No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

JAMES MICHAEL BARTLEY,

Petitioner-Appellant,

v.

UNITED STATES OF AMERICA,

Respondent-Appellee.

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

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PETITION FOR WRIT OF CERTIORARI

THEODORE BLANK
FEDERAL DEFENDER SERVICES OF IDAHO, INC.
702 West Idaho Street, Suite 1000
Boise, Idaho 83702
Thad_Blank@fd.org
208-331-5500

Question Presented

Whether the government may deny a law-abiding citizen their right to bear arms under the Second Amendment based solely on a competency proceeding that entailed no finding of mental illness or dangerousness.

TABLE OF CONTENTS

APPENDIX

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

Petition for Certiorari

Petitioner James Michael Bartley petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit.

Orders Below

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

United States v. Bartley, 9 F.4th 1128 (9th Cir. 2021)

United States v. Bartley, 400 F. Supp. 3d 1066 (D. Idaho July 9, 2019)

Counsel is aware of no related cases currently pending before the Court.

Jurisdictional Statement

The Ninth Circuit Court of Appeals entered its final order in Mr. Bartley's case on August 20, 2021. *See* Appendix A. This petition is timely under Supreme Court Rule 13.3.

Relevant Constitutional and Statutory Provisions

The Second Amendment to the United States Constitution provides:

> 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.

Title 18 of the United States Code, Section 922(g)(4) provides:

> 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.

Statement of the Case

In 2011, Mr. Bartley, a military veteran, was charged in Idaho with the misdemeanor offense of driving under the influence. His defense counsel raised concerns with his competency. The magistrate judge ultimately found that Mr. Bartley was not competent to proceed to trial. Mr. Bartley was sent to a state hospital, pursuant to procedures set out under Idaho law. He was diagnosed with schizophrenia and treated with psychotropic medication. After approximately six weeks, Mr. Bartley was deemed competent and discharged.

In July of 2018, Mr. Bartley was accosted in a parking lot and displayed a firearm in self-defense. Shortly afterwards, law enforcement found Mr. Bartley in possession of two firearms. He was charged under 18 U.S.C. § 922(g)(4) with unlawfully possessing the firearms as a "mental defective" or "person who has been committed to a mental institution."

Mr. Bartley filed a motion to dismiss in the district court, challenging the constitutionality of the statute. The court denied the motion. Mr. Bartley pled guilty and was sentenced to 20 months imprisonment.

Mr. Bartley appealed his conviction to the Ninth Circuit, arguing *inter alia*, that § 922(g)(4) violates the right to bear arms enshrined in the Second Amendment, particularly when it attaches to competency proceedings that entail no finding of dangerousness. The Ninth Circuit affirmed his conviction, ruling that § 922(g)(4) survives intermediate scrutiny.

Mr. Bartley requests certiorari so that the Court can clarify the standard of scrutiny and correct the vast infringement on Second Amendment rights authorized by the Ninth Circuit's approach.

Reasons for Granting the Petition

A. The Lower Courts are Deeply Fractured About How to Analyze Second Amendment Challenges to § 922(g)(4)

In *D.C. v. Heller*, this Court recognized that the Second Amendment guarantees individual citizens' right to keep and bear arms for the "core lawful purpose of self-defense." 554 U.S. 570, 630 (2008). *Heller* provided limited guidance on the boundaries of this constitutional right. The *Heller* Court acknowledged that "[l]ike most rights, the right secured by the Second Amendment is not unlimited." *Id.* at 626. It offered few guidelines on the boundaries of this right: Certain "longstanding prohibitions on the possession of firearms by felons and the mentally ill" may be "presumptively lawful," *id.* at 626, 627 n.26; restrictions cannot be evaluated under a "freestanding 'interest-balancing' approach," *id.* at 634; and the level of scrutiny for any restriction is at least higher than rational basis review, *id.* at 628.

This limited guidance has left a "vast terra incognita" that "has troubled courts since *Heller* was decided." *Kachalsky v. Cty. of Westchester*, 701 F.3d 81, 89 (2d Cir. 2012) (internal quotation omitted). *Heller* noted "that there will be time enough to expound upon the historical justifications for the exceptions we have mentioned if and when those exceptions come before us." *Id.* at 635. The muddled reasoning of

the courts of appeals shows it is time for the Court to expound with respect to the criminal prohibitions contained in 18 U.S.C. § 922(g)(4).

Two circuits have, post-*Heller*, ruled on the constitutionality of section 922(g)(4), both applying a milquetoast intermediate scrutiny review and reaching contrary results. *Compare Bartley*, 9 F.4th 1128 *and Mai v. United States*, 952 F.3d 1106, 1110 (9th Cir. 2020) *with Tyler v. Hillsdale Cty. Sheriff's Dep't*, 837 F.3d 678, 697 (6th Cir. 2016) (en banc).[1]

In the Ninth Circuit, *Mai* upheld section 922(g)(4)'s firearm prohibition in the context of a civil commitment. 952 F.3d at 1110. The panel gave significant weight to the finding of dangerousness in the state commitment proceeding, reasoning that "a person who required formal intervention and involuntary commitment by the State because of the person's dangerousness is not a 'law-abiding, responsible citizen.'" *Id.* at 1115 (quoting *Heller*, 554 U.S. at 635). Yet in *Bartley*—where Mr. Bartley's commitment did not entail any finding of dangerousness—the Ninth Circuit simply waved off its previous emphasis on dangerousness as irrelevant under "the plain language of the statute and its implementing regulation." *Bartley*, 9 F.4th at 1133. Following *Mai,* eight circuit judges dissented from the denial to rehear the case en banc, all agreeing that at a minimum, the circuit erred in its application of

[1] The Third Circuit held section 922(g)(4) constitutional on different grounds—that *Heller*'s presumptively lawful language excluded the plaintiff from any Second Amendment protection. *Beers v. Att'y Gen. United States*, 927 F.3d 150, 157 (3d Cir. 2019). However, this Court subsequently vacated the opinion after the Bureau of Alcohol, Tobacco, Firearms and Explosives certified that Pennsylvania's relief-from-disabilities program satisfied the criteria of federal law, permitting the plaintiff to lawfully possess a firearm under state and federal law. *See Beers v. Barr*, 140 S. Ct. 2758 (2020).

intermediate scrutiny. *See Mai v. United States*, 974 F.3d 1082, 1083 (9th Cir. 2020) (Bumatay, J., dissenting from denial of rehearing en banc).

The Sixth Circuit's reasoning in *Tyler* also reflects a deeply fractured approach to the Second Amendment. Judge Gibbons's lead plurality opinion applied intermediate scrutiny and concluded that as applied to the plaintiff, section 922(g)(4) was not constitutional. 837 F.3d at 699. Judges Batchelder and Sutton wrote concurrences agreeing with the result but disputing that a tiers-of-scrutiny review was appropriate under *Heller*. 837 F.3d at 703 (Batchelder, J., concurring) ("[*Heller* and *McDonald v. City of Chicago*, 561 U.S. 742 (2010)] conspicuously refrain from engaging in anything resembling heightened scrutiny review, and . . . both put the historical inquiry at the center of the analysis, not at the margin."); *id.* at 708 (Sutton, J., concurring) ("Think of the *Heller* exception as an off switch to the right to bear arms and of § 922(g) as Congress's effort to define it."). Judge Boggs—the author of the underlying panel opinion in *Tyler*—also wrote separately to reiterate his view that strict scrutiny, rather than intermediate, should be applied to § 922(g)(4). *Id.* at 702 (Boggs, J., concurring). Judge Moore, joined by four others, dissented on the ground that the "presumptively lawful" language in *Heller* was decisive and, alternately, that § 922(g)(4) survived intermediate scrutiny. *Id.* at 714–21 (Moore, J., dissenting).

These opinions evince the highly divergent interpretation of *Heller* by circuit court judges. There is no consensus as to the role of the historical record in evaluating the constitutionality of § 922(g)(4); whether, if heightened scrutiny applies,

§ 922(g)(4) should be analyzed under intermediate or strict scrutiny; whether § 922(g)(4) passes muster under these standards; and what factors are relevant to the analysis. This lack of consensus underscores the importance of granting review.

B. The Ninth Circuit's Analysis Is Deeply Flawed.

The Ninth Circuit's decision affirming the constitutionality of section 922(g)(4) purports to "assume, without deciding, that § 922(g)(4) . . . burdens Second Amendment rights," and thus avoids deciding whether the statute is "a presumptively lawful regulatory measure" falling outside the scope of Second Amendment protection. *Mai*, 952 F.3d at 1115; *see also Bartley*, 9 F.4th at 1135. Yet, this ostensibly undecided issue nonetheless dictated the Ninth Circuit's ultimate conclusion. The court reasoned that § 922(g)(4) warrants intermediate, rather than strict scrutiny, because "a person who required formal intervention and involuntary commitment by the State because of the person's dangerousness is not a 'law-abiding, responsible citizen'" who fits within the "core" of those entitled to Second Amendment protections. *Mai*, 952 F.3d at 1115. Similarly, the Sixth Circuit applied intermediate scrutiny because "[r]eviewing § 922(g)(4) under strict scrutiny would invert *Heller*'s presumption that prohibitions on the mentally ill are lawful." *Tyler*, 837 F.3d at 691. This reasoning—that the core Second Amendment right to keep and bear arms—is to be enjoyed fully only by "certain privileged classes of people" is wholly inconsistent with *Heller*. *Mai*, 974 F.3d at 1099 (VanDyke, J., dissenting from denial of rehearing en banc).

First, the Ninth Circuit's approach to selecting the appropriate standard of scrutiny ignores *Heller*'s admonition to focus upon the text, history, and tradition of the Second Amendment to divine its contours. Instead, the Ninth Circuit "punt[ed]" on this essential threshold analysis, holding that those falling within the scope of the law have—*ipse dixit*—a diminished right to constitutional protection. *Id.* at 1089 (Bumatay, J., dissenting from denial of rehearing en banc). This turns the necessary analysis on its head—unless section 922(g)(4) truly pertains *only* to those historically excluded from the Second Amendment—the statute unquestionably "strikes at the core Second Amendment right" since it "completely deprives [those subject to § 922(g)(4)] of the ability to possess a firearm, even within the home." *Id.* at 1092. *See also Tyler*, 837 F.3d 678, 702 (Boggs, J., concurring in most of the judgment) ("The proper level of scrutiny is strict scrutiny, as with other fundamental constitutional rights . . . ."); *United States v. Chovan*, 735 F.3d 1127, 1145 (9th Cir. 2013) (Bea, J., concurring) ("[S]electing intermediate scrutiny as the correct level at which to review a categorical, status-based disqualification from the core right of the Second Amendment also does not make sense.").

Second, a proper review of the historical record shows that § 922(g)(4) does not fit with the historical view of the right to bear arms. Section 922(g)(4) attaches a firearms disability to a person's past adjudication or commitment. But the Framers' view was that any "such deprivations [of rights] 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." *Tyler*, 837 F.3d at 706

(Batchelder, J., concurring). Further, any loss of rights or membership in the community was based on a person's *dangerousness*, not any view that mental illness was inherently debilitating. To the contrary, in the colonial era the "absence of threatening behavior was generally accompanied by tolerant attitudes" and that approach faltered only when the "behavior of insane persons appeared to threaten public safety." Gerald N. Grob, *The Mad Among Us: A History of the Care of America's Mentally Ill* 13 (1994). Thus, for instance, the Address and Reasons of Dissent of the Minority of the Convention of the State of Pennsylvania to Their Constituents, the "highly influential" precursor to the Second Amendment, *Heller*, 554 U.S. at 604, does not mention mental illness. Rather, it states that "no law shall be passed for disarming the people or any of them, unless for crimes committed, *or real danger of public injury from individuals*." (emphasis added).

Mr. Bartley's case demonstrates the stakes. Mr. Bartley was charged after he displayed a firearm in self-defense. The Government *agreed* that his use of the firearm was lawful self-defense under state law.[2] Yet, based on a competency proceeding years earlier that did not include a finding that Mr. Bartley is dangerous or even mentally ill, the Ninth Circuit concluded his possession of a firearm unlawful. Unless corrected by this Court, the Ninth Circuit's faulty analysis will unjustly impinge on the constitutional rights of Mr. Bartley and many others.

[2] The Government stipulated in the plea agreement that Mr. Bartley's display of the firearm was not "in connection with another felony offense," U.S.S.G. § 2K2.1(b)(6)(B), and joined in an objection to the initial presentence report that explained why Mr. Bartley's use of the firearm was lawful self-defense under Idaho law.

Conclusion

For the above reasons, Mr. Bartley respectfully asks the Court to grant a Writ of Certiorari.

Respectfully submitted on this 18th day of November 2021.

/s/ Theodore Blank
Theodore Blank
Assistant Federal Defender
Federal Defender Services of Idaho
Attorneys for Petitioner-Appellant
James Michael Bartley