No. 19-

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

PETITION FOR A WRIT OF CERTIORARI

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January 9, 2020

QUESTION PRESENTED

May the government permanently deny a mentally healthy, responsible, and law-abiding citizen of the United States the opportunity to recover his Second Amendment rights solely because of a long-ago involuntary commitment?

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

Petitioner is Bradley Beers. Respondents are William P. Barr, Attorney General of the United States; the United States Department of Justice; the United States Bureau of Alcohol, Tobacco, Firearms, & Explosives ("ATF"); Thomas E. Brandon, Deputy of the ATF; Ronald B. Turk, Associate Deputy Director/Chief Operating Officer of the ATF; the United States Federal Bureau of Investigation; and the United States of America. No party is a corporation.

RULE 14.1(B)(iii) STATEMENT

This case arises from the following proceedings in the United States District Court for the Eastern District of Pennsylvania, and the United States Court of Appeals for the Third Circuit:

Beers v. *United States*, No. 17-3010 (3d Cir. June 20, 2019)

Beers v. *Lynch*, No. 2-16-cv-06440 (E.D. Pa. Sept. 5, 2017)

There are no other proceedings in state or federal trial or appellate courts, or in this Court directly related to this case.

TABLE OF CONTENTS

TABLE OF CONTENTS—continued

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES—continued

TABLE OF AUTHORITIES—continued

TABLE OF AUTHORITIES—continued

PETITION FOR A WRIT OF CERTIORARI

Petitioner Bradley Beers respectfully petitions for a writ of certiorari to review the decision of the Third Circuit.

INTRODUCTION

Petitioner Bradley Beers brought this as-applied challenge to 18 U.S.C. § 922(g)(4), which at all relevant times prohibited him from possessing a firearm because he was involuntarily committed during an episode of teenage depression more than fourteen years ago. Mr. Beers has needed no treatment since and is now a mentally healthy thirty-three year old whose firearm rights have been restored under state law. As both the government and the Third Circuit below recognized, he is not a danger to himself or others.

This should have been sufficient to decide this case. The Second Amendment "elevates above all other interests the right of law-abiding, responsible citizens to use arms in defense of hearth and home." *District of Columbia* v. *Heller*, 554 U.S. 570, 635 (2008). As a law-abiding and responsible American, Mr. Beers is therefore entitled to possess a firearm. To be sure, both *Heller* and *McDonald* noted that longstanding limitations on gun possession by "the mentally ill" were "presumptively lawful," but this plainly referred to those struggling with mental illness in the present tense. *Heller*, 554 U.S. at 626–27, 627 n.26; *accord McDonald* v. *Chicago*, 561 U.S. 742, 786 (2010). Because Mr. Beers is now fully recovered, he is no longer in the relevant category, and there is no basis for continuing to deprive him of his fundamental rights.

The Third Circuit nevertheless held—in direct conflict with *Tyler* v. *Hillsdale Cty. Sheriff's Dep't*, 837 F.3d 678 (6th Cir. 2016) (en banc)—that Mr. Beers's Second Amendment rights are forever extinguished. It asserted that those who have been involuntarily committed are "unvirtuous" and irrevocably "forfeit[]" their rights in exactly the same manner as felons. Pet. App. 11a, 16a. Indeed, they "forfeit" their rights in a more fundamental way than felons, who may regain their rights if they are pardoned or their convictions are expunged or set aside.

To soften the blow, the panel offered that "[n]othing in our opinion should be read as perpetuating the stigma surrounding mental illness." *Id.* at 18a. Rather, it pinned the blame on "our forebearers [sic]" who "saw a danger in providing mentally ill individuals the right to possess guns," even those individuals who "may now be rehabilitated." *Id.*

This was baseless. The court acknowledged that its conclusion directly conflicted with *Tyler*, but it did not endeavor to explain why its contrary view of the historical record was correct. Indeed, the panel's two-paragraph discussion of the history noted only that those who were dangerously mentally ill could be "locked up" and, *a fortiori*, could also be disarmed at the time of the founding—a point that the Sixth Circuit also explicitly acknowledged. See *id.* at 15a; *Tyler*, 837 F.3d at 689 (plurality opinion), 705–06 (Batchelder, J., concurring in most of the judgment). The Third Circuit, however, did not provide any reasoning to support its "deduction"—contrary to *Tyler*—that such deprivations could be permanent, regardless of recovery. Pet. App. 15a n.43.

In reality, our common law tradition has "long recognized that mental illness is not a permanent condition." *Tyler*, 837 F.3d at 710 (Sutton, J., concur-

ring in most of the judgment). Thus, as one leading founding-era treatise explained, "[a] lunatic is never to be looked upon as irrecoverable." Anthony Highmore, *A Treatise on the Law of Idiocy and Lunacy* 73 (1807). And "the law always imagines, that the[] accidental misfortunes [that caused the lunacy] may be removed" and the person's rights restored. 1 William Blackstone, *Commentaries* *304–05. Even the sole historical source on mental illness that the panel below relied upon explained—*on the same page* that it looked to—that "[a lunatic] is to be kept . . . locked up only so long as such lunacy or disorder shall continue, and no longer." Henry Care, *English Liberties, or the Free-born Subject's Inheritance* 329 (1774).[1]

The Third Circuit's analysis cannot be squared with these historical understandings, and its erroneous conclusion not only creates an irreconcilable conflict with the en banc Sixth Circuit, but it also introduces further confusion into an already fractured body of law. To see this, one need look no further than the opinion below and the eight separate opinions in *Tyler*, none of which commanded a majority. Among the disputed questions are: (1) what the historical record shows; (2) whether the historical record is dispositive as a legal matter; (3) whether a heightened scrutiny analysis should be used; (4) if so, what level of scrutiny applies; and (5) whether applications of § 922(g)(4) to those who have recovered satisfies heightened scrutiny review.

In this area of Second Amendment jurisprudence, as in many others, lower courts find themselves at

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[1] The panel's opinion quotes Care indirectly through Carlton F.W. Larson's article *Four Exceptions in Search of A Theory:* District of Columbia v. Heller *and Judicial* Ipse Dixit, 60 Hastings L.J. 1371, 1377 (2009). Pet. App. 15a n.43.

sea. The upshot has been a dramatic "narrowing from below," which has done exactly what this Court forbade: treating the Second Amendment as "a second-class right, subject to an entirely different body of rules than the other Bill of Rights guarantees." *McDonald*, 561 U.S. at 780.

OPINIONS BELOW

The opinion of the Third Circuit is reported at 927 F.3d 150 (2019) and is reproduced in the appendix to this petition at Pet. App. 1a–18a. The opinion of the United States District Court for the Eastern District of Pennsylvania is unpublished and is reproduced at Pet. App. 19a–32a.

JURISDICTION

The court of appeals entered its judgment on June 20, 2019, and denied a timely petition for rehearing and rehearing en banc on September 11, 2019. On November 25, 2019, Justice Alito extended the time to file this petition up to and including January 9, 2020. The Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Second Amendment of the U.S. Constitution provides that "[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.

The Fifth Amendment of the U.S. Constitution provides that "[n]o person shall be . . . deprived of life, liberty, or property, without due process of law." U.S. Const. amend. V.

The Fourteenth Amendment of the U.S. Constitution provides that "All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV § 1.

The statutory provisions involved are set forth in the appendix to this petition: 18 U.S.C. § 922(g)(4), 34 U.S.C. § 40915, and Pa. Cons. Stat. § 6105. Pet. App. 36a–38a.

STATEMENT OF THE CASE

A. 18 U.S.C. § 922(g)(4)

Starting in 1968, the federal government has prohibited firearm possession by anyone "who has been adjudicated as a mental defective" or "who has been committed to any mental institution." 18 U.S.C. § 922(g)(4) (initially codified Sec. 102, § 922(h)(1), (4), 82 Stat. at 1220–21).[2] Since the 1980s, however, Congress has vacillated about whether to allow those whose rights were stripped by this statute to get them back. In 1986, it passed a provision allowing aggrieved persons to petition the government to have their rights restored. See Firearms Owners' Protection Act, Pub. L. No. 99-308, sec. 105, § 925(c), 100 Stat. 449, 459 (1986). But in 1992 it changed course,

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[2] The government interprets "committed to a mental institution" as applying only to persons who were *involuntarily* committed by an appropriate judicial authority. *See* 27 C.F.R. § 478.11.

defunding that recovery program amid its concerns that reviewing applications was a "very difficult and subjective task which could have devastating consequences for innocent citizens if the wrong decision is made." S. Rep. No. 102-353, at 19 (1992); Treasury, Postal Service, and General Government Appropriations Act, 1993, Pub. L. No. 102-393, 106 Stat. 1729, 1732 (1992).

Despite these professed concerns, however, Congress again had a change of heart in 2008, amending the law to provide funding to states, which—if they chose—could certify their own recovery programs; such programs, if approved by the ATF, allow for those disarmed by § 922(g)(4) to seek the restoration of federal gun privileges. NICS Improvement Amendments Act of 2007, Pub. L. No. 110-180, § 105, 121 Stat. 2559, 2569–70 (2007) ("NIAA"); 34 U.S.C. § 40911(2)(A). So far, approximately, two-thirds of the states have done so.[3]

B. Bradley Beers

Fourteen years ago, when he returned home from college in winter 2005, nineteen-year-old Bradley Beers found himself deeply overwhelmed and stressed; he had enrolled in twenty-one credit hours and was not performing as well as he had hoped. Compl. ¶26, *Beers* v. *Lynch*, No. 16-6440 (E.D. Pa. Dec. 15, 2016), ECF No. 1. Profoundly frustrated, he contemplated suicide, remarking that he had nothing to live for. *Id.* ¶27, Ex. A. Mr. Beers's mother contact-

[3] To the best of Mr. Beers's knowledge, the ATF does not publish its approvals of state-program certifications; accordingly, "[t]he actual number of states with qualifying relief-from-disabilities programs is uncertain." *Tyler*, 837 F.3d at 683 n.2 (plurality opinion).

ed his pediatrician, who recommended bringing him to the Lower Bucks Hospital, a facility offering both voluntary and involuntary commitment for inpatient treatment of mental illness. *Id.* ¶31. To be voluntarily committed, Mr. Beers would have had to fill out paperwork under the Pennsylvania Mental Health Procedures Act. *Id.* ¶¶32, 38. However, Mr. Beers was overwhelmed, and the employees at the hospital were frustrated. As a result, his mother filled out the paperwork instead; the form the employees gave her was for involuntary commitment. *Id.* ¶¶33–38. Consequently, Mr. Beers was involuntarily committed by Order of the Court of Common Pleas of Bucks County, Pennsylvania, for a period not to exceed seven days. *Id.* ¶¶38–39. This was later extended, and Mr. Beers soon returned home. *Id.* ¶¶39–40.

Since that temporary experience with teenage depression fourteen years ago, Mr. Beers has never needed treatment for his mental health. *Id.* ¶47, Ex. D. It is undisputed that he is mentally healthy and not a danger to himself or to others.

C. Procedural Background

In 2013, Mr. Beers saw psychiatrist Dr. Mark Bernstein, M.D., who concluded after a thorough medical examination that Mr. Beers was able to "safely handle firearms." *Id.* Later, the Court of Common Pleas of Bucks County issued an Order declaring that Mr. Beers was not a danger to himself or others, restoring his state firearm rights pursuant to 18 Pa. Cons. Stat. § 6105(f). Stipulation, *Beers* v. *Lynch*, No. 16-6440 (E.D. Pa. June 15, 2017), ECF No. 29. This did not restore Mr. Beers's federal rights, however, as Pennsylvania's relief-from-disabilities program had not been approved by the ATF.

Mr. Beers therefore filed this suit, seeking declaratory and injunctive relief barring the government from enforcing § 922(g)(4) against him on the grounds that it violated the Second Amendment, his right to due process, and his entitlement to equal protection of the laws. The district court dismissed, holding that evidence of rehabilitation played no role in the Second Amendment analysis. Pet. App. 5a.

The Third Circuit affirmed, concluding that "[p]assage of time and evidence of rehabilitation" are categorically irrelevant. *Id.* at 16a. According to the panel, those who have been involuntarily committed are "unvirtuous" and irrevocably "forfeit" their Second Amendment rights in precisely the same manner as felons. *Id.* at 11a, 16a. It nevertheless hastened to assure that:

> Nothing in our opinion should be read as perpetuating the stigma surrounding mental illness. Although Beers may now be rehabilitated, we do not consider this fact in the context of the very circumscribed, historical inquiry we must conduct [under *Heller* and *McDonald*]. Historically, our forebearers saw a danger in providing mentally ill individuals the right to possess guns. That understanding requires us to conclude that § 922(g)(4) is constitutional as applied to Beers.

Id. at 18a.

But nothing in the opinion attempted to show that our forebears believed that mental illness was necessarily permanent or that prior involuntary commitment justified forever stripping someone of their fundamental rights. *Id.* Rather, the panel's cursory historical analysis mentioned only two things: First, that, while no founding-era laws sought to regulate firearm possession by the mentally ill, "judicial offi-

cials were authorized to 'lock up' so-called 'lunatics' or other individuals with dangerous mental impairments." *Id.* at 15a. And second, that the "Address and Reasons of Dissent of the Minority of the Convention of the State of Pennsylvania to Their Constituents" proposed "exclud[ing] from the right to bear arms [those that posed] a 'real danger of public injury.'" *Id.* The court gave no reasons for asserting that the Founders viewed felons and the mentally ill as equivalent, or that they believed that mental illness demonstrated "unvirtuousness" characteristic of those who committed "'serious' crimes."

As the panel acknowledged, its conclusion created a circuit conflict with the en banc Sixth Circuit. *Id.* at 17a n.50 ("In *Tyler* v. *Hillsdale County Sheriff's Department*, the Sixth Circuit reached the opposite result to the one we reach here . . . ."). Mr. Beers then filed a timely petition for rehearing or rehearing en banc, which was denied on September 11, 2019. *Id.* at 34a.

REASONS FOR GRANTING THE PETITION

I. REVIEW IS NECESSARY TO RESOLVE AN INTRACTABLE CONFLICT BETWEEN THE CIRCUIT COURTS

A. The Courts of Appeals are Divided Over Whether a Person Who Has Recovered From Mental Illness May Petition to Regain His Second Amendment Rights.

The opinion below acknowledges a direct conflict with the Sixth Circuit's en banc decision in *Tyler*. Both the Sixth Circuit and the court below addressed the same question: whether, under the Second Amendment, those who have recovered from a mental illness may regain their right to possess a firearm.

1. In *Tyler*, the Sixth Circuit held that § 922(g)(4) could be unconstitutionally applied to an individual who had been committed to a mental institution but resided in a state providing no means to seek relief from the disability imposed by federal law. Mr. Tyler had gone through a devastating divorce and was involuntarily committed for a brief period of time due to severe depression. 837 F.3d at 683 (plurality opinion). Following this commitment, he demonstrated no further signs of mental illness. See *id.* at 683–84. Nevertheless, nearly thirty years later, he was barred from purchasing a firearm because the ATF had not approved Michigan's rehabilitation law as compliant under the NIAA. *Id.* at 684. Mr. Tyler thus challenged § 922(g)(4) under the Second Amendment, which, he contended, "forbids Congress from permanently prohibiting firearm possession by currently healthy individuals who were long ago committed to a mental institution." *Id.* at 685.

A majority of the Sixth Circuit agreed. The lead opinion by Judge Gibbons recognized that under *Heller*, "longstanding prohibitions on the possession of firearms by felons and the mentally ill" are "presumptively lawful." 554 U.S. at 626, 627 n.26; see also *McDonald*, 561 U.S. at 742, 786. But § 922(g)(4) "does not use the phrase 'mentally ill,' nor does it attempt to prohibit all currently mentally ill persons from firearm possession." *Tyler*, 837 F.3d at 687 (plurality opinion). Instead, Congress used "prior judicial adjudications," including past involuntary commitments, "as proxies for mental illness." *Id.* "Prior involuntary commitment is not coextensive with current mental illness," the court recognized, so "[t]o rely solely on *Heller*'s presumption . . . would amount to a judicial endorsement of Congress's power to declare,

'Once mentally ill, always so.'" *Id.* at 687–88. The court declined to adopt so broad a position.

Instead, the lead opinion analyzed Mr. Tyler's claim under the two-step framework dictated by its precedent.[4] See *id.* at 685, 689–94 (citing *United States* v. *Greeno*, 679 F.3d 510 (6th Cir. 2012)). The court examined whether the class of persons subject to the regulation—those who had been involuntarily committed—"fall[s] completely outside the reach of the Second Amendment." *Id.* at 688. It noted that no historical evidence produced by the government indicated that those who had previously been committed as a result of mental illness should be precluded from the Second Amendment right to keep or bear arms. *Id.* at 689. For instance, the government contended that "the right to bear arms was tied to the concept of a virtuous citizenry." *Id.* at 689 (quoting Appellee Br. at 18). But the government could not show that those no longer suffering from a mental illness were among the class of people the Founders would have considered unvirtuous. See *id.* The court therefore refused to read *Heller*'s dictum about the presumptive lawfulness of certain regulations as necessarily applying

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[4] A number of the circuits have adopted a similar two-pronged test. *See, e.g.*, *Binderup* v. *Att'y Gen. U.S.*, 836 F.3d 336 (3d Cir. 2016) (en banc), *cert. denied sub nom. Binderup* v. *Sessions*, 137 S. Ct. 2323 (2017); *United States* v. *Chester*, 628 F.3d 673, 680 (4th Cir. 2010); *United States* v. *Reese*, 627 F.3d 792, 800–01 (10th Cir. 2010). The first step examines whether the law at issue regulates conduct that falls within the Second Amendment's ambit, and the second step examines the government's justifications for the regulations under a heightened form of scrutiny. *E.g.*, *Tyler*, 837 F.3d at 685–86 (plurality opinion). Only the first step is at issue in the circuit split addressed here.

to "people who have been involuntarily committed." *Id.* at 690.[5]

While Judge Gibbons's lead opinion for the en banc court did not command a majority, concurring opinions by Judge Boggs, Judge Batchelder, Judge McKeague, and Judge Sutton provided sufficient votes for the result. Accordingly, the Sixth Circuit held that Mr. Tyler had raised "a viable claim under the Second Amendment" and allowed his suit to proceed "to determine the statute's constitutionality as applied to" him. *Id.* at 699.

2. By contrast, the court below held that a person who had once suffered from mental illness could raise no viable claim under the Second Amendment. Unlike the Sixth Circuit, the Third Circuit concluded that the "[p]assage of time and evidence of rehabilitation" are categorically irrelevant to an as-applied challenge to § 922(g)(4). Pet. App. 16a. In reaching this conclusion, the Third Circuit applied a similar two-part test to the one used by the Sixth Circuit. See *id.* at 6a, 8a–12a (relying on *Binderup*, 836 F.3d at 349–50). But it determined that it did not need to proceed past the first step, because—it said—Mr. Beers had not distinguished his circumstances from those traditionally barred from exercising the right to keep and bear arms.

It reasoned that "the traditional justification for disarming mentally ill individuals was that they were

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[5] Additional issues concerning this two-part framework are addressed below. *See infra* 14–17. In *Tyler*, the Sixth Circuit chose to apply intermediate scrutiny instead of strict scrutiny. It concluded that the government's goals of reducing crime and the risk of suicide did not justify the categorical bar that § 922(g)(4) placed on Mr. Tyler's ever owning a firearm. 837 F.3d at 690–99 (plurality opinion).

considered dangerous to themselves and/or to the public at large." *Id.* at 15a–16a. Without distinguishing between present and past mental illness, the court rejected the notion that the "[p]assage of time and evidence of rehabilitation" could inform the question of whether a person's Second Amendment rights should be restored. Thus, "[a]lthough Beers may now be rehabilitated, we do not consider this fact." *Id.* at 18a. Instead, the court below equated the formerly mentally ill with felons, finding that both are "unvirtuous" and irrevocably "forfeit[]" their Second Amendment rights. *Id.* at 11a, 16a. It drew this equivalency without recognizing, as the Sixth Circuit had, that mental illness is not necessarily a once-and-forever status. Based upon this flawed reasoning, the court posited a "deduction" that the justifiable deprivation of the right to bear arms to a dangerously mentally ill person could be permanent, regardless of whether the person recovered. *Id.* at 15a n.43. Thus, it concluded, there was no basis for an as-applied Second Amendment challenge to § 922(g)(4). Indeed, it specifically noted that it was splitting with the Sixth Circuit. *Id.* at 17a.

3. This Court's review of the decision below is necessary to resolve this irreconcilable split. As it stands, the Third Circuit views a person's involuntary commitment to a mental institution as a permanent forfeiture of his Second Amendment rights. If allowed to stand, the opinion below precludes any challenge to § 922(g)(4). The Sixth Circuit, by contrast, views the Second Amendment as providing an avenue for rehabilitation. Under *Tyler*, formerly committed individuals have a right to seek relief from the disability imposed by federal law. This issue is recurring, and these positions—and the geographic disparities they create—warrant this Court's resolution.

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

The conflict between the Third and Sixth Circuits also implicates a broader and deeper disagreement about how to analyze Second Amendment challenges. While a majority agreed in *Tyler* that the Second Amendment allows as-applied challenges to § 922(g)(4), the judges disagreed profoundly about the underlying analytical framework. As explained above, Judge Gibbons's lead plurality opinion applied a two-step framework, concluding that the underlying history was unclear and that the statute's blanket categorization failed intermediate scrutiny, remanding for further proceedings.

Judge Batchelder, joined by Judge Boggs, concurred in most of the judgment, but disagreed with the plurality's method, emphasizing that tiers-of-scrutiny review was inappropriate in the Second Amendment context, "a forbidden peregrination from the actual meaning of the Constitution into the realms of judicial policymaking." *Tyler,* 837 F.3d at 702 (Batchelder, J., concurring in most of the judgment). Under *Heller* and *McDonald*, Judge Batchelder contended, lower courts were bound to decide cases by looking to the history and tradition surrounding the Second Amendment. *Id.* at 703 (citing *Heller* v. *District of Columbia*, 670 F.3d 1244, 1282 (D.C. Cir. 2011) (Kavanaugh, J., dissenting)); see also *Houston* v. *New Orleans*, 675 F.3d 441, 451–52 (5th Cir.) (Elrod, J., dissenting), *opinion withdrawn and superseded on reh'g*, 682 F.3d 361 (5th Cir. 2012) (per curiam). Contrary to the panel below, however, Judge Batchelder concluded that the founding-era evidence

conclusively demonstrated that those who recovered their sanity had their rights restored.[6]

Judge Boggs—the author of the panel opinion in *Tyler*—also wrote separately to reiterate his belief that, since the majority of the court has determined not to revisit the two-step framework, strict—not intermediate—scrutiny should be applied to § 922(g)(4). *Tyler,* 837 F.3d at 702 (Boggs, J., concurring in most of the judgment). As he explained in his panel opinion, strict scrutiny is the default in virtually all other areas of law concerning fundamental rights, and this Court, by rejecting Justice Breyer's proposed "interest balancing" approach, "strongly indicated that intermediate scrutiny should *not* be employed" in the Second Amendment context. *Tyler* v. *Hillsdale Cty. Sheriff's Dep't*, 775 F.3d 308, 318, 327–28 (6th Cir. 2014), *reh'g en banc granted, opinion vacated* (Apr. 21, 2015). More fundamentally, Judge Boggs "reject[ed] intermediate scrutiny . . . because it has no basis in the Constitution." *Id.* at 328; *accord Heller* v. *District of Columbia (Heller II)*, 670 F.3d 1244, 1284 (D.C. Cir. 2011) (Kavanaugh, J., dissenting) ("Even if it were appropriate to apply one of the levels of scrutiny after *Heller*, surely it would be strict scrutiny rather than . . . intermediate scrutiny . . . .").[7]

Judge Sutton, joined by Judges Boggs, McKeague, and Kethledge, also concurred in most of the judg-

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[6] This history is discussed in detail *infra* at 19–22.

[7] *See also United States* v. *Chovan,* 735 F.3d 1127, 1145–46, 1149–52 (9th Cir. 2013) (Bea, J., concurring) ("Categorical curtailment of constitutional rights based on an individual's status requires more rigorous analysis than intermediate scrutiny."); *NRA* v. *ATF*, 714 F.3d 334, 336 (5th Cir. 2013) (Jones, J., dissental, joined by Jolly, Smith, Clement, Owen, & Elrod, JJ.) ("[T]he level of scrutiny required [for the case] must be higher than [intermediate scrutiny].").

ment. While he stopped short of rejecting tiers-of-scrutiny outright, Judge Sutton argued that this framework had no place in analyzing the blanket-classifications of § 922(g)(4). Like determinations in the First Amendment context that speech is (or is not) obscene, the question of mental illness is a matter of independent judgment and should not be subject to means-ends scrutiny. *Tyler,* 837 F.3d at 711 (Sutton, J., concurring in most of the judgment).

Here, the generalization implicit in § 922(g)(4)—that once mentally ill means always mentally ill—was demonstrably unsound. As Judge Sutton lamented, "[i]t would be one thing if the government were making this argument in 1927. See *Buck* v. *Bell*, 274 U.S. 200 (1927). But it is not. No one today, I would have thought, thinks a prior institutionalization *necessarily* equals a present mental illness." *Tyler*, 837 F.3d at 710 (Sutton, J., concurring in most of the judgment). Indeed, in no other area of law may the government paint with so broad a brush. "If there is one thing clear in American law today, it is that the government may not deny an individual a benefit, least of all a constitutional right, based on a sky-high generalization and a skin-deep assumption stemming from a long-ago diagnosis or a long-ago institutionalization." *Id.*

Judge McKeague wrote separately as well, explaining that, while he agreed with Judge Sutton's approach, he also believed, contrary to Judge Boggs, that "[i]f we continue to apply [the] two-step analysis, I fully agree with the [lead opinion's] choice of intermediate scrutiny." *Id.* at 700 (McKeague, J., concurring).

Judge White concurred with the plurality opinion, but wrote a brief concurrence because she believed Judge Batchelder and Judge Sutton "f[ound] clarity

and certainty that elude[d]" her. *Id.* (White, J., concurring). The complexity of the issues was much better resolved, she believed, through the framework of intermediate scrutiny review. *Id.*

Judge Moore dissented, joined by Chief Judge Cole, Judge Griffin, Judge Stranch, and—in part—by Judge Rogers.[8] Unlike the panel below, however, Judge Moore's approval of § 922(g)(4) did not aver that the history was conclusive; rather, she argued: (1) that the "presumptively lawful" dictum in *Heller* and *McDonald* was itself sufficient to decide the case; and (2) that, in any event, § 922(g)(4) easily satisfied intermediate scrutiny. *Id*. at 714–21 (Moore, J., dissenting).

Taken together, there are thus at least five entrenched disagreements among the lower courts: (1) whether the historical record supports the constitutionality of § 922(g)(4); (2) whether the historical record should be dispositive or (3) whether there should be some kind of means-ends review of that statute's blanket categorizations; (4) whether, if heightened scrutiny applies, § 922(g)(4) should be analyzed under strict or intermediate scrutiny; and (5), whether, if heightened scrutiny is appropriate, the blanket categorizations of § 922(g)(4) pass muster. This fundamental lack of consensus about how to analyze as-applied challenges to § 922(g)(4) underscores the importance of granting review.

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[8] Judge Rogers agreed with the plurality that history was inconclusive and that intermediate scrutiny was the appropriate, yet he agreed with the dissenters that § 922(g)(4) survived intermediate scrutiny. *Id.* at 714 (Rogers, J., concurring in part and dissenting in part).

II. THE THIRD CIRCUIT'S ANALYSIS IS GRAVELY FLAWED

Both *Heller* and *McDonald* cautioned that their reasoning did not disturb "longstanding prohibitions on the possession of firearms by felons and the mentally ill," which are "presumptively lawful." 554 U.S. at 626, 627 n.26; 561 U.S. at 786. These exceptions, however, plainly refer to those who are felons or mentally ill *in the present tense*. See *Tyler*, 837 F.3d at 707–08 (Sutton, J., concurring in most of the judgment). Thus, for example, a convicted felon who was later exonerated or pardoned would not come within this exception as he would no longer be a felon. See*, e.g.*, *Binderup* v. *Att'y Gen. U.S.*, 836 F.3d 336, 345 (3d Cir. 2016) (en banc) (Ambro, J.), *cert. denied sub nom. Binderup* v. *Sessions*, 137 S. Ct. 2323 (2017).

The panel below, however, passed over this Court's carefully chosen invocation of the present tense, concluding instead that the historical underpinnings of the right to keep and bear arms made Mr. Beers's recovery *per se* irrelevant. It claimed its hands were tied in this regard by *Heller* and *McDonald*, which required a "very circumscribed, historical inquiry": That inquiry, the Third Circuit said, revealed that "there is no historical support for [the] restoration of Second Amendment rights," regardless of the "passage of time or rehabilitation." Pet. App. 17a–18a. "Although Beers may now be rehabilitated, we do not consider this fact . . . ." *Id.* at 18a.

This "historical inquiry," however, was pure *ipse dixit*. Nothing in the opinion even attempted to show that our forebears believed that mental illness was viewed as inevitably permanent or that prior involuntary commitment warranted forever stripping someone of his or her fundamental rights. *Id*. Rather, the panel's cursory historical analysis mentioned only

two things: First, that, while no founding-era laws sought to regulate firearm possession by the mentally ill, "judicial officials were authorized to 'lock up' so-called 'lunatics' or other individuals with dangerous mental impairments." *Id.* at 15a. And second, that the "Address and Reasons of Dissent of the Minority of the Convention of the State of Pennsylvania to Their Constituents" proposed "exclud[ing] from the right to bear arms [those that posed] a 'real danger of public injury.'" *Id.*

These points support the panel's conclusion that traditional understandings of the right to keep and bear arms did not extend to those who were presently dangerously mentally ill. But they in no way support the panel's "deduction," *id.* at n.43, that such deprivations could be permanent or that recovery was irrelevant.

Quite the opposite: Founding-era limitations of gun rights turned on "present danger[ousness]." *Binderup*, 836 F.3d at 368 (Hardiman, J., concurring in part and concurring in the judgments). And one searches the historical record in vain for the harsh and punitive attitude towards mental illness that the panel attributed to the founding generation.

In reality, colonial- and founding-era America was "startlingly humane" and "compassionate" toward the mentally ill. Clayton E. Cramer, *My Brother Ron: A Personal and Social History of Deinstitutionalization of the Mentally Ill* 19–20 (2012). And "by the eighteenth century [Colonial Americans] regarded mental illness as analogous to physical ailments," recognizing that even serious cases were often curable. *Id.* at 25.

For example, a 1751 petition to the Pennsylvania House of Representatives seeking funding for what

would become the colony's first public hospital noted that "the [n]umber of [l]unaticks, or [p]ersons distemper[e]d in [m]ind, and deprived of their rational [f]aculties hath greatly increased." Benjamin Franklin & David Hall, *Some Account of the Pennsylvania Hospital* 4 (1754). The petition argued that a public hospital could ameliorate this crisis because "it ha[d] been found, by the [e]xperience of many [y]ears, that above two [t]hirds of the mad [p]eople received into Bethlehem [h]ospital [in England], and there treated properly, have been perfectly cured." *Id.* Similarly, when Virginia "opened the first American institution for the mentally ill in 1773" it "designated it as a hospital, not an asylum . . . . [T]he goal of a hospital was to cure the patient, not simply hold him for his own safety." Cramer*, supra*, at 26.

These understandings were deeply embedded in founding-era legal doctrine. "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 in most of the judgment) (citing 1 Frederick Pollock & Frederic William Maitland, *The History of English Law Before the Time of Edward I* 507–08 (1898)). Thus, one leading founding-era treatise on mental health law noted that "[a] lunatic is never to be looked upon as irrecoverable." Highmore, *supra*, at 73. Blackstone likewise explained that "the law always imagines, that the[] accidental misfortunes [causing the lunacy] may be removed" and rights restored. 1 Blackstone, *supra*, at *304–05. The sole historical source regarding mental illness that the panel relied upon (albeit indirectly, through a law review article)—Henry Care's *English Liberties, or the Free-born Subject's Inheritance*—states *on the same page* relied upon by the panel that

"[a lunatic] is to be kept . . . locked up only so long as such lunacy or disorder shall continue, and no longer." Care, *supra*, at 329.

The Third Circuit said nothing about this historical understanding; instead it compared those who had been involuntarily committed to felons, concluding that "neither passage of time nor evidence of rehabilitation 'can restore Second Amendment rights that were forfeited.'" Pet. App. 16a (quoting *Binderup*, 836 F.3d at 350). But this assumes an equivalence between felons and the mentally ill utterly foreign to the founding generation.

Then, as now, a felon who had been rehabilitated—*i.e.*, was no longer dangerous—was still a felon; a mentally ill person who had been rehabilitated was no longer regarded as mentally ill.[9] Further, an accused felon could be convicted only if he had the necessary evil intent. See, *e.g.*, 4 William Blackstone, *Commentaries* *20–21. And this intent was the very thing those with serious mental illness could not

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[9] The common law recognized that mental illness was sometimes episodic. *See* Henry F. Buswell, *The Law of Insanity in its Application to the Civil Rights and Capacities and Criminal Responsibility of the Citizen* 1 & n.3 (1885). In fact, the reason some kinds of mental illness were called "lunacy" was because, prior to the enlightenment, periodic symptoms were thought (incorrectly) to be related to the changing phases of the moon. *Id.* at 1 n.1. The common law dealt with this reality in a practical manner: "As the law presumes that every man is sane until the contrary is proved, so it presumes that insanity, having been once shown to exist, continues until the contrary is made to appear, and this whether a permanent recovery or merely lucid interval is alleged to have occurred." *Id.* at 209–10. Notably, however, "[w]hen insanity appears as the result of some special and temporary cause, and experience shows that the cause being removed the effect will probably disappear, the presumption [that insanity continues] does not prevail." *Id.* at 213.

have: "[I]f one that is *Non compos Mentis* or an Idiot kill a Man, this is no Felony, for they have not Knowledge of Good and Evil, nor can have a felonious Intent, nor a Will or Mind to do Harm." Michael Dalton, *The Country Justice: Containing the Practice, Duty, and Power of the Justices of the Peace, as well as in and out of their Sessions* 334 (1746). Nor did one "forfeit" any rights through involuntary commitment. Then, as now, to "forfeit" something was "[t]o lose or render [it] confiscable, *by some fault, offense or crime*." *Forfeit*, Webster's American Dictionary of the English Language (1828) (emphasis added). Again, founding-era common law did not blame people for mental illness—rather, like other illnesses, "lunacy," "mania," and "distraction" were viewed as "misfortunes," not faults or evidence that someone was "unvirtuous."

Modern medicine has confirmed the intuitions of those old common-law jurists. As the government itself has noted: "People with mental health problems can get better and many recover completely." U.S. Dep't of Health & Human Servs., *Mental Health Myths and Facts* (Aug. 29, 2017), https://www.mentalhealth.gov/basics/mental-health-myths-facts. This is especially true when the mental health struggle occurred during someone's teenage years. As this Court has noted, "developments in psychology and brain science continue to show fundamental differences between juvenile and adult minds. . . . Juveniles are more capable of change than are adults." *Graham* v. *Florida*, 560 U.S. 48, 68 (2010).

Contemporary legal doctrine also continues to protect the rights of those who have struggled with mental illness. Over the last several decades, "[c]ase after case [has] lament[ed] (and correct[ed]) the unfair generalizations that once applied to individuals with

mental health challenges." *Tyler*, 837 F.3d at 712 (Sutton, J., concurring in most of the judgment) (collecting examples); see also *O'Connor* v. *Donaldson*, 422 U.S. 563, 576 (1975) ("[A] State cannot constitutionally confine without more a nondangerous individual who is capable of surviving safely in freedom by himself or with the help of willing and responsible family members or friends."); *Addington* v. *Texas*, 441 U.S. 418 (1979); *Foucha* v. *Louisiana*, 504 U.S. 71, 78 (1992).

The import here is straightforward: The rights of a mentally healthy, law-abiding adult cannot be stripped "based on a sky-high generalization and a skin-deep assumption stemming from a long-ago diagnosis or a long-ago institutionalization." *Tyler*, 837 F.3d at 710 (Sutton, J., concurring in most of the judgment). Unless corrected by this Court, the panel's faulty analysis will unjustly circumscribe the rights of those in the Third Circuit and will sow further confusion about the meaning of the Second Amendment.

III. THIS CASE IS NOT MOOT

On July 1, 2019, only eleven days after the panel below issued its opinion, the ATF released a "Certification of Qualifying State Relief from Disabilities Program" for the first time approving Pennsylvania's relief scheme under the NIAA. Cf. 34 U.S.C. §§ 40911(2)(A), 40915.[10] It is our understanding that Mr. Beers is covered by this policy change and is now licensed to possess a firearm and has obtained one.

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[10] Respondents informed Mr. Beers's counsel of this development before Mr. Beers filed his petition for en banc review in the Third Circuit. The ATF's form is not part of the record in this case.

Any suggestion that ATF's approval of Pennsylvania's recovery program mooted this case would be misplaced. The timing of ATF's approval of Pennsylvania's recovery program—a mere eleven days after the Third Circuit's opinion created a circuit split—creates a textbook example of voluntary cessation and appears intended to insulate the Third Circuit's opinion from review, particularly since there have been no changes to Pennsylvania's rehabilitation law in recent years.

It is blackletter law that "[a] defendant's voluntary cessation of allegedly unlawful conduct ordinarily does not suffice to moot a case." *Friends of the Earth, Inc.* v. *Laidlaw Envtl. Serv. (TOC), Inc.*, 528 U.S. 167, 174 (2000). Indeed, defendants claiming that their acts have mooted a case bear a "'heavy burden of persua[ding]' the court that the challenged conduct cannot reasonably be expected to start up again." *Id.* at 189 (quoting *United States* v. *Concentrated Phosphate Export Ass'n, Inc.*, 393 U.S. 199, 203 (1968)). Respondent cannot shoulder that burden here. For starters, ATF maintains the discretion to rescind its approval of a state rehabilitation program. See Congressional Research Serv., *Gun Control: National Instant Criminal Background Check Systems (NICS) Operations and Related Legislation* (Oct. 17, 2019), Appx. D, https://crsreports.congress.gov/product/pdf/R/R45970 (explaining that Connecticut's certification "is no longer considered qualified or approved by ATF due to 2013 changes in the state's mental health law").

Moreover, federal and state laws concerning mental illness and guns are subject to extensive public and governmental ferment. For example, the President has recently emphasized his belief that there is an acute need to change federal policies concerning

possession of firearms by those with mental illness.[11] Should any policy change in this area fail to differentiate between individuals *presently* suffering from a dangerous mental illness and those who were *previously* involuntarily committed, Mr. Beers would be in the same position as before the government's voluntary cessation. Because it is not clear that ATF's approval of Pennsylvania's law is permanent, the Respondents cannot seek to insulate this case from review under the guise of mootness.[12]

Additionally, that Mr. Beers obtained his firearm privileges after the ATF approved Pennsylvania's rehabilitation scheme has no bearing on the mootness issue. As noted, there is no guarantee that ATF's approval is permanent. But, as long as that approval is in place, the plain terms of § 40915 mean that a Pennsylvania court's order finding that Mr. Beers has been rehabilitated is sufficient to relieve him of any disability under federal law. His subsequent successful application for a firearm license and purchase of a firearm are hence not independent factors; rather, the government's unilateral actions seeking to insulate this case from review are the sole cause for any claim that this case is moot.

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[11] *See, e.g.*, Matthew Choi, *'We Have to Start Building Institutions Again': Trump Again Links Guns and Mental Health*, Politico (Aug. 15, 2019), https://www.politico.com/story/2019/08/15/trump-mental-health-background-checks-gun-violence-1464977; Associated Press, *The Latest: Trump Focuses on Mental Illness, Not Gun Control* (Aug. 16, 2019), https://apnews.com/ee17d07cdda74eeabc7f6d572cb8e6f8.

[12] If Respondents do contend that the government's acts do not amount to voluntary cessation, the Court should hold this petition pending its resolution of similar issues in *New York State Rifle & Pistol Association Inc.* v. *City of New York* (No. 18-280).

More fundamentally, the privileges Mr. Beers now has he possesses only as a matter of governmental grace, *not* constitutional right. Under the Third Circuit's holding, Mr. Beers is now permanently outside of the protection the Second Amendment. Deriving someone of a fundamental right is a real and ongoing injury, and, all else aside, this case therefore continues to present a live controversy.

Finally, even if the Court concludes that Respondents mooted this case through actions taken after the decision below was rendered, the Court should vacate the lower court's opinion under *Munsingwear*. See *United States* v. *Munsingwear, Inc.*, 340 U.S. 36, 39 (1950) ("The established practice of the Court in dealing with a civil case from a court in the federal system which has become moot while on its way here or pending our decision on the merits is to reverse or vacate the judgment below and remand with a direction to dismiss.").

CONCLUSION

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

Respectfully submitted,

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