No. 18-36071

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

DUY T. MAI,

Plaintiff-Appellant,

v.

UNITED STATES, et al.,

Defendants-Appellees.

On Appeal from the United States District Court
for the Western District of Washington

RESPONSE TO PETITION FOR REHEARING AND REHEARING EN BANC

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INTRODUCTION AND SUMMARY

Plaintiff was involuntarily committed for mental health treatment by court order in 1999 for a period extending for months. Although plaintiff is barred from possessing a firearm under federal law, plaintiff contends in this suit that this prohibition violates the Second Amendment.

This Court correctly rejected plaintiff's as-applied challenge. The Court's conclusion that the Second Amendment is not violated by the application to plaintiff of section 922(g)(4)'s "longstanding prohibition[] on the possession of firearms by . . . the mentally ill," *District of Columbia v. Heller*, 554 U.S. 570, 626 (2008), was fully consistent with Supreme Court precedent, as well as this Court's precedent rejecting as-applied challenges to other provisions of the Gun Control Act. Moreover, history and common sense confirm that restricting the firearm possession of persons with a history of mental disturbance is not inconsistent with "the right of law-abiding, responsible citizens to" keep and bear arms. *Heller*, 554 U.S. at 635.

In his rehearing petition, plaintiff relies heavily on a Sixth Circuit decision, arguing that the Sixth Circuit would hold that the statute as applied to him violates the Second Amendment. As the unanimous panel in this case explained, however, the Sixth Circuit did not hold that the statute was unconstitutional as-applied but rather remanded to the district court. And this Court and the Sixth Circuit agree on much of the analysis when faced with an as-applied challenge to section (g)(4),

parting ways only at the point where this Court determined that there existed a substantial fit between Congress's compelling interest in preventing gun violence and the means chosen in section (g)(4). As explained below, this Court has the better of that debate.

Similarly unavailing are plaintiff's renewed challenges to the wisdom of Congress's judgment regarding prohibiting those who have been committed to a mental institution from possessing firearms. This Court properly rejected those arguments in the first instance, and plaintiff provides no cause to revisit those conclusions. Nor does it advance plaintiff's claim to observe that he was a juvenile when he was first committed. As the government explained to this Court, that argument was not developed in the district court and, in any event, plaintiff remained committed after his 18th birthday.

STATEMENT

1. Federal law prohibits any person who "has been committed to a mental institution" from shipping, transporting, possessing, or receiving firearms and ammunition. 18 U.S.C. § 922(g)(4). Congress enacted this provision as part of the Gun Control Act of 1968, Pub. L. No. 90-618, 82 Stat. 1213, after a multi-year inquiry into violent crime that included "field investigation and public hearings." S. Rep. No. 88-1340, at 1-2 (1964).

During the hearings, federal law enforcement officials noted the "number of tragedies and crimes" resulting from the circumvention of local firearms laws,

including an incident involving a "mentally ill youth who bought a gun in a Fairfax gunshop . . . and used it to kill a high school student." *Juvenile Delinquency: Hearings Before the Subcomm. to Investigate Juvenile Delinquency of the S. Comm. on the Judiciary*, 88th Cong. 3375 (1963) (pt. 14) (statement of James Bennett, Director, U.S. Bureau of Prisons). The evidence before Congress also addressed suicide, showing 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).

Congress sought to address these problems by "regulat[ing] more effectively interstate commerce in firearms so as to reduce the likelihood that they fall into the hands of the lawless or those who might misuse them," S. Rep. No. 89-1866, at 1 (1966), including "persons who are not criminals, but who commit sudden, unpremeditated crimes with firearms as a result of mental disturbances," 114 Cong. Rec. 21,829 (statement of Rep. Bingham). Lawmakers explained that they sought to restrict access to firearms from "individuals who by their previous conduct or mental condition or irresponsibility have shown themselves incapable of handling a dangerous weapon in the midst of an open society," *id.* at 21,809-10 (statement of Rep. Tenzer), such as "persons with a history of mental disturbances," *id.* at 21,784 (statement of Rep. Celler).

As originally enacted, the Gun Control Act included a provision under which an individual barred from firearm possession due to certain non-firearm offenses

could apply to the federal government for "relief from the disabilities imposed by Federal laws," based on a showing "that the circumstances regarding the conviction, 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." Pub. L. No. 90-618, § 102, 82 Stat. at 1225. In 1986, Congress expanded that relief-from-disabilities program to cover any person whom the Gun Control Act "prohibited from possessing, shipping, transporting, or receiving firearms." Firearms Owners' Protection Act, Pub. L. No. 99-308, § 105(1)(A), 100 Stat. 449, 459 (1986) (codified as amended at 18 U.S.C. § 925(c)) (quotation marks omitted). As relevant here, the federal program for "relief from the disabilities imposed by Federal [firearms] laws," 18 U.S.C. § 925(c), was in effect from 1986 until 1992, when Congress suspended its funding through an appropriations restriction on the Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF), which administered the program. *See* Treasury, Postal Service, and General Government Appropriations Act, 1993, Pub. L. No. 102-393, tit. I, 106 Stat. 1729, 1732 (1992); *United States v. Bean*, 537 U.S. 71, 74-75 (2002).

Congress subsequently found deficiencies in the reporting of information to the National Instant Criminal Background Check System (NICS) that made it possible for individuals with documented mental health problems to purchase and misuse firearms notwithstanding 18 U.S.C. § 922(d)(4) and (g)(4). It accordingly enacted the NICS Improvement Amendments Act of 2007, Pub. L. No. 110-180,

121 Stat. 2559 (2008). The Act, *inter alia*, authorizes federal grants to assist States to improve the quality of information they make available to the databases searched by NICS. *Id.* § 103(b)(1), 121 Stat. at 2567. To be eligible for such a grant, a State must certify that it has implemented a qualifying program under which persons who "pursuant to State law" have been adjudicated mentally defective or committed to a mental institution may "apply to the State for relief from the disabilities imposed by [18 U.S.C. § 922(d)(4) and (g)(4)]." *Id.* § 103(c), 121 Stat. at 2568; *id.* § 105(a), 121 Stat. at 2569. A State may receive federal authorization to provide relief from the federal firearm disability at Section (g)(4)—and thereby be eligible for a grant—only if its program provides for a specified state authority to "grant the relief, pursuant to State law and in accordance with the principles of due process, if . . . 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." *Id.* § 105(a)(2), 121 Stat. at 2569-70. At present, over thirty States—though not Washington—have created qualifying programs.

2. Plaintiff, Duy T. Mai, was involuntarily committed for mental health treatment by court order in 1999. ER 72; *see also* ER 26 (providing court's determination that plaintiff posed a "likelihood of serious harm to others"); ER 51 (describing history of involuntary hospitalization). That commitment expired by August 8, 2000. Pl. Br. 7. Because of this commitment, plaintiff was prohibited under

both federal and Washington state law from possessing a firearm. Plaintiff contends that he has not had an episode of clinical depression since at least 2010. *See* Pl. Br. 25.

In 2014, plaintiff filed a petition in Washington state court for restoration of his firearms rights, which the court granted. ER 73. Plaintiff remained subject to section (g)(4)'s firearm disability, however, because Washington did not have in place a qualifying restoration of firearms rights statute under the NICS Improvement Amendments Act.

Plaintiff filed this lawsuit in April 2017, alleging that 18 U.S.C. § 922(g)(4) as applied to him violated the Second and Fifth Amendments. ER 74-75.

The district court dismissed the suit, explaining that this Court "has consistently rejected arguments that the constitutionality of a prohibition on possession turns on whether there is evidence that the specific plaintiff is violent or non-violent." ER 65. "Thus," the court held, plaintiff's "argument that the Court should find that his involuntary commitment and alleged past mental health issues do not provide a constitutional basis for a prohibition on his right to bear arms is unpersuasive." *Id.*

This Court affirmed the district court in a unanimous decision. Recognizing that plaintiff "conced[ed] that the statutory prohibition on his possession of firearms during the period of his commitment was constitutional under the Second Amendment," Op. 4, the Court rejected plaintiff's argument that the statute was unconstitutional because of "his alleged return to mental health and peacableness." *Id.*

Explaining that "[t]he government has presented a strong argument" that "§ 922(g)(4) does not burden Second Amendment rights" given that "historical evidence supports the view that society did not entrust the mentally ill with the responsibility of bearing arms," Op. 14, the Court assumed without deciding that the provision burdened conduct under the Second Amendment.

Applying intermediate scrutiny, Op. 16, the Court held that the government had demonstrated a "compelling" interest in preventing gun violence. Op. 18. The Court recognized that "[t]he Second Amendment allows categorical bans on groups of persons who presently pose an increased risk of violence," and that Congress had reasonably adjudged that those who have been committed to a mental institution pose an increased risk of violence. Op 18-19. In "assessing congressional judgment," this Court explained that it does "not impose an 'unnecessarily rigid burden of proof.'" Op. 21 (quoting *Pena v. Lindley*, 898 F.3d 969, 979 (9th Cir. 2018)). The Court observed that "[b]y limiting the prohibition to those with a demonstrated history of dangerousness, § 922(g)(4) is more narrowly tailored than other lifetime prohibitions" this Court has "upheld, such as § 922(g)(1)'s prohibition as to felons, both violent and non-violent." Op. 28.

The Court further rejected plaintiff's contention that the NICS Improvement Amendments indicated that Congress no longer believed that prohibiting those who have been committed to a mental institution in the past from possessing a firearm was permissible, explaining that "Congress' statutory extension of grace to some persons

as part of a political compromise aimed at preventing gun violence does not affect [the] constitutional analysis." Op. 25.

ARGUMENT

THE PANEL CORRECTLY HELD THAT APPLICATION OF SECTION 922(G)(4) TO PLAINTIFF DOES NOT VIOLATE THE SECOND AMENDMENT.

A. This Court correctly determined that Section 922(g)(4) does not violate the Second Amendment as applied to plaintiff. In *District of Columbia v. Heller*, 554 U.S. 570, 626 (2008), the Supreme Court recognized that, "[l]ike most rights, the right secured by the Second Amendment is not unlimited." The Supreme Court expressly provided a non-exhaustive list of "presumptively lawful regulatory measures," including "longstanding prohibitions on the possession of firearms by felons and the mentally ill." *Id.* at 626-27, 627 n.26. The Court explained that "nothing in [its] opinion should be taken to cast doubt on" such measures, *id.* at 626, and "repeat[ed] those assurances" in *McDonald v. City of Chicago*, 561 U.S. 742, 786 (2010) (plurality opinion).

The panel in this case declined to hold categorically that section 922(g)(4) was permissible based on the historical record. Op. 14. It did, however, correctly observe that "[t]he government has presented a strong argument" that "§ 922(g)(4) does not burden Second Amendment rights" because "historical evidence supports the view that society did not entrust the mentally ill with the responsibility of bearing arms," Op. 14. As the government explained (Br. 11), the Supreme Court's inclusion of

firearm prohibitions based on mental illness in its list of "presumptively lawful regulatory measures," *Heller*, 554 U.S. at 626-27, 627 n.26, reflects the historical record, which makes clear that "the right of law-abiding, responsible citizens" to possess firearms, *id.* at 635, does not extend to individuals who have been "committed to a mental institution," 18 U.S.C. § 922(g)(4); *see also United States v. Vongxay,* 594 F.3d 1111, 1118 (9th Cir. 2010) (noting that most scholars of the Second Amendment agree that the right to bear arms was "inextricably . . . tied to" the concept of a "virtuous citizen[ry]" and does not preclude laws disarming unvirtuous citizens) (alterations in original) (quotation marks omitted); *United States v. Emerson*, 270 F.3d 203, 226 n. 21 (5th Cir. 2001) (observing that "those of unsound mind" were historically prohibited from firearm possession) (quotation marks omitted). As courts have recognized, "most scholars of the Second Amendment agree that the right to bear arms was tied to the concept of a virtuous citizenry," which did not include individuals with a history of mental illness. *United States v. Yancey*, 621 F.3d 681, 684-85 (7th Cir. 2010) (per curiam). Indeed, such individuals were often physically isolated from the community at large through confinement at home or in welfare and penal institutions. *See, e.g.,* Gerald N. Grob, *The Mad Among Us: A History of the Care of America's Mentally Ill* 5-21, 29, 43 (1994).

The panel's judgment was therefore correct viewed through the historical lens. It was also a faithful implementation of this Court's means-end scrutiny precedent. *See United States v. Chovan*, 735 F.3d 1127, 1139 (9th Cir. 2013). The Court correctly

determined that there existed "a reasonable fit between" the government's important "objective and the conduct regulated." *Id.* The empirical evidence presented by the government demonstrated that Congress acted constitutionally in determining that persons who have been involuntarily committed should not be trusted with firearms. *See* Gov't Br. 19-22 (relying on studies showing link between history of mental illness and firearms violence). Plaintiff cannot seriously dispute that his prior involuntary commitment—following a judicial finding that he was mentally disturbed and in need of medical treatment—is relevant to the risk of current or future mental illness. *See Florida Bar v. Went For It, Inc.*, 515 U.S. 618, 628 (1995) (relying on "history, consensus, and simple common sense" to judge fit under means-end scrutiny) (quotation marks omitted).

The Court's determination, moreover, accords with the legislative history. Congress enacted section 922(g)(4) following an inquiry that revealed "a serious problem of firearms misuse in the United States." S. Rep. No. 89-1866, at 3, 53. The legislation was designed to "cut down or eliminate firearms deaths caused by persons who are not criminals, but who commit sudden, unpremeditated crimes with firearms as a result of mental disturbances," 114 Cong. Rec. 21,829 (statement of Rep. Bingham). When it subsequently enacted the NICS Improvement Amendments Act of 2007, Pub. L. No. 110-180, § 103(a)(1), 121 Stat. at 2567, Congress again found that individuals with disqualifying mental health histories were acquiring and misusing firearms.

B.1. Plaintiff's arguments in favor of rehearing are unavailing. Plaintiff has not demonstrated any conflict between the panel's holding and Supreme Court precedent or precedent from this Court. Although plaintiff urges (Pet. 4) that the panel's decision conflicts with *Heller* and *McDonald*, that contention is both undeveloped and without merit. The panel's holding is faithful to the Supreme Court's admonition that the Second Amendment right is not unlimited, and the Supreme Court's reference to presumptively lawful measures, including prohibitions on possessions of firearms by the mentally ill. *Heller*, 554 U.S. at 626-27, 627 n.26.

As explained, in issuing its unanimous decision, the panel acted in accordance with this Court's precedent. *See* Op. 12 (citing *United States v. Torres*, 911 F.3d 1253, 1258 (9th Cir. 2019)*, Vongxay*, 594 F.3d at 1118*,* and *Chovan*, 735 F.3d at 1142); *see also Petramala v. U.S. Dep't of Justice*, 481 F. App'x 395 (9th Cir. 2012) (unpublished decision rejecting challenge to 922(g)(4)). There is therefore no need for this Court's review to ensure "uniformity of the court's decisions." Fed. R. App. P. 35(b)(1)(A). The decision in this case is moreover consistent with two unpublished decisions from other courts of appeals and a decision from the Third Circuit that was vacated by the Supreme Court as moot under *United States v. Munsingwear, Inc.*, 340 U.S. 36 (1950). *See Heller v. Bedford Cent. Sch. Dist.,* 665 F. App'x 49, 54 (2d Cir. 2016); *United States v. McRobie*, No. 08-4632, 2009 WL 82715 (4th Cir. Jan. 14, 2009) (per curiam); *Beers v. Attorney Gen. U.S.*, 927 F.3d 150 (3d Cir. 2019), *vacated as moot sub nom. Beers v.*

Barr, No. 19-864, 2020 WL 2515441 (U.S. May 18, 2020).

Plaintiff nevertheless urges (Pet. 6) that this Court should "follow the Sixth Circuit," relying on the Sixth Circuit's fractured decision in *Tyler v. Hillsdale County Sheriff's Department*, 837 F.3d 678 (6th Cir. 2016) (en banc). There, as this Court recognized, the Sixth Circuit was in general agreement that the federal firearm disability may constitutionally be applied to individuals who have been committed to a mental institution. Op. 21-23; *See Tyler*, 837 F.3d at 699 (Gibbons, J.). The Sixth Circuit also agreed that an individualized evaluation is not required to satisfy intermediate scrutiny. Op. 23. The Sixth Circuit parted ways only in analyzing the substantial fit between the interest and the means chosen. *See Tyler*, 837 F.3d at 699 (Gibbons, J.) (remanding to district court to permit government to present additional evidence justifying section (g)(4)'s categorical restriction). Plaintiff urges that the Sixth Circuit better evaluated the fit because the studies relied upon by the government do not support its case (Pet. 11-12), but that contention demonstrates no entitlement to rehearing or rehearing en banc.

As the government explained in its brief, the *Tyler* Court, unlike the Court here, misunderstood *Heller*'s reference to the presumptive lawfulness of the ban on the possession of firearms by the mentally ill, questioning "whether the *Heller* Court had in mind § 922(g)(4) as opposed to state restrictions, or no particular restriction at all." *Tyler*, 837 F.3d at 687 (Gibbons, J.). But even setting that aside, this Court correctly explained in the decision in this case that proper application of intermediate scrutiny

does not require a perfect fit. In "assessing congressional judgment," this Court explained, the Court does "not impose an 'unnecessarily rigid burden of proof.'" Op. 21 (quoting *Pena v. Lindley*, 898 F.3d 969, 979 (9th Cir. 2018)); *see also Fyock v. City of Sunnyvale*, 779 F.3d 991, 1000 (9th Cir. 2015) (explaining that the government need not utilize "the least restrictive means of achieving its interest" in order to withstand intermediate scrutiny); *Ward v. Rock Against Racism*, 491 U.S. 781, 798 (1989) ("Lest any confusion on the point remain, we reaffirm today that a regulation … need not be the least restrictive or least intrusive means" in order to satisfy intermediate scrutiny).

2. Plaintiff further emphasizes that the state court determined that he posed a risk of violence only to others, but not to himself. Pet. 9, 11. It is hard to understand how this emphasis assists plaintiff. Section (g)(4) draws no distinction between those who have "been adjudicated as a mental defective or who ha[ve] been committed to a mental institution" based on concerns about the risk posed to themselves or the risk posed to others. § 922(g)(4). And the legislative record shows that Congress was concerned not just with suicide, but also with the risk that mentally ill individuals pose to others. Legislators supporting the bill, for example, expressed concern with the misuse of firearms by "persons who are not criminals, but who commit sudden, unpremeditated crimes with firearms as a result of mental disturbances," 114 Cong. Rec. 21,829 (statement of Rep. Bingham). These legislators explained that they sought to restrict access to firearms from "individuals who by their previous conduct or mental condition or

irresponsibility have shown themselves incapable of handling a dangerous weapon in the midst of an open society," *id.* at 21,809-10 (statement of Rep. Tenzer), such as "persons with a history of mental disturbances," *id.* at 21,784 (statement of Rep. Celler).

3. Plaintiff also renews his contention that he no longer poses a risk of harm and therefore cannot be constitutionally prohibited from possessing a firearm. Pet. 9-10. That argument finds no support in the historical record. Nor did the Supreme Court suggest that section (g)(4) could be applied only when a court determines that an individual is dangerous. *See Heller*, 554 U.S. at 626 (declaring that "nothing in [its] opinion should be taken to cast doubt" on "longstanding prohibitions on the possession of firearms by . . . the mentally ill").

Indeed, plaintiff fails to identify any decision in which this Court, in determining whether a section 922(g) prohibition was constitutional, considered the dangerousness of an individual following a prohibiting event. *See Vongxay*, 594 F.3d at 1118 (felony conviction); *Petramala*, 481 F. App'x at 396 (commitment to a mental institution); *Chovan*, 735 F.3d at 1141 (domestic violence misdemeanor conviction) (rejecting the plaintiff's argument that "§ 922(g)(9) is unconstitutional as applied . . . because his 1996 domestic violence conviction occurred fifteen years before his § 922(g)(9) conviction, he is unlikely to recidivate, and he has in fact been law-abiding for those fifteen years"); *see also United States v. Rozier*, 598 F.3d 768, 771 (11th Cir. 2010); *Binderup v. Attorney Gen. U.S. of Am.*, 836 F.3d 336, 349 (3d Cir.

2016) (Ambro, J.) (sustaining an as-applied challenge to section 922(g)(1), but rejecting the relevance of post-conviction conduct and declining to accept the argument that "the passage of time or evidence of rehabilitation will restore the Second Amendment rights of people who committed serious crimes").

4. Plaintiff further contends that the NICS Improvement Amendments Act demonstrates that Congress no longer believes that individuals who have been committed to a mental institution in the past pose a danger when possessing firearms. Pet. 8, 11. But the panel correctly rejected that argument, explaining that "Congress' statutory extension of grace to some persons as part of a political compromise aimed at preventing gun violence does not affect [the] constitutional analysis." Op. 25. Plaintiff incorrectly contends that the Act must have relevance because it represents a "significant change in the law." Pet. 11. As plaintiff notes, however, the Act has no bearing on the question whether section (g)(4) burdens conduct protected by the Second Amendment. And even in considering section (g)(4) under intermediate scrutiny, the fact that Congress believed that—under the right conditions and applying appropriate criteria—a state court could make a mental health and public safety determination does not mean that in the *absence* of such a finding (Washington State does not have a qualifying restoration program), Congress cannot prohibit possession of firearms based on prior commitment to a mental institution.

5. Plaintiff also urges rehearing en banc because he was a juvenile when

committed. As the government explained (Gov't Br. 15-16), however, plaintiff failed to develop this argument in the district court and, moreover, remained committed after he turned 18. Plaintiff has not argued that the commitment proceedings he underwent did not comport with due process. Indeed, plaintiff's own submissions to this Court demonstrate that he was determined to present "a likelihood of serious harm to others" after a hearing, ER 26, and committed for a period of time extending for months. This issue is therefore not presented by this case, and certainly presents no reason to grant rehearing en banc.

CONCLUSION

The petition for rehearing and rehearing en banc should be denied.

Respectfully submitted,

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June 2020

STATEMENT OF RELATED CASES

Counsel for defendants are not aware of any related cases, as defined in Ninth Circuit Rule 28-2.6

CERTIFICATE OF COMPLIANCE WITH FEDERAL RULE OF APPELLATE PROCEDURE 32(a)

I hereby certify that this brief complies with the requirements of Circuit Rule 40-1 and Federal Rule of Appellate Procedure 32(a)(5) and (6) because it has been prepared in 14-point Garamond, a proportionally spaced font.

I further certify that this brief complies with the type-volume limitation of Circuit Rule 40-1 because it contains of 3,896 words, according to the count of Microsoft Word.

/s/ Abby C. Wright
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CERTIFICATE OF SERVICE

I hereby certify that on June 10, 2019, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

The plaintiffs in this case are registered CM/ECF users and service will be effected using the CM/ECF system.

/s/ Abby C. Wright
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