UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

Case No. 08-20437-CR-GRAHAM/TORRES

UNITED STATES OF AMERICA,

Plaintiff,

vs.

ROBERTO BOFFIL-RIVERA,

Defendant.
_____/

REPORT AND RECOMMENDATION ON
DEFENDANT'S MOTION TO DISMISS COUNT 14

This matter is before the Court on Defendant's Motion to Dismiss Count 14 of the indictment in this case based upon the Second Amendment [D.E. 39].[1] Roberto Boffil-Rivera ("Defendant") seeks to dismiss Count 14, charging him with being an unlawful alien in possession of a firearm in violation of 18 U.S.C. § 922(g)(5)(A). The United States of America ("Government"), in response to the argument that this statute is unconstitutional under the Second Amendment, argues that the now-recognized individual right to bear arms has no application in this case. Having carefully considered the motion, the response, and the record in this case, the Court concludes that Defendant's Motion to Dismiss Count 14 should be Denied.

[1] This motion was referred for a Report and Recommendation by the Honorable Donald L. Graham pursuant to 28 U.S.C. § 636(b)(1) and the Magistrate Rules of the Local Rules of the Southern District of Florida. [D.E. 29].

I. BACKGROUND

Defendant was indicted by the Grand Jury in only two counts of a fourteen-count indictment naming Defendant and his co-defendant Yamil Gonzalez-Rodriguez ("Gonzalez"). The Grand Jury alleges in Count 14 that on or about May 7, 2008, Defendant knowingly possessed a firearm in interstate commerce while he was a foreign alien illegally and unlawfully in the United States, in violation of 18 U.S.C. § 922(g)(5). Count 15 also charges Defendant with knowingly making false statements to law enforcement when asked about his possession or ownership of a firearm, in violation of 18 U.S.C. § 1001(a)(2). These are the only facts in the record for purposes of this motion to dismiss.

Background details of the case can be found in the complaint that preceded the indictment. [D.E. 2]. The Government alleges that on April 25, 2008, agents of Immigration and Customs Enforcement ("ICE") received information that a Cuban national was being intimidated by alien smugglers. That source said that he had lived in Cuba until April 20, 2008. He asked a childhood friend in Cuba for a contact who had information or could arrange to smuggle him into the United States. The friend told him to contact defendant Gonzalez. The source contacted Gonzalez sometime in late February 2008 to arrange for him to smuggle the source into the United States.

On April 20, 2008, Gonzalez contacted the source by telephone and told him to go to Playa Guanabo in Havana, Cuba to meet a boat that would transport him to the United States. Gonzalez also told him that the smuggling fee would be $25,000 for the source and two other individuals. The source followed the instructions and boarded a boat on the coast of Cuba that traveled to an area near a dock around Billy Bags National Park in Key Biscayne. On April 21, 2008, the four aliens were discovered by United States Border Patrol after their landing.

On the same day of the landing, he was approached by Gonzalez and two other individuals to collect the smuggling fee. The source ultimately contacted ICE about his dilemma. Starting on April 28, 2008, four different consensual phone calls were placed by the source to Gonzalez. During one call, Gonzalez acknowledged that he was responsible for bringing him into the United States. On May 7, 2008, the source and an undercover Miami-Dade Detective, who was posing as the source's family member from out of town, went to the Holiday Inn at the Miami International Airport to meet with Gonzalez. Gonzalez arrived there with this Defendant, Roberto Boffil-Rivera. Gonzalez got out of the vehicle and approached the CS and the undercover detective. The detective offered to pay $3,000 towards the smuggling fee. The $3,000 was handed over, but Gonzalez was unsatisfied with the incomplete payment. He threatened to shoot the source on the spot in the parking lot. Gonzalez then got back in the car with Defendant and began to pull away.

The ICE and MDPD officers decided to arrest Gonzalez and Defendant at that point in time. The vehicle was searched incident to arrest and a loaded assault rifle, a KAHR PM-40, was found on the backseat of the car. Following the arrest, Defendant was read his rights and waived them in writing. He gave a written statement to ICE Special Agents that denied any ownership of any weapons at any time since his own illegal entry into the United States. Defendant had been a Cuban national who entered the country in October 2007. Defendant has not adjusted his status under the Cuban Adjustment Act. The Government claims that he is now illegally and unlawfully in the United States.

During an inventory search of Gonzalez's vehicle following the arrest, agents found, among many other items, multiple photographs of Defendant with firearms, including a photograph with the same KAHR PM-40 that was found on the backseat of the vehicle at the

time of his arrest. On the back of some of the photographs, in the Defendant's handwriting, he claimed it was his weapon.

Based on these circumstances, the Grand Jury indicted Defendant on May 20, 2008. [D.E. 7]. The count at issue in this motion to dismiss is Count 14 of that indictment that charges him with being an unlawful alien in knowing possession of a firearm. The pending motion seeks to dismiss this Count pursuant to the Second Amendment and the Supreme Court's recent decision in *District of Columbia v. Heller,* 554 U.S. ___, 128 S. Ct. 2783 (2008). [D.E. 39 at 1]. Defendant contends that, as *Heller* held that the Second Amendment "confers an individual right to keep and bear arms," this is inconsistent with § 922(g)(5)(A)'s blanket prohibition on illegal aliens like him "from owning or possessing any firearm for any purpose whatsoever." [*Id.* at 2].

The Government argues in opposition that the Second Amendment right, recognized in *Heller,* does not apply to illegal aliens like Defendant. He is not a citizen or legal resident and falls outside the scope of the Second Amendment right to bear arms. Alternatively, the Government argues that even if the Second Amendment could apply to some category of aliens, those rights are forfeited when that alien chooses to enter or remain in the country illegally.

II. ANALYSIS

A. Standard of Review Requires Denial of Motion

Under Fed. R. Crim. P. 12, a district court considering a motion to dismiss an indictment is limited to reviewing the face of the indictment. *See, e.g., U.S. v. Sharpe,* 438 F.3d 1257, 1263 (11th Cir. 2006). Given the very limited facts set forth in this indictment, an "as applied" challenge to the constitutionality of a federal statute is largely unavailable. Defendant thus has a difficult mountain to climb to meet his burden of showing that no prosecution is possible under this particular statute, section 922(g)(5)(A), and that no factual

circumstances exist under which the statute could be constitutionally valid. *See United States v. Salerno,* 481 U.S. 739, 745 (1987), *cited in United States v. Sabri,* 541 U.S. 600, 605 (2004) (facial attack must meet the "demanding standard set out in [*Salerno*]"). As a result, "facial challenges are best when infrequent" and indeed are especially "discouraged." *Sabri,* 541 U.S. at 608-09 (citing *United States v. Raines,* 362 U.S. 17, 22 (1960)).

This is true even when fundamental rights are at stake. As the Supreme Court recently reaffirmed in the First Amendment context, "a facial challenge *must fail* where the statute has a 'plainly legitimate sweep.'" *Washington State Grange v. Washington State Republican Party,* 552 U.S. ___, 128 S. Ct. 1184, 1190 (2008) (quoting *Washington v. Glucksberg,* 521 U.S. 702, 739-740 and n.7 (1997) (Stevens, J., concurring)) (emphasis added). This is the case because claims of facial invalidity rest largely on speculation and often, as here, on a "factually barebones record[.]" *Id.* at ___, 128 S. Ct. at 1191 (quoting *Sabri,* 541 U.S. at 609). They also "run contrary to the fundamental principle of judicial restraint that courts should neither 'anticipate a question of constitutional law in advance of the necessity of deciding it' nor 'formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied.'" *Id.* (quoting *Ashwander v. TVA,* 297 U.S. 288, 347 (1936) (Brandeis, J., concurring)).

Defendant must also overcome the presumption that all Congressional enactments are constitutional. *See, e.g., Heller v. Doe,* 509 U.S. 312, 320 (1993) (a statute is presumed constitutional); *INS v. Chadha,* 462 U.S. 919, 944 (1983) (same); *Fairbank v. United States,* 181 U.S. 283, 285 (1901) (in challenging an act of Congress "[t]he presumptions are in favor of constitutionality"). As the party seeking to overcome that presumption, Defendant bears the burden of demonstrating its unconstitutionality. *See Lujan v. G & G Fire Sprinklers, Inc.,* 532 U.S. 189, 198 (2001) (citing *INS v. Chadha,* 462 U.S. at 944). Defendant must thus negate

every conceivable basis that might support this statute. *Heller v. Doe,* 509 U.S. at 320 ("The burden is on the one attacking the legislative arrangement to negative every conceivable basis which might support it.") (citing *Lehnhausen v. Lake Shore Auto Parts Co.,* 410 U.S. 356, 364 (1973)).

The statute being challenged here, section 922(g), plainly has a legitimate sweep by limiting the types of persons who may own or possess weapons. *District of Columbia v. Heller* recognized the validity of such an effort at the same time as it held unconstitutional, as per the Second Amendment right to bear arms, two District of Columbia statutes that totally banned handgun possession in the home and required all firearms to be to kept inoperable at all times. The Court's opinion acknowledged that "the right secured by the Second Amendment is not unlimited." *Heller,* 128 S. Ct. at 2816. The Court emphasized that "nothing in [its] 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." *Id.* at 2816–17. The Court intended its identification of such "presumptively lawful regulatory measures only as examples," not as an exhaustive list. *Id.* at 2817 n.26.[2]

Section 922(g) clearly sets forth a variety of categories of persons whom the Congress has found should be exempted from lawful gun ownership. Illegal or unlawful aliens are one

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[2] This acknowledgment is not just dicta. It was a critical part of the Court's analysis in response to the City's arguments that public safety would be jeopardized if an individual right was recognized. Moreover, assuming that it is dicta, "dicta from the Supreme Court is not something to be lightly cast aside." *Peterson v. BMI Refractories Inc.,* 124 F.3d 1386, 1392 n.4 (11th Cir. 1997); *McDonald's Corp. v. Robertson,* 147 F.3d 1301, 1315 (11th Cir. 1998) (Carnes, J., concurring specially) ("[D]icta in our opinions is not binding on anyone for any purpose. Because of considerations having to do with the first word in that court's name, Supreme Court dicta may be a different matter insofar as 'inferior courts' such as our own and the district courts are concerned.").

of those recognized categories. The plainly legitimate scope of Congress's purpose in enacting section 922(g) insulates it from a facial attack.

Heller casts no shadow on the statute on a facial challenge, though perhaps an as-applied challenge would be possible to address a claim that a particular prohibition, like the one here involving unlawful aliens, is too broad and sweeps to far. When one considers the arguments raised in Defendant's motion, they are in fact largely as-applied arguments. Defendant does not seem to take issue that *some* illegal aliens may be precluded from owning or possession firearms. Defendant primarily takes issue with the vast sweep of the current prohibition that applies to persons who are illegal on day one versus others, like this Defendant, who may not be technically documented but have sufficient ties to the local community such that their right to self-defense through a firearm should not be automatically infringed. Defendant, however, provided no compelling authority to overcome the predominantly held view that facial challenges should not be raised on a motion to dismiss like this one. And Defendant concedes that an as-applied challenge cannot be procedurally raised at this juncture of the case.

Accordingly, on this basis alone, the motion to dismiss, which is entirely based on a facial challenge to the constitutionality of the statute, should be denied.

B. Illegal Aliens Fall Outside the Scope of the Second Amendment

If we look past this fatal obstacle to Defendant's motion, and consider the merits of a facial attack to section 922(g)(5), we must begin by defining the scope of the Second Amendment right that the Supreme Court recognized in *Heller*.

The Second Amendment provides: "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., Amd. II. *Heller* determined that this Amendment confers an individual, not just

a collective, right to bear arms for the lawful purpose of self-defense. The Court rejected the contrary argument that the Amendment protected only the right to possess and carry a firearm in connection with militia service. The Court reconciled the prefatory clause ("well-regulated Militia") and the operative clause ("the right of the people to keep and bear Arms") as follows: "[The] prefatory clause announces the purpose for which the right was codified: to prevent elimination of the militia. The prefatory clause does not suggest that preserving the militia was the only reason Americans valued the ancient right; most undoubtedly thought it even more important for self-defense and hunting. But the threat that the new Federal Government would destroy the citizens' militia by taking away their arms was the reason that right – unlike some other English rights – was codified in a written Constitution." *Id.* at 2801.

The holding of the case, therefore, is limited to the conclusion that there is an "individual right to keep and bear arms" and thus "the absolute prohibition of handguns held and used for self-defense in the home" is barred by the Second Amendment. *Id.* at 2821-22. The Court left open for another day the extent to which government could enact statutes "regulating" the right to bear arms, *id.* at 2822, other than to reaffirm that "the right was not unlimited, just as the First Amendment's right of free speech was not. . . . " *Id.* at 2799.

This case presents a challenge to Congress's ability to regulate *who* can bear Arms under the Second Amendment. The text of the Amendment provides that the right extends to "the people" whose right shall not be infringed. *Heller*'s definition of "the people" is central to the outcome of this question. *See id.* at 2790-91.

We reiterate first that *Heller* recognized that the individual right secured by the Second Amendment was a pre-existing right under common law:

> [I]t has always been widely understood that the Second Amendment, like the First and Fourth Amendments, codified a pre-existing right. The very text of the Second Amendment implicitly recognizes the pre-existence of the right and declares only that it "shall not be infringed." As we said in *United States v.*

> *Cruikshank,* 92 U.S. 542, 553 (1876), "[t]his is not a right granted by the Constitution. Neither is it in any manner dependent upon that instrument for its existence. The Second amendment declares that it shall not be infringed . . . ."

Id. at 2797–98.

That common law right was held only by citizens and those who swore allegiance to the Government; it did *not* include everyone present on American soil. At the time of the Founding, not all persons were entitled to the protection of the common law right and some individuals were excluded "because of perceived unfitness, untrustworthiness or alienage." Don B. Kates, Jr., *Handgun Prohibition and the Original Meaning of the Second Amendment,* 82 Mich. L. Rev. 204, 217 n.54 (1983), *cited generally in Heller,* 128 S. Ct. at 2801. Just as felons and the mentally impaired were considered outside the scope of the Second Amendment's protection, *Heller,* 128 S. Ct. at 2816-17, the Founders would have equally understood that persons present in the country illegally or without permanency could, consistent with the well-established limitations on the common law right, be barred from possessing arms.

Historical support for this conclusion, some of which is cited in *Heller* itself, is plentiful. For instance, Samuel Adams and other delegates urged the Massachusetts ratifying convention to recommend barring Congress from "prevent[ing] the people of the United States, who are peaceable citizens, from keeping their own arms." 2 Bernard Schwartz, *The Bill of Rights: A Documentary History* 674–75 (1971). The New Hampshire convention proposed that "Congress shall never disarm any Citizen unless such as are or have been in Actual Rebellion." *Id.* at 761. In these proposals, the pre-existing right clearly inured only to "peaceable" or lawful "Citizens." *See also* David Yassky, *The Second Amendment: Structure, History, and Constitutional Change,* 99 Mich. L. Rev. 588, 626–27 (2000) ("The average citizen whom the

Founders wish to see armed was a man of republican virtue – a man shaped by his myriad ties to his community, the most important for this purpose being the militia.").

Founding-era statutes confirm this limitation on the pre-existing common law right. During the American Revolution, several states passed laws providing for the confiscation of weapons owned by persons refusing to swear an oath of allegiance to the state or the United States. *See* Saul Cornell and Nathan DeDino, *A Well Regulated Right: The Early American Origins Of Gun Control,* 73 Fordham L. Rev. 487, 506 (2004) (compiling statutes). To deal with the potential threat coming from armed citizens who remained loyal to Great Britain, states took the obvious precaution of disarming these persons. *Id.* Thus, even within the confines of the pre-existing right to keep and bear arms, certain persons – such as those who did not swear loyalty to this country – were seen as falling outside the protection of that right, and laws or regulations that disarmed them were well-established at the time the Second Amendment was adopted. Indeed, several Founding-era state constitutions expressly provided that the right to bear arms extended only to "citizens." *See, e.g.,* Pa. Cons. Stat. (1790); Ky. Const. (1792); Miss. Const. (1817); Conn. Const. (1818); Me. Const. (1819).

Along these same lines, *Heller* concluded that the reference to "the people" in the Second Amendment "unambiguously refers to all members of the political community, not an unspecified subset." 128 S. Ct. at 2790-91. *Heller* grouped this reference to "the people" with others found in the Bill of Rights, specifically the First, Fourth, and Ninth Amendments, as defined by an earlier Supreme Court decision, *United States v. Verdugo-Urquidez,* 494 U.S. 259 (1990), *cited in Heller,* 128 S. Ct. at 2791. In that decision, which related to the scope of the Fourth Amendment's application to the DEA's search of a foreign national that took place on foreign soil, Justice Rehnquist's majority opinion adopted the following definition of "the people":

> "[T]he people" seems to have been a term of art employed in select parts of the Constitution . . . . [Its uses] sugges[t] that "the people" protected by the Fourth Amendment, and by the First and Second Amendments, and to whom rights and powers are reserved in the Ninth and Tenth Amendments, refers to a class of persons who are part of a national community or who have otherwise developed sufficient connection with this country to be considered part of that community.

Verdugo-Urquidez, 494 U.S. at 265.

Verdugo-Urquidez is but one example of a series of cases that recognize that foreign nationals or "aliens" are not entitled to all the rights and privileges of American citizens. Justice Jackson's "ascending scale of rights" analysis is fully applicable today:

> The alien, to whom the United States has been traditionally hospitable, has been accorded a generous and ascending scale of rights as he increases his identity with our society. Mere *lawful presence* in the country creates an implied assurance of safe conduct and gives him certain rights; they become more extensive and secure when he makes preliminary declaration of intention to become a citizen, and they expand to those of full citizenship upon naturalization.

Johnson v. Eisentrager, 339 U.S. 763, 770-71 (1950) (emphasis added). As a result, lawful resident aliens who are present within the constitution's jurisdiction and have "developed substantial connections with this country" are entitled to minimal constitutional protections. *Verdugo-Urquidez,* 494 U.S. at 271. *See, e.g., Graham v. Richardson,* 403 U.S. 365, 376 (1971) (resident aliens may raise equal protection challenges under the Fourteenth Amendment); *Kwong Hai Chew v. Colding,* 344 U.S. 590, 596 (1953) (resident alien is a "person" within the meaning of the Fifth Amendment); *Wong Wing v. United States,* 163 U.S. 228, 238 (1896) (resident aliens entitled to certain Fifth and Sixth Amendment rights); *Yick Wo v. Hopkins,* 118 U.S. 356, 369 (1886) (resident aliens protected by due process rights of Fourteenth Amendment).

The recognition of certain rights to resident aliens, however, does not mean that "all aliens are entitled to enjoy all the advantages of citizenship or, indeed, to the conclusion that

all aliens must be placed in a single homogenous legal classification. For a host of constitutional and statutory provisions rest on the premise that a legitimate distinction between citizens and aliens may justify attributes and benefits for one class not accorded to the other; . . . ." *Mathews v. Dietz,* 426 U.S. 67, 78 (1976) (resident aliens not deprived of due process under the Fifth Amendment for Congressional limits on participation in federal medicaid insurance program).

Neither foreign nationals who have not yet reached our shores, nor illegal aliens who have done so unlawfully and without the Attorney General's permission, are entitled to the full panoply of rights available to citizens or even resident aliens. To the contrary, that status by definition places such individuals outside the traditional protections of the Constitution:

> We reject the claim that "illegal aliens" are a "suspect class." No case in which we have attempted to define a suspect class . . . has addressed the status of persons unlawfully in our country. Unlike most of the classifications that we have recognized as suspect, entry into this class, by virtue of entry into this country, is the product of voluntary action. Indeed, entry into the class is itself a crime. In addition, it could hardly be suggested that undocumented status is a "constitutional irrelevancy." With respect to the actions of the Federal Government, alienage classifications may be intimately related to the conduct of foreign policy, to the federal prerogative to control access to the United States, and to the plenary federal power to determine who has sufficiently manifested allegiance to become a citizen of the Nation.

Plyler v. Doe, 457 U.S. 202, 221 n.19 (1982). *See, e.g., Verdugo-Urquidez,* 494 U.S. at 268-69 (rejecting application of Fourth Amendment to search of foreign national because not "every constitutional provision applies wherever the United States Government exercises its power"); *INS v. Lopez-Mendoza,* 468 U.S. 1032, 1050-51 (1984) (Fourth Amendment exclusionary rule not applicable to civil deportation proceedings); *Mathews,* 426 U.S. at 79-80 ("In the exercise of its broad power over naturalization and immigration, Congress regularly makes rules that would be unacceptable if applied to citizens. The exclusion of aliens and the reservation of the power to deport have no permissible counterpart in the Federal Government's power to

regulate the conduct of its own citizenry."); *Shaughnessy v. United States ex rel. Mezei,* 345 U.S. 206, 210 (1953) ("Courts have long recognized the power to expel or exclude aliens as a fundamental sovereign attribute exercised by the Government's political departments largely immune from judicial control."); *Balzac v. Porto Rico,* 258 U.S. 298 (1922) (Sixth Amendment did not extend right to jury trials to territories within U.S. control like Puerto Rico); *United States ex rel. Turner v. Williams,* 194 U.S. 279, 292 (1904) (excludable alien not entitled to First Amendment protection from deportation because "[h]e does not become one of the people to whom these things are secured by our Constitution by an attempt to enter, forbidden by law").

Clearly, under any historical interpretation of the enactment of the Second Amendment or the interpretation of any similar right under the Constitution, the individual right to bear arms defined by *Heller* does not apply to an illegal and unlawful alien. This Defendant, alleged by this Indictment to have been an unlawful alien, is not a citizen, is not ostensibly a person with identifiable and significant ties to the community, and is not someone who has any duty of allegiance to the United States. A person of his status could have been barred from possessing a firearm under English or Colonial American common law, and similarly could be precluded from doing so under the Second Amendment. His mere presence here does not entitle him to constitutional protection because he is clearly outside the scope of the "political community" who are conferred rights under the Second Amendment.

For these reasons and on this limited record, Defendant has not met his burden of showing that section 922(g)(5) is facially unconstitutional.

C. Equal Protection Issues are Premature

We reiterate that this motion presents a facial challenge to the statute, requiring Defendant to show that the statute could never be constitutionally applied to any unlawful alien. Whether the statute could be constitutionally infirm as against a particular "unlawful alien," because for instance he or she may have a particularly strong claim to having ties to the country regardless of undocumented status, is not an issue that can be addressed through this motion. An as-applied challenge will have to wait for further factual development, either in the scope of this proceeding or by separate civil action challenging the application of the statute to a particular plaintiff.

That is particularly true if Defendant is ultimately correct that the "fundamental right" to bear arms found in the Second Amendment could apply in some instances to undocumented aliens. Defendant argued at the hearing on the motion that even if the Second Amendment standing alone would not be enough, for the reasons the Court relied on above, an equal protection challenge under the Fifth Amendment would be sufficient in many instances. Defendant takes the position that any classification based on alienage in connection with the right to bear arms would require a heightened standard of scrutiny under the equal protection clause. In that case, Defendant posits, a blanket prohibition on firearms based on alien status would be unconstitutional.

This argument, even if it had any merit, is clearly inappropriate on a motion to dismiss in connection with a criminal indictment. There are far too many facts that the Court would have to find, which are clearly outside the four corners of the Indictment, to grant relief in response to such an argument. The Court has found no authority, and Defendant points to none, where an equal protection challenge such as this was properly adjudicated in a criminal case on a motion to dismiss. And even if such an argument could or should technically be

raised on a motion to dismiss to preserve the issue, the Court should clearly defer ruling on the merits of such an argument pending factual development and a trial. *See, e.g., United States v. Miller,* 491 F.2d 638, 647 (5th Cir. 1974) ("The propriety of granting a motion to dismiss an indictment under [Fed.R.Crim.P. 12] by pretrial motion is by-and-large contingent upon whether the infirmity in the prosecution is essentially one of law or involves determinations of facts."); *United States v. Beard,* 761 F.2d 1477, 1479 (11th Cir. 1985) (district court properly exercised its discretion to defer ruling on motion to dismiss in favor of factual development at trial and to reject pretrial request for evidentiary hearing to determine if dismissal warranted by due process clause).

Even if Defendant is right, for instance, that a heightened standard of review were warranted for an alienage classification regulating the Second Amendment right to bear arms, that standard of review would require the Government to prove "that its classification has been precisely tailored to serve a compelling government interest" or at least a "substantial interest" of the Government. *Plyler,* 457 U.S. at 217 (finding intermediate scrutiny applied to equal protection challenge to state's denial of education benefits to children of undocumented aliens). Clearly the Government could not meet its burden on a cold paper record. An equal protection challenge is thus the very type of constitutional issue that cannot be adjudicated on a facial challenge basis. The possibility that the Government could make that showing in a given case with sufficient factual development by definition precludes adjudication of the constitutional issue on a motion to dismiss. *See, e.g., United States v. Mena,* 863 F.2d 1522, 1527 (11th Cir. 1989) (affirming denial of motion to dismiss indictment on due process grounds based on facial challenge to statute); *see also United States v. Reed,* 114 F.3d 1067, 1070 (10th Cir. 1997) (as applied challenge to section 922(g) reversed where based only on evidentiary proffer of the parties because "such a sensitive and fact intensive

analysis as that undertaken by the district court should be based only on the facts as they emerge at trial").

Moreover, there is a serious question whether any heightened standard of review would ever apply to a classification involving illegal and unlawful aliens. The cases Defendant points to as examples of such heightened scrutiny under equal protection grounds were cases involving *lawful* aliens challenging entitlement to certain benefits, *see, e.g., Graham v. Richardson,* 403 U.S. at 372, or the children of undocumented or unlawful aliens who have no power to "affect their parents' conduct nor their own status." *Plyler,* 457 U.S. at 220. In the case of unlawful aliens, however, the Supreme Court has made clear that "undocumented status is [not] an absolutely immutable characteristic since it is the product of conscious, indeed, unlawful action." *Id.* Thus, illegal aliens are *not* a "suspect class" for equal protection purposes because their entry into the country is the product of voluntary unlawful action. *Id.* at 219 n.19.

And although, post-*Heller,* an alien could argue that a heightened standard of review was required in a case involving governmental classifications affecting the "fundamental right" to bear arms, that too would face a seemingly insurmountable obstacle in the Federal government's plenary role over immigration matters. As the Supreme Court found in *Mathews v. Diaz,* there is a very significant distinction between the application of equal protection principles to state governmental classifications versus those involving the Federal government's classification of aliens. "[T]he Fourteenth Amendment's limits on state powers are substantially different from the constitutional provisions applicable to the federal power over immigration and naturalization." 426 U.S. at 86-87. That is so because "it is the business of the political branches of the Federal Government, rather than that of . . . the States . . . to regulate the conditions of entry and residence of aliens. The equal protection analysis also

involves significantly different considerations because it concerns the relationship between aliens and the States rather than between aliens and the Federal Government." *Id.* at 84-85. There is thus no "political hypocrisy" in applying heightened scrutiny to a state's classification of aliens, but the considerably narrower "wholly irrational" or rational basis test to Congress's classification of aliens. *Id.* at 86-87. *See also Heller v. Doe,* 509 U.S. at 320; *INS v. Delgado,* 466 U.S. 210, 235 (1984).

For that reason, Congressional classifications between citizens and aliens, or among different classes of aliens, are routinely reviewed on a rational basis standard, and *not* on a heightened scrutiny standard. *See, e.g., Camacho-Salinas v. Attorney General,* 460 F.3d 1343, 1348-49 (11th Cir. 2006) (applying rational basis test to provision of Immigration and Nationality Act distinguishing between types of aliens who must meet seven-year residency requirements based on Congress's "broad power to regulate the admission and exclusion of aliens"); *Rodriguez ex rel. Rodriguez v. United States,* 169 F.3d 1342, 1346-48 (11th Cir. 1999) (applying rational basis test to federal statute determining eligibility for supplemental security income benefits).

That also holds true even where fundamental rights may be at stake. *See, e.g., Azizi v. Thornburgh,* 908 F.2d 1130, 1133-34 (2d Cir. 1990) (applying rational basis to review of immigration statute limiting effects of marriage on deportation proceedings even though statute interfered with "fundamental nature of the right to marry"). Even fundamental rights must be measured against the long-standing recognition that "control over matters of immigration is a sovereign prerogative, largely within the control of the executive and the legislature." *Landon v. Plasencia,* 459 U.S. 21, 34 (1982). Judicial review of legislation affecting fundamental rights but arising under matters of immigration and naturalization is quite limited. *See Fiallo v. Bell,* 430 U.S. 787, 792 (1977); *Hampton v. Mow Sun Wong,* 426

U.S. 88, 101 n.21 (1976) (Congress's "power over aliens is of a political character and therefore subject only to narrow judicial review.").

Thus it is quite likely that an equal protection challenge by an unlawful alien to section 922(g)(5), if properly raised with a sufficient factual record, will still fail under rational basis or even intermediate level review. In enacting section 922(g)(5)(A), Congress specifically limited the prohibition against possessing firearms to aliens who are "illegally or unlawfully in the United States," and the government is required to prove an alien's unlawful presence in this country as an element of § 922(g)(5)(A). As such, the statute at issue in this case prohibits the possession of firearms by persons whose very presence in the county is illegal. As demonstrated by *Heller's* explicit recognition of the presumptive validity of restricting firearms possession by felons, Second Amendment rights may be forfeited through the commission of criminal conduct. An undocumented alien is already in an illegal status under Federal immigration law, and is often maintaining that status through additional illegal means. *See, e.g.,* 8 U.S.C. § 1324c (document fraud related to immigration benefits, including eligibility to enter the U.S.); 8 U.S.C. § 1325(a) (illegal entry into the United States); 8 U.S.C. § 1326 (illegal reentry); 18 U.S.C. § 1543 (passport fraud); 18 U.S.C. § 1546(a) (fraud involving immigrant visas and other entry documents).

Therefore, even if aliens as a class may indeed possess some fundamental rights as "people" governed by the Second Amendment, Congress certainly has the authority to limit the constitutional rights of unlawful aliens in ways that would not be permissible for citizens or legal residents. *See, e.g., Fiallo v. Bell,* 430 U.S. at 792 ("in the exercise of its broad power over immigration and naturalization, 'Congress regularly makes rules that would be unacceptable if applied to citizens.'" (quoting *Matthews v. Diaz,* 426 U.S. at 80). For instance, Congress's power includes even "the authority to detain aliens suspected of entering the country illegally

pending their deportation hearings." *Reno v. Flores,* 507 U.S. 292, 305 (1993). If Congress has the plenary authority to detain all aliens suspected of being in this country illegally, then it likely also has the lesser authority to limit illegal aliens' ability to possess a potentially deadly firearm.

The Federal Code is peppered with many examples of Congress's broad authority over aliens and their relationship to citizens or residents. Title 8 of the United States Code, regulating aliens and nationality, is founded on the legitimacy of distinguishing between citizens and aliens. A variety of other federal statutes provide for disparate treatment of aliens and citizens that are well-established and immune from an equal protection challenge. These include prohibitions and restrictions upon Government employment of aliens, 10 U.S.C. § 5571 and 22 U.S.C. § 1044(e); upon private employment of aliens, 10 U.S.C. § 2279 and 12 U.S.C. § 72; upon investments and businesses of aliens, 12 U.S.C. § 619 and 47 U.S.C. § 17; upon benefits available to citizens that are excluded for aliens, 26 U.S.C. § 931 and 46 U.S.C. § 1171(a); upon protections extended to citizens but not aliens, 19 U.S.C. § 1526 and 29 U.S.C. § 633a; and upon statutes imposing added burdens on aliens, 26 U.S.C. § 6851(d) and 28 U.S.C. § 1391(d).

Section 922(g)(5)(A) is a product of this same type of legislation. Congress has made a policy judgment, as it has in numerous other statutes, that unlike citizens and legal residents, illegal aliens by their very unauthorized nature and lack of allegiance to the government of the United States pose a greater risk to abuse firearms. See Omnibus Crime Control and Safe Streets Act of 1968, Pub. L. No. 90-351, § 1201, 82 Stat. 197, 236 (1968) (Congressional findings for predecessor to section 922(g)).

That policy judgment has been widely recognized and endorsed in the law. By including illegal aliens within the ambit of the statute's prohibitions, Congress believed that

such aliens came within the class of untrustworthy persons whose possession of firearms would constitute a threat to society. *See, e.g., Huddleston v. United States,* 415 U.S. 814, 824 (1974) ("[t]he principal purpose of the federal gun control legislation . . . was to curb crime by keeping 'firearms out of the hands of those not legally entitled to possess them because of age, criminal background, or incompetency.'") (quoting S. Rep. No. 1501, at 22 (1968)); *Barrett v. United States,* 423 U.S. 212, 218 (1976) ("[t]he very structure of the Gun Control Act demonstrates that Congress did not intend merely to restrict interstate sales but sought broadly to keep firearms away from the persons Congress classified as potentially irresponsible and dangerous."); *Scarborough v. United States,* 431 U.S. 563, 573 (1977) (the "legislative history [of section 922] . . . supports the view that Congress sought to rule broadly to keep guns out of the hands of those who have demonstrated that 'they may not be trusted to possess a firearm without becoming a threat to society.'") (quoting 114 Cong. Rec. 14,773 (1968) (remarks of Senator Long)).

For instance, in upholding section 1202(a)(5) (section 922(g)(5)(A)'s predecessor statute) against an equal protection challenge, the Second Circuit endorsed this proposition because "[i]llegal aliens are aliens who have already violated a law of this country" and 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." *United States v. Toner,* 728 F.2d 115, 128-29 (2d Cir. 1984) (affirming order denying motion to dismiss portion of indictment on equal protection grounds). For similar reasons, an equal protection challenge to the same statute, premised on the "fundamental right" to bear arms, will likely be found to be rationally related to a legitimate governmental interest, or even

sufficiently related to a substantial governmental interest – protecting society from undocumented persons maintaining themselves outside the law.[3]

We need go no further. It suffices to say that a facial challenge to this statute, which is based on no factual record and premised on a theory that runs counter to well-established principles of federal law, has no merit whatsoever in the context of a motion to dismiss this Indictment. We can leave for another day the final disposition of Defendant's Second Amendment or equal protection challenges. For now, however, the motion to dismiss should be denied.

III. CONCLUSION

Accordingly, it is hereby **RECOMMENDED** that Defendant's Motion to Dismiss Count 14 of the Indictment [D.E. 39] be **DENIED**.

Pursuant to Local Magistrate Rule 4(b), the parties have **six calendar days** from the date of this Report and Recommendation, i.e. **until August 18, 2008 by 9:00 a.m.**, to serve and file written objections, if any, with the Honorable Donald L. Graham, United States District Judge. *The Court, pursuant to S.D. Fla. Mag.J. Rule 4(a), is expediting any such objections given the imminent trial date in the case.* Failure to timely file objections shall bar

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[3] We note that these policy interests were included among some of the reasons why the statute's application to convicted felons was upheld by the Supreme Court on an equal protection challenge. *See Lewis v. United States,* 445 U.S. 55, 65-66 (1980) ("The firearm regulatory scheme at issue here is consonant with the concept of equal protection embodied in the Due Process Clause of the Fifth Amendment if there is some rational basis for the distinctions made or they have some relevance to the purpose for which the classification is made. . . . [The statute] clearly meets this test.") (internal quotations and alterations omitted). That reasoning also led the Fifth Circuit to reaffirm the validity of this aspect of the statute on a later equal protection challenge even after that Circuit had explicitly found there to be an individual right to bear arms protected under the Second Amendment. *See United States v. Emerson,* 270 F.3d 203 (5th Cir. 2001); *see also United States v. Scott,* 2007 WL 2376239 (5th Cir. Aug. 21, 2007) (rejecting equal protection and Second Amendment challenges to felon in possession provision in section 922(g)(1); *United States v. Bernal,* 2008 WL 2078164 (S.D. Tex. May 15, 2008) (following *Emerson* and rejecting equal protection challenge to felon in possession provision).

the parties from a *de novo* determination by the District Judge of an issue covered in the report and bar the parties from attacking on appeal the factual findings contained herein. *R.T.C. v. Hallmark Builders, Inc.,* 996 F.2d 1144, 1149 (11th Cir. 1993); *LoConte v. Dugger*, 847 F.2d 745 (11th Cir. 1988); *Nettles v. Wainwright*, 677 F.2d 404, 410 (5th Cir. Unit B 1982) (en banc); 28 U.S.C. § 636(b)(1).

DONE AND SUBMITTED at Miami, Florida, this 12th day of August, 2008.

EDWIN G. TORRES
United States Magistrate Judge