

Mental Health History Is History: A Lifetime Ban on Gun Possession Due to History of Involuntary Commitment Violates the Second Amendment*

Gun control is a widely debated issue in the United States that often centers on whether restricting access to firearms will increase safety. What is often left undiscussed is the stigma and stereotypes that long-lasting bans on firearm possession have on those subjected to gun control laws. Section 922(g)(4) of the Gun Control Act imposes a lifetime ban on gun possession for persons who have a history of involuntary commitment. The Sixth and Ninth Circuits, in Tyler v. Hillsdale County and Mai v. United States, respectively, were asked to decide whether this lifetime ban violates the Second Amendment. Applying intermediate scrutiny, the Sixth Circuit said yes while the Ninth Circuit said no.

This Recent Development examines this resulting circuit split as well as the government's justifications for § 922(g)(4)—preventing crime and suicide—and argues § 922(g)(4) fails to adequately address those important issues, making it unconstitutional under the Second Amendment. Section 922(g)(4) permanently categorizes those with a history of involuntary commitment as mentally ill, instead of addressing the real issue: keeping guns out of the hands of those who currently present a danger to themselves and others. Recognizing that the government's interests are nevertheless important, this Recent Development proposes the adoption of a federal extreme risk law that adequately instills measures aimed to prevent crime and suicide while also protecting the rights of those subjected to involuntary commitment.

INTRODUCTION

A little over fifty years have passed since Congress enacted the Gun Control Act of 1968.¹ The Act, which prevents nine categories of people from possessing firearms,² has stirred political debates³ and prompted a line of decisions by the Supreme Court.⁴ Yet, its effects on those targeted groups are

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1. Gun Control Act of 1968, Pub. L. No. 90-618, 82 Stat. 1213 (codified as amended in scattered sections of 18 and 26 U.S.C.).

2. *Id.* at 1220–21 (codified as amended at 18 U.S.C. § 922(g)(1)–(9)).

3. See Katherine Schaeffer, *Key Facts About Americans and Guns*, PEW RSCH. CTR. (Sept. 13, 2021), <http://www.pewresearch.org/fact-tank/2021/09/13/key-facts-about-americans-and-guns/> [<http://perma.cc/CPD2-BCWF>] (showing a divide in Americans' views on gun control laws).

4. See generally *Rehaif v. United States*, 139 S. Ct. 2191 (2019) (holding that a person must know that they were within the nine categories of individuals specified by the statute who cannot lawfully possess firearms when they possessed the firearm); *Voisine v. United States*, 136 S. Ct. 2272 (2016) (applying the federal ban on firearms possession to a defendant with a prior misdemeanor

still being revealed today. Specifically, one category of persons subject to the Act—those “adjudicated as a mental defective” or “committed to a mental institution”⁵—live with the stigma that they are permanently dangerous.⁶ Whether those with a history of involuntary commitment should be able to possess a firearm not only presents a public policy issue but a constitutional one as well. In *Tyler v. Hillsdale County*⁷ and *Mai v. United States*,⁸ the Sixth and Ninth Circuits, respectively, considered for the first time whether the lifetime ban on gun possession imposed on those with a history of involuntary commitment⁹ by 18 U.S.C. § 922(g)(4) is constitutional.¹⁰

This Recent Development examines the government’s justifications for § 922(g)(4)—preventing crime and suicide—and argues that a lifetime ban on gun possession for those with a history of involuntary commitment fails to adequately address those important issues, making it unconstitutional under the Second Amendment. Further, this Recent Development argues that § 922(g)(4) permanently categorizes those with a history of involuntary commitment as mentally ill instead of addressing the real issue: keeping guns out of the hands of those who *currently* present a danger to themselves and others. The stories of Charles Tyler and Duy Mai show the ways in which current law and its past enforcement mechanisms have failed to strike an appropriate balance between advocating for gun safety and addressing the nation’s mental health crisis without promoting stigma and stereotyping. Further, the Ninth Circuit’s support of the government in its *Mai* opinion affirms the government’s failure to take appropriate steps towards preventing the issue of suicide—the very issue the government claims justifies a lifetime ban.

conviction for use of physical force against a domestic relation); *Henderson v. United States*, 575 U.S. 622 (2015) (holding that 18 U.S.C. § 922(g) does not apply to a felon who does not retain control over his guns); *Small v. United States*, 544 U.S. 385 (2005) (finding that the “convicted in any court” element of a federal felon-in-possession-of-firearm statute does not include convictions obtained in foreign courts).

5. Gun Control Act of 1968, 82 Stat. at 1221 (codified as amended at 18 U.S.C. § 922(g)(4)).

6. See Paul S. Appelbaum, *Violence and Mental Disorders: Data and Public Policy*, 163 AM. J. PSYCHIATRY 1319, 1320 (2006).

7. 837 F.3d 678 (6th Cir. 2016).

8. 952 F.3d 1106 (9th Cir. 2020).

9. Involuntary commitment is “a legal intervention by which a judge, or someone acting in a judicial capacity, may order that a person with symptoms of a serious mental disorder, and meeting other specified criteria, be confined in a psychiatric hospital or receive supervised outpatient treatment for some period of time.” SUBSTANCE ABUSE & MENTAL HEALTH SERVS. ADMIN., CIVIL COMMITMENT AND THE MENTAL HEALTH CARE CONTINUUM: HISTORICAL TRENDS AND PRINCIPLES FOR LAW AND PRACTICE 1 (2019) [hereinafter SAMHSA], <https://www.samhsa.gov/sites/default/files/civil-commitment-continuum-of-care.pdf> [https://perma.cc/ZA45-6K3P].

10. In *Beers v. Attorney General United States*, 927 F.3d 150 (3d Cir. 2019), the Third Circuit also considered this question. *Id.* at 159 (holding § 922(g)(4) constitutional).

This analysis proceeds in four parts. Part I provides background on § 922(g)(4) and the current circuit split regarding the effectual lifetime ban this law creates. Part II assesses the legality of such a ban under a Second Amendment two-step inquiry and argues both the Sixth and Ninth Circuits failed to appropriately apply strict scrutiny, rather than intermediate scrutiny, in their respective holdings. Part III examines the justifications of § 922(g)(4)'s lifetime ban—advanced by both Congress and the government in *Mai*—which the Ninth Circuit adamantly supported. Part III further argues that the government's failure to adequately address mental health causes these arguments to fall short under both intermediate and strict scrutiny. Lastly, Part IV examines possible solutions that would adequately instill measures aimed to prevent crime and suicide while also protecting the rights of those subjected to involuntary commitment, such as the enactment of a new federal extreme risk law.

I. BACKGROUND

This part provides background on § 922(g)(4) and explains why the relief programs that once made this statute less burdensome are no longer available. This part also provides background on the current circuit split regarding whether or not § 922(g)(4)'s lifetime ban is constitutional.

A. *A History of § 922(g)(4) and Its Counterparts*

Under 18 U.S.C. § 922(g)(4), it is unlawful for any person who has been “adjudicated as a mental defective or who has been committed to a mental institution” to possess a firearm.¹¹ This includes “a formal commitment of a person to a mental institution by a court, board, commission, or other lawful authority,”¹² which is colloquially known as an involuntary commitment.¹³ Since state law governs this adjudication process, involuntary commitment laws vary by state.¹⁴ However, almost all states have laws governing three forms of court-ordered involuntary commitment: emergency hospitalization for evaluation, inpatient civil commitment, and outpatient civil commitment.¹⁵ While the verbiage and standards differ by state, some commonalities exist.¹⁶ For inpatient civil commitment, all states require a showing of “mental

11. 18 U.S.C. § 922(g)(4).

12. 27 C.F.R. § 478.11 (2021).

13. SAMHSA, *supra* note 9, at 1.

14. *Id.*

15. *Know the Laws in Your State*, TREATMENT ADVOC. CTR., <https://www.treatmentadvocacycenter.org/component/content/article/183-in-a-crisis/1596-know-the-laws-in-your-state> [http://perma.cc/KQG5-EFER]. Connecticut, Maryland, Massachusetts, and Tennessee are the only states that do not currently have laws providing for court-ordered outpatient treatment. *Id.*

16. SAMHSA, *supra* note 9, at 11–12.

illness,” though the definition of “mental illness” varies by state.¹⁷ Further, almost all state laws also require a showing of “dangerousness”; however, the definition, recency of such danger, and relation to propensity of violence drastically vary by state.¹⁸

Other sections of the Gun Control Act reveal that Congress did not intend for § 922(g)(4) to be an absolute bar to gun possession for persons involuntarily committed. The Gun Control Act included a provision, now codified at § 925(c), to allow individuals to apply to the Attorney General for relief from the disabilities imposed by § 922(g).¹⁹ Applicable regulations grant the Director of the Bureau of Alcohol, Tobacco, Firearms and Explosives (“ATF”) the power to grant relief from § 922(g)²⁰ if the Director finds “the applicant 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 public interest.”²¹ Though this appears to give the director much subjective discretion, the director may not grant relief unless the person has “subsequently [been] determined by a court, board, commission, or other lawful authority to have been restored to mental competency, to be no longer suffering from a mental disorder, and to have had all rights restored.”²² Any denial by the ATF can be appealed to the appropriate federal district court.²³ Currently, however, no individual has the ability to seek relief through this provision, as Congress indefinitely defunded the relief-from-disabilities program in 1992.²⁴ This, in turn, prohibits an individual from having their claim reviewed by a federal court.²⁵

Even still, Congress managed to provide a new remedy. To better enforce § 922(g)(4), Congress implemented the NICS Improvement Amendments Act of 2007 (“NIAA”),²⁶ which sought to strengthen the

17. *See id.* at 11.

18. *See id.* at 8–9.

19. *See* Gun Control Act of 1968, Pub. L. No. 90-618, 82 Stat. 1225 (codified as amended at 18 U.S.C. § 925(c)).

20. 28 C.F.R. § 0.130(a)(1) (2021); 27 C.F.R. § 478.144(d) (2021).

21. 18 U.S.C. § 925(c); 27 C.F.R. § 478.144(d).

22. 27 C.F.R. § 478.144(e).

23. *See* 18 U.S.C. § 925(c).

24. *Tyler v. Hillsdale County*, 837 F.3d 678, 682 (6th Cir. 2016); *see* Treasury Department Appropriations Act, 1993, Pub. L. No. 102-393, 106 Stat. 1729, 1732 (“That none of the funds appropriated herein shall be available to investigate or at upon applications for relief from Federal firearms disabilities under 18 U.S.C. [§] 925(c).”); *see also* *United States v. Bean*, 537 U.S. 71, 75 n.3 (2002) (listing Congress’s appropriation restrictions).

25. *See Bean*, 537 U.S. at 78 (“The absence of an actual denial of respondent’s petition by ATF precludes judicial review under § 925(c).”).

26. NICS Improvement Amendments Act of 2007, Pub. L. No. 110-180, 121 Stat. 2559 (codified as amended at 18 U.S.C. § 922 note).

National Instant Criminal Background Check System (“NICS”).²⁷ The NIAA functions as an incentive mechanism: when states report mental health histories to the NICS, the government must extend grant funding to states to enhance their criminal history reporting systems.²⁸ In exchange for a grant, states are required to (1) report involuntary commitment records to the national system and (2) implement a state program that provides relief from § 922(g)(4), similar to the program previously run by the ATF.²⁹ Currently, only thirty-two states have created qualifying relief programs,³⁰ meaning those residing in a state without a program still have no access to relief from § 922(g)(4). This has led those with a history of involuntary commitment to seek an alternative route to relief: challenging the constitutionality of § 922(g)(4).

B. *The Sixth Circuit’s Take: Tyler v. Hillsdale County*

In 1985, Charles Tyler’s wife of twenty-three years left him for another man and depleted Tyler’s finances, leaving him “emotionally devastated.”³¹ Concerned for his safety, Tyler’s daughters contacted the police and arranged for a psychological evaluation for their father.³² As a result of the evaluation, Tyler was involuntarily committed for less than one month after a Michigan probate court found that Tyler was “reasonably expected” to cause serious physical injuries to himself or others in the near future.³³ Since his discharge, Tyler has not needed follow-up therapy, has held a steady job for eighteen years, and has remarried.³⁴ In 2012, Tyler received substance-abuse and psychological evaluations which reported no signs of mental illness, and the doctor specifically concluded that Tyler’s incident in 1985 was a “brief reactive depressive episode.”³⁵

27. See generally Implementation of the NICS Improvement Amendments Act of 2007, 81 Fed. Reg. 91,702 (Dec. 19, 2016) (codified at 20 C.F.R. § 421) (discussing the Social Security Administration’s implementation of the NICS Improvement Amendments Act of 2007).

28. NICS Improvement Amendments Act of 2007 § 301.

29. *Id.* Under these programs,

a State court, board, commission, or other lawful authority shall grant the relief . . . if the circumstances regarding the disabilities . . . and the person’s 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.

Id. § 105(a)(2).

30. See BECKI GOGGINS & ANNE GALLEGOS, STATE PROGRESS IN RECORD REPORTING FOR FIREARM-RELATED BACKGROUND CHECKS: MENTAL HEALTH SUBMISSIONS 8 (2016), <https://www.ojp.gov/pdffiles1/bjs/grants/249793.pdf> [<https://perma.cc/KQG5-EFER>].

31. *Tyler v. Hillsdale County*, 837 F.3d 678, 683 (6th Cir. 2016).

32. *Id.*

33. *Id.*

34. *Id.*

35. *Id.* at 683–84.

Tyler's home state of Michigan did not have an ATF-approved relief-from-disabilities program. Therefore, Tyler's only recourse to obtain a firearm was to bring federal suit, alleging that, due to Michigan's lack of a relief-from-disabilities program, § 922(g)(4) violated his Second Amendment right because of the permanent ban it placed on him.³⁶ The Sixth Circuit applied the usual two-step approach used to resolve Second Amendment challenges,³⁷ asking: (1) "whether the challenged law burdens conduct that falls within the scope of the Second Amendment right, as historically understood," and if so, (2) whether the government's justification of the restriction is strong enough to survive the appropriate level of scrutiny.³⁸ Under step one, the Sixth Circuit concluded that the government did not meet its burden of proof showing that people with a history of involuntary commitment are historically understood as unprotected by the Second Amendment.³⁹ Proceeding under step two, and finding that intermediate scrutiny should be applied,⁴⁰ the court asked whether there was an important governmental interest for § 922(g)(4)'s ban and whether § 922(g)(4) was reasonably related to that interest.⁴¹ The Sixth Circuit found the government's interests of (1) protecting the community from crime and (2) preventing suicide to be "not only legitimate, [but] compelling."⁴² Keeping in mind that the ban imposed on Tyler and those similarly situated is effectively permanent,⁴³ the court required that the government show evidence of the continuing need to disarm those who were involuntarily committed years ago.⁴⁴ Ultimately, the court found that the government's submitted evidence, which showed higher rates of suicide from those involuntarily committed, did not answer "the key question at the heart of this case: Is it reasonably necessary to forever bar all previously

36. *Id.* at 684 (bringing an as-applied challenge).

37. *See id.* at 685 (first citing *United States v. Greeno*, 679 F.3d 510, 518 (6th Cir. 2012); then citing *United States v. Marzzarella*, 614 F.3d 85, 89 (3d Cir. 2010); then citing *United States v. Chester (Chester I)*, 628 F.3d 673, 680 (4th Cir. 2010); and then citing *United States v. Reese*, 627 F.3d 792, 800–01 (10th Cir. 2010)).

38. *Id.* at 685–86.

39. *Id.* at 689–90 ("In the face of what is at best ambiguous historical support, it would be peculiar to conclude that § 922(g)(4) does not burden conduct within the ambit of the Second Amendment as historically understood based on nothing more than *Heller's* observation that such a regulation is 'presumptively lawful.'").

40. *Id.* at 691–92. "To hold, as Tyler requests, that he is at the core of the Second Amendment despite his history of mental illness would cut too hard against Congress's power to categorically prohibit certain presumptively dangerous people from gun ownership." *Id.* (reasoning that strict scrutiny was not applicable under these facts).

41. *Id.* at 693.

42. *Id.*

43. *Id.* at 694.

44. *Id.* (reasoning that a higher burden is required because the ban imposed by § 922(g)(4) is "effectively permanent").

institutionalized persons from owning a firearm?”⁴⁵ Most influential in the court’s reasoning was the very fact that from 1986 to 1992, Congress itself effectively answered “no” to this question through the enactment of § 925(c), as well as the NICS Improvement Amendments Act.⁴⁶ Thus, the Sixth Circuit ruled that § 922(g)(4) was unconstitutional as applied to Charles Tyler.⁴⁷

C. *The Ninth Circuit’s Take: Mai v. United States*

Four years after the *Tyler* decision, the Ninth Circuit came to the opposite conclusion in *Mai v. United States*.⁴⁸ In 1999, at age seventeen, Duy Mai was involuntarily committed for nine months after a Washington state court determined he was both mentally ill and dangerous.⁴⁹ Since then, Mai has earned his GED, a bachelor’s and master’s degree, has held a steady job, and started a family.⁵⁰ Mai had also already successfully petitioned a Washington state court for relief from the Washington state law that prohibited him from possessing a firearm;⁵¹ however, the standard for relief required by Washington law is lower than that required by federal law.⁵²

To gain legal access to a firearm under Washington law, Mai only needed to show he “no longer presents a substantial danger to himself [] or the public.”⁵³ However, for Washington’s process to qualify as an ATF-approved relief-from-disabilities program, the relevant relief law must require a determination that “the person will not be likely to act in a manner dangerous to public safety” and that granting “relief would not be contrary to the public interest.”⁵⁴ Thus, Mai also had no choice but to argue that his Second Amendment right was violated by the lifetime ban.⁵⁵ Like the Sixth Circuit in *Tyler*, the Ninth Circuit also found under a two-step analysis that § 922(g)(4) burdened Mai’s Second Amendment right and that intermediate scrutiny should be applied.⁵⁶ The court also agreed that the government has two

45. *Id.* at 697.

46. *Id.* (“It is a clear indication that Congress does not believe that previously committed persons are sufficiently dangerous as a class to permanently deprive all such persons of their Second Amendment right to bear arms.”).

47. *Id.* at 699.

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

49. *Id.* at 1110.

50. *Id.*

51. *Id.*; *see also* WASH. REV. CODE ANN. § 9.41.040(2)(a)(iv) (Westlaw through ch. 1 of the 2022 Reg. Sess. of the Wash. Leg.).

52. *Tyler*, 837 F.3d at 1112.

53. § 9.41.047(3)(c)(iii).

54. 34 U.S.C. § 40915(a)(2).

55. *Mai*, 952 F.3d at 1117 (“[Mai] argues 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.”).

56. *Id.* at 1115 (“Just as intermediate scrutiny applies to the other lifetime bans in § 922(g), so too does intermediate scrutiny apply to § 922(g)(4)’s prohibition.”).

important interests: (1) preventing crime and (2) preventing suicide.⁵⁷ However, the Ninth Circuit held that § 922(g)(4)'s lifetime ban on gun possession survived intermediate scrutiny and did not violate Mai's Second Amendment right. The court relied upon Congress's judgment, which was supported by scientific evidence, that those who have been involuntarily committed pose an increased risk of violence long after being involuntarily committed.⁵⁸

II. INTERMEDIATE SCRUTINY IS THE WRONG TEST

This part provides further insight into the two-step inquiry traditionally used when courts face Second Amendment challenges and how the Supreme Court's decision in *District of Columbia v. Heller*⁵⁹ left courts with little guidance as to which level of scrutiny should be applied. Because § 922(g)(4) is a permanent denial of a fundamental right, this part argues that both the Sixth and Ninth Circuits erred in applying intermediate scrutiny rather than strict scrutiny.

A. *The Second Amendment and the Two-Step Inquiry*

The Second Amendment guarantees “[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.”⁶⁰ In *Heller*, the Supreme Court made a monumental decision: the Second Amendment secures “an individual right to keep and bear arms” without regard to a militia service.⁶¹ However, the Court noted that the right is “not unlimited”⁶² and that, among other categories, “longstanding prohibitions on the possession of firearms by felons and the mentally ill”⁶³ are “presumptively lawful.”⁶⁴

When assessing Second Amendment challenges, courts use a two-step inquiry asking: “(1) whether the challenged law burdens conduct protected by the Second Amendment and (2) if so, directs courts to apply an appropriate level of scrutiny.”⁶⁵ A law fails step one of the inquiry “if it either falls within

57. *Id.* at 1116.

58. *Id.* at 1117–19.

59. 554 U.S. 570 (2008).

60. U.S. CONST. amend. II.

61. *Heller*, 554 U.S. at 595.

62. *Id.*

63. *Id.* at 626–27.

64. *Id.* at 627 n.26; see also Lindsay Colvin, *History, Heller, and High-Capacity Magazines: What Is the Proper Standard of Review for Second Amendment Challenges?*, 41 FORDHAM URB. L.J. 1041, 1052 (2014).

65. *United States v. Chovan*, 735 F.3d 1127, 1136 (9th Cir. 2013); see also *Tyler v. Hillsdale County*, 837 F.3d 678, 685 (6th Cir. 2016) (first citing *United States v. Greeno*, 679 F.3d 510, 518 (6th Cir. 2012); then citing *United States v. Marzzarella*, 614 F.3d 85, 89 (3d Cir. 2010); then citing

one of the ‘presumptively lawful regulatory measures’ identified in *Heller* or regulates conduct that historically has fallen outside the scope of the Second Amendment.”⁶⁶ *Heller* provided a list of “presumptively lawful” prohibitions, giving courts an easy escape route to determine that laws like § 922(g)(4) do not burden conduct protected by the Second Amendment.⁶⁷ This was the case for the Ninth Circuit in *Mai*, as they found that the plaintiff’s claims were rooted in the type of presumptively lawful regulation explicitly allowed by *Heller*.⁶⁸ By doing so, the Ninth Circuit made its first failure by necessarily equating “mentally ill,” a presumptively lawful group to prohibit from possessing guns as noted in *Heller*,⁶⁹ with *anyone* who has *ever* been involuntarily committed to a mental institution. As the Sixth Circuit properly recognized, *Heller* spoke of “the mentally ill.”⁷⁰ However, this phrase is entirely absent in § 922(g)(4), which uses judicial adjudications as a proxy for mental illness.⁷¹ Despite its overbroad generalization, the Ninth Circuit continued to step two of the analysis by “assum[ing], without deciding, that § 922(g)(4), as applied to [Mai], burdens Second Amendment rights.”⁷²

What *Heller* lacks is an answer to the question of what level of scrutiny should be applied.⁷³ Though it is agreed that more than rational basis review is required,⁷⁴ the level of scrutiny applied in Second Amendment challenges depends “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.”⁷⁵ In *Tyler*, the Sixth Circuit denied Tyler’s request to apply strict scrutiny, reasoning that “[t]o hold, as Tyler requests, that he is at the core of the Second Amendment despite his history of mental illness would cut too hard against Congress’s power to categorically prohibit certain presumptively

Chester I, 628 F.3d 673, 680 (4th Cir. 2010); and then citing *United States v. Reese*, 627 F.3d 792, 800–01 (10th Cir. 2010)).

66. *Mai v. United States*, 952 F.3d 1106, 1114 (9th Cir. 2020) (quoting *United States v. Chovan*, 735 F.3d 1127, 1136 (9th Cir. 2013)).

67. *Chester I*, 628 F.3d at 679 (“Some courts have treated *Heller*’s listing of ‘presumptively lawful regulatory measures,’ for all practical purposes, as a kind of ‘safe harbor . . . [but] . . . [t]his approach . . . approximates rational-basis review, which has been rejected by *Heller*.”); see also *United States v. McCane*, 573 F.3d 1037, 1050 (10th Cir. 2009) (Tymkovich, J., concurring) (“Rather than seriously wrestling with how to apply this new Second Amendment rule . . . courts will continue to simply reference the applicable *Heller* dictum and move on.”).

68. *Mai*, 952 F.3d at 1114.

69. *Heller*, 554 U.S. at 626–27.

70. *Tyler*, 837 F.3d at 687.

71. *Id.*

72. *Mai*, 952 F.3d at 1115.

73. *Heller*, 554 U.S. at 628 n.27.

74. *Id.*

75. *United States v. Chovan*, 735 F.3d 1127, 1138 (9th Cir. 2013).

dangerous people from gun ownership.”⁷⁶ In making this statement, the Sixth Circuit undercut its well-reasoned analysis that involuntary commitment is not the equivalent of the “mentally ill” category set out in *Heller*.⁷⁷ The *Tyler* court backed away from applying strict scrutiny to § 922(g)(4), concerned that it would “invert *Heller*’s presumption that prohibitions on the mentally ill are lawful.”⁷⁸ Both the Sixth and Ninth Circuits agreed that “§ 922(g)(4) does not burden the public at large,” but instead “burdens only a narrow class of individuals who are not at the core of the Second Amendment—those . . . previously involuntarily committed,”⁷⁹ and therefore justified placing strict scrutiny aside.⁸⁰ Ultimately, stereotyping those once involuntarily committed as dangerous, mentally ill persons resulted in the application of the wrong form of scrutiny.

B. *Why Strict Scrutiny Should Have Been Applied*

Both the Sixth and Ninth Circuits should have applied strict scrutiny in *Tyler* and *Mai* because a lifetime ban on gun possession due to a history of involuntary commitment, not a diagnosed and current mental illness, severely infringes upon the core right of the Second Amendment. The Court in *Heller*, having already ruled out rational basis review,⁸¹ warned that when choosing whether to apply intermediate or strict scrutiny, a court must consider the severity of the regulation: “A less severe regulation—a regulation that does not encroach on the core of the Second Amendment—requires a less demanding means-end showing.”⁸²

However, when “fundamental rights” are at stake, strict scrutiny should be applied.⁸³ The Supreme Court has ruled that the Second Amendment is indeed one of those fundamental rights.⁸⁴ As told by *Heller*, the core right of the Second Amendment is “the right of law-abiding, responsible citizens to use arms in defense of hearth and home.”⁸⁵ Though *Heller* further affirmed that the mentally ill do not strike at the core of the Second Amendment,⁸⁶ *Heller* in no way indicated that this characterization includes persons who

76. *Tyler*, 837 F.3d at 691 (“[T]he *Heller* Court understood that Congress’s power to enact categorical disqualifications was ‘part of the original meaning’ of the Second Amendment.” (citing *United States v. Skoien*, 614 F.3d 638, 640 (7th Cir. 2010))).

77. See *supra* notes 70–72 and accompanying text.

78. *Tyler*, 837 F.3d at 691.

79. *Id.*; *Mai v. United States*, 952 F.3d 1106, 1115 (9th Cir. 2020).

80. *Tyler*, 837 F.3d at 692.

81. *Heller v. United States*, 554 U.S. 570, 628 n.27, 634–35 (2008).

82. *Nat’l Rifle Ass’n of Am. v. ATF*, 700 F.3d 185, 195 (5th Cir. 2012).

83. See *Roe v. Wade*, 410 U.S. 113, 155 (1973).

84. *McDonald v. City of Chicago*, 561 U.S. 742, 746 (2010) (“The Court is correct in describing the Second Amendment right as ‘fundamental’ to the American scheme of ordered liberty.”).

85. *Heller*, 554 U.S. at 635.

86. *Id.* at 626–27.

formerly struggled with mental illness. A person with a past record of involuntary commitment cannot be deemed lawless or irresponsible without further individual assessment. In fact, the majority of involuntarily committed patients are not violent a year after discharge.⁸⁷ To maintain that those with a record of involuntary commitment have less entitlement to a fundamental right than others is to stereotype a group of people based on their past and affirmatively state that mental illness is static.⁸⁸ Thus, applying strict scrutiny to § 922(g)(4) is appropriate and requires that the statute be “narrowly tailored to achieve a compelling governmental interest.”⁸⁹

III. WHY § 922(G)(4) FAILS UNDER BOTH INTERMEDIATE AND STRICT SCRUTINY

While it is without question that the government has both an important and compelling interest in reducing crime and suicide, as this part lays out, § 922(g)(4) is not narrowly tailored to such interests, let alone substantially related. Strict scrutiny aside, the Ninth Circuit erred in finding that § 922(g)(4) passed intermediate scrutiny. While Congress should be able to pass laws that keep guns out of the hands of the mentally ill, that limit should be narrowly imposed upon those persons who are *currently* dangerous in order to survive constitutional muster.⁹⁰

A. Congress’s Important and Compelling Interests for § 922(g)(4)

Because both the Sixth and Ninth Circuits found that intermediate scrutiny applied,⁹¹ the government had to identify an important interest promoted by § 922(g)(4).⁹² Congress’s purpose in enacting the Gun Control Act was to prevent crime by keeping “firearms out of the hands of those not legally entitled to possess them because of age, criminal background, or

87. See Henry J. Steadman, Edward P. Mulvey, John Monahan, Pamela Clark Robbins, Paul S. Appelbaum, Thomas Grisso, Loren H. Roth & Eric Silver, *Violence by People Discharged from Acute Psychiatric Inpatient Facilities and by Others in the Same Neighborhoods*, 55 ARCHIVES GEN. PSYCHIATRY 393, 399–400 (1998).

88. See *Tyler v. Hillsdale County*, 837 F.3d 678, 720 (6th Cir. 2016) (Sutton, J., concurring) (“If the individual has ever [been involuntarily committed] says the government, that is that: He necessarily is a risk to himself or others for the rest of his life and thus may not possess a gun for the rest of his life. That is a remarkable proposition.”).

89. *Abrams v. Johnson*, 521 U.S. 74, 82 (1997).

90. “History is consistent with common sense: it demonstrates that legislatures have the power to prohibit dangerous people from possessing guns. But that power extends only to people who are *dangerous*.” *Kanter v. Barr*, 919 F.3d 437, 451 (7th Cir. 2019) (Barrett, J., dissenting).

91. *Mai v. United States*, 952 F.3d 1106, 1115 (9th Cir. 2020); *Tyler*, 837 F.3d at 693.

92. *United States v. Chovan*, 735 F.3d 1127, 1139 (9th Cir. 2013) (“Although courts have used various terminology to describe the intermediate scrutiny standard, all forms of the standard [first] require [] the government’s stated objective to be significant, substantial, or important.”).

incompetency.”⁹³ More specifically, Congress had two purposes for enacting § 922(g)(4): (1) protecting the community from crime and (2) preventing suicide, both of which were intended to be accomplished by “cut[ting] down or eliminat[ing] firearms deaths caused by persons who are not criminals, but who commit sudden, unpremeditated crimes with firearms as a result of mental disturbances.”⁹⁴

Under an intermediate scrutiny analysis, once the government has articulated an important interest, “[a]ll that is required is ‘a fit that is not necessarily perfect, but reasonable; that represents not necessarily the single best disposition but one whose scope is in proportion to the interest served.’”⁹⁵ Because § 922(g)(4) imposes a lifetime ban on gun possession—since it applies to any person that was at any point involuntarily committed—the government should be required to present evidence of a continuing need to disarm those who were involuntarily committed many years ago to justify the law.⁹⁶

B. *Justifications Used in Mai*

In applying intermediate scrutiny, the Ninth Circuit accepted the government’s argument that § 922(g)(4) is reasonably related to preventing suicide.⁹⁷ However, the court entirely failed to articulate a reason as to why § 922(g)(4) promotes the government’s interest of reducing crime. The court only generalized that: “like felons and domestic-violence assailants, those who have been involuntarily committed to a mental institution also pose an increased risk of violence,” and that “scientific evidence amply supports” such a conclusion.⁹⁸ Thus, the court concluded § “922(g)(4)’s prohibition is . . . a reasonable fit for the government’s laudable goal of preventing gun violence.”⁹⁹ However, this referenced scientific evidence—which assesses the likelihood that those with a mental illness will commit suicide—was only used to justify the law in terms of preventing suicide, *not* crime.¹⁰⁰ The court pointed to a meta-analysis, cited to by the government, which studied the relationship between suicide and a record of mental illness.¹⁰¹ The study found that up to eight and a half years after release from involuntary commitment,

93. S. REP. NO. 90-1501, at 22 (1968).

94. See 114 CONG. REC. 21,829 (1968).

95. *Neinast v. Bd. of Trs. of Columbus Metro. Libr.*, 346 F.3d 585, 594 (6th Cir. 2003) (quoting *Bd. of Trs. v. Fox*, 492 U.S. 469, 480 (1989)).

96. *Tyler*, 837 F.3d at 694.

97. *Mai v. United States*, 952 F.3d 1106, 1117 (9th Cir. 2020).

98. *Id.*

99. *Id.*

100. *Id.*

101. E. Clare Harris & Brian Barraclough, *Suicide as an Outcome for Mental Disorders: A Meta-Analysis*, 170 BRIT. J. PSYCHIATRY 205, 205 (1997).

such persons had a suicide risk thirty-nine times what was expected based on World Health Organization mortality statistics.¹⁰² Patients studied up to fifteen years after discharge from in-patient treatment were found to have a suicide risk seven times that of a person who had not been involuntarily committed.¹⁰³ Ultimately, the Ninth Circuit concluded that “although the scientific evidence suggests that Plaintiff’s increased risk of suicide decreases over time, nothing suggests that it ever dissipates entirely.”¹⁰⁴

Mai specifically asserted that § 922(g)(4) is unconstitutional as applied to him, someone who no longer suffers from mental illness.¹⁰⁵ The court noted that if they were to assess Mai personally, “nothing in the record suggests that [Mai’s] level of risk is nonexistent or that his level of risk matches the risk associated with a similarly situated person who lacks a history of mental illness.”¹⁰⁶ The court made this conclusory statement *after* noting that Mai’s psychological evaluation indicated that he had less of a risk of suicide than the base rate for individuals with a psychiatric history.¹⁰⁷ More specifically, Mai’s psychological evaluation indicated that he has a “low risk for future violence” and does not have a “significant suicide risk.”¹⁰⁸

C. *Why These Justifications Are Not Reasonable and Fail Intermediate Scrutiny*

The statistics cited by the government¹⁰⁹—that those with a history of involuntarily commitment have an increased risk of suicide—do not justify a lifetime ban on gun possession, as its scope is entirely out of proportion to the interests served. These statistics lump together all persons with a history of involuntary commitment and do little to show Mai and Tyler’s—and other similarly situated persons’—mental health status *today*.¹¹⁰ Under intermediate scrutiny, the government needed to have “presented sufficient evidence of the continued risk presented by persons who were previously committed.”¹¹¹ This section argues that a lifetime ban on gun possession for those with a history of involuntary commitment is unconstitutional because the arguments used to justify the ban—that it is substantially related to preventing crime and suicide—are undercut by the reality of what it means to be involuntarily committed and the ever-climbing rates of suicide.

102. *Id.* at 205, 219–20.

103. *Id.* at 221.

104. *Mai*, 952 F.3d at 1118.

105. *Id.* at 1119.

106. *Id.*

107. *Id.*

108. *Id.*

109. *See supra* notes 100–03 and accompanying text.

110. *See supra* notes 97–103 and accompanying text.

111. *Tyler v. Hillsdale County*, 837 F.3d 678, 696 (6th Cir. 2016).

1. Section 922(g)(4) Is Categorically Underinclusive

First, a categorical ban on those involuntarily committed is so underinclusive, both in terms of effectively targeting those who pose a danger in possessing guns and preventing suicide, that the fit between § 922(g)(4)'s goals and its effects is unreasonable.¹¹² For example, not everyone who has spent time receiving treatment for a mental health issue, no matter how serious the mental illness may be, has their Second Amendment right infringed upon. Federal regulation 27 C.F.R. § 478.11 sheds light on the meaning of “adjudicated as a mental defective” and maintains that § 922(g)(4) only applies to persons involuntarily committed, not those *voluntarily* committed.¹¹³ Thus, § 922(g)(4) is too narrow in scope: it is unreasonable for the government to maintain that persons who were previously involuntarily committed still maintain a risk strong enough to justify denying their Second Amendment right when those who were voluntarily committed never had their right suppressed, even when presenting an immediate danger to themselves and others.

If the purpose of § 922(g)(4) is to keep guns out of the hands of the mentally ill, there is no reason to differentiate between involuntarily and voluntarily committed patients. To be voluntarily committed, a physician must determine that the individual has a mental disorder and would benefit from treatment.¹¹⁴ No person will be admitted unless a medical professional confirms the individual's need for “observation, diagnosis, evaluation, care or treatment.”¹¹⁵ The main difference between involuntary commitment and voluntary commitment is that the former is court ordered, while the latter requires that the individual have capacity to give informed consent for commitment.¹¹⁶ This does not necessarily mean persons voluntarily committed

112. In the equal protection context, the Supreme Court has generally only permitted statutory classifications to be underinclusive and overinclusive when applying rational basis review. *See, e.g.,* *Vance v. Bradley*, 440 U.S. 93, 108–09 (1979) (“We accept such imperfection because it is in turn rationally related to the secondary objective of legislative convenience.”); *see also* Robert C. Farrell, *Equal Protection: Overinclusive Classifications and Individual Rights*, 41 ARK. L. REV. 1, 17–21 (1988) (explaining that “even grossly overinclusive classifications are permissible” when rational basis is applied in an equal protection context and listing examples of relevant cases); *id.* at 23 (explaining that “a substantial number of overinclusive sex classifications have been invalidated” when intermediate scrutiny is applied in an equal protection context); *id.* at 29 (explaining that an “extremely tight fit between classification and purpose” is required to satisfy strict scrutiny in equal protection cases).

113. 27 C.F.R. § 478.11 (2021) (“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: is a danger to himself or to others; or lacks the mental capacity to contract or manage his own affairs.”).

114. Donald H. Stone, *The Benefits of Voluntary Inpatient Psychiatric Hospitalization: Myth or Reality?*, 9 B.U. PUB. INT. L.J. 25, 27 (1999).

115. *Id.* at 30.

116. *See id.* at 35–37.

have higher capacity than those involuntarily committed. In fact, one study found that those voluntarily committed were more impaired in capacity than those involuntarily committed.¹¹⁷ In sum, there is no difference between the “mental illness” status of those voluntarily committed and those involuntarily committed. Thus, the argument that § 922(g)(4) effectively keeps guns out of the hands of the mentally ill is severely undercut because the statute does not even apply to *all* persons previously committed to an institution for mental illness.

Rather, the framing of § 922(g)(4) effectively creates a suppression of rights for those who may have limited resources and ability to seek voluntary treatment at no fault of their own,¹¹⁸ despite the shared struggle of mental illness for both groups. It is difficult to say how many people § 922(g)(4) disproportionately affects.¹¹⁹ Tracking the number of people who are involuntarily committed in the United States each year is complicated for a myriad of reasons.¹²⁰ Patient privacy concerns, the criteria for commitment varying by jurisdiction, and decentralized mental health care systems prevent easy access to publicly available information.¹²¹ A 2015 study showed that an estimated nine out of every one thousand people with a serious mental illness were involuntarily committed.¹²² But in comparison, it is expected that one in twenty adults experience serious mental illness each year.¹²³ The 2019 National Survey on Drug Use and Health showed that from 2002 to 2019, the percentage of people who received inpatient mental health services increased from 0.7% (1.5 million) to 1% (2.4 million).¹²⁴ A 2008 study found that fifty beds per one hundred thousand people would be sufficient to meet the needs for acute and long-term inpatient care, but in many states, there are as little as five beds per every one hundred thousand people available.¹²⁵ These statistics indicate that even if one sought voluntary inpatient treatment, it may be impossible to obtain and could instead result in involuntary commitment.¹²⁶

117. *Id.* at 46.

118. *See infra* notes 123–26 and accompanying text.

119. *See* Nathaniel P. Morris, *Detention Without Data: Public Tracking of Civil Commitment*, 71 PSYCHIATRIC SERVS. 741, 741–42 (2020).

120. *See id.*

121. *Id.* at 742.

122. SAMHSA, *supra* note 9, at 8. A serious or severe mental illness can be defined as: “A longstanding mental illness that causes moderate-to-severe disability of prolonged duration.” Daniel Yohanna, *History of Medicine: Deinstitutionalization of People with Mental Illness: Causes and Consequences*, 15 VIRTUAL MENTOR, 886, 886 (2013).

123. *Mental Health by the Numbers*, NAT’L. ALL. ON MENTAL ILLNESS, <https://www.nami.org/mhstats> [<https://perma.cc/6NNM-LDHZ>] (Mar. 2021) [hereinafter NAMI].

124. SAMHSA, *supra* note 9, at 5.

125. Yohanna, *supra* note 122, at 886.

126. *Id.* It is worth noting this deficiency can lead to people with severe mental illnesses being homeless or finding their housing in the criminal justice system. *Id.*

Nevertheless, if § 922(g)(4) only targets those who have been adjudicated to a mental institution, the law necessarily neglects to keep guns out of the hands of those who seek voluntary treatment, such as the millions of Americans who suffer from mental illness.

The law is also underinclusive in terms of properly addressing the important interest of preventing suicide. As both the *Mai* and *Tyler* courts noted, suicide by firearm is a huge crisis in America.¹²⁷ The 2021 Brady Report shows that sixty-three people die by suicide with a gun every day.¹²⁸ But Congress has remained unchallenged as to whether § 922(g)(4) actually reduces suicide by a meaningful number to justify a lifetime ban. In fact, firearm suicides have increased almost every year since 2006.¹²⁹ There is no indication that suicide rates are declining—“[a]mong adults aged eighteen or older, the percentage who had serious thoughts of suicide in the past year increased from 3.7% in 2008 to 4.8% in 2019” with the estimates increasing each year through that time period.¹³⁰ The government in *Tyler* relied in part on the Brady Center’s 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.”¹³¹ As the Sixth Circuit noted, this would justify keeping those with a history of suicide attempts from possessing guns, but “does not fully justify the need to permanently disarm anyone who has been involuntarily committed for whatever reason.”¹³² The ever-present and ever-increasing problem of suicide forces us to ask if § 922(g)(4) has even made a reasonable impact on reducing suicide. In sum, because § 922(g)(4) is underinclusive in terms of effectively targeting both persons with mental illnesses who may pose a danger in possessing guns and those at risk of committing suicide, the fit between § 922(g)(4)’s goals and its effects is unreasonable.

2. Section 922(g)(4) Is Categorically Overinclusive

While a statute can regulate more people than necessary and still be constitutional, that “amount of overreach must be reasonable.”¹³³ The legal

127. See BRADY UNITED AGAINST GUN VIOLENCE, THE TRUTH ABOUT SUICIDE AND GUNS 5 [hereinafter BRADY REPORT], <https://brady-static.s3.amazonaws.com/Gun-Suicide-Prevention.pdf> [<https://perma.cc/48AY-S57Q>].

128. *Id.*

129. *Id.*

130. SUBSTANCE ABUSE & MENTAL HEALTH SERVS. ADMIN., KEY SUBSTANCE USE AND MENTAL HEALTH INDICATORS IN THE UNITED STATES: RESULTS FROM THE 2019 NATIONAL SURVEY ON DRUG USE AND HEALTH 48 (2020), <https://www.samhsa.gov/data/sites/default/files/reports/rpt29393/2019NSDUHFFRPDFWHTML/2019NSDUHFFR1PDFW090120.pdf> [<http://perma.cc/2B5Q-93CP>].

131. *Tyler v. Hillsdale County*, 837 F.3d 678, 695 (6th Cir. 2016).

132. *Id.*

133. *Id.* at 698.

standard for firearm bans is not limited to the mentally ill: “State firearm bans are not limited to the acutely, or even potentially, psychotic. Again, the key trigger for a firearm ban in most places is commitment to an inpatient facility.”¹³⁴ Thus, the application of § 922(g)(4) is not limited to those with severe mental illness who are likely to misuse firearms. Rather, the statute encompasses anyone who has ever been involuntarily committed, making it wholly unrelated to “cut[ting] down or eliminat[ing] firearms deaths caused by persons who are not criminals, but who commit sudden, unpremeditated crimes with firearms as a result of mental disturbances.”¹³⁵ This category of previously committed persons not only includes those who have since recovered from their decade-old illness that led to their commitment, but it also includes many other groups of people who never even suffered from mental illnesses that resulted in “unpremeditated crimes with firearms.” In general, people may be involuntarily committed if they are found to be both dangerous and have a mental illness.¹³⁶ Because being involuntarily committed does not hinge on a person’s risk of harming themselves or others by use of firearms, the population of people subjected to § 922(g)(4) is broader than necessary to keep guns out of the hands of persons likely to commit crimes with firearms.

For example, persons with eating disorders are frequently subjected to involuntary commitment.¹³⁷ Death rates for this group of people are unfortunately high and involuntary commitment can be justified in an attempt to save their lives.¹³⁸ Though persons with eating disorders may contemplate suicide, death most often occurs because of medical complications of chronic starvation and purging behaviors.¹³⁹ Thus, although an eating disorder constitutes a mental illness and this mental illness presents a danger of self-harm, persons with this mental illness are not likely to misuse firearms,¹⁴⁰ yet are still subject to a lifetime ban of gun possession due to their history of involuntary commitment.

134. Fedrick E. Vars & Amanda Adcock Young, *Do the Mentally Ill Have a Right To Bear Arms?*, 48 WAKE FOREST L. REV. 1, 15 (2013).

135. See 114 CONG. REC. 21,829 (1968).

136. SAMHSA, *supra* note 9, at 11–12.

137. Megan Testa & Sara G. West, *Civil Commitment in the United States*, 7 PSYCHIATRY 30, 37 (2010).

138. See *id.*

139. *Id.*; see also Manfred Maximilian Fichter & Nobert Quadflieg, *Mortality in Eating Disorders – Results of a Large Prospective Clinical Longitudinal Study*, 49 INT’L J. EATING DISORDERS 391, 395 (2016).

140. Michael Ollove, *States Tackle Mental Illness and Gun Ownership*, PEW (Mar. 21, 2013), <https://www.pewtrusts.org/en/research-and-analysis/blogs/stateline/2013/03/21/states-tackle-mental-illness-and-gun-ownership> [https://perma.cc/3ZFQ-GLCT].

Another group with high involuntary commitment rates is people with substance abuse disorders.¹⁴¹ The term “committed to a mental institution” in § 922(g)(4) includes a commitment for drug use.¹⁴² Substance abusers often end up involuntarily committed, not because they are considered dangerous, but rather because of high rates of treatment reluctance and refusal of treatment that is required for survival.¹⁴³ Some involuntary commitment state laws do not even require a finding of dangerousness in order to involuntarily commit these persons, and instead solely rely on a finding of drug dependence.¹⁴⁴ The opioid crisis has led to many states passing laws that allow for involuntary commitment on the basis of substance use.¹⁴⁵ In 1991, only eighteen states permitted involuntary commitment for substance abuse alone; that number is now at least thirty-eight.¹⁴⁶ Not only do state involuntary commitment laws like these fail to effectively treat substance users, they target persons who are not even likely to commit violent crimes.¹⁴⁷

Finally, minority populations have an increased risk of involuntary commitment even when they may not actually meet the standards for commitment. Courts rely on physicians’ diagnosis of a mental illness to determine whether or not a person meets the qualifications of involuntarily commitment.¹⁴⁸ This grants physicians broad subjective power that may be influenced by bias.¹⁴⁹ For example, Black people are three times more likely than white people to be diagnosed with schizophrenia.¹⁵⁰ Further, nonwhite males are significantly more likely than white males to be involuntarily committed.¹⁵¹ This difference is not found for other forms of hospitalization, such as voluntary commitment, indicating that the difference is likely due to the coercive nature of involuntary commitment rather than an increased

141. Testa & West, *supra* note 137, at 37.

142. BUREAU OF ALCOHOL, TOBACCO, FIREARMS & EXPLOSIVES, FEDERAL FIREARMS PROHIBITION UNDER 18 U.S.C. § 922(g)(4) (2009), <https://www.atf.gov/file/58791/download> [<https://perma.cc/35YQ-E796>].

143. Testa & West, *supra* note 137, at 37.

144. *Id.*

145. Leo Beletsky & Denise Tomasini-Joshi, ‘Treatment Facilities’ Aren’t What You Think They Are, N.Y. TIMES (Sept. 3, 2019), <https://www.nytimes.com/2019/09/03/opinion/opioid-jails-treatment-facilities.html> [<https://perma.cc/789U-3RNE> (dark archive)].

146. *Id.*

147. Leo Beletsky & Elizabeth Ryan, *The Wrong Path: Involuntary Treatment and the Opioid Crisis*, CRIME REP. (Aug. 16, 2017), <https://thecrimereport.org/2017/08/16/the-wrong-path-involuntary-treatment-and-the-opioid-crisis/> [<https://perma.cc/7XF8-ZW3E>].

148. Henry T. Lynch, *Involuntary Hospitalization and Bias Against Marginalized Groups*, 18 STAN. UNDERGRADUATE RSCH. J. 40, 41 (2019).

149. *Id.*

150. *Id.*

151. Sarah Rosenfield, *Race Differences in Involuntary Hospitalization: Psychiatric vs. Labeling Perspectives*, 25 J. HEALTH & SOC. BEHAV. 14, 17 (1984).

presence of mental illness in nonwhites.¹⁵² One study found that when comparing nonwhites to whites with similar psychiatric conditions and levels of dangerous behavior, nonwhites were still more likely to be involuntarily committed than whites.¹⁵³ Thus, because minorities may be involuntarily committed due to bias and stigma rather than because they meet the standards for commitment, § 922(g)(4) overincludes minority populations.

Even though these groups of people typically cannot be involuntarily committed unless they are found to be both mentally ill and dangerous,¹⁵⁴ the underlying reason for their commitment does not justify a lifetime gun ban for these classifications of people. Thus, § 922(g)(4) is too broad in scope and not adequately targeted towards a group of people who actually pose a danger of committing dangerous, unpremeditated criminal acts.

3. “[O]nce Mentally Ill Does Not Mean Always Mentally Ill”

Finally, as Justice McKeague noted in his concurrence in *Tyler*, “once mentally ill does not mean always mentally ill.”¹⁵⁵ The MacArthur Foundation study from 1998, which is still widely cited today, compared “civil admission” patients to a control group in the same neighborhood.¹⁵⁶ The study found that committed patients were less likely to have actual or threatened weapon violence compared to their neighbors.¹⁵⁷ Notably, the study found that there was a decline in violence of the studied former patients over time.¹⁵⁸ Despite the fact that only “3%–5% of violent crimes in the United States are attributed to serious mental illness,” people view those with mental illnesses as a threat.¹⁵⁹ However, “those with mental illness may actually be less likely to commit serious violent acts than the general population.”¹⁶⁰ These studies and statistics indicate that the scope of § 922(g)(4) is not proportional to the interest served because those involuntarily committed, let alone those with a history of mental illness, are not the greatest source of danger in our society.

152. *See id.* at 17–18 (“[T]he relationship between race and involuntary hospitalization remains for males when the type and severity of disorder is controlled. Thus, the analysis supports a labeling perspective on race differences.”).

153. *Id.*

154. SAMHSA, *supra* note 9, at 11–12.

155. *Tyler v. Hillsdale County*, 837 F.3d 678, 700 (6th Cir. 2016) (McKeague, J., concurring).

156. Steadman et al., *supra* note 87, at 394.

157. *Id.* at 400 (finding former patients had a 22.3% risk of weapon violence while other members of that same community had a 42.3% risk). The study noted that substance abuse is what significantly raises the prevalence of violence in both the civilly committed and community samples.

Id.

158. *Id.*

159. Samantha M. Caspar & Artem M. Joukov, *Worse than Punishment: How the Involuntary Commitment of Persons with Mental Illness Violates the United States Constitution*, 47 HASTINGS CONST. L.Q. 499, 517 (2020).

160. *Id.* at 518.

The Ninth Circuit found the government's citations to the meta-analysis—which showed the risk of suicide for involuntary committed persons to be thirty-nine times higher than what was expected—heavily persuasive.¹⁶¹ Yet that same analysis also found that this heightened risk of suicide for those involuntarily committed is greatest “following short first admissions.”¹⁶² The sampling in that study did not include any persons whose involuntary commitments were as long ago as both *Mai* and *Tyler*.¹⁶³ Of the 14,000 patients studied, 98% were studied for the year following their commitment and only 2% were studied for 2.5–8.5 years post-commitment.¹⁶⁴ The court in *Mai* also conveniently failed to mention that the study's conclusion was that “[s]uicide risk seems highest at the beginning of treatment and diminishes thereafter.”¹⁶⁵

The Supreme Court has made it clear that the “right to keep and bear arms” is a “fundamental right necessary to our system of ordered liberty,”¹⁶⁶ and when one such fundamental right is at stake, strict scrutiny is favored.¹⁶⁷ Excluding an entire class of people from pursuing a fundamental right for life should require evidence that their mental illness lasts for life. Further, affirmative evidence that those with a history of involuntary commitment are more dangerous than the general public is needed if a lower level of scrutiny is going to be applied.¹⁶⁸ To do less indicates that a class of people who may have fully recovered from mental illness are entitled to lesser rights than the average population. Rather than provide evidence that people previously involuntarily committed have a sufficient continued risk of danger to themselves and others, the government has exacerbated the negative stereotypes of the mentally ill by defending § 922(g)(4).

IV. SOLUTIONS

Although the government's interests in keeping guns out of the hands of those who pose a danger to themselves and others are important, § 922(g)(4) infringes on the constitutional right to bear arms. A better solution is needed to address these interests. This part examines possible solutions, which include creating a federal extreme risk law that adequately instills measures to protect

161. See *supra* notes 98–103 and accompanying text.

162. Harris & Barraclough, *supra* note 101, at 220.

163. See *supra* notes 33 and 49 and accompanying text.

164. Harris & Barraclough, *supra* note 101, at 219–20.

165. *Id.* at 223.

166. *McDonald v. City of Chicago*, 561 U.S. 742, 778 (2010).

167. *Washington v. Glucksberg*, 521 U.S. 702, 721 (1997) (holding strict scrutiny applies to “fundamental” liberty interests).

168. “[W]ithout such a comparison [of previously committed individuals’ propensity for violence compared to the general population], the data is insufficient to justify § 922(g)(4)’s perpetual curtailment of a constitutional right.” *Tyler v. Hillsdale County*, 837 F.3d 678, 696 (6th Cir. 2016).

safety while also protecting the rights of those subjected to involuntary commitment.

A. *Bring Back § 925(c) Relief-from-Disabilities Program or Expand NICS Improvement Amendments Act*

One solution to this important issue is to leave § 922(g)(4) as is and bring back § 925(c) Relief-from-Disabilities Program. Congress defunded the program in 1992 because reviewing the applications was a “very difficult and subjective task which could have devastating consequences for innocent citizens if the wrong decision is made.”¹⁶⁹ Ironically, with the relief program gone, every single citizen who has been involuntarily committed now faces the devastating consequence of a fundamental right being taken away for life.¹⁷⁰ Nevertheless, Congress makes a reasonable argument that a federal relief program would likely be inefficient and too subjective.¹⁷¹ While there may not be a reasonable expectation to view individuals on a case-by-case basis, how the law stands fails to recognize that “[o]nce depressed does not mean always depressed; once mentally ill does not mean always mentally ill; and once institutionalized does not mean always institutionalized.”¹⁷²

Further, requiring that the government fund such a program may run counter to established precedent that “[s]ome categorical disqualifications are permissible: Congress is not limited to case-by-case exclusions of persons who have been shown to be untrustworthy with weapons.”¹⁷³ Regardless, simply the availability of being able to apply for relief from the § 922(g)(4) lifetime ban does not make the law *itself* constitutional.¹⁷⁴ As the Sixth Circuit noted, Congress’s establishment of the relief-from-disabilities program from 1986 to 1992 is a sign that Congress realized that it is not “reasonably necessary to forever bar all previously institutionalized persons from owning a firearm.”¹⁷⁵ Therefore, refunding the program does little to solve the biggest issue: § 922(g)(4) does not even surpass intermediate scrutiny.

Another option is complete state adoption of relief-from-disabilities programs. Under the NICS Improvement Amendments Act, states must

169. *Mai v. United States*, 952 F.3d 1106, 1111 (9th Cir. 2020) (quoting S. REP. NO. 102-353, at 19–20 (1992)).

170. *See Is There a Way for a Prohibited Person To Restore Their Right To Receive or Possess Firearms and Ammunition?*, BUREAU ALCOHOL, TOBACCO, FIREARMS & EXPLOSIVES (Aug. 21, 2019), <https://www.atf.gov/firearms/qa/there-way-prohibited-person-restore-their-right-receive-or-possess-firearms-and> [<https://perma.cc/R5FP-W63L>].

171. *See Mai*, 952 F.3d at 1111 (citing S. REP. NO. 102-353, at 19).

172. *Tyler*, 837 F.3d at 710 (Sutton, J., concurring).

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

174. *See supra* Section III.C.

175. *Tyler*, 837 F.3d at 698 (“It is a clear indication that Congress does not believe that previously committed persons are sufficiently dangerous as a class to permanently deprive all such persons of their Second Amendment right to bear arms.”).

create a relief-from-disabilities program in order to receive federal funds.¹⁷⁶ Because creating such a program is a choice by the states, there is unequal availability of this remedy, as only thirty-two states currently have a relief program.¹⁷⁷ Under anti-commandeering principals, the federal government cannot force all states to offer such a program,¹⁷⁸ making it impossible to ensure availability of remedies. Further, just like § 925(c), the availability of a state relief-from-disabilities program does not make § 922(g)(4) constitutional on its face.¹⁷⁹

B. *The Fix: A Federal Extreme Risk Law*

The best solution to actually keeping guns out of the hands of those who pose a danger of committing unpremeditated crimes with firearms as a result of mental disturbances is to replace § 922(g)(4) with a federal extreme risk law. Extreme risk protection order (“ERPO”) laws, or colloquially known as “red flag” laws, temporarily remove guns from the hands of persons who are determined by a judge to be currently at an imminent risk of harming themselves or others.¹⁸⁰ The basic process under an ERPO law is as follows. First, a law enforcement officer, family member, or other professional (such as a person’s physician) can petition a court to place a person under an ERPO.¹⁸¹ Next, the court can immediately enter a short-term, ex parte ERPO so long as the petitioner meets their burden of proof.¹⁸² Not until after a full, adversary hearing may the court enter a longer, yet temporary, ERPO.¹⁸³ This order requires the person to relinquish their firearms and prevents them from obtaining new ones while the ERPO is in effect.¹⁸⁴ About nineteen states have adopted these laws,¹⁸⁵ but there have been few attempts at any federal legislation.¹⁸⁶

176. See *supra* notes 26–29 and accompanying text.

177. See GOGGINS & GALLEGOS, *supra* note 30, at 8.

178. *New York v. United States*, 505 U.S. 144, 161, 173 (1992); see also BRIAN T. YEH, CONG. RSCH. SERV., R44797, THE FEDERAL GOVERNMENT’S AUTHORITY TO IMPOSE CONDITIONS ON GRANT FUNDS 3 (2017).

179. See *supra* Section III.C.

180. Joseph Blocher & Jacob D. Charles, *Firearms, Extreme Risk, and Legal Design: “Red Flag” Laws and Due Process*, 106 VA. L. REV. 1285, 1285 (2020).

181. *Id.* at 1288–89.

182. *Id.*

183. *Id.*

184. *Id.*

185. *Extreme Risk Protection Orders*, GIFFORDS L. CTR., <https://giffords.org/lawcenter/gun-laws/policy-areas/who-can-have-a-gun/extreme-risk-protection-orders/> [https://perma.cc/6CTL-SXF S]. For further analysis of the history of state ERPO laws, see Coleman Gay, *“Red Flag” Laws: How Law Enforcement’s Controversial New Tool To Reduce Mass Shooting Fits Within Current Second Amendment Jurisprudence*, 61 B.C. L. REV. 1491, 1499–510 (2020).

186. Blocher & Charles, *supra* note 180, at 1298.

1. ERPO Laws Better Address the Government's Interests

The effect of the ERPO is that it targets only those *currently* posing a danger to themselves or others,¹⁸⁷ which would effectively address the government's important and compelling interests of preventing crime and suicide.¹⁸⁸ Although research on these laws is limited due to their recency, studies have already shown that ERPO laws are working to prevent suicides.¹⁸⁹ One study, analyzing the effectiveness of Connecticut's ERPO law between 1999 and 2013, found that "one suicide was averted for every ten or eleven guns seized."¹⁹⁰ Persons subjected to state ERPO laws were found to have suicide rates thirty times higher than the average person,¹⁹¹ showing these laws are properly targeting those most at risk of self-harm. In its 2021 report, Brady United Against Gun Violence called for the passing of ERPO laws to aid in the prevention of the gun suicide epidemic because of the demonstrated effectiveness of state ERPO laws.¹⁹² Because more than two-thirds of suicides in America are committed with firearms,¹⁹³ it is clear that keeping firearms out of the hands of those who pose the greatest risk of self-harm is necessary. But because fifty percent of people who die from suicide by gun are those who do not even have a diagnosed mental illness,¹⁹⁴ an ERPO law that focuses on individual behavioral risk factors would be more effective than a law like § 922(g)(4).¹⁹⁵

Further, by limiting who can initiate an ERPO, these laws work to better target persons at risk of committing a crime or suicide. The aforementioned MacArthur study found that those with the highest risk of experiencing violence caused by persons with a history of commitment were their family and friends inside the home.¹⁹⁶ Because of this, family and friends who may initiate an ERPO proceeding are better suited to assessing the need to remove a gun from someone with behavioral risks of firearm misuse.¹⁹⁷ Ultimately, ERPO laws are more effective at targeting individuals who are *currently* danger risks because family and friends are much better at identifying at-risk

187. William Frizzell & Joseph Chien, *Extreme Risk Protection Orders To Reduce Firearm Violence*, 70 PSYCHIATRIC SERVS. 75, 76 (2019).

188. See *supra* note 96 and accompanying text.

189. Blocher & Charles, *supra* note 180, at 1300.

190. *Id.*

191. Timothy Williams, *What Are 'Red Flag' Gun Laws, and How Do They Work?*, N.Y. TIMES (Aug. 6, 2019), <https://www.nytimes.com/2019/08/06/us/red-flag-laws.html?searchResultPosition=1> [<https://perma.cc/D9Q3-J5S9> (dark archive)].

192. BRADY REPORT, *supra* note 127, at 14–15.

193. *Id.* at 3.

194. *Id.* at 14.

195. *Id.* at 3.

196. Steadman et al., *supra* note 87, at 400.

197. BRADY REPORT, *supra* note 127, at 14.

individuals than merely someone's record of previous involuntary commitment.

2. ERPO Laws Do Not Stigmatize the Mentally Ill

While § 922(g)(4) equates history of involuntary commitment with mental illness and effectively assumes that once deemed mentally ill, one is permanently dangerous,¹⁹⁸ many state ERPO laws do not require a finding of mental illness in order for an ERPO to be entered. In Connecticut, for example, an ERPO may be entered if an individual is found to “pose[] a risk of imminent personal injury to himself or herself or to other individuals.”¹⁹⁹ The law says nothing about mental health or illness.²⁰⁰ In fact, Connecticut lawmakers specifically rejected the idea of basing the law on a diagnosis of mental illness by a psychiatrist in fear that this would stigmatize persons with mental illnesses.²⁰¹ Similarly, Indiana's ERPO law requires a finding that an individual is “dangerous” under the meaning of the statute.²⁰² “Dangerous” is defined to specifically state that “[t]he fact that an individual has been released from a mental health facility or has a mental illness that is currently controlled by medication does not establish that the individual is dangerous” under the meaning of the statute.²⁰³ Thus, rather than stigmatize the mentally ill, a federal ERPO law could be limited to assessing one's current level of danger rather than one's status in relation to their mental health history.

3. Criticism of ERPO Laws

Critics of ERPO laws find them problematic for being a “pre-crime” punishment and note that there is a fundamental difference between “restraining a person who has harmed others” and “restraining someone who is only at risk of doing so.”²⁰⁴ Yet this criticism falls flat when compared to what is happening under the current law. Under § 922(g)(4), persons can also be involuntarily committed having never committed a crime.²⁰⁵ Rather, the test for whether a person should be committed is if they are at risk of harming

198. *See supra* Section III.C.3.

199. CONN. GEN. STAT. ANN. § 29-38c (Westlaw through all enactments of the 2021 Reg. Sess. and the 2021 June Spec. Sess.).

200. *See id.*

201. Jeffrey W. Swanson, Michael A. Norko, Hsiu-Ju Lin, Kelly Alanis-Hirsch, Linda K. Frisman, Madelon V. Baranoski, Michele M. Easter, Allison G. Robertson, Marvin S. Swartz & Richard J. Bonnie, *Implementation and Effectiveness of Connecticut's Risk-Based Removal Law: Does It Prevent Suicides?*, 80 LAW & CONTEMP. PROBS. 179, 186 (2017).

202. IND. CODE ANN. § 35-47-14-2 (Westlaw through all legislation of the 2021 1st Reg. Sess. of the 122d Gen. Assemb.).

203. *Id.* § 35-47-14-1(b).

204. Blocher & Charles, *supra* note 180, at 1286–87.

205. *See* 18 U.S.C. § 922(g)(4).

themselves or others, not whether or not they have done so.²⁰⁶ Some critics also allege that these laws violate due process, seeing as they result in the taking of property before a full hearing.²⁰⁷ While constitutional due process typically requires the opportunity to be heard before the taking of one's property,²⁰⁸ this does not "always require[] the State to provide a hearing prior to the initial deprivation of property."²⁰⁹ The Supreme Court has held that procedural due process is still satisfied if there is either (1) a need for quick action by the state or (2) it is impractical to provide "meaningful predeprivation process."²¹⁰ Involuntary commitment, which happens without procedural due process, has been found to fall into the first category.²¹¹ Because involuntary commitment permanently affects firearm rights, ERPO laws would also be justified under the need for quick action by the state.

Despite these criticisms, a federal ERPO law addressing those who pose a risk of firearm misuse is the best option for replacing a statute that not only presents an unconstitutional lifetime ban but is both overinclusive and underinclusive and has failed by substituting "rough status proxies for risk."²¹² Unlike § 922(g)(4), a ban on gun possession under a federal ERPO law would be temporary. The initial removal of a gun would be similar to that of a temporary domestic violence protective order, extending ten days before a formal hearing can be held.²¹³ Similar to Massachusetts' ERPO law, the gun suspension will not be continued until after the individual has had a formal hearing in which dangerousness is proven, and even then, the ban on gun possession will only last up to a year.²¹⁴

4. Constitutionality of ERPO Laws

If a federal ERPO law were to be enacted, it must pass constitutional muster. As earlier discussed, when assessing Second Amendment challenges, courts use a two-step inquiry asking: "(1) whether the challenged law burdens conduct protected by the Second Amendment and (2) if so, directs courts to apply an appropriate level of scrutiny."²¹⁵ Under step one of the Second Amendment analysis, just like § 922(g)(4), an ERPO law is not limited to

206. See *supra* notes 14–18 and accompanying text.

207. Blocher & Charles, *supra* note 180, at 1291.

208. *Matthews v. Eldridge*, 424 U.S. 319, 333 (1976).

209. *Parratt v. Taylor*, 451 U.S. 527, 540 (1981).

210. *Id.* at 539.

211. See Blocher & Charles, *supra* note 180, at 1326–27.

212. *Id.* at 1294.

213. Shawn E. Fields, *Second Amendment Sanctuaries*, 115 NW. U. L. REV. 437, 450 (2020).

214. MASS. GEN. LAWS ANN. ch. 140, § 131S (Westlaw through Ch. 14 of the 2022 2d Ann. Sess.); see also Bethany Stevens, *Massachusetts Adopts "Red Flag" Law*, 62 BOS. BAR J. 6, 7 (2018).

215. *Mai v. United States*, 952 F.3d 1106, 1113 (9th Cir. 2020) (quoting *United States v. Chovan*, 735 F.3d 1127, 1136 (9th Cir. 2013)).

persons in a “presumptively lawful” category as provided by *Heller* because it does not, and should not, hinge on a finding of mental illness.²¹⁶

Thus, a federal ERPO law constitutionality assessment would proceed to step two. The debate over whether strict or intermediate scrutiny applies thus continues, but assuming the higher standard of strict scrutiny applies, the federal ERPO law must be “narrowly tailored to achieve a compelling governmental interest.”²¹⁷ As discussed, the government has a compelling interest of preventing crime and suicide.²¹⁸ State ERPO laws have been found to be appropriately tailored to such interests.²¹⁹ In *Redington v. State*,²²⁰ the plaintiff challenged the constitutionality of Indiana’s ERPO law as applied to him.²²¹ The Indiana Court of Appeals found it relevant that under Indiana’s ERPO law, the plaintiff is able to petition the court every 180 days for return of his firearms.²²² Further, the court noted that the state “bears the burden of proving that the individual is ‘dangerous’ by a heightened clear and convincing evidence standard.”²²³ ERPO laws like Indiana’s do not present the same constitutional issues as § 922(g)(4) because they do not effectively create lifetime bans, and they require an actual finding of dangerousness rather than relying on one’s mental health history. Because the proposed federal ERPO law will target an individual rather than a class, a hearing will ultimately be required to show a standard of danger exists *now*, and the data show the risk of danger of persons with mental illnesses is highest at first and then decreases,²²⁴ a temporary ban on gun possession through the form of an ERPO law would be held constitutional.

CONCLUSION

Heller refers to the mentally ill in the present sense.²²⁵ Yet “[o]ne’s status as . . . ‘mentally ill’ may change over the course of a lifetime”²²⁶—something § 922(g)(4) fails to acknowledge. “[T]he mental health of Clifford Tyler in 1986 is [not] the mental health of Clifford Tyler in 2016,”²²⁷ and the mental health of Duy Mai in 1999 is not the mental health of Duy Mai in 2020. Until § 922(g)(4) is replaced with a better approach to keep guns out of the hands of

216. *See supra* Section II.A.

217. *Abrams v. Johnson*, 521 U.S. 74, 82 (1997).

218. *See supra* Section III.A.

219. *See Redington v. State*, 992 N.E.2d 823, 825 (Ind. Ct. App. 2013).

220. *Id.* at 823.

221. *See id.* at 828.

222. *See id.* at 834.

223. *See id.* at 835.

224. *See supra* notes 161–65 and accompanying text.

225. *Tyler v. Hillsdale County*, 837 F.3d 678, 699 (6th Cir. 2016) (McKeague, J., concurring).

226. *Id.* at 708 (Sutton, J., concurring).

227. *Id.* at 710.

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those who pose a true danger of possessing firearms, courts will continue to strip a fundamental right from a class of people who are being stigmatized for a record of involuntary commitment that cannot be erased, and the government's compelling interests of preventing crime and suicide will go unmet.

LAURA E. JOHNSON**

** I am thankful for the members of the *North Carolina Law Review*, especially my primary editor, Micah Rubin, for dedicating their time and energy to helping this piece become the best it could be. I am tremendously grateful for my friends and family for providing endless support, especially my parents who answer an absurd amount of FaceTime calls from me.

