *Perez* court's opting to avoid analyzing the threshold question of coverage and proceeding instead directly to scrutiny. The threshold question arguably requires a dive into the history and tradition behind the Second Amendment,[72] a task that may simply be too taxing for lower courts to

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the term "law-abiding" served only to reduce the level of scrutiny applied to restrictions on undocumented immigrants' ability to possess arms, not to render those restrictions per se constitutional. *See Perez*, 6 F.4th at 454–55.

63 798 F.3d 664 (7th Cir. 2015).

64 *Id.* at 670.

65 *Id.*

66 *Id.* at 673.

67 678 F.3d 1164 (10th Cir. 2012).

68 *Id.* at 1169 (citing United States v. Reese, 627 F.3d 792, 802 (10th Cir. 2010)).

69 911 F.3d 1253 (9th Cir. 2019).

70 *Id.* at 1262–63.

71 *Perez* cites *Torres* only twice. *See Perez*, 6 F.4th at 453 n.21, 455 n.41.

72 The Supreme Court applied this methodology in *Heller* and subsequent opinions. *See, e.g.*, District of Columbia v. Heller, 554 U.S. 570, 579–628 (2008); McDonald v. City of Chicago, 561 U.S. 742, 767–78 (2010).

engage in.[73] The Second Circuit's practice of avoiding it altogether may be a matter of judicial economy.[74] Another consideration lies within the court's purported avoidance of "introducing difficult questions" into its jurisprudence. *Perez* alludes to the consequences that a ruling excluding undocumented immigrants from "the people" covered by the Second Amendment could have for the *other* rights the Constitution confers to noncitizens.[75] Such a ruling could potentially impact everything from speech to Fourth Amendment rights. As the partial concurrence in *Portillo-Munoz* noted at the time, such a ruling "effectively means that millions of similarly situated residents of the United States are 'non-persons' who have no rights to be free from unjustified searches of their homes and bodies and other abuses, nor to peaceably assemble or petition the government."[76] In instead centering its analysis on the concept of being "law-abiding," a restriction unique to post-*Heller* Second Amendment doctrine, the *Perez* court functionally reached the same outcome as had other circuits without implicating the rights of undocumented immigrants in these other contexts.

However, the *Perez* court's analysis raises problems of its own, both in methodology and in "introducing difficult questions" as to other rights holders. First, it is unclear that the *Perez* analysis ultimately has any methodological advantages. Under *Heller*, any attempt to draw lines around the non-law-abiding category would probably require the same complicated analysis of text and history that the *Perez* court purported to avoid in skipping the threshold coverage question.[77] *Perez* itself

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[73] *See* Darrell A.H. Miller, *Romanticism Meets Realism in Second Amendment Adjudication*, 68 DUKE L.J. ONLINE 33, 34 (2018) ("[O]riginalism is a method of reasoning that only the nine Justices of the Supreme Court can apply with any regularity. . . . [N]ot only are lower federal court judges . . . resource-constrained, they are also institutionally-constrained by their subordinate place in the judicial hierarchy.").

[74] It may also be a matter of stare decisis. Joseph Blocher, United States v. Perez *and Doctrinal Development*, DUKE CTR. FOR FIREARMS L.: SECOND THOUGHTS BLOG (Sept. 15, 2021), https://firearmslaw.duke.edu/2021/09/united-states-v-perez-and-doctrinal-development [https://perma.cc/SL8K-SHGF]; *see Perez*, 6 F.4th at 453 ("We see no reason to abandon that approach here.").

[75] *See Perez*, 6 F.4th at 452 (raising the issue of how "'the people' in this context coheres with different but related designations in other enumerated rights").

[76] United States v. Portillo-Munoz, 643 F.3d 437, 443 (5th Cir. 2011) (Dennis, J., concurring in part and dissenting in part); *see also* D. McNair Nichols, Jr., Note, *Guns and Alienage: Correcting a Dangerous Contradiction*, 73 WASH. & LEE L. REV. 2089, 2095 (2016) (discussing the broad implications of holding that noncitizens are not included within "the people").

[77] *See* United States v. Carpio-Leon, 701 F.3d 974, 979–81 (4th Cir. 2012) (examining "the historical evidence supporting the notion that the government could disarm individuals who are not law-abiding members of the political community," *id.* at 980). Even should this line be defined by something such as felonious conduct, as *Heller* suggested it might, *see Heller*, 554 U.S. at 626, there is doubt as to the historical validity of this categorical bar, *see* Kanter v. Barr, 919 F.3d 437, 464 (7th Cir. 2019) (Barrett, J., dissenting) (arguing that history supports the proposition that the state could disarm a category of people it deems "dangerous" but not "that felons lose their Second Amendment rights solely because of their status as felons").

illustrates why this is the case, as in the absence of historical analysis the Second Circuit relied only on limited and inapposite precedent in drawing its line. In ruling that Perez — whose mere presence in the United States was not itself a crime, who had entered the United States as a child incapable of forming the requisite intent to violate the law,[78] and who had no criminal record[79] — was not "law-abiding," the court stretched *Heller*'s literal language even further than did *Portillo-Munoz* and *Carpio-Leon*.[80] It also stretched Second Circuit precedent. Apart from *Heller*, *Perez* relied heavily on the Second Circuit's earlier opinion in *United States v. Jimenez*,[81] which held that those dishonorably discharged from the military — an action generally taken for felony-equivalent conduct — were not "law-abiding" and thus fell outside the Second Amendment's core protection.[82] Perez's unlawful presence in the United States, however, was a mere civil violation,[83] and it was this single violation *alone* that made Perez non-law-abiding in the Second Circuit's analysis.[84]

Second, *Perez*'s analysis has broad consequences for *all* Second Amendment rights. As Judge Menashi pointed out in his concurrence in the judgment, *Perez*'s reasoning could potentially apply to a much wider range of individuals beyond undocumented immigrants.[85] It could, for example, cover those guilty of traffic violations.[86] And because this same non-law-abiding designation was also an appropriate rationale to categorically forbid the individual from possessing firearms, even if he had not committed a violent offense, it "water[ed] down the intermediate scrutiny the court purportedly applie[d] . . . into a form of rational basis review."[87] One can detect a similar loosening of the scrutiny analysis in the opinions of the other circuits that have resolved this

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

79 *Perez*, 6 F.4th at 454.

80 Though *Carpio-Leon* similarly employed the "law-abiding" concept, albeit in a different step in the analysis, the opinion explicitly limited its holding to undocumented immigrants. *See Carpio-Leon*, 701 F.3d at 981 ("[W]e do not hold that any person committing any crime automatically loses the protection of the Second Amendment. . . . And we readily confirm our limited holding as to illegal aliens by their particular relationship to the United States.").

81 895 F.3d 228 (2d Cir. 2018).

82 *Id.* at 235–36.

83 Marco Poggio, *Debate over Immigrants' Gun Rights Ignites in 2nd Circ. Case*, LAW360 (Sept. 12, 2021, 8:02 PM), https://www.law360.com/articles/1396315/debate-over-immigrants-gun-rights-ignites-in-2nd-circ-case [https://perma.cc/47G9-9JE5].

84 *See Perez*, 6 F.4th at 454 ("Perez also does not qualify as a 'law-abiding, responsible citizen[]' because, however he may choose to live his life in the United States, his presence here is unlawful.").

85 *See id.* at 461 (Menashi, J., concurring in the judgment) ("Under the court's logic, . . . a person who has 'never committed a crime of violence and . . . could be trusted with a firearm' but commits a single non-violent offense may be divested of all rights under the Second Amendment." (citation omitted) (quoting *id.* at 456 (majority opinion))).

86 Poggio, *supra* note 83.

87 *Perez*, 6 F.4th at 457 (Menashi, J., concurring in the judgment).

question on scrutiny grounds, even those that have not relied so heavily on *Heller*'s "law-abiding" language.[88] Such a loosening is perhaps necessary to accept the somewhat paradoxical proposition that a category of people who may possess Second Amendment rights can nevertheless be categorically barred from ever possessing firearms.[89] Therefore, rather than avoiding a difficult question, the *Perez* court merely chose between two of them.

Despite the lack of empirical evidence that undocumented immigrants are any more likely than members of the general population to be involved in violent crime,[90] there seems to be a deep discomfort with the idea that they may possess a constitutional right to be armed.[91] However, the convergence of two doctrinal trends — an individual-rights-centered vision of the Second Amendment no longer tied to militia service and an expansion of coverage for undocumented immigrants under the Bill of Rights — makes this syllogism hard to escape.[92] It is therefore almost impossible for courts to uphold § 922(g)(5)'s prohibition without conducting an analysis that in turn runs counter to one of these two trends. The choice is a stark one, and one that will continue to divide the lower courts until *Heller*'s ambiguities are clarified or until a court decides that § 922(g)(5) does in fact violate the Second Amendment.

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[88] *See, e.g.*, United States v. Meza-Rodriguez, 798 F.3d 664, 673 (7th Cir. 2015) (expressing skepticism toward the government's argument that those who have violated immigration laws are "likely to abuse guns," but accepting that "the government has an strong interest in preventing people who already have disrespected the law . . . from possessing guns"); United States v. Huitron-Guizar, 678 F.3d 1164, 1170 (10th Cir. 2012) (speculating as to conclusions Congress "may have" reached in passing § 922(g)(5)).

[89] At least one court has commented upon this paradox. *See Huitron-Guizar*, 678 F.3d at 1169 ("The apparent inconsistency in assuming the existence of a right before sustaining a law that acts as a blanket prohibition on it is, we believe, outweighed . . . ."). The sole practical difference between resolving the question at the threshold coverage step rather than the scope of protection step is that, under the former approach, undocumented immigrants would lack standing to even assert Second Amendment claims. *See* Jacob D. Charles, *Defeasible Second Amendment Rights: Conceptualizing Gun Laws that Dispossess Prohibited Persons*, 83 LAW & CONTEMP. PROBS., no. 3, 2020, at 53, 60.

[90] Pratheepan Gulasekaram, *"The People" of the Second Amendment: Citizenship and the Right to Bear Arms*, 85 N.Y.U. L. REV. 1521, 1578 (2010).

[91] Pratheepan Gulasekaram, *Guns and Membership in the American Polity*, 21 WM. & MARY BILL RTS. J. 619, 628 (2012) ("*Portillo-Munoz* makes explicit what many may find implicitly or silently disquieting about guns and noncitizens in our constitutional order — that there is just something unsettling about extending gun rights to those who are not full members of the American polity.").

[92] *See* Gulasekaram, *supra* note 90, at 1524 ("[T]he right of armed self-defense posited by *Heller* cannot coexist with the restriction of 'the people' of the Second Amendment to citizens.").