In With the One-Step, Out With the Circuit Split: Post-*Bruen* Analysis of 18 U.S.C. § 922(g)(4)

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I. INTRODUCTION

In 2020, approximately 1 in 5 American adults—or 57.8 million people—suffered from some form of mental illness.[1] But, despite its prevalence and treatability,[2] mental illness remains associated with unfortunate stigmas.[3] In some instances, those stigmas extend to the law. According to 18 U.S.C. § 922(g)(4), anyone "who has been committed to a mental institution" is barred from "possess[ing] . . . any firearm or ammunition . . . ."[4] There are, of course, good reasons for keeping firearms out of the hands of the mentally ill—especially given nearly half of those who commit suicide are diagnosed with some form of mental health condition.[5] However, in many states, the law operates to ban someone *indefinitely* from owning a firearm, irrespective of the severity of his underlying illness, the status of his recovery, or the length of his commitment.[6] In other words, the law treats someone who was "once mentally ill" as "always mentally ill,"[7] subjecting him to the same firearms ban applied to felons.[8]

Whether or not it is good policy to extend a federal ban on possessing firearms to people who have recovered from mental illnesses, there remains a separate question of whether the ban is constitutional. The Second Amendment secures "the right of the people to keep and bear Arms . . . ."[9] And in *District of Columbia v. Heller* and *McDonald v. City of Chicago*, the Supreme Court interpreted the constitutional protection to encompass an ordinary citizen's right to possess a weapon for self-defense.[10] Based on the Court's understanding of the Second Amendment right, a number of healthy, formerly committed individuals—each denied the ability to purchase a firearm—have challenged the

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[1] *Mental Health by the Numbers*, NAT'L ALL. ON MENTAL ILLNESS, https://www.nami.org/mhstats [https://perma.cc/P52L-F2YX] (Apr. 2023).

[2] *See* EMILY P. TERLIZZI & JEANNINE S. SCHILLER, NAT'L CTR. FOR HEALTH STATS., MENTAL HEALTH TREATMENT AMONG ADULTS AGED 18-44: UNITED STATES, 2019-2021, at 5 (2022) (summarizing recent trends in mental health treatment).

[3] Deidre McPhillips, *90% of US Adults Say the United States Is Experiencing a Mental Health Crisis, CNN/KFF Poll Finds*, CNN (Oct. 5, 2022), https://www.cnn.com/2022/10/05/health/cnn-kff-mental-health-poll-wellness/index.html [https://perma.cc/JLE3-KL7M].

[4] 18 U.S.C. § 922(g)(4).

[5] *Mental Health by the Numbers*, *supra* note 1 (reporting that "46% of people who die by suicide had a diagnosed mental health condition").

[6] *See infra* Part II.A.

[7] Tyler v. Hillsdale Cnty. Sheriff's Dep't, 837 F.3d 678, 710 (6th Cir. 2016) (en banc) (Sutton, J., concurring in most of the judgment).

[8] 18 U.S.C. § 922(g)(1).

[9] U.S. CONST. amend. II.

[10] District of Columbia v. Heller, 554 U.S. 570, 592 (2008) (determining the Second Amendment "guarantee[s] the individual right to possess and carry weapons in case of confrontation"); McDonald v. City of Chicago, 561 U.S. 742, 749–50 (2010) (incorporating the protections to apply against the states).

federal ban.[11] In light of these challenges, a circuit split has emerged. Two circuits have held § 922(g)(4) violated the respective claimants' rights, while one circuit has held the law did not.[12]

The Supreme Court has not directly weighed in on this split, but the October 2021 term ushered in the first major Second Amendment decision since 2010. In *New York State Rifle & Pistol Ass'n v. Bruen*, the Court clarified the proper analysis for determining the validity of regulations that burden an individual's right to bear arms, placing significant emphasis on the need to consider "the Second Amendment's text and historical understanding."[13] The new history-only approach marked a departure from the analytical approach the circuits adopted in the wake of *Heller* and *McDonald*—which often involved evaluating a regulation under some form of means-end scrutiny.[14]

Because each circuit that has considered § 922(g)(4)'s constitutionality reviewed the statute under a now-obsolete analytical approach, the recent development in Second Amendment jurisprudence sheds new light on the circuit split.[15] This Note argues that, because *Bruen* requires lower courts to wrestle more seriously with the history and tradition of the Second Amendment when analyzing the validity of § 922(g)(4), doing so should resolve the current circuit split in favor of invalidating the federal ban as applied to people who have recovered from mental illnesses.[16]

Part II of this Note introduces 18 U.S.C. § 922(g)(4) and other regulations that pertain to the firearms ban for formerly committed persons. It also describes the current circuit split on the law's constitutionality. Part III analyzes the recent Supreme Court case in *Bruen* and its explicit rejection of the Second Amendment analysis the circuits adopted in the wake of *Heller* and *McDonald*. Part IV argues that *Bruen* should resolve the current circuit split, and courts should deem § 922(g)(4) unenforceable against recovered persons. Part V briefly concludes.

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[11] *See, e.g.*, Mai v. United States, 952 F.3d 1106, 1109 (9th Cir. 2020); Beers v. Att'y Gen. U.S., 927 F.3d 150, 153 (3d Cir. 2019), *vacated sub nom.* Beers v. Barr, 140 S. Ct. 2758 (2020) (mem.); *Tyler*, 837 F.3d at 684.

[12] Melissa J. Araiza, Comment, *Once Mentally Ill, Always So? Maybe Yes, Maybe No: Addressing the 18 U.S.C. § 922(g)(4) Circuit Split and Lifetime Gun Bans for the (Formerly) Mentally Ill*, 100 NEB. L. REV. 785, 787 (2022).

[13] N.Y. State Rifle & Pistol Ass'n v. Bruen, 142 S. Ct. 2111, 2131 (2022).

[14] *Id.* at 2125–26 (describing the analytical approach "the Courts of Appeals . . . coalesced around"); *see infra* Part II.B.1.

[15] *See, e.g.*, *Tyler*, 837 F.3d at 685–86 (describing the obsolete approach).

[16] *See infra* Part IV.A.

II. SECTION 922(g)(4) AND THE CURRENT CIRCUIT SPLIT

A. *The Federal Ban on Mentally Ill Persons Possessing Firearms*

Congress instituted a ban on mentally ill persons possessing firearms as part of the Gun Control Act of 1968.[17] The Act's purpose was "to provide support to Federal, State, and local law enforcement officials in their fight against crime and violence . . . ."[18] It was motivated, at least in-part, by gun violence that had taken place on a national stage throughout the 1960s—including the assassinations of President Kennedy and Dr. Martin Luther King, Jr.[19] In order to reduce bloodshed plaguing the country, Congress felt it necessary to keep weapons out of the hands of "dangerous individual[s]."[20] Thus, the law bars—among other groups—felons, "fugitives," "addict[s]," and "aliens" from "possess[ing] . . . any firearm or ammunition . . . ."[21] Congress also determined that the mentally ill are unfit to be "entrusted with guns," given they are "either mentally unable or unwilling to exercise the responsibility which comes with the ownership and use of firearms . . . ."[22] Accordingly, § 922(g)(4) precludes anyone who "has been adjudicated as a mental defective *or* who has been committed to a mental institution" from possessing a gun.[23]

It is worth pausing to identify exactly who § 922(g)(4) seeks to disarm. Start with people the law coarsely labels "defective."[24] To adjudicate a person mentally defective, a court or other tribunal must determine that the individual poses a risk of self-harm, harm to others, or otherwise lacks the faculties "to contract or manage his own affairs."[25] This includes, for example, when a court makes an insanity determination in a criminal case.[26] The law also applies to committed persons.[27] While, on its face, § 922(g)(4) does not distinguish between voluntary and involuntary commitment, it has been implemented to affect only those involuntarily committed.[28] Involuntary commitment is a civil

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[17] Gun Control Act of 1968, Pub. L. No. 90-618, § 922, 82 Stat. 1213, 1220–21.

[18] *Id.* at 1213.

[19] *See* 114 CONG. REC. 21,809 (1968) (statement of Rep. Tenzer) (urging Congress to "act now" to address gun violence and citing the assassinations of John F. Kennedy, Medgar Evers, Dr. Martin Luther King, Jr., and Robert F. Kennedy as reasons for doing so); *id.* at 21,808 (statement of Rep. Cahill).

[20] *Id.* at 21,812 (statement of Rep. Schwengel) (explaining the need to bar "felon[s]" and the "mentally incompetent" from possessing firearms).

[21] 18 U.S.C. §§ 922(g)(1)–(3), (5).

[22] *See* 114 CONG. REC. 21,836 (1968) (statement of Rep. Dwyer); *id.* at 21,810 (statement of Rep. Tenzer).

[23] 18 U.S.C. § 922(g)(4) (emphasis added).

[24] *Id.*

[25] 27 C.F.R. § 478.11 (2022).

[26] *Id.*

[27] 18 U.S.C. § 922(g)(4).

[28] 27 C.F.R. § 478.11; Tyler v. Hillsdale Cnty. Sheriff's Dep't, 837 F.3d 678, 681–82 (6th Cir. 2016) (en banc).

legal proceeding.[29] The proceedings will vary by state, but they generally require a medical examination and a court hearing.[30] If, after a hearing, a court determines an individual requires medical treatment, it will order such treatment against the person's wishes.[31]

While § 922(g)(4) imposes an indefinite ban on these classes of people, Congress included a relief from disabilities provision whereby "[a] person who is prohibited from possessing . . . firearms or ammunition may make application to the Attorney General for relief from the disabilities imposed by Federal law[] . . . ."[32] Theoretically, then, a person once deemed "defective" or once committed to an institution who subsequently recovers could have his right to possess a firearm restored so long as he shows he "will not be likely to act in a manner dangerous to public safety . . . ."[33] But only in theory. That is because, since 1992, Congress has made federal funds unavailable for effectuating § 925(c)—the relief from disabilities provision.[34] Without proper funding for government agencies to review applications for relief, § 922(g)(4) effectively operates as a lifetime ban on possessing firearms.

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[29] Kamron A. Fariba & Vikas Gupta, *Involuntary Commitment*, NAT'L LIBR. OF MED., https://www.ncbi.nlm.nih.gov/books/NBK557377/ [https://perma.cc/DBQ7-VXTM] (Apr. 4, 2023).

[30] *Id.* In Ohio, for example, the civil commitment process begins with an interested party submitting an affidavit to a probate court stating someone suffers from a mental illness substantial enough to require treatment. DISABILITY RTS. OHIO, CIVIL COMMITMENT: UNDERSTANDING YOUR RIGHTS 4 (Apr. 2016), https://disabilityrightsohio.org/assets/documents/dro_civil_commitment_april2016.pdf [https://perma.cc/E3EV-DAQS]. The probate court must then determine whether probable cause exists to require treatment. *Id.* at 5. If so, it will send notice to the individual and request that the county mental health board investigate whether court-ordered treatment is necessary. *Id.* Shortly thereafter, a hearing will ensue. *Id.* Before the court can mandate treatment, the health board "must provide 'clear and convincing' evidence" it is necessary to do so. *Id.* at 6. Upon a finding of clear and convincing evidence, the court may then order treatment. *See id.* at 6, 8–11. After commitment, a patient's needs might change, so interested parties may request a change to the court's order. *Id.* at 12. Otherwise, court-ordered treatment will continue until "the court's order runs out." *See id.* at 13. At that point, the individual may have another hearing where the court will determine whether to order additional treatment. *Id.*

[31] Fariba & Gupta, *supra* note 29.

[32] 18 U.S.C. § 925(c). Today, the authority to grant relief resides with the Director of the Bureau of Alcohol, Tobacco, Firearms and Explosives ("ATF"). 28 C.F.R. § 0.130(a)(1) (2022); 27 C.F.R. § 478.144(b).

[33] *See* 18 U.S.C. § 925(c); *see also* 27 C.F.R. § 478.144(d).

[34] Treasury, Postal Service, and General Government Appropriations Act, 1993, Pub. L. No. 102-393, 106 Stat. 1729, 1732; *see* Tyler v. Hillsdale Cnty. Sheriff's Dep't, 837 F.3d 678, 682 (6th Cir. 2016) (en banc) (calling § 925(c) a "nullity"); *see also* Laura E. Johnson, *Mental Health History Is History: A Lifetime Ban on Gun Possession Due to History of Involuntary Commitment Violates the Second Amendment*, 100 N.C. L. REV. 919, 922 (2022).

Over a decade after defunding the federal relief from disability program, Congress did, however, incentivize a state alternative. Motivated by the tragic mass shooting on Virginia Tech's campus, Congress passed the NICS Improvement Amendments Act of 2007.[35] The Act made federal grants available to states in an effort to strengthen the National Instant Criminal Background Check System ("NICS")—a federal system used to determine whether a prospective gun buyer is legally eligible to possess a firearm.[36] Congress conditioned federal funds on a grantee-state establishing a relief from disability program resembling the defunded federal program.[37] So, again, someone barred from possessing a firearm under 18 U.S.C. § 922(g)(4) could theoretically petition for relief if and when he recovered from his mental illness. But, again, the relief remains only theoretical in many places. States are not compelled to meet the federal grant conditions and may instead opt to forgo federal money. Indeed, only thirty-two states have established a qualifying disability relief program.[38] In the remaining eighteen states, § 922(g)(4) continues to operate as a lifetime ban, regardless of whether a person makes a full recovery from his mental illness.

B. *The Current Circuit Split on the Constitutionality of § 922(g)(4)*

Because those deemed mentally defective or those committed to mental institutions are effectively banned for life from possessing a firearm in many states, § 922(g)(4) has been challenged in several circuits. Each respective challenger alleged that the ban, as applied, unconstitutionally burdened his right to bear arms.[39] In resolving these cases, the circuits have diverged on whether the law is, in fact, in conflict with the Second Amendment.[40]

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[35] NICS Improvement Amendments Act of 2007, Pub. L. No. 110-180, § 2, 121 Stat. 2559, 2560.

[36] *See id.* § 103 (providing grants "to establish or upgrade information and identification technologies for firearms eligibility determinations"); *id.* § 301 (providing grants to, among other things, "improve the automation and transmittal of criminal history dispositions . . . and mental health adjudications or commitments"); *see also Firearms Checks (NICS)*, FED. BUREAU OF INVESTIGATIONS, https://www.fbi.gov/how-we-can-help-you/more-fbi-services-and-information/nics (on file with the *Ohio State Law Journal*).

[37] NICS Improvement Amendments Act §§ 103(c), 105. While a fully funded federal program would not limit disability relief to the mentally ill, to qualify for a federal grant, a state is only required to provide relief to persons described in 18 U.S.C. § 922(g)(4). *Id.* § 105(a)(1); *see also Tyler*, 837 F.3d at 682 n.1.

[38] WILLIAM J. KROUSE, WILLIAM R. MORTON & SCOTT D. SZYMENDERA, CONG. RSCH. SERV., R44752, GUN CONTROL, MENTAL INCOMPETENCY, AND SOCIAL SECURITY ADMINISTRATION FINAL RULE 5 (2017) ("Thirty-two states and the VA have established disability relief programs under the NIAA.").

[39] Mai v. United States, 952 F.3d 1106, 1112 (9th Cir. 2020); Beers v. Att'y Gen. U.S., 927 F.3d 150, 153 (3d Cir. 2019), *vacated sub nom.* Beers v. Barr, 140 S. Ct. 2758 (2020) (mem.); *Tyler*, 837 F.3d at 684.

[40] *See supra* note 12 and accompanying text.

1. *The Pre-*Bruen *Two-Step Analysis*

While the circuits are split over the validity of § 922(g)(4), this Part begins with where the courts agreed: how to properly analyze the legal challenges. Prior to the Supreme Court's decision in *Bruen*, there was general agreement among the circuits on how to evaluate regulations that implicated the Second Amendment.[41]

Following the seminal Second Amendment decisions in *Heller* and *McDonald*, the circuits rallied around a "two-step framework" for evaluating whether a regulation unduly burdened the Second Amendment.[42] At step one of this approach, courts began by determining whether the law at issue touched upon conduct or persons protected by "the Second Amendment right, as historically understood."[43] The historical inquiry was derived specifically from *Heller*.[44] There, the Court analyzed the text of the Second Amendment and concluded that it protects the right to possess a firearm irrespective of one's connection to military service.[45] After making that initial determination, the Court then turned to history to confirm its conclusion, emphasizing the importance of a historical analysis because the Second Amendment "codified a *pre-existing* right" to bear arms.[46] It makes sense, then, that the circuits situated the historical review at step one of the two-step framework.

Applying step one, regulations that implicated persons or activities falling outside the Second Amendment's protections "as understood at the time of the framing of the Bill of Rights" were "not subject[] to further constitutional scrutiny."[47] In other words, they raised no constitutional issues. But if a reviewing court could not determine from history alone whether a regulation comported with the Second Amendment—or if history revealed the regulated

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[41] *See* N.Y. State Rifle & Pistol Ass'n v. Bruen, 142 S. Ct. 2111, 2125 (2022); *see also id.* at 2127 n.4 (citing agreement among the First, Second, Third, Fourth, Fifth, Sixth, Seventh, Ninth, Tenth, Eleventh, and D.C. Circuits). In fact, in his dissenting opinion in *Bruen*, Justice Breyer criticized the majority for breaking from the "Courts of Appeals' consensus framework," calling it "unusual" for the Court to "disrupt settled" law. *Id.* at 2174–75 (Breyer, J., dissenting).

[42] *See id.* at 2125 (majority opinion); *see also* Alan Gura, *The Second Amendment as a Normal Right*, 127 HARV. L. REV. F. 223, 224–25 (2014) ("This approach typically takes the form of a two-step rubber-stamping process.").

[43] *See, e.g.*, *Tyler*, 837 F.3d at 688 (quoting United States v. Greeno, 679 F.3d 510, 518 (6th Cir. 2012)).

[44] *See generally* District of Columbia v. Heller, 554 U.S. 570 (2008). In *Heller*, the Court was asked to decide whether a D.C. regulation that "prohibit[ed] . . . the possession of useable handguns in the home violate[d] the Second Amendment." *Id.* at 573.

[45] *Id.* at 576–92 (finding the text provided "a strong presumption that the Second Amendment right is exercised individually and belongs to all Americans").

[46] *Id.* at 592; *see also Bruen*, 142 S. Ct. at 2127–28 (concisely summarizing the *Heller* Court's historical analysis).

[47] *See, e.g.*, *Tyler*, 837 F.3d at 685–86.

activities or persons were "not categorically unprotected" by the Amendment—it would advance to step two of the framework.[48]

At step two, courts invoked means-end scrutiny to analyze the challenged regulation. That involved "examin[ing] the 'strength of the government's justification for restricting or regulating the exercise of Second Amendment rights.'"[49] The level of scrutiny courts applied depended on "(1) how close the law c[ame] to the core of the Second Amendment right and (2) the severity of the law's burden on that right."[50] A law that touched upon a "core" Second Amendment right warranted strict scrutiny.[51] The government carried the burden of showing it was "narrowly tailored to achieve a compelling government interest."[52] Any other law warranted intermediate scrutiny and would be upheld if the government could show it was "substantially related to the achievement of an important government interest."[53]

2. *The § 922(g)(4) Circuit Split Under the Two-Step Framework*

Section 922(g)(4) has been challenged in three circuits. And, in analyzing the law, each circuit operated within the two-step framework. This Part briefly reviews how each of the circuits answered the question of whether indefinitely banning formerly committed individuals from possessing firearms violates the Second Amendment.

a. *Sixth Circuit:* Tyler v. Hillsdale County Sheriff's Department

In 1985, Charles Tyler's marriage of twenty-three years fell apart when his wife left him for another man.[54] The events left Tyler in an emotional state of disarray, and his daughters became increasingly concerned he might seriously harm himself.[55] Doctors and the Hillsdale County, Michigan Probate Court

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[48] *See, e.g.*, *id.* at 686; *see also Bruen*, 142 S. Ct. at 2126 (describing step one of the two-step).

[49] *See, e.g.*, *Tyler*, 837 F.3d at 686 (quoting United States v. Greeno, 679 F.3d 510, 518 (6th Cir. 2012)); Mai v. United States, 952 F.3d 1106, 1115 (9th Cir. 2020) ("[L]aws burdening Second Amendment rights must withstand more searching scrutiny than rational basis review." (quoting United States v. Torres, 911 F.3d 1235, 1262 (9th Cir. 2019))).

[50] *See, e.g.*, *Mai*, 952 F.3d at 1115 (quoting United States v. Chovan, 735 F.3d 1127, 1138 (9th Cir. 2013)); *see also Bruen*, 142 S. Ct. at 2126.

[51] *See Bruen*, 142 S. Ct. 2126. "The Courts of Appeals generally maintain[ed] 'that the core Second Amendment right is limited to self-defense *in the home*.'" *Id.* (quoting Gould v. Morgan, 907 F.3d 659, 671 (1st Cir. 2018)). However, some circuits included public carry as a core right. *Id.* (citing Wrenn v. District of Columbia, 864 F.3d 650, 659 (D.C. Cir. 2017)).

[52] *See id.* (quoting Kolbe v. Hogan, 849 F.3d 114, 133 (4th Cir. 2017)).

[53] *See id.* at 2126–27 (quoting Kachalsky v. County of Westchester, 701 F.3d 81, 96 (2d Cir. 2012)).

[54] *Tyler*, 837 F.3d at 683.

[55] *Id.*

shared that concern.[56] Tyler was committed to a mental hospital where he stayed for somewhere between "two to four weeks" before being discharged.[57] Thereafter, he remarried and, for about two decades, "successfully held a job . . . ."[58] In 2011—some twenty-five years after his depressive episode—Tyler attempted to purchase a firearm, but the NICS flagged his brief civil commitment in the 1980s.[59] Despite being cleared by doctors as having had "no signs of mental illness" since his post-divorce commitment, Tyler was deemed ineligible for gun ownership.[60] Michigan did not have a relief from disability program in place, so Tyler's only plausible option to legally own a firearm was to challenge § 922(g)(4) directly.[61] Naming various government defendants, Tyler filed suit in federal court alleging the firearm ban, as applied to him, unconstitutionally infringed upon his Second Amendment rights.[62]

After the district court dismissed the case,[63] a three-judge panel reversed and the Sixth Circuit granted an *en banc* rehearing.[64] At step one of the now-familiar two-step framework, the *en banc* Sixth Circuit declined to accept the government's argument that formerly committed individuals are "categorically unprotected by the Second Amendment."[65] The court thus quickly proceeded to step two. There, it determined "intermediate scrutiny [was] preferable in evaluating challenges to § 922(g)(4) . . . ."[66] Although a lifetime ban "is a severe restriction," the court explained the law "burdens only a narrow class of individuals who are not at the core of the Second Amendment," and, as such, strict scrutiny "impos[ed] too high a burden on the government . . . ."[67]

Applying intermediate means-end scrutiny, the Sixth Circuit held the government certainly had an important interest in keeping guns away from the

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[56] *Id.*

[57] *Id.*

[58] *Id.*

[59] *Id.* at 684 ("The Hillsdale County Sheriff's Office informed Tyler that he was ineligible to purchase a firearm because . . . he had previously been committed to a mental institution.").

[60] *Tyler*, 837 F.3d at 683–84. Tyler's doctor determined his response to being left by his wife was a "brief reactive depressive episode." *Id.*

[61] *Id.* at 684.

[62] *Id.*

[63] Tyler v. Holder, No. 1:12–CV–523, 2013 WL 356851, at *1 (W.D. Mich. Jan 29, 2013).

[64] Tyler v. Hillsdale Cnty. Sheriff's Dep't, 775 F.3d 308, 308, 311 (6th Cir. 2014), *vacated, reh'g granted* 837 F.3d 678 (6th Cir. 2016).

[65] *Tyler*, 837 F.3d at 688–90. The government drew upon sources from the Pennsylvania Convention, the Massachusetts ratifying convention, as well as Second Amendment legal scholarship. *Id.* at 688–89. The Court refused to accept both those historical sources and dictum in *Heller* regarding the presumptive lawfulness of banning felons and the mentally ill from possessing firearms as conclusive evidence that § 922(g)(4)'s ban on the formerly ill is lawful. *Id.* at 688–90.

[66] *Id.* at 692.

[67] *Id.* at 691–92.

mentally ill to reduce gun deaths—including suicides.[68] The court was therefore left to determine whether § 922(g)(4) was substantially related to that end, and it answered that question in the negative.[69] Because the law effectively placed a lifetime ban on Tyler, the government was required to show "some evidence of the continuing need to disarm those long ago adjudicated mentally ill . . . ."[70] While the government could show why it may be necessary to prevent *currently* ill and *recently committed* individuals from possessing firearms, it failed to show the need for a lifetime ban.[71] Importantly, the court viewed the NICS Improvement Amendments Act as evidence that Congress never intended to permanently preclude the formerly committed from owning guns.[72] In the court's view, Tyler therefore had a viable Second Amendment claim against the government.[73]

b. *Ninth Circuit:* Mai v. United States

The facts underlying *Mai* are reminiscent of those in *Tyler*. Duy Mai was involuntarily committed to a mental hospital in 1999 after "he threatened himself and others."[74] Approximately ninth months after being committed, Mai was discharged, and in the following years, he pursued an education, became gainfully employed, and had two children.[75] More than a decade and a half after his temporary commitment, Mai attempted to purchase a gun.[76] While he allegedly "no longer suffer[ed] from mental illness," § 922(g)(4) precluded him from doing so, and there was no federally approved relief from disability program in his home state of Washington.[77]

Despite the factual similarities between *Mai* and *Taylor*, the Ninth Circuit held in favor of the government.[78] According to the court, the government offered convincing historical arguments that, at step one, Second Amendment

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[68] *Id.* at 693. In fact, the court was convinced the "interests [were] not only legitimate, they [were] compelling." *Id.*

[69] *Id.* at 699.

[70] *Id.* at 694.

[71] *Tyler*, 837 F.3d at 694–96.

[72] *Id.* at 697 (The Act "is a clear indication that Congress does not believe that previously committed persons are sufficiently dangerous as a class to permanently deprive all such persons of their Second Amendment right to bear arms.").

[73] *Id.* at 699.

[74] Mai v. United States, 952 F.3d 1106, 1110 (9th Cir. 2020).

[75] *Id.*

[76] *Id.* at 1112.

[77] *Id.* at 1110, 1112. Interestingly, at the time of the case, Washington had a relief from disability program, but it did not satisfy the requirements set out in the NICS Improvement Amendments Act. So, although Mai "successfully petitioned a Washington state court for relief," he was unable to attain relief from the federal ban under § 922(g)(4). *Id.*

[78] *Id.* at 1121.

protections do not extend to the mentally ill.[79] But the court engaged in scant historical analysis of its own. Instead, it followed the "well-trodden and judicious course taken by [the Ninth Circuit] in many recent cases."[80] That is, it "assume[d], without deciding" that Mai was not categorically unprotected by the Second Amendment.[81] The court thus skipped to step two.

The Ninth Circuit—expressing agreement with the Sixth Circuit—held intermediate scrutiny was the appropriate level of review at step two.[82] The circuits also agreed that the government's interest in "preventing crime and preventing suicide" were not only important, but compelling.[83]

But that was the end of their agreement. The Ninth Circuit determined there was a reasonable fit between the government's interests and its means of achieving them through the firearms ban.[84] It concluded that, "like felons and domestic-violence assailants, those who have been involuntarily committed to a mental institution also pose an increased risk of violence."[85] Because regulations imposing categorical bans on those groups have been upheld, the court reasoned the same should be true with respect to § 922(g)(4).[86] Most notably, the court rejected Mai's argument—which carried the Sixth Circuit's decision—that the government could not justify a continued firearms ban against him.[87] Rather, "scientific evidence cited by the government show[ed] an increased risk of violence for those who have been released from involuntary commitment."[88] Although the risk might diminish over time, the court was unwilling to hold that Congress is prohibited from "predict[ing] that the increased risk would not plummet to *zero* in later years."[89] Accordingly,

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[79] *Id.* at 1114 ("[H]istorical evidence supports the view that society did not entrust the mentally ill with the responsibility of bearing arms.").

[80] *Mai*, 952 F.3d at 1114 (internal quotation marks omitted) (citing Pena v. Lindley, 898 F.3d 969, 976 (9th Cir. 2018)). Lower courts have been criticized by some scholars for disregarding the "searching historical inquiry" the *Heller* Court demanded. *See, e.g.*, Gura, *supra* note 42, at 224. Indeed, courts have been accused of "rubber-stamping" regulations like § 922(g)(4) by reducing historical analysis to "vague generalities" and then advancing to step two where "absolute deference" would be given to "legislative judgment[s]." *Id.* at 224–25.

[81] *Mai*, 952 F.3d at 1115.

[82] *Id.* The court cited *Tyler* for the proposition that—while it is a significant regulation—Section 922(g)(4) affects a narrow class of people thought to be beyond the original protective sphere of the Second Amendment. *Id.*

[83] *Id.* at 1116.

[84] *Id.* at 1121.

[85] *Id.* at 1117.

[86] *Id.* at 1116–17.

[87] *Mai*, 952 F.3d at 1117 (disagreeing "that the *continued* application of the prohibition to [Mai was] *no longer* justified because of the passage of time and his alleged mental health and peaceableness").

[88] *Id.* at 1117–18 (citing scientific evidence).

[89] *Id.* at 1118.

Congress could ban Mai from purchasing a gun without violating the Second Amendment.[90]

c. *Third Circuit:* Beers v. Attorney General United States

The facts in *Beers* are familiar. In 2005, Bradley Beers was briefly committed after threatening suicide.[91] Thereafter, he attempted to purchase a firearm but was denied the ability to do so when a background check flagged his involuntary hospital stay.[92] Although Beers was deemed capable of safely possessing a firearm by a doctor, he remained barred under § 922(g)(4).[93] Litigation ensued.[94]

Unlike the Sixth and Ninth Circuits, the Third Circuit held at step one that, as applied to Beers, the firearms ban did not violate the Second Amendment.[95] At step one, for Beers to succeed on his challenge, the Third Circuit required him to both "identify the traditional justifications for excluding from Second Amendment protections the class of which he appears to be a member" and, next, "distinguish his circumstances from those of persons in the historically barred class."[96] Surveying a few historical sources, the court held the traditional justification for keeping weapons away from the mentally ill "was that they were considered dangerous to themselves and/or to the public at large."[97] Thus, it was incumbent upon Beers to show he never posed a danger to himself or others.[98]

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[90] *Id.* at 1121. The Ninth Circuit also disagreed with the Sixth Circuit that the NICS Improvement Amendments Act indicated Congress never intended to impose a lifetime ban. *Id.* at 1119; *see supra* note 72 and accompanying text. In the Ninth Circuit's view, the Act's inclusion of a grant precondition requiring states to create relief from disability programs was "part of a political compromise." *Mai*, 952 F.3d at 1119–20. It therefore could not be understood to "disturb[] the longstanding congressional judgment—supported by scientific evidence—that those who are involuntarily committed . . . pose an increased risk of violence." *Id.*

[91] Beers v. Att'y Gen. U.S., 927 F.3d 150, 152 (3d Cir. 2019), *vacated sub nom.* Beers v. Barr, 140 S. Ct. 2758 (2020) (mem.).

[92] *Id.*

[93] *Id.* at 152–53.

[94] *Id.* at 153.

[95] *Id.* at 159.

[96] *Id.* at 157. The court purported to derive these requirements from the Supreme Court's decision in *Heller*. *Id.* at 155. There, the Supreme Court stated in dictum that nothing in its opinion "should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons and the mentally ill." *Id.* at 154 (quoting District of Columbia v. Heller, 554 U.S. 570, 626 (2008)). According to the Third Circuit, "there was no historical support for the proposition that Second Amendment rights could be restored after they were forfeited." *Id.* at 156. Thus, just as with the ban on felons possessing firearms, the Third Circuit determined the only way for a plaintiff in Beer's position to have his rights restored was to "distinguish himself from the historically-barred class." *Id.* In other words, to show he was never "a danger to himself or to others." *Id.* at 159.

[97] *Beers*, 927 F.3d at 158.

[98] *Id.* at 159.

In the court's view, he failed to do just that. It expressly rejected Beers' argument that the passage of time and his rehabilitation sufficiently differentiated him from the mentally ill who were historically barred from owning firearms.[99] Because Beers had no other way to distinguish himself, the court upheld § 922(g)(4) as applied against him.[100]

III. *BRUEN* AND THE NEW SECOND AMENDMENT ANALYTICAL FRAMEWORK

The circuit split over the constitutionality of § 922(g)(4) as applied to people like Tyler, Mai, and Beers has remained unchanged since *Mai* was decided in 2020. No other Courts of Appeals nor the Supreme Court has since addressed the issue. But, in 2022, the Supreme Court handed down its most significant Second Amendment opinion since *McDonald* was decided in 2010.[101] *New York State Rifle & Pistol Ass'n v. Bruen* essentially rewrote the rules for analyzing Second Amendment challenges. As such, the decision will impact how courts evaluate statutes like § 922(g)(4). This Part introduces *Bruen* and discusses the Supreme Court's history-only Second Amendment analytical approach.

A. *Background and Procedural History*

At issue in *Bruen* was a New York law that, among other things, required a person who wished to carry a firearm outside of his home for self-defense to first apply for a license.[102] Under the licensing regime, an applicant was required to show "proper cause exist[ed]" for his unrestricted concealed carry.[103] New York state courts determined proper cause meant the applicant had to "demonstrate a special need for self-protection distinguishable from that of the general community."[104] If an applicant fell short of showing proper cause, he was limited to a license that permitted carrying firearms outside the home only for things like "hunting, target shooting, or employment."[105]

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[99] *Id.* at 158 (explaining that, historically, forfeited Second Amendment rights could not be restored).

[100] *Id.* at 159. Interestingly, at the very end of its opinion, the court cautioned that nothing "should be read as perpetuating the stigma surrounding mental illness." *Id.* The step one historical inquiry was "very circumscribed" and could therefore not take rehabilitation into account. *Id.*

[101] *See generally* N.Y. State Rifle & Pistol Ass'n v. Bruen, 142 S. Ct. 2111 (2022).

[102] *Id.* at 2123 (citing N.Y. PENAL LAW § 400.00(2)(f) (McKinney 2023)).

[103] *Id.*

[104] *Id.* (quoting *In re* Klenosky, 428 N.Y.S.2d 256, 257 (N.Y. App. Div. 1980)).

[105] *Id.* (citing cases).

Petitioners, Brandon Koch and Robert Nash, each attempted to obtain unrestricted concealed carry licenses.[106] However, both applications were denied because neither Koch nor Nash were able to claim they faced a "unique danger" such that they had proper cause to carry a firearm in public.[107] Alleging that the restrictive licensing regime infringed upon their Second Amendment rights, Koch and Nash sued various state officials.[108]

The district court and the Second Circuit relied on *Kachalsky v. County of Westchester* to dismiss the complaint.[109] In *Kachalsky*, the Second Circuit upheld the same law at issue in *Bruen*.[110] Without explicitly saying it was doing so, the *Kachalsky* court applied the two-step framework to uphold the licensing regime in the face of a Second Amendment challenge. At step one, the court "assum[ed] that the Second Amendment applie[d]."[111] Then, at step two, the court identified intermediate scrutiny as the appropriate level of review,[112] and it determined the licensing law was "substantially related to New York's interests in public safety and crime prevention."[113] Refusing to disturb the *Kachalsky* precedent, the Second Circuit dismissed Koch and Nash's complaint thereby reaffirming the validity of the New York law under the two-step framework.[114]

B. *The* Bruen *Decision*

In a lengthy and consequential opinion, the Supreme Court in *Bruen* reshaped Second Amendment jurisprudence as it has developed since *Heller* and *McDonald*. In the opening lines of his analysis for the Court, Justice Thomas "decline[d] to adopt [the] two-part approach" the circuits had consistently applied to evaluate regulations implicating the Second Amendment.[115] Pointedly, the Court held the two-step was "one step too many."[116]

The Courts of Appeals misunderstood the Second Amendment analysis *Heller* demanded. The Supreme Court clarified that, "despite [its] popularity,"

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[106] *Id.* at 2124–25. New York State Rifle & Pistol Association is a gun rights advocacy group "organized to defend the Second Amendment rights of New Yorkers" like Koch and Nash. *Id.* at 2125.

[107] *Bruen*, 142 S. Ct. at 2125. Petitioners were instead awarded restricted licenses. *Id.*

[108] *Id.*

[109] *Id.*

[110] Kachalsky v. County of Westchester, 701 F.3d 81, 101 (2d Cir. 2012).

[111] *Id.* at 93. The court found the history on this question to be "highly ambiguous." *Id.* at 91.

[112] *Id.* at 96. According to the court, the "Second Amendment's core concerns are strongest inside hearth and home." *Id.* But, because states have long regulated firearms outside of the home, intermediate scrutiny—rather than strict—was warranted in this case. *Id.* at 96–97.

[113] *Id.* at 98.

[114] N.Y. State Rifle & Pistol Ass'n v. Beach, 818 Fed. App'x 99, 100 (2d Cir. 2020).

[115] N.Y. State Rifle & Pistol Ass'n v. Bruen, 142 S. Ct. 2111, 2126 (2022).

[116] *Id.* at 2127.

means-end scrutiny has no place in *Heller*'s methodology.[117] Rather, the proper approach for evaluating a regulation that burdens the right to bear arms is to look solely at the Second Amendment's text and history.[118] Put simply, the analysis involves the first step of the two-step framework—and the first step alone. Indeed, the Court took issue with the proliferation of step two, especially when courts—as they often did—applied intermediate scrutiny.[119] The Court "expressly rejected the application of any judge-empowering interest-balancing inquiry" in its *Heller* decision.[120] In fact, intermediate scrutiny "interest balancing" is more consistent with Justice Breyer's dissent in that case than it is with the majority's opinion.[121]

After affirmatively ruling out the two-step, the Court articulated the proper historical approach. Analysis begins with the Second Amendment's text.[122] If the "plain text covers an individual's conduct, the Constitution presumptively protects that conduct."[123] The burden then shifts to the government to "justify its regulation by demonstrating that it is consistent with the Nation's historical tradition of firearm regulation."[124] Only a firearms regulation that finds historical support will overcome Second Amendment scrutiny.[125] The Court explained that, in some cases, the analysis will be "fairly straightforward."[126] If, for example, a modern regulation seeks to remedy an issue that existed in the 18th century but there is no analogous 18th century regulation, the absence of a historical antecedent is evidence the modern regulation is unconstitutional.[127] By the same token, a modern regulation that *does* have a historical counterpart will likely pass Second Amendment muster.[128]

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[117] *Id.* (Only "[s]tep one of the predominant framework is broadly consistent with *Heller*, which demands a test rooted in the Second Amendment's text, as informed by history.").

[118] *Id.* at 2128–29.

[119] *Id.* at 2129; *see supra* Part II.B.

[120] *Bruen*, 142 S. Ct. at 2129 (internal quotation marks omitted) (quoting District of Columbia v. Heller, 554 U.S. 570, 634 (2008)).

[121] *Id.*; *see* Gura, *supra* note 42, at 228 (observing that courts were issuing decisions that "sound[ed] an awful lot like Justice Breyer's dissents"). Justice Breyer would have adopted "an interest balancing inquiry" in the Second Amendment context. *Heller*, 554 U.S. at 689 (Breyer, J., dissenting). Under his standard, courts would be tasked with determining whether a "statute burdens a protected interest in a way or to an extent that is out of proportion to the statute's salutary effects upon other important governmental interests." *Id.* at 689–90.

[122] *Bruen*, 142 S. Ct. at 2129–30.

[123] *Id.*

[124] *Id.* at 2130.

[125] *Id.*

[126] *Id.* at 2131.

[127] *Id.* The Court cited *Heller* as an example of this kind of straightforward Second Amendment analysis. *Id.* There, the District of Columbia attempted to remedy gun violence—a problem that has persisted since colonial times. *Id.* It did so by enacting "a flat ban on the possession of handguns in the home." *Id.* Because there was no similar 18th century firearm ban, the Court concluded the regulation violated the Second Amendment. *Id.*

[128] *See Bruen*, 142 S. Ct. at 2131–32.

While the historical approach may be straightforward in some cases, the difficulty, of course, lies in "cases implicating unprecedented societal concerns or dramatic technological changes."[129] But difficult cases do not warrant falling back on levels of scrutiny. Instead, courts must analyze modern problems by engaging in "reasoning by analogy."[130] In determining whether a modern regulation is sufficiently analogous to a historical one, the Court identified two non-exhaustive metrics for comparison. Those are "*how* and *why* the regulations burden a law-abiding citizen's right to armed self-defense."[131] In other words, the adequacy of an analogy depends on whether—in relation to a historical regulation—a modern regulation places "a comparable burden on the right to armed self-defense" and whether that comparable burden is "justified."[132] The Court cautioned that "analogical reasoning . . . is neither a regulatory straightjacket nor a regulatory blank check."[133] A modern regulation is not necessarily constitutional merely because some historical analogue exists.[134] At the same time, a regulation must only be supported by "a well-established and representative historical *analogue*, not a historical *twin*."[135]

Having clarified the proper historical approach, the Court endeavored to evaluate the constitutionality of New York's proper-cause licensing regime. As a threshold matter, it determined the text of the Second Amendment presumptively protected the ability of individuals to carry their firearms in public.[136] The Court then proceeded at length to analyze historical evidence from "(1) medieval to early modern England; (2) the American Colonies and the early Republic; (3) antebellum America; (4) Reconstruction; and (5) the late-

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[129] *Id.* at 2132. The Court was not oblivious to the fact that "[t]he regulatory challenges posed by firearms today are not always the same as those that preoccupied the Founders in 1791 or the Reconstruction generation in 1868." *Id.*

[130] *Id.*

[131] *Id.* at 2133 (emphasis added). Justice Breyer criticized the majority for providing lower courts inadequate guidance on how to engage in this kind of analogical reasoning. *Id.* at 2179 (Breyer., J., dissenting). In his view, the two metrics the court provided were actually just means-end scrutiny in disguise. *Id.* "Ironically," he opined, "the Court believes that the most relevant metrics of comparison are a regulation's means (how) and ends (why)." *Id.*

[132] *Id.* at 2133 (majority opinion).

[133] *Id.*

[134] *Bruen*, 142 S. Ct. at 2133. Indeed, "uphold[ing] every modern law that remotely resembles a historical analogue" would "risk[] endorsing outliers that our ancestors would never have accepted." *Id.* (internal quotation marks omitted) (quoting Drummond v. Robinson, 9 F.4th 217, 226 (3d Cir. 2021)).

[135] *Id.*

[136] *Id.* at 2134 (noting that "[n]othing in the Second Amendment's text draws a home/public distinction with respect to the right to keep and bear arms").

19th and early-20th centuries."[137] Ultimately, it concluded that New York failed to justify its regulation by identifying a sufficient historical analogue.[138]

While a detailed recitation of the Court's historical analysis is beyond the scope of this Note, it is worth highlighting some of the reasoning that may guide future courts tasked with interpreting the Second Amendment. Importantly, the Court instructed that "not all history is created equal."[139] With Goldilocks undertones, it explained that historical evidence from too long *before* and too long *after* the adoption of the Second Amendment is less instructive as to the Amendment's original meaning.[140] The history must be just right. That is, the most persuasive history will be from around the time the Second Amendment was ratified in 1791.[141] The *Bruen* Court therefore discounted much of the historical evidence from the English common law as well as from the late-19th century that New York offered in support of its law.[142] Consequently, future Second Amendment litigation will almost certainly focus on Founding-era history.

Lower courts may also glean from the Court's analysis in *Bruen* that, even if the government identifies *some* support for a regulation from the relevant historical period, that cannot be the end of the matter. The government's burden is more demanding.[143] While it is not immediately clear how much historical

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[137] *Id.* at 2135–36.

[138] *Id.* at 2156 (holding that after a "long journey through the Anglo-American history of public carry . . . respondents have not met their burden to identify an American tradition justifying the State's proper-cause requirement").

[139] *Id.* at 2136.

[140] *Bruen*, 142 S. Ct. at 2136–37; United States v. Love, 647 F. Supp. 3d 664, 669 (N.D. Ind. 2022) ("Reviewing courts, then, must find the goldilocks of historical analogues: not too old, not too new, but just right."). *Bruen*, of course, dealt with a New York state law. *Bruen*, 142 S. Ct. at 2122. Second Amendment protections only apply against the states by way of incorporation. *See* McDonald v. City of Chicago, 561 U.S. 742, 750 (2010). Thus, *Bruen* is more accurately described as a Fourteenth Amendment case. *See Bruen*, 142 S. Ct. at 2137. Interestingly, the Court acknowledged "an ongoing scholarly debate on whether courts should primarily rely on the prevailing understanding of an individual right when the Fourteenth Amendment was ratified in 1868" or when the Second Amendment was ratified in 1791. *Id.* at 2138. Justice Barret wrote separately on this point. *Id.* at 2162–63 (Barrett, J., concurring). She cautioned that the *Bruen* decision "should not be understood to endorse freewheeling reliance on historical practice from the mid-to-late 19th century to establish the original meaning of the Bill of Rights." *Id.* at 2163. Because the Court ultimately determined New York's regulation could not be supported by historical evidence from either time period, it avoided deciding the issue. *Id.* at 2138 (majority opinion).

[141] *Bruen*, 142 S. Ct. at 2136; Joseph Greenlee, *Restoring the Founders' Right to Bear Arms*, SCOTUSBLOG (June 29, 2022), https://www.scotusblog.com/2022/06/restoring-the-founders-right-to-bear-arms/ [https://perma.cc/MQ3P-37GL] (explaining that "[f]ounding-era history is paramount").

[142] *Bruen*, 142 S. Ct. at 2139 (discounting early English common law history); *id.* at 2154 (discounting late 19th-century history).

[143] *See* Greenlee, *supra* note 141 ("The government carries the burden of proving that the regulation is constitutional. This burden is significant.").

evidence is sufficient to support a modern regulation or how analogous a historical regulation must be to a modern one,[144] the government must at least offer more than three early Republic regulations and a handful of comparable 18th and 19th century laws.[145] That was the most persuasive evidence New York could offer to justify its licensing regime, and, in the Court's view, it was insufficient.[146]

In some respects, *Bruen* created more questions than answers.[147] The Court itself recognized that its decision may cause some uncertainty in the law.[148] Nonetheless, the decision was unmistakably clear: The Constitution demands that courts wrestle more seriously with the text and history of the Second Amendment. For better or worse, the history-only approach is now the law of the land, and lower courts must apply it.

IV. RESOLVING THE 18 U.S.C. § 922(g)(4) CIRCUIT SPLIT POST-*BRUEN*

Despite the Supreme Court's insistence that the history-only approach was the only appropriate method for interpreting the Second Amendment from the start, every circuit applied means-end scrutiny following *Heller*.[149] Thus, *Bruen* marked a seismic shift in Second Amendment jurisprudence. It could be several years before a clear picture of how lower courts apply the history-only approach emerges. But new Second Amendment challenges are already underway—including challenges to several of the firearms bans contained in 18 U.S.C.

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[144] *See supra* notes 129–135 and accompanying text.

[145] *See Bruen*, 142 S. Ct. at 2142 ("doubt[ing] that *three* colonial regulations could suffice to" support New York's law); *id.* at 2150 (concluding that 18th and 19th century laws were not as burdensome—and thus could not support—New York's law); *see also* Greenlee, *supra* note 141 (explaining New York failed to carry its burden in defending its open carry law).

[146] *See Bruen*, 142 S. Ct. at 2156.

[147] *See id.* at 2179 (Breyer, J., dissenting) (lamenting that the majority opinion "gives the lower courts precious little guidance regarding how to resolve modern constitutional questions"); *see also* Nadine El-Bawab, *Supreme Court Decision Creates Confusion Over Which Firearm Restrictions Are Constitutional*, ABC NEWS (Jan. 13, 2023), https://abcnews.go.com/US/supreme-court-decision-creates-confusion-firearm-restrictions-constitutional/story?id=96364133 [https://perma.cc/PG85-NLWA] ("Since the U.S. Supreme Court overturned a New York law limiting the concealed carry of handguns in public areas, there has been an increasing lack of clarity on gun restrictions . . . .").

[148] *See Bruen*, 142 S. Ct. at 2134 ("And we acknowledge that 'applying constitutional principles to novel modern conditions can be difficult and leave close questions to the margins.'" (quoting Heller v. District of Columbia, 670 F.3d 1244, 1275 (D.C. Cir. 2011) (Kavanaugh, J., dissenting)).

[149] *See supra* note 41 and accompanying text.

§ 922.[150] Consequently, the lower courts are reevaluating these regulations and their precedents in light of *Bruen*.[151]

It is only a matter of time until § 922(g)(4)'s indefinite ban on formerly committed individuals possessing firearms is once again challenged in court.[152] This Part argues that, under the history-only approach to Second Amendment analysis, courts should hold the ban unconstitutional as applied to people like Tyler, Mai, and Beers.[153] Indeed, the Supreme Court's decision in *Bruen* helps resolve the current circuit split over the validity of § 922(g)(4).[154] History does not support the law's indefinite ban. This Part concludes by addressing arguments that the ban should survive post-*Bruen* scrutiny and why those arguments ultimately fall short.

A. *Applying the History-Only Approach to § 922(g)(4)*

Whether § 922(g)(4) can withstand post-*Bruen* Second Amendment scrutiny is a novel question. Each of the circuits that issued opinions on the constitutionality of § 922(g)(4) did so before *Bruen* was decided. Two of the three circuits based their decisions on means-end scrutiny.[155] Those decisions immediately conflict with current Second Amendment jurisprudence.[156] Only

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[150] *See* United States v. Harrison, 654 F. Supp. 3d 1191, 1196 (W.D. Okla. 2023) (noting the "flood" of challenges to "the constitutionality of various subparts of 18 U.S.C. § 922 in light of" the *Bruen* decision).

[151] *See, e.g.*, United States v. Rahimi, 61 F.4th 443, 448 (5th Cir. 2023), *cert. granted*, 143 S. Ct. 2688 (2023) (explaining "that *Bruen* requires [the Fifth Circuit] to re-evaluate [its] Second Amendment jurisprudence"); United States v. Gould, 672 F. Supp. 3d 167, 171 (S.D.W. Va. 2023) (evaluating § 922(g)(4) and whether, in light of *Bruen*, people "determined to be a danger to themselves or society, have a constitutional right to possess a firearm despite the danger they pose").

[152] The court in *Gould* did not address whether an indefinite ban violates the Second Amendment as applied to people who have recovered from mental illnesses. Instead, it held § 922(g)(4) facially constitutional because, historically, "dangerous persons could be disarmed." *Gould*, 672 F. Supp. 3d at 183–84. At the time of writing, no case has addressed the as applied issue raised in *Tyler*, *Mai*, and *Beers* that this Note focuses on.

[153] Because each circuit that has evaluated § 922(g)(4) has done so on an as applied challenge and because the law operates differently depending on whether a state has adopted a relief from disability program, this Note does not address whether § 922(g)(4) could overcome a facial challenge. But it is worth noting the law is certainly susceptible to such a challenge. To be sure, the courts are already reviewing facial challenges to § 922(g) post-*Bruen*. *See Rahimi*, 61 F.4th at 448.

[154] While this Note focuses on a judicial solution to § 922(g)(4) post-*Bruen*, others have argued Congress should take a more active role by amending the statute. Zachary M. Robole, Note, *In Defense of (Mental) Hearth and Home: Challenges to § 922(g)(4) in the Wake of* New York State Rifle & Pistol Ass'n v. Bruen, 107 MINN. L. REV. 2329, 2373, 2382–84 (2023).

[155] *See supra* notes 68–73 and accompanying text (Sixth Circuit); *supra* notes 82–90 and accompanying text (Ninth Circuit).

[156] *See supra* notes 115–116 and accompanying text.

the Third Circuit based its decision on history. But its historical analysis was flimsy at best.[157] What's more, the court improperly placed the burden of collecting historical evidence on the law's challenger, rather than on the government.[158] As a result, each circuit will need to start anew in the likely event that they must reassess the law's validity. Ultimately, a faithful application of *Bruen*'s history-only analytical approach should lead to the invalidation of § 922(g)(4) as applied to people who have recovered from illnesses, thereby resolving the current circuit split.

1. *Plain Text Inquiry*

The threshold inquiry under *Bruen* is to determine whether a regulation's challenger is protected by the plain text of the Second Amendment.[159] So, in the context of § 922(g)(4), the question is whether a person "who has been adjudicated as a mental defective or who has been committed to a mental institution" is covered.[160]

None of the three circuits that evaluated § 922(g)(4) pre-*Bruen* fully engaged in this kind of plain text inquiry. Only the Sixth Circuit explicitly concluded that the mentally ill were presumptively protected by the Second Amendment, but it did so as part of its historical analysis.[161] The Third Circuit—also as a part of its historical analysis—relied on dictum in *Heller* to determine the mentally ill were entirely outside the scope of the Second Amendment.[162] For reasons discussed below, text alone does not support this conclusion. The Ninth Circuit avoided the question altogether, opting instead to assume the mentally ill were covered so it could immediately proceed to means-end scrutiny.[163] In the post-*Bruen* landscape, courts must consider the original understanding of the Second Amendment's text more carefully.

At first glance, determining whether the mentally ill are presumptively protected by the Amendment's plain text might seem like a challenging

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[157] The Court relied heavily on dictum in *Heller* regarding the presumptive lawfulness of banning the mentally ill from possessing firearms. Beers v. Att'y Gen. U.S., 927 F.3d 150, 154 (3d Cir. 2019), *vacated sub nom.* Beers v. Barr, 140 S. Ct. 2758 (2020) (mem.); *cf.* Kanter v. Barr, 919 F.3d 437, 453 (7th Cir. 2019) (Barrett, J., dissenting) (expressing reluctance to place too much weight on dictum in *Heller*).

[158] In *Beers*, the challenger was required to "(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." *Beers*, 927 F.3d at 155 (quoting Binderup v. Att'y Gen. U.S., 836 F.3d 336, 346–47 (3d Cir. 2016)).

[159] *See* N.Y. State Rifle & Pistol Ass'n v. Bruen, 142 S. Ct. 2111, 2126 (2022).

[160] 18 U.S.C. § 922(g)(4).

[161] Tyler v. Hillsdale Cnty. Sheriff's Dep't, 837 F.3d 678, 690 (6th Cir. 2016) ("[P]eople who have been involuntarily committed are not categorically unprotected by the Second Amendment.").

[162] *Beers*, 927 F.3d at 154.

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

question. This is especially so given the *Heller* Court's passing statement that "nothing in [its] opinion should be taken to cast doubt on the longstanding prohibition on the possession of firearms by felons and the mentally ill."[164] But upon further examination, it becomes clear the Second Amendment's plain text covers even the mentally ill. The right to bear arms explicitly extends to "the people."[165] According to the Supreme Court, that is a "term of art" which "unambiguously refers to all members of the political community, not an unspecified subset."[166] Surely, the mentally ill are not excluded from that sweeping language. Then-Judge Barrett did not think so. According to her, "[n]either felons nor the mentally ill are categorically excluded from our national community."[167] They should therefore not be categorically excluded from the protections the Second Amendment secures for the "people."

Starting with the presumption that groups like felons and the mentally ill have a right to bear arms may, for some, be a troubling way to view the Second Amendment. To be sure, many courts and commentators view these groups as beyond the *scope* of the Second Amendment.[168] In other words, if a person becomes a member of an unprotected group, he loses his right to bear arms "as a self-executing consequence of his new status."[169] But as then-Judge Barrett explained, "[t]hat is an unusual way of thinking about rights" because, normally, a person is deprived of his rights as a result of some government action.[170]

This point is best understood with a hypothetical.[171] Assume for a moment someone develops obsessive-compulsive disorder ("OCD")—a mental illness that might cause a person to engage in "repetitive behaviors" such as excessive

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[164] District of Columbia v. Heller, 554 U.S. 570, 626 (2008).

[165] U.S. CONST. amend. II.

[166] *Heller*, 554 U.S. at 580 (citing United States v. Verdugo-Urquidez, 494 U.S. 259, 265 (1990)).

[167] Kanter v. Barr, 919 F.3d 437, 453 (7th Cir. 2019) (Barrett, J., dissenting). Judge Barrett was unwilling to assume the *Heller* Court deemed felons and the mentally ill altogether beyond the reach of Second Amendment's protections. As she put it, "[t]he constitutionality of felon [and mentally ill] dispossession was not before the Court in *Heller*, and because it explicitly deferred analysis of this issue, the scope of its assertion is unclear." *Id.*

[168] *See, e.g.*, Beers v. Att'y Gen. U.S., 927 F.3d 150, 154 (3d Cir. 2019) (subscribing to the view that groups—including the mentally ill—"historically, have not had the right to keep and bear arms"), *vacated sub nom.* Beers v. Barr, 140 S. Ct. 2758 (2020) (mem.); Eugene Volokh, *Implementing the Right to Keep and Bear Arms for Self-Defense: An Analytical Framework and a Research Agenda*, 56 UCLA L. REV. 1443, 1497 (2009) (explaining that "[s]cope justifications rest on a conclusion that some past authorities responsible for the scope of the constitutional provision . . . view certain people as untrustworthy (presumably because they are dangerous)").

[169] *Kanter*, 919 F.3d at 452 (Barrett, J., dissenting).

[170] *Id.* at 452–53.

[171] This hypothetical is loosely based on one offered by then-Judge Barrett. *See id.*

handwashing.[172] Assume also that Congress passed a law (and the Supreme Court deemed it constitutional) that bans anyone with a mental illness from owning a firearm. However, after making a legislative determination that they pose no threat to themselves or others, Congress carves out an exemption for individuals with OCD. If it is true that people who are mentally ill are categorically unprotected by the Second Amendment, the individual with OCD "could possess a gun as a matter of legislative grace. But he would lack standing to assert constitutional claims that other citizens could assert."[173] That is because, under such a view, if the mentally ill are "out, they're out"—they are not part of the "people" protected by the Second Amendment.[174] As this hypothetical illustrates, excluding individuals with mental illness from the "people" produces a strange result.

Assuredly, then, it is preferable to presume the mentally ill are part of the "people" protected by the plain text of the Second Amendment. All this is not to say the mentally ill cannot lose their right to possess firearms. "Instead, it means that the question is whether the government has the power to disable the exercise of a right that they otherwise possess."[175] This view is more consistent with how other rights are treated. As an example, a person *may* lose their right to vote after being convicted of a felony.[176] But in some states felons never lose that right—even while incarcerated.[177] In those places, they retain their full constitutional protections against any interference with the right to vote. Thus, in the United States, being convicted of certain crimes merely makes a person "*eligible* to lose" his right—it is not automatically forfeited.[178]

There is no reason to treat the right to bear arms any differently than other rights. Indeed, the Court has reiterated time and again that "the constitutional right to bear arms . . . is not 'a second-class right . . . .'"[179] And there is certainly no reason to think the mentally ill should be treated as second-class citizens. Thus, a fair reading of the Second Amendment's plain text should lead courts to the conclusion that the mentally ill are "people" presumptively afforded the right to bear arms.

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[172] Jamarie Geller, *What Is Obsessive-Compulsive Disorder?*, AM. PSYCHIATRIC ASS'N (Oct. 2022), https://www.psychiatry.org/patients-families/obsessive-compulsive-disorder/what-is-obsessive-compulsive-disorder [https://perma.cc/4EMU-WYDZ].

[173] *Kanter*, 919 F.3d at 452 (Barrett, J., dissenting).

[174] *Id.*

[175] *Id.* at 453.

[176] *See* U.S. CONST. amend. XIV, § 2; U.S. DEP'T OF JUST., GUIDE TO STATE VOTING RULES THAT APPLY AFTER A CRIMINAL CONVICTION 2 (2022); *see also Kanter*, 919 F.3d at 453 & n.3 (Barrett, J., dissenting).

[177] *See, e.g.*, U.S. DEP'T OF JUST., *supra* note 176, at 4 ("In Maine, Puerto Rico, Vermont, and Washington D.C., a criminal conviction never restricts your voting rights. You can vote even if you are incarcerated.").

[178] *See Kanter*, 919 F.3d at 453 (Barrett, J., dissenting).

[179] N.Y. State Rifle & Pistol Ass'n v. Bruen, 142 S. Ct. 2111, 2156 (2022) (quoting McDonald v. City of Chicago, 561 U.S. 741, 780 (2010)).

2. *Historical Inquiry*

Having established that the plain text of the Second Amendment presumptively protects the mentally ill, the validity of § 922(g)(4) turns on whether the law is supported by "this Nation's historical tradition of firearm regulation."[180]

The Third, Sixth, and Ninth Circuits all failed to properly engage in the level of historical analysis that the Supreme Court now deems constitutionally required. Recall that the Sixth and Ninth Circuits based their holdings on means-end scrutiny.[181] That kind of analysis is a nonstarter post-*Bruen*. The Third Circuit, by contrast, upheld the application of § 922(g)(4) on historical grounds.[182] But its analysis was insufficient for two reasons. First, the court relied too heavily on a mere presumption that the government can regulate the possession of firearms by the mentally ill as a justification for § 922(g)(4)'s indefinite ban.[183] *Bruen* demands more.[184] Second, rather than placing the burden on the government to support its regulation, the Third Circuit required the law's challenger to "distinguish himself from the historically-barred class of mentally-ill individuals."[185] That, too, is inapposite with the Court's holding in *Bruen*.[186]

This Part therefore seeks to do what the circuit courts did not: properly analyze whether there are historically analogous practices that justify § 922(g)(4)'s indefinite ban on someone who was once mentally ill from possessing a firearm. This undertaking reveals that § 922(g)(4) should be deemed unconstitutional as applied to people like Tyler, Mai, and Beers—people who were once mentally ill, later recovered, and now have no way of restoring their right to bear arms.

As an initial matter, there is the question of whether the government can ban someone who is *currently* mentally ill from possessing a firearm. Without a doubt, there are good policy reasons for such a ban given the danger someone who is mentally ill might pose to himself or others.[187] But without a historical

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[180] *Id.* at 2126. In the course of litigation, the burden would fall on the government to make this showing. *Id.*

[181] *See supra* notes 68–73, 83–90 and accompanying text.

[182] *See supra* notes 95–100 and accompanying text.

[183] Beers v. Att'y Gen. U.S., 927 F.3d 150, 154 (3d Cir. 2019), *vacated sub nom.* Beers v. Barr, 140 S. Ct. 2758 (2020) (mem.). The presumption was derived from dictum in *Heller*. *See* District of Columbia v. Heller, 54 U.S. 570, 626 (2008). But by its own terms, the *Heller* Court did "not undertake an exhaustive historical analysis" on that issue. *Id.* To its credit, the Third Circuit did discuss some historical evidence regarding justifications for banning the mentally ill from possessing firearms. *See Beers*, 927 F.3d at 157–58. Those are discussed further *infra* Part IV.B.

[184] *See supra* Part III.B.

[185] *Beers*, 927 F.3d at 157.

[186] *See* N.Y. State Rifle & Pistol Ass'n v. Bruen, 142 S. Ct. 2111, 2127 (2022).

[187] *See generally* CTRS. FOR DISEASE CONTROL & PREVENTION, PREVENTING SUICIDE (May 2023), https://www.cdc.gov/suicide/pdf/NCIPC-Suicide-FactSheet-508_FINAL.pdf

justification, good policy will not suffice to uphold a firearms regulation.[188] Unfortunately, determining how the law historically treated the mentally ill proves to be quite challenging. For one, early understandings of mental health were quite limited. Indeed, the term "lunatic"—used to describe someone with a mental illness at the time of the Founding—is derived from the idea that a person was "lucid" in intervals "depending upon the change of the moon."[189] The historical inquiry is only further complicated by the fact that laws directly addressing the possession of firearms by the mentally ill did not begin to pop up until around the 20th century.[190]

Nonetheless, there does seem to be historical support for limiting the right to bear arms for those *currently* ill. As Judge Batchelder discussed in her *Tyler* concurrence, in the 18th century, rights were understood as "intimately connected with the idea of reason."[191] This proves to be important because "idiots" and "lunatics" were defined as people "without the power of reason" and those that "lost the use of [their] reason," respectively.[192] Thus, "by definition," they could not exercise their rights because rights could only "be exercised . . . by those possessing reason."[193]

However, rights were not immediately forfeited. There were traditionally processes for determining whether someone was mentally ill and thus unable to reason. Under the common law, "[t]he question of ideocy [was] tried before the escheator or sheriff, by a jury of twelve men."[194] Only after someone was

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[https://perma.cc/Q9Z2-V3VN] (describing the public health risk caused by suicide). *But see* Kerry Breen, *Is Mental Illness Really Driving Gun Violence in the US? Here's What the Research Says*, TODAY (May 27, 2022), https://www.today.com/health/health/mental-illness-gun-violence-us-research-says-rcna30833 [https://perma.cc/4CVS-3ZZW] (discussing the fact that the supposed link between gun violence and the mentally ill is overblown).

[188] *See, e.g.*, United States v. Rahimi, 61 F.4th 443, 448 (5th Cir. 2023) ("The question presented in this case is *not* whether prohibiting the possession of firearms by someone subject to a domestic violence restraining order is a laudable policy goal.").

[189] 1 WILLIAM BLACKSTONE, COMMENTARIES *304. The Latin root "luna" means moon. *Lunar*, OXFORD ENG. DICTIONARY, https://www.oed.com/dictionary/lunar_adj?tab=etymology#38706310 (on file with the *Ohio State Law Journal*).

[190] *See* 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, 1376–77 (2009).

[191] Tyler v. Hillsdale Cnty. Sheriff's Dep't, 837 F.3d 678, 704–05 (6th Cir. 2016) (en banc) (Batchelder, J., concurring in most of the judgment) (citing 18th-century political philosophers, including Burlamaqui).

[192] ANTHONY HIGHMORE, A TREATISE ON THE LAW OF IDIOCY AND LUNACY 1 (1822); 1 BLACKSTONE, *supra* note 189, at *304.

[193] *Tyler*, 837 F.3d at 705 (Batchelder, J., concurring in most of the judgment) (citing HENRY F. BUSWELL, THE LAW OF INSANITY IN ITS APPLICATION TO THE CIVIL RIGHTS AND CAPACITIES AND CRIMINAL RESPONSIBILITY OF THE CITIZEN 17 (1885)).

[194] HIGHMORE, *supra* note 192, at 20–21; *Tyler*, 837 F.3d at 706 (explaining that "the common law . . . allowed for the deprivation of the fundamental right to liberty or the

deemed ill by a jury could he then be dispossessed of his rights.[195] And in 18th century America, dispossession included the government's ability to legally confine the mentally ill—the ultimate loss of rights.[196]

During the Founding era, if someone could be confined on account of their illness, it follows that the same person could be stripped of his right to possess a firearm. To be sure, "confining implies first disarming."[197] The practice of confining the mentally ill is certainly not a perfect analogue for modern laws disarming them, but it is worth repeating that *Bruen* does not require a "historical twin."[198] Rather, as long as the "how" and the "why" for confining the mentally ill in the 18th century and disarming the mentally ill today are sufficiently similar, the comparison will support a modern statute like § 922(g)(4).[199] It is certainly plausible the two are adequately analogous. In the 18th century, a person could only be confined after "a valid judgment from a civil tribunal."[200] Similarly, § 922(g)(4) only applies to someone "who has been adjudicated as a mental defective or who has been committed to a mental institution."[201] The *how* back then and the *how* today both involve an adjudicatory process. As to the *why*, 18th century confinement was a means of ensuring dangerous people were not "permitted to go abroad."[202] Similarly, the purpose of § 922(g)(4) is to keep firearms out of the hands of people who might harm themselves or others.[203] There is thus a cognizable historical justification for § 922(g)(4)'s ban on the presently ill from possessing firearms.

But any historical support § 922(g)(4) marshals for banning someone currently ill, it lacks for banning someone who is *no longer ill*. Mental illness was never understood to be permanent.[204] Quite the opposite. Founding-era evidence indicates people understood it was possible to recover from a

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fundamental right to control one's property only upon a valid judgment from a civil tribunal"); *see also* 1 BLACKSTONE, *supra* note 189, at *303–05.

[195] 1 BLACKSTONE, *supra* note 189, at *303 (discussing that, at common law, once a jury deemed someone ill, "the profits of his lands and the custody of his person may be granted by the king to some subject").

[196] Larson, *supra* note 190, at 1377; *see* HIGHMORE, *supra* note 192, at 11 (Similarly, in England, once a "disorder [grew] permanent," it became "proper to apply to legal authority to warrant a lasting confinement.").

[197] *Tyler*, 837 F.3d at 705 (Batchelder, J., concurring in most of the judgment); Larson, *supra* note 190, at 1377.

[198] N.Y. State Rifle & Pistol Ass'n v. Bruen, 142 S. Ct. 2111, 2133 (2022) (emphasis omitted).

[199] *Id.* at 2132–33.

[200] *Tyler*, 837 F.3d at 706 (Batchelder, J., concurring in most of the judgment).

[201] 18 U.S.C. § 922(g)(4).

[202] Larson, *supra* note 190, at 1377 (quoting HENRY CARE, ENGLISH LIBERTIES, OR THE FREE-BORN SUBJECT'S INHERITANCE 329 (6th ed. 1774)).

[203] *See supra* note 22 and accompanying text.

[204] *See Tyler*, 837 F.3d at 710 (Sutton, J., concurring in most of the judgment) ("Our common law heritage has long recognized that mental illness is not a permanent condition.").

sickness.[205] According to one treatise: "A lunatic is never to be looked upon as irrecoverable."[206] It was therefore assumed a person's reason could be restored and, as a consequence, so too could his rights.[207] Evidently, this played out in practice. Confinement of the mentally ill, for example, was limited to as "long as such lunacy or disorder shall continue, and no longer."[208] It goes without saying this historical understanding comports with modern science.[209] "[O]nce mentally ill does not mean always mentally ill."[210]

When § 922(g)(4) operates to indefinitely ban someone from possessing a firearm—including someone fully recovered from his illness—any analogy that might be drawn between the modern regulation and 18th century confinement practices begins to break down. Consider once again the metrics offered by the Supreme Court to evaluate the sufficiency of a comparison—the "how" and the "why."[211] A clear difference emerges with respect to *how* confinement operated and *how* § 922(g)(4) operates in the absence of a relief from disability program. Again, confinement was limited to the time a person remained ill.[212] Whenever the "lunatic recover[ed] his senses," he could be reevaluated, deemed healthy, and have his legal rights restored.[213] The same is not true regarding § 922(g)(4). Today, if a person is adjudicated mentally defective or civilly committed—irrespective of how brief that commitment is—he is subject to a lifetime ban on possessing a firearm.[214] Even explicit confirmation from a physician that an individual poses no danger to himself or others is insufficient for overcoming the ban.[215]

The indefinite ban thus reveals an obvious incongruence with respect to the *why*. The mentally ill were historically confined to protect society from a

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[205] HIGHMORE, *supra* note 192, at 73; 1 BLACKSTONE, *supra* note 189, at *304 ("For the law always imagines that these accidental misfortunes may be removed . . . .").

[206] HIGHMORE, *supra* note 192, at 73; *see Tyler*, 837 F.3d at 706 (Batchelder, J., concurring in most of the judgment) (quoting the same passage).

[207] *Tyler*, 837 F.3d at 706 (Batchelder, J., concurring in most of the judgment) (explaining "that which a person recovered when he overcame a serious mental illness was his *reason*, the faculty necessary to exercise his rights").

[208] *Id.* (quoting HENRY CARE, ENGLISH LIBERTIES, OR THE FREE-BORN SUBJECT'S INHERITANCE 329 (6th ed. 1774)). As another example, at common law, a person's property went into trust to be "watch[ed] over the periods of imbecility." HIGHMORE, *supra* note 192, at 73. But "with as scrupulous an exactness as the most anxious friend could be expected," the trustee was to "render an account when the affliction shall be removed." *Id.*

[209] Sarah Powell, *Dispelling Myths on Mental Illness*, NAT'L ALL. ON MENTAL ILLNESS (July 17, 2015), https://www.nami.org/blogs/nami-blog/july-2015/dispelling-myths-on-mental-illness [https://perma.cc/BCT7-DDVP].

[210] *Tyler*, 837 F.3d at 710 (Sutton, J., concurring in most of the judgment).

[211] N.Y. State Rifle & Pistol Ass'n v. Bruen, 142 S. Ct. 2111, 2132–33 (2022).

[212] *See supra* notes 206–207 and accompanying text.

[213] *See* HIGHMORE, *supra* note 192, at 73.

[214] *See supra* notes 32–38 and accompanying text.

[215] *See, e.g.*, *Tyler*, 837 F.3d at 683–84.

danger.[216] Logically, then, confinement was limited to the duration of that danger.[217] The same cannot be said for § 922(g)(4). The law may well prevent a danger by banning the possession of firearms for the extent of a person's illness, but there is no rationale (no *why*) for continued disarmament after the danger expires. Thus, early 18th century confinement practices prove to be insufficiently analogous to § 922(g)(4)'s indefinite ban.

The historical inquiry in this Part is undoubtedly limited in scope. That is due at least in-part to the apparent lack of historical analogues that closely resemble § 922(g)(4). Indeed, "[o]ne searches in vain through eighteenth-century records to find any laws specifically excluding the mentally ill from firearms ownership."[218] Nonetheless, even related 18th-century confinement practices are insufficiently analogous to § 922(g)(4), so it appears the law fails post-*Bruen* Second Amendment scrutiny.[219] When new challenges to the lifetime ban begin to emerge, courts must avoid retreating to tiers of scrutiny to analyze the regulation.[220] "Instead, the government must affirmatively prove that its firearms regulation is part of the historical tradition that delimits the outer bounds of the right to keep and bear arms."[221] Because it seems unlikely the government could do so for § 922(g)(4), the law should be deemed unconstitutional as applied to people like Tyler, Mai, and Beers.

B. *Arguments in Support of § 922(g)(4)'s Lifetime Ban Are Unpersuasive*

In the years to come, proponents of § 922(g)(4) will have to develop arguments that can overcome *Bruen*'s history-only approach to Second Amendment analysis. Advocates will advance at least three arguments in support of upholding the law: First, *Heller* expressly permits banning the mentally ill from possessing firearms; second, there is "no historical support for the proposition that Second Amendment rights could be restored after they were forfeited;"[222] and third, public policy supports § 922(g)(4)'s indefinite ban. These arguments fall short under the *Bruen* framework.

First, as in the past, advocates of § 922(g)(4) will argue the Supreme Court deemed regulations pertaining to the mentally ill "presumptively lawful" under

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[216] *See* Larson, *supra* note 190, at 1377.

[217] *See Tyler*, 837 F.3d at 706 (Batchelder, J., concurring in most of the judgment) ("A lunatic is to be kept . . . locked up only so long as such lunacy or disorder shall continue, and no longer." (quoting HENRY CARE, ENGLISH LIBERTIES, OR THE FREE-BORN SUBJECT'S INHERITANCE 329 (6th ed. 1774) (internal quotations and alterations omitted))).

[218] Larson, *supra* note 190, at 1376.

[219] *See* N.Y. State Rifle & Pistol Ass'n v. Bruen, 142 S. Ct. 2111, 2156 (2022).

[220] *Id.* at 2127.

[221] *Id.*

[222] Beers v. Att'y Gen. U.S., 927 F.3d 150, 156 (3d Cir. 2019), *vacated sub nom.* Beers v. Barr, 140 S. Ct. 2758 (2020) (mem.).

the Second Amendment.[223] However, the Court's reference to a prohibition on the mentally ill possessing firearms in *Heller* is merely dictum.[224] Further, in the very same sentence of the opinion that § 922(g)(4) advocates rely on, the Court cautioned that it did "not undertake an exhaustive historical analysis" of any such prohibitions.[225] As a result, "*Heller*'s dictum does not settle the question" of whether § 922(g)(4) can overcome constitutional scrutiny.[226]

But even assuming § 922(g)(4) is, in fact, presumptively lawful, presumptions are rebuttable. The Supreme Court would surely expect lower courts to engage in the historical analysis that it expressly indicated it did *not* undertake in *Heller*.[227] That raises the question: What historical analysis is appropriate for evaluating a regulation that indefinitely bans the mentally ill from possessing firearms? The only logical answer is the analysis the Court mandated in *Bruen*.[228] Of course, as this Note argues, analyzing § 922(g)(4) under the *Bruen* framework reveals that an indefinite ban is unconstitutional as applied to individuals who have recovered from their mental illnesses.[229]

Second, proponents of § 922(g)(4) may argue—as the Third Circuit did in *Beers*—that there is no historical support for the restoration of forfeited Second Amendment rights.[230] In other words, once someone lost his right to bear arms as a result of becoming ill, he traditionally could not have that right restored. For starters, the *Beers* court made this sweeping assertion by citing to only one other Third Circuit opinion, and that opinion made the same assertion without *any* citation to authority.[231] The Third Circuit's lack of support is in stark contrast with the conclusions of other judges and scholars who *have* found historical support for the restoration of rights—including now-Justice Barrett.[232]

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[223] *See, e.g.*, *id.* at 154 (quoting District of Columbia v. Heller, 554 U.S. 570, 627 n.26 (2008)).

[224] *See, e.g.*, Tyler v. Hillsdale Cnty. Sheriff's Dep't, 837 F.3d 678, 686–87 (6th Cir. 2016) (en banc); Kanter v. Barr, 919 F.3d 437, 453 (7th Cir. 2019) (Barrett, J., dissenting) ("[T]he scope of [the majority's] assertion is unclear. For example, does 'presumptively lawful' mean that such regulations are presumed lawful unless a historical study shows otherwise?").

[225] *Heller*, 554 U.S. at 626.

[226] *See Kanter*, 919 F.3d at 454 (Barrett, J., dissenting).

[227] *See Heller*, 554 U.S. at 626.

[228] *See supra* Part III.B.

[229] *See supra* Part IV.A.

[230] Beers v. Att'y Gen. U.S., 927 F.3d 150, 158 (3d Cir. 2019), *vacated sub nom.* Beers v. Barr, 140 S. Ct. 2758 (2020) (mem.).

[231] *Id.* at 156; Binderup v. Att'y Gen. U.S., 836 F.3d 336, 350 (3d Cir. 2016) (claiming without authority that "[t]there is no historical support for the view that the passage of time or evidence of rehabilitation can restore Second Amendment rights that were forfeited").

[232] *See supra* Part IV.A.2; *see also* Tyler v. Hillsdale Cnty. Sheriff's Dep't, 837 F.3d 678, 705–06 (6th Cir. 2016) (en banc) (Batchelder, J., concurring in most of the judgment); Kanter v. Barr, 919 F.3d 437, 454 (7th Cir. 2019) (Barrett, J., dissenting) (explaining the lack of historical support for permanently dispossessing all felons).

Moreover, even if it were true that Second Amendment rights could not traditionally be restored, that alone would likely fail to rescue § 922(g)(4). *Bruen* places the burden on the government to show a historical analogue exists that supports a modern regulation.[233] Put differently, the government is required to make an *affirmative* showing of historical evidence. In *Bruen*, for example, the government had the burden of identifying a tradition of burdensome concealed carry laws—not identifying the absence of historical support for concealed carry.[234] Now compare the following two arguments with respect to § 922(g)(4). First, § 922(g)(4) should be upheld because there is a historical analogue that supports indefinitely banning the mentally ill from possessing firearms. Second, § 922(g)(4) should be upheld because there is a historical analogue that supports banning the presently ill from possessing a firearm, and there is no historical evidence that the right to possess a firearm could be restored. The first argument would almost certainly overcome the history-only approach.[235] But the second argument—which the Third Circuit apparently accepted—relies in-part on the *absence* of historical evidence.[236] Given the emphasis the Court placed on identifying a tradition, rather than identifying the absence of tradition,[237] it is unlikely the second argument could overcome Second Amendment scrutiny.

Finally, proponents of § 922(g)(4) will invoke policy reasons to support imposing an indefinite ban on the mentally ill possessing firearms. As the argument goes, the mentally ill pose an increased risk to themselves and others.[238] And while their risk of violence may diminish over time, "nothing suggests that it ever dissipates entirely."[239] Thus, an indefinite ban is justified[240]

To be sure, the policy reasons for disarming the presently ill are strong, and a regulation that does so may well be constitutional.[241] However, putting aside the issue of lawfulness, the policy reasons for § 922(g)(4) begin to break down

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[233] *See* N.Y. State Rifle & Pistol Ass'n v. Bruen, 142 S. Ct. 2111, 2135 (2022).

[234] *See id.*

[235] *See id.* at 2131.

[236] *See Beers*, 927 F.3d at 158–59.

[237] *See Bruen*, 142 S. Ct. at 2127.

[238] *See, e.g.*, *Mental Health by the Numbers*, *supra* note 1 ("46% of people who die by suicide had a diagnosed mental condition"); Mai v. United States, 952 F.3d 1106, 1117 (9th Cir. 2020) ("Congress determined that . . . those who have been involuntarily committed to a mental institution also pose an increased risk of violence.").

[239] *Mai*, 952 F.3d at 1118.

[240] *See id.*

[241] *See supra* notes 187–203 and accompanying text. It is worth noting, however, evidence suggests society's belief that the seriously mentally ill are significantly more violent than the average person is overblown. "[R]esearch indicates only 3% to 5% of violent acts can be attributed to persons with" serious mental illnesses, and "persons with mental illness are responsible for fewer than 1% of all gun-related homicides." EMILEE GREEN, ILL. CRIM. JUST. INFO. AUTH., MENTAL ILLNESS AND VIOLENCE: IS THERE A LINK? 2 (May 2020), https://researchhub.icjia-api.cloud/uploads/mentalillnessandviolence-200504T16271190.pdf [https://perma.cc/UNG6-5L2M].

when the ban extends to people who have recovered from mental illnesses. As a threshold matter, different mental health conditions "carry different risks."[242] In fact, "[t]he overwhelming majority of people with mental illness are not violent."[243] But in states without a relief from disability program, § 922(g)(4) will operate to indefinitely dispossess both a violent individual and a nonviolent individual.[244] Worse, even if the nonviolent individual makes a full recovery, he will *still* be banned from possessing a firearm.[245] Justifying § 922(g)(4) on the grounds that it protects society from someone who was never a risk to himself or others is hardly persuasive. Finally, with respect to the violent individual, evidence *does* suggest risks associated with mental illness dissipate over time.[246] Even serious mental illnesses have a recovery rate of "up to 65%."[247] Again, a policy that favors protecting society from a violent individual is unnecessary when the individual is no longer violent.

There are also strong policy reasons that counsel against indefinitely disarming people who have recovered from mental illnesses—namely preventing the perpetuation of stigmas associated with mental illnesses. The American Psychiatric Association has identified several mental health stigmas: public stigma, self-stigma, and institutional stigma.[248] Institutional stigma "involve[es] policies of government and private organizations that intentionally or unintentionally limit opportunities for people with mental illness."[249] Section 922(g)(4)'s lifetime ban arguably fits that category. In states without a relief from disability program, the government can rob a person of his opportunity to ever possess a firearm again simply because he struggled in the past with a mental illness.[250] That flies in the face of "[a] key lesson of disability rights law"

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[242] GREEN, *supra* note 241, at 3.

[243] *The Truth About Mental Health and Gun Violence*, NAT'L ALL. ON MENTAL ILLNESS, https://namica.org/advocacy/criminal-justice-advocacy/the-truth-about-mental-health-and-gun-violence/ [https://perma.cc/SDH7-L3AW]; Powell, *supra* note 209 ("Having a mental health condition does not make a person more likely to be violent or dangerous.").

[244] *See supra* Part II.A.

[245] *See supra* Part II.A.

[246] *Mental Health Myths and Facts*, SUBSTANCE ABUSE AND MENTAL HEALTH SERVS. ADMIN., https://www.mentalhealth.gov/basics/mental-health-myths-facts [https://perma.cc/RN3X-P7W7] (Apr. 24, 2023); *see also* Tyler v. Hillsdale Cnty. Sheriff's Dep't, 837 F.3d 678, 696 (6th Cir. 2016) (en banc).

[247] Larry Davidson & Katherine Ponte, *Serious Mental Illness Recovery: The Basics*, NAT'L ALL. ON MENTAL ILLNESS (Aug. 11, 2021), https://www.nami.org/Blogs/NAMI-Blog/August-2021/Serious-Mental-Illness-Recovery-The-Basics [https://perma.cc/LJC7-MU4E].

[248] Jeffrey Borenstein, *Stigma, Prejudice and Discrimination Against People with Mental Illness*, AM. PSYCH. ASS'N (Aug. 2020), https://www.psychiatry.org/patients-families/stigma-and-discrimination [https://perma.cc/W4T8-FUDF].

[249] *Id.* ("Public stigma involves the negative or discriminatory attitudes that others have about mental illness," while "[s]elf-stigma refers to the negative attitudes, including internalized shame, that people with mental illness have about their own condition.").

[250] *See supra* Part II.A.

which says "that governments may not treat dynamic features as static and immutable."[251] People can recover.[252] But, unfortunately, recovery may be less likely in light of stigmas.[253] "More than half of people with mental illness don't receive help for their disorders" in part "due to concerns about being treated differently" by others.[254] The laws in this country should play no role in perpetuating discrimination against people who have suffered from mental illnesses.

In a post-*Bruen* world, courts should not accept arguments that dictum in *Heller*, a supposed lack of historical support for the restoration of Second Amendment rights, and public policy justify upholding § 922(g)(4) as applied to people like Tyler, Mai, and Beers.

V. CONCLUSION

The Supreme Court's recent decision in *New York State Rifle & Pistol Ass'n v. Bruen* transformed Second Amendment jurisprudence as it has developed since *District of Columbia v. Heller* and *McDonald v. City of Chicago*. The history-only approach replaced the two-step for evaluating firearms regulations.[255] Thus, decisions applying the two-step will have to be replaced with decisions that have an eye toward the American tradition of regulating firearms.[256]

18 U.S.C. § 922(g)(4) is among the many laws that will need to be reevaluated post-*Bruen*. Today, there is a circuit split over the constitutionality of indefinitely banning the mentally ill from possessing firearms.[257] But that split should be resolved.[258] There is a lack of historical support for imposing a lifetime ban on people who were once mentally ill but subsequently recovered.[259] It is time the courts recognize § 922(g)(4) is unconstitutional as applied to people like Tyler, Mai, and Beers. After all, "[o]nce depressed does not mean always depressed; once mentally ill does not mean always mentally ill; and once institutionalized does not mean always institutionalized."[260]

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[251] *Tyler*, 837 F.3d at 712 (Sutton, J., concurring in most of the judgment) (explaining that "[j]ust as one's physical condition changes over the course of a lifetime, worsening at some moments and improving at others, one's mental condition changes as well").

[252] *See id.* at 711 (referencing a facts sheet from the Department of Health and Human Services); Davidson & Ponte, *supra* note 247.

[253] *See* Borenstein, *supra* note 248.

[254] *Id.*

[255] *See supra* Part III.B.

[256] *Id.*

[257] *See supra* Part II.B.2.

[258] *See supra* Part IV.A.

[259] *Id.*

[260] Tyler v. Hillsdale Cnty. Sheriff's Dep't, 837 F.3d 678, 710 (6th Cir. 2016) (en banc) (Sutton, J., concurring in most of the judgment).