

19-620-cr

United States v. Perez

1 In the
2 United States Court of Appeals
3 For the Second Circuit
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6 AUGUST TERM 2019
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8 ARGUED: FEBRUARY 13, 2020

9 DECIDED: JULY 29, 2021
10

11 No. 19-620-cr
12

13 UNITED STATES OF AMERICA,

14 *Appellee,*
15

16 *v.*
17

18 JAVIER PEREZ,

19 *Defendant-Appellant.*
20

21 _____
22 On Appeal from the United States District Court
23 for the Eastern District of New York.
24

25 _____
26 Before: WALKER, CARNEY, and MENASHI,* *Circuit Judges.*
27

28 _____
29
30 Defendant-Appellant Javier Perez appeals from a judgment of
31 conviction for possessing a firearm and ammunition while unlawfully

* Circuit Judge Ralph K. Winter, originally a member of this panel, died on December 8, 2020. Circuit Judge Steven J. Menashi has replaced Judge Winter on the panel for this appeal. See 2d Cir. IOP E(b).

1 present in the United States. Perez challenges the statute of
2 conviction, 18 U.S.C. § 922(g)(5), on the basis that it violates the
3 Second Amendment right to bear arms by imposing a categorical bar
4 on his ability to possess a firearm or ammunition. Assuming without
5 deciding that, even as an undocumented alien, he is entitled to Second
6 Amendment protection, we hold that 18 U.S.C. § 922(g)(5), as applied
7 to Perez, withstands intermediate scrutiny. Accordingly, we
8 **AFFIRM** the judgment of the district court (Carol B. Amon, J.) in its
9 entirety.

10 Judge Menashi concurs in the judgment in a separate opinion.

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1 JOHN M. WALKER, JR., *Circuit Judge*:

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3 Defendant-Appellant Javier Perez appeals from a judgment of
4 conviction for possessing a firearm and ammunition while unlawfully
5 present in the United States. Perez challenges the statute of
6 conviction, 18 U.S.C. § 922(g)(5), on the basis that it violates the
7 Second Amendment right to bear arms by imposing a categorical bar
8 on his ability to possess a firearm or ammunition. Assuming without
9 deciding that, even as an undocumented alien, he is entitled to Second
10 Amendment protection, we hold that 18 U.S.C. § 922(g)(5), as applied
11 to Perez, withstands intermediate scrutiny. Accordingly, we
12 **AFFIRM** the judgment of the district court (Carol B. Amon, J.) in its
13 entirety.

14

BACKGROUND

15 Javier Perez was born in rural Mexico in 1989 and entered the
16 United States without authorizing documents at the age of 13. From
17 that time until his arrest in 2018, he was self-employed as a carpenter.
18 After residing with relatives in Brooklyn, New York for several years,
19 he eventually secured his own apartment. Perez became involved
20 with the Ninos Malos gang in his youth, but asserts that he has not
21 been a member since 2012. In or around 2017, he moved to New
22 Haven, Connecticut to live with his girlfriend and her young son. He
23 has two children, who were born in the United States and are living
24 with their mother in Brooklyn, and whom he visits and helps support
25 financially.

1 The Offense Conduct

2 On July 23, 2016, Perez was attending a barbeque in the Sunset
3 Park neighborhood of Brooklyn when a violent fight broke out down
4 the street. Several young men wielding bats and machetes were
5 attacking a member of a rival gang. At some point during the fight,
6 Perez borrowed a firearm from an acquaintance, approached the
7 fight, and fired several shots into the air. Hearing the gunshots, the
8 young men scattered, and Perez returned to the barbeque and gave
9 the gun back to his acquaintance.

10 A few days later, the New York Police Department (NYPD)
11 obtained a video recording of the incident that showed the shooter to
12 be a man later identified as Perez. The NYPD identified the firearm
13 as a .380 caliber Davis Industries semiautomatic pistol by matching
14 its shell casing to that of a gun used in a subsequent shooting on
15 October 8, 2016, also in Brooklyn. In April 2017, after Perez was
16 arrested by NYPD officers for a separate offense, he admitted to being
17 the shooter at the July 23, 2016 incident and that he had borrowed and
18 fired the gun to intimidate the gang members. When he fired the gun,
19 he was unlawfully present in the United States.

20 Procedural History

21 On April 30, 2018, a grand jury indicted Perez on possession of
22 a firearm and ammunition while being an alien illegally and
23 unlawfully in the United States, in violation of 18 U.S.C. § 922(g)(5).
24 Perez moved to dismiss the indictment, arguing that § 922(g)(5) on its
25 face violated the Second Amendment by erecting a categorical bar on

1 the possession of firearms by illegal or unlawful aliens. The district
2 court denied the motion to dismiss the indictment. Assuming
3 without finding that the Second Amendment affords constitutional
4 protection to undocumented aliens, the district court concluded that
5 § 922(g)(5) survives intermediate scrutiny and thus is constitutional.
6 Perez entered a conditional plea of guilty that preserved his right to
7 challenge § 922(g)(5) under the Second Amendment, and was
8 sentenced to 20 months' imprisonment and 3 years' supervised
9 release. This appeal followed.

10

DISCUSSION

11 The sole issue on appeal is whether 18 U.S.C. § 922(g)(5) as
12 applied to Perez violates the Second Amendment. Section 922(g)(5)
13 prohibits “an alien . . . illegally or unlawfully in the United States”
14 from “possess[ing] . . . any firearm or ammunition” in or affecting
15 commerce.¹ We employ a two-step framework to determine the
16 constitutionality of a restriction on firearms: (1) we assess whether
17 the law burdens conduct protected by the Second Amendment; (2) we

¹ The government argues that Perez waived his as-applied challenge to the constitutionality of § 922(g)(5) because he raised solely a facial challenge in the district court. We previously treated a defendant's facial challenge to a related provision, § 922(g)(6), which prohibits firearm possession by one who has been dishonorably discharged from the military, as an as-applied challenge, even though the defendant raised arguments only as to the provision's facial invalidity in the district court and on appeal. See *United States v. Jimenez*, 895 F.3d 228, 232 (2d Cir. 2018). Consistent with that approach, we consider here whether § 922(g)(5) is unconstitutional as applied to Perez.

1 determine and apply the appropriate level of scrutiny.² We review *de*
2 *novvo* the district court's decision that the statute was constitutional as
3 applied.³

4 **I. Whether the Second Amendment Applies to Perez**

5 The Second Amendment provides, "A well regulated Militia,
6 being necessary to the security of a free State, the right of the people
7 to keep and bear Arms, shall not be infringed." Perez argues that "the
8 people" includes aliens like him, who are present unlawfully but have
9 developed substantial connections to the country. We have not
10 decided whether the Second Amendment protects undocumented
11 immigrants.

12 The Supreme Court outlined the contours of the Second
13 Amendment in the seminal decision, *District of Columbia v. Heller*.⁴
14 Based on extensive historical analysis, *Heller* broadly declared that the
15 Second Amendment confers a right to bear arms while leaving details
16 of the right to further adjudication. *Heller* read the Second
17 Amendment to codify a preexisting right for the individual to
18 "possess and carry weapons in case of confrontation."⁵ That right,
19 however, does not extend to the "carry[ing] [of] arms for *any sort of*

² *New York State Rifle & Pistol Ass'n, Inc. v. Cuomo*, 804 F.3d 242, 253 (2d Cir. 2015) (NYSRP).

³ *Id.* at 252 (internal quotation marks and citation omitted).

⁴ 554 U.S. 570 (2008).

⁵ *Id.* at 592.

1 confrontation.”⁶ Noting that the right is “not unlimited,”⁷ the Court
2 considered the scope of the Second Amendment along two
3 dimensions: what types of “arms” are protected and who are among
4 “the people.” First, the Second Amendment protects the sorts of
5 weapons that were “in common use at the time” that were typically
6 owned by “law-abiding citizens for lawful purposes.”⁸ This right, of
7 law-abiding persons to protect themselves and family members in the
8 home using a weapon in common use, is “the *central component*”
9 guaranteed by the Second Amendment.⁹

10 Second, *Heller* suggested that “the people” in the text of the
11 Second Amendment is a term of art that refers to members of the
12 “political community.”¹⁰ *Heller* relied on the Supreme Court’s prior
13 decision in *United States v. Verdugo-Urquidez*,¹¹ which examined the
14 Fourth Amendment’s reference to “the people,” and opined: “[Its
15 uses] suggest[] that ‘the people’ protected by the Fourth Amendment,
16 and by the First and Second Amendments, . . . refers to a class of
17 persons who are part of a national community or who have otherwise
18 developed sufficient connection with this country to be considered
19 part of that community.”¹² Based on this reading of “the people,” we

⁶ *Id.* at 595.

⁷ *Id.*

⁸ *Id.* at 624, 627.

⁹ *McDonald v. City of Chicago*, 561 U.S. 742, 767 (2010) (quoting *Heller*, 554 U.S. at 599); see also *id.* at 780.

¹⁰ *Heller*, 554 U.S. at 580.

¹¹ 494 U.S. 259 (1990).

¹² *Heller*, 554 U.S. at 580 (citing *Verdugo-Urquidez*, 494 U.S. at 265).

1 have previously concluded that, “[a]lthough the [*Heller*] Court uses
2 ‘citizens’, presumably at least some non-citizens are covered by the
3 Second Amendment.”¹³ For example, permanent resident aliens who
4 are law-abiding, pay taxes, and contribute to political campaigns have
5 established connections with this country that may qualify them to be
6 among “the people” who have a Second Amendment right.¹⁴

7 Relying on *Heller* and *Verdugo-Urquidez*, Perez argues that he is
8 among “the people” who possess a right to bear arms because he has
9 developed “sufficient connection[s] with” the United States, having
10 lived continuously in this country for the fifteen years preceding his
11 arrest. This analysis oversimplifies a question of some complexity.
12 *Heller* and *Verdugo-Urquidez* suggested that a person may be among
13 “the people” if he has developed connections with the United States,
14 but that those connections must be sufficiently great to qualify him as
15 a member of the “national” or “political” community. While Perez
16 appears to have put down roots in this country through years of
17 steady employment and a familial and social network, his status as an
18 unlawfully present alien necessarily makes him ineligible to vote or
19 hold certain government offices and subjects him to deportation at
20 any time. Excluded from participation in our democratic political
21 institutions, it is uncertain whether he can qualify as being part of the

¹³ *Jimenez*, 895 F.3d at 233 n.1.

¹⁴ See *Verdugo-Urquidez*, 494 U.S. at 271 (collecting cases recognizing constitutional rights of resident aliens).

1 “national” or “political” community.¹⁵ Regardless, reaching this issue
2 here risks “introducing difficult questions into our jurisprudence,”¹⁶
3 such as how “the people” in this context coheres with different but
4 related designations in other enumerated rights. For example,
5 “person,” as used in the Fifth and Fourteenth Amendments, has “long
6 been recognized” to include unlawful aliens and confer on them due
7 process rights.¹⁷

8 Taking a different approach to the question, various of our
9 sister courts have read *Heller* to exclude entirely from the Second
10 Amendment groups who have defied the law or are otherwise
11 “unvirtuous.”¹⁸ *Heller* identified the right of “law-abiding,
12 responsible” persons to keep arms to be at the heart of the Second
13 Amendment, and validated “longstanding prohibitions on the
14 possession of firearms by felons and the mentally ill.”¹⁹ Although
15 *Heller* itself left open whether certain groups are wholly excluded
16 from the Second Amendment’s protections or, instead, have a right
17 that legislatures may severely restrict, some circuits have relied on the
18 foregoing passages in *Heller* to conclude that undocumented aliens
19 like Perez are not entitled to Second Amendment protections because

¹⁵ Cf. *Sugarman v. Dougall*, 413 U.S. 634, 647 (1973) (describing a political community as based in part on who can vote and hold certain state positions that perform functions going to “the heart of representative government”).

¹⁶ *Jimenez*, 895 F.3d at 234.

¹⁷ *Plyler v. Doe*, 457 U.S. 202, 210 (1982).

¹⁸ *Jimenez*, 895 F.3d at 233 (collecting cases from the Third, Fourth, Eighth, Ninth, and Eleventh Circuits).

¹⁹ *Heller*, 554 U.S. at 626.

1 they are not “law-abiding.”²⁰ Yet other circuits have held or assumed
2 that unauthorized aliens are included in “the people” but concluded
3 that § 922(g)(5) is a permissible restriction.²¹

4 Our court has declined to address the extent to which the
5 Second Amendment protects conduct or individuals beyond the core
6 guarantee of a law-abiding person’s right to keep firearms for self-
7 defense.²² Recognizing that *Heller* left a “vast *terra incognita*” as to
8 what conduct or characteristics disqualify a person from the Second
9 Amendment’s protections,²³ our practice in those cases has been to
10 assume that a given firearm restriction implicates rights guaranteed
11 by the Second Amendment and determine whether the restriction
12 would nonetheless withstand the appropriate level of scrutiny.²⁴ We
13 see no reason to abandon that approach here. Deciding whether
14 undocumented immigrants like Perez have a constitutional right to
15 possess firearms “risks introducing difficult questions into our

²⁰ *United States v. Carpio-Leon*, 701 F.3d 974, 979–81 (4th Cir. 2012);
United States v. Portillo-Munoz, 643 F.3d 437, 440 (5th Cir. 2011), *as revised*
(June 29, 2011); *United States v. Flores*, 663 F.3d 1022 (8th Cir. 2011) (*per*
curiam).

²¹ *United States v. Meza-Rodriguez*, 798 F.3d 664, 666, 672 (7th Cir. 2015)
(holding); *United States v. Torres*, 911 F.3d 1253, 1261 (9th Cir. 2019)
(assuming without deciding); *United States v. Huitron-Guizar*, 678 F.3d 1164,
1169 (10th Cir. 2012) (assuming without deciding).

²² *See NYSRP*, 804 F.3d at 257; *Jimenez*, 895 F.3d at 233–34.

²³ *Jimenez*, 895 F.3d at 234 (quoting *Kachalsky v. Cnty. of Westchester*,
701 F.3d 81, 89 (2d Cir. 2012)).

²⁴ *Id.*

1 jurisprudence, including questions that have divided other courts.”²⁵
2 We need not decide the question here, because even if we were to
3 assume that Perez has a constitutional right to possess firearms, we
4 find that § 922(g)(5) is a permissible restriction when applied to the
5 facts of this case.

6 **II. Determining and Applying the Requisite Level of Scrutiny**

7 We first determine the appropriate level of scrutiny to apply to
8 § 922(g)(5). Generally, courts apply one of three levels of scrutiny to
9 evaluate whether a law is constitutional: strict scrutiny, intermediate
10 scrutiny, or rational basis review. Under strict scrutiny, the most
11 demanding standard, the government must demonstrate that the
12 challenged law serves a compelling governmental interest and is
13 narrowly tailored to achieve that interest.²⁶ Intermediate scrutiny is
14 less demanding, requiring only that the law be “substantially related
15 to the achievement of an important governmental interest.”²⁷ The
16 most lenient standard, rational basis review, asks whether the law is
17 rationally related to a legitimate governmental purpose.²⁸ *Heller*
18 cautioned that a restriction on Second Amendment rights requires
19 heightened scrutiny beyond rational basis.²⁹

²⁵ *Id.* (citing *Binderup v. Att’y Gen. United States of Am.*, 836 F.3d 336 (3d Cir. 2016), and *Tyler v. Hillsdale Cnty. Sheriff’s Dep’t*, 837 F.3d 678 (6th Cir. 2016)).

²⁶ *Gratz v. Bollinger*, 539 U.S. 244, 270 (2003).

²⁷ *NYSRP*, 804 F.3d at 261 (quoting *Kachalsky*, 701 F.3d at 96).

²⁸ *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 440 (1985).

²⁹ *Heller*, 554 U.S. at 628 n.27.

1 We determine whether a restriction on firearms is examined
2 under strict or intermediate scrutiny based on two factors: “(1) how
3 close the law comes to the core of the Second Amendment right and
4 (2) the severity of the law’s burden on the right.”³⁰ “[L]aws that place
5 either insubstantial burdens on conduct at the core of the Second
6 Amendment or substantial burdens on conduct outside the core of the
7 Second Amendment . . . can be examined using intermediate
8 scrutiny.”³¹ Only restrictions that substantially burden core rights
9 trigger strict scrutiny.³²

10 *Heller* identified as at the core of the Second Amendment “the
11 right of law-abiding, responsible citizens to use arms” in self-defense
12 in the home.³³ We have also emphasized that whether the possessor
13 is “law-abiding and responsible” is critical to determining whether an
14 interest falls within the core right.³⁴ In *United States v. Jimenez*, we
15 upheld an analogous provision that banned the possession of guns by
16 those who were dishonorably discharged from the military on the
17 basis that such individuals generally have been convicted of felony-
18 equivalent conduct.³⁵ To determine the burden imposed by a
19 restriction on the possession of firearms, we consider the scope of the

³⁰ *NYSRP*, 804 F.3d at 258 (internal quotation marks and citation omitted).

³¹ *Jimenez*, 895 F.3d at 234.

³² *Id.*

³³ *See Heller*, 554 U.S. at 635.

³⁴ *Jimenez*, 895 F.3d at 235; *see also United States v. Bryant*, 711 F.3d 364, 369 (2d Cir. 2013) (per curiam).

³⁵ *Jimenez*, 895 F.3d at 236–37.

1 restriction and the extent to which adequate alternatives remain for
2 persons who are law-abiding to acquire a firearm for self-defense.³⁶

3 Section 922(g)(5) erects a categorical ban on the possession of
4 firearms by undocumented immigrants like Perez, and thus imposes
5 a substantial burden on his ability to bear arms. Indeed, this burden
6 is insurmountable as long as his presence in the country is unlawful.
7 His interest in simply possessing firearms, however, is not at the core
8 of the Second Amendment right identified in *Heller*. As noted above,
9 *Heller* identified the core interest of the right as self-defense in the
10 home. Here, Perez's possession was neither in self-defense nor in the
11 home. While outdoors, he quickly took a weapon not his own,
12 charged down a residential street towards a gang fight, and shot the
13 weapon several times in the air.

14 Perez also does not qualify as a "law-abiding, responsible
15 citizen[]" because, however he may choose to live his life in the
16 United States, his presence here is unlawful. Perez asserts that his
17 undocumented status, without more, is not a crime and, unlike the
18 defendant in *Jimenez*, he had no criminal history prior to this
19 conviction. But Perez cannot reasonably dispute that he entered this
20 country without authorization, has continued to remain without
21 complying with established laws and procedures applicable to
22 immigrants, and therefore is subject to deportation. We do not
23 consider Perez's interest in possessing guns at all similar to that of a
24 "law-abiding, responsible" person pursuing self-defense. We agree

³⁶ *NYSRP*, 804 F.3d at 259.

1 with the district court that, as applied to Perez, § 922(g)(5) does not
2 implicate conduct at the core of the Second Amendment and thus
3 conclude that intermediate scrutiny applies.

4 To withstand intermediate scrutiny, the law must be
5 “substantially related to the achievement of an important
6 governmental interest.”³⁷ We have observed that regulation of
7 firearms “has always been more robust” than governmental measures
8 affecting other constitutional rights.³⁸ Thus, our only role is to ensure
9 that Congress formulated the challenged regulation “based on
10 substantial evidence.”³⁹ Perez concedes that public safety in the
11 context of using firearms is an important governmental objective. We
12 turn our attention, then, to whether § 922(g)(5) bears a substantial
13 relation to the achievement of that objective and conclude that it does.

14 The government supplies three principal rationales for the ends
15 served by § 922(g)(5), each of which we find furthers public safety:
16 (1) preventing individuals who live outside the law from possessing
17 guns, (2) assisting the government in regulating firearm trafficking by
18 preventing those who are beyond the federal government’s control
19 from distributing and purchasing guns, and (3) preventing those who
20 have demonstrated disrespect for our laws from possessing firearms.
21 Based on all three rationales, we conclude that § 922(g)(5) is

³⁷ *Id.* at 261 (quoting *Kachalsky*, 701 F.3d at 96).

³⁸ *Kachalsky*, 701 F.3d at 100.

³⁹ *Id.* at 97 (quoting *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 666 (1994)) (internal quotation marks omitted).

1 substantially related to the government's interest in promoting public
2 safety with respect to the use of firearms.

3 First, it can hardly be disputed that, simply by virtue of their
4 status, undocumented immigrants largely "liv[e] outside the law" in
5 at least that one fundamental respect and sometimes more.⁴⁰ By not
6 taking part in all formal systems of registration, identification, or
7 employment that the law requires, undocumented aliens are "harder
8 to trace"⁴¹ and thus their behavior is harder to regulate in some
9 respects. Perez's arguments, that he did not assume a false identity
10 and that certain jurisdictions issue driver's licenses regardless of
11 immigration status, carry little weight. It remains that Perez has
12 never filed federal tax returns or had a social security number, and
13 there is no indication that he was ever employed "on the books."

14 Second, by prohibiting unlawful immigrants like Perez from
15 possessing lethal weapons, § 922(g)(5) furthers Congress's interest in
16 regulating interstate commerce in firearms for the purpose of
17 investigating, tracking, and preventing gun violence. "When
18 Congress enacted [18 U.S.C. § 921 *et seq.*], it was concerned with the
19 widespread traffic in firearms,"⁴² having found that the United States
20 had "become the dumping ground of the castoff surplus military

⁴⁰ *United States v. Toner*, 728 F.2d 115, 129 (2d Cir. 1984).

⁴¹ *United States v. Torres*, 911 F.3d 1253, 1264 (9th Cir. 2019).

⁴² *Huddleston v. United States*, 415 U.S. 814, 824 (1974).

1 weapons of other nations.”⁴³ While the federal firearm regulatory
2 regime covers manufacturers and importers, wholesalers, and
3 retailers, the secondary market of private sales is largely
4 unregulated.⁴⁴ Firearms transferred even once by an unlicensed seller
5 and later used in a crime are “generally impossible” for law
6 enforcement to trace.⁴⁵ The secondary market of private transactions
7 has also been a substantial source of guns diverted to the illegal
8 market.⁴⁶ Born of a fear that their immigration status could be
9 discovered, unauthorized aliens seeking to procure a firearm may be
10 especially attracted to purchasing on the secondary market, where
11 sellers are not required to conduct background checks or maintain
12 transfer records under federal law.⁴⁷ Section 922(g)(5) thus aids
13 Congress’s efforts in suppressing the illicit market in firearms and
14 regulating interstate commerce in firearms.

⁴³ Omnibus Crime Control and Safe Streets Act of 1968, Pub. L. No. 90-351, § 901(a)(7), 82 Stat. 226 (1968).⁴⁴ *Abramski v. United States*, 573 U.S. 169, 185 (2014).

⁴⁴ *Abramski v. United States*, 573 U.S. 169, 185 (2014).

⁴⁵ Bureau of Alcohol, Tobacco, & Firearms, Youth Crime Gun Interdiction Initiative, *Crime Gun Trace Reports* (2000) 29 (July 2002), <https://www.atf.gov/file/2176/download>.

⁴⁶ Bureau of Alcohol, Tobacco, & Firearms, Youth Crime Gun Interdiction Initiative, *Performance Report for the Senate and House Committees on Appropriations Pursuant to Conference Report 105-825* 6 (Feb. 1999), <https://www.atf.gov/file/5601/download>.

⁴⁷ See *Abramski*, 573 U.S. at 180–81 (discussing why an individual prohibited from owning firearms might send a straw purchaser to buy a firearm on his behalf).

1 Third, the government has an obvious interest in prohibiting
2 the possession of firearms by those who are not, as *Heller* put it, “law-
3 abiding.” Congress has every right to “conclude[] that those who
4 show a willingness to defy our law are candidates for further
5 misfeasance or at least a group that ought not be armed when
6 authorities seek them.”⁴⁸ Perez does not dispute that he has
7 continuously failed to be “law-abiding” by remaining in this country
8 without authorization, even though he may have lacked criminal
9 intent as a minor entering the country. As to Perez’s assertion that
10 § 922(g)(5) is overbroad, we acknowledge that many undocumented
11 immigrants have never committed a crime of violence and that many
12 could be trusted with a firearm. But the same can be said for felons
13 and people with a mental illness who have not committed a violent
14 offense, groups also barred from possessing firearms. Congress is
15 “better equipped than the judiciary to make sensitive public policy
16 judgments” regarding the dangers posed by firearm possession and
17 how to mitigate those risks.⁴⁹ The legislative measures it enacts to
18 reduce those dangers, such as § 922(g)(5), need not be the least
19 restrictive means of achieving that objective when reviewed under
20 intermediate scrutiny.⁵⁰ Accordingly, we conclude that § 922(g)(5)
21 does not substantially burden any Second Amendment right to bear
22 arms that is particularized to Perez.

⁴⁸ *United States v. Huitron-Guizar*, 678 F.3d 1164, 1170 (10th Cir. 2012).

⁴⁹ *NYSRP*, 804 F.3d at 261 (internal quotation marks omitted)
(quoting *Kachalsky*, 701 F.3d at 97).

⁵⁰ *Id.*

1

CONCLUSION

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For the foregoing reasons, we AFFIRM the district court's decision in full.