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**CROSSING THE CONSTITUTIONAL BORDER: SHOULD AMERICANS BE
DREAMING OF NEW GUN CONTROL LAWS?**

Sarah Mustafa

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I. Introduction

The Summer of 2012 set the stage for unprecedented gun violence and novel immigration reform in the United States. Following the shooting of 12 individuals at a Colorado Movie Theater in July 2012, gun control took center stage during the 2012 presidential elections.¹ Several tragic gun-related incidents followed the Colorado shooting, most notably, the shooting of twenty first-grade students and fifteen teachers at Sandy Hook elementary school in Connecticut.² However, gun reform is not the only pressing issue before Congress. There are an estimated 11.2 million illegal immigrants currently living in the U.S.³ Immigration and gun control are a constant concern for our government, but what happens when gun control and immigration meet? This Note will focus on a discussion of the Gun Control Act, 18 U.S.C. § 922(g)(5)(A), as it exists regarding restriction of gun ownership to illegal aliens. The reasons for

¹ Lateef Mungin, *Accused Colorado movie theater shooter to enter plea*, CNN.COM (Tue. March 12, 2013), <http://www.cnn.com/2013/03/12/justice/colorado-theater-shooting/>.

² Susan Candiotti, *Newtown Shooting details revealed in newly released documents*, CNN.COM (Friday March 29, 2013), <http://www.cnn.com/2013/03/28/us/connecticut-shooting-documents>.

³ Julia Preston, *11.2 Million Illegal Immigrants in U.S. in 2010, Report Says; No Change From '09*, NYTIMES.COM (Feb. 1, 2011), <http://www.nytimes.com/2011/02/02/us/02immig.html>.

creating classification of the Gun Control Act were justified when it was initially enacted; however, in light of the “Dream Act” that President Obama enacted by Executive Order in July 2012, which grants illegal aliens deferred action, the justifications that supported Congress’ reasoning for restricting illegal aliens from gun ownership are now moot. This Note will analyze the congressional intent in the formation of the Gun Control Act of 1968 regarding restriction of gun ownership to illegal aliens, and how the Dream Act has challenged these reasons by virtue of creating a system of identification, among other things, that allows the government to trace these individuals who continue to reside in the U.S. “illegally.”

The passing of the Dream Act was a momentous occasion for the millions of undocumented and illegal aliens that reside in our country today. The Dream Act produced a class of “qualified” illegal aliens that are granted deferred action based on meeting the criteria and guidelines of the U.S. Department of Homeland Security.⁴ While Dreamers are not granted lawful permanent residence or a pathway to citizenship through deferred action, it is important to note the definition of an undocumented, illegal alien because the Gun Control Act explicitly bans all illegal aliens from owning guns. However, the definition of “aliens” no longer applies to Dreamers. An alien is defined as “[a]ny person not a citizen or national of the United States.”⁵ By definition, Dreamers are also considered illegal aliens under the Gun Control Act because they are not given citizen or national status. However, this Note will argue that the provision of the Gun Control Act banning possession of guns from Dreamers is unconstitutional because the congressional intent behind the ban is moot as applied to Dreamers.

⁴ For purposes of this Note, I will be referring to these individuals as “Dreamers.”

⁵ U.S. Department of Homeland Security, *Definition of Terms* available at <http://www.dhs.gov/definition-terms#0> (last visited Feb. 7, 2013).

II. The Federal Gun Control Act of 1968, § 922(g)(5) – Unlawful Acts And Illegal Aliens

The Bureau of Alcohol, Tobacco, Firearms and Explosives (hereinafter “ATF”) is the primary federal agency responsible for the enforcement of the federal firearms laws.⁶ The ATF is charged with the prevention of violent crime and terrorism, and seeks to protect the welfare of the community.⁷ With the enactment of the Federal Gun Control Act of 1968 (hereinafter “Gun Control Act”), ATF specifically targeted the regulation of firearms, working to “take armed, violent offenders off the streets and to ensure criminals and other prohibited persons do not possess firearms.”⁸ The Federal Gun Control Act of 1968 “criminalizes the possession of firearms in or affecting commerce by convicted felons, fugitives from justice, unlawful users of controlled substances, persons adjudicated to be mentally defective, illegal aliens, aliens admitted under certain non-immigrant visas, persons dishonorably discharged from the Armed Forces, persons who have renounced their United States citizenship, persons subject to certain restraining orders, and persons convicted of misdemeanor crimes of domestic violence.”⁹ Specifically, Sections 922(g)(5)(A) and (d)(5)(A) prohibit illegal aliens from owning guns.¹⁰ The statute “makes it unlawful for any illegal alien in the United States to possess, in or affecting commerce, any firear”¹¹ Furthermore, Section 922(d)(5)(A) makes it “unlawful for any person to sell or otherwise dispose of any firearm or ammunition to any person knowing or

⁶ Carl J. Truscott, Special Message from the Director of the Bureau of Alcohol, Tobacco, Firearms and Explosives, U.S. Department of Justice, Bureau of Alcohol, Tobacco, Firearms and Explosives, *Office of Enforcement Programs and Services, Firearms Programs Division*. Federal Firearms Regulations Reference Guide (Sept. 2005), <http://www.atf.gov/publications/download/p/atf-p-5300-4.pdf>.

⁷ Carl J. Truscott, *Special Message from the Director of the Bureau of Alcohol, Tobacco, Firearms and Explosives*, U.S. Department of Justice, Bureau of Alcohol, Tobacco, Firearms and Explosives, Office of Enforcement Programs and Services, Firearms Programs Division (Sept. 2005), <http://www.atf.gov/publications/download/p/atf-p-5300-4.pdf>.

⁸ *Id.*

⁹ *Id.*

¹⁰ 18 U.S.C. § 922 (g)(5)(A) (West 1968).

¹¹ 18 U.S.C. § 922 (g)(5); *United States v. Yanez-Vasquez*, No. 09-40056-01-SAC, 2010 WL *411112 (D. Kan. Jan. 28, 2010).

having reasonable cause to believe that such person-- (5) who, being an alien- (A) is illegally or unlawfully in the United States; or (B) except as provided in subsection (y)(2), has been admitted to the United States under a nonimmigrant visa . . . ”¹² Pursuant to Section 922(g)(5)(A) it shall be unlawful for any person described in subsection (g) to “to receive, possess, or transport any firearm or ammunition in or affecting interstate or foreign commerce; or (2) to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce.”¹³ Section 922(g)(5)(A) continues on to add that the government must prove the following to establish liability: (1) that the defendant was an alien illegally or unlawfully in the United States; (2) that defendant knowingly shipped, possessed, or received the firearm in question; and (3) the firearm at some point traveled in or affected interstate commerce.¹⁴ Additionally, the government must show a “sufficient nexus” between the defendant and the firearm through at least constructive possession, and it must show a connection between the firearm and interstate or international commerce.¹⁵

It is clear, based on section 922, that illegal aliens do not have the right to own guns while residing in the United States. While there are exceptions to this rule,¹⁶ determining the illegal status of an alien is required to trigger liability under section 922.¹⁷ Furthermore, it is important to define who exactly is included in this category of illegal aliens prohibited from owning guns. That being said, the ATF has defined “alien” to mean “[a]ny person not a citizen or

¹² 18 U.S.C. § 922(d)(5)(A).

¹³ 18 U.S.C. § 922(h).

¹⁴ 18 U.S.C. § 922(g)(5)(A).

¹⁵ 18 U.S.C. § 922(g)(5)(A); 65 A.L.R. Fed. 2d 249 (originally published 2012).

¹⁶ The Gun Control Act provides five general exceptions to the ban on illegal aliens owning guns. The ATF has listed the following five exceptions to include: “hunting purposes or in possession of a hunting permit; official foreign government representative; official foreign government representative w/ State Dept. designation; official foreign law enforcement official on government business; special waiver from the U.S. Attorney General.” FEDERAL FIREARMS LICENSEE INFORMATION SERVICE NEWSLETTER pg. 2 (Nov. 2008).

¹⁷ 18 U.S.C. § 922(d)(5)(A).

national of the United States.”¹⁸ More specifically, illegal aliens are those “who are unlawfully in the United States” and are “not in valid immigrant, nonimmigrant or parole status. . . .”¹⁹ The term includes four categories by which someone can be classified as an alien: first, any person who “unlawfully entered the United States without inspection and authorization by an immigration officer and who has not been paroled into the United States under section 212(d)(5) of the Immigration and Nationality Act (INA). . . .”²⁰ Second, any person who is a nonimmigrant and who overstays his or hers visitor’s visa or “violates the terms of the nonimmigrant category in which he or she was admitted,” will be classified as an illegal alien.²¹ Third, any person who is paroled under INA section 212(d)(5) and whose term has expired or who has violated their parole status will also fall under this alien category.²² Finally, any person “under an order of deportation, exclusion, or removal, or under an order to depart the United States voluntarily” will also be classified as an alien.²³

The Gun Control Act itself is silent, however, as to the meaning of “illegally or unlawfully in the United States.”²⁴ The courts, therefore, “look to the interpretation of the ATF to determine its meaning.”²⁵ The ATF has interpreted “illegal alien” to include those who currently unlawfully reside in the United States and are not in “valid immigrant, nonimmigrant or parole status.”²⁶ It is important to note, however, that the term “entered” has not been defined under the definition used by the ATF in classifying those aliens who have come to the United States

¹⁸ 27 C.F.R. § 478.11 (West 2012).

¹⁹ FEDERAL FIREARMS LICENSEE INFORMATION SERVICE NEWSLETTER 35 (2005).

²⁰ 27 C.F.R. § 478.11.

²¹ *Id.*

²² *Id.*

²³ *Id.*

²⁴ *United States v. Latu*, 479 F.3d 1153, 1158-59 (9th Cir. 2007).

²⁵ *Latu*, 479 F.3d at 59.

²⁶ *Id.*

illegally.²⁷ The INA defines “entry” to mean: “(1) a crossing into the territorial limits of the United States, *i.e.*, physical presence; (2)(a) inspection and admission by an immigration officer, or (b) actual and intentional evasion of the inspection at the nearest inspection point; and (3) freedom from official restraint.”²⁸

Therefore, it has become “a well-established proposition that ‘a person is not ‘in’ the United States until he is not only physically present on the United States side of the border, but also enjoys ‘freedom from official restraint.’”²⁹ Based on the definition promulgated by the Immigration and Nationality Act, the “illegal aliens” who entered as young children and are now young adults fulfill the requirements of “entering” the U.S. illegally, despite many having no cultural ties to their country of origin.³⁰ This point will be important in examining the conflicting status of immigrants known as Dreamers under the “Dream Act,” discussed *infra*, Part IV.

The Gun Control Act does not “criminalize the possession of a firearm by an alien who ‘comes to the United States’ or ‘brings a firearm to the United States,’” but instead criminalizes the *possession* of a firearm by an alien who is “illegally or unlawfully in the United States.”³¹ This might pose a problem for many of these prohibited illegal aliens who identify themselves with American customs and norms.³² Many of these individuals learned about constitutional rights, including the right to gun ownership.³³ However, they have also learned that these rights are not extended to them.³⁴ There is extensive case law that discusses the limitations of gun

²⁷ *Lopez-Perera*, 438 F.3d at 935.

²⁸ 18 U.S.C. § 1101 (a)(13) (West 1998); *see* *Sidhu v. Ashcroft*, 368 F.3d 1160, 1163-64 (9th Cir. 2004) (quoting *Matter of Patel*, 20 I. & N. Dec. 368, 370 (1991)).

²⁹ *Lopez-Perera*, 438 F.3d at 935 (citing *United States v. Zavala-Mendez*, 411 F.3d 1116, 1120 (9th Cir.2005)).

³⁰ *Id.*

³¹ *Lopez-Perera*, 438 F.3d at 936.

³² Secretary Napolitano Announces Deferred Action Process for Young People Who Are Low Enforcement Priorities, *Office of the Press Secretary* (June 15, 2012), <http://www.dhs.gov/news/2012/06/15/secretary-napolitano-announces-deferred-action-process-young-people-who-are-low>.

³³ *Lopez-Perera*, 438 F.3d at 936.

³⁴ *Id.*

ownership as to illegal aliens.³⁵ Many defendants have argued that due to their applications for change of status and/or pending applications for change in illegal status, they are not “illegal” within the meaning of section 922(g)(5)(A).³⁶ The Circuit Courts and the Supreme Court, however, have rejected this argument, adhering to a strict reading and interpretation of the statute.³⁷

The Supreme Court, in *United States v. Flores*, observed that while an alien without any authorization is not allowed to reside in the United States, “an alien who *has* received ‘limited temporary authorization’ (i.e., a temporary stay of removal and a temporary work permit), is still an illegal alien for purposes of section 922(g)(5)(A).³⁸ Similarly, in *United States v. Collins*, the Fifth Circuit rejected the defendant’s argument that the government failed to prove his illegal status.³⁹ The court again emphasized that for purposes of section 922(g)(5), “an alien who is in the United States without authorization is in the country illegally.”⁴⁰ The court determined that a jury could have reasonably concluded that Collins was illegally residing in the United States.⁴¹ The court further continued that it is not necessary that the government prove that “the defendant knew that firearms possession was illegal by reason of the defendant’s illegal or nonimmigrant alien status.”⁴² Again, this might become difficult for those illegal aliens who identify with the laws of the United States by virtue of being raised here despite having entered illegally as children.

³⁵ *United States v. Ochoa-Colchado*, 521 F.3d 1292, 1294 (10th Cir. 2008).

³⁶ *United States v. Flores*, 404 F.3d at 322; *Ochoa-Colchado*, 521 F.3d at 1294.

³⁷ *See e.g.*, *United States v. Huritron-Guizar* 678 F.3d 1164, 1164 (10th Cir. 2012); *United States v. Carpio-Leon*, 701 F.3d 974, 974 (4th Cir. 2012).

³⁸ *Ochoa-Colchado*, 521 F.3d at 1295-96.

³⁹ *United States v. Collins*, 15 F.3d 179, 179 (5th Cir. 1994).

⁴⁰ 65 A.L.R. Fed. 2d 249 (Originally published in 2012).

⁴¹ *Collins*, 15 F.3d at 179 (“The agent testified that the INS records pertaining to Collins would have been ‘voluminous’ if Collins had applied for immigrant status in order to remain in the United States legally.”).

⁴² 65 A.L.R. Fed. 2d 249 (Originally published in 2012).

III. Legislative Intent For Restricting Illegal Aliens From Owning Guns: What Is The Government’s Interest In Restricting Aliens From Owning Firearms?

The Gun Control Act’s legislative history sheds light on Congress’s motive for enacting the ban. The Gun Control Act seeks to protect against terrorism, violent crime, and to keep firearms out of the hands of “prohibited persons.”⁴³ Congress further stated during a committee meeting that the “principal purposes” of the Gun Control Act of 1968 are to “make it possible to keep firearms out of the hands of those not legally entitled to possess them because of age, criminal background, or incompetency, and to assist law enforcement authorities in the States and their subdivisions in combating the increasing prevalence of crime.”⁴⁴ The Supreme Court agreed with Congress, noting that the fundamental purpose of the Federal Gun Control Act “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.’”⁴⁵

Congressional records and Senate reports have provided guidance and insight into the policy justifications for restricting illegal aliens from owning guns.⁴⁶ Notably, “[t]he alien-in-possession ban was incorporated from a predecessor statute by the 1986 Firearm Owners’ Protection Act, Pub. L. No. 99–308, 100 Stat. 449,” with the purpose of keeping firearms away from those deemed “irresponsible or dangerous.”⁴⁷ Congress’ justifications for the ban conform with public policy objectives, namely to keep our communities safe from gun violence in the hands of those not entitled by law to possess them. While gun ownership is a right embedded in the Constitution for U.S. citizens, the congressional justifications for this ban were warranted against those aliens who have no documentation or authorization to reside in the U.S.

⁴³ Special Message from Carl J. Truscott, *supra* note 7.

⁴⁴ S. Rep. No. 90–1097; S. Rep. No. 1097, 1968.

⁴⁵ *Huddleston v. United States*, 415 U.S. 814, 824 (1974).

⁴⁶ S. Rep. No. 1097, 1968 U.S.C.C.A.N. 2112, 2113 (1968).

⁴⁷ S. Rep. No. 98–583 at 12 (1986).

In an effort to determine the congressional intent of the Gun Control Act, the Fifth Circuit, in *U.S. v. Orellana*,⁴⁸ utilized the “rule of lenity” in reversing and remanding the lower court’s indictment of Mr. Orellana, an illegal alien from El Salvador.⁴⁹ Mr. Orellana received Temporary Protected Status (“TPS”) subsequent to his illegal entry, and was indicted under section 922(g)(5)(A) for the unlawful possession of a firearm.⁵⁰ In reaching its decision, the court noted that “[w]hile true that upon withdrawal of TPS, Orellana would ‘revert’ to his original illegal immigration status, he was in a form of lawful status throughout the time his TPS registration was effective. Thus, the plain language of section 922(g)(5)(A) provides support for the proposition that his presence in the United States was lawful at the time alleged in his indictment. At the very least, it does not unambiguously indicate that his presence was unlawful.”⁵¹

More interestingly, however, the court determined that because section 922(g)(5)(A) was ambiguous as applied to an alien with TPS, and because of ATF regulation and the absence of binding case law, the court determined it would apply the rule of lenity to this case.⁵² The rule of lenity is employed “when choice has to be made between two readings of what conduct Congress has made a crime,” noting that the court should not impose criminal sanctions based on

⁴⁸ *United States v. Orellana*, 405 F.3d 360, 360 (5th Cir. 2005).

⁴⁹ *Orellana*, 405 F.3d at 365.

⁵⁰ Aliens who apply for and receive TPS are allowed to remain in the United States and work, provided that they register annually and their country of nationality remains designated. They are ineligible for most public assistance programs, but are allowed to apply for adjustment of status as if they possessed lawful non-immigrant status. While registered for TPS, an alien maintains any pre-existing immigration status he previously obtained, and may acquire a new immigration status. Once TPS is withdrawn, an alien reverts to any immigration status that he maintained or was granted while registered for TPS. *Id.* at 365-66.

⁵¹ *Orellana*, 405 F.3d at 366; *see* 65 A.L.R. Fed. 2d 249 (Originally published in 2012) (noting that the *Orellana* court acknowledged “it was questionable whether such an alien could be considered an ‘immigrant,’ since the word as used in the regulation likely referred only to aliens who were in lawful permanent residence. However, the court also recognized that the term ‘immigrant’ was sometimes used in the Immigration and Nationality Act as a generic catchall word to refer to any alien except one who was classified in one of the specified nonimmigrant categories. The court further recognized that although some deference is due an agency’s interpretation of a criminal statute, the Bureau of Alcohol, Tobacco and Firearms’ (ATF) field of expertise lay outside the realm of immigration law.”).

⁵² *Id.* at 370.

“ambiguous implication.”⁵³ Therefore, the rule of lenity is used as a “tool for statutory interpretation,” and the court has repeatedly “emphasized that the ‘touchstone’ of the rule of lenity ‘is statutory ambiguity.’”⁵⁴ For these reasons, the *Orellana* court found it appropriate to apply the rule of lenity, which should only be employed “after other canons of construction have proven unsatisfactory in pursuit of a criminal statute’s meaning.”⁵⁵ This becomes important in determining what standards the courts should use in handling violations of section 922(g)(5)(A) in the event that a Dreamer is found to be in possession of a firearm based on their permission to reside in the United States. Therefore, given the ambiguity of section 922(g)(5)(A) as applied to Dreamers, the rule of lenity should be used to determine the boundaries of the Gun Control Act as applied to Dreamers, especially because the congressional justifications for the ban are no longer valid.

Not all courts, however, have followed the Fifth Circuit’s reasoning and holding in *Orellana*. In *United States v. Flores*, the government appealed a decision from the United States District Court for the District of Texas “charging Defendant-Appellee Giovanni Flores with violating 18 U.S.C. Section 922(g)(5)(A) by being an alien, illegally or unlawfully in the United States, in possession of a firearm.”⁵⁶ On appeal, the court, in finding defendant guilty of violating section 922(g)(5)(A), found that “an alien’s application for temporary protected status (TPS) and consequent receipt of certain temporary treatment benefits while his TPS application was pending, including employment authorization, did *not* alter his status as illegal alien for purposes of applying [Section] 922(g)(5)(A).”⁵⁷ This holding completely contradicts the reasoning and

⁵³ *United States v. Universal C. I. T. Credit Corp.*, 344 U.S. 218, 221-22 (1952).

⁵⁴ *Moskal v. United States*, 498 U.S. 103, 107 (1990) (citing *Bifulco v. United States*, 447 U.S. 381, 387 (1980)) (quoting *Lewis v. United States*, 445 U.S. 55, 65 (1980)).

⁵⁵ *Orellana*, 405 F.3d at 371.

⁵⁶ *United States v. Flores*, 404 F.3d 320, 322 (2005).

⁵⁷ *Id.* at 322.

holding of the *Orellana* court. Not surprisingly, the District Court of Texas did not find the definition of “illegal alien” for purposes of section 922(g)(5)(A) to be exactly clear. The court was forced to acknowledge that the interpretation of section 922(g)(5)(A) “poses a question involving a mixture of both immigration and criminal law,” delegating the interpretation section 922(g)(5) specifically to the ATF.⁵⁸ The court read the phrase “illegally or unlawfully in the United States” in section 922(g)(5)(A) “to include those aliens, like Flores, who entered the country illegally and subsequently qualified for temporary treatment benefits. . . .”⁵⁹ The court, similar to the Fifth Circuit in *Orellana*, turned to the ATF for guidance in their regulations and interpretations of section 922(g)(5)(A).⁶⁰ It concluded that the regulations define an alien illegally or unlawfully in the United States as an alien who is “not in valid immigrant, nonimmigrant or parole status[;][t]he term includes any alien ... [w]ho unlawfully entered the United States without inspection and authorization by an immigration officer and who has not been paroled into the United States under section 212(d)(5) of the Immigration and Nationality Act (INA). . . .”⁶¹ However, the Court was also forced to grapple with the fact that neither the “INA, 8 U.S.C. §1101, nor its corresponding immigration regulations define the phrase ‘illegally or unlawfully in the United States.’”⁶² Ultimately, the court in *Flores* determined that despite granting an illegal alien a temporary stay of removal and allowing him to work during that stay, he could not be immune from liability under section 922(g)(5)(A) “based on his employment authorization” alone.⁶³

⁵⁸ *Id.* at 326.

⁵⁹ *Id.*

⁶⁰ *See* 27 C.F.R. § 478.11 (West 2012).

⁶¹ *Flores*, 404 F.3d at 326.

⁶² *Id.*

⁶³ 65 A.L.R. Fed. 2d 249 (Originally published in 2012).

Perhaps employment authorization alone would not carry enough weight to convince Congress that an illegal alien might not be harmless. But what about proof of other combined factors such as absence of a criminal record and proof that the alien is enrolled in an educational institution? Considerations such as these, taken as a whole, counter the justifications proclaimed by Congress, making the ban on alien gun ownership ineffective and unconstitutional concerning Dreamers.

B. United States v. Huitron-Guizar And The Second Amendment As Applied to Illegal Aliens

More recently, in *United States v. Huitron-Guizar*,⁶⁴ the Tenth Circuit rejected defendant Emmanuel Huitron-Guizar's Second Amendment and Equal Protection challenges to his conviction under the Gun Control Act. Huitron-Guizar was arrested after the search of his home revealed that he was illegally in possession of three firearms.⁶⁵ Mr. Guizar was born in Mexico, but was brought to the United States at age three.⁶⁶ Mr. Guizar was twenty-four years old at the time of his arrest, and was not a U.S. citizen.⁶⁷ On appeal, Mr. Guizar challenged the Gun Control Act, Section 922(g)(5), arguing its unconstitutionality based on his claim that it violates the Second Amendment and Equal Protection Clause.⁶⁸ The Tenth Circuit was presented with the task of determining whether the alien in possession statute violated Mr. Guizar's Second Amendment right to bear arms.⁶⁹ Relying on the Supreme Court case of *United States v. Heller*, the Tenth Circuit noted that the "amended Gun Control Act of 1968, forbids gun possession by nine classes of individuals: felons, fugitives, addicts or users of controlled substances, the mentally ill, illegal and non-immigrant aliens, the dishonorably discharged, renouncers of their

⁶⁴ *Huitron-Guizar*, 678 F.3d at 1165.

⁶⁵ *Id.*

⁶⁶ *Id.*

⁶⁷ *Id.*

⁶⁸ *Id.*

⁶⁹ *Id.* at 1166.

citizenship, those subject to court orders for harassing, stalking, or threatening intimate partners or their children, and those convicted for misdemeanor domestic violence.”⁷⁰

The Tenth Circuit, in analyzing the congressional intent of the alien-in-possession ban determined that:

Congress may have concluded that illegal aliens, already in probable present violation of the law, simply do not receive the full panoply of constitutional rights enjoyed by law-abiding citizens. Or that such individuals, *largely outside the formal system of registration, employment, and identification, are harder to trace and more likely to assume a false identity*. Or Congress may have concluded that those who show a willingness to defy our law are candidates for further misfeasance or at least a group that ought not be armed when authorities seek them. It is surely a generalization to suggest, as courts do, *see, e.g., United States v. Orellana*, 405 F.3d 360, 368 (5th Cir.2005), that unlawfully present aliens, as a group, pose a greater threat to public safety—but general laws deal in generalities. The class of convicted felons, too, includes non-violent offenders. *See McCane*, 573 F.3d at 1048–49 (10th Cir.2009) [. . .] The law applies with equal force to those who entered yesterday and those who, like Mr. Huitron–Guizar, were carried across the border as a toddler. The bottom line is that crime control and public safety are indisputably “important” interests.⁷¹

This interpretation of the Gun Control Act provides, as the court clearly stated, a “generalization” that all illegal immigrants, among other prohibited persons, pose a threat to the welfare of the community and therefore should not be allowed to own firearms in accordance with the “congressional intent” behind the statute. However, this interpretation of the statute’s intent is no longer constitutional, as discussed *infra*, when applied to Dreamers. Indeed, Congress proffered good reasons for prohibiting illegal aliens from possession of firearms, including the inability of both state and federal government to identify aliens without documentation, and because they have “already violated a law of this country” and are “likely to

⁷⁰ See *United States v. Heller*, 554 U.S. 570 (2008); *Huitron-Guizar*, 678 F.3d at 1166.

⁷¹ *Huitron-Guizar*, 678 F.3d at 1169 (emphasis added).

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.”⁷²

It is worth observing, however, that even when presented with proof to the contrary, the Second Circuit in *United States v. Olchoa-Colchado*,⁷³ rejected the argument of the defendant, “who claimed, based on the policy outlined above, that he was an alien with similar status to an individual with TPS because he “maintained lawful employment, renewed his EAD⁷⁴ every year, kept the Government informed of his current residence, and was generally available to the Government throughout its processing of his applications.”⁷⁵ He therefore argued tat he was not an alien “whose presence was unknown or undocumented, or who was unable to work and therefore resorted to criminal activity to support himself.”⁷⁶ Nevertheless, the court reasoned that “[t]o permit aliens to legally possess firearms pending the resolution of their applications for adjustment of status would compromise the safety and security of U.S. citizens and residents because those aliens would be able to obtain firearms during the pendency of their applications and they would still have those weapons upon being forced “underground” when their applications are denied.”⁷⁷ While this reasoning may have some merit, it cannot be applied to Dreamers because they are not individuals with “pending applications” and are specifically approved on the basis of identifying documentation.

⁷² *Ochoa-Colchado*, 521 F.3d at 1297 (quoting *United States v. Toner*, 728 F.2d 115, 128 (2d Cir.1984)).

⁷³ *Id.*

⁷⁴ EAD is a commonly used acronym for “Employment Authorization Document.” U.S. Citizenship and Immigration Services, *available at* <http://www.uscis.gov/portal/site/uscis/menuitem.5af9bb95919f35e66f614176543f6d1a/?vgnextoid=73ddd59cb7a5d010VgnVCM10000048f3d6a1RCRD&vgnnextchannel=db029c7755cb9010VgnVCM10000045f3d6a1RCRD> (last visited Feb. 8, 2013).

⁷⁵ *Ochoa-Colchado*, 521 F.3d at 1297.

⁷⁶ *Id.* at 1297.

⁷⁷ *Id.* at 1298.

B. Who Is A “Person” Within The Meaning Of The Second Amendment?

Defining “person” within the meaning of the Second Amendment has not been an easy task, especially when it comes to illegal aliens. The Court, in *United States v. Verdugo-Urquidez* provided an instructive analysis, stating that while the Second Amendment is not clear as to who is a “person” within its definition, ““the people” protected by the Fourth Amendment, and by the First and Second 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.”⁷⁸ Additionally, the Tenth Circuit, in *Huitron-Guizar*, emphasized that unlike citizens, illegal aliens are not conferred the same constitutional rights because of their illegal status.⁷⁹ Despite the lengthy court decisions on the issue of who is considered an “illegal alien” within the meaning of section 922(g)(5)(A), the Second Amendment grants “people” the right to bear arms.⁸⁰ Specifically, the Second Amendment states: “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.”⁸¹ It is less clear who falls within the meaning of “the people.”⁸²

Given this definition, it would be inaccurate to state that the estimated forty million unauthorized immigrants living in the United States have not somehow developed sufficient connections and relationships with our communities.⁸³ While there are many reasons why illegal

⁷⁸ *United States v. Verdugo-Urquidez* 494 U.S. 259, 265 (1990); *Huitron-Guizar*, 678 F.3d at 1167.

⁷⁹ *Huitron-Guizar*, 678 F.3d at 1166 (quoting *Johnson v. Eisentrager*, 339 U.S. 763, 770 (1950): “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.”).

⁸⁰ U.S. CONST. amend. II.

⁸¹ U.S. CONST. amend. II. (emphasis added).

⁸² *Huitron-Guizar*, 678 F.3d at 1167 (quoting *Verdugo-Urquidez* 494 U.S. at 265).

⁸³ *A Portrait of the 40 Million, Including 11 Million Unauthorized, A Nation of Immigrants available at* <http://www.pewhispanic.org/2013/01/29/a-nation-of-immigrants/> (last visited Jan. 29, 2013).

aliens should not be in possession of firearms, the Dream Act focuses on a special category of immigrants who have essentially lived their entire lives in the United States, just without any formal documentation. It focuses on the children of unlawful immigrants who had no choice in their decision to live in the U.S. and who have grown up adopting the American culture and language.

Furthermore, the *Verdugo–Urquidez* Court properly noted that Second Amendment rights are not unrestricted as to U.S. citizens either. For example, “[a]n airline passenger may not carry aboard a concealed firearm.”⁸⁴ The Court further recognized that there is an “ascending” scale of rights that increases as one’s status in the country changes, i.e. “[a] *temporary* resident alien has fewer rights than a *permanent* resident alien.”⁸⁵ In reaching its determination, the Court applied intermediate scrutiny in analyzing the issue, which requires a showing that the government has a substantially related interest to an important official end.⁸⁶ The “substantial interest” and “official end,” as already stated, is to keep firearms out of the hands of prohibited persons.⁸⁷ Therefore, the Tenth Circuit concluded, based on its interpretation of Congress’ intent behind the prohibition, that “[t]he law applies with equal force to those who entered yesterday and [to] those who, like Mr. Huitron–Guizar, were carried across the border as a toddler.”⁸⁸ The bottom line is that gun control and public safety are indisputably “important” interests,” therefore imposing liability on Mr. Huitron-Guizar under section 922(g)(5).⁸⁹ Still, *Huitron-Guizar* did not answer all the questions regarding the illegal alien prohibition.

⁸⁴ 49 U.S.C. § 46505 (West 2001); *Huitron-Guizar*, 678 F.3d at 1166.

⁸⁵ *Huitron-Guizar*, 678 F.3d at 1166.

⁸⁶ *Id.*

⁸⁷ See discussion *supra* note 64.

⁸⁸ See *Orellana*, 405 F.3d at 365-66.

⁸⁹ *Huitron-Guizar*, 678 F.3d at 1170.

Examining the Supreme Court’s decision in *United States v. Heller*,⁹⁰ the court in *Huitron-Guizar* questioned why, “[i]f the right’s ‘central component,’” as interpreted by *Heller*, is to secure an individual’s ability to defend his home, business, or family (which often includes children who are American citizens, but born of immigrant parents), should all aliens who are not lawfully residing in the United States be left to the mercies of burglars and assailants? That must be at least one reason behind the wave of challenges to section 922(g)(5).⁹¹ The court deferred to Congress’ distinction between “citizens and non-citizens, or between lawful and unlawful aliens”⁹² Ultimately, the court found that section 922(g)(5) withstood Mr. Huitron–Guizar’s Second Amendment and Equal Protection challenges but it left open the question of whether or not documented immigrants could own guns.⁹³

However, the District Court for the District of Kansas, in *United States v. Yanez-Vasquez*,⁹⁴ criticized the *Heller* decision, which it said “underscores [the Verdugo-Urquidez] interpretation by recognizing the Second Amendment right as “the right of law-abiding, responsible *citizens* to use arms in defense of hearth and home,”⁹⁵ by arguing that the right was intended for and guaranteed to citizens.⁹⁶ The inconsistencies in these decisions therefore leave open to interpretation whether or not the dicta in *Heller* includes Dreamers within the scope of individuals that do not qualify as “persons” under the Second Amendment for purposes of section 922 (g)(5)(A). It is important to note, as the Tenth Circuit recognized, that the *Heller* dicta regarding the scope of the Second Amendment and section 922(g)(5) as to illegal aliens

⁹⁰ *Id.*

⁹¹ *Id.*

⁹² *Id.*

⁹³ *Id.* at 1170.

⁹⁴ *Yanez-Vasquez*, 2010 WL 411112, at *2.

⁹⁵ *Dist. of Columbia v. Heller*, 554 U.S. 570, 570 (2008); *Yanez-Vasquez*, 2010 WL 411112 at *2.

⁹⁶ *Yanez-Vasquez*, 2010 WL 411112 at *2.

continues to only be dicta and only a few courts post-*Heller* have held that the Second Amendment does not apply to illegal aliens.⁹⁷

While there are already many questions that remain unanswered concerning firearm possession and illegal aliens, a new question can now be added to the list: whether the Federal Gun Control Act, as written, is unconstitutional as a result of the Dream Act because Congress' justifications for promulgating the prohibition against illegal aliens is now moot.

IV. President Obama's Executive Order For Deferred Action – What Is The Scope And Impact Of The “DREAM Act?”

On June 15, 2012, the U.S. Department of Homeland Security (“DHS”) announced its new program, known as “Deferred Action for Childhood Arrivals,” whereby qualified illegal aliens would be eligible for relief from deportation if they arrived before the age of sixteen and are younger than age thirty at the time of application.⁹⁸ Deferred Action applies to the children of illegal immigrants who were brought to the United States at very young ages and are now grown, living in the United States without any form of documentation.⁹⁹ President Obama's Deferred Action plan is designed to allow certain people *who did not intentionally violate immigration law* to continue to live and work in the United States.¹⁰⁰ What this means is that “children who were brought into the United States illegally and who have grown up in America did not set out to break any immigration laws. Since they are not responsible for what happened when they were young *it is unreasonable to punish them.*”¹⁰¹ Eligible individuals will be offered deferred action

⁹⁷*Id.* (emphasis added) (finding that “Consistent with that interpretation, the *few* cases which have examined the constitutionality of 922(g)(5) *post-Heller* have held that illegal aliens are not protected by the Second Amendment.”).

⁹⁸ Jeffrey Passell, et al., *Up to 1.7 Million Unauthorized Immigrant Youth May Benefit from New Deportation Rules*, PEW HISPANIC CENTER (Aug. 14, 2012).

⁹⁹ Secretary Napolitano Announces Deferred Action Process for Young People Who Are Low Enforcement Priorities, *supra* note 32.

¹⁰⁰ *Id.*

¹⁰¹ *Id.*

for a period of two years, subject to renewal.¹⁰² President Obama has repeatedly stated that “it makes no sense to remove productive young people to countries where they may not have lived or even speak the language. They have become productive members in our communities. They have grown up swearing allegiance to our flag. Yet they live in the shadows of America, without the possibility to realize their dreams.”¹⁰³

A. Necessary Documentation and Requirements for Deferred Action.

DHS has provided guidelines for Dreamers in order to have their applications for Deferred Action properly submitted. These requirements give significant insight into why Congress’ justifications for prohibiting aliens from owning firearms is no longer suitable as applied to Dreamers. The Department of Homeland Security has listed the following qualifiers in order for individuals to be eligible for Deferred Action: “you must 1. Have entered the United States when you were younger than 16 years of age; 2. Have been in the United States for five years prior to June 15, 2012 (small trips outside of the United States for humanitarian reasons won't impact this requirement); 3. Be older than 15 to apply; 4. Not be older than 30 years of age; 5. Have either graduated from a high school or equivalent, enrolled in school or are a veteran of the United States military; 6. Submit to a background check and have a clean record without felonies, misdemeanors (other than maybe one or two small misdemeanors), or any evidence of you being a threat to the country.”¹⁰⁴ The background checks consist of the following: “checking biographic and biometric information provided by the individuals against a variety of databases maintained by DHS and other federal government agencies.”¹⁰⁵ More

¹⁰² *Id.*

¹⁰³ Cecilia Muñoz, *Deferred Action Process for Certain Young People: Smart and Sensible Immigration Policy*, THE WHITE HOUSE BLOG (June 15, 2012, 03:07 PM EDT), <http://www.whitehouse.gov/blog/2012/06/15/deferred-action-process-certain-young-people-smart-and-sensible-immigration-policy>.

¹⁰⁴ Eligibility for Deferred Action, U.S. Department of Homeland Security, available at <http://www.dhs.gov/eligibility-deferred-action> (last visited Feb. 7, 2013).

¹⁰⁵ *Id.*

importantly, Secretary Napolitano stated that Dreamers are “young people who were brought to the United States as young children, [who] do not present a risk to national security or public safety”¹⁰⁶ While the Gun Control Act seeks to avoid putting firearms in the hands of aliens for various public policy reasons, including safety from undocumented or dangerous individuals, it is unlikely based on congressional history that immigrants like the Dreamers are the individuals Congress intended to ban from gun ownership.

DHS also requires applicants to provide extensive documentation proving that they have lived in the United States.¹⁰⁷ Applicants must demonstrate that they came to the United States before age sixteen, and that they have lived in the United States for the past five years.¹⁰⁸ They may do this by submitting any of the following documents: “rent receipts or utility bills, employment records (pay stubs, W-2 Forms, etc), school records (letters, report cards, etc), Military records (Form DD-214 or NGB Form 22), official records from a religious entity confirming participation in a religious ceremony, copies of money order receipts for money sent in or out of the country, passport entries, birth certificates of children born in the U.S., dated bank transactions, a Social Security card, automobile license receipts or registration, deeds, mortgages, rental agreement contracts, tax receipts, or insurance policies.”¹⁰⁹ Additionally, DHS requires that all applicants submit “proof of identification” by providing either one of the following: “passport or national identity document from the person’s country of origin, a birth certificate with photo identification, a school or military ID with photo, or any U.S. government immigration or other document bearing the applicant’s

¹⁰⁶ Secretary Napolitano Announces Deferred Action Process for Young People Who Are Low Enforcement Priorities, *supra* note 32.

¹⁰⁷ Deferred Action for Childhood Arrivals, *Frequently Asked Questions*, <http://www.dhs.gov/deferred-action-childhood-arrivals> (last visited Feb. 8, 2013).

¹⁰⁸ *Id.*

¹⁰⁹ *Id.*

name and photo.”¹¹⁰ The government has clearly noted that these extensive requirements also support the government’s intended purpose of focusing its “enforcement resources on the removal of individuals who pose a national security or public safety risk, including immigrants convicted of crimes, violent criminals, felons, and repeat immigration law offenders.”¹¹¹ Deferred Action further enhances the Department’s ability to focus on these priority removals.¹¹² The intent behind granting deferred action is to allow law-abiding individuals who have contributed in a productive way to our community to enjoy the opportunities this country has to offer. However, it was probably not predicted that the Gun Control Act and deferred action would clash in a way that is of significant importance to our country’s immigration policy and safety.

B. Why Did President Obama Authorize The Dream Act?

A 2012 Pew Hispanic Center study estimates based on data gathered from a March 2010 Current Population Survey (CPS) conducted jointly by the U.S. Bureau of Labor Statistics and the Census Bureau, that approximately 1.7 million individuals will be eligible for Deferred Action.¹¹³ This research considered variables such as immigrants who “met age, education and duration of residence criteria outlined by the U.S. Department of Homeland Security for its ‘Deferred Action for Childhood Arrivals program’ in order to produce the most accurate results.”¹¹⁴

A few important statistics on illegal aliens in the United States provide insight as to the vast number of individuals who could potentially qualify for the deferred action program, and

¹¹⁰ *Id.*

¹¹¹ Secretary Napolitano Announces Deferred Action Process for Young People Who Are Low Enforcement Priorities, *supra* note 32.

¹¹² *Id.*

¹¹³ Passell, *supra* note 98, at 2.

¹¹⁴ *Id.*

provide some obvious reasons why President Obama implemented such a significant change in immigration law. The United States saw a 27% increase in its illegal immigrant population between 2000 and 2009, according to DHS.¹¹⁵ Therefore, given the requirement that all applicants for Deferred Action must fulfill the necessary prerequisites for approval,¹¹⁶ millions of illegal aliens will not fit under the Dreamers umbrella. Nevertheless, the following facts will demonstrate the impact that Deferred Action will have on those illegal immigrants that do qualify: “The number of illegal immigrants in the United States was estimated at 11.5 million in 2011, according to the Pew Hispanic Center.”¹¹⁷ Of this population, approximately 6.8 million entered the United States before 2000.¹¹⁸ Furthermore, it is worth noting that the largest portion of this population is of Hispanic descent, with “fifty-eight percent of the illegal immigrant population [being] from Mexico.”¹¹⁹

Deferred Action specifically avoids granting those individuals with serious criminal backgrounds the right to deferred action.¹²⁰ The Department of Homeland Security has stated that although deferred action provides for a delay in deportations, it continues to be a form of “prosecutorial discretion that does not confer lawful permanent resident status or a path to citizenship. Only the Congress, acting through its legislative authority, can confer these rights.”¹²¹ Furthermore, DHS has promulgated further restrictions in order to ensure that the

¹¹⁵ *Id.*

¹¹⁶ Secretary Napolitano Announces Deferred Action Process for Young People Who Are Low Enforcement Priorities, *supra* note 32.

¹¹⁷ *Facts on Immigration in the United States*, CNN.COM (June 15, 2012), available at <http://news.blogs.cnn.com/2012/06/15/facts-on-immigration-in-the-united-states/>.

¹¹⁸ *Id.*

¹¹⁹ *Id.*

¹²⁰ Secretary Napolitano Announces Deferred Action Process for Young People Who Are Low Enforcement Priorities, *supra* note 32.

¹²¹ Deferred Action for Childhood Arrivals, *Frequently Asked Questions*, <http://www.dhs.gov/deferred-action-childhood-arrivals> (last visited on February 7, 2013).

individuals receiving the benefit of deferred action do not pose a threat to our society.¹²² Specifically, DHS has indicated that individuals seeking deferred action will also undergo a background check.¹²³ Additionally, any person awaiting removal proceedings will also be required to “undergo biographic and biometric background checks before USCIS will consider whether to exercise prosecutorial discretion under the consideration of deferred action for childhood arrivals process.”¹²⁴ DHS further warns that if you have been convicted of any “felony offense, a significant misdemeanor offense, or three or more other misdemeanor offenses not occurring on the same date and not arising out of the same act, omission, or scheme of misconduct, you will not be considered for deferred action under the new process except where DHS determines there are exceptional circumstances.”¹²⁵ A federal offense for purposes of Deferred Action means: “a federal, state, or local criminal offense punishable by imprisonment for a term exceeding one year.”¹²⁶ DHS has defined a misdemeanor, “as defined by federal law (specifically, one for which the maximum term of imprisonment authorized is one year or less but greater than five days) and that meets the following criteria: 1) Regardless of the sentence imposed, is an offense of domestic violence; sexual abuse or exploitation; burglary; unlawful possession or use of a firearm; drug distribution or trafficking; or, driving under the influence; or 2) If not an offense listed above, is one for which the individual was sentenced to time in custody of more than 90 days.”¹²⁷ Furthermore, DHS has made it clear that the individual must have served in custody, and therefore “does not include a suspended sentence.”¹²⁸

¹²² *Id.*

¹²³ *Id.*

¹²⁴ *Id.*

¹²⁵ *Id.*

¹²⁶ *Id.*

¹²⁷ Deferred Action for Childhood Arrivals, *Frequently Asked Questions available at* <http://www.dhs.gov/deferred-action-childhood-arrivals> (last visited on February 7, 2013).

¹²⁸ *Id.*

V. How Does This Impact A “Dreamer’s” Immigration Status, If At All?

The Department of Homeland Security has provided guidance as to the immigration status of the individuals who qualify for Deferred action.¹²⁹ Specifically, the “frequently asked questions” section of the website asks the following: “Do I accrue unlawful presence¹³⁰ if I have a pending request for consideration of deferred action for childhood arrivals?”¹³¹ The applicant will “continue to accrue unlawful presence while the request for consideration of deferred action for childhood arrivals is pending, unless,” the applicant is under the age of 18 at the time the request is made.¹³² If an applicant is under the age of 18 at the time his or her request is submitted, but turn 18 while the request is processed, the applicant “*will not accrue unlawful presence while the request is pending.*”¹³³ More importantly, however, is the fact that “if your case is deferred, you will *not* accrue unlawful presence during the period of deferred action.”¹³⁴ While unlawful presence will not be accrued during the period of Deferred Action, Deferred Action will not “excuse previously accrued unlawful presence.”¹³⁵ This becomes significant for purposes of determining whether a Dreamer, like an alien that receives TPS, should be allowed to own a gun given the ambiguities presented regarding § 922 (g)(5) of the Gun Control Act.¹³⁶

A. Deferred Action eliminates Congress’ concern regarding identification.

Many applicants wonder what benefits they would obtain from Deferred Action. One of those concerns is employment. Eligibility to work in the United States may be granted through Deferred Action. DHS has indicated that “[p]ursuant to existing regulations, if your case is

¹²⁹ *Id.*

¹³⁰ Unlawful presence refers to an individual who does not have any documentation or permission to reside in the United States.

¹³¹ *Id.*

¹³² *Id.*

¹³³ *Id.*

¹³⁴ Deferred Action for Childhood Arrivals, *Frequently Asked Questions available at* <http://www.dhs.gov/deferred-action-childhood-arrivals> (last visited on February 7, 2013).

¹³⁵ *Id.*

¹³⁶ *See* discussion *supra*, Part II.

deferred, you may obtain employment authorization from USCIS provided you can demonstrate an economic necessity for employment.”¹³⁷ Additionally, once employment authorization has been granted, and the two-year period for deferred action has passed, an applicant may re-apply for deferral and may also re-apply for working permits.¹³⁸ This is particularly important because an applicant may hypothetically receive deferred action for longer than two years (i.e. perhaps 4, 6 or 8 years) with employment privileges, which provides the applicant with a social security number.¹³⁹ Congress’ rationale that illegal aliens should not own guns because they are not identifiable, is eliminated through the granting of a social security number to these Dreamers. Furthermore, Congress would not have to worry about aliens with false identities because Deferred Action has implemented an identification process that requires detailed background checks and other forms of identification in order to ensure that the person receiving approval is in fact that individual.

B. Is Obama Pulling the Trigger on 18 U.S.C. § 922(g)(5)(A)?

Deferred Action presents new challenges for Congress. An important question that Congress will need to address in light of the Deferred Action program is whether federal legislation can become unconstitutional because, as a result of changed facts (i.e. Deferred Action), the underlying governmental interests supporting federal legislation at the time of its enactment no longer exist therefore make the law moot. These challenges will now include the structuring of legal rights for the Dreamers and how to sort out the legal complexities that might

¹³⁷ *Id.*

¹³⁸ *Id.*

¹³⁹ Deferred Action for Childhood Arrivals, *Frequently Asked Questions available at* <http://www.dhs.gov/deferred-action-childhood-arrivals> (last visited on August 15, 2012) (explaining that “unless terminated, individuals whose case is deferred pursuant to the consideration of deferred action for childhood arrivals process will not be placed into removal proceedings or removed from the United States for a period of two years. You may request consideration for an extension of that period of deferred action. As long as you were not above the age of 30 on June 15, 2012, you may request a renewal after turning 31. Your request for an extension will be considered on a case-by-case basis.”).

arise out of their deferred action. DHS has stated “the fact that you are not accruing unlawful presence does not change whether you are in lawful status while you remain in the United States. Because you lack lawful status at the time DHS defers action in your case, you remain subject to all legal restrictions and prohibitions on individuals in unlawful status.”¹⁴⁰

Notwithstanding Congress’ intent, “[p]residential intent, which may be implicit in legislation and legislative history, is explicit in signing statements. Presidents generally issue signing statements [Executive Orders] when they sign a bill into law, and unlike veto messages, these statements are discretionary”¹⁴¹ It therefore becomes important because these statements serve four broad purposes: “First, they explain what the President believes will be the effect of the statute; Second, they instruct officers of the executive branch how to interpret or administer the statute;” Third, signing statements may indicate the President’s belief that there is a constitutional defect in the statute and that he will therefore not enforce an unconstitutional provision; and Fourth, signing statements create legislative history with the expectation that “courts will give the statement some weight when construing the statute.”¹⁴² Furthermore, a statute “is construed as a whole with reference to the system of which it is part. One reviews the policy behind the statute, the legislative scheme of which the statute is a part, the legislative history, and concepts of reasonableness along with the language of the statute in order to determine the legislative intent.”¹⁴³

The President and DHS created a concern as a result of Deferred Action because the program presents a challenge to the constitutionality of section 922(g)(5) of the Gun Control Act by virtue of eliminating all congressional justifications for denying illegal aliens the right to own

¹⁴⁰ *Id.*

¹⁴¹ Kristy L. Carroll, *Whose Statute Is It Anyway?: Why and How Courts Should Use Presidential Signing Statements When Interpreting Federal Statutes*, 46 CATH. U. L. REV. 475, 488-90 (1997).

¹⁴² *Id.*

¹⁴³ *Id.*

firearms. Determining that section 922(g)(5) as written is unconstitutional requires an analysis of what triggered Congress' concern for denying illegal aliens the right to own firearms. The courts are already in disagreement as to how they interpret changed statuses as they relate to illegal aliens.¹⁴⁴

As cited above, the Tenth Circuit in *Ochoa-Colchado* noted, in reaching its conclusion, that “[w]e can envision no reason why Congress would grant illegal aliens the ability lawfully to arm themselves precisely at the moment the government commences its effort *to remove them* from the country.”¹⁴⁵ However, the court perhaps did not envision that the government might want to keep an estimated 1.7 million illegal immigrants who are eligible for Deferred Action, subject to renewal and employment privileges.¹⁴⁶ Deferred Action does not harmonize with the legislative intent that shaped the alien-in-possession ban.¹⁴⁷ As the Court in *Verdugo-Urquidez* properly noted, “aliens receive constitutional protections when they have come within the territory of the United States”—like “persons”—*and* “develop substantial connections with this country.”¹⁴⁸ It is certainly fair to say that an estimated 1.7 million eligible Dreamers who qualify for deferred action have been individuals that were brought to the United States as children, many of whom, to use the words of President Obama, have never lived in nor speak the language of their native countries, but instead identify with the American culture and speak English.¹⁴⁹

However, following *Heller*, courts were left to interpret the scope of that decision as to their own cases, and whether or not it extended to the other categories of individuals described in section 922(g)(5), without expressly stating so. The Tenth Circuit, for example, “subsequently

¹⁴⁴ See discussion *supra*, Part III.

¹⁴⁵ *Ochoa-Colchado*, 521 F.3d at 1298 (citing *Atandi*, 376 F.3d at 1190 n.9).

¹⁴⁶ Passell, *supra* note 98, at 3.

¹⁴⁷ *Ochoa-Colchado*, 521 F.3d at 1298 (citing *Atandi*, 376 F.3d at 1190 n.9) (emphasis added).

¹⁴⁸ *Verdugo-Urquidez*, 494 U.S. at 260.

¹⁴⁹ See *supra* text accompanying note 76.

held that *Heller's* language...includes a prohibited category not specifically mentioned by *Heller*, namely, persons convicted of misdemeanor crimes of domestic violence. . . .”¹⁵⁰ The court continued to reason that “[n]otably, felons and the mentally ill are the first and fourth entries on the list of persons excluded from firearm possession by § 922(g), and in between come fugitives from justice and unlawful drug users”¹⁵¹ Additionally, the court stated that “[n]othing suggests that the *Heller* dictum, which we must follow, is not inclusive of § 922 (g)(9) involving those convicted of misdemeanor domestic violence.”¹⁵² Consequently, a broad reading of *Heller's* language might include all the prohibited categories in section 922(g), but a narrow reading of *Heller* would find that aliens granted Deferred Action might not be restricted from owning firearms.”¹⁵³ A critical point, however, is that *Heller* continues to be dicta, which is not binding on all courts. That being said, “[i]n reviewing the construction of a statute by the agency charged with its interpretation and enforcement, a court ordinarily will find the agency's interpretation to be controlling unless it is plainly erroneous or inconsistent with the statute.”¹⁵⁴ Courts must also bear in mind that although deference should be given to agencies like the ATF, “those constructions that are contrary to clear congressional intent or that frustrate the policy Congress sought to implement,” should be rejected.¹⁵⁵ Therefore, because the legislative intent behind section 922 is not consistent with Deferred Action, Congress should amend the Gun Control Act to specifically address Dreamers.

¹⁵⁰ *Yanez-Vasquez*, 2010 WL 411112, at *1.

¹⁵¹ 18 U.S.C. § 922 (g)(1)-(4); *Yanez-Vasquez*, 2010 WL 411112, at *2.

¹⁵² *Id.*

¹⁵³ *Id.*

¹⁵⁴ 82 C.J.S. Statutes § 467; see also 2A Sutherland Statutory Construction § 45:5 (7th ed.) (explaining that “[t]he statute is construed as a whole with reference to the system of which it is part. One reviews the policy behind the statute, the legislative scheme of which the statute is a part, the legislative history, and concepts of reasonableness along with the language of the statute in order to determine the legislative intent.”).

¹⁵⁵ *Id.*

President Obama's Deferred Action Plan directly counters the rationale used by Congress in prohibiting aliens from owning firearms.¹⁵⁶ More specifically, Deferred Action is granted on the fundamental premise that those individuals do not pose a threat to society should be allowed to stay in the United States to continue their education and obtain potential employment.¹⁵⁷ In fact, the Secretary of Homeland Security, Janet Napolitano, has stated that "[o]ur nation's immigration laws must be enforced in a firm and sensible manner," adding that "they are not designed to be blindly enforced without consideration given to the individual circumstances of each case. Nor are they designed to remove productive young people to countries where they may not have lived or even speak the language. Discretion, which is used in so many other areas, is especially justified here."¹⁵⁸

Furthermore, in light of changed circumstances and facts, neither Congress nor the courts have presented reasons as to why Dreamers should be treated the way criminals or mentally handicapped individuals are treated regarding gun ownership. It is well established that the "[l]egislative purpose and intent when obvious must be carried out irrespective of rules and interpretation as the intention of the lawmaker is the law."¹⁵⁹ There is clearly strong public policy that supports the prohibition of firearm ownership from those types of "high risk" individuals such as criminals and the mentally impaired, but individuals that the government considers to be law abiding, posing no threat, and in fact welcomed, should not be classified in the same way as those individuals prohibited from gun ownership under section 922. This simply does not square with the congressional intent that motivated the alien-in-possession ban. Furthermore, in constructing the appropriate statutory interpretation of section 922 as applied to Dreamers, "[i]t

¹⁵⁶ See S. Rep. No. 1097, 1968 U.S.C.C.A.N. 2112, 2112 (1968).

¹⁵⁷ Deferred Action for Childhood Arrivals, *Frequently Asked Questions*, <http://www.dhs.gov/deferred-action-childhood-arrivals> (last visited on Feb. 7, 2013).

¹⁵⁸ *Id.*

¹⁵⁹ 2A Sutherland Statutory Construction § 45:5 (7th ed.).

has also been said that in search for legislative intent, courts look to the objective to be attained, the nature of the subject matter and the contextual setting.”¹⁶⁰ The objective of the Gun Control Act was not to keep law abiding individuals from owning guns.

In light of these changed facts, it is proper that “[i]n all cases the object is to see what is the intention expressed by the words used. But, from the imperfection of language, it is impossible to know what that intention is without inquiring further, and seeing what the circumstances were with reference to which the words were used [. . .] for the meaning of the word varies according to the circumstances with respect to which they were used.”¹⁶¹ Ultimately, “the legislative will governs decisions on the construction of statutes,” which “continues to be the test most often declared by courts.”¹⁶² Varying facts and circumstances is exactly what Congress now faces in light of the Deferred Action Program. Therefore, it is reasonable to make the conclusion that section 922(g)(5)(A) is no longer constitutionally stable because the legislative intent that supported denying illegal aliens the right bear firearms is no longer a concern as to the Dreamers.

VI. Conclusion

Ultimately, a closer look at the statutory purposes of the Gun Control Act, specifically § 922(g)(5)(A), reveals that it is unconstitutional as applied to Dreamers. For the reasons set forth above, the Gun Control Act as written should be changed in order to compromise the legislative intent of Congress with the changed circumstances presented by Deferred Action. Taking a holistic view of the Gun Control Act and its purpose, insofar as it precludes a certain category of immigrants from owning firearms it is now unconstitutional because the government interest in enacting that part of the Gun Control Act is moot by virtue of the President's Executive Order.

¹⁶⁰ *Id.*

¹⁶¹ *Id.*

¹⁶² *Id.*

Congress' statutory interpretation of the Gun Control Act might lead to changes in § 922 (g)(5)(A) as courts will "employ a presumption of severability to deal with isolated unconstitutional provisions: they presume that unconstitutional language or an unconstitutional application of general language can and should be severed from the remainder of the statute, while allowing the rest of the law to be enforced."¹⁶³ Still, because of the constitutional infirmity of the Gun Control Act, congress should ¹⁶⁴ This decision can only be left for Congress and the courts to decide, and perhaps will occur during the current presidential term.

This Note does not advocate the granting of gun ownership to the estimated millions of Dreamers, but it does intend to bring to light the issues regarding the Gun Control Act and the potential problems that individuals granted deferred action could face if the statutory language and congressional intent as to these Dreamers is not made more explicit

The 2012 presidential elections made many wonder what the future of the Dream Act would hold. Although President Obama's victory in the 2012 elections saved the Dreamers from any regressive legislation, it still showed the fragility and many uncertainties that remain to be answered. An estimated 69% of Hispanic voters supported President Obama during his campaign. Mitt Romney, the Republican challenger, suffered huge criticism from the Hispanic voting community when "[t]wo days after Mitt Romney vowed to honor the deportation reprieves granted by the Obama administration to many young illegal immigrants, his campaign clarified that he would halt the program if he wins the presidency."¹⁶⁵ Deferred Action has become one of the lead issues for many registered Hispanic voters, who account for

¹⁶³ C. Vered Jona, *Cleaning Up for Congress: Why Courts Should Reject the Presumption of Severability in the Face of Intentionally Unconstitutional Legislation*, 76 GEO. WASH. L. REV. 698, 699-700 (2008).

¹⁶⁴ *Id.*

¹⁶⁵ Michael Finnegan, *Romney Backpedals on Deportation* (October 3, 2012), available at <http://www.latimes.com/news/politics/la-pn-romney-backpedals-deportations-20121003,0,6503089.story>.

approximately 11% of the nation's 215 million eligible voters.¹⁶⁶ Whether Deferred Action was a step in the right direction has yet to be determined. What can be said with confidence, however, is that reversing the Dream Act would only create a nightmare. An estimated 1.7 million young Hispanics alone qualify for deferred action.¹⁶⁷ This obviously does not include undocumented immigrants of other ethnicities and therefore provides only a snapshot of those undocumented immigrants currently residing in the United States who have already been granted deferred action. Whether Congress will pull the trigger on section 922 (g)(5) and do away with its ambiguities has yet to be determined, but one thing is for certain: the Gun Control Act as written stands on no constitutional grounds and identifies a gaping hole in our nations' immigration and gun control laws.

¹⁶⁶ Mark Hugo Lopez, et al., PEW HISPANIC CENTER, *Latino Voters Support Obama by 3-1 Ratio, But Are Less Certain than Others about Voting* (October 11, 2012).

¹⁶⁷ PEW RESEARCH HISPANIC CENTER, *Up to 1.4 Million Unauthorized Immigrants Could Benefit from New Deportation Policy* (June 15, 2012), available at <http://www.pewhispanic.org/2012/06/15/up-to-1-4-million-unauthorized-immigrants-could-benefit-from-new-deportation-policy/>.