The mission of the National Christian Forensics and Communications Association is to promote excellence in communications through competitive opportunities where homeschool students develop the skills necessary to think critically and communicate effectively in order to address life issues from a biblical worldview in a manner that glorifies God.
On the following pages, you’ll find the competition packet for the 2018-2019 NCFCA Moot Court problem. The information contained here outlines the main arguments for each side, as explained through the lens of “judges” issuing opinions in a fictional case in district and appellate court.

Under NCFCA rules, students are limited in the round to materials contained in the record, which includes the facts and the sources used throughout this packet. Students may, of course, come up with their own arguments based on the materials included in the record. Further, while the court opinions in this packet are based on the same facts, they may present those facts from different perspectives, highlighting the importance of “framing” the factual narrative to best support the legal argument.

This packet is divided into two “issues” and each competitor on a team will be responsible for arguing one of those issues. Although this remains a team effort, this year’s problem features two different and separate Petitioners who each have their own separate appellate issue.

As with any Moot Court problem, the volume of material may seem daunting at first, but its length and breadth are intentional and actually serve to make it easier for students to get a handle on these issues right away. The court opinions give substantial background information on these issues, for the purpose of educating students on the basic concepts from the beginning. Make no mistake, the issues students will argue in this moot court competition are real, complex legal issues, often taught in the second and third years of law school. Nonetheless, these issues are not as difficult as they seem, and NCFCA students have proven very capable of quickly mastering these topics.

We encourage students to jump in and try arguing the case right away—the details will fall into place with practice. In addition to reading this packet and outlining the major arguments for each side, students should read the problem and, once it is released, the bench brief for assistance in figuring out the key arguments and how best to present them. Students are allowed to research outside the problem packet. Although the in-round citations will be limited to things contained within this packet, outside research can often spark different ways of thinking and can lead to better understanding and clearer argumentation.

Finally, the appendix to this problem packet includes copies of the cases and relevant issues from statutes cited within the packet. These are provided only for your convenience. There is no need to master them all before the beginning of competition season. Many of the cases and materials cited in the packet are only cited for only a small portion of the case, and the portions of the case not cited in the problem may not be relevant. The important material for the students to learn before competition is the material contained within this packet. The fictional court opinions already highlight the major arguments and sources for both sides, and as long as students understand these key points they will be ready to argue the case, at least at a basic level.

While deeper study of the cited materials is not necessary to begin competition, as students progress they may benefit from more detailed study of the cited materials. To assist in this effort, below we have listed the primary sources used (in alphabetical order) for each of the two issues. Every student competing in moot court should aim to become familiar with these cases, and then move on to the other materials cited within the packet only when they are ready to develop advanced arguments based on the nuances of the law. If you would like to add an additional resource for teaching, thought-provoking conversation, and practice, we would suggest that you participate in HSLDA’s online class that uses the
current NCFCA Moot Court problem as its core. Use code PTNCFCA30 to receive a $30 discount off registration.

While it is helpful for students to, at minimum, become familiar with these primary cases throughout the competition season, there is no need for students to feel limited to the text of the cases themselves. Many of these cases are considered landmark cases in the legal world, and students should have little difficulty finding helpful analyses of these cases online with simple internet searches.

We are excited that you are interested in NCFCA Moot Court! If you’re not sure whether to compete in this event, we encourage you to give it a try—moot court is a truly unique event, and students and parents alike typically find that they enjoy it far more than they expected. Additionally, there are substantial resources available through NCFCA and elsewhere for students looking to learn this popular event. We hope you find the materials on the following pages interesting and helpful, and we look forward to seeing you at an NCFCA Moot Court competition this season.
Table of Cases Cited

2nd Amendment Issue

*Heller v. District of Columbia (Heller II)*, 670 F.3d 1244 (D.C. Cir., 2011)
*Moore v. Madigan*, 702 F.3d 933 (7th Cir., 2012)
*United States v. Carpio-Leon*, 701 F.3d 974 (4th Cir., 2012)
*United States v. Huitron-Guizar*, 678 F.3d 1164 (10th Cir., 2012)
*United States v. Meza-Rodriguez*, 798 F.3d 664 (7th Cir., 2015)
*United States v. Portillo-Munoz*, 643 F.3d 437 (5th Cir., 2011)
*Woollard v. Gallagher*, 712 F.3d 865 (4th Cir., 2013)

5th Amendment Issue

*Greenholtz v. Inmates of Nebraska Penal Complex*, 442 U.S. 1 (1979)
*Jennings v. Rodriguez*, 200 L. Ed. 2d 122 (2018)
*Jones v. Cunningham*, 371 U.S. 236 (1963)
*Leng May Ma v. Barber*, 357 U.S. 185 (1958)
*Prieto Romero v. Clark*, 534 F.3d 1053, (9th Cir. 2008)
*Shaughnessy v. Mezei*, 345 U.S. 206 (1953)
*Wong Wing v. United States*, 163 U.S. 228 (1896)
*Zadvydas v. Davis*, 533 U.S. 678 (2001)
IN THE SUPREME COURT
OF THE UNITED STATES

2018-19

Dominic Garcia and Maria Alvarez, Petitioners
v.
United States of America, Respondent

On Writ of Certiorari to the United States Court of Appeals for the Fourteenth Circuit.

ORDER OF THE COURT ON SUBMISSION

IT IS THEREFORE ORDERED that counsel appear before the Supreme Court to present oral argument on the following issues:

1) Whether the Make America Safe Again Act’s ban on the concealed carry of firearms by undocumented persons violate the right to bear arms protected by the Second Amendment?

2) Whether the Make America Safe Again Act’s provision for the indefinite detention of illegal entrants into the United States of America violates the Due Process Clause of the Fifth Amendment?

© NCFCA 2018. The contents of this case problem are fictional, and while the facts and circumstances described are drawn from reality, any relation to actual persons is purely coincidental.
In the
United States Court of Appeals For the Fourteenth Circuit

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DOMINIC GARCIA and MARIA ALVAREZ,
Plaintiffs-Appellants

v.

UNITED STATES OF AMERICA,
Defendant-Appellee.

____________________

Appeals from the United States District Court for the District of New Mexico.

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Before ANTHONY, Chief Judge, and CAVANA and HARLAND, Circuit Judges.

Opinion by Chief Judge Anthony, in which Judge Harland joins:

I.

This case comes before us on appeal from the United States District Court for the District of New Mexico, where two constitutional challenges to the same law were consolidated for the purposes of argument under Fed. R. Civ. P. 42(a). Plaintiffs Dominic Garcia (hereafter “Garcia”) and Maria Alvarez (hereafter “Alvarez”) filed suit. Garcia alleged that the denial of his concealed carry permit under the Make America Safe Act violated his right to keep and bear arms; Alvarez claimed that her indefinite detention was a result of the Make America Safe Act and that it violated her Habeas Corpus rights. After a three-week bench trial, the district court granted judgment in favor of the defendant, the United States, on the merits of the constitutional claims raised based on the Second Amendment and procedural due process. We AFFIRM the judgment of the United States District Court for the District of New Mexico.

II.

Overview of Facts

A. The Make America Safe Again Act

On January 20, 2017, President Christian Thomas was inaugurated as the 45th President of the United States. He campaigned on a platform of being tougher on immigration, an issue that had been a focal point of the presidential election. In 2014, several news stories—including the tragic murder of a young girl by an illegal alien—thrust immigration reform into the national spotlight. The two political parties drew battle lines over their stances on immigration, and it significantly affected the congressional midterm elections. Republicans kept control of the House of Representatives in 2014, while Democrats kept the Senate,
effectively killing hopes for any significant reform. Republican and Democratic party leaders attempted several times to write an omnibus immigration bill, but no bill ever gained the consensus of both parties or both houses of Congress.

As such, in 2016, then-candidate Thomas promised to cut through congressional gridlock and use his background as a corporate attorney to forge consensus on immigration without backing down on promises he made about tougher border enforcement. He won the popular vote narrowly, and the electoral college by an even smaller margin. His political party—the Republican Party—gained the presidency but failed to gain seats in the Senate, leaving one house of Congress in control of Democrats. Some pundits stated that this doomed his chances of making any meaningful progress on immigration reform.

In response, President Thomas encouraged congressional leadership towards compromise in public addresses. He asked House leaders to draft an immigration bill that included increased border security. In exchange, he promised to support a pathway to citizenship for certain classes of illegal aliens.

In April, Congresswoman Guy Richie (R-CO) referred a new bipartisan immigration bill to the House Judiciary Committee’s Subcommittee on Immigration and Border Security. After rounds of debate and intense media scrutiny, an omnibus immigration reform bill called the “Make America Safe Again Act of 2017” (hereafter “the Act”) passed in the House by a vote of 221-209, and in the Senate by a vote of 59-40. On May 11, 2017, the President signed it into law.

The Act includes significant changes to U.S. immigration law. Several provisions make it more difficult for aliens to cross the border illegally and give more power to border enforcement. It establishes a new zero tolerance policy for immigrants who have entered illegally, rescinding an older policy which allowed non-violent immigrants to go free to save resources for high-threat immigrants. The Act also appropriates funding for increased border security at critical points (including fencing and drone surveillance) and distributed more resources to U.S. Immigration and Customs Enforcement (ICE). Most controversially, the Act gives the attorney general and federal law enforcement authorities the authority to capture unlawful immigrants and detain them indefinitely while they await deportation hearings. While alternatives to detention are not expressly prohibited, no alternatives are explicitly named in the Act.

The Act also provides a significant concession for pro-immigration groups. It offers a path to citizenship for undocumented persons who reside in the U.S. because they immigrated as children (voluntarily or involuntarily with their parents). The Act stipulates that undocumented persons who immigrated to the U.S. before the age of 16, have lived in the country for seven years, are not currently in deportation proceedings, and have never been convicted of a felony offense or multiple misdemeanors are eligible for citizenship. These immigrants can register with U.S. Citizenship and Immigration Services (USCIS) to prove their eligibility for the amnesty program and apply for citizenship. If their application is initially approved, they are granted immunity from deportation for a five-year waiting period until their application is granted or denied. This final grant or denial is based on the applicant’s good behavior during the waiting period and retaining eligibility under these requirements.

During the waiting period, immigrants must comply with a number of restrictions: they must remain in the country without traveling outside the U.S., and they cannot be convicted of a felony or classified misdemeanor. Additionally, they may not purchase, sell, or manufacture firearms. Moreover, the Act bars undocumented persons from carrying firearms by any means, by prohibiting them from obtaining
concealed carry permits (and states from granting permits to those persons), and it bars those undocumented persons from openly carrying a firearm in states that allow open carry (see Appendix A).

B. Facts of the Second Amendment Issue

Undocumented Persons in the U.S.

There are an estimated 11.3 million illegal immigrants in the U.S., about 8 million of whom are believed to be employed, meaning they constitute approximately 5% of the American workforce. Undocumented workers are overrepresented in manual and low-skilled labor, such as farming and construction-related jobs, where the Bureau of Labor Statistics estimates they make up 26% and 15% of those workforces, respectively. In every occupation, however, U.S. citizens outnumber undocumented workers.

Most undocumented persons are long-term residents. As of 2017, an estimated 66% of adult undocumented persons had resided in the U.S. for 10 years or more, and only 14% of undocumented immigrants had lived in the U.S. for less than five years. In 2014 the median length of time an illegal immigrant had lived in the U.S. was 14 years, meaning that half of illegal immigrants had lived in the U.S. for longer than that.

It is difficult to calculate how many of the millions of undocumented migrants were brought to the U.S. as children and, thus, how many would be eligible for citizenship under the Act, but some estimates exist. Before the passage of the Act, USCIS estimated that 950,000 undocumented persons would apply for citizenship through the Act and that most would be granted legal status. A public interest group, Advocates for Immigrants (AFI), estimated that there were 1.6 million immigrants who met the criteria laid out in the Act. A researcher from a non-profit think tank, the Center for Immigration Policy and Immigrant Rights (CIPAIR), testified before the House Judiciary Committee that there were 3.1 million immigrants who had been brought to the U.S. as children and only a small fraction of them had committed crimes disqualifying them from amnesty. The federal government has not yet published official numbers on how many illegal aliens have applied for citizenship status, so we must rely on initial estimates.

Criminal Activity and Gun Rights

As a condition to Republicans signing on to a pathway to citizenship, Speaker of the House Jim Jeffrey said that “provisions must be implemented to stop criminal aliens from taking advantage of the path to citizenship–after all, we don’t want to make permanent the crime and chaos illegal aliens have brought to this country.” While there are a number of well-publicized incidents of undocumented persons committing crimes, illegal immigrants generally commit crimes at lower rates than native-born citizens. One 2018 study found that illegal immigrants in Texas were 25% less likely to be convicted of homicide than citizens, 11% less likely to be convicted of sexual assault, and 79% less likely to be convicted of theft. A study from the American Journal of Criminology in 2015 also found that neighborhoods with higher concentrations of illegal immigrants have lower crime rates than those with lower concentrations of illegal immigrants.

However, the criminal activity of illegal immigrants is not negligible, even among immigrants brought to the U.S. as children. The Government Accountability Office (GAO) in 2011 found that undocumented persons were responsible for 200,000 assaults, 25,000 homicides, 42,000 robberies and nearly 70,000 sex
offenses. While there are no reliable disaggregated numbers for how many of these crimes were committed with firearms, assaults with deadly weapons were included in the number of assaults. In anticipation of the Act, USCIS also calculated the criminal activity of aliens who had been brought to the U.S. as children. It estimated that 8% of immigrants who would otherwise be eligible for citizenship had committed prior crimes.

Historically, there have been few relevant federal gun restrictions, but federal law heavily restricts possession of firearms by noncitizens. Non-immigrants, such as tourists or temporary guest workers, are generally prohibited from possessing firearms, unless they have a valid sporting purpose for so doing (such as a tourist on a hunting trip). No such exceptions exist for undocumented persons, however: the federal Gun Control Act of 1968 flatly prohibits undocumented persons from possessing firearms and makes such possession a felony offense. In a 2017 speech, the Attorney General of the U.S. defended the policy by stating, that the law was meant to “prevent possession of guns by unfit persons and to restrict possession of types of firearms that are particularly suited to criminal misuse.”

**Appellant Garcia**

Dominic Garcia was born in El Salvador. When he was two years old, his mother, fleeing extreme poverty, brought him across the southern border into the U.S. They settled in Albuquerque, New Mexico. Garcia grew up with the knowledge that his mom sometimes had to hide from the police, but he assumed that he was an American citizen. He went to public school in New Mexico, and graduated at the top of his high school class. He is conversational in Spanish, but not fluent (he is fluent in English and testified that he considers it his native language). He has never returned to El Salvador, and has no notable family ties to his birth country. In 2006, he enrolled in Central New Mexico Community College, which does not require proof of citizenship for academic eligibility. He graduated with a bachelor’s degree in engineering, and married his wife at the age of 23.

As an adult, Garcia’s mother informed him of his undocumented status, but Garcia and his mother were afraid that if they tried to apply for citizenship they would be identified as unlawful aliens and deported. New Mexico does not require employers to verify the citizenship status of potential employees, and Garcia was already on his way to a college degree, so he decided to continue life as an undocumented person and hope that a pathway to citizenship would open up someday.

Garcia lived in a neighborhood that was heavily populated by illegal immigrants in New Mexico, and the community found ways to operate as functional U.S. citizens. The consensus among the community was that paying federal income taxes—even as an illegal immigrant—would curry favor with the government and possibly make them eligible for citizenship someday. Garcia obtained the Social Security number of a citizen and used it to fill out I-9 tax forms, and he filed tax returns using an Individual Taxpayer Identification Number (ITIN). Using an ITIN, illegal immigrants can pay taxes without noting a Social Security number and claim the income reported on their W-2s.

After graduating college, Garcia obtained a job as a construction engineer in a suburb north of Albuquerque. Although he does not have a birth certificate, Garcia estimates that he is currently 32 years old based on his mother’s report of when she carried him across the border. The parties do not dispute this timeline or Garcia’s age. Garcia and his wife have two children—aged 7 and 4—who are U.S. citizens by birth. Garcia has never been arrested for, let alone convicted of, any state or federal crime.
In October 2014, Garcia became the victim of crime. After working late on a job site one evening, he missed the last bus home and decided to walk. On his way, he was accosted by two unknown individuals who assaulted him and stole his wallet and cell phone. Garcia’s wife took him to the hospital, where he stayed for three days because of injuries to his head and ribcage. Garcia was worried that if he called the police they would discover his unlawful residence in the U.S., so he did not report the crime to law enforcement.

In response, Garcia sought to purchase a firearm for self-defense, both to protect himself and to protect his family. While federal law prohibits undocumented persons from purchasing a firearm, New Mexico has few regulations on the sale of firearms and allows any resident of the state—regardless of citizenship—to purchase firearms from any retailer without a background check or a permit. Garcia purchased a .38 Special revolver from a major firearms retailer in December 2014.

When the Make America Safe Again Act was passed in 2017, the news was well-publicized in southern border-states and areas with heavy populations of undocumented persons. Garcia quickly learned that he was eligible for deferred action and applied for citizenship status. He received a letter on September 7, 2017, informing him that his application was accepted and that he had entered into the five-year waiting period.

With the hope that he would soon become a citizen, Garcia went to a county clerk’s office to apply for a concealed carry permit. New Mexico state law allows for the concealed carry of handguns in public with a permit. In order to receive a permit, residents must complete a three-hour gun safety training course online and pass a test and background check. Garcia completed the training course, passed the test, and submitted his application on October 11, 2017.

During Garcia’s background check, it became evident that he was a noncitizen. His information was cross-checked with federal databases, and it was revealed that Garcia was an illegal alien awaiting citizenship status. Because the Act specifically proscribed granting concealed carry permits to unlawful aliens, his application for a concealed carry permit was denied.

After contacting a public interest legal group specializing in litigating immigrant issues, Garcia filed suit under 42 U.S.C. § 1983 alleging that the Act violated his constitutional rights by denying him a concealed carry permit, because, he argues, concealed carry in public is an essential element of the right of self-defense that the Second Amendment protects.

C. Facts of the Fifth Amendment Issue

Border Security in the U.S.

ICE has 1,013 detention centers across the country. On average, these facilities held a cumulative total of 39,322 people per day in 2016. That same year, 71% of detainees were subject to “mandatory detention,” triggered by a criminal conviction. The crimes which subject an individual to mandatory detention fall into two categories: inadmissibility into the U.S.—which includes drug-related offenses, terrorism, and “crimes of moral turpitude” including but not limited to murder, rape, domestic abuse, aggravated assault, theft, and fraud—and crimes warranting deportation—including multiple crimes of moral turpitude,
firearms offenses, and espionage. Individuals in mandatory detention are apprehended by ICE upon release from criminal custody and may not receive bond hearings. Their detention lasts as long as the proceedings against them.

Despite the high rate of mandatory detainees under the previous law, on average more than half of all detainees (51%) are marked as non-threatening, and just 15% were classified as high security threats. ICE has not published updated detention data since the passage of the Act. However, it is common knowledge that the Act has substantially increased the number of detainees apprehended at the border. The effects of increased detention rates on the percentage of mandatory detainees and their threat classifications are unknown.

The detention provision of the Act has polarized the American political landscape. Supporters of the Act, including President Thomas, have been known to say that it stops the “infestation” of America with “criminals.” This stance has grown increasingly popular since a detainee who had been released pending his deportation hearing murdered a mid-western college student. Under the new Act, detainees do not have the opportunity to challenge their detention, so a detainee would not have had the chance to be released and harm a U.S. citizen. Opponents of the Act, on the other hand, call the policy “abuse,” and an affront to human rights. They point to deaths in detention and the high rate of “non-threatening” persons detained as support for their stance. Many opponents suggest employing alternatives to detention which are less restrictive. They cite, as examples, bond, parole, the use of ankle monitoring systems, community programs, and check-ins with ICE officers.

According to 2016 ICE statistics, detainees spend an average of 44 days in detention, but some have spent years in custody. Detention costs the U.S. government an estimated $266 per detainee per day for a family, or $161 for an individual. Alternatives to detention range from 17 cents to $17 per person per day. Of the detainees held in ICE facilities who chose to appeal their deportation orders in 2010, 45% prevailed. 52% prevailed on their claims in 2016. No corresponding data exists for the success of these claims after the Act went into effect.

**Appellant Alvarez**

Maria Alvarez was born in Vasco de Quiroga—a small agrarian village in central Mexico. Living conditions there are poor and wages prove similarly low. When disease strikes, residents often suffer without medical attention because they cannot afford to travel to a larger town where they might be able to find a doctor. With little opportunity for upward mobility, most live out their days in poverty. Alvarez—like most in her village—has never possessed a birth certificate, passport, or any other legal documentation to prove her identity.

In 2005, when Alvarez was 10 years old, her parents fell ill and passed away. She continued to live in Vasco de Quiroga, where her father's parents cared for her together until, in late 2011, Alvarez’s grandfather also succumbed to disease. Alvarez's father, mother and grandfather had all been unable to afford medical attention. Fearing a similar fate for herself and her grandmother, Alvarez sought employment with better pay hoping she might pull her family out of poverty. Though no such opportunity presented itself within Vasco de Quiroga, Alvarez had heard rumors that farmers in the U.S. would pay more than triple her current wages for work.
Several in Alvarez’s community consistently traveled to New Mexico to work as seasonal farm laborers. In 2012, Alvarez decided to join them. She was 16 at the time. The first year, she made several thousand dollars—more than she had ever seen at one time. From 2012 to 2017, Alvarez worked in the U.S. and only returned to Mexico during the off-season. She learned English, and even knew some popular American songs and films. By 2017, Alvarez had earned enough that she believed, with one more summer’s wages, she could afford to move her grandmother somewhere with better care—maybe even to the U.S., where they would then seek permanent residency together.

On May 18, 2017, Alvarez and four other migrant workers—Marco Ramirez, Alejandro Quiroz, Mateo Rivera, and Camila Rosa—drove a truck north from Vasco de Quiroga toward New Mexico where they intended to resume work for several U.S. farmers. They had never had difficulty crossing the border before, but that day they were stopped by U.S. Customs and Border Protection (CBP). Ramirez pulled over and compliantly rolled down the window as CBP Border Patrol Agent Chris Browning asked to see identification. Ramirez explained that they had been working in New Mexico for several years, but when all five failed to produce documentation Agent Browning told them they were under arrest. Browning escorted them to a local police station, where they were informed that they had broken U.S. immigration law and would be scheduled for deportation. Alvarez asked Officer Paul Sanchez whether there was a way she could stay in the U.S. to work, rather than be deported. Officer Sanchez informed her that in order to do so, she would have to successfully challenge her deportation in a formal hearing and remain in detention in the Santa Fe Federal Regional Pretrial Detention Facility (SFPDF) until her case had been decided. When Alvarez inquired how long she would have to wait, Officer Sanchez was unable to give her a clear timeframe. Alvarez asked to be scheduled for a hearing and Officer Sanchez reported her request to the appropriate authorities.

On November 24, 2017, Alvarez had spent six months in detainment at SFPDF and was still waiting for her hearing. she asked guard Patty Morris whether her hearing had been scheduled yet. Morris brought the inquiry to her supervisors, who informed her that Alvarez’s hearing had not yet been scheduled. Morris relayed this information to Alvarez, explaining that the process often takes longest for those whose history, like Alvarez’s, does not weigh particularly for or against her admittance to the U.S. Alvarez asked if she could leave SFPDF to work while she waited for her hearing to be scheduled and promised that, if let go, she would appear for her removal hearing. Morris told her that would require a separate hearing—one which SFPDF would not grant because it was not required to under the Act—and that detention time was mandatory under the Act.

An immigrant rights attorney happened to be visiting the facility that day and overheard Alvarez speaking with the guard. The attorney asked to speak with Alvarez and informed her that she should have the 5th Amendment right to the separate hearing she had requested and offered to file suit on her behalf. Alvarez accepted the offer. Both parties stipulate that ICE has deemed Alvarez “non-threatening.”

D. Jurisdiction and Standing
The district court had subject matter jurisdiction under 28 U.S.C. § 1331, and venue is proper under 28 U.S.C. § 1391(e). The United States was properly served under Fed. R. Civ. P. 4(i)(2) and 28 U.S.C. § 1391(e)(2). Plaintiffs Garcia and Alvarez sufficiently demonstrated to the district court that they had standing to bring this suit, and the Government never alleged they lacked standing. All previously enumerated facts were found by the district court after a bench trial and formed the basis for the judgment entered in favor of the United States by the district court. No factual disputes remain, and all issues still outstanding in this litigation are questions of law that are reviewed de novo.

III.

A. Second Amendment Analysis

This case touches on two critical aspects of the right to keep and bear arms: the breadth of the Second Amendment’s applicability and the extent of the government’s power to regulate firearm possession. The Supreme Court’s guidance on the Second Amendment has been substantial but limited in scope, and lower courts have been left to navigate the world of gun regulations by applying these precedents to a variety of complex situations. This is one such situation, and a case of first impression for this court.

The right of self-defense has been recognized as a fundamental human liberty, and the central purpose of the Second Amendment. McDonald v. City of Chicago, 561 U.S. 742 (2010). We should proceed with caution before legitimizing the government’s ability to take that away. But the legislative tradition of regulating immigrant behavior and the interests of the government counsel us towards the conclusion that the petitioner’s argument, while novel, is constitutionally unsound.

Standard of Review for Gun Regulations

While District of Columbia v. Heller, 554 U.S. 570 (2008), clarified the original meaning of the Second Amendment, it did not codify a standard of review for adjudicating future cases. In this absence, lower courts have fashioned a two-step review system that mimics the principles in Heller. The D.C. Circuit in Heller v. District of Columbia (“Heller II”), 670 F.3d 1244 (D.C. Cir. 2011), explained that courts must first inquire “whether a particular provision impinges upon a right protected by the Second Amendment,” and, second, must “determine whether the provision passes muster under the appropriate level of constitutional scrutiny.” The second prong follows from the first, so the foundational question is whether the Second Amendment applies to Garcia in the first place.

Applicability of the Second Amendment Privilege to Non-citizens

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.” U.S. const. amend. II. In Heller, the Court clarified that this guarantees an individual right to bear arms for self-defense, not merely a collective right a militia. In recent years, the courts have been forced to grapple with the meaning of “the people.” If “the people” have an individual right to own guns, are there any classes of people Congress can prohibit from owning guns? Most importantly for this case: does “the people” refer to just citizens, or to noncitizens as well?
On the one hand, when the Constitution uses the phrase “the people” or “persons” without reference to citizenship, the courts have interpreted this to include noncitizens. For example, noncitizens, even illegal aliens, have rights of speech, privacy, due process, and even equal protection of the law. In United States v. Verdugo-Urquidez, the Court commented, “‘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.” Verdugo-Urquidez, 494 U.S. 259, 265 (1990). However, this case was not a definitive proclamation of the extension of the term “people” in the Second Amendment; the case itself only dealt with Fourth Amendment concerns, so the reference to the Second Amendment is nonbinding dicta.

When the Court did deal specifically with gun rights in Heller, it observed, “In all six other provisions of the Constitution that mention ‘the people,’ the term unambiguously refers to all members of the political community, not an unspecified subset.” Heller, 554 U.S. at 644. Garcia makes the bold claim that he is a member of the political community, despite his unauthorized residency.

Garcia fails to note, however, that Heller’s historical discussion of the Second Amendment’s meaning was inextricably linked with the concept of citizenship. The Tenth Circuit commented that “It is not exactly reading between the lines to note how frequently the opinion [in Heller] connected arms-bearing and citizenship.” United States v. Huitron-Guzar, 678 F.3d 1164, at 1168 (10th Cir. 2012). Citizens, those who live and reside here while following our laws, are implied to be the ones who have a protected ability to own a gun.

Significantly, Heller did not attempt to “clarify the entire field” of Second Amendment jurisprudence. 554 U.S. at 635. The question at issue in that case was whether the Second Amendment protects an individual right to bear arms or only the collective right of a state militia. As such, its commentary on the applicability of the right to illegal aliens is mere dicta, and trying to discern from Heller alone whether an illegal alien can claim Second Amendment protection stretches the case too far.

Even if Heller’s comment that all members of the political community have Second Amendment rights does represent binding doctrine, it does not thereby follow that Garcia is among the members of the political community who can claim a right to bear arms. The Fifth Circuit has clarified that “Illegal aliens are not ‘law-abiding, responsible citizens’ or ‘members of the political community,’ and aliens who enter or remain in this country illegally and without authorization are not Americans as that word is commonly understood.” United States v. Portillo-Munoz, 643 F.3d 437, 440 (5th Cir. 2011). Accordingly, the Supreme Court has routinely held that Congress may distinguish between citizens and noncitizens, and particularly between legal and illegal aliens. “Congress has the authority to make laws governing the conduct of aliens that would be unconstitutional if made to apply to citizens.” Id. at 441. For example, Congress can deny Medicare benefits to certain classes of illegal aliens in a manner that would be unconstitutionally discriminatory if done to citizens. Id. at 441 (internal citations omitted).

Further, just because the Constitution protects a right does not mean that it protects that right in the same way for all people, regardless of externalities or circumstances. Huitron-Guzar observes, “[The] ascending scale of constitutional rights is elaborate. An alien outside the country has fewer rights than one within, e.g., an alien held at the border has no right to a deportation hearing.” 678 F.3d. at 1166.
Congress unquestionably has the ability to limit the breadth of gun ownership, even among citizens and even along arbitrary lines. *Heller* clarified that an individual right to bear arms does not mean governments cannot restrict the rights of felons to own guns. 554 U.S. at 626-27. Most felons are U.S. citizens, and many are nonviolent. But just because both a con artist and an axe murderer are equally affected by a gun ban for felons does not make the ban presumptively invalid. Similarly, just because Garcia–admittedly, a seemingly benign undocumented alien–has lost his access to a concealed carry permit along with other more dangerous and more untrustworthy immigrants, does not make Congress’ action illegitimate.

Nonetheless, the Act is not arbitrary in the first place. Congress has not cast an overly wide net, scooping up persons with legitimate gun rights in the process. The Fourth Circuit, addressing a similar case, noted, “Illegal aliens are not law-abiding members of the political community and aliens who have entered the United States unlawfully have no more rights under the Second Amendment than do aliens outside of the United States seeking admittance.” *United States v. Carpio-Leon*, 701 F.3d 974, 975 (4th Cir. 2012). The very fact that Garcia entered into the U.S. illegally, resides in the U.S. illegally, and is receiving wages illegally, demonstrates that he is not a member of the political community that can invoke a Second Amendment right.

In his dissent, Judge CAVANA contends that Garcia should not be treated as part of the class of illegal aliens, since he is on his way to becoming a citizen. He argues that he is more akin to a permanent resident than a criminal alien crossing the southern border repeatedly. This is simply not his determination to make. “[C]ourts must defer to Congress as it lawfully exercises its constitutional power to distinguish between citizens and non-citizens, or between lawful and unlawful aliens, and to ensure safety and order.” *Huitron-Guizar*, 678 F.3d at 1170. Mr. Garcia may be in a sort of ‘probationary period’ as he takes advantage of the Act’s pathway to citizenship. But this does not entitle him to the full rights and privileges of citizenship unless and until he becomes a citizen.

**Level of Scrutiny**

We do not concede that Garcia had a colorable Second Amendment claim. However, in the alternative (and for the sake of clarifying our Second Amendment jurisprudence), we are willing to assume *arguendo* that Garcia has some sort of Second Amendment right, albeit a limited one. If that were true, then the Act imposes a burden on his right to bear arms. While no provision of the Act currently seeks to take away the gun that Garcia possesses, the Act he challenges prohibits him from legally carrying it outside his home. This burdens his liberty interest under the Second Amendment, so the government must justify this intrusion upon his personal liberty. While many statutes burden constitutionally-protected liberties, not all of them are unconstitutional, so long as the government can demonstrate that the challenged statute survives the appropriate standard of review. Thus, we turn to the second prong of *Heller II*.

Unfortunately, there is no brightline for when to apply different levels of scrutiny in Second Amendment cases. *Heller* was clear that rational basis review will not suffice to evaluate gun regulations, since that would effectively eviscerate the Second Amendment. The circuits have instead applied more exacting levels of scrutiny when the law is more burdensome. Most circuits have settled on a version of intermediate scrutiny to review restrictions on gun ownership–especially those that apply to illegal immigrants. For example, the Seventh Circuit analyzed a similar statute and required a “strong showing” from the government that the law was “substantially related to an important governmental objective,” language we have always understood to refer to intermediate scrutiny. *United States v. Meza-Rodriguez*, 798 F.3d 664,
672 (7th Cir. 2015) (internal citations omitted). Cf. Huitron-Guizar, 678 F.3d at 1169 (noting that intermediate scrutiny would seem to apply to a Second Amendment claim brought by an illegal alien). We are inclined to do the same.

The Make America Safe Again Act thus demands that we answer the question: is a ban on concealed carry permits for a class of undocumented persons substantially related to an important governmental objective? We think there is little debate that the answer is yes.

Governmental Interest

“[O]utside the home, firearm rights have always been more limited, because public safety interests often outweigh individual interests in self-defense.” Woollard v. Gallagher, 712 F.3d 865, 876 (4th Cir. 2013) (internal citations omitted). Indeed, public safety is certainly an important governmental objective. It is one of the chief goals of immigration law specifically and criminal law generally. For this reason, states have routinely limited the concealed carry of weapons in a number of cases, and other states have at times prohibited it altogether.

However, this case does not require us to comment on the constitutionality of concealed carry bans in general—merely for the small subgroup of undocumented persons, particularly those who are waiting to receive citizenship. And while Garcia tells a compelling tale of being brought to this country as a toddler and living and working here, he nonetheless resides here illegally and lives and works in violation of federal law. He is nothing short of a criminal, and the government has the sovereign power to deport him. The fact that he is awaiting citizenship does not change this—during his 5 year probation, his eligibility can be revoked and he can be sent back to El Salvador. Without having embraced the duties of citizenship, Garcia cannot expect the rights of citizenship. The government has a strong interest in limiting his access to weapons.

Not to mention, “illegal aliens are those who… are likely to maintain no permanent address in this country, elude detection through an assumed identity, and – already living outside the law – resort to illegal activities to maintain a livelihood.” Portillo-Munoz, 643 F.3d at 441. Indeed, the facts of our record show the number of crimes committed by illegal aliens is a real national threat. Congress surely has an interest in limiting the damage immigrants could do with guns, and prevent aliens from using the pathway to citizenship as a shield for criminal behavior. Or as the Fifth Circuit explained in Huitron: “It is surely a generalization to suggest, as courts do… that unlawfully present aliens, as a group, pose a greater threat to public safety— but general laws deal in generalities… The law applies with equal force to those who entered yesterday and those who…were carried across the border as a toddler. The bottom line is that crime control and public safety are indisputably "important" interests.” 678 F.3d at 1170 (internal citations omitted).

Even the one circuit that has recognized the right of illegal immigrants to own weapons has upheld government restrictions on that right. In Meza-Rodriguez, the Seventh Circuit agreed with the government’s position that unauthorized noncitizens “often live…largely outside the formal system of registration, employment, and identification, [and] are harder to trace and more likely to assume a false identity.” 798 F.3d at 673. Given this reality, the government’s interest in denying concealed carry permits to illegal immigrants is an important one, and their method is sufficiently tailored to their goal.
IV.

A. Fifth Amendment Analysis

Today the court faces a unique question: does the Fifth Amendment's due process clause imply a right to parole, probation or bail for non-citizens found in violation of U.S. immigration laws? We find that it does not and address two issues underlying Alvarez's claim. First, to what extent can a person who has unlawfully entered the country claim the protection of the Fifth Amendment? Second, do the Fifth Amendment's provisions—including the guarantee of the opportunity for bail—extend to temporary release from detainment, prior to a final hearing?

Non-Citizens' Claim to the Fifth Amendment

The question of the Fifth Amendment’s protections as applied to undocumented immigrants is a complex one. Judge CAVANA in his dissent rightly observes the lofty language of Wong Wing v. United States, 163 U.S. 228, 242 (1896), where the Court noted, “The term ‘person,’ used in the Fifth Amendment, is broad enough to include any and every human being within the jurisdiction of the republic.” Yet he ignores the rest of the quotation, in which the Court goes on to refer to citizens and resident aliens—and not citizens and undocumented immigrants—as the recipients of Fifth Amendment protection. Id.

Indeed, the Court in Shaughnessy v. Mezei, 345 U.S. 206 (1953), clearly established that entrant aliens are not afforded the same constitutional protections as citizens or resident aliens. Mezei, an alien resident of the U.S., left the country for a 19-month stay in Hungary. When he attempted reentry, he was detained. Mezei, 345 U.S. at 208-10. Based upon his extended absence, the government determined Mezei to be an entrant alien and denied him entry for security reasons. Id. at 213-14. When no other country would accept him, the government continued to confine him while they sought an alternative host country, though it was unclear when they would be able to remove him. Despite Mezei's petition for habeas relief, the Court held that his indefinite detention did not violate the Constitution, because he was an entrant alien, not a resident alien within U.S. borders. Id. at 214-16.

Though detained for different reasons, Alvarez finds herself in an arguably similar situation. She, like Mezei, sought admission to the U.S. as an entrant alien. She, like Mezei, was denied. In both cases, the government began deportation proceedings, only to encounter a barrier to deportation. In Mezei's case, the barrier was that no other country would accept him; in Alvarez's, it is that she has requested a hearing to contest her deportation. Both Mezei and Alvarez were placed in indefinite detention to await the removal of their respective barriers. Just as the Court upheld Mezei's detention, so too we must uphold Alvarez's. As an entrant alien, she is not entitled to the same rights as someone who, to use the dissent’s misapplied term, is within the “jurisdiction” of the U.S.

The dissent argues groundlessly that Alvarez falls within U.S. jurisdiction because the SFPDF happens to be located within U.S. borders. This argument falls flat when we consider that Mezei's detention took place on Ellis Island—clearly within U.S. borders—and he was still found without constitutional rights. Even if we were to grant that Alvarez is entitled to Fifth Amendment protections—which we do not—the state need not satisfy all prongs of traditional due process in order to have done its due diligence when it comes to the case of an alien entrant. Indeed, “[w]hatever the procedure authorized by Congress is, it is
due process as far as alien entry is concerned.” *Knauff v. Shaughnessy*, 338 U.S. 537, 544 (1950). We would be remiss not to acknowledge here Congress’s broad authority to regulate immigration. Generally, federal courts uphold whatever method Congress has prescribed for determining who may be accepted into the country – whether that acceptance refers to full residence or on the short-term release which Alvarez seeks. (See *Knauff*, 338 U.S. 537 (1950), *Jennings v. Rodriguez*, 200 L. Ed. 2d 122 (2018)) In this case, Congress has seen fit to use indefinite detention while enforcing its immigration policy. It saw no need to mandate that ICE detention facilities make provisions for detainees who wish to seek relief through some form of bail, parole, or probation. We likewise see no need to interfere with what is clearly an appropriate exercise of congressional authority.

As a resident alien, the petitioner does not qualify for constitutional Fifth Amendment protections. Nor has Congress, through its regulatory powers, deigned to afford her equivalent constructive protections. Consequently, we find Alvarez without a colorable constitutional claim. Nevertheless, for the sake of clarifying the jurisprudence on indefinite detention, we are willing to assume *arguendo* that she is entitled to due process protection. We consider the constitutionality of indefinite detention below.

**Indefinite Detention**

Indefinite detention is an accurate, but oft-misunderstood term for the situation in which Alvarez finds herself. Those who most strongly oppose this practice often describe it, either by design or accident, as though it were not indefinite, but infinite. Thus, when we speak of a detainee’s inability to challenge detention, many are quick to call it unconstitutional. A life in pretrial custody without the opportunity for bail seems an affront to the Constitution.

Yet it is important to acknowledge the practical distinctions between indefinite detention, in which petitioner finds herself, and pretrial custody. The dissent contends that indefinite detention of an illegal immigrant and pretrial confinement of a criminal are factually similar; they are not. Alvarez is not, as Judge CAVANA would have it, a yet-to-be-convicted criminal “awaiting a hearing to determine whether punishment is necessary.” Criminals in pretrial confinement have had evidence compiled against them, but that evidence has yet to be presented in court and they have yet to go through a sentencing period. The same is not true for immigrants in detainment. *De facto* sentencing occurs the moment an alien entrant is found within U.S. borders in violation of U.S. immigration law.

Immigrants are placed in indefinite detention only after they have broken U.S. law. When Alvarez was found in violation of U.S. immigration law on May 18, 2017, she was scheduled for deportation. This is consistent with standard immigration practice. Deportees are not required to appear before a judge in order for their deportation to be constitutional. In fact, as Justice Thomas noted in his concurrence to *Jennings*, “Congress has prohibited courts from reviewing aliens’ claims related to their removal, except in a petition for review from a final removal order or in other circumstances not present here.” *Jennings*, 200 L. Ed. 2d at 150 (Thomas, J., concurring). It is only when an alien entrant wishes to challenge his or her deportation order that review of this claim by the courts is required by due process or even possible under federal law.

As far as due process is concerned, the discovery of a violation and subsequent authorization for deportation are functionally similar to the trial and punishment phase in criminal proceedings. A request for a deportation hearing, then, is functionally similar to a post-sentencing appeal in a criminal case. As an alien entrant authorized for deportation, Alvarez is not situated as a criminal in pre-trial custody, but
rather a convicted criminal awaiting the results of a sentence appeal. We must note that she currently resides in SFPDF not because the government is waiting to determine whether she may be deported, but rather because the government has determined that she should be deported and she chose to challenge that judgment. The Ninth Circuit has acknowledged that although indefinite detainment may be constitutionally questionable of its own accord, when an alien chooses to challenge deportation proceedings, the state may continue his detention until the proceedings have drawn to a close. Prieto Romero v. Clark, 534 F.3d at 1068. This has critical implications for our analysis.

Bail, Parole and Probation

First, the language of "bail" used by the dissent is entirely inappropriate in this context. Though Judge CAVANA calls for Alvarez to be granted her constitutional right to bail, it is common knowledge that bail becomes unavailable the moment a criminal conviction triggers sentencing. His assumption that she has such a right is predicated on a faulty understanding of immigration proceedings. If immigration cases were handled in the same manner as criminal cases, the similarities the dissent draws between Alvarez and a pre-trial criminal would be insightful. Yet because Judge CAVANA ignores the de facto sentencing period that triggered Alvarez’s initial complaint, his observations are ultimately inconsequential.

Second, the non-detention custody corollary for convicted criminals is parole or probation--to which there is no Fifth Amendment right. There is some difference between the two – namely, parole is an early release from prison, while probation is an alternative to prison. Both result in the prisoner’s release into society earlier than the traditional sentence permits, both are time-limited (up to the maximum duration of the sentence), and both are conditioned on the cooperation of the parolee or probationer with certain behavioral requirements. In both cases, violation of those conditions results in the convict’s return to confinement.

The Supreme Court has broadly conflated its treatment of probation and parole. For instance, in Greenholtz v. Inmates of Neb. Penal Complex, 442 U.S. 1 (1979), the Court cites nearly identical holdings in two cases dealing with a parolee and a probationer respectively. In both instances, a state law established guidelines around parole or probation. In both instances, the state revoked or reconsidered the parole or probation of petitioners, and petitioners alleged that they did not receive due process in the revocation of their relief. “[T]he decision to revoke parole must be made in conformity with due process standards. … Similarly, … we held that a probationer must be accorded due process when a decision is to be made about the continuation of his probation.” Greenholtz, 442 U.S. at 19. This is but one example of the conflation of probation and parole in the Supreme Court’s jurisprudence.

Greenholtz’s requirement that due process must be followed during the revocation or continuation of probation should not, however, be read as a Fifth Amendment requirement that probation or parole be available. Once a criminal has passed through the sentencing period, the due process clause no longer mandates relief from confinement. “There is no constitutional or inherent right of a convicted person to be conditionally released before the expiration of a valid sentence.” Greenholtz, 442 U.S. at 7.

Cross-applying our analysis of bail, parole and probation to the facts at hand, we find that temporary relief from detention falls in the same class as parole and probation. Like parole and probation, it is an alternative to detention which is both conditional and time-limited. Unlike probation or parole, a hearing will follow the release period, and that hearing may result in deportation, which does not return the ‘parolee’ to
American society in the same way that a successful period of parole or probation would. However, it could be said that one outcome (deportation) is like an unsuccessful probation period – it results in the originally intended punishment. The other outcome (admission) is like a successful parole – the time away was just an ‘early release’ into the society of which the former detainee would later become a part.

Thus we find once again that Alvarez is without a colorable constitutional claim. Bail is unavailable to someone who, like Alvarez, has already gone through the sentencing process. Any other form of relief, while not outlawed by the Constitution, is not provided for under the due process clause. Alvarez’s case is an extreme one, but constitutional analysis must not be predicated upon emotional responses to unfortunate situations. In addressing her claim, we ask not whether the constitution might permit the state to offer bail, but rather whether it requires it to. Although her situation may be unfortunate, it does not reach the threshold of a constitutional violation--even if we constructively grant her Fifth Amendment protections for which alien entrants do not qualify.

Conclusion

In summary, we find Alvarez’s claim is a weak one at best. Though her situation may be undesirable, that does not make it unconstitutional. What Alvarez seeks is equivalent to parole or probation, and not guaranteed under the Fifth Amendment. Congress has chosen to let in those undocumented immigrants – and only those undocumented immigrants – who successfully challenge their deportation in the requisite hearing. Any other admittance is not allowed – and that is Congress’s prerogative, not the judiciary’s. There has been no egregious denial of a hearing, as this hearing is precisely what Alvarez awaits presently.

Given these facts, we uphold the Act both facially and as applied to the Petitioner. The judgement of the district court is affirmed.

It is so ordered.

Judge Cavana, dissenting.

I.

The majority today invokes the undocumented status of petitioners to justify denial of their fundamental freedoms to self-defense and just treatment. This would be objectionable enough if it merely stripped immigrants of their rights. But the majority’s reasoning makes the government the arbiter of when and where the Bill of Rights applies, threatening all of our constitutional protections in the process. For this reason, I cannot join the majority.

The Second Amendment

There are two points at which the Act violates the Second Amendment. It impermissibly limits the scope of those who can exercise the right to self-defense, and then hamstrings that right by prohibiting concealed carry in public. The majority disregards both precedent and our commitment to constitutional liberties in their quest to validate their favored political view – stricter restrictions on immigration.
First, both the text and history of the Bill of Rights indicate that Garcia is among those meant by “the people.” The Court has never held that “the people” means one thing in the First and Fourth Amendments and something completely different in the Second Amendment. Portillo-Munoz, 643 F.3d at 443 (Dennis, J., dissenting). Indeed, it defies all common intuition, since the first ten amendments were written and ratified together. As long as the Court recognizes the rights of noncitizens for the purposes of the other amendments, it is fundamentally incongruous to deny those same individuals the right to bear arms.

James Madison explicitly rejected the idea that the Constitution did not protect noncitizens because they were not party to the Constitution. He wrote, “If aliens had no rights under the Constitution, they might not only be banished, but even capitally punished, without a jury or the other incidents to a fair trial.” 4 Jonathan Elliot, The Debates in the Several State Conventions on the Adoption of the Federal Constitution as Recommended by the General Convention at Philadelphia, in 1787, 556 (1888). Remember, that for the Founding generation, the Constitution did not grant rights, it recognized them. To the Founders, governments can only protect rights, not revoke them. How could the government be required to respect the fundamental rights of some, but not others?

Indeed, the consequences of the majority’s reasoning could have a domino effect that undermines the rights of noncitizens across the board. If illegal immigrants do not have Second Amendment rights because they are not part of the political community, do they have privacy rights? Free speech rights? Can the government ban immigrant lobbying groups from assembling, or search their homes without warrants? If we truly believe in human rights, we cannot pick some rights to recognize as fundamental and not others.

For the Founders, the right to self-defense was one of these core, preexisting rights, an “inalienable right of all men.” McDonald v. City of Chicago, 561 U.S. 742, 818 (2010) (Thomas, J., concurring). The majority sidesteps this reality by couching its opinion in terms of citizenship, as if we as Americans have rights because we are citizens and Garcia, as a noncitizen, cannot claim such rights. In this hypothetical world, the government bestows rights to citizens as privileges. But the government giveth, and the government taketh away. If the government can grant or withhold rights as it considers reasonable, we as jurists cannot hope to contradict that sovereign power. But this country was founded on the opposite premise. While the courts have outlined a limited number of cases where the exercise of fundamental rights can be circumscribed, this is not one of those cases.

Heller itself took the position that all individuals in the political community have a right to gun ownership. Heller, 554 U.S. at 580. Just because Heller did not discuss citizenship as its primary goal does not mean that this principle is not controlling. And Heller made clear that the Second Amendment extends to members of the political community. The Heller Court relied heavily on Verdugo-Urquidez, which defined “political community” as those residents who have developed “sufficient connection with this country.” Verdugo-Urquidez, 494 U.S. at 265. The Fifth Circuit, offering further guidance, suggested that “sufficient connection” occurs when an alien is (1) voluntarily present in the U.S. and (2) accepts “some societal obligations.” Portillo-Munoz, 643 F.3d at 441.

Garcia fits this description perfectly. He voluntarily chooses to live in the country rather than return to El Salvador and has accepted many social obligations. He was publicly educated in the U.S., works in the U.S., pays taxes to the U.S. (rather than taking the easier route to make money off the books), and is raising his children in the U.S. When the Act provided a pathway to citizenship, Garcia was among the
first to apply. Indeed, he was brought to the U.S. as a two-year-old and has lived here ever since, without ever breaking the law. All of his meaningful social and familial connections are inextricably American. If he is not part of the political community, who is?

Instead of recognizing this, the majority paints Garcia as a criminal, because he resides unlawfully in the U.S. However, the Court has recognized that unauthorized immigrants who were brought here by their parents may lack the requisite intent to be guilty of illegal entry. Meza-Rodriguez, 798 F.3d at 673 (internal citations omitted). In fact, the Supreme Court has also held that the government cannot discriminate or arbitrarily limit the freedoms or privileges of children of illegal aliens. Id. at 671 (internal citations omitted). Other than his illegal entry, there is nothing in Garcia’s life that qualifies him as a vagrant, a criminal, or an alien in American society. For the majority to write him out of the political community even when he meets the standards set by precedent is to engage in dangerous selectivity.

If that was not enough, it is a stretch to consider Garcia as part of the class of illegal aliens any longer. The facts of the record establish that his initial application for citizenship was accepted, and he is now in a five-year ‘probation’ period where he is awaiting final citizenship. During this period, any deportation actions are deferred and he is immune from immigration enforcement. This makes him more akin to a legal, noncitizen resident than an illegal immigrant who constantly dodges border enforcement.

By every metric, Garcia is a part of the “people.” Regulations on immigrant gun ownership only date back to 1968 in our record, far too recently for us to presume them legal by virtue of their antiquity, as the court suggested in Heller, 554 U.S. at 626. As a longstanding, law-abiding, and recently legally-recognized resident of the U.S., Garcia has just as much of a Second Amendment right as his citizen counterparts.

As such, I would require the government to provide an exceedingly persuasive justification for the Act’s ban on concealed carry, but a more exacting standard of review is not necessary to invalidate the Act. Even under the majority’s articulation of intermediate scrutiny, the law cannot pass constitutional muster.

The majority offers no reason to believe that self-defense is a more precious right inside the home than outside it. The dangers that cause people to carry guns exist everywhere, and perhaps more so outside than in a person’s residence. Garcia himself was mugged and assaulted while walking through the city, not at his house. Why would the Second Amendment protect Garcia’s right to defend himself with a weapon on his front porch but not in a back alley?

The Seventh Circuit concluded as much in Moore v. Madigan, noting “Both Heller and McDonald do say that “the need for defense of self, family, and property is most acute” in the home...but that doesn’t mean it is not acute outside the home.” Moore v. Madigan, 702 F.3d 933, 935 (7th Cir. 2012). Additionally, the Moore court wrote that: “A...prohibition on carrying gun in public prevents a person from defending himself anywhere except inside his home; and so substantial a curtailment of the right of armed self-defense requires a greater showing of justification than merely that the public might benefit on balance from such a curtailment.” Id. at 940.

Indeed, the government proffers no evidence that undocumented persons are particularly prone to gun violence, or that prohibiting concealed carry permits is effective at curtailing violent crime. It is as if they hope that the general association of illegal immigrants with crime will suffice for their Act to pass constitutional muster. To the contrary, guilt-by-association tactics only reveal how thin the veneer is on
this attempt to strip members of the political community of their constitutional right to self-defense. We as a court cannot give such actions our blessing with one breath and extol the rule of law in the next.

Fifth Amendment

It is a sad state of affairs when the court--supposedly the bastion of defense for individual liberties--is willing to place the plenary power of Congress above the most basic of human rights in order to preserve its preferred approach to immigration policy. The majority believes it is Congress' prerogative to detain Ms. Alvarez indefinitely, without opportunity for bail--a belief predicated on the fiction that alien entrants somehow lie outside the bounds of constitutional protection. I disagree: the Constitution could not point more clearly to the contrary.

Today we address whether indefinite detention of alien entrants violates the Fifth Amendment's due process clause. It is striking that the majority opinion never once turns to the original text of the due process clause in order to answer this question. Judging by their decision, I can only conclude that my colleagues have never read it.

Application of Fifth Amendment to Non-Citizens

The Fifth Amendment reads, "no person shall … be deprived of life, liberty, or property, without due process of law…" U.S. const. amend. V. If that language is not clear enough, the Court certainly left no question when it noted over a century ago that "[t]he term 'person,' used in the Fifth Amendment, is broad enough to include any and every human being within the jurisdiction of the republic." Wong Wing v. United States, 163 U.S. 228, 242 (1896). The majority highlights Wong Wing's specific protections for resident aliens and citizens, treating that list as exhaustive rather than illustrative. But the absence of specific textual protections for alien entrants cannot be read as a negation of their rights when the Court held, just phrases earlier, "any and every human being within the jurisdiction of the republic" falls under Fifth Amendment protection. Id.

Here the majority applies Shaughnessy v. Mezei, 345 U.S. 206 (1953), contending that Ms. Alvarez, as an alien entrant, has no rights because she is not a U.S. resident. In their haste to justify the Act, the majority has failed to acknowledge substantive differences between Mezei and the case at hand. Mezei was a former alien resident whose status was changed to that of an entrant, due to an extended absence in Hungary. He was excluded from entry after immigration officials determined he was a threat to national security. Mezei, 345 U.S. at 208-10. With that justification for rejection, Mezei was unable to appeal his deportation and was confined to Ellis Island indefinitely because he could not find another country willing to admit him. He did not fall within U.S. jurisdiction or qualify for special protections because the U.S. had already fully rejected his application and had no intent to reevaluate his position.

Alvarez's situation is quite different. She has not been excluded from the U.S. for national security reasons. In fact, Immigration and Customs Enforcement (ICE) has labeled her "non-threatening." For the past five years, she has spent more time in the U.S. than she has in Mexico. She was detained because she, like many born into impoverished communities, did not have identification papers. When the U.S. began deportation proceedings against her, she requested a hearing to challenge her removal. That request was granted in word, though not in deed, and she remains in SFPDF awaiting the completion of an ongoing
appeal. She, unlike Mezei, falls very clearly within the jurisdiction of the U.S., as her present detention is perfectly wed to an ongoing appeal and not the result of her inability to gain admission to any country.

For decades, courts have entertained the notion that an alien entrant does not fall within the "jurisdiction of the republic." Yet when an alien woman has spent more than a year bound in the unrelenting custody of the state, I think it is high time we abandon this exercise in fiction. The majority would have us acknowledge the state's jurisdiction to detain Alvarez in one breath, and deny its jurisdiction to offer her basic protections in the next. They cannot have it both ways.

Standard of Review

Granting that Alvarez is entitled to Fifth Amendment protection, we approach the question of scrutiny. Though the Court's jurisprudence on the appropriate standard of review for Fifth Amendment appeals is varied, I recommend applying the Mathews v. Eldridge balancing test, which the Court has found instructive in deciding the Fifth Amendment claims of non-citizens and enemy combatants, see Landon v. Plascencia, 459 U.S. 21 (1982), Hamdi v. Rumsfeld, 542 U.S. 507 (2004), and Boumediene v. Bush, 553 U.S. 723 (2008).

"In evaluating the procedures in any case, the courts must consider the interest at stake for the individual, the risk of an erroneous deprivation of the interest through the procedures used as well as the probable value of additional or different procedural safeguards, and the interest of the government in using the current procedures, rather than additional or different procedures." Landon v. Plascencia, 459 U.S. at 34 (1982), citing Mathews v. Eldridge 424 U.S. 319, 424 U.S. 334-335 (1976). We must consider, then, the interests of Ms. Alvarez and the risks of erroneous deprivations at hand, balancing those interests and risks against the interest of the government and potential costs of additional procedures. I do so below.

Petitioner's Interest & Risks

At the heart of Ms. Alvarez's petition is the desire to freely live and work within the U.S. Though she wishes to present her case formally in a removal hearing, the government's failure to schedule her for such a hearing has left her indefinitely interned in SFPDF, wondering if she will ever be released. Ms. Alvarez presents a simple request: that she be granted relief from detention until such a time as the state decides to schedule her for a removal hearing. SFPDF rejected this request on the grounds that the Act did not require it to offer such relief. Today we consider not whether she should be granted relief, but rather whether the state should be required to offer her avenues through which she might petition for relief.

Implicit within the due process clause is the understanding that no person may be deprived of bodily liberty prior to a conviction without opportunity for bail. Jennings v. Rodriguez (Breyer, dissenting), 583 U.S. ___ (2018). Though the state has every right to fully confine an individual post-conviction, the Constitution recognizes a criminal's right to bail in cases of pretrial criminal confinement for all but the most violent of crimes.

The majority contends Ms. Alvarez ought to be confined like a convicted criminal, without the chance for parole or probation. Yet "reason tells us that the civil confinement at issue here and the pretrial criminal confinement that calls for bail are in every relevant sense identical." Jennings, (Breyer, dissenting), 583 U.S. ___ (2018). Both the pretrial criminal and the indefinitely detained migrant are held in state custody, awaiting a hearing to determine whether punishment is necessary. (In the case of a detained migrant,
"punishment" comes in the form of deportation.) Within U.S. jurisprudence, we have recognized the rights of enemy combatants to petition their detention. Hamdi v. Rumsfeld, 542 U.S. 507 (2004). We have recognized the rights of those confined involuntarily to mental hospitals to contest their confinement on a yearly basis. U.S. v. Comstock, 560 U.S 126 (2010), as cited in Jennings, (Breyer, dissenting), 583 U.S. __ (2018). We have even recognized the rights of terrorists to petition their detention. Boumediene, 553 U.S. 723 (2008). Why should immigrants seeking asylum be denied the same?

I find Justice Breyer's reasoning in his dissent to Jennings compelling. "Which class of persons--defendants or asylum seekers--seems more likely to have acted in a manner that typically warrants confinement. A person charged with a crime cannot be confined at all without a finding of probable cause that he or she committed the crime." Jennings, (Breyer, dissenting), 583 U.S. __ (2018). In Boumediene, part of the Court’s historical analysis of habeas actions included the initial standard that prisoners had to prove that it was probable they were imprisoned without just cause. 553 U.S. at 779. Perhaps that analysis would prove helpful today. Alvarez has at least a substantial chance of prevailing in her deportation challenge hearing. If the Constitution requires us to afford pretrial criminals--most of whom are convicted, not acquitted--the opportunity for bail, what constitutional justification can there possibly be for denying Ms. Alvarez--who is on "trial" to gain entry into the U.S. and has a substantial chance of prevailing--the same?

This is not the first time a court has considered the constitutionality of indefinite detention for immigrants, as the majority well noted. Contrary to the majority's opinion, however, Jennings does not support the notion that indefinite detention without bail is constitutional. Jennings raised a statutory question, and a constitutional question, and while the Court found that the statute made no provision guaranteeing bail to aliens in detention facilities, it declined to rule on the constitutionality of the statute, instead remanding the case to the Ninth Circuit for further information. Jennings, 200 L. Ed. 2d at 157.

In Zadvydas v. Davis, the Court wrote that “A statute permitting indefinite detention of an alien would raise a serious constitutional problem. The Fifth Amendment's Due Process Clause forbids the Government from 'depriv[ing]' any "person ... of ... liberty ... without due process of law.' Freedom from imprisonment-from government custody, detention, or other forms of physical restraint-lies at the heart of the liberty that Clause protects.” Zadvydas, 533 U.S. 678, 690 (2001). In Zadvydas (and by extension Clark v. Martinez, 543 U.S. 371 (2005)), the Court dealt with a statute imposing a 90-day limit on detention once an alien was ordered removed. When the government did not believe some aliens’ removal would occur in the foreseeable future, the Court determined that the government could only detain the aliens for the “reasonable” length of six months before the government must review their detention. Zadvydas, 533 U.S. at 701-702.

It bears noting that Ms. Alvarez has been in detention for more than a year, waiting on the government to decide to hear her case. The Court has never reviewed or upheld statutes in which a detainee of this nature was held for so long without bail, and I would argue cases of indefinite detention would have been decided differently had the periods of detention in question been for comparable lengths of time. Even in Prieto Romero v. Clark, which the majority cites as an example of multi-year detention as an immigrant awaits a hearing to challenge deportation proceedings, the Ninth Circuit evaluated the risk Prieto Romero posed to his community and offered him the opportunity for bail.
Even if the majority were to take the erroneous stance that aliens are not afforded the right to bail because they are not yet fully citizens, see Leng May Ma v. Barber, 357 U.S. 185, 185-90 (1958), that position would not preclude recognizing a liberty interest warranting some relief short of bail. For instance, carefully-designed parole would achieve many of the same goals as detention – government oversight of persons not yet approved to reside permanently in the U.S., and ability to restrict their whereabouts prior to deportation hearings – but it would still constitute custody. See Jones v. Cunningham, 371 U.S. 236, 244 (1963) (finding that parolees were “still within the jurisdiction of the District Court, and they can be required to do all things necessary to bring the case to a final adjudication”).

Here, the outlook is far grimmer. Alvarez has no opportunity for probation or parole, let alone for bail. The only remedy is deportation – but that is the very end which she seeks to avoid. Implicit within petitioner's request to be heard, then, is a request that her basic Fifth Amendment rights be honored.

State Interest & Cost

Admitting that Alvarez's constitutional rights have been violated, the state might still save the Act by proffering an interest in her detention which outweighs the petitioner's interest in having a bail hearing. But it is hard to see what justification the government could possibly have for detaining without relief a woman whose only crime was being born in a community where papers to prove one's identity were unheard of. Alvarez presents no risk to national security, nor has she been convicted of a crime. The state's articulated "interests" in detaining her are merely paltry excuses for unconstitutional treatment in order to save the Act.

The state's primary justification rests on its understanding of plenary power as a shield against judicial oversight. This understanding is inaccurate. Congress has broad power to regulate immigration, (see, for example, Knauff v. Shaughnessy, 338 U.S. 537, 544 (1950)), but that power does not include the right to violate the constitutional rights of immigrants and expect the courts to look the other way. Plenary power requires the courts to grant deference to congressional decision-making where possible, but in no way intimates that they should turn a blind eye to unconstitutional conduct. Given that Alvarez's constitutional rights are violated by indefinite detention without bail or some related alternative, I find the state's invocation of plenary power unconvincing. When a constitutional right has been violated, the state ought to offer a justification for that violation beyond a dismissive "we do so because we can."

The majority advances a second state interest: one in preserving the blessings of liberty for the citizens and authorized alien residents who call the U.S. their home. Judge ANTHONY rightly expresses the state's interest in selecting those who may live and work within its borders, and contends that a ruling in favor of petitioner would trample on this governmental liberty. While I affirm the states interest in such instances, I disagree with his contention that finding for the petitioner necessitates such a negative outcome for the state. I must reiterate, petitioner asks of us not that she be granted bail or parole or probation, but rather that the state be required to give her a hearing in which she may request as much. If the state were to determine, for one reason or another, that Alvarez poses an unreasonable threat to society, it would still retain the right to deny her parole or probation--thus retaining full control over who enters U.S. society.

The first interest proffered by the state cannot provide immunity to constitutional scrutiny, while the second is not significantly impinged upon by the remedy petitioner requests. A brief glance at suggestive remedial costs demonstrates the state's similarly lackluster financial justification. Detention for a single
individual costs the U.S. government an estimated $161 per day, while alternative forms of custody (such as bail, parole, or probation) may cost as little as 17 cents per day. Even employing the highest estimated of $17 per day for non-detention forms of custody, the U.S. government could save up to $52,560 per year on an individual such as Ms. Alveraz. While it is unclear how many immigrants are in positions similar to hers, increased border vigilance will likely continue to create pressure on detention facilities. The employment of alternative forms of custody for qualified migrants could make facility operation more manageable. Although the government would have to allocate certain resources for bail hearings, the associated costs would very likely be made up by decreased housing expenses.

Weighing the state's interest against the petitioners, I find strongly in favor of petitioner. In Boumediene v. Bush, 553 U.S. 723 (2008), the petitioners – prisoners at Guantanamo Bay – were not afforded basic due process protections, so they filed habeas actions. Even these suspected terrorists were granted relief in that case – and it is striking that the majority wishes not to grant a non-threatening young woman the same.

For the aforementioned reasons, I respectfully dissent.
Moot Court Case Appendix

1. **Compilation of referenced cases** (link)
   Also found in the Resource Library

2. **The Make America Safe Again Act of 2017**

   Relevant excerpts from the statute:

**Section 301: Pathway to Citizenship**

**A. Eligibility**

1. The following resident aliens are eligible to apply for citizenship, even if they currently reside within the borders of the United States in violation of U.S. law:
   a. Individuals who immigrated to the United States before the age of 16;
   b. Have continuously resided in the United States for seven years;
   c. Are not currently in deportation proceedings; and
   d. Have not been convicted of either a felony offense or multiple misdemeanors.

2. The Attorney General of the United States is authorized to create and disseminate an application to all immigrants who meet the requirements set forth in 301(A)(1). The application shall include some form of proof of all four prongs of eligibility. The responsibility is on the application to provide the requisite documentation.

**B. Application Process**

2. The Department of Homeland Security will verify the authenticity of documents submitted to prove the eligibility of an applicant.
3. Eligible applicants will receive written notification within 14 days that their application for citizenship under 301(A) has been accepted, and they will enter a 5 year waiting period beginning the day that the written notification is postmarked.

**C. Waiting Period**

1. Immigrants cannot begin the formal citizenship process under 8 U.S.C 12 until they have completed the five-year waiting period mentioned in 301(B)(3).
2. During this five-year waiting period, eligible applicants must comply with the following restrictions:
   a. The applicant must not travel outside the borders of U.S. jurisdiction;
   b. Applicants must not be found guilty of a felony or misdemeanor offense; and
c. Applicants may not manufacture, purchase, or sell firearms, as defined in 18 U.S.
Code § 921.
   i. Applicants may also not apply for or receive a permit for the concealed
      carry of a firearm or the open carry of a firearm in their possession,
      regardless of state law providing for the licensing of firearms.
3. Any applicant that fails to comply with the restrictions laid forth in 301(C)(2) may have
   their eligibility and application terminated and may be subject to deportation or removal
   from the United States
4. Any applicant who has received written notification that their application has been
   accepted will be immune from deportation by agents of the United States, and will not be
   entered into removal proceedings

Section 704: Detention of Apprehended Illegal Immigrants

A. Arrival at Ports of Entry
   a. Every person entering the United States at a port of entry must present legal documents
      verifying their identity.
      a. Valid documents include:
         i. Passport
         ii. Birth certificate
         iii. Social security card or international equivalent
         iv. Legal ID card with a proof of residence and a secondary form of identification, as
determined by the Immigration and Customs Enforcement
         v. Any other identification deemed acceptable to verify identity by the Immigration
            and Customs Enforcement Agency
   b. This requirement may be waived IF:
      i. The individual can prove to the satisfaction of border guards that they do not
         possess and cannot obtain such documents because it is
            1. Physically or legally impossible to do so, or
            2. Do so would cause the individual to face a credible fear of
               1. Persecution OR
               2. Physical threat
      ii. The individual is
            1. In imminent danger, OR
            2. Can demonstrate a credible fear or
               1. Persecution OR
               2. Physical threat
      iii. The individual is an unaccompanied minor
   2. Any individual qualifying for an exception under § 704(A)(1) of this title must file a formal
      request for application review with Immigration and Customs Enforcement.
      a. If an individual is in immediate danger, that individual should arrive at a port of entry and
         request expedited application review.
      b. At the discretion of the Immigration and Customs Enforcement Agency, individuals who
         qualify under § 704(A)(1)(b) or § 704(A)(1)(c) of this title may be permitted to stay in
         designated detention facilities while their application is reviewed.
3. All persons arriving at a port of entry who possess papers shall be processed in the order in which they arrived, unless they qualify for the same exceptions stated under § 704(A)(1), who may receive expedited review pursuant to § 704(A)(2)(a).

4. Immigration and Customs Enforcement shall establish criteria to determine who may be admitted past a port of entry.

5. Anyone who is admitted past a port of entry under this title shall be assigned a case worker to help with the process of filing the applicant for the appropriate resident status pursuant to 8 U.S.C. § 1186.

6. No non-citizen or non-permanent resident arriving at a port of entry may enter without receiving a notification of formal admittance from the Immigration and Customs Enforcement Agency. Any person attempting to do so will be treated as an unlawful immigrant pursuant to § 704(B)(1) of this title.

B. Unlawful Immigrants

1. For purposes of this title, an “unlawful immigrant” is defined as any non-citizen or non-permanent resident who:
   a. Attempts to cross a land or sea border at a port of entry
      i. Without showing officials the documentation required by § 704(A)(1)(a) or demonstrating a valid exception under § 704(A)(1)(b)
      ii. After a border official has denied the individual entry, despite having documentation
   b. Attempts to cross a land or sea border at a point other than a port of entry

2. All unlawful immigrants apprehended at the border shall be asked to show documentation verifying their identity compliant with § 704(A)(1)(a).
   a. If an unlawful immigrant is able to prove their identity, a border guard may arrange to have the immigrant escorted to a port of entry IF they may meet the same exceptions established under § 704(A)(1)(b). These individuals must be returned to a port of entry with a notice to officials at the port that the individual attempted to cross the border unlawfully.
   b. If an unlawful immigrant is not able to prove their identity, or does not qualify for the stated exception, the apprehending border guard must immediately begin deportation proceedings, for which Immigration and Customs Enforcement shall establish guidelines.

3. If an unlawful immigrant cannot be immediately deported under the guidelines established, or wishes to contest their deportation, they shall be enrolled in the nearest detention facility sanctioned by Immigration and Customs Enforcement for immigrant detention.

C. Detention and Deportation Hearings

1. ICE-sanctioned detention centers shall be used to detain:
   a. Unlawful immigrants
i. awaiting deportation
   ii. wishing to contest their deportation
b. Mandatory detainees under 8 U.S.C. § 1225
c. Persons awaiting admittance under § 704(A)(2) of this title
2. Detainees shall remain in detention until their proceedings are complete.