

---

4-25-2022

## Restoration of Second Amendment Rights from a Lifetime Ban Imposed by 18 U.S.C. § 922(G)(4): The Sixth Circuit Provides a Path Forward

Bennett E. Kuhar  
*Cleveland-Marshall College of Law*

Follow this and additional works at: <https://engagedscholarship.csuohio.edu/clevstrev>  
**How does access to this work benefit you? Let us know!**

---

### Recommended Citation

Bennett E. Kuhar, *Restoration of Second Amendment Rights from a Lifetime Ban Imposed by 18 U.S.C. § 922(G)(4): The Sixth Circuit Provides a Path Forward*, 70 Clev. St. L. Rev. 603 (2022)  
available at <https://engagedscholarship.csuohio.edu/clevstrev/vol70/iss3/8>

This Note is brought to you for free and open access by the Journals at EngagedScholarship@CSU. It has been accepted for inclusion in Cleveland State Law Review by an authorized editor of EngagedScholarship@CSU. For more information, please contact [library.es@csuohio.edu](mailto:library.es@csuohio.edu).

# **RESTORATION OF SECOND AMENDMENT RIGHTS FROM A LIFETIME BAN IMPOSED BY 18 U.S.C. § 922(G)(4): THE SIXTH CIRCUIT PROVIDES A PATH FORWARD**

BENNETT E. KUHAR\*

## ABSTRACT

Title 18 U.S.C. § 922(g)(4) imposes a disability prohibiting the ownership and possession of firearms on individuals who have been previously involuntarily committed. Because of an inconsistent patchwork of state and federal laws, relief from this disability, or restoration of an individual's fundamental right to own or possess firearms, is not available to all people. In effect, some individuals who have been previously involuntarily committed face a lifetime ban, while other similarly situated people can own or possess firearms once again. This issue has created a circuit split between the Third, Sixth, and Ninth Circuits. Despite applying the same constitutional analysis to the issue and similar facts, all three circuits reached different results. The Sixth Circuit found an individual who had been previously involuntarily committed many years prior had a Second Amendment claim to challenge the firearm disability prohibiting firearm ownership. This Note asserts the Sixth Circuit's analysis is most persuasive because it properly applies intermediate scrutiny, it is consistent with the current understanding of Second Amendment rights and related legislative history, it fairly considers the rights of those with a history of mental illness rather than continues the stigmatization of mental illness, and it effectively balances the rights of those previously involuntarily committed with the compelling government interests of general public safety.

---

\* Bennett Kuhar is expected to receive his J.D. from Cleveland State University, Cleveland-Marshall College of Law, in May 2022. Bennett graduated from Northwestern University in 2011 with a B.S. in Mechanical Engineering and in 2012 with a M.S. in Project Management. He extends his gratitude to Professor Brian Glassman for teaching him first year legal writing and analysis and to Professor Reginald Oh for teaching him constitutional law and providing guidance on this Note. Lastly, and most importantly, Bennett extends a special, heartfelt thank you to his family and friends for their undying support and encouragement.

## CONTENTS

I.	INTRODUCTION .....	604
II.	THE PERMANENT BAN CREATED BY 18 U.S.C. 922(G)(4) .....	607
III.	SECOND AMENDMENT RIGHTS AND ANALYSIS FRAMEWORK.....	612
	A. <i>The Two-Step Analysis Framework</i> .....	614
IV.	ANALYSIS.....	617
	A. <i>The 18 U.S.C. § 922(g)(4) Permanent Ban Circuit Split</i> .....	617
	1. The Third Circuit Improperly Determined § 922 (g)(4) Does Not Burden Second Amendment Rights .....	618
	2. The Ninth Circuit Seemingly Applies Rational Basis Scrutiny Instead of Intermediate Scrutiny .....	620
	3. The Sixth Circuit Applies Intermediate Scrutiny and Finds a Valid Second Amendment Claim.....	622
	B. <i>The Sixth Circuit’s Decision Properly Considers Previous Legislation and the Rights of Those with a History of Mental Illness</i> .....	626
	C. <i>The Sixth Circuit Balances the Rights of Those Previously Involuntarily Committed with Compelling Government Interests</i> .....	628
V.	CONCLUSION .....	630

## I. INTRODUCTION

Looking to protect his home and his family, Joe Smith<sup>1</sup> made the decision to purchase his first firearm. While the process of purchasing a first firearm can be intimidating, Joe went to the local sportsmen store, and the clerk walked him through the process with relative ease. He selected the firearm he wanted to purchase and began the process of completing his background check by filling out the required self-reporting questionnaire. Joe waited while the clerk ran his background check through the federal system. After a short while, the clerk returned to him and informed Joe he could not complete the sale. Joe’s background check indicated that he had a “disability”<sup>2</sup> that prohibited him from purchasing or possessing a firearm. Twenty years prior, when Joe was a young adult, he had been involuntarily committed to a psychiatric institution. Since then, Joe has had a clean bill of health, graduated from college, earned a graduate degree, has been promoted numerous times in his job, and has started a family. By all means, Joe is an upstanding and productive member of

---

<sup>1</sup> Joe Smith’s story is hypothetical, but it depicts a story similar to the real plaintiffs’ stories from real cases that will be described throughout this Note.

<sup>2</sup> Federal and state laws contain provisions that prohibit specific classes of individuals from owning firearms. These statutes commonly refer to these prohibitions as “disabilities.” *See, e.g.*, 18 U.S.C. § 925; FLA. STAT. § 790.064 (2020); OHIO REV. CODE ANN. § 2923.13 (LexisNexis 2015).

society, yet he is unable to possess or own a firearm because of his prior time spent in a psychiatric institution.

Second Amendment rights are a commonly contested issue in the United States.<sup>3</sup> In the wake of gun violence, it is common to see pleas for stricter gun control battling with vehement support of Second Amendment rights.<sup>4</sup> In response to the civil unrest that has resulted from riots, a presidential election year, and the COVID-19 pandemic, many people have purchased firearms to protect themselves and their families.<sup>5</sup> While the government does not track firearm sales, it does track background checks that are required to buy a firearm from a federally licensed dealer.<sup>6</sup> The number of background checks from January to June in 2020 nearly doubled when compared to the same months in 2019.<sup>7</sup> Many of these purchasers were expected to be first time buyers.<sup>8</sup> Considering the current unrest and the fact that many people have decided to protect themselves with firearms in response, Joe's situation seems unfair on its face.

In the pivotal Second Amendment rights case, *District of Columbia v. Heller*, the Supreme Court held that the Second Amendment protected an individual right to own a firearm.<sup>9</sup> Ownership is not limited to militia or military uses; instead, it applies to individuals for the purpose of self-defense of the person and home.<sup>10</sup> However, the Court noted this right is not unlimited, and the outcome of *Heller* did not invalidate

---

<sup>3</sup> Gun control is listed in the top five issues as "extremely important" in conjunction with healthcare, terrorism and national security, education, and the economy. Zach Hrynowski, *Several Issues Tie as Most Important in 2020 Election*, GALLUP (Jan. 13, 2020), <https://news.gallup.com/poll/276932/several-issues-tie-important-2020-election.aspx>.

<sup>4</sup> In response to the Parkland, Florida shooting, many people and states called for gun control laws. These calls were met with resistance from Second Amendment advocates the NRA, who would consistently try to undermine any proposed legislation. See Matt Vasilogambros, *After Parkland, States Pass 50 New Gun-Control Laws*, PEW CHARITABLE TRS. (Aug. 2, 2018), <https://www.pewtrusts.org/en/research-and-analysis/blogs/stateline/2018/08/02/after-parkland-states-pass-50-new-gun-control-laws>.

<sup>5</sup> Chris Arnold, *Pandemic and Protests Spark Record Gun Sales*, NPR (July 16, 2020, 11:03 AM), <https://www.npr.org/2020/07/16/891608244/protests-and-pandemic-spark-record-gun-sales>; Marc Fisher et al., *America on Edge: Covid Lockdowns, Protests and Election Strife Led to Record Gun Sales*, WASH. POST (Jan. 18, 2021), [https://www.washingtonpost.com/national/record-gun-sales-us-2020/2021/01/18/d25e8616-55a9-11eb-a931-5b162d0d033d\\_story.html](https://www.washingtonpost.com/national/record-gun-sales-us-2020/2021/01/18/d25e8616-55a9-11eb-a931-5b162d0d033d_story.html).

<sup>6</sup> Arnold, *supra* note 5.

<sup>7</sup> The statistics show that 9,851,516 background checks were completed in January through June 2020 compared to 5,819,681 in January through June 2019. *Id.*

<sup>8</sup> The NSSF surveyed many firearm retailers, which reported that approximately 40% of sales were to purchasers who have never owned a firearm. Through July that is approximately 5,000,000 new gun owners. *First-Time Gun Buyers Grow to Nearly 5 Million in 2020*, NAT'L SHOOTING SPORTS FOUND. (Aug. 24, 2020), <https://www.nssf.org/first-time-gun-buyers-grow-to-nearly-5-million-in-2020/>.

<sup>9</sup> *District of Columbia v. Heller*, 554 U.S. 570, 592 (2008).

<sup>10</sup> *Id.* at 580–81.

“presumptively lawful” longstanding prohibitions based on disabilities or prohibitions on possessing firearms in certain areas, like government buildings or schools.<sup>11</sup> Under 18 U.S.C. § 922(g)(4), an individual’s prior involuntary commitment establishes a firearm disability.<sup>12</sup> Despite this strong Supreme Court ruling regarding firearm ownership rights, Joe would be still unable to purchase a firearm.

Fortunately, there are programs that provide relief from disability, which can restore an individual’s Second Amendment right to possess a firearm.<sup>13</sup> Unfortunately, the programs are a part of an evolving area of law that is composed of “a confusing and at times contradictory body of federal and state laws.”<sup>14</sup> Further, despite the existence of these programs, there is potential that Joe could live in a state that does not provide any opportunity to restore Second Amendments rights because of the relationship between state and federal laws.<sup>15</sup>

The combination of the Second Amendment providing a fundamental individual right to bear arms in the United States, the existence of disabilities that prevent the ownership and possession of firearms, and the availability (or lack thereof) of relief from disability poses the legal issue of whether “[i]t is reasonably necessary to forever ban all previously institutionalized persons from owning a firearm?”<sup>16</sup> This question has produced a circuit split regarding the constitutionality of 18 U.S.C. § 922(g)(4).

In an as-applied case, the Sixth Circuit held the plaintiff had a viable claim under the Second Amendment regarding an effective lifetime ban, and the government did not provide evidence sufficient to justify this ban for an individual with a clean bill of health who had been committed many years ago.<sup>17</sup> Conversely, in a similar case, the Ninth Circuit held the plaintiff’s ban withstood Second Amendment scrutiny as the government was able to show a reasonable fit between the § 922(g)(4) prohibition and furthering its goal of preventing gun violence.<sup>18</sup> Finally, the Third Circuit, concluded the plaintiff’s lifetime ban under § 922(g)(4) was proper and did not burden Second Amendment rights because mentally ill individuals were traditionally not allowed to own firearms if they were dangerous to themselves or the public.<sup>19</sup> The plaintiff could

---

<sup>11</sup> *Id.* at 626.

<sup>12</sup> 18 U.S.C. § 922(g)(4).

<sup>13</sup> Liza H. Gold & Donna Vanderpool, *Legal Regulation of Restoration of Firearm Rights After Mental Health Prohibition*, 46 J. AM. ACAD. PSYCHIATRY & L. 298, 298 (2018).

<sup>14</sup> *Id.* at 306.

<sup>15</sup> *Id.* at 303.

<sup>16</sup> *Tyler v. Hillsdale Cnty. Sheriff’s Dep’t*, 837 F.3d 678, 697 (6th Cir. 2016).

<sup>17</sup> *Id.* at 699.

<sup>18</sup> *Mai v. United States*, 952 F.3d 1106, 1121 (9th Cir. 2020).

<sup>19</sup> *Beers v. Att’y Gen. U.S.*, 927 F.3d 150, 159 (3d Cir. 2019). The Third Circuit applied slightly different analysis than the other circuits. The faults of this analysis will be discussed below in Part IV.

not distinguish his circumstances from members of the class of people whom Section 922(g)(4) has historically barred.<sup>20</sup>

Regarding the circuit split on the § 922(g)(4) permanent ban, the Sixth Circuit approach is the most persuasive because it balanced the rights of those with a history of mental illness against the compelling government interests of protecting public health and safety.<sup>21</sup> It properly applied intermediate scrutiny by requiring more stringent evidence that sufficiently illustrates that previous involuntary commitment is indicative of mental health issues, justifying the prohibition of firearm ownership years later.<sup>22</sup> Conversely, the Ninth Circuit effectively and improperly applied a rational basis test, and despite the court's claim to not be stigmatizing mental health, the Third Circuit's test has that exact effect.<sup>23</sup> Further, the Sixth Circuit's finding of a Second Amendment claim is consistent with the current understanding of the Second Amendment as well as historical and recent legislative intent.<sup>24</sup>

Part II of this Note establishes the issue created by 18 U.S.C. § 922(g)(4) and the confusing intersection of state and federal law. Part III discusses the current status of Second Amendment rights and the two-step analysis commonly used to analyze constitutional challenges to the Second Amendment. Part IV discusses the circuit split between the Third, Sixth, and Ninth circuits and how the *Tyler* decision correctly applies intermediate scrutiny, considers existing legislation, and balances the rights of those previously involuntarily committed with the government interest of public safety. This Note concludes in Part V.

## II. THE PERMANENT BAN CREATED BY 18 U.S.C. 922(G)(4)

Despite interpretation of the same statute and virtually the same facts, the Sixth, Ninth, and Third Circuits have inconsistently interpreted 18 U.S.C. § 922(g)(4) and, in some instances, incorrectly found a constitutional lifetime ban on firearm ownership created by the statute. *District of Columbia v. Heller* established an individual right to own firearms.<sup>25</sup> The Court cautioned that the right is not unlimited when it stated “nothing in our opinion should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons and the mentally ill, or laws forbidding the carrying of firearms in sensitive places such as schools and government buildings.”<sup>26</sup>

---

<sup>20</sup> *Id.* The court stated that the historically barred class of people that were outside of the Scope of the Second Amendment were “individuals who were considered dangerous to the public or to themselves.” *Id.* at 158.

<sup>21</sup> *Tyler*, 837 F.3d at 699.

<sup>22</sup> *Id.* at 692.

<sup>23</sup> *Mai*, 952 F.3d at 1115; *Beers*, 927 F.3d at 158 (purporting to apply intermediate scrutiny, the court in effect applied the rational basis test).

<sup>24</sup> *Tyler*, 837 F.3d at 681–82; Paul S. Appelbaum, *Does the Second Amendment Protect the Gun Rights of Persons with Mental Illness?*, 68 PSYCHIATRIC SERVS. 3, 5 (2017).

<sup>25</sup> *District of Columbia v. Heller*, 554 U.S. 570, 592 (2008).

<sup>26</sup> *Id.* at 626.

The Court considered these longstanding prohibitions “presumptively lawful.”<sup>27</sup> While it did not explicitly list it, the Court likely considered 18 U.S.C. § 922(g) as one of these presumptively lawful prohibitions.<sup>28</sup> Section 922(g)(4), part of the Gun Control Act of 1968 and the main focus of this Note, provides:

It shall be unlawful for any person— . . . (4) 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.<sup>29</sup>

This statute includes prohibitions for other classes of individuals that would be presumptively lawful as well (e.g., felons, fugitives from justice, persons dishonorably discharged, and misdemeanants of domestic violence).<sup>30</sup> A violation of this statute is a felony that can lead to penalties of up to ten years in prison and a maximum fine of \$250,000.<sup>31</sup>

There is minimal historical evidence supporting the exclusion of the mentally ill from firearm ownership.<sup>32</sup> Prohibitions related to firearms are by no means new. Congress’s power to enact categorical prohibitions was “part of the original meaning” of the Second Amendment.<sup>33</sup> However, “[o]ne [would search] in vain through eighteenth-century records to find any laws specifically excluding the mentally ill from firearms ownership.”<sup>34</sup> “[L]egal limits on the possession of firearms by the mentally ill . . . are of 20th Century vintage.”<sup>35</sup> Generally, these prohibitions are meant to protect the public.<sup>36</sup> The Supreme Court has stated the purpose of § 922(g) “was to keep firearms out of the hands of presumptively risky people.”<sup>37</sup> Further, the courts

---

<sup>27</sup> *Id.* at 627 n.26.

<sup>28</sup> *Id.*

<sup>29</sup> 18 U.S.C. § 922(g).

<sup>30</sup> *Id.*

<sup>31</sup> 18 U.S.C. § 924(a)(2); 18 U.S.C. § 3571(b)(3).

<sup>32</sup> Carlton F.W. Larson, *Four Exceptions in Search of a Theory: District of Columbia v. Heller and Judicial Ipse Dixit*, 60 HASTINGS L.J. 1371, 1376 (2009).

<sup>33</sup> *United States v. Skoien*, 614 F.3d 638, 640 (7th Cir. 2010).

<sup>34</sup> Larson, *supra* note 32, at 1376.

<sup>35</sup> *Skoien*, 614 F.3d at 641.

<sup>36</sup> Larson, *supra* note 32, at 1377.

<sup>37</sup> *Dickerson v. New Banner Inst.*, 460 U.S. 103, 112 n.6 (1983); *see also Huddleston v. United States*, 415 U.S. 814, 824 (1974).

have expressed that § 922 (g)(4) has the added purpose of protecting the community from crime and preventing suicide.<sup>38</sup>

The Bureau of Alcohol, Tobacco, Firearms, and Explosives (hereinafter “ATF”) has defined many of the crucial terms of § 922(g)(4) in 27 C.F.R. § 478.11.<sup>39</sup> “Adjudicated as a mental defective” means:

A determination by a court, board, commission, or other lawful authority that a person, as a result of marked subnormal intelligence, or mental illness, incompetency, condition, or disease: (1) Is a danger to himself or to others; or (2) Lacks the mental capacity to contract or manage his own affairs.<sup>40</sup>

This includes findings of insanity by a court in criminal cases and persons found incompetent to stand trial or not guilty by reason of lack of mental responsibility under the Uniform Code of Military Justice.<sup>41</sup> “Committed to a mental institution” means a “formal commitment of a person to a mental institution by a court, board, commission, or other lawful authority.”<sup>42</sup> It includes involuntary commitment to a mental institution, but notably does not include voluntary commitment or persons admitted for observation.<sup>43</sup> In addition to commitment for mental defectiveness or mental illness, it also includes other reasons like drug use.<sup>44</sup> The ATF has defined “mental institution” as “mental health facilities, mental hospitals, sanitariums, psychiatric facilities, and other facilities that provide diagnoses by licensed professionals of mental retardation or mental illness, including a psychiatric ward in a general hospital.”<sup>45</sup>

To properly understand the implications of the ban § 922(g)(4) imposes, it is necessary to understand what conduct can lead to involuntary commitment and under what standard. The Supreme Court considers involuntary commitment, frequently called civil commitment, to be a “significant deprivation of liberty” that requires due process of the law protection.<sup>46</sup> This deprivation has historically been justified on two grounds—the policing power and the *parens patriae* power.<sup>47</sup> The policing power

---

<sup>38</sup> Tyler v. Hillsdale Cnty. Sheriff’s Dep’t, 837 F.3d 678, 693 (6th Cir. 2016).

<sup>39</sup> 27 C.F.R. § 478.11 (2020).

<sup>40</sup> *Id.*

<sup>41</sup> *Id.*

<sup>42</sup> *Id.*

<sup>43</sup> *Id.*

<sup>44</sup> *Id.*

<sup>45</sup> *Id.*

<sup>46</sup> Addington v. Texas, 441 U.S. 418, 425 (1979); *see, e.g.*, Jackson v. Indiana, 406 U.S. 715, 731 (1972); *In re Gault*, 387 U.S. 1, 50 (1967); Specht v. Patterson, 386 U.S. 605, 608 (1967).

<sup>47</sup> 4 JOHN PARRY, TREATISE ON HEALTH CARE LAW § 20.04(1) (2020).

generally refers to a state's authority to protect its citizens from harm.<sup>48</sup> The *parens patriae* power, Latin for "parent of the people," refers to a state's authority to protect and act as guardian for individuals unable to care for themselves.<sup>49</sup> Considering these justifications, individuals can be involuntarily committed if they are considered dangerous to themselves or others.<sup>50</sup>

In *Addington v. Texas*, the Supreme Court found that the standard of "clear, unequivocal[,] and convincing" evidence used by the trial court was constitutionally adequate to find individuals dangerous to themselves or others.<sup>51</sup> While "unequivocal" is not required, states are free to use it in their standard.<sup>52</sup> A mere standard of preponderance of the evidence could lead to factfinders committing individuals "solely on a few isolated instances of unusual conduct."<sup>53</sup> Thus, because of the potential loss of liberty, the Court found the common civil standard of preponderance of the evidence to be inadequate.<sup>54</sup> The Court refused to apply the beyond a reasonable doubt standard common to criminal proceedings because, "given the uncertainties of psychiatric diagnosis, it may impose a burden the state cannot meet and thereby erect an unreasonable barrier to needed medical treatment."<sup>55</sup> Therefore, a person could be involuntarily committed if they are found to be dangerous to themselves or others by clear and convincing evidence.

There are existing processes, often referred to as "relief from disability" statutes or programs,<sup>56</sup> through which individuals who have been involuntarily committed can restore their Second Amendment rights. However, there is no universal, straightforward process as the existing statutes include a confusing intersection of federal and state laws regarding both prohibitions and restorations of rights.<sup>57</sup> Some states do not have prohibitions related to involuntary commitment, others have similar prohibitions to § 922(g)(4), and others have prohibitions with stricter standards.<sup>58</sup> This can lead to confusion because of rules requiring federal entities to relieve disabilities

---

<sup>48</sup> *Id.* § 20.04(1)(b).

<sup>49</sup> *Parens Patriae*, LEGAL INFO. INST., CORNELL L. SCH., [https://www.law.cornell.edu/wex/parens\\_patriae](https://www.law.cornell.edu/wex/parens_patriae) (last visited Dec. 2, 2020); e.g., PARRY, *supra* note 47, § 20.04(1)(a); *Addington*, 441 U.S. at 426.

<sup>50</sup> *Involuntary Civil Commitment*, LEGAL INFO. INST., CORNELL L. SCH., [https://www.law.cornell.edu/wex/involuntary\\_civil\\_commitment](https://www.law.cornell.edu/wex/involuntary_civil_commitment) (last visited Dec. 3, 2020).

<sup>51</sup> *Addington*, 441 U.S. at 433.

<sup>52</sup> *Id.* at 432.

<sup>53</sup> *Id.* at 427.

<sup>54</sup> *Id.*

<sup>55</sup> *Id.* at 432.

<sup>56</sup> See Gold & Vanderpool, *supra* note 13, at 298.

<sup>57</sup> *Id.* at 306.

<sup>58</sup> Michigan is an example of a state with no prohibitions. *Id.* at 302. California is an example of a state with stricter prohibitions. *Id.* at 299.

imposed by federal entities, state entities to relieve disabilities imposed by state entities, and the fact that some state programs can relieve federal disabilities if the state program meets federal standards and is certified by the ATF.<sup>59</sup>

The Gun Control Act of 1968 included the possibility of relief from disability for felons but not individuals who had been involuntarily committed.<sup>60</sup> The Firearm Owners Protection Act of 1986 amended 18 U.S.C. § 925(c) to allow relief from disability for any class of persons prohibited under § 922(g).<sup>61</sup> Because of this amendment, between 1986 and 1992, individuals could petition the Attorney General through the ATF for the restoration of gun rights.<sup>62</sup> This petition would be granted if the ATF deemed the individual not likely to endanger public safety and the grant of relief would not be contrary to the public interest.<sup>63</sup> Individuals who were denied relief could seek judicial review in federal court.<sup>64</sup> In 1992, Congress decided to defund this program because it was “a very difficult and subjective task which could have devastating consequences for innocent citizens if the wrong decision [was] made.”<sup>65</sup> Through this action, Congress nullified the authority of both the ATF and the federal judiciary to relieve a firearm disability because, in *United States v. Bean*, the Supreme Court held that the “absence of actual denial . . . [from the] ATF precludes judicial review under § 925(c).”<sup>66</sup>

In 2008, Congress passed the NICS Improvement Amendments Act (hereinafter “NIAA”).<sup>67</sup> While the primary purpose of this statute was to improve state compliance with the NICS (the National Instant Criminal Background Check System)<sup>68</sup> and tighten scrutiny and regulations on firearms purchasers, this statute also included important provisions related to relief.<sup>69</sup> First, the Act mandated that all federal agencies that impose mental health adjudications or involuntary commitments provide a process for relief from prohibitions.<sup>70</sup> Second, the Act provided grant money to

---

<sup>59</sup> *Id.* at 303–04.

<sup>60</sup> Gun Control Act of 1968, 18 U.S.C. § 925(c) (amended 1986).

<sup>61</sup> 18 U.S.C. § 925(c).

<sup>62</sup> Gold & Vanderpool, *supra* note 13, at 302.

<sup>63</sup> 18 U.S.C. § 925(c).

<sup>64</sup> *Id.*

<sup>65</sup> S. REP. NO. 102-353, at 19–20 (1992).

<sup>66</sup> *United States v. Bean*, 537 U.S. 71, 78 (2002).

<sup>67</sup> NICS Improvement Amendments Act of 2007, Pub L. No. 110–180, 121 Stat. 2559 (2008) (codified as amended at 34 U.S.C. §§ 40902–41).

<sup>68</sup> The NICS was created by Congress in 1993 as part of the Brady Handgun Violence Protection Act. Gold & Vanderpool, *supra* note 13, at 300.

<sup>69</sup> *Id.*

<sup>70</sup> NICS Improvement Amendments Act of 2007, Pub. L. No. 110–180, §101(c)(2)(A), 121 Stat. 2559, 2563 (2008) (codified as amended at 34 U.S.C. § 40911).

states that implemented a disability relief program that was certified by the ATF as meeting the NIAA's restoration criteria.<sup>71</sup> These state programs, under 34 U.S.C. § 40915, could restore both state and federal firearm rights.<sup>72</sup>

Relief from disability programs are not available to citizens in all states, which creates the possibility of an unjust lifetime ban. Approximately thirty states currently have relief from disability programs that comply with the NIAA's standards.<sup>73</sup> States that do not have a prohibition for involuntarily committed individuals similar to § 922(g)(4), like Michigan, consequently do not have a relief from disability statute that meets federal standards.<sup>74</sup> Other states that do have involuntary commitment prohibitions do not have NIAA compliant programs.<sup>75</sup> These last two types of states create the issue that there is not a possibility of federal relief for the respective state's citizens, effectively creating a permanent ban.<sup>76</sup> The circuit split, which is the focus of this Note, perfectly illustrates the permanent ban issue created by the confusing system of federal and state laws regarding relief from disability. Ultimately, the Sixth Circuit provides a potential path forward for individuals facing a permanent ban through its analysis and treatment of the Second Amendment.<sup>77</sup>

### III. SECOND AMENDMENT RIGHTS AND ANALYSIS FRAMEWORK

The Sixth Circuit correctly applied the commonly-used Second Amendment framework in a manner consistent with the current understanding of Second Amendment rights. The Second Amendment provides, “[a] well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed.”<sup>78</sup> Considering its inclusion in the Bill of Rights, the right to possess a firearm has been a fundamental right in the United States since its inception. As previously stated, the Second Amendment is not unfamiliar with controversy and questions regarding its scope. However, before *Heller* in 2008, “the

---

<sup>71</sup> *Id.* §§ 105(a), 103(c); Delegation Order—Authority to Facilitate Implementation of the NICS Improvement Amendments Act of 2007, 74 Fed. Reg. 33,475 (June 22, 2009).

<sup>72</sup> *Id.* See Gold & Vanderpool, *supra* note 13, at 303 (explaining that where a state has a certified relief program, federal law provides for the restoration of firearms rights suspended because of mental health exclusions).

<sup>73</sup> BUREAU OF ALCOHOL, TOBACCO, FIREARMS AND EXPLOSIVES, GUIDE: NICS IMPROVEMENT AMENDMENTS ACT OF 2007 (2021), <https://www.atf.gov/file/155981/download> (listing states that have qualified relief of disability programs that ATF has approved).

<sup>74</sup> Gold & Vanderpool, *supra* note 13, at 301–02.

<sup>75</sup> *Id.*

<sup>76</sup> *Id.* at 303.

<sup>77</sup> *Tyler v. Hillsdale Cnty. Sheriff's Dep't*, 837 F.3d 678, 700 (6th Cir. 2016) (holding that the government must justify a lifetime ban on gun possession under § 922(g)(4) with additional evidence of necessity or that the individual would be a risk to himself or others if he were allowed to possess a firearm).

<sup>78</sup> U.S. CONST. amend. II.

Supreme Court had barely opined on [its] scope.”<sup>79</sup> Prior to *Heller*, the most recent Supreme Court case on the scope of the Second Amendment was *United States v. Miller* in 1939.<sup>80</sup> In *Miller*, the Court addressed a criminal law that banned the possession of short-barreled shotguns and asked whether it had a “reasonable relationship to the preservation or efficiency of a well regulated militia.”<sup>81</sup> This ruling ignited a “longstanding debate over whether the Second Amendment provides an individual right to keep and bear arms versus a collective right belonging to the states to maintain militias.”<sup>82</sup>

A vast majority of the courts embraced the collective right theory until the Supreme Court answered the question in *Heller*.<sup>83</sup> In *Heller*, the Plaintiffs, who were residents of Washington D.C., challenged the constitutionality of a number of laws governing the ownership, use, and storage of firearms which amounted to a total ban on handguns and restricted the ability to use guns in the home.<sup>84</sup> With Justice Antonin Scalia authoring the opinion, the Court analyzed the history of the Second Amendment and applied a very textualist approach to affirm the D.C. Circuit’s reasoning.<sup>85</sup> The first part of the Second Amendment, the prefatory clause, indicates a purpose for the amendment, but does not limit it just to the militia or military use.<sup>86</sup> Additional purposes can be determined from historical rights that existed prior to the Constitution, primarily self-defense.<sup>87</sup> In the second part of the amendment, the operative clause, the “right of the people,” as used in the Bills of Rights, universally communicates an individual right.<sup>88</sup> Therefore, the Second Amendment protects a right that is “exercised individually and belongs to all Americans.”<sup>89</sup> The Court held that the Second Amendment protected an individual right to possess a firearm

---

<sup>79</sup> SARAH HERMAN PECK, CONG. RSCH. SERV., R44618, POST-HELLER SECOND AMENDMENT JURISPRUDENCE, at 1 (Mar. 25, 2019).

<sup>80</sup> *Id.*

<sup>81</sup> *United States v. Miller*, 307 U.S. 174, 178 (1939).

<sup>82</sup> PECK, *supra* note 79, at 1.

<sup>83</sup> *Id.*

<sup>84</sup> The District of Columbia had laws that effectively prohibited the possession of handguns, as it is a crime to carry an unregistered firearm, and the registration of handguns was prohibited. It also required guns to be stored unloaded and disassembled or bound by a trigger lock in the owner’s home. *District of Columbia v. Heller*, 554 U.S. 570, 574–76 (2008).

<sup>85</sup> *Id.* at 578–95.

<sup>86</sup> “A prefatory clause does not limit or expand the scope of the operative clause.” *Id.*

<sup>87</sup> The Court discussed how the right to own firearms was not tied to military service in England, preexisted the founding of the country, and developed out of a need for protection from public and private violence. *Id.* at 592–94.

<sup>88</sup> *Id.* at 579–80.

<sup>89</sup> *Id.* at 579–81.

unconnected with service in a militia or military and an individual right to use that firearm for traditionally lawful purposes, such as self-defense within the home.<sup>90</sup>

Applying this logic to the facts of the case, the Court held that the District's ban on handgun possession in the home and its prohibition against storing lawfully owned firearms readily operable in the home for the purposes of immediate self-defense violated the Second Amendment.<sup>91</sup> The Court also distinguished its new ruling from *Miller* by determining that the prior case primarily addressed the types of weapons eligible for Second Amendment protection.<sup>92</sup>

Because *Heller* involved a challenge of the District of Columbia law and not a state law, the question of whether *Heller* applied to the states was out of the reach of the Court, and the Court left it unanswered.<sup>93</sup> This question was important because the Bill of Rights originally applied to only the Federal Government and federal court cases.<sup>94</sup> States could adopt similar laws, but were not obligated to do so.<sup>95</sup> Using the incorporation doctrine, the Court can make provisions of the Bill of Rights applicable to the states through the Due Process Clause of the Fourteenth Amendment.<sup>96</sup> The Court addressed this issue in *McDonald v. City of Chicago* when it reaffirmed the Second Amendment rights defined in *Heller*, and found that the right to keep and bear arms was incorporated and made applicable to the states by the Due Process Clause of the Fourteenth Amendment.<sup>97</sup>

#### A. *The Two-Step Analysis Framework*

The following cases challenge the constitutionality of § 922(g)(4). It is important to distinguish between facial challenges and as-applied challenges. Under a facial challenge, the challenger is arguing that no application of the statute would be constitutional.<sup>98</sup> Conversely, under an as-applied challenge, the challenger argues that

---

<sup>90</sup> *Id.* at 580–81, 626, 635; see PECK, *supra* note 79, at 1 (“The Supreme Court’s landmark 5-4 decision in *Heller* . . . [held] that the Second Amendment guarantees an individual right to possess firearms for historically lawful purposes, such as self-defense in the home.”).

<sup>91</sup> *Id.* at 630.

<sup>92</sup> *Id.* at 622.

<sup>93</sup> *Id.* at 620 n.23 (noting the incorporation question has not been presented in this case).

<sup>94</sup> *Incorporation Doctrine*, LEGAL INFO. INST., CORNELL L. SCH., [https://www.law.cornell.edu/wex/incorporation\\_doctrine](https://www.law.cornell.edu/wex/incorporation_doctrine) (last visited Mar. 30, 2020).

<sup>95</sup> *Id.*

<sup>96</sup> The Due Process Clause is a legal obligation of all states and says a “state [shall not] deprive any person of life, liberty, or property, without due process of the law.” U.S. CONST. amend. XIV, § 1.

<sup>97</sup> *McDonald v. City of Chicago*, 561 U.S. 742, 750–51 (2010); *Incorporation Doctrine*, *supra* note 94, at 1.

<sup>98</sup> Alex Kreit, *Making Sense of Facial and As-Applied Challenges*, 18 WM. & MARY BILL RTS. J. 657, 657 (2010).

the statute is unconstitutional as applied to him/her because of his/her particular circumstances, even though the statute may otherwise be constitutional.<sup>99</sup>

The Third, Sixth, and Ninth circuits all used virtually the same framework to decide their respective as-applied challenges of 18 U.S.C. § 922(g)(4), yet all the cases produced different results despite similar facts. It is an appropriate choice considering other circuits have adopted this two-step framework to address Second Amendment challenges, including challenges to other provisions of § 922(g).<sup>100</sup> The first step “asks whether the challenged law burdens conduct that falls within the scope of the Second Amendment right, as historically understood [when the Bill of Rights was ratified].”<sup>101</sup> In the first step, the government has to establish that the challenged law regulates activity outside of the scope of the Second Amendment as understood when the Bill of Rights was ratified for it to be unprotected.<sup>102</sup> However, if the historical evidence is inconclusive or suggests that the regulated activities or individuals are not categorically unprotected, then the court moves to the next step.<sup>103</sup> In the second step, the court must decide and apply the appropriate level of scrutiny.<sup>104</sup> This decision should be based on: “(1) ‘how close the law comes to the core of the Second Amendment right,’ and (2) ‘the severity of the law’s burden on the right.’”<sup>105</sup>

It is briefly worth discussing the options for the level of scrutiny applied to the constitutional challenges. The level of scrutiny changes with the subject of the law because certain liberties or classes of people are more highly protected than others.<sup>106</sup> Rational-basis review is very deferential to Congress and laws typically survive this level of review as long as they are rationally related to a legitimate government interest.<sup>107</sup> Intermediate scrutiny requires the law to be substantially related to an

---

<sup>99</sup> *Id.*

<sup>100</sup> See *United States v. Greeno*, 679 F.3d 510, 518 (6th Cir. 2012); *United States v. Marzarella*, 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).

<sup>101</sup> *Greeno*, 679 F.3d at 518.

<sup>102</sup> *Tyler v. Hillsdale Cnty. Sheriff's Dep't*, 837 F.3d 678, 685–86 (6th Cir. 2016).

<sup>103</sup> *Id.* at 686.

<sup>104</sup> *Id.*

<sup>105</sup> *United States v. Chovan*, 735 F.3d 1127, 1138 (9th Cir. 2013) (quoting *Ezell v. City of Chicago*, 651 F.3d 684, 703 (7th Cir. 2011)).

<sup>106</sup> Randall R. Kelso, *Standards of Review Under the Equal Protection Clause and Related Constitutional Doctrines Protecting Individual Rights: The “Base Plus Six” Model and Modern Supreme Court Practice*, 4 U. PA. J. CONST. L. 225, 229 n.20 (2002).

<sup>107</sup> Marium Morshedi, *Levels of Scrutiny*, SUBSCRIPT L. (Mar. 6, 2018), <https://www.subscriptlaw.com/blog/levels-of-scrutiny>; *Rational Basis Test*, LEGAL INFO. INST.: CORNELL L. SCH., [https://www.law.cornell.edu/wex/rational\\_basis\\_test](https://www.law.cornell.edu/wex/rational_basis_test) (last visited Dec. 2, 2020).

important interest of the government.<sup>108</sup> Finally, strict scrutiny requires the law to be narrowly tailored to a compelling government issue.<sup>109</sup>

The circuits that reached the second step, the Sixth and the Ninth circuits, both applied intermediate scrutiny. Surviving intermediate scrutiny requires: “(1) the government’s stated objective to be significant, substantial, or important; and (2) a reasonable fit between the challenged regulation and the asserted objective.”<sup>110</sup> In *Heller*, the Court ruled out rational-basis scrutiny because, under that standard of review, the Second Amendment would have no effect.<sup>111</sup> Strict scrutiny is typically applied to government actions in cases where fundamental rights have been restricted like discrimination on the base of race or religion, restriction on freedom of speech, and restriction of voting.<sup>112</sup> Notably, this does not include the Second Amendment’s right to own a firearm.<sup>113</sup> Thus, the courts’ selection of intermediate scrutiny is appropriate, especially because many of the other circuit courts have selected intermediate scrutiny when analyzing the constitutionality of other § 922(g) provisions.<sup>114</sup> As this Note will illustrate below, the intermediate scrutiny test is largely a question of evidence and whether the government’s proffered evidence supports its interest in a way that justifies the restriction of an individual’s Second Amendment right.

In summary, the Supreme Court has determined that the Second Amendment provides an individual right to possess a firearm for lawful purposes that is subject to limitations.<sup>115</sup> For example, the Second Amendment does not confer a right to possess any kind of weapon for whatever reason.<sup>116</sup> Citizens cannot own what are considered

---

<sup>108</sup> *Id.*; *Intermediate Scrutiny*, LEGAL INFO. INST., CORNELL L. SCH., [https://www.law.cornell.edu/wex/intermediate\\_scrutiny](https://www.law.cornell.edu/wex/intermediate_scrutiny) (last updated Dec. 2, 2020).

<sup>109</sup> Morshedi, *supra* note 107; *Strict Scrutiny*, LEGAL INFO. INST., CORNELL L. SCH., [https://www.law.cornell.edu/wex/strict\\_scrutiny](https://www.law.cornell.edu/wex/strict_scrutiny) (last updated Dec. 2, 2020).

<sup>110</sup> *Chovan*, 735 F.3d at 1139 (internal citation omitted).

<sup>111</sup> *District of Columbia v. Heller*, 554 U.S. 570, 629 n.27 (2008).

<sup>112</sup> Richard H. Fallon, Jr., *Strict Judicial Scrutiny*, 54 *UCLA L. Rev.* 1267, 1268–69 (2007).

<sup>113</sup> Adam Joseph Neuman, *Drawing New Conclusions: Is the Second Amendment a Fundamental Right?*, FELS INST. OF GOV’T, UNIV. OF PA. (Feb. 6, 2017), <https://www.fels.upenn.edu/recap/posts/846> (explaining that the right to bear arms is not a fundamental right).

<sup>114</sup> *See* *United States v. Chovan*, 735 F.3d 1127, 1138 (9th Cir. 2013) (applying intermediate scrutiny in challenge to § 922(g)(9)); *United States v. Booker*, 644 F.3d 12, 25 (1st Cir. 2011) (applying the equivalent of intermediate scrutiny to § 922(g)(9)); *United States v. Staten*, 666 F.3d 154, 159–60 (4th Cir. 2011) (applying intermediate scrutiny in challenge to § 922(g)(9)); *United States v. Chester*, 628 F.3d 673, 683 (4th Cir. 2010) (applying intermediate scrutiny in challenge to § 922(g)(9)); *United States v. Williams*, 616 F.3d 685, 692 (7th Cir. 2010) (applying intermediate scrutiny in challenge to § 922(g)(1)).

<sup>115</sup> *Heller*, 554 U.S. at 626.

<sup>116</sup> *Id.*

dangerous and unusual weapons (e.g., machine guns and destructive devices).<sup>117</sup> Another allowable limitation that has been upheld by the courts is the ability of the government to restrict the possession or carrying of firearms in certain places like government buildings or schools.<sup>118</sup> Finally, the Court in *Heller* stated that the existing prohibitions on ownership, including the prohibition that is the focus of this Note under § 922(g)(4), are presumptively lawful.<sup>119</sup>

The fact that existing long-standing prohibitions are presumptively lawful seemingly defeats the position that the Sixth Circuit's interpretation of § 922(g)(4) is the most persuasive, and courts have in fact used this presumption to dispose of similar cases.<sup>120</sup> However, the fact that the Court states there is a presumption of lawfulness logically implies that there is a possibility that a ban could also be considered unconstitutional under the Second Amendment in some cases.<sup>121</sup> If this were not the case, the Court would simply have made a blanket statement that permanent lifetime bans on specified classes are constitutional. Or otherwise stated, the Court could have said that the classes of § 922(g), and specifically those who have been involuntarily committed which fall under subsection (g)(4), are categorically unprotected by the Second Amendment.

The following Part addresses how some of the federal circuits have addressed the permanent ban created by § 922(g)(4). Specifically, it discusses the Third and Ninth Circuits' failure to correctly apply the previously described framework and the Sixth Circuit's application of the two-step framework, which ultimately resulted in a Second Amendment claim against the ban.

#### IV. ANALYSIS

##### A. *The 18 U.S.C. § 922(g)(4) Permanent Ban Circuit Split*

The states' different treatment of disability from involuntary commitment and relief from disability has created a circuit split. Considering the similarity in facts and circumstances between *Tyler*, *Mai*, and *Beers* (e.g., prior involuntary commitment, elapsed time, and a physician finding their patient having a clean bill of health), it is reasonable to expect that all the cases would reach the same result. However, all the cases produced drastically different results. On one side, the Sixth Circuit has recognized there is a Second Amendment claim for those who have been previously

---

<sup>117</sup> *Id.* at 627. The National Firearms Act was originally passed in 1934 and has been amended over the years. It defines and regulates a variety of different types of weapons—commonly called “NFA weapons or items.” For instance, the act bans machine guns and destructive devices and restricts the ownership of short barreled rifles (a rifle that has a barrel less than eighteen inches long) and silencers. *National Firearms Act*, ATF (Apr. 7, 2020), <https://www.atf.gov/rules-and-regulations/national-firearms-act>; *Main 80 Percent Lower Laws*, 80% ARMS, (Dec. 28, 2021) <https://www.80percentarms.com/blog/maine-80-percent-lower-laws/>.

<sup>118</sup> *Heller*, 554 U.S. at 626.

<sup>119</sup> *Id.* at 626.

<sup>120</sup> *Tyler v. Holder*, No. 12-CV-523, 2013 U.S. Dist. LEXIS 11511, at \*10–12 (W.D. Mich. Jan. 29, 2013).

<sup>121</sup> *United States v. Williams*, 616 F.3d 685, 692 (7th Cir. 2010).

committed.<sup>122</sup> On the other side, the Ninth and the Third Circuits have decided the permanent ban created by § 922(g)(4) survives constitutional scrutiny.<sup>123</sup> The Sixth Circuit correctly applied Second Amendment analysis and balanced government interests against individual rights of people with a history of mental health issues when it found some individuals who were previously committed had a Second Amendment claim when facing a lifetime prohibition under § 922(g)(4).<sup>124</sup>

1. The Third Circuit Improperly Determined § 922(g)(4) Does Not Burden Second Amendment Rights

In *Beers v. Attorney General of the United States*, the Third Circuit incorrectly determined that § 922(g)(4) does not burden conduct falling within the scope of the Second Amendment and perpetuated the stigmatization of mental illness.<sup>125</sup> The court concluded that § 922(g)(4) was constitutional because, as applied to the Plaintiff Beers, it did not burden conduct falling within the scope of the Second Amendment because he was unable to distinguish his circumstances from the historically-barred class.<sup>126</sup> Beers was a young man who was involuntarily committed in December 2005 after he told his mother he was suicidal and put a gun in his mouth.<sup>127</sup> A Pennsylvania court extended his commitment twice because it concluded Beers presented a danger to himself and others.<sup>128</sup> Shortly after his discharge in 2006, Beers attempted to purchase a firearm and was rejected due to the disability on his record.<sup>129</sup> Beers had not required any mental health treatment since his 2006 discharge, and a physician who examined Beers in 2013 thought Beers would be able to safely handle firearms again.<sup>130</sup> Beers appealed to the Supreme Court, which granted a writ of certiorari and later remanded the case to Third Circuit to dismiss as moot.<sup>131</sup>

The Third Circuit used a modified version of the two-step analysis which ultimately led to a drastically different result than the Sixth and Ninth Circuits. The Plaintiff had to: “(1) identify the traditional justifications for excluding from Second Amendment protections the class of which he appears to be a member, and then (2) present facts about himself and his background that distinguish his circumstances from

---

<sup>122</sup> *Tyler v. Hillsdale Cnty. Sheriff’s Dep’t*, 837 F.3d 678, 699 (6th Cir. 2016).

<sup>123</sup> *Beers v. Att’y Gen. U.S.*, 927 F.3d 150, 158 (3d Cir. 2019); *Mai v. United States*, 952 F.3d 1106, 1121 (9th Cir. 2020).

<sup>124</sup> *Tyler*, 837 F.3d at 699.

<sup>125</sup> *Beers*, 927 F.3d at 158.

<sup>126</sup> *Id.*

<sup>127</sup> *Id.* at 152.

<sup>128</sup> *Id.*

<sup>129</sup> *Id.*

<sup>130</sup> *Id.*

<sup>131</sup> *Beers v. Att’y Gen. U.S.*, 822 Fed. App’x 56, 57 (3d Cir. 2020).

those of persons in the historically barred class” of mentally ill individuals.<sup>132</sup> If the Plaintiff satisfied this test, the burden would have shifted to the government to demonstrate the statute satisfies intermediate scrutiny.<sup>133</sup> The Plaintiff was unable to do this because “[t]raditionally, individuals who were considered dangerous to the public or to themselves were outside of the scope of Second Amendment protection” and he plainly fell within the described class of § 922(g)(4) since he had been involuntarily committed.<sup>134</sup>

In the analyzed cases, the courts looked for evidence justifying the prohibition of those who have been involuntarily committed and they often relied on historical evidence.<sup>135</sup> The Third Circuit relied on historical evidence when applying the first step in the analysis.<sup>136</sup> On one hand this is proper to determine the considerations of the Founders who passed the Second Amendment and the Legislatures who passed later laws like § 922(g). However, on the other hand, this approach can be very damaging to the case of individuals with a history of mental illness. The Second Amendment was ratified over 200 years ago and § 922(g) became law over 50 years ago.<sup>137</sup> Similar to many other areas of medicine, society’s understanding of mental health and associated physiological and biological processes is magnitudes greater then when either of these laws passed.<sup>138</sup> Courts tend to rely on historical evidence when analyzing Second Amendment issues, and this historical evidence can be insightful to the understanding of the subject of the law when the law was enacted. However, regarding mental illness and § 922(g)(4) specifically, because of the current understanding of mental illness and the fact that rehabilitation is vastly different than even twenty-five years ago, it should be given very little weight.

---

<sup>132</sup> *Beers*, 927 F.3d at 155.

<sup>133</sup> *Id.*

<sup>134</sup> *Id.* at 157, 159.

<sup>135</sup> See *District of Columbia v. Heller*, 554 U.S. 570, 579–98 (2008) (using historical evidence to establish the meaning of the prefatory and operative clauses of the Second Amendment); *Tyler v. Hillsdale Cnty. Sheriff’s Dep’t*, 837 F.3d 678, 688–89 (6th Cir. 2016) (analyzing the scope of the Second Amendment as historically understood); *Beers*, 927 F.3d at 157–58 (reviewing the “traditional” justifications for prohibiting the mentally ill from possessing firearms).

<sup>136</sup> *Beers*, 927 F.3d at 157–58.

<sup>137</sup> The Bills of Rights was ratified in 1791. *The Bill of Rights*, NAT’L ARCHIVES (Oct. 7, 2021), <https://www.archives.gov/founding-docs/bill-of-rights/how-did-it-happen#:~:text=On%20October%20202%2C%201789%2C%20President,the%20E2%80%9C%20Bill%20of%20Rights.%E2%80%9D>. Section 922(g)(4) was a part of the Gun Control Act of 1968. 18 U.S.C. § 922(g)(4) (enacted 1968).

<sup>138</sup> David Mechanic, *Mental Health Services Then and Now*, 26 HEALTH AFFS. 1548, 1548 (2007) (“Over the past twenty-five years, psychiatric services have shifted from hospital to community. Managed care reinforces this trend. Mental illness is better understood and less stigmatized, and services are more commonly used.”). See also Nick Venters, *The Past, Present and Future of Innovation in Mental Health*, NHS DIGIT. (July 20, 2018), <https://digital.nhs.uk/blog/transformation-blog/2018/the-past-present-and-future-of-innovation-in-mental-health>.

The Third Circuit used *Heller*'s "presumptively lawful" language and essentially reduced the question to simply if individuals fell into the statutorily enumerated class. As discussed below, this language is not meant to be conclusive.<sup>139</sup> The court essentially said the only way to show § 922(g)(4) burdened Second Amendment rights was to not be a member of the class.<sup>140</sup> Time and rehabilitation were not relevant to the court's consideration at all.<sup>141</sup> This is perhaps the court's biggest flaw because this simple logic is very demeaning and perpetuates the stigmatization of mental health issues.

## 2. The Ninth Circuit Seemingly Applies Rational Basis Scrutiny Instead of Intermediate Scrutiny

The Ninth Circuit also addressed § 922(g)(4) in *Mai v. United States* and arguably applied a rational basis test rather than intermediate scrutiny.<sup>142</sup> It held that the continued application of § 922(g)(4) to plaintiff Mai survived Second Amendment intermediate scrutiny and was constitutional as applied to him.<sup>143</sup> In 1999, a Washington state court involuntarily committed Mai for over nine months when he was seventeen years old because he was deemed mentally ill and dangerous.<sup>144</sup> Since his release in 2000, Mai earned multiple degrees, was gainfully employed, had a family, and lived a "socially responsible, well-balanced, and accomplished life."<sup>145</sup> According to Mai, he no longer suffered from mental illness, and, as a result, in 2014 he was able to restore his Second Amendment rights under Washington State Law.<sup>146</sup> However, Washington's relief program is not certified by the ATF, so Mai was still prohibited from possessing a firearm under federal law and had no avenue for relief.<sup>147</sup>

The district court granted the government's motion to dismiss for failure to state a claim, holding that § 922(4)(g) is categorically constitutional under the Second Amendment in addition to it satisfying intermediate scrutiny.<sup>148</sup> On appeal, the Ninth

---

<sup>139</sup> See *infra* Part IV.A.3.

<sup>140</sup> *Beers*, 927 F.3d at 156.

<sup>141</sup> *Id.*

<sup>142</sup> *Mai v. United States*, 952 F.3d 1106, 1121 (9th Cir. 2020).

<sup>143</sup> *Id.*

<sup>144</sup> *Id.* at 1110.

<sup>145</sup> *Id.*

<sup>146</sup> *Id.*; See WASH. REV. CODE ANN. § 9.41.047(3) (2020) (allowing persons to petition for relief of disability and courts to grant relief on findings of: "[1] The petitioner is no longer required to participate in court-ordered inpatient or outpatient treatment; [2] The petitioner has successfully managed the condition related to his commitment; [3] The petitioner no longer presents a substantial danger to himself, or the public; and [4] The symptoms related to the commitment are not reasonably likely to recur").

<sup>147</sup> *Mai*, 952 F.3d at 1112.

<sup>148</sup> *Id.*

Circuit assumed that § 922(g)(4) burdened Second Amendment rights and reasoned that § 922(4)(g) is narrowly tailored to those who were found actually dangerous through procedures satisfying due process, and thus the prohibition is a reasonable fit for the important goal of reducing gun violence.<sup>149</sup> Therefore, the court found that the lifetime prohibition was constitutional as applied to the plaintiff.<sup>150</sup>

Rather than analyzing the first step of the Second Amendment framework and despite mentioning the government's strong argument, the Ninth Circuit in *Mai* just assumed that § 922(g)(4) burdened Second Amendment rights as applied to the plaintiff.<sup>151</sup> The court applied intermediate scrutiny because § 922(g)(4)'s prohibition falls outside of the core Second Amendment right of self-defense for law-abiding, responsible citizens and the lifetime ban was substantial.<sup>152</sup>

The Ninth Circuit's application of intermediate scrutiny in the second step and its acceptance of the government's evidence is concerning. First, the government presented its interest as some variant of keeping firearms out of the hands of presumptively risky people, protecting the public from gun violence, and preventing suicide.<sup>153</sup> These interests are "compelling," and it is not contentious that they satisfy the first prong of intermediate scrutiny.<sup>154</sup> In the second step, the court showed deference to Congressional decision-making when it accepted the government's scientific evidence that fairly supported Congress's reasonable conclusions that led to the prohibition under § 922(g)(4).<sup>155</sup> Thus, there was a reasonable fit between the prohibition and preventing the important goal of reducing gun violence and the prohibition withstood Second Amendment scrutiny.<sup>156</sup>

The use of "deference" and "fairly" in describing its analysis indicates more of a rational basis test or reads like the "plausible reasons" that the Sixth Circuit flatly rejects in *Tyler*.

The plaintiff's evidence showed the risk that diminished over time but not that the risk ever disappeared.<sup>157</sup> Conversely, the government's scientific evidence showed a general increased risk of suicide, often a short time after involuntary commitment, based on prior involuntary commitment, which the Ninth Circuit ultimately accepted.<sup>158</sup>

---

<sup>149</sup> *Id.* at 1121.

<sup>150</sup> *Id.*

<sup>151</sup> *Id.* at 1115.

<sup>152</sup> *Id.* (noting further that intermediate scrutiny has applied to other lifetime bans under § 922(g)).

<sup>153</sup> *Id.* at 1116; *Tyler v. Hillsdale Cnty. Sheriff's Dep't*, 837 F.3d 678, 693 (6th Cir. 2016).

<sup>154</sup> *Tyler*, 837 F.3d at 693.

<sup>155</sup> *Mai*, 952 F.3d at 1118.

<sup>156</sup> *Id.* at 1120–21.

<sup>157</sup> *Id.* at 1119.

<sup>158</sup> *Id.* at 1117.

The acceptance of the government's evidence imposed an unfair burden on the plaintiff since it suffered from the same issue as the evidence presented to the Sixth Circuit in *Tyler* below—a lack of evidentiary support that the risk with which Congress is concerned would remain high many years after involuntary commitment.<sup>159</sup> Despite this issue, the Ninth Circuit imposed the high burden of showing that risk of mental illness or suicide is completely nonexistent in the plaintiff.<sup>160</sup> This burden seems unfair when compared to the burden of clear and convincing evidence that the individual is dangerous to themselves or others required by due process to involuntarily commit an individual established by *Addington*.<sup>161</sup> The plaintiff's burden is seemingly equivalent to beyond a reasonable doubt, which is typically reserved for criminal cases. This is especially concerning because none of the plaintiffs in any of the cases discussed committed any crimes.

3. The Sixth Circuit Applies Intermediate Scrutiny and Finds a Valid Second Amendment Claim

The Sixth Circuit held that the government had not carried its burden to establish a reasonable fit between the important goals of reducing crime and suicides and § 922(g)(4)'s permanent ban, and thus, the Plaintiff Tyler had a viable claim under the Second Amendment.<sup>162</sup> Tyler was a seventy-four-year-old man who was involuntarily committed for two to four weeks in 1986 after his wife of twenty-three years divorced him and left him emotionally distraught.<sup>163</sup> Worried about their father, his daughters called the police, and a Michigan probate court found by clear and convincing evidence that he was mentally ill and could injure himself or others.<sup>164</sup> After his discharge, Tyler resumed normal life, held a job for approximately twenty years, remarried, and had a good relationship with his daughters and ex-wife. His doctors, who completed substance-abuse and psychological evaluations in 2012, reported Tyler had no signs of mental illness years after his involuntary commitment.<sup>165</sup> In 2011, Tyler unsuccessfully appealed to the FBI after an unsuccessful attempt to purchase a firearm.<sup>166</sup> He later sued multiple state and federal defendants on the grounds that § 922(g)(4) was unconstitutional as applied to him because Michigan's lack of relief from disabilities program was essentially a permanent ban.<sup>167</sup>

Before using the Second Amendment two-step framework, the Sixth Circuit briefly analyzed *Heller* and determined it did not provide an answer to the

---

<sup>159</sup> *Id.* at 1118–19.

<sup>160</sup> *Id.* at 1119.

<sup>161</sup> *Addington v. Texas*, 441 U.S. 418, 425 (1979).

<sup>162</sup> *Tyler v. Hillsdale Cnty. Sheriff's Dep't*, 837 F.3d 678, 699 (6th Cir. 2016).

<sup>163</sup> *Id.* at 683.

<sup>164</sup> *Id.*

<sup>165</sup> *Id.* at 683–84.

<sup>166</sup> *Id.* at 684.

<sup>167</sup> *Id.*

constitutionality of § 922(g)(4).<sup>168</sup> The court did this primarily to overturn the lower court, which dismissed the plaintiff's case based on the Supreme Court's "presumptively lawful" dictum regarding longstanding prohibitions from *Heller*.<sup>169</sup> The district court relied on this dictum to dismiss the case, and alternatively stated the statute would survive intermediate scrutiny.<sup>170</sup> However, the Sixth Circuit refused to dispose of the case on *Heller*'s presumptively lawful language and disagreed with the lower court in determining § 922(g)(4) would not survive intermediate scrutiny.<sup>171</sup> The Sixth Circuit noted that this language is "precautionary, not conclusive" and decided that *Heller*'s dictum does not "foreclose § 922(g)(4) from constitutional scrutiny."<sup>172</sup> This conclusion is supported by the Supreme Court expressly reserving explorations of historical justifications of these "presumptively lawful" bans to later cases in *Heller*.<sup>173</sup> Thus, Tyler had a Second Amendment claim to challenge the constitutionality of this statute as applied to him.<sup>174</sup>

In *Tyler*, the Sixth Circuit stated that some sort of showing must be made to justify Congress's adoption of prior involuntary commitments as a basis for categorical, permanent prohibition of Second Amendment rights.<sup>175</sup> To show that § 922(g)(4) didn't burden conduct that falls within the scope of the Second Amendment, the government presented evidence from historical sources and historical scholarship stating that disarming people wouldn't be allowed if they were "peaceable citizens," "virtuous citizens," or unless there was "a real danger of public injury from individuals."<sup>176</sup> None of the sources provided direct support that previously involuntarily committed individuals were considered when the Bill of Rights was created, and thus the conduct did not fall outside of the scope of Second Amendment rights.<sup>177</sup>

The Sixth and Ninth Circuit courts in *Tyler* and *Mai*, respectively, moved to the second step of the analysis, while the Third Circuit's analysis prematurely stopped at the first step. The Sixth Circuit properly considered that there is minimal historical evidence specifically regarding mental illness when the Bill of Rights was ratified.<sup>178</sup> The Sixth Circuit determined that the "better option" is to determine whether a

---

<sup>168</sup> *Id.* at 686–87.

<sup>169</sup> *Id.* at 689.

<sup>170</sup> *Id.*

<sup>171</sup> *Id.* at 687–88.

<sup>172</sup> *Id.* at 686–87.

<sup>173</sup> *District of Columbia v. Heller*, 554 U.S. 570, 635 (2008).

<sup>174</sup> *Tyler*, 837 F.3d at 699.

<sup>175</sup> *Id.* at 688.

<sup>176</sup> *Id.* at 689.

<sup>177</sup> *Id.*

<sup>178</sup> *Id.* at 689.

regulation presumptively satisfies a heightened level of scrutiny, as opposed to simply concluding § 922(g)(4) does not burden conduct in the scope of the Second Amendment because of a Supreme Court observation that a regulation is presumptively lawful.<sup>179</sup> “[P]eople who have been involuntarily committed are not categorically unprotected by the Second Amendment,” and therefore there is a possibility that they can exercise their individual Second Amendment right.<sup>180</sup>

The Sixth Circuit dismissed strict scrutiny and properly selected intermediate scrutiny as the test to address the plaintiff’s § 922(g)(4) permanent ban.<sup>181</sup> The court noted that reviewing under strict scrutiny would also be improper because it would restrict Congress’s power to categorically prohibit presumptively dangerous people from gun ownership.<sup>182</sup> Further it would invert *Heller*’s presumption that prohibitions against the mentally ill are lawful.<sup>183</sup> Section 922(g)(4) is a severe restriction, but it does not burden the general public. Rather, it is narrowly applied to those who are not at the core of the Second Amendment right.<sup>184</sup> Thus, the court selected intermediate scrutiny because “[s]ection 922(g)(4) does not burden the core of the Second Amendment right, but it does place a substantial burden on conduct and persons protected by the Second Amendment.”<sup>185</sup>

The Sixth and Ninth Circuits split on the second prong of the intermediate scrutiny test—whether the government established a reasonable fit between its presented interest and the permanent ban imposed by § 922(g)(4). In *Tyler*, the Sixth Circuit stated “some evidence of the continuing need to disarm those long ago adjudicated mentally ill is necessary to justify” the ban.<sup>186</sup> Numerous plausible reasons would not suffice.<sup>187</sup> The government presented legislative history and empirical evidence but ultimately failed to carry its burden in providing evidence to establish a reasonable fit between § 922(g)(4) and a permanent ban of individuals who had been previously involuntary committed and now appear to have a clean bill of mental health.<sup>188</sup>

In their application of intermediate scrutiny, the Sixth and Ninth Circuits analyzed similar evidence but yielded different results, which is an indication that the courts actually applied different tests. In *Tyler*, the Sixth Circuit considered legislative history linking mental illness and individuals who had recently been involuntarily

---

<sup>179</sup> *Id.* at 690.

<sup>180</sup> *Id.*

<sup>181</sup> *Id.* at 691.

<sup>182</sup> *Id.*

<sup>183</sup> *Id.*

<sup>184</sup> *Id.*

<sup>185</sup> *Id.* at 692.

<sup>186</sup> *Id.* at 694.

<sup>187</sup> *Id.*

<sup>188</sup> *Id.* at 699.

committed to tragic shootings.<sup>189</sup> Further, it reviewed empirical studies linking mental health and involuntary commitment to gun violence and suicide risk.<sup>190</sup> The Sixth Circuit found that this evidence was appropriate to justify § 922(g)(4)'s ban against someone who had recently been involuntarily committed, but the evidence did not indicate a continued risk for someone like the Plaintiff who was involuntarily committed many years ago and had no intervening mental health issues.<sup>191</sup> Since § 922(g)(4) imposes a lifetime ban on a fundamental constitutional right, more sufficient evidence is required to justify such a severe restriction.<sup>192</sup> Thus, the statute did not survive intermediate scrutiny and Tyler had a viable Second Amendment claim that the district court could address on remand.<sup>193</sup>

All of the courts used a similar analysis framework and the Sixth and Ninth Circuits both claimed to have applied intermediate scrutiny, which conforms with the current body of law surrounding the Second Amendment. However, the Sixth Circuit stands apart from the others when considering subtleties in its analysis. Primarily, the court does not rely on the Supreme Court's dictum of "presumptively lawful" prohibitions as a conclusive factor like the Ninth and Third Circuits. Rather, it properly uses the *Heller*'s dictum as precatory language that guides its analysis in exploring the historical justifications of bans, the constitutionality of which the Supreme Court did not mean to decide in *Heller*. The court actually scrutinizes and strives to find a reasonable fit between § 922(g)(4)'s prohibition and the proffered evidence.<sup>194</sup> The Sixth Circuit properly applied intermediate scrutiny and found that those previously involuntarily committed may have a Second Amendment claim against the permanent ban imposed by § 922(g)(4) as applied to their circumstances.<sup>195</sup>

Stated simply, the Sixth Circuit's decision that there was a Second Amendment claim against the lifetime ban imposed by § 922(g)(4) provides a path forward for those who have been involuntarily committed in the past. This is particularly important because this path forward is needed for approximately twenty states that do not have relief from disability programs.<sup>196</sup> Conversely, the other circuits' decisions prevent the restoration of fundamental constitutional rights for the same class of people and perpetuate the stigmatization of those who have a history of mental illness. This is most apparent when looking at the evidence used to support the respective decisions.

The Sixth Circuit's decision in *Tyler* most closely conforms with Second Amendment rights established by *Heller* and the common treatment of those rights. The expectation that the same facts and evidence under the same framework would

---

<sup>189</sup> *Id.* at 694–95.

<sup>190</sup> *Id.* at 695–96.

<sup>191</sup> *Id.* at 695–96, 699.

<sup>192</sup> *Id.* at 699.

<sup>193</sup> *Id.*

<sup>194</sup> *Id.* at 693.

<sup>195</sup> *Id.* at 699.

<sup>196</sup> Bureau of Alcohol, Tobacco, Firearms and Explosives, *NICS Improvement Amendments Act of 2007*, ATF (July 7, 2021), <https://www.atf.gov/file/155981/download>.

produce similar results again is emphasized but not realized. The Sixth Circuit analyzed the government's evidence and found it insufficient to justify a lifetime ban rather than allowing a permanent ban that arguably stigmatizes mental health issues.<sup>197</sup> Finally, in reaching its decision, the Sixth Circuit balanced the compelling government issues of preventing gun violence and crime and preventing suicide.<sup>198</sup>

*B. The Sixth Circuit's Decision Properly Considers Previous Legislation and the Rights of Those with a History of Mental Illness*

The Sixth Circuit was the only court in the circuit split to actually give any weight to the legislative record and the rights of those with a history of mental illness.<sup>199</sup> Considering this circuit split arises out of statutory interpretation, it is worthwhile to look at legislation that Congress and state legislatures have passed. One important distinction is that § 922(g)(4) applies to those who have been involuntarily committed, but not to voluntarily committed persons or persons admitted for observation.<sup>200</sup> Many of these individuals could be suffering from the same level of mental illness, but Congress has limited the effect of this statute to involuntary commitment.<sup>201</sup> Under the statutory interpretation canon of *expressio unius est exclusio alterius*, this indicates that Congress does not believe all instances of mental illness justify a permanent ban on firearm ownership to prevent gun violence and suicide.<sup>202</sup>

As previously mentioned, Congress has historically allowed for relief from disability created by § 922(g). Various firearms acts have supported relief over the years by continuously increasing opportunities for relief. Most recently, as part of the NIAA, Congress enacted 34 U.S.C. § 40915, which allows states to set up relief from disability programs that could relieve the disability imposed by § 922(g)(4).<sup>203</sup> According to the Ninth Circuit, this statute is political compromise and mere Congressional “grace” that was required to pass the NIAA.<sup>204</sup> The Sixth Circuit takes a vastly different position—that § 40915 was an indication that Congress does not believe previously committed individuals are sufficiently dangerous *as a class* which would justify a lifetime ban.<sup>205</sup> Considering previous acts like the Gun Control Act of

---

<sup>197</sup> *Tyler*, 837 F.3d at 697.

<sup>198</sup> *Id.* at 699.

<sup>199</sup> *Id.* at 697.

<sup>200</sup> 27 C.F.R. § 478.11 (2020).

<sup>201</sup> *Id.*

<sup>202</sup> This statutory canon of construction provides that to express or include one thing implies the exclusion of the other or of the alternative. *Expressio unius est exclusio alterius*, BLACK'S LAW DICTIONARY (9th ed. 2009). Because Congress specifically included involuntary commitment, it is implied that Congress did include voluntary commitment in the law and further that not all mental illness justified the prohibition of the possession of firearms.

<sup>203</sup> 34 U.S.C. § 40915.

<sup>204</sup> *Mai v. United States*, 952 F.3d 1106, 1119–20 (9th Cir. 2020).

<sup>205</sup> *Tyler*, 837 F.3d at 697.

1968<sup>206</sup> and the Firearm Owners Protection Act<sup>207</sup> also displayed Congress's willingness to offer relief from disability, the Sixth Circuit's reasoning is more persuasive. A counterargument to this point is that Congress has defunded the relief from disability program created under the Firearm Owners Protection Act.<sup>208</sup> While this is true, legislative history indicates Congress defunded it because it was difficult for the ATF to administer, not because Congress intended to create a lifetime prohibition.<sup>209</sup>

While Congress has created the opportunity for relief from disability, the NIAA essentially created a confusing, patchwork, and unfair system of relief from disability that grants relief to some individuals and not others.<sup>210</sup> This is illustrated simply by the cases in this circuit split. The Plaintiff in *Mai* was able to restore state firearms rights, but not federal firearms rights.<sup>211</sup> In *Tyler*, the Sixth Circuit acknowledges that the Plaintiff's state is one of the states that have not created an NIAA compliant relief from disability program, resulting in a lifetime ban.<sup>212</sup> The court does provide a potential remedy through finding a Second Amendment claim, but the case highlights the inefficiency of this process.<sup>213</sup> It illustrates the unfairness of the system and the need for a more unified body of law establishing relief from disability programs applicable to all states.

The Third and Ninth Circuits' decisions perpetuate the stigmatization of mental illness. The Ninth Circuit closed its decision by stating, "[w]e emphatically do not subscribe to the notion that 'once mentally ill, always so'" and even accepted that the Plaintiff is no longer mentally ill.<sup>214</sup> Similarly, the Third Circuit, the court that is the least persuasive and arguably the most damaging to the rights of individuals who have been previously committed, closes its opinion with similar language. It stated, "[n]othing in our opinion should be read as perpetuating the stigma surrounding mental illness."<sup>215</sup> However, this statement seems rather contradictory to, or at least in contention with, the analysis and final disposition of the case. Crucially, the analysis

---

<sup>206</sup> The Gun Control Act of 1968 provided the possibility of relief for felons but not those who had been involuntarily committed. Gun Control Act of 1968, 18 U.S.C. § 925(c) (amended 1986).

<sup>207</sup> The Firearm Owners Protection Act amended the Gun Control act to include the possibility of relief from disability for all disabilities created under 18 U.S.C § 922(g). *Id.* § 925(c).

<sup>208</sup> *Mai*, 952 F.3d at 1111.

<sup>209</sup> S. REP. NO. 102-353 (1992).

<sup>210</sup> Gold & Vanderpool, *supra* note 13, at 306.

<sup>211</sup> *Mai*, 952 F.3d at 1110.

<sup>212</sup> *Tyler v. Hillsdale Cnty. Sheriff's Dep't*, 837 F.3d 678, 683 (6th Cir. 2016).

<sup>213</sup> *Id.* at 699.

<sup>214</sup> *Mai*, 952 F.3d at 1121.

<sup>215</sup> *Beers v. Att'y Gen. U.S.*, 927 F.3d 150, 159 (3d Cir. 2019).

in *Beers* indicated the only way to show § 922(g)(4) burdened Second Amendment rights was to not be a member of the class.<sup>216</sup> Time and rehabilitation were not remotely relevant to the court's consideration.<sup>217</sup> Otherwise stated, once a person has been placed in the prohibited class there is no way to remove their disability. Despite the court's well-intentioned dictum at the end of its decision,<sup>218</sup> the implication from the court's analysis is simple; a person can never recover from their mental illness that led to their involuntary commitment.

Under § 922(g)(4) involuntary commitment is treated as a proxy for mental illness.<sup>219</sup> Rather than continuing the stigmatization of mental illness by implying that individuals that were previously involuntarily committed cannot return to the status of lawful, responsible individuals, the Sixth Circuit has provided a potential path forward to individuals who otherwise might face a lifetime ban.<sup>220</sup> Congress has indicated support for relief from disability through the various acts it has passed over the years.<sup>221</sup> It stands to reason that, absent substantial evidence that there is a continued risk for individuals like the plaintiffs in these cases, a clean bill of health and a clean record justify the possibility of restoring the individual Second Amendment right available to lawful and responsible citizens of the United States.

C. *The Sixth Circuit Balances the Rights of Those Previously Involuntarily Committed with Compelling Government Interests*

While the Sixth Circuit's decision is partially pro-Second Amendment, a position subject to public disapproval, the court is not dismissive of the government interests of preventing crime and suicide. This Note discusses Second Amendment rights and the rights of those with a history of mental health issues. On their own, both of these topics can be controversial. The combination of the two rights has potential to make them even more controversial. For this reason, it is important to emphasize the need to balance these rights with the rights and safety of the general public. The Supreme Court has said that the primary general purpose of § 922(g) is "to keep firearms out of the hands of presumptively risky people."<sup>222</sup> In *Tyler*, the Sixth Circuit quoted this and the government proffered additional interests more specifically related to § 922(g)(4)—protecting the community from crime and preventing suicide.<sup>223</sup> The

---

<sup>216</sup> *Id.* at 156.

<sup>217</sup> *Id.*

<sup>218</sup> *Id.* at 159.

<sup>219</sup> *Tyler v. Hillsdale Cnty. Sheriff's Dep't*, 837 F.3d 678, 700 (6th Cir. 2016) (White, J., concurring).

<sup>220</sup> *Id.* at 699 (majority opinion).

<sup>221</sup> Gun Control Act of 1968, 18 U.S.C. § 925(c) (amended 1986).

<sup>222</sup> *Dickerson v. New Banner Inst.*, 460 U.S. 103, 112 n.6 (1983).

<sup>223</sup> *Tyler*, 837 F.3d at 693.

court is mindful of how important these interests are and considers them “compelling.”<sup>224</sup>

This Note does not contend that § 922(g)(4) fails to serve these compelling interests. There is no doubt that the statute’s purpose of preventing crime and suicide is important and would survive many as-applied constitutional challenges even under the ruling from the Sixth Circuit. For instance, the Plaintiff in *Beers* from the Third Circuit attempted to purchase a firearm shortly after being released from involuntary commitment.<sup>225</sup> As discussed above, the Sixth Circuit indicated that the government’s evidence better supported a ban on recently released individuals.<sup>226</sup> Thus, the result of *Tyler* is reasonably limited to individuals with similar circumstances to the Plaintiff in *Tyler*, primarily those who are years removed from their involuntary commitment with a clean bill of health. The *Tyler* result would seem to exclude people trying to purchase firearms shortly after involuntary commitment like in *Beers*, who admittedly fall within the concerns and original purpose of the statute as indicated by the empirical evidence in both *Mai* and *Tyler*. Ultimately, this Note focuses on the unfair and confusing body of state and federal law, including § 922(g)(4), and relief from disability and emphasizes, as the Sixth Circuit does, that better empirical evidence is required to support a lifetime ban of fundamental Second Amendment rights.

One significant way the courts and the parties balanced these government interests against the individual rights in question is through their selection of constitutionality challenge. These cases did not question whether the statutory prohibition was unconstitutional facially, but rather the parties challenged whether the ban was unconstitutional as applied to them and their specific situation.<sup>227</sup> While this narrowness could be burdensome to the judicial system, § 922(g)(4) being held facially unconstitutional would contradict *Heller* and undermine the government’s compelling interests.

The Sixth Circuit agrees and acknowledges this in several ways. First, the court assumed that § 922(g)(4) is one of the presumptively lawful statutes that the Supreme Court references in *Heller*.<sup>228</sup> Second, in its selection of intermediate scrutiny, the court recognized that Congress has the power to categorically prohibit certain presumptively dangerous people from firearm ownership.<sup>229</sup> Third, the court considers the evidence presented by the government good justification for prohibiting recently committed individuals from owning firearms.<sup>230</sup> Finally, the court states that Plaintiff has a Second Amendment claim as applied to him, not that § 922(g)(4) is

---

<sup>224</sup> *Id.*

<sup>225</sup> *Beers v. Att’y Gen. U.S.*, 927 F.3d 150, 153 (3d Cir. 2019).

<sup>226</sup> *Tyler*, 837 F.3d at 695–96, 699.

<sup>227</sup> *Id.* at 684; *Beers*, 927 F.3d at 153; *Mai v. United States*, 952 F.3d 1106, 1109 (9th Cir. 2020).

<sup>228</sup> *Tyler*, 837 F.3d at 688.

<sup>229</sup> *Id.* at 691.

<sup>230</sup> *Id.* at 695.

unconstitutional.<sup>231</sup> It is possible that another individual under slightly different facts would not receive this treatment from the court. While the outcome in *Tyler* is an important step toward the restoration of Second Amendment rights, there is still a possibility that the government produces more sufficient evidence on remand which would result in the ban being constitutional.

In summary, in holding the Plaintiff had a Second Amendment right while still maintaining the general constitutionality of § 922(g)(4), the Sixth Circuit balanced the Plaintiff's individual Second Amendment right with the government's interest of keeping firearms out of the hands of presumptively dangerous people.

#### V. CONCLUSION

The Supreme Court decided that the Second Amendment provides law-abiding and respectful citizens the individual right to own firearms for self-defense in *District of Columbia v. Heller*.<sup>232</sup> However, presumptively lawful prohibitions can restrict this right based on previous conduct or occurrences, like prior involuntary commitment. Some individuals who have previously been involuntarily committed can restore their Second Amendment right if they live in the right state; others face a lifetime ban.

The Sixth Circuit's treatment of relief from disability with regard to individuals previously involuntarily committed provides a fair and reasonable analysis that can lead to the restoration of Second Amendment rights.<sup>233</sup> It properly considers the current status of Second Amendment rights and correctly applies intermediate scrutiny. Its final ruling displays recognition that all individuals could have their Second Amendment individual right restored and, at minimum, that the existing relief from disability system calls for a uniform system of law. The ruling recognizes the unfairness of the current relief from disability programs and that previously involuntarily committed individuals can recover rather than stigmatizing those with a history of mental illness. Finally, it balances the compelling government interests like preventing gun violence and suicide with a path forward for individuals with a firearms disability. The Sixth Circuit's ruling provides hope to individuals who have been previously involuntarily committed that the stigmatization of mental health may be dissipating and that they can restore their Second Amendment rights to protect home, hearth, and family like the rest of Americans.

---

<sup>231</sup> *Id.* at 699.

<sup>232</sup> *District of Columbia v. Heller*, 554 U.S. 570, 635 (2008).

<sup>233</sup> *See generally Tyler*, 837 F.3d at 696–99.