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Once Mentally Ill, Always So? Maybe Yes. Maybe No: Addressing the 18 U.S.C. § 922(g)(4) Circuit Split and Lifetime Gun Bans for the (Formerly) Mentally Ill

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Comment*

Once Mentally Ill, Always So? Maybe Yes. Maybe No: Addressing the 18 U.S.C. § 922(g)(4) Circuit Split and Lifetime Gun Bans for the (Formerly) Mentally Ill

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* Melissa J. Araiza, J.D., 2022, University of Nebraska College of Law; B.A., 2014, University of Nebraska at Lincoln. This Comment is dedicated to my husband, Aaron Araiza, our son Alaric, my parents, Pam and Bob West, and the many other family members, friends, and mentors who gave me their constant love, guidance, and support both during law school and beyond. Without them, I could accomplish nothing. Special thanks also go to the *Nebraska Law Review* team who helped prepare this Comment for publication.

I. INTRODUCTION

Under 18 U.S.C. § 922(g)(4), an individual who is adjudicated as mentally ill or who has received a prior involuntary commitment to a mental health institution may not possess a firearm.[1] This federal code section was first established in the late 1960s, yet it remains unclear whether this regulation on firearms dispossession is a permanent or temporary disability.[2] In *Tyler v. Hillsdale County Sheriff's Department* (*Tyler III*), Clifford Tyler brought an as-applied constitutional challenge against § 922(g)(4), alleging that the statute was unconstitutional because it prevented him from possessing a firearm even though he was no longer mentally ill and posed no danger to himself or others.[3] In *Beers v. Attorney General* (*Beers II*), Bradley Beers claimed that § 922(g)(4) was unconstitutional because as applied, it continued to restrict his ability to purchase or own a gun even though he was rehabilitated from the condition that led to his involuntary commitment.[4] In *Mai v. United States* (*Mai III*), Duy Mai also challenged § 922(g)(4) as unconstitutional as applied to his circumstances because he had successfully proven to a Washington court that he was

1. 18 U.S.C. § 922(g)(4) (West). This provision declares it unlawful for any person

> who has been adjudicated as a mental defective or who has been committed to a mental institution . . . to ship or transport in interstate or foreign commerce, or possess in or affecting commerce, any firearm or ammunition; or to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce.

Id.

2. *See* discussion *infra* Parts II, V (reviewing the history of § 922(g)(4) and its application in various circuits).
3. Tyler v. Hillsdale Cnty. Sheriff's Dep't, 837 F.3d 678 (6th Cir. 2016).
4. Beers v. Att'y Gen. U.S., 927 F.3d 150 (3d Cir. 2019), *vacated as moot sub nom.* Beers v. Barr, 140 S. Ct. 2758 (2020).

no longer mentally ill, yet federal restrictions continued to prevent him from purchasing a firearm.[5]

For Clifford Tyler, the Sixth Circuit Court of Appeals determined that the government had not offered data sufficient to justify a lifetime ban where Tyler had been rehabilitated.[6] Bradley Beers's claim before the Third Circuit Court of Appeals was unsuccessful after the court held that Beers was not protected by the Second Amendment at all; however, Beers was able to later obtain a firearm after Pennsylvania's relief-from-disabilities program was certified by the federal government.[7] Duy Mai's claim was denied entirely after the Ninth Circuit Court of Appeals found that the government had offered data sufficient to justify a lifetime ban, irrespective of Mai's rehabilitation.[8]

In each as-applied challenge, the government relied on the same meta-analysis of data to support § 922(g)(4). The *Tyler III* court found this meta-analysis insufficient to justify a lifetime ban against rehabilitated individuals and thus held that § 922(g)(4) did not survive intermediate scrutiny.[9] The *Mai III* court, on the other hand, found that the meta-analysis was sufficient to justify a lifetime ban regardless of rehabilitation and that the statute survived intermediate scrutiny.[10] But because the Ninth Circuit's application of the intermediate scrutiny standard was too broad and because it overlooked critical flaws in the data, future courts considering as-applied challenges to § 922(g)(4) should follow the precedent set by the Sixth Circuit Court of Appeals in *Tyler III*, rather than that set by the Ninth Circuit in *Mai III*. To impose such a severe restriction on Second Amendment rights as a lifetime ban, the government must provide stronger justification using more accurate data and tailor enforcement with a temporal limitation.

Part II of this Comment provides a background on 18 U.S.C. § 922 and the addition of subsection (g)(4). Part III discusses various challenges to subsection (g)(4) as brought by diversely situated plaintiffs in the Sixth, Third, and Ninth Circuits. Part IV examines the varied application of intermediate scrutiny in each circuit based on factors applicable to each claimant. Finally, Part V argues that the Ninth Circuit's panel opinion incorrectly applied the intermediate scrutiny

5. Mai v. United States, 952 F.3d 1106 (9th Cir. 2020), *reh'g en banc denied*, 974 F.3d 1082 (9th Cir. 2020).
6. *See* discussion *infra* section III.A, subsection IV.B.1 (detailing Clifford Tyler's as-applied challenge to § 922(g)(4)).
7. *See* discussion *infra* section III.B (detailing Bradley Beers's as-applied challenge to § 922(g)(4)).
8. *See* discussion *infra* section III.C, subsection IV.B.2 (detailing Duy Mai's as-applied challenge to § 922(g)(4)).
9. *See* discussion *infra* subsection IV.B.1 (reviewing the Sixth Circuit's application of intermediate scrutiny).
10. *See* discussion *infra* subsection IV.B.2 (reviewing the Ninth Circuit's application of intermediate scrutiny).

standard, reducing the test to little more than a rational basis review and drawing incorrect conclusions about subsection (g)(4)'s authority to create a lifetime gun ban. Part V further argues that the Sixth Circuit, which determined that the data supplied by the government was inadequate to justify a *lifetime* ban for the *formerly* mentally ill, should be the authoritative example used by future courts to consider the constitutionality of 18 U.S.C. § 922(g)(4).

II. HISTORY OF 18 U.S.C. § 922(g)(4)

In March of 1963, Lee Harvey Oswald purchased a bolt-action rifle by mail under a fictitious name.[11] On November 22, 1963, Oswald used this rifle to assassinate President John F. Kennedy.[12] In the wake of the assassination, multiple pieces of legislation were proposed to combat increasing gun violence and eliminate mail order gun loopholes, yet each piece of legislation met strong opposition and failed to pass.[13] Just a few years later, racial tensions erupted in civil unrest and violence: in 1967, there were 159 race riots that left eighty-five dead and resulted in 11,000 arrests;[14] in 1968, both Martin Luther King Jr. and Robert F. Kennedy were assassinated.[15]

11. EARL WARREN ET AL., REPORT OF THE PRESIDENT'S COMMISSION ON THE ASSASSINATION OF PRESIDENT KENNEDY 119 (1964), https://www.archives.gov/research/jfk/warren-commission-report/chapter-4.html#[https://perma.cc/7HR9-VVD4]. To order the rifle, Oswald attached a coupon from an advertisement in *American Rifleman* to a purchase order under the name A. Hiddel, to be delivered to a P.O. Box in Texas. *Id.* Oswald also purchased a revolver from a different company using the same mail-order method. *Id.* at 174.

12. *Id.* at 61. Oswald shot President John F. Kennedy as the presidential motorcade drove past the Texas School Book Depository in Dallas, Texas. *Id.*

13. A Bill to Regulate the Interstate Shipment of Firearms, S. 1975, 88th Cong. (1963); A Bill to Amend the Federal Firearms Act of 1938, S. 1592, 89th Cong. (1965); *see* Jon Michaud, *The Birth of the Modern Gun Debate*, NEW YORKER (Apr. 19, 2012), https://www.newyorker.com/books/double-take/the-birth-of-the-modern-gun-debate [https://perma.cc/F3FJ-EK3S].

14. Sam Hill, *Racism, Police Killings and Riots. This Was America in 1967 and in 2020. Will This Be Us in 2070, Too?*, NEWSWEEK (June 4, 2020, 2:00 PM), https://www.newsweek.com/fifty-years-cycle-riots-police-racism-america-1508792 [https://perma.cc/AZ3K-4VA6].

15. On April 4, 1968, James Earl Ray assassinated Martin Luther King Jr. as King stood on a balcony outside his second-floor room at the Lorraine Motel in Memphis, Tennessee. *Assassination of Martin Luther King, Jr.*, MARTIN LUTHER KING, JR. RSCH. & EDUC. INST., https://kinginstitute.stanford.edu//assassination-martin-luther-king-jr [https://perma.cc/MQ4Z-URSD] (last visited Dec. 6, 2021). On June 5, 1968, an assassin shot Robert F. Kennedy, presidential candidate and brother of former President John F. Kennedy, at a campaign event inside the Ambassador Hotel in Los Angeles, California. Robert Kennedy died a day later on June 6, 1968. William Manchester, *Robert F. Kennedy*, BRITANNICA, https://www.britannica.com/biography/Robert-F-Kennedy [https://perma.cc/2RBF-954H] (Nov. 16, 2021).

The violence, high-profile shootings, and assassinations dramatically changed the debates surrounding gun regulation.[16] In response, Senator Thomas Dodd introduced the Omnibus Crime Control and Safe Streets Act of 1968.[17] "Because of the revival of public sentiment, the incessancy of the gun debate, and the drastic amendments made by the National Rifle Association," this bill passed Congress and was enacted on October 22, 1968.[18] This Act created 18 U.S.C. § 922, which at first did not discuss mental status in terms of firearm possession.[19] Later that year, Congress also passed the Gun Control Act of 1968 (GCA), which created and amended numerous federal code sections "[t]o assist State and local governments in reducing the incidence of crime."[20] Under the GCA, provisions related to mental health were added to 18 U.S.C. § 922 as subsection (g)(4) in October 1968.[21]

Thirteen years after the GCA was enacted, John Warnock Hinckley Jr. attempted to shoot President Ronald Reagan.[22] While no one was killed, White House Press Secretary Jim Brady suffered a critical head injury.[23] After recovering, Jim and his wife, Sarah Brady,

16. *U.S. Gun Control: A History of Tragedy, Legislative Action*, CBS NEWS (Apr. 13, 2013, 7:58 PM), https://www.cbsnews.com/news/us-gun-control-a-history-of-tragedy-legislative-action/ [https://perma.cc/Q6HB-LBN3] (quoting presidential historian Doug Brinkley as explaining that "people wanted to do something," specifically regarding mail-order guns).

17. Omnibus Crime Control and Safe Streets Act of 1968, Pub. L. No. 90-351, 82 Stat. 197-239.

18. Bennett D. Sorensen, *Senator Dodd Versus the National Rifle Association: Passing the Gun Control Act of 1968*, PDXSCHOLAR, MAY 2, 2013, at 1, 19–20, https://pdxscholar.library.pdx.edu/cgi/viewcontent.cgi?article=1018&context=Younghistorians [https://perma.cc/Y8LQ-KLND]. The bill originally resulted in a tie vote in both the House Judiciary Committee and the Senate Judiciary Committee but was later passed on reconsideration. *Id.*

19. Mental status was not discussed in the code section itself; however, Sections 1201 to 1203 of the Act creating this code section described congressional findings on the matter and set out penalties for unlawful possession. 82 Stat. at 236–37. Section 1201 stated that "the receipt, possession, or transportation of a firearm by . . . mental incompetents" is burdensome on commerce, safety, the exercise of constitutional rights under the First Amendment, and the effective operation of government. Section 1202 provided that anyone who had been declared mentally incompetent by a court who "receives, possesses, or transports" a firearm will be subject to a $10,000 fine, up to two years in prison, or both. *Id.*

20. Gun Control Act of 1968, Pub. L. No. 90-618, 82 Stat. 1213-36.

21. *Id.*

22. *John Hinckley Jr Fast Facts*, CNN, https://www.cnn.com//03/20/us/-jr-fast-facts/index.html [https://perma.cc/CCD6-7792] (May 23, 2021, 8:33 AM). The assassination attempt occurred March 30, 1981, in Washington, D.C. *Id.*

23. Brady was shot in the head above his left eye and was left permanently paralyzed on the left side of his body. Victor Cohn, *James Brady and His Odyssey*, WASH. POST (Nov. 23, 1981), https://www.washingtonpost.com/archive/politics/1981/11/23/james-brady-and-his-odyssey/c2f3e1fb-c40e-40a7-b944-48153de71ba5/ [https://perma.cc/4S9C-PX9E].

worked to enact the "Brady Bill,"[24] gun control legislation that included several provisions eventually codified as subsections to 18 U.S.C. § 922.[25] After the bill was passed by Congress on November 30, 1993,[26] and as a result of an intervening Supreme Court holding, the FBI later created the National Instant Criminal Background Check System (NICS) for firearms purchasers.[27]

As of 1998, when the NICS was fully implemented, licensed firearms dealers seeking to transfer a firearm to an individual are required to contact the NICS and perform a background check on that individual. If the individual does not pass the background check, the system will notify the licensed dealer and that individual cannot receive a firearm.[28] From November 30, 1998, to April 30, 2016, about twenty-three thousand denials were issued due to "Adjudicated Mental Health" and the prohibitions on firearm use under § 922(g)(4).[29]

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24. *History of Brady*, BRADY, https://www.bradyunited.org/history [https://perma.cc/8BV9-D9RF] (last visited Sept. 28, 2020).
25. The Brady Bill mandated a five-day waiting period before the purchase of any handgun by individuals effective February 28, 1994. *Brady Law*, BUREAU OF ALCOHOL, TOBACCO, FIREARMS & EXPLOSIVES, https://www.atf.gov/rules-and-regulations/brady-law [https://perma.cc/5LA9-BYMN] (July 15, 2021); Brady Handgun Violence Prevention Act, Pub. L. No. 103–159, 107 Stat 1536. The bill also established procedures for background checks, a new requirement for firearm purchases. *Brady Law*, BRITANNICA, https://www.britannica.com/topic/Brady-Law [https://perma.cc/3LVL-8MSP] (Nov. 2, 2021).
26. 107 Stat 1536. It took six votes, over seven years, and three different presidencies before the bill passed in 1993. *History of Brady*, *supra* note 24.
27. As originally written, the Brady Bill "required state and local law-enforcement officials to perform background checks during the five-day waiting period." *Brady Law*, *supra* note 25. The Supreme Court later struck down this provision. Printz v. United States, 521 U.S. 898, 935 (1997) ("The Federal Government may neither issue directives requiring the States to address particular problems, nor command the States' officers . . . to administer or enforce a federal regulatory program.").
28. Denials under the NICS system fall into roughly twelve different categories, with a prior conviction being the most prevalent reason for denial and renunciation of U.S. citizenship as the least common reason. FED. BUREAU OF INVESTIGATION, FEDERAL DENIALS: REASONS WHY THE NICS SECTION DENIES, NOVEMBER 30, 1998–NOVEMBER 30, 2021, at 1 (2021) [hereinafter FEDERAL DENIALS], https://www.fbi.gov/file-repository/federal_denials.pdf/view [https://perma.cc/UHB3-GXB2]. If the NICS results do not specify, the individual can contact either the FBI or the Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF) for further information, although the ATF is not authorized to accept petitions or applications for relief from disabilities. *Is There a Way for a Prohibited Person To Restore Their Right to Receive or Possess Firearms and Ammunition?,* BUREAU OF ALCOHOL, TOBACCO, FIREARMS & EXPLOSIVES, https://www.atf.gov/firearms/qa/there-way-prohibited-person-restore-their-right-receive-or-possess-firearms-and [https://perma.cc/MJ9Y-U3CP] (Aug. 21, 2019).
29. FEDERAL DENIALS, *supra* note 28. The total number of background checks between November 30, 1998, and April 30, 2016, was more than 235 million, and five years later the total had topped 400 million. FED. BUREAU OF INVESTIGATION,

For the many Americans who are not directly impacted by § 922(g)(4)'s firearms limitations, these measures might be characterized as necessary to help reduce or prevent gun violence.[30] But for those citizens who are restricted under § 922(g)(4), this regulation may be perceived as a huge overstep, which results in the unconstitutional loss of Second Amendment rights.[31]

III. CHALLENGES TO § 922(g)(4) IN THE SIXTH, THIRD, AND NINTH CIRCUITS

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

1. Factual Background

Section 922(g)(4) was first challenged in a court of law by Clifford Charles Tyler, a seventy-four-year-old man living in Michigan.[32] In 1985, when Tyler was approximately forty-six years old, his wife of twenty-three years ran away with another man, emptied his bank accounts, and served him with divorce papers.[33] This series of events left Tyler in an extremely emotional state, during which he had trouble sleeping and would sit at home pounding his head on the ground.[34] Tyler's daughters became concerned that he might hurt himself so they contacted local police, who took Tyler for a psychological evaluation.[35]

NICS FIREARM BACKGROUND CHECKS: MONTH/YEAR 1 (2021), https://www.fbi.gov/file-repository/nics_firearm_checks_-_month_year.pdf/view [https://perma.cc/JQJ9-4T4G]. Between November 30, 1998, and November 30, 2021, NICS denied more than two million prospective firearms purchasers. FEDERAL DENIALS, *supra* note 28. The total number of denials based on "adjudicated mental health" was about 63,000, or three percent of all denials. *Id.*

30. Mai v. United States, 952 F.3d 1106, 1109 (9th Cir. 2020), *reh'g en banc denied*, 974 F.3d 1082 (9th Cir. 2020).

31. Those 63,000 NICS denials may encompass additional citizens who, like Clifford Tyler, Bradley Beers, and Duy Mai, have no criminal history and have no history of violence against others. The broad language of the statute sweeps in those who have been previously adjudicated as mentally ill but have since recovered from their mental illness, or those who have been adjudicated mentally ill for behaviors which cause them to be a danger to themselves through an inability to care for their own basic needs but which have little tendency for any form of violence. *See infra* Part IV (analyzing the constitutionality of continued firearms dispossession for citizens who are not presently mentally ill).

32. The case was first heard in district court, Tyler v. Holder (*Tyler I*), No. 1:12-CV-523, 2013 WL 356851, at *1 (W.D. Mich. Jan. 29, 2013), then was appealed, Tyler v. Hillsdale Cty. Sheriff's Dep't (*Tyler II)*, 775 F.3d 308 (6th Cir. 2014), and eventually reheard en banc, Tyler v. Hillsdale Cty. Sheriff's Dep't. (*Tyler III*), 837 F.3d 678 (6th Cir. 2016).

33. *Tyler III*, 837 F.3d at 687.

34. *Id.*

35. *Id.*

Hospital physicians concluded that Tyler required in-patient treatment, and petitioned the Hillsdale County Probate Court to have him committed.[36] The probate court determined that Tyler was mentally ill and could "be reasonably expected within the near future to intentionally or unintentionally seriously physically injure [himself] or others."[37] The court also concluded that hospitalization was the only method of treatment adequate to meet Tyler's needs.[38] Tyler was committed for a period "not to exceed 30 days" and again for a period "not to exceed 90 days."[39]

After his discharge, Tyler returned home, successfully held a job for the next eighteen years, and even remarried in 1999.[40] During a 2012 substance abuse and psychological evaluation, Tyler reported that he had never experienced a depressive episode other than the one that occurred when his wife left him—he even stated that he had repaired the relationship with his ex-wife.[41] The evaluating physician reported that Tyler showed no evidence of a thought disorder and concluded that "Tyler's response to his divorce was a 'brief reactive depressive episode'" and that he showed no signs of mental illness.[42] Further, he had no issues with alcohol or drug abuse and had no past legal involvement.[43]

2. Procedural History

On February 7, 2011, Tyler attempted to purchase a gun and was informed by the Hillsdale County Sheriff's Office that he was ineligible to purchase a firearm because the NICS background check had indicated his previous commitment to a mental institution.[44] In August 2011, Tyler appealed the denial to the FBI's NICS section, requesting that his rights be restored.[45] In January 2012, the NICS section denied Tyler's appeal, stating that his federal firearm rights could not be restored until Michigan established a relief-from-disabilities program approved by the Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF).[46]

36. *Id.*
37. *Id*. at 683.
38. *Id.*
39. *Id.*
40. *Id.*
41. *Id.* at 683–84.
42. *Id*. at 684.
43. *Id.*
44. *Id.* at 685.
45. *Id.*
46. *Id.* at 684.

Tyler then sued various defendants in federal court, asserting an as-applied constitutional challenge to § 922(g)(4).[47] According to Tyler, § 922(g)(4) operated as an essentially permanent ban on his fundamental right to keep and bear arms.[48] The federal defendants moved to dismiss Tyler's complaint for failure to state a claim.[49] The district court granted the motion, relying on the holding in *District of Columbia v. Heller*,[50] stating that "prohibitions on the possession of firearms by the mentally ill were presumptively lawful and concluding that Tyler was not within the ambit of the Second Amendment as historically understood."[51] The district court concluded that § 922(g)(4) would survive intermediate scrutiny even without a means for post-commitment relief.[52] Tyler thereafter appealed the decision, and the Sixth Circuit Court of Appeals reversed the dismissal after finding that the government had not provided sufficient data to satisfy intermediate scrutiny.[53]

B. *Beers v. Attorney General United States*

Bradley Beers was the second person to contend that § 922(g)(4) was unconstitutional as applied to his circumstances.[54] Beers asserted that his previous mental adjudication should no longer bar his ability to possess a firearm because he had since been rehabilitated.[55]

On December 28, 2005, when he was nineteen years old, Beers told his mother that he was suicidal and put a gun in his mouth.[56] He was thereafter involuntarily committed, and his examining physician determined that he was indeed suicidal and that inpatient treatment was required for his own safety.[57] Beers's involuntary commitment was extended twice after a Pennsylvania court concluded that he continued to present a danger to himself or others.[58] Since his release in

47. *Id.*; *see Tyler I*, No. 1:12-CV-523, 2013 WL 356851, at *1 (W.D. Mich. Jan. 29, 2013).
48. *Tyler III* at 684*; see Tyler I*, 2013 WL 356851, at *1–5.
49. *Tyler III* at 684: *see* FED. R. CIV. P. 12(b)(6).
50. *Tyler III* at 684; *see* District of Columbia v. Heller, 554 U.S. 570 (2008).
51. *Tyler III* at 684; *see Tyler I*, 2013 WL 356851, at *3.
52. *Tyler III* at 684; *see Tyler I*, 2013 WL 356851, at *6.
53. *See* discussion *infra* subsection IV.B.1 (discussing the Sixth Circuit's application of intermediate scrutiny).
54. *Beers II*, 927 F.3d 150 (3d Cir. 2019), *judgment vacated sub nom.* Beers v. Barr, 140 S. Ct. 2758 (2020) (mem.).
55. *Id.* at 152.
56. *Id.*
57. *Id.* Beers was committed to a psychiatric inpatient hospital for a period of up to 120 hours pursuant to Pennsylvania's Mental Health Procedures Act. *Id.*
58. More specifically, the court extended Beers's commitment after it determined that Beers was "severely mentally disabled and in need of treatment." *Id.* (footnote omitted).

2006, Beers has received no mental health treatment.[59] In 2013, Beers was examined by a physician who "opined that Beers was able 'to safely handle firearms again without risk of harm to himself or others.'"[60]

In 2017, Beers filed a complaint alleging that § 922(g)(4) was unconstitutional as applied to him.[61] On the government's motion to dismiss, the district court held that Beers had been unable to distinguish his circumstances from those of mentally ill individuals who were subject to the longstanding prohibitions on firearm possession and that evidence of his rehabilitation was irrelevant.[62] On appeal, the Third Circuit Court of Appeals determined that Beers had not been able to distinguish himself from the historically barred class, and thereafter held that § 922(g)(4) was constitutional because "[h]istorically, our forebearers saw a danger in providing mentally ill individuals the right to possess guns."[63] In so holding, the Third Circuit ended its constitutional inquiry before applying any requisite level of scrutiny. For this reason, Beers's claim will not be analyzed throughout the remainder of this Comment, which aims to specifically address the application of intermediate scrutiny to as-applied constitutional challenges to § 922(g)(4).[64]

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59. *Id.* at 153.

60. *Id.* at 152. While the court did not specify in its opinion, Beers was likely examined for the sole purpose of regaining access to firearms. Beers attempted to purchase a firearm shortly after he was discharged from commitment in 2006 but was denied when a background check revealed that Beers had been involuntarily committed. *Id.*

61. Beers v. Lynch (*Beers I*), 2:16-cv-6440, 2017 U.S. Dist. LEXIS 166492, at *1 (E.D. Penn. Sept. 5, 2017).

62. *Id.* at *10–11. The district court granted the government's motion on the basis that 18 U.S.C. § 922(g)(4) did not impose a burden on conduct falling within the scope of the Second Amendment and was therefore constitutional as applied to Beers. *Beers II*, 927 F.3d at 152.

63. *Beers II*, 927 F.3d at 159. Beers sought review of this decision and petitioned for a rehearing. While Beers's petition was pending, the ATF approved Pennsylvania's certification and found that its state-level relief-from-disabilities program satisfied the minimum criteria established by federal law. *See* DEP'T OF JUST., OMB No. 1140-0094, CERTIFICATION OF QUALIFYING STATE RELIEF FROM DISABILITIES PROGRAM (May 31, 2019), https://princelaw.files.wordpress.com/2019/07/paniaa-cert-7.1.19.pdf [https://perma.cc/Z3ZE-F5FB]. As a result, the state-court order restoring Beers's rights to possess a firearm lifted the federal disability that § 922(g)(4) had imposed. Petition for a Writ of Certiorari at 23, Beers v. Barr (*Beers III*), 140 S. Ct. 2758 (2020) (No. 19-864), 2020 WL 116161, at *23. Beers thereafter successfully obtained a firearms license and a firearm. *Id.* The circuit court denied a rehearing of Beers's claim, and Beers thereafter appealed to the Supreme Court, but the Supreme Court remanded the case with instructions to dismiss the case as moot. *Beers III*, 140 S. Ct. 2758 (2020) (mem.); Beers v. Att'y Gen. U.S., 822 F. App'x 56 (3d Cir. 2020) (vacated as moot).

64. See *infra* Parts IV, V (discussing various applications of intermediate scrutiny to § 922(g)(4)).

C. *Mai v. United States*

Dui Mai is the most recent challenger to § 922(g)(4). His claim was first filed in the Western District of Washington in 2018,[65] was denied a rehearing en banc by the Ninth Circuit in the September 2020,[66] and his petition for a writ of certiorari was denied in April 2021.[67]

1. Factual Background

In October of 1999, Dui Mai was only seventeen years old when he was involuntarily committed for mental health treatment after the King County Superior Court found him "*both* mentally ill *and* dangerous."[68] Evidence concerning the events that led to his commitment are sparse and unclear, other than "he threatened himself and others."[69] Mai was committed for a period of nine months, during which time he turned eighteen.[70] His commitment ended in August of 2000.[71] Since his commitment, Mai has earned a GED as well as both a bachelor's degree and master's degree in microbiology.[72] While earning his degree, he married and had two children.[73] Since then, he has worked at the Benaroya Research Institute.[74] As part of his job, he has successfully passed an FBI background check and is allowed to have unescorted access and use of a JL Shepherd Mark II Cesium-137 irradiator.[75]

65. Mai v. United States (*Mai I*), No. C17-0561, 2018 WL 784582, at *1 (W.D. Wash. Feb. 8, 2018), *motion for relief from judgment denied*, No. C17-0561, 2018 WL 10502329 (W.D. Wash. Dec. 21, 2018), *aff'd*, 952 F.3d 1106 (9th Cir. 2020).
66. Mai v. United States (*Mai IV*), 974 F.3d 1082 (9th Cir. 2020), *cert. denied*, No. 20-819, 2021 WL 1602649, at *1 (Apr. 26, 2021).
67. Mai v. United States, No. 20-819, 2021 WL 1602649, at *1 (U.S. Apr. 26, 2021).
68. Mai v. United States (*Mai III*), 952 F.3d 1106, 1110 (9th Cir. 2020), *reh'g en banc denied*, 974 F.3d 1082 (9th Cir. 2020). Under Washington state statute, a minor in Washington is able to consent to voluntary admission. Wash. Rev. Code Ann. § 71.34.700 (West 2020). Comparatively, many other jurisdictions do not allow minors to consent to voluntary commitment or require parental consent for the commitment of a minor. *See, e.g.*, MONT. CODE ANN. § 53-21-112 (2014) (requiring parent or guardian consent for a minor under sixteen years old to receive mental health services); 405 ILL. COMP. STAT. ANN. 5/3-400 (2015) (same).
69. *Mai III*, 952 F.3d at 1110.
70. *Id.*
71. *Id.*
72. Complaint at 3, *Mai I*, No. C17-0561, 2018 WL 784582 (W.D. Wash. Feb. 8, 2018), *motion for relief from judgment denied*, No. C17-0561, 2018 WL 10502329 (W.D. Wash. Dec. 21, 2018), *aff'd*, 952 F.3d 1106 (9th Cir. 2020).
73. While Mai is no longer married, he continues to be active in his children's lives. *Id.* at 4.
74. *Id.* at 3.
75. JL Shepherd Mark II Cesium-137 irradiators produce gamma radiation and deal specifically with Cesium-137 (also known as Caesium-137), a radioactive isotope which is extremely dangerous if handled incorrectly. An experiment conducted in 1961 showed that laboratory mice which were dosed with 21.5 υCi/g had a rate of fifty percent fatality within thirty days of exposure. Yu. I. Moskalev, *Biological*

In 2014, Mai petitioned the King County Superior Court for restoration of his firearm rights, "supplying the court with medical and psychological examinations and supportive declarations from over ten people."[76] These declarations included statements of mental health professionals that Mai "does not present any observable psychopathology, is of low risk for future violent and nonviolent criminal behavior, has consistently screened negative for depression, and does not represent a significant risk to himself or to others."[77] The court granted his petition and restored his Washington state firearms rights.[78] Specifically, the Washington court found that Mai is no longer required to participate in court-ordered inpatient or outpatient treatment, has successfully managed the condition related to his commitment, no longer presents a substantial danger to himself or the public, and the symptoms related to the commitment are not reasonably likely to recur.[79]

2. Procedural History

After having his rights restored in Washington, Mai attempted to purchase a firearm but received a denial from NICS pursuant to 18 U.S.C. § 922(g)(4).[80] Mai spoke to someone at the ATF, who informed him that "his state restoration order is not sufficient to overcome the federal prohibition in § 922(g)(4)."[81] Washington's restoration statute predates the NICS Improvement Amendments Act of 2007 (NIAA), and therefore does not comply with NIAA requirements.[82] Mai filed a complaint in the Western District of Washington bringing an as-applied constitutional challenge to § 922(g)(4), and the government moved to dismiss for failure to state a claim.[83]

Effects of Cesium-137, *in* DISTRIBUTION, BIOLOGICAL EFFECTS, AND MIGRATION OF RADIOACTIVE ISOTOPES 220 (1974). Cesium-137 is not only dangerous to health through exposure but can also have drastic consequences: after the Chernobyl nuclear power plant accident, high quantities of Cesium-137 had enveloped the land surrounding the explosion site. As a result, the land is uninhabitable and cannot be used for agricultural or other purposes and will remain this way for decades to come as the Cesium-137 continues to decay. *See Chernobyl: Assessment of Radiological and Health Impacts*, OECD NUCLEAR ENERGY AGENCY (2002).

76. Complaint at 4, *Mai I*, No. C17-0561, 2018 WL 784582.
77. Appellant's Reply Brief at 6–7, *Mai III*, 952 F.3d 1106 (9th Cir. 2020) (No. 18-36071), *reh'g en banc denied*, 974 F.3d 1082 (9th Cir. 2020), 2019 WL 3525957, at *2, *6–7.
78. Complaint at 4, *Mai I*, 2018 WL 784582.
79. *Mai III*, 952 F.3d at 1110 (referencing the requirements of Wash. Rev. Code § 9.41.047(3)(c)).
80. Complaint at 4, *Mai I*, 2018 WL 784582.
81. *Mai I*, 2018 WL 784582, at *1; *see* NICS Improvement Amendments Act of 2007, Pub. L. No. 110–180, §§ 2(9), 103, 105, 122 Stat. 2559, 2560, 2568–69 (2008).
82. *Mai I*, 2018 WL 784582, at *2.
83. *Id.* at *1, *3.

In considering this motion to dismiss, the district court assessed Mai's claim under a two-step inquiry similar to that used in both *Tyler III* and *Beers II*.[84] First, the district court held that Mai had failed to allege sufficient facts showing that he no longer suffers from a mental illness.[85] The district court specifically addressed Mai's contention that he was not mentally ill because he was living a "socially responsible, well-balanced, and accomplished life," stating that this "mischaracterizes what it means to live with a mental illness and implies that the mentally ill cannot have a productive and fulfilling life."[86] Although Mai had produced numerous medical and psychological examinations to the King County Superior Court while petitioning for restoration of his state firearm rights, he had failed to "allege facts showing how the court's grant of his petition distinguishes him from the mentally ill."[87] Additionally, while Washington's state restoration statute only requires that the applicant "no longer presents a substantial danger to himself or herself, or the public," federal law requires Mai to prove that he "no longer suffers from the condition related to the commitment."[88]

Moving on to the second step of the inquiry, the district court found that § 922(g)(4) satisfied intermediate scrutiny.[89] To support its motion, the government provided "numerous studies that indicate that those with a history of mental illness bear a significant additional risk of gun violence than those in the general population, both against others as well as against themselves."[90] In granting the government's motion, the district court held that the "fit" between the government's asserted objective (i.e., regulation of firearm possession) and the challenged law was reasonable and that the challenged law was substantially related to the government's interest in promoting public safety and preventing suicide.[91]

A panel of the Ninth Circuit heard Mai's claim on appeal.[92] This panel affirmed the district court's dismissal of Mai's claim.[93] Mai then

84. *See* discussion *supra* sections III.A and III.B. This two-step inquiry, "(1) asks whether the challenged law burdens conduct protected by the Second Amendment" based on a historical understanding of the scope of the Second Amendment, "and (2) if so, directs courts to apply an appropriate level of scrutiny." *Mai I*, 2018 WL 784582, at *3 (quoting Jackson v. City of San Francisco, 746 F.3d 953, 960 (9th Cir. 2014)).
85. *Id.* at *5.
86. *Id.*
87. *Id.*
88. *Id.*
89. *Id.* at *5–6.
90. *Id.* at *6.
91. *Id.* at *6–7.
92. *Mai III*, 952 F.3d 1106 (9th Cir. 2020), *reh'g en banc denied*, 974 F.3d 1082 (9th Cir. 2020).
93. *Id.* at 1121.

petitioned the court for both a rehearing and a rehearing en banc, and on September 10, 2020, the Ninth Circuit denied both petitions after "the matter failed to receive a majority of votes of non-recused active judges in favor of en banc consideration."[94] Judges Collins, Bumatay, and VanDyke each wrote separate dissenting opinions, which are discussed more fully in subsection IV.B.2 below.[95]

IV. INTERMEDIATE SCRUTINY IN *TYLER III AND MAI III*

Both *Tyler*[96] and *Mai*[97] applied a two-step inquiry, a common framework used to resolve Second Amendment challenges in many other circuits.[98] In this two-step inquiry, the reviewing court must first ask whether the challenged law burdens conduct that falls within the scope of the Second Amendment.[99] If it does, then the court must apply an appropriate level of scrutiny, analyzing the strength of the government's justification for restricting Second Amendment rights.[100]

A. Does § 922(g)(4) Burden Conduct Within the Scope of the Second Amendment?

In step one, both circuits determined that the law burdened conduct within the scope of the Second Amendment, but for different reasons. The Sixth Circuit stated that "[t]he core right recognized in *District of Columbia v. Heller* is 'the right of law-abiding, responsible citizens to use arms in defense of the hearth and home,'" and thus the government was presumptively allowed to regulate firearm possession for those outside this defined group, including felons and the mentally ill, as they are not within the Second Amendment's scope.[101] But the Sixth Circuit also emphasized that *Heller* did not have a conclusive effect on Tyler's claim.[102] While *Heller's* "presumptively lawful" language confirms that some categorical prohibitions are permissible and

94. *Mai IV*, 974 F.3d 1082, 1083 (9th Cir. 2020).
95. *See infra* subsection IV.B.2 (discussing the Ninth Circuit's denial of Mai's petition for rehearing en banc and multiple dissenting opinions criticizing the denial).
96. *Tyler III*, 837 F.3d 678, 685 (6th Cir. 2016). This framework was adopted by the Sixth Circuit in *United States v. Greeno*, 679 F.3d 510, 518 (6th Cir. 2012).
97. *Mai III*, 952 F.3d at 1113–14 (citing *Tyler III*, 837 F.3d at 683–84; *Beers II*, 927 F.3d 150, 152 (3d Cir. 2019)). This inquiry was first adopted by the Ninth Circuit in *United States v. Chovan*, 735 F.3d 1127, 1136 (9th Cir. 2013).
98. *See* United States v. Marzzarella, 614 F.3d 85, 89 (3d Cir. 2010); United States v. Chester, 628 F.3d 673, 680 (4th Cir. 2010); United States v. Reese, 627 F.3d 792, 800–01 (10th Cir. 2010).
99. *Tyler III*, 837 F.3d at 685; *Mai III*, 952 F.3d at 1113–14.
100. *Tyler III*, 837 F.3d at 686; *Mai III*, 952 F.3d at 1115–21.
101. *Tyler III*, 837 F.3d at 685 (6th Cir. 2016) (quoting District of Columbia v. Heller 554 U.S. 570, 635 (2008)).
102. *Id.* at 687.

that Congress is not limited to case-by-case exclusions of persons who have been shown to be untrustworthy with weapons, neither are the courts excused from constitutional analysis on the matter. "A presumption implies 'that there must exist the possibility that the ban could be unconstitutional in the face of an as-applied challenge.'"[103] Such presumption must therefore be shown to apply in the instant case.[104]

Due to a lack of historical support for a lifetime ban,[105] as well as divergent vocabulary used in the *Heller* opinion and § 922(g)(4),[106] the circuit court found that Tyler's "factual scenario calls into question the applicability of § 922(g)(4)'s lifetime ban to Tyler and likewise calls into question the applicability of *Heller's* presumption of lawfulness to his Second Amendment claim."[107] The Sixth Circuit concluded that the historical evidence cited by both the government in *Tyler III* and by the court in *Heller* did not "directly support the proposition that persons who were once committed due to mental illness are forever ineligible to regain their Second Amendment rights."[108] Further, the circuit court found that *Heller's* "presumptively lawful" language was difficult to fit into the two-pronged approach used to analyze Second Amendment claims. As the court stated, "it is difficult to discern whether prohibitions on felons and the mentally ill are presumptively lawful because they do not burden persons within the ambit of the Second Amendment as historically understood, or whether the regulations presumptively satisfy some form of heightened means-end scrutiny."[109] The court chose the latter option—"that people who have been involuntarily committed are not categorically unprotected by the Second Amendment."[110] As a result, the government had failed to

103. *Id.* at 686 (citing United States v. Williams, 616 F.3d 685, 692 (7th Cir. 2010)).

104. *Id.* at 687.

105. The Sixth Circuit noted that neither party was able to present sufficient historical evidence either conclusively supporting or opposing a ban on the possession of guns by anyone who has been committed to a mental institution. *Id*.

106. *Id. Heller* spoke of bans on "the mentally ill," whereas 18 U.S.C. § 922(g)(4) "does not use the phrase 'mentally ill,' nor does it attempt to prohibit all currently mentally ill persons from firearm possession." *Id.* (noting that § 922(g)(4) uses prior judicial adjudications for incompetency and involuntary commitment as proxies for mental illness). Instead, § 922(g)(4) bans handgun possession by any person "who has been adjudicated as a mental defective or has been committed to a mental institution." 18 U.S.C. § 922(g)(4) (West 2015); *see also* United States v. Rehlander, 666 F.3d 45, 50 (1st Cir. 2012) ("Congress did not prohibit gun possession by those who were or are mentally ill and dangerous . . . . [A]s with the ban on prior felons, Congress sought to piggyback on determinations made in *prior judicial proceedings* to establish status.").

107. *Tyler III*, 837 F.3d at 688.

108. *Id.* at 689.

109. *Id.* at 690.

110. *Id.*

meet its burden of establishing that the regulated conduct fell outside the scope of the Second Amendment as historically understood.[111]

The Ninth Circuit similarly addressed *Heller*, noting that the right to keep and bear arms is "not unlimited" and that regulations prohibiting the possession of firearms by felons and the mentally ill are "presumptively lawful."[112] In order to distance himself from prior cases regarding § 922, Mai emphasized that "a prohibition as to those persons who are *presently* mentally ill and dangerous does not implicate the Second Amendment" because the language of *Heller* and historical evidence are limited to the narrow category of "presently ill" individuals, but that he is not presently ill and therefore the lifetime ban is unconstitutional.[113] For the sake of judicial efficiency, the Ninth Circuit chose to "assume, without deciding, that § 922(g)(4), as applied to [Mai], burdens Second Amendment rights."[114] From here, both circuit

111. *Id.* at 689–90.

112. *Mai III*, 952 F.3d 1106, 1113 (9th Cir. 2020) (quoting District of Columbia v. Heller, 554 U.S. 570, 595, 627 n.26 (2008)), *reh'g en banc denied*, 974 F.3d 1082 (9th Cir. 2020). The Ninth Circuit also reviewed the avenues for relief from 18 U.S.C. § 922(g)(4). *Id.* at 1111. There are currently two options, but both were unavailable to Mai. *Id.* Under 18 U.S.C. § 925(c), and as of 1986, individuals could apply to the United States Attorney General for relief from the disabilities imposed by federal laws with respect to firearms and the mentally ill. *Id.* However, this statutory option is currently unavailable, as the program was defunded in 1992 after Congress concluded that "determining eligibility had proved to be a 'very difficult and subjective task which could have devastating consequences for innocent citizens if the wrong decision is made.'" *Id.* (quoting S. Rep. No. 102-353, at 19 (1992)). Alternatively, plaintiffs in Mai's position may seek relief through a state program that qualifies under the NIAA. 34 U.S.C. §§ 40902–40941. To qualify, the program must provide that a state court or other lawful authority shall grant relief if the circumstances regarding an individual's disabilities, record, and reputation "are such that the person will not be likely to act in a manner dangerous to public safety and that the granting of the relief would not be contrary to the public interest." *Mai III*, 952 F.3d at 1112 (citing 34 U.S.C. § 40915(a)(2)). According to the government, "'approximately thirty states' have created qualifying programs." *Id.* (citing *State Profiles—NARIP*, BUREAU OF JUST. STAT., https://bjs.ojp.gov/programs/nics-improvement-amendments-act/state-profiles [https://perma.cc/4TFA-N9QR] (last visited Dec. 29, 2021)). While Washington does allow restoration of rights by state statute, this mechanism does not qualify under the NIAA because "the factual findings required by Washington law differ from the factual findings" required by the NIAA. *Id.* Under Washington law, an individual may restore their rights if they no longer present a *substantial* danger to themselves or to the public; under the NIAA, the same individual must prove that they "will not be likely to act in a manner *dangerous* to public safety." *Id.* (emphasis added) (quoting 34 U.S.C. § 40915(a)(2)). Because Washington does not qualify under the NIAA, this option is additionally unavailable to Mai. Thus, he currently has no avenue for relief from the disabilities imposed under § 922(g)(4).

113. *Id.* at 1114.

114. *Id.* at 1115.

courts proceeded to the second step of the two-step constitutional inquiry.[115]

B. Is the Government's Justification for § 922(g)(4) Strong Enough To Survive Intermediate Scrutiny?

The courts then moved on to step two—determining (1) the appropriate level of scrutiny to apply and (2) if the government's justification for burdening Second Amendment rights satisfies that scrutiny.[116] Both courts ruled out rational basis and strict scrutiny as inappropriate for reviewing Second Amendment constitutional challenges.[117] Each court agreed that in the second step of the inquiry, the appropriate level of review for constitutional challenges to § 922(g)(4) was intermediate scrutiny.[118]

According to the Sixth Circuit, intermediate scrutiny required that the government's stated objective be "significant, substantial, or important" and "a reasonable fit between the challenged regulation and the asserted objective."[119] The Ninth Circuit stated that § 922(g)(4) "simply needs to promote a substantial government interest that

115. The Ninth Circuit stated both *Tyler III* and *Beers II* would inform its own analysis. *Id.* at 1113–14 (citing *Tyler III*, 837 F.3d at 683–84 and *Beers II*, 927 F.3d 150, 152 (3d Cir. 2019)).

116. *Tyler III*, 837 F.3d at 690–99; *Mai III*, 952 F.3d at 1115–21.

117. *Heller* ruled out rational basis review, finding that such a low tier of scrutiny would have no effect in protecting constitutional rights. District of Columbia v. Heller, 554 U.S. 570, 628 n.27 (2008) ("If all that was required . . . was a rational basis, the Second Amendment would be redundant with the separate constitutional prohibitions on irrational laws, and would have no effect."). Yet strict scrutiny "would invert *Heller's* presumption that prohibitions on the mentally ill are lawful," *Tyler III*, 837 F.3d at 691, because under strict scrutiny, "[w]e start by presuming that the ordinance is unconstitutional." Lac Vieux Desert Band of Lake Superior Chippewa Indians v. Mich. Gaming Control Bd., 276 F.3d 876, 879 (6th Cir. 2002).

118. *Tyler III*, 837 F.3d at 692. Intermediate scrutiny has also been applied by the Fourth, Seventh, and Tenth Circuits when reviewing Second Amendment claims against other sub-sections of 18 U.S.C. § 922. *See, e.g.*, Bonidy v. U.S. Postal Serv., 790 F.3d 1121, 1126 (10th Cir. 2015) (reasoning that intermediate scrutiny "appropriately places the burden on the government to justify its restriction[ ], while also giving [Congress] considerable flexibility to regulate gun safety"); United States. v. Carter, 669 F.3d 411, 417 (4th Cir. 2012); United States v. Williams, 616 F.3d 685, 692 (7th Cir. 2010) (applying intermediate scrutiny to 18 U.S.C. § 922(g)(1)'s ban on gun ownership by felons); United States v. Mahin, 668 F.3d 119, 124 (4th Cir. 2012) (reviewing 18 U.S.C. § 922(g)(8)); United States v. Chapman, 666 F.3d 220, 226 (4th Cir. 2012) (reviewing 18 U.S.C. § 922(g)(8)); United States v. Reese, 627 F.3d 792, 802 (10th Cir. 2010) (reviewing 18 U.S.C. § 922(g)(8)); *see also* United States v. Yancey, 621 F.3d 681, 683 (7th Cir. 2010) (declining to pick a specific form of scrutiny but requiring a "strong showing that [18 U.S.C. § 922(g)(3)] was substantially related to an important governmental objective").

119. *Tyler III*, 837 F.3d at 693 (citing United States v. Chovan, 735 F.3d 1127, 1139 (9th Cir. 2013)).

would be achieved less effectively absent the regulation."[120] The governmental interest in § 922(g)(4)'s ban on firearm possession for the mentally ill is preventing crime, violence, and suicide.[121] According to both *Tyler III* and *Mai III* these interests are not only legitimate—they are compelling.[122]

1. Application of Intermediate Scrutiny in Tyler III

As framed by the Sixth Circuit, Tyler's claim at this stage boiled down to the final question of fit: whether the government had established "a reasonable fit between its important objectives of public safety and suicide prevention and its permanent ban on the possession of firearms by persons adjudicated to be mentally unstable, some of them long ago."[123] In order to establish this reasonable fit, the government was required to present some form of evidence, other than anecdotes or supposition, of the continuing need to disarm citizens whose involuntary confinement or adjudication as mentally ill occurred long ago.[124] This evidence was needed to justify § 922(g)(4) because the ban imposed on Tyler, and persons similarly situated to Tyler, is effectively permanent.[125]

The government pointed to the statute's legislative history, which included Congress's observation that the school shooting at Virginia Tech in 2007 and a high-profile shooting in New York in 2002 were both perpetrated by individuals with proven histories of mental illness and recent involuntary commitments.[126] Additionally, the Brady Center to Prevent Gun Violence supplied studies showing that "those with a past suicide attempt are more likely than the general public to commit suicide at a later date and that firearms are the most likely method for committing suicide."[127] The Sixth Circuit agreed that this evidence justified the need to keep firearms out of the hands of "those

120. *Mai III*, 952 F.3d at 1116 (citing United States v. Torres, 911 F.3d 1253, 1263 (9th Cir. 2019)).
121. Specifically, the *Congressional Record* shows that Congress intended to "cut down or eliminate firearms deaths caused by persons who are not criminals, but who commit sudden, unpremeditated crimes with firearms as a result of mental disturbances." *See* 114 CONG. REC. 21,829 (1968) (statement of Rep. John Bingham).
122. *Tyler III*, 837 F.3d at 693; *Mai III*, 952 F.3d at 1116.
123. *Tyler III*, 837 F.3d at 693. Under intermediate scrutiny, the burden of justification rests entirely on the state. *Id.* at 694 (quoting United States v. Virginia, 518 U.S. 515, 533 (1996).
124. *Id.*
125. 18 U.S.C. § 925(c)'s relief-from-disabilities program remains unfunded. Michigan has not chosen to create a qualifying relief program under the 2008 NICS Amendments and there is no path available for Tyler to seek the restoration of his Second Amendment rights. *Tyler III*, 837 F.3d at 694. The same is true for others barred by 18 U.S.C. § 922(g)(4) in at least nineteen other states. *Id.*
126. *Id.* at 694–95.
127. *Id.* at 695.

currently suffering from mental illness and those just recently removed from an involuntary commitment." Further, such evidence demonstrated why it might be reasonable to permanently prevent those with a prior suicide attempt from possessing firearms.[128] However, this evidence did not justify a *lifetime* ban for *all* persons previously committed, especially if they, like Tyler, had been involuntarily committed without ever attempting suicide and had remained healthy and peaceable for many years after release.[129]

The court discussed other evidence presented to support the lifetime ban, such as evidence that "[r]ates of violence may peak around the time of hospital admission, when patients are in acute crisis, and remain high for a period of time after discharge because many patients still have active mental disorders after they leave the hospital."[130] But after reviewing each piece of evidence, the court concluded the data was "insufficient to justify § 922(g)(4)'s perpetual curtailment of a constitutional right."[131] To the Sixth Circuit, the fact that Congress established various relief-from-disabilities programs gave a clear indication that it did not understand the statute to permanently foreclose a previously committed person's Second Amendment rights.[132]

The Sixth Circuit ultimately held that based on the record, the government's evidence and arguments did not pass intermediate scrutiny, and more evidence was required to justify such a severe restriction.[133] There was "no indication of the *continued* risk presented by people who were involuntarily committed many years ago and who have no history of intervening mental illness, criminal

128. *Id.*

129. *Id.*

130. *Id.* at 696 (citing Henry J. Steadman et al., *Violence by People Discharged from Acute Psychiatric Inpatient Facilities and by Others in the Same Neighborhoods*, 55 ARCHIVES GEN. PSYCHIATRY 393, 400 (1998)).

131. *Tyler III*, 837 F.3d at 695–96. Among other evidence, the court discussed a meta-analysis of various studies, E. Clare Harris & Brian Barraclough, *Suicide as an Outcome for Mental Disorders: A Meta-Analysis*, 170 BRIT. J. PSYCHIATRY 205 (1997), which the court found "clouds rather than clarifies the connection between prior commitment and future dangerousness," *Tyler III*, 837 F.3d at 696.

132. *Tyler III*, 837 F.3d at 697. The first program, in effect from 1986 to 1992, allowed individuals to apply to the Attorney General for relief from their disabilities imposed under 18 U.S.C. § 922(g)(4). *See* 18 U.S.C. § 925(c). The second program, which began under the NICS Improvement Amendments Act of 2007, authorized federal grants to the states to improve the NICS instant background check system. *See* NICS Improvement Amendments Act of 2007, Pub. L. No. 110–80, §§ 2(9), 103, 105, 122 Stat. 2559, 2560, 2568–69 (2008) (codified at 34 U.S.C. §§ 40902, 40913 & 40915). To receive these funds, states are required to create a relief-from-disabilities program that allows individuals barred by § 922(g)(4) to apply to have their rights restored. *Id.*

133. *Tyler III*, 837 F.3d at 699.

activity, or substance abuse."[134] Holding that Tyler therefore had a viable Second Amendment claim, the circuit court reversed the district court's dismissal.[135]

2. Application of Intermediate Scrutiny Under Mai III

Mai's as-applied constitutional challenge also rested on the claim that "the *continued* application of the prohibition to him is *no longer* justified because of the passage of time and his alleged mental health and peaceableness in recent years."[136] The Ninth Circuit disagreed, noting that multiple cases, studies, and reports showed that firearms tend to exacerbate acts of violence and greatly increase the risk of death for those who attempt suicide.[137] As framed by the Ninth Circuit, "although § 922(g)(4)'s prohibition takes effect as a result of a *past* event, the statute 'target[s] a *present* danger, i.e., the danger posed by [those who previously have been involuntarily committed to a mental institution] who bear arms.'"[138] After reviewing the studies and reports provided by the government,[139] the Ninth Circuit concluded that individuals with a history of involuntary commitment continue to pose "an ever-present increased risk of violence."[140]

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134. *Id*.

135. *Id.*

136. *Mai III*, 952 F.3d 1106, 1117 (9th Cir. 2020). Mai conceded that the statute's prohibitions on firearms possession were constitutional during the period of his commitment. *Id.* at 1109.

137. *Id.* at 1116; *See, e.g.*, Bonidy v. U.S. Postal Serv., 790 F.3d 1121, 1126 (10th Cir. 2015); Matthew Miller & David Hemenway, *Guns and Suicide in the United States*, 359 NEW ENG. J. MED. 989, 990 (2008) ("A suicide attempt with a firearm rarely affords a second chance. Attempts involving drugs or cutting, which account for more than 90% of all suicidal acts, prove fatal far less often.").

138. *Mai III*, 952 F.3d at 1117 (alteration in original) (quoting Vartelas v. Holder, 566 U.S. 257, 271 (2012)).

139. The government cited the same meta-analysis in *Mai III* that it had cited in *Tyler III*. *Id.* In *Tyler III*, the court found that such meta-analysis clouded rather than clarified the issue. *Tyler III*, 837 F.3d at 696. But in *Mai III*, the Ninth Circuit quoted the analysis, emphasizing that "studies of persons released from involuntary commitment reported a combined 'suicide risk 39 times that expected,'" and concluding that such an "extraordinarily increased risk of suicide clearly justifies the congressional judgment that those released from involuntary commitment pose an increased risk of suicide." *Mai III*, 952 F.3d at 1117, 1121 (quoting Harris & Barraclough, *supra* note 131, at 220). For the Ninth Circuit, this evidence was enough to fairly support Congress's reasonable conclusions that "those who have been involuntarily committed to a mental institution continue to pose an increased risk of violence even many years after their release from commitment." *Id.* at 1118 (citation omitted).

140. *Id.* at 1116–18. Compare this to *United States v. Chovan*, where the Ninth Circuit "upheld the constitutionality of 18 U.S.C. § 922(g)(9)'s ban on the possession of firearms by domestic violence misdemeanants because that category of persons has a high rate of domestic violence recidivism and because the use of firearms by domestic abusers causes more deaths." 735 F.3d 1127, 1140–41 (9th Cir. 2013).

Having confirmed the scientific soundness of Congress's decision to restrict firearm possession of involuntarily institutionalized individuals, the Ninth Circuit dismissed Mai's assertion that the legitimate congressional purpose for the prohibition does not apply to his specific circumstances.[141] The court explained that, in assessing the constitutionality of the presumptive right to regulate firearms for a particular class of citizens, "we are assessing congressional judgment about a category of persons, not about [Mai] himself," and that "the Second Amendment does not demand 'an individualized hearing' to assess [Mai's] own personal level of risk."[142]

The Ninth Circuit held that Congress' enactment of the NIAA does not affect its analysis. Unlike the *Tyler III* court, the Ninth Circuit did not see the NIAA as a "'clear indication that Congress does not believe that previously committed persons are sufficiently dangerous as a class' to prohibit them from possessing firearms."[143] Instead, it perceived the NIAA as "a political compromise that included [34 U.S.C.] § 40915's avenue for relief for some of the least dangerous only in exchange for greatly improved enforcement as to all the rest, including the most dangerous."[144] The NIAA was full of compromises which not only represented diverse groups but which were necessary in order to move the legislation to the floor and ensure that the NICS system would more effectively serve its purpose.[145]

Ultimately, the Ninth Circuit determined that the government met its burden by showing 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."[146] While that determination left Mai without any avenue for relief from § 922(g)(4), the governmental interest of "preventing horrific acts of violence" was compelling, and "the scientific evidence strongly suggests that the increased risk is not tiny."[147] It also pointed out that § 922(g)(4) "applies not to persons who *theoretically* might be dangerous at some point in their lives" but only to "those who were found, through procedures sat-

141. *Mai III*, 952 F.3d at 1118–19.

142. *Id.* at 1119 (quoting *Tyler III*, 837 F.3d at 698 n.18).

143. *Id.* at 1119 (quoting *Tyler III*, 837 F.3d at 697).

144. *Id.*

145. *Id.* at 1119 n.8 (citing 153 CONG. REC. 15,676 (2007)) (statement of Rep. John Conyers Jr.) ("In order to move the legislation to the floor, it was necessary to make some accommodations . . . to incorporate the concerns of gun owners."); *id.* at 15,677 (statement of Rep. Michael N. Castle) ("This legislation represents a true compromise [with] the NRA and the Brady Group."); *accord* 153 CONG. REC. 36,338 (2007) (statement of Sen. Patrick Leahy) ("[T]his compromise legislation . . . respects the rights of gun owners and, at the same time, makes sure that the NICS system will work more effectively.").

146. *Mai III*, 952 F.3d at 1121.

147. *Id.* at 1120–21.

isfying due process, [to be] *actually* dangerous in the past."[148] According to the Ninth Circuit, "§ 922(g)(4) is more narrowly tailored than other lifetime prohibitions" that it has previously upheld, "such as § 922(g)(1)'s prohibition as to felons, both violent and non-violent," in *United States v. Phillips*.[149] Thus, the Ninth Circuit upheld the district court's dismissal of Mai's claim and held that § 922(g)(4) withstands Second Amendment intermediate scrutiny.[150]

On denial of Mai's later petitions for rehearing and for rehearing en banc, Judges Collins, Bumatay, and VanDyke each wrote separate dissenting opinions criticizing this application of intermediate scrutiny.[151] Judge Bumatay first pointed out that Mai had presented enough evidence of his return to mental health that the state of Washington "agreed that Mai doesn't present a substantial danger to himself or to the public and that the symptoms that led to his commitment are not reasonably likely to reoccur."[152] Judge Bumatay conducted a review of the text, history, and tradition of the Second Amendment that, according to him, revealed, "At the time of the Founding, the idea that the formerly mentally ill were permanently deprived of full standing in the community was nowhere to be found."[153] Further, his review established that the era had "a deeply rooted common law tradition recognizing that mental illness was not a permanent condition."[154] Judge Bumatay asserted that because the panel ignored this

148. *Id.* at 1121 (footnote omitted).

149. *Id.* (citing United States v. Phillips, 827 F.3d 1171, 1175–76 (9th Cir. 2016)).

150. *Id.*

151. *Mai IV*, 974 F.3d 1082, 1083 (9th Cir. 2020). Judge Collins joined part of Judge Bumatay's dissent in which he "ably explains . . . [that] the panel's application of intermediate scrutiny here is seriously flawed and creates a direct split with the Sixth Circuit. That alone is enough to warrant en banc review." *Id.* (Collins, J., dissenting). Additionally, Judge Collins stated he was skeptical of the framework used by the Ninth Circuit and believed en banc review was proper to assess whether it properly followed the controlling principles set forth in *Heller*. *Id.*

152. *Mai IV*, 974 F.3d 1082, 1085 (Bumatay, J., dissenting).

153. *Id.* at 1089–90. According to Judge Bumatay, rules and decisions of the founding era addressed the manner of carrying, such as the concealment of weapons, and "the first decision addressing a firearms regulation based on the condition of a person . . . did not arise until 1886." *Id.* at 1088. Because rules and decisions based on the condition of a person were scarce during the founding era and ratification, Judge Bumatay also reviewed "the dominant thinking on mental illness in that period." *Id.* at 1089.

154. *Id.* at 1089 (citation omitted). Judge Bumatay presented multiple sources which agreed, "[A] lunatic [was] never to be looked upon as irrecoverable": Virginia's state constitution limited civil rights of "lunatics," but only "during their state of insanity" or until "they recovered their senses"; judicial officials were only authorized to lock up "individuals with dangerous mental impairments . . . only so long as such lunacy or disorder shall continue, and no longer"; and according to multiple scholars, "the law always imagines, that the[ ] accidental misfortunes [that caused the lunacy] may be removed" and at that point the person's rights restored. *Id.* at 1089–90 (first quoting ANTHONY HIGHMORE, A TREATISE ON THE

important information, it failed to recognize depth of the issue and proceeded to apply a two-part analysis which relied on "judicial interest balancing," even though such methods were explicitly rejected in *Heller*.[155]

Judge Bumatay further stated that even under the two-part analysis, the panel had further drawn the wrong conclusions by incorrectly identifying intermediate scrutiny as the proper standard of review and then incorrectly applying that standard.[156] Because the panel "assumed, rather than decided, that § 922(g)(4) as applied to Mai burdens conduct protected by the Second Amendment," the panel failed to recognize that "this law not only burdens Second Amendment-protected conduct, but that it also strikes at the core right protected by its guarantee. . . . an omission that infects the rest of the *Chovan* analysis."[157] Had the panel properly done the analysis required in step one, as Judge Bumatay had, it should have concluded that strict scrutiny was the proper standard of review.[158]

Even in its application of intermediate scrutiny, Judge Bumatay asserted that the panel still "got it wrong" because it relied on "several ill-suited studies, many compiling data from foreign countries. One of the primary studies relied on by the court analyzed suicide risk after release from involuntary commitment, but it offered no information about suicide risk for someone like Mai—20 years past his commitment and free of mental health issues."[159] Judge Bumatay agreed with the *Tyler III* court that this evidence did not "demonstrate a '*continued* risk presented by people who were involuntarily committed many years ago and who have no history of intervening mental illness, criminal activity, or substance abuse'" sufficient to satisfy even intermediate scrutiny.[160] Seven other judges supported Judge Bumatay's contention that "[i]f we are to accede to the permanent deprivation of

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LAW OF IDIOCY AND LUNACY 73 (1807); then quoting 1 ST. GEORGE TUCKER, BLACKSTONE'S COMMENTARIES: WITH NOTES OF REFERENCE, TO THE CONSTITUTION AND LAWS, OF THE FEDERAL GOVERNMENT OF THE UNITED STATES; AND OF THE COMMONWEALTH OF VIRGINIA 145 (1803); then quoting HENRY CARE, ENGLISH LIBERTIES, OR THE FREE-BORN SUBJECT'S INHERITANCE 329 (6th ed. 1774); and then quoting 1 WILLIAM BLACKSTONE, COMMENTARIES 304–305 (1893)).

155. *Id.* at 1086 (citation omitted). A core constitutional protection should not be subjected to a freestanding interest-balancing approach because "[a] constitutional guarantee subject to future judges' assessments of its usefulness is no constitutional guarantee at all." *Id.* at 1087 (quoting District of Columbia v. Heller, 554 U.S. 570, 634 (2008)).

156. *Id*. at 1090–91.

157. *Id*. at 1091.

158. *Id.*

159. *Id.* at 1094 (criticizing the meta-analysis, Harris & Barraclough, *supra* note 131, at 219, 223).

160. *Id.* at 1095 (quoting *Tyler III*, 837 F.3d 678, 699 (6th Cir. 2016)).

Mai's fundamental right, we should, at a minimum, demand evidence sufficiently tailored to his circumstances."[161]

Judge VanDyke fully endorsed Judge Bumatay's dissent but wrote separately to expound on the matter in a much harsher tone.[162] Judge VanDyke described Duy Mai as "another innocent casualty of this court's demonstrated dislike of things that go bang" and called the panel's logic circular in that it grouped Mai into an ill-fitting category and then used this categorization against him.[163] Judge VanDyke also criticized the panel's decision for misconstruing *Heller*, in which the Supreme Court found certain *activities* to be within the core of the Second Amendment, not certain *classes of people*.[164] Judge VanDyke examined the panel's reasonable fit standard, finding that it was grossly overbroad, incomplete, and an "incorrect tool for measuring regulations that facially burden a fundamental right."[165] Additionally, the panel had "not only applie[d] this inappropriate standard, it

161. *Id.* (citation omitted) (joined in Part IV by Judges Ikuta, Bade, and Hunsaker, and in Part IV.B by Judges Bennett, Collins, and Bress). With twenty-nine judges, the Ninth Circuit has been described as "the most outsized federal appellate court." Ilya Shapiro & Nathan Harvey, *Break Up the Ninth Circuit*, 26 GEO. MASON L. REV. 1299, 1300 (2019). The size of the circuit is unwieldy, causing "procedural inefficiencies, jurisprudential unpredictability, and unusual en banc process[es]." *Id.* at 1329. Due to the size of the circuit, there is a huge backlog of federal appeals, with a median time frame of 22.8 months from notice of appeal to a final order or opinion. *Id.* at 1300. Additionally, there are "more than 3,600 combinations of three-judge panels and hundreds of opinions published each year," which leaves lawyers and district court judges "hard-pressed to understand what the court will do in any given case." *Id.* The Ninth Circuit also employs a "limited" en banc procedure, in which only a subset of judges participate. While this makes sense procedurally (it would be impractical for twenty-nine judges to take part in a single oral argument or deliberate on a decision en masse), this method defeats the purpose of en banc proceedings and "arguably contributes to the circuit consistently having among the highest reversal rates before the Supreme Court." *Id.* at 1300–01. Even with eight votes supporting a rehearing en banc, it was not enough to secure a rehearing of Mai's claim. *Mai IV*, 974 F.3d 1082, 1082.

162. *Mai IV*, 974 F.3d at 1097 (VanDyke, J., dissenting). Judge VanDyke's dissent was joined in full by Judge Bumatay. *Id.*

163. *Id.* at 1099 ("The panel believes class-based categorical bans are permissible under intermediate scrutiny, so long as those bans target groups that pose a heightened risk of violence. Because some metrics indicate that individuals *recently* involuntarily committed are more violent than the general public, the panel surmises that the firearm ban, as applied to Mai (who was committed as a juvenile decades ago), survives intermediate scrutiny. . . . Ironically, the *broader* the class, the more likely it is to pass this standard." (footnote omitted) (citations omitted)).

164. *Id.* at 1099–1100 (citing District of Columbia v. Heller, 554 U.S. 570 (2008)).

165. *Id.* at 1101, 1103. ("[T]his isn't heightened scrutiny at all. Originally developed to analyze *neutral* regulations that *incidentally* burdened First Amendment rights in a way that was *no greater than was essential*, this test would have been a poor fit for direct restrictions on Second Amendment rights.").

applie[d] it inappropriately."[166] As stated by Judge VanDyke, "Government burdens on the Second Amendment may not always need to fit into skinny jeans, but they should never come dressed in clown pants. The current 'reasonable fit' standard makes it embarrassingly easy for the government to sustain its regulations."[167]

V. ANALYSIS

To briefly summarize the holdings from each circuit: In *Tyler III*, the Sixth Circuit found that § 922(g)(4) may pass intermediate scrutiny but that the government had not yet provided enough data to justify the statute's lifetime ban on firearms.[168] In *Beers II*, the Third Circuit found that the plaintiff was not protected by the Second Amendment at all.[169] In *Mai III*, the Ninth Circuit found that § 922(g)(4) satisfies intermediate scrutiny because the restrictions created by § 922(g)(4) are a reasonable fit with the government's important interest of preventing gun violence and suicide, and that the government did supply enough data to justify a lifetime ban.[170] *Tyler III* and *Mai III* have therefore created a direct circuit split by holding that the government, through the same argument and data and in relation to the same federal statute, both has and has not justified a lifetime ban on firearms under § 922(g)(4) for individuals who have been adjudicated mentally ill or involuntarily committed.

Future courts analyzing this issue (if such courts continue to use two-step inquiries or intermediate scrutiny review) should adopt the precedent of the Sixth Circuit as set out in *Tyler III* rather than the precedent set by the Ninth Circuit in *Mai III*.[171] The Ninth Circuit's application of intermediate scrutiny was too broad, where the court failed to identify that intermediate scrutiny requires not only a reasonable fit between the statute in question and the government's important interest, but also a showing that the statute does not burden substantially more protected conduct than is necessary to further the interest. The Ninth Circuit also failed to address the shortcomings of

166. *Id*. at 1101.
167. *Id.* at 1104.
168. *See* discussion *supra* section III.A and subsection IV.B.1.
169. *See* discussion *supra* section III.B.
170. *See* discussion *supra* section III.C and subsection IV.B.2.
171. An alternative, considering the conflicting precedents of *Tyler III* and *Mai III*, is to avoid the two-step analysis altogether. *Mai IV*, 974 F.3d 1082, 1086 (Bumatay, J., dissenting) ("Judges across this country have questioned whether [two-prong] tests are consistent with *Heller*'s command to follow the text, history, and tradition in evaluating the scope of the Second Amendment." (citations omitted)). As explained by Judge Bumatay, the two-prong approach has been criticized by judges in multiple circuits for failing to follow *Heller* and was even criticized by Justice Samuel Alito in *N.Y. State Rifle & Pistol Ass'n, Inc., v. City of New York*, 140 S. Ct. 1525, 1541–44 (2020) (Alito, J., dissenting).

the suicide risk meta-analysis provided by the government, whereas *Tyler III* and the dissenting opinions written by Judges Bumatay and VanDyke in *Mai IV* recognized that the government's evidence was off-point, incomplete, and insufficient to satisfy intermediate scrutiny.[172]

A. The Ninth Circuit's Application of Intermediate Scrutiny Was Too Broad and Therefore Amounted to Little More than Rational Basis Review

The Ninth Circuit incorrectly applied intermediate scrutiny to § 922(g)(4) when it held that this statute was a reasonable fit for the government's important interests. Under intermediate scrutiny, a federal statute limiting Second Amendment rights cannot be a reasonable fit if such limitations are not reasonably tailored to the government's important interest.[173]

All three circuits reviewing challenges to § 922(g)(4) have agreed that *Heller* ruled out rational basis review.[174] *Tyler III* and *Mai III* also agreed that *Heller* had effectively ruled out strict scrutiny; thus, intermediate scrutiny was the appropriate tier to review Second Amendment challenges.[175] Intermediate scrutiny requires the government to state an interest that is "significant, substantial, or important."[176] In *Tyler III*, the court stated that the objective of § 922(g) was "to keep firearms out of the hands of presumptively risky people."[177] By comparison, *Mai III* stated that § 922(g)'s objectives were to "prevent horrific acts of violence."[178] *Tyler III* and *Mai III* were referring to the same statute, congressional record, and legislative history to draw out the "stated governmental interest," and yet *Mai's*

172. *Tyler III*, 837 F.3d 678, 695–96 (6th Cir. 2016); *Mai IV*, 974 F.3d at 1083 (9th Cir. 2020).

173. *See infra* note 181 (discussing the reasonable fit standard).

174. *See supra* section IV.B.

175. *See supra* note 117. The Third Circuit held that Bradley Beers had failed to pass the first step of the two-part inquiry, and therefore the court did not proceed to the application of intermediate scrutiny. *Beers II*, 927 F.3d 150, 154 (3rd Cir. 2019). However, the Third Circuit did cite to *United States v. Marzzarella*, in which the circuit previously defined intermediate scrutiny as one that requires a "substantial or important" governmental interest and that "the fit between the challenged regulation and the asserted objective be reasonable, not perfect." 614 F.3d 85, 98 (3d Cir. 2010).

176. *Tyler III*, 837 F.3d at 693 (quoting United States v. Chovan, 735 F.3d 1127, 1139 (9th Cir. 2013)); *Mai III*, 952 F.3d 1106, 1115 (9th Cir. 2020) (quoting Silvester v. Harris, 843 F.3d 816, 821–22 (9th Cir. 2016)).

177. *Tyler III*, 837 F.3d at 693 (quoting Dickerson v. New Banner Inst. Inc., 460 U.S. 103, 112 n.6 (1983)).

178. *Mai III*, 952 F.3d at 1121 ("Suicide affects not only its immediate victim; family members, friends, and the community as a whole suffer immensely. Even a small decrease in the number of suicides is, therefore, a significant public benefit.").

language was more colorful. These differences briefly indicate the tone of each opinion;[179] while the Sixth Circuit was open to the idea of rehabilitation for Tyler, the Ninth Circuit was not as convinced rehabilitation was possible for Mai.[180]

In addition to a significant, substantial, or important governmental interest, intermediate scrutiny requires that the stated interest be appropriately served through the challenged statute. Both *Tyler III* and *Mai III* identified that the government's interest is appropriately served if there is a reasonable fit between the restriction imposed and the interest served.[181] However, intermediate scrutiny requires not only a fit between a restriction on constitutional rights and the important governmental interest, but also that such restrictions "are not substantially broader than necessary to achieve that interest."[182] This does not require "the least restrictive means but . . . a means narrowly tailored to achieve the desired objective."[183] In essence, the fit between a restriction of constitutional rights and the government's important interest cannot be reasonable if it is also overbroad.

The Sixth Circuit, without explicitly stating that this step was necessary, did appropriately apply this standard when it specified that the government needed to justify a *continuing* need under § 922(g)(4), especially against individuals whose commitment was long ago or against individuals who are able to prove to a court of law that they have returned to mental peaceableness.[184] According to *Tyler III*, the government's evidence showed that restrictions under § 922(g)(4) were justified for a period of time after an individual is first released from commitment, or if an individual has been committed and also has a history of attempting suicide. But this evidence did not show a continued risk posed by those who have returned to mental peaceable-

179. As stated by Judge VanDyke, the Ninth Circuit was demonstrating its "dislike of things that go bang." *Mai IV*, 974 F.3d 1082, 1097 (9th Cir. 2020) (VanDyke, J., dissenting).

180. The Ninth Circuit stated that it "emphatically [does] not subscribe to the notion that 'once mentally ill, always so.'" *Mai III*, 952 F.3d at 1121. But as Judges Bumatay and VanDyke point out in their later written dissenting opinions, the Ninth Circuit has effectively adopted this premise because "the panel's decision inescapably effectuates exactly that ethic." *Mai IV*, 974 F.3d 1082, 1097 (VanDyke, J., dissenting).

181. In *Tyler III*, the government needed to "establish a reasonable fit between its important objectives of public safety and suicide prevention and its *permanent* ban on the possession of firearms by persons adjudicated to be mentally unstable, some of them long ago." *Tyler III*, 937 F.3d at 693 (emphasis added) (citation omitted). In *Mai III*, "the government must demonstrate that 18 U.S.C. § 922(g)(4) is a 'reasonable fit' for the goal of reducing gun violence." *Mai III*, 952 F.3d at 1120 (citation omitted).

182. Heller v. District of Columbia, 670 F.3d 1244, 1258 (D.C. Cir. 2011) (quoting Ward v. Rock Against Racism, 491 U.S. 781, 782–83 (1989)).

183. *Id.* (quoting Bd. of Trs. of State Univ. of N.Y. v. Fox, 492 U.S. 469, 480 (1989)).

184. *See supra* subsection IV.B.1.

ness, and especially failed to show a continued risk for those who have no history of suicide attempts or contemplation. Unlike the Ninth Circuit, the Sixth Circuit recognized that an individual who was once mentally ill does not necessarily remain mentally ill in perpetuity.[185] Some individuals are able to be rehabilitated, to join the ranks of other "law-abiding, responsible citizens," and should be able to restore their constitutional rights accordingly.[186]

The Ninth Circuit, on the other hand, found that the government could impose a lifetime ban against Mai because he belonged to a "narrow class of individuals who are not at the core of the Second Amendment."[187] While the court agreed that the restriction was severe and effectively permanent, it was permissible because it did not burden the public at large.[188] The problem with this holding is that its reliance on class identification was overly broad for the data provided.[189] The class was not limited to individuals with a history of contemplated or attempted suicide, yet the Ninth Circuit found that the class passed muster under intermediate scrutiny because *some members* of this larger class posed a heightened risk of violence.[190] When applied to other contexts, this framework is clearly dangerous to constitutional rights. As illustrated by Judge VanDyke,

> Suppose Congress instituted a firearm ban against *anyone who has committed a crime*—from jaywalkers to violent felons. That "all criminals" classification would withstand scrutiny under the panel's standard because, when lumped together into one group, that group—as a whole—poses a heightened risk of violence just because *some* members of that group do. Whether committing murder or activating the turn signal too late, under the panel's rationale, "all criminals" are no longer law-abiding, responsible citizens entitled to basic Second Amendment rights.[191]

185. "Faced with either holding that Mai's past mental illness rendered him perpetually mentally ill . . . or admitting that Mai had the same Second Amendment right as any other law-abiding citizen, the panel punted . . . to avoid the awkwardness of expressly saying up front what it implicitly concluded" earlier in the first part of its opinion: "that Mr. Mai's long-ago mental illness forever excludes him from the community of 'law-abiding, responsible citizens' under the Second Amendment (i.e., once mentally ill, always so)." *Mai IV*, 974 F.3d 1082, 1098 (9th Cir. 2020) (VanDyke, J., dissenting).

186. *Tyler III*, 837 F.3d at 685 (citing District of Columbia v. Heller, 554 U.S. 570, 635 (2008)).

187. *Mai III*, 952 F.3d 1106, 1115 (9th Cir. 2020).

188. *Id.*

189. The meta-analysis had a very limited section devoted to involuntary commitments and no mention of risk for those who have been "adjudicated mentally ill." Instead, it focused on suicide risks for all mentally ill patients, regardless of whether they had ever made contact with a court of law. *See infra* section V.B (discussing this meta-analysis and its flaws and limitations).

190. *Mai III*, 952 F.3d at 1116 ("The Second Amendment allows categorical bans on groups of persons who presently pose an increased risk of violence." (citation omitted)).

191. *Mai IV*, 974 F.3d 1082, 1099 (9th Cir. 2020) (VanDyke, J., dissenting).

As further explained by Judge VanDyke, this logic is not only dangerous, but also circular. The Ninth Circuit lumped Mai into a group to which he seemingly does not belong and then used that classification against him:

> Step 1: Congress bans firearm possession for a broad class of people including some sub-class therein that poses a heightened risk of violence. Step 2: Our court says the broad class is outside "core" of the Second Amendment. Step 3: We say the individual in the broad class is also outside the core, even though no evidence says he belongs to a violent sub-class, and all the evidence suggests otherwise. Step 4: We lower the level of scrutiny and relax the "fit" requirement so that a wildly overbroad prohibition can be deemed "reasonable." This bootstrapping approach is an ingenious but insidious way to render the Second Amendment a paper tiger.[192]

Intermediate scrutiny requires not only a reasonable fit between the statute in question and the government's important interest, but also a showing that the statute does not burden substantially more protected conduct than is necessary to further the interest. By failing to properly consider this additional requirement, the Ninth Circuit creates a hole in the reasonable fit requirement that "the government could drive a truck through."[193]

B. *Tyler III* Correctly Discounted the Meta-Analysis Provided by the Government, and *Mai III* Incorrectly Relied on the Same, Where the Meta-Analysis Was Not an Accurate Representation of American Citizens

In both *Tyler III* and *Mai III*, the government offered the same study to support its argument—*Suicide as an Outcome for Mental Disorders: A Meta-Analysis*.[194] In this meta-analysis, the authors reviewed previously published medical literature on the mortality of common mental disorders in order to estimate the combined suicide risk of each disorder.[195] The Sixth Circuit properly discounted the meta-analysis because it recognized that the data was not tailored to Clifford Tyler's circumstances.[196] Conversely, the Ninth Circuit believed that a continuing need had been justified through the meta-analysis, stating that "suicide risk following release from commitment is extremely high," and while this risk declines over time, it likely never reaches zero.[197] There are multiple flaws with the Ninth Circuit's interpretation of the meta-analysis. First, the Ninth Circuit ig-

192. *Id.* (citation omitted).
193. *Id.* at 1103.
194. Harris & Barraclough, *supra* note 131, at 205; *Tyler III*, 837 F.3d 678, 695–96 (6th Cir. 2016).; *Mai III*, 952 F.3d at 1117.
195. Harris & Barraclough, *supra* note 131, at 205.
196. *Tyler III*, 837 F.3d at 696–97.
197. *Mai III*, 952 F.3d at 1117–18.

nored that this meta-analysis was not an accurate representation of American citizens—it was based on patient data from around the world and made no consideration of the differences between varied systems of healthcare or differing procedures for involuntary commitment. Second, the Ninth Circuit disregarded the statistical errors present in the analysis—the data were so irregular, even the authors stated that it was likely flawed.

Published in 1997, the meta-analysis was based on mortality studies conducted from 1966 to 1993.[198] Not only is the data dated, all of the information, regarding individuals from a wide variety of international health systems, is compiled into an undifferentiated class.[199] In most sections of the analysis, patients from the United States were grouped with other foreign populations to calculate a combined score.[200] Use of this combined data becomes even more concerning when reviewing the data dedicated to involuntary commitments. The meta-analysis reviewed three papers on involuntary commitment, for a combined total population of 14,000.[201] However, ninety-eight percent of this population was only followed for one year after their commitment, and the other two percent were followed for 2.5 to 8.5 years.[202] This means that any resulting data or risk analyses are *substantially* limited to patients within their first year of release and can give little indication of the actual suicide expectancy for patients whose involuntary commitment ended more than one year prior; further, there is no data available for patients who were released more

198. Harris & Barraclough, *supra* note 131, at 205. This means that the most recent data available in the meta-analysis was at least twenty-three years old when *Tyler III* was decided in 2016 and at least twenty-seven years old when *Mai III* was decided in 2020. With medical knowledge doubling "every few months," it is extremely questionable whether the data analyzed would still be accurate for the purposes of assessing suicide risk—when medical knowledge changes, so does the ability to successfully treat a patient's illness. Breda Corish, *Medical Knowledge Doubles Every Few Months; How Can Clinicians Keep Up?*, ELSEVIER (Apr. 23, 2018), https://www.elsevier.com/connect/medical-knowledge-doubles-every-few-months-how-can-clinicians-keep-up [https://perma.cc/7SC3-3SXJ]. It is easy to imagine that the risk of suicide for patients living in 1966 would be very different if those patients could have received modern medical care and treatment.

199. *See infra* note 207 and accompanying text (differentiating between populations represented in the data).

200. In a portion of the meta-analysis which reviewed schizophrenia patient data, the United States was not separated by percentage in the discussion of the combined risk. Instead, "North America 19%" was identified as a portion of the 8.5 combined increased suicide risk. Harris & Barraclough, *supra* note 131, at 210–11. In this same category, Chinese patients inexplicably had an increased risk of suicide "60 times over that expected," as compared to the mean risk of suicide "8.5 times that expected." *Id.*

201. *Id.* at 219.

202. *Id.* at 219–20.

than 8.5 years prior.[203] This data breached even the minimum inclusion criteria set out by the authors and was included only because there was an "absence of other large studies on involuntary commitment."[204]

To add to these concerning temporal limitations, ninety-eight percent of the population that accounted for the expected value of the "involuntary commitment" combined risk were Danish.[205] The remaining two percent of the population observed for purposes of scoring involuntary commitment risks were split between Scottish and American individuals.[206] Based on these populations, the combined suicide risk was "39 times that expected. The highest risks were for 'non-psychosis' and following short first admissions."[207] Neither *Tyler III* nor *Mai III* made any indication that it considered the impact of a majority Danish population on the overall result of this suicide expectancy and how that might affect a constitutional analysis,[208] especially considering the procedures for involuntary commitment differ significantly between America and Denmark.[209] Additionally, neither court indicated

203. *Id.* at 219. But according to *Mai III*, "[w]e cannot conclude that, because no one apparently has published a study beyond 8.5 years after the participants' release from involuntary commitment, Congress may not infer that the increased risk of violence continues after that time period." 952 F.3d at 1118.

204. Harris & Barraclough*, supra* note 131, at 219–20.

205. *Id.* at 220.

206. *Id.*

207. *Id.* The meta-analysis stated that, for many of the disorders studied, suicide risk is highest for "[t]he recently discharged" or "in the first few weeks following discharge," "at the beginning of treatment," at the "initial phases of illness," "for those with a history of suicide attempt," or "following short first admissions." *Id.* at 210–23.

208. The Sixth Circuit stated that the meta-analysis "clouds rather than clarifies the connection between prior commitment and future dangerousness" based on the temporal limitations but failed to address the limitations that arise based on the origin of the data. *Tyler III*, 837 F.3d 678, 695–96 (6th Cir. 2016).

209. Denmark has been identified as one of the happiest countries in the world, consistently topping the World Happiness Report "in all six areas of life satisfaction." *Why Finland and Denmark Are Happier Than the U.S.*, WORLD HAPPINESS REP. (Jan. 9, 2020), https://worldhappiness.report/news/why-finland-and-denmark-are-happier-the-us/#:~:text=the%20Nordic%20countries%%20to,%2C%%%%%20 [https://perma.cc/7N3T-G2A5]. Denmark provides free (taxpayer-funded) healthcare to all residents, and mental health care is fully covered under this system. Roosa Tikkanen et al., *International Health Care System Profiles: Denmark*, COMMONWEALTH FUND (June 5, 2020), https://www.commonwealthfund.org/international-health-policy-center/countries/denmark [https://perma.cc/HJK6-JPW6]. Based on such an accessible system, where residents are known to be on average healthier and happier than any other nation in the world, Danish residents who have mental health concerns are more likely to get the treatment they need before their mental disorder advances to a dangerous level or becomes serious enough to warrant commitment. Indeed, the Danish system of involuntary commitment often requires a medical diagnosis of "psychosis." Simei Zhang et al., *Involuntary Admission and Treatment of Patients with Mental Disorder*, 31

that they considered sources of error or the implications of such errors on meta-analysis forms of data.[210]

In reviewing this specific set of data on involuntary commitments, the *Mai III* court focused on the meta-analysis's report that for those released from involuntary commitment, the combined suicide risk was thirty-nine times the expected risk, emphasizing that this "extraordinarily increased risk of suicide clearly justifies the congressional judgment that those released from involuntary commitment pose an increased risk of suicide."[211] Conversely, the *Tyler III* court considered the temporal limitations of the study in observing participants (2–8.5 years) and even noted that the risk was at its peak "following short

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NEUROSCIENCE BULL. 99, 101 (2015). Comparatively, the United States does not "stipulate specific mental disorders" or "the severity of [a] mental disorder" which would qualify a person for involuntary admission. *Id.* at 101–02. These significant differences in availability of care and standards of commitment would indicate that a resident of Denmark who has been involuntarily committed is the type of patient who is not responding to care, or who has a very serious and potentially untreatable disorder. The fact that these patients are thirty-nine times more likely to commit suicide is presumably less related to the fact that they were committed but rather that their disorder is more advanced or untreatable. In the United States, we should expect a very different outcome based on our systems of healthcare, where seventy-four percent of Americans do not believe mental health services are accessible. *New Study Reveals Lack of Access as Root Cause for Mental Health Crisis in America*, NAT'L COUNCIL FOR MENTAL WELLBEING (Oct. 10, 2018), https://www.thenationalcouncil.org/press-releases/new-study-reveals-lack-of-access-as-root-cause-for-mental-health-crisis-in-america/ [https://perma.cc/GR2K-E9YR]. In America, low-income households are even less likely to seek mental health treatment due to cost, and of those that do seek help, many use community center services rather than those of a qualified mental health center. *Id.* It is therefore much more likely in the United States that patients who are involuntarily committed may have received either very little or no mental health treatment or maybe even discovered their disorder for the first time after already becoming a danger to themselves or others. Accordingly, Americans who are involuntarily committed would have a lowered risk of suicide post-release, as compared to their Danish counterparts, if their disorder were more likely to be at a less advanced stage when admitted to treatment.

210. The authors themselves indicate that their results may be flawed in multiple ways: "Subject exclusion, short follow-up, form of analysis, publication bias and multiple publication of the same material can overestimate the effect studied"; "Bias [favoring] the publication of papers reporting increased suicide risk seems to have happened"; as well as the double-counting of data and statistical error resulting from discrepancies in confidential and non-confidential patient data. Harris & Barraclough, *supra* note 131, at 221–22. While the authors concluded that virtually all mental disorders may have an increased risk of suicide, so too did they indicate that "[s]uicide risk seems highest at the beginning of treatment and diminishes thereafter" and "the lifetime risk assessed on small cohorts with relatively short follow-up should be re-determined." *Id.* at 223. While the involuntary commitment data was not drawn from a small cohort, it was drawn from a mostly non-American population, and received such little follow-up that the authors determined it was in breach of their own minimum standards of reporting. *Id.* at 219–20.

211. *Mai III*, 952 F.3d 1106, 1117 (9th Cir. 2020).

first admissions."[212] After considering these temporal limitations, which the *Mai III* court did not appear to contemplate, the *Tyler III* court concluded that this data does not sufficiently "explain why a lifetime ban is reasonably necessary."[213] The *Tyler III* court also concluded that this data was especially insufficient to explain a lifetime ban on patients who had no history of suicide attempt or contemplation.[214]

The Ninth Circuit's holding that § 922(g)(4) withstands intermediate scrutiny based on the meta-analysis data is seriously flawed; it fails to recognize that this meta-analysis was not an accurate representation of American citizens, systems of healthcare, or law and ignores the significant risk of statistical error present in the analysis. The Sixth Circuit properly identified many of the issues with this meta-analysis when it concluded that the data it presented was not sufficient to justify a lifetime ban under § 922(g)(4).

VI. CONCLUSION

Until the government provides sufficient alternative data to justify a lifetime ban on firearm possession under § 922(g)(4), this statute must be held unconstitutional. As applied to individuals like Duy Mai, Bradley Beers, and Clifford Tyler, who have each proven to a court of law that they returned to mental peaceableness or no longer suffer from the mental condition that led to their involuntary commitment, this statute has not yet been properly justified by evidence or data to support a lifetime firearms ban.[215] This is especially true for individuals dispossessed of firearms under § 922(g)(4) who were involuntarily committed for non-violent disorders or who have never attempted or contemplated suicide. While the government's interest in preventing gun violence and suicide is extremely compelling, its interest must be reasonably served by the statute or regulation it uses to deprive citi-

212. *Tyler III*, 837 F.3d 678, 696 (6th Cir. 2016) (quoting Harris & Barraclough, *supra* note 131, at 220).

213. *Id.* (citation omitted).

214. *Id.* at 695. An interesting statistic to also consider: the restrictions created by 18 U.S.C. § 922(g)(4) "[deny] gun rights to about 450 former patients who would not use a firearm to commit suicide for every gun suicide it prevents." Fredrick E. Vars & Amanda Adcock Young, *Do the Mentally Ill Have a Right To Bear Arms?*, 48 WAKE FOREST L. REV. 1, 22 (2013).

215. Clifford Tyler was unable to petition his own state court because Michigan has not yet adopted a relief-from-disabilities program. *Tyler III*, 837 F.3d at 684. However, the Sixth Circuit did find that "a number of healthy, peaceable years separate [Tyler] from [his] troubled history." *Id.* at 695. After the ATF approved Pennsylvania's state-level relief-from-disabilities program, Bradley Beers proved to a Pennsylvania court that he met the requirements for restoration of his Second Amendment rights and was able to obtain a gun. *Beers III*, 140 S. Ct. 2758 (2020) (mem.). Duy Mai "successfully petitioned a Washington state court for relief" in 2014. *Mai III*, 952 F.3d at 1110.

zens of their fundamental rights. Properly enforcing all components of the reasonable fit standard is essential to avoid watering down fundamental rights or transforming them into "paper tigers."[216]

Future courts considering as-applied constitutional challenges to § 922(g)(4) should recognize the flaws within the Ninth Circuit's panel opinion. Such courts should instead look to the Sixth Circuit for guidance when applying intermediate scrutiny, to ensure that this tier of constitutional review is properly applied and, if upheld, that § 922(g)(4)'s application to the formerly mentally ill is properly justified through data sufficiently tailored to the challenger's circumstances.

216. *See supra* note 190.