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Navigating Heller's Murky Waters: Second Amendment Protections for Individuals Previously Involuntarily Institutionalized

Kristen Kinneary

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I. Introduction

Duy Mai was just seventeen years old when a Washington state court involuntarily institutionalized him.[1] The court determined that Mai was mentally ill, dangerous, and in need of mental health treatment after he made serious threats to himself and others.[2] Following a nine-month-long commitment, Mai was released from the treatment facility and has since lived a "socially-responsible," balanced life.[3] He finished school, earned several degrees, gained employment, and is now a father to two children.[4] Fourteen years after his release, Mai successfully petitioned a Washington state court to reinstate his right to possess a firearm—a right that was restricted due to his involuntary commitment.[5] Despite his success in state court, however, on appeal the Ninth Circuit upheld the continued application of 18 U.S.C. § 922(g)(4), which prohibits firearm possession by any person "who has been adjudicated as a mental defective or who has been committed to a mental institution."[6] Consequently, federal law has effectively banned Mai for life from possessing a firearm.[7] Is this permanent deprivation of the right to possess a firearm a violation of the Second Amendment as applied to individuals, like Mai, who were involuntarily committed to a mental institution but have since been rehabilitated? The circuit courts are currently split on this issue.[8]

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[1] Mai v. United States, 952 F.3d 1106, 1110 (9th Cir. 2020).
[2] *Id.*
[3] *Id.*
[4] *Id.*
[5] *Id.*
[6] *Mai*, 952 F.3d at 1109; 18 U.S.C. § 922(g)(4) (2018).
[7] *See Mai*, 952 F.3d at 1110–12.
[8] *See id.* at 1109; Beers v. Att'y Gen. U.S., 927 F.3d 150, 159 (3d Cir. 2019), *vacated on other grounds*, 140 S. Ct. 2758 (2020); Tyler v. Hillsdale Cty. Sheriff's Dep't, 837 F.3d 678, 699 (6th Cir. 2016).

Having clear gun control legislation is of paramount importance. Gun violence, particularly the increasing prevalence of mass shootings, is a constant subject of litigation and policy debate in the United States. According to the Gun Violence Archives ("GVA"), the number of mass shootings across the United States has steadily increased each year since 2014.[9] In 2014, the GVA reported 269 mass shootings.[10] Just five years later, in 2019, it reported 417.[11] Similarly, although less publicly announced, the numbers of suicides-by-gun reported are also rising.[12] In 2014, the GVA reported 21,386 suicides-by-gun, and in 2018, it reported 24,432.[13] These numbers are striking, and in the aftermath of every tragedy are debates about gun control—an ongoing struggle where the desire to preserve the Second Amendment and the desire to prevent more lives from being lost to gun violence appear to be in tension with one another.[14] Furthermore, the discussion as to what relationship, if any, exists between mental illness and a tendency for gun violence remains open.

At one extreme end of the policy debate is the belief that "[g]uns don't kill people, the mentally ill do."[15] And while this is, of course, a highly inflammatory assertion, it arguably echoes

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[9] The Gun Violence Archives was established in 2013 as a not-for-profit organization, which performs independent research and collects and publishes gun violence data. The organization defines "mass shooting" based on a statistical threshold of "[four] or more shot and/or killed in a single event [incident], at the same general time and location not including the shooter." *General Methodology*, GUN VIOLENCE ARCHIVES, https://www.gunviolencearchive.org/methodology (last visited May 11, 2021). *But cf.* Emily Wajert, Comment, *Navigating the Rights of the Mentally Ill and the Second Amendment: Defining Responsibility, Balancing Safety, and Weighing Constitutional Rights*, 19 U. PA. J. CONST. L. 731, 739 (2017) (discussing the disparities in reports of gun violence, which results, in part, from differing definitions of "mass shooting").

[10] GUN VIOLENCE ARCHIVES, https://www.gunviolencearchive.org (last visited May 11, 2021).

[11] *Id.*

[12] *Id.*

[13] *Id.*

[14] *See, e.g.*, John Haltiwanger, *Obama Faced Relentless Opposition to Gun Reform, Even After a Shooting That Left 20 Children Dead*, BUSINESS INSIDER (Aug. 6, 2019, 3:35 PM), https://www.businessinsider.com/why-obama-faced-relentless-opposition-gun-reform-after-sandy-hook-2019-8; Arash Javanbakht, *Mental Illness and Gun Laws: What You May Not Know About the Complexities*, THE CONVERSATION (February 26, 2018, 6:33 AM, updated March 1, 2018, 10:39 AM), https://theconversation.com/mental-illness-and-gun-laws-what-you-may-not-know-about-the-complexities-92337 (quoting former President Donald Trump as saying, "I do not want mentally ill people to have guns. Take the guns first, go through due process second").

[15] Ann Coulter, *Guns Don't Kill People, the Mentally Ill Do*, ANNCOULTER.COM (Jan. 16, 2013), https://anncoulter.com/2013/01/16/guns-dont-kill-people-the-mentally-ill-do.

what many people have come to believe. For example, a 2019 study showed that approximately eighty-three percent of people faulted the country's mental health system for mass shootings.[16] In comparison, only sixty-nine percent faulted the accessibility of firearms.[17] In fact, "[b]y a more than 2-to-1 margin, more people say mass shootings reflect problems identifying and treating people with mental health problems rather than inadequate gun control laws."[18] Those on the opposite side of the debate argue that mental illness has no significant correlation to gun violence.[19] They also warn that further stigmatization of mental illness could be dangerous for an already vulnerable group of people.[20]

Although the right is now commonly referred to as fundamental, the Supreme Court refrained from acknowledging a personal right to possess a firearm until the early twenty-first century, when it decided *District of Columbia v. Heller*.[21] In *Heller*, the Court addressed the Second Amendment's scope and held that it the right to keep and bear arms is an individual right, irrespective of military affiliation.[22] Although its overall holding expanded the general understanding of the Second Amendment's application, the Court nevertheless described the "longstanding prohibitions on the possession of firearms by felons and the mentally ill"[23] as

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[16] Lydia Saad, *More Blaming Extremism, Heated Rhetoric for Mass Shootings*, GALLUP (Sept. 11, 2019), https://news.gallup.com/poll/266750/blaming-extremism-heated-rhetoric-mass-shootings.aspx.
[17] *Id.*
[18] Peyton M. Craighill & Scott Clement, *What Americans Blame Most for Mass Shootings (Hint: It's Not Gun Laws)*, WASH. Post (Oct. 26, 2015, 7:00 AM), https://www.washingtonpost.com/news/the-fix/wp/2015/10/26/gun-control-americans-overwhelmingly-blame-mental-health-failures-for-mass-shootings/.
[19] *See* Editorial Board, *Don't Blame Mental Illness for Gun Violence*, N.Y. TIMES, (Dec. 15, 2015), https://www.nytimes.com/2015/12/16/opinion/dont-blame-mental-illness-for-gun-violence.html ("Blaming mental health problems for gun violence in America gives the public the false impression that most people with mental illness are dangerous, when in fact a vast majority will never commit violence.").
[20] *See* Susan McMahon, *Gun Laws and Mental Illness: Ridding the Statutes of Stigma*, 5 U. PA. J. L & PUB. AFF. 1, 5–11 (2020).
[21] 554 U.S. 570 (2008). The most recent case preceding *Heller* was decided in 1939. United States v. Miller, 307 U.S. 174 (1939). In that case, Miller challenged the National Firearms Act of 1934's regulation of the interstate transport of certain firearms as violating the Second Amendment. *Id.* at 175–77. Rather than acknowledging an individual right to possess a firearm, the court concluded that "[i]n the absence of any evidence tending to show that possession or use of a [sawed-off] shotgun . . . has some reasonable relationship to the preservation or efficiency of a well regulated militia, we cannot say that the Second Amendment guarantees the right to keep and bear such an instrument." *Id.* at 178.
[22] *Heller*, 554 U.S. at 595.
[23] *Id.* at 626.

"presumptively lawful."[24] In doing so, *Heller* left many open questions as to the applicability of existing legislation and the standard under which courts should review future constitutional challenges.

Part II of this Comment will provide background on (1) the Gun Control Act of 1968; (2) the restrictions on firearm possession placed on certain classes of people, as enumerated in 18 U.S.C. § 922(g); and (3) the avenues of relief (or lack thereof) for individuals seeking to restore their Second Amendment rights. Part III will discuss further the Supreme Court's decision in *Heller* and the resulting uncertainty in the lower courts. Part IV will analyze the current circuit split regarding § 922(g)(4)'s permanent ban on firearm possession, particularly as applied to individuals who, as a result of involuntary commitment, have lost their rights. Part V of this Comment will then urge the Supreme Court to provide uniform guidance and suggest that it adopt the reasoning set forth by the Ninth Circuit in *Mai v. United States*.[25]

II. Legislative Limitations to the Second Amendment

The Second Amendment to the United States Constitution 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."[26] Although an individual right to possess firearms was not affirmatively recognized by the Supreme Court until 2008,[27] extensive federal gun control legislation emerged in the early twentieth century when Congress first passed the National Firearm Act of 1934,[28] "which established a stringent taxation and registration scheme for specified weapons associated with the Prohibition-fueled gang violence of the time."[29] Since then, Congress

[24] *Id.* at 627 n.26.
[25] 952 F.3d 1106 (9th Cir. 2020).
[26] U.S. CONST. amend. II.
[27] *See generally Heller*, 554 U.S. 570 (addressing whether prohibiting individual possession of handguns violated the Second Amendment).
[28] National Firearms Act, Publ. L. 73–474, 48 Stat. 1236 (1934).
[29] MICHAEL A. FOSTER & SARAH HERMAN PECK, CONG. RESEARCH SERV., R45629, FEDERAL FIREARMS LAWS: OVERVIEW AND SELECTED LEGAL ISSUES 2 (2019), https://crsreports.congress.gov/product/pdf/R/R45629.

has passed related legislation including, most notably to this Comment, the Gun Control Act of 1968.[30] And as such legislation continues to increase, so do restrictions on the rights guaranteed by the Second Amendment. This Part will first discuss the background of the Gun Control Act of 1968 and the restrictions imposed on the right to firearm possession, as enumerated in 18 U.S.C. § 922(g). Then, this Part will explore the paths through which individuals can petition to have their rights restored once lost.

A. The Gun Control Act of 1968

Over thirty years after Congress passed its first wide-spanning piece of gun control legislation, the National Firearm Act of 1934, it had to act once again in response to growing rates of violence and civil unrest in the 1960s.[31] During that period, the increasing number of urban riots and protests led to increased fear of gun violence; and increased fear of gun violence led to "increased demand for firearms as instruments of self-defense."[32] The rate of homicides committed with handguns increased substantially and steadily, as did the interstate flow of firearms.[33] And while the assassinations of President John F. Kennedy and Dr. Martin Luther King Junior certainly expedited passage of the Gun Control Act of 1968,[34] its highly likely that Congress was responding primarily to racial bias and a growing fear that Black people would arm themselves in their fight for civil rights.[35]

The Gun Control Act of 1968 ("the Act") was established to serve three main purposes: (1) to regulate the movement of firearms within interstate commerce, (2) "to regulate the importation

[30] Gun Control Act of 1968, Publ. L. No. 90–168, 76 Stat. 111 (codified at 18 U.S.C. §§ 921–931 (2018).
[31] Nash E. Gilmore, Article, *A Bridge Over Troubled Water: The Second Amendment Guarantee for the Previously Mentally Institutionalized*, 86 MISS. L. J. SUPRA 1, 13 (2017).
[32] Franklin E. Zimring, *Firearms and Federal Law: The Gun Control Act of 1968*, 4 J. LEGAL STUD. 133, 148 (1975).
[33] *See id.* (providing the example that "[i]n 1965 Detroit experience a total of 140 homicides; 55 of these, or 39 per cent, were committed with guns. Three years later 72 percent of Detroit's 389 killings were committed with guns").
[34] Gilmore, *supra* note 3131, at 13.
[35] Stefan B. Tahmassebi, *Gun Control and Racism*, 2 GEO. MASON U. C.R. L.J. 67, 80 (1991) (quoting ROBERT SHERRIL, THE SATURDAY NIGHT SPECIAL 280 (1972)) ("In his book *The Saturday, Night Special*, anti-gun journalist Robert Sherrill frankly admitted that the Gun Control Act of 1968 was 'passed not to control guns but to control Blacks.'").

of firearms into the United States," and (3) to restrict firearm possession from certain classes of individuals.[36] Since 1968, Congress has amended the Act on numerous occasions with intervening legislation, including the Firearm Owner's Protection Act of 1986 and the Brady Handgun Violence Protection Act of 1993, through which the National Instant Criminal Background Check System was created (hereinafter "NICS").[37] The Act now represents a complex statutory regime rather than a single statute.[38]

In furtherance of the Act's third purpose—to regulate who can (and cannot) possess firearms—Congress carved out categories of prohibited persons and enumerated the list in 18 U.S.C. § 922(g).[39] The list includes convicted felons, fugitives, habitual substance abusers, illegal immigrants, and individuals who are, or have been, dishonorably discharged from the military, the subject of a restraining order, or domestic-violence misdemeanants.[40] Most relevant to this Comment, § 922(g)(4) restricts persons "who [have] been adjudicated as a mental defective or [have] been committed to a mental institution," from possessing firearms.[41] Although the Act does not define "commitment to a mental institution," federal regulation has interpreted the phrase to mean a "formal commitment of a person to a mental institution by a court, board, commission, or other lawful authority."[42] It is intended only to encompass involuntary commitment, not commitment "for observation or a voluntary admission."[43] Accordingly, federal regulation has extended the term "adjudicated" to both the former and latter clause of § 922(g)(4). Individuals

[36] *Id.* at 13–14.
[37] Foster & Peck, *supra* note 29.
[38] *Id.* at 6.
[39] 18 U.S.C. § 922(g) (2018).
[40] *Id.*
[41] *Id.* § 922(g)(4).
[42] 27 C.F.R. § 478.11.
[43] *Id.*; *see also* United States v. Rehlander, 666 F.3d 45, 50 (1st Cir. 2012) ("[A] temporary hospitalization under section 3863 does not constitute a 'commitment' under section 922."); United States v. Hansel, 474 F.2d 1120, 1123 (8th Cir. 1973) ("There is nothing in 18 U.S.C. § 922(h) [now § 922(g)] which indicates an intent to prohibit the possession of firearms by persons who had been hospitalized for observation and examination, where they were found not to be mentally ill. The statute makes it clear that a commitment is required.").

restricted from firearm possession under this provision lose their rights only after their case has been heard by an appropriate judicial authority that determines the individuals are a danger to themselves or others.

B. Seeking Relief: Federal Law's Catch-22

In addition to setting forth categorical prohibitions on firearm possession, the Act also provides a federal relief-from-disabilities program, codified in 18 U.S.C. § 925(c).[44] This section of the Act provides that an individual barred from possessing firearms under any provision of § 922(g) may seek reinstatement of his rights from the Attorney General.[45] The Attorney General is empowered to grant such relief upon a showing "that the circumstances regarding the disability, and the applicant's record and reputation, are such that the applicant will not be likely to act in a manner dangerous to public safety and that the granting of relief would not be contrary to the public interest."[46] The Attorney General's power is completely discretionary and he may deny relief even when all of the elements are otherwise satisfied.[47] In that case, the applicant may file a petition with the United States District Court for judicial review.[48] Yet Congress defunded the program in 1992, so, unfortunately for those seeking federal relief, § 925(c) is now a nullity.[49] Congress decided to defund the program due to its highly subjective nature, stating that the application review process was too difficult of a task to undertake, especially when the result could be a devastating loss for the applicant.[50]

About fifteen years after § 925(c) was defunded, Congress enacted the NICS Improvement Amendments Act of 2007 in an attempt to "encourage the states to supply accurate and up-to-date

[44] 18 U.S.C. § 925(c).
[45] *Id*.
[46] *Id*.
[47] *See* United States v. Bean, 537 U.S. 71, 76 (2002).
[48] *Id*. at 76–77.
[49] Tyler v. Hillsdale Cty. Sheriff's Dep't, 837 F.3d 678, 682 (6th Cir. 2016).
[50] *Id*.

information to deferral firearm databases," through the issuance of federal grants.[51] Congress conditioned these grants on a state creating a relief-from-disabilities program through which individuals, restricted from firearm possession under § 922(g)(4), could petition to the state for the restoration of their rights.[52] In order to grant relief, a "State court, board, commission, or other lawful authority" must determine that the applicant's record and reputation show that he or she "will not be likely to act in a manner dangerous to public safety and that the granting of relief would not be contrary to public interest."[53] Because § 925(c) is null, this is the only avenue by which such relief can be granted. Currently, approximately thirty states have a qualifying program.[54]

III. The Second Amendment's Scope as Defined by the Supreme Court

During most of American history, there was a widespread belief that Second Amendment protections applied only in the context of militia service.[55] This was largely a result of the Supreme Court's 1939 holding in *United States v. Miller*.[56] In that case, the Court declined to interpret the Second Amendment as protecting an individual's possession of a specific shotgun—which was otherwise in violation of the National Firearms Act of 1934—because the shotgun was not "ordinary military equipment," and it was not being used to "contribute to the common defense."[57] But after almost eight decades of silence, the Court in 2008 revisited this issue in *District of*

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[51] *Id.*; NICS Improvement Amendments Act of 2007, Publ. L. No. 1110–1180, 121 Stat. 2559 (2008).
[52] *Tyler*, 837 F.3d at 682. This provision was codified in 34 U.S.C. § 40915 (2018), which "permits a person, who pursuant to State law, has been adjudicates as described in [§ 922(g)(4)], or has been committed to a mental institution, to apply to the state for relief." Note that while § 925(c) provided an avenue for relief for all persons barred under any provision of § 922(g), § 40915 only provides relief for those barred specifically by § 922(g)(4). *Id.* at 682 n.1.
[53] 34 U.S.C. § 40915.
[54] Mai v. United States, 952 F.3d 1106, 1112 (9th Cir. 2020); *see also State Profiles: NICS Act Record Improvement Program (NARIP) Awards FY 2009–2018*, BUREAU OF JUSTICE STATISTICS, https://www.bjs.gov/index.cfm?ty=tp&tid=491 (last visited Feb. 18, 2021) (including the Tulalip Tribe of Washington as the thirty-first state to have a program).
[55] District of Columbia v. Heller, 554 U.S. 570, 577 (2008).
[56] 307 U.S. 174 (1939)
[57] *Id. at* 175–78.

Columbia v. Heller.[58] This Part will first broadly discuss *Heller*'s holding. Then it will address the questions that the Court left unresolved.

A. *District of Columbia v. Heller*

In *Heller*, the Supreme Court reviewed a District of Columbia regulation that generally prohibited the individual registration and possession of handguns.[59] In doing so, it addressed the question of whether the Second Amendment right to "keep and bear arms" was limited to the context of service in the militia.[60] Answering in the negative, the Court held that the Second Amendment guarantees an individual right to possess and use firearms for traditionally lawful purposes; it is not limited to those that are connected to the militia.[61] It also determined that the protected class at the core of the Second Amendment was intended to be "law-abiding, responsible citizens."[62] Yet, despite broadly interpreting the Second Amendment to expand its application, the Court cautioned that the rights conferred by the Second Amendment are not unlimited, drawing an analogy to the parameters of the First Amendment.[63] Further, the Court made explicit that "noting in [its] opinion should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons and the mentally ill."[64] It even referred to such regulations as "presumptively lawful."[65] Justice Scalia, writing for the majority, gave an extensive historical account of the Second Amendment and its implications in the case at hand; however, the Court's decision was narrow in scope and did not provide a clear legal framework for future challenges.

B. *Heller*'s Unsettled Principles

[58] 554 U.S. 570 (2008).
[59] *Id. at* 573–76.
[60] *Id.*
[61] *Id.* at 581, 589.
[62] *Id.* at 635.
[63] *Id.* at 595 ("[W]e do not read the Second Amendment to protect the right of citizens to carry arms for *any sort* of confrontation, just as we do not read the First Amendment to protect the right of citizens to speak for *any purpose*.").
[64] *Heller*, 554 U.S. at 626.
[65] *Id.* at 627 n.26.

One of the most surprising aspects of *Heller*'s opinion was the Court's refusal to "establish a level of scrutiny for Second Amendment restrictions."[66] The Court justified this decision simply because *Heller* was its first in-depth analysis of the Second Amendment, and thus some remaining areas of uncertainty were to be expected.[67] Nonetheless, while a uniform approach has yet to be established by the Supreme Court, there seems to be a general consensus among the lower courts that the restrictions enumerated in § 922(g) should be analyzed using intermediate scrutiny.[68]

In order to withstand constitutional muster under intermediate scrutiny, the challenged law "must be substantially related to an important governmental interest."[69] This standard of review calls for a greater showing than rational basis review, which requires only that a challenged law "be rationally related to a legitimate governmental purpose,"[70] yet it is not quite as rigorous as strict scrutiny, which requires that the law "furthers a compelling interest and is narrowly tailored to achieve that interest."[71] Under intermediate scrutiny, the government need not show that the challenged law is the least restrictive way to further its "important" interest, but it must show that it is at least a reasonable fit.[72] Because of the general consensus among the lower courts that intermediate scrutiny should apply to challenges against § 922(g) restrictions, any disagreement as to the application of an alternative level of scrutiny is outside the scope of this Comment. Instead, this Comment will use intermediate scrutiny to approach any analysis.

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[66] *Id.* at 634–35 (declining to adopt one of the traditional standards, such as strict scrutiny, intermediate scrutiny or a rational basis review, and explicitly rejecting an "interest-balancing inquiry").
[67] *Id.* at 635.
[68] *See* Mai v. United States, 952 F.3d 1106, 1109 (2020) (applying intermediate scrutiny to § 922(g)(4)); Tyler v. Hillsdale Cty. Sheriff's Dep't, 837 F.3d 678, 690–92 (6th Cir. 2016) (applying intermediate scrutiny to § 922(g)(4)); *see also* United States v. Chovan, 735 F.3d 1127, 1137–38 (9th Cir. 2013) (applying intermediate scrutiny to § 922(g)(9), which prohibits firearm possession by convicted domestic violence misdemeanant); United States v. Carter, 669 F.3d 411, 417 (4th Cir. 2012) (applying intermediate scrutiny to § 922(g)(3), which prohibits firearm possession by habitual substance abusers); United States v. Williams, 616 F.3d 685, 692 (7th Cir. 2010) (applying intermediate scrutiny to § 922(g)(1), which prohibits firearm possession by convicted felons).
[69] Clark v. Jeter, 486 U.S. 456, 461 (1998).
[70] *Id.*
[71] FEC v. Wisconsin Right to Life, Inc., 551 U.S. 449, 464 (2007).
[72] United States v. Skoien, 587 F.3d 803, 805–06 (7th Cir. 2009).

The *Heller* Court also left unsettled the question of whether its discussion of the Second Amendment's "long-standing prohibitions" on the mentally ill was simply dicta, or if it intended to foreclose any challenges to § 922(g)(4) by referring the prohibitions as "presumptively lawful".[73] In 2010, the Court had the chance to revisit this issue in *McDonald v. City of Chicago*, another case in which petitioners challenged a state-issued handgun ban.[74] In *McDonald*, the Court affirmed its holding in *Heller*—that the Second Amendment protects an individual right—and also restated *Heller*'s proposition that "[its] holding did not cast doubt on longstanding regulatory measure."[75] Despite this reiteration, it still seems unclear to what extent § 922(g)(4) is shielded from any constitutional scrutiny. Confusion is exacerbated by the ambiguity in the *Heller* Court's use of the phrase "the mentally ill."[76] Most notably, the Court uses language that is, on its face, in the present tense. This has raised speculation as to whether the Court intended to include only individuals who are currently mentally ill and, therefore, leave open the possibility that such restriction could be lifted once a person regains his or her mental health.[77]

IV. The Split

Over a decade after the Supreme Court issued its decision in *District of Columbia v. Heller*, lower courts have yet to adopt a uniform approach for addressing challenges to Second Amendment restrictions. Furthermore, despite most courts adopting intermediate scrutiny as the appropriate standard of review,[78] its application is seemingly inconsistent. As a result, an

[73] District of Columbia v. Heller, 554 U.S. 570, at 626, 627 n.26. (2008)
[74] 561 U.S. 742 (2010).
[75] *Id.* at 786.
[76] *Heller*, 554 U.S. at 626.
[77] *See* Mai v. United States, 952 F.3d 1106, 1114 (9th Cir. 2020).
[78] *See id.* at 1109 (applying intermediate scrutiny to § 922(g)(4)); Tyler v. Hillsdale Cty. Sheriff's Dep't, 837 F.3d 678, 690–92 (6th Cir. 2016) (applying intermediate scrutiny to § 922(g)(4)); *see also* United States v. Chovan, 735 F.3d 1127, 1137–38 (9th Cir. 2013) (applying intermediate scrutiny to § 922(g)(9), which prohibits firearm possession by convicted domestic violence misdemeanant); United States v. Carter, 669 F.3d 411, 417, (4th Cir. 2012) (applying intermediate scrutiny to § 922(g)(3), which prohibits firearm possession by habitual substance abusers); United States v. Williams, 616 F.3d 685, 692 (7th Cir. 2010) (applying intermediate scrutiny to § 922(g)(1), which prohibits firearm possession by convicted felons).

individual's chance for relief from § 922(g)(4) is heavily dependent on the jurisdiction he or she brings the claim. This section explores the circuit split between the Third, Sixth, and Ninth Circuits in order to illustrate the different ways in which intermediate scrutiny and *Heller* have been applied.

A. *Tyler v. Hillsdale County Sherriff's Department*

In January 1986, Michigan's Hillsdale County Probate Court determined that Clifford Tyler was mentally ill and dangerous.[79] When Tyler first came before the court, he was "emotionally devastated" as a result of his recent separation from his wife of twenty-three years.[80] Tyler's daughters contacted the local police because they feared that Tyler would harm himself; the court agreed.[81] The probate court involuntarily committed Tyler and he remained at the treatment center for approximately two to four weeks.[82] Subsequent to his release, Tyler never received any follow-up therapy and has lived a generally healthy life.[83] He also remarried and has maintained a good relationship with his daughters.[84] In 2011, Tyler sought to purchase a firearm but was denied as a result of his involuntary commitment.[85] In an attempt to have his rights restored, Tyler "underwent both a substance-abuse and a psychological evaluation."[86] The doctor concluded that, although Tyler likely suffered a depressive episode thirty-six years earlier, he was no longer mentally ill.[87] Nonetheless, the state of Michigan has not created a relief-from-disabilities program, making Tyler ineligible to apply for relief under 34 U.S.C § 40915.[88]

[79] *Tyler*, 837 F.3d at 683.
[80] *Id.*
[81] *Id.*
[82] *Id.* (noting also that Tyler declined medication for the entire period of his commitment).
[83] *Id.* at 683–84.
[84] *Id.*
[85] *Tyler*, 837 F.3d at 684.
[86] *Id.* at 683.
[87] *Id.* at 684.
[88] *Id.* at 683.

After reviewing Tyler's case, the Sixth Circuit determined that the Supreme Court's categorization of the "long standing prohibitions" on the mentally ill as "presumptively lawful" in *Heller* did not insulate § 922(g)(4) from constitutional scrutiny.[89] Accordingly, the court adopted a two-step analysis generally accepted to resolve Second Amendment challenges.[90] Under this analysis, the court first looks at "whether the challenged law burdens conduct that falls within the scope of the Second Amendment right, as historically understood."[91] If it does not, then the inquiry is over.[92] If it does, however, then the court must determine the appropriate level of scrutiny with which to review the law and examine "the strength of the government's justification for restricting or regulating the exercise of the Second Amendment."[93]

1. Does § 922(G)(4) Burden Second Amendment Conduct?

The Sixth Circuit began by addressing whether *Heller*, on its own, resolved the first step of the analysis considering that the Supreme Court categorized prohibitions on mentally ill persons as "presumptively lawful."[94] The court held it did not.[95] As interpreted by the Sixth Circuit, the word "presumptively" does not conclusively foreclose an as-applied challenge to Second Amendment restrictions because such language is "precautionary, not preclusive."[96]

The court then looked at the historical basis for restricting firearm possession from persons who were mentally ill, which the *Heller* Court referred to as "longstanding."[97] Unlike the *Heller* Court, however, the Sixth Circuit determined that any historical basis for such a restriction was

[89] *Id.* at 681.
[90] *Id.* at 685; *see also* United States v. Greeno, 679 F.3d 510, 538 (6th Cir. 2012); United States v. Marzzarella, 614 F.3d 85, 89 (3d Cir. 2010); United States v. Reese, 627 F.3d 792, 800–801 (10th Cir. 2010) (adopting the same two-step analysis).
[91] *Tyler*, 837 F.3d at 686 (quoting *Greeno*, 679 F.3d at 518).
[92] *Id.*
[93] *Id.* (quoting Ezell v. City of Chicago, 651 F.3d 683, 703 (7th Cir. 2011)).
[94] *Id.*
[95] *Id.*
[96] *Id.* at 686–87.
[97] *Tyler*, 837 F.3d at 687 (quoting District of Columbia v. Heller, 554 U.S. 570, 626 (2008)).

lacking, particularly considering that § 922(g)(4) was not enacted until 1968.[98] Moreover, it pointed out that while the *Heller* Court adopted the phrase "the mentally ill," § 922(g)(4) does not utilize the same language.[99] In contrast, § 922(g)(4) is particularly limited to people who have been "adjudicated" as a "mental defective" or who have been committed to a mental institution—"adjudicated" being the operative word.[100] Making clear that it would not subscribe to the notion of "[o]nce mentally ill, always so," the Sixth Circuit ruled that the government must provide further proof that the petitioner was still mentally ill and dangerous.[101] Accordingly, the court determined that the government failed to meet its burden to prove that people previously involuntary committed for mental health treatment categorically fall outside of the scope of the Second Amendment.[102]

2. Can § 922(g)(4) Withstand Constitutional Scrutiny?

The second step of the court's two-step analysis requires the court, first, to determine what level of scrutiny should be applied, and second, to determine whether the challenged law withstands such scrutiny.[103] Like many other circuits, the Sixth Circuit determined that intermediate scrutiny was the appropriate standard of scrutiny to apply because "[t]o hold . . . that [Tyler] is at the core of the Second Amendment despite his history of mental illness would cut too hard against Congress's power to categorically prohibit certain presumptively dangerous people from gun ownership."[104] It also found that even though the burden of a permanent ban on firearm

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[98] *Id.*
[99] *Id.*
[100] *Id.*
[101] *Id.* at 687–88.
[102] *Id.* at 690 ("In the face of what is at best ambiguous historical support, it would be peculiar to conclude that § 922(g)(4) does not burden conduct within the ambit of the Second amendment as historically understood based on nothing more than *Heller*'s observation such a regulation is 'presumptively lawful.'") (quoting District of Columbia v. Heller, 554 U.S. 570, 626 n.26 (2008)).
[103] *See Tyler*, 837 F.3d at 690.
[104] *Id.* at 690; *see also* Ezell v. City of Chicago, 651 F.3d 683, 684 (7th Cir. 2011) (explaining that the choice of level of scrutiny "will depend on how close the law comes to the core of the Second Amendment right and the severity of the law's burden on that right"). It is also significant to note that when the Sixth Circuit first heard Tyler's case, it analyzed the claim under strict scrutiny; however, when the case came before it again in 2016, the court determined

possession is a substantial one on Tyler individually, the burden is quite narrow overall because it only applies to a small subset of the population—those who have been involuntarily institutionalized or adjudicated as "mentally defective."[105] Accordingly, the Sixth Circuit analyzed the challenged law under intermediate scrutiny.

The court first asked whether the government had put forth an important interest.[106] In addition to the general objective of § 922(g)(4), which is to keep firearms out of the hands of people who are considered to potentially be dangerous, the court also considered two other objectives: (1) to reduce gun-related violence and crime and (2) to prevent suicides-by-gun.[107] According to the Sixth Circuit, those interests were "not only legitimate, they [were] compelling."[108] The issue was, however, determining how closely § 922(g)(4) served those interests.

To prove its case, the government pointed to two recent mass shootings, both of which were perpetrated by individuals who were mentally ill and had recently been involuntarily committed.[109] The Sixth Circuit ruled that evidence was not sufficiently related to Tyler's case because Tyler's involuntary commitment occurred years ago and he has since been evaluated as not having a mental illness.[110] It then considered an empirical study put forth by the government, which found the risk for suicide to be thirty-nine times higher for people who have been previously committed than not.[111] The court, however, did not place great weight on this study either because it spanned a period fewer than two years; therefore, it did not reasonably explain why a lifelong

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that intermediate scrutiny was the more appropriate standard. *See generally* Tyler v. Hillsdale Cty. Sheriff's Dep't, 775 F.3d 308 (2014) (applying strict scrutiny).

[105] *Tyler*, 837 F.3d at 691.

[106] *Id.* at 693.

[107] *Id.*

[108] *Id.*

[109] *Id.* at 694–95 (referring to the Virginia Tech shooting and a subsequent shooting in New York).

[110] *Id.* at 695.

[111] *Tyler*, 837 F.3d at 695–96; *see also* E. Clare Harris & Brian Barraclough, *Suicide as an Outcome for Mental Illness: A Meta-Analysis*, 170 BRIT. J. PSYCHIATRY 205, 223 (1997) (noting also that the risk for suicide is greater closer to the time an individual is released from commitment; the risk diminishes thereafter).

ban was necessary to achieve the government's objectives as-applied to individuals like Tyler, who were committed decades ago.[112] Next, the government presented evidence that Connecticut saw a fifty-three-percent decrease in violent crimes perpetrated by people with prior commitments after the state began preventing those individuals from purchasing firearms.[113] But the court determined that the study merely showed that restricting access to guns reduces gun violence; it did not "meaningfully compare previously committed individual's propensity for violence with that of the general population.[114]

In comparison, Tyler presented a study, which concluded that "when controlling for substance abuse problems, the rates of violent acts perpetrated by involuntary committed patients and the general population in one community in Pittsburgh was 'statistically indistinguishable.'"[115] Lastly, the court pointed to the creation of § 925(c), and later § 40915, as evidence in and of itself that Congress intended for individuals to have an avenue for relief under § 922(g)(4).[116]

Accordingly, the Sixth Circuit held that the government was currently unable to overcome its burden of proving that a lifelong ban on firearm possession was substantially related to government interests as applied to Tyler's case.[117] It then remanded the case to the district court for decision and cautioned that in order to justify § 922(g)(4), the government either had to prove to the district court that the ban was constitutional as-applied to Tyler because he would be a danger to himself or others, or it had to offer more evidence to support the statute's categorical, permanent ban.[118]

B. *Beers v. Attorney General United States*

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[112] *Tyler*, 837 F.3d at 696.
[113] *Id.*
[114] *Id.*
[115] *Id.* (quoting Henry J. Steadman et al., *Violence by People Discharged from Acute Psychiatric Impatient Facilities and by Others in the Same Neighborhoods*, 55 ARCHIVES GEN. PSYCHIATRY 393 (1998)).
[116] *Id.* at 697.
[117] *Id.*
[118] *Tyler*, 837 F.3d at 699.

Three years following *Tyler*, the Third Circuit addressed an almost identical issue in *Beers v. Attorney General United States.*[119] Plaintiff Bradley Beers was involuntarily committed for mental health treatment in 2005 after "he told his mother that he was suicidal and put a gun in his mouth."[120] He was first committed for up to 120 hours, but his commitment was extended by a Pennsylvania state court twice after it determined Beers was "severely mentally disabled and in need of treatment."[121] Shortly after his commitment, Beers attempted to purchase a firearm but was denied after notice of his involuntary commitment appeared on the NICS background check.[122] Beers has not received further mental health treatment subsequent to being released in 2006.[123] Additionally, in 2013, a physician examined Beers and reported that he would be able to "safely handle firearms again without risk of harm to himself or others."[124]

The Third Circuit departed from the two-prong framework for Second Amendment challenges adopted in *Tyler* and placed the burden of proof more heavily on Beers rather than the government.[125] First, the court looked at the justifications for barring the prohibited class from Second Amendment protections.[126] Then, it asked whether Beers could distinguish himself from those persons.[127] It determined that only if Beers could distinguish himself would the burden shift to the government to show that the challenged law could survive heightened scrutiny.[128]

Unlike the *Tyler* Court, the Third Circuit never scrutinized § 922(g)(4) because it determined that Beers was outside of the class of persons historically protected by the Second Amendment.[129] Although it conceded that there is little historical evidence of specifically

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[119] 927 F.3d 150 (3d Cir. 2019), *vacated on other grounds*, 140 S. Ct. 2758 (2020).
[120] *Id.* at 153.
[121] *Id.*
[122] *Id.*
[123] *Id.*
[124] *Id.*
[125] *Beers*, 927 F.3d at 154–55.
[126] *Id.* at 155.
[127] *Id.*
[128] *Id.*
[129] *Id.* at 159.

prohibiting the mentally ill from possessing firearms, the court maintained that this was only because such laws were not necessary in the eighteenth-century.[130] For example, it considered the fact that in the eighteenth century, courts had the authority to incarcerate people it considered insane.[131] Accordingly, the court found that "the traditional justification for disarming mentally ill individuals was that they were considered dangerous to themselves and/or to the public at large," and that there was sufficient historical evidence to support the ban, even if it was sparse.[132] Furthermore, the Third Circuit determined that Beers would be unable to distinguish himself from the traditionally prohibited class because his case rested on the substantial passage of time between his involuntary commitment and rehabilitation.[133] It explained that "neither the passage of time nor evidence of rehabilitation 'can restore Second Amendment rights that were forfeited,'" because there is no historical evidence to support the contrary.[134] According to the court, the only way for Beers to completely remove himself from the prohibited class was to show that he was in fact never adjudicated as a danger to himself or others—an obviously impossible burden.[135] The Third Circuit, therefore, upheld the categorical restriction imposed by § 922(g)(4).[136]

C. *Mai v. United States*

Shortly after *Beers*, the Ninth Circuit also addressed an as-applied challenge to § 922(g)(4)'s lifelong ban in *Mai v. United States.*[137] In that case, seventeen-year-old Duy Mai was involuntarily committed to a mental institution by a Washington state court after he threatened to hurt himself and others and the court found that he was mentally ill and dangerous.[138] Mai was

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[130] *Id.* at 157–58.
[131] *Beers*, 927 F.3d at 157–58 ("Thus, courts analyzing the traditional justifications for disarming the mentally ill have noted that 'if taking away a lunatic's liberty was permissible, then we should find the "lesser intrusion" of taking his or her firearms was also permissible.'").
[132] *Id.* at 158.
[133] *Id.* at 159.
[134] *Id.* (quoting Binderup v. Att'y Gen. of United States, 836 F.3d 334, 350 (3d Cir. 2016)).
[135] *Id.*
[136] *Id.*
[137] 952 F.3d 1106 (9th Cir. 2020).
[138] *Id.* at 1110–11.

released from the mental health facility at age eighteen, after only nine months of treatment, and has since lived a "socially-responsible" and balanced life.[139] Fourteen years following his release, Mai attempted to purchase a firearm but was denied as a result of his prior involuntary commitment.[140] Even though Mai qualified under Washington's state relief-from-disabilities program, the federal court determined that the state's program itself did not qualify under 34 U.S.C. § 40915 because it was significantly less stringent.[141] Particularly the court pointed out that Washington's statute lacks a requisite finding that "relief would not be contrary to the public interest," which is present in § 40915.[142] As a result, Mai brought suit and argued that, as applied to him, § 922(g)(4) was unconstitutional.[143]

In deciding Mai's case, the Ninth Circuit applied the same two-step analysis for challenges to Second Amendment restrictions as was applied by the Sixth Circuit— first asking whether the burdened conduct is within the scope of the Second Amendment, and then determining whether the challenged law withstands the appropriate level of scrutiny.[144] Diverging from the Sixth Circuit and the Third Circuit, however, the *Mai* Court essentially refrained from any historical analysis and "assume[d], without deciding, that § 922(g)(4), as applied to Plaintiff, burden[ed] Second Amendment rights."[145]

In addressing the second step of the analysis, the court agreed with the Sixth Circuit that intermediate scrutiny was the correct standard to apply.[146] The court came to this conclusion for

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[139] *Id.*
[140] *Id.*
[141] *Id.* at 1110–12; *see generally* Rev. Code Wash. (ARCW) § 9.41.047 (permitting the court to restore the rights of a person previously barred from possession a firearm as a result of involuntary commitment if the court finds that: (1) the person is not "required to participate in court-ordered" treatment, (2) the person "has successfully managed the condition related to commitment," (3) the person "no longer presents a substantial danger to himself or herself, or the public," and (4) "[t]he symptoms related to the commitment . . . are not reasonably likely to recur").
[142] *Id.* at 1112 (quoting 34 U.S.C. § 40915).
[143] *Mai*, 952 F.3d at 1110–12.
[144] *Id.* at 1113.
[145] *Id.* at 1115.
[146] *Id.*

two reasons. First, it determined that Mai, like others who had been previously involuntarily committed, fell outside of the core class of persons protected by the Second Amendment—law-abiding, responsible citizens.[147] Second, it determined that § 922(g)(4) burdened only a narrow class, even if its effects were substantial on Mai individually.[148] The Ninth Circuit, however, differed in its application of intermediate scrutiny. Like the *Tyler* Court, it found the government's interests of preventing suicide and reducing crime to be serious and compelling; however, unlike the *Tyler* Court, the Ninth Circuit found that § 922(g)(4) was sufficiently related to those interests.[149]

To prove its case, the government presented the same case study as it did in *Tyler*, which concluded that the risk of suicide is thirty-nine percent higher for individuals who have been involuntarily committed.[150] The court, however, disagreed with the Sixth Circuit and determined that the study provided sufficient justification to support Congress's finding that § 922(g)(4)'s restrictions would be a reasonable solution.[151] Even though the research presented studied a maximum time period of eight-and-a-half years, and Mai was discharged from hospitalization two decades ago, the court determined that this was irrelevant to its analysis because, under intermediate scrutiny, it need not impose an unnecessarily rigorous burden on the government.[152] The court reiterated that the government did not need to present the court with evidence that perfectly matched the facts of Mai's case; it just needed to present enough evidence to reasonably connect its important interest to the challenged law.[153] And in cases like the one at hand, where empirical evidence is incomplete overall, deference should be given to Congress to make

[147] *Id.*
[148] *Id.* at 1115.
[149] *Mai*, 952 F.3d at 1116–17.
[150] *Id.* at 1117.
[151] *Id.*
[152] *Id.* at 1117–18.
[153] *Id.* at 1118.

predictive judgments and implement the law accordingly.[154] According to the Ninth Circuit, "[t]hat standard applied because 'we are weighing a legislative judgment, not evidence in a criminal trial."[155] The court then contended that it did not need to scrutinize § 922(g)(4) in relation to the government's other interests, such as reducing crime, because it found a reasonable fit between § 922(g)(4) and the stated objective of reducing suicide rates[156]

Lastly, the court held that the creation of § 40915 could not be used to infer congressional intent because it was an "extension of grace to some persons as a part of a political compromise," which will not affect a constitutional analysis.[157] Even considering the lack of relief programs available to Mai, the Ninth Circuit still found that the other factors discussed outweighed this limitation and justified the categorical enforcement of § 922(g)(4) because the Second Amendment does not require individualized hearings for personal risk assessment.[158]

D. Summarizing the Split

In assessing § 922(g)(4)'s constitutionality, the Third Circuit began its analysis by asking what the traditional justifications for barring individuals previously involuntarily committed from firearm possession and whether the petitioner could distinguish himself from that class.[159] By framing the first inquiry in this way the court ended its analysis before scrutinizing § 922(g)(4) because it quickly determined that the only way petitioner could distinguish himself from the restricted class was to show that he in fact had not been involuntarily committed.[160] In contrast, the Sixth and Ninth Circuit began by addressing the question of whether the statute burdens Second Amendment rights.[161] To do this, both courts followed a nearly identical two-step test, asking (1)

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[154] *Id.*
[155] *Mai*, 953 F.3d at 1118 (quoting Mahoney v. Sessions, 871 F.3d 873, 98 (9th Cir. 2017)).
[156] *Id.* at 1116 n.5.
[157] *Id.* at 1120.
[158] *Id.* at 1119–20.
[159] Beers v. Att'y Gen. U.S., 927 F.3d 150, 154–55 (3d Cir. 2019), *vacated on other grounds*, 140 S. Ct. 2758 (2020).
[160] *Id.* at 159.
[161] *Mai*, 952 F.3d at 1113; Tyler v. Hillsdale Cty. Sheriff's Dep't, 837 F.3d 678, 685–86 (6th Cir. 2016).

whether the prohibited conduct falls within the protections of the Second Amendment, and if so, (2) whether the law can withstand constitutional scrutiny.[162] In addressing the first step, the Sixth Circuit did a full analysis of the historical support for its finding that Second Amendment guarantees were burdened.[163] In contrast, the Ninth Circuit so assumed without deciding.[164] Finally, both the Sixth and Ninth Circuits adopted intermediate scrutiny to analyze § 922(g) but the courts diverged on their findings and overall outcomes.[165]

V. Addressing the Split

The Supreme Court has recognized the Second Amendment as being "deeply rooted in this Nation's history and tradition."[166] It protects a constitutional right that is heavily exercised and valued across the United States. Resolution by the Court on the aforementioned circuit split is necessary in order to establish uniform policy and expectations. By examining different justifications for categorically upholding § 922(g)(4), this Part suggests that the Ninth Circuit correctly applied intermediate scrutiny to the challenged law in *Mai v. United States*,[167] and it proposes that the Supreme Court should adopt a similar analysis.

A. Defining the Protected Class

In *District of Columbia v. Heller*, the Supreme Court established that the Second Amendment was intended to protect "law-abiding, responsible citizens."[168] Individuals restricted from possessing a firearm as a result of involuntary institutionalization under § 922(g)(4) do not

[162] *Mai*, 952 F.3d at 1113; *Tyler*, 837 F.3d at 686.
[163] *See Tyler*, 837 F.3d at 688–90.
[164] *Mai*, 952 F.3d at 1115.
[165] *Compare id.* at 952 F.3d at 1121 (holding that "§ 922(g)(4)'s prohibition on those who have been involuntarily committed to a mental institution is a reasonable fit for the important goal of reducing gun violence"), *with Tyler*, 837 F.3d at 699 ("We cannot conclude . . . that the government has carried its burden to establish a reasonable fit between the important goals of reducing crime and suicides and § 922(g)(4)'s permanent disbarment of all persons with a prior commitment.").
[166] McDonald v. City of Chicago, 561 U.S. 742, 768 (2010) (quoting Washington v. Glucksberg, 521 U.S. 702, 721 (1997)).
[167] 952 F.3d 1106 (9th Cir. 2020).
[168] 554 U.S. 570, 635 (2008).

fall within that class. Plaintiffs in the above-mentioned cases all argued that they have been rehabilitated from their mental illnesses and offered proof that they live balanced and peaceful lives. Yet even accepting that the plaintiffs are presently responsible citizens, this should not automatically place them back within the Second Amendment's protected class. Individuals restricted by § 922(g)(4) as a result of involuntary commitment required formal intervention, they were afforded due process, and a court determined that they were a danger to themselves or others. As a result, they can no longer fit into the category of "responsible" citizens.

This approach is consistent with that taken by the courts when considering other § 922(g) restrictions. For example, in *United States v. Chovan*, the Ninth Circuit considered an as-applied challenge to § 922(g)(9), which "prohibits persons convicted of domestic violence misdemeanors from possessing firearms for life."[169] The court concluded that, despite present-day peacefulness and notwithstanding the passage of time since conviction, domestic violence misdemeanants were not "law-abiding" citizens such that § 922(g)(9) would implicate the core Second Amendment guarantee.[170] Similarly, in *Hamilton v. Pallozi*, the Fourth Circuit upheld the permanent ban on firearm possession that § 922(g)(1) imposes on felons.[171] In that case, the plaintiff was convicted of three non-violent state felonies—credit card fraud, credit card theft, and credit card forgery—and was sentenced to four years in prison."[172] The Fourth Circuit held that "a felon cannot be returned to the category of 'law-abiding, responsible citizens' for the purposes of the Second Amendment," leaving open only the narrow exceptions of a pardon or the law underlying the conviction being held unconstitutional.[173] Furthermore, the court refused to consider evidence of

[169] 735 F.3d 1127, 1129 (9th Cir. 2013).
[170] *Id.* at 1138.
[171] 848 F.3d 617, 629 (4th Cir. 2017); *accord* United States v. Rozier, 598 F.3d 768, 771 (11th Cir. 2010) (per curiam) ("[*Heller*'s] language suggests that statues disqualifying felons from possessing a firearm under any and all circumstances do not offend the Second Amendment.").
[172] *Pallozi*, 848 F.3d at 618.
[173] *Id.* at 626, 629.

rehabilitation or the passage of time in issuing its decision.[174] Accordingly, the Ninth Circuit soundly applied this reasoning to petitioner Duy Mai's case. Once adjudicated as mentally ill and dangerous, and committed for mental health treatment, Mai was removed from the class of "responsible" citizens that is at the core of the Second Amendment.

Arguably, § 922(g)(4) can be broken up into two prongs—first addressing individuals adjudicated as mentally ill and second addressing individuals previously involuntarily institutionalized. Individuals like Mai may be able to persuade a court that they have since been rehabilitated and are no longer mentally ill, but that does not remove the fact that they still fit the second prong. This reasoning is analogous to that in *Chovan* and *Hamilton*. Just because the petitioner in *Chovan* was no longer dangerous, does not erase the fact that he once was. And in *Hamilton*, even where the petitioner was not convicted of a traditionally "dangerous" crime, the prior adjudication still acted as a bar from firearm possession.

B. Historical Evidence of Second Amendment Restrictions

Historical evidence is an important factor when considering whether a challenged statute infringes on Second Amendment rights. "A law does not burden Second Amendment rights if it 'regulates conduct that historically has fallen outside the scope of the Second Amendment.'"[175] Federal prohibitions on firearm possession by those who are adjudicated as mentally ill or previously involuntarily committed are undeniably twentieth-century creations; § 922(g)(4) itself was not enacted until 1968.[176] Nonetheless, there are reasons to believe that analogous restrictions were imposed throughout history in a less formal manner. For example, "[i]n eighteenth-century America, justices of the peace were authorized to 'lock up' 'lunatics' who were 'dangerous to be

[174] *Id.* at 629.
[175] Mai v. United States, 952 F.3d 1106, 1114 (9th Cir. 2020).
[176] Pub.L. 90–618, 82 Stat. 1213, 1220.

permitted to go abroad.'"[177] Accordingly, it has been suggested that "[i]f this significant infringement of liberty was permissible, then the lesser step of mere disarmament would likely be permissible as well."[178] Furthermore, stepping out of the confines of mental illness, historically and "at a higher level of generality . . . any person viewed as potentially dangerous could be disarmed by the government without running afoul of the 'right to bear arms.'"[179]

Nevertheless, evidence rooting § 922(g)(4)'s restriction in history is limited at best, and does not seem to be enough to support a categorical, permanent ban on a constitutional guarantee.[180] When an individual loses his Second Amendment rights he loses, in large part, the ability to protect himself, his family, and his property. The Third Circuit's acceptance of this evidence as conclusive without analyzing § 922(g)(4) under any form of heightened scrutiny takes too narrow of a view. On the other hand, an argument can be made that such pervasive gun violence is also largely a creation of the twentieth century, and, therefore Congress should be able to pass legislation that addresses current needs. The Ninth Circuit's analysis in *Mai* took a prudent approach and "assume[d], without deciding, that § 922(g)(4) as applied to [the petitioner], burden[ed] Second Amendment rights."[181] In doing so, the court properly placed the burden on the government to prove that the law was justified and could survive constitutional scrutiny without totally discrediting the limited historical evidence presented.

C. Empirical Evidence Supporting an Important Governmental Interest

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[177] Carlton F.W. Lawson, *Four Exceptions in Search of a Theory: District of Columbia v. Heller and Judicial Ipse Dixit*, 60 HASTINGS L.J. 1371, 1377 (2009); *see, e.g.*, Beers v. Att'y Gen. U.S., 927 F.3d 150, 157–58 (3d Cir. 2019), *vacated on other grounds*, 140 S. Ct. 2758 (2020) (discussing such historical evidence to support its decision to uphold § 922(g)(4)'s restriction); United States v. Emerson, 270 F.3d 203, 226 n.21(5th Cir. 2001) (noting that "those of unsound mind" were historically prohibiting from possessing firearms).

[178] Lawson, *supra* note 177, at 1377.

[179] *Id.*

[180] *But see* U.S. v. Skoien, 614 F.3d 638, 641 (7th Cir. 2010) (noting that, even outside of those recognized in 1791, "[c]ategorical limits on the possession of firearms would not be a constitutional anomaly. Think of the First Amendment, which has long had categorical limits: obscenity, defamation, incitement to crime, and others.").

[181] *Mai*, 952 F.3d at 1115.

In both *Mai* and *Tyler*, the government offered empirical studies that discussed the relationship between mental illness and the propensity for suicide. In *Mai*, the Ninth Circuit correctly concluded that these studies provided a sufficient amount of evidence to support a congressional finding that intervening legislation was necessary. Despite the Sixth Circuit in *Tyler* focusing more on the relationship between mental illness and violence, reducing suicide rates is just as important of an interest as reducing crime rates.[182] When a person commits suicide, the tragedy affects not only the decedent but also his or her family and friends, and the community at large.[183] Accordingly, "[e]ven a small decrease in the number of suicides is a public benefit."[184] Furthermore, the connection between mental illness and the propensity for suicide is not insignificant. A 2003 study, which utilized the psychological autopsy method[185] to explain reasons why individuals committed suicide, concluded that "the clearest association between suicide and any of the study variables was with mental disorder – 91%."[186] Additionally, it has been suggested that "virtually all mental disorders have an increased risk of suicide except mental retardation and possibly dementia and agoraphobia."[187] A suicide attempt is also significantly more likely to be successful if attempted with a gun rather than by other means.[188] This evidence indicates that prohibiting individuals with histories of involuntary commitment for mental health treatment is a

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[182] *See* Washington v. Glucksberg, 521 U.S. 702, 728–35 (1997) (recognizing suicide prevention as an "unquestionably important and legitimate" governmental interest).
[183] *Id.* at 1121.
[184] *Id.*
[185] Jonathan Cavanagh et al., *Psychological Autopsy Studies of Suicide: A Systematic Review*, 33 PSYCHOL. MED. 395, 395 (2003) ("This technique is based upon a combination of interviews of those closest to the deceased and an examination of corroborating evidence from sources such as hospital and general practice case-notes, social work reports and criminal records.").
[186] *Id.* at 399.
[187] E. Clare Harris & Brian Barraclough, *Suicide as an Outcome for Mental Illness: A Meta-Analysis*, 170 BRIT. J. PSYCHIATRY 205, 222 (1997)).
[188] *See* Madeline Drexler, *Guns & Suicide: The Hidden Toll*, HARV. PUB. HEALTH, hsph.harvard.edu/magazine/magazine_article/guns-suicide/ (reporting that "about [eight-five] percent of suicide attempts with firearms end in death," whereas "drug overdose . . . is fatal in less that [three] percent of cases").

reasonable fit for achieving the goal of reducing suicide rates, particularly because determining when someone has truly been rehabilitated from mental illness is a difficult task to undertake.

In relation to the government's other interest—reducing gun violence—a prominent point of criticism is that connecting mental illness and violence hardens the public to individuals suffering from mental illness.[189] It would be very difficult to argue that there is no stigmatizing effect of § 922(g)(4); however, in *Mai*, the Ninth Circuit attempted to circumvents this issue to some extent by pushing the analysis away from the hot top of gun violence and refocusing the analysis on suicide risks. After all, under intermediate scrutiny, if a court is able to sufficiently connect one of the government's interests to the challenged law, it need not connect all of them.

Furthermore, a relevant area of empirical study that is not discussed by the courts is the ability of health professionals to determine when someone has recovered from a mental illness and what danger they pose, if any, to themselves and others. This is significant because it indicates the likelihood that a second judicial hearing would be successful in determining the fitness of an individual, previously involuntarily committed, for firearm possession. Where an expert's testimony or medical examinations are used to attest to an individual's rehabilitation since an involuntary institutionalization, it is important for the court to know accurate information. Particularly where relief involves the legal grant of access to a dangerous weapon, courts should be certain that the individual has no lingering symptoms of mental illness. Yet, it is widely accepted that physicians cannot, with good certainty, predict individual behavior because of the broad spectrum of mental illness. While they may be able to speak generally about specific groups, predicting one person's individual behavior is unlikely.[190]

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[189] *See* Susan McMahon, *Gun Laws and Mental Illness: Ridding the Statutes of Stigma*, 5 U. Pa. J.L. & Pub. Aff. 1, 10 (2020) (arguing that "connecting mental illness and mass shooting harden public attitudes against individuals with mental illness and further ingrain stigma in the public discourse and in the legal landscape").

[190] *See* Jeffrey W. Swanson, *Preventing the Unpredicted: Managing Violence Risk in Mental Health Care*, 59 PSYCHIATRIC SERVS. 191, 191–93 (2008).

Although "neuroprotection—'or the belief that one can predict individual behavior from neuroscientific data'—is becoming increasingly popular in United States courtrooms, neuroscientists have yet to develop a sufficient understanding of the cause of many serious mental health issues."[191] This is often used as an argument against banning the mentally ill from firearm possession; however, the argument can easily be reversed. Where there is no certain way to determine that someone who was afforded due process and adjudicated dangerous is now no longer a danger, individual liberties may have to suffer in order to protect the public at large.[192] This approach is also in line with intermediate scrutiny, as intermediate scrutiny allows for some under-and-overinclusiveness.

D. Importance of Recognizing Congressional Authority

Under intermediate scrutiny, Congress does not need to draft its laws in the least restrictive way possible.[193] Accordingly, to uphold a challenged law, a court must only determine that Congress's objectives would be achieved less efficiently without that law.[194] This means that in *Mai* and *Tyler*, the government needed only to show that restricting individuals previously involuntary committed from possessing firearms was substantially related to its goals of reducing gun violence or suicide; it did not need to show that this was the only way to achieve its goals. Furthermore, where empirical or medical evidence is arguably scarce, the Supreme Court has ruled that in certain cases, it is proper to show deference to the legislature. For example, in *Turner Broadcasting System v. FCC*, the Court determined that "sound policy making often required legislators to forecast future events and to anticipate the likely impact of these events based on

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[191] Wajert, *supra* note 9, at 733 (quoting Judith Edersheim et al., *Can Neuroscience Predict Human Behavior?*, HUFFINGTON POST (Feb. 13, 2013), https://www.huffpost.com/entry/traumatic-brain-injury_b_2296203).
[192] *Cf.* Gonzales v. Carhart, 550 U.S. 124, 163 (2007) (holding in a case of abortion rights that "[t]he Court has given state and federal legislatures wide discretion in areas where there is medical and scientific uncertainty"); Marshall v. United States, 414 U.S. 417, 427 ("When Congress undertakes to act in areas fraught with medical and scientific uncertainties, legislative options must be especially broad and courts should be cautious not to rewrite legislation.").
[193] Mai v. United States, 952 F.3d 1106, 1117–18 (9th Cir. 2020).
[194] *Id.*

deductions and inferences for which complete empirical support may be unavailable."[195] In showing "substantial deference to the predictive judgments of Congress," courts certainly do not need to abandon judicial review altogether; however, the Court defined the judiciary's role as "assur[ing] that, in formulating its judgments, Congress has drawn reasonable inferences based on substantial evidence."[196]

The Sixth Circuit deviated from these principles when it determined that the government had not carried its burden of reasonably linking § 922(g)(4) to its goals. In both *Mai* and *Tyler*, the government presented evidence that the risk for suicide was thirty-nine times higher for people who have been previously committed than not.[197] In *Tyler*, the Sixth Circuit determined that this evidence was insufficient because the study ultimately concluded that the risk of suicide was greatest shortly following commitment and diminished thereafter.[198] Yet, in doing so, it seems that the court either applied a stricter level of scrutiny than intermediate or it failed to recognize that a diminished risk is not a dissolved risk. Likewise, the Sixth Circuit rejected the government's evidence determining that using a firearm substantially increases the risk that a suicide attempt will be successful and its evidence that "relapse and readmission are common following and initial commitment."[199]

In contrast, the *Mai* Court determined that the studies reasonably supported the congressional judgment despite their temporal limitations, reasoning that nothing suggested that the risks posed disappeared entirely overtime, even if they decreased.[200] This approach is more in

[195] Turner Broad. Sys., Inc. v. FCC, 512 U.S. 622, 665 (1994) (implementing intermediate scrutiny to address the question of whether "must" carry provisions infringed on a cable company's First Amendment rights by limiting its freedom of speech and freedom of the press). *But see* Wajert, *supra* note 9, at 733 (arguing that we are letting fear create public policy).
[196] *Turner Broad. Sys., Inc.*, 512 U.S. at 666.
[197] *See* Tyler v. Hillsdale Cty. Sheriff's Dep't, 837 F.3d 678, 695–96 (6th Cir. 2016); *Mai*, 952 F.3d at 1118.
[198] *See Tyler*, 837 F.3d at 696.
[199] *Id.*
[200] *Mai*, 952 F.3d at 1118.

line with showing "substantial deference to the predictive judgments of Congress."[201] And where the outcome could be death or serious bodily injury, it seems particularly important to show this deference.

VI. Conclusion

As rates of gun violence and suicide continue to increase, it is of paramount importance that a uniformed approach to § 922(g)(4) constitutional challenges is established. Although there are unfortunate consequences that can result from a categorical ban on firearm possession, preventing suicide and reducing gun violence are compelling congressional interests that can be reasonably tied to § 922(g)(4)'s prohibition of firearm possession by individuals previously involuntarily committed to a mental health facility. Because the government need not show a perfectly tailored fit under intermediate scrutiny, the government overcame its burden, and *Mai v. United States* was correctly decided. Accordingly, should it grant review of this growing issue, the Supreme Court should adopt the Ninth Circuit's analysis to as-applied challenges to § 922(g)(4).

[201] *Turner Broad. Sys., Inc.*, 512 U.S. at 666.