No. 20-819

In the Supreme Court of the United States

DUY T. MAI, PETITIONER

v.

UNITED STATES OF AMERICA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

Whether 18 U.S.C. 922(g)(4), the federal statute that forbids possession of firearms by a person who "has been committed to a mental institution," violates the Second Amendment as applied to petitioner.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 14-42) is reported at 952 F.3d 1106. The order of the court of appeals denying rehearing (Pet. App. 43-92) is reported at 974 F.3d 1082. The order of the district court (Pet. App. 1-13) is not published in the Federal Supplement but is available at 2018 WL 784582.

JURISDICTION

The judgment of the court of appeals was entered on March 11, 2020. A petition for rehearing was denied on September 10, 2020 (Pet. App. 46). The petition for a writ of certiorari was filed on December 9, 2020. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. In the Gun Control Act of 1968, Pub. L. No. 90-618, 82 Stat. 1213, Congress enacted restrictions on the

possession of firearms by certain classes of individuals. One of those restrictions makes it unlawful for a person "who has been adjudicated as a mental defective or who has been committed to a mental institution" to ship, transport, possess, or receive any firearm or ammunition in or affecting interstate or foreign commerce. 18 U.S.C. 922(g)(4).

Previously, a person could obtain relief from the disability in Section 922(g)(4) by filing an application with the Attorney General and by showing to the Attorney General's satisfaction "that the circumstances regarding the disability, and the applicant's record and reputation, are such that the applicant will not be likely to act in a manner dangerous to public safety and that the granting of the relief would not be contrary to the public interest." 18 U.S.C. 925(c). Every year since 1992, however, Congress has enacted an appropriations bar prohibiting the federal government from investigating or acting upon any such application for relief. See *Logan* v. *United States*, 552 U.S. 23, 28 n.1 (2007).

A person may nevertheless obtain relief from the disability in Section 922(g)(4) through state-run "relief from disabilities program[s]." 34 U.S.C. 40915(a). A state program must satisfy certain criteria in order to receive authorization to lift the disability imposed by Section 922(g)(4). Among other requirements, the program must provide relief where "the circumstances regarding the disabilities[,] * * * and the person's record and reputation, are such that the person will not be likely to act in a manner dangerous to public safety and that the granting of the relief would not be contrary to the public interest." 34 U.S.C. 40915(a)(2). Congress has provided federal grants to help States maintain such programs. 34 U.S.C. 40913(b)(7). At present, 34

States have established qualifying programs. See William J. Krouse, Cong. Research Serv., R45970, *Gun Control: National Instant Criminal Background Check System (NICS) Operations and Related Legislation* App. D, at 43-44 (Oct. 17, 2019).

2. Petitioner was involuntarily committed to a mental institution in Washington in 1999, after a state court found him to be both mentally ill and dangerous. Pet. App. 18. That commitment expired by August 2000, when petitioner turned eighteen. *Ibid.* Petitioner contends (Pet. 12) that he has not had an episode of clinical depression since at least 2010.

As a result of the involuntary commitment, both federal and Washington state law precluded petitioner from possessing a firearm. Pet. App. 17-18. In 2014, a Washington state court granted petitioner relief from the state firearm disability. *Id.* at 18. But Washington's program does not constitute a qualifying relief-from-disabilities program under federal law, because "the federal standard is more stringent than the Washington standard." *Id.* at 23. Petitioner's federal disqualification thus remains in place. *Ibid.*

In 2017, petitioner filed this suit in the Western District of Washington, claiming that Section 922(g)(4) violates the Second Amendment as applied to him. Pet. App. 3. The district court granted the government's motion to dismiss petitioner's complaint. *Id.* at 1-13. As relevant here, the court explained that "the mentally ill" have been "historically barred from Second Amendment protections." *Id.* at 9. The court further explained that "numerous studies * * * indicate that those with a history of mental illness bear a significant additional risk of gun violence * * * both against others as well as against themselves." *Id.* at 11.

3. The court of appeals affirmed. Pet. App. 14-42.

The court of appeals explained that, under its precedents, it was required to ask "whether the challenged law burdens conduct protected by the Second Amendment" and, if so, to "apply an appropriate level of scrutiny." Pet. App. 25 (citation and internal quotation marks omitted). The court acknowledged that "[t]he government ha[d] presented a strong argument * * * that § 922(g)(4) does not burden Second Amendment rights." *Id.* at 27. It noted, for example, that "§ 922(g)(4) ha[s] been on the books for decades" and that "historical evidence supports the view that society did not entrust the mentally ill with the responsibility of bearing arms." *Ibid.* The court nonetheless "assume[d], without deciding, that § 922(g)(4), as applied to [petitioner], burdens Second Amendment rights." *Id.* at 28.

The court of appeals then held that intermediate scrutiny, rather than strict scrutiny, provides the proper standard under which to evaluate petitioner's challenge. Pet. App. 28-30. Applying that standard, the court explained that the government had compelling interests in "preventing crime and preventing suicide" and that Section 922(g)(4) was sufficiently tailored to those objectives. *Id.* at 30-31. The court discussed "scientific evidence" that "shows an increased risk of violence for those who have been released from involuntary commitment." *Id.* at 33.

4. The court of appeals denied rehearing en banc. Pet. App. 43-92. Multiple judges dissented from the denial of rehearing en banc: Judge Collins, *id.* at 47; Judge Bumatay (joined in full by Judge VanDyke and in part by Judges Ikuta, Bade, Hunsaker, Bennett,

Collins, and Bress), *id.* at 47-73; and Judge VanDyke (joined by Judge Bumatay), *id.* at 74-92.

ARGUMENT

Petitioner renews his contention (Pet. 16-36) that 18 U.S.C. 922(g)(4) violates the Second Amendment as applied to him. The court of appeals correctly rejected that contention, and its decision does not conflict with any decision of this Court or any other court of appeals. This case also would be a poor vehicle for considering the question presented. Further review is unwarranted.

1. In *District of Columbia* v. *Heller*, 554 U.S. 570 (2008), this Court held that the Second Amendment protects an individual right to possess firearms for traditionally lawful purposes such as self-defense. The Court explained, however, that "the right secured by the Second Amendment is not unlimited," and it cautioned that "nothing in [its] opinion should be taken to cast doubt on longstanding prohibitions on the possession of firearms by * * * the mentally ill." *Id.* at 626. In *McDonald* v. *City of Chicago*, 561 U.S. 742 (2010), a plurality of the Court again emphasized that nothing in *Heller* casts doubt on the constitutionality of "prohibitions on the possession of firearms by * * * the mentally ill." *Id.* at 786 (citation omitted).

The Court's assurances in *Heller* and *McDonald* have a sound basis in history. There is a long tradition of preventing mentally ill persons from possessing firearms. See Glenn Harlan Reynolds, *A Critical Guide to the Second Amendment*, 62 Tenn. L. Rev. 461, 480 (1995) ("[F]elons, children, and the insane were excluded from the right to arms."); Robert Dowlut, *The Right to Arms: Does the Constitution or the Predilection of Judges Reign?*, 36 Okla. L. Rev. 65, 96 (1983) ("Colonial and

English societies of the eighteenth century, as well as their modern counterparts, have excluded infants, idiots, lunatics, and felons [from the right to keep and bear arms]."); Thomas M. Cooley, *A Treatise on the Constitutional Limitations Which Rest Upon the Legislative Power of the States of the American Union* 28-29 (1868) (explaining that the term "the *people*" has traditionally been interpreted in certain contexts to exclude "the idiot, the lunatic, and the felon").

The court of appeals also correctly determined that Section 922(g)(4) satisfies intermediate scrutiny because it serves the government's compelling interests in "protecting the community from crime," *Schall* v. *Martin*, 467 U.S. 253, 264 (1984), and "preventing suicide," *Washington* v. *Glucksberg*, 521 U.S. 702, 730-735 (1997). Congress enacted Section 922(g)(4) after a multi-year investigation that revealed "a serious problem of firearms misuse in the United States." S. Rep. No. 1866, 89th Cong., 2d Sess. 3, 53 (1966). The investigation revealed that guns were used in over half of all suicides, S. Rep. No. 1340, 88th Cong., 2d Sess. 3 (1964); that, "[i]n 1966, 6,855 Americans were murdered by gun [whereas] 10,407 suicides and 2,600 fatal accidents involved firearms," 114 Cong. Rec. 21,774 (1968) (statement of Rep. Rosenthal); and that "[i]n the [preceding] decade, 92,747 Americans took their own lives with a firearm, reflecting the fact that the surest and easiest way to commit suicide is with a gun," *id.* at 21,811 (statement of Rep. Schwengel).

Further, when Congress subsequently enacted the NICS Improvement Amendments Act of 2007, Pub. L. No. 110-180, § 103(a)(1), 121 Stat. 2567, it found that individuals with disqualifying mental health histories were continuing to acquire and misuse firearms. In

April 2007, "a student with a history of mental illness at the Virginia Polytechnic Institute and State University shot to death 32 students and faculty members, wounded 17 more, and then took his own life." § 2(9), 121 Stat. 2560. "In spite of a proven history of mental illness, the shooter was able to purchase the two firearms used in the shooting," which was "the deadliest campus shooting in United States history." *Ibid.*; see also § 2(8), 121 Stat. at 2560 (describing 2002 shooting where "[t]he man who committed [the] double murder had a prior disqualifying mental health commitment," but nonetheless passed a background check).

Empirical evidence confirms that Congress acted constitutionally in deciding that persons who have been involuntarily committed should not be trusted with firearms. Pet. App. 33. Research suggests that persons who suffer from significant mental illness pose an increased risk of harm to themselves or others. See Seena Fazel & Martin Grann, *The Population Impact of Severe Mental Illness on Violent* Crime, 163 Am. J. Psychiatry 1397, 1401 (2006); E. Clare Harris & Brian Barraclough, *Suicide as an Outcome for Mental Disorders: A Meta-Analysis*, 170 Brit. J. Psychiatry 205, 218-219 (1997); Virginia Aldigé Hiday, *Civil Commitment: A Review of Empirical Research*, 6 Behav. Sci. & L. 15, 25 (Winter 1988). Research also suggests that firearms are much more likely to cause injury or death than other available weapons. As one commentator observed, "[a] suicide attempt with a firearm rarely affords a second chance," while "[a]ttempts involving drugs or cutting, which account for more than 90% of all suicidal acts, prove fatal far less often." Matthew Miller & David Hemenway, *Guns and Suicide in the United States*, 359 New Eng. J. Med. 989, 990 (2008). As a result, firearms

account for approximately half of all suicide deaths each year. See Nat'l Ctr. for Health Statistics, Ctr. for Disease Control & Prevention, *Suicide and Self-Inflicted Injury*.

Petitioner errs in contending (Pet. 30-31) that the court of appeals should have analyzed his individual circumstances, rather than the category of mentally ill persons more broadly. In *Heller*, this Court indicated that the Second Amendment permits categorical bans on the possession of firearms by "the mentally ill." 554 U.S. at 626. Further, petitioner cites no historical source suggesting that individuals with a history of mental illness are entitled to individualized exemptions from firearm restrictions. See Pet. 30-31. In any event, petitioner's individual circumstances, even if relevant, would not change the result in this case. Petitioner's commitment lasted for months and rested on a finding that petitioner's behavior posed a serious risk of harm to others. C.A. E.R. 26.

2. The court of appeals' decision does not conflict with the decision of any other court of appeals. One court of appeals has rejected a constitutional challenge to Section 922(g)(4) in a published opinion subsequently vacated as moot, and two courts of appeals have rejected similar challenges in unpublished opinions. See *Beers* v. *Attorney General United States*, 927 F.3d 150 (3d Cir. 2019), vacated as moot, 140 S. Ct. 2758 (2020); *Heller* v. *Bedford Central Sch. Dist.*, 665 Fed. Appx. 49, 54 (2d Cir. 2016); *United States* v. *McRobie*, No. 08-4632, 2009 WL 82715 (4th Cir. Jan. 14, 2009) (per curiam). No court of appeals has held that an individual who has been involuntarily committed to a mental institution has a right under the Second Amendment to possess a firearm.

Petitioner errs in contending (Pet. 25-29) that the decision below conflicts with the Sixth Circuit's decision in *Tyler* v. *Hillsdale County Sheriff's Department*, 837 F.3d 678 (2016) (en banc). No opinion in *Tyler* commanded a majority of the court, but, according to the lead opinion's count, a majority of the judges concluded that (1) the government had not yet established the constitutionality of Section 922(g)(4) as applied in that case, (2) the government could establish the constitutionality of Section 922(g)(4) by introducing "additional evidence" that a ban on possession of firearms by a person committed to a mental institution satisfied "intermediate scrutiny," and (3) it was necessary to remand the case so that the district court could apply that standard. *Id.* at 699 (opinion of Gibbons, J.); see *id.* at 699-700 (McKeague, J., concurring); *id.* at 700-702 (White, J., concurring); *id.* at 702 (Boggs, J., concurring in most of the judgment); *id.* at 707 (Batchelder, J., concurring in most of the judgment); *id.* at 714 (Sutton, J., concurring in most of the judgment); *ibid.* (Rogers, J., dissenting); *id.* at 721 (Moore, J., dissenting). On remand, the plaintiff voluntarily dismissed his suit. See Stipulated Order of Dismissal, *Tyler* v. *Hillsdale County Sheriff's Department*, No. 12-cv-523, (W.D. Mich. Aug. 7, 2017). The Sixth Circuit thus never reached any definitive conclusion about the constitutionality of Section 922(g)(4) as applied in that case.

Petitioner also errs in contending (Pet. 16-25) that this Court should grant review because the courts of appeals have used different analytical frameworks in addressing challenges to the disqualifications in Section 922(g). Almost all the cases that petitioner cites involve provisions other than Section 922(g)(4). See Pet. 16-17 (citing cases involving disqualifications in "§ 922(g)(1),"

"§ 922(g)(3)," "§ 922(g)(5)," "§ 922(g)(8)," "§ 922(g)(9)"). In addition, this case does not provide an appropriate vehicle for resolving this issue because petitioner has not shown that his challenge would succeed under *any* circuit's approach. He argues (Pet. 16-25) that courts have disagreed about whether to analyze Second Amendment challenges by looking to history and tradition or by applying levels of scrutiny, but as described above, his challenge would fail under either approach.

3. At a minimum, the question of Section 922(g)(4)'s constitutionality warrants further percolation. The court below is the only court of appeals that has definitively addressed the question whether the provision complies with the Second Amendment. As noted earlier, the Third Circuit's decision in *Beers* was vacated as moot, and the Sixth Circuit failed to reach a definitive conclusion in *Tyler*. See pp. 8-9, *supra*. "[F]urther percolation may assist [this Court's] review of this issue of first impression." *Box* v. *Planned Parenthood of Indiana & Kentucky, Inc.*, 139 S. Ct. 1780, 1784 (2019) (Thomas, J., concurring); see *Arizona* v. *Evans*, 514 U.S. 1, 23 n.1 (1995) (Ginsburg, J., dissenting) ("We have in many instances recognized that when frontier legal problems are presented, periods of 'percolation' in, and diverse opinions from, state and federal appellate courts may yield a better informed and more enduring final pronouncement by this Court.").

This case also would be a poor vehicle for resolving the constitutionality of Section 922(g)(4). The case raises fact-bound disputes about petitioner's individual circumstances; for example, petitioner himself states that "the record conflicts on whether [he] ever threatened himself." Pet. App. 31 n.4. Further, petitioner seeks to raise arguments that he forfeited below. Although

petitioner turned eighteen years old before the end of his commitment, he argues (Pet. 34-36) that the court of appeals should have considered his status as a juvenile at the time his commitment began. Petitioner, however, failed to develop that contention in the district court, see Gov't C.A. Br. 15, and the court of appeals accordingly did not address it. These factual and procedural issues further demonstrate that the Court's review is not warranted in this case.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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MARCH 2021