

## NOTES

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# WHO HAS THE RIGHT?: ANALYSIS OF SECOND AMENDMENT CHALLENGES TO 18 U.S.C. § 922(G)(4)

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*“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.”<sup>1</sup>*

### INTRODUCTION

On December 28, 2005, Bradley Beers told his mother he had placed a gun in his mouth, had nothing to live for, and that he was going to kill himself.<sup>2</sup> A college student at the time, Beers was armed with both a musket he used for Civil War reenactments and with the determination to end his life.<sup>3</sup> Fortunately, he never had the chance. Before tragedy struck, Beers’s mother intervened and brought him to a local hospital for a mental health evaluation.<sup>4</sup> Beers was involuntarily committed under Pennsylvania law after a physician found him depressed and suicidal, such that “inpatient treatment was needed for his safety.”<sup>5</sup> His involuntary commitment was extended twice in the months that followed, and he was deemed to be “severely mentally disabled and in need of treatment” at two separate court proceedings.<sup>6</sup> However, soon after Beers was released, he attempted to purchase a firearm yet

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1 U.S. CONST. amend. II.

2 *Beers v. Lynch*, No. 2:16-cv-6440, 2017 U.S. Dist. LEXIS 166492, at \*3–4 (E.D. Pa. Sept. 5, 2017).

3 *Id.* at \*4.

4 *Id.*

5 *Id.*

6 Brief for the Appellees at 6–7, *Beers v. Att’y Gen.*, 927 F.3d 150 (3d Cir. 2019) (No. 17-3010).

again.<sup>7</sup> While Beers perhaps considered himself rehabilitated and deserving of a second chance to possess a firearm, his constitutional right to exercise that privilege is far from certain.

When the Second Amendment to the United States Constitution was ratified in 1791,<sup>8</sup> its ratifiers perhaps had not considered its specific implications for individuals such as Beers. Rather, its provisions likely reflected the sentiment of the times—prevailing distrust of standing armies and military rule.<sup>9</sup> At that time, “[n]either hunting nor self-protection, individually speaking,” seemed to prompt the nation’s Founders to cement the right to keep and bear arms.<sup>10</sup> Instead, the Amendment responded to the fear that Congress possessed too much power to build a national standing army and thus to disarm state militias.<sup>11</sup> Nonetheless, the right to bear arms in the Founding era was always premised on certain qualifications, namely a person’s status as white, male, able-bodied, and typically of certain religious affiliation.<sup>12</sup> As such, selective disarmament continued even after the Amendment’s ratification, preventing Native Americans, free and enslaved African Americans, and others from keeping or bearing arms.<sup>13</sup> These restrictions were grounded on the notion that certain individuals throughout history have been considered “too dangerous, too radical, or too unpredictable to have weaponry.”<sup>14</sup>

While many scholars have historically viewed the Second Amendment as providing a collective right, particularly in the context of protecting state militias,<sup>15</sup> judicial interpretation of the Second Amendment has shifted in recent years. In 2008, the Supreme Court held for the first time in *District of Columbia v. Heller* that the Second Amendment protects an individual right to bear arms, unattached to organized militia service.<sup>16</sup> Justice Scalia, writing for the majority, concluded that the prevention of tyranny, through state militias, was only one motivation behind the ratification of the Amendment.<sup>17</sup> Indeed, Justice Scalia thought, the Amendment was also understood

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7 *Id.* at 7.

8 *Right to Bear Arms*, NAT’L CONST. CTR., <https://constitutioncenter.org/interactive-constitution/amendment/amendment-ii> (last visited Jan. 11, 2021).

9 See *Burton v. Sills*, 248 A.2d 521, 526 (N.J. 1968); Daniel E. Feld, Annotation, *Federal Constitutional Right to Bear Arms*, 37 A.L.R. Fed. 696 § 2 (1978).

10 Meg Penrose, *A Return to the States’ Rights Model: Amending the Constitution’s Most Controversial and Misunderstood Provision*, 46 CONN. L. REV. 1463, 1473 (2014).

11 *District of Columbia v. Heller*, 554 U.S. 570, 637 (2008) (Stevens, J., dissenting).

12 Penrose, *supra* note 10, at 1473.

13 *Id.* at 1473–74.

14 *Id.* at 1474.

15 *Id.* at 1481–82.

16 *Heller*, 554 U.S. at 582–84; see also Penrose, *supra* note 10, at 1476.

17 *Heller*, 554 U.S. at 599; see also Spenser F. Powell, Note, *Constitutional Law—The Second Amendment—The Constitutionality of Prohibiting Firearm Possession by Individuals Previously Committed to a Mental Institution*, 84 TENN. L. REV. 561, 570 (2017).

at the time of ratification as codifying a “pre-existing right” to bear arms for self-defense.<sup>18</sup>

Nonetheless, the *Heller* Court acknowledged that even an individual right to bear arms is not unlimited.<sup>19</sup> In fact, Justice Scalia wrote that “nothing in [*Heller*] should be taken to cast doubt” on the constitutionality of “longstanding prohibitions” on firearm ownership for certain categories of people, including felons and the mentally ill.<sup>20</sup> While Scalia deemed those particular prohibitions presumptively lawful, the *Heller* Court declined to define the full scope of the Second Amendment right,<sup>21</sup> leaving unanswered questions for lower courts.<sup>22</sup> Instead, the *Heller* Court merely recognized the right of “law-abiding, responsible citizens” to own firearms, without deciding who falls within the confines of that classification.<sup>23</sup>

One notable question that remains after *Heller* is whether “presumptively lawful” prohibitions on firearm ownership,<sup>24</sup> specifically for those considered mentally ill, can include lifetime bans. As the law stands today, individuals who have been “adjudicated as a mental defective or who [have] been committed to a mental institution” at any time are categorically barred from possessing firearms.<sup>25</sup> That prohibition, codified at 18 U.S.C. § 922(g)(4), has given rise to a circuit split in the past five years, with the Third, Sixth, and Ninth Circuits reaching different conclusions on its constitutionality. In each case, the plaintiff argued that, at least as applied to him, § 922(g)(4) violates the Second Amendment.<sup>26</sup> While the Third and Ninth Circuits rejected the challenges,<sup>27</sup> the Sixth Circuit remanded the case for further proceedings, holding that the government had failed to meet its burden of showing that a lifetime ban on firearm possession reasonably fit the statute’s goals.<sup>28</sup> Though ultimately reaching different conclusions, each circuit applied a two-part test to evaluate the challenges.<sup>29</sup> First, the court determines “whether the challenged law burdens conduct protected by the Second Amendment.”<sup>30</sup> If it does, courts proceed to the second step and “apply an appro-

18 *Heller*, 554 U.S. at 603; *see also* Powell, *supra* note 17, at 570.

19 *Heller*, 554 U.S. at 626; *see also* Powell, *supra* note 17, at 570.

20 *Heller*, 554 U.S. at 626.

21 *Id.*

22 *See, e.g.*, *Tyler v. Hillsdale Cnty. Sheriff’s Dep’t (Tyler I)*, 775 F.3d 308, 316 (6th Cir. 2014), *rev’d en banc*, 837 F.3d 678 (6th Cir. 2016) (*en banc*).

23 *See Heller*, 554 U.S. at 635.

24 *Id.* at 627 n.26.

25 18 U.S.C. § 922(g)(4) (2018).

26 *Beers v. Att’y Gen.*, 927 F.3d 150, 152 (3d Cir. 2019); *Tyler v. Hillsdale Cnty. Sheriff’s Dep’t (Tyler II)*, 837 F.3d 678, 681 (6th Cir. 2016); *Mai v. United States*, 952 F.3d 1106, 1109 (9th Cir. 2020).

27 *Beers*, 927 F.3d at 159; *Mai*, 952 F.3d at 1121.

28 *Tyler II*, 837 F.3d at 699.

29 *See id.* at 685–86; *Beers*, 927 F.3d at 153; *Mai*, 952 F.3d at 1113.

30 *Mai*, 952 F.3d at 1113 (quoting *United States v. Torres*, 911 F.3d 1253, 1258 (9th Cir. 2019)).

priate level of [heightened] scrutiny.”<sup>31</sup> However, if the opposite conclusion is reached at step one, the inquiry is over and the provision is constitutional.

This Note argues that courts should decide challenges to § 922(g)(4) solely under the first step of the test, based on the notion that individuals subject to § 922(g)(4) fall outside the scope of Second Amendment protection. Thus, under the two-part test, the law would not burden conduct protected by the Amendment, rendering step two unnecessary for at least the vast majority of § 922(g)(4) challenges. This Note provides three independent ways in which courts could deem § 922(g)(4) outside the purview of the Second Amendment, and each should be considered a permissible approach.

The first Part of this Note provides background information on the relationship between mental illness and violence in the United States, which established the rationale for the enactment of § 922(g)(4). Part II then considers the text of § 922(g)(4), including opportunities for relief from the firearm prohibition. Next, Part III discusses the implications of recent Supreme Court Second Amendment jurisprudence for § 922(g)(4), which has provided the backdrop for lower court analysis. Part IV then summarizes recent § 922(g)(4) decisions across three circuit courts, in which they interpreted the relevant Supreme Court jurisprudence and offered their own analyses. Finally, Part V provides three alternative approaches that courts could use when evaluating challenges to § 922(g)(4), based on the framework provided in the recent circuit court holdings.

## I. MENTAL ILLNESS AND VIOLENCE IN THE UNITED STATES

Though civil commitment has existed in the United States for hundreds of years,<sup>32</sup> reliable statistics about the practice largely remain unavailable.<sup>33</sup> Due to patient privacy issues and a decentralized U.S. mental health care system, the exact number of individuals subject to involuntary commitment each year is not publicly known.<sup>34</sup> However, in 2015, a branch of the U.S. Department of Health and Human Services estimated that only nine out of every 1000 people with a “serious mental illness” had been involuntarily committed that year.<sup>35</sup> Generally, data also suggest that involuntary commitments have decreased over the past several decades, as a movement toward deinstitutionalization has taken shape.<sup>36</sup>

31 *Id.* (quoting *Torres*, 911 F.3d at 1258); see also *United States v. Chovan*, 735 F.3d 1127, 1137 (9th Cir. 2013).

32 Stuart A. Anfang & Paul S. Appelbaum, *Civil Commitment—The American Experience*, 43 *ISR. J. PSYCHIATRY & RELATED SCIS.* 209, 210 (2006).

33 Nathaniel P. Morris, *Detention Without Data: Public Tracking of Civil Commitment*, 71 *PSYCHIATRIC SERVS.* 741, 741 (2020).

34 *Id.*

35 SUBSTANCE ABUSE & MENTAL HEALTH SERVS. ADMIN., U.S. DEP’T OF HEALTH & HUM. SERVS., *CIVIL COMMITMENT AND THE MENTAL HEALTH CARE CONTINUUM: HISTORICAL TRENDS AND PRINCIPLES FOR LAW AND PRACTICE* 8 (2019), [https://www.samhsa.gov/sites/default/files/civil-commitment-continuum-of-care\\_041919\\_508.pdf](https://www.samhsa.gov/sites/default/files/civil-commitment-continuum-of-care_041919_508.pdf) [hereinafter SAMHSA].

36 *Id.*

Further, state laws governing involuntary commitment have tightened over the past century, limiting the types of individuals subject to these commitments.<sup>37</sup> By 1980, almost every state had implemented a dangerousness requirement in its involuntary commitment statute<sup>38</sup>—a requirement that remains an important criterion in state laws today.<sup>39</sup> In fact, in many of these statutes, the individual must pose a threat of serious bodily harm to himself or others before involuntary commitment can be imposed.<sup>40</sup> As a result, the dangerousness criterion usually refers directly to an individual’s risk of engaging in violent acts.<sup>41</sup> Nonetheless, a finding of dangerousness is not required in every statute; instead, some allow for involuntary commitment upon a finding of “grave disability.”<sup>42</sup> The latter is usually defined as an “inability to provide for basic personal needs,” such as food and shelter.<sup>43</sup> Finally, most states also allow for involuntary commitment only when an individual’s needs cannot be met in a less restrictive setting.<sup>44</sup> Thus, if a caregiver or other outpatient setting could adequately provide for the person’s care, he or she will not meet the statutory guidelines for involuntary commitment.<sup>45</sup>

## II. BACKGROUND AND TEXT OF § 922(G)(4)

To combat the general misuse of firearms, various prohibitions on gun ownership have existed throughout the nation’s history.<sup>46</sup> As courts and scholars have noted, the Second Amendment has inherently been “tied to the concept of a virtuous citizenry,” such that the government has always retained the power to “disarm ‘unvirtuous citizens.’”<sup>47</sup> Congress codified that sentiment over fifty years ago, when it passed the Gun Control Act of 1968 (“GCA”) in response to the assassinations of President John F. Kennedy and Dr. Martin Luther King, Jr.<sup>48</sup> At the time, the GCA was intended to control access to weapons by “those whose possession thereof [is] contrary to

37 *Id.*

38 *Id.* at 3, 6.

39 See TREATMENT ADVOC. CTR., STATE STANDARDS FOR CIVIL COMMITMENT (2020), <https://www.treatmentadvocacycenter.org/storage/documents/state-standards/state-standards-for-civil-commitment.pdf> (listing each state’s involuntary commitment statute).

40 See *id.*

41 SAMHSA, *supra* note 35, at 9.

42 *Id.* at 9.

43 *Id.*

44 *Id.* at 12.

45 See, e.g., TREATMENT ADVOC. CTR., *supra* note 39, at 27, 46, 65 (Maine, North Carolina, and Utah).

46 See *District of Columbia v. Heller*, 554 U.S. 570, 626 (2008).

47 *United States v. Yancey*, 621 F.3d 681, 684–85 (7th Cir. 2010) (quoting *United States v. Vongxay*, 594 F.3d 1111, 1118 (9th Cir. 2010)).

48 *Huddleston v. United States*, 415 U.S. 814, 824 (1974); J. Baxter Stegall, Comment, *The Curse of Ham: Disarmament Through Discrimination—The Necessity of Applying Strict Scrutiny to Second Amendment Issues in Order to Prevent Racial Discrimination by States and Localities Through Gun Control Laws*, 11 LIBERTY U. L. REV. 271, 300–01 (2016).

the public interest.”<sup>49</sup> Accordingly, Congress was primarily concerned with preventing crime by keeping “firearms out of the hands of those not legally entitled to possess them,” whether due to age, criminal background, or mental incapacity.<sup>50</sup> As the Supreme Court confirmed in *Huddleston v. United States*, Congress’s purpose for enacting the law was never in doubt—it specifically aimed to prevent certain classes of individuals from owning or possessing firearms.<sup>51</sup>

Among those classes are individuals with severe mental illness. Under 18 U.S.C. § 922(g)(4), Congress specifically prohibits the shipping, receiving, transporting, or possessing of firearms by those “[1] who ha[ve] been adjudicated as a mental defective or [2] who ha[ve] been committed to a mental institution.”<sup>52</sup> Congress enacted the provision after conducting a multiyear analysis on gun violence, which uncovered “a serious problem of firearms misuse in the United States.”<sup>53</sup> Thus, members of Congress thought it necessary to prevent “mental incompetents” and “persons with a history of mental disturbances” from possessing firearms.<sup>54</sup> In doing so, the statutory provision aimed to prohibit firearm ownership among those who “by their previous conduct or mental condition” have proven themselves “incapable of handling a dangerous weapon in . . . an open society.”<sup>55</sup> Accordingly, Congress enacted § 922(g)(4) to prevent certain mentally ill individuals from possessing firearms, based on their membership in one of the two statutory groups.

Under the first statutory category, the possession and ownership of firearms is prohibited when an individual has been “adjudicated as a mental defective.”<sup>56</sup> That adjudication occurs when a court or other lawful authority determines that the individual “is a danger to himself or to others”; “lacks the mental capacity to contract or manage his own affairs”; is found insane by a court in a criminal case; or is found incompetent to stand trial or found “not guilty by reason of lack of mental responsibility.”<sup>57</sup> Under the second statutory category, firearm possession and ownership is similarly prohibited for those who have been committed to a mental institution. An individual falls into that category when a court or other lawful authority has formally committed that individual to a mental health facility or hospital, a psychiatric facility, a sanitarium, or a psychiatric ward of a general hospital.<sup>58</sup> Notably, the provision excludes those who have temporarily stayed in a mental institu-

49 *Huddleston*, 415 U.S. at 824; Stegall, *supra* note 48, at 304–06.

50 *Huddleston*, 415 U.S. at 823–24 (quoting S. REP. NO. 90-1501, at 22 (1968)).

51 *Id.* at 827.

52 18 U.S.C. § 922(g)(4) (2018).

53 Brief for the Appellees, *supra* note 6, at 22 (quoting S. REP. NO. 89-1866, at 3 (1966)).

54 114 CONG. REC. 21,784 (1968) (statement of Rep. Celler).

55 *Id.* 21,809–10 (statement of Rep. Tenzer).

56 18 U.S.C. § 922(g)(4).

57 27 C.F.R. § 478.11(2)(b)(2) (2020).

58 *Id.*; see also BUREAU OF ALCOHOL, TOBACCO, FIREARMS & EXPLOSIVES, U.S. DEP’T OF JUST., FEDERAL FIREARMS PROHIBITION UNDER 18 U.S.C. § 922(G)(4): PERSONS ADJUDICATED AS A MENTAL DEFECTIVE OR COMMITTED TO A MENTAL INSTITUTION (2009), <https://>

tion for observation and those who admitted themselves voluntarily.<sup>59</sup> Nonetheless, if the statute does apply and is subsequently violated, the penalties are severe—violators can be punished by a fine of \$250,000, imprisoned for up to ten years, or both.<sup>60</sup>

While § 922(g)(4) appears to create a blanket prohibition on firearm ownership for those affected, Congress has in fact codified an opportunity for relief.<sup>61</sup> Under 18 U.S.C. § 925(c), the U.S. Attorney General (“AG”) has the legal discretion to restore an individual’s right to obtain a firearm.<sup>62</sup> To do so, the AG must review the record and circumstances of the case and find that the person is unlikely “to act in a manner dangerous to public safety,” such that restoring the right “would not be contrary to the public interest.”<sup>63</sup> However, Congress defunded this relief from disabilities program in 1992 and has maintained the bar on funding ever since.<sup>64</sup> The decision to defund was the result of a policy judgment among Congress members, who concluded that determining eligibility under § 925(c) had proven to be a “very difficult and subjective task” with potentially “devastating consequences.”<sup>65</sup>

Nonetheless, in 2008, Congress reopened the possibility for relief by authorizing federal grants for states under 34 U.S.C. § 40915, as part of the NICS Improvement Amendments Act (NIAA).<sup>66</sup> The statute authorizes federal grants to help states determine which of their citizens are eligible to purchase firearms and to assist in supplying that information to federal databases.<sup>67</sup> To receive one of the grants, states are required to implement a relief from disabilities program, allowing an individual who has been “adjudicated as a mental defective” or committed to a mental institution to petition for a restoration of his or her rights.<sup>68</sup>

For the program to qualify, it must first permit an individual barred from firearm ownership under § 922(g)(4) to apply to the state for relief.<sup>69</sup> Subsequently, when a state court or other lawful authority evaluates the application, it must consider three factors: “(1) the circumstances regarding the firearms disability imposed by 18 U.S.C. § 922(g)(4); (2) the petitioner’s

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[www.atf.gov/resource-center/docs/guide/atf-i-33104-%E2%80%94federal-firearms-prohibitions-under-18-usc-%C2%A7-922g4-%E2%80%93/download](http://www.atf.gov/resource-center/docs/guide/atf-i-33104-%E2%80%94federal-firearms-prohibitions-under-18-usc-%C2%A7-922g4-%E2%80%93/download).

59 27 C.F.R. § 478.11.

60 See BUREAU OF ALCOHOL, TOBACCO, FIREARMS & EXPLOSIVES, *supra* note 58.

61 18 U.S.C. § 925(c) (2018).

62 *Id.*

63 *Id.*

64 *Tyler I*, 775 F.3d 308, 312–13 (6th Cir. 2014), *rev’d en banc*, 837 F.3d 678 (6th Cir. 2016) (en banc).

65 *Mai v. United States*, 952 F.3d 1106, 1111 (9th Cir. 2020) (quoting S. REP. No. 102-353, at 19 (1992)).

66 NICS Improvement Amendments Act of 2007, Pub. L. No. 110-180, § 105, 121 Stat. 2559, 2569–70 (2008) (codified at 34 U.S.C. § 40915 (2018)); *Tyler I*, 775 F.3d at 313.

67 See *Mai*, 952 F.3d at 1119 (discussing the NIAA’s purpose).

68 *Id.* at 1110 n.3, 1111–12 (quoting 18 U.S.C. § 922(g)(4)).

69 34 U.S.C. § 40915(a)(1).

‘record’; and (3) the petitioner’s ‘reputation.’”<sup>70</sup> Additionally, the court must find that the petitioner “will not be likely to act in a manner dangerous to public safety,” and that granting the relief “would not be contrary to the public interest.”<sup>71</sup> Finally, if the person is denied relief under the state program, he or she must be allowed to petition the state court for a de novo judicial review.<sup>72</sup> Since the passage of the NIAA, about thirty states have created qualifying relief programs.<sup>73</sup>

### III. RECENT JUDICIAL INTERPRETATIONS: *HELLER* AND *MCDONALD*

Within the judiciary, however, § 922(g)(4) continues to face its own separate challenges. Though § 922(g)(4) was enacted decades ago, two more recent U.S. Supreme Court cases have strongly influenced modern judicial interpretations of the provision.<sup>74</sup> While neither case directly references § 922(g)(4), a few key passages do implicate the constitutionality of laws regarding gun ownership for those with mental illness. The first and most significant case—*District of Columbia v. Heller*—was decided in 2008 and signified the Court’s first attempt at an “in-depth examination of the Second Amendment.”<sup>75</sup> Writing for the 5–4 majority, Justice Scalia cautioned that the case would not “clarify the entire field,” as the Court could later expound on its reasoning when other cases raise new questions.<sup>76</sup> Nonetheless, Justice Scalia did discuss several structural implications of the Second Amendment, stating that it divided naturally into two parts: the prefatory clause (“A well regulated Militia, being necessary to the security of a free State”) and the operative clause (“the right of the people to keep and bear Arms, shall not be infringed”).<sup>77</sup> Though Justice Scalia recognized that the clauses are linked, he rejected the idea that the prefatory clause “limit[s] or expand[s] the scope” of the operative clause.<sup>78</sup> Instead, Justice Scalia concluded that the prefatory clause merely “announces the purpose” for which the right to bear arms was codified: the preservation of citizen militias.<sup>79</sup> Even so, Justice Scalia said, the clause should not be read as narrowly as other judges, includ-

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70 *Mai v. United States*, No. C17-0561, 2018 WL 784582, at \*2 (W.D. Wash. Feb. 8, 2018) (quoting NICS Improvement Amendments Act of 2007 § 105(a)(2)).

71 *Id.* (quoting NICS Improvement Amendments Act § 105(a)(2)).

72 *Mai*, 952 F.3d at 1112 (quoting 34 U.S.C. § 40915(a)(3)).

73 *Id.*

74 *McDonald v. City of Chicago*, 561 U.S. 742 (2010); *District of Columbia v. Heller*, 554 U.S. 570 (2008).

75 *Heller*, 554 U.S. at 635.

76 *Id.*

77 *Id.* at 576–77 (quoting U.S. CONST. amend. II). The prefatory clause refers to the first half of the Second Amendment (“A well regulated Militia, being necessary to the security of a free State . . .”), while the operative clause refers to the latter half (“ . . . the right of the people to keep and bear Arms, shall not be infringed.”). See *id.*; U.S. CONST. amend. II.

78 *Heller*, 554 U.S. at 578.

79 *Id.* at 599.

ing the dissenters, have suggested.<sup>80</sup> Rather, the concern regarding the militia served only as the impetus for codification of the right in the Constitution, though “most” thought the Second Amendment provided important protection for self-defense and hunting as well.<sup>81</sup>

When discussing the operative clause—the main section of the opinion—Justice Scalia undertook an extensive study of the history and text of the Second Amendment. First, he concluded that one particular phrase in the Amendment, “right of the people,” refers to an individual right—after all, Justice Scalia argued, the First and Fourth Amendments of the unamended Constitution and Bill of Rights used the exact same phrase and “unambiguously” referred to individual rights.<sup>82</sup> Next, the opinion analyzed the “keep and bear Arms” portion of the clause, relying on dictionaries from the Founding era and uses of the terms in early documents.<sup>83</sup> In doing so, Justice Scalia wrote, there was no indication that keeping and bearing arms was specifically confined to the use of weapons within an organized militia.<sup>84</sup> Ultimately, “[p]utting all of [those] textual elements together,” Justice Scalia concluded that the operative clause itself guarantees an individual right to possess firearms “in case of confrontation,” including for self-defense.<sup>85</sup>

Nonetheless, perhaps the most influential part of the opinion—or at least most relevant for this Note—is the recognition that even an individual right to bear arms is “not unlimited.”<sup>86</sup> As Justice Scalia stated, commentators and courts throughout history have clarified that the Second Amendment did not establish a right to keep “any weapon whatsoever in any manner whatsoever and for whatever purpose.”<sup>87</sup> Instead, Justice Scalia explicitly noted that “nothing” in *Heller* should be construed as casting doubt on “longstanding prohibitions on the possession of firearms” for certain individuals, including felons and the mentally ill.<sup>88</sup> In an accompanying footnote, Justice Scalia deemed the prohibitions for the two latter categories “presumptively lawful regulatory measures.”<sup>89</sup> Accordingly, *Heller* affirmed the notion that restricting particular classes of people from bearing arms is “presumptively lawful.”

80 *Id.* at 577.

81 *Id.* at 599.

82 *Id.* at 579. The other uses of the phrase “right of the people” can be found “in the First Amendment’s Assembly-and-Petition Clause and in the Fourth Amendment’s Search-and-Seizure Clause.” *Id.* Justice Scalia also noted that the Ninth Amendment employed similar phrasing: “The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.” *Id.* (quoting U.S. CONSR. amend. IX). Justice Scalia argued that each of those uses “unambiguously” denotes an individual, not a collective, right. *Id.*

83 *Id.* at 581–86.

84 *Id.* at 585.

85 *Id.* at 592.

86 *Id.* at 626.

87 *Id.*

88 *Id.*

89 *Id.* at 627 n.26.

Though *Heller* clarified the basic meaning and the preliminary scope of the Second Amendment, the opinion—as Justice Scalia predicted—left open several questions. The Court resolved one of them two years later in *McDonald v. City of Chicago*, which decided whether the Second Amendment applied to the states.<sup>90</sup> In another 5–4 decision, the Court held that the Fourteenth Amendment indeed incorporates the Second Amendment.<sup>91</sup> As such, the individual right to keep and bear arms, as established in *Heller*, is now controlling on both the federal government and the states.<sup>92</sup> Notably, however, the Court echoed *Heller*'s qualification that the Second Amendment right is not unlimited. Recounting that *Heller* “did not cast doubt” on longstanding prohibitions on the possession of firearms by felons and the mentally ill, the Court expressly stated that it “repeat[s] those assurances” in *McDonald*.<sup>93</sup> As such, the Court concluded that even incorporation of an individual right to possess firearms would “not imperil every law regulating firearms.”<sup>94</sup>

#### IV. RECENT APPLICATIONS OF *HELLER*

Within the circuit courts, *Heller* and *McDonald* immediately began to shape Second Amendment jurisprudence, particularly as it relates to § 922(g)(4). In 2010, the Third Circuit handed down an influential opinion in *United States v. Marzzarella*, in which the court developed a two-pronged approach for general Second Amendment challenges.<sup>95</sup> It thought the relevant inquiry under *Heller* should first ask “whether the challenged law imposes a burden on conduct falling within the scope of the Second Amendment[ ].”<sup>96</sup> If it does not, the inquiry is over. However, if the opposite conclusion is reached, the second prong then requires the court to “evaluate the law under some form of means-end scrutiny.”<sup>97</sup> Should the law pass muster under the selected standard, it is constitutional; if it fails to do so, the court must invalidate the law.<sup>98</sup>

Though the Third Circuit specifically applied its new two-pronged approach in the context of § 922(k), which prohibits possession of firearms with an obliterated serial number,<sup>99</sup> its sister circuits have broadly employed the test for other Second Amendment challenges. For instance, the Sixth Circuit applied the two-pronged approach in *United States v. Greeno* to evaluate a provision of the U.S. Sentencing Guidelines, after the defendant claimed the application of a dangerous weapon enhancement to his sentence

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90 *McDonald v. City of Chicago*, 561 U.S. 742 (2010).

91 *Id.* at 750.

92 *Id.*

93 *Id.* at 786.

94 *Id.*

95 *United States v. Marzzarella*, 614 F.3d 85, 89 (3d Cir. 2010).

96 *Id.*

97 *Id.*

98 *Id.*

99 *Id.* at 87.

violated the Second Amendment.<sup>100</sup> The Fourth, Seventh, and Tenth Circuits have similarly applied the two-pronged approach to their Second Amendment cases, more or less in the exact same terms.<sup>101</sup>

Within the last five years, multiple circuits have had occasion to consider *Marzzarella's* two-pronged approach in the specific context of § 922(g)(4). One of the most notable was the Sixth Circuit's holding in *Tyler v. Hillsdale County Sheriff's Department (Tyler II)*.<sup>102</sup> The 2016 en banc decision vacated a 2014 panel decision,<sup>103</sup> ultimately concluding that the plaintiff had a "viable claim under the Second Amendment."<sup>104</sup> As it did in *Greeno*, the Sixth Circuit again employed the two-pronged approach to evaluate the plaintiff's as-applied challenge to § 922(g)(4).<sup>105</sup> The plaintiff, then seventy-four years old, had been involuntarily committed in 1986 after his wife served him with divorce papers.<sup>106</sup> The Sixth Circuit first concluded under step one that individuals, such as the plaintiff, who had been involuntarily committed "are not categorically unprotected by the Second Amendment."<sup>107</sup> However, the court noted the particular challenge of "mapping" *Heller's* language onto the two-step test.<sup>108</sup> In fact, the opinion conceded that it was "difficult to discern" whether prohibitions on firearms for the mentally ill are "presumptively lawful" because these prohibitions "do not burden persons within the ambit of the Second Amendment as historically understood," or "whether the regulations presumptively satisfy some form of heightened means-end scrutiny."<sup>109</sup> The Sixth Circuit ultimately opted for the latter option, stating that prohibitions on firearms for the mentally ill had "at best ambiguous historical support."<sup>110</sup> Thus, the court proceeded to step two of the test and chose to apply intermediate scrutiny to evaluate § 922(g)(4).<sup>111</sup> Ultimately, the court found that while the government had a legitimate interest in preventing firearms from reaching "presumptively risky people,"<sup>112</sup> the government had not

100 *United States v. Greeno*, 679 F.3d 510, 518–20 (6th Cir. 2012).

101 *Id.* at 518. In *United States v. Chester*, the Fourth Circuit applied the two-pronged approach to a challenge under § 922(g)(9), which prohibits possession of firearms for those who have been convicted of a misdemeanor crime of domestic violence. 628 F.3d 673, 677, 680 (4th Cir. 2010). The Seventh Circuit also employed the *Marzzarella* approach in *Ezell v. City of Chicago*, which considered a city ordinance that mandated firing-range training as a prerequisite for gun ownership yet banned firing ranges in the city. 651 F.3d 684, 704–10 (7th Cir. 2011). Finally, the Tenth Circuit in *United States v. Reese* applied the test for § 922(g)(8). 627 F.3d 792, 800–04 (10th Cir. 2010).

102 *Tyler II*, 837 F.3d 678 (6th Cir. 2016).

103 *Tyler I*, 775 F.3d 308 (6th Cir. 2014), *rev'd en banc*, 837 F.3d 678 (6th Cir. 2016).

104 *Tyler II*, 837 F.3d at 699.

105 *Id.* at 681, 685.

106 *Id.* at 683.

107 *Id.* at 690.

108 *Id.*

109 *Id.*

110 *Id.*

111 *Id.* at 692.

112 *Id.* at 693 (quoting *Dickerson v. New Banner Inst., Inc.*, 460 U.S. 103, 112 n.6 (1983)).

fully satisfied its burden.<sup>113</sup> Specifically, the Sixth Circuit found that the government had failed to prove a “reasonable fit” between its goal and § 922(g)(4)’s lifetime ban on those with prior involuntary commitments.<sup>114</sup> As the government had not offered sufficient proof of the “continued risk” imposed by such individuals, the court decided that the lifetime ban was not justified.<sup>115</sup>

Three years later, the Third Circuit reached a drastically different conclusion in *Beers v. Attorney General*<sup>116</sup>—the case highlighted in this Note’s introduction. *Beers*, a college student deemed suicidal and involuntarily committed multiple times, also brought an as-applied challenge to § 922(g)(4).<sup>117</sup> While the Third Circuit similarly used the traditional two-pronged approach, it ended the inquiry at the first step.<sup>118</sup> The decision adhered closely to the Third Circuit’s prior ruling in *Binderup v. Attorney General*, in which the court considered an as-applied challenge to § 922(g)(1), the felon-in-possession provision.<sup>119</sup> In *Binderup*, the Third Circuit had further defined step one of the two-pronged test and established requirements that a plaintiff must satisfy to show that a “law imposes a burden on conduct falling within the scope of the Second Amendment’s guarantee.”<sup>120</sup> Specifically, the plaintiff “must (1) identify the traditional justifications for excluding from Second Amendment protections the class of which he appears to be a member, and then (2) present facts about himself and his background that distinguish his circumstances from those of persons in the historically barred class.”<sup>121</sup>

In *Binderup*, the Third Circuit concluded that neither the length of time elapsed since the conviction nor a showing of rehabilitation should be considered under the constitutional inquiry.<sup>122</sup> *Beers* applied the same reasoning to § 922(g)(4) and concluded that those factors were also irrelevant in the context of that provision,<sup>123</sup> as time and rehabilitation historically were never sufficient to “restore Second Amendment rights that were forfeited.”<sup>124</sup> As such, *Beers* could not seek to distinguish himself from those historically barred from firearm ownership by claiming he was “no longer a danger to himself or to others.”<sup>125</sup> Rather, the Third Circuit concluded that *Beers* could seek to distinguish himself only by “demonstrating that he was

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113 *Id.* at 699.

114 *Id.*

115 *Id.*

116 927 F.3d 150 (3d Cir. 2019).

117 *See id.* at 152.

118 *Id.* at 159.

119 836 F.3d 336, 340 (3d Cir. 2016) (en banc).

120 *Id.* at 359 (quoting *United States v. Marzarella*, 614 F.3d 85, 89 (3d Cir. 2010)).

121 *Id.* at 347 (citation omitted).

122 *Id.* at 350.

123 *Beers*, 927 F.3d at 159.

124 *Id.* (quoting *Binderup*, 836 F.3d at 350).

125 *Id.*

never determined to be a danger to himself or to others” in the first place.<sup>126</sup> As Beers had specifically been deemed as such by a court on two separate occasions, the Third Circuit rejected his challenge.<sup>127</sup> Thus, as applied to Beers, § 922(g)(4) did “not burden conduct falling within the scope of the Second Amendment,”<sup>128</sup> thereby ending the inquiry at step one and rendering the provision constitutional.

Less than a year after the Third Circuit’s ruling, the Ninth Circuit considered yet another challenge to § 922(g)(4) in *Mai v. United States*. Similar to the previous two cases, the Ninth Circuit challenge involved a prior involuntary commitment from which the plaintiff alleged he had been rehabilitated.<sup>129</sup> The Ninth Circuit’s approach to the plaintiff’s challenge perhaps reflects the middle ground between *Tyler II* and *Beers*, as the Ninth Circuit ultimately upheld the constitutionality of § 922(g)(4) but only after completing both steps of the *Marzzarella/ Greeno* test. Under the first step, the Ninth Circuit opted to “assume, without deciding,” that § 922(g)(4) burdened Second Amendment rights as applied to the plaintiff.<sup>130</sup> Like the Sixth Circuit in *Tyler II*, the Ninth Circuit proceeded to step two of the inquiry and also opted for intermediate scrutiny.<sup>131</sup> However, unlike the Sixth Circuit, the court in *Mai* found that the government had shown both a compelling interest in preventing crime and suicide and a reasonable fit between that interest and the law.<sup>132</sup> In reaching that conclusion, the Ninth Circuit relied on statistics, such as the high likelihood of suicide among those who had been involuntarily committed, and on § 922(g)(4)’s dangerousness requirement.<sup>133</sup> As § 922(g)(4) applies only to those who were found “*actually dangerous*” through a qualifying proceeding, the Ninth Circuit deemed the provision “more narrowly tailored” than other provisions it upheld in the past, such as § 922(g)(1).<sup>134</sup>

## V. THE WAY FORWARD

Given the aforementioned precedents, a clear divide has emerged on the constitutionality of § 922(g)(4). Still, much of that divide has centered on the second step of the *Marzzarella/ Greeno* test—the level of scrutiny to apply and whether § 922(g)(4) satisfies it.<sup>135</sup> However, this Note argues that the first step of the aforementioned test warrants greater consideration and indeed provides an answer to the constitutional question, in at least the

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126 *Id.*

127 *Id.* at 152, 159.

128 *Id.* at 159.

129 *See Mai v. United States*, 952 F.3d 1106, 1110 (9th Cir. 2020).

130 *Id.* at 1115.

131 *Id.*

132 *Id.* at 1117, 1120.

133 *Id.* at 1121.

134 *Id.*

135 *See, e.g., Mai*, 952 F.3d at 1115–17; *Tyler II*, 837 F.3d 678, 690, 692, 699 (6th Cir. 2016).

majority of cases. Under that step, courts consider whether the law at issue burdens conduct protected by the Second Amendment.<sup>136</sup> If it does not, courts have no need to apply means-end scrutiny, thereby ending the inquiry at step one.<sup>137</sup> Given that framework, the general analysis in *Beers* should serve as the proper constitutional guide to deciding as-applied challenges to § 922(g)(4). Based on that precedent, as-applied challenges to the provision should rarely, if ever, succeed.

This Note proposes several channels through which courts could deem § 922(g)(4) constitutional under step one of the *Marzzarella/Greeno* test, using the express language of *Tyler II*, *Beers*, and *Mai*. The first two options focus specifically on the Ninth Circuit's understanding of that step of the test. In *Mai*, the Ninth Circuit stated that a law will not burden Second Amendment rights "if it either falls within one of the 'presumptively lawful regulatory measures' identified in *Heller* or regulates conduct that historically has fallen outside the scope of the Second Amendment."<sup>138</sup> While *Mai* did not resolve the case at this step, the Ninth Circuit nonetheless noted that the government had presented a "strong argument" that § 922(g)(4) survives under both inquiries, such that the law would not burden constitutionally protected conduct.<sup>139</sup> However, *Mai*'s suggestion should be taken a step further, as both *Heller* and the historical scope of the Second Amendment lend support to the constitutionality of § 922(g)(4). Aside from those inquiries, the third option relies specifically on *Beers* to analyze constitutional challenges to § 922(g)(4). While the inquiry is narrower than under *Mai*, the Third Circuit's approach serves as another feasible route to upholding the law under step one of the *Marzzarella/Greeno* test. With those options in place, courts should no longer sidestep the first prong of the test in favor of means-end scrutiny—instead, they can and should resolve cases under step one.

#### A. Option One: The "Presumptively Lawful" Category Under *Heller*

Under *Heller*, the Court identified certain "longstanding prohibitions" on firearm possession as "presumptively lawful regulatory measures."<sup>140</sup> Within that category, the Court specifically included prohibitions for "felons and the mentally ill," noting that "nothing in [the] opinion should be taken to cast doubt" on those restrictions.<sup>141</sup> Nonetheless, the Court never clarified how lower courts should interpret its "presumptively lawful" language, giving rise to differing interpretations across the courts of appeals.<sup>142</sup> While

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136 See *Mai*, 952 F.3d at 1113.

137 See *id.*

138 *Id.* at 1114 (quoting *United States v. Torres*, 911 F.3d 1253, 1258 (9th Cir. 2019)).

139 See *id.*

140 *District of Columbia v. Heller*, 554 U.S. 570, 626–27, 627 n.26 (2008).

141 *Id.* at 626.

142 See, e.g., *Tyler II*, 837 F.3d 678, 686–87 (6th Cir. 2016) ("We do not take *Heller*'s 'presumptively lawful' dictum to foreclose § 922(g)(4) from constitutional scrutiny."); *United States v. Marzzarella*, 614 F.3d 85, 91 (3d Cir. 2010) ("We recognize the phrase

alternative interpretations have been advanced, the most logical reading of the opinion is to consider the restrictions as “exceptions” to the Second Amendment right.<sup>143</sup> As the Third Circuit argued in *Marzzarella*, that reading best comports with *Heller*’s text and structure.<sup>144</sup>

For instance, when naming the presumptively lawful regulations, the *Heller* Court used key language to describe firearm restrictions for those considered mentally ill. The Court specifically stated that its opinion casts no doubt on “prohibitions” on firearm possession, not merely on regulations for these individuals.<sup>145</sup> As such, scholars have correctly argued that the majority indeed sanctioned the “categorical exclusion” of both felons and the mentally ill from Second Amendment protection.<sup>146</sup> While the specific reason for singling out these two groups in particular is unknown,<sup>147</sup> the implication for firearm possession among felons and the mentally ill is clear—individuals in both of these groups fall outside the scope of the Amendment.

The structure of the *Heller* opinion also bolsters *Marzzarella*’s reading. Directly after listing the presumptively lawful regulations, the *Heller* Court considered restrictions on the types of weapons that Americans can lawfully obtain.<sup>148</sup> The Court specifically defined said restrictions as “another important limitation” on the Second Amendment right.<sup>149</sup> The Court then clarified that certain dangerous weapons fall outside the scope of the Amendment itself, such that the Amendment “does not protect” them.<sup>150</sup> Thus, in comparing the presumptively lawful regulations with the weapons restrictions and describing both with the same term, the *Heller* Court likely aimed to “treat them equivalently,” both being exceptions to the Second Amendment.<sup>151</sup>

### 1. “Mentally Ill” Phrasing and § 922(g)(4)

One criticism of relying on *Heller* to decide the constitutionality of § 922(g)(4) relates to a crucial phrase in *Heller*. While the opinion discussed the presumptive lawfulness of prohibitions for the “mentally ill,” § 922(g)(4) never explicitly references that term.<sup>152</sup> Instead, the provision refers to those who have been “adjudicated as a mental defective” or who have been “com-

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‘presumptively lawful’ could have different meanings under newly enunciated Second Amendment doctrine.”).

143 This reading was advocated by the Third Circuit in *Marzzarella*, 614 F.3d at 91.

144 See *id.*

145 *Heller*, 554 U.S. at 626.

146 See, e.g., Joseph Blocher, *Categoricalism and Balancing in First and Second Amendment Analysis*, 84 N.Y.U. L. Rev. 375, 414 (2009).

147 See *id.*

148 *Marzzarella*, 614 F.3d at 91 (discussing *Heller*’s structure).

149 *Heller*, 554 U.S. at 627; see *Marzzarella*, 614 F.3d at 91.

150 *Heller*, 554 U.S. at 625.

151 *Marzzarella*, 614 F.3d at 91.

152 Compare *Heller*, 554 U.S. at 626, with 18 U.S.C. § 922(g)(4) (2018).

mitted to a mental institution.”<sup>153</sup> However, as Judge Moore argued in her *Tyler II* dissent, *Heller* was “almost certainly” describing § 922(g)(4) when it discussed longstanding prohibitions for the mentally ill.<sup>154</sup>

First, only one federal statute could feasibly be regarded as a prohibition on firearm ownership among the mentally ill—§ 922(g)(4).<sup>155</sup> Generally, the Gun Control Act of 1968, codified in part at 18 U.S.C. § 922(g), is the overarching source of federal firearms law as it relates to the mentally ill.<sup>156</sup> While other federal statutes implicate firearm ownership for these individuals, only § 922(g)(4) directly imposes a prohibition. For example, 18 U.S.C. § 925(c) and the NICS Improvement Amendments Act allow for the restoration of firearm privileges for those who fall within the purview of § 922(g)(4), as discussed in preceding sections.<sup>157</sup> However, those provisions specifically provide for the *reinstatement* of firearms privileges for certain mentally ill individuals, not for a prohibition on such privileges, as *Heller* explicitly states.<sup>158</sup> Further, as those provisions were enacted even later in history than the Gun Control Act of 1968, which itself was enacted 177 years after the ratification of the Second Amendment, they are unlikely to be deemed “longstanding.”<sup>159</sup>

Finally, interpreting *Heller* as a reference to § 922(g)(4) also fits with the widespread judicial understanding of the other “longstanding” prohibition in *Heller*—that which prohibits felons from possessing firearms. In the same sentence, the *Heller* opinion described as presumptively lawful the “longstanding prohibitions on the possession of firearms” by both “felons and the mentally ill.”<sup>160</sup> While the connection between the “mentally ill” language and § 922(g)(4) has been challenged, several courts have at least implied that the “felon” language clearly refers to § 922(g)(1).<sup>161</sup> Notably, however, the *Heller* opinion never stated that the “longstanding prohibitions” it men-

153 18 U.S.C. § 922(g)(4).

154 *Tyler II*, 837 F.3d 678, 716 (6th Cir. 2016) (Moore, J., dissenting).

155 *Id.*

156 18 U.S.C. § 922; John Malcolm & Amy Swearer, *Part III: The Current State of Laws Regarding Mental Illness and Guns*, THE HERITAGE FOUND. (Feb. 13, 2019), <https://www.heritage.org/civil-society/report/part-iii-the-current-state-laws-regarding-mental-illness-and-guns>.

157 18 U.S.C. § 925(c); NICS Improvement Amendments Act of 2007, Pub. L. No. 110-180, 121 Stat. 2559 (2008) (codified in scattered sections of 34 U.S.C.).

158 *District of Columbia v. Heller*, 554 U.S. 570, 626–27 (2008) (referring specifically to “longstanding *prohibitions* on the possession of firearms by . . . the mentally ill” (emphasis added)).

159 See Nelson Lund, *The Second Amendment, Heller, and Originalist Jurisprudence*, 56 UCLA L. REV. 1343, 1357 (2009); Gregory J. Pals, Note, *Judicial Review Under 18 U.S.C. § 925(c): Abrogation Through Appropriations?*, 76 WASH. U. L.Q. 1095, 1097 (1998).

160 *Heller*, 554 U.S. at 626.

161 See, e.g., *Binderup v. Att’y Gen.*, 836 F.3d 336, 347 (3d Cir. 2016) (en banc) (referring to § 922(g)(1) as a “presumptively lawful regulatory measure”); *United States v. Vongxay*, 594 F.3d 1111, 1118 (9th Cir. 2010) (quoting the sentence on “longstanding prohibitions” in *Heller* and subsequently concluding that § 922(g)(1) falls under the presumptively lawful category).

tioned were in fact referring to § 922(g)(1). Further, there are numerous other federal and state statutes that implicate felons' gun rights, including 18 U.S.C. § 925(c).<sup>162</sup> Thus, if the term “felons” in *Heller* indeed refers to § 922(g)(1), the same presumption should apply with respect to § 922(g)(4) and *Heller*'s reference to the “mentally ill.”

## 2. Prevailing Analysis of § 922(g)(1)

Further, resolving the constitutionality of § 922(g)(4) directly under *Heller* would be consistent with the overarching and prevailing analysis of the federal felon-in-possession statute, § 922(g)(1).<sup>163</sup> In fact, as Judge Moore discussed in her *Tyler II* dissent, deciding challenges to § 922(g)(4) in any other way would call into question the current approach to § 922(g)(1) among various courts of appeals.<sup>164</sup>

Under § 922(g)(1), a person convicted of a crime punishable by imprisonment for more than one year cannot purchase or possess a firearm—a lifelong prohibition with the same consequences as § 922(g)(4).<sup>165</sup> After *Heller*, challenges to the constitutionality of § 922(g)(1) have been uniformly rejected, notably without subjecting the provision to any level of scrutiny.<sup>166</sup> In fact, the Sixth Circuit itself, which invalidated § 922(g)(4) in *Tyler II*, upheld § 922(g)(1) in 2010, basing its decision on the express language of *Heller*.<sup>167</sup> Specifically, the court quoted the oft-used phrase in *Heller*—“nothing in [the] opinion should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons”—and noted that the phrase has been “sufficient to dispose” of § 922(g)(1) challenges in its sister circuits.<sup>168</sup> The Sixth Circuit implicitly accepted that reasoning in its own decision regarding § 922(g)(1), stating that *Heller*'s express language “does not bring into question the constitutionality of § 922(g)(1).”<sup>169</sup>

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162 Restoration of Rts. Project, *50-State Comparison: Loss & Restoration of Civil/Firearms Rights*, COLLATERAL CONSEQUENCES RES. CTR., <https://ccresourcecenter.org/state-restoration-profiles/chart-1-loss-and-restoration-of-civil-rights-and-firearms-privileges/> (Jan. 4, 2021).

163 18 U.S.C. § 922(g)(1) (2018).

164 See *Tyler II*, 837 F.3d 678, 714 (6th Cir. 2016) (Moore, J., dissenting).

165 18 U.S.C. § 922(g)(1).

166 *United States v. Khami*, 362 F. App'x 501, 507 (6th Cir. 2010) (citing cases from several other circuits that heard challenges to § 922(g)(1)).

167 *Id.* at 508.

168 *Id.* at 507 (alteration in original) (quoting *District of Columbia v. Heller*, 554 U.S. 570, 626 (2008)) (first citing *United States v. Stuckey*, 317 F. App'x 48, 50 (2d Cir. 2009); then citing *United States v. Brunson*, 292 F. App'x 259, 261 (4th Cir. 2008); then citing *United States v. Anderson*, 559 F.3d 348, 352 (5th Cir. 2009); then citing *United States v. Irish*, 285 F. App'x 326, 327 (8th Cir. 2008); then citing *United States v. Smith*, 329 F. App'x 109, 110–11 (9th Cir. 2009); then citing *United States v. McCane*, 573 F.3d 1037, 1047 (10th Cir. 2009); and then citing *United States v. Battle*, 347 F. App'x 478, 479–81 (11th Cir. 2009)).

169 *Id.* at 508.

Based on that holding, a court would need to distinguish § 922(g)(1) from § 922(g)(4) to invalidate the latter. However, the phrasing of *Heller* itself casts doubt on any feasible possibility of doing so. Specifically, the same sentence used to uphold § 922(g)(1) across multiple circuits mentions not only felons, but also the mentally ill. As *Heller* states, “nothing in [the] opinion should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons *and the mentally ill.*”<sup>170</sup> If that phrasing is “sufficient to dispose” of challenges to § 922(g)(1), as related to felons, *Heller* should also dispose of similar challenges to § 922(g)(4), as related to the mentally ill. While the *Tyler II* majority offered a few distinguishing points, none is sufficient to justify the differential treatment of the two provisions.

Among other reasons, the *Tyler II* majority considers *Heller* inconclusive as related to § 922(g)(4) in part due to the provision’s “lack of historical pedigree.”<sup>171</sup> The majority explained that firearm prohibitions on the mentally ill arose in the twentieth century, with § 922(g)(4) passing in 1968.<sup>172</sup> As such, the opinion concluded that “it would be odd” to use the express language of *Heller* alone to “rubber stamp” a permanent prohibition on firearms for past involuntary commitment.<sup>173</sup> Nonetheless, the Sixth Circuit—and several sister circuits—did just that in dismissing similar challenges to § 922(g)(1).<sup>174</sup> As Judge Moore notes in dissent, the first federal statute prohibiting felons from possessing firearms also arose in the twentieth century.<sup>175</sup> Section 922(g)(1), specifically, was enacted in 1961—a mere seven years before § 922(g)(4).<sup>176</sup> Thus, the Sixth Circuit’s use of historical pedigree could scarcely support a distinction between the two provisions.<sup>177</sup> Should history serve as a relevant factor in interpreting *Heller*’s language, then both § 922(g)(1) and § 922(g)(4) would face similar constitutional difficulties, though the former has easily withstood such challenges.<sup>178</sup>

Additionally, the *Tyler II* majority distinguishes the lifetime ban that § 922(g)(4) imposes, particularly as it relates to those who have recovered from previous mental illness.<sup>179</sup> In its reasoning, the majority claims that *Heller*’s “presumption of lawfulness” is “call[ed] into question” by factual circumstances such as those in *Tyler II*, wherein the plaintiff was involuntarily committed decades prior to seeking firearm ownership.<sup>180</sup> Ultimately, the majority concluded, *Heller* should not be interpreted as “enshrin[ing] a permanent stigma” on those who have been involuntarily committed to a mental

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170 *Heller*, 554 U.S. at 626 (emphasis added).

171 *Tyler II*, 837 F.3d 678, 687 (6th Cir. 2016).

172 *Id.*

173 *Id.*

174 *See Khami*, 362 F. App’x at 507.

175 *Tyler II*, 837 F.3d at 715 (Moore, J., dissenting).

176 *Id.* at 716.

177 *Id.* at 715.

178 *See id.* at 716.

179 *Id.* at 688 (majority opinion).

180 *Id.*

institution.<sup>181</sup> Nonetheless, the same logic directly maps onto § 922(g)(1), especially as it relates to nonviolent felons and to felons convicted years ago.<sup>182</sup> For instance, an individual convicted of a nonviolent drug offense in 1980 could have rehabilitated himself, just as the plaintiff arguably did in *Tyler II*.<sup>183</sup> However, because the convicted felon is barred from firearm ownership under § 922(g)(1), instead of § 922(g)(4), his constitutional challenge is unlikely to prevail in the Sixth Circuit or its sister circuits, based on existing precedent. Still, there is little reason to believe that he poses a greater danger to himself or to society than does the plaintiff in *Tyler II*, or any other individual disenfranchised under § 922(g)(4).<sup>184</sup> Thus, *Tyler II*'s reasoning on this point should apply with equal force to § 922(g)(1), absent any unmentioned differentiating factor.

Given the applicability of the above arguments to both § 922(g)(1) and § 922(g)(4), the Sixth Circuit and several of its sister circuits face a predicament. Though challenges to § 922(g)(1) have been uniformly rejected, the Sixth Circuit's reasoning under *Tyler II* could easily provide support for invalidating the provision.<sup>185</sup> Without a sufficient distinguishing characteristic between § 922(g)(1) and § 922(g)(4), no reasonable justification exists for the disparate treatment. Thus, § 922(g)(4) should be interpreted in accordance with the prevailing analysis of § 922(g)(1), which would compel courts to decide the constitutional question without subjecting the provision to any heightened scrutiny.

### B. *Option Two: Historical Scope of the Second Amendment*

Historically, individuals with mental illness have also fallen outside the scope of the Second Amendment, rendering their constitutional challenges under § 922(g)(4) similarly unavailing.<sup>186</sup> As *Heller* states, the Second Amendment “codified a *pre-existing* right,”<sup>187</sup> whose existence is not “in any manner dependent upon” the Constitution.<sup>188</sup> Thus, any exclusions or limitations on the right to bear arms that existed when the Constitution was ratified continue to exist today.<sup>189</sup> That general limitation applies to those with a history of mental illness, as these individuals have traditionally been deemed “dangerous to the public or to themselves,” rendering them “outside of the scope of Second Amendment protection.”<sup>190</sup>

While federal laws regulating firearm possession for the mentally ill are relatively new, courts have employed “tools of deduction” to evaluate histori-

181 *Id.*

182 *See id.* at 716 (Moore, J., dissenting).

183 Powell, *supra* note 17, at 596.

184 *See id.*

185 *See id.*

186 *See* United States v. Marzzarella, 614 F.3d 85, 91 (3d Cir. 2010).

187 District of Columbia v. Heller, 554 U.S. 570, 592 (2008).

188 *Id.* (quoting United States v. Cruikshank, 92 U.S. 542, 553 (1876)).

189 *See Marzzarella*, 614 F.3d at 91.

190 Beers v. Att’y Gen., 927 F.3d 150, 157 (3d Cir. 2019).

cal prohibitions for this group.<sup>191</sup> During the eighteenth century, courts have noted, statutes explicitly barring the mentally ill from firearm ownership would have been unnecessary.<sup>192</sup> During that period, justices of the peace could simply “lock up” perceived “lunatics” who were considered dangerous.<sup>193</sup> Several courts have extrapolated on such authority in the context of firearm possession.<sup>194</sup> Namely, if depriving a person of his physical liberty was allowed, then the less drastic act of removing the person’s firearms would similarly have been acceptable.<sup>195</sup>

Further, scholars largely agree that at the Founding, the right to keep and bear arms was tied to the concept of a “virtuous citizenry.”<sup>196</sup> As such, that understanding would not prohibit the passage of laws that prevent the “unvirtuous” or those “deemed incapable of virtue” from possessing firearms.<sup>197</sup> Though individuals “who have committed or are likely to commit” violent crimes are the clearest historical example of the “unvirtuous,” the category is not limited to violent criminals.<sup>198</sup> Instead, the “unvirtuous” also include those individuals who have “committed a serious criminal offense, violent or nonviolent,”<sup>199</sup> and those with a history of mental illness.<sup>200</sup> As such, these individuals would have fallen outside the category of “law-abiding, responsible citizens” for whom the individual right to bear arms was confirmed in *Heller*.<sup>201</sup> Indeed, at the Founding era, disarming felons and those who would fall within § 922(g)(4)—individuals committed to a mental institution or adjudicated as a mental defective—would comport with the general right to bear arms.<sup>202</sup>

191 *Id.* at 157 n.43.

192 *See id.* at 157–58.

193 Carlton F.W. Larson, *Four Exceptions in Search of a Theory: District of Columbia v. Heller and Judicial Ipse Dixit*, 60 HASTINGS L.J. 1371, 1377 (2009) (quoting HENRY CARE, ENGLISH LIBERTIES, OR THE FREE-BORN SUBJECT’S INHERITANCE 329 (William Nelson ed., Providence, Shakespear’s Head 6th ed. 1774) (1680)).

194 *See, e.g.*, *Jefferies v. Sessions*, 278 F. Supp. 3d 831, 841 (E.D. Pa. 2017); *Keyes v. Lynch*, 195 F. Supp. 3d 702, 718 (M.D. Pa. 2016).

195 *See, e.g.*, *Beers*, 927 F.3d at 158; *Jefferies*, 278 F. Supp. 3d at 841; *Keyes*, 195 F. Supp. 3d at 718.

196 *Nat’l Rifle Ass’n v. Bureau of Alcohol, Tobacco, Firearms & Explosives*, 700 F.3d 185, 201 (5th Cir. 2012) (quoting Don B. Kates & Clayton E. Cramer, *Second Amendment Limitations and Criminological Considerations*, 60 HASTINGS L.J. 1339, 1359 (2009)).

197 Kates & Cramer, *supra* note 196, at 1360.

198 *Binderup v. Att’y Gen.*, 836 F.3d 336, 348 (3d Cir. 2016) (en banc).

199 *Id.*

200 Brief for the Appellees at 16, *Beers*, 927 F.3d 150 (No. 17-3010).

201 *District of Columbia v. Heller*, 554 U.S. 570, 635 (2008); Brief for the Appellees at 13, *Beers*, 927 F.3d 150 (No. 17-3010).

202 *See United States v. Emerson*, 270 F.3d 203, 226 n.21 (5th Cir. 2001); Brief for the Appellees at 13, *Beers*, 927 F.3d 150 (No. 17-3010); 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].”); Stephen P. Halbrook, *What the Framers Intended: A Linguistic Analysis of the Right to “Bear*

Additionally, laws barring felons from obtaining firearms also arose in later decades, though many courts and scholars have accepted the historical disarmament of this group without question.<sup>203</sup> As noted, federal law did not prohibit firearm ownership among felons until 1938, and the current firearms ban for both violent and nonviolent felons came to fruition only in 1961.<sup>204</sup> Nonetheless, several courts have relied exclusively on *Heller* and its discussion of “longstanding prohibitions” on felons in possession of firearms to reject challenges to § 922(g)(1).<sup>205</sup> Others have also relied on scholarly discussions of common-law limitations on the right to bear arms, which have concluded that felons inherently fell outside the scope of that right.<sup>206</sup> Thus, while the limitation was not codified under federal law until centuries later, scholars have widely adhered to the notion that criminals, whether or not violent, were prevented from keeping and bearing arms in the Founding era.<sup>207</sup> In fact, the *Heller* Court itself considered as “highly influential” a Pennsylvania report from 1787 that addressed commonly understood limitations on the right to bear arms.<sup>208</sup> That report stated that “no law shall be passed for disarming the people or any of them *unless* for crimes committed, or real danger of public injury.”<sup>209</sup> Thus, its drafters specifically recognized the exclusion of criminals from Second Amendment protection. As circuit courts have similarly noted, many states—which had also guaranteed a right to bear arms in their own constitutions—“did not extend this right to persons convicted of crime.”<sup>210</sup> Even though their constitutions lacked specific exceptions for criminals, such restrictions were “understood” in the eight-

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*Arms*,” 46 LAW & CONTEMP. PROBS., no. 1, 1986, at 151, 161 (stating that “violent criminals, children, and those of unsound mind may be deprived of firearms”).

203 *Binderup*, 836 F.3d at 348 (“Several of our sister circuits endorse the ‘virtuous citizen’ justification for excluding felons and felon-equivalents from the Second Amendment’s ambit.”); *United States v. Carpio-Leon*, 701 F.3d 974, 979–80 (4th Cir. 2012) (“[F]elons ‘were excluded from the right to arms’ because they were deemed unvirtuous.” (quoting Glenn Harlan Reynolds, *A Critical Guide to the Second Amendment*, 62 TENN. L. REV. 461, 480 (1995))); *Don B. Kates, Jr., The Second Amendment: A Dialogue*, 49 LAW & CONTEMP. PROBS., no. 1, 1986, at 143, 146 (“One implication of this emphasis on the virtuous citizen is that the right to arms does not preclude laws disarming the unvirtuous citizens (i.e., criminals) or those who, like children or the mentally unbalanced, are deemed incapable of virtue.”).

204 *United States v. Skoien*, 614 F.3d 638, 640 (7th Cir. 2010).

205 *United States v. Anderson*, 559 F.3d 348, 352 & n.6 (5th Cir. 2009) (stating that plaintiff’s challenge to § 922(g)(1) was “foreclosed” by Circuit’s prior precedent, and that *Heller* offers “no basis for reconsidering” that precedent); *United States v. McCane*, 573 F.3d 1037, 1047 (10th Cir. 2009) (rejecting plaintiff’s § 922(g)(1) challenge, relying exclusively on *Heller*’s “longstanding prohibitions” language and on *Anderson*).

206 *Binderup*, 836 F.3d at 349 (surveying several sources on felons’ right to bear arms).

207 *See id.*

208 *District of Columbia v. Heller*, 554 U.S. 570, 604 (2008); *id.* at 658 (Stevens, J., dissenting).

209 *Id.* at 658 (Stevens, J., dissenting) (emphasis added) (quoting 2 BERNARD SCHWARTZ, *THE BILL OF RIGHTS: A DOCUMENTARY HISTORY* 665 (1971)).

210 *United States v. Skoien*, 614 F.3d 638, 640 (7th Cir. 2010).

eenth century.<sup>211</sup> As a result, the lack of written, legalized exceptions for felons does not imply that these individuals fell within the scope of the Second Amendment, as the aforementioned sources have recognized.

Accordingly, the similar lack of formalized exceptions to the right to bear arms for the mentally ill does not signify historical support for such a right. As the Pennsylvania report acknowledged, not only did those who committed crimes lack a personal right to possess firearms, but so did those who posed a “real danger of public injury.”<sup>212</sup> At the Founding, those with a history of mental illness or those of unsound mind were not among those individuals permitted to bear arms without posing such a danger to the public.<sup>213</sup> In fact, these individuals could even be removed from their communities and restricted in their physical liberty, confined to their homes or institutionalized.<sup>214</sup> Accordingly, if such grave consequences were imposed on individuals with mental illness throughout history, there is little reason to doubt the implication that they similarly fell outside the scope of those protected by the Second Amendment.

### C. *Option Three: The Beers Analysis*

While the aforementioned two approaches focus on the Ninth Circuit’s inquiry of the first step in the *Marzzarella/Greeno* test, the third option follows the Third Circuit’s approach in *Beers*.<sup>215</sup> This option tracks previously applied precedent in the context of § 922(g)(1) and could provide another valid alternative for courts evaluating similar challenges to § 922(g)(4). Under the Third Circuit approach, to determine whether a law burdens conduct protected by the Second Amendment, the plaintiff must “(1) identify the traditional justifications for excluding from Second Amendment protections the class of which he appears to be a member, and then (2) present facts about himself and his background that distinguish his circumstances from those of persons in the historically barred class.”<sup>216</sup> If a plaintiff is unable to meet those requirements, his challenge to § 922(g)(4) will fail.

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211 *Id.* (citing STEPHEN P. HALBROOK, *THE FOUNDERS’ SECOND AMENDMENT: ORIGINS OF THE RIGHT TO BEAR ARMS* 273 (2008)).

212 *Heller*, 554 U.S. at 658 (Stevens, J., dissenting) (quoting 2 SCHWARTZ, *supra* note 209, at 665).

213 Brief for the Appellees at 14, *Beers v. Att’y Gen.*, 927 F.3d 150 (3d Cir. 2019) (No. 17-3010).

214 *Id.* (citing GERALD N. GROB, *THE MAD AMONG US: A HISTORY OF THE CARE OF AMERICA’S MENTALLY ILL* 5–21, 29, 43 (1994)).

215 In July 2019, the Bureau of Alcohol, Tobacco, Firearms, and Explosives approved Pennsylvania’s relief program under the NIAA, which lawfully permitted *Beers* to possess a firearm. Petition for Writ of Certiorari at 23, *Beers v. BarT*, 140 S. Ct. 2758 (2020) (No. 19-864). In May 2020, the Supreme Court subsequently vacated the judgment in *Beers* and ordered the Third Circuit to dismiss the case as moot. *Beers*, 140 S. Ct. at 2759. Accordingly, the Supreme Court did not reach the merits of the case.

216 *Beers*, 927 F.3d at 157 (quoting *Binderup v. Att’y Gen.*, 836 F.3d 336, 346–47 (3d Cir. 2016) (en banc)).

Under the first prong, *Beers* had already concluded that the historical record supports the constitutionality of § 922(g)(4).<sup>217</sup> After noting that individuals deemed “dangerous to the public or to themselves” fell outside the scope of the Second Amendment, the court concluded that the mentally ill must have been included in that category.<sup>218</sup> Relying on the historical sources presented in the previous Section, the court noted the lawfulness of physically confining “lunatics” and others similarly situated in the eighteenth century, indicating that these individuals would not be considered capable of possessing firearms.<sup>219</sup> Thus, the Third Circuit deemed the mentally ill part of the historically barred class, implying that those who fall within the scope of § 922(g)(4) would inherently be included in that category.<sup>220</sup>

Next, the plaintiff would then need to distinguish himself from that class, though an ability to do so under the Third Circuit approach would be highly difficult.<sup>221</sup> Relying on its precedent in *Binderup*, the Third Circuit again concluded that evidence of reform or of the passage of time could not be used to distinguish the plaintiff.<sup>222</sup> Though *Binderup* specifically considered a challenge to § 922(g)(1), it determined that rehabilitation and the passage of time are generally insufficient to “restore” forfeited Second Amendment rights,<sup>223</sup> even if they were forfeited outside of the context of § 922(g)(1). As *Beers* later stated, the rationale for disregarding those factors under a § 922(g)(1) inquiry also applies to § 922(g)(4).<sup>224</sup> Based on *Binderup*’s findings, there exists “no historical support” for the restoration of Second Amendment rights based on the passage of time or rehabilitation.<sup>225</sup> Though Congress could opt to provide a remedy—as it did with § 925(c), for example—such an act would be a “matter of legislative grace,” not of necessity.<sup>226</sup> Further, the *Beers* court addressed the more practical challenge courts face when considering the passage of time and rehabilitation. As the Supreme Court has confirmed, the judiciary—and federal courts, in particular—is not “institutionally equipped’ to conduct ‘a neutral, wide-ranging investigation’” into assessments of rehabilitation and recidivism.<sup>227</sup> While state courts are sometimes called to engage in a similar inquiry, namely by deciding whether to involuntarily commit an individual, federal courts have no role in that process.<sup>228</sup> Thus, requiring federal courts to insert themselves into the inquiry—and decide whether an individual has been rehabilitated or

217 *Id.*

218 *Id.*

219 *Id.* at 158 (quoting Larson, *supra* note 193, at 1377).

220 *See id.*

221 *Id.* at 159.

222 *Id.*

223 *Binderup v. Att’y Gen. U.S.*, 836 F.3d 336, 350 (3d Cir. 2016) (en banc).

224 *Beers*, 927 F.3d at 159.

225 *Id.*

226 *Binderup*, 836 F.3d at 350.

227 *Id.* (quoting *United States v. Bean*, 537 U.S. 71, 77 (2002)).

228 *Beers*, 927 F.3d at 159 n.52.

whether a sufficient amount of time has passed since the disqualifying event under § 922(g)(4)—would present logistical and conceptual challenges.

Based on those considerations, the Third Circuit's inquiry has greatly circumscribed the scope of as-applied challenges to § 922(g)(4). In fact, the court concluded in *Beers* that an individual in the historically barred class—i.e., those with mental illness—can distinguish himself in only one way: “[D]emonstrating that he was never determined to be a danger to himself or to others.”<sup>229</sup> However, as the majority of state statutes relating to involuntary commitment impose a dangerousness requirement,<sup>230</sup> the odds of a plaintiff succeeding in that endeavor are slim. As such, challenges to § 922(g)(4) would likely prevail in only rare cases under the Third Circuit's approach.

Given the historical backdrop of the Third Circuit's analysis, other courts could rely on the same historical sources to conduct their own *Beers*-esque inquiry, notwithstanding the absence of *Binderup* in their precedent. Based on those sources, the historical inquiry supports the exclusion of firearm rights for those with a history of mental illness, placing them inherently within the historically barred class. Further, the Third Circuit approach greatly streamlines the inquiry for as-applied challenges to § 922(g)(4). As the effect of time and rehabilitation would be inherently difficult to evaluate<sup>231</sup>—and ripe for error—eliminating that inquiry would prevent federal courts from engaging in a subjective judgment call. Additionally, as time and rehabilitation have historically never supported a restoration of Second Amendment rights,<sup>232</sup> courts would remain well within the scope of their precedent in rejecting such an inquiry. Thus, the Third Circuit's approach should serve as another viable alternative to evaluating challenges to § 922(g)(4).

## CONCLUSION

Though § 922(g)(4) faces an uncertain fate across various circuits, the constitutionality of the provision has indeed already been addressed by precedent and by historical sources. Given *Heller*'s recognition of “longstanding prohibitions” on firearms by the mentally ill, several courts and scholars have concluded that the mentally ill lie entirely outside the scope of the Second Amendment.<sup>233</sup> Further, the historical record supports the same conclusion, as “lunatics” and those of unsound mind could lawfully lose their fundamental freedoms, which would include firearm possession.<sup>234</sup> Given those sources, courts should gain greater confidence in concluding that the federal statute governing mental illness—§ 922(g)(4)—does not burden conduct

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229 *Id.* at 159.

230 TREATMENT ADVOC. CTR., *supra* note 39.

231 *Beers*, 927 F.3d at 159.

232 *Id.*

233 *See, e.g.*, Blocher, *supra* note 146, at 414.

234 Larson, *supra* note 193, at 1377 (quoting CARE, *supra* note 193, at 329).

falling within the scope of the Second Amendment. Thus, as with § 922(g)(1)'s felon-in-possession provision, courts can and should decide challenges to § 922(g)(4) without having to resort to means-end scrutiny.

This Note traced three approaches that courts could viably implement to evaluate challenges to § 922(g)(4). Though none has gained universal approval, each has substantial support in Supreme Court precedent, other federal court precedent, or historical sources. Thus, courts would remain within the scope of their authority in relying solely on step one of the *Marzzarella/Greene* test to evaluate § 922(g)(4). While the Third Circuit has served as the primary example in employing such an approach, other circuits should and perhaps will follow its lead. In *Mai*, for instance, the Ninth Circuit ultimately proceeded to step two of the test but noted that a “strong argument” had been made for resolving the challenge at the first step.<sup>235</sup> Going forward, perhaps the court has already paved the way for a resolution at that step within the Ninth Circuit and will follow through with its analysis under that route. Though only time will determine the prevailing approach to § 922(g)(4) challenges, the approaches outlined in this Note should each serve as suitable ways to decide the constitutional question.

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235 *Mai v. United States*, 952 F.3d 1106, 1114–15 (9th Cir. 2020).

