No. 19-864

IN THE

Supreme Court of the United States

BRADLEY BEERS,

Petitioner,

v.

WILLIAM P. BARR, ATTORNEY GENERAL OF THE UNITED STATES OF AMERICA, *et al.*,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

REPLY BRIEF OF PETITIONER

MICHAEL P. GOTTLIEB
VANGROSSI & RECCHUITI
319 Swede Street
Norristown, PA 19401
(610) 279-4200

SARAH O'ROURKE SCHRUP
NORTHWESTERN SUPREME COURT PRACTICUM
375 East Chicago Avenue
Chicago, IL 60611
(312) 503-0063

JEFFREY T. GREEN*
CHRISTOPHER S. ROSS
SIDLEY AUSTIN LLP
1501 K Street, N.W.
Washington, D.C. 20005
(202) 736-8000
jgreen@sidley.com

Counsel for Petitioner

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* Counsel of Record

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REPLY BRIEF

I. THE CIRCUIT SPLIT IS GENUINE AND PRESENTED HERE

1. The government sidesteps the core question that has divided three circuit courts: whether a person who was once involuntarily committed may forever be treated as presently mentally ill. No one disputes that *Heller* and *McDonald* preemptively approved of "longstanding prohibitions on the possession of firearms by . . . the mentally ill." *District of Columbia* v. *Heller*, 554 U.S. 570, 626 (2008); *McDonald* v. *City of Chicago*, 561 U.S. 742, 786 (2010); see also Pet. 18. And no one disputes that there is a "longstanding historical tradition of preventing mentally ill persons from possessing firearms." Opp. 8. These points, at bottom, address only the merits.

The dispute here is whether the Second Amendment permits a person who was once involuntary committed to be barred from the right to bear arms *forever*. Put differently, the parties—and the lower courts—differ on whether the Court wrote the *Heller*/*McDonald* mental-illness exception in the present tense. Compare *Tyler* v. *Hillsdale Cty. Sheriff's Dep't*, 837 F.3d 678, 687–88 (6th Cir. 2016) (en banc) (plurality opinion) ("Prior involuntary commitment is not coextensive with current mental illness . . . ."), with Pet. App. 18a ("Although Beers may now be rehabilitated, we do not consider this fact . . . ."); see also *Mai* v. *United States*, 952 F.3d 1106, 1113–14 (9th Cir. 2020) (noting that *Tyler* and *Beers* "reached opposite conclusions" on whether 18 U.S.C. § 922(g)(4) burdens Second Amendment rights).

The government, however, fails to acknowledge in any meaningful way this core split between the circuits. Opp. 8–12. Thus, the government has no response to the historical analysis suggesting that restrictions on the mentally ill were limited to those who were presently dangerous. Pet. 18–23; cf. *N.Y. State Rifle & Pistol Ass'n, Inc.* v. *City of New York*, No. 18-280, slip op. at 25 (U.S. Apr. 27, 2020) (Alito, J., dissenting) ("[H]istory supported the constitutionality of some laws limiting the right to possess a firearm, such as laws banning firearms from certain sensitive locations and prohibiting possession by felons and other dangerous individuals."). And it provides no basis for the Third Circuit's conclusion that someone who is not presently dangerous should forever lose the protections of the Second Amendment.

2. The government asserts that even if a person had recovered from a mental illness, "there would have to be some mechanism for determining whether [that] person . . . should have his rights restored." Opp. 9. As evidence that federal law satisfies the Second Amendment in this regard, the government points to a state's ability to certify that it has a relief-from-disability program under 34 U.S.C. § 40915. *Id.*

Section 40915 may be a sufficient prophylactic for states that have developed qualifying relief programs, but it is certainly not for the remaining twenty or so states.[1] And it was insufficient for Bradley Beers until

[1] The government cites a Congressional Research Service report for the fact that 34 states have qualifying programs. Opp. 3 (citing Cong. Research Serv., *Gun Control: National Instant Criminal Background Check Systems (NICS) Operations and Related Legislation* (Oct. 17, 2019), App. D, https://crsreports.congress.gov/product/pdf/R/R45970). The cited appendix lists twenty-eight states that are certified by ATF. *See* Cong. Research Serv., *supra*, at App. D. In the Ninth Circuit, the government

the Bureau of Alcohol, Tobacco, Firearms, and Explosives ("ATF") approved Pennsylvania's program a mere eleven days after the Third Circuit issued its opinion. (As discussed below, this approval was an act of voluntary cessation that does not moot this case.) In any event, whether these programs satisfy the Second Amendment is tangential to the question presented here.

The government's argument underscores the flaws in the opinion below. The court below concluded that the "[p]assage of time and evidence of rehabilitation" are irrelevant to any person who has forfeited his or her Second Amendment rights. Pet. App. 16a. Under this view, there would never be *any* need to determine if "the Second Amendment requires something more than the system that Congress has already established." Opp. 9.

A forfeiture, like a diamond, is forever says the Third Circuit. As noted, even the government won't defend that claim.

3. The government's attempt to minimize the stark split among the circuits is equally fruitless. It reasons that the three circuits that have addressed § 922(g)(4)'s constitutionality "diverge only with respect to the treatment of States that do not maintain such programs." Opp. 11. This myopic view is unwarranted and incorrect.

The decisions diverge at every step. First, the Third Circuit explicitly recognized that it was deviating from the Sixth Circuit on the question of whether a person who is involuntarily committed permanently forfeits

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stated that "approximately thirty States" have been certified. *See Mai*, 952 F.3d at 1112. The Sixth Circuit also noted the lack of public data on the number of certified programs. *See Tyler*, 837 F.3d at 683 n.2.

his or her Second Amendment rights, thereby avoiding entirely the question of scrutiny. Pet. App. 17a n.50, 18a. Second, the Ninth Circuit deviated from both courts by assuming (contrary to the Third Circuit) that § 922(g)(4) burdened the plaintiff's Second Amendment rights while holding (contrary to the Sixth Circuit) that the government's defense of § 922(g)(4) satisfied intermediate scrutiny. See *Mai*, 952 F.3d at 1115, 1121. Thus, the rationale of the court below is plainly contrary to the rationales applied by two other circuit courts.[2] Both of those circuits allowed as-applied, Second Amendment challenges to proceed past the threshold where the Third Circuit ended its analysis. Whether these states have ATF-certified rehabilitation programs is beside the point.

In the end, the lower courts are intractably divided on whether individuals regulated by § 922(g)(4) have a right under the Second Amendment to petition for relief from that regulation. This disagreement stems from the language and historical basis of the *Heller/McDonald* presumptively lawful exceptions and whether this Court meant mental illness in the past or present tense. Using this exception, the Third Circuit has categorically held that the Second Amendment affords no protection to regulated individuals, while the Sixth Circuit has held (and the Ninth Circuit has as-

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[2] The government appears to take shelter in the facts that no opinion from the en banc Sixth Circuit had a majority, and that the court remanded to allow the government another chance at surviving intermediate scrutiny. Opp. 10. Yet, in that case, sixteen judges produced eight separate opinions advocating different approaches to the meaning of the *Heller/McDonald* presumptively lawful categories and the proper level of scrutiny. Pet. 14–17. This only highlights the need for this Court to give clear guidance on these core questions of Second Amendment jurisprudence.

sumed) that it does afford protection. The opinion below joins other "federal and state courts [that] may not be properly applying *Heller* and *McDonald*." See *N.Y. State Rifle & Pistol Ass'n*, slip op. at 1 (Kavanaugh, J., concurring). Here, the Third Circuit joined that chorus through a crabbed historical analysis that led to a discordant reading of this Court's precedent.

II. THE GOVERNMENT'S VOLUNTARY CESSATION CAUSED ANY MOOTNESS

1. The government makes no attempt to explain ATF's decision to certify Pennsylvania's relief program just eleven days after the Third Circuit's opinion created the circuit split described above. Nor does it deny that the Third Circuit's decision played a role in this certification. For this reason, the government's act of voluntary cessation suggests that it sought to evade further review. See *Friends of the Earth, Inc.* v. *Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 189 (2000). The Court should not bless such tactics.

The government asserts that it did not "unilaterally discontinue[] the action challenged by [Mr. Beers]." Opp. 6. Not so. When ATF certified that Pennsylvania's relief law, 18 Pa. Cons. Stat. Ann. § 6105(f)(1), satisfied federal law, the government introduced—as only it could with its certification power—the alleged mootness problem on which it now relies.

The government claims that the case "became moot as a result of a combination of actions taken before and during this litigation by the federal government, Pennsylvania, and [Mr. Beers] himself." Opp. 6. It goes on to set forth—without any corroborating detail or citations—a causal chain including "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, [Mr. Beers]'s decision to apply for relief through that program, and Pennsylvania's decision to grant such relief." *Id.* at 6–7.

Yet ATF alone held the certification trump card. Pennsylvania's relief-from-disability law was enacted in 1995,[3] and the state's application to ATF for certification almost certainly came before the Third Circuit's opinion issued on June 20, 2019. As for Mr. Beers, a Pennsylvania state court granted relief from the firearm disability under state law on May 9, 2017, see Stipulation, *Beers* v. *Lynch*, No. 16-6440 (E.D. Pa. June 15, 2017), ECF No. 29, but Mr. Beers remained subject to § 922(g)(4) until ATF certified that Pennsylvania's law satisfied federal law. Cf. Opp. 4–5. Thus, no matter how it is sliced, ATF's suspiciously timed order was a foundational cause of any mootness here.

Yet the government provides no information concerning ATF's decision to approve Pennsylvania's program, such as when Pennsylvania applied or how long the application was pending. And instead of explaining why its actions were *not* a voluntary cessation, it pins mootness to Mr. Beers's later act of obtaining a firearm—which was only possible because of ATF's voluntary cessation in the first place.

The government provides no case law to justify its novel theory that later links in a causal chain can negate a party's own act of voluntary cessation. The government stresses that the voluntary-cessation doctrine applies only where defendants stop their illegal

[3] 1995 Pa. Legis. 1st Spec. Sess. Act 1995-17 (H.B. 110), Pub. L. No. 1024 (June 13, 1995).

activities and "ordinarily does not apply to 'the voluntary acts of a third-party.'" Opp. 6 (quoting *Iron Arrow Honor Soc'y* v. *Heckler*, 464 U.S. 67, 72 (1983) (per curiam)). In that case, however, it was the third party alone whose actions mooted the case. See *Iron Arrow*, 464 U.S. at 72. Here, on the contrary, the government points to no third-party action that is relevant to the timing of ATF's order. Moreover, the government concedes that it played a role in creating any mootness through its actions taken shortly after a newly ripened circuit split emerged.

Finally, the government speaks only in vague terms about ATF's certification decisions, Opp. 5–7, and provides no insight into that agency's apparent discretion to certify and de-certify a state's program. See Pet. 24 (citing Cong. Research Serv., *Gun Control: National Instant Criminal Background Check Systems (NICS) Operations and Related Legislation* (Oct. 17, 2019), https://crsreports.congress.gov/product/pdf/R/R45970). This Court has noted that a party refuting an allegation of voluntary cessation has a "'heavy burden of persua[ding]' the court that the challenged conduct cannot reasonably be expected to start up again." *Friends of the Earth, Inc.*, 528 U.S. at 189 (alteration in original) (quoting *United States* v. *Concentrated Phosphate Export Ass'n, Inc.*, 393 U.S. 199, 203 (1968)). The government's vague assertions fall far short of that burden.

2. If the Court concludes that this case is moot, it should nevertheless vacate the Third Circuit's opinion under *United States* v. *Munsingwear, Inc.*, 340 U.S. 36 (1950). The government has conceded that it played a part in creating any mootness, which it explained resulted from "a combination of actions *taken by the federal government*, the state government, and [Mr. Beers] himself." Opp. 13 (emphasis added). What the

government has not explained is what its role was in the process, such as when ATF received Pennsylvania's request for certification, how long ATF took to process that application, and what role the court of appeals' opinion played in granting that certification eleven days after a circuit split ripened. Thus, because the government prevailed below yet acted to moot this case, the Court should vacate the Third Circuit's opinion. See *Azar* v. *Garza*, 138 S. Ct. 1790, 1792 (2018) (per curiam) (vacating under *Munsingwear*); *Arizonans for Official English* v. *Arizona*, 520 U.S. 43, 71–72 (1997) ("Vacatur is in order when mootness occurs through happenstance—circumstances not attributable to the parties—or *relevant here, the 'unilateral action of the party who prevailed in the lower court.*'" (emphasis added)).[4]

The government's casual dismissal of Mr. Beers's *Munsingwear* argument fails. Had ATF not certified Pennsylvania's program when it did, there would be no question of mootness in this case, and Mr. Beers would be "entitled" to further review in light of the irreconcilable circuit split described above and in the petition. *Munsingwear*, 340 U.S. at 39; *contra* Opp. 12.

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[4] *N.Y. State Rifle & Pistol Ass'n* does not alter this conclusion. The Court found that case was moot in light of New York State's and New York City's amendments to the applicable state firearm statute and local firearm rule. *See* slip op. at 1 (per curiam). Accordingly, the Court found there to be a relevant "change in the legal framework." *See id.* at 2 (quoting *Lewis* v. *Cont'l Bank Corp.*, 494 U.S. 472, 482–83 (1990)). There is no comparable change here, because ATF acted by approving Pennsylvania's certification under § 40915. Indeed, as the government notes, § 922(g)(4) "remains on the books." Opp. 6. Thus, vacatur under *Munsingwear* remains the appropriate remedy if the Court finds this case to be moot.

At bottom, this case is about whether the Second Amendment permits an individual who was once institutionalized temporarily to be forever barred from exercising his right to bear arms. Because the Third Circuit's analysis failed to address that question adequately, vacatur under *Munsingwear* in light of the government's role in mooting this case is warranted.

CONCLUSION

The petition should be granted.

Respectfully submitted,

MICHAEL P. GOTTLIEB
VANGROSSI & RECCHUITI
319 Swede Street
Norristown, PA 19401
(610) 279-4200

SARAH O'ROURKE SCHRUP
NORTHWESTERN SUPREME COURT PRACTICUM
375 East Chicago Avenue
Chicago, IL 60611
(312) 503-0063

JEFFREY T. GREEN*
CHRISTOPHER S. ROSS
SIDLEY AUSTIN LLP
1501 K Street, N.W.
Washington, D.C. 20005
(202) 736-8000
jgreen@sidley.com

Counsel for Petitioner

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* Counsel of Record