UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
CORPUS CHRISTI DIVISION

UNITED STATES OF AMERICA	§	
	§	
VS.	§	CRIMINAL ACTION NO. 2:22-CR-426
	§	
JOSE PAZ MEDINA-CANTU	§	

ORDER ON MOTION TO DISMISS
COUNT ONE OF THE INDICTMENT

Defendant Jose Paz Medina-Cantu stands indicted with one count as an alien, illegally and unlawfully present in the United States, in possession of a firearm in violation of 18 U.S.C. § 922(g)(5) and one count of illegally reentering the United States in violation of 8 U.S.C. § 1326. D.E. 6. Before the Court is Defendant's Motion to Dismiss Count One of the Indictment (D.E. 17) and the Government's response (D.E. 18). Defendant's motion argues that 18 U.S.C. § 922(g)(5) violates the Second Amendment of the United States Constitution, pursuant to the Supreme Court of the United States' opinion in *New York State Rifle & Pistol Association, Inc. v. Bruen*, 142 S. Ct. 2111 (2022). For the reasons set out below, the Court **DENIES** the motion to dismiss count one of the indictment (D.E. 17).

DISCUSSION

A. The Second Amendment Trio

Bruen is the third in a trio of recent opinions construing the scope and applicability of the right to keep and bear arms, with each building on the one(s) before. In *District of Columbia v. Heller*, 554 U.S. 570, 635 (2008), the Court held that the Second Amendment

prevented the District of Columbia from banning the possession of handguns in the home. The Court also stated that, because *Heller* was the "Court's first in-depth examination of the Second Amendment, one should not expect it to clarify the entire field . . . ." *Id*. at 635. In that regard, it wrote:

> Although we do not undertake an exhaustive historical analysis today of the full scope of the Second Amendment, nothing in our opinion should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons and the mentally ill, or laws forbidding the carrying of firearms in sensitive places such as schools and government buildings, or laws imposing conditions and qualifications on the commercial sale of arms.

554 U.S. at 626-27.[1] "***Assuming that Heller is not disqualified from the exercise of Second Amendment rights***, the District must permit him to register his handgun and must issue him a license to carry it in the home." *Id*. at 635 (emphasis added).

In *McDonald v. City of Chicago, Illinois*, 561 U.S. 742, 791 (2010), the Supreme Court held that the Second Amendment applies to the States through the Fourteenth Amendment's due process clause. At the same time, the Court reiterated its caution in *Heller*: "We made it clear in *Heller* that our holding did not cast doubt on such longstanding regulatory measures such as "prohibitions on the possession of firearms by felons . . . ." *Id*. at 786. In a separate concurrence, Justice Scalia wrote, "No fundamental right—not even the First Amendment—is absolute. The ***traditional restrictions go to show the scope of the right***, not its lack of fundamental character." *Id*. at 802 (emphasis added).

[1] The Court also recognized "another important limitation on the right to keep and carry arms[:] . . . the historical tradition of prohibiting the carrying of 'dangerous and unusual weapons.'" *Id*. at 627.

The Supreme Court's *Bruen* opinion then holds that "the Second and Fourteenth Amendments protect an individual's right to carry a handgun for self-defense outside the home." *Bruen*, 142 S. Ct. at 2122. While the issue of a right to possess a firearm by an alien illegally present in the United States was not before the Court in these cases, the Court repeatedly referred to the Second Amendment right as one to be exercised by "ordinary, law-abiding citizens." *E.g.*, 142 S. Ct. at 2122, 2131, 2138, 2156. More specifically, it held that the *Bruen* petitioners "—two ordinary, law-abiding, adult citizens—are part of 'the people' whom the Second Amendment protects." *Id*. at 2134. In his concurring opinion, Justice Alito wrote:

> ***Our holding decides nothing about who may lawfully possess a firearm*** or the requirements that must be met to buy a gun. Nor does it decide anything about the kinds of weapons that people may possess. Nor have we disturbed anything that we said in *Heller* or *McDonald* [], about restrictions that may be imposed on the possession or carrying of guns.

Id. at 2157 (emphasis added); *see also* Kavanaugh, J., concurring, *id*. at 2162 (repeating the disclaimers in *Heller* and *McDonald* that nothing in the opinion should be taken as casting doubt on the longstanding prohibitions on the persons entitled to exercise Second Amendment rights).

In sum, the Second Amendment trio of cases read the Second Amendment rights expansively. However, none of them addressed the constitutionality of the statute prohibiting an alien illegally present in the United States from possessing a firearm. The

Fifth Circuit has not addressed this issue since *Bruen* set out the proper presumptions and analysis to apply.[2]

B. The *Bruen* Constitutional Analysis

To determine whether a statute violates the Second Amendment, the *Bruen* opinion described the inquiry as follows:

> When the Second Amendment's plain text covers an individual's conduct, the Constitution presumptively protects that conduct. The government must then justify its regulation by demonstrating that it is consistent with the Nation's historical tradition of firearm regulation. Only then may a court conclude that the individual's conduct falls outside the Second Amendment's "unqualified command."

Id. at 2129-30.

This iteration leaves unclear whether there is a preliminary "plain text coverage" issue, followed by a secondary "historically justified regulation" analysis, or whether it is all one inquiry. And while the burden of proof is squarely on the Government to show that its regulation is historically justified, it is not clear—if it is a separate inquiry—where the burden lies with respect to whether the conduct at issue falls within the plain text of the Second Amendment.

For direction on this issue, this Court notes that *Bruen* replaced a two-step approach that had evolved in the courts of appeals whereby a first step analyzed the history of the Second Amendment to see if it applied and a second means-end step was used to determine

[2] *See United States v. Portillo-Munoz*, 643 F.3d 437, 442 (5th Cir. 2011), *as revised* (June 29, 2011) (finding § 922(g)(5) constitutional under *Heller*).

if the regulation served an appropriate governmental purpose by appropriately circumscribed limitations on the constitutional right. In *Bruen*, Justice Thomas, writing for the majority, observed:

> Despite the popularity of this two-step approach, it is one step too many. Step one of the predominant framework is broadly consistent with *Heller*, which demands a test rooted in the Second Amendment's text, as informed by history. But *Heller* and *McDonald* do not support applying means-end scrutiny in the Second Amendment context. Instead, the government must affirmatively prove that its firearms regulation is part of the historical tradition that delimits the outer bounds of the right to keep and bear arms.

142 S. Ct. at 2127.

This passage suggests that the inquiry is a single question—the scope of the Second Amendment based on its text, as understood by the public at the time of its adoption, and as informed through historical context. *See* 142 S. Ct. at 2127-28. But, as set out below, courts have struggled with a chicken-and-egg conundrum. Does a historically traditional regulation mean that the conduct never fell within the scope of the Second Amendment because the public understood it to be excluded—a foundational exclusion based on an interpretation of "the people"? Or does the conduct fall within the scope (aliens are people, too), but is subject to longstanding regulatory limitations that bring it back out of the scope—a regulatory exclusion? And does it matter in this case?

C. Post-*Bruen* Interpretations

Bruen was issued less than seven months ago at the time of this writing. In the time since, this Court has located only two cases that have applied *Bruen* to a challenge to the

constitutionality of the federal statute prohibiting an alien illegally present in the United States from possessing a firearm. *United States v. DaSilva*, No. 3:21-CR-267, 2022 WL 17242870, at *5 (M.D. Pa. Nov. 23, 2022); *United States v. Carbajal-Flores*, No. 20-CR-00613, 2022 WL 17752395, at *4 (N.D. Ill. Dec. 19, 2022). Both courts analyzed the constitutional challenge in two steps: the *DaSilva* court first finding that "the people" under the Second Amendment likely did not include aliens illegally present in the United States and the *Carbajal-Flores* court finding the opposite based on binding circuit precedent. 2022 WL 17242870, at *11; 2022 WL 17752395, at *2-3. Both courts found that regardless of the first inquiry, the historical tradition of firearm regulation nonetheless supports this prohibition and ruled that this statute was constitutional under *Bruen*. 2022 WL 17242870, at *12; 2022 WL 17752395, at *4.

In contrast to these two opinions analyzing the statute prohibiting an alien illegally present in the United States from possessing a firearm, the issue of the felon-in-possession statute has been addressed by many federal courts. These cases illuminate the various approaches to *Bruen* and can be placed into three categories.

First are those finding that the plain text includes felons as part of "the people" entitled to exercise rights under the Second Amendment. *E.g., United States v. Charles*, No. MO:22-CR-00154-DC, 2022 WL 4913900, at *12 (W.D. Tex. Oct. 3, 2022) (treating the Supreme Court's observations regarding (1) plain text—which does not expressly define "the people" as limited to "law abiding citizens"—and (2) the presumptively lawful nature of felon-in-possession statutes to be in conflict); *United States v. Collette*, No.

MO:22-CR-00141-DC, 2022 WL 4476790, at *8 (W.D. Tex. Sept. 25, 2022) (same); *United States v. Coombes*, No. 22-CR-00189-GKF, 2022 WL 4367056, at *3 (N.D. Okla. Sept. 21, 2022); *United States v. Carrero*, No. 2:22-CR-00030, 2022 WL 9348792, at *2 (D. Utah Oct. 14, 2022). They reason that the language is not facially limited to law-abiding citizens and/or that the Supreme Court's remarks in that regard (including the presumptive lawfulness of felon-in-possession statutes), as dicta, are not binding. However, they each go on to find that the historical limitations on the right to keep and bear arms support the constitutionality of the statute.

Second are those that find that because felons are not law-abiding citizens, the Second Amendment's plain text does not apply to them. That is because "the people" was commonly understood in colonial times as meaning law-abiding, virtuous citizens. *E.g.*, *Range v. Attorney Gen. United States*, 53 F.4th 262, 284 (3d Cir. 2022); *United States v. Perez-Garcia*, No. 3:22-CR-01581-GPC, 2022 WL 4351967, at *6 (S.D. Cal. Sept. 18, 2022); *United States v. Snead*, No. 1:22-CR-033, 2022 WL 16534278, at *5 (W.D. Va. Oct. 28, 2022) (specifically relying on the Supreme Court's dicta that "the people" applies only to law-abiding citizens). They generally add that the historical context inquiry further supports the constitutionality of the felon-in-possession statute.

Third are those that take a more unified approach, not treating the plain text (conduct) and historical context (regulation) questions as separate steps in the analysis. *E.g.*, *United States v. Hill*, No. 21CR107 WQH, 2022 WL 4361917, at *2 (S.D. Cal. Sept. 20, 2022); *United States v. Siddoway*, No. 1:21-CR-00205-BLW, 2022 WL 4482739, at *2

(D. Idaho Sept. 27, 2022); *see also United States v. Jackson*, No. CR 21-51 (DWF/TNL), 2022 WL 4226229, at *2 (D. Minn. Sept. 13, 2022); *United States v. Butts*, No. CR22-33-M-DWM, 2022 WL 16553037, at *4 (D. Mont. Oct. 31, 2022) (rejecting argument that because the Supreme Court's felon-in-possession remarks are dicta, they can be ignored); *United States v. Grant*, No. CR 3:22-161-MGL-1, 2022 WL 16541138, at *3 (D.S.C. Oct. 28, 2022); *United States v. Burton*, No. CR 3:22-362-MGL-1, 2022 WL 16541139, at *3 (D.S.C. Oct. 28, 2022); *United States v. Riley*, No. 1:22-CR-163 (RDA), 2022 WL 7610264, at *10 (E.D. Va. Oct. 13, 2022) (remarking that, even if considered separately, "the people" does not include felons). Like the others, they conclude that, all things considered, the federal felon-in-possession statute is constitutional.

D. Analysis

The text of the Second Amendment reads: "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." The statute at issue makes it "unlawful for any person . . . who, being an alien . . . illegally or unlawfully in the United States . . . to ship or transport in interstate or foreign commerce, or possess in or affecting commerce, any firearm or ammunition; or to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce." 18 U.S.C. § 922(g)(5).

1. Conduct Within Scope of Second Amendment

The parties here have not offered any new perspectives that shed further light on whether the Supreme Court intended a two-part test (with different burdens of proof).

Defendant's argument analyzes each step individually, arguing first that the plain text of the Second Amendment encompasses aliens illegally present in the United States by construing "the people" to include those who are illegally and unlawfully present in the United States. D.E. 17, p. 5. Defendant contends that the history of the United States immigration laws shows that the framers did not differentiate between classes of migrants in referring to "the people," thereby including immigrants illegally present in the United States in this definition. *Id*. at 5-7.

The Government argues that the *Bruen* test involves two discreet steps and that the burden of proof on the first step—whether the conduct was within the scope of the Second Amendment—was impliedly placed on the party challenging the regulation.[3] D.E. 18, p. 7 (analogizing to pre-*Bruen* First Amendment cases). It also contends that "the people" in the Second Amendment refers only to those in the political community at the time of ratification, which excluded aliens illegally present in the United States. *Id*. at 9-10.

The Fifth Circuit held that the phrase "the people" in the Second Amendment does not include aliens illegally present in the United States after analyzing the text of the Amendment pursuant to *Heller*. *United States v. Portillo-Munoz*, 643 F.3d 437, 442 (5th Cir. 2011), *as revised* (June 29, 2011). While Defendant argues that *Bruen* abrogated this holding because the *Portillo-Munoz* court did not engage in historical analysis, *Bruen* expressly endorsed the *Heller* framework as it relates to textual analysis. *See Bruen* at

[3] The Government concedes that the Supreme Court did not state where the burden lies in determining whether conduct is covered by the Second Amendment. D.E. 18, p. 7. It explains that the issue was moot in *Bruen* because the parties there had agreed that the conduct was covered. *Id*.

2127. And here, the Fifth Circuit did not reach its conclusion upholding the constitutionality of § 922(g)(5) by conducting the means-end analysis now prohibited by *Bruen*. *See Portillo-Munoz*, 643 F.3d at 440-42. The Court finds that "the people" in the Second Amendment does not include aliens illegally present in the United States.

However, even assuming that *Bruen* abrogated *Portillo-Munoz* and Defendant here is broadly encompassed within the definition of "the people" protected under the Second Amendment, the regulation still comports with historical traditions limiting the scope of this Amendment. *See DaSilva*, 2022 WL 17242870, at *5; 2022 WL 17752395, at *4. For these reasons, the issue of whether Defendant has the burden to demonstrate this qualification is effectively moot. Either (1) as an alien illegally present in the United States, he is disqualified or (2) if qualified, the regulation still comports with historical traditions limiting the scope of the Second Amendment.

2. Historical Traditions Justifying Firearm Regulations

Defendant argues that the Government cannot meet its burden[4] of showing that the restriction on aliens illegally present in the United States is justified by longstanding historical traditions because illegal reentry was not criminalized until 1929 and the statute at issue was first passed in 1968, long after the Second Amendment was adopted. D.E. 17, p. 8. And the Supreme Court made clear that there must be a robust tradition of distinctly

[4] The Government argues that Defendant bears the burden of proof because he is making a facial constitutional challenge. D.E. 18, p. 6. This is inconsistent with the *Bruen* assignment of the burden of proof to the Government to show the historical justification for the restriction on Second Amendment rights. As already indicated, the Court declines to opine as to the burden of proof regarding the plain text scope of the Second Amendment, if it is a separate inquiry, because it is moot.

similar historical regulations as of the time the Amendment was ratified. *Id*. In response, the Government argues that the historical record supports that the right to bear arms was limited to citizens when the Amendment was adopted. D.E. 18, p. 13.

Prior to *Bruen*, some courts had investigated the law and understanding of colonial America with respect to aliens illegally present in the United States and the limits on their right to keep and bear arms at the time of the adoption of the United States Constitution and its amendments. That was the first step in the pre-*Bruen* analysis—the only step now approved by *Bruen*. *See, e.g.*, *United States v. Jimenez-Shilon*, 34 F.4th 1042, 1050 (11th Cir. 2022); *United States v. Carpio-Leon*, 701 F.3d 974, 982 (4th Cir. 2012); *United States v. Perez*, 6 F.4th 448, 463 (2d Cir. 2021) (Menashi, J., concurring)[5].

The Court finds that the historical context is sufficient to support the constitutionality of the statute prohibiting aliens illegally present in the United States from possessing a firearm. Because the historical context analysis provided by the other courts sufficiently exhausts the issue, the Court declines to write separately to detail this decision. Whether or not the Second Amendment analytically applies to aliens illegally present in the United States at the outset, it is clear that (a) the Supreme Court did not intend to overrule precedent that upheld restrictions on the Second Amendment regarding who may lawfully possess a firearm and (b) the historical context of the statute prohibiting aliens illegally present in the United States from possessing a firearm shows that it is a

[5] While the majority opinion assumed that the restriction on aliens illegally present in the United States implicated rights guaranteed by the Second Amendment in order to proceed in its means-end inquiry, the concurrence recounted the history of the Second Amendment that precluded a finding that aliens illegally present in the United States could invoke the Amendment. *See Perez*, 6 F.4th at 453, 448-63.

longstanding regulation that does not infringe on properly understood Second Amendment rights.

CONCLUSION

For the reasons set out above, the Court **DENIES** the motion to dismiss count one of the indictment (D.E. 17).

ORDERED on January 10, 2023.

NELVA GONZALES RAMOS
UNITED STATES DISTRICT JUDGE