No. 19-864

In the Supreme Court of the United States

BRADLEY BEERS, PETITIONER

v.

WILLIAM P. BARR, ATTORNEY GENERAL, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

Whether 18 U.S.C. 922(g)(4), which forbids possession of firearms by a person who "has been committed to a mental institution," violates the Second Amendment as applied to petitioner.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-18a) is reported at 927 F.3d 150. The opinion of the district court (Pet. App. 19a-33a) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on June 20, 2019. A petition for rehearing was denied on September 11, 2019 (Pet. App. 34a-35a). On November 25, 2019, Justice Alito extended the time within which to file a petition for a writ of certiorari to and including January 9, 2020, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. In the Gun Control Act of 1968, Pub. L. No. 90-618, 82 Stat. 1213, Congress enacted restrictions on

the possession of firearms by certain classes of individuals. One of those restrictions makes it unlawful for a person "who has been adjudicated as a mental defective or who has been committed to a mental institution" to ship, transport, possess, or receive any firearm or ammunition in or affecting interstate or foreign commerce. 18 U.S.C. 922(g)(4).

Previously, a person could obtain relief from the disability in Section 922(g)(4) by filing an application with the Attorney General and by showing to the Attorney General's satisfaction "that the circumstances regarding the disability, and the applicant's record and reputation, are such that the applicant will not be likely to act in a manner dangerous to public safety and that the granting of the relief would not be contrary to the public interest." 18 U.S.C. 925(c). Every year since 1992, however, Congress has enacted an appropriations bar prohibiting the federal government from investigating or acting upon any such application for relief. See *Logan* v. *United States*, 552 U.S. 23, 28 n.1 (2007).

A person may nevertheless obtain relief from the disability in Section 922(g)(4) through state-run "relief from disabilities program[s]." 34 U.S.C. 40915(a). A state program must satisfy certain criteria in order to receive authorization to lift the disability imposed by Section 922(g)(4). For example, the program must provide for relief where "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"; the program must operate "in accordance with the principles of due process"; and the program must

allow an unsuccessful applicant to obtain "de novo judicial review" in state court. 34 U.S.C. 40915(a)(2)-(3). Congress has provided federal grants to help States maintain such programs. See 34 U.S.C. 40913(b)(7). At present, 34 States have established qualifying programs. See William J. Krouse, Cong. Research Serv., R45970, *Gun Control: National Instant Criminal Background Check System (NICS) Operations and Related Legislation* App. D, at 43-44 (Oct. 17, 2019).

2. Petitioner was committed to a psychiatric institution in Pennsylvania in 2005. Pet. App. 21a. Petitioner, then a college student, became depressed and suicidal, telling his family "that he had nothing to offer [them] and nothing to live for," "that he had put a gun in his mouth," and "that he was 'going to * * * kill himself.'" *Ibid.* (brackets and citation omitted). Petitioner owned a firearm, and his mother became concerned that "he d[id] have the means to * * * kill himself." *Ibid.* (citation omitted). A doctor who examined petitioner concluded that petitioner was "severely mentally disabled," that he presented a "clear and present danger" to himself and others, and that he required immediate treatment. *Id.* at 4a n.2, 21a (emphasis and citations omitted); see D. Ct. Doc. 1, Ex. A, at 2 (Dec. 15, 2016). Petitioner was committed to a psychiatric hospital in December 2005, and a state court extended petitioner's commitment in December 2005 and again in January 2006. Pet. App. 4a. After petitioner was discharged later in 2006, he attempted to buy a firearm, but the attempt failed because a background check revealed the commitment. *Id.* at 22a.

3. In December 2016, petitioner brought this suit in federal district court, challenging the constitutionality of 18 U.S.C. 922(g)(4) as applied to him. See D. Ct. Doc.

1, at 1-2. A few months later, he applied to a Pennsylvania state court for restoration of his right to possess firearms in accordance with state law. See D. Ct. Doc. 24-1, at 17 (Mar. 25, 2017). The Pennsylvania court concluded that petitioner could "possess a firearm without risk of harm to himself or other persons" and accordingly granted the application. D. Ct. Doc. 29, Ex. A, at 1 (June 15, 2017). At that time, however, the Bureau of Alcohol, Tobacco, Firearms, and Explosives (ATF) had not yet determined that Pennsylvania's program satisfied the federal criteria for relief programs. Pet. App. 5a n.9. The court's action accordingly neither relieved petitioner of his federal-law disability under Section 922(g)(4) nor affected petitioner's federal suit. *Ibid.*

The district court granted the federal government's motion to dismiss petitioner's complaint. Pet. App. 19a-33a. As relevant here, the court concluded that "persons who were previously involuntarily committed for prior mental illness" fall "outside the scope of the Second Amendment's protection." *Id.* at 26a. The court also concluded that petitioner could not overcome that disqualification by showing his "'current fitness' to possess firearms." *Id.* at 26a-27a.

4. a. The court of appeals affirmed. Pet. App. 1a-18a. The court explained that the historical record showed that "the mentally ill" were "outside of the scope of Second Amendment protection." *Id.* at 14a. The court further explained that petitioner could not sidestep that traditional disqualification "by arguing that he is no longer a danger to himself or to others" as a result of the passage of time. *Id.* at 17a. The court found "no historical support for such restoration of Second Amendment rights." *Id.* at 18a. The court added that "federal courts are ill-equipped to determine

whether any particular individual who was previously deemed mentally ill should have his or her firearm rights restored." *Ibid.*

b. The court of appeals denied petitioner's petition for rehearing. Pet. App. 34a-35a. On July 1, 2019, while the petition for rehearing was pending, ATF approved Pennsylvania's certification that its state relief-from-disabilities program satisfied the minimum criteria established by federal law. See Pet. 23. As a result of that decision, the previous state-court order restoring petitioner's rights to possess a firearm operated to lift the federal disability imposed by Section 922(g)(4). See 34 U.S.C. 40915(b). Petitioner states that he has since secured a firearm license and has obtained a firearm. See Pet. 23.

ARGUMENT

Petitioner contends (Pet. 9-26) that Section 922(g)(4) violates the Second Amendment as applied to him. But petitioner's challenge to Section 922(g)(4) is now moot, because petitioner is no longer disabled from owning a firearm and has, in fact, acquired one. In any event, the court of appeals correctly rejected petitioner's constitutional challenge, and its decision does not conflict with any decision of this Court. Further review is unwarranted.

1. Article III empowers federal courts to decide "Cases" and "Controversies." U.S. Const. Art. III, § 2, Cl. 1. A suit becomes moot—and thus no longer is a case or controversy under Article III—"when the issues presented are no longer 'live' or the parties lack a legally cognizable interest in the outcome." *Already, LLC* v. *Nike, Inc.*, 568 U.S. 85, 91 (2013) (citation omitted). Petitioner brought this suit to challenge the constitutionality, as applied to him, of Section 922(g)(4)'s restriction

on the possession of firearms by people who have been committed to mental institutions. But federal law allows state programs that satisfy certain criteria to relieve a person of that restriction; Pennsylvania has certified that its program satisfies those criteria; ATF has approved that certification; and Pennsylvania has restored petitioner's rights under that program. See pp. 3-5, *supra*. The upshot, as petitioner acknowledges (Pet. 23), is that petitioner is no longer subject to the federal statutory restriction whose constitutionality he challenges. Indeed, petitioner states (*ibid.*) that he has now secured a firearms license and acquired a firearm. As a result, this case is now moot. Petitioner no longer has any "legally cognizable interest in the outcome" of any suit regarding the constitutionality of Section 922(g)(4). *Already*, 568 U.S. at 91 (citation omitted).

Petitioner invokes the principle that a "defendant's voluntary cessation of allegedly unlawful conduct ordinarily does not suffice to moot a case." Pet. 24 (quoting *Friends of the Earth, Inc.* v. *Laidlaw Environmental Services (TOC), Inc.*, 528 U.S. 167, 174 (2000)). But that doctrine applies only to "voluntary discontinuance of challenged activities by a *defendant*"; it ordinarily does not apply to "the voluntary acts of a third-party." *Iron Arrow Honor Society* v. *Heckler*, 464 U.S. 67, 72 (1983) (per curiam). In this case, the government has not unilaterally discontinued the action challenged by petitioner; quite the contrary, the challenged law, Section 922(g)(4), remains on the books. This case instead became moot as a result of a combination of actions taken before and during this litigation by the federal government, Pennsylvania, and petitioner himself—namely, Pennsylvania's establishment of a restoration-of-rights program, Pennsylvania's decision to certify that the

program satisfies federal standards, ATF's decision to approve that certification, petitioner's decision to apply for relief through that program, and Pennsylvania's decision to grant such relief.

Petitioner suggests that "it is not clear that ATF's approval of Pennsylvania's law is permanent" and that "ATF maintains the discretion to rescind its approval of a state rehabilitation program" as a result of future "'changes in the state's mental health law.'" Pet. 24-25 (citation omitted). This Court has explained, however, that a case remains live only so long as the threat of injury is "sufficiently real and immediate to show an existing controversy," and that a mere "speculative contingency" does not suffice. *Deakins* v. *Monaghan*, 484 U.S. 193, 200 n.4 (1988) (brackets and citations omitted). The prospect that the Pennsylvania legislature will revise the State's restoration-of-rights program, and that ATF will respond by rescinding its approval of that program, is purely speculative. Moreover, petitioner's disability has already been lifted under a program that satisfies the necessary criteria, and petitioner fails to explain how hypothetical future changes to the program and hypothetical future rescissions of approval in response to those changes would retroactively affect the relief he has already obtained.

At a minimum, the threshold dispute regarding mootness makes this case a poor vehicle for considering the question presented. As a result, "[w]hatever the ultimate merits of the parties' mootness arguments, there are strong prudential considerations disfavoring the exercise of the Court's certiorari power." *Padilla* v. *Hanft*, 547 U.S. 1062, 1063 (2006) (Kennedy, J., concurring in the denial of certiorari).

2. In any event, the court of appeals correctly rejected petitioner's contention that the application of Section 922(g)(4) to him violates the Second Amendment. In *District of Columbia* v. *Heller*, 554 U.S. 570 (2008), this Court held that the Second Amendment protects an individual right to possess firearms for traditionally lawful purposes such as self-defense. The Court explained, however, that, "the right secured by the Second Amendment is not unlimited," and it cautioned that "nothing in [its] opinion should be taken to cast doubt on longstanding prohibitions on the possession of firearms by * * * the mentally ill." *Id.* at 626. In *McDonald* v. *City of Chicago*, 561 U.S. 742 (2010), a plurality of the Court again emphasized that nothing in *Heller* casts doubt on the constitutionality of "prohibitions on the possession of firearms by * * * the mentally ill." *Id.* at 786 (citation omitted). Those assurances reflect the longstanding historical tradition of preventing mentally ill persons from possessing firearms. See Glenn Harlan Reynolds, *A Critical Guide to the Second Amendment*, 62 Tenn. L. Rev. 461, 480 (1995) ("[F]elons, children, and the insane were excluded from the right to arms."); Robert Dowlut, *The Right to Arms: Does the Constitution or the Predilection of Judges Reign?*, 36 Okla. L. Rev. 65, 96 (1983) ("Colonial and English societies of the eighteenth century, as well as their modern counterparts, have excluded infants, idiots, lunatics, and felons [from the right to keep and bear arms]."); Thomas M. Cooley, *A Treatise on the Constitutional Limitations Which Rest Upon the Legislative Power of the States of the American Union* 28-29 (1868) (explaining that the term "the *people*" has traditionally been interpreted in certain contexts to exclude "the idiot, the lunatic, and the felon").

Petitioner argues (Pet. 9) that the Second Amendment precludes the government from disarming a person who was committed to a mental institution in the past, if the person has since recovered from his mental illness. Even if that were so, however, there would have to be some mechanism for determining whether a person has recovered from a mental illness and thus should have his rights restored. Congress has already established such a mechanism: a qualifying state program may relieve a person from the disability established by Section 922(g)(4) upon a showing that "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." 34 U.S.C. 40915(a)(2). Congress has required state programs to make that determination "in accordance with the principles of due process," and it has ensured that unsuccessful applicants have an opportunity for "de novo judicial review." 34 U.S.C. 40915(a)(2)-(3). Petitioner fails to explain why the Second Amendment requires something more than the system that Congress has already established.

To be sure, at the time of the Third Circuit's decision, ATF had not yet determined that Pennsylvania's relief program satisfied the applicable federal criteria, and the Third Circuit held that Section 922(g)(4) remains constitutional even in a State without such a program. See pp. 3-4, *supra*. This Court has explained, however, that it ordinarily "appl[ies] the law in effect at the time it renders its decision" and that, when there is a "'change in the law'"—including a "change * * * made by an administrative agency"—the Court applies "'the changed law.'" *Thorpe* v. *Housing Authority*, 393 U.S.

268, 281-282 & n.38 (1969) (citation omitted); see *Patterson* v. *Alabama*, 294 U.S. 600, 607 (1935) ("[T]he Court is bound to consider any change, either in fact or law, which has supervened since the judgment was entered."). Since ATF has now determined that Pennsylvania's relief program satisfies the applicable criteria, this case no longer presents any issue concerning the application of Section 922(g)(4) to persons who lack access to such a program.

3. Petitioner contends (Pet. 9-13; Pet. Supp. Br. 1-3) that the decision below and the Ninth Circuit's similar decision in *Mai* v. *United States*, 952 F.3d 1106 (2020), conflict with *Tyler* v. *Hillsdale County Sheriff's Department*, 837 F.3d 678 (2016), a case in which the en banc Sixth Circuit considered the constitutionality of Section 922(g)(4) as applied to a person who might otherwise qualify for relief from the disability, but whose State had failed to create a qualifying relief program. No opinion in *Tyler* commanded a majority of the court, but, according to the lead opinion's count, a majority of the judges concluded that (1) the government had not yet established the constitutionality of applying Section 922(g)(4) in such circumstances, (2) the government could establish the constitutionality of applying Section 922(g)(4) by introducing "additional evidence" that a "lifetime ban" on possession of firearms by a person committed to a mental institution satisfied "intermediate scrutiny," and (3) it was necessary to remand the case so that the district court could apply that standard. *Id.* at 699 (opinion of Gibbons, J.); see *id.* at 699-700 (McKeague, J., concurring); *id.* at 701-702 (White, J., concurring); *id.* at 702 (Boggs, J., concurring in most of the judgment); *id.* at 707 (Batchelder, J., concurring in most of the judgment); *id.* at 714 (Sutton, J., concurring

in most of the judgment); *id.* at 714 (Rogers, J., dissenting); *id.* at 721 (Moore, J., dissenting).

Petitioner asserts (Pet. 2; Pet. Supp. Br. 1-3) that the decision below and *Mai* directly conflict with *Tyler*, but that contention is incorrect. All three decisions recognize the government's power, as a general matter, to prohibit mentally ill persons from possessing firearms. See Pet. App. 14a-16a; *Mai*, 952 F.3d at 1113; *Tyler*, 837 F.3d at 687 (opinion of Gibbons, J.); *Tyler*, 837 F.3d at 705 (Batchelder, J., concurring in most of the judgment); *Tyler*, 837 F.3d at 708 (Sutton, J., concurring in most of the judgment). Further, under all three decisions, Section 922(g)(4) at a minimum raises no constitutional concerns with respect to States that maintain qualifying state relief programs. See Pet. App. 16a-18a; *Mai*, 952 F.3d at 1117; *Tyler*, 837 F.3d at 697 (opinion of Gibbons, J.); *Tyler*, 837 F.3d at 713 (Sutton, J., concurring in most of the judgment). The decisions diverge only with respect to the treatment of States that do not maintain such programs. The Third and Ninth Circuits concluded that Section 922(g)(4) remains constitutional in those circumstances. Pet. App. 16a-18a; *Mai*, 952 F.3d at 1118. The Sixth Circuit, by contrast, failed to reach any definitive conclusion regarding the constitutionality of Section 922(g)(4) in that situation; rather, the Sixth Circuit remanded the case so that the government could introduce additional evidence and so that the district court could determine whether that evidence established that applying Section 922(g)(4) in that situation satisfied intermediate scrutiny. See *Tyler*, 837 F.3d at 699 (opinion of Gibbons, J.).

Any disagreement regarding the proper treatment of States without qualifying relief programs is now academic in the Third Circuit. Today, all three States in

that circuit—New Jersey, Delaware, and Pennsylvania —maintain relief programs approved by the federal government. See Del. Code. Ann. tit. 11, § 1448A(*l*) (West 2013); N.J. Stat. Ann. §§ 30:4-80.8 to 30:4-80.10 (West 2010). Petitioner has identified no decision of any court of appeals suggesting that the application of Section 922(g)(4) to persons with access to such programs raises any constitutional problems.

4. Petitioner suggests (Pet. 26) that the Court vacate the judgment below under *United States* v. *Munsingwear, Inc.*, 340 U.S. 36, 39 (1950). As a general matter, that remedy is available to petitioners who otherwise satisfy the usual criteria for certiorari, but who "have been prevented" by mootness "from obtaining the review to which they are entitled." *Ibid.* If, however, a petitioner is not otherwise "entitled" to review under the usual criteria for certiorari, he is not entitled to vacatur under *Munsingwear* either, and the appropriate course in such a case is simply to deny the petition. See Stephen M. Shapiro et al., *Supreme Court Practice* § 19.4 n.34 (11th ed. 2019) (noting that the Court routinely "denies certiorari in arguably moot cases unless the petition presents an issue (other than mootness) worthy of review"); see also, *e.g.*, Gov't Amicus Br. at 10, *McFarling* v. *Monsanto Co.*, 545 U.S. 1139 (2005) (No. 04-31). And here, this case would not warrant review even apart from mootness because, as explained above, it does not involve any well-developed circuit conflict.

Contrary to petitioner's suggestion (Pet. 25 n.12), there also is no sound reason to hold this case for *New York State Rifle & Pistol Ass'n Inc.* v. *City of New York*, No. 18-280 (argued Dec. 2, 2019). Petitioner observes (Pet. 25 n.12) that *New York State Rifle & Pistol*

Ass'n raises issues relating to mootness and voluntary cessation, but those issues have no apparent bearing on this case. There, a city unilaterally amended a local ordinance after this Court granted a petition for a writ of certiorari in a case challenging that ordinance. In contrast, this case has become moot as a result of a combination of actions taken by the federal government, the state government, and petitioner himself, all before the filing of the petition for a writ of certiorari.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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