

CONSTITUTIONAL LAW – THE SECOND  
AMENDMENT – THE CONSTITUTIONALITY OF  
PROHIBITING FIREARM POSSESSION BY  
INDIVIDUALS PREVIOUSLY COMMITTED TO A  
MENTAL INSTITUTION

*Tyler v. Hillsdale County Sheriff's Department*,  
837 F.3d 678 (6th Cir. 2016)

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INTRODUCTION

In 1968, the United States Congress passed the Gun Control Act (“the Act”), which prohibited various classes of individuals from shipping, transporting, or possessing any firearms or ammunition.<sup>1</sup> One provision of the Act, currently codified at 18 U.S.C. § 922(g)(4), made it “unlawful for any person . . . who has been adjudicated as a mental defective *or* who has been committed to a mental institution” to possess such a weapon.<sup>2</sup> The Act also created a mechanism by

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1. Gun Control Act of 1968, Pub. L. No. 90-618, 82 Stat. 1213 (codified as amended at 18 U.S.C. §§ 921–28 (2012)).

2. 18 U.S.C. § 922(g)(4) (2012) (emphasis added). Other provisions of § 922(g) apply the same restriction on firearm shipment and possession to other enumerated classes of individuals. See § 922(g)(1) (convicted felons); § 922(g)(2) (fugitives from justice); § 922(g)(3) (unlawful users of or those addicted to controlled substances); § 922(g)(5) (illegal or non-resident aliens); § 922(g)(6) (individuals dishonorably

which individuals subject to its restrictions “may make application to the Attorney General for relief from the disabilities imposed by Federal laws” and thus regain their firearm privileges.<sup>3</sup> The U.S. Attorney General has, in turn, delegated authority to administer the federal relief-from-disabilities program to the director of the Bureau of Alcohol, Tobacco, Firearms, and Explosives (“ATF”).<sup>4</sup> Congress, however, defunded this program in 1992<sup>5</sup> and has “affirmatively retained the bar on funding” since that time.<sup>6</sup> Nevertheless, in 2008, Congress approved funding for states to implement their own relief-from-disabilities programs, which, if adopted, allow eligible applicants to recover their federal firearm privileges as well.<sup>7</sup>

In 1985, the plaintiff, Clifford Charles Tyler, suffered a temporary mental breakdown after his “wife of twenty-three years served him divorce papers[,] . . . ran away with another man[,] and

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discharged from the military); § 922(g)(7) (individuals who have renounced their U.S. citizenship); § 922(g)(8) (individuals subject to certain types of domestic restraining orders); § 922(g)(9) (individuals who have been convicted of a “misdemeanor crime of domestic violence”).

3. 18 U.S.C. § 925(c) (2012). The law further specifies that:

[T]he Attorney General may grant such relief if it is established to his satisfaction that the circumstances regarding the disability, and the applicant’s record and reputation, are such that the applicant will not be likely to act in a manner dangerous to public safety and that the granting of the relief would not be contrary to the public interest.

*Id.* Section 925(c) then provides for judicial review of the denial of such relief by the appropriate federal district court and permits the court additional latitude in admitting evidence. *Id.*

4. 28 C.F.R. § 0.130(a)(1) (2015) (“[T]he Director of the Bureau of Alcohol, Tobacco, Firearms, and Explosives shall: . . . [i]nvestigate, administer, and enforce the laws related to . . . firearms, . . . and perform other duties as assigned by the Attorney General . . . .”); *see also* 27 C.F.R. § 478.144 (2015) (stating application and filing requirements for the federal relief-from-disabilities program, as administered by the ATF).

5. Treasury, Postal Service, and General Government Appropriations Act of 1993, Pub. L. No. 102-393, 106 Stat. 1729, 1732 (1992) (“[N]one of the funds appropriated herein shall be available to investigate or act upon applications for relief from Federal firearms disabilities under 18 U.S.C. [§ 925(c)].”).

6. *Tyler v. Hillsdale Cty. Sheriff’s Dep’t (Tyler II)*, 775 F.3d 308, 312 (6th Cir. 2014) (citing Consolidated Appropriations Act of 2014, Pub. L. No. 113-76, 128 Stat. 5, 57 (2014)), *vacated*, 837 F.3d 678 (6th Cir. 2016) (en banc).

7. NICS Improvement Amendments Act of 2007, Pub. L. No. 110-180, §§ 103–05, 121 Stat. 2559, 2567–69 (2008). “If, under a State relief from disabilities program implemented in accordance with this section, an application for relief . . . is granted with respect to an adjudication or a commitment to a mental institution[,] . . . the adjudication or commitment, as the case may be, is deemed not to have occurred for purposes of [§ 922].” *Id.* § 105(b), 131 Stat. at 2570.

depleted Tyler's finances."<sup>8</sup> Upon the recommendation of Tyler's psychologist, a Michigan probate court ordered Tyler to report to a regional medical facility for treatment of thirty days or less.<sup>9</sup> At the end of this program, Tyler returned home, reentered the workforce, and experienced no other medical or legal issues for the next two decades.<sup>10</sup> When Tyler attempted to purchase a firearm in 2011, however, the Hillsdale County Sheriff's Department promptly informed him that he was ineligible to own a firearm under federal law.<sup>11</sup> The Department reached this conclusion by relying on the Federal Bureau of Investigation's National Instant Criminal Background Check System ("NICS"), which reported Tyler's prior commitment to a mental institution.<sup>12</sup> Tyler appealed the NICS determination in August 2011, but in January 2012, the FBI's NICS section informed him of the denial of his appeal.<sup>13</sup> Moreover, Tyler's state of residence, Michigan, had never implemented a state relief-from-disabilities program, and the federal program remained defunded.<sup>14</sup> Tyler thus had no recourse—outside of a constitutional challenge—by which to regain his federal firearm ownership rights.<sup>15</sup>

In May 2012, Tyler filed suit in the United States District Court for the Western District of Michigan, seeking declaratory and injunctive relief against various federal, state, and county defendants.<sup>16</sup> In relevant part, Tyler alleged that § 922(g)(4)—as

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8. *Tyler II*, 775 F.3d at 313–14.

9. *Id.* at 314. The probate court specifically found that the plaintiff “was ‘a person requiring treatment because [he was] mentally ill’ . . . [and] could be ‘reasonably expected within the near future to intentionally or unintentionally seriously physically injure [himself] or others.’” *Id.* (first and third alterations in original).

10. *Id.*

11. *Id.* at 314–15.

12. *Id.*

13. *Id.* at 315.

14. *See NICS Act Record Improvement Program (NARIP) Awards FY 2009–2015*, BUREAU OF JUSTICE STATISTICS, <http://www.bjs.gov/index.cfm?ty=tp&tid=491#funding> (last visited Jan. 9, 2016) (indicating that Michigan has received no federal funds under the NICS Act Record Improvement Program (“NARIP”) from 2009 to 2015).

15. *See Tyler II*, 775 F.3d at 315.

16. *Tyler v. Holder (Tyler I)*, No. 1:12-CV-523, 2013 WL 356851, at \*1–2 (W.D. Mich. Jan. 29, 2013). Tyler originally named the following parties as defendants: the United States of America; Attorney General Eric Holder; the Department of Justice; B. Todd Jones, Acting Director of the ATF; Thomas E. Brandon, Deputy Director of the ATF; the ATF itself; Robert S. Mueller, III, Director of the Federal Bureau of Investigation (FBI); the FBI itself; Rick Snyder, Governor of Michigan; Colonel Kriste Kibbey Etue, Director of the Michigan Department of State Police; the

applied to him, in his particular circumstances and as a Michigan resident—violated his right to keep and bear arms under the Second and Fourteenth Amendments to the U.S. Constitution.<sup>17</sup> After dismissing the claims against the state defendants,<sup>18</sup> the district court rejected Tyler’s argument that “the right to keep and bear arms, as historically understood, extends to previously committed individuals who are no longer a ‘real danger.’”<sup>19</sup> The court also held that, even if § 922(g)(4) did burden Tyler’s Second Amendment rights, the federal prohibition on firearm possession by those previously committed would satisfy intermediate judicial scrutiny.<sup>20</sup> Thus, having found § 922(g)(4) constitutional, the court granted the defendants’ motion to dismiss for failure to state a claim under Federal Rule of Civil Procedure 12(b)(6).<sup>21</sup>

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Hillsdale County Sheriff’s Department; and Stan W. Burchardt, Sheriff of Hillsdale County, Michigan. Complaint for Declaratory Judgment and Injunctive Relief at 3–5, *Tyler v. Holder*, 2013 WL 356851 (W.D. Mich. Jan. 29, 2013) (No. 12-523), 2012 WL 5212623.

17. Complaint for Declaratory and Injunctive Relief, *supra* note 16, at 9–10. In total, the plaintiff originally asserted three separate constitutional claims: (1) a Second Amendment challenge against the federal defendants, *id.* at 9-10; (2) a Fifth Amendment challenge against the federal defendants, *id.* at 10–11; and (3) a Fourteenth Amendment challenge, premised on violations of the Equal Protection and Due Process Clauses, against the state and county defendants, *id.* at 11–12. The first count alleged that § 922(g)(4), as enforced by the federal defendants, infringed upon Tyler’s Second Amendment rights in the absence of any available federal or state relief-from-disabilities programs. *Id.* at 9–10. The second count asserted that § 922(g)(4)’s “unconstitutionally broad [firearms] ban on a certain class of individuals” violated the plaintiff’s rights under the Due Process Clause of the Fifth Amendment. *Id.* at 10–11. That clause provides that “[n]o person shall be . . . deprived of life, liberty, or property, without due process of law.” U.S. CONST. amend. V, cl. 3. The third count claimed that the state and county defendants had infringed upon the plaintiff’s Fourteenth Amendment rights under the Equal Protection and Due Process Clauses, U.S. CONST. amend. XIV, § 1, cl. 3–4, both by enforcing § 922(g)(4) and by denying him “notice and an opportunity to be heard on the matter prior to the deprivation,” Complaint for Declaratory and Injunctive Relief, *supra* note 16, at 11–12.

18. *Tyler II*, 775 F.3d at 315.

19. *Tyler I*, 2013 WL 356851, at \*11.

20. *Id.* at \*12.

21. *Id.* at \*18. The state defendants had already been dismissed from the action prior to the district court’s decision. *See id.* at \* 5–6 n.3. As to the plaintiff’s Fifth Amendment claim, the district court held that the plaintiff’s substantive due process rights were co-extensive with his Second Amendment rights, and therefore dismissal of the first count also required dismissal of the second count. *Id.* at \*19–20 (quoting *Albright v. Oliver*, 510 U.S. 266, 273 (1994)). Once the federal defendants had been dismissed, the parties agreed that the court’s ruling was also dispositive as to the county defendants. *Tyler II*, 775 F.3d at 315.

On appeal to the Sixth Circuit, the appellate panel accepted this resolution of the

On appeal, a panel of the United States Court of Appeals for the Sixth Circuit reversed the dismissal of Tyler's complaint.<sup>22</sup> The panel held that the Second Amendment, as historically understood, affords at least some protection to individuals previously committed to a mental institution.<sup>23</sup> The panel further held that, under strict scrutiny, § 922(g)(4) serves a compelling governmental interest but is not narrowly tailored to achieve that interest.<sup>24</sup> Subsequently, the full Sixth Circuit vacated the panel's decision for rehearing en banc.<sup>25</sup> After rehearing the case, a majority of judges agreed with the panel that the district court's decision should be reversed and remanded for further proceedings.<sup>26</sup> But the majority also held that intermediate scrutiny, rather than the panel's choice of strict scrutiny, was the appropriate level of constitutional review.<sup>27</sup> In so holding, the Sixth Circuit brought its Second Amendment jurisprudence into harmony with the prevailing views of its sister circuits concerning challenges to federal firearm laws.<sup>28</sup>

## I. THE RIGHT TO KEEP AND BEAR ARMS

The Second Amendment states, "A well regulated militia, being necessary to the security of a free state, the right of the people to keep and bear arms, shall not be infringed."<sup>29</sup> For most of the past two centuries, this amendment remained one of the more uncontroversial provisions of the Bill of Rights and received little

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collateral issues and considered only the plaintiff's Second Amendment challenge. *Id.* Of course, because the county defendants remained in the litigation on appeal, the plaintiff's Fourteenth Amendment claim against them presumably remained viable; the court, however, never addressed this issue. *See id.* at 317–44. Instead, the Sixth Circuit focused exclusively on whether the district court erred in finding that the plaintiff had presented no colorable claim on Second Amendment grounds. *Id.* at 311.

22. *Tyler II*, 775 F.3d at 344.

23. *Id.* at 322.

24. *Id.* at 334.

25. *Tyler v. Hillsdale Cty. Sheriff's Dep't*, No. 13-1876, 2015 U.S. App. LEXIS 6638, at \*2 (6th Cir. Apr. 21, 2015) ("[A] majority of the Judges of this Court . . . have voted for rehearing of this case en banc.").

26. *Tyler v. Hillsdale Cty. Sheriff's Dep't (Tyler III)*, 837 F.3d 678, 699 (6th Cir. 2016) ("Because there are a number of separate opinions in this case, it is imperative that we clearly state the next steps. As I read the opinions, ten of us would reverse the district court; six of us would not.").

27. *Id.* ("[A]t least twelve of us agree that intermediate scrutiny should be applied, if we employ a scrutiny-based analysis.").

28. *See infra* Section II.C.

29. U.S. CONST. amend. II.

judicial attention.<sup>30</sup> Indeed, only a few U.S. Supreme Court cases<sup>31</sup> had dealt with the Second Amendment in any depth prior to the 2008 decision in *District of Columbia v. Heller*.<sup>32</sup> Since *Heller*, however, a number of constitutional challenges have arisen to cast doubt on longstanding regulations of firearm use and possession.<sup>33</sup>

### A. Historical Treatment of the Second Amendment

The Second Amendment, along with the other nine amendments forming the Bill of Rights, was ratified in 1791.<sup>34</sup> The Supreme Court first dealt with the Second Amendment in *United States v. Cruikshank*, in which the Court considered whether a sixteen-count indictment stated charges cognizable under federal law.<sup>35</sup> All counts were based on section 6 of the Enforcement Act of 1870,<sup>36</sup> which criminalized concerted action to deny another's exercise of a right guaranteed by the Constitution or federal law.<sup>37</sup> The indictment charged the defendants with having attempted to infringe upon various rights of two black citizens; in particular, the second and

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30. See Brannon P. Denning, *Can the Simple Cite be Trusted?: Lower Court Interpretations of United States v. Miller and the Second Amendment*, 26 CUMB. L. REV. 961, 972 n.57 (1996) (observing that the Supreme Court has only directly confronted Second Amendment challenges in three cases over more than two centuries); see also Patrick J. Charles, *The Faces of the Second Amendment Outside the Home: History Versus Ahistorical Standards of Review*, 60 CLEV. ST. L. REV. 1, 3–4 (2012) (noting a dramatic shift in Supreme Court jurisprudence—and accompanying “revisionist history” among commentators—since the 2008 *Heller* decision).

31. See *infra* Section II.A.

32. *District of Columbia v. Heller*, 554 U.S. 570 (2008).

33. Charles, *supra* note 30, at 2 (“In the wake of *District of Columbia v. Heller* and *McDonald v. City of Chicago* there have been numerous legal challenges to extend the Second Amendment outside the home. The challenges come in all forms.” (footnotes omitted)).

34. See generally STEPHEN P. HALBROOK, *THE FOUNDERS’ SECOND AMENDMENT* 295–98 (2008) (providing a thorough discussion of the 1791 Constitutional Convention and ratification process).

35. *United States v. Cruikshank*, 92 U.S. 542, 548 (1875). The case came before the Court on a question certified by the United States Circuit Court for the District of Louisiana, which had divided on the issue of the indictment’s legal sufficiency. *United States v. Cruikshank*, 25 F. Cas. 707, 708 (C.C.D. La. 1874).

36. Enforcement Act of 1870, ch. 114, 16 Stat. 140–46, amended by First Enforcement Act of 1871, ch. 99, § 1, 16 Stat. 433, 433.

37. *Id.* § 6, 16 Stat. at 141. In relevant part, this section made it a federal felony for “two or more persons [to] band or conspire together, . . . with intent to prevent or hinder [another person’s] free exercise and enjoyment of any right or privilege granted or secured to him by the Constitution or laws of the United States, or because of his having exercised the same.” *Id.*

tenth counts asserted violations of the right of “bearing arms for a lawful purpose.”<sup>38</sup> In analyzing these counts, the Court flatly stated: “This is not a right granted by the Constitution. Neither is [the right] in any manner dependent upon that instrument for its existence.”<sup>39</sup> The Court also noted that the Second Amendment—whatever its true scope may be—operated only to constrain the powers of the federal government, rather than those of the states.<sup>40</sup>

A decade later, the Court in *Presser v. Illinois* considered not whether a private citizen had infringed upon another’s Second Amendment rights, but whether a state had done so.<sup>41</sup> The defendant was tried and convicted under Illinois’ Military Code, which made it unlawful for private citizens to “associate themselves together as a military company or organization, or to drill or parade with arms . . . , without the license of the governor thereof.”<sup>42</sup> Presser argued before the Supreme Court that this provision violated the federal Constitution’s Army and Militia Clauses,<sup>43</sup> the Compact Clause,<sup>44</sup> and the Second Amendment.<sup>45</sup> After dismissing the defendant’s other constitutional arguments, the Court rejected the claim that Illinois’s prohibition on private military activity

38. *Cruikshank*, 92 U.S. at 553.

39. *Id.* Note that the latter comment seems to imply a pre-existing right to bear arms, albeit one absent from the federal Constitution. Such an interpretation is partly consistent with the majority opinion in *District of Columbia v. Heller*, 554 U.S. 570, 603 (2008) (noting that the Second Amendment “was widely understood to codify a *pre-existing* right rather than to fashion a new one”). On the other hand, the *Cruikshank* Court’s assertion that the Constitution secures no such right better comports with Justice Stevens’s reading of the Second Amendment. *Id.* at 651 (Stevens, J., dissenting).

40. *Cruikshank*, 92 U.S. at 553 (“This is one of the amendments that has no other effect than to restrict the powers of the national government . . .”). Ultimately, the Court found all other counts of the indictment wanting as well and “remanded[] with instructions to discharge the defendants.” *Id.* at 559 (emphasis omitted).

41. *Presser v. Illinois*, 116 U.S. 252, 260 (1886).

42. *Id.* (quoting Military Code of Illinois, art. XI, § 5, 1879 Ill. Laws 192, 203–04 (codified as amended at 20 ILL. COMP. STAT. 1805 / 94 (West 2016))).

43. U.S. CONST. art. I, § 8, cl. 12, 15–16, 18. These provisions give Congress the power:

To raise and support armies[;] . . . [t]o provide for calling forth the militia to execute the laws of the union, suppress insurrections and repel invasions; [t]o provide for organizing, arming, and disciplining, the militia, and for governing such part of them as may be employed in the service of the United States[;] . . . [and t]o make all laws which shall be necessary and power for carrying into execution the foregoing powers . . . .

*Id.*

44. *Id.* art. I, § 10, cl. 3 (“No State shall, without the Consent of Congress, . . . keep Troops, or Ships of War in time of Peace . . .”).

45. *Id.* amend. II.

infringed upon a right to keep and bear arms.<sup>46</sup> Relying on *Cruikshank*, the Court held that the Second Amendment did not directly constrain the powers of the states.<sup>47</sup> The Court did note, however, that because “all citizens capable of bearing arms constitute the . . . reserve militia of the United States,” a state could theoretically violate the Second Amendment by totally disarming the general populace, thus preventing the formation of the national militia.<sup>48</sup>

Finally, in *United States v. Miller*, the Supreme Court confronted an overt claim that the Second Amendment guarantees an individual right to possess a firearm.<sup>49</sup> *Miller* concerned the indictment of two individuals for the interstate transport of a double-barreled, sawed-off shotgun in violation of the National Firearms Act.<sup>50</sup> The district court had sustained the defendants’ demurrer on the ground that enforcement of the statute would violate their Second Amendment rights.<sup>51</sup> The Supreme Court disagreed: After an exhaustive review of the historical origins of the militia and various states’ pre-1791 militia acts, the Court held that the federal ban on possession of a sawed-off shotgun did not run afoul of the Second Amendment.<sup>52</sup> Crucially, the Court premised its ruling on “the absence of any evidence tending to show that possession or use of [such a weapon] at this time has some reasonable relationship to the preservation or efficiency of a well regulated militia.”<sup>53</sup> In addition, the Court made clear that the Second Amendment was adopted “with obvious purpose to assure the continuation and render possible the effectiveness” of the militia and “must be interpreted and applied with that end in view.”<sup>54</sup>

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46. *Presser*, 116 U.S. at 264–65.

47. *Id.* (citing *United States v. Cruikshank*, 92 U.S. 542, 553 (1875)).

48. *Id.* at 265. “[T]he States cannot, even laying the constitutional provision in question out of view, prohibit the people from keeping and bearing arms, so as to deprive the United States of their rightful resource for maintaining the public security . . .” *Id.* (emphasis added).

49. *United States v. Miller*, 307 U.S. 174, 176 (1939).

50. National Firearms Act, ch. 757, §§ 4–5, 48 Stat. 1236, 1237–38 (1934) (current version at 26 U.S.C. § 5861 (2012)).

51. *United States v. Miller*, 26 F. Supp. 1002, 1002 (W.D. Ark.), *rev’d*, 307 U.S. 174 (1939).

52. *Miller*, 307 U.S. at 182. “Most if not all of the States have adopted provisions touching the right to keep and bear arms. . . . But none of them seem to afford any material support for the challenged ruling of the court below.” *Id.*

53. *Id.* at 178.

54. *Id.*

B. *The New Era of Second Amendment Jurisprudence*

In 2008, the Supreme Court handed down its decision in *District of Columbia v. Heller*, a case that divided the Court and ushered in a new era of Second Amendment jurisprudence.<sup>55</sup> Prior to *Heller*, the District of Columbia (the “District”) had effectively banned the private ownership and possession of handguns.<sup>56</sup> The plaintiff, a District special police officer permitted to carry a pistol while on duty, unsuccessfully sought a registration certificate to keep a handgun in his home.<sup>57</sup> He then sued to enjoin the District from enforcing its various statutory obstacles to handgun possession, asserting an unconstitutional infringement of the Second Amendment.<sup>58</sup> The district court dismissed the plaintiff’s complaint, “reject[ing] the notion that there is an individual right to bear arms separate and apart from service in the Militia.”<sup>59</sup> The District of Columbia Circuit then reversed, finding that the Second Agreement did protect such an individual right and holding that the District’s regulatory regime unconstitutionally burdened that right.<sup>60</sup> In a 5–4 decision, the Supreme Court affirmed the court of appeals, thus invalidating the District’s ban on handgun possession in the home and burdensome requirements for storage of firearms.<sup>61</sup>

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55. 554 U.S. 570 (2008). “The Supreme Court’s decisions in [*Heller* and *McDonald*] settled several important controversies concerning the Second Amendment right to keep and bear arms. They also left many vital questions unanswered.” Allen Rostron, *The Continuing Battle over the Second Amendment*, 78 ALB. L. REV. 819, 819 (2015) (footnotes omitted); see also 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, 1449–75 (2009) (proposing an alternate approach to post-*Heller* Second Amendment challenges, in contrast to the more pervasive tiers-of-scrutiny analysis).

56. See D.C. CODE § 7-2501.01(12) (2001) (defining “pistol”); *id.* § 7-2502.01(a) (requiring registration of all firearms); *id.* § 7-2502.02(a)(4) (generally barring registration of pistols); *id.* § 7-2507.02 (requiring lawful firearms to be kept unloaded and disassembled or bound by trigger-lock); *id.* § 22-4504(a) (prohibiting the carrying of a handgun without a permit); *id.* § 22-4506 (empowering the chief of police to issue temporary one-year permits).

57. *Heller*, 554 U.S. at 575.

58. *Parker v. District of Columbia*, 311 F. Supp. 2d 103, 103–04 (D.D.C. 2004), *rev’d*, 478 F.3d 370 (D.C. Cir. 2007), *aff’d sub nom. Heller*, 554 U.S. 570.

59. *Id.* at 109.

60. *Parker v. District of Columbia*, 478 F.3d 370, 395, 401 (D.C. Cir. 2007), *aff’d sub nom. Heller*, 554 U.S. 570. The court of appeals understood the complaint to claim only the right of “self-defense in the home,” without “asserting a right to carry such weapons outside the[] home[.]” *Id.* at 374.

61. *Heller*, 554 U.S. at 635. Note that the Court’s holdings are limited to “handgun possession *in the home*” and “rendering any lawful firearm *in the home*

Writing for the majority, Justice Scalia focused largely on a historical analysis of the Second Amendment and divided its text into two parts: a “prefatory clause and [an] operative clause.”<sup>62</sup> While acknowledging that some logical connection between the two is necessary to any fair reading of the Amendment, Justice Scalia denied that the prefatory clause—that which mentions militia service—could “limit or expand the scope of the operative clause.”<sup>63</sup> The majority instead held that, while prevention of tyranny through preservation of the militia was *one* purpose behind the Second Amendment, its drafters also intended to protect the rights of hunting and self-defense.<sup>64</sup> The Court thus concluded that the Amendment was understood at the time of its ratification to codify a “pre-existing right” to the use of firearms for self-defense.<sup>65</sup> The Court supported this conclusion through lengthy citation to the historical record, including analogous state constitutional provisions, post-ratification commentary, and prior case law.<sup>66</sup>

The Court recognized, however, that the individual right to firearm possession the Second Amendment protects is not unlimited.<sup>67</sup> At the same time, the Court declined to fully explicate the scope of this right, leaving that task to future cases and other courts.<sup>68</sup> In highly significant (but uncited) language, Justice Scalia warned that:

[N]othing in our opinion should be taken to cast doubt on longstanding prohibitions on the possession of firearms by

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operable.” *Id.* (emphases added); *see also* *United States v. Masciandaro*, 638 F.3d 458, 474–76 (4th Cir. 2011) (declining, by a 2-1 majority, to extend Second Amendment protection beyond the home without explicit authorization from the Supreme Court).

62. *Heller*, 554 U.S. at 577. The prefatory clause states, “A well regulated Militia, being necessary to the security of a free State”; the operative clause reads, “[T]he right of the people to keep and bear Arms, shall not be infringed.” *See id.* (citing U.S. CONST. amend. II).

63. *Id.* at 578 (citing FORTUNATUS DWARRIS, A GENERAL TREATISE ON STATUTES 268–69 (Platt Potter ed. 1871) (1830–31)).

64. *Id.* at 599.

65. *Id.* at 603.

66. *E.g., id.* at 601, 606, 619. Justice Scalia distinguished the *Miller* case in particular through two different means: construal of its holding as limited to the type of weapon at issue, i.e. a short-barreled shotgun, and criticism of the decision’s procedural history, i.e. its lack of “thorough examination.” *Id.* at 621–25.

67. *Id.* at 626 (“From Blackstone through the 19th-century cases, commentators and courts routinely explained that the right was not a right to keep and carry any weapon whatsoever in any manner whatsoever and for whatever purpose.”).

68. *Id.*

felons *and the mentally ill*, or laws forbidding the carrying of firearms in sensitive places . . . , or laws imposing conditions and qualifications on the commercial sale of arms.<sup>69</sup>

In a footnote, the Court referred to the above exceptions as “presumptively lawful regulatory measures,” but offered no further guidance on what it meant by this remark.<sup>70</sup>

The majority next applied its newfound interpretation of the Second Amendment to the District’s firearms regulations and found them to be fundamentally at odds.<sup>71</sup> Notably, in invalidating the District’s restrictive licensing requirements and home-storage regulations, the Court defined the Second Amendment as protecting “the right of law-abiding, responsible citizens to use arms in defense of hearth and home.”<sup>72</sup>

In his dissenting opinion, Justice Stevens flatly disagreed with the Court’s reading of the historical record, finding instead that the Second Amendment merely guarantees a right to use arms in connection with militia service.<sup>73</sup> This dissent further argued that the *Miller* decision clearly rejected the majority’s reading of the Amendment and that, absent any newly discovered historical evidence or legislative activity, the doctrine of *stare decisis* demanded obedience to *Miller*.<sup>74</sup> In a separate dissenting opinion, Justice Breyer argued that, even if the Second Amendment did protect an individual right to possess a firearm,<sup>75</sup> the District’s

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69. *Id.* at 626–27 (emphasis added).

70. *Id.* at 626 n.26. Courts and commentators have expressed widespread disagreement over the import of these four exceptions and accompanying footnote, though most have recognized that at least *some* significance must attach to them. *See, e.g.*, *United States v. Skoien (Skoien II)*, 614 F.3d 638, 640 (7th Cir. 2010) (en banc) (“We do not think it profitable to parse these passages of *Heller* as if they contained an answer to the question whether § 922(g)(9) is valid. They are precautionary language.”). *But see* *United States v. Greeno*, 679 F.3d 510, 517 (6th Cir. 2012) (referring to these exceptions as “a non-exhaustive list of presumptively lawful regulations,” which “this Circuit has relied on . . . to reject Second Amendment challenges”); 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, 1372 (2009) (“Although these exceptions are arguably dicta, they are dicta of the strongest sort. . . . For all practical purposes, these issues have been decided—and decided in favor of constitutionality.”).

71. *Heller*, 554 U.S. at 629–30.

72. *Id.* at 635.

73. *Id.* at 651 (Stevens, J., dissenting).

74. *Id.* at 677–79 (arguing that the majority gave “insufficient reason to disregard a unanimous opinion of this Court, upon which substantial reliance has been placed by legislators and citizens for nearly [seventy] years”).

75. Justice Breyer assumed as much for the sake of argument, but he also fully

regulations burdened that right in a manner fully consistent with historical gun-control laws.<sup>76</sup> Moreover, Justice Breyer criticized the majority's failure to identify an analytical program for Second Amendment challenges and suggested that an "interest-balancing inquiry"—rather than traditional means-end scrutiny—would best serve this purpose.<sup>77</sup> The majority, however, expressly rejected this approach and declined to specify the appropriate level of judicial scrutiny, holding that "[u]nder any of the standards of scrutiny . . . applied to enumerated constitutional rights," the District's firearm regulations were unconstitutional.<sup>78</sup>

Two years later, in *McDonald v. City of Chicago*, the Supreme Court extended *Heller* past its original application to only the federal government.<sup>79</sup> By recognizing that the Due Process Clause of the Fourteenth Amendment<sup>80</sup> incorporates the rights enshrined in the Second Amendment, the Court made the constitutional protection of an individual right to possess a firearm controlling also on the states.<sup>81</sup> Notably, the Court indicated that neither this decision nor

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agreed with Justice Stevens that no such individual right exists. *Id.* at 681 (Breyer, J., dissenting).

76. *Id.* at 683–87 (citing to ratification-era laws in Boston, Philadelphia, and New York City as evidence of the reasonableness of the District's regulatory regime).

77. *Id.* at 689. The dissent rejected the plaintiff's argument—largely ignored by the Court—that strict scrutiny should apply, finding such a standard impracticable for Second Amendment challenges. *Id.* Because gun control laws will almost always serve a compelling interest, "any attempt *in theory* to apply strict scrutiny . . . will *in practice* turn into an interest-balancing inquiry." *Id.*

78. *Id.* at 628 (majority opinion). The standards of scrutiny to which the Court referred are intermediate scrutiny and strict scrutiny. *Id.* at 634. Under the former, "a challenged law 'must be substantially related to an important governmental objective.'" *Tyler II*, 775 F.3d 308, 323 (6th Cir. 2014) (quoting *Clark v. Jeter*, 486 U.S. 456, 461 (1988)), *vacated*, 837 F.3d 678 (6th Cir. 2016) (en banc). Under the latter, a challenged law must "further[] a compelling interest and [be] narrowly tailored to achieve that interest." *Id.* (quoting *Citizens United v. FEC*, 558 U.S. 310, 340 (2010)). A third possible tier of scrutiny, rational basis review, "requires only that that the [law] rationally further a legitimate state interest." *Nordlinger v. Hahn*, 505 U.S. 1, 10 (1992). The *Heller* Court expressly rejected the suitability of rational basis review, which functions as a basic constitutional requirement of rationality rather than a tier of scrutiny to be applied to burdens on enumerated rights. *See* 554 U.S. at 628 n.27 ("If all that was required to overcome the right to keep and bear arms was a rational basis, the Second Amendment would be redundant . . . and would have no effect.").

79. 561 U.S. 742, 750 (2010).

80. "[N]or shall any state deprive any person of life, liberty, or property, without due process of law . . ." U.S. CONST. amend. XIV, § 1, cl. 3.

81. *McDonald*, 561 U.S. at 791. To receive incorporation status under the Fourteenth Amendment, a right must be "fundamental to our scheme of ordered liberty." *Id.* at 767 (emphasis omitted) (citing *Duncan v. Louisiana*, 391 U.S. 145, 149

*Heller* should “cast doubt on such longstanding regulatory measures as ‘prohibitions on the possession of firearms by felons and the mentally ill.’”<sup>82</sup> The Court simply “repeat[ed] those assurances” and made clear that the scope of the Amendment was limited.<sup>83</sup>

### C. Subsequent Developments in the Circuit Courts of Appeals

Since *McDonald*, the Court has decided no other cases that explicitly concern the Second Amendment, thus leaving the task of defining the Amendment’s parameters largely to the federal courts of appeals and district courts.<sup>84</sup> The lower courts, however, have approached this task in an uneven manner, producing divisions of opinion both within and between the circuits.<sup>85</sup> On the other hand, what the courts of appeals *have* agreed upon—in direct contrast to Justice Scalia’s ambivalence in *Heller*—is the need to identify a precise tier of judicial scrutiny to apply to Second Amendment challenges.<sup>86</sup> Moreover, a general consensus has developed among the circuits that the appropriate standard to apply is intermediate scrutiny.<sup>87</sup>

The First Circuit, in upholding the constitutionality of § 922(g)(9)’s ban on gun ownership by domestic violence misdemeanants, declined to explicitly choose between strict and

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(1968)). The *McDonald* Court had little difficulty finding to this to be the case, given *Heller*’s determination that an individual right to use firearms in self-defense was both an ancient common law right and one fundamental to the Second Amendment. *See id.* (citing *Heller*, 554 U.S. at 599).

82. *Id.* at 786 (quoting *Heller*, 554 U.S. at 626).

83. *Id.*

84. *See* Rostron, *supra* note 55, at 819. “Struggling with these unresolved issues, lower courts have produced a large and continually growing volume of decisions about the Second Amendment in recent years.” *Id.*

85. *See Tyler II*, 775 F.3d 308, 324 (6th Cir. 2014) (noting that the circuit courts’ “actual approaches” to choosing a tier of judicial scrutiny are “less neat—and far less consistent—than” they first appear), *vacated*, 837 F.3d 678 (6th Cir. 2016) (en banc).

86. *See* Rostron, *supra* note 55, at 820 (commending the circuits for rejecting a primarily historical analysis in favor of a tiers-of-scrutiny analysis). *But see* Volokh, *supra* note 55, at 1446 (arguing for a justification-based approach to Second Amendment challenges rather than the application of strict scrutiny, intermediate scrutiny, or an undue-burden analysis).

87. *See, e.g., Tyler II*, 775 F.3d at 324 (conceding that, despite the court’s own adoption of strict scrutiny, the “circuits have generally applied intermediate scrutiny in Second Amendment challenges”). The following review of the doctrinal landscape is not intended to be exhaustive. Rather, this section tracks the *Tyler* court’s own survey of the relevant case law and thus serves primarily to explore the basis for that decision. *See id.* at 324–27.

intermediate scrutiny.<sup>88</sup> The court nonetheless required a “*substantial* relationship between the restriction and an *important* governmental objective” to pass constitutional muster—the classic language used to indicate intermediate scrutiny.<sup>89</sup> The First Circuit recently confirmed its faith in this approach in *United States v. Carter*,<sup>90</sup> which roundly rejected another § 922(g)(9) challenge as being “foreclosed by binding precedent in this circuit.”<sup>91</sup> Similarly, in *Kachalsky v. County of Westchester*, the Second Circuit applied “less than strict scrutiny” to a New York law that limited an individual’s ability to carry a firearm in public.<sup>92</sup> The court found intermediate scrutiny most appropriate because the law at issue did not “burden the ‘core’ [right] of self-defense in the home,” although it left open the question of what tier should apply to “core” cases.<sup>93</sup>

In *United States v. Marzzarella*, the Third Circuit pioneered a “two-pronged approach” to Second Amendment challenges and upheld a defendant’s conviction under § 922(k) for possession of a weapon with an obliterated serial number.<sup>94</sup> Under the first prong, the government failed to meet its burden of proving that § 922(k) burdened conduct outside the historical scope of the Amendment.<sup>95</sup> Nevertheless, under the second prong, the court chose to apply intermediate scrutiny<sup>96</sup> and found a reasonably close relationship

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88. *United States v. Booker*, 644 F.3d 12, 25 (1st Cir. 2011).

89. *Id.* (emphasis added) (citing *Skoien II*, 614 F.3d 638, 641 (7th Cir. 2010)). The *Tyler* court understood this decision to adopt a “form of intermediate scrutiny.” 775 F.3d at 324.

90. 752 F.3d 8 (1st Cir. 2014).

91. *Id.* at 13 (citing *Booker*, 644 F.3d at 25–26). The court noted that, although the Supreme Court’s recent decision in *United States v. Castleman*, 134 S. Ct. 1405 (2014), left *Booker* in doubt on other grounds, *Castleman* did nothing to disturb *Booker*’s precedential status regarding Second Amendment challenges, *Carter*, 752 F.3d at 13.

92. 701 F.3d 81, 93 (2d Cir. 2012).

93. *Id.*; accord *Kwong v. Bloomberg*, 723 F.3d 160, 168 n.16 (2d Cir. 2013); *United States v. Bryant*, 711 F.3d 364, 369 (2d Cir. 2013)

94. 614 F.3d 85, 101 (3d Cir. 2010).

95. *Id.* at 95. The court also, in performing this analysis, interpreted the *Heller* exceptions as “exceptions to the Second Amendment guarantee,” i.e., as conduct outside the historical scope of the rights conferred. *Id.* at 91. Because *Heller*’s list was not exhaustive, however, the court found room for “additional classes of restrictions” within the historical scope of the right; here, the court simply found the historical evidence inconclusive as to the law at issue. *Id.* at 92, 95.

96. *Id.* at 97. The court did note, however, that “the Second Amendment can trigger more than one particular standard of scrutiny” and expressed some degree of uncertainty as to its choice. *Id.* Further, the court held that the law would survive constitutional review even if strict scrutiny were to apply instead. *Id.* at 99.

between § 922(k) and the important interests it served.<sup>97</sup>

The Fourth and Fifth Circuits have similarly used multi-tiered approaches in determining the correct level of constitutional scrutiny.<sup>98</sup> Under such an approach, “the appropriate level of scrutiny depends on the nature of the conduct being regulated and the degree to which the challenged law burdens the right.”<sup>99</sup> In *United States v. Masciandaro*, for example, the Fourth Circuit applied intermediate scrutiny to a federal regulation<sup>100</sup> that prohibited possession of a firearm inside a vehicle while within a national park.<sup>101</sup> The court upheld the applicability of the regulation to the defendant under intermediate scrutiny, but it noted that strict scrutiny might be appropriate when analyzing laws that burden the “core right identified in *Heller*—the right of a law-abiding, responsible citizen to possess and carry a weapon for self-defense.”<sup>102</sup>

The only Sixth Circuit case to deal substantially with this issue prior to *Tyler* was *United States v. Greeno*, which upheld a dangerous-weapon sentencing enhancement.<sup>103</sup> In *Greeno*, the court adopted the Third Circuit’s “two-pronged approach” to Second Amendment challenges:

Under the first prong, the court asks whether the challenged law burdens conduct that falls within the scope of the Second Amendment right, as historically understood. . . . ‘If the government cannot establish this . . . then there must be a second inquiry.’ Under this prong, the court applies the appropriate level of scrutiny.<sup>104</sup>

The *Greeno* court was able to resolve the constitutional challenge at issue under the first prong alone, holding that the historical scope of

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97. *Id.* at 98–99; see also *United States v. Huet*, 665 F.3d 588, 602 (3d Cir. 2012) (holding that a Second Amendment challenge for aiding and abetting possession of a firearm by a felon, in violation of 18 U.S.C. § 922(g)(1)–(2) (2012), failed under the first prong of *Marzzarella*).

98. See, e.g., *National Rifle Ass’n of Am. v. ATF*, 700 F.3d 185, 195 (5th Cir. 2012); *United States v. Masciandaro*, 638 F.3d 458, 470–71 (4th Cir. 2011); *United States v. Chester*, 628 F.3d 673, 683 (4th Cir. 2010).

99. *Tyler II*, 775 F.3d 308, 326 (6th Cir. 2014) (quoting *National Rifle Ass’n of Am.*, 700 F.3d at 195), *vacated*, 837 F.3d 678 (6th Cir. 2016) (en banc).

100. 36 C.F.R. § 2.4(b) (2015).

101. *Masciandaro*, 638 F.3d at 460.

102. *Id.* at 469 (quoting *Chester*, 673 F.3d at 682–83) (emphasis omitted).

103. 679 F.3d 510, 521 (6th Cir. 2012).

104. *Id.* at 518 (citations omitted) (quoting *Ezell v. City of Chicago*, 651 F.3d 684, 703 (7th Cir. 2011)).

the Second Amendment does not encompass use of a firearm for unlawful purposes.<sup>105</sup> As a result, the Sixth Circuit reserved decision on the correct level of judicial scrutiny it *would* apply to Second Amendment challenges.<sup>106</sup>

The Seventh Circuit has shifted direction several times in its Second Amendment case law but has always avoided the use of strict scrutiny.<sup>107</sup> For example, in *United States v. Skoien*, the court initially held that intermediate scrutiny applied to a § 922(g)(9) challenge, but then remanded to require the government to better meet its burden of justification.<sup>108</sup> After rehearing en banc, the *Skoien* court again accepted that intermediate scrutiny should apply and upheld the constitutionality of the challenged law.<sup>109</sup> Later, however, the court in *Ezell v. City of Chicago* adopted “a more rigorous showing than that applied in *Skoien*, if not quite ‘strict scrutiny.’”<sup>110</sup> As with the Fourth and Fifth Circuits, the Seventh Circuit indicated that the requisite level of judicial scrutiny would depend on “how close the law comes to the core of the Second Amendment right and the severity of the law’s burden.”<sup>111</sup>

The Eighth Circuit has largely shied away from employing any explicit level of scrutiny,<sup>112</sup> while the Tenth Circuit has expressly applied intermediate scrutiny to uphold the validity of § 922(g)(8).<sup>113</sup> The Ninth Circuit, on the other hand, has followed a jurisprudential pattern similar to that of the Seventh Circuit by selecting intermediate scrutiny but leaving room for sensitivity to context.<sup>114</sup>

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105. *Id.* at 521. Indeed, “[t]o hold to the contrary would suggest that the Second Amendment protects an individual’s right to possess a weapon for criminal purposes. Nothing in *Heller*, the common law, or early case law suggests such a reading.” *Id.* at 519.

106. *Id.* at 521 n.2.

107. *Ezell*, 651 F.3d at 713 (Rovner, J., concurring) (recognizing the court’s continued reliance on a standard of analysis categorically lower than strict scrutiny).

108. *United States v. Skoien (Skoien I)*, 587 F.3d 803, 816 (7th Cir. 2009), *rev’d en banc*, 614 F.3d 638 (7th Cir. 2010).

109. *Skoien II*, 614 F.3d at 641–42, 645. Writing for the en banc panel, Judge Easterbrook simply accepted the government’s “concession” that intermediate scrutiny should apply, but he also referred to the choice as “prudent” and expressed the court’s desire to avoid the “levels of scrutiny quagmire” as much as possible. *Id.* at 641–42.

110. *Ezell*, 651 F.3d at 708 (majority opinion).

111. *Id.* at 703 (citing Volokh, *supra* note 55, at 1454–72).

112. *See generally* *United States v. Bena*, 664 F.3d 1180 (8th Cir. 2011) (rejecting facial challenge to the constitutionality of 18 U.S.C. § 922(g)(8) (2012) (domestic restraining orders)).

113. *United States v. Reese*, 627 F.3d 792, 802 (10th Cir. 2010).

114. *See Jackson v. City & Cty. of S.F.*, 746 F.3d 953, 965 (9th Cir. 2014); *United States v. Chovan*, 735 F.3d 1127, 1136 (9th Cir. 2013).

Specifically, like the *Ezell* court, the Ninth Circuit has recognized that intermediate scrutiny is the appropriate constitutional test for laws that burden all but the most fundamental of Second Amendment conduct.<sup>115</sup>

As with the Eighth Circuit, the Eleventh Circuit has generally avoided selection of a particular level of scrutiny, despite upholding the constitutionality of federal firearm regulations in several cases.<sup>116</sup> The District of Columbia Circuit, on the other hand, has adopted a position consistent with the approach of the Seventh and Ninth Circuits.<sup>117</sup>

Therefore, in general, the courts of appeals have exhibited a strong preference for intermediate scrutiny in the Second Amendment context, while at the same time allowing for some flexibility as the case may demand. Indeed, prior to *Tyler*, the Sixth Circuit was one of the few federal circuits yet to take a position on the correct level of scrutiny for Second Amendment challenges.<sup>118</sup>

## II. ANALYSIS OF *TYLER V. HILLSDALE COUNTY SHERIFF'S DEPARTMENT*

In *Tyler v. Hillsdale County Sheriff's Department*,<sup>119</sup> a panel of the Sixth Circuit Court of Appeals held, in a 3–0 decision, that the federal prohibition on firearm possession by individuals previously committed to a mental institution was unconstitutional.<sup>120</sup> Sitting en banc, the Sixth Circuit subsequently vacated the panel's decision and held that intermediate scrutiny, rather than strict scrutiny, was the appropriate model of constitutional analysis for the case at hand.<sup>121</sup> Nevertheless, the ultimate result under both decisions is the same: The plaintiff stated a viable Second Amendment claim in opposition to § 922(g)(4).<sup>122</sup>

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115. *Chovan*, 735 F.3d at 1138.

116. See, e.g., *United States v. Rozier*, 598 F.3d 768, 772 (11th Cir. 2010) (per curiam) (upholding § 922(g)(1)); *United States v. Battle*, 347 F. App'x 478, 480–81 (11th Cir. 2009) (unpublished per curiam opinion) (upholding § 922(g)(1)).

117. See *Heller v. District of Columbia*, 670 F.3d 1244, 1257 (D.C. Cir. 2011) (applying intermediate scrutiny but noting that the required strength of the government's interest will depend on how critical the burdened conduct is to the Second Amendment).

118. *United States v. Greeno*, 679 F.3d 510, 521 n.2 (6th Cir. 2012).

119. *Tyler II*, 775 F.3d 308, 344 (6th Cir. 2014), *vacated*, 837 F.3d 678 (6th Cir. 2016) (en banc).

120. *Id.* at 344.

121. *Tyler III*, 837 F.3d 678, 699 (6th Cir. 2016).

122. See *id.*; *Tyler II*, 775 F.3d at 344.

### A. *The Panel Decision*

Judge Danny Boggs wrote the opinion for the unanimous panel and first discussed the appropriate mode of analysis for a Second Amendment challenge after *Heller*.<sup>123</sup> Observing the limited scope of the *Heller* ruling and the unsettled contours of the modern Second Amendment, the court noted that this case presented a difficult question of first impression for the Sixth Circuit.<sup>124</sup> Further, the court rejected the notion that “*Heller’s* assurance that the state may prohibit the ‘mentally ill’ from possessing firearms” was sufficient to resolve this case in favor of the government.<sup>125</sup> First, the *Heller* exceptions are dicta, albeit highly persuasive dicta.<sup>126</sup> Second, the two categories of people identified in § 922(g)(4)—those “adjudicated as a mental defective” and those formerly committed<sup>127</sup>—are not mutually inclusive.<sup>128</sup> In other words, not all people formerly subject to involuntary commitment remain mentally ill forevermore.<sup>129</sup>

While the *scope* of the Second Amendment right may remain uncertain after *Heller*, the *structure* of the court’s analysis is clear—at least in the Sixth Circuit.<sup>130</sup> Under *Greeno*, the court must determine: (1) whether the law burdens conduct within the historical scope of the Second Amendment; and, if so, (2) whether the law passes muster under the correct level of scrutiny.<sup>131</sup> As to the first prong, the court reviewed the historical evidence offered by both the plaintiff and the government, finding neither set conclusive on the question of the Second Amendment’s historical scope.<sup>132</sup> The

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123. *Tyler II*, 775 F.3d at 316.

124. *Id.* at 316–17. The court phrased the primary question for review as follows: “[D]oes the Second Amendment forbid Congress from prohibiting firearm possession by *all* individuals previously committed to a mental institution?” *Id.* (emphasis added).

125. *Id.* at 317 (citing 18 U.S.C. § 922(g)(4) (2012)).

126. *Id.* (citing *McDonald v. City of Chicago*, 561 U.S. 742, 786 (2010)).

127. § 922(g)(4).

128. *Tyler II*, 775 F.3d at 317.

129. *Id.*

130. *Id.* at 317–18.

131. *United States v. Greeno*, 679 F.3d 510, 518–19 (6th Cir. 2012). The *Tyler* court expressed substantial doubt as to the “soundness of this two-step approach,” finding it contrary to the language in *Heller* that is critical of both interest-balancing and level-of-scrutiny analyses. *Tyler II*, 775 F.3d at 319 (citing *District of Columbia v. Heller*, 554 U.S. 570, 634–35 (2008)). Nevertheless, the court considered itself bound by the precedent established in *Greeno* and thus continued with the two-step analysis. *Id.*

132. *Tyler II*, 775 F.3d at 322. The district court similarly held that the historical evidence failed to resolve the first prong of the *Greeno* test. *Tyler I*, No. 1:12-CV-523,

government largely relied on ratification-era sources reflecting the disarmament of those who posed a “real danger of public injury.”<sup>133</sup> The court, however, dismissed this evidence because it showed only what *Heller* already made clear—that the government may impose *some* restrictions on the firearm rights of dangerous individuals.<sup>134</sup> Moreover, the court itself was unable to find any valid evidence of “[s]pecific eighteenth-century laws disarming the mentally ill”; such laws are a twentieth century creation.<sup>135</sup> Thus, because the government bears the burden of proof under the first prong of *Greeno*, the court resolved the prong in the plaintiff’s favor and held that the Second Amendment historically applied to “at least some individuals previously committed to mental institutions.”<sup>136</sup>

The court then proceeded to the second prong of *Greeno*: analyzing the burden imposed by the challenged law under the appropriate level of scrutiny.<sup>137</sup> Because *Greeno* had refrained from determining what standard should apply, the court had no choice but to do so here.<sup>138</sup> The court immediately rejected rational basis review as a candidate, given *Heller*’s explicit language to that effect.<sup>139</sup> The court then considered the government’s two main arguments in favor of intermediate scrutiny: that the *Heller* exceptions foreclose the possibility of strict scrutiny, and that the other circuits have generally selected intermediate scrutiny.<sup>140</sup> The court rejected the first argument by interpreting *Heller*’s “presumptively lawful” language non-literally; otherwise, some form of rational basis review would have to apply.<sup>141</sup>

As to the second argument, the court reviewed the case law in the other circuits and found several causes for concern.<sup>142</sup> While acknowledging a “general trend . . . in favor of some form of

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2013 WL 356851, at \*3 (W.D. Mich. Jan. 29, 2013).

133. *Tyler II*, 775 F.3d at 320 (emphasis omitted) (quoting The Address and Reasons of Dissent of the Minority of the Convention of the State of Pennsylvania to Their Constituents (1787), reprinted in 2 BERNARD SCHWARTZ, THE BILL OF RIGHTS: A DOCUMENTARY HISTORY 665 (1971)).

134. *Id.* (citing *Heller*, 554 U.S. at 635).

135. *Id.* at 321 (quoting Larson, *supra* note 70, at 1378).

136. *Id.* at 322.

137. *United States v. Greeno*, 679 F.3d 510, 518 (6th Cir. 2012) (citing *United States v. Marzzarella*, 614 F.3d 85, 89 (3d Cir. 2010)).

138. *Tyler II*, 775 F.3d at 323 (citing *Greeno*, 679 F.3d at 520 n.2).

139. *Id.* (quoting *Heller*, 554 U.S. at 628 n.27).

140. *Id.* at 323–24.

141. *Id.* at 324 (citing *Heller*, 554 U.S. at 627 n.27). Instead, the court suggested that the “better[] reading of the language is that the Court presumed that it would find the *Heller* exceptions constitutional *after applying* some analytic framework.” *Id.*

142. *Id.* at 324–26; see *supra* Section II.C (discussing these authorities in detail).

intermediate scrutiny,” the court gave four reasons for choosing strict scrutiny instead.<sup>143</sup> *First*, the Supreme Court’s finding that the right to keep and bear arms is “necessary to our system of ordered liberty” strongly suggests the appropriateness of strict scrutiny.<sup>144</sup> *Second*, tiered-scrutiny analysis originally arose in the First Amendment context, which itself has traditionally favored strict scrutiny.<sup>145</sup> *Third*, the *Heller* majority’s rejection of Justice Breyer’s interest-balancing approach compels a higher form of review.<sup>146</sup> And *fourth*, the rationale that led the *Heller* majority to reject rational basis review applies with equal force to intermediate scrutiny—namely, that lower forms of scrutiny borrowed from the Court’s equal protection jurisprudence do not apply to enumerated rights.<sup>147</sup> As such, the court held that statutes challenged under the Second Amendment must receive strict scrutiny analysis.<sup>148</sup>

Having selected the appropriate level of review, the court next analyzed § 922(g)(4) under strict scrutiny.<sup>149</sup> The court quickly concluded that the law served compelling interests in the prevention of crime and suicide by firearm, a point never truly in doubt.<sup>150</sup> The government, however, also bore the burden of proving narrow

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143. *Tyler II*, 775 F.3d at 326.

144. *Id.* (quoting *McDonald v. City of Chicago*, 561 U.S. 742, 778 (2010)). The court further noted that, while strict scrutiny is not always required when analyzing a fundamental right, “the Supreme Court has suggested that there is a *presumption* in favor of strict scrutiny” in such cases. *Id.* (emphasis in original) (citing *Washington v. Glucksberg*, 521 U.S. 702, 721 (1997)).

145. *Id.* at 327; *see, e.g.*, *Citizens United v. FEC*, 558 U.S. 310, 340 (2010) (campaign-related speech); *Boy Scouts of Am. v. Dale*, 530 U.S. 640, 648 (2000) (freedom of association); *United States v. Playboy Entm’t Grp., Inc.*, 529 U.S. 803, 813 (2000) (non-content-neutral regulation).

146. *Tyler II*, 775 F.3d at 328. This argument turns on interpreting Justice Breyer’s dissent in *Heller*, 554 U.S. 570, 690 (2008), as advocating a form of intermediate scrutiny based on past First Amendment precedent, *see Turner Broad. Sys. v. FCC*, 520 U.S. 180, 195–96 (1997).

147. *Tyler II*, 775 F.3d at 328 (citing *Heller*, 554 U.S. at 628 n. 27).

148. *Id.* at 328–29. At the same time, the court also predicted that this choice was unlikely to be outcome-determinative compared to the other circuits’ choices. *Id.* The court gave three reasons for this: (1) multiple forms of each scrutiny standard exist; (2) even within the same standard, judges tend to reach different results; and (3) strict and intermediate scrutiny are ultimately close in construction. *Id.* at 329–30. As to the third point, the court also noted that, because firearm regulations will almost always serve a compelling interest, the only real difference between the two standards lies in the degree of tailoring required. *Id.* (citing *Volokh, supra* note 55, at 1470).

149. *Id.* at 330.

150. *Id.* at 331 (citing *Schall v. Martin*, 467 U.S. 253, 264 (1984) (crime prevention), and *Washington v. Glucksberg*, 521 U.S. 702, 735 (1997) (suicide prevention)).

tailoring, i.e., a precisely drawn fit between the ends sought and the means used.<sup>151</sup> The essential issue was whether “previously institutionalized persons [were] sufficiently dangerous, as a class, . . . to deprive permanently all such persons of the Second Amendment right to bear arms.”<sup>152</sup> The court determined that Congress had already answered this question in the negative by creating the federal relief-from-disabilities program under § 925(c).<sup>153</sup> Moreover, even after Congress had defunded this program, it continued to recognize the importance of the firearm rights of non-dangerous class members by authorizing funds for state-created programs.<sup>154</sup> Because Michigan had declined to adopt such a program, however, Tyler was barred from firearm ownership for a fundamentally arbitrary reason: He had the misfortune of residing in one state instead of another.<sup>155</sup> Finding that “an individual’s ability to exercise a ‘fundamental righ[t]’ . . . cannot turn on such a distinction,” the court held that § 922(g)(4) was not narrowly tailored to serve its compelling ends.<sup>156</sup>

This holding represents the first instance in which any circuit court has found a federal gun-control regulation to violate the Second Amendment since *Heller*, despite the large volume of case law that had developed on the subject.<sup>157</sup> Seeking to justify its conclusion, the court attempted to distinguish § 922(g)(4) from other provisions of § 922(g) that have survived appellate review.<sup>158</sup> In doing so, the court explained that § 922(g)(4) differs from each of the other “who” provisions of § 922(g) “in at least one of four crucial

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151. *Id.* at 331. “[T]he requirement of narrow tailoring is satisfied ‘so long as the . . . regulation promotes a substantial governmental interest that would be achieved less effectively absent the regulation.’” *Ward v. Rock Against Racism*, 491 U.S. 781, 799 (1989) (citing *United States v. Albertini*, 472 U.S. 675, 698 (1985)). Thus, a law may fail narrow tailoring by being either overinclusive or underinclusive in achieving its desired goal. *Tyler II*, 775 F.3d at 331 (quoting *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 546 (1993)).

152. *Tyler II*, 775 F.3d at 333.

153. *Id.*

154. *Id.* (citing NICS Improvement Amendments Act of 2007, Pub. L. No. 110-180, § 103(c), 121 Stat. 2559, 2568 (2008)).

155. *Id.* at 334. Given that it was reviewing a dismissal for failure to state a claim under Federal Rule of Civil Procedure 12(b)(6), the court accepted the allegations of Tyler’s complaint as true—including the fact that he would be otherwise eligible to regain his federal firearm rights. *Id.* n.25.

156. *Id.* (alteration in original) (quoting *McDonald v. City of Chicago*, 561 U.S. 742, 778 (2010)).

157. *Id.* (citing *United States v. Mahin*, 668 F.3d 119, 123 (4th Cir. 2012)).

158. *Id.* (“We have examined the judicial landscape and our decision, in fact, fits comfortably within it.”)

respects”: (1) permanency, (2) applicability to non-violent individuals, (3) applicability to law-abiding individuals, and (4) punishment of non-volitional behavior.<sup>159</sup>

For example, the prohibition on possession by felons, § 922(g)(1), both applies only to law-breakers and falls within one of *Heller*’s express exceptions.<sup>160</sup> Similarly, § 922(g)(9) (domestic violence misdemeanants) applies only to violent criminals by definition and might be temporary, because of possible expungement.<sup>161</sup> More controversially, § 922(g)(3) (unlawful drug users and drug addicts) targets potentially non-violent, non-criminal, and non-volitional conduct.<sup>162</sup> The court distinguished the multiple cases upholding § 922(g)(3)<sup>163</sup> on the ground that its ban is not necessarily permanent, i.e., one could stop being a drug user or drug addict.<sup>164</sup> Section 922(g)(4), by contrast, runs afoul of all four indicia discussed above and thus places a far greater burden on the Second Amendment rights of those to whom it applies.<sup>165</sup> In sum, however compelling the government’s interest in protecting human life may be, Congress simply failed to craft a statutory mechanism narrowly tailored to achieving that goal.<sup>166</sup>

Judge Julia Smith Gibbons also authored a brief concurring opinion, in which she joined in the court’s holding but disagreed with its application of strict scrutiny.<sup>167</sup> Judge Gibbons noted the widespread trend of applying intermediate scrutiny to Second Amendment challenges and observed that both parties to the case had endorsed intermediate scrutiny.<sup>168</sup> Because § 922(g)(4) failed to pass muster under *either* level of heightened scrutiny, however,

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159. *Id.* at 336.

160. *Id.* at 335–36 (citing *District of Columbia v. Heller*, 554 U.S. 570, 626 (2008)).

161. *Id.* at 337–39. The court noted that six different circuits had upheld the constitutionality of § 922(g)(9), though “some of these cases offer dissenting voices, reflect a strong emphasis on limiting principles, and include remands.” *Id.* at 337.

162. *Id.* at 340–41.

163. *See, e.g.*, *United States v. Carter (Carter II)*, 750 F.3d 462 (4th Cir. 2014); *United States v. Dugan*, 657 F.3d 998 (9th Cir. 2011); *United States v. Yancey*, 621 F.3d 681 (7th Cir. 2010).

164. *Tyler II*, 775 F.3d at 341–42. The court noted that “breaking addiction could be ‘extraordinarily difficult’ but that, nonetheless, the law allowed a person” to do just that, thereby reclaiming her federal firearm rights. *Id.* at 341 (quoting *United States v. Carter (Carter I)*, 669 F.3d 411, 419 (4th Cir. 2012) (remanding for further proof)).

165. *Id.* at 342.

166. *Id.*

167. *Id.* (Gibbons, J., concurring).

168. *Id.*

Judge Gibbons firmly agreed with the other two panel members in holding the law unconstitutional.<sup>169</sup>

### B. *The En Banc Decision*

After rehearing en banc, a majority of the Sixth Circuit voted to retain the ultimate result in the above panel opinion but to disapprove much of its reasoning—most notably, the choice of strict scrutiny.<sup>170</sup> Judge Gibbons authored the lead opinion,<sup>171</sup> accompanied by six other opinions concurring in whole<sup>172</sup> or in part<sup>173</sup> and one dissenting opinion.<sup>174</sup>

The court<sup>175</sup> first addressed the “threshold question” of whether “*Heller* itself provide[s] an answer to the constitutionality of § 922(g)(4) as applied to Tyler.”<sup>176</sup> Unlike the panel, the court here assumed that § 922(g)(4) fell within the scope of the “longstanding prohibition[]” on firearm possession by the mentally ill that *Heller* deemed “presumptively lawful.”<sup>177</sup> Nevertheless, the court that this exception was not dispositive of the case, as “*Heller* only established a presumption that such bans were lawful; it did not invite courts onto an analytical off-ramp to avoid constitutional analysis.”<sup>178</sup> Instead, because “a presumption implies . . . ‘the possibility that the ban could be unconstitutional in the face of an as-applied challenge,’”<sup>179</sup> the court held that the government must still prove “that the presumption applies in the instant case.”<sup>180</sup> But given

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169. *Id.* at 345.

170. *Tyler III*, 837 F.3d 678, 699 (6th Cir. 2016).

171. *Id.* at 681–699. Judges Siler, Cook, McKeague, White, and Donald joined the lead opinion in full, and Judge Rogers joined in part. *Id.* at 680.

172. Judges McKeague and White authored opinions concurring in whole with the lead opinion. *Id.* at 680.

173. Judges Boggs, Batchelder, and Sutton authored opinions concurring in most of the lead opinion. *Id.* at 680–81. Judge Rogers authored an opinion concurring in part with the lead opinion and in part with Judge Moore’s dissenting opinion. *Id.* at 681.

174. Judge Moore authored a dissenting opinion in which Chief Judge Cole and Judges Clay, Griffin, and Stranch joined in full and Judge Rogers joined in part. *Id.* at 681.

175. This section will use the phrase “the court” to refer to Judge Gibbons’ lead opinion, for the sake of brevity.

176. *Id.* at 686.

177. *Id.* (quoting *District of Columbia v. Heller*, 554 U.S. 570, 627 n.26 (2008)).

178. *Id.*

179. *Id.* (quoting *United States v. Williams*, 616 F.3d 685, 692 (7th Cir. 2010)).

180. *Id.* at 687 & n.7 (citing *Carter I*, 669 F.3d 411, 420 (4th Cir. 2012), and *United States v. Yancey*, 621 F.3d 681, 684–85 (7th Cir. 2010), as examples of cases that “have refused to rely solely on *Heller* to resolve constitutional challenges to

“§ 922(g)(4)’s lack of historical pedigree,” reliance on *Heller*’s longstanding prohibitions dicta was especially inapposite.<sup>181</sup> In any event, the *Heller* exception speaks of the “mentally ill,” but § 922(g)(4) “uses prior judicial adjudications—incompetency and involuntary commitment—as proxies for mental illness.”<sup>182</sup> Thus, *Heller*’s presumption of validity applies only if the proxy matches its subject, i.e., if Congress was justified in “declar[ing], ‘Once mentally ill, always so.’”<sup>183</sup> The court flatly rejected the plausibility of this assumption; indeed, the facts of Tyler’s own life belied the notion that one cannot recover from mental illness.<sup>184</sup>

Because the *Heller* exceptions could not resolve the case, the court next turned to *Greeno*’s two-step analysis.<sup>185</sup> As for the first prong, the court agreed with both the panel and the district court that the government’s historical evidence failed to prove that persons previously committed to mental institutions are categorically exempt from the Second Amendment’s sweep.<sup>186</sup> Further, noting tension between *Heller*’s presumptively lawful exceptions and the *Greeno* historical inquiry,<sup>187</sup> the court determined that the *Heller* exceptions are presumptively lawful because such regulations are likely to satisfy means-end scrutiny—not because they target conduct categorically beyond the Second Amendment’s scope.<sup>188</sup> Thus, in cases where *Heller*’s presumptions of validity

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§ 922(g)(3), which makes it a crime for habitual drug addicts to possess a gun while they are abusing illegal substances”).

181. *Id.* at 687. The court here refers to the fact that “legal limits on the possession of firearms by the mentally ill . . . are of 20th Century vintage,” just as the panel found in its opinion. *Id.* (quoting *Skoien II*, 614 F.3d 638, 641 (7th Cir. 2010)).

182. *Id.* (citing *United States v. Rehlander*, 666 F.3d 45, 50 (1st Cir. 2012)).

183. *Id.* at 687–88.

184. *Id.* at 688 (noting that “Tyler is thirty years removed from a brief depressive episode and that he has had no intervening mental health or substance abuse problems since that time”).

185. *Id.*

186. *Id.* at 689. Just as the panel concluded, *Tyler II*, 775 F.3d 308, 320 (6th Cir. 2014), *vacated*, 837 F.3d 678 (6th Cir. 2016) (en banc), the mere fact “that the Founders understood the Amendment to protect the virtuous does not explain who was counted among that class,” *Tyler III*, 837 F.3d at 689.

187. *Tyler III*, 837 F.3d at 690 (“In mapping *Heller*’s ‘presumptively lawful’ language onto the two-step inquiry, it is difficult to discern whether prohibitions on felons and the mentally ill are presumptively lawful because they do not burden persons within the ambit of the Second Amendment as historically understood, or whether the regulations presumptively satisfy some form of heightened means-end scrutiny.”).

188. *Id.*

apply, they apply only at the *second* step of the *Greeno* analysis.<sup>189</sup>

As for the second prong, the court agreed with the panel that “the choice is between intermediate and strict scrutiny.”<sup>190</sup> Before the en banc court, Tyler advanced two arguments in favor of strict scrutiny: (1) that he was “the sort of responsible, law-abiding citizen’ . . . at the core of the Second Amendment”; and (2) that “§ 922(g)(4) completely and permanently extinguishes his core right to use a firearm in defense of hearth and home.”<sup>191</sup> The court rejected the first argument because it would “cut too hard against Congress’s power to categorically prohibit certain presumptively dangerous people from gun ownership.”<sup>192</sup> In other words, Tyler’s argument would invert *Heller*’s presumptive validity for bans targeting the mentally ill because strict scrutiny carries a presumption of unconstitutionality.<sup>193</sup> The court also rejected Tyler’s second argument: While § 922(g)(4)’s ban is both severe and permanent, “it burdens only a narrow class of individuals who are not at the core of the Second Amendment.”<sup>194</sup> And permanence alone cannot entail strict scrutiny, as other provisions of § 922(g) have permanent effect but have consistently received intermediate scrutiny.<sup>195</sup>

The court thus selected intermediate scrutiny as the mode of analysis “preferable in evaluating challenges to § 922(g)(4) and similar prohibitions,” though it left open the future possibility of

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189. *See id.* The panel came to the same conclusion. *Tyler II*, 775 F.3d at 324. Of course, because the court had already concluded that the presumption concerning firearm-possession bans targeting the mentally ill did not apply in this case. *See Tyler III*, 837 F.3d at 688.

190. *Tyler III*, 837 F.3d at 690 (citing *District of Columbia v. Heller*, 554 U.S. 570, 628 n.27 (2008), for the proposition that rational basis review is inappropriate for enumerated constitutional rights).

191. *Id.* at 690–91 (quoting Appellant’s Supplemental Brief at 9, *Tyler III*, 837 F.3d 678 (6th Cir. 2016) (No. 13-1876), 2015 WL 3424834, at \*9).

192. *Id.* at 691.

193. *See id.* The court noted two additional factors undercutting Tyler’s argument that he was a “core” subject of Second Amendment protection: (1) the Second Amendment right is distinct from other constitutional protections due to the inherent dangerousness of firearms; and (2) in classifying individuals under § 922(g)(4), Congress had “chosen to rely on prior judicial determinations that [they] pose a risk of danger to themselves or others,” a seemingly reliable source of information. *Id.*

194. *Id.*

195. *Id.* at 691–92. For example, §§ 922(g)(1) (convicted felons) and (g)(9) (domestic violence misdemeanants), “which also impose permanent bans, have been consistently reviewed under intermediate scrutiny.” *Id.* (citing, *inter alia*, *United States v. Chovan*, 735 F.3d 1127, 1138 (9th Cir. 2013) (§ 922(g)(9)); *United States v. Williams*, 616 F.3d 685, 692–93 (7th Cir. 2010) (§ 922(g)(1))).

applying strict scrutiny to burdens on the “core of the Second Amendment right.”<sup>196</sup> The court noted that its choice both struck the proper balance between the protections of the Second Amendment and the inherent dangers of guns and matched the “near unanimous preference for intermediate scrutiny” among the circuits.<sup>197</sup>

Applying intermediate scrutiny, the court easily agreed with the panel and district court that the government’s asserted interests of preventing gun-related crime and suicide were both legitimate and compelling.<sup>198</sup> Next, however, the court held that the government failed to discharge its burden of proving “a reasonable fit between its important objectives of public safety and suicide prevention and its permanent ban on the possession of firearms by persons adjudicated to be mentally unstable.”<sup>199</sup> To meet its burden, the government pointed to both: (1) legislative fact-finding concerning the role of mental illness in public shootings; and (2) empirical evidence that those with a prior suicide attempt are more likely to try again and to use firearms in the attempt.<sup>200</sup> But both sources suffered from the same fatal flaw: While “compelling evidence of the need to bar firearms from those *currently* suffering from mental illness,” these findings alone could not justify a *permanent* ban for those committed at any point in their lives.<sup>201</sup> Other studies cited by the government likewise failed to demonstrate a continuing risk of harm beyond the initial period after an individual’s release.<sup>202</sup> Tyler, on the other hand, cited evidence that the incidence of violence by previously committed individuals declined over time and was, in the aggregate,

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196. *Id.* at 692 & n.12 (“[T]he Second Amendment is no more susceptible to a one-size-fits-all standard of review than any other constitutional right. Gun-control regulations impose varying degrees of burden on Second Amendment rights, and individual assertions of the right will come in many forms.” (quoting *United States v. Chester*, 628 F.3d 673, 682 (4th Cir. 2010))).

197. *Id.* at 692–93.

198. *Id.* at 693.

199. *Id.* (citing *Chovan*, 735 F.3d at 1140). “In discharging this burden, the government can rely on a wide range of sources, including legislative history, empirical evidence, case law, and even common sense, but it may not ‘rely upon mere ‘anecdote and supposition.’” *Id.* at 694 (quoting *Carter I*, 669 F.3d 411, 418 (4th Cir. 2012)).

200. *Id.* at 694–95.

201. *Id.* at 695 (emphasis added). The court found this observation “particularly [true] in cases like Tyler’s, where a number of healthy, peaceable years separate the individual from their troubled history.” *Id.*

202. *Id.* at 695–96 (citing E. Clare Harris & Brian Barraclough, *Suicide as an Outcome for Mental Illness: A Meta-Analysis*, 170 BRIT. J. PSYCHIATRY 205, 220–23 (1997); Frederick E. Vars & Amanda Adcock Young, *Do the Mentally Ill Have a Right to Bear Arms?*, 48 WAKE FOREST L. REV. 1, 21–22 (2013)).

“statistically indistinguishable” from the general population.<sup>203</sup>

Furthermore, the court noted that “the temporal limitation of other § 922(g) bans has been a key consideration in finding that those regulations pass muster under heightened scrutiny.”<sup>204</sup> Permanent bans like §§ 922(g)(1) and (g)(9), by contrast, have survived review only after a much greater evidentiary showing than the government offered here.<sup>205</sup> And none of its evidence “answer[ed] the key question at the heart of this case: Is it reasonably necessary to forever bar all previously institutionalized persons from owning a firearm?”<sup>206</sup> Indeed, as the panel recognized, Congress itself had answered that question in the negative by approving both federal and state relief-from-disabilities mechanisms.<sup>207</sup> Ultimately, while recognizing Congress’s power to “regulate categorically” and adopt imprecise prophylactic rules in the realm of gun control, the court held that the government simply failed to provide sufficient evidence on the second prong of intermediate scrutiny.<sup>208</sup>

Multiple judges authored total or partial concurring and dissenting opinions in *Tyler*, briefly summarized here. Judge Boggs, author of the panel opinion, concurred in the result but noted his continuing preference for strict scrutiny.<sup>209</sup> Next, Judge Sutton concurred in most of the judgment but would have taken a different analytical path.<sup>210</sup> He conceived of *Heller*’s exception for the mentally ill as “an off switch to the right to bear arms and of § 922(g) as Congress’s effort to define it.”<sup>211</sup> But *Heller* referred to “felons” and the “mentally ill” in the present tense, so “*Heller* creates an exception only for those who currently fall into these categories.”<sup>212</sup> Thus, Judge Sutton viewed this case as one of a “classification

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203. *Id.* at 696 (citing Henry J. Steadman, et al., *Violence by People Discharged from Acute Psychiatric Inpatient Facilities and by Others in the Same Neighborhoods*, 55 ARCHIVES GEN. PSYCHIATRY 393, 400 (1998)).

204. *Id.* at 697.

205. *Id.* at 696–97 (citing *United States v. Staten*, 666 F.3d 154, 166–67 (4th Cir. 2011) (§ 922(g)(9)); *United States v. Williams*, 616 F.3d 685, 693 (7th Cir. 2010) (§ 922(g)(1))).

206. *Id.* at 697.

207. *Id.* In other words, “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.” *Id.*

208. *Id.* at 698–99.

209. *See id.* at 702 (Boggs, J., concurring).

210. *Id.* at 707 (Sutton, J., concurring).

211. *Id.* at 708. This “historically grounded and sensible” exception rests on the critical need “to keep weapons out of the hands of those who, due to psychiatric challenges, pose a risk to themselves or others.” *Id.*

212. *Id.*

mistake”: § 922(g)(4) treats Tyler as mentally ill within the meaning of *Heller*, “assum[ing] that the mental health of Clifford Tyler in 1986 is the mental health of Clifford Tyler in 2016.”<sup>213</sup> Both historical practice and modern medical knowledge, however, belie this assumption: “Once depressed does not mean always depressed; once mentally ill does not mean always mentally ill.”<sup>214</sup> Because mental illness is neither a “permanent classification” nor a “fixed state of mind,” Tyler was, in Judge Sutton’s view, entitled to a hearing to determine whether he remains mentally ill.<sup>215</sup>

Judge McKeague concurred in the result under either the majority’s reasoning or Judge Sutton’s, choosing to remain undecided “until the Supreme Court clarifies its preferred approach.”<sup>216</sup> Next, Judge Batchelder concurred in the result and much of Judge Sutton’s opinion, writing separately to criticize the *Greeno* two-step analysis for “fail[ing] to give adequate attention to the Second Amendment’s original public meaning.”<sup>217</sup> Judge Batchelder equated means-end scrutiny (at any level) with the very interest balancing *Heller* rejected;<sup>218</sup> instead, the inquiry must turn on the “text, history, and tradition of the Second Amendment.”<sup>219</sup> While the common law permitted authorities to strip the mentally ill of certain rights, it also “provided that those who had recovered their sanity should have their rights restored.”<sup>220</sup> But because § 922(g)(4) provides no mechanism for Tyler to prove his sanity, the statute infringes upon the historical scope of the Second Amendment and is unconstitutional.<sup>221</sup>

Judge White concurred in the majority’s application of intermediate scrutiny but criticized Judges Sutton and Batchelder for the undue simplicity of their analyses.<sup>222</sup> In other words, the conceded truth that “once mentally ill does not mean always mentally ill” does not necessarily entail a “right to an individualized ‘present-tense’ determination” of one’s current mental health.<sup>223</sup>

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213. *Id.* at 709–10.

214. *Id.* at 710.

215. *Id.* at 713.

216. *Id.* at 699–700 (McKeague, J., concurring).

217. *Id.* at 702 (Batchelder, J., concurring).

218. *Id.* at 702–03.

219. *Id.* at 702.

220. *Id.* at 706. “As one early nineteenth-century legal treatise put it, [a] lunatic is never to be looked upon as irrecoverable.” *Id.* (alteration in original) (citing ANTHONY HIGHMORE, A TREATISE ON THE LAW OF IDIOCY AND LUNACY 73 (1807)).

221. *Id.* at 707.

222. *Id.* at 700 (White, J., concurring).

223. *Id.* (quoting *id.* at 710 (Sutton, J., concurring)).

While “[i]n an ideal world, every disability or privilege would be subject to accurate individual adjudication,” in the real world, “the Constitution permits legislative judgments and proxies.”<sup>224</sup> It just so happened that the legislative proxy here—§ 922(g)(4)—fell short under the proper level of judicial scrutiny.<sup>225</sup>

Judge Moore dissented for two main reasons: (1) *Heller*’s exception for the mentally ill was dispositive of the case; and, alternatively, (2) § 922(g)(4) passed muster under intermediate scrutiny.<sup>226</sup> First, the Sixth Circuit had relied on *Heller*’s exceptions to dispose of challenges to § 922(g)(1)’s ban for convicted felons “without examining history or applying any level of means-end scrutiny.”<sup>227</sup> The same reasoning should apply to the mentally-ill exception, as the felon-in-possession ban similarly lacks clear historical pedigree and also imposes a permanent ban.<sup>228</sup> Alternatively, Judge Moore agreed that intermediate scrutiny was proper but found § 922(g)(4) sufficiently related to the government’s interests in public safety and suicide prevention.<sup>229</sup> In Judge Moore’s view, the government had presented sufficient evidence of the “link between involuntary commitments and firearm violence,” along with even starker evidence of “the link between mental illness, firearms, and suicide.”<sup>230</sup> Moreover, the “high rate of relapse for individuals who have previously been involuntarily committed” more than justified the permanence of § 922(g)(4)’s ban.<sup>231</sup>

Finally, Judge Rogers concurred with much of the lead opinion’s reasoning but agreed with Judge Moore that § 922(g)(4) survived intermediate scrutiny.<sup>232</sup>

224. *Id.* at 701 (White, J., concurring).

225. *See id.* (“The definitional fit—adjudication as a mental defective or involuntary commitment—is patently reasonable, but the durational fit is troubling. As the lead opinion explains, although the government has connected mental illness with crime and suicide, it has failed to provide adequate support for a lifetime disqualification of persons previously committed.”).

226. *See id.* at 714 (Moore, J., dissenting).

227. *Id.*; *see also* *United States v. Carey*, 602 F.3d 738, 741 (6th Cir. 2010) (“In short, *Heller* states that the Second Amendment right is not unlimited, and, in fact, it is specifically limited in the case of felon prohibitions.”); *United States v. Khami*, 362 Fed. App’x 501, 508 (6th Cir. 2010) (deeming the *Heller* language “sufficient to dispose of the claim that § 922(g)(1) is unconstitutional”).

228. *Tyler III*, 837 F.3d at 715–16 (Moore, J., dissenting).

229. *Id.* at 717–18.

230. *Id.* at 718–19.

231. *Id.* at 719.

232. *Id.* at 714 (Rogers, J., dissenting).

### III. CRITIQUE OF *TYLER V. HILLSDALE COUNTY SHERIFF'S DEPARTMENT*

After rehearing en banc, *Tyler* represents an important, yet contradictory addition to post-*Heller* Second Amendment law: While the Sixth Circuit has brought its analytical framework in line with its sister circuits by adopting intermediate scrutiny,<sup>233</sup> the court has broken with the current trend by finding a longstanding federal firearm provision unconstitutional, at least as applied to *Tyler*.<sup>234</sup> In doing so, the court revealed a wide difference of opinion among its judges as to the correct way to analyze such challenges, from the panel decision to the numerous concurrences and dissents of the en banc decision.<sup>235</sup> The question, then, is whether the majority ultimately selected the best analytical framework and reached the best result.

First, both the panel and the en banc court interpreted *Heller*'s exceptions for felons, the mentally ill, and others as mere predictions regarding the outcome of the appropriate analysis, rather than categorical exclusions from the scope of the Second Amendment.<sup>236</sup> This is the best reading of *Heller*, which itself disclaimed any "exhaustive historical analysis . . . of the full scope of the Second Amendment" in listing those exceptions.<sup>237</sup> The Court in *Heller* was simply attempting to foreclose any concern that its decision would necessitate the total upheaval of existing firearm laws.<sup>238</sup> Further,

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233. See *supra* Part II.C (demonstrating that the vast majority of circuit courts to directly confront the issue of selecting a tier of scrutiny for Second Amendment challenges has adopted intermediate scrutiny).

234. *Tyler II*, 775 F.3d 308, 334 (6th Cir. 2014) ("[N]o other appeals court has sustained a Second Amendment challenge to a federal firearms regulation since *Heller* was decided."); *vacated*, 837 F.3d 678 (6th Cir. 2016) (en banc).

235. See *supra* Part III (summarizing the panel and en banc opinions).

236. See *Tyler III*, 837 F.3d at 690 (majority opinion) ("[I]t is difficult to discern whether prohibitions on felons and the mentally ill are presumptively lawful because they do not burden persons within the ambit of the Second Amendment as historically understood, or whether the regulations presumptively satisfy some form of heightened means-end scrutiny. Ultimately, the latter understanding is the better option."); *Tyler II*, 775 F.3d at 324 ("An equally valid, if not better, reading of the language is that the Court presumed that it would find the *Heller* exceptions constitutional after applying some analytic framework.")

237. *District of Columbia v. Heller*, 554 U.S. 570, 626 (2008); see also *id.* at 627 n.26 ("We identify these presumptively lawful regulatory measures only as examples; our list does not purport to be exhaustive.")

238. See *Skoien II*, 614 F.3d 638, 640 (7th Cir. 2010) (en banc) ("The[ *Heller* exceptions] are precautionary language. . . . [T]he Justices have told us that the matters have been left open. Th[is] language . . . warns readers not to treat *Heller* as containing broader holdings than the Court set out to establish . . ."); see also

given the lack of historical grounding for the exceptions, notwithstanding *Heller*'s description of them as "longstanding,"<sup>239</sup> it would be strange for the Second Amendment to wholly exclude these four distinct categories of persons or conduct from its reach.<sup>240</sup> Such a reading would inevitably spur litigation raising other purported categorical exclusions from Second Amendment protection,<sup>241</sup> thus diverting attention from a more nuanced analysis of a challenged law's effect on the plaintiff's particular situation. Instead, the Sixth Circuit has wisely abandoned the absolutist approach to the *Heller* exceptions that it formerly embraced in *Greeno*.<sup>242</sup> And by casting *Heller*'s "presumptively lawful" language as establishing a rebuttable presumption that the listed prohibitions will satisfy means-end scrutiny, the court has given meaningful content to otherwise ambiguous dicta.<sup>243</sup>

Second, despite its use by both the panel and the en banc court, a number of Sixth Circuit judges have expressed either distaste for or open disagreement with the *Greeno* two-step analysis.<sup>244</sup> Two-step models in *Greeno*'s mold have now found favor among a number of circuits;<sup>245</sup> the question is whether such a framework best models

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Larson, *supra* note 70, at 1386 (concluding that the *Heller* exceptions cannot rest on an originalist historical analysis alone and "will ultimately have to be justified under some standard of scrutiny," whether undue burden analysis, intermediate scrutiny, or a reasonableness test).

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

240. See Larson, *supra* note 70, at 1374–79 (studying the historical record and concluding that, with the sole exception of the sensitive-places prohibition, the *Heller* exceptions all "significantly postdate both the Second Amendment and the Fourteenth Amendment" and lack clear eighteenth- or nineteenth-century analogues).

241. Indeed, *Heller* practically invites such litigation by noting that its list of longstanding prohibitions "does not purport to be exhaustive." 554 U.S. at 627 n.26.

242. See *United States v. Greeno*, 679 F.3d 510, 517–18 (6th Cir. 2012) (treating the felon exception as a categorical exception to Second Amendment protection); see also *United States v. Wishnant*, 391 F. App'x 426, 430 (6th Cir. 2010) (same); *United States v. Carey*, 602 F.3d 738, 741 (6th Cir. 2010) (same).

243. *Tyler III*, 837 F.3d 678, 686–87 (6th Cir. 2016) (en banc) (quoting *Heller*, 554 U.S. at 627 n.26).

244. See *id.* at 700 (McKeague, J., concurring) ("If we continue to apply *Greeno*'s two-step analysis, I fully agree with the majority's choice of intermediate scrutiny."); *id.* at 702 (Boggs, J., concurring) ("I believe that the analysis I laid out in the panel's now-vacated opinion is correct so long as we are bound by *Greeno*."); *id.* (Batchelder, J., concurring) ("[T]he two-step *Greeno* test . . . fails to give adequate attention to the Second Amendment's original public meaning . . ."); *Tyler II*, 775 F.3d 308, 318 (6th Cir. 2014) ("There may be a number of reasons to question the soundness of this two-step approach."); *vacated*, 837 F.3d 678 (6th Cir. 2016) (en banc).

245. See, e.g., *Greeno*, 679 F.3d at 518; *United States v. Marzarella*, 614 F.3d 85, 89 (3d Cir. 2010); *United States v. Chester*, 628 F.3d 673, 680 (4th Cir. 2010);

*Heller's* conception of the Second Amendment. The first step of *Greeno* seems uncontroversial: In any Second Amendment challenge, surely the court must first determine whether that Amendment applies at all.<sup>246</sup> Such a determination is analogous to the initial inquiry in any First Amendment case of whether “speech,” within the Amendment’s meaning, is implicated in the first instance.<sup>247</sup> While framing this first step as an originalist inquiry is of debatable utility,<sup>248</sup> a majority of Justices in *Heller* agreed that the analysis of a Second Amendment challenge must turn on the “historical understanding of the scope of the right.”<sup>249</sup> Thus, a historical inquiry is unavoidable. But should, as Judge Batchelder argued in *Tyler*,<sup>250</sup> that inquiry be the end of the analysis?

The real crux of the debate surrounding the analytical framework for the Second Amendment is what (if any) standard of review should follow the initial historical inquiry. Multiple alternatives have surfaced, including strict<sup>251</sup> and intermediate scrutiny,<sup>252</sup> undue-burden analysis,<sup>253</sup> a reasonableness standard,<sup>254</sup> an interest-balancing test,<sup>255</sup> and a shifting standard based on the

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United States v. Reese, 627 F.3d 792, 800 (10th Cir. 2010).

246. *Greeno*, 679 F.3d at 518 (“Under the first prong, we must determine whether the [challenged law] burdens conduct that falls within the scope of the Second Amendment right as historically understood.”).

247. See R. George Wright, *What Counts as “Speech” in the First Amendment?: Determining the Scope of the Free Speech Clause*, 37 PEPP. L. REV. 1217, 1218 (2010).

248. See, e.g., Rostron, *supra* note 70, at 825 (“[I]n practice, the two-step model often winds up turning more on the second step than the first. Historical analysis does not provide clear answers to most of the difficult Second Amendment issues that courts face today, and history therefore continues to take an inevitable backseat to practical policy considerations.”).

249. *District of Columbia v. Heller*, 554 U.S. 570, 625 (2008).

250. *Tyler III*, 837 F.3d 678, 702 (6th Cir. 2016) (Batchelder, J., concurring).

251. *Tyler II*, 775 F.3d 308, 328 (6th Cir. 2014), *vacated*, 837 F.3d 678 (6th Cir. 2016) (en banc).

252. *Tyler III*, 837 F.3d at 692 (majority opinion).

253. Lawrence Rosenthal, *Second Amendment Plumbing After Heller: Of Standards of Scrutiny, Incorporation, Well-Regulated Militias, and Criminal Street Gangs*, 41 URB. LAW. 1, 6 (2009) (“*Heller* suggests that firearms regulation should be sustained as long as it poses no undue burden to the right to keep and bear arms, much as the Court has evaluated abortion regulations.”); *cf.* *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 874 (1992) (plurality opinion) (adopting an “undue burden” analysis for burdens on the right to an abortion).

254. See Adam Winkler, *Scrutinizing the Second Amendment*, 105 MICH. L. REV. 683, 716 (2007) (“The states have applied a reasonable regulation test to a wide array of gun control measures . . .”).

255. *District of Columbia v. Heller*, 554 U.S. 570, 689 (2008) (Breyer, J., dissenting).

materiality of the infringement.<sup>256</sup> By noting in *Heller* that the District's gun-control regime would fail "[u]nder any of the standards of scrutiny . . . applied to enumerated constitutional rights," the Supreme Court has signaled that traditional means-end scrutiny, whether intermediate or strict, may be most appropriate.<sup>257</sup> Indeed, the overwhelming majority of circuit courts have come to rely on the use of such a test in the Second Amendment context.<sup>258</sup> Moreover, the Court in *Heller* expressly tied the application of the Second Amendment to that of the First,<sup>259</sup> which itself rests heavily on tiers-of-scrutiny analysis.<sup>260</sup> Thus, use of means-end scrutiny for the Second Amendment would be a natural fit. Certainly such a mode of analysis is "entirely familiar" to modern courts.<sup>261</sup> But most importantly, means-end scrutiny permits the government to pursue important policy objectives by restricting enumerated constitutional rights, while still empowering courts to curtail such restrictions when they go too far.<sup>262</sup> While avoiding the sort of "freestanding 'interest-balancing' approach" that the Court repudiated in *Heller*,<sup>263</sup>

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256. See Calvin Massey, *Guns, Extremists, and the Constitution*, 57 WASH. & LEE L. REV. 1095, 1137 (2000) ("[O]nly material infringements of the right ought to trigger the presumption of invalidity that places on the government the burden of justifying the infringement.").

257. *Heller*, 554 U.S. at 628–29 (majority opinion); see also *id.* at 634 (rejecting Justice Breyer's own repudiation of "the traditionally expressed levels (strict scrutiny, intermediate scrutiny, rational basis)").

258. Rostron, *supra* note 55, at 820.

259. See *Heller*, 554 U.S. at 635 ("The First Amendment contains the freedom-of-speech guarantee that the people ratified, which included exceptions for obscenity, libel, and disclosure of state secrets, but not for the expression of extremely unpopular and wrong headed views. The Second Amendment is no different. Like the First, it is the very *product* of an interest balancing by the people . . .").

260. See, e.g., *Reed v. Town of Gilbert*, 135 S. Ct. 2218, 2231 (2015) (applying strict scrutiny to a content-based restriction on speech); *Fla. Bar v. Went For It, Inc.*, 515 U.S. 618, 623–24 (1995) (applying intermediate scrutiny to a restriction on commercial speech); *Pickup v. Brown*, 740 F.3d 1208, 1231 (9th Cir. 2013) (applying rational basis review to the regulation of professional conduct with an incidental effect on speech).

261. R. George Wright, *What if All the Levels of Constitutional Scrutiny Were Completely Abandoned?*, 45 U. MEM. L. REV. 165, 165–66 (2014). "For example, one or more varieties of tiered scrutiny typically appear in adjudication involving equal protection, freedom of speech, the free exercise of religion, substantive due process, . . . and even in adjudicating the exercise of enumerated congressional powers." *Id.* (footnotes omitted).

262. See *Bonidy v. U.S. Postal Serv.*, 790 F.3d 1121, 1126 (10th Cir. 2015) (noting that "[i]ntermediate scrutiny appropriately places the burden on the government to justify its restrictions, while also giving governments considerable flexibility to regulate gun safety").

263. *Heller*, 554 U.S. at 634. In other words, unlike the explicit interest-

means-end scrutiny simply recognizes the fundamental principle that no constitutional right, enumerated or otherwise, is absolute.<sup>264</sup>

Third, the en banc court correctly concluded that intermediate scrutiny was the appropriate tier of review for § 922(g)(4). While the panel was apt to note that First Amendment jurisprudence has traditionally favored strict scrutiny,<sup>265</sup> “[t]he right to carry weapons in public for self-defense poses inherent risks to others” that the freedom of speech does not entail.<sup>266</sup> Words and expressive conduct carry dangers of their own,<sup>267</sup> but of a kind far less direct and pervasive than the raw destructive capability of modern firearms.<sup>268</sup> And in any event, certain restrictions on speech receive only intermediate scrutiny—e.g., regulations of commercial speech and other expressive conduct not at the heart of the First Amendment.<sup>269</sup> By analogy, restrictions on the right to bear arms outside the “core” of the Second Amendment should receive the same level of review, assuming that rational basis is off the table.<sup>270</sup> Such a form of review “makes sense in the Second Amendment context” because it “places the burden on the government to justify its restrictions, while also giving governments considerable flexibility to regulate gun safety.”<sup>271</sup> The overwhelming consensus of the circuits on this point

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balancing inquiry favored by Justice Breyer, *see id.* at 689 (Breyer, J., dissenting), means-end scrutiny does not permit courts to weigh the individual right to bear arms directly against important governmental objectives. Rather, such a standard permits only limited restrictions on the right that manage to satisfy a demanding threshold inquiry.

264. Darrell H. Miller, *Institutions and the Second Amendment*, 66 DUKE L.J. 69, 119 (2016).

265. *Tyler II*, 775 F.3d 308, 327 (6th Cir. 2014), *vacated*, 837 F.3d 678 (6th Cir. 2016) (en banc).

266. *Bonidy*, 790 F.3d at 1126.

267. *Cf. Schenk v. United States*, 249 U.S. 47, 53 (1919) (“The most stringent protection of free speech would not protect a man in falsely shouting fire in a theatre and causing a panic. . . . The question in every case is whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that [the legislature] has a right to prevent.”).

268. In 2015, guns killed 13,286 people and injured 26,819 people in the United States, excluding suicides. *Guns in the US: The Statistics Behind the Violence*, B.B.C. NEWS (Jan. 5, 2016), <http://www.bbc.com/news/world-us-canada-34996604>.

269. *See, e.g., Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm’n*, 447 U.S. 557, 562 (1980) (recognizing “the ‘commonsense’ distinction between speech proposing a commercial transaction, which occurs in an area traditionally subject to government regulation, and other varieties of speech,” and applying intermediate scrutiny to the former (quoting *Ohralik v. Ohio State Bar Ass’n*, 436 U.S. 447, 455–56 (1978))).

270. *See Tyler III*, 837 F.3d 678, 692 (6th Cir. 2016) (majority opinion).

271. *Bonidy*, 790 F.3d at 1126; *accord Tyler III*, 837 F.3d at 692.

indicates its wisdom.<sup>272</sup> Thus, the en banc court was correct to repudiate the panel's choice of strict scrutiny and instead select a more flexible alternative.

Fourth, the majority correctly held that the government failed to provide sufficient evidence on the second prong of intermediate scrutiny—that § 922(g)(4) is substantially related to the public safety interests it serves.<sup>273</sup> While the government cited several studies and legislative findings indicating a close connection between mental illness and gun violence, it provided no real evidence that this risk persists indefinitely following release from involuntary commitment.<sup>274</sup> And, although the government noted “the strong potential for relapse” among such persons and “the difficulty in determining which previously committed individuals will pose further danger,”<sup>275</sup> the government's inability to pinpoint possible sources of harm with precision cannot, in itself, justify a curtailment of liberty. Indeed, as both the panel and the en banc majority recognized, Congress's creation of the § 925(c) relief-from-disabilities program indicated a legislative conviction that those once committed can and do recover from mental illness.<sup>276</sup> Congress's 2008 authorization of state-created analogue programs merely reinforces that inference.<sup>277</sup> Furthermore, the facts of Tyler's own case highlight a fundamental principle recognized by multiple judges of the en banc court: “[O]nce mentally ill does not mean always mentally ill.”<sup>278</sup> Because a prior involuntary commitment at any point in life is not a reasonable proxy for current mental illness—at least as applied to Tyler himself—§ 922(g)(4) fails to pass muster under intermediate scrutiny.

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272. *United States v. Mahin*, 668 F.3d 119, 123 (4th Cir. 2012) (“[T]he courts of appeals have generally applied intermediate scrutiny to uphold Congress' effort under § 922(g) to ban firearm possession by certain classes of non-law-abiding, non-responsible persons who fall outside the Second Amendment's core protections.”).

273. *Tyler III*, 837 F.3d at 699.

274. *See id.* at 695–97.

275. *Id.* at 719 (Moore, J., dissenting).

276. *See id.* at 697; *Tyler II*, 775 F.3d 308, 333 (6th Cir. 2014), *vacated*, 837 F.3d 678 (6th Cir. 2016) (en banc).

277. *See* NICS Improvement Amendments Act of 2007, Pub. L. No. 110-180, 121 Stat. 2559 (2008). While the dissent is correct that Congress may provide more protection for enumerated rights than the Constitution, *Tyler III*, 837 F.3d at 719 (Moore, J., dissenting), these actions nonetheless reflect a legislative judgment that § 922(g)(4) sweeps too broadly in scope.

278. *Tyler III*, 837 F.3d at 710 (Sutton, J., concurring); *accord id.* at 688 (majority opinion); *id.* at 700 (McKeague, J., concurring); *id.* (White, J., concurring).

## CONCLUSION

In *Tyler v. Hillsdale County Sheriff's Department*, the Sixth Circuit determined that § 922(g)(4)'s ban on firearm possession for individuals previously committed to a mental institution was unconstitutional as-applied. So long as *Heller's* invocation of an individual right to bear arms remains controlling—a point worth debating itself—the court's conclusion best fits the facts of the case at hand. Tyler's situation reveals exactly why § 922(g)(4)'s previous conviction prong fails to meaningfully identify those who pose an actual danger to themselves or society. On the other hand, the en banc court wisely reversed course from the prior panel decision in selecting intermediate scrutiny, the majority choice of the circuits in Second Amendment challenges. While the court's invalidation of a federal firearm prohibition may be novel in itself, the Sixth Circuit has now brought its analytical framework for such challenges in line with the growing consensus of the lower federal courts.

The real tension that emerges from *Tyler*, however, is that between the Sixth Circuit's treatment of felons under § 922(g)(1) and the mentally ill under § 922(g)(4). Many of the same arguments that ultimately prevailed in invalidating the latter ban readily apply to the former as well. Indeed, just as Tyler had recovered from his brief depressive episode after thirty years of stable living, there is no reason to think that a convicted felon could not come to lead a peaceful, law-abiding life after a similar period of time. This is particularly true, of course, for nonviolent offenders. The en banc majority disposed of this concern in a footnote: "A felony conviction, unlike an adjudication of incompetence or involuntary commitment, 'trigger[s] a number of disabilities, many of which impact fundamental constitutional rights.'"<sup>279</sup> But this response seems unsatisfying, particularly in light of the court's holding that *Heller's* exceptions for felons and the mentally ill establish only a *presumption* of constitutionality, not a categorical stamp of approval. Thus, the court has seemingly left the door open to a future Second Amendment challenge by a convicted felon in a situation analogous to Tyler's. Given the majority's reasoning, a contrary result is difficult to justify on either analytical or normative grounds. Thus, while § 922(g)(4) is the first of the federal firearm bans to fall in *Heller's* shadow, *Tyler* serves as a warning that § 922(g)(4)'s sister provisions may not be quite so safe as once thought.

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279. *Id.* at 688 n.9 (majority opinion) (alteration in original) (quoting *United States v. Barton*, 633 F.3d 168, 175 (3d Cir. 2011)).