NO.

IN THE SUPREME COURT OF THE UNITED STATES

Duy T. Mai,
Petitioner,

v.

United States, *et al.*,
Respondents

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

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Can the Second Amendment tolerate a lifetime firearm ban on Mr. Mai, a mentally healthy, stable, and law-abiding individual, because of a juvenile involuntary commitment that occurred over twenty years ago?

PARTIES TO THE PROCEEDING

Petitioner is Duy T. Mai. Respondents are the United States; the Department of Justice; the Bureau of Alcohol, Tobacco, Firearms, and Explosives; the Federal Bureau of Investigation; Jefferson B. Sessions III, as Attorney General; James B. Comey, as Director of the Federal Bureau of Investigation; and Thomas E. Brandon, as Acting Director of the Bureau of Alcohol, Tobacco, Firearms, and Explosives.[1]

[1] The individuals sued in their representative capacities are reprinted from Mr. Mai's complaint filed in April 2017 and do not currently hold their respective offices. "[A]ny misnomer not affecting the parties' substantial rights must be disregarded." Fed. R. Civ. P. 25(d)(1).

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This case arises from the following proceedings in the United States District Court for the Western District of Washington and the United States Court of Appeals for the Ninth Circuit:

Mai v. United States, No. 2:17-cv-00561 (W.D. Wa. Feb. 8, 2018), appearing unpublished at 2018 U.S. Dist. LEXIS 21020 and 2018 WL 784582.

Mai v. United States, 952 F.3d 1106 (9th Cir. 2020) (panel opinion) and 974 F.3d 1082 (9th Cir. 2020) (denial of rehearing *en banc* and related dissents).

There are no other proceedings in any state or federal court directly related to this case.

JURISDICTION

The Ninth Circuit entered its judgment on March 11, 2020. It denied a timely petition for rehearing and rehearing *en banc* on September 10, 2020. On March 19, 2020, this Court issued an order extending the time to file a petition for a writ of certiorari to 150 days after denial of a petition for rehearing. The Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

"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." U.S. Const. amend. II.

"It shall be unlawful for any person . . . who has been adjudicated as a mental defective or who has been committed to a mental institution . . . to ship or transport in interstate or foreign commerce, or possess in or affecting commerce, any firearm or ammunition; or to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce." 18 U.S.C. § 922(g)(4).

INTRODUCTION

Two decades ago, a Washington state court involuntarily committed petitioner Duy Mai for mental health treatment when he was just seventeen years old. As a result of that commitment, federal law permanently prohibits Mr. Mai from exercising his Second Amendment rights. In other words, Mr. Mai has lost a core constitutional right because of an event that occurred before he had even reached the age of majority. This result is unconscionable and cannot withstand Second Amendment scrutiny.

Most importantly, the Ninth Circuit opinion has created a three-way circuit split, both as to framework and as to result. In this case, the Ninth Circuit assumed, without deciding, that 18 U.S.C. § 922(g)(4) burdens Mr. Mai's Second Amendment rights, but found that the law survives intermediate scrutiny. In *Tyler*

v. Hillsdale County Sheriff's Department, 837 F.3d 678 (6th Cir. 2016) (*en banc*), the Sixth Circuit ruled that § 922(g)(4) burdens the Second Amendment and that it does not survive intermediate scrutiny. In *Beers v. Attorney General*, 927 F.3d 150 (3d Cir. 2019), *vacated as moot*, 140 S. Ct. 2758 (2020), the Third Circuit ruled that § 922(g)(4) does not burden the Second Amendment, and did not subject the law to Second Amendment scrutiny.

Mr. Mai's prohibition is permanent because the fact of a prior involuntarily commitment is dispositive under federal law. There is no allowance for consideration of any mitigating factors, such as *why* the commitment occurred, *when* it occurred, *what* has transpired since the commitment, or the *present mental health status* of the individual. Mr. Mai's commitment occurred twenty years ago while he was a juvenile, and he has received recent clean bills of mental health from several qualified professionals. In 2014, a state court restored his firearm rights under Washington state law. In doing so, the state court found that Mr. Mai was no longer required to participate in treatment, had successfully managed the condition related to his commitment, no longer presents a substantial danger to himself or the public, and his symptoms are not reasonably likely to recur.

It is undisputed that Mr. Mai is mentally healthy and is not a danger to himself or others. Yet, he remains prohibited by federal law, 18 U.S.C. § 922(g)(4).

To vindicate his Second Amendment rights, Mr. Mai filed an as-applied challenge to § 922(g)(4). In direct conflict with the Sixth Circuit, the Ninth Circuit affirmed the trial court's dismissal for failing to state a claim. Assuming, without

deciding, that the challenged regulation burdens Second Amendment rights, the Ninth Circuit held that § 922(g)(4) satisfies intermediate scrutiny as applied to Mr. Mai because there is a "reasonable fit" between prohibiting involuntarily committed individuals from possessing firearms and the importance of reducing gun violence.

However, a holding that § 922(g)(4) applies to Mr. Mai *for life* has no support in law, history, common sense, reason, or logic. The Ninth Circuit's ruling tacitly and wrongfully affirms the notion that "once mentally ill, always so," treats the Second Amendment as a "second-class right" in violation of *District of Columbia v. Heller*, 554 U.S. 570 (2008) and *McDonald v. City of Chicago*, 561 U.S. 742 (2010), and simply ignores this Court's maxim that "children are different." *Miller v. Alabama*, 567 U.S. 460, 480 (2012).

Since the landmark decisions in *Heller* and *McDonald*, this Court has stayed largely silent on crucial Second Amendment issues, so the lower courts have been left to their own devices. What is the correct framework to review Second Amendment challenges? Can the Second Amendment withstand the imposition of a lifetime prohibition? Are the "presumptively lawful" prohibitions announced in *Heller conclusively* lawful, or are they subject to challenge? Those prohibitions may also not be as "longstanding" as once assumed; what role does history play in defining the penumbras of the Second Amendment? Youth matters in the context of the Eighth Amendment; does it matter in the context of the Second Amendment?

These issues have spilled a lot of ink at the courts of appeal. The *Tyler* decision required an *en banc* determination in the form of eight separate opinions.

The Ninth Circuit in this case issued three separate dissenting opinions from the decision to deny rehearing *en banc*, encompassing eight dissenting votes. The *Beers* case came before the Court on a petition for a writ of certiorari in January 2020, but was vacated as moot. 140 S. Ct. 2758 (2020).

Mr. Mai's case is ripe and finally presents the Court with the best opportunity to clarify its Second Amendment jurisprudence. It is time for the Court to issue much needed guidance and fortify Second Amendment protections for peaceable and law-abiding Americans everywhere.

STATEMENT OF THE CASE

A. Mr. Mai.

In October 1999, when he was seventeen years old, the King County Superior Court involuntarily committed Mr. Mai for mental health treatment under cause number 99-6-01555-4. Excerpts of Record (ER), Vol I, at 72. The King County Court later transferred venue of the proceedings to Snohomish County under cause number 00-6-00072-6. *Id.* His commitment expired by August 8, 2000 and he has not been committed since. *Id.*

Following his commitment, Mr. Mai has lived a fruitful and fulfilling life. *Id.* In 2001, he enrolled in community college, completing a GED and earning credits that allowed him to transfer to a university. *Id.* In 2002, he graduated from the University of Washington with a degree in microbiology and a cumulative 3.7 GPA.

Id. He then enrolled in a graduate program at the University of Southern California (USC) and graduated with a master's degree in microbiology in 2009. *Id.*

After USC, Mr. Mai moved back to Seattle, where he began work at Benaroya Research Institute, studying viruses. *Id.* As part of his employment, he successfully passed an FBI background check for access to radioactive material. *Id.* In April 2016, he worked briefly as a contractor for Seattle Genetics doing cancer research. *Id.* In October 2016, he began working for a cancer research center as an immune monitoring specialist and remained employed there as of the time the complaint was filed in April 2017. *Id.* at 73.

While living in Los Angeles and attending USC, Mr. Mai met Michelle Ross and fathered twins. *Id.* Although Mr. Mai and Ms. Ross are no longer together, Mr. Mai continues to be an active father in his children's lives. *Id.*

Mr. Mai has completely recovered from the condition that lead to the involuntary commitment twenty years ago. *Id.* He no longer uses any medication to control his condition and he no longer has any condition to control in the first instance. *Id.* He lives a socially responsible, well-balanced, and accomplished life. *Id.*

In 2014, Mr. Mai petitioned the King County Superior Court for restoration of his Washington state firearm rights. *Id.* In support of this petition, he supplied the court with medical and psychological examinations attesting to his mental health. *Id.* Dr. Nancy Connolly, M.D. stated that Mr. Mai "has never demonstrated evidence of clinical depression" since at least 2010, and that "[i]n office depression

screening has consistently been negative and he has consistently demonstrated healthy lifestyle and behaviors." *Id.* at 40. She further opined that "he [does not] represent[] a significant suicide risk nor do I believe that he is at risk for harming others." *Id.* Dr. Stacy Cecchet, Ph.D. performed a forensic psychological evaluation and risk assessment on Mr. Mai, and opined that Mr. Mai's condition "is now in full remission," and that he "is of low risk for future violent and nonviolent criminal behavior and does not present with any observable psychopathology." *Id.* at 54. Finally, Dr. Brendon Scholtz, Ph.D. performed his own examination of Mr. Mai and reviewed the report and conclusions of Dr. Cecchet. *Id.* at 45-46. Dr. Scholtz opined that Dr. Cecchet's conclusions were accurate and clinically sound, that he agreed with her conclusions, and that "Mr. Mai does not appear to be currently experiencing any significant psychological distress and he does not appear to have any overt symptoms of a major disorder of thought or mood." *Id.*

The state court restored Mr. Mai's firearm rights under Wash. Rev. Code § 9.41.047. *Id.* at 35-36. In doing so, the court found that Mr. Mai was no longer required to participate in treatment, had successfully managed the condition related to his commitment, no longer presents a substantial danger to himself or the public, and his symptoms are not reasonably likely to recur. § 9.41.047(3)(c).

It is undisputed that Mr. Mai is mentally healthy and is not a danger to himself or others.

B. Application of Federal Law.

Title 18 U.S.C. § 922(g)(4) prohibits firearm possession by anyone "adjudicated as a mental defective or . . . committed to any mental institution." Federal regulations further define a commitment as "[a] formal commitment of a person to a mental institution by a court, board, commission, or other lawful authority. The term includes a commitment to a mental institution involuntarily."[2] 27 C.F.R. § 478.11. Unlike the prohibitions for felonies or domestic violence misdemeanors, the prohibition for those involuntarily committed does not have any "exemption" clauses. *Compare* 18 U.S.C. § 921(a)(20) (providing that felony convictions that are expunged, set aside, pardoned, or for which an individual received a restoration of civil rights are not prohibiting), *and* 18 U.S.C. § 921(a)(33) (same language but for domestic violence misdemeanors), *with* 18 U.S.C. § 922(g)(4). There is a federal restoration of firearm rights statute, 18 U.S.C. § 925(c), but it has been useless for thirty years. *See United States v. Bean*, 537 U.S. 71 (2002).

In 2008, Congress passed the NICS Improvement Amendments Act of 2007 (NIAA), Pub. L. No. 110-180, 121 Stat. 2559 (2008). In it, Congress exempted involuntarily committed individuals from (g)(4)'s prohibition if the individual received a restoration of firearm rights from a state court, board, commission, or other lawful authority. NIAA § 105. However, the federal government would only

[2] Mr. Mai acknowledges that he was involuntarily committed as a juvenile in 1999 by a Washington state court and that his commitment meets this definition.

recognize such a state restoration if state law matches certain requirements set out in the NIAA. *Id.* Washington state's restoration statute, Wash. Rev. Code § 9.41.047, does not meet the NIAA's requirements. Thus, residents of Washington state with an involuntary commitment are still permanently prohibited from possessing a firearm by federal law even if the right to possess a firearm is restored under Washington state law.

C. Procedural History.

In April 2017, Mr. Mai filed a complaint in the United States District Court for the Western District of Washington, alleging an unconstitutional infringement of his Second Amendment rights. ER at 70-75. The trial court dismissed the matter under FRCP 12(b)(6) for failing to state a claim, relying largely on *Heller*'s "longstanding prohibitions" language. Appendix at 1-13. The Ninth Circuit affirmed. Appendix at 14-42. It assumed, without deciding, § 922(g)(4) burdened Second Amendment rights, but ultimately held that the law survived intermediate scrutiny because the government carried its burden of showing a reasonable fit between the regulation and the need to reduce gun violence. Despite considering Mr. Mai's *as-applied* challenge, neither court ever explained why the law survives scrutiny *as applied* to Mr. Mai or why it is reasonable to allow the government to forbid Mr. Mai from possessing a firearm *for life*. The Ninth Circuit denied a petition for rehearing *en banc* on September 10, 2020, with eight dissenting votes and three separate opinions. Appendix at 43-92.

Mr. Mai timely files this Petition for a Writ of Certiorari.

REASONS FOR GRANTING THE PETITION

A. There Exists an Irreconcilable Split Among the Lower Courts, Both as to Framework and as to Result.

1. The Lower Courts are Divided About How to Analyze Second Amendment Challenges.

In the absence of guidance from this Court, some lower courts have fashioned a two-step framework for analyzing Second Amendment challenges to § 922(g). This two-step framework asks 1) whether the challenged law burdens conduct protected by the Second Amendment and if so, 2) directs courts to apply an appropriate level of scrutiny. *See United States v. Chovan*, 735 F.3d 1127 (9th Cir. 2013); *United States v. Chester*, 628 F.3d 673 (4th Cir. 2010); *United States v. Reese*, 627 F.3d 792 (10th Cir. 2010); *United States v. Skoien*, 587 F.3d 803 (7th Cir. 2009), *rev'd on other grounds en banc*, 614 F.3d 638 (7th Cir. 2010); *United States v. Booker*, 644 F.3d 12 (1st Cir. 2011) (categorical ban requires a "substantial relationship between the restriction and an important governmental objective."); *Tyler v. Hillsdale Cnty. Sheriff's Dep't*, 837 F.3d 678 (6th Cir. 2016) (*en banc*). The circuits adopting this approach favor intermediate scrutiny when dealing with § 922(g) challenges. *See id.*; *see also Wilson v. Lynch*, 835 F.3d 1083 (9th Cir. 2016) (reviewing § 922(g)(3)); *United States v. Mahin*, 668 F.3d 119 (4th Cir. 2012) (reviewing § 922(g)(8)); *United States v. Torres*, 911 F.3d 1253 (9th Cir. 2019) (reviewing § 922(g)(5)).

Taking a different approach, the Eleventh Circuit dispensed with articulating or adopting any formal framework for analyzing Second Amendment challenges in *United States v. White*, 593 F.3d 1199 (11th Cir. 2010). There, the court simply concluded that it "see[s] no reason to exclude § 922(g)(9) [domestic violence

misdemeanors] from the list of longstanding prohibitions on which *Heller* does not cast doubt." *Id.* at 1206. It ultimately held that "§ 922(g)(9) is a presumptively lawful longstanding prohibition on the possession of firearms." *Id.* The Fourth Circuit has criticized this approach because it "approximates rational-basis review," and the phrase "presumptively lawful . . . suggests the possibility that one or more of these longstanding regulations could be unconstitutional in the face of an as-applied challenge." *Chester*, 628 F.3d at 679.

The Third Circuit has had a particularly hard time deciding on the proper framework. In *Beers,* the court explained that it initially adopted the same two-part test for Second Amendment challenges as discussed *supra* at 16. 927 F.3d at 154 (quoting *United States v. Marzzarella*, 614 F.3d 85, 89 (3d Cir. 2010)). But the Circuit later carved out a different test specifically for § 922(g)(1) challenges (felony conviction). *Id.* at 154-55. To challenge a § 922(g)(1) prohibition, a challenger had to distinguish himself "by demonstrating either (1) that he was convicted of a minor, nonviolent crime and thus 'he is no more dangerous than a typical law-abiding citizen;' or (2) that a significant time has passed so that he has been 'rehabilitated' and 'poses no continuing threat to society.'" *Id.* at 155 (quoting *United States v. Barton*, 633 F.3d 168, 174 (3d Cir. 2011)).

Unsatisfied with itself, the Circuit decided to backpedal this exception five years later in *Binderup v. Attorney General*, 836 F.3d 336 (3d Cir. 2016) by changing the test. *Id.* at 155. An exception to § 922(g)(1) still exists, but the test is now different: "the only way a felon can distinguish himself from the historically-barred

class of individuals who have been convicted of serious crimes is by demonstrating that his conviction was for a non-serious crime, i.e., that he is literally not a part of the historically-barred class." *Id.* at 156. It remains a mystery why the Third Circuit's jurisprudence can tolerate an exception to § 922(g)(1) but not § 922(g)(4). It is also a mystery why the Circuit has no problem deciding the controversial question of what is or is not a "non-serious crime" for the purposes of the § 922(g)(1) exception it carved out in *Binderup*, yet weighing evidence of rehabilitation for the purposes of § 922(g)(4) is simply too much for the federal courts to handle. *Id.* ("[M]ost importantly, . . . courts are not institutionally equipped to conduct a neutral, wide-ranging investigation into . . . assertions of rehabilitation.").

The *en banc* Sixth Circuit issued eight separate opinions in *Tyler*. The lead opinion applied the same two-part framework the Ninth Circuit applied in this case. 837 F.3d at 681-700 (Gibbons, J., for the plurality). Judge Gibbons found that § 922(g)(4) burdened conduct protected by the Second Amendment, rejected strict scrutiny in favor of intermediate scrutiny, and ultimately concluded that, based on the record before the court, the government had not carried its burden to establish that § 922(g)(4) satisfied intermediate scrutiny as applied to all persons with a prior involuntary commitment. *Id.* The appeals court remanded the case back to the trial court and provided the government an opportunity to present further evidence explaining the necessity of a lifetime ban or why Tyler would be a risk to himself or others were he allowed to possess a firearm. *Id.* at 700.

In a concurring opinion, Judges Batchelder and Boggs disagreed with Judge Gibbons's method, emphasizing that tiers-of-scrutiny review was inappropriate in the Second Amendment context. *Id.* at 702-07 (Batchelder, J., concurring). Under *Heller*, courts were bound to decide cases by looking to the history and tradition surrounding the Second Amendment. The opinion concluded that a review of founding-era evidence conclusively demonstrated that those who recovered their sanity had their rights restored. *Id.* Judge Boggs also wrote separately to stress that the correct level of scrutiny to apply - if any at all - is strict scrutiny. *Id.* at 702 (Boggs, J., concurring). Strict scrutiny is the default in virtually all other areas of law concerning fundamental rights, and by rejecting an interest-balancing approach, the *Heller* court strongly indicated that intermediate scrutiny should not be employed. *Id.*

Judge Moore dissented, finding that *Heller's* "presumptively lawful" language was dispositive of the issue, and in any event, that § 922(g)(4) easily satisfied intermediate scrutiny. *Id.* at 714-21 (Moore, J., dissenting). Judge Rogers joined the plurality's finding that a historical analysis was not sufficiently conclusive to dispose of the issue, but he agreed with the dissent that § 922(g)(4) survived intermediate scrutiny. *Id.* at 714 (Rogers, J., dissenting).

Despite analyzing both steps of the framework on numerous occasions in the context of other § 922(g) challenges, the Ninth Circuit in the case at bar decided that it was not necessary to resolve the first question - whether § 922(g)(4) burdens conduct protected by the Second Amendment. *Mai v. United States*, 952 F.3d 1106,

1114-15 (9th Cir. 2020). Instead, the court decided to follow the "well-trodden and judicious course" taken in *Pena v.* Lindley, 898 F.3d 969 (9th Cir. 2018) by simply assuming, without deciding, that § 922(g)(4) burdened conduct protected by the Second Amendment. *Id.* But *Pena* dealt with a challenge to California's Unsafe Handgun Act, which enacted various regulatory schemes; it had nothing to do with any outright prohibition on the possession of a firearm. 898 F.3d at 973.

In actuality, the Ninth Circuit has never issued an opinion regarding a § 922(g) challenge where it did not analyze both steps. *See, e.g., Chovan*, 735 F.3d 1127; *Wilson*, 835 F.3d 1083; *Torres*, 911 F.3d 1253. *See also United States v. Vongxay*, 594 F.3d 1111 (9th Cir. 2010) (reviewing the § 922(g)(1) felony prohibition prior to adopting the two-part *Chovan* framework). By conveniently skipping the threshold question, it broke with every sister circuit that employs the two-step framework, as well as its own tradition in analyzing § 922(g) challenges. This approach also makes clear that the court concluded Mr. Mai would lose his challenge before it even set pen to paper (or finger to keyboard). The conclusion informed the analysis.

The two-step framework adopted by the Ninth Circuit and other circuits faces significant dissent from judges across the country. In a vehement dissent from denial of rehearing *en banc* in this case, Ninth Circuit Judge Bumatay argued that the two-step framework does not comport with *Heller*'s command to follow the text, history, and tradition in evaluating the scope of the Second Amendment. 974 F.3d 1082, 1086 (9th Cir. 2020) (Bumatay, J., dissenting from denial of rehearing *en*

banc). The *Heller* court rejected the notion that "the scope of the Second Amendment right should be determined by judicial interest balancing." *Id.* (quoting *McDonald v. City of Chicago*, 561 U.S. at 785). Yet, the two-part framework imposes the type of interest balancing that *Heller* forbade. *Id.* Instead, Judge Bumatay would uphold a law banning the possession of a firearm in the home for self-defense only "if the prohibition falls within an exception understood to be outside of the [Second] Amendment's scope at the time of the Founding." *Id.* at 1087-88; s*ee also id.* at 1086-87 (collecting seven opinions from judges of the Third, Fifth, Sixths, Sevenths, and D.C. Circuits, including Justices Alito and Kavanaugh, questioning the soundness of judicial interest balancing after *Heller*).

Moving to the historical analysis that should inform Second Amendment scrutiny, Judge Bumatay pointed out that "[h]istorical regulations of the right to bear arms focused more on how people *used* weapons - not who could own them." *Id.* at 1088. More specifically, there is no historical support during the founding of the United States for a prohibition on firearms for the mentally ill. *Id.* A review of eighteenth-century records reveals no laws specifically concerning mental illness and firearms because "[s]uch laws would be highly unusual in a context where regulations focused on use rather than ownership." *Id.* at 1088-89. Laws concerning firearm ownership and mental health did not begin propagating in various states until 1930. *Id.* at 1089. The federal statute at issue here, 18 U.S.C. § 922(g)(4) was not enacted until 1968. *Id.*

Even where a historical record of mental health's impact on individual rights exists, it is clear that "mental illness was considered a *temporary* ailment that only justified a *temporary* deprivation of rights. At the time of the Founding, the idea that the formerly mentally ill were permanently deprived of full standing in the community was nowhere to be found." *Id.* at 1090. Consequently, *Heller*'s language regarding "presumptively lawful" prohibitions on possession of a firearm by the mentally ill applies to those who are *presently* mentally ill. *Id.* Because Mr. Mai is no longer mentally ill, the Second Amendment cannot tolerate § 922(g)(4)'s lifetime ban as applied to him. *Id.*

But Judge Bumatay went on to criticize the panel decision's even if the *Chovan* two-step framework is correct. *Id.* at 1091. Specifically, he chided the panel opinion for applying intermediate scrutiny despite not performing the first step of the analysis to determine how close the challenged law comes to the core of the Second Amendment right. *Id.* Had the panel opinion performed the analysis, the only valid conclusion would have been to apply strict scrutiny. *Id.* The application of § 922(g)(4) "strikes at the core Second Amendment right - and guts it. Indeed, § 922(g)(4) completely deprives Mai of the ability to possess a firearm, even within the home, where protections are at their zenith." *Id.* at 1092. By not applying strict scrutiny, the panel opinion further reinforces the notion that the Second Amendment is a second-class right - "laws that burden the core of a fundamental right are invariably analyzed under heightened scrutiny . . . [and] rarely survive." *Id.* (citing First Amendment cases from the Supreme Court).

Judge VanDyke joined Judge Bumatay in casting doubt on the correctness of the *Chovan* two-part framework as applied to the Second Amendment. In his view, the "core" of the Second Amendment has nothing to do with "classes" of people. *Id.* at 1097 (VanDyke, J., dissenting from denial of rehearing *en banc*). By lumping individuals like Mai into overbroad groups, the panel opinion effectively gives governments "carte blanche to legislate the Second Amendment away." *Id. Heller* concluded that "the Second Amendment right is likewise exercised individually and belongs to *all Americans*." *Id.* at 1100. Yet, the panel opinion wrongfully denies the ability to exercise a *core* right to a *class* of people: "Although the panel concludes that certain privileged classes of people constitute the 'core of the Second Amendment' (while, by extension, other classes like the one it lumped Mai into don't), the *Heller* Court never applied this test to the right's *holders*, but only to its *substance*." *Id.* at 1100-01. By straying from *Heller*'s reading of the Second Amendment, the panel "invents a *class scrutiny* standard in order to quietly lump Mai into a class ('the mentally ill')," and "tragically relegates folks like Mai to permanent second-class status." *Id.* at 1101.

In total, eight judges dissented from the Ninth Circuit's denial of rehearing *en banc*. All eight would have ruled that § 922(g)(4) did not pass muster under any level of scrutiny as applied to Mr. Mai, with three of those eight further agreeing that the *Chovan* two-step framework is not a correct interpretation of *Heller* or the Second Amendment.

Five months after the panel opinion in this case, a different Ninth Circuit panel questioned its own Second Amendment precedent. *Duncan v. Becerra*, 970 F.3d 1133 (9th Cir. 2020). Considering a challenge to California's ban on large capacity magazines, the *Duncan* court acknowledged that "[t]his circuit has used seemingly varying formulations of intermediate scrutiny in the Second Amendment context." *Id.* at 1165. At times, the Ninth Circuit has stated that intermediate scrutiny requires a reasonable fit between the challenged regulation and a significant, substantial, or important government objective; other times, the court has required only that a firearm regulation promote a substantial government interest that would be achieved less effectively absent the regulation. *Id.* In one case, both standards were cited. *Id.* at 1166. "Other decisions within our court and elsewhere have used language that suggests varying intensities of 'bite.'" *Id.* (collecting cases). *See also Mai*, 974 F.3d at 1103-04 (VanDyke, J., dissenting from denial of rehearing *en banc*) (discussing the panel opinion's application of a "relaxed" heightened scrutiny standard).

In short, there are entrenched disagreements between the circuits and within the circuits themselves. Is *Heller*'s "presumptively lawful" language dispositive? Is a historical reading necessary for Second Amendment scrutiny? Is a historical reading *the only* way to interpret the Second Amendment, or is the Second Amendment subject to means-end/tiers-of-scrutiny review? If tiers-of-scrutiny review is correct, what level of scrutiny should courts apply? Does § 922(g)(4) survive historical

review or any form of means-end review? This lack of consensus about how to analyze as-applied challenges to § 922(g)(4) makes review by this Court imperative.

2. The Lower Courts are Divided About the Constitutionality of § 922(g)(4).

The Ninth Circuit in the case at bar assumed, without deciding, that § 922(g)(4) burdens conduct falling within the scope of the Second Amendment and applied intermediate scrutiny. The Sixth Circuit in *Tyler* explicitly decided that § 922(g)(4) burdens conduct falling within the scope of the Second Amendment and applied intermediate scrutiny. Despite application of intermediate scrutiny and review of essentially the same evidence cited by the government, the two circuits came to opposite conclusions. The Third Circuit in *Beers* did not apply any level of scrutiny, finding that § 922(g)(4) does not burden conduct falling within the scope of the Second Amendment. Although the Sixth and Third Circuits engaged in a similar historical analysis, they, too, reached opposite conclusions. So, the Ninth and Sixth Circuits agree on the framework, the Ninth and Third Circuits agree on result, and the Sixth and Third Circuits apparently agree on nothing. The only common thread among the circuits is to acknowledge the need to dispel "the stigma surrounding mental illness," *Beers*, 927 F.3d at 159, but only the Sixth Circuit has done anything about it.

On the question of § 922(g)(4)'s burden on Second Amendment rights, the Sixth Circuit found that "historical evidence cited by *Heller* and the government does not directly support the proposition that persons who were once committed due

to mental illness are forever ineligible to regain their Second Amendment rights." 837 F.3d at 689. "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." *Id.* at 690. In support of this conclusion, the Sixth Circuit specifically noted that a search of eighteenth-century records does not reveal any laws specifically excluding the mentally ill from firearm ownership. *Id.* at 689.

The Third Circuit also acknowledged the dearth of eighteenth-century laws regarding firearm possession by the mentally ill, but concluded that such laws were not necessary during the eighteenth century because "judicial officials were authorized to lock up so-called 'lunatics' or other individuals with dangerous mental impairments." 927 F.3d at 157-58. If taking away a "lunatic's" liberty was permissible, then the lesser intrusion of taking firearms away is also permissible. *Id.* at 158. The Third Circuit instead reinforced a bright-line holding that "neither passage of time nor evidence of rehabilitation can restore Second Amendment rights that were forfeited" and that "[t]here was no historical support for the proposition that forfeited rights could be restored." *Id.* at 158.[3] The "historical underpinnings" of § 922(g)(4) were to keep guns from individuals who posed a danger to themselves or to others. *Id.* at 158-59. Because Beers was committed to a mental institution for

[3] In *Tyler*, Judge Batchelder made a compelling case that disarmament occurred only during periods of active "lunacy" and was not permanent. 837 F.3d at 706 (Batchelder, J., concurring).

these reasons, and because Second Amendment rights could not be restored after they were forfeited, Beers could not distinguish his circumstances from other members in this "historically-barred class." *Id.* at 158.

On the question of whether § 922(g)(4) survived intermediate scrutiny, the Ninth Circuit in this case deferred to Congress: "[I]n enacting § 922(g)(4), Congress determined that, like felons and domestic-violence assailants, those who have been involuntarily committed to a mental institution also pose an increased risk of violence. As we explain below, scientific evidence amply supports that congressional judgment." 952 F.3d at 1117. As one example of scientific evidence, the court cited a study by E. Clare Harris and Brian Barraclough regarding suicide risk following an involuntary commitment. The court cited the study as support that persons released from involuntary commitment reported a combined suicide risk thirty-nine times that expected. *Id.* The court acknowledged that the study only followed the outcomes of those released from an involuntary commitment for up to eight and a half years, and the study did not perfectly match Mr. Mai's circumstances. Here, again, the court deferred to Congress: "[W]e do not require scientific precision. We ask only whether the evidence fairly supports Congress'[s] reasonable conclusions. When empirical evidence is incomplete, we must accord substantial deference to the predictive judgments of Congress." *Id.* at 1118. The court concluded that it is "assessing congressional judgment about a category of persons, not about [Mr. Mai] himself." *Id.* at 1119.

Where the Ninth Circuit chose to defer, the Sixth Circuit chose to embrace its duty to subject the law to actual scrutiny. Since the prohibition imposed by § 922(g)(4) was permanent as applied to Tyler, "some evidence of the continuing need to disarm those long ago adjudicated mentally ill is necessary to justify § 922(g)(4)'s means to its ends." 837 F.3d at 694. The Sixth Circuit found that the government's purported justifications "[did] not . . . answer why Congress is justified in *permanently* barring anyone who has been previously committed, particularly in cases like Tyler's, where a number of healthy, peaceable years separate the individual from their troubled history." *Id.* at 695 (emphasis added). Taking a closer look at the same Harris and Barraclough study taken at face value by the Ninth Circuit, the Sixth Circuit observed that ninety-eight percent of the 14,000 patients were studied for only a year following their commitment, and the remaining two percent were studied anywhere from two and a half to eight and a half years post-commitment. *Id.* at 696. These studies "do not explain why a lifetime ban is reasonably necessary." *Id.* Likewise, the court rejected citation to a study vouching for a fifty-three percent reduction in rates of violent crime after imposition of a firearm ban on those who have been involuntarily committed, because "the data does not meaningfully compare previously committed individuals' propensity for violence with that of the general population. And without such a comparison, the data is insufficient to justify § 922(g)(4)'s perpetual curtailment of a constitutional right." *Id.*

Finally, the *Tyler* court recognized that Congress itself has undermined the government's attempt to justify § 922(g)(4): "The NICS Improvement Amendments Act is a less restrictive alternative to the permanent bar created by § 922(g)(4) [and] 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." *Id.* at 697. It concluded:

> There is no indication of the *continued* risk presented by people who were involuntarily committed many years ago and who have no history of intervening mental illness, criminal activity, or substance abuse. Indeed, Congress's evidence seems to focus solely on the risk posed by those presently mentally ill and who have been recently committed. Any prospective inference we may draw from that evidence is undercut by Congress's recognition, in the 2008 NICS Amendments, that a prior involuntary commitment need not be a permanent impediment to gun ownership.

Id. at 699.

The Ninth and Sixth Circuits looked at the same evidence cited by the government and came to opposite conclusions. The Sixth and Third Circuits looked at the same historical records and came to opposite conclusions. Thirteen distinct opinions spread over three different circuits on the same issues have culminated in a smorgasbord of conflicting analyses, conclusions, and results. The need for Supreme Court intervention has never been greater or clearer.

B. The Ninth Circuit Predetermined its Conclusion, Applied What Amounts to Rational Basis Review, and Gave No Weight to Mr. Mai's Status as a Juvenile at the Time of the Commitment.

1. The Ninth Circuit Decided Mr. Mai's Fate from the Start.

From the beginning, the Ninth Circuit approached Mr. Mai's case differently from other § 922(g) challenges it had considered: the court decided to simply assume that § 922(g)(4) burdens Second Amendment rights. While this approach makes it look like the court gave Mr. Mai the benefit of the doubt by allowing the case to proceed past a threshold question, it reveals that the court had already decided the case at that point. The court would not have skipped a step in its analysis if there was any hope whatsoever of Mr. Mai prevailing. The rest of the opinion is just rationalization to justify a predetermined conclusion.

This is also evident from the panel opinion's unwillingness to scrutinize § 922(g)(4) *as applied* to Mr. Mai's facts. The court made no effort to conceal this fact, explicitly emphasizing that it is "assessing congressional judgment about a category of persons, not about [Mr. Mai] himself." 952 F.3d at 1119. With this pronouncement, the panel made clear that this case was never about Mr. Mai, it was always about guns. *See* 974 F.3d at 1097 (VanDyke, J., dissenting from denial of rehearing *en banc*) ("The answer is a simple four-letter word: guns."). Despite launching an *as applied* challenge, the Ninth Circuit gave Mr. Mai's actual circumstances a bare glance. It reasoned that although Mr. Mai submitted psychological evaluations attesting to the soundness of his mental health, "nothing in the record suggests that [Mr. 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." *Id.* at 1119.

However, nothing in the record suggests that those who lack a history of mental illness are at *zero* risk of violence. And, in fact, the record does support the notion that "Mr. Mai's risk of violent and non-violent recidivism [is] at or below the baseline of his normative group." ER at 45. It also does not require resort to scientific study to know as true from common sense that people who have never been involuntarily committed are perfectly capable of committing violence against themselves and others. The Ninth Circuit seems to suggest that Congress can impose a *lifetime* forfeiture of Second Amendment rights on anyone it deems to have a nonzero risk of violence, but such a holding would encompass every American. The panel clearly chose a predetermined result and torturously reasoned its way to that result, leaving the facts of the case in the dust.[4]

2. The Ninth Circuit's Analysis Amounts to Rational Basis Review.

Heller rules out rational basis review. *Tyler*, 837 F.3d at 690. "Whatever its precise contours might be, intermediate scrutiny cannot approximate the deference

[4] The panel opinion also expressly stated that because it determined § 922(g)(4) is a reasonable fit for preventing suicide, it would not address whether the statute is also a reasonable fit for preventing crime. But, the record conflicts on whether Mr. Mai ever threated himself. For example, one of his psychological evaluations states that "On 10/18/1999 Mr. Mai threatened himself and others and was detained for treatment." ER at 51. However, the state court that committed Mr. Mai did so because he presented "a likelihood of serious harm to others." ER at 25. The box for "a likelihood of serious harm to him/herself" is specifically not checked. *Id.* This repeats on the next page of that order. ER at 26.

of rational basis review. *Heller* forecloses any such notion." *Duncan*, 970 F.3d at 1166. Deference to congressional judgments is inappropriate in the context of challenged firearm prohibitions. *Id.* "While the issue of gun violence is important and emotionally charged, it does not involve highly technical or rapidly changing issues requiring such deference. . . . Put another way, intermediate scrutiny cannot mean *Chevron*-like deference." *Id.* at 1167. To defer blindly to Congress "would amount to an abdication of our judicial independence and we refuse to do so." *Id.*

The panel opinion in this case purports to apply intermediate scrutiny, but the gap it leaves between objective and fit is too wide to be called anything other than rational basis. We know this because the Sixth Circuit in *Tyler* meticulously and thoroughly rejected the government's proffered evidence that a *lifetime* prohibition on the possession of a firearm is necessary to effect Congress's intent. The government presented essentially the same evidence in *Tyler* as it did here. The difference in outcome can be attributed only to the level of scrutiny each court applied.

Intermediate scrutiny requires that a law must be narrowly tailored to serve a significant governmental interest. *Id.* at 1165 (quoting *Packingham v. North Carolina*, 137 S. Ct. 1730, 1736 (2017)). "While [intermediate scrutiny] is neither fatal nor feeble, it still requires a reviewing court to scrutinize a challenged law with a healthy dose of skepticism. Indeed, the law must address harms that are real in a material way." *Id.* (citing *Edenfield v. Fane*, 507 U.S. 761, 771 (1993)). "The burden of satisfying intermediate scrutiny is demanding and rests entirely on the

government." 974 F.3d at 1094 (Bumatay, J., dissenting from denial of rehearing *en banc*). "It doesn't require the court to approve shoddy data or reasoning. We demand consistency and substantiality in the evidence the government uses to establish a sufficient fit between its means and ends. The proffer of loose-fitting generalities in the form of statistical data is insufficient to clear intermediate scrutiny." *Id.*

Yet, the panel opinion's analysis is largely of such data. The panel acknowledged that the data does not fit Mr. Mai's situation, but wrote it off as "good enough" for Congress to impose a *lifetime* ban. Yet, "[t]he court offered no reasoned explanation of how a fundamental right can be contingent on off-point studies conducted overseas, despite the Supreme Court counseling against relying on such inapposite data." *Id.* at 1095 (citing *Craig v. Boren*, 429 U.S. 190, 201 (1976)).

The panel also waived off the NICS Improvement Amendments Act as a "political compromise" that did not affect Congress's ability to pronounce "once mentally ill, always so." In the wake of the tragic Virginia Tech campus shooting perpetrated by a mentally ill individual, Congress *loosened* restrictions on the possession of firearms by those who have been involuntarily committed. But, for the Ninth Circuit, this is not evidence of the government's disingenuous position - it's just a dash of congressional fancy.

At no point in its analysis did the panel question the validity of the evidence it was reviewing by asking why the evidence supports a finding that Mr. Mai should be prohibited *for life*. In fact, the panel concluded that "§ 922(g)(4)'s prohibition on those who have been involuntarily committed to a mental institution is a reasonable

fit for the important goal of reducing gun violence." But the question before the panel was whether § 922(g)(4) is a reasonable fit *for life*. The Sixth Circuit recognized the importance of this qualification - *for life* - and the Ninth Circuit did not. Thus, the Ninth Circuit ended up answering a question that no one asked.

3. The Ninth Circuit Gave No Weight to Mr. Mai's Juvenile Status.

"[C]hildren are different." *Miller v. Alabama*, 567 U.S. 460, 480 (2012). In other contexts, this Court has a rich tradition of differentiating between children and adults. *See, e.g., Roper v. Simmons*, 543 U.S. 551 (2005) (imposing the death penalty for a crime committed by a juvenile is unconstitutional); *Graham v. Florida*, 560 U.S. 48 (2010) (imposing life imprisonment without possibility of parole for a non-homicide crime committed by a juvenile is unconstitutional); *Miller*, 567 U.S. 460 (mitigating factors must be taken into account before a juvenile can be sentenced to life without possibility of parole for homicide); *J.D.B. v. North Carolina*, 564 U.S. 261 (2011) (age is a factor when determining whether someone is "in custody" for the purposes of interrogation and the *Miranda* warnings).

"[C]hildren are constitutionally different from adults . . . [b]ecause juveniles have diminished culpability and greater prospects for reform." *Miller*, 567 at 471. This rests "not only on common sense . . . but on science and social science as well." *Id.* Juveniles do not typically "develop entrenched patterns of problem behavior." *Id.* Additionally, "developments in psychology and brain science continue to show fundamental differences between juvenile and adult minds." *Id.* at 471-72. These

findings enhance "the prospect that, as the years go by and neurological development occurs, deficiencies will be reformed." *Id.* at 472.

Most importantly, *Miller* reiterated: "Deciding that a juvenile offenderforever will be a danger to society would require making a judgment that he isincorrigible - but incorrigibility is inconsistent with youth." *Id.*

While the Court has not considered age within the context of the Second Amendment, it is a crucial factor and its consideration is imperative for consistency. The underpinnings of this Court's prior holdings that "children are different" - lack of maturity, vulnerability to negative influences, limited brain and character development, enhanced opportunity for rehabilitation - do not change just because the Court is now reviewing the Second Amendment instead of the Eighth or the Fifth. These findings completely gut the government's position that Congress is justified in imposing a lifetime prohibition on the possession of a firearm, even when the predicate event that lead to the prohibition occurred during youth.

The Ninth Circuit did not bother to address this inconsistency in any meaningful manner. It mentioned only that the commitment spanned Mr. Mai's eighteenth birthday, and left it at that. 952 F.3d at 1110. But the fact of Mr. Mai's youth at the time of the commitment is not an inconvenient fact that should be ignored - it is central to the case. Courts cannot deny an individual his fundamental Second Amendment right because of an event that occurred when he was seventeen, without also explaining why this Court's maxim that "children are different" does not apply to him. Anything short of a reasoned analysis on why the same principles

cease to exist just because firearms are at issue is not only a disservice to Mr. Mai, it is a disservice to the Constitution. And anything short of a holding that age is a relevant factor would - yet again - relegate the Right to Bear Arms to a "second-class right."

CONCLUSION

For the foregoing reasons, the Court should grant the petition for a writ of certiorari.

Respectfully submitted,

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Date: 12/9/2020