No. 20-819

IN THE
# Supreme Court of the United States

DUY T. MAI, *Petitioner*,

v.

UNITED STATES OF AMERICA, *ET AL.*, *Respondents*.

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

**Brief *Amicus Curiae* of**
**Gun Owners of America, Inc.,**
**Gun Owners Foundation,**
**Gun Owners of California, Inc., and**
**Heller Foundation in Support of Petitioner**

ROBERT J. OLSON*
WILLIAM J. OLSON
JEREMIAH L. MORGAN
WILLIAM J. OLSON, P.C.
370 Maple Ave. W., Ste. 4
Vienna, VA 22180
(703) 356-5070
wjo@mindspring.com
Attorneys for *Amici Curiae*
*Counsel of Record
January 19, 2021

## TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES. . . . . . . . . . . . . . . . . . . . . . . ii

INTEREST OF THE *AMICI CURIAE*. . . . . . . . . . . . . . . . . 1

STATEMENT OF THE CASE. . . . . . . . . . . . . . . . . . . . . . 1

SUMMARY OF ARGUMENT. . . . . . . . . . . . . . . . . . . . . . 2

ARGUMENT

I. THE LOWER COURTS ARE REFUSING TO FAITHFULLY APPLY *HELLER*. . . . . . . . . . . . . . . . . 5

II. TEXT, HISTORY, AND TRADITION ARE THE PROPER ANALYTICAL TOOLS. . . . . . . . . . . . . . . 11

CONCLUSION.. . . . . . . . . . . . . . . . . . . . . . . . . . . . 14

## TABLE OF AUTHORITIES

Page

U.S. CONSTITUTION

Amendment II. . . . . . . . . . . . . . . . . . . . . . . . 2, *passim*

STATUTES

18 U.S.C. § 922(g). . . . . . . . . . . . . . . . . . . . . 2, *passim*

CASES

*Caetano v. Massachusetts*,
136 S. Ct. 1027 (2016).. . . . . . . . . . . . . . . . . . . . 7
*District of Columbia v. Heller*,
554 U.S. 570 (2008).. . . . . . . . . . . . . . . . . 2, *passim*
*Duncan v. Becerra*, 970 F.3d 1133
(9th Cir. 2020).. . . . . . . . . . . . . . . . . . . . . . . . . . 7
*McDonald v. City of Chicago*,
561 U.S. 742 (2010).. . . . . . . . . . . . . . . . . . . . 2, 6
*N.Y. State Rifle & Pistol Ass'n v. City of N.Y.*,
140 S. Ct. 1525 (2020).. . . . . . . . . . . . . . . . . . . . 6
*Rogers v. Grewal*, 140 S. Ct. 1865 (2020). . . . . . . . 11
*Tyler v. Hillsdale Cty. Sheriff's Dep't*,
837 F.3d 678 (6th Cir. 2016). . . . . . . . . 11, 12, 13
*United States v. Chovan*, 735 F.3d 1127
(9th Cir. 2013).. . . . . . . . . . . . . . . . . . . . . . . . . 6

## INTEREST OF THE *AMICI CURIAE*[1]

Gun Owners of America, Inc. and Gun Owners of California, Inc. are nonprofit social welfare organizations, exempt from federal income tax under Internal Revenue Code ("IRC") section 501(c)(4). Gun Owners Foundation and Heller Foundation are nonprofit educational and legal organizations, exempt from federal income tax under IRC section 501(c)(3).

*Amici* organizations were established, *inter alia*, for the purpose of participating in the public policy process, including conducting research, and informing and educating the public on the proper construction of state and federal constitutions, as well as statutes related to the rights of citizens, and questions related to human and civil rights secured by law.

## STATEMENT OF THE CASE

Petitioner was involuntarily committed for mental health treatment for a brief period of time when he was a minor. Petitioner was released from his commitment more than two decades ago and, since then, has led an exemplary life. A Washington state court found "Mai doesn't present a substantial danger to himself or to the public and ... the symptoms that led to his commitment are not reasonably likely to

---

[1] It is hereby certified that counsel for Petitioner and for Respondents have consented to the filing of this brief; that counsel of record for all parties received notice of the intention to file this brief at least 10 days prior to its filing; that no counsel for a party authored this brief in whole or in part; and that no person other than these *amici curiae*, their members, or their counsel made a monetary contribution to its preparation or submission.

reoccur." *Mai v. United States*, 974 F.3d 1082, 1085 (9th Cir. 2020) (Bumatay, J., dissenting). Under Washington state law, Petitioner is free to own a firearm. But the Ninth Circuit took the position that federal law prohibits those who have "been adjudicated as a mental defective or [have] been committed to a mental institution" from ever exercising their Second Amendment rights. *See* 18 U.S.C. § 922(g)(4).

Despite Washington State's affirmation that Petitioner is part of "the people" protected by the Second Amendment, the Ninth Circuit blocks his exercise of his Second Amendment rights. And, because federal courts across the United States blatantly ignore this Court's Second Amendment holdings, treating "the true palladium of liberty" like a "constitutional orphan," this Court needs to grant the petition and restore order.

## SUMMARY OF ARGUMENT

Practically speaking, the Ninth Circuit has never found a Second Amendment violation it won't countenance. The circuit court accomplishes this by applying a watered-down interest balancing test that it dubs "intermediate scrutiny." Despite this Court's crystal-clear holdings in *District of Columbia v. Heller*, 554 U.S. 570, 600 (2008) and *McDonald v. City of Chicago*, 561 U.S. 742 (2010), explaining that Second Amendment rights are not subject to federal judges' estimation of their usefulness or propriety, the Ninth Circuit deliberately and unabashedly continues to treat the Second Amendment like a second-class right, showing — as Judge VanDyke described it — a

"demonstrated dislike of things that go bang." *Mai*, 974 F.3d at 1097.

This Court's opinion in *District of Columbia v. Heller* began by interpreting the text of the Second Amendment. *See id.* at 576. First, the Court described "the People" to whom the Amendment applies. *Id.* at 579. Second, the Court explained the "arms" that are protected. *Id.* at 581. Finally, the court laid out the scope of the verbs "keep" and "bear." *Id.* at 582. After that, the Court confirmed its view of the text by examining the historical treatment of the Second Amendment. *Id.* at 600-619.

This comprehensive, textually based analysis set forth in *Heller* governs how the lower courts are to analyze a Second Amendment challenge to a law infringing persons, arms, or activities. The Ninth Circuit, however, bypasses this mandate, applying what it calls "intermediate scrutiny," but which in reality is scrutiny-in-name-only, and has proven infinitely malleable to permit judges to reach whatever result they desire.

In this matter, the Ninth Circuit applied its version of "intermediate scrutiny," which it claims requires only that the "government's statutory objective ... be significant, substantial, or important, and [that] there ... be a reasonable fit between the challenged law and that objective." *Mai v. United States*, 952 F.3d 1106, 1115 (9th Cir. 2020) (citations and punctuation omitted). If those prerequisites are met, then it is permissible for government to infringe rights that the Constitution states "shall not be

infringed." In this case, the court asserted that "two important [government] interests support § 922(g)(4)'s ban on the possession of firearms by those who were involuntarily committed to a mental institution: preventing crime and preventing suicide." *Id.* at 1116.

Based on these vague justifications, the Ninth Circuit upheld the federal ban being applied even to those who were committed for mental care long ago, despite not now suffering from any form of mental illness. At the same time, the court acknowledged that, while "§ 922(g)(4)'s prohibition takes effect as a result of a *past* event, the statute target[s] a *present* danger, i.e., the danger posed by [those who previously have been involuntarily committed to a mental institution] who bear arms." *Id.* at 1116 (cleaned up). The lower court also recognized that "§ 922(g)(4)'s prohibition places" a substantial burden on Petitioner's exercise of Second Amendment rights. *Id.* at 1115.

As a statutory matter, the federal government interprets § 922(g)(4)'s prohibited categories to not only include those with serious, debilitating, lifelong mental handicaps, but to also include those such as veterans suffering from PTSD, and perhaps soon to include senior citizens who occasionally forget where they left their car keys. There is little support for the view that § 922(g)(4) was ever intended to apply to someone like Petitioner. However, if § 922(g)(4) is properly read to apply to Petitioner, then it would be unconstitutional on its face, because merely once having suicidal thoughts, or a diagnosis of clinical depression, does not mean that a person is not part of "the people" to whom the Second Amendment applies.

Despite the Ninth Circuit's assertion that it has "no reason to doubt[] that [Petitioner] is no longer mentally ill" and that it does "not subscribe to the notion that once mentally ill, always so" (*id.* at 1121, punctuation omitted), the Ninth Circuit's watered-down intermediate scrutiny analysis allowed it to reach the court's desired result: Section 922(g)(4)'s ban on previously committed individuals, even as a juvenile, was found to be a "reasonable fit for the congressional goal of reducing gun violence." *Id.* at 1120.

The Ninth Circuit's willful circumvention of Second Amendment rights should not be allowed to continue, and it is high time for this Court to clear up any confusion that the lower courts have created as to how *Heller*'s mandate should be applied.

## ARGUMENT

### I. THE LOWER COURTS ARE REFUSING TO FAITHFULLY APPLY *HELLER*.

In *Heller*, this Court specifically disallowed the methodology that lower courts routinely employ to analyze Second Amendment challenges. Justice Scalia's opinion for the Court expressly rejected the position of dissenting Justice Breyer, who had proposed "a judge-empowering 'interest-balancing inquiry' that 'asks whether the statute burdens a protected interest in a way or to an extent that is out of proportion to the statute's salutary effects upon other important governmental interests.'" *Heller* at

634. If Justice Breyer's rejected position sounds like the two-step test, created by lower federal courts to implement *Heller*, that is because it is. In the instant case, the Ninth Circuit applied the two-step test it had created out of whole cloth in *United States v. Chovan*, 735 F.3d 1127 (9th Cir. 2013), asking atextual questions like "'(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.'" *Mai v. United States*, 952 F.3d 1106, 1115 (9th Cir. 2020). Of course, the Second Amendment does not read "shall not be infringed *severely*."

The Ninth Circuit's willful disregard for *Heller* and *McDonald* should come as no surprise. Courts across the country do the same thing and, to date, their rulings have been allowed to stand. Yet this Court has refused to enforce its rulings and, indeed, has neglected its Second Amendment jurisprudence. Justices Alito, Thomas, and Gorsuch shared their concern in *N.Y. State Rifle & Pistol Ass'n v. City of N.Y.*, 140 S. Ct. 1525, 1544 (2020) that the "mode of review in [*N.Y. State Rifle*] is representative of the way *Heller* has been treated in the lower courts. If that is true, there is cause for concern." Justice Kavanaugh also shared that concern and invited this Court to "address that issue soon…" *Id.* at 1527. Thus far, however, this Court has not done so, which has allowed the lower courts, both federal and state, to run roughshod over the rights of Americans.[2]

[2] For example, even after this Court's *unanimous* per curiam opinion in *Caetano v. Massachusetts*, 136 S. Ct. 1027 (2016), there are states where stun guns are still banned. *See Roberts v. Ballard*, Civil Action No. 1:18-cv-00125(HG-RT) and *O'Neil, et al.*

It is common knowledge that there has been no worse circuit in which to litigate a Second Amendment challenge than the Ninth Circuit. To date, the Ninth Circuit has a *perfect* anti-gun record — there has not been one post-*Heller* case that has resulted in a finding that the government (either state or federal) infringed on Second Amendment rights. On the rare occasion that a panel of the court "goes rogue" in support of the Second Amendment, the case is immediately taken *en banc* (sometimes *sua sponte*) and overturned.[3] Judge Bumatay's dissent in the instant case reports on the Ninth Circuit's hostility to the Second Amendment:

> [t]o the rational observer, it is apparent that our court just doesn't like the Second Amendment very much. We always uphold restrictions on the Second Amendment right to keep and bear arms. Show me a burden — any burden — on Second Amendment rights, and this court will find a way to uphold it. Even when our panels have struck down laws that violate the Second Amendment, our court rushes in en banc to reverse course. *See, e.g., Teixeira v. County of Alameda*, 873 F.3d 670, 690 (9th Cir. 2017) (en banc) (reversing panel's invalidation of a regulation prohibiting the right to purchase and sell firearms); *Peruta v.*

*v. Neronha, et al.*, Civil Action No. 1:19-cv-00612-WES-PAS.

[3] The Ninth Circuit has a petition for *en banc* rehearing pending in *Duncan v. Becerra*, 970 F.3d 1133 (9th Cir. 2020), which it has neither granted nor denied as of the filing of this brief.

> *County of San Diego*, 824 F.3d 919, 942 (9th Cir. 2016) (en banc) (reversing panel's invalidation of city law requiring showing of special self-defense need to obtain conceal carry permit where open carry was also prohibited); *Young v. Hawaii*, 896 F.3d 1044, 1074 (9th Cir. 2018) (discussed above), *reh'g en banc granted*, 915 F.3d 681 (9th Cir. 2019). Other rights don't receive such harsh treatment. There exists on our court a clear bias — a real prejudice — against the Second Amendment and those appealing to it. [*Mai v. United States*, 974 F.3d 1082, 1104-05 (9th Cir. 2020) (Bumatay, J., dissenting).[4]]

---

[4] Fn. 6 of Judge Bumatay's dissent catalogs additional cases from the Ninth Circuit upholding various Second Amendment restrictions:

> *Torres*, 911 F.3d at 1264-65 (upholding ban on illegal aliens possessing firearms); *Pena*, 898 F.3d at 973 (upholding ban on purchasing particular firearms); *Mahoney*, 871 F.3d at 883 (upholding limitations on police officers using department-issued firearms); *Bauer*, 858 F.3d at 1227 (upholding use of firearm sales fees to fund enforcement efforts against illegal firearm purchasers); *Silvester*, 843 F.3d at 829 (upholding 10-day waiting period for purchasers who have already cleared a background check in less than 10 days); *Fyock*, 779 F.3d at 1001 (upholding city's ban on high-capacity magazines); *Jackson v. City & County of San Francisco*, 746 F.3d 953, 970 (9th Cir. 2014) (upholding city's firearm and ammunition regulations); *Chovan*, 735 F.3d at 1142 (upholding ban on domestic violence misdemeanants owning firearms despite not

Judge VanDyke echoed Judge Bumatay's concern, noting the court's disdain for the "four-letter word: guns." *Id.* at 1097 (VanDyke, J., dissenting).

Courts, including the Ninth Circuit, have largely been able to circumvent the Second Amendment through development and application of a clever test which purports to be derived from *Heller*, but which in reality strays far afield from *Heller*'s mandate that Second Amendment challenges must be analyzed on a textual, then historical, then traditional basis.[5] To be sure, the Second Amendment clearly sets out the elements which govern its application: "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.

Thus, it should suffice merely to ask if a challenged law infringes upon an American's right to keep and bear arms. If that answer is in the affirmative, then a constitutional violation has occurred. In this case, these questions answer themselves.

In this case, Petitioner was deemed banned, for life, from keeping and bearing arms under § 922(g)(4), because the federal government believes he cannot be trusted with a firearm, notwithstanding his home state of Washington having taken the opposing

> committing domestic violence for 15 years); *United States v. Vongxay*, 594 F.3d 1111, 1118 (9th Cir. 2010) (upholding ban on felons possessing firearms). [*Mai*, 974 F.3d at 1104 n.6.]

[5] In many cases, reference to the text alone is adequate.

position. Petitioner's ban is not because he committed a crime or because he is too young to exercise his right, but rather merely because at one point in his life he suffered from a mental illness and was involuntarily committed for mental health treatment. Petitioner does not *currently* suffer from a mental illness, but *suffered* from mental health problems. So, despite the Ninth Circuit's assertion that "[w]e emphatically do not subscribe to the notion that 'once mentally ill, always so,'" it held § 922(g)(4)'s lifetime ban for someone not currently suffering from mental illness perfectly constitutional. *Mai*, 952 F.3d at 1121.

Interestingly enough, many of the provisions in 18 U.S.C. § 922(g) are not understood to operate in a similar fashion. For example, § 922(g)(3) prohibits from firearm possession a person who "is an unlawful user of or addicted to any controlled substance," and it is clear that this prohibition is for *current* unlawful users or those *currently* addicted to controlled substances — not those who have *ever* unlawfully used a controlled substance (even if they "didn't inhale"). Rather, this federal prohibiting factor is a temporary moratorium on a person's Second Amendment rights. The same applies to the prohibition on aliens "illegally or unlawfully in the United States" (§ 922(g)(5)(A)) as, once that alien cures the defect in status, that section no longer bans possession. The same applies to a myriad of other disqualifications in § 922(g), including § 922(g)(8) (being subject to a restraining order) and § 922(g)(2) (being a fugitive from justice).

## II. TEXT, HISTORY, AND TRADITION ARE THE PROPER ANALYTICAL TOOLS.

As Justice Thomas' recent dissent from the denial of certiorari in *Rogers v. Grewal*, 140 S. Ct. 1865 (2020) explains, "[t]he Second Amendment provides no hierarchy of 'core' and peripheral rights" (*id.* at 1867), and is not subject to "means-ends scrutiny" or "'a tripartite binary test with a sliding scale and a reasonable fit.'" *Id.* (citation omitted). But these truths are apparently lost on the lower courts.

In analyzing § 922(g)(4), a court must look first at the text, and for confirmation at the historical tradition of disarming those who have been adjudicated mentally defective. That did not occur below. First, presumably no one would dispute that Petitioner is part of "the people" to whom the Second Amendment applies, since he is an American who currently suffers from no mental health issues and has no other state or federal disqualifications that would prevent him from possessing firearms.

What is more, the historical record confirms a complete absence of any historical antecedent for modern statutes like § 922(g)(4). Indeed, as Judge Bumatay noted, "[i]t should come as no surprise[] that scholars have 'search[ed] in vain through eighteenth-century records to find any laws specifically excluding the mentally ill from firearms ownership.'" *Mai*, 974 F.3d at 1088.

There is a split in the circuits. The Sixth Circuit in *Tyler v. Hillsdale Cty. Sheriff's Dep't*, 837 F.3d 678 (6th

Cir. 2016) delved into § 922(g)(4) and found that it lacked a "historical pedigree." *Tyler* at 687.[6] Likewise, that court ruled that "[p]rior involuntary commitment is not coextensive with current mental illness: a point the government concedes in its brief, and a point Congress recognized when it enacted the NICS Improvement Amendments Act, thereby allowing states to restore the right to possess a gun to persons previously committed." *Id.* at 687-88.

In *Tyler*, the Sixth Circuit concluded that "Tyler has a viable claim under the Second Amendment and ... the government has not justified a lifetime ban on gun possession by anyone who has been 'adjudicated as a mental defective' or 'committed to a mental institution.'" *Id.* at 699. Judge Batchelder's concurrence in most of the judgment in *Tyler* went even further, and looked at the history of what it described as insanity/lunacy in individuals. Judge Batchelder likened an insane individual to that of "a minor who had not yet attained the age of reason [as] both were unable, by definition, to exercise their rights because rights could, in the central case, be exercised only by those possessing reason. Conversely, an insane person could not justly be subjected to many of the obligations that corresponded to those rights, such as criminal liability." *Id.* at 705 (Batchelder, J., concurring). Judge Batchelder found that "such

[6] As Judge Collins noted in his dissent from the denial of rehearing *en banc*, "the panel's application of intermediate scrutiny here is seriously flawed and creates a direct split with the Sixth Circuit. That alone is enough to warrant en banc review." *Mai*, 974 F.3d at 1097 (Collins, J., dissenting). It also merits this Court's review as well.

deprivations were not once-for-all. Since at least the time of Edward I (1239-1307), the English legal tradition provided that those who had recovered their sanity should have their rights restored." *Id.* at 706. Judge Batchelder concluded that "[t]he key fact is that, at the time of the Founding, no fundamental right could lawfully be circumscribed to the extent that § 922(g)(4) regulates gun rights." *Id.* at 707.

Judge Bumatay's dissent in the instant case does what the panel below should have done: it first analyzed the text, then the history, and then the tradition of § 922(g)(4)'s ban on those afflicted with mental illness. Judge Bumatay found that "[g]iven the paucity of Founding-era laws specifically prohibiting gun ownership by the mentally ill, we are better served by exploring the dominant thinking on mental illness in that period. On this, the evidence is clear: temporary mental illness didn't lead to a permanent deprivation of rights." *Mai*, 974 F.3d at 1089 (Bumatay, J., dissenting). "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.

Because the text, history, and tradition demonstrate that § 922(g)(4) does not pass constitutional muster, and a split in the circuits exists, this Court should grant certiorari to again instruct the lower courts on the proper analysis required in cases alleging infringements of Second Amendment rights. Any further delay will continue the multitude of infringements on the people's right to keep and bear

arms, which the Second Amendment commands "shall not be infringed."

## CONCLUSION

For the reasons stated above, the Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

ROBERT J. OLSON*
WILLIAM J. OLSON
JEREMIAH L. MORGAN
WILLIAM J. OLSON, P.C.
370 Maple Ave. W., Ste. 4
Vienna, VA 22180
(703) 356-5070
wjo@mindspring.com
Attorneys for *Amici Curiae*
January 19, 2021

**Counsel of Record*