NOTE

SECOND-CLASS CITIZENS UNDER THE SECOND AMENDMENT: THE CASE FOR APPLYING STRICT SCRUTINY TO LIFETIME FIREARM BANS FOR INDIVIDUALS PREVIOUSLY COMMITTED TO MENTAL INSTITUTIONS

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INTRODUCTION

The Federal Gun Control Act of 1968[1] has permanently deprived a subset of responsible, law-abiding Americans of their fundamental right to possess a firearm in their homes—thereby transforming them into second-class citizens for the purposes of the Second Amendment. Under the Federal Gun Control Act, individuals in approximately nineteen states are currently banned from owning firearms for life if they have ever been involuntarily committed to a mental institution.[2] This strange phenomenon where the de facto scope of an individual's Second Amendment rights is dependent on the individual's resident state is the result of two factors: (1) 18 U.S.C. § 922(g)(4)'s committed provision,[3] and (2) a lack of federal and state funding for programs that would allow those affected by § 922(g)(4) to petition federal or state governments for their firearm bans to be lifted.[4]

On March 11, 2020, the Ninth Circuit in *Mai v. United States* became the third circuit to rule on the constitutionality of 18 U.S.C. § 922(g)(4)'s lifetime ban on firearm ownership for anyone who has ever been involuntarily committed to a mental institution.[5] In doing so, it created a three-circuit split regard-

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1 18 U.S.C. § 922 (2018).

2 *See The NICS Improvement Amendments Act of 2007*, BUREAU JUST. STAT., http://www.bjs.gov/index.cfm?ty=TP&tid=49#2011 [https://perma.cc/W8Z4-TVES] (last visited Nov. 2, 2020); *see also* discussion subpart II.A. *infra* (discussing the scope of this ban and the states which have or have not provided a means by which individuals can seek relief).

3 *See id.*

4 *See infra* subpart II.A.

5 952 F.3d 1106, 1121 (9th Cir. 2020). On September 10, 2020, the Ninth Circuit rejected to rehear the case en banc. *See* Mai v. United States, 974 F.3d 1082 (9th Cir. 2020).

ing how to analyze constitutional challenges to this portion of § 922(g)(4).

In sum, the current case law on this issue is a quagmire. In 2019, the Third Circuit in *Beers v. Attorney General United States* created a circuit split with the Sixth Circuit when it held that those affected by § 922(g)(4) did not fall within the scope of the Second Amendment, and on that basis held § 922(g)(4)'s ban constitutional.[6] The Sixth Circuit in *Tyler v. Hillsdale Sheriff's Dep't* (*Tyler I*) had held the opposite in 2014, asserting that § 922(g)(4)'s committed provision did in fact fall within the Second Amendment's scope.[7] The Sixth Circuit, sitting en banc, then affirmed this portion of *Tyler I* two years later in *Tyler v. Hillsdale Sheriff's Dep't* (*Tyler II*).[8] Although the Sixth Circuit in *Tyler I* applied strict scrutiny to § 922(g)(4)'s committed provision and found it unconstitutional,[9] the en banc panel in *Tyler II* reversed, applied intermediate scrutiny to the provision, and again held that the provision was unconstitutional as applied.[10] Then, creating a three-circuit split, the Ninth Circuit in *Mai* declined to hold that § 922(g)(4)'s provision implicates the Second Amendment, but instead "assum[ed]" that it did "without deciding."[11] Like the Sixth Circuit, the Ninth Circuit in *Mai* then applied intermediate scrutiny. However, unlike the Sixth Circuit, the Ninth Circuit held that the provision survived intermediate scrutiny.

Many circuit judges in the Third, Fifth, Sixth, Seventh, Ninth, and D.C. Circuits have argued in dissents and concurrences that rather than applying tiers of scrutiny, courts should look to the text, history, and tradition of the Second Amendment to analyze the constitutionality of Second Amendment regulations.[12] Nevertheless, courts across the country

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6 Beers v. Att'y Gen. U.S., 927 F.3d 150, 157 (3d Cir. 2019). On May 18, 2020, the Supreme Court granted Beers's petition for certiorari and remanded the case to the Third Circuit, directing the Third Circuit to dismiss Beers' case as moot. *See* Beers v. Barr, 140 S. Ct. 2758, 2759 (2020).

7 *See* Tyler v. Hillsdale Cty. Sheriff's Dep't (*Tyler I*), 775 F.3d 308, 322 (6th Cir. 2014), *vacated*, 837 F.3d 678 (2016).

8 *See* Tyler v. Hillsdale Cty. Sheriff's Dep't. (*Tyler II*), 837 F.3d 678, 690 (6th Cir. 2016) (en banc).

9 *See Tyler I*, 775 F.3d at 330, 334.

10 *See Tyler II*, 837 F.3d at 692, 699.

11 Mai v. United States, 952 F.3d 1106, 1115 (9th Cir. 2020).

12 *See, e.g.*, Mai v. United States, 974 F.3d 1082, 1095 (9th Cir. 2020) (Bumatay, J., dissenting from denial of en banc review). To support their argument that the Ninth Circuit should abandon its prior practice of applying tiers of scrutiny to Second Amendment challenges, multiple Ninth Circuit judges cited dissents and concurrences from circuit judges in Third, Fifth, Sixth, Seventh, and D.C. Circuits in which the judges questioned the propriety of applying tiers of

have continued to apply tiers of scrutiny to challenges to Second Amendment regulations. In light of this trend, this Note discusses why courts that feel bound by precedent to apply tiers of review to challenges to firearm regulations should apply strict scrutiny to § 922(g)(4) challenges.

This Note seeks to critique the conflicting approaches that the Third, Sixth, and Ninth Circuits have taken when analyzing what Second Amendment rights, if any, individuals are entitled to after a mental institution involuntarily commits them. Additionally, this Note offers a novel solution. To do so, it explores "not the *what, where, when,* or *why* of the Second Amendment's limitations—but the *who*."[13] Part I first discusses the modern framework for analyzing Second Amendment claims. Part II then discusses the language of § 922(g)(4), whom it affects, and why previously involuntarily committed Americans in approximately nineteen states are entirely foreclosed from seeking relief from § 922(g)(4)'s lifetime firearm ban. It then offers an in-depth analysis of how the Third, Sixth, and Ninth Circuits have applied the post-*Heller* framework for adjudicating as-applied Second Amendment challenges to § 922(g)(4)'s lifetime ban for the involuntarily committed. Part III briefly explores why the policy goals of reducing the stigma of mental illness and increasing access to mental healthcare point in favor of ensuring that presently mentally healthy individuals have the opportunity to petition for relief from § 922(g)(4)'s firearm ban. Finally, Part IV offers a novel approach to analyzing Second Amendment challenges to § 922(g)(4)—viewing the application of strict scrutiny as justifiable by viewing *Heller*'s exceptions as an off switch to the Second Amendment right to bear arms. Part IV discusses why Judge Sutton's assertion "that *Heller* create[d] an on-off switch to the right to bear arms,"[14] although originally offered to refute the application of *any* form of scrutiny to § 922(g)(4)'s committed provision, can also be used to support the argument that courts must analyze § 922(g)(4)'s committed provision under strict scrutiny.

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scrutiny to Second Amendment challenges post-*Heller*. *Id.* at 1086–87; *see also* Heller v. District of Columbia (*Heller II*), 670 F.3d 1244, 1271 (D.C. Cir. 2011) (Kavanaugh, J., dissenting) (arguing that post-*Heller* and *McDonald*, courts should analyze the constitutionality of firearm regulations based on the Second Amendment's "text, history, and tradition, not by a balancing test such as strict or intermediate scrutiny").

13 *Tyler I*, 775 F.3d at 316.

14 *See Tyler II*, 837 F.3d at 712 (Sutton, J., concurring in part).

I
THE MODERN FRAMEWORK FOR ANALYZING AS-APPLIED SECOND AMENDMENT CHALLENGES

A. *Heller* and *McDonald* Solidify the Individual Second Amendment Right to Self-Defense

The Second Amendment to the United States Constitution is only twenty-six words: "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."[15] Over the first two centuries of the amendment's existence, the Court offered minimal guidance for interpreting what these twenty-six words mean in relation to individuals' rights to defend themselves.[16] Until 2008 in the groundbreaking case *District of Columbia v. Heller*,[17] the Court had only issued three Second Amendment opinions. First, in 1875, the court held in *United States v. Cruikshank* that the Second Amendment only constrained the federal government and in no way limited the power of the states.[18] Next, in 1886, in *Presser v. Illinois* the Court confirmed *Cruikshank*, and subsequently upheld the constitutionality of a state law restricting gun ownership for those not involved in the state's formal militia.[19] Fifty-three years later, the court in *United States v. Miller* upheld the constitutionality of a federal ban on shotguns less than eighteen inches long.[20]

Heller relied on the history and language of the Second Amendment to confirm for the first time that the Second Amendment right to self-defense is an individual rather than a collective right limited to militias.[21] Decided two years after *Heller*, the Court in *McDonald v. City of Chicago* expanded *Heller*'s reach by holding that the Second Amendment applies to the states and local governments via the Fourteenth Amend-

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15 U.S. CONST. amend. II.

16 *See* District of Columbia v. Heller (*Heller I*), 554 U.S. 570, 626 (2008) ("For most of our history the question [of the validity of Second Amendment regulations] did not present itself.").

17 *See id.* at 619–26.

18 *See* United States v. Cruikshank, 92 U.S. 542, 553 (1876) (noting that the Second Amendment "has no other effect than to restrict the powers of the national government").

19 *See* Presser v. Illinois, 116 U.S. 252, 253, 265 (1886).

20 *See* United States v. Miller, 307 U.S. 174, 178 (1939).

21 *See Heller I*, 554 U.S. at 595. Additionally, *Heller* is notable because it held that it was unconstitutional for D.C. to ban handgun ownership in the home and more broadly, it was unconstitutional for D.C. to ban any lawful firearm ownership in the home if a person is keeping the firearm for imminent self-defense. *See id.* at 635.

ment's incorporation of the Bill of Rights.[22] *Heller* arose out of a D.C. police officer's challenge to several D.C. laws that banned individuals from using operable firearms, including handguns, inside their own homes.[23] Even where an individual was able to lawfully acquire a handgun or other firearm and use it for self-defense or recreation in public, all lawfully owned firearms stored at the owner's home had to be rendered inoperable via disassembly or via the use of a trigger-lock.[24]

Heller declined the opportunity to apply a specific level of scrutiny or provide a clear test when striking down the constitutionality of D.C. laws at issue. It did, however, explicitly note that applying rational basis scrutiny would be inappropriate to Second Amendment challenges and instead is only appropriate to apply "when evaluating laws under constitutional commands that are themselves prohibitions on irrational laws."[25] In other words, if a court applied rational basis review to a firearms regulation, the Second Amendment would be rendered a nullity because "rational basis is essential for legislation in general."[26] The Court also explicitly rejected Justice Breyer's suggestion in his dissent to adopt an "interest-balancing inquiry" that would require courts to "ask[ ] whether the statute burdens a protected interest in a way or to an extent that is out of proportion to the statute's salutary effects upon other important governmental interests."[27] Instead, the Court simply noted that because D.C.'s regulations encroached so heavily on

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22 "In sum, it is clear that the Framers and ratifiers of the Fourteenth Amendment counted the right to keep and bear arms among those fundamental rights necessary to our system of ordered liberty." McDonald v. City of Chicago, 561 U.S. 742, 778 (2010).

23 *Heller I*, 554 U.S. at 574–76 (outlining the facts of the case); *see* D.C. CODE §§ 7–2501.01(12), 7–2502.01(a), 7–2502.02(a)(4) (2020) (criminalizing the carrying of unregistered firearms and prohibiting individuals from registering handguns). The law did, however, allow individuals to receive one-year licenses to carry their handguns. *See id.*; *see also Heller I*, 554 U.S. at 575 (stating the same).

24 *See* D.C. CODE § 7–2507.02 ("Except for law enforcement personnel . . . each registrant shall keep any firearm in his possession unloaded and disassembled or bound by a trigger lock or similar device unless such firearm is kept at his place of business, or while being used for lawful recreational purposes within the District of Columbia.").

25 *Heller I*, 554 U.S. at 628 n.27 ("If all that was required to overcome the right to keep and bear arms was a rational basis, the Second Amendment would be redundant with the separate constitutional prohibitions on irrational laws, and would have no effect.")

26 United States v. Skoien, 614 F.3d 638, 641 (7th Cir. 2010).

27 *Heller I*, 554 U.S. at 689–90 (Breyer, J., dissenting). In rejecting Justice Breyer's suggested interest-balancing inquiry, the majority noted that "[w]e know of no other enumerated constitutional right whose core protection has been subjected to a freestanding 'interest-balancing' approach. . . . A constitutional guar-

the core of the Second Amendment right to self-defense, the Court would inevitably find them unconstitutional "[u]nder any of the standards of scrutiny that we have applied to enumerated constitutional rights."[28]

Heller noted in dicta that an individual's right to self-defense remains subject to limitations.[29] The Court explained that no part of its opinion "should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons and the mentally ill, or laws forbidding the carrying of firearms in sensitive places such as schools and government buildings, or laws imposing conditions and qualifications on the commercial sale of arms."[30] The Court noted that its list of limitations was not "exhaustive" and opinion provided them as examples of "presumptively lawful regulatory measures."[31]

Heller further limited the scope of the Second Amendment by explaining that the Second Amendment right to self-defense does not extend to all people.[32] Rather, the Second Amendment "concerns only 'the right of law-abiding, *responsible* citizens'" and *Heller* therefore "presumed that certain individuals may be '*disqualified* from the exercise of Second Amendment rights.'"[33] Decided two years after *Heller*, the Court in *McDonald v. City of Chicago* repeated *Heller*'s admonition that it is lawful for a statute to ban felons or the mentally ill from owning firearms.[34]

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antee subject to future judges' assessments of its usefulness is no constitutional guarantee at all." *Id.* at 634.

28 *Id.* at 628.

29 *See id.* at 595 (explaining that "[o]f course" the individual right to firearm ownership is "not unlimited, just as the First Amendment's right of free speech was not"); *see, e.g.*, United States v. Williams, 553 U.S. 285, 288 (2008) ("We have long held that obscene speech—sexually explicit material that violates fundamental notions of decency—is not protected by the First Amendment.").

30 *Heller I*, 554 U.S. at 626–27. For example, the Second Amendment does not protect an individual's right to possess weapons that are "not typically possessed by law-abiding citizens for lawful purposes, such as short-barreled shotguns." *Id.* at 625. Additionally, the Second Amendment does not prohibit laws banning individuals from "carrying . . . firearms in sensitive places such as schools and government buildings." *Id.* at 626.

31 *Id.* at 627 n.26.

32 *See id.* at 635.

33 *See Tyler I*, 775 F.3d 308, 322 (6th Cir. 2014) (quoting *Heller I*, 554 U.S. at 635), *vacated*, 837 F.3d 678 (6th Cir. 2016) (en banc).

34 McDonald v. City of Chicago, 561 U.S. 742, 786 (2010).

B. The Lower Courts' Two-Step Inquiry to As-Applied Second Amendment Challenges Post-*Heller* and *McDonald*

"Applying the lessons from *Heller* and *McDonald*,"[35] all but two circuit courts have adopted a two-step inquiry when adjudicating an as-applied challenge to a Second Amendment regulation.[36] The Eighth Circuit has not yet adopted the two-step inquiry, but it has not explicitly rejected it either.[37] District courts within the Eighth Circuit, relying on the Eighth Circuit's silence regarding the validity of the two-step inquiry, have applied the two-step inquiry to Second Amendment challenges.[38]

1. *Step One of the Two-Step Approach: Determining the Second Amendment's Scope*

The first step in analyzing an as-applied challenge to a firearms regulation is to ask: does the challenged law burden

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

36 *See, e.g.*, *id.* at 1113 ("[W]e have adopted a two-step inquiry for assessing whether a law violates the Second Amendment."); Beers v. Attorney Gen. U.S., 927 F.3d 150, 153 (3d Cir. 2019) ("[W]e are required to conduct a two-part inquiry."); Worman v. Healey, 922 F.3d 26, 33 (1st Cir. 2019) ("Our recent decision . . . mapped out a two-step approach for analyzing Second Amendment challenges."); N.Y. State Rifle & Pistol Ass'n. v. Cuomo, 804 F.3d 242, 253 (2d Cir. 2015) ("[W]e adopt a two-step analytical framework . . . ."); Nat'l Rifle Ass'n of Am. v. Bureau of Alcohol, Tobacco, Firearms, & Explosives 700 F.3d 185, 194 (5th Cir. 2012) (adopting "a version" of the two-step approach taken by the majority of circuits); GeorgiaCarry.Org, Inc. v. Georgia, 687 F.3d 1244, 1260 n. 34 (11th Cir. 2012) ("Like our sister circuits, we believe a two-step inquiry is appropriate . . . ."); United States v. Greeno, 679 F.3d 510, 518 (6th Cir. 2012) ("We find this two-pronged approach appropriate and, thus, adopt it in this Circuit."); *Heller II*, 670 F.3d 1244, 1252 (D.C. Cir. 2011) ("We accordingly adopt . . . a two-step approach to determining the constitutionality of the District's gun laws."); Ezell v. City of Chicago, 651 F.3d 684, 701–04 (7th Cir. 2011) (adopting a two-step framework like the one in *Heller* because the "same principles apply"); United States v. Chester, 628 F.3d 673, 680 (4th Cir. 2010) ("Thus, a two-part approach to Second Amendment claims seems appropriate under *Heller* . . . ."); United States v. Reese, 627 F.3d 792, 800–01 (10th Cir. 2010) ("Applying [*Heller*'s two-pronged] approach here . . . ."). Due to its specialized nature, the Federal Circuit does not hear Second Amendment cases. *See, e.g.*, 28 U.S.C. § 1295 (2018) (detailing the nature of the Federal Circuit's specialized jurisdiction).

37 *See* United States v. Hughley, 691 F. App'x 278, 279 (8th Cir. 2017) (deciding an as-applied challenge to a ban on felons owning firearms by noting that the Eighth Circuit rejects such challenges because felons are "among those historically not entitled to Second Amendment protections"). In *Hughley*, the Eighth Circuit noted that although other circuits have adopted a two-step inquiry to Second Amendment challenges, the Eighth Circuit has not adopted this approach, and "decline[d] to do so here." *Id.* at 279 n.3.

38 *See, e.g.*, United States v. Johnson, No. CR15–3035–MWB, 2016 WL 212366, at *7 (N.D. Iowa, Jan. 19, 2016) (applying the two-step inquiry to Second Amendment adopted by a majority of circuits, reasoning that "[i]t does not appear that the Eighth Circuit has yet adopted or rejected the two-step approach.").

activity that falls within the Second Amendment's scope?[39] If a court holds that the challenged law does not fall within the Second Amendment's scope, the inquiry ends and the law is constitutional.[40]

Courts turn to the Second Amendment's text, history, and tradition to determine whether a challenged regulation falls within the Amendment's scope.[41] For example, courts presume that longstanding historical firearm regulations are lawful and therefore do not fall within the Second Amendment's scope.[42] The D.C. Circuit rationalized in *Heller v. District of Columbia* (*Heller II*) that for a regulation to be longstanding, the public must have accepted it for a long time, which in turn makes it unlikely that the regulation infringes upon a constitutional right.[43] In contrast, if a firearm regulation is relatively new, the regulation is not longstanding and instead falls within the Second Amendment's scope. For example, the Ninth Circuit in *United States v. Chovan* held that a prohibition against firearm possession for those convicted of misdemeanor domestic violence that first emerged in 1996 was not longstanding, and therefore the prohibition fell within the Second Amendment's scope.[44]

2. *Step Two of the Two-Step Approach: Applying Heightened Scrutiny*

If a court determines that a regulation burdens conduct that is within the Second Amendment's scope, the court's inquiry continues to the second step: which form of heightened scrutiny applies?[45] As noted in subpart I.A *supra*, *Heller*

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39 *See Mai*, 952 F.3d at 1113.

40 *See, e.g.*, United States v. Marzzarella, 614 F.3d 85, 89 (3rd. Cir. 2010) (explaining that if a challenged law does not fall within the Second Amendment's scope, "our inquiry is complete").

41 *See, e.g.*, United States v. Torres, 911 F.3d 1253, 1258 (9th Cir. 2019) (explaining that the first step to analyzing Second Amendment challenges required the court to determine whether the challenged law "regulates conduct that historically has fallen outside the scope of the Second Amendment"); United States v. Rene E., 583 F.3d 8, 16 (1st Cir. 2009) (holding that a federal handgun ban for juveniles that contained various exceptions did not fall within the Second Amendment's scope because similar state laws have existed since the 1800s.).

42 *Heller II*, 670 F.3d 1244, 1253 (D.C. Cir. 2011).

43 *Id.*

44 United States v. Chovan, 735 F.3d 1127, 1137 (9th Cir. 2013). *Chovan* then applied intermediate scrutiny and held that the prohibition was constitutional. *Id.* at 1139.

45 *See, e.g.*, *Heller II*, 670 F.3d at 1252 ("We ask first whether a particular provision impinges upon a right protected by the Second Amendment; if it does, then we go on to determine whether the provision passes muster under the appropriate level of constitutional scrutiny.").

unambiguously held that courts should not apply rational basis review to laws implicating Second Amendment rights.[46] Instead, the court simply left open whether courts should apply a heightened level of scrutiny such as intermediate or strict scrutiny to Second Amendment regulations.[47] When asked to apply heightened scrutiny, courts must ask: "Given that a protected right is burdened by this regulation, and given the character of that right, how strong a justification does the government need to have to impose this kind of burden?"[48] Strict scrutiny only applies if the burdened right is (1) fundamental, and (2) if the challenged regulation substantially burdens this right.[49] If either of these factors is not present, courts will apply intermediate scrutiny to a firearm regulation.[50] To determine if a firearm regulation burdens a fundamental right, courts look to how close a regulation comes "to the core of the Second Amendment right."[51]

Post-*Heller*, some courts have interpreted the case law to mean that circuit courts nearly unanimously apply intermediate scrutiny to laws that fall within the Second Amendment's scope.[52] However, as noted by the Sixth Circuit, "[a] closer look . . . reveals that the circuits' actual approaches are less neat—and far less consistent—than that."[53] In sum, circuits do not automatically apply intermediate scrutiny to firearm regulations. Instead, they have properly recognized that strict scru-

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46 *See Heller I*, 554 U.S. 570, 628 n.27 (2008).

47 *See id.* at 628; *see also Tyler II*, 837 F.3d 678, 690 (6th Cir. 2016) (en banc) (explaining that because *Heller* rejected rational basis review as an option, the court had to choose between applying intermediate and strict scrutiny when analyzing a firearm regulation.).

48 Mark Tushnet, Heller *and the Perils of Compromise*, 13 LEWIS & CLARK L. REV. 419, 425 (2009) (internal quotation marks omitted).

49 *See, e.g.*, *Tyler II*, 837 F.3d at 690–91 (reasoning that the choice of scrutiny should be informed by how close the law comes to the core of the fundamental Second Amendment right and the severity of the law's burden on that right); Tushnet, *supra* note 48, at 425 (describing the test for whether a strict scrutiny standard should apply).

50 *See, e.g.*, Mai v. United States, 952 F.3d 1106, 1115 (9th Cir. 2020) (applying intermediate scrutiny upon holding that a firearm regulation fell "well outside the core of the Second Amendment").

51 *See, e.g.*, United States v. Chovan, 735 F.3d 1127, 1138 (9th Cir. 2013); *Tyler II*, 837 F.3d at 690–91 (examining how close the law comes to the core of the Second Amendment right as an indication of whether a fundamental right is burdened).

52 Silvester v. Harris, 843 F.3d 816, 823 (9th Cir. 2016) (discussing circuit courts' approaches to analyzing the constitutionality of firearm regulations and contending that there is "near unanimity in the post-*Heller* case law that when considering regulations that fall within the scope of the Second Amendment, intermediate scrutiny is appropriate").

53 *Tyler I*, 775 F.3d 308, 324 (6th Cir. 2014).

tiny is only appropriate when the challenged firearm regulation is particularly severe and encroaches on the "core" of the Second Amendment right to self-defense.[54]

II
THREE CIRCUITS ARE SHARPLY DIVIDED ON HOW 18 U.S.C. § 922(G)(4)'S COMMITTED PROVISION FITS WITHIN THE ESTABLISHED FRAMEWORK FOR EVALUATING AS-APPLIED SECOND AMENDMENT CHALLENGES

Although *Heller* noted that longstanding prohibitions on firearm ownership for felons and the mentally ill were presumptively lawful, the Court did not explain when a plaintiff could rebut these presumptions or even *why* these prohibitions were exceptions to the Second Amendment at all.[55]

Rather than providing guidance for lower courts, *Heller* simply noted that "there will be time enough to expound upon the historical justifications for those exceptions we have mentioned [i.e. for felons and the mentally ill] if and when the exceptions come before us."[56] Although the scope of *Heller*'s mentally ill exception has not yet reached the Supreme Court, this issue has begun to percolate in lower courts via as-applied challenges to 18 U.S.C. § 922(g)(4)'s lifetime ban on firearm ownership for anyone who has ever been involuntarily committed to a mental institution.

A. The Scope of 18 U.S.C. § 922(g)(4) and Its Committed Provision

In the wake of the assassinations of President John F. Kennedy, Senator Robert F. Kennedy, and Dr. Martin Luther King, Jr., Congress passed the Gun Control Act of 1968.[57]

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54 *See id.* at 324–26 (discussing cases from the First, Second, Third, Fourth, Fifth, Seventh, Ninth, Tenth, and the D.C. Circuits to conclude that although the "general trend" among circuit courts is to apply "some form of intermediate scrutiny," the proper level of scrutiny "in Second Amendment cases . . . remains a difficult, highly contested question").

55 J. Harvie Wilkinson III, *Of Guns, Abortions, and the Unraveling Rule of Law*, 95 VA. L. REV. 253, 283–84 (2009). Constitutional law scholar Mark Tushnet has argued that this lack of clarity is due to *Heller*'s "presumptively lawful" exceptions being provided by Justice Antonin Scalia as being "transparent add-ons" as "compromises" to earn Justice Anthony Kennedy's vote. *See* Tushnet, *supra* note 49, at 420–21. Some critics have gone so far as to declare this portion of *Heller* as "the opinion's *deus ex machina* dicta." *See* United States v. McCane, 573 F.3d 1037, 1049 (10th Cir. 2009) (Tymkovich, J., concurring).

56 *Heller I*, 554 U.S. 570, 635 (2008).

57 Sarah Gray, *Here's a Timeline of the Major Gun Control Laws in America*, TIME (April 30, 2019, 11:13 AM), https://time.com/5169210/us-gun-control-laws-history-timeline/ [https://perma.cc/Z6LE-YNTQ].

Included in the Act was 18 U.S.C. § 922(g), which provides a list of nine categories of people for whom it is illegal "to ship or transport in interstate or foreign commerce, or possess in or affecting commerce, any firearm or ammunition; or to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce."[58] The statute's fourth category reaches anyone "who has been adjudicated as a mental defective or who has been committed to a mental institution."[59] Section 922(g)(4) was written based on the assumption that anyone who has ever been diagnosed with mental illness is more likely to engage in gun violence; while proposing the Act, House Representative Emanuel Celler remarked, "No one can dispute the need to prevent . . . mental incompetents [and] persons with a history of mental disturbances . . . from buying, owning, or possessing firearms."[60]

Section 922(g)(4) does not apply to those who have consented to being admitted to a mental hospital, nor does it include individuals who have only entered a mental institution for observation.[61] As explained by the Bureau of Alcohol, Tobacco, Firearms and Explosives,

> the term [committed to a mental institution] includes a commitment: [t]o a mental institution involuntarily; [f]or mental defectiveness or mental illness; or [f]or other reasons, such as for drug use. The term *does not include* a person in a mental institution for observation or by voluntary admission.
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> [. . . .]
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> The term "mental institution" includes mental health facilities, mental hospitals, sanitariums, psychiatric facilities, and other facilities that provide diagnoses by licensed professionals of mental retardation or mental illness, including a psychiatric ward in a general hospital.[62]

Under the due process clause, a state may only involuntarily confine an individual if the state can show "by clear and convincing evidence that the individual is mentally ill and dangerous."[63]

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58 18 U.S.C. § 922(g)(9) (2018).

59 18 U.S.C. § 922(g)(4).

60 114 CONG. REC. 21,784 (1968) (statement of Rep. Celler).

61 *See* 27 C.F.R. § 478.11 (2020).

62 BUREAU OF ALCOHOL, TOBACCO, FIREARMS & EXPLOSIVES, FEDERAL FIREARMS PROHIBITION UNDER 18. U.S.C. § 922(G)(4) PERSONS ADJUDICATED AS A MENTAL DEFECTIVE OR COMMITTED TO A MENTAL INSTITUTION (May 2009), https://www.atf.gov/file/58791/download [https://perma.cc/NZ9X-QH6K] (emphases omitted).

63 Foucha v. Louisiana, 504 U.S. 71, 80 (1992) (quoting Jones v. United States, 463 U.S. 354, 362 (1983)).

In contrast to the statute's relatively broad definition for "mentally committed," § 922(g)(4)'s definition of "adjudicated as a mental defective" is fairly narrow. The Bureau of Alcohol, Tobacco, Firearms and Explosives has explained that "[a] person is 'adjudicated as a mental defective'" for the purposes of § 922(g)(4) only if:

> a court, board, commission, or other lawful authority has made a determination that a person, as a result of marked subnormal intelligence, mental illness, incompetency, condition, or disease: [i]s a danger to himself or to others; [l]acks the mental capacity to contract or manage his own affairs; [i]s found insane by a court in a criminal case; or [i]s found incompetent to stand trial, or not guilty by reason of lack of mental responsibility, pursuant to articles 50a and 72b of the Uniform Code of Military Justice, 10 U.S.C. §§ 850a, 876b.[64]

Although federal law provides two methods for an individual to obtain relief from § 922(g)(4)'s ban, in some states neither method is available. The first method, which is currently available to no one, is found in 18 U.S.C. § 925(c).[65] In § 925(c), Congress provided that those affected by § 922(g)(4) could petition the Attorney General for relief, which the Attorney General could then discretionarily grant or deny.[66] The Attorney General delegated this power the Bureau of Alcohol, Tobacco, Firearms, and Explosives (ATF).[67] However, from 1992 and continuing to the present day, this has not been a viable method for relief.[68] In 1992, Congress banned ATF "from using 'funds appropriated herein . . . to investigate or act upon applications for relief from Federal firearms disabilities under 18 U.S.C. [§]925(c).'"[69] Every year after 1992 Congress has continued to ban funding for this purpose.[70] Without an ad-

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64 BUREAU OF ALCOHOL, TOBACCO, FIREARMS & EXPLOSIVES, *supra* note 63 (quoting 18 U.S.C. § 922(g)(4) (2018)).

65 18 U.S.C. § 925(c) (providing that "[a] person who is prohibited from possessing . . . firearms or ammunition may make application to the Attorney General for relief from the disabilities imposed by Federal laws with respect to the . . . possession of firearms").

66 *See id.*

67 *See* 28 C.F.R. § 0.130(a)(1) (2020) (delegating to the ATF the power to "[i]nvestigate, administer, and enforce the laws related to alcohol, tobacco, firearms, explosives, and arson, and perform other duties as assigned by the Attorney General, including exercising the functions and powers of the Attorney General under the following provisions of law").

68 *See* Mai v. United States, 952 F.3d 1106, 1111 (9th Cir. 2020).

69 United States v. Bean, 537 U.S. 71, 74–75 (2002) (quoting Treasury, Postal Service, and General Government Appropriations Act of 1993, Pub. L. No. 102-393, 106 Stat. 1729, 1732) (alterations in original)).

70 *Mai*, 952 F.3d at 1111.

verse ruling by ATF (which cannot occur without funding), there can be no judicial review.[71]

Congress has also provided a second method where an individual seeking relief from § 922(g)(4)'s ban could petition a state program that meets the qualifications of 34 U.S.C. § 40915.[72] Notably, Congress has no authority to force any state to create and run a federal regulatory program.[73] The most recent data from the Bureau of Justice Statistics notes that as of December 2017, thirty-one states have opted to create a relief-from-disabilities program that meets these requirements.[74] Although data after 2017 is not available from the Bureau of Justice, it appears that as of January 2020, one-third of all states remain without a qualifying relief program.[75]

Thus, in approximately nineteen states, those who have ever been involuntarily committed are unable to remove their lifetime ban of firearm ownership under § 922(g)(4). In three of these states—Michigan, Pennsylvania, and Washington—individuals have challenged this ban. This litigation has resulted in three circuit court opinions in the Third,[76] Sixth,[77] and Ninth[78] Circuits, all of which have applied the post-*Heller* framework for Second Amendment challenges, and all of which have produced different results.

B. Step One of the Two-Step Inquiry: Circuit Courts' Holdings on Whether the Second Amendment's Scope Reaches Individuals Who Have Been Previously Committed

As of April 21, 2020, three circuits have encountered constitutional challenges to § 922(g)(4)'s committed provision, and all three have taken different approaches to applying step one of the two-step inquiry for Second Amendment challenge.

First, in 2014, the Sixth Circuit in *Tyler I* held that the government did not meet its burden to establish that the Second Amendment as it was understood at the founding did not

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71 *See Bean*, 537 U.S. at 76.

72 *Mai*, 952 F.3d at 1111.

73 *See* Printz v. United States, 521 U.S. 898, 935 (1997).

74 *The NICS Improvement Amendments Act of 2007*, *supra* note 2.

75 *See* Petition for Writ of Certiorari at 6 & n.3, Beers v. Barr, 927 F.3d 150 (3d Cir. 2019) (No. 19-864) (noting that the exact number of states with a qualifying relief program is "uncertain," but that "approximately, two-thirds of states" have one).

76 *See* Beers v. Att'y Gen. U.S., 927 F.3d 150 (3d Cir. 2019), cert. granted, judgment vacated sub nom. Beers v. Barr, 206 L. Ed. 2d 933 (May 18, 2020).

77 *See Tyler II*, 837 F.3d 678 (6th Cir. 2016) (en banc).

78 *See* Mai v. United States, 952 F.3d 1106 (9th Cir. 2020).

"extend[ ] to at least some individuals previously committed to mental institutions."[79] On this basis, the Sixth Circuit held that it could move on to step two.[80] *Tyler I* remarked that § 922(g) bans firearm ownership for not only the mentally ill, but also anyone who has been involuntarily committed.[81] Invoking the statutory interpretation rule against redundancy, *Tyler I* argued that § 922(g)(4)'s reference to both the "mentally ill" *and* the "committed" means that they are separate categories, and therefore *Heller*'s presumption that bans on firearm ownership for the mentally ill could not be dispositive in this case.[82]

In 2016 in *Tyler II*, an en banc panel affirmed *Tyler I*'s step one analysis and conclusion.[83] In doing so, *Tyler II* repeated the argument that *Heller*'s dictum that firearms regulating gun ownership by felons and the mentally ill are "presumptively lawful" did not require the court to end the inquiry at step one.[84] Rather, *Tyler II* contended that it was impossible to determine whether *Heller*: (1) understood the mentally ill to be beyond the Second Amendment's scope or (2) understood the mentally ill to be within the Second Amendment's scope, but that courts should maintain a presumption that firearm regulations for the mentally ill survive under some form of heightened scrutiny.[85] Noting that there was "ambiguous historical support" for the first theory, "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 that such a regulation is 'presumptively lawful.'"[86]

Next, in 2019, the Third Circuit held the opposite, contending that that those affected by § 922(g)(4) did not fall within the scope of the Second Amendment.[87] The Third Circuit in *Beers v. Barr* applied the first step differently than *Tyler I* and *Tyler II* by instead placing the burden on the plaintiff, rather than the government, to show that Second Amendment protections apply to individuals who have been previously involuntarily com-

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79 *Tyler I*, 775 F.3d 308, 322 (6th Cir. 2014), *vacated* 837 F.3d 678 (6th Cir. 2016).

80 *See id.*

81 *Id.* at 317.

82 *Id.*

83 *See Tyler II*, 837 F.3d 678, 690 (6th Cir. 2016) (en banc).

84 *See id.* at 689–690.

85 *See id.* at 690.

86 *Id.* (quoting *Heller I*, 554 U.S. 570, 627 n.26 (2008)).

87 Beers v. Att'y Gen. U.S., 927 F.3d 150, 157 (3d Cir. 2019).

mitted. *Beers* held that the plaintiff, who had been previously involuntarily committed, was unable to differentiate "himself from the historically-barred class of mentally ill individuals"[88] and on this basis held that he was categorically excluded from the Second Amendment's scope.[89] Citing to the fact that the plaintiff was involuntarily committed fourteen years prior because he was suicidal, and because "Pennsylvania courts extended [plaintiff's] involuntary commitment on two occasions," *Beers* asserted that the plaintiff had been, at the very least, dangerous to himself or to others at one point in time.[90] Ultimately, *Beers* found this fact dispositive, by arguing (1) that the plaintiff forfeited his Second Amendment rights when he was involuntarily committed, and (2) citing Third Circuit precedent to establish that "neither passage of time nor evidence of rehabilitation 'can restore Second Amendment rights that were forfeited.'"[91] Thus, to the *Beers* court, it was irrelevant that the plaintiff had been committed fourteen years prior[92] and that he claimed that he was "now rehabilitated."[93]

Beers also argued that at the time of the founding, there was an understanding that an individual did not have a right to firearm ownership if the individual was dangerous to the public.[94] Additionally, *Beers* could find "no historical support for . . . restoration of Second Amendment rights," and concluded that "federal courts are ill-equipped to determine whether any particular individual who was previously deemed mentally ill should have his or her firearm rights restored."[95]

Providing the least guidance of the three circuits, the Ninth Circuit in *Mai v. United States* declined to hold that § 922(g)(4)'s ban implicates the Second Amendment, but instead "assume[d]" that it did "without deciding."[96] The Ninth Circuit did, however, note that the government had "presented a strong argument that . . . § 922(g)(4) does not burden Second Amendment rights."[97] Citing *Beers*, *Mai* similarly conflated those involuntarily committed to those with mental illness and noted that, historically, society has not allowed the mentally ill

88 *Id.*
89 *See id.* at 157–59.
90 *See id.* at 159.
91 *See id.* (quoting Binderup v. Att'y Gen. U.S., 836 F.3d 336, 350 (3d Cir. 2016)).
92 *See id.* at 152.
93 *See id.* at 158.
94 *Id.*
95 *Id.* at 159.
96 Mai v. United States, 952 F.3d 1106, 1115 (9th Cir. 2020).
97 *Id.* at 1114.

to own firearms.[98] The plaintiff in *Mai* argued that in light of "historical evidence," *Heller*'s reference to the "mentally ill" refers only to the *currently* mentally ill.[99] Based on this reasoning, the plaintiff then asked *Mai* to adopt *Tyler II*'s holding that the government cannot permanently ban individuals from owning firearms based solely on their status as previously committed mental patients. *Mai* did not comment on the validity of the plaintiff's argument and instead held that it was unnecessary for the court to decide whether the government's or the plaintiff's characterization of the historical record was correct. Rather, the court would "assume, without deciding, that § 922(g)(4), as applied to Plaintiff, burdens Second Amendment rights"[100] so that the court could then move onto the second step of the inquiry.[101]

C. Step Two of the Two-Step Inquiry: Circuit Courts' Use of Intermediate Scrutiny to Evaluate the Constitutionality of 18 U.S.C. § 922(g)(4)'s Committed Provision

Although the Third Circuit's analysis in *Beers* ended on step one of the inquiry,[102] the Sixth Circuit in both *Tyler I* and *Tyler II* and the Ninth Circuit in *Mai* continued on to the second step of the inquiry by applying heightened scrutiny.

The Sixth Circuit in *Tyler v. Hillsdale County Sheriff's Dep't* (*Tyler I*) applied strict scrutiny to an individuals as-applied challenge to § 922(g)(4)'s committed provision.[103] The Sixth Circuit later vacated *Tyler I* and reheard the case en banc in *Tyler v. Hillsdale County Sheriff's Dep't* (*Tyler II*).[104] *Tyler II* applied intermediate scrutiny to the plaintiff's challenge.[105]

Although *Tyler I* is no longer good law, its application of strict scrutiny to § 922(g)(4) remains relevant given that only two circuits have applied *any* form of scrutiny to § 922(g)(4)'s committed provision. Given that *Tyler II* spawned two concurrences, four concurrences in part, and a dissent,[106] the question of what, if any, form of scrutiny applies to as-applied challenges to § 922(g)(4) is far from settled.

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98 *See id.* at 1114 (citing *Beers*, 927 F.3d at 157–58).
99 *Id.*
100 *Id.* at 1115.
101 *See id.*
102 *See* section I.B.1 *supra*.
103 *Tyler I*, 775 F.3d 308, 328 (6th Cir. 2014).
104 *Tyler II*, 837 F.3d 678 (6th Cir. 2016) (en banc).
105 *Id.* at 692.
106 *Id.* at 680–81.

In *Tyler I* and *Tyler II*, the plaintiff was a seventy-four-year-old man whose daughters involuntarily committed him to a mental institution following a messy divorce thirty-years prior.[107] Before his admittance, the plaintiff had been "crying non-stop, not sleeping, depressed, and suicidal."[108] The plaintiff was released from the institution approximately fourteen to thirty days later, took no prescription medicine during his stay, and received no therapy after his release.[109]

Tyler I began its analysis by discussing the differing burdens on the government for intermediate versus strict scrutiny. Under intermediate scrutiny, the government must merely show that a law is "substantially related to an important governmental objective."[110] Under strict scrutiny, the burden on the government is much higher, as the government must prove "that a challenged law 'furthers a compelling interest and is narrowly tailored to achieve that interest.'"[111]

After acknowledging that the majority of circuit courts typically apply some form of intermediate scrutiny to Second Amendment challenges,[112] *Tyler I* maintained that Supreme Court precedent nevertheless creates a "presumption" that when a "fundamental right is at stake," strict scrutiny should apply.[113] *Tyler I* also noted that when the Supreme Court applies intermediate scrutiny, "the Court has expressly indicated a reason for downgrading from strict scrutiny."[114] *Tyler I* further explained that because the Supreme Court has not provided an express reason for a court to apply intermediate scrutiny to Second Amendment challenges, this provided an additional reason to apply strict scrutiny to the plaintiff's challenge of § 922(g)(4)'s committed provision.[115] More fundamentally, *Tyler I* argued that intermediate scrutiny "ha[d] no basis

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107 *See id.* at 683.

108 *Tyler I*, 775 F.3d at 314.

109 *See Tyler II*, 837 F.3d at 683.

110 *Tyler I*, 775 F.3d at 323 (quoting Clark v. Jeter, 486 U.S. 456, 461 (1988)).

111 *Id.* (quoting Citizens United v. Fed Election Comm'n, 558 U.S. 310, 340 (2010)).

112 *Id.* at 324–26 (discussing the various forms of intermediate scrutiny that the First, Second, Third, Fourth, Fifth, Seventh, Ninth, Tenth, and the D.C. Circuits have applied to Second Amendment challenges).

113 *Id.* at 326–27 (citing Washington v. Glucksberg, 521 U.S. 702, 721 (1997)); *Washington*, 521 U.S. at 762 (Souter, J., concurring in the judgment); Poe v. Ullman, 367 U.S. 497, 548 (1961) (Harlan, J., dissenting).

114 *Tyler I*, 775 F.3d at 327 (noting the Supreme Court applies intermediate scrutiny to areas such as commercial speech and content-neutral regulation and has expressly explained why it has "downgraded" to intermediate scrutiny in these areas).

115 *See id.* at 328.

in the Constitution"[116] and that *Heller*'s refusal to endorse Justice Breyer's "interest-balancing" approach only further indicated that strict scrutiny was the proper approach.[117]

Upon applying strict scrutiny to § 922(g)(4)'s committed provision, *Tyler I* held that § 922(g)(4)'s committed provision was unconstitutional as applied to the plaintiff.[118] Although agreeing with the government that § 922(g)(4)'s committed provision furthered compelling government interests—namely preventing community gun violence and suicide, *Tyler I* held that § 922(g)(4)'s committed provision failed strict scrutiny because, as applied to the plaintiff, the provision was not "narrowly tailored to achieve [the government's] interests."[119] Notably, *Tyler I* argued that Congress' inclusion of a relief-from-disabilities program in the Gun Control Act revealed Congress' determination that individuals who have been previously committed to a mental institution are not threatening enough as a "class" to require "that all members must be permanently deprived of firearms."[120] *Tyler I* further pointed out that had the plaintiff lived in a different state that had created a federally approved relief-from-disabilities program, the Plaintiff would have had the opportunity to restore his Second Amendment rights given that he was not a threat to himself or others.[121] In light of the above, *Tyler I* concluded that § 922(g)(4) was not sufficiently tailored as applied to the Plaintiff, and therefore failed strict scrutiny and was unconstitutional, as-applied.[122]

Two years later, *Tyler II* reversed *Tyler I*, holding that § 922(g)(4) was unconstitutional as applied to the plaintiff under *intermediate* scrutiny. *Tyler II* explained that its choice between intermediate vs. strict scrutiny "should be informed by "(1) 'how close the law comes to the core of the Second Amendment right,' and (2) 'the severity of the law's burden on the right.'"[123] First, *Tyler II* rejected the plaintiff's assertion that Congress does not have the power to categorically prohibit a group of individuals from owning firearms due to their mental health history.[124] *Tyler II* then argued that the court could not

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116 *Id.*
117 *See id.*
118 *Id.* at 334.
119 *Id.* at 331, 334.
120 *Id.* at 333.
121 *See id.* at 333–34.
122 *Id.* at 334.
123 *See Tyler II*, 837 F.3d 678, 690 (6th Cir. 2016) (en banc) (quoting United States v. Chovan, 735 F.3d 1127, 1138 (9th Cir. 2013)).
124 *Id.* at 691.

apply strict scrutiny without "invert[ing] *Heller's* presumption that prohibitions on the mentally ill are lawful."[125] In doing so, *Tyler II* conflated the plaintiff's *thirty-year-old*, temporary depressive episode with *present* mental illness. Additionally, *Tyler II*, relying solely on a Tenth Circuit opinion, argued that because firearms are dangerous, the Second Amendment right is distinguishable from other central constitutional rights, and therefore courts should not require the government to reach "too high a burden . . . to justify its gun safety regulations."[126] Lastly, directly refuting *Tyler I*'s conclusion that § 922(g)(4) was overly broad, *Tyler II* conceded that § 922(g)(4) was a "severe restriction," but argued that it was nevertheless narrow because it only burdened a "narrow class of individuals who are not at the core of the Second Amendment."[127]

Upon determining that intermediate scrutiny was the relevant standard, *Tyler II* upheld *Tyler I*'s holding that § 922(g)(4) was unconstitutional as applied to the plaintiff.[128] *Tyler II* provided that to survive intermediate scrutiny, a statute must satisfy two factors.[129] First, the government's goal in passing the statute must be "significant, substantial, or important."[130] Second, there must be a "reasonable fit between the challenged regulation and the asserted objective."[131] *Tyler II* conceded that the first factor was satisfied because the government's interest in reducing gun violence was compelling.[132] *Tyler II* then held that the second factor was not met because § 922(g)(4) created a permanent ban, and the government did not meet its duty to present enough evidence that those who have been previously committed present a "continued risk" for gun violence.[133]

On March 11, 2020, the Ninth Circuit returned to this issue in *Mai v. United States*.[134] At seventeen years old, the plaintiff in *Mai* was deemed by the state of Washington to be "mentally ill and dangerous."[135] He was involuntarily committed to a mental institution for over nine months, but he was eventually released. Seventeen years later, the plaintiff was

125 *Id.*
126 *Id.*
127 *Id.*
128 *Id.* at 693, 699.
129 *Id.* at 693.
130 *Id.*
131 *Id.*
132 *Id.*
133 *Id.* at 696.
134 *See* Mai v. United States, 952 F.3d 1106, 1115 (9th Cir. 2020).
135 *Id.* at 1109.

steadily employed, claimed to no longer have mental illness, and filed suit in federal court to challenge the constitutionality of § 922(g)(4) as applied to him.[136]

When determining which level of scrutiny to apply, *Mai* applied the same test *Tyler II* applied, which provided that the appropriate level of scrutiny was dependent upon: "(1) how close the law comes to the core of the Second Amendment right and (2) the severity of the law's burden on the right."[137] *Mai* first noted that post-*Heller* courts have nearly unanimously applied intermediate scrutiny to Second Amendment challenges—strict scrutiny would only be appropriate if the challenged regulation substantially burdened the "core" of a Second Amendment right.[138] *Mai* asserted that the Second Amendment's core "is 'the right of law-abiding, responsible citizens to use arms in defense of hearth and home.'"[139] Under the due process clause, a state may only involuntarily confine an individual if the state can show "by clear and convincing evidence that the individual is mentally ill and dangerous."[140] Likely relying on this fact, *Mai* argued that an individual who has been involuntarily committed by definition cannot be a "law-abiding, responsible citizen," and therefore any individual who has ever been previously committed "falls well outside the core of the Second Amendment right."[141]

Mai then applied the identical standard as *Tyler II* for how to determine if a statute survives intermediate scrutiny: (1) "the government's statutory objective must be 'significant, substantial, or important,'" and (2) "there must be a 'reasonable fit' between the challenged law and that objective."[142] Again, like *Tyler II*, *Mai* concluded that the government's interest in preventing gun violence and suicide was substantial.[143] Finally diverging from *Tyler II*, however, *Mai* concluded that because the government had sufficiently established, *as a category*, that the involuntarily committed were at an increased risk for engaging in gun violence, § 922(g)'s lifetime ban survived intermediate scrutiny.[144]

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136 *See id.* at 1110, 1112.
137 *Id.* at 1115 (quoting United States v. Chovan, 735 F.3d 1127, 1138 (9th Cir. 2013)).
138 *Id.*
139 *Id.* (quoting *Chovan*, 735 F.3d at 1138).
140 Foucha v. Louisiana, 504 U.S. 71, 80 (1992) (quoting Jones v. United States, 463 U.S. 354, 362 (1983)).
141 *Mai*, 952 F.3d at 1115.
142 *Id.* (quoting Silvester v. Harris, 843 F.3d 816, 821–22 (9th Cir. 2016)).
143 *Id.* at 1116.
144 *See id.* at 1120–21.

III
POLICY GOALS POINT IN FAVOR OF ENSURING THAT PRESENTLY MENTALLY HEALTHY INDIVIDUALS HAVE THE OPPORTUNITY TO PETITION FOR RELIEF FROM § 922(G)(4)'S FIREARM BAN

Congress passed § 922(g)(4) with a noble goal in mind—to reduce gun violence by keeping guns out of the hands of the mentally ill.[145] But was its approach overbroad? Some critics argue that firearm bans for the involuntarily committed do not further their purported goal to reduce gun violence.[146] Some scholars have directly questioned the efficacy of any firearm ban for the mentally ill.[147]

Overbroad mental-illness-related regulations run the risk of stigmatizing mental illness and reducing the chance that individuals will seek treatment.[148] For example, some researchers argue that mental-illness-related firearm bans, such as lifetime bans for those who have been previously committed, may actually *increase* the risk of suicide by increasing the stigma surrounding receiving mental health treatment.[149] This directly contradicts the policy rationales in both *Mai*[150] and

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145 *See* 114 CONG. REC. 21,784 (1968) (statement of Rep. Celler).

146 *See, e.g.*, Katherine L. Record & Lawrence O. Gostin, *A Robust Individual Right to Bear Arms Versus the Public's Health: The Court's Reliance on Firearm Restrictions on the Mentally Ill*, 6 CHARLESTON L. REV. 371, 378 (2012) (arguing that because categorizations such as "involuntary commitment, adjudicated dangerousness, and receipt of verdict of not guilty by reason of insanity. . . . [o]ften follow rather than precede acts of violence, they have limited utility").

147 *See generally* Susan McMahon, *Gun Laws and Mental Illness: Ridding the Statutes of Stigma*, 5 U. PA J. L. & PUB. AFF. 1, 24 (2020) (explaining that the psychiatric literature "provides little to no support" for the assertion that gun bans tied to previously diagnosed mental illness reduce gun violence).

148 Additionally, some lower courts and scholars have also argued that § 922(g)(4) violates the ADA by discriminating against the mentally ill. *See* Catherine Dowie, *Constitutional Law—Impact of Involuntary Commitments and Mental Illness on Second Amendment Rights*—Tyler v. Hillsdale Cty. Sherriff's Dep't, *837 F.3d 678 (6th Cir. 2016)*, 13 J. HEALTH & BIOMEDICAL L., 275, 279, & n.21 (2018) (listing judge's opinions and court briefings that suggest that firearm bans for the mentally ill have the potential to violate the ADA). Title II of ADA provides: "no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity." 42 U.S.C. § 12132 (2018). Whether or not § 922(g)(4) violates the ADA is beyond the scope of this Note. However, it is reasonable to conclude that § 922(g)(4) has the potential to make individuals *feel* that they are being unlawfully discriminated against, which in turn has the potential to lead some individuals to forego mental health treatment rather than be subject to a law that they perceive as discriminatory.

149 *See* McMahon, *supra* note 147, at 45–46.

150 Mai v. United States, 952 F.3d 1106, 1120–21 (9th Cir. 2020).

Tyler II[151] which both quickly conceded that § 922(g)(4) furthered the government's interest in preventing suicide.

Additionally, individuals who face a permanent firearm-ownership ban due to their previous commitment in a mental institution run the risk of feeling excluded from their community's gun culture. This will disincentivize people from trying to get their loved ones committed. Undeniably, gun culture and gun ownership are significant parts of many Americans' lives. As revealed by a 2017 Pew study of gun owners: fifty-eight percent of men and forty-three percent of women often or sometimes engage in target shooting; thirty-seven percent of men and twenty-eight percent of women often or sometimes go hunting; twenty-two percent of men and twenty-seven percent of women often or sometimes attend gun shows; forty-three percent of men and thirty-three percent of women often or sometimes watch gun-oriented videos; thirty-nine percent of men and twenty-eight percent of women often or sometimes visit gun-oriented websites; and eleven percent of men and twelve percent of women often or sometimes listen to gun-oriented radio shows or podcasts.[152] Of those who own guns, sixty-seven percent say that a "major reason why they own a gun" is for protection, thirty-eight percent say that a major reason is hunting, and thirty percent say the same for sport shooting.[153] Given America's prevalent gun culture in large swaths of the country, the current lack of relief from disabilities programs in approximately nineteen states is illogical and unfair. More specifically, this lack of opportunity relief denies non-dangerous individuals the opportunity to fully participate in their community's gun-related pastimes.

IV
A PROPOSED SOLUTION: WHY JUDGE SUTTON'S DESCRIPTION OF *HELLER*'S EXCEPTIONS AS AN "OFF SWITCH" TO THE RIGHT TO BEAR ARMS, ALTHOUGH ORIGINALLY USED TO REJECT TIERS OF REVIEW, CAN BE USED TO EXPLAIN WHY COURTS SHOULD APPLY STRICT SCRUTINY TO § 922(G)(4)'S COMMITTED PROVISION

The core of the Second Amendment consists of "the right of law-abiding, responsible citizens to use arms in defense of

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151 *See Tyler II*, 837 F.3d 678, 681 (6th Cir. 2016) (en banc).

152 Kim Parker, Juliana Menasca Horowitz, Ruth Igielnik, J. Baxter Oliphant & Anna Brown, *America's Complex Relationship with Guns*, PEW RESEARCH CTR. (June 22, 2017), https://www.pewsocialtrends.org/2017/06/22/americas-complex-relationship-with-guns/ [https://perma.cc/SN8Z-5NAD].

153 *Id.*

hearth and home."[154] In its current form, § 922(g)(4)'s committed provision is overbroad because it permanently deprives formerly ill individuals of the core of their Second Amendment rights.

As discussed in Part I *supra*, The Supreme Court in *Heller* foreclosed the possibility of applying rational basis review to a Second Amendment challenge[155] but otherwise did not provide guidance as to whether intermediate or strict scrutiny is appropriate when analyzing a Second Amendment challenge to a firearm regulation.[156] When deciding whether to apply intermediate or strict scrutiny to a law that burdens a person's Second Amendment rights, circuit courts typically examine "(1) how close the law comes to the core of the Second Amendment right and (2) the severity of the law's burden on the right."[157] After conducting this analysis, courts almost always apply intermediate scrutiny to Second Amendment challenges.[158] Most Second Amendment regulations, however, do not implicate the very core of the Second Amendment—§ 922(g)(4) undeniably does.

Section 922(g)(4)'s lifetime ban *permanently* deprives a specific class of people—individuals who had once exhibited signs of mental illness and danger to themselves or others—of their core constitutional right to possess firearms in their homes. Some members of this class are able to prove that, in the present day, medical professionals consider them cured. Despite this truth, certain states' enforcement of § 922(g)(4) denies such individuals the opportunity to restore their fundamental Second Amendment right to possess a gun in the home. Thus, at a minimum, § 922(g)(4)'s lifetime ban fails strict scrutiny as

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154 *See Heller I*, 554 U.S. 570, 635 (2008).

155 *See id.* at 628 n.27 (2008) ("If all that was required to overcome the right to keep and bear arms was a rational basis, the Second Amendment would be redundant with the separate constitutional prohibitions on irrational laws, and would have no effect.").

156 *See id.* at 628–29 (noting that challenged regulation was so burdensome on individuals to protect themselves in their homes that the regulation would be unconstitutional "[u]nder any of the standards of scrutiny that [the Court has] applied to enumerated constitutional rights").

157 Mai v. United States, 952 F.3d 1106, 1115 (9th. Cir. 2020) (quoting United States v. Chovan, 735 F.3d 1127, 1138). *See, e.g.*, United States v. Masciandaro, 638 F.3d 458, 470 (4th Cir. 2011) ("[W]e assume that any law that would burden the 'fundamental,' core right of self-defense in the home by a law-abiding citizen would be subject to strict scrutiny.").

158 *See, e.g.*, Silvester v. Harris, 843 F.3d 816, 823 (9th Cir. 2016) (noting that the case law in the Ninth circuit and its "sister circuits thus clearly favors the application of intermediate scrutiny in evaluating the constitutionality of firearms regulations, so long as the regulation burdens to some extent conduct protected by the Second Amendment").

applied to presently healthy individuals who wish to possess firearms in their homes.

This Note proposes that Justice Sutton's partial concurrence in *Tyler II*, although it advocates for an approach that eschews tiers of review,[159] is nonetheless instructive as to why courts that apply tiers of review to Second Amendment challenges should apply strict scrutiny to challenges against § 922(g)(4)'s committed provision.

Judge Sutton's explanation of how § 922(g)(4) violated the plaintiff's core Second Amendment rights is refreshingly succinct and straightforward. Judge Sutton first suggests that to resolve *Tyler II*, all you need only know are the following three facts: Clifford Tyler has been (1) classified by federal law as mentally ill for the rest of his life; (2) denied the opportunity to ever again possess a gun; and (3) denied the opportunity to submit evidence that, thirty years after being released from a mental institution after thirty days, he is not a threat to himself or others.[160] Judge Sutton then reminds the reader of *Heller*'s recognition that some Americans are subject to "longstanding prohibitions on the possession of firearms by felons and the mentally ill."[161] Judge Sutton then asserts that no one disagrees that *Heller*'s exception referred to felons and the mentally ill in the present tense.[162]

Later in his concurrence, Judge Sutton then asks the reader to consider the *Heller* exception as an "off switch to the right to bear arms."[163] If a person is presently a felon or mentally ill, *Heller*'s exceptions have turned the switch off, and she has no right to bear arms. For everyone else, the switch stays on, and they are protected by the Second Amendment.

Although Judge Sutton goes on to suggest that "[t]iers of review have nothing to do" with this analysis,[164] let's instead tack on his switch analogy to the post-*Heller* two-step inquiry.

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159 *See* Tyler v. Hillsdale Cty. Sheriff's Dep't (*Tyler II*), 837 F.3d 678, 707–08 (6th Cir. 2016) (en banc) (Sutton, J. concurring in part).

160 *See id.* at 707–08.

161 *Id.* at 708 (quoting *Heller I*, 554 U.S. 570, 626–27 (2008) (internal quotation marks omitted).

162 *Id.* This is a logical assertion, given that in *Heller*, the petitioners argued that if the Court held that the handgun ban was unconstitutional, the respondent could acquire a handgun license assuming he was not disqualified, a qualification the Court took to mean someone who "is not a felon and is not insane." *See Heller*, 554 U.S. at 631. Notably, the court presumed that somebody would be disqualified if they were "insane," and did not provide a more expansive categorization such as "potentially insane" or "previously committed."

163 *Tyler II*, 837 F.3d at 708.

164 *Id.* at 710.

Imagine a person, such as the plaintiffs in *Beers*, *Tyler*, or *Mai*, who was involuntarily committed to a mental institution over a decade ago and now desires the opportunity to prove to the government that she does not serve as a threat to herself or others. Let's call her BTM. Like the plaintiffs in *Beers*, *Tyler*, and *Mai*, BTM does not qualify as someone who has been "adjudicated as mentally defective" for the purposes of § 922(g)(4). Thus, *Heller*'s switch remains on because BTM has no present diagnosis as mentally ill. This person remains protected by the Second Amendment, and thus step one of the two-step inquiry is satisfied.

Moving on to step two of the two-step inquiry, BTM is now allowed to present evidence to confirm that she is not mentally ill. She then presents sufficient evidence to establish this fact. Under Justice Sutton's approach where no tier of scrutiny is needed, the analysis ends here. Section 922(g)(4) is unconstitutional as applied to BTM. Full stop. Applying strict scrutiny, the result is the same—as long as the switch stays on, *Heller*'s exceptions do not apply to BTM. Said differently, when determining which level of scrutiny to apply courts look at: "(1) how close the law comes to the core of the Second Amendment right and (2) the severity of the law's burden on the right."[165] A lifetime ban on owning firearms necessarily permanently deprives someone of the core of their Second Amendment right, which consists of "the right of law-abiding, responsible citizens to use arms in defense of hearth and home."[166] This is where *Tyler II* and *Mai* both got it wrong in the scrutiny analysis—both baselessly assumed that a person's status as having been involuntarily committed renders them "not law abiding" or "responsible" but this is a tortured reading of the plain language of *Heller*.[167] BTM is not a felon and it is not a crime to be involuntarily committed. Thus, she must be classified as "law-abiding." Additionally, she has not been adjudicated as mentally ill, so she also is not "mentally ill," and BTM has had no

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165 *See, e.g.*, Mai v. United States, 952 F.3d 1106, 1115 (9th. Cir. 2020) (quoting United States v. Chovan, 735 F.3d 1127, 1138 (9th Cir. 2013)).

166 *See Heller I*, 554 U.S. 570, 635 (2008).

167 See *Mai*, 952 F.3d at 1115 for the contention that "[r]egardless of present-day peaceableness, a person who required formal intervention and involuntary commitment by the State because of the person's dangerousness is not a 'law-abiding, responsible citizen.'"; *see also Tyler II*, 837 F.3d at 691 ("To hold, as Tyler requests, that he 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. . . . Reviewing § 922(g)(4) under strict scrutiny would invert *Heller*'s presumption that prohibitions on the mentally ill are lawful.").

opportunity to prove to a relief board or a court that she is responsible enough to own a firearm. This Note proposes that although both Judge Sutton's approach and the application of strict scrutiny via the traditional two-step inquiry reach the correct result, the latter approach is nevertheless useful given that courts across the country overwhelmingly feel bound by their prior case law to apply tiers of review to Second Amendment challenges.[168]

Additionally, by confirming that scrutiny analysis applies, § 922(g)(4)'s committed provision remains facially constitutional, because statistically some previously involuntarily committed individuals *are* mentally ill even though they have not been formally adjudicated as mentally ill. In those situations, *Heller*'s exceptions have switched the right to bear arms off. The Second Amendment's scope no longer reaches these individuals, even though a court has not yet formally adjudicated these individuals as mentally ill, and therefore these individuals *should* be blocked from buying firearms even during a brief window when they have not been formally adjudicated as mentally ill. Thus, applying strict scrutiny for challenges to § 922(g)(4)'s committed provision best balances society's need to keep the mentally ill and those around them safe while also protecting all citizens' core Second Amendment right recognized in *Heller* to self-defense.

CONCLUSION

By applying strict scrutiny to as-applied challenges to § 922(g)(4)'s committed provision, individuals with past mental illness that required treatment in a mental institution will be treated with greater dignity. These individuals will be treated with greater dignity because they will be treated more uniformly and fairly under the law. If courts applied strict scrutiny to these challenges, individuals in all fifty states would have the opportunity to challenge lifetime bans imposed on them by § 922(g)(4), and those that are presently mentally healthy would have their Second Amendment rights restored.

If Congress determines that it is too costly for courts to adjudicate as-applied challenges to § 922(g)(4), they can pass legislation that reinstates funding for the ATF to process such claims. What Congress cannot constitutionally do, however, is revoke funding for the ATF (as it has already done) and then

168 *See supra* note 12 and accompanying text.

deny involuntarily committed plaintiffs *any* forum for adjudicating claims for relief from § 922(g)(4)'s ban.

Keeping guns out of the hands of those who seek to inflict violence on themselves or others is a noble goal. However, it is entirely illogical to suggest that a lifetime firearm ban without the possibility of relief for the involuntarily committed furthers this goal. If it did, Congress certainly would not currently fund and otherwise encourage the existence of programs in thirty-one states that currently allow individuals to challenge their firearm ownership ban under § 922(g)(4).

Receiving mental health treatment should not transform a responsible, law-abiding citizen into a second-class citizen under the Second Amendment. It is deeply troubling that courts have used individuals' histories of receiving mental illness treatment as a reason to permanently deprive individuals of their fundamental rights. As long as *Heller* remains good law, and as long as courts continue to apply tiers of review to Second Amendment challenges, strict scrutiny remains the only appropriate tier of review for firearm regulations as overbroad as § 922(g)(4)'s committed provision.