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Under Fire: Evaluating As-Applied Challenges to Disarming the Involuntarily Committed

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UNDER FIRE: EVALUATING AS-APPLIED CHALLENGES TO DISARMING THE INVOLUNTARILY COMMITTED

Abstract: 18 U.S.C. § 922(g)(4) prohibits previously committed persons from purchasing or possessing firearms. On March 11, 2020, in *Mai v. United States*, the U.S. Court of Appeals for the Ninth Circuit assumed, without deciding, that § 922(g)(4) burdens the Second Amendment rights of individuals no longer living with mental illness. It then agreed with the Sixth Circuit Court of Appeals—the lone other circuit to reach the question—in holding that intermediate scrutiny applies. Unlike the Sixth Circuit, however, the Ninth Circuit concluded that the provision survives intermediate scrutiny. The Third Circuit also considered an as-applied challenge to § 922(g)(4), but it did not address the scrutiny issue because it held that the law does not burden constitutionally protected conduct. This Comment argues that the Ninth Circuit’s approach is correct because it does not give undue weight to ambiguous historical evidence in determining the scope of the Second Amendment’s protections and it demonstrates appropriate deference to Congress.

INTRODUCTION

“Mental illness and hatred pull[ed] the trigger, not the gun.”¹ That was President Donald Trump’s message to the American people following a week-end in August 2019 in which nearly one hundred people were killed or injured during two separate mass shootings.² Tragically, one of the attackers was able to secure a gun despite a federal law that barred him from doing so.³ That pro-

¹ President Donald Trump, Remarks on the Mass Shootings in Texas and Ohio (Aug. 5, 2019) (transcript available at <https://trumpwhitehouse.archives.gov/briefings-statements/remarks-president-trump-mass-shootings-texas-ohio/> [<https://perma.cc/Y4NN-BM62>]). Despite President Trump’s claim, the relationship between mental illness and violence is complicated. See Lois Beckett, *Myth vs. Fact: Violence and Mental Health*, PROPUBLICA, <https://www.propublica.org/article/myth-vs-fact-violence-and-mental-health> [<https://perma.cc/Q5WF-BKBK>] (June 18, 2014) (explaining that, although individuals living with serious mental illness pose an increased risk of violence, most people living with mental illness will never be violent).

² Trump, *supra* note 1. On August 3, 2019, a gunman killed twenty people and injured twenty-seven others at a Walmart in El Paso, Texas. Campbell Robertson et al., *Back-to-Back Outbreaks of Gun Violence in El Paso and Dayton Stun Country*, N.Y. TIMES (Aug. 4, 2019), <https://www.nytimes.com/2019/08/04/us/mass-shootings-dayton-el-paso.html> [<https://perma.cc/FY55-UXHL>]. The next day, a man shot up an entertainment district in Dayton, Ohio, killing nine and injuring nearly thirty others. *Id.*

³ Dan Frosh & Sadie Gurman, *Texas Shooter Had Been Banned from Buying Firearms Because Mentally Unfit*, WALL ST. J. (Sept. 4, 2019), <https://www.wsj.com/articles/texas-shooter-had-been-banned-from-buying-firearms-because-mentally-unfit-11567540321> [<https://perma.cc/DYU4-BZAR>]; see § 922(g) (barring certain classes of people from buying or possessing firearms). Section 922(g)(4)

vision, 18 U.S.C. § 922(g)(4), bans individuals who have been involuntarily committed from buying or possessing firearms.⁴

In 2020, in *Mai v. United States*, the U.S. Court of Appeals for the Ninth Circuit held that 18 U.S.C. § 922(g)(4) did not violate the Second Amendment as applied to a plaintiff who had allegedly recovered from his mental illness.⁵ The decision is significant because the United States has almost 400 million guns and more than eleven million adults living with a serious mental illness.⁶ Moreover, previously committed persons already pose a significant suicide risk, and evidence suggests that firearm access only increases that danger.⁷

Part I of this Comment provides an overview of the Supreme Court's Second Amendment jurisprudence, the Gun Control Act of 1968, the general framework federal courts use to resolve Second Amendment challenges, and the factual and procedural background of *Mai*.⁸ Part II discusses the circuit split between the Third, Sixth, and Ninth Circuits with respect to as-applied challenges to § 922(g)(4).⁹ Finally, Part III maintains that the Ninth Circuit's approach is correct because it does not give undue weight to founding-era gun laws, and it evaluates congressional decision making under an appropriately deferential evidentiary standard.¹⁰

prohibited the Texas gunman from purchasing or possessing a firearm because a court had previously found him to be “mentally unfit.” Frosh & Gurman, *supra*; see § 922(g)(4) (barring individuals previously “adjudicated as a mental defective” from buying or possessing firearms).

⁴ 18 U.S.C. § 922(g)(4). A firearm is any weapon that utilizes an explosive to discharge a projectile. *Id.* § 921(a)(3). It includes the frame or receiver of the firearm (the portion that contains the firing mechanism), any device used to muffle or silence a firearm, and any destructive device, such as a bomb or grenade. *Id.* §§ 921(a)(3), 921(a)(4). An involuntary commitment occurs when a legal authority transfers a person to a mental hospital against their will due to mental illness, drug use, or other reasons. 27 C.F.R. § 478.11 (2020).

⁵ *Mai v. United States*, 952 F.3d 1106, 1109 (9th Cir. 2020), *petition for cert. filed*, (U.S. Dec. 9, 2020) (No. 20-819).

⁶ See *Gun Violence Statistics*, GIFFORDS L. CTR., <https://giffords.org/gun-violence-statistics/> [<https://perma.cc/3ZHC-Q3JN>] (estimating that there are 393 million guns in America, more than any other wealthy nation); *Mental Health Statistics*, NAT'L INST. OF MENTAL HEALTH, <https://www.nimh.nih.gov/health/statistics/mental-illness.shtml> [<https://perma.cc/BSV9-UEGX>] (estimating that 11.2 million American adults were living with a serious mental illness in 2017). Serious Mental Illness refers to any “mental, behavioral, or emotional” condition that significantly affects an individual’s ability to perform at least one major life activity. *Mental Health Statistics, supra*.

⁷ See *Mai*, 952 F.3d at 1117 (referencing a study published in the *British Journal of Psychiatry* concluding that individuals with a prior involuntary commitment experience “a combined ‘suicide risk 39 times that expected’” (quoting E. Clare Harris & Brian Barraclough, *Suicide as an Outcome for Mental Disorders: A Meta-Analysis*, 170 BRIT. J. PSYCHIATRY 205, 220 (1997))); *Gun Violence Statistics, supra* note 6 (noting that access to a firearm “triples suicide risk”).

⁸ See *infra* notes 11–56 and accompanying text.

⁹ See *infra* notes 57–106 and accompanying text.

¹⁰ See *infra* notes 107–134 and accompanying text.

I. HELLER, GUN CONTROL, AND THE TWO-STEP FRAMEWORK

In 2020, in *Mai v. United States*, the U.S. Court of Appeals for the Ninth Circuit considered an as-applied challenge to 18 U.S.C. § 922(g)(4) and concluded that the law did not violate the plaintiff’s Second Amendment rights.¹¹ Section A of this Part introduces the U.S. Supreme Court’s 2008 decision in *District of Columbia v. Heller* where the Court first described the nature and “core” of the Second Amendment’s protections.¹² Section B considers the origins of the Gun Control Act of 1968 and the purpose of § 922(g).¹³ Section C discusses how federal courts have interpreted and applied *Heller* to resolve more recent Second Amendment challenges.¹⁴ Finally, Section D examines the factual background and procedural history of *Mai*.¹⁵

A. Heller: A Clash of History and Original Understanding

The Second Amendment provides that “the right of the people to keep and bear Arms, shall not be infringed.”¹⁶ For more than two hundred years, the Supreme Court did not hear a case that required it to clarify the Amendment’s meaning.¹⁷ In 2008, however, in *District of Columbia v. Heller*, the Court conducted a robust historical and textual analysis and concluded that the Second

¹¹ *Mai v. United States*, 952 F.3d 1106, 1109 (9th Cir. 2020), *petition for cert. filed*, (U.S. Dec. 9, 2020) (No. 20-819). An as-applied challenge argues that a law is unconstitutional given a particular set of facts. *Challenge*, BLACK’S LAW DICTIONARY (11th ed. 2019). In contrast, a facial challenge contends that a law is per se unconstitutional. *Id.*

¹² See *infra* notes 16–29 and accompanying text.

¹³ See *infra* notes 30–36 and accompanying text.

¹⁴ See *infra* notes 37–44 and accompanying text.

¹⁵ See *infra* notes 45–56 and accompanying text.

¹⁶ U.S. CONST. amend. II (“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.”).

¹⁷ See 2 RONALD D. ROTUNDA & JOHN E. NOWAK, TREATISE ON CONSTITUTIONAL LAW § 14.2(b) (7th ed. 2020) (discussing the history of the Court’s Second Amendment jurisprudence and suggesting that prior cases did not necessitate an explanation of the Amendment’s meaning). Prior to the Court’s 2008 decision in *District of Columbia v. Heller*, the seminal case in Second Amendment jurisprudence was *United States v. Miller*, 307 U.S. 174 (1939). See Michael P. O’Shea, *The Right to Defensive Arms After District of Columbia v. Heller*, 111 W. VA. L. REV. 349, 352 (2009) (suggesting that differing interpretations of *Miller* “dominated” Second Amendment jurisprudence prior to *Heller*). Jackson Miller was a member of a depression-era criminal gang that committed a series of audacious heists. Brian L. Frye, *The Peculiar Story of United States v. Miller*, 3 N.Y.U. J. L. & LIBERTY 48, 53 (2008). In 1938, Oklahoma and Arkansas state police pulled Miller over while he was on his way to Claremore, Arkansas, where he was apparently planning to commit another robbery. *Id.* at 58. Miller was arrested and charged with violating the National Firearms Act after the police found an unregistered, short-barreled shotgun in the car. *Id.* He maintained that the Act violated his Second Amendment rights, and the district court agreed. *Id.* at 60. On appeal, a unanimous Supreme Court held that because the weapon had no reasonable relationship to the militia, the Second Amendment did not protect its possession and use. *Miller*, 307 U.S. at 178.

Amendment secures an individual right to possess firearms for self-defense.¹⁸ The issue in *Heller* was whether the District's ban on handguns violated the Second Amendment.¹⁹ In its decision, the Court described self-defense as the "core" of the right to bear arms.²⁰ It reasoned that, because the handgun is America's weapon of choice for self-defense, the District's ban infringed upon the core of the right and was therefore unconstitutional.²¹ The Court ruled, however, that the right has limits.²² For example, it explained that certain well-established regulations, such as those barring individuals with a mental illness from possessing firearms, are "presumptively lawful."²³

¹⁸ See *District of Columbia v. Heller*, 554 U.S. 570, 592 (2008) (holding that the text and history of the Second Amendment demonstrate that it grants an individual right to possess firearms for self-defense).

¹⁹ *Id.* at 628. Several District of Columbia provisions were at issue in *Heller*. *Id.* at 574–75. The District criminalized carrying an unregistered gun while simultaneously barring handgun registration. *Id.* A separate provision prohibited carrying an unlicensed handgun and authorized the chief of police to issue one-year licenses. *Id.* at 576. In addition, the District enacted certain gun storage requirements. *Id.* It ordered guns stored within a home to be kept "unloaded and disassembled or bound by a trigger lock or similar device." D.C. CODE § 7-2507.02 (2008); *Heller*, 554 U.S. at 576. The plaintiff in *Heller* was a special police officer who legally carried a handgun while on duty. 554 U.S. at 575. He filed suit in the U.S. District Court for the District of Columbia after the District denied his application to register and store his gun at his home. *Id.* at 575–76. He apparently wanted to keep a gun in his home because he lived near a "troubled" public housing project. Justin Wm. Moyer, 'The Culture's Changed': Gun Rights Supporters Mark 10 Years Since Landmark Ruling Toppled D.C. Gun Ban, WASH. POST (June 26, 2018), https://www.washingtonpost.com/local/crime/the-cultures-changed-gun-rights-supporters-mark-10-years-since-landmark-ruling-toppled-dc-gun-ban/2018/06/26/02fd0f738-7890-11e8-bda2-f99f3863e603_story.html [<https://perma.cc/FB99-JXXS>].

²⁰ See *Heller*, 554 U.S. at 635 (holding that the Second Amendment primarily protects "the right of law-abiding, responsible citizens to use arms in defense of hearth and home").

²¹ *Id.* at 628–29. The Court characterized the District's regulations as one of the most "severe" gun regimes in the nation's history. *Id.* at 628. The Court determined that it was irrelevant that the District permitted residents to possess other kinds of firearms at home because it reasoned that handguns are uniquely important to self-defense. *Id.* The Court suggested a number of reasons as to why someone might prefer to use a handgun for self-defense, including that a person can use it while simultaneously calling the police. *Id.* Regardless of the reason, the Court explained that the handgun's sheer popularity for self-defense rendered the ban unconstitutional. *Id.*

²² *Id.* at 595. For example, the Court held that the right extends only to ordinary weapons. *Id.* at 627. Indeed, according to the Court, just as the First Amendment does not protect all speech, the Second Amendment does not grant a right to possess a gun for every kind of confrontation. *Id.* at 595. Although the Court in *Heller* analogized the reach of the Second Amendment to that of the First Amendment, the question of who is included in "the people"—a term used in both—is a fiercely contested question in constitutional law, especially in the Second Amendment context. See Maria Stracqualursi, Note, *Undocumented Immigrants Caught in the Crossfire: Resolving the Circuit Split on "The People" and the Applicable Level of Scrutiny for Second Amendment Challenges*, 57 B.C. L. REV. 1447, 1461–64 (2016) (explaining that the Court in *Heller* concluded that the phrase is a term of art and has the same meaning throughout the Bill of Rights but suggesting that the Court's use of slightly different language throughout its decision in *Heller* muddled the issue).

²³ *Heller*, 554 U.S. at 626–27 & n.26. The Court emphasized 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." *Id.* at 626–27. The Court

Central to the Court's decision in *Heller* was how the framing generation understood the scope of the right to bear arms.²⁴ The majority acknowledged that the Framers adopted the Second Amendment to address the concern that an oppressive government could disarm the militia, but nonetheless decided that the scope of the right is not limited to a militia context.²⁵ The Court held that the Second Amendment codified the English common-law right to bear arms, which centered around self-defense.²⁶ Justice Stevens's dissent, however, challenged that version of history.²⁷ Drawing on the Amendment's drafting history, he suggested that the right was limited to a militia context.²⁸

In 2010, in *McDonald v. City of Chicago*, the Supreme Court reiterated that the core of the right is to own a firearm for self-defense, and once again emphasized that "longstanding" prohibitions barring individuals with mental illness from owning firearms are "presumptively lawful."²⁹

emphasized that its list of "presumptively lawful" regulations was not exhaustive, but merely illustrative. *Id.* at 626–27 & n.26.

²⁴ *See id.* at 576–77 (explaining that courts must interpret the Constitution's text in light of its "normal" meaning according to a typical founding-era citizen).

²⁵ *See id.* at 599 (distinguishing between the reason the right was codified and the right itself and suggesting that the framing generation also valued the right to bear arms for purposes of hunting and self-defense).

²⁶ *See id.* at 593–94 (discussing the history that led the English Crown to guarantee an arms-bearing right and explaining that it is viewed as the predecessor to the Second Amendment). The Court viewed William Blackstone's reflections on the English right as strong evidence that the Second Amendment was not limited to a militia context. *Id.* at 594. Blackstone recognized the English guarantee as the right to keep and use arms "for self-preservation and defence." *Id.* (quoting 1 WILLIAM BLACKSTONE, COMMENTARIES *140). The Court also pointed to several arms-bearing provisions in contemporary state constitutions as evidence that the founding generation understood the animating concern of the Second Amendment to be self-defense. *Id.* at 600–01. It reasoned that Pennsylvania's 1776 Constitution strongly suggested as much because it explicitly guaranteed a right to bear arms for self-defense. *Id.* at 601. Justice Stevens responded that, in light of such explicit provisions, the U.S. Constitution's omission of such language combined with the Amendment's preamble suggests that the constitutional right was designed for another purpose. *Id.* at 643 (Stevens, J., dissenting).

²⁷ *See id.* at 637 (contending that arguments made at the time of adoption demonstrate that the Framers did not codify "the common-law right of self-defense").

²⁸ *Id.* at 646. According to Justice Stevens, opponents of the Constitution were acutely concerned that Congress could disarm state militias. *Id.* at 655. In response, several states, including Virginia and New York, proposed amendments to ensure that the militias would not be disarmed. *Id.* New Hampshire submitted an amendment that went further, providing a wider range of firearm protections. *Id.* For Justice Stevens, James Madison's incorporation of the narrower, militia-focused language evidenced an intent to reject a self-defense rationale. *Id.* at 660.

²⁹ *McDonald v. City of Chicago*, 561 U.S. 742, 786 (2010) (emphasizing that the Court's holding did not call into question "longstanding" prohibitions barring felons and the mentally ill from possessing firearms). *McDonald v. City of Chicago*, which the Court decided in 2010, involved a challenge to a Chicago ordinance that practically barred handgun possession within the city. *Id.* at 750. In *McDonald*, the Supreme Court incorporated the Second Amendment against the states and then remanded the case to the U.S. Court of Appeals for the Seventh Circuit for additional proceedings. *Id.* at 750, 791. Because the District of Columbia is not a state, *Heller* had not addressed the question of incorporation. *Heller*, 554 U.S. at 620 n.23 (majority opinion).

B. *The Gun Control Act and 18 U.S.C. § 922(g)*

In response to rising crime rates and the assassinations of President John F. Kennedy and Dr. Martin Luther King Jr., Congress passed the Gun Control Act in 1968.³⁰ In doing so, Congress sought to keep guns away from dangerous individuals.³¹ As such, § 922(g) of the Act prohibits certain classes of people, including individuals who have been “adjudicated as a mental defective or who ha[ve] been committed to any mental institution,” from buying and possessing firearms.³²

Individuals whose firearm rights were revoked under § 922(g)(4) theoretically have two mechanisms to restore their federal firearm rights.³³ Individuals may either petition the U.S. Attorney General or, if they reside in a state with a qualifying program, petition a state court for relief.³⁴ In 1992, however, Congress defunded the Attorney General relief mechanism because it believed the decision to restore a mentally ill person’s firearm rights was too precarious.³⁵ As a result, individuals who § 922(g)(4) bars from buying or possessing

³⁰ Pub. L. No. 90-618, 82 Stat. 1213; Christopher M. Johnson, Note, *Second Class: Heller, Age, and the Prodigal Amendment*, 117 COLUM. L. REV. 1585, 1593 n.45 (2017) (discussing the legislative history of the Gun Control Act of 1968).

³¹ James B. Jacobs & Jennifer Jones, *Keeping Firearms Out of the Hands of the Dangerously Mentally Ill*, 47 CRIM. L. BULL. 388 (2011). Congress was particularly concerned about individuals whose mental illness might provoke them to commit violent crime spontaneously. Brief for the Appellees at 2, *Beers v. Barr*, 140 S. Ct. 2758 (2020) (mem.) (No. 17-3010).

³² 18 U.S.C. § 922(g)(4). Federal regulations define a commitment as “[a] formal commitment of a person to a mental institution by a court, board, commission, or other lawful authority.” 27 C.F.R. § 478.11 (2020). It specifically includes involuntary commitments and excludes hospital admissions that are voluntary or merely for observation. *Id.* In *Mai v. United States*, the Ninth Circuit explained that due process requires a finding that the person is “both mentally ill and dangerous.” 952 F.3d 1106, 1110 (9th Cir. 2020), *petition for cert. filed*, (U.S. Dec. 9, 2020) (No. 20-819). Moreover, if a state’s process for committing individuals with mental illness lacks sufficient judicial involvement, it does not constitute a commitment under § 922(g)(4). *Id.* A mental institution includes any facility in which licensed medical providers diagnose mental illness. 27 C.F.R. § 478.11. Mental defective refers to a legal determination that a person’s mental condition renders them either “a danger to [themselves] or others” or unable to “manage [their] own affairs.” *Id.*

³³ *Mai*, 952 F.3d at 1111.

³⁴ *Id.* at 1111–12. To qualify, state relief programs must comply with 34 U.S.C. § 40915, which itself identifies three requirements. 34 U.S.C. § 40915. First, the program must allow individuals whose federal firearm rights were revoked under § 922(g)(4) to apply to the state for relief. *Id.* Second, it must ensure that relief is granted when there is a determination that the individual is unlikely to pose a threat to public safety and doing so is not in conflict with the public interest. *Id.* Third, the program must allow for a court to review denials de novo. *Id.*

³⁵ *Mai*, 952 F.3d at 1111. Congress expressed concern that, even after a Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF) investigation, it is impossible to determine whether an individual is dangerous. Brief for the Appellees, *supra* note 31, at 4. It explained that the program required executive-branch officials to make a determination knowing that any error could be fatal. *Id.*

firearms and who reside in a state without a qualifying program have no remedy to restore their federal firearm rights.³⁶

C. Post-Heller Challenges: The Two-Step Framework

The Supreme Court in *District of Columbia v. Heller* declined to determine the appropriate level of scrutiny for evaluating whether a particular restriction violates the Second Amendment.³⁷ Instead, it simply explained that the scope of a constitutional right is the product of the people's understanding at the time of its adoption.³⁸ With little guidance from the Court, lower courts post-*Heller* have adopted a two-step test to determine whether an act violates the Second Amendment.³⁹ That framework first analyzes whether the restriction at issue burdens conduct within the scope of the Second Amendment as it was historically understood.⁴⁰ If the law at issue falls outside the scope of

³⁶ See *Mai*, 952 F.3d at 1115 (explaining that absent congressional or state action, § 922(g)(4) amounts to a permanent ban for individuals living in states without qualifying restoration programs). The latest U.S. Department of Justice statistics indicate that as of 2018, thirty states had qualifying programs. *NICS Act Record Improvement Program (NARIP) Awards FY 2009–2018*, BUREAU OF JUST. STAT., <https://www.bjs.gov/index.cfm?ty=tp&tid=491#Summary> [<https://perma.cc/2NP2-BXSJ>].

³⁷ See 554 U.S. 570, 634 (2008) (rejecting an interest-balancing approach and explaining the scope of a right is enshrined when codified). To determine whether a challenged law is consistent with the Constitution, courts typically apply one of three tiers of scrutiny: rational basis review, intermediate scrutiny, or strict scrutiny. Brett Snider, FINDLAW BLOG, *Challenging Laws: 3 Levels of Scrutiny Explained* (Jan. 27, 2014), https://blogs.findlaw.com/law_and_life/2014/01/challenging-laws-3-levels-of-scrutiny-explained.html [<https://perma.cc/LY2E-YKGU>]. Rational basis review is highly deferential to government action. *Rational-Basis Test*, BLACK'S LAW DICTIONARY, *supra* note 11. It only requires that the government demonstrate “a reasonable relationship” between the law at issue and “a legitimate governmental objective” for the law to withstand the challenge. *Id.* In contrast, under strict scrutiny, the government must provide a “compelling interest” to substantiate the law at issue. *Strict Scrutiny*, BLACK'S LAW DICTIONARY, *supra* note 11. Finally, intermediate scrutiny requires the government to demonstrate that the law's objective is “significant, substantial, or important” and that there is a “‘reasonable fit’ between the challenged law and the objective.” *Mai*, 952 F.3d at 1115 (quoting *Silvester v. Harris*, 843 F.3d 816, 821–22 (9th Cir. 2016)).

³⁸ 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). In his dissent, Justice Breyer contended that the historical inquiry should only be the start of the constitutional analysis. *Id.* at 687 (Breyer, J., dissenting). Justice Breyer recommended that courts apply an interest-balancing test to resolve Second Amendment challenges. *Id.* at 689–90.

³⁹ See *United States v. Chovan*, 735 F.3d 1127, 1137 (9th Cir. 2013) (observing that the Ninth Circuit joined other appellate courts in adopting a two-step framework for Second Amendment challenges). There is disagreement on the level of analytical guidance that *Heller* provides. *Compare Heller v. District of Columbia*, 670 F.3d 1244, 1271 (D.C. Cir. 2011) (Kavanaugh, J., dissenting) (contending that *Heller* and *McDonald* rule out the traditional tiers of scrutiny and clearly require courts to evaluate firearms regulations solely in light of the Second Amendment's text, history, and tradition), with Saul Cornell, *The Right to Carry Firearms Outside of the Home: Separating Historical Myths from Historical Realities*, 39 FORDHAM URB. L.J. 1695, 1696 (2012) (averring that *Heller* provided no analytical framework for future Second Amendment challenges).

⁴⁰ See *Mai*, 952 F.3d at 1113 (explaining that post-*Heller*, the Ninth Circuit has employed a two-step approach in which step one asks whether the law at issue infringes on constitutionally protected

the Amendment, it is constitutional.⁴¹ If, however, the measure does burden the right to bear arms, courts then determine the proper level of scrutiny and apply it.⁴² Since *Heller*, several circuits have heard as-applied challenges to § 922(g) prohibitions.⁴³ In doing so, nearly every court has ruled that intermediate scrutiny is appropriate for restrictions that burden the right to bear arms.⁴⁴

D. Factual and Procedural History of Mai

In *Mai*, the Ninth Circuit considered whether the application of § 922(g)(4) to the plaintiff, who had allegedly recovered from his mental illness, violated the Second Amendment.⁴⁵ In 1999, a Washington state court involuntarily committed the plaintiff after it concluded that he was mentally ill and dangerous.⁴⁶ As a result, he lost his firearm rights under both state and federal law.⁴⁷ The plaintiff claimed he had since recovered.⁴⁸ Approximately fourteen years after his discharge, he successfully petitioned for restoration of his state firearm rights.⁴⁹ He then attempted to purchase a gun, but § 922(g)(4)

conduct). In doing so, courts imitate the Supreme Court's historical survey in *Heller* at step one. *See, e.g., Chovan*, 735 F.3d at 1137 (surveying the history of federal firearms regulation to conclude that prohibitions on domestic violence misdemeanants are a modern creation); *Ezell v. City of Chicago*, 651 F.3d 684, 705–06 (7th Cir. 2011) (reviewing various eighteenth and nineteenth-century gun regulations to determine whether target practice is within the Second Amendment's scope).

⁴¹ *Tyler v. Hillsdale Cty. Sheriff's Dep't*, 837 F.3d 678, 685–86 (6th Cir. 2016).

⁴² *See id.* (explaining that the Sixth Circuit's test for Second Amendment challenges requires courts to determine and apply the proper level of scrutiny if the regulated conduct or class is not "categorically unprotected" or the historical evidence is inconclusive).

⁴³ *See, e.g., Binderup v. Att'y Gen. U.S.*, 836 F.3d 336, 339 (3d Cir. 2016) (evaluating two as-applied challenges to 18 U.S.C. § 922(g)(1), which prohibits convicted felons from buying or possessing firearms); *United States v. White*, 593 F.3d 1199, 1205 (11th Cir. 2010) (considering an as-applied challenge to 18 U.S.C. § 922(g)(9), which bars those convicted of domestic violence offenses from buying or possessing firearms).

⁴⁴ *Silvester v. Harris*, 843 F.3d 816, 823 (9th Cir. 2016) (surveying the approaches of the Second, Third, Fourth, Fifth, Seventh, and D.C. Circuits and concluding that, post-*Heller*, there is "near unanimity" that intermediate scrutiny applies to regulations that burden Second Amendment rights). *Tyler v. Hillsdale Cty. 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), *rev'd en banc*, 837 F.3d 678 (6th Cir. 2016).

⁴⁵ *Mai*, 952 F.3d at 1109.

⁴⁶ *Id.* at 1110. At age seventeen, the plaintiff was committed for over nine months after he threatened himself and others. *Id.*

⁴⁷ Complaint at 3, *Mai v. United States*, No. C17-0056, 2018 WL 784582 (W.D. Wash. Feb. 8, 2018), *aff'd*, 952 F.3d 1106.

⁴⁸ *Mai*, 952 F.3d at 1110. The plaintiff claimed to have fully recovered from his mental health condition, explaining that he was no longer taking any medication. Complaint, *supra* note 47, at 4. After his release, the plaintiff earned a bachelor's in microbiology from the University of Washington and a masters in microbiology from the University of Southern California. *Id.* at 3. He then worked as a researcher, including at the Benaroya Research Institute, where he underwent and passed an FBI background check. *Id.*

⁴⁹ Complaint, *supra* note 47, at 4.

prohibited him from doing so.⁵⁰ He filed a complaint in the U.S. District Court for the Western District of Washington claiming that the continued application of § 922(g)(4) violated his Second Amendment rights.⁵¹ The court granted the defendants' motion to dismiss and held that the provision was "presumptively lawful" under *Heller*.⁵²

The plaintiff appealed the decision to the U.S. Court of Appeals for the Ninth Circuit.⁵³ On appeal, the Ninth Circuit did not determine whether § 922(g)(4) burdened the Second Amendment.⁵⁴ Instead, the court simply assumed that it did.⁵⁵ It decided that intermediate scrutiny applied and held that § 922(g)(4) was a reasonable fit in light of the federal government's important public safety interests.⁵⁶

⁵⁰ *Mai*, 2018 WL 784582, at *1. Federal law governing the restoration of firearm rights has a more demanding standard than the corresponding Washington State law. *Mai*, 952 F.3d at 1112. Washington State's relief program does not qualify under 34 U.S.C. § 40915 because it merely requires a determination that an individual is not a substantial threat to his own safety or that of the public, whereas the federal standard necessitates a finding that the individual is unlikely to pose a danger to the public. *Id.* In addition, unlike Washington State law, federal law requires that the restoration of the petitioner's firearm rights not conflict with the public interest. *Id.*

⁵¹ Complaint, *supra* note 47, at 5–6. The plaintiff named seven defendants: the United States, the Department of Justice, ATF, and the Federal Bureau of Investigation, as well as the relevant heads of each agency. *Id.* at 2.

⁵² *Mai*, 2018 WL 784582, at *4, *7. The district court relied on *United States v. Vongxay*, in which the Ninth Circuit considered the "presumptively lawful" regulations identified in *Heller* an essential part of the Supreme Court's decision. *Id.* at *4; see *United States v. Vongxay*, 594 F.3d 1111, 1115 (9th Cir. 2010) (finding *Heller*'s "presumptively lawful" dicta binding). The Ninth Circuit's 2012 decision in *Petramala v. U.S. Department of Justice* also guided the district court's decision. *Mai*, 2018 WL 784582, at *4.; see *Petramala v. Dep't of Just.*, 481 F. App'x 395, 396 (9th Cir. 2012). There, the Ninth Circuit affirmed the trial court's dismissal of an as-applied challenge, concluding that § 922(g)(4) is an acceptable restraint on the right to bear arms. *Petramala*, 481 F. App'x at 396.

⁵³ *Mai*, 952 F.3d at 1112.

⁵⁴ *Id.* at 1109. The Ninth Circuit followed its approach in *Pena v. Lindley*. *Id.* at 1115; see *Pena v. Lindley*, 898 F.3d 969, 976 (9th Cir. 2018). There, the court assumed that the challenged provision burdened the plaintiff's Second Amendment rights because it reasoned that the provision was constitutional regardless of whether it did so. *Pena*, 898 F.3d at 976.

⁵⁵ *Mai*, 952 F.3d at 1115.

⁵⁶ *Id.* at 1109. In response to the Ninth Circuit's decision, the plaintiff filed a petition for a panel and en banc rehearing, which the court denied. *Mai v. United States*, 974 F.3d 1082, 1083 (9th Cir. 2020) (mem.). Three judges—Judge Daniel Collins, Judge Patrick Bumatay, and Judge Lawrence Vandyke—authored separate dissents on the denial of the en banc rehearing. *Id.* at 1082. Each judge's dissent criticized the panel's application of intermediate scrutiny. See *id.* at 1083 (Collins, J., dissenting on denial of rehearing en banc) (describing the court's version of intermediate scrutiny as "seriously flawed"); *id.* at 1094–95 (Bumatay, J., dissenting on denial of rehearing en banc) (claiming that the court's version of intermediate scrutiny permitted the government to rely on insufficient data to meet its burden); *id.* at 1106 (VanDyke, J., dissenting on denial of rehearing en banc) (labeling the panel's version of scrutiny "toothless").

II. DISCUSSION OF THE CIRCUIT SPLIT

Since the Supreme Court's 2008 decision in *District of Columbia v. Heller*, the Third, Sixth, and Ninth Circuit Courts of Appeals have each considered as-applied challenges to 18 U.S.C. § 922(g)(4).⁵⁷ Although all three circuits have adopted a version of the widely-used two-step framework to resolve Second Amendment challenges, the Sixth and Ninth Circuits diverge on whether the provision survives intermediate scrutiny.⁵⁸ Unlike its sister courts, the Third Circuit resolved the constitutionality of § 922(g)(4) at step one of its inquiry and held that it regulates activity beyond the scope of the Amendment.⁵⁹

Section A of this Part summarizes how the Sixth Circuit first determined that individuals with mental illness are not beyond the Second Amendment's reach before it concluded that § 922(g)(4) cannot withstand intermediate scrutiny.⁶⁰ Section B describes how the Third Circuit adopted a version of the same two-step approach as the Sixth Circuit but concluded that § 922(g)(4) does not burden constitutionally protected conduct.⁶¹ Finally, Section C recounts how in 2020, in *Mai v. United States*, the Ninth Circuit resolved the plaintiff's as-applied challenge, holding that § 922(g)(4) survives intermediate scrutiny.⁶²

A. The Sixth Circuit's Ruling in Tyler

In 2016, in *Tyler v. Hillsdale County Sheriff's Department*, the Sixth Circuit Court of Appeals considered whether § 922(g)(4) violated the Second Amendment as applied to a plaintiff who had been involuntarily committed thirty years prior, but who was no longer mentally ill.⁶³ The en banc panel

⁵⁷ See 18 U.S.C. § 922(g)(4) (barring persons with a prior involuntary commitment from possessing or buying firearms); *Mai v. United States*, 952 F.3d 1106, 1109 (9th Cir. 2020) (evaluating an as-applied challenge to § 922(g)(4)), *petition for cert. filed*, (U.S. Dec. 9, 2020) (No. 20-819); *Beers v. Att'y Gen. U.S.*, 927 F.3d 150, 152 (3d Cir. 2019), *vacated as moot sub nom.* *Beers v. Barr* 140 S. Ct. 2758 (2020) (mem.) (same); *Tyler v. Hillsdale Cty. Sheriff's Dep't*, 837 F.3d 678, 681 (6th Cir. 2016) (same).

⁵⁸ See *Mai*, 952 F.3d at 1109, 1113 (using the two-step test and holding that § 922(g)(4) survives intermediate scrutiny); *Beers*, 927 F.3d at 153, 159 (adopting the two-step framework and not reaching the scrutiny question because it held § 922(g)(4) was beyond the scope of the Amendment's protections); *Tyler*, 837 F.3d at 681, 685–86 (adopting the two-step test and ruling that § 922(g)(4) does not withstand intermediate scrutiny).

⁵⁹ *Beers*, 927 F.3d at 159.

⁶⁰ See *infra* notes 63–76 and accompanying text.

⁶¹ See *infra* notes 77–92 and accompanying text.

⁶² See *infra* notes 93–106 and accompanying text.

⁶³ *Tyler*, 837 F.3d at 681. In 2011, the plaintiff attempted to purchase a firearm, but § 922(g)(4) blocked him from doing so. *Id.* at 684. In 1986, a Michigan state court committed him after it concluded that he was a threat to himself and others. *Id.* at 683. In 1985, the plaintiff's wife of more than twenty years reportedly left him for another man, drained his finances, and filed for divorce. *Id.* He became distressed. *Id.* According to him, however, the incident was the only “depressive episode” he had ever experienced. *Id.* at 683–84.

adopted a two-step approach to address the question.⁶⁴ First, the court examined whether the restriction fell within the scope of the Amendment's protections as they were historically understood.⁶⁵ After determining that the historical record was inconclusive, the court evaluated the government's basis for the restriction.⁶⁶

At step one, the Sixth Circuit clarified that the proper focus of the historical inquiry is on whether the Amendment's protections include individuals living with mental illness, rather than on specific conduct, because § 922(g)(4) is a class-based prohibition.⁶⁷ The court accepted that the Framers intended to limit the Second Amendment's protections to "virtuous" citizens, but decided that the record did not establish precisely who met that description at the time of the framing.⁶⁸ Accordingly, the Sixth Circuit held that the government did not meet its burden of demonstrating that the class was beyond the reach of the Amendment.⁶⁹

It then turned to the question of scrutiny.⁷⁰ The Sixth Circuit held that intermediate scrutiny was appropriate because it compels the government to defend the need for the provision, while also giving it room to regulate guns.⁷¹

⁶⁴ *Id.* at 685. The Sixth Circuit initially considered the case in 2014 after the plaintiff appealed the district court's dismissal. *Tyler v. Hillsdale Cty. Sheriff's Dep't*, 775 F.3d 308, 311 (6th Cir. 2014), *rev'd en banc*, 837 F.3d 678 (6th Cir. 2016). There, the Sixth Circuit determined that persons with mental illness are not "categorically unprotected" by the Second Amendment and held that strict scrutiny applied. *Id.* at 322, 328–29. It then remanded to the district court to declare § 922(g)(4) unconstitutional as applied to the plaintiff. *Id.* at 344.

⁶⁵ *Tyler*, 837 F.3d at 685.

⁶⁶ *Id.* at 689. At both steps of the inquiry, the Sixth Circuit placed the burden on the government. *See id.* at 685–86 (explaining that the government must demonstrate that the regulation falls outside the Second Amendment's scope and that the government must demonstrate its constitutionality under heightened scrutiny). Before applying the law, the Sixth Circuit acknowledged a "tension" between *District of Columbia v. Heller*'s "presumptively lawful" dicta and the two-step framework. *Id.* at 689–90; *see* *District of Columbia v. Heller*, 554 U.S. 570, 626–27, 627 n.26 (2008) (providing a non-exhaustive list of "presumptively lawful" regulations). It reasoned that restrictions on the mentally ill may be "presumptively lawful" either because they fit within the historical understanding of the right or because they survive heightened scrutiny. *Tyler*, 837 F.3d at 690. Because the Court in *Heller* did not identify a "historical justification[]" for those measures, the Sixth Circuit reasoned that the Supreme Court was likely presuming such laws would survive heightened scrutiny. *Id.*

⁶⁷ *Tyler*, 837 F.3d at 688.

⁶⁸ *Id.* at 689. To meet its burden in *Tyler v. Hillsdale County Sheriff's Department*, the government emphasized, among other historical evidence, a Samuel Adams proposal from the Massachusetts ratifying convention. *Id.* Adams advocated against any constitutional interpretation that would bar "peaceable citizens" from bearing arms. *Id.* (quoting Samuel Adams' proposal at the Massachusetts ratifying convention, *reprinted in* 2 BERNARD SCHWARTZ, *THE BILL OF RIGHTS, A DOCUMENTARY HISTORY* 675, 681 (Leon Friedman et al. eds., 1971)). The court concluded, however, that such evidence was too vague to discern who the framing generation considered virtuous. *Id.*

⁶⁹ *Id.* at 690.

⁷⁰ *Id.*

⁷¹ *Id.* at 692. The court quickly ruled out rational basis review. *See id.* at 690 (noting that *Heller* explicitly rejected that tier of scrutiny). It then explained that strict scrutiny would be inconsistent with *Heller*'s "presumptively lawful" dicta. *See id.* at 691 (explaining that applying strict scrutiny to

The court reasoned that the right to bear arms is unique because it poses a danger to others.⁷² It also observed that federal appellate courts have applied intermediate scrutiny to other § 922(g) prohibitions that impose similar burdens.⁷³ In applying intermediate scrutiny, the court recognized two legitimate government interests: policing crime and combatting suicide.⁷⁴ The court concluded, however, that the evidence was insufficient to establish a “reasonable fit” between the provision and the government’s public safety interests.⁷⁵ The court held that the government failed to demonstrate that a lifetime firearm ban was reasonably necessary for all previously committed persons.⁷⁶

B. *The Third Circuit’s Holding in Beers*

In 2019, in *Beers v. Attorney General United States*, the Third Circuit Court of Appeals considered a similar as-applied challenge to § 922(g)(4).⁷⁷ In 2005, the plaintiff was committed to a psychiatric hospital.⁷⁸ A state court subsequently determined that the plaintiff was a risk to himself and twice extended his commitment.⁷⁹ Within a year of his release, he attempted, but failed, to purchase a gun.⁸⁰ In 2017, he filed suit in the U.S. District Court for the East-

§ 922(g)(4) would contradict *Heller*’s logic that barring individuals with a mental illness from possessing firearms is “presumptively lawful”).

⁷² *Id.* at 692.

⁷³ *Id.*; see, e.g., *United States v. Chovan*, 735 F.3d 1127, 1138 (9th Cir. 2013) (applying intermediate scrutiny to 18 U.S.C. § 922(g)(9)’s prohibition for domestic violence misdemeanants); *United States v. Carter*, 669 F.3d 411, 413 (4th Cir. 2012) (applying intermediate scrutiny to 18 U.S.C. § 922(g)(3)’s prohibition on persons addicted to controlled substances).

⁷⁴ *Tyler*, 837 F.3d at 693. The court held that both interests were “compelling.” *Id.*

⁷⁵ *Id.* at 699. The court acknowledged that the evidence showed that “relapse and readmission” often do occur after an involuntary commitment. *Id.* at 696. It noted, however, that the studies in the record focused on behavior over a relatively short period of time, from a single year to just twenty-two months. *Id.* Therefore, the court determined that such data did not shed light on the risk that individuals like the plaintiff pose decades later. *Id.*

⁷⁶ *Id.* at 699. Notably, the court also determined that Congress disagreed with the government’s position. *Id.* at 698. In 2008, after a mentally ill man gunman attacked Virginia Tech, Congress offered federal grants to states in exchange for submitting improved data to the National Instant Criminal Background Check System. *Id.* To qualify for the grants, states had to create a federally compliant relief program for individuals § 922(g)(4) prohibited from possessing a firearm. *Id.* The Sixth Circuit interpreted that Act as evidence that Congress rejected the view that the previously committed are so dangerous a class to justify barring them from ever possessing a firearm. *Id.*

⁷⁷ *Beers v. Att’y Gen.* U.S., 927 F.3d 150, 152 (3d Cir. 2019), *vacated as moot sub nom.* *Beers v. Barr*, 140 S. Ct. 2758 (2020) (mem.).

⁷⁸ *Beers*, 927 F.3d at 152. In 2005, the then-nineteen-year-old plaintiff was “distressed” because he was struggling in school. Petition for a Writ of Certiorari at 6, *Beers v. Barr*, 140 S. Ct. 2758 (2020) (mem.). He reportedly indicated to his mother that he was suicidal and placed a gun in his mouth. *Beers*, 927 F.3d at 152. A doctor examined the plaintiff at the hospital and concluded that he needed inpatient treatment. *Id.*

⁷⁹ *Beers*, 927 F.3d at 152.

⁸⁰ *Id.*

ern District of Pennsylvania claiming that § 922(g)(4) violated his Second Amendment rights.⁸¹

The district court dismissed the complaint, finding that the provision was constitutional because it did not infringe upon conduct protected by the Second Amendment.⁸² On appeal, the Third Circuit explained that it had previously adopted a two-part test for Second Amendment challenges.⁸³ Notably, before applying the two-part test, the court emphasized that it had previously held that “neither passage of time nor evidence of rehabilitation” were relevant.⁸⁴ The Third Circuit variant on the two-part test required the plaintiff to first articulate the historic rationale for excluding the class at issue and then to differentiate his situation from that of the class.⁸⁵ Only if the plaintiff could successfully do both would the burden then shift to the government to satisfy heightened scrutiny.⁸⁶

The court reasoned that historically, persons with mental illness have been excluded from possessing firearms because they were a threat to public safety.⁸⁷ The court reiterated that its historical analysis offered no evidence indicating that firearm rights could be restored.⁸⁸ Accordingly, to succeed, the plaintiff needed to prove that he never posed a threat to himself or others.⁸⁹ A

⁸¹ *Id.* at 153. The plaintiff initially brought suit challenging § 922(g)(4) and an analogous state provision. *Beers v. Lynch*, No. 2:16-cv-6440, 2017 U.S. Dist. LEXIS 166492, at *2 (E.D. Pa. Sept. 5, 2017), *aff’d sub nom. Beers v. Att’y Gen.* U.S., 927 F.3d 150, 152 (3d Cir. 2019), *vacated as moot sub nom. Beers v. Barr* 140 S. Ct. 2758 (2020) (mem.).

⁸² *Beers*, 927 F.3d at 153. The district court ruled that it was irrelevant whether the plaintiff had recovered from his mental illness, explaining that § 922(g)(4) does not include such an exception. *Beers*, 2017 U.S. Dist. LEXIS 166492, at *10–11. It also reasoned that there is no historical practice of restoring mentally ill individuals’ firearm rights after they have recovered. *Id.* at *11.

⁸³ *Beers*, 927 F.3d at 153. In its 2010 decision in *United States v. Marzarella*, the Third Circuit interpreted *Heller* to require a two-part inquiry. 614 F.3d 85, 89 (3d Cir. 2010).

⁸⁴ *Beers*, 927 F.3d at 156. In 2016, in *Binderup v. Attorney General United States*, the Third Circuit considered an as-applied challenge to § 922(g)(1), which bars felons from possessing firearms. 836 F.3d 336, 343 (3d Cir. 2016). There, the court was unequivocal: no historical evidence supports the idea that the right to bear arms must be restored after some period of time or after a finding of rehabilitation. *Id.* at 350. It deemed any congressional remedy “a matter of legislative grace.” *Id.* In other words, the court determined that the Constitution does not demand a remedy, but Congress may nonetheless choose to restore a group’s Second Amendment rights. *See id.* (holding that the Second Amendment does not require Congress to establish a rights-restoration program for convicted felons). Following *Binderup*, plaintiffs in the Third Circuit must show that they were not convicted of a serious crime to differentiate themselves from the “historically-barred class” of felons. *Beers*, 927 F.3d at 156. The Third Circuit in *Binderup* also highlighted the judiciary’s own limitations, explaining that courts are ill-suited to determine whether an individual is truly rehabilitated and no longer poses a danger to the public. *Id.*

⁸⁵ *Beers*, 927 F.3d at 155.

⁸⁶ *Id.*

⁸⁷ *Id.* at 158.

⁸⁸ *Id.*; *see Binderup*, 836 F.3d at 350.

⁸⁹ *Beers*, 927 F.3d at 159.

state court, however, had previously found that to be true.⁹⁰ The Third Circuit determined that the plaintiff could not separate himself from the barred class.⁹¹ The Third Circuit, therefore, held that § 922(g)(4) did not violate his Second Amendment rights.⁹²

C. Mai: *The Ninth Circuit Framework*

In 2020, in *Mai v. United States*, the Ninth Circuit Court of Appeals applied the prevailing two-step framework to evaluate the plaintiff's as-applied challenge.⁹³ The court reasoned that a law does not burden the Second Amendment if it is either "presumptively lawful" under *Heller* or if the class at issue was traditionally beyond the Amendment's reach.⁹⁴ The Ninth Circuit observed that *Heller* explicitly identified categorical bans on the mentally ill as "presumptively lawful," and that there was strong evidence that the Second Amendment did not historically protect individuals living with mental illness.⁹⁵ The court, however, assumed, without deciding, that § 922(g)(4) infringed upon the plaintiff's right to bear arms.⁹⁶ It then considered the proper level of scrutiny to apply.⁹⁷

⁹⁰ *Id.*

⁹¹ *Id.*

⁹² *Id.* In May 2020, the Supreme Court granted a writ of certiorari. *Beers v. Barr*, 140 S. Ct. 2758, 2759 (2020) (mem.). Subsequently, Pennsylvania created a "restoration-of-rights" program that complied with the federal requirements. Brief for the Federal Respondents in Opposition at 6–7, *Beers v. Barr*, 140 S. Ct. 2578 (2020) (mem.) (No. 19-864). After ATF approved Pennsylvania's certification, the plaintiff obtained relief through the program and purchased a firearm. *Id.* at 5, 7. As a result, there was no Article III controversy for a court to decide. *See id.* at 5. The Court therefore vacated the judgement and remanded the case to the Third Circuit, instructing it to dismiss the case as moot. *Barr*, 140 S. Ct. at 2759. On September 25, 2020, the Third Circuit dismissed the case as moot. *Beers v. Att'y Gen. U.S.*, 822 F. App'x 56, 57 (3d Cir. 2020) (mem.). Nevertheless, the Third Circuit's analytical framework remains relevant. *See Beers*, 927 F.3d at 153 (applying the two-step framework to an as-applied challenge to § 922(g)(4)).

⁹³ *Mai*, 952 F.3d at 1113.

⁹⁴ *Id.* at 1114.

⁹⁵ *Id.* The Ninth Circuit observed that the government argued persuasively that § 922(g)(4) does not burden the plaintiff's right to bear arms. *Id.* It noted that, in *District of Columbia v. Heller*, the Supreme Court explicitly included restrictions on the mentally ill in its list of "presumptively lawful" measures. *Id.* (quoting *District of Columbia v. Heller*, 554 U.S. 570, 626 (2008)). The court also explained that § 922(g)(4) has been the law for decades. *Id.* It also endorsed the historical analysis set forth by the Third Circuit in *Beers*, which concluded that persons living with mental illness have been historically excluded from the scope of the Second Amendment. *See id.* (highlighting *Beers* for its historical overview, which indicated that the mentally ill were traditionally prohibited from possessing firearms).

⁹⁶ *Id.* at 1115. The plaintiff acknowledged that § 922(g)(4) is constitutional as applied to individuals who are currently living with a mental illness. *Id.* at 1114. He maintained, however, that the prohibition was historically limited to that narrower group. *Id.* The Ninth Circuit chose not to resolve that issue. *Id.* Rather, the Ninth Circuit assumed that the plaintiff's rights were burdened and proceeded to its level of scrutiny analysis, just as it did in *Pena v. Lindley* and as the Fourth Circuit did in *Wollard v. Gallagher*. *Id.* at 1114–15; *see Pena v. Lindley*, 898 F.3d 969, 976 (9th Cir. 2018) (assuming the

To determine the appropriate level of scrutiny, the court evaluated § 922(g)(4)'s proximity to the core of the right to bear arms and the gravity of the provision's encroachment on that right.⁹⁸ It reasoned that § 922(g)(4) does not interfere with the core of the right because a person who has been involuntarily committed is not a "law-abiding, responsible citizen."⁹⁹ The court acknowledged that the burden was "substantial," in that it could result in a lifetime ban.¹⁰⁰ Nevertheless, the court reasoned that the burden is diminished because it only affects a small subset of society unconnected to the core of the right.¹⁰¹ Thus, the court chose to apply intermediate scrutiny.¹⁰²

In applying intermediate scrutiny, the Ninth Circuit identified two important government interests: reducing crime and combatting suicide.¹⁰³ Most importantly, it determined that the scientific evidence the government submitted, which indicated an increased suicide risk more than a decade after a patient's discharge, supported Congress's conclusion that individuals who have been involuntarily committed present a higher risk of violence well after their release.¹⁰⁴ According to the court, Congress need not justify its decision with "scientific precision."¹⁰⁵ The Ninth Circuit, therefore, departed from the Sixth

law at issue burdened protected conduct because the law nonetheless withstands heightened scrutiny); *Wollard v. Gallagher*, 712 F.3d 865, 876 (4th Cir. 2013) (explaining that the court may assume that the challenged provision burdens protected conduct because it survived the appropriate level of scrutiny).

⁹⁷ *Mai*, 952 F.3d at 1115.

⁹⁸ *Id.*

⁹⁹ *Id.*; see *Heller*, 554 U.S. at 635 (defining the core of the right as "the right of law-abiding, responsible citizens to use arms in defense of hearth and home"). Applying the logic of *United States v. Chovan*, the court explained that a person is not "a law-abiding, responsible citizen," even if they are no longer living with a mental illness, if their condition once required the state to formally intervene and commit them. *Mai*, 952 F.3d at 1115; see *Chovan*, 735 F.3d at 1138 (concluding that § 922(g)(9)'s prohibition for domestic violence misdemeanants does not burden the core of the Second Amendment because those with a criminal conviction are not law-abiding).

¹⁰⁰ *Mai*, 952 F.3d at 1115.

¹⁰¹ *Id.*; see *Tyler v. Hillsdale Cty. Sheriff's Dep't*, 837 F.3d 678, 691 (6th Cir. 2016) (holding that the burden was lessened because § 922(g)(4) does not apply to the general public). That the Ninth Circuit has applied intermediate scrutiny to other permanent bans under § 922(g) provided additional support for the court's conclusion. *Mai*, 952 F.3d at 1115.

¹⁰² *Mai*, 952 F.3d at 1115.

¹⁰³ *Id.* at 1116. Like the Sixth Circuit, the Ninth Circuit concluded that those public safety interests are "compelling." *Id.*; see *Tyler*, 837 F.3d at 693 (concluding that the government's interests in preventing crime and suicide are compelling).

¹⁰⁴ *Mai*, 952 F.3d. at 1118. For example, the court highlighted a study in the record that examined the suicide risk of patients more than a decade after their release. *Id.* The study evaluated some patients for fifteen years following their release from treatment and found that their suicide risk was still "seven times that expected." *Id.* (quoting E. Clare Harris & Brian Barraclough, *Suicide as an Outcome for Mental Disorders: A Meta-Analysis*, 170 BRIT. J. PSYCHIATRY 205, 220 (1997)).

¹⁰⁵ *Id.* (quoting *Pena v. Lindley*, 898 F.3d 969, 984 (9th Cir. 2018)). The court differentiated between the evidence required to sustain legislation and that required to secure a conviction in a criminal case. *Id.* Congress need only rely on evidence that "fairly supports" its "reasonable" judgment. *Id.* (quoting *Jackson v. City of San Francisco*, 746 F.3d 953, 969 (9th Cir. 2014)).

Circuit's holding and concluded that the ban was reasonable in light of Congress's public safety interests.¹⁰⁶

III. THE NINTH CIRCUIT'S AGILE APPROACH: SIDE-STEPPING AMBIGUOUS HISTORY AND SETTING THE PROPER EVIDENTIARY BURDEN

The U.S. Court of Appeals for the Ninth Circuit's approach in *Mai v. United States* recognized that it is unnecessary for courts to examine founding-era history to decide whether the right to bear arms has historically applied to individuals with mental illness because 18 U.S.C. § 922(g)(4) nonetheless survives intermediate scrutiny.¹⁰⁷ The court's approach also rejected an overly stringent evidentiary standard, thereby giving Congress sufficient flexibility in policymaking.¹⁰⁸

Section A of this Part argues that the Ninth Circuit correctly side-stepped an exhaustive historical inquiry, acknowledging that the Supreme Court's 2008 decision in *District of Columbia v. Heller* had already identified restrictions like § 922(g)(4) as "presumptively lawful" and that courts are ill-equipped to perform historical surveys.¹⁰⁹ Section B endorses the Ninth Circuit's deference to congressional decision-making because it recognized the realities of policy-making and empowered legislatures to make reasonable, data-driven decisions concerning gun safety.¹¹⁰

¹⁰⁶ *Id.* at 1117. In September 2020, the Ninth Circuit denied the plaintiff's petition for an en banc rehearing. *Mai v. United States*, 974 F.3d 1082, 1083 (9th Cir. 2020) (mem.). Circuit Judges Collins, Bumatay, and Vandyke filed separate dissenting opinions that criticized the Ninth Circuit panel's approach and decision in *Mai*. *Id.* at 1082. Judge Bumatay suggested that *Heller* specifically prohibited courts from employing an interest-balancing approach and averred that the two-step analysis is just that. *Id.* at 1086 (Bumatay, J., dissenting on denial of rehearing en banc). In his view, *Heller* required judges to evaluate Second Amendment challenges solely in light of the Amendment's history, tradition, and text. *Id.* Applying that logic to § 922(g)(4), Judge Bumatay concluded that the provision is unconstitutional because it restricts a class of persons from possessing firearms, and, at the time of the founding, gun regulations were limited to restricting conduct. *Id.* at 1088–90. Moreover, Judge Bumatay suggested that because the common law understood mental illness as a temporary condition, such a diagnosis did not result in the permanent revocation of rights. *Id.* at 1090.

¹⁰⁷ *See Mai v. United States*, 952 F.3d 1106, 1114–15 (9th Cir. 2020) (explaining that resolving which view is more historically accurate is unnecessary), *petition for cert. filed*, (U.S. Dec. 9, 2020) (No. 20-819). The Ninth Circuit, relying on its logic in *Pena v. Lindley*, reasoned that even if § 922(g)(4) burdened the plaintiff's Second Amendment rights, the provision is still valid as applied to him because it survives intermediate scrutiny. *See id.*; *Pena*, 898 F.3d at 976 (endorsing that approach where the law at issue is valid regardless of whether it burdens protected conduct).

¹⁰⁸ *See Mai*, 952 F.3d at 1118 (critiquing the Sixth Circuit's judgment that the scientific evidence Congress relied upon is insufficient and explaining that, even when it is imperfect, courts should show deference to Congress's decision).

¹⁰⁹ *See infra* notes 111–124 and accompanying text.

¹¹⁰ *See infra* notes 125–134 and accompanying text.

A. *The Ninth Circuit Approach Avoids Giving Undue Weight to Ambiguous History*

In *Mai*, the Ninth Circuit correctly avoided performing a lengthy historical analysis to determine whether individuals no longer living with mental illness are historically excluded from the Second Amendment's protections.¹¹¹ This approach was not only faithful to the Supreme Court's decision in *Heller*, but it also recognized that the history surrounding such exclusions is especially elusive, that courts are institutionally ill-equipped to perform such an inquiry, and that courts are vulnerable to weaponizing history.¹¹²

In light of *Heller*, both the Third and Sixth Circuits turned to history to determine whether § 922(g)(4) burdens protected conduct.¹¹³ Nevertheless, the courts reached opposite results.¹¹⁴ In *Mai*, on the other hand, the Ninth Circuit allocated little time to parsing through colonial American history to determine the "true" scope of the right to bear arms.¹¹⁵ The wisdom of the Ninth Circuit's approach is that, although history may offer some insight, it is unlikely to provide precise answers.¹¹⁶ That logic is especially applicable to restrictions on persons with mental illness because there had been no need for such measures

¹¹¹ See *Mai*, 952 F.3d at 1114 (explaining that it is unnecessary to decide which party's view is better aligned with America's historical tradition and assuming that § 922(g)(4) does burden the plaintiff's Second Amendment rights).

¹¹² See *District of Columbia v. Heller*, 554 U.S. 570, 626–27 (2008) (noting gun ownership restrictions on individuals living with mental illness are "presumptively lawful"); *Tyler v. Hillsdale Cty. Sheriff's Dep't*, 837 F.3d 678, 687 (6th Cir. 2016) (finding the historical evidence on the Second Amendment's application to the mentally ill to be inconclusive); Saul Cornell, *Heller, New Originalism, and Law Office History: "Meet the New Boss, Same as the Old Boss,"* 56 UCLA L. REV. 1095, 1098 (2009) (describing the Court's historical analysis in *Heller* as emblematic of "law office history" in which judges engineer a particular historical narrative to advance their political preferences); Cornell, *supra* note 39, at 1697 (suggesting that differentiating between "law office history" and serious academic scholarship is a difficult task for judges in Second Amendment disputes).

¹¹³ See *Beers v. Att'y Gen. U.S.*, 927 F.3d 150, 157–58 (3d Cir. 2019), *vacated as moot sub nom. Beers v. Barr*, 140 S. Ct. 2758 (2020) (mem.) (examining the historical justifications for barring persons with mental illness from possessing firearms); *Tyler*, 837 F.3d at 689–90 (same).

¹¹⁴ Compare *Beers*, 927 F.3d at 158 (concluding from the historical record that persons living with mental illness were traditionally disarmed because they posed a danger to themselves and/or their communities), with *Tyler*, 837 F.3d at 689 (concluding that the historical evidence was too vague to determine whether § 922(g)(4) burdens the right to bear arms).

¹¹⁵ See *Mai*, 952 F.3d at 1114–15 (observing that the historical evidence backs up the notion that America disarmed persons living with mental illness because the country considered them a public safety risk before choosing not to decide whether § 922(g)(4) burdens Second Amendment rights).

¹¹⁶ See, e.g., *Tyler*, 837 F.3d at 689 (noting that the founding generation viewed the Second Amendment as applying only to virtuous citizens, but suggesting that the description is insufficient to identify who would have been considered so); cf. Saul Cornell, *Early American Gun Regulation and the Second Amendment: A Closer Look at the Evidence*, 25 LAW & HIST. REV. 197, 203–04 (2007) (arguing that there were several "constitutional discourses" on the Second Amendment in colonial America and that how each "vied for dominance" and changed poses difficulties for those relying on historical evidence).

during the eighteenth century.¹¹⁷ By presuming that § 922(g)(4) burdened protected conduct, the court focused its analysis on the heart of the issue: determining the proper level of constitutional scrutiny and applying it.¹¹⁸

Proponents of a weighty historical analysis in Second Amendment jurisprudence suggest that absent one, judges will be unable to determine the scope of the right.¹¹⁹ The Ninth Circuit, however, rightly deferred to the Supreme Court's robust historical inquiry in *Heller* and proceeded to apply scrutiny with the Court's conception of the core of the right guiding its analysis.¹²⁰ As a practical matter, a thorough historical inquiry is a tall task for judges.¹²¹ It requires them to sort through complicated, and at times conflicting, records and to discern what is historically accurate.¹²² Moreover, judges often disagree over which evidence and/or time period is pertinent to discerning the scope of the Second Amendment.¹²³ Perhaps the gravest risk though is that judges will weaponize pieces of the historical record to reach a predetermined holding that aligns with their ideological agenda.¹²⁴

¹¹⁷ *Beers*, 927 F.3d at 157; see 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, 1376–78 (2009) (suggesting that because eighteenth-century justices of the peace could imprison “lunatics,” it is logical to presume that the founding generation would have understood prohibitions against gun ownership for persons with mental illness to be valid).

¹¹⁸ See *Mai*, 952 F.3d at 1115–19 (considering the proper level of constitutional scrutiny and deciding upon intermediate scrutiny).

¹¹⁹ See *Mai v. United States*, 974 F.3d 1082, 1091 (9th Cir. 2020) (mem.) (Bumatay, J., dissenting on denial of rehearing en banc) (contending that the Ninth Circuit's approach in *Mai* is “infect[ed]” because it omits the historical analysis and suggesting that engaging in such an analysis would have revealed that § 922(g)(4) burdens the core of the Second Amendment right).

¹²⁰ See *Mai*, 952 F.3d at 1115 (determining the proper level of scrutiny in light of *Heller*'s ruling that the core of the Second Amendment is the “right of law-abiding, responsible citizens to use arms in defense of health and home” (quoting *Heller*, 554 U.S. at 635)).

¹²¹ See Cornell, *supra* note 39, at 1697 (contending that it is difficult for judges to separate sound historical scholarship from advocacy disguised as historical scholarship in Second Amendment cases).

¹²² *Id.*

¹²³ See *id.* at 1697 n.8 (identifying possible sources of historical evidence and noting that judges are divided over how to weigh and interpret them). For example, some judges interpret *Heller* to require a focus primarily on the founding period whereas others claim that it endorses a broad survey through at least the nineteenth century. Compare *Nat'l Rifle Ass'n of Am. v. Bureau of Alcohol, Tobacco, Firearms & Explosives*, 700 F.3d 185, 194 (5th Cir. 2012) (concluding that *Heller* demonstrates that courts may consider nineteenth and twentieth century sources at step one), with *Nat'l Rifle Ass'n of Am. v. Bureau of Alcohol, Tobacco, Firearms & Explosives*, 714 F.3d 334, 337 (5th Cir. 2013) (Jones, J., dissenting on denial of rehearing en banc) (reading *Heller* as creating a hierarchy of historical materials and suggesting that founding-era materials are most relevant).

¹²⁴ See Cornell, *supra* note 112, at 1098 (criticizing the Court's “new originalism” approach in *Heller*). Some scholars argue that *Heller* exemplifies “a results oriented methodology” whereby judges can simply cherry-pick historical evidence to arrive at an ideologically-convenient conclusion. *Id.*; see Hon. J. Harvie Wilkinson III, *Of Guns, Abortions, and the Unraveling Rule of Law*, 95 VA. L. REV. 253, 269 (2009) (observing that the justices in both the majority and minority in *Heller* unsurprisingly concluded that history supported their interpretations of the Second Amendment).

B. The Ninth Circuit's Proper Evidentiary Burden

The Ninth Circuit's evidentiary standard is far less strict than that of the Sixth Circuit, and it correctly recognizes that policymakers must often make prognostic decisions with incomplete information.¹²⁵ The Sixth and Ninth Circuits agreed that intermediate scrutiny is appropriate for as-applied challenges to § 922(g)(4), but diverged on whether the provision survives such scrutiny.¹²⁶ The Ninth Circuit's analytical approach is correct because it recognizes the nature of policymaking and sets its burden accordingly.¹²⁷

In *Tyler v. Hillsdale County Sheriff's Department*, the Sixth Circuit concluded that the government did not meet its burden of proving that § 922(g)(4)'s lifetime ban was reasonable.¹²⁸ To impose such a burden, the court reasoned, the government would need to demonstrate that individuals who were involuntarily committed many years ago posed an ongoing risk to themselves or the public.¹²⁹ In contrast, in *Mai*, the Ninth Circuit emphasized that the Second Amendment permits class prohibitions and rejected the Sixth Circuit's overly individualized evidentiary standard.¹³⁰ The Ninth Circuit rightly concluded that Congress may rely on any evidence that it believes is relevant.¹³¹ Congress is entitled to such deference because it is institutionally better equipped than a panel of judges to gather and analyze data as part of the policymaking process.¹³² When a court second-guesses a congressional judgment that is both reasonable and data-driven, it improperly interferes with the

¹²⁵ Compare *Mai*, 952 F.3d at 1118 (concluding that courts should evaluate only whether policy decisions are “fairly support[ed]” by the evidence because legislating sometimes necessitates predicting the consequences of future events) (quoting *Jackson v. City of San Francisco*, 746 F.3d 953, 969 (9th Cir. 2014)), with *Tyler*, 837 F.3d at 696 (reasoning that evidence of an increased suicide risk twenty-two months after discharge is insufficient to conclude that the class poses an ongoing risk long after release).

¹²⁶ Compare *Mai*, 952 F.3d at 1109 (ruling that § 922(g)(4) is a “reasonable fit” with the government's important interest in reducing gun violence), with *Tyler*, 837 F.3d at 699 (concluding that the government failed to demonstrate that § 922(g)(4) is a “reasonable fit” in light of its public safety interests).

¹²⁷ See *Mai*, 952 F.3d at 1118 (explaining that to develop sage public policy, legislators and their staffs must sometimes predict future events and/or rely on incomplete data). The approach also recognizes that data may change and Congress is better suited than the courts to respond. See Wilkinson, *supra* note 124, at 292, 299–300 (observing that “legislatures can amend laws when . . . social conditions change” whereas courts end the debate).

¹²⁸ *Tyler*, 837 F.3d at 699.

¹²⁹ See *id.* (concluding that the government did not prove that individuals in the plaintiff's circumstances pose a continued danger to themselves or the public and characterizing the government's evidence as focusing on individuals currently living with mental illness and those recently released from commitment).

¹³⁰ See *Mai*, 952 F.3d at 1119 (explaining that Congress need only focus on persons with a mental illness as a class and that the Second Amendment does not require a personalized risk assessment).

¹³¹ See *id.* at 1118 (rejecting inflexible standards for congressional judgements).

¹³² See *Turner Broad. Sys., Inc. v. F.C.C.*, 520 U.S. 180, 195 (1997) (explaining that legislatures are better positioned than courts to collect and evaluate data for drafting legislation).

legislature's policy-making role.¹³³ The Ninth Circuit's decision in *Mai* adheres to this important principle.¹³⁴

CONCLUSION

In *Mai v. United States*, the Ninth Circuit held that § 922(g)(4) survives intermediate scrutiny. The court appropriately followed the Supreme Court's guidance in *District of Columbia v. Heller* and adopted the prevailing two-step framework widely used by federal appellate courts to resolve as-applied Second Amendment challenges. Importantly, however, it sidestepped an exhaustive historical analysis in step one, mindful that *Heller* had explicitly presumed that such regulations were lawful. The Ninth Circuit's approach to evaluating § 922(g)(4) challenges should be the model for federal courts. This is because the Ninth Circuit's decision to assume that § 922(g)(4) burdened the plaintiff's Second Amendment rights permitted the court to focus on the heart of the issue: whether the provision withstands heightened constitutional scrutiny. Implicit in the Ninth Circuit's approach was the recognition that courts are institutionally ill-equipped to conduct expansive historical inquiries and that the historical evidence related to disarming the mentally ill is ambiguous. Moreover, the court's decision to apply intermediate scrutiny is consistent with the only other federal appellate court to address the question.

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¹³³ See *id.* at 196 (explaining that courts must defer to congressional judgements when they rely on "substantial" evidence because otherwise judges usurp Congress's authority to craft social policy).

¹³⁴ See *Mai*, 952 F.3d at 1118 (recognizing that the evidentiary issue is limited to "whether the evidence 'fairly supports' Congress' 'reasonable conclusions'" (quoting *Mahoney v. Sessions*, 871 F.3d 873, 979–80 (9th Cir. 2017))).