

10-2021

A "Second-Class Right" For "Second-Class Citizens"

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Recommended Citation

Benjamin A. Rice, *A "Second-Class Right" For "Second-Class Citizens"*, 74 SMU L. REV. F. 181 (2021)

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SMU Law Review Forum

Volume 74

October 2021

181–205

A “SECOND-CLASS RIGHT” FOR “SECOND-CLASS CITIZENS”

*Benjamin A. Rice**

ABSTRACT

In McDonald v. City of Chicago, the Supreme Court countenanced against treating the Second Amendment as a “second-class right.” Against this admonition, congressional defunding of federal restorative programs has rendered the amendment a second-class right for an ever-increasing and much-maligned group of people: those who have been adjudicated as mentally ill. In a majority of states, those who have been involuntarily committed at any point in their lives to a mental health institution lose the right to bear arms for life. Taking guns out of the hands of those who have enjoyed decades of good mental health after a brief stint of treatment stigmatizes all who have battled mental illness and unfairly treats them as “second-class citizens,” undeserving of their constitutionally guaranteed rights.

This Comment seeks to show that even in the ever-evolving jurisprudence of the Second Amendment, the lifetime ban currently imposed on this group fails under all forms of constitutional analysis. This Comment updates current scholarship by addressing two as-of-yet undiscussed circuit court cases and looking to the ascendent “historical approach” to Second Amendment challenges, in which courts look to the text, history, and tradition of the right to determine constitutionality. Then, it looks to tiered scrutiny, proposing that courts examine challenges to the current effective ban under the lens of strict scrutiny and disproving the oft-cited government interests.

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I. INTRODUCTION

Until immigrating to the United States at age two, Duy T. Mai lived in a Thai refugee camp.¹ Since then, he has lived the quintessential American success story: Mai graduated from a prestigious west coast university with a 3.7 GPA in microbiology, and he later completed post-graduate studies on cancer research, receiving a graduate degree in microbiology.² After obtaining his second degree, Mai moved to the state of Washington to research virology at a number of

1. Mai v. United States (*Mai II*), 974 F.3d 1082, 1084 (9th Cir. 2020) (Bumatay, J., dissenting) (denying rehearing en banc).

2. *Id.*

prestigious research centers throughout the state.³ In his home life, Mai is a father of two, he remains close to his extended family, and he regularly volunteers near his home.⁴

But like more than seventeen million Americans,⁵ Mai has a history of depression. In 1999, at age seventeen, Mai was involuntarily committed to a mental health hospital for treatment, for which a state court adjudicated him as mentally ill and dangerous.⁶ Mai's brief brush with depression thankfully passed. The following year, his commitment ended, and he has not needed treatment since.⁷ According to Mai, he has since completely recovered and no longer takes medication to control his previous condition.⁸ In support of his claim, it should be noted that Mai's academic successes occurred after his commitment.⁹ Despite his post-commitment successes, his onetime brush with depression has irreversibly changed his legal status: his involuntary commitment means that both Washington¹⁰ and federal¹¹ law bar him from legally purchasing a firearm.

Undeterred, in 2014 Mai started the tortuous process of recouping his Second Amendment rights and reestablishing his name in the eyes of the law. In that year, he petitioned a Washington state court to restore his firearm rights to permit him to purchase a firearm for self-defense.¹² To augment his petition, Mai gathered supportive declarations from medical and psychological experts testifying to his condition.¹³ The state court granted his petition under state law,¹⁴ stating plainly that "[Mai] no longer presents a substantial danger to himself, or the public."¹⁵ Mai's rights, at least under state law, were restored.

His rights under federal law have been another story altogether. After the restoration of his state rights, Mai attempted to pass a required background check to purchase a firearm but later received a phone call from the Bureau of Alcohol, Tobacco, Firearms, and Explosives (ATF) notifying him that the restoration of his state rights did not nullify his ban under 18 U.S.C. § 922(g)(4), which prohibits possession of firearms by those who have been involuntarily committed to a mental institution.¹⁶ The current federal statutory scheme permits states to opt in to a program in which their state reviewing bodies may lift the

3. *Id.*

4. *Id.*

5. *Major Depression*, NAT'L INST. OF MENTAL HEALTH, <https://www.nimh.nih.gov/health/statistics/major-depression.shtml> [https://perma.cc/4KUF-B6AN].

6. *Mai v. United States (Mai I)*, 952 F.3d 1106, 1110 (9th Cir. 2020).

7. Appellant's Opening Brief at 7, *Mai I*, 952 F.3d 1106 (No. 18-36071), 2019 WL 1580778, at *7.

8. *Id.* at 8.

9. *Id.* at 7.

10. WASH. REV. CODE § 9.41.047 (2020).

11. 18 U.S.C. § 922(g)(4).

12. Appellant's Opening Brief, *supra* note 7, at 8.

13. *Id.*

14. *Id.*

15. *Mai v. United States (Mai I)*, 952 F.3d 1106, 1110 (9th Cir. 2020).

16. Appellant's Opening Brief, *supra* note 7, at 9.

federal ban on their citizens.¹⁷ But Washington, like the majority of states in 2020, has not elected to opt in to the program.¹⁸ Effectively, because of a short, involuntary commitment more than twenty years ago, Mai can never purchase a firearm under federal law. The law stands on the shaky premise that once mentally ill, always mentally ill, and stigmatizes those like Mai who have overcome their bouts with depression.

Unable to take advantage of restorative programs, Mai brought a Second Amendment suit in federal court to reestablish his rights,¹⁹ but he has lost in each of his cases. His legal struggles highlight two areas for concern in modern Second Amendment jurisprudence. First, the court's analysis of his challenge to § 922(g)(4) differs greatly from two factually similar cases outside of the Ninth Circuit where Mai brought his challenge, highlighting the bare unpredictability of modern Second Amendment jurisprudence.²⁰ Second, and more narrowly, the effective lifetime ban on firearm possession by those involuntarily committed for old and nonextant mental health concerns is unconstitutional under any of the current competing Second Amendment analyses.

In Part II, this Comment will outline current Second Amendment jurisprudence. Part III will address Mai's case and two other as-applied challenges to § 922(g)(4) that have reached the federal courts of appeals, all of which have resulted in different holdings. Part IV will show that the statute, as it stands, fails under the ascendent historical approach advanced by originalist judges since then-Judge Kavanaugh's dissent in *Heller v. District of Columbia*, and Part V will show the same under the widely used tiered scrutiny approach.

II. THE CURRENT STATE OF SECOND AMENDMENT JURISPRUDENCE

The Second Amendment provides that, "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."²¹ The amendment is no model for clarity—one Second Amendment scholar noted that "[i]t's almost as if James Madison, the author of the amendment, had just discovered this wonderful new thing, the comma, and wanted to put it in there as many times as possible."²² For most part of its history, clauses and commas befuddled anyone trying to make sense of the amendment, and only a handful of Supreme Court cases shed any light on the one-sentence amendment.

17. See *infra* Part II.D.1.

18. *NICS Act Record Improvement Program (NARIP) Awards FY 2009-2020*, BUREAU OF JUST. STAT., <https://bjs.ojp.gov/programs/nics-improvement-amendments-act/state-profiles?tid=491&ty=tp#5is2kq> [<https://perma.cc/YLB9-43EM>] (recording only twenty-two states taking part in the program in 2020); see also *infra* Part II.D.

19. *Mai v. United States*, No. C17-0561, 2018 WL 784582, at *1 (W.D. Wash. Feb. 8, 2018).

20. See *infra* Parts III.A–III.B (discussing the two cases).

21. U.S. CONST. amend. II.

22. *Radiolab Presents: More Perfect – The Gun Show*, RADIOLAB, at 02:37 (Feb. 23, 2018), <https://www.wnycstudios.org/podcasts/radiolab/articles/radiolab-presents-more-perfect-gun-show> [<https://perma.cc/CR9J-489E>].

A. MILLER TO HELLER

Not until the 2008 decision in *District of Columbia v. Heller* did the Supreme Court attempt to delineate the amendment's scope. Until *Heller*, debate raged over whether the Second Amendment protects an individual right to keep and bear arms or, instead, a collective right protecting firearm use only in connection with militia service.²³ In *Heller*, Justice Scalia resolved the individual- or collective-rights debate in favor of the former interpretation.²⁴ Writing for the five-justice majority, Justice Scalia penned a well-researched originalist analysis of the Second Amendment, looking to dictionary definitions contemporary to the Constitution's ratification,²⁵ post-English Restoration militia laws,²⁶ and late eighteenth-century state constitutions²⁷ to conclude that the right conferred was, indeed, an individual one.²⁸ To Justice Scalia, the amendment's prefatory clause—providing that “[a] well regulated Militia being necessary to the security of a Free State”—serves only to announce the purpose for which the right to keep and bear arms was originally codified, and *not* to limit the operative clause to a collective right protecting only those serving in the militia.²⁹ Next, highlighting the importance of self-defense weapons in the history of the Second Amendment,³⁰ the majority held that the District of Columbia's blanket ban on handgun possession, including those held in the home for self-defense, was constitutionally forbidden.³¹ The holding failed to settle the Second Amendment debate.

For all that Justice Scalia did to clarify the rights debate, he left open the question of how to address future Second Amendment challenges. Answers to whether Justice Scalia prescribed a constitutional analysis for future challenges in his opinion are up-for-debate at best. Questions on the proper analysis are further complicated by the debate over how much deference to give *Heller*'s “presumptively lawful” bans.³² In noting the limits of the Second Amendment right at the end of the opinion, Justice Scalia gave his blessing to bans on possession by the mentally ill by giving it the label of presumptively lawful, but the claim went unsupported.³³ In effect, the unsubstantiated sentence excuses

23. See generally Brannon P. Denning, *Can the Simple Cite Be Trusted?: Lower Court Interpretations of United States v. Miller and the Second Amendment*, 26 CUMB. L. REV. 961, 972–76 (1996) (discussing pre-*Heller* debate of the scope of the right).

24. *District of Columbia v. Heller (Heller I)*, 554 U.S. 570, 592–95 (2008).

25. Justice Scalia used Samuel Johnson's eighteenth-century dictionary to define both “arms” and “keep.” *Id.* at 581–82 (quoting 1 DICTIONARY OF THE ENGLISH LANGUAGE 106, 1095 (4th ed. 1773) (reprt. 1978)).

26. *Id.* at 593–95.

27. *Id.* at 600–03.

28. *Id.* at 595.

29. *Id.* at 595, 599.

30. *Id.* at 624–25 (quoting *State v. Kessler*, 614 P.2d 94, 98 (Or. 1980)) (“In the colonial and revolutionary war era, [small-arms] weapons used by militiamen and weapons used in defense of person and home were one and the same.”).

31. *Id.* at 635.

32. *Id.* at 626–27, 627 n.26.

33. See *id.* (listing other presumptively lawful prohibitions in addition to the ban on possession by formerly mentally ill individuals, including bans on the possession of “dangerous

§ 922(g)(4)'s ban. Certainly, those who are currently mentally ill might be required to face some hurdles in firearm possession, but did Justice Scalia give a nod to lifetime bans based on little more than a period of mental illness in a person's youth? Such a position is unlikely, given that the late justice's opinion amounts to a sixty-three-page screed against a complete handgun ban. But the lack of a clearly defined analysis coupled with unsubstantiated dicta leaves a tangle of unsettled questions on Second Amendment doctrine, especially as it relates to the presumptively lawful categorical bans.

The confusion has played out in the "presumptively lawful" ban under § 922(g)(4). In fact, many post-*Heller* challenges to § 922(g)(4), though containing largely identical facts, have seen different results.³⁴ Factoring in dissenting and concurring opinions, the list of hypothesized ways to resolve these as-applied challenges proves mind-numbingly complex and leaves even judges confused.³⁵ To be sure, the Court has granted certiorari to a number of Second Amendment cases post-*Heller*, but none have resolved the debate surrounding the proper analysis,³⁶ and lower courts have had to make sense of *Heller* on their own.

B. TIERED SCRUTINY OR "TEXT, HISTORY, AND TRADITION"?

"In *Heller*'s wake, two opposing points of view have emerged regarding [the] proper" analysis for Second Amendment challenges.³⁷ All circuits have filled the gap by opting for a two-tiered analysis first pioneered by the Third Circuit in *United States v. Marzzarella*.³⁸ Under this approach, courts first ask what level of scrutiny applies based on whether the statute burdens the Second Amendment's core of lawful self-defense³⁹ and then analyze the statute under

and unusual" weapons, possession by felons, and the carrying of weapons in certain sensitive places); *see also* *McDonald v. City of Chicago*, 561 U.S. 742, 786 (2010) (reaffirming the list of presumptively lawful regulatory measures and explicitly extending the Second Amendment to the states through the Fourteenth Amendment).

34. *E.g.*, *Mai v. United States (Mai I)*, 952 F.3d 1106, 1109, 1121 (9th Cir. 2020) (finding that § 922(g)(4) withstands intermediate scrutiny as applied to the plaintiff); *Beers v. Att'y Gen. United States*, 927 F.3d 150, 159 (3d Cir. 2019), *cert. granted, judgment vacated sub nom.* *Beers v. Barr*, 140 S. Ct. 2758 (2020) (mem.) (disposing of the challenge and upholding the statute under the first step of tiered scrutiny); *Tyler v. Hillsdale Cnty. Sheriff's Dep't (Tyler II)*, 837 F.3d 678, 699 (6th Cir. 2016) (en banc) (applying intermediate scrutiny, finding that the plaintiff has a viable claim, and remanding to the district court).

35. In the en banc opinion of *Tyler*, Judge Gibbons writes that "as [she] read[s] the opinions . . . at least twelve of [them] agree that intermediate scrutiny should be applied." *Tyler II*, 837 F.3d at 699 (emphasis added).

36. *See McDonald*, 561 U.S. at 749–753; *Caetano v. Massachusetts*, 577 U.S. 411, 411–12 (2016) (per curiam) (discussing the application of *Heller* to stun guns).

37. Lindsay Colvin, *History, Heller, and High-Capacity Magazines: What Is the Proper Standard of Review for Second Amendment Challenges?*, 41 *FORDHAM URB. L.J.* 1041, 1043 (2014).

38. 614 F.3d 85, 89 (3d Cir. 2010). *See generally* Benjamin A. Ellis, Note, "Time Enough" for Scrutiny: *The Second Amendment, Mental Health, and the Case for Intermediate Scrutiny*, 25 *WM. & MARY BILL RTS. J.* 1325, 1343–47 (2017) (discussing in depth the circuit courts' precedents).

39. *Marzzarella*, 614 F.3d at 89–90. The Court in *Heller* stated that "[M]ost [Americans] undoubtedly thought [the Second Amendment] even more important for self-defense and hunting," and the interest in self-defense "was the central component of the right itself." District of Columbia

the requisite scrutiny.⁴⁰ Despite the lack of direction in *Heller*, the court in *Marzzarella* read the landmark case to suggest such a tiered approach.⁴¹ Though it enjoys dubious approval in *Heller*, the approach presents a familiar analysis to judges used to analyzing tiered scrutiny in other constitutional claims.

C. “TEXT, HISTORY, AND TRADITION”: THE HISTORICAL APPROACH

By contrast, the historical approach resolves Second Amendment challenges by combing historical sources and striking down statutes for which no analogy can be found.⁴² The approach has not seen widespread approval in majority opinions, but a growing number of originalist judges have advocated its approach in dissents or concurrences, such that it may see approval over tiered scrutiny in the future. Advocates of the historical approach make much of Justice Scalia’s keen eye to the history of the Second Amendment in *Heller* when determining the scope of the right. They further maintain that Justice Scalia’s dive into the history of the amendment amounts to an analysis for lower courts to emulate in future cases that leaves no room for interest balancing.⁴³

In 2011, then-Judge Kavanaugh on the D.C. Circuit took up the flag for the historical approach and argued for its adoption in his dissenting opinion in *Heller II*.⁴⁴ His dissent is frequently seen as the genesis of the revolt against tiered scrutiny.

Three years after *Heller*, *Heller II* concerned the District of Columbia’s renewed attempt to regulate firearm possession. Following the first *Heller* case, the D.C. Council passed a slew of regulations that required firearm registration⁴⁵ and prohibited broadly defined categories of assault weapons⁴⁶ and large-capacity magazines.⁴⁷ Although the registration requirements provided the avenue to gun ownership that *Heller* required, they created a protracted process for ownership that included, among other requirements, sufficient eyesight,⁴⁸ a knowledge of local firearm laws,⁴⁹ fingerprinting,⁵⁰ and continued background checks.⁵¹ The assault-weapons ban was sweeping, covering certain semi-automatic rifles, pistols, shotguns, and all semi-automatic firearms that included pistol grips or thumbhole stocks.⁵² The regulations, at least ostensibly, complied

v. *Heller* (*Heller I*), 554 U.S. 570, 599 (2008).

40. *Marzzarella*, 614 F.3d at 89.

41. *Id.*

42. *Mai v. United States* (*Mai II*), 974 F.3d 1082, 1087–88 (9th Cir. 2020) (Bumatay, J., dissenting).

43. *Id.* at 1086 (Bumatay, J., dissenting).

44. *Heller v. District of Columbia* (*Heller II*), 670 F.3d 1244, 1270–71 (D.C. Cir. 2011) (Kavanaugh, J., dissenting).

45. D.C. CODE § 7-2502.01(a) (2015).

46. § 7-2502.02(a)(6).

47. § 7-2506.01(b) (defining “large capacity” as holding more than ten rounds).

48. § 7-2502.03(a)(11).

49. § 7-2502.03(a)(10).

50. § 7-2502.04(a).

51. § 7-2502.07(d) (repealed 2012) (requiring background checks every six years).

52. § 7-2501.01(3A)(A).

with *Heller* in that they provided Dick Heller and other D.C. residents an avenue for legal ownership of firearms for the purpose of self-defense. Even so, Heller and the co-plaintiffs in the case were each denied possession of certain weapons after compliance with the application process, and they brought suit against the regulations' barriers to ownership and the outright ban on certain classes of weapons.⁵³

Dick Heller—often lionized by Second Amendment proponents for his successes in his first challenge⁵⁴—was unable to repeat his earlier Supreme Court victory, losing at the D.C. Circuit on his Second Amendment arguments against assault-weapon and high-capacity-magazine bans.⁵⁵ Judge Douglas H. Ginsburg looked to the freshly minted *Heller* opinion in support of the contention that the plaintiffs' Second Amendment right was not without bounds.⁵⁶ He then applied the widely accepted two-step analysis to the Second Amendment issue, looking to *Heller* to aid in determining the requisite level of scrutiny.⁵⁷ Judge Ginsburg eventually settled on intermediate scrutiny but remanded the case to the district court to develop a fuller record on the novel requirements' relation to government interests.⁵⁸ The opinion was par for the course for current Second Amendment cases: the majority looked to *Heller*, and then it applied tiered scrutiny.

While Heller's second attempt failed to overturn the laws at issue, then-Judge Kavanaugh's full-throated dissent has ensured that the case has a spot in the canon of gun-rights cases. Judge Kavanaugh disagreed with both the result of the case and the application of tiered scrutiny. To him, the proper route for Second Amendment analyses lies in the "text, history, and tradition" of the amendment and in appropriate historical analogues for novel weapons regulations, rather than judicial "re-calibrat[ion]" of the scope of the right through tiered scrutiny.⁵⁹ Central to Judge Kavanaugh's argument is that the historical test, which he underhandedly calls "the *Heller* test," is "more determinate and 'much less subjective' because 'it depends upon a body of evidence susceptible of reasoned analysis rather than a variety of vague . . . [p]rinciples whose combined conclusion can be found to point in any direction the judges favor.'"⁶⁰ To him, his approach precludes judicial subjectivity. Under such an approach, Judge Kavanaugh would have held that the statutes at issue were unconstitutional because they were neither longstanding nor sufficiently

53. *Heller v. District of Columbia (Heller II)*, 670 F.3d 1244, 1249 (D.C. Cir. 2011).

54. 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/2018/06/26/02fdf738-7890-11e8-bda2-f99f3863e603_story.html [https://perma.cc/TD6X-XM9J].

55. *Heller II*, 670 F.3d at 1264.

56. *Id.* at 1252.

57. *Id.* at 1252–53.

58. *Id.* at 1253, 1258–60.

59. *Id.* at 1271 (Kavanaugh, J., dissenting).

60. *Id.* at 1274 (quoting *McDonald v. City of Chicago*, 561 U.S. 742, 804 (2010) (Scalia, J., concurring)).

rooted in text, history, and tradition of the Second Amendment.⁶¹

D. SECTION 922(G)(4)'S EFFECTIVE LIFETIME BAN

Debate over the proper analysis has raged across Second Amendment challenges, but especially so in challenges to § 922(g)(4). Congress passed this and other gun-control statutes in 1968 in an effort to stem the number of high-profile shootings that had marked the decade. Just five days after Lee Harvey Oswald assassinated President Kennedy in 1963 with a mail-order rifle, Senator Thomas Dodd from Connecticut led the charge for gun control by introducing legislation to restrict sales of firearms through the mails.⁶² Though the efforts of the initial Dodd bill came to nothing, Senator Dodd continued to introduce legislation at the request of President Johnson.⁶³ Comprehensive legislation finally saw widespread support in 1968 after two more high-profile killings: the Gun Control Act of 1968 (GCA) passed the Senate the month after the slaying of Martin Luther King, Jr. and passed the House the day after the assassination of Robert F. Kennedy.⁶⁴ Congress declared that the GCA's purpose was "to provide support to [f]ederal [and] [s]tate . . . law enforcement officials in their fight against crime and violence."⁶⁵ To that end, the GCA expanded the categories of congressionally defined groups proscribed from firearm possession, including felons and the mentally ill.⁶⁶

Including a ban on possession by the mentally ill, perhaps in some ways precipitated by the violence of the mid-1960s, extended the list of prohibited classes past pre-GCA regulations. Senator Dodd blamed violent television programs, extremist organizations, and the ease with which Americans can obtain firearms as contributing to a "sickness of violence."⁶⁷ Sickness, a byword for mental illness, was thus squarely within the GCA's sights. No doubt Senator Dodd was thinking of "sick" assassins like Lee Harvey Oswald and James Earl Ray in his remarks.

In order to hinder the sickness of violence, § 922(g)(4) provides that "[i]t 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 or receive any firearm.⁶⁸ The ATF regulations expand on the statute, defining one as "[a]djudicated as mental defective" if there has been a determination by a legal body that "a person, as a result of marked subnormal intelligence, or mental

61. *Id.* at 1285.

62. Jon Michaud, *The Birth of the Modern Gun Debate*, NEW YORKER (Apr. 19, 2012), <https://www.newyorker.com/books/double-take/the-birth-of-the-modern-gun-debate> [<https://perma.cc/3QLM-QQMP>].

63. Laura Smith, UNIV. OF CONN. LIBRS., *Thomas J. Dodd and the Gun Control Act of 1968*, CONN. HIST.ORG (Dec. 13, 2016), <https://connecticuthistory.org/thomas-j-dodd-and-the-gun-control-act-of-1968/> [<https://perma.cc/4QPG-SZAG>].

64. Franklin E. Zimring, *Firearms and Federal Law: The Gun Control Act of 1968*, 4 J. LEGAL STUD. 133, 146–48 (1975).

65. Gun Control Act of 1968, Pub. L. 90-618, § 101, 82 Stat. 1213, 1213 (1968).

66. Zimring, *supra* note 64, at 149.

67. 114 CONG. REC. S16649 (daily ed. June 11, 1968) (statement of Sen. Dodd).

68. 18 U.S.C. § 922(g)(4).

illness, incompetency, condition, or disease” is a “danger to himself or others” or “[l]acks the mental capacity to contract or manage his own affairs.”⁶⁹ The term “[c]ommitted to a mental institution,” at issue in the *Mai* case, includes involuntary commitments to mental institutions for mental defectiveness, mental illness, or “other reasons, such as for drug use.”⁷⁰

1. *The Relief Program*

Of crucial importance to the statute’s unconstitutionality, the ban on firearm possession by those who have been adjudicated mentally ill was *never meant to be permanent*. The framers of the GCA had the foresight to provide an outlet for those barred by § 922(g)(4) to regain their Second Amendment rights through application to the Attorney General.⁷¹ Such outlet, codified at 18 U.S.C. § 925(c), grants to the Attorney General the ability to grant “relief from the disabilities imposed by Federal laws” after reviewing the circumstances of the applicant’s record and deciding “that the applicant will not be likely to act in a manner dangerous to public safety.”⁷² The Attorney General later delegated the authority to review these claims to the director of the ATF.⁷³ In 1992, however, Congress defunded the program,⁷⁴ and for fifteen years thereafter, all people like *Mai* were left without an avenue to regain their Second Amendment rights.

In 2008, there was renewed hope for those like *Mai* wanting to restore their rights: that year Congress punted the issue of adjudicating relief to the states. In changes to the National Instant Criminal Background Check System (NICS) scheme,⁷⁵ Congress gave states the power to grant relief from § 922(g)(4)’s ban if an authorized state body found that the individual would not pose a danger to public safety.⁷⁶ States that created relief-granting bodies in compliance with Congress’s scheme became eligible for grant funding to assist in implementing such bodies.⁷⁷ The congressional punt has proven only somewhat successful. The availability of grant funds has only attracted a handful of states: in 2020, only twenty-two states received funding.⁷⁸ In all other states, formerly involuntarily committed persons are unable to regain their Second Amendment rights via any federal or state statutory or administrative route. The only option left for this class of individuals is to bring an as-applied Second Amendment challenge to the statute, a costly and flawed solution. Some applicants that have

69. 27 C.F.R. § 478.11 (2019).

70. *Id.*

71. Gun Control Act of 1968, Pub. L. 90-618, § 102, 82 Stat. 1213, 1224–26 (1968) (codified as amended at 18 U.S.C. § 925). The original text provided for application to the Secretary of the Treasury. *Id.*

72. 18 U.S.C. § 925(c).

73. 28 C.F.R. § 0.130(a)(1) (2015).

74. See Treasury, Postal Service, and General Government Appropriations Act, 1993, Pub. L. No. 102-393, 106 Stat. 1729, 1732 (1993).

75. NICS Improvement Amendments Act of 2007, Pub. L. No. 110-180, § 105, 121 Stat. 2559, 2569–70 (2008).

76. *Id.*

77. *Id.* § 301, at 2571.

78. See *NICS Act Record Improvement Program (NARIP) Awards FY 2009-2020*, *supra* note 18.

brought Second Amendment claims have indeed received a federal reinstatement of rights. In a minority of cases, judges have interpreted “involuntary commitment” under § 922(g)(4) narrowly to avoid the deprivation of rights,⁷⁹ and in others, judges have found the statute unconstitutional as applied.⁸⁰ Although promising, adjudication of these claims on an as-applied basis is too costly for many potential plaintiffs, would clog federal dockets, and on a more fundamental level, serves as an unwieldy vehicle through which American citizens should be forced to rely to reinstate their rights.

III. RECENT AS-APPLIED CASES AGAINST SCHEME OF § 922(G)(4) IN THE CIRCUIT COURTS

These challenges to § 922(g)(4)’s effective lifetime ban have been met with mixed results. As mentioned, the three factually similar post-*Heller* challenges to § 922(g)(4) that have reached the federal circuit courts have reached markedly different conclusions. This Part will discuss the three cases and their outcomes.

A. SIXTH CIRCUIT: TYLER V. HILLSDALE COUNTY SHERIFF’S DEPARTMENT

The Sixth Circuit was the first circuit post-*Heller* to wrestle with a Second Amendment challenge to § 922(g)(4) in *Tyler v. Hillsdale County Sheriff’s Department*.⁸¹ The state of Michigan’s failure to implement a relief program meant that Tyler was unable to purchase a firearm,⁸² but the district court dismissed his suit for failure to state a claim under the Second Amendment.⁸³ In the panel decision on appeal, Judge Boggs disagreed with the lower court’s analysis. He settled on tiered scrutiny in keeping with the circuit’s precedent on Second Amendment challenges to categorical bans.⁸⁴ Bound by the use of tiered scrutiny, Judge Boggs was free to choose the level of scrutiny as a matter of first impression for the circuit.⁸⁵ Noting what he called “intermediate scrutiny’s shaky foundation in Second Amendment law”⁸⁶ and that the strongest argument in its favor amounted to nothing more than its popularity among circuits in other categorical bans,⁸⁷ Judge Boggs opted to examine the as-applied challenge under

79. *Franklin v. Sessions*, 291 F. Supp. 3d 705, 723–24 (W.D. Pa. 2017) (avoiding the “seriousness of these constitutional issues” with regards to a lack of review in Pennsylvania through the canon of constitutional avoidance); *United States v. Rehlander*, 666 F.3d 45, 49 (1st Cir. 2012) (“[W]e now conclude that section 922 should not be read to encompass a temporary hospitalization attended only by the ex parte procedures of section 3863.”).

80. *Keyes v. Sessions*, 282 F. Supp. 3d 858, 878 (M.D. Pa. 2017) (“Enforcement of the statute against Keyes therefore violates his right to keep and bear arms—a right guaranteed to him by the Second Amendment to the United States Constitution.”).

81. *Tyler v. Hillsdale Cnty. Sheriff’s Dep’t (Tyler I)*, 775 F.3d 308, 311 (6th Cir. 2014), *rev’d en banc*, 837 F.3d 678 (6th Cir. 2016).

82. *Id.* at 313–15.

83. *Tyler v. Holder*, No. 1:12-CV-523, 2013 WL 356851, at *1 (W.D. Mich. Jan. 29, 2013).

84. *Tyler I*, 775 F.3d at 317–18 (citing *United States v. Greeno*, 679 F.3d 510, 518 (6th Cir. 2012)).

85. *Id.* at 311.

86. *Id.* at 330.

87. *Id.* at 324.

strict scrutiny.⁸⁸ He subsequently held that Tyler had stated a claim and remanded to the district court.⁸⁹

Judge Boggs's opinion rankled his Sixth Circuit colleagues, who reviewed the case en banc. The en banc panel agreed that reversing the district court was proper, but it disagreed with Judge Boggs's choice of strict scrutiny.⁹⁰ In the first step of tiered scrutiny—whether the statute burdened conduct protected by the Second Amendment—the en banc panel rejected the government's argument that *Heller*'s presumptively lawful language meant that § 922(g)(4) was per se constitutional.⁹¹ Instead, the court rightfully noted that the presumptively lawful category rested on ambiguous historical support, and it found that previously committed persons “are not categorically unprotected by the Second Amendment.”⁹² Consequently, § 922(g)(4), at least as applied to Tyler, burdened his Second Amendment right. Second, the en banc majority reasoned that risks inherent in firearms distinguish Second Amendment claims from other rights that use strict scrutiny,⁹³ and it instead settled on the “near unanimous preference for intermediate scrutiny.”⁹⁴ Noting that Tyler had a “viable claim” under the Second Amendment and citing an incomplete record, the court remanded the case to the district court for resolution.⁹⁵

In total, six concurrences and one dissent trade punches on the correct analysis, highlighting the judicial confusion post-*Heller*.⁹⁶ In the same vein as Judge Kavanaugh's dissent in *Heller II*, Judge Batchelder advocated for the historical approach in concurrence because, to her, two-step analyses “fail[] to give adequate attention to the Second Amendment's original public meaning.”⁹⁷ Regardless, the majority opinion's evenhanded approach that held Tyler had stated a claim in *Tyler II* provides the best approach of the three circuit-level opinions to ensure that plaintiffs have at least some avenue for a restoration of rights. Further, the opinion leaves little doubt as to the proper analysis for future as-applied challenges to § 922(g)(4) within the Sixth Circuit: judges are to employ a two-step analysis and use intermediate scrutiny.

B. THIRD CIRCUIT: BEERS V. ATTORNEY GENERAL UNITED STATES

In the case of *Beers v. Attorney General United States*, the Third Circuit, like the Sixth before it, looked to a two-step inquiry to resolve the as-applied challenge to § 922(g)(4).⁹⁸ The Third Circuit, though, employed a novel form of

88. *Id.* at 328.

89. *Id.* at 344.

90. *Tyler v. Hillsdale Cnty. Sheriff's Dep't (Tyler II)*, 837 F.3d 678, 699 (6th Cir. 2016).

91. *Id.* at 688–90.

92. *Id.* at 690.

93. *Id.* at 691.

94. *Id.* at 692.

95. *Id.* at 699.

96. *Id.* at 699–721.

97. *Id.* at 702 (Batchelder, J., concurring).

98. *Beers v. Att'y Gen. United States*, 927 F.3d 150, 153 (3d Cir. 2019), *cert. granted, judgment vacated sub nom. Beers v. Barr*, 140 S. Ct. 2758 (2020) (mem.) (granting certiorari and remanding with instructions to dismiss the case as moot).

the two-step inquiry tailored specifically to categorical bans that replaces the first step of the inquiry with a two-part question. Under the Third Circuit's formulation, the challenger must (1) identify the traditional justifications for the exclusion of his class from Second Amendment protections, and (2) present facts about himself that distinguish him from persons of the historically barred class.⁹⁹ This approach, the *Binderup* approach, explicitly invites challengers to present their medical histories as testament to their reformed status and serves as an ostensibly sympathetic route for the restoration of rights.

But the Third Circuit's opinion was anything but plaintiff-friendly. In the first step of the *Binderup* approach, the Third Circuit read the history of the rights of the mentally ill to say something entirely different than did the Sixth Circuit before it. Whereas the Sixth Circuit read history to stand for the proposition that mental illness did not conclusively justify a lifetime ban,¹⁰⁰ the court in *Beers* concluded that the historical practice of disarming potentially dangerous persons justified § 922(g)(4).¹⁰¹ The panel downplayed the novelty of bans on firearm possession by the mentally ill by noting that similar laws would have been unnecessary in the eighteenth century, when judicial officials were free "to lock up . . . individuals with dangerous mental impairments" because they posed a danger to the public.¹⁰² In such a system, the mentally ill would have been unable to access firearms without the need for statutes.¹⁰³ By analogy, the court reasoned that "if taking away a [mentally ill person]'s liberty was permissible, then . . . the lesser intrusion of taking his . . . firearms" should be no cause for concern.¹⁰⁴ The court then looked to whether *Beers* had sufficiently distinguished himself from the historical group, decided that he had not, and upheld the lower court's rejection of his challenge.¹⁰⁵

C. NINTH CIRCUIT: MAI V. UNITED STATES

The majority opinion from the Ninth Circuit's iteration of an as-applied challenge to § 922(g)(4) presents yet another different outcome from a largely similar factual scenario. In reviewing *Mai*'s Second Amendment challenge to the federal statute, the Ninth Circuit, like the two circuits before it, employed a two-step analysis.¹⁰⁶ Under the first step, *Mai* urged the Ninth Circuit to follow *Tyler II*'s lead by finding that mental illness does not justify a lifetime ban and, consequently, that the statute burdened his Second Amendment right.¹⁰⁷ The

99. *Id.* at 155 (quoting *Binderup v. Att'y Gen. United States*, 836 F.3d 336, 346–47 (3d Cir. 2016)).

100. *Tyler II*, 837 F.3d at 689–90.

101. *See Beers*, 927 F.3d at 157–58.

102. *Id.* at 158 (internal quotations omitted) (citing 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, 1377–78 (2009)).

103. *See id.*

104. *Id.* (internal quotations omitted) (quoting *Jefferies v. Sessions*, 278 F. Supp. 3d 831, 841 (E.D. Pa. 2017)).

105. *Id.* at 158–59.

106. *Mai v. United States (Mai I)*, 952 F.3d 1106, 1113 (9th Cir. 2020).

107. *Id.* at 1114.

court declined to decide one way or the other on the issue, however, and assumed without deciding that the statute burdened his rights.¹⁰⁸ Although the court noted in *Mai*'s favor that "[t]hose who are no longer mentally ill . . . unquestionably pose less of a risk of violence" compared to when they were institutionalized,¹⁰⁹ it shot down the challenge under intermediate scrutiny because of the government's interests in preventing crime and suicide.¹¹⁰

In his dissenting opinion from the denial to rehear the *Mai* case en banc, Judge Bumatay took issue with the holding of the case and the application of tiered scrutiny, penning a strident but well-researched dissent arguing that the text, history, and tradition of the Second Amendment supported *Mai*'s contention that he should be allowed to own a firearm.¹¹¹ The forcefulness of the dissent makes it a viable alternative to tiered scrutiny, and yet another potential candidate for as-applied challenge analyses.

D. TAKING STOCK

It is difficult to explain the three divergent majority opinions. Out of the three final opinions, *Tyler II* takes the most plaintiff-friendly approach and suggests unconstitutional application, *Beers* expresses hostility towards restoration of rights for the once involuntarily committed, and *Mai I* gives deference to government interests. All three cases use a form of tiered scrutiny and settle on intermediate scrutiny, but *Beers* failed to pass step one, *Mai* failed to pass step two, and *Tyler* stated a viable claim under both steps such that it was necessary to remand. The spectrum of possibilities only increases when factoring in the cases' dissents, concurrences, and nonfinal judgements.

The Sixth Circuit in *Tyler II* came closest to correctly recognizing that the effective lifetime ban under § 922(g)(4) is an unconstitutional infringement on the Second Amendment rights of those who have enjoyed years of good mental health after involuntary commitment. Such a ban fails under the historical approach advanced by then-Judge Kavanaugh, and it is too broad to survive tiered scrutiny, as will now be demonstrated in turn.

IV. SECTION 922(G)(4) PROVES UNCONSTITUTIONAL UNDER THE HISTORICAL APPROACH

Judges looking to the text, history, and tradition of the Second Amendment should strike down these as-applied challenges as unconstitutional. To repeat, no circuit court has adopted this approach, but it has enjoyed ascendent levels of approval in dissent such that it may feature in a majority opinion in the future.

108. *Id.* at 1114–15.

109. *Id.* at 1121.

110. *Id.* at 1116.

111. *Mai v. United States (Mai II)*, 974 F.3d 1082, 1085–88 (9th Cir. 2020) (Bumatay, J., dissenting).

A. HISTORY OF STATUTES BANNING POSSESSION

Put bluntly, laws banning possession by the involuntarily committed do not enjoy a historical pedigree, with one commentator noting that “[o]ne searches in vain through eighteenth-century records to find any laws specifically excluding the mentally ill from firearms ownership.”¹¹² The closest historical support lies in two state laws from the 1880s, which do not specifically target the mentally ill but rather ban possession by those of an “unsound mind.”¹¹³ Such laws did not see wider approval until the 1930s when a small number of states adopted the American Bar Association’s Uniform Firearms Act, which “prohibited delivery of a pistol to any person of ‘unsound mind.’”¹¹⁴ In addition to a flimsy pedigree, these statutes may not even serve as proper analogues. As another scholar has noted, the definition of unsound mind suggests a permanent condition instead of a temporary one, like mental illness, which can often be remedied with medical assistance.¹¹⁵

As discussed in Part II, *supra*, the history of § 922(g)(4) is not longstanding: Congress passed § 922(g)(4) in the late 1960s, a mere forty years before *Heller*. Even then, the ban was not meant to be permanent, as the relief scheme gave those categorically banned the opportunity to prove their return to mental sanity.¹¹⁶ Only in 1992 did the ban become effectively permanent, and even then, the changes to the scheme were intended to keep guns out of the hands of felons, not the mentally ill.¹¹⁷

B. HISTORICAL ANALOGIES

If no direct historical precedent can be found, judges are next to “reason by analogy from history and tradition.”¹¹⁸ To be sure, finding a direct analogue for § 922(g)(4) is likely fruitless because, as the court in *Beers* noted, such bans were historically unnecessary owing to the practice of institutionalization in the colonial and early periods of America,¹¹⁹ which obviated the need for statutes

112. Larson, *supra* note 102, at 1376.

113. Mark Frassetto, *Firearms and Weapons Legislation up to the Early Twentieth Century 76–77* (Jan. 15, 2013) (unpublished manuscript), <https://ssrn.com/abstract=2200991> [<https://perma.cc/K2V3-68WU>] (first citing 1881 Fla. Laws 87, chap. 3285, § 1; and then citing 1883 Kan. Sess. Laws 159 § 1).

114. Larson, *supra* note 102, at 1376–77. Pennsylvania, for example, adopted the uniform statute in the 1930s. *Mai II*, 974 F.3d at 1089.

115. Nash E. Gilmore, *A Bridge Over Troubled Water: The Second Amendment Guarantee for the Previously Mentally Institutionalized*, 86 MISS. L.J. SUPRA 1, 26 (2017) (citing *Unsound Mind*, BLACK’S LAW DICTIONARY (2d ed. 1910)) (noting that the Black’s Law definition of “unsound mind” refers to “an adult who from infirmity of mind is incapable of managing himself or his affairs”).

116. See *supra* Part II.

117. See Gilmore, *supra* note 115, at 22–23 (discussing what Gilmore calls the accidental restriction). Gilmore notes that Senate hearings reveal a concern with felon possession. *Id.* In those hearings, Senator Simon stated that “[t]he goal of this provision has always been to prohibit convicted felons from getting their guns back” *Id.* at 23 n.119 (quoting 142 CONG. REC. 27,066 (1996)).

118. *Heller v. District of Columbia (Heller II)*, 670 F.3d 1244, 1275 (D.C. Cir. 2011).

119. *Beers v. Att’y Gen. United States*, 927 F.3d 150, 157–58 (3d Cir. 2019).

on societal behavior. In the Enlightenment period, the asylum quickly became the primary approach to treat the mentally ill.¹²⁰ As the *Beers* court noted, judicial officials in this asylum-based system were free “to ‘lock up’ . . . individuals with dangerous mental impairments,” such that laws on firearm possession were unnecessary.¹²¹ Institutionalization became “an object of praise” in the eighteenth century and continued as the dominant remedy for mental health until the mid-twentieth century, when doctors came to see medication as the primary means of combatting mental illness.¹²² In sum, there simply was no need for statutes on how to deal with the mentally ill at the time of our nation’s founding until some 200 years had elapsed.

Instead, one must look to historical analogy,¹²³ for which institutionalization is the proper analogue to modern bans on possession by the mentally ill. In the period of institutionalization, the loss of rights associated with mental illness lasted only as long as a person’s commitment. Judge Bumatay notes in his *Mai II* dissent that a Lockean understanding of reason and rights can shed light on the historical relationship between temporary commitment and the commensurate loss of rights.¹²⁴ To Locke, rights attach to those who have attained “reason,” and those rights can be stripped only for the duration that a person has lost reason.¹²⁵ The link therein to mental health lies in the fact that colonial health experts treated mental illness as a *temporary* loss of reason.¹²⁶ State laws on the subject are in accord. Early Virginia laws limited rights to “lunatics” only “during their state of insanity.”¹²⁷ As one treatise puts it, “a lunatic [was] never to be looked upon as irrecoverable.”¹²⁸

Although no direct historical analogue exists, a Lockean understanding of rights supports the idea that a loss of rights should last no longer than the period of loss of reason. Using such an approach as our historical analogue in the absence of similar statutes, then, § 922(g)(4) is unconstitutional.

V. TIERED SCRUTINY

Courts, at least for the foreseeable future, are much more likely to resolve challenges to § 922(g)(4)’s prohibition on firearm possession by the mentally ill on the basis of tiered scrutiny. All circuits currently employ some form of

120. MICHELLE O’REILLY & JESSICA NINA LESTER, EXAMINING MENTAL HEALTH THROUGH SOCIAL CONSTRUCTIONISM: THE LANGUAGE OF MENTAL HEALTH 35 (2017).

121. *Beers*, 927 F.3d at 158 (citing Larson, *supra* note 102, at 1377–78).

122. O’REILLY & LESTER, *supra* note 120, at 36–40.

123. *See Heller II*, 670 F.3d at 1275.

124. *Mai v. United States (Mai II)*, 974 F.3d 1082, 1089 (9th Cir. 2020) (Bumatay, J., dissenting).

125. *Id.* (citing JOHN LOCKE, TWO TREATISES OF GOVERNMENT (1691), *reprinted in* 4 JOHN LOCKE, THE WORKS OF JOHN LOCKE 207, 339, 342 (12th ed. 1824)).

126. *Id.*

127. *Id.* (citing 1 ST. GEORGE TUCKER, BLACKSTONE’S COMMENTARIES: WITH NOTES OF REFERENCE, TO THE CONSTITUTION AND LAWS, OF THE FEDERAL GOVERNMENT OF THE UNITED STATES; AND OF THE COMMONWEALTH OF VIRGINIA 145 (1803)).

128. *Id.* (citing ANTHONY HIGHMORE, A TREATISE ON THE LAW OF IDIOCY AND LUNACY 73 (1807)).

scrutiny for as-applied Second Amendment challenges to categorical bans, with the historical approach seeing daylight only in dissent. That being said, history has a place in the two-step analysis. In the words of the Ninth Circuit, the first step of the tiered-scrutiny analysis requires courts “to explore the amendment’s reach based on a historical understanding of the scope of the Second Amendment right.”¹²⁹ The second step of the analysis, on the other hand, looks to the government interests in passing the statutes and the scientific data undergirding those interests.¹³⁰

A. GOVERNMENT INTERESTS AT STAKE

As-applied challenges to firearm bans under § 922(g) frequently feature litigants duking it out over medical studies to bolster, or undercut, alleged government interests. For § 922(g)(4) specifically, those interests are almost always prevention of crime and suicide.¹³¹ These interests are indisputably laudable, and few would likely take umbrage at their classification as compelling or legitimate.¹³² At the same time, the government must be able to establish a fit between those objectives and the current lifetime ban on the possession of firearms under § 922(g)(4)¹³³ without resorting to “mere anecdote and supposition.”¹³⁴ This the government cannot do. Studies often prove a higher short-term propensity for violence or suicide post-release for certain subsets of the community suffering from mental health conditions.¹³⁵ But those trends are simply not borne out in studies of those who have enjoyed decades of good mental health after involuntary commitment. Upholding § 922(g)(4)’s ban despite that fact undercuts the Ninth Circuit’s “emphatic[]” rejection of “the notion that ‘once mentally ill, always so.’”¹³⁶ In the words of the *Tyler II* court, the proffered studies do not justify a lifetime bar to a fundamental right for a person who was “involuntarily committed many years ago and who ha[s] no history of intervening mental illness, criminal activity, or substance abuse.”¹³⁷ The ninetieth Congress would agree, since it never actually intended the GCA to be a lifetime ban on possession when it passed the Act in 1968.¹³⁸

129. *Mai v. United States (Mai I)*, 952 F.3d 1106, 1114 (9th Cir. 2020) (internal citation omitted).

130. *Id.* at 1116–17.

131. *See, e.g., id.* at 1116; *Tyler v. Hillsdale Cnty. Sheriff’s Dep’t (Tyler I)*, 775 F.3d 308, 331 (6th Cir. 2014).

132. *United States v. Salerno*, 481 U.S. 739, 747 (1987) (“There is no doubt that preventing danger to the community is a legitimate regulatory goal.”); *United States v. Masciandaro*, 638 F.3d 458, 473 (4th Cir. 2011) (“Although the government’s interest need not be ‘compelling’ under intermediate scrutiny, cases have sometimes described the government’s interest in public safety in that fashion.”).

133. *Tyler I*, 775 F.3d at 331.

134. *Tyler v. Hillsdale Cnty. Sheriff’s Dep’t (Tyler II)*, 837 F.3d 678, 694 (6th Cir. 2016) (internal quotations omitted) (quoting *United States v. Carter*, 669 F.3d 411, 418 (4th Cir. 2012)).

135. *Id.* at 694–96 (discussing research on formerly involuntarily committed people’s risk for violence and suicide risk).

136. *Mai I*, 952 F.3d at 1121.

137. *Tyler II*, 837 F.3d at 699.

138. *See supra* Part II.D.

1. *Crime Prevention*

Neither studies on the government interest of crime prevention nor scare tactics on the dangers posed by the mentally ill warrant a lifetime ban on firearm possession. Eliciting the names of mass shooters with histories of mental health problems, as the government did in *Tyler I*, does nothing to prove why all persons with past mental health problems deserve a lifetime ban and serves only to further stigmatize this class of Americans. The government in *Tyler I* unfairly drew parallels between the plaintiff and the Virginia Tech shooter, who had a mental health history that should have disqualified him from being able to pass a background check.¹³⁹ In that case, a disconnect between state and federal reporting systems led to his being able to purchase the firearms that ultimately killed thirty-two students in 2007.¹⁴⁰ This fact may underscore the importance of effective background check systems, but such an analogy to Tyler amounts to dishonesty. On the one hand, the Virginia Tech shooter had revered the Columbine massacre in middle school,¹⁴¹ written violent stories in his college English classes,¹⁴² and grown so hostile in class that his classmates stopped attending lectures.¹⁴³ Tyler, by comparison, had a brief depressive episode in 1985 after his “wife of twenty-three years ran away with another man, depleted [his] finances, and then served him with divorce papers,” and for the next thirty years he experienced no problems.¹⁴⁴

Most medical studies are similarly ill-suited to justify lifetime bans. One frequently cited scientific study found an increased propensity for reported assaultive weapon use for 11.1% of former mental health patients compared to only 2.7% of the never-treated control group.¹⁴⁵ Yet when the researchers adjusted their findings for psychotic symptoms, they found that “much of the difference between mental patient groups and the never-treated group in rates of relatively recent violent/illegal behavior can be explained by the level of psychotic symptoms.”¹⁴⁶ In effect, the study only shows that those who have been committed and who are *still exhibiting symptoms* of mental health problems pose an increased risk. At any rate, the category of former patients in the study is overbroad, including any former patient who has not gone to mental health counseling in the past year,¹⁴⁷ and is subsequently an inapt comparison for those

139. Brief for Federal Appellees at 21–22, *Tyler v. Hillsdale Cnty. Sheriff’s Dep’t (Tyler I)*, 775 F.3d 308 (6th Cir. 2014) (No. 13-1876), 2013 WL 6221194, at *21–22.

140. *Id.*

141. VA. TECH REV. PANEL, MASS SHOOTINGS AT VIRGINIA TECH: REPORT OF THE REVIEW PANEL PRESENTED TO TIMOTHY M. KAINE, GOVERNOR COMMONWEALTH OF VIRGINIA 35 (2007), <https://scholar.lib.vt.edu/prevail/docs/VTRReviewPanelReport.pdf> [<https://perma.cc/F25G-JLCM>].

142. *Id.* at 41–42.

143. *Id.* at 42–43.

144. *Tyler v. Hillsdale Cnty. Sheriff’s Dep’t (Tyler II)*, 837 F.3d 678, 683–84 (6th Cir. 2016).

145. Fredrick E. Vars & Amanda Adcock Young, *Do the Mentally Ill Have A Right to Bear Arms?*, 48 WAKE FOREST L. REV. 1, 15 (2013) (citing Bruce G. Link, Howard Andrews & Francis T. Cullen, *The Violent and Illegal Behavior of Mental Patients Reconsidered*, 57 AM. SOCIO. REV. 275, 283 tbl.1 (1992)).

146. Link et al., *supra* note 145, at 288.

147. *Id.* at 280.

like Mai that have not needed counseling for decades. An often cited meta-analysis of five studies shows that 0.3% of schizophrenics committed homicide compared to 0.02% of the general population—a fifteen-fold increase.¹⁴⁸ But schizophrenia is a “lifelong brain disorder,”¹⁴⁹ and while the study may weigh against restoration of Second Amendment rights to schizophrenics, it does little to prove the same for temporary depressive episodes. When looking to the broader spectrum of mental health disorders, one study’s “most unexpected finding” was the sharp decline in violent activity over time.¹⁵⁰ In that same study, when controlling for substance-abuse problems, the researchers found that “the rates of violent acts perpetrated by involuntarily committed patients and the general population [of the study’s community were] ‘statistically indistinguishable.’”¹⁵¹ Not surprisingly, the authors of one law review article wrote that, collectively, studies that track mental health patients without substance-abuse disorders “suggest that only the seriously mentally ill or those with psychosis are more violent.”¹⁵²

According to the studies, only certain subsections of the community afflicted by mental health problems pose an increased risk. Those subsets are not nebulous groupings or ill-defined categories, but rather they are those that suffer from certain conditions like psychosis or schizophrenia, or suffer from comorbid addictions like alcohol or drug dependencies.¹⁵³ With a thumbs-up from a physician confirming a clean bill of mental health, there simply is no scientific basis linking increased criminality to those like Mai or Tyler.

2. *Suicide Prevention*

The government’s interest in preventing self-harm among those with mental health problems further buttresses Congress’s reasons for § 922(g)(4).¹⁵⁴ Like the prevention of crime, the interest here similarly enjoys Supreme Court recognition.¹⁵⁵ But like the shaky support from criminality studies, the studies on suicide rates do not justify rigid lifetime bans on constitutional rights. For example, one government-cited meta-analysis in *Tyler II* shows a suicide risk for involuntarily committed patients at “thirty-nine times that expected,” but the

148. Seena Fazel, Gautam Gulati, Louise Linsell, John R. Geddes, & Martin Grann, *Schizophrenia and Violence: Systematic Review and Meta-Analysis*, 6 PLOS MED. 1, 7 (Aug. 11, 2009).

149. *Schizophrenia*, MENTALHEALTH.GOV, <https://www.mentalhealth.gov/what-to-look-for/psychotic-disorders/schizophrenia> [<https://perma.cc/6NX4-JFCS>] (Aug. 23, 2017).

150. *Tyler v. Hillsdale Cnty. Sheriff’s Dep’t (Tyler II)*, 837 F.3d 678, 696 (6th Cir. 2016) (quoting Henry J. Steadman, Edward P. Mulvey, John Monahan, Pamela Clark Robbins, Paul S. Appelbaum, Thomas Grisso, Loren H. Roth & Eric Silver, *Violence by People Discharged from Acute Psychiatric Inpatient Facilities and by Others in the Same Neighborhoods*, 55 ARCHIVES GEN. PSYCHIATRY 393, 400 (1998)).

151. *Id.* (emphasis added) (quoting Steadman et al., *supra* note 150).

152. Vars & Young, *supra* note 145, at 17.

153. See *Tyler II*, 837 F.3d at 696 (citing Steadman et al., *supra* note 150); Vars & Young, *supra* note 145, at 17.

154. See, e.g., *Mai v. United States (Mai I)*, 952 F.3d 1106, 1116 (9th Cir. 2020).

155. *Id.* (citing *Washington v. Glucksberg*, 521 U.S. 702, 730–35 (1997) (discussing physician-assisted suicide)).

risks were highest following first admissions.¹⁵⁶ In fact, suicide risk diminishes after the beginning of treatment, with “many papers” concurring in that point.¹⁵⁷

To be sure, mental health disorders and suicide rates share a disquieting relationship—at least “[n]inety percent . . . of suicide victims in the United States suffered from mental illness.”¹⁵⁸ The same government-cited meta-analysis study found that suicide risk for individuals with psychiatric diagnoses was eleven times that of individuals without any diagnosis.¹⁵⁹ But again, unqualified numbers may blur the reality of suicide in communities afflicted by mental health concerns. In the meta-analysis, the highest incidence of suicide occurred in the year immediately following consultation and in those with a history of suicide attempts, suggesting that the rates for people like Mai and Tyler are, in reality, much lower.¹⁶⁰ The high incidence of suicide in the first year is borne out in a recent meta-analysis that shows drop-offs in suicide rates postdischarge.¹⁶¹

In sum, studies on crime and suicide within the community of mental health disorders undoubtedly reveal troubling numbers across the board. But there lies the rub: across the board studies do not reflect statistics for people who are many years removed from their involuntary commitment and have suffered no symptoms since their initial episodes. In litigation, the government has, as of yet, been unable to prove the contrary. Given the paucity of data to justify the categorical and rigid lifetime ban on a constitutional right, as-applied challenges under the right facts prevail under any level of scrutiny.

B. STRICT SCRUTINY

Strict scrutiny is a high standard of review, which Justice Thomas has stated proves “automatically fatal in almost every case.”¹⁶² Laws that involve fundamental rights in due process claims,¹⁶³ for example, are examined under

156. E. Clare Harris & Brian Barraclough, *Suicide as an Outcome for Mental Disorders*, 170 BRIT. J. PSYCHIATRY 205, 219–20 (1997) (discussing three studies from Northern Europe and one from America).

157. *Id.* at 223.

158. Vars & Young, *supra* note 145, at 21.

159. Harris & Barraclough, *supra* note 156, at 221 tbl.14h.

160. *See id.* at 221.

161. *See* Daniel Thomas Chung, Christopher James Ryan, Dusan Hadzi-Pavlovic, Swaran Preet Singh, Clive Stanton & Matthew Michael Large, *Suicide Rates After Discharge from Psychiatric Facilities: A Systematic Review and Meta-Analysis*, 74 JAMA PSYCHIATRY 694, 697–98 (2017). Across all studies, the suicide rate in the first three months post-discharge was 1,132 per 100,000 person-years. *Id.* at 697. After ten years, the rates dropped to 277 per 100,000 person-years. *Id.* First-time admits to psychiatric facilities suffered from lower overall rates of suicide compared with their multiadmit peers (305 to 517 per 100,000 person-years, respectively), *id.* at 697–98, which could suggest an even lower incidence of suicide after ten years for those that visited facilities only once. *See id.* Though the author readily concedes that the numbers are troubling when compared to the global suicide rate of only 11.4 per 100,000 person-years, well-funded, state-sponsored review panels would likely be able to discern between high- and low-risk applicants from within the groups that suffer from the lowest rates. *Id.* at 695.

162. *Fisher v. Univ. of Tex. at Austin*, 570 U.S. 297, 316 (2013) (Thomas, J., concurring) (internal citations and quotations omitted).

163. *Washington v. Glucksberg*, 521 U.S. 702, 720 (1997).

strict scrutiny, and they pass muster only if the law is “the least restrictive means of achieving a compelling state interest.”¹⁶⁴ Most circuit courts’ Second Amendment jurisprudence follows a model in which the decision between strict and intermediate scrutiny hinges on “the nature of the conduct being regulated and the degree to which the challenged law burdens the right.”¹⁶⁵

The general consensus is that § 922(g)(4) is not subject to strict scrutiny. Only one court has applied strict scrutiny, but it was vacated in en banc review¹⁶⁶—no court has applied it since. Even so, judges have not shied from advocating its use in dissenting opinions.¹⁶⁷ The argument goes that the statute’s effective lifetime ban not only strikes at the Second Amendment’s core interest in protecting the right for “law-abiding, responsible citizens to use arms in defense of hearth and home,” but that it guts it.¹⁶⁸ What is more is that the statute’s effective ban targets a narrow class of individuals—the very reason for which the Court began building its heightened scrutiny jurisprudence in the first place.¹⁶⁹ Finally, judges see strict scrutiny as being in accordance with the high pedestals on which both *Heller* and *McDonald* place the right.¹⁷⁰

In the event that a court examines the statute under strict scrutiny, it should fail because it is not narrowly tailored. As it stands, *all* formerly involuntarily committed persons in a majority of states are banned from owning firearms, even though studies show that not everyone in this group poses increased risks of suicide or crime. Congress recognized the overinclusivity of this ban when it passed the original GCA and included a fully funded relief program in order to separate those that no longer pose risks from those that do. Because Congress’s restorative outlet to avoid overinclusivity is now available in only a minority of states, in all other states the ban is overinclusive. NICS data published in 2021 reveals over 6.5 million persons are prohibited from purchasing firearms under § 922(g)(4).¹⁷¹ Some portion of that group can certainly petition state restorative bodies because they live in states with these programs, though the exact number is unclear because the NICS data is not subdivided by state. Yet data from states like Massachusetts, for example, illustrate the overinclusivity of the ban. The Commonwealth of Massachusetts does not receive federal funding to conduct

164. *McCullen v. Coakley*, 573 U.S. 464, 478 (2014).

165. David B. Kopel & Joseph G.S. Greenlee, *The Federal Circuits’ Second Amendment Doctrines*, 61 ST. LOUIS U. L.J. 193, 276 (2017) (quoting *Heller v. District of Columbia (Heller I)*), 670 F.3d 1244, 1257 (D.C. Cir. 2011)).

166. *Tyler v. Hillsdale Cnty. Sheriff’s Dep’t (Tyler I)*, 775 F.3d 308, 330 (6th Cir. 2014), *rev’d en banc*, 837 F.3d 678 (6th Cir. 2016).

167. *Mai v. United States (Mai II)*, 974 F.3d 1082, 1092 (9th Cir. 2020) (Bumatay, J., dissenting).

168. *Id.* (citing *District of Columbia v. Heller (Heller I)*, 554 U.S. 570, 635 (2008)).

169. *Id.* (citing *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 n.4 (1938)).

170. The court in *Tyler I* noted that “the Supreme Court has by now been clear and emphatic that the ‘right to keep and bear arms’ is a ‘fundamental righ[t] necessary to our system of ordered liberty.’” *Tyler I*, 775 F.3d at 326 (quoting *McDonald v. City of Chicago*, 561 U.S. 742, 778 (2010)). It continued, “In our view, that strong language suggests that restrictions on that right trigger strict scrutiny.” *Id.*

171. *Active Records in the NICS Indices*, FBI, https://www.fbi.gov/file-repository/active_records_in_the_nics-indices.pdf/view [<https://perma.cc/6YCY2-2M32>] (July 31, 2021).

restorative bodies,¹⁷² despite suffering from some of the highest rates of involuntary commitment from those states studied.¹⁷³ Without a restorative body, some 48,000 Massachusettsans lose their Second Amendment rights *for life* each year.¹⁷⁴ What is more is that the number of Americans who lose their rights is on the rise. A recent study on rates of involuntary commitment—the first study of its kind—revealed an uptick in such commitments from 2012 through 2016 of 13.1%.¹⁷⁵ With such an increase, more Americans each year will permanently lose their rights.

C. INTERMEDIATE SCRUTINY

The statute similarly fails under intermediate scrutiny.¹⁷⁶ Courts that elect not to subject § 922(g)(4) to strict scrutiny will likely analyze it under intermediate scrutiny,¹⁷⁷ as it carries favor with the majority of judges in federal circuits when reviewing Second Amendment challenges.¹⁷⁸ Intermediate scrutiny is less exacting than strict scrutiny, requiring that the government set forth an “important governmental objective” and that the statute is “substantially related” to serve that interest.¹⁷⁹ Due to its less exacting standard, intermediate scrutiny provides some wiggle room, and “the government need not prove that there is ‘no burden whatsoever on [the claimant’s] . . . right under the Second Amendment.’”¹⁸⁰

Conceding that crime and suicide prevention constitute important government interests, the question becomes one of fit. As with the discussion of strict scrutiny, § 922(g)(4) is unconstitutional because of its overbreadth in classifying persons no longer exhibiting symptoms of their mental illness with those that are currently mentally ill, and imposing a lifetime ban on all. To be sure, overbreadth does not automatically render a statute unconstitutional under intermediate scrutiny. In fact, the Supreme Court’s formulation of intermediate scrutiny does not require the fit to be necessarily perfect, but the fit must nonetheless prove

172. *NICS Act Record Improvement Program (NARIP) Awards FY 2009-2020*, *supra* note 18.

173. Gi Lee & David Cohen, *Incidences of Involuntary Psychiatric Detentions in 25 U.S. States*, 72 *PSYCHIATRIC SERVS.* 61, 65 fig.2 (2021).

174. The rate of involuntary commitment in the state is around 700 per 100,000 persons year. *Id.* at 65. Census data reflects that the state’s population estimate as of 2019 was 6,892,503 persons. *QuickFacts Massachusetts*, U.S. CENSUS BUREAU, <https://www.census.gov/quickfacts/MA> [<https://perma.cc/4WWC-AYNZ>]. Total population divided by 100,000 multiplied by 700 reveals that more than 48,000 residents in the state lose their rights each year.

175. Lee & Cohen, *supra* note 173, at 63.

176. See *Keyes v. Sessions*, 282 F. Supp. 3d 858, 878 (M.D. Pa. 2017); *Tyler v. Hillsdale Cnty. Sheriff’s Dep’t (Tyler II)*, 837 F.3d 678, 699 (6th Cir. 2016) (declining to offer a final judgment of constitutionality, but suggesting that without further studies, § 922(g)(4) would fail intermediate scrutiny because “[t]here is no indication of the *continued* risk presented by people who were involuntarily committed many years ago and who have no history of intervening mental illness, criminal activity, or substance abuse”).

177. The court in *Tyler II*, for example, did not consider the applicability of rational basis review after writing off strict scrutiny. *Tyler II*, 837 F.3d at 692 (“With strict scrutiny put aside, there is only one choice left: intermediate scrutiny.”).

178. Ellis, *supra* note 38, 1343–47 (discussing all circuit courts’ approaches).

179. *Clark v. Jeter*, 486 U.S. 456, 461 (1988).

180. *Tyler II*, 837 F.3d at 693 (citations omitted).

substantial.¹⁸¹ Courts analyzing these as-applied challenges recognize that the fit between the statute and government interests is not substantial: in an as-applied challenge to § 922(g)(4), one federal district court noted that “[w]e have been presented with no evidence to indicate that disarming those who went through a period of mental illness and suicide attempts over a decade ago . . . reasonably fits within the governmental interest.”¹⁸²

D. EXTRA-JUDICIAL SOLUTIONS

Although the statute fails as it is applied to the formerly involuntarily committed under tiered scrutiny and the historical approach, relying on plaintiffs to bring as-applied challenges that will likely be appealed is a short-term fix that fails to correct the root of the problem. Only those that have the time and money to bring suit against the government can realistically bring these challenges that may go through years of litigation and rounds of appellate review.¹⁸³ Even for those that have the resources, potential challengers may be disincentivized to disclose their history of mental illness in court.

A better solution lies in refunding the federal relief-from-disabilities program that the GCA created in 1968. Such a system would foster uniformity and ensure that citizens of all states have a route to restore their Second Amendment rights. Alternatively, Congress could retool the current state incentive program to encourage more than just twenty-two states to participate.¹⁸⁴ As other commentators have noted, the federal relief program “cost[s] the government \$3,700 to process each application, which is a small amount of money . . . when weighed against protecting an individual’s right guaranteed to him by the Constitution.”¹⁸⁵

E. ENDING THE STIGMA

As a matter of policy, ending the effective lifetime ban may go hand-in-hand with reducing the stigma of mental illness. The stigma of mental illness both “denigrates the value of people who have a mental illness” and “creates inequities in funding and service delivery that undermine recovery and full social participation.”¹⁸⁶ Studies on the topic link mental-illness stigma to a perception that those who are afflicted are “dangerous, unpredictable, different, and to be blamed for their condition.”¹⁸⁷ Those that suffer feel the

181. See *Heller v. District of Columbia (Heller II)*, 670 F.3d 1244, 1258 (D.C. Cir. 2011) (quoting *Bd. of Trs. of State Univ. of N.Y. v. Fox*, 492 U.S. 469, 480 (1989)).

182. *Keyes v. Sessions*, 282 F. Supp. 3d 858, 878 (M.D. Pa. 2017).

183. Tyler’s challenge, for example, was heard on January 29, 2013. *Tyler v. Holder*, No. 1:12-CV-523, 2013 WL 356851 (W.D. Mich. Jan. 29, 2013). Not until three and a half years later did the Sixth Circuit hear the case en banc. *Tyler II*, 837 F.3d at 678. Even then, the court remanded the case. *Id.* at 699.

184. See *supra* Part II.D.

185. Gilmore, *supra* note 115, at 38.

186. Julio Arboleda-Flórez & Heather Stuart, *From Sin to Science: Fighting the Stigmatization of Mental Illnesses*, 57 CANADIAN J. PSYCHIATRY 457, 457 (2012).

187. Julie Chronister, Chih-Chin Chou & Hsin-Ya Liao, *The Role of Stigma Coping and Social Support in Mediating the Effect of Societal Stigma on Internalized Stigma, Mental Health Recovery*,

disapprobation: public disapproval can be associated with “lower self-esteem, depression, feeling misunderstood and ashamed, poor medication adherence, fewer successful social interactions, reduced help seeking, worse recovery, lower quality of life (QOL), fewer job opportunities, inadequate health coverage, and fewer leased apartments.”¹⁸⁸

In the wake of highly publicized shootings in the 2010s—Sandy Hook Elementary; Aurora, Colorado; and the Arizona attack that left six dead and U.S. Representative Gabrielle Gifford injured—pro-Second Amendment lobbying groups turned to the mentally ill as a scapegoat.¹⁸⁹ The National Rifle Association’s Wayne LaPierre, in discussing a national database of the mentally ill, spoke about the existence of “genuine monsters [who are] so deranged, so evil, so possessed by voices and driven by demons, that no sane person can ever[] possibly comprehend them.”¹⁹⁰ Efforts to curb violence are laudable, but such rhetoric does nothing but sensationalize the overstated link between mental illness and violence.¹⁹¹

But societal distrust of the mentally ill can be mitigated through legislative reforms that improve protections for this class.¹⁹² In addition to righting a constitutionally impermissible wrong, requiring states to conduct holistic examinations of applicants seeking to regain their Second Amendment rights would reduce the feelings of being devalued, dismissed, and dehumanized by a system that codifies sentiments expressed by Wayne LaPierre. Repealing a law that casts all of those once adjudicated to be mentally ill into one category and replacing it with a system that looks at each person as an individual restores a sense of belonging and fitting with society.¹⁹³ Psychiatric studies concur: lower rates of self-stigma (the internalization of society’s negative stereotypes) correlates to improved outcomes down the road.¹⁹⁴

VI. CONCLUSION

When Congress defunded the federal restorative program in 1992,¹⁹⁵ it

and Quality of Life Among People with Serious Mental Illness, 41 J. CMTY. PSYCH. 582, 583 (2013).

188. *Id.*

189. Debra A. Pinals, *Firearms and Mental Illness: Preventing Fear and Stigma from Overtaking Reason and Rationality*, 40 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 379, 381–82 (2014).

190. *Id.* at 382–83 (quoting Wayne La Pierre, *Remarks from the NRA Press Conference on Sandy Hook School Shooting, Delivered on Dec. 21, 2012 (Transcript)*, WASH. POST. (Dec. 21, 2012), https://www.washingtonpost.com/politics/remarks-from-the-nra-press-conference-on-sandy-hook-school-shooting-delivered-on-dec-21-2012-transcript/2012/12/21/bd1841fe-4b88-11e2-a6a6-aabac85e8036_story.html [https://perma.cc/L2NB-ALDM]).

191. *See supra* Part V.A; Pinals, *supra* note 189, at 385–87.

192. *See* Arboleda-Flórez & Stuart, *supra* note 186, at 462.

193. *See* Janice Connell, Alicia O’Cathain & John Brazier, *Measuring Quality of Life in Mental Health: Are We Asking the Right Questions?*, 120 SOC. SCI. & MED. 12, 15 (2014).

194. Nathalie Oexle, Mario Müller, Wolfram Kawohl, Ziyang Xu, Sandra Viering, Christine Wyss, Stefan Vetter & Nicolas Rüschi, *Self-Stigma as a Barrier to Recover: A Longitudinal Study*, 268 EUR. ARCHIVES PSYCHIATRY & CLINICAL NEUROSCIENCE 209, 209–11 (2018).

195. *See* Treasury, Postal Service, and General Government Appropriations Act, 1993, Pub. L. No. 102–393, 106 Stat. 1729, 1732.

effectively created a lifetime ban on firearm possession by those that have, at some point in their lives, been involuntarily committed to a mental health institution. Such a ban upholds the misguided notion that “once mentally ill, always so”¹⁹⁶—a notion that is belied by studies on the governmental interests at stake.

Second Amendment jurisprudence stands on uncertain grounds in recent years given the unpredictability of judicial analysis. Justice Scalia’s pronouncement on the presumptive validity of statutes like § 922(g)(4) only serves to muddy waters. Simply put, the statute does not enjoy the historical pedigree that *Heller* assumed, and scientific studies call into question whether the statute serves the asserted government interests of suicide and crime prevention at all. Though it is perhaps high time that the Supreme Court takes up another Second Amendment case to pass judgment on the correct analysis of the right, courts in the immediate future should find that the statute offends a “fundamental right necessary to our system of ordered liberty”¹⁹⁷ under either a historical or tiered-scrutiny analysis. Alternatively, Congress should retool the current restorative body framework to ensure that Americans in all states have access to some form of redress.

People like Mai and Tyler who have enjoyed many years of clean mental health since an involuntary commitment deserve to have their rights restored. The Second Amendment is not a second-class right, and formerly committed Americans are not second-class citizens—finding § 922(g)(4) unconstitutional would put into practice these two common-sense ideals.

196. *Mai v. United States (Mai I)*, 952 F.3d 1106, 1121 (9th Cir. 2020).

197. *Tyler v. Hillsdale Cnty. Sheriff’s Dep’t (Tyler I)*, 775 F.3d 308, 326 (6th Cir. 2014) (citing *McDonald v. City of Chicago*, 561 U.S. 742, 778 (2010)).