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## ONCE MENTALLY ILL, ALWAYS A DANGER? LIFETIME BANS ON GUN OWNERSHIP UNDER FIRE FOLLOWING INVOLUNTARY COMMITMENT

*Amanda Pendel\**

### ABSTRACT

18 U.S.C. § 922(g)(4) imposes a lifetime ban on those who have been involuntarily committed to a mental institution from purchasing, or possessing a firearm, regardless of an extended passage of time, or a finding that the individual is unlikely to pose a danger to themselves or the public. Three circuits have created a split concerning the constitutionality of this statute. The Third Circuit held in *Beers v. Attorney General United States* that those involuntarily committed were outside of the scope of the Second Amendment; therefore, the § 922(g)(4)'s categorical ban is constitutional. Next, the Ninth Circuit in *Mai v. United States* assumed, without deciding, that these same individuals are inside of the scope of the Second Amendment but held § 922(g)(4) constitutional under intermediate scrutiny as applied to those whose commitments were long ago. Finally, the Sixth Circuit held in *Tyler v. Hillsdale City Sheriff's Department*, that individuals such as Tyler, who had been involuntarily committed into a mental institution, were within the Second Amendment's scope. The Sixth Circuit held § 922(g)(4) unconstitutional under intermediate scrutiny.

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\* Juris Doctor Candidate 2022, Touro College Jacob D. Fuchsberg Law Center; B.A. Human Relations, St. Joseph's College. This Note is dedicated to the most influential person in my life, my mother Dina. I am forever grateful for your unconditional love and support. Thank you for making it possible for me to attend law school and follow my dream of becoming an attorney. Many thanks to my family and friends for their unwavering encouragement and motivation throughout law school. Lastly, I would like to thank my advisor and mentor Professor Debbie Lanin, as well as the entire Touro Law Review Staff for their guidance during this process.

## I. INTRODUCTION

There is often a stigma forcibly attached to those who have been involuntarily committed to mental institutions, despite the lack of evidence to support any continued danger to themselves or society. Congress perpetuates this stigma in 18 U.S.C. § 922(g)(4) by imposing a permanent gun ownership ban on those who have been involuntarily “committed to a mental institution,” regardless of how much time has elapsed since the committal or the previously committed person’s current mental state.<sup>1</sup> Although two potential avenues for relief from this categorical, lifetime ban exist, one is currently a nullity and the other is only available to citizens of certain states.

The federal circuit courts disagree on the constitutionality of this lifetime ban. The majority, consisting of the Third and Ninth Circuits, held in *Beers v. Attorney General United States*<sup>2</sup> and *Mai v. United States*,<sup>3</sup> respectively, that a lifetime gun ban does not violate the Second Amendment of the United States Constitution.<sup>4</sup> Conversely, the Sixth Circuit held, in *Tyler v. Hillsdale City Sheriff’s Department*,<sup>5</sup> that a lifetime ban on gun ownership is a clear violation of the Second Amendment.<sup>6</sup>

This unsettled dispute has been a source of recent debate, and the circuits have not come to a meaningful resolution.<sup>7</sup> Nonetheless, current case law demonstrates the need to consider the indefiniteness of the lifetime ban imposed by 18 U.S.C. § 922(g)(4) due to arguments asserting that after a passage of time, individuals no longer present a threat to society or themselves. While it is important to respect every citizen’s right to due process, it is equally imperative to prevent

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<sup>1</sup> 18 U.S.C. § 922(g) (“It shall be unlawful for any person . . . who has been adjudicated as a mental defective or who has been committed to a mental institution . . . [to] possess in or affecting commerce, any firearm or ammunition; or to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce.”).

<sup>2</sup> 927 F.3d 150 (3d Cir. 2020).

<sup>3</sup> 952 F.3d 1106 (9th Cir. 2019).

<sup>4</sup> U.S. CONST. amend. II. The Second Amendment provides “[a] well-regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed.”

<sup>5</sup> 837 F.3d 678 (6th Cir. 2016).

<sup>6</sup> *Id.* at 699.

<sup>7</sup> See *Beers*, 927 F.3d at 158; *Mai*, 952 F.3d at 1109; and *Tyler*, 837 F.3d at 681.

mentally unstable individuals from harming themselves by limiting their access to firearms.<sup>8</sup>

This Note will be divided into five sections. Section II will discuss the history of 18 U.S.C. § 922(g)(4) as it applies to those involuntarily committed to a mental institution. Section III will analyze the circuit split including the majority and minority decisions. Section IV will examine which circuit has made the proper decision. Finally, Section V will conclude the Note.

## II. HISTORY OF 18 U.S.C. § 922(G)(4)

Section 922(g)(4) provides that firearm possession is unlawful for those who have been adjudicated as a mental defective or committed to a mental institution under § 922(g)(4).<sup>9</sup> The Code of Federal Regulations defines “adjudicated as a mental defective” to include, “[a] determination by a court, board, commission, or other lawful authority that a person, as a result of . . . mental illness. . . [i]s a danger to himself or to others . . . .”<sup>10</sup> The Code further defines “committed to a mental institution” as a “[f]ormal commitment of a person to a mental institution by a court, board, commission, or other lawful authority,” including “commitment to a mental institution involuntarily” and “commitment for mental defectiveness or mental illness.”<sup>11</sup>

Although individuals who have been involuntarily committed to a mental hospital are barred from possessing a firearm, federal law provides two “potential” avenues to obtain relief from the § 922(g)(4) bar.<sup>12</sup> These two options seem to provide individuals with a meaningful opportunity to restore their Second Amendment right; however, the first option is no longer viable and the second option is only available to those living in one of the thirty states with eligible state-run programs under 34 U.S.C. § 40915.

Pursuant to the first avenue, an individual may apply under 18 U.S.C. § 925(c) to the United States Attorney General for relief from the disabilities imposed by Federal laws with respect to the possession

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<sup>8</sup> *See id.*

<sup>9</sup> 18 U.S.C. § 922(g)(4) (2015).

<sup>10</sup> 27 C.F.R. § 478.11 (2019).

<sup>11</sup> *See id.*

<sup>12</sup> *Mai*, 952 F.3d at 1111.

of firearms.<sup>13</sup> The Attorney General may, but is not required to, grant relief

if it is established to his satisfaction that the circumstances regarding the disability, and the applicant's record and reputation, are such that the applicant will not be likely to act in a manner dangerous to public safety and that the granting of the relief would not be contrary to the public interest.<sup>14</sup>

However, since 1992, Congress has withheld funds to prevent the implementation of § 925(c) because eligibility became “a very difficult and subjective task which could have devastating consequences for innocent citizens if the wrong decision is made.”<sup>15</sup> Accordingly, until Congress funds this program, relief under § 925(c) is unavailable.

Under the second option, relief is solely provided through an eligible state-run program under 34 U.S.C. § 40915.<sup>16</sup> Although this avenue for restoration sounds promising, it is not available in every state. Currently, only thirty states have created programs that qualify, thus leaving residents of twenty states with no alternative.<sup>17</sup> In order to be deemed eligible, the program must ““permit a person who, pursuant to State law . . . has been committed to a mental institution, to apply to the State for relief from the disabilities imposed by 18 U.S.C. § 922(g)(4) and other Laws.”<sup>18</sup> Additionally, the program is required to provide that

a State court, board, commission, or other lawful authority shall grant the relief, pursuant to State law and in accordance with the principles of due process, if the circumstances regarding the disabilities . . . and the person's record and reputation, are such that the person will not be likely to act in a manner dangerous to public

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<sup>13</sup> *Id.* (citing 18 U.S.C. § 925(c) (2019)).

<sup>14</sup> 18 U.S.C. § 925 (2019); *see* *United States v. Bean*, 537 U.S. 71, 77 (2002) (noting the discretionary nature of the decision and observing that relief may be denied “even when the statutory prerequisites are satisfied”).

<sup>15</sup> S. REP. NO. 102-353 (1992).

<sup>16</sup> 34 U.S.C. § 40915 (2017).

<sup>17</sup> BUREAU OF JUSTICE STATISTICS, *State Profiles: NICS Act Record Improvement Program (NARIP) Awards FY 2009–2018*, <https://www.bjs.gov/index.cfm?ty=tp&tid=491> (providing state-by-state information suggesting that thirty states and one tribe have qualifying programs) (last visited Sep. 16, 2020).

<sup>18</sup> *Mai*, 952 F.3d at 1111–12 (quoting 34 U.S.C. § 40915).

safety and that the granting of the relief would not be contrary to the public interest.<sup>19</sup>

Furthermore, state programs must allow residents to petition to the state court “for a de novo judicial review of [a] denial.”<sup>20</sup> If someone is granted relief under a qualifying state program, the lifetime ban on the possession of firearms under § 922(g)(4) does not apply.<sup>21</sup>

Other states, such as Washington, have attempted to create qualifying programs but have failed because the factual findings required by the state differ from the federal requirements under § 40915.<sup>22</sup> For example, Washington law requires a factual finding that the applicant “no longer present[s] a *substantial danger* to himself or herself, or the public.”<sup>23</sup> This differs from the federal standard, which requires that “the person will not be likely to act in a manner *dangerous* to public safety.”<sup>24</sup> Since the federal standard is more demanding than the state standard, as the latter only requires a finding that individual is not a substantial threat to his own safety or that of the public, and the former standard necessitates a finding that the individual is unlikely to pose a danger to the public, it fails to meet the federal requirements under § 40915 and is thus unenforceable under the supremacy clause.<sup>25</sup> Unless states, like Washington, heighten the standards of their programs to adhere to the requirements of § 40915, individuals have no avenue for relief from § 922(g)(4)’s firearm prohibition.<sup>26</sup>

### III. THE CIRCUIT SPLIT

Within the past decade, a circuit split has divided the courts in determining the constitutionality of lifetime gun bans under federal law.<sup>27</sup> Although the circuits reach different conclusions, all apply the same two-step inquiry to determine whether § 922(g) violates the

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<sup>19</sup> *Id.*

<sup>20</sup> 34 U.S.C. § 40915(a)(3) (2017).

<sup>21</sup> 34 U.S.C. § 40915(b) (2017).

<sup>22</sup> *Mai*, 952 F.3d at 1112.

<sup>23</sup> *Id.* (quoting WASH. REV. CODE § 9.41.047(3)(c)(iii)) (emphasis added).

<sup>24</sup> *Id.* (quoting 34 U.S.C. § 40915(a)(2) (2017)) (emphasis added).

<sup>25</sup> *Mai*, 2018 WL 784582, at \*1.

<sup>26</sup> *Mai*, 952 F.3d at 1113.

<sup>27</sup> Compare *Mai*, 952 F.3d at 1121, with *Beers*, 927 F.3d at 159 (holding that § 922(g)(4)’s gun ban was constitutional under the Second Amendment); *Tyler*, 837 F.3d at 699 (holding that the gun ban imposed by § 922(g)(4) was unconstitutional under the Second Amendment).

Second Amendment. Step one asks whether the challenged law burdens conduct protected by the Second Amendment. If the answer to step one is affirmative, step two directs courts to apply an appropriate level of scrutiny.<sup>28</sup> The level of scrutiny depends upon the severity of the burden the provision places on core Second Amendment rights.<sup>29</sup>

### A. The Majority

In 2008, the Supreme Court held in *District of Columbia v. Heller*<sup>30</sup> that a long-standing regulation of firearms does not generally impinge upon Second Amendment rights because the Second Amendment is not unlimited.<sup>31</sup> The Court further noted that well established regulations, such as those prohibiting persons with mental illnesses from owning firearms, are presumptively lawful.<sup>32</sup> In its decision, the Court described self-defense at the “core” of the Second Amendment by providing the right to bear arms for “law-abiding, responsible citizens to use arms in defense of hearth and home.”<sup>33</sup> The Supreme Court asserted that this right does not permit individuals to keep and carry any weapon in any manner for whatever purpose.<sup>34</sup> The Supreme Court in *Heller* declined to define the appropriate level of scrutiny when determining whether a particular restriction violates the Second Amendment, and instead, stated that the scope of a constitutional right is the outcome of the people’s understanding at the time of its adoption.<sup>35</sup>

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<sup>28</sup> *Mai*, 952 F.3d at 1113 (quoting *United States v. Chovan*, 735 F.3d 1127, 1136 (9th Cir. 2013)).

<sup>29</sup> *Id.* at 1137.

<sup>30</sup> 554 U.S. 570 (2008).

<sup>31</sup> *Id.* at 596.

<sup>32</sup> *Heller*, 554 U.S. at 626-27 (the Court accentuated that its decision did not “cast doubt on longstanding prohibitions on the possession of firearms by felons and the mentally ill, or laws forbidding the carrying of firearms in sensitive places such as schools, government buildings, or laws imposing conditions and qualifications on the commercial sale of arms.”).

<sup>33</sup> *Heller*, 554 U.S. at 635.

<sup>34</sup> *Id.*

<sup>35</sup> *See Heller*, 554 U.S. at 634–35 (rejecting the traditional levels of scrutiny and explaining that the scope of enumerated rights is the product of interest balancing at the time of enactment).

### 1.      *The Ninth Circuit*

Most recently, the Ninth Circuit Court of Appeals, in *Mai v. United States*, broadened the circuit split by issuing a majority opinion in favor of § 922(g)(4)'s permanent firearm prohibition. At the age of seventeen, Mai was involuntarily committed to a mental facility for over nine months after threatening the safety of himself and others.<sup>36</sup> In the twenty years following his release, Mai received a GED, a bachelor's degree, and a master's degree.<sup>37</sup> In addition to obtaining gainful employment, Mai also became the father of two children.<sup>38</sup> According to the complaint, Mai "no longer struggle[d] from mental illness, and he live[d] a 'socially-responsible, well-balanced, and accomplished life.'"<sup>39</sup> Nonetheless, due to the condition of Mai's mental health over twenty years ago, he was prohibited from purchasing or possessing a firearm.<sup>40</sup>

In 2017, Mai filed an action in the United States District Court for the Western District of Washington after he was denied the ability to purchase a firearm under § 922(g)(4). In his complaint, he alleged that "the government"<sup>41</sup> violated his Second Amendment right to bear arms and his Fifth Amendment right to due process.<sup>42</sup> In response to the action, the government moved to dismiss the complaint for failure to state a claim.<sup>43</sup> The district court granted the motion, holding that "§ 922(g)(4) is categorically constitutional under the Second Amendment and, alternatively, that § 922(g)(4) satisfies intermediate

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<sup>36</sup> *Mai v. United States*, 952 F.3d 1106, 1110 (9th Cir. 2019).

<sup>37</sup> *Id.*

<sup>38</sup> *Id.*

<sup>39</sup> *Id.* (noting that Mai claimed to have fully recovered from his mental health condition, explaining that he was no longer taking any medication). After his release, the plaintiff earned a bachelor's in microbiology from the University of Washington and a master's in microbiology from the University of Southern California. *Id.* He then worked as a researcher, including at the Benaroya Research Institute, where he underwent and passed an FBI background check. *Id.*

<sup>40</sup> *Id.* Although Washington law allows citizens to petition for relief from the state law prohibition, the program is less stringent than federal law, and therefore is inapplicable to Mai's case as discussed above. *Id.*

<sup>41</sup> *Id.* (noting that "the government" consists of the Department of Justice; the United States Attorney General; the Federal Bureau of Investigation; and the Bureau of Alcohol, Tobacco, Firearms, and Explosives collectively).

<sup>42</sup> *Id.*

<sup>43</sup> *Id.*



scrutiny.”<sup>44</sup> Additionally, the court rejected Mai’s due process claim.<sup>45</sup> Mai sought leave to amend his complaint; however, the amendment was ultimately denied as futile.<sup>46</sup> Mai proceeded with a timely appeal to the United States Court of Appeals for the Ninth Circuit.<sup>47</sup>

On appeal, Mai argued that he should be allowed to possess firearms, notwithstanding his earlier involuntary commitment.<sup>48</sup> The court noted that Mai never asserted an equal protection claim based upon Washington State’s failure to have a qualifying program under § 40915 as opposed to thirty other states which do have such programs. The court further noted that Mai did not advance a due process claim on appeal.<sup>49</sup> For these reasons, the only issue analyzed on appeal was whether the Second Amendment required that Mai have the ability to possess a firearm.<sup>50</sup>

The Ninth Circuit, along with the other circuits in the split, applied a two-step inquiry to determine whether § 922(g) violates the Second Amendment.<sup>51</sup> The first step is to determine whether the law being challenged burdens conduct protected by the Amendment.<sup>52</sup> To establish a burden on protected conduct, the court must “explore the amendment’s reach based on a historical understanding of the scope of the Second Amendment right.”<sup>53</sup> The court will look at the customary justifications for barring a class of individuals from possessing guns and ask whether the challenger is able to distinguish his circumstances from those individuals in the historically-barred class.<sup>54</sup> If a law falls within a presumptively lawful regulatory measure, or regulates conduct that historically has fallen outside the scope of the Second Amendment, it does not place a burden on Second Amendment rights.<sup>55</sup>

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<sup>44</sup> *Id.*

<sup>45</sup> *Id.*

<sup>46</sup> *Id.*

<sup>47</sup> *Id.*

<sup>48</sup> *Id.* at 1113.

<sup>49</sup> *Id.*

<sup>50</sup> *Id.*; see *Smith v. Marsh*, 194 F.3d 1045, 1052 (9th Cir. 1999) (holding that arguments not raised in the opening brief are forfeited).

<sup>51</sup> *Mai*, 952 F.3d at 1113.

<sup>52</sup> *United States v. Torres*, 911 F.3d 1253, 1257 (9th Cir. 2019) (quoting *United States v. Chovan*, 735 F.3d 1127, 1136 (9th Cir. 2013)).

<sup>53</sup> *Torres*, 911 F.3d at 1258.

<sup>54</sup> *Id.* at 1253.

<sup>55</sup> *Id.*

Once step one is satisfied, courts then move to step two, which applies an appropriate level of scrutiny.<sup>56</sup> Three tiers of scrutiny are available for courts to apply when determining whether a challenged law is consistent with the Constitution, rational basis review, intermediate scrutiny, or strict scrutiny.<sup>57</sup> “[T]here has been near unanimity demonstrated in case law that, when considering regulations that fall within the scope of the Second Amendment, intermediate scrutiny is appropriate.”<sup>58</sup> For this reason, in *Mai*’s case, and most cases considering regulations falling under the Second Amendment, intermediate scrutiny is applied.<sup>59</sup>

The Ninth Circuit assumed, without deciding, that § 922 (g)(4) as applied to *Mai* burdened his Second Amendment rights satisfying step one of the two-step analysis.<sup>60</sup> Under step two, the court determined that intermediate scrutiny should apply because “a person who required formal intervention and involuntary commitment by the State because of the person’s dangerousness is not a ‘law-abiding, responsible citizen.’”<sup>61</sup> For that reason alone, the court found that § 922(g)(4)’s prohibition fell well outside the core of the Second Amendment, since the statute only burdens a narrow class of individuals, instead of the public at large.<sup>62</sup> The court further elaborated that this regulation was “presumptively lawful” based upon historical evidence supporting that the mentally ill were not entrusted to hold the responsibility of bearing arms.<sup>63</sup>

In order to withstand intermediate scrutiny, § 922(g)(4) must promote a substantial government interest that would be achieved less

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<sup>56</sup> *Torres*, 911 F.3d at 1257 (quoting *United States v. Chovan*, 735 F.3d 1127, 1136 (9th Cir. 2013)).

<sup>57</sup> BLACK’S LAW DICTIONARY (11th ed. 2019) (defining the Rational-Basis test to only require the government to demonstrate a “reasonable relationship” between the law at issue and a “legitimate governmental objective for the law to withstand the challenge. Further, intermediate scrutiny requires the government to demonstrate that a law’s objective is significant, substantial, or important” and that there is a reasonable fit between the law and its objective. Last, strict scrutiny requires the government to provide a compelling interest to substantiate the law at issue.).

<sup>58</sup> *Mai v. United States*, 952 F.3d 1106, 1113 (9th Cir. 2019) (quoting *Torres*, 911 F.3d at 1262).

<sup>59</sup> *Id.* at 1114.

<sup>60</sup> *Id.*

<sup>61</sup> *Id.*

<sup>62</sup> *Id.*

<sup>63</sup> *Id.*

successfully absent the statute.<sup>64</sup> In this case, the Ninth Circuit held that § 922(g)(4)'s application withstood intermediate scrutiny because of two compelling interests: (1) preventing crime; and (2) preventing suicide.<sup>65</sup> When enacting § 922(g), Congress intended to keep firearms away from presumptively risky people, such as those who have been involuntarily committed into a mental institution by allowing categorical bans on groups of individuals who presently pose an increased risk of violence.<sup>66</sup>

On appeal, Mai argued that the *continued* application of the prohibition [wa]s *no longer* justified due to the passage of time and his alleged mental health in recent years.<sup>67</sup> The Ninth Circuit disagreed, relying on scientific evidence cited by the government that establishes a heightened risk of violence for those who have been released from involuntary commitment.<sup>68</sup> The court relied on a meta-analysis, which analyzed the relationship between a history of mental illness and the apparent risk of suicide.<sup>69</sup> The analysis found that those released from involuntary commitment reported a combined suicide risk thirty-nine times higher than expected.<sup>70</sup> The court reasoned that the study's findings justified the need to enforce § 922(g)(4)'s prohibition.<sup>71</sup>

Despite the presence of scientific evidence, Mai argued that the findings were not a perfect match for his situation.<sup>72</sup> According to this evidence, the suicide risk following an involuntary commitment is at its highest point at release and slowly "diminishes thereafter."<sup>73</sup> Mai argued that the studies the court relied upon only followed outcomes of individuals released from involuntary commitment for up to 8.5 years; meanwhile, Mai was released over twenty years ago, had no

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<sup>64</sup> *Torres*, 911 F.3d at 1263 (internal quotation marks omitted).

<sup>65</sup> *Mai*, 952 F.3d at 1116.

<sup>66</sup> *Id.*

<sup>67</sup> *Id.* at 1117.

<sup>68</sup> *Id.*

<sup>69</sup> *Mai*, 952 F.3d at 1117 (quoting E. Clare Harris & Brian Barraclough, *Suicide as an Outcome for Mental Disorders: A Meta-Analysis*, 170 BRIT. J. PSYCHIATRY 205, 221 (1997) (emphasis added) (defining "the 'expected' rate of suicide as either the rate calculated by the authors of the individual study or the background rate for the general population of the relevant country, controlling for years of the study, age, and gender").

<sup>70</sup> *Id.*

<sup>71</sup> *Mai*, 952 F.3d at 1117.

<sup>72</sup> *Id.*

<sup>73</sup> *Id.*

further mental health issues, and no longer posed a threat to himself or others.<sup>74</sup>

The court agreed in part and held that, although those who were involuntarily committed decades ago and are no longer considered mentally ill “unquestionably pose less of a risk of violence now than when a state court found them to be mentally ill and dangerous[,] . . . scientific evidence reasonably supports the congressional judgment that they nevertheless still pose an increased risk of violence.”<sup>75</sup> The court relied upon other studies, which included a variety of treatment types,<sup>76</sup> tracked patients for up to fifteen years, and found a reported suicide risk *eleven* times higher than expected.<sup>77</sup>

The Ninth Circuit used the studies to conclude that, although the risks of suicide and violence lessen over time, there was no evidence to suggest that the risk would ever dissipate entirely.<sup>78</sup> This circuit further agreed with the Sixth Circuit, that the Second Amendment does not warrant “‘an individualized hearing’ to assess one’s personal level of risk.”<sup>79</sup> The court reasoned that even if it considered the facts specifically pertaining to Mai, nowhere in his record did it suggest that his “level of risk [wa]s nonexistent or that his level of risk matche[d] the risk associated with a similarly situated person who lack[ed] a history of mental illness.”<sup>80</sup>

Moreover, the Ninth Circuit expressly stated that 34 U.S.C. § 40915 did not affect its analysis of the case at bar.<sup>81</sup> The Ninth Circuit recognized that the Sixth Circuit had held that § 40915 “is a clear indication that Congress does not believe that previously committed persons are sufficiently dangerous as a class” to prohibit citizens from possessing firearms. Nonetheless, the Ninth Circuit interpreted this law differently.<sup>82</sup> The court in Mai’s case believed that Congress

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<sup>74</sup> *Id.*

<sup>75</sup> *Id.*

<sup>76</sup> *Id.* (stating that different treatment types include inpatient, out-patient, voluntary, and community care).

<sup>77</sup> E. Clare Harris & Brian Barraclough, *Suicide as an Outcome for Mental Disorders: A Meta-Analysis*, 170 BRIT. J. PSYCHIATRY 205, 221 (1997).

<sup>78</sup> *Mai*, 952 F.3d at 1118.

<sup>79</sup> *Tyler*, 837 F.3d at 698 n.18; *see also Torres*, 911 F.3d at 1264 n.6 (holding that, when applying intermediate scrutiny, a level of over-inclusiveness for a firearms prohibition is permissible).

<sup>80</sup> *Tyler*, 837 F.3d at 698.

<sup>81</sup> *Mai*, 952 F.3d at 1119.

<sup>82</sup> *Id.*

enacted § 40915 to improve the National Instant Criminal Background Check System (“NICS”).<sup>83</sup> The court reasoned that including an avenue for relief under § 40915 was merely a political compromise that provided the possibility of relief to the least dangerous citizens in exchange for “greatly improved enforcement as to all the rest, including the most dangerous.”<sup>84</sup>

The Ninth Circuit concluded that, although it did not subscribe to the notion that “once mentally ill, always so” and accepted that Mai was no longer mentally ill, the federal prohibition placed on firearms possession withstood Second Amendment scrutiny.<sup>85</sup> Further, the court held that the Second Amendment “allow[ed] Congress to further its goal of preventing gun violence by barring [Mai] from possessing a firearm” and affirmed the decision of the lower court.<sup>86</sup>

## 2. *The Third Circuit*

The second case included in the majority was filed in the United States District Court for the Eastern District of Pennsylvania by Bradley Beers, who asserted that § 922(g)(4) was unconstitutional as applied to him.<sup>87</sup>

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<sup>83</sup> See 34 U.S.C. § 40902. A relief from disabilities program is implemented by a State in accordance with this section if the program

(1) permits a person who, pursuant to State law, has been adjudicated as described in subsection (g)(4) of section 922 of Title 18 or has been committed to a mental institution, to apply to the State for relief from the disabilities imposed by subsections (d)(4) and (g)(4) of such section by reason of the adjudication or commitment;

(2) provides that a State court, board, commission, or other lawful authority shall grant the relief, pursuant to State law and in accordance with the principles of due process, if the circumstances regarding the disabilities referred to in paragraph (1), and the person's record and reputation, are such that the person will not be likely to act in a manner dangerous to public safety and that the granting of the relief would not be contrary to the public interest; and

(3) permits a person whose application for the relief is denied to file a petition with the State court of appropriate jurisdiction for a de novo judicial review of the denial.

*Id.* The National Instant Criminal Background Check System (“NICS”) is a federal background-check system listing individuals who are not permitted to possess a firearm for a variety of reasons.

<sup>84</sup> *Mai*, 952 F.3d at 1119.

<sup>85</sup> *Id.* at 1121.

<sup>86</sup> *Id.*

<sup>87</sup> *Beers*, 927 F.3d at 152.

On December 28, 2005, Beers was involuntarily admitted for psychiatric treatment after placing a gun inside of his mouth and confessing to his mother that he was suicidal.<sup>88</sup> During Beers's 120-hour involuntary hold, the examining physician concluded that Beers was suicidal and that in-patient treatment was necessary for his safety.<sup>89</sup> On December 29, 2005, and again on January 3, 2006, Beers's involuntary commitment was extended as per Sections 303 and 304 of Pennsylvania's Mental Health Procedure Act ("MHPA"), because the court determined Beers was "severely mentally disabled and in need of treatment."<sup>90</sup>

Beers did not have any further mental health treatment since his release in 2006.<sup>91</sup> Following his discharge, Beers attempted to purchase a firearm but was denied because his background check reported his prior involuntary commitment to a mental institution.<sup>92</sup> In 2013, Beers was examined by a physician who concluded that Beers was now able "to safely handle firearms again without risk of harm to himself or others; however, due to § 922(g)(4), Beers remain[ed] prohibited from possessing a firearm."<sup>93</sup>

The district court held that, based on precedent, evidence of Beers's rehabilitation was irrelevant and could not distinguish him

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<sup>88</sup> *Id.* at 150.

<sup>89</sup> *Id.*: see also 50 PA. C.S. § 7302 ("Emergency examination may be undertaken at a treatment facility upon the certification of a physician stating the need for such examination.").

<sup>90</sup> *Beers*, 927 F.3d at 152; see also 50 PA. C.S. § 7303(a) ("Application for extended involuntary emergency treatment may be made for any person who is being treated pursuant to section 302 whenever the facility determines that the need for emergency treatment is likely to extend beyond 120 hours."); *Id.* at § 7304(a)(2) ("Where a petition is filed for a person already subject to involuntary treatment, it shall be sufficient to represent, and upon hearing to reestablish . . . that his condition continues to evidence a clear and present danger to himself or others ....").

<sup>91</sup> *Beers*, 927 F.3d at 153.

<sup>92</sup> *Id.*

<sup>93</sup> *Id.*

While the government's motion to dismiss Beers's complaint in the District Court was still pending, a Pennsylvania court restored Beers's state law right to possess a firearm, pursuant to 18 PA. C.S. § 6105(f), which allows the restoration of state gun ownership rights. Because § 6105(f) does not satisfy federal requirements allowing for acknowledgement by the federal government of the state's restoration of gun rights, Beers remains subject to the prohibition of § 922(g)(4).

*Id.*; see Pub. L. No. 110-180 § 105 (2008).

from others in a similar situation.<sup>94</sup> As a result, the district court ruled that § 922(g)(4) did not impose a burden on conduct protected by the Second Amendment, and, therefore, the district court found the provision constitutional as applied to Beers.<sup>95</sup> Beers appealed the district court's rejection of his challenge of § 922(g)(4) to the Third Circuit.<sup>96</sup>

The Third Circuit applied the same two-step analysis as the Ninth and Sixth Circuits. However, Beers was unable to establish step one of the analysis because he could not prove that § 922(g)(4) burdened conduct falling within the scope of the Second Amendment.<sup>97</sup> Although Beers claimed to be rehabilitated, he failed to distinguish himself from “the historically barred class of mentally ill individuals who were excluded from Second Amendment protection because of the danger they had posed to themselves and others.”<sup>98</sup>

The Third Circuit concluded that Beers was properly identified as a member of the class described in § 922(g)(4) for two reasons.<sup>99</sup> First, the court relied on the Code of Federal Regulations to define key terms employed in § 922(g)(4) such as “adjudicated as a mental defective,”<sup>100</sup> “committed to a mental institution,”<sup>101</sup> and

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<sup>94</sup> *Id.* at 153; *see also* *Binderup v. Att’y Gen.*, 836 F.3d 336 (3d Cir. 2016) (holding that mentally ill individuals subject to the prohibition under § 922(g)(4) cannot distinguish their own personal circumstances).

<sup>95</sup> *Beers*, 927 F.3d. at 155.

<sup>96</sup> *Id.*

<sup>97</sup> *Id.* at 157.

<sup>98</sup> *Id.*

<sup>99</sup> 18 U.S.C. § 922(g) (2015) (“It shall be unlawful for any person . . . (4) who has been adjudicated as a mental defective or who has been committed to a mental institution; . . . to ship or transport in interstate or foreign commerce, or possess in or affecting commerce, any firearm or ammunition; or to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce.”).

<sup>100</sup> *See* 27 C.F.R. § 478.11 (2019) (defining the term “Adjudicated as a mental defective.” (a) A determination by a court, board, commission, or other lawful authority that a person, as a result of marked subnormal intelligence, or mental illness, incompetency, condition, or disease: (1) Is a danger to himself or to others; or (2) Lacks the mental capacity to contract or manage his own affairs.)

<sup>101</sup> *Id.* (stating that being committed to a mental institution means, a “[f]ormal commitment of a person to a mental institution by a court, board, commission, or other lawful authority,” including “commitment to a mental institution involuntarily” and “commitment for mental defectiveness or mental illness”).

“commitment to a mental institution involuntarily.”<sup>102</sup> When reading the definitions of these terms, Beers fell into each category. Second, Beers was involuntarily committed to a psychiatric hospital by the United States District Court for the Eastern District of Pennsylvania pursuant to state and federal regulations, making him a member of the class of mentally ill individuals who were excluded from Second Amendment privileges.<sup>103</sup>

Furthermore, the Third Circuit explained why those who were considered dangerous to themselves and the public traditionally fall outside of the scope of Second Amendment protection.<sup>104</sup> Historically, laws excluding the mentally ill from possessing firearms were not necessary during the eighteenth century because “judicial officials were authorized to ‘lock up’ so-called ‘lunatics’ or other individuals with dangerous impairments.”<sup>105</sup> At that time, courts reasoned that “if taking away a lunatic’s liberty was permissible, then we should find the ‘lesser intrusion’ of taking his or her firearms was also permissible.”<sup>106</sup> The Third Circuit further compared this case to *Binderup v. Attorney General*.<sup>107</sup> In *Binderup*, the court ruled that those who commit a crime are excluded from the right to bear arms if they present an actual danger of public injury.<sup>108</sup> The court in *Binderup* further explained that “the traditional justification for disarming

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<sup>102</sup> See 50 PA. C.S. § 7302 (“Emergency examination may be undertaken at a treatment facility upon the certification of a physician stating the need for such examination ....”); see also *id.* at § 7303(a) (“Application for extended involuntary emergency treatment may be made for any person who is being treated pursuant to section 302 whenever the facility determines that the need for emergency treatment is likely to extend beyond 120 hours.”); *id.* at § 7304(a)(2) (“Where a petition is filed for a person already subject to involuntary treatment, it shall be sufficient to represent, and upon hearing to reestablish ... that his condition continues to evidence a clear and present danger to himself or others ....”).

<sup>103</sup> *Beers*, 927 F.3d at 152.

<sup>104</sup> *Id.*

<sup>105</sup> *Id.* See also Carlton F.W. Larson, *Four Exceptions in Search of a Theory*: District of Columbia v. Heller and Judicial Ipse Dixit, 60 HASTINGS L.J. 1371, 1373 (2009). The tools of deduction employed here to conclude that the mentally ill were historically barred from gun ownership, where there is little evidence of *specific* historic prohibitions. *Id.*

<sup>106</sup> *Jefferies v. Sessions*, 278 F. Supp. 3d 831, 841 (E.D. Pa. 2017) (quoting *Keyes v. Lynch*, 195 F. Supp. 3d 702, 718 (M.D. Pa. 2016)).

<sup>107</sup> 836 F.3d 336 (3d Cir. 2016).

<sup>108</sup> *Binderup v. Att’y Gen.*, 836 F.3d 336, 350.



mentally ill individuals was that they were considered dangerous to themselves or the public at large.<sup>109</sup>

To distinguish himself, Beers argued that a substantial amount of time had passed since he had been involuntarily institutionalized and that, due to this extended period, he was rehabilitated.<sup>110</sup> As established by the Third Circuit in *Binderup*, neither evidence of rehabilitation nor a substantial period of time “can restore Second Amendment rights that were forfeited . . . [and] there was no historical support for the proposition that forfeited rights could be restored.”<sup>111</sup> In order to challenge § 922(g)(1) under *Binderup*, one must distinguish his circumstances “only by demonstrating that he was not convicted of a serious crime, but not by demonstrating that he had reformed or been rehabilitated.”<sup>112</sup> In *Binderup*, the challengers did not commit serious crimes, which is why a ban on their right to bear arms was unconstitutional as applied to them.<sup>113</sup>

With *Binderup* as precedent, the only way Beers could distinguish his circumstances was to establish that he was never deemed a danger to himself or to others.<sup>114</sup> According to the court in *Beers*, it was not enough for Beers to solely establish that he no longer posed a danger to himself or others.<sup>115</sup> If he only had to prove the lack of danger, this would exceed the scope of the ruling established in *Binderup* that “neither passage of time nor evidence of rehabilitation ‘can restore the Second Amendment rights that were forfeited.’”<sup>116</sup> Beers was involuntarily committed to a mental institution for those very reasons – he admitted to feeling suicidal, and a court found him to be a danger to himself and others.<sup>117</sup> In addition, the Pennsylvania state court elected to extend Beers’s commitment two separate times due to Beers’s doctor noting that inpatient treatment was needed to secure Beers’s safety.<sup>118</sup>

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<sup>109</sup> *Id.* at 351.

<sup>110</sup> *Beers*, 927 F.3d. at 155.

<sup>111</sup> *Id.* (quoting *Binderup v. Att’y Gen.*, 836 F.3d 336, 350 (3d Cir. 2016)).

<sup>112</sup> *Id.*

<sup>113</sup> *Id.*

<sup>114</sup> *Id.* at 159.

<sup>115</sup> *Id.*

<sup>116</sup> *Id.* (quoting *Binderup v. Att’y Gen.*, 836 F.3d 336, 350 (3d Cir. 2016)).

<sup>117</sup> *Id.*

<sup>118</sup> *Id.*

### B. The Minority: The Sixth Circuit

Currently, *Tyler v. Hillsdale County Sheriff's Department*<sup>119</sup> is the sole judicial decision of the minority opinion regarding lifetime gun bans on those who have been involuntarily committed into mental institutions.<sup>120</sup> In *Tyler*, Clifford Charles Tyler was involuntarily committed to a mental institution for less than a month, following an emotional divorce.<sup>121</sup> Although three decades passed since Tyler's depressive episode,<sup>122</sup> and despite his clean bill of mental health, Tyler was ineligible to possess a firearm under § 922(g)(4).<sup>123</sup> After the Bureau of Alcohol, Tobacco, Firearms, and Explosives ("ATF") declined to review Tyler's petition to restore his right to own a firearm, he sought a declaratory judgment that § 922(g)(4) was unconstitutional as applied to him.<sup>124</sup>

At the time of Tyler's appeal, he was seventy-four years old.<sup>125</sup> According to a substance-abuse evaluation in 1985, Tyler's wife of twenty-three years had an affair and left with another man, completely depleted Tyler's finances, and served him with divorce papers.<sup>126</sup> As a result, Tyler was emotionally devastated, had trouble sleeping, and sat at home "in the middle of the floor . . . pounding his head."<sup>127</sup> When this incident occurred, Tyler's daughters feared that their father was a danger to himself and decided to contact the local police who brought Tyler to the Sheriff's Department to begin the necessary steps for Tyler's psychological evaluation.<sup>128</sup>

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<sup>119</sup> 837 F.3d 678 (6th Cir. 2016).

<sup>120</sup> Federal regulations make clear that "committed to a mental institution" applies only to persons who are *involuntarily* committed by an appropriate judicial authority following due process safeguards. See 27 C.F.R. § 478.11 (defining "committed to a mental institution").

<sup>121</sup> *Tyler*, 837 F.3d at 681.

<sup>122</sup> *Depressive Episode*, STEDMAN'S MED. DICTIONARY (24th ed. 1982) ("[A] manifestation of a major mood disorder involving an enduring period of some or all of the following signs: significant sadness, tearfulness, decreased appetite, weight loss, sleep and energy disturbance, psychomotor agitation or retardation, feelings of worthlessness, guilt, helplessness, hopelessness, decreased concentration, thoughts of death, and suicidal ideation.").

<sup>123</sup> *Tyler*, 837 F.3d at 681.

<sup>124</sup> *Id.*

<sup>125</sup> *Id.* at 683.

<sup>126</sup> *Id.*

<sup>127</sup> *Id.* at 684 (quoting DE 1–1, Ex. C, 23).

<sup>128</sup> *Id.*

The doctor who examined Tyler concluded that he required in-patient treatment and petitioned the court to have him committed.<sup>129</sup> On appeal, the court found, by “clear and convincing evidence,” that Tyler was mentally ill.<sup>130</sup> With this finding, the court predicted that Tyler was expected to injure himself or others either intentionally or unintentionally within the near future.<sup>131</sup> Additionally, the court noted that hospitalization was the only treatment method “adequate to meet [Tyler’s] treatment needs.”<sup>132</sup>

Tyler was committed for a period no longer than thirty days and was ordered to undergo additional treatment “for a period not to exceed 90 days.”<sup>133</sup> Upon his arrival at the institution, Tyler was depressed and had multiple bruises on his head and face.<sup>134</sup> He remained in the in-patient treatment center for two to four weeks,<sup>135</sup> but declined to take prescription medications, fearing they would alter his “thinking.”<sup>136</sup> After being discharged from the hospital, Tyler did not receive any follow-up therapy.<sup>137</sup> Once he returned home, Tyler successfully held a job for the next eighteen years, maintained a close relationship with his daughters, repaired his relationship with his ex-wife, and married his second wife in 1999.<sup>138</sup> In 2012, Tyler underwent a substance-abuse and psychological evaluation, where he reported that he never experienced a depressive episode,<sup>139</sup> other than the one following his divorce.<sup>140</sup>

During his evaluation, Dr. Osentoski stated that Tyler’s cognitive ability appeared to be in the “average range” and that there was “no [present] evidence of thought disorder ... [or] hallucinatory phenomena.”<sup>141</sup> Additionally, Tyler’s physician, Dr. Osentoski

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<sup>129</sup> *Id.*

<sup>130</sup> *Id.*

<sup>131</sup> *Id.* (quoting DE 1–2, Ex. F, 36).

<sup>132</sup> *Id.*

<sup>133</sup> *Id.* (quoting DE 1–2, Ex. F, 36–7).

<sup>134</sup> *Id.*

<sup>135</sup> Tyler’s 2012 psychological evaluation notes that records from his hospitalization at Ypsilanti Regional Center are unavailable because the regional center closed many years ago. *Id.* (quoting DE 1–2, Ex. F, 36–7).

<sup>136</sup> *Id.*

<sup>137</sup> *Id.*

<sup>138</sup> *Id.*

<sup>139</sup> STEDMAN’S MED. DICTIONARY, *supra* note 125, at 18.

<sup>140</sup> *Tyler*, 837 F.3d 678, 684–85.

<sup>141</sup> *Id.* at 685 (quoting DE 1–1, Ex. B, 20).

reported no signs of mental illness.<sup>142</sup> Dr. Osentoski concluded that “Tyler’s response to his divorce was a brief reactive depressive episode[;]” however, at the time of his evaluation, Tyler did not present any evidence of mental illness.<sup>143</sup> Finally, Tyler’s substance-abuse evaluation revealed no current issues involving alcohol or drug abuse and noted that Tyler never had substance abuse problems.<sup>144</sup>

In May 2012, Tyler sued various county, state, and federal defendants in federal court, alleging that § 922(g)(4) was unconstitutional as applied to him.<sup>145</sup> Tyler asserted that because the statute functions as a permanent ban on his fundamental Second Amendment right and since Michigan lacked a qualifying relief-from-disabilities program, he had no opportunity to petition for his right back.<sup>146</sup> Moreover, Tyler also disputed that § 922(g)(4), as applied to him, violated the Equal Protection Clause.<sup>147</sup> Furthermore, Tyler claimed that the state’s failure to notify him and afford him an opportunity to be heard amounted to a violation of the Due Process Clauses of the Fifth and Fourteenth Amendments.<sup>148</sup> The district court dismissed Tyler’s suit for failure to state a claim.<sup>149</sup> The court reasoned that *Heller*’s longstanding prohibitions on the possession of firearms by felons and the mentally ill are “presumptively lawful” foreclosed claims like Tyler’s.<sup>150</sup>

The Sixth Circuit Court of Appeals reversed and remanded Tyler’s claim, holding that his complaint stated a valid Second Amendment claim.<sup>151</sup> Additionally, the court held that the government did not carry its burden to establish that § 922(g)(4)’s permanent ban was substantially related to the government’s important interests in reducing crime and preventing suicide.<sup>152</sup> The appellate court did not understand *Heller*’s pronouncement regarding presumptively lawful prohibitions to insulate § 922(g)(4) from constitutional scrutiny.<sup>153</sup> In

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<sup>142</sup> *Id.* at 685.

<sup>143</sup> *Id.* at 685 (quoting DE 1–1, Ex. B, 20).

<sup>144</sup> *Id.*

<sup>145</sup> *Id.*

<sup>146</sup> *Id.*

<sup>147</sup> *Id.*

<sup>148</sup> *Id.*

<sup>149</sup> *Id.*

<sup>150</sup> *Id.* (discussing *Heller*, 554 U.S. at 626).

<sup>151</sup> *Id.*

<sup>152</sup> *Id.*

<sup>153</sup> *Id.*

the Sixth Circuit Court of Appeals' *de novo* review of the district court's dismissal of Tyler's claim, the judges recognized the importance of the Second Amendment; however, the court noted that, like freedom of speech, the Second Amendment is not unlimited.<sup>154</sup>

The court in *Tyler* adopted the same two-step framework to resolve Second Amendment challenges.<sup>155</sup> Under step one, the government bears the burden of conclusively demonstrating that § 922(g)(4) burdens someone included in the class of persons historically understood to be unprotected.<sup>156</sup> To trace the statute's historical lineage, the government relied on both historical scholarship and sources. First, the government referred to a proposal presented by the Pennsylvania anti-federalist faction at the Pennsylvania Convention.<sup>157</sup> The proposal stated that "no law shall be passed for disarming the people or any of them, unless for crimes committed, *or real danger of public injury from individuals*."<sup>158</sup> Additionally, this proposal suggested that "the said Constitution be never construed to authorize Congress . . . to prevent the people of the United States *who are peaceable citizens*, from keeping their own arms."<sup>159</sup>

Ultimately, the Sixth Circuit agreed with the district court's finding that the historical evidence cited by the government under *Heller*'s "presumptively lawful" standard does not directly establish that individuals who were committed into an institution due to mental illness are forever ineligible to regain their Second Amendment rights.<sup>160</sup> The court then proceeded to the second step of the analysis with an understanding that individuals who have been involuntarily committed are not categorically unprotected by the Second Amendment.<sup>161</sup>

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<sup>154</sup> *Tyler*, 837 F.3d at 685.

<sup>155</sup> *Id.*

<sup>156</sup> *Id.* at 688; see *U.S. v. Greeno*, 679 F.3d 510, 518 (6th Cir. 2012).

<sup>157</sup> *Tyler*, 837 F.3d at 688 (quoting CA6 R. 43, Appellee).

<sup>158</sup> *Id.* at 689 (quoting The Address and Reasons of Dissent of the Minority of the Convention of the State of Pennsylvania to Their Constituents, 1787, *reprinted in* 2 Bernard Schwartz, *The Bill of Rights, A Documentary History* 665 (1971)).

<sup>159</sup> *Id.* at 681.

<sup>160</sup> *Id.* at 689.

<sup>161</sup> *Id.* at 693 n.12 (quoting "We do not suggest that strict scrutiny will never be applicable in a Second Amendment challenge to a gun regulation."). See also *United States v. Chester*, 628 F.3d at 673, 682 (4th Cir. 2010) (quoting "[t]he Second Amendment is no more susceptible to a one-size-fits-all standard of review than any other constitutional right. Gun-control regulations impose varying degrees of burden

In this step of its analysis, the court ultimately found it was proper to apply intermediate scrutiny in Tyler's case. Tyler argued that the appropriate level of scrutiny was strict scrutiny, asserting that (1) he was "the sort of responsible, law-abiding citizen that . . . the Supreme Court has recognized" under the Second Amendment, and (2) § 922(g)(4) outright extinguishes his fundamental right to use a firearm in defense of hearth and home entirely.<sup>162</sup>

In *Heller*, the Court agreed that the authority to enact categorical disqualifications was part of the original meaning of the Second Amendment.<sup>163</sup> Likewise, if the Court was to review § 922(g)(4) under strict scrutiny, *Heller's* presumption of prohibitions on the mentally ill would be reversed.<sup>164</sup> Regarding Tyler's first point, the appellate court cautioned others against imposing too high of a burden on Congress to justify its regulations pertaining to firearm safety guidelines, especially in situations when the government has elected to rely on "prior judicial determinations that individuals pose a risk of danger to themselves or others."<sup>165</sup>

As to Tyler's second point, the court found that, while Tyler was right to say that the impact of § 922(g)(4) entirely deprived him of his core right to own and possess a firearm in defense of hearth and

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on Second Amendment rights, and individual assertions of the right will come in many forms."). *Id.*

<sup>162</sup> *Id.* (quoting CA6 R.53, Appellant's Suppl. Br. at 8-9).

<sup>163</sup> *Heller*, 554 U.S. at 626-27.

<sup>164</sup> *Id.* at n.11.

In his *Heller* dissent, Justice Breyer concluded that it would be inappropriate to apply strict scrutiny to the majority's enumerated, presumptively lawful prohibitions:

"Respondent proposes that the Court adopt a 'strict scrutiny' test, which would require reviewing with care each gun law to determine whether it is 'narrowly tailored to achieve a compelling governmental interest.' *Abrams v. Johnson*, 521 U.S. 74, 82 (1997); see Brief for Respondent 54-62. But the majority implicitly, and appropriately, rejects that suggestion by broadly approving a set of laws—prohibitions on concealed weapons, forfeiture by criminals of the Second Amendment right, prohibitions on firearms in certain locales, and governmental regulation of commercial firearm sales—whose constitutionality under a strict-scrutiny standard would be far from clear."

*Id.* (quoting 554 U.S. at 688 (Breyer, J., dissenting)); see also *Lac Vieux Desert Band of Lake Superior Chippewa Indians v. Mich. Gaming Control Bd.*, 276 F.3d 876, 879 (6th Cir. 2002) (noting that under strict scrutiny, "[w]e start by presuming that the ordinance is unconstitutional").

<sup>165</sup> *Id.* at 691.

home, this deprivation did not require a strict scrutiny analysis.<sup>166</sup> The court noted that although § 922(g)(4) is an extreme restriction, the class it affects is narrow.<sup>167</sup> Similar to several other provisions of the statute, § 922(g)(4) does not place an encumbrance on the public at large, but rather only on a limited class of individuals who are not deemed to be at the center of the Second Amendment—those who have been previously involuntarily committed into a mental institution, or those who have been adjudicated mentally defective.<sup>168</sup>

Additionally, in a non-exhaustive review of cases surrounding § 922(g), there was a near unanimous preference for intermediate scrutiny determined by the court.<sup>169</sup> Thus, like many of its sister circuits, the Sixth Circuit held that intermediate scrutiny was applicable.<sup>170</sup> When applying intermediate scrutiny, “[a]ll that is

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<sup>166</sup> *Id.*

<sup>167</sup> *Id.*

<sup>168</sup> *Id.*; see *United States v. Reese*, 627 F.3d 792, 802 (10th Cir. 2010) (“opting to apply intermediate scrutiny to § 922(g)(8) in part because the ‘statute[ ] prohibit[s] the possession of firearms by [a] narrow class[ ] of persons who, based on their past behavior, are more likely to engage in domestic violence’”). The court added that “although there is a longstanding prohibition on gun ownership based § 922(g)(4), it does not necessarily required the court to apply strict scrutiny. Additionally, the court further explains that Sections 922(g)(1) and (9), which also impose permanent bans, have been routinely reviewed under intermediate scrutiny.” *Id.* (internal citations omitted) (referencing *United States v. Chovan*, 735 F.3d 1127, 1138 (9th Cir. 2013); *United States v. Booker*, 644 F.3d 12, 25 (1st Cir. 2011); *United States v. Staten*, 666 F.3d 154, 159; *United States v. Chester*, 628 F.3d at 673, 682-83 (4th Cir. 2010); *United States v. Williams*, 616 F.3d 689, 692-93 (7th Cir. 2010).

<sup>169</sup> Some courts have declined to wade “into the ‘levels of scrutiny’ quagmire.” *United States v. Skoien*, 614 F.3d 638, 642 (7th Cir. 2010); *U.S. v. Greeno*, 679 F.3d 510, 518 (6th Cir. 2012). This necessitates selection of an appropriate level of scrutiny, forecloses this option. 679 F.3d at 518. Nevertheless, even those courts that have avoided the scrutiny morass have adopted inquiries approximating traditional intermediate scrutiny. See, e.g., *Booker*, 644 F.3d at 25 (requiring “a substantial relationship between the restriction and an important governmental objective”); *Yancey*, 621 F.3d at 683; *Skoien*, 614 F.3d at 641-42 (requiring “some form of strong showing” that the law is “substantially related to an important governmental objective”).

<sup>170</sup> *United States v. Greeno*, 679 F.3d 510, 518 (6th Cir. 2012); see *United States v. Mahin*, 668 F.3d 119, 124 (4th Cir. 2012); *United States v. Chapman*, 666 F.3d 220, 226 (4th Cir. 2012); *United States v. Reese*, 627 F.3d at 802.

As noted previously, courts have consistently applied intermediate scrutiny to § 922(g)(9)’s ban on convicted domestic-violence misdemeanants. The Fourth Circuit has applied intermediate

required is ‘a fit that is not necessarily perfect, but reasonable; that represents not necessarily the single best disposition but one whose scope is in proportion to the interest served.’<sup>171</sup> Additionally, the government need not prove that there is “no burden whatsoever on [the claimant’s] ... right under the Second Amendment.”<sup>172</sup>

In Tyler’s case, the court focused heavily on Congress’s decision to rely on prior judicial determinations, and reasoned that there was a substantial relationship between the government’s interest to keep firearms out of the hands of “presumptively risky people” and § 922(g)(4)’s prohibition, even without an option for post-commitment review.<sup>173</sup> In addition to this general interest, the government offered two additional justifications for § 922(g)(4), protecting against crime and suicide prevention.<sup>174</sup> The Sixth Circuit found these interests not only legitimate, but compelling.<sup>175</sup>

The next step of the application required the government to establish whether the firearm ban, as applied to individuals like Tyler, was substantially related to its objectives of suicide prevention and public safety.<sup>176</sup> To meet this burden, the court noted, the government could rely on various sources such as legislative history, case law, empirical evidence, and even common sense; it could not, however, rely upon mere “anecdote and supposition.”<sup>177</sup>

Ultimately, the government relied on empirical evidence and legislative history to uphold § 922(g)(4) by pointing to legislative observations about the role of mental illnesses in two public shootings,

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scrutiny to § 922(g)(3), which prohibits gun possession by drug addicts and unlawful users of controlled substances. The Seventh Circuit has also applied intermediate scrutiny to § 922(g)(1)’s ban on gun ownership by felons. Likewise, the Fourth and Tenth Circuits have subjected § 922(g)(8), which disallows gun possession by individuals subject to domestic protective orders, to intermediate scrutiny.

*Id.* (internal citations omitted).

<sup>171</sup> *Id.* at 693. *Neinast v. Bd. Trs. Columbus Metro. Libr.*, 346 F.3d 585, 594 (6th Cir. 2003) (quoting *Bd. Trs. State Univ. N.Y. v. Fox*, 492 U.S. 469, 480 (1989)).

<sup>172</sup> *Id.*; *Chapman*, 666 F.3d at 228.

<sup>173</sup> *See Dickerson v. New Banner Inst., Inc.*, 460 U.S. 103 (1983); *see also Huddleston v. United States*, 415 U.S. 814, 824 (1974).

<sup>174</sup> *Tyler*, 837 F.3d at 694.

<sup>175</sup> *Id.*

<sup>176</sup> *Id.*

<sup>177</sup> *Id.* (quoting *United States v. Playboy Enter. Grp., Inc.*, 529 U.S. 803, 822 (2000)).



the first at Virginia Tech<sup>178</sup> and the second in New York.<sup>179</sup> The court reasoned that, although there was compelling evidence of the need to remove firearms from those currently suffering from a mental illness, or those recently removed from an involuntary commitment, it does not justify Congress's ability to permanently bar individuals.<sup>180</sup> Specifically, a firearms ban should not prevent individuals like Tyler, who have had "healthy, peaceable years . . . [since] their troubled history" to own a firearm.<sup>181</sup>

In addition to legislative observations, the government pointed to multiple empirical and meta-analysis studies which each conclude that those who have previously attempted suicide are more likely than the general public to commit suicide at a later date.<sup>182</sup> One study asserted that the most probable method of suicide for these individuals was by a firearm, aiding the government's case.<sup>183</sup> Once again, the court in *Tyler* reasoned that this evidence may be helpful for those who have previously attempted suicide, but it did not justify the need to permanently disarm anyone who had been committed to a mental institution for any reason.<sup>184</sup> Nothing in the record suggested that Tyler had ever attempted suicide, or that a significant number of people affected by § 922(g)(4) had attempted suicide.<sup>185</sup> Tyler continued to assert that because none of the studies cited by the government applied to him, he should be able to have his right to bear arms restored.<sup>186</sup>

It is unclear whether a passage of time alone is enough to subside a risk of danger to oneself or others following an involuntary commitment. A separate study indirectly cited by the government found that previously committed individuals had a suicide risk thirty-nine times higher than following short first admissions.<sup>187</sup> This study concluded that suicide risk appeared to be highest at the beginning of

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<sup>178</sup> *Id.* at 697. In 2008, Congress "authorized federal grants to the states for their help in shoring up the NICS instant background check system after a gunman with "a proven history of mental illness" killed dozens at Virginia Tech, less than two years after his commitment into a mental facility." *Id.*

<sup>179</sup> *Id.* at 695.

<sup>180</sup> *Id.*

<sup>181</sup> *Id.* at 696.

<sup>182</sup> *Id.*

<sup>183</sup> *Id.*

<sup>184</sup> *Id.*

<sup>185</sup> *Id.*

<sup>186</sup> *Id.*

<sup>187</sup> *Id.* at 696 (quoting 170 BRIT. J. PSYCHIATRY at 220).

treatment, and ultimately diminishes as time passes.<sup>188</sup> The court determined that the government did not offer sufficient evidence of the continued risk presented by persons who had been formerly committed because the studies only analyzed the behavior of individuals over a one-year and twenty-two-month period, respectively, and failed to explain why a lifetime ban was reasonably necessary.<sup>189</sup>

The court then reasoned that, from 1986 to 1992, federal law allowed a relief-from-disabilities program where under § 925(c), individuals who have been prohibited by federal law to possess a firearm, could apply to the Attorney General for relief.<sup>190</sup> However, as noted above, in 1992, this program was defunded because reviewing applications was “a very difficult and subjective task which could have devastating consequences for innocent citizens if the wrong decision is made.”<sup>191</sup> In 2008, Congress had a change of heart when it authorized federal grants to the states for their help with the NICS instant background check.<sup>192</sup> To receive this funding, states were required to create relief-from-disabilities programs that allow individuals who have been barred by § 922(g)(4) to apply to have their rights restored.<sup>193</sup> The court noted this initiative clearly indicated that Congress did not believe that those who had been previously committed were sufficiently dangerous as a class to permanently deprive all of their Second Amendment right to bear arms.<sup>194</sup>

The Court of Appeals concluded that Tyler held a viable claim under the Second Amendment, and that the government did not meet its burden of justifying a permanent ban on firearm possession to any individual who has either been “adjudicated as a mental defective” or “committed into a mental institution.”<sup>195</sup> The court expressly said that, as it “read the opinions, ten of us would reverse the district court; six of us would not... [a]nd at least twelve of us agree that intermediate scrutiny should be applied, if we employ a scrutiny-based analysis.”<sup>196</sup> Therefore, Tyler’s case was reversed and remanded to the district court with an instruction to apply intermediate scrutiny to determine §

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<sup>188</sup> *Id.*

<sup>189</sup> *Id.*

<sup>190</sup> *Id.*

<sup>191</sup> *Id.* (quoting S. REP. NO. 102–353, at 19 (1992)).

<sup>192</sup> *Id.*

<sup>193</sup> *Id.*

<sup>194</sup> *Id.*

<sup>195</sup> *Id.* at 699.

<sup>196</sup> *Id.*

922(g)(4)'s constitutionally as applied to Tyler.<sup>197</sup> Additionally, the government was directed to provide additional evidence explaining why (1) a lifetime gun ban under § 922(g)(4) was necessary and (2) § 922(g)(4) was constitutional as applied to Tyler.<sup>198</sup> The *Tyler* decision suggests that prior involuntary commitment to a mental institution does not equate to a current mental illness; thus, the federal law should not automatically bar individuals who were once involuntarily committed from possessing firearms.

#### IV. WHO HAS IT RIGHT?

The three circuit courts addressing this issue have reached distinctive conclusions regarding firearm rights of those who were involuntarily committed. First, the Third Circuit in *Beers* held that those involuntarily committed were outside of the scope of the Second Amendment; therefore, the § 922(g)(4)'s categorical ban is constitutional.<sup>199</sup> Next, the Ninth Circuit in *Mai* assumed, without deciding, that these same individuals are inside of the scope of the Second Amendment but § 922(g)(4) is still constitutional under intermediate scrutiny as applied to those whose commitments were long ago.<sup>200</sup> Finally, the Sixth Circuit held in *Tyler*, that individuals such as Tyler, who had been involuntarily committed into a mental institution, were within the Second Amendment's scope.<sup>201</sup> The Sixth Circuit held § 922(g)(4) unconstitutional under intermediate scrutiny as applied to those whose commitments were long ago.<sup>202</sup>

The best approach taken by the three circuits thus far is that of the Ninth Circuit. The prohibition is a reasonable fit for preventing suicide and danger to the public because the governmental interest is compelling, and the prohibition strictly applies to those found dangerous through procedures deemed to satisfy due process. Further, scientific evidence suggests a significant increased risk of death by firearm by those who have been involuntarily committed to a mental institution.<sup>203</sup> Although the Ninth Circuit view may seem overly

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<sup>197</sup> *Id.*

<sup>198</sup> *Id.*

<sup>199</sup> *Beers v. Att'y Gen. U.S.*, 927 F.3d 150, 159 (3d Cir. 2020).

<sup>200</sup> *Mai v. United States*, 952 F.3d 1106, 1121 (9th Cir. 2019).

<sup>201</sup> *Tyler*, 837 F.3d at 699.

<sup>202</sup> *Id.*

<sup>203</sup> Harris & Barraclough, *supra* note 77, at 221 (emphasis added) (defining "the 'expected' rate of suicide as either the rate calculated by the authors of the individual

intense, it is in the best interests of both the individual who was involuntarily committed, and the safety of the public at large to hold the ban constitutional.

The Court in *Heller* explained that the scope of a constitutional right is the product of society's understanding at the time of adoption.<sup>204</sup> This reasoning falls under step one of the post-*Heller* two-step analysis, which determines whether the limitation at issue burdens conduct within the scope of the Second Amendment as it was historically understood. After *Heller*, nearly every court has held that intermediate scrutiny applies to limitations that bar the right to possess a firearm.<sup>205</sup>

If the Supreme Court was to hear this issue, it should follow suit with the Ninth Circuit's assumption and the Sixth Circuit's analysis and find that those involuntarily placed into a mental institution fall within the scope of the Second Amendment. Additionally, the Third Circuit's ruling will likely fail because its finding is contradictory to psychiatric evidence, despite the court in *Beers* noting otherwise.<sup>206</sup> By deciding that a person's rehabilitation is irrelevant regarding forfeiture of Second Amendment rights for both felons and the mentally ill, the *Beers* court supports the stigma that those who were once deemed mentally ill will always be mentally ill.<sup>207</sup> While the court noted that "[n]othing in our opinion should be read as perpetuating the stigma surrounding mental illness," its

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study or the background rate for the general population of the relevant country, controlling for years of the study, age, and gender").

<sup>204</sup> See *Heller*, 554 U.S. at 634-35 (explaining the scope of enumerated rights is the product of interest balancing at the time of enactment and rejecting the traditional levels of scrutiny and holding that the Second Amendment codified the English common-law right to bear arms, which centered around self-defense).

<sup>205</sup> See *Silvester v. Harris*, 843 F.3d 816, 823 (9th Cir. 2016) (evaluating the approach of the Second, Third, Fourth, Fifth, Seventh, and D.C. Circuits and finding that, post-*Heller*, there is "near unanimity" that intermediate scrutiny applies to regulations that burden Second Amendment rights). *Tyler v. Hillsdale Cnty. Sheriff's Dep't*, 775 F.3d 308, 328-29 (6th Cir. 2014) (holding that strict scrutiny applies to § 922(g)(4) as-applied challenges).

<sup>206</sup> See Debra A Pinals et al., *American Psychiatric Association: Position Statement on Firearm Access, Acts of Violence and the Relationship to Mental Illness and Mental Health Service*, 33 BEHAV. SCI. LAW 195, 196 (2015) (stating that The American Psychiatric Association's official position as "the process for restoring an individual's right to purchase or possess a firearm following a disqualification related to mental disorder should be based on adequate clinical assessment, with decision-making responsibility ultimately resting with an administrative authority or court").

<sup>207</sup> *Id.*

conclusion that those who have been involuntarily committed are outside of the scope of the Second Amendment indicates otherwise.

The Sixth and Ninth Circuits diverge when determining whether § 922(g)(4) survives intermediate scrutiny.<sup>208</sup> The Sixth Circuit ultimately found the lifetime ban unconstitutional when applying intermediate scrutiny, recognizing two legitimate governmental interests when applying § 922(g)(4): combatting suicide and preventing crimes.<sup>209</sup> However, the government failed to meet its burden of establishing a reasonable connection between the provision and its safety interests, which influenced the court to rule that § 922(g)(4) was unconstitutional.<sup>210</sup> Similar to the Sixth Circuit, the Ninth Circuit in *Mai* identified the same two compelling interests when applying intermediate scrutiny.<sup>211</sup>

However, in *Mai*, the court determined that the government met its burden by submitting evidence demonstrating that individuals who have been involuntarily committed present a higher risk of suicide, even after a decade from their release; this supported the conclusion about individuals like Mai posing a continued danger.<sup>212</sup> Further, the Ninth Circuit will likely be found to have correctly viewed the scientific evidence because Congress need not justify its decision

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<sup>208</sup> See *Mai v. United States*, 952 F.3d 1106, 1113 (9th Cir. 2019). (applying the two-step analysis and finding that § 922(g)(4) survives intermediate scrutiny); *Tyler v. Hillsdale Cnty. Sheriff's Dep't*, F.3d 678, 681, 685–86 (6th Cir. 2016). (applying the two-step analysis and ruling that § 922(g)(4) does not withstand intermediate scrutiny).

<sup>209</sup> See *Tyler*, 837 F.3d at 693 (stating both policing crime and preventing suicide compelling interests).

<sup>210</sup> *Id.* at 699. The court ruled this way because the studies and evidence presented by the government focused on relapse and readmission of individuals for short periods of times. *Id.* The studies relied upon by the government evaluated individuals for a year after their involuntary commitment, up to twenty months. *Id.* Because the data displayed in the evidence did not discuss the long-term risks that individuals who were committed decades ago faced, the court was not convinced individuals such as Tyler pose a threat. *Id.*

<sup>211</sup> *Mai*, 952 F.3d at 1116.

<sup>212</sup> See *Id.* at 1118 (quoting E. Clare Harris & Brian Barraclough, *Suicide as an Outcome for Mental Disorders: A Meta-Analysis*, 170 BRIT. J. PSYCHIATRY 205, 220 (1997)) (highlighting a study relied on by the government which evaluated the suicide risk of individuals for up to fifteen years following their involuntary confinement and finding that their suicide risk was seven times higher than expected).

to uphold a provision with “scientific precision.”<sup>213</sup> Because evidence exists that demonstrates the continued danger of those who have been involuntarily committed, even after an extended period of time, the need to uphold § 922(g)(4) exists; thus, the Ninth Circuit concluded the second prong of the test properly in light of Congress’s public safety concerns.

Out of the three circuits that have touched upon this issue, it is likely that the Ninth Circuit reached the proper conclusion and that § 922(g)(4)’s indefinite ban on previously involuntarily committed individuals into a mental institution is constitutional. Although there may be individuals, such as Mai and Beers, who are burdened by the prohibition and may very well no longer suffer from any mental conditions, the courts are not equipped to make that determination.

## V. CONCLUSION

In 2020, over 43,000 people were killed by firearms, and year after year rates are increasing exponentially.<sup>214</sup> With the country’s tumultuous relationship involving firearm possession,<sup>215</sup> it is important to understand the limits and implications of § 922(g)(4). These boundaries are essential to determine who may possess guns, where they may store them, and when they may use them. As three circuits have reached three different conclusions regarding the constitutionality of § 922(g)(4), the need to address this issue at the highest level is essential. The Supreme Court must reach an ultimate decision of whether involuntary commitment to a mental institution is enough to trigger a lifelong ban on firearm ownership and possession. For the reasons expounded throughout this Note, it is likely that the Supreme Court’s holding should align with the Ninth Circuit.

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<sup>213</sup> *Id.* (quoting *Pena v. Lindley*, 898 F.3d 969, 984 (9th Cir. 2018)). Congress may rely on evidence that “fairly supports” its reasonable judgment to sustain legislation. *Id.* (quoting *Jackson v. City of San Francisco*, 746 F.3d 953, 969 (9th Cir. 2014)).

<sup>214</sup> Past Summary Ledgers, GUN VIOLENCE ARCHIVE, <https://www.gunviolencearchive.org/past-tolls> (last visited Mar. 13, 2021).

<sup>215</sup> Evidence Based Research Since 2013, GUN VIOLENCE ARCHIVE, <https://www.gunviolencearchive.org/past-tolls> (last visited Mar. 30, 2021) (citing that since 2013, there have been over 135 mass shootings, over 5,000 homicides, and over 6,500 suicides due to gun violence).