The Honorable Richard A. Jones

UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

DUY T. MAI, Plaintiff v. UNITED STATES OF AMERICA, et al. Defendants.	NO. 2:17-cv-00561 REPLY IN SUPPORT OF DEFENDANTS' MOTION TO DISMISS Noted for Consideration on: July 14, 2017

I. INTRODUCTION

Defendants the United States; the Department of Justice ("DOJ"); the Bureau of Alcohol, Tobacco, Firearms and Explosives ("ATF"); the Federal Bureau of Investigation ("FBI"); Jefferson B. Sessions III, as Attorney General; Andrew McCabe, as Acting Director of the FBI;[1] and Thomas E. Brandon, as Acting Director of the ATF, (collectively "Defendants"), by and through undersigned counsel, Annette L. Hayes, United States Attorney for the Western District

[1] Plaintiff names former Director of the FBI James Comey. Pursuant to Rule 25(d)(1) of the Federal Rules of Civil Procedure, Defendants reiterate their request that Mr. McCabe be substituted for Mr. Comey.

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of Washington, and Jessica M. Andrade, Assistant United States Attorney for said District, respectfully submit this Reply in Support of Motion to Dismiss.

Preliminarily, Plaintiff does not respond to Defendants' argument that Plaintiff's due process claim under the Fifth Amendment should be dismissed. *See* Motion to Dismiss (Dkt. No. 4) at 21-22. This is likely because Ninth Circuit precedent indicates that firearm rights are more appropriately analyzed under the Second Amendment. *Nordyke v. King*, 644 F.3d 776, 794 (9th Cir. 2011). Accordingly, this Court should dismiss Plaintiff's due process claim.

With regard to Plaintiff's Second Amendment claim, Plaintiff argues that this Court should ignore Supreme Court and Ninth Circuit precedent and instead follow Sixth Circuit case law to recognize an as-applied Second Amendment challenge to 18 U.S.C. § 922(g)(4). As described in the Motion to Dismiss and reiterated below, Supreme Court and Ninth Circuit precedent indicate that the firearm restriction at issue in this case does not burden rights contemplated by the Second Amendment, and therefore this Court need not proceed to the as applied analysis.

Regardless, if this Court does decide to proceed to an as applied Second Amendment analysis, including means-end scrutiny, this Court should still dismiss this matter. Plaintiff concedes that intermediate scrutiny applies, in other words that the "statutory classification must be substantially related to an important governmental objective." *Clark v. Jeter*, 486 U.S. 456, 461 (1988). Plaintiff also concedes that the government's interest in this matter is important. Response at 6. Accordingly, this Court need only analyze whether the regulation—Section 922(g)(4)—substantially relates to the government interest at issue. Here, given the case

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law on point, legislative history, and empirical evidence, Section 922(g)(4) meets this standard, and Plaintiff's complaint should be dismissed.

II. ARGUMENT

A. Plaintiff's Claim Involves Conduct that Falls Outside the Scope of the Second Amendment's Protection, and This Court Need Not Consider Plaintiff's As Applied Challenge.

Plaintiff argues that this Court should adopt the reasoning of the Sixth Circuit in *Tyler v. Hillsdale County Sherriff's Department*, 837 F.3d 678 (6th Cir. 2016), to hold that the firearm rights of the mentally ill fall within the scope of the historical protections of the Second Amendment. This argument, however, is contrary to Supreme Court and Ninth Circuit law. As Plaintiff reiterates, the Supreme Court in *Heller* stated that its decision "should [not] be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons and the mentally ill . . ." *Dist. of Columbia v. Heller*, 554 U.S. 570, 635 (2008). In its interpretations of this language, the Ninth Circuit has not allowed as applied Second Amendment challenges to either of the categorical prohibitions mentioned by the court in *Heller*, and codified in the Gun Control Act ("GCA") at 18 U.S.C. 18 U.S.C. § 922(g)(1) (ban on possession rights for felons) or 18 U.S.C. § 922(g)(4) (ban on possession rights for those who have been committed to a mental institution).

In *Vongxay*, cited by Plaintiff, the Ninth Circuit rejected a challenge to Section 922(g)(1) because under *Heller*, "felons are categorically different from the individuals who have a fundamental right to bear arms." *United States v. Vongxay*, 594 F.3d 1111, 1115 (9th Cir. 2010). While the court in *Vongxay* did analyze other Second Amendment Case law, as noted by Plaintiff in his response, this analysis did not indicate that an as applied challenge to Section 922(g)(1) (or

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Section 922(g)(4)) was appropriate. Instead, the court found that it was bound by its earlier holding in *United States v. Younger*, 398 F.3d 1179 (9th Cir. 2005), and found comfort that other circuits had ruled similarly, regardless of their analysis. *Vongxay*, 594 F.3d at 1116. The Ninth Circuit later repeated this reasoning. *See Van Der Hule v. Holder*, 759 F.3d 1043, 1050–51 (9th Cir. 2014) (relying on *Vongxay* to again uphold 18 U.S.C. § 922(g)(1) as constitutional); *see also United States v. Chovan*, 735 F.3d 1127, 1144–45 (9th Cir. 2013) (Bea, J., concurring) ("The Court in *Heller* seemed to equate the status of a felon ... with a presumptive disqualification from the Second Amendment right.").

Notably, in *United States v. Philips*, where a defendant challenged his conviction for being a felon in possession of a handgun on Second Amendment grounds, given that the relevant felony was "nonviolent," the Ninth Circuit again reiterated that *Vongxay* "foreclose[d]" the Second Amendment argument. *Phillips*, 827 F.3d at 1174. In other words, there could be no "as applied" challenge to Section 922(g)(1). Plaintiff puts forth no reason why this repeated Ninth Circuit reasoning would not apply to Section 922(g)(4), the other prohibition called out by *Heller*. Also, though the one Ninth Circuit case to deal with a Second Amendment challenge to Section 922(g)(4) is unpublished and not precedential (*Petramala v. U.S. Dep't of Justice*, 481 F. App'x 395 (9th Cir. 2012)), Defendants respectfully submit that the reasoning of the district court and its affirmation by the Ninth Circuit is instructive. *Petramala v. United States Dept. of Justice*, No. CV 10–2002–PHX–FJM, 2011 WL 3880826 (D.Ariz. Sept. 2, 2011).

In sum, there is no indication that the Ninth Circuit would recognize an as applied challenge to Section 922(g)(4) given its jurisprudence regarding the "longstanding prohibitions on the possession of firearms by felons and the mentally ill" called out in *Heller*. Case law from

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other circuits cited by Plaintiff, including *Tyler*, and *United States v. Williams*, 616 F.3d 685 (7th Cir. 2010) is inapposite. Notably, in *United States v. Chester*, 628 F.3d 673 (4th Cir. 2010), also cited by Plaintiff, the Fourth Circuit was actually evaluating 18 U.S.C. § 922(g)(9)'s ban on possession rights for domestic violence misdeamants. *Id.* at 674. As the court in *Chester* noted, such a ban was not called out by *Heller* in the same way as bans on possession rights for felons and the mentally ill. *Id.* at 677-78.[2]

Further, the case cited by Plaintiff for the proposition that the Ninth Circuit "emphasize[s] the temporal and nonpermanent nature of other disqualifiers" for possession rights examined a GCA restriction not specifically called out in *Heller*. *Wilson v. Lunch*, 835 F.3d 1083 (9th Cir. 2016) (analyzing prohibition on firearm possession rights for medical marijuana users). The other cases cited by Plaintiff in this context are similarly distinguishable. *United States v. Carter*, 669 F.3d 411 (4th Cir. 2012) (examining Section 922(g)(3), applying to drug abusers); *United States v. Mahin*, 668 F.3d 119 (4th Cir. 20120) (examining Section 922(g)(8), applying to subjects of domestic violence protection orders). Supreme Court and Ninth Circuit precedent are clear, the regulation at issue here does not burden a right traditionally protected by the Second Amendment, and therefore this case should not proceed to an as applied analysis.

[2] Sadly, the court in *Chester* notes there is no historical evidence to show domestic violence misdemeanants would have been denied possession rights, and thus no evidence that was part of the intent of the drafters of the Second Amendment. *Chester*, 628 F.3d at 681. This is contrary to the evidence regarding historical treatment of firearm rights for the mentally ill cited in Defendants' Motion to Dismiss.

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B. Should this Court Consider Plaintiff's As Applied Challenge, the Regulation Easily Meets Intermediate Scrutiny.

Where Second Amendment rights are at issue, which Defendants do not concede here, means end scrutiny of the regulation is appropriate. *United States v. Chovan*, 735 F.3d 1127, 1136 (9th Cir. 2013). Intermediate scrutiny is appropriate level of means end scrutiny to apply here. *Id.* at 1127; *see also* Response (Dkt. No. 6) at 4. Plaintiff concedes the first prong of the intermediate scrutiny analysis, that the interest that the government is regulating is important. Response at 6. Given Plaintiff's agreement that the interest regulated is "important" under intermediate scrutiny, this Court need only consider whether there is "a reasonable fit between the challenged regulation and the asserted objective." *Chovan*, 735 F.3d at 1139.

Preliminarily, though the Plaintiff seeks to challenge Section 922(g)(4) as applied to him, Plaintiff's response makes absolutely mention of his own individual circumstances in the brief. *See generally* Response (Dkt. No. 6). In other words, Plaintiff presents no argument that the regulation is particularly unconstitutional as applied to him, instead he appears to attack the provision on its face. *Cf. Chovan*, 735 F.3d at 1141-42. Regardless, Plaintiff's arguments fail to show that Section 922(g)(4) is inappropriate under intermediate scrutiny.

Case law and legislative history regarding the GCA and Section 922(g)(4) in particular reveal that the interests at issue include preventing firearm violence in order to protect public safety, and including to prevent suicide. S. Rep. No. 89-1866, at 1; *see also* Cong. Rec. 13,219 (statement of Sen. Tydings). Congress sought to "cut down or eliminate firearms deaths caused by persons who are not criminals, but who commit sudden, unpremeditated crimes with firearms as a result of mental disturbances." 114 Cong. Rec. 21,829 (statement of Rep. Bingham); *see*

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also Motion to Dismiss at 13-14. The Supreme Court has recognized this interest as inherently important. *See Washington v. Glucksberg*, 521 U.S. 702, 735 (1997) (recognizing the government's interest in suicide prevention as "unquestionably important and legitimate").

In arguing that the government's regulation is not a "substantially related" for the asserted objective, Plaintiff only argues that the government has not shown that those who have been committed to a mental institution are always prone to gun violence. Response at 8-9. This is not, however, the requirement of intermediate scrutiny's substantially related test. *Cf. Chovan*, 735 F.3d at 1140 (going through intermediate scrutiny analysis). Nor, as suggested by Plaintiff, is it the government's obligation to produce evidence in support of Congress' judgment on this matter. *See Fla. Bar v. Went For It, Inc.*, 515 U.S. 618, 628 (1995) (noting that even under strict scrutiny, some restrictions on speech can be upheld "based solely on history, consensus, and 'simple common sense.'"). The question is, rather, whether keeping guns from those who have been committed to a mental institution is substantially related to the interest of preventing gun violence, including public safety and suicide prevention. *Id.*

Here, Congress specifically contemplated Section 922(g)(4) as a prophylactic to keep firearms out of the hands of presumptively risky persons. As noted in Defendants' Motion to Dismiss, Congress relied on a history of involuntary commitment or adjudicated mental illness as the basis for the prophylactic firearm prohibition. *See* 114 Cong. Rec. 14,773 (1968) (Sen. Long) (stating that mentally ill individuals, "by their actions, have demonstrated that they are dangerous, or that they *may become dangerous*" (emphasis added)). In enacting Section 922(g)(4), Congress certainly was aware that "a person committed to a mental institution later may be deemed cured and released"; nevertheless, "[t]he past . . . commitment disqualifies.

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Congress obviously felt that such a person [who had previously been committed to a mental institution], though unfortunate, was too much of a risk to be allowed firearms privileges." *Dickerson v. New Banner Inst., Inc.*, 460 U.S. 103, 116 (1983).

And, though empirical evidence is not required to support Congress' judgment, significant evidence exists. As described in Defendants' Motion to Dismiss, multiple studies indicate that those who have a history of mental illness bear a significant additional risk of gun violence than those in the general population. *See, e.g.*, Seena Fazel & Martin Grann, *The Population Impact of Severe Mental Illness on Violent Crime*, 163 Am. J. Psychiatry 1397, 1401 (Aug. 2006) (reporting increased risk "in patients with severe mental illness compared with the general population"); *see also* Motion to Dismiss at 18-19. In addition, evidence shows that those who have a history of mental illness, who are already at a high risk for suicide, are at an even higher risk when a firearm is present. *See, e.g.* Joseph R. Simpson, *Bad Risk? An Overview of Laws Prohibiting Possession of Firearms by Individuals With a History of Treatment for Mental Illness*, 35 J. Am. Acad. Psychiatric Law 330, 338 (2007) (concluding that "individuals with psychiatric diagnoses may be at higher risk of suicide if there are firearms in their households"); *see also* Motion to Dismiss at 19-20.

Plaintiff analyzes this evidence and argues that none of the studies cited show that someone who is committed to a mental institution or otherwise found to be mentally ill is always at risk for gun violence or suicide. But, this is not the requirement of the substantial relationship inquiry. For instance, in *United States v. Chovan* the Ninth Circuit found that evidence that perpetrators of domestic violence were likely to continue to be violent was sufficient to show a

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"substantial relationship" between a prohibition on domestic violence misdemeanants' possession rights and protecting public safety. As the court explained:

> [E]ven if we were to …assume that Chovan has had no history of domestic violence since [his conviction], Chovan has not presented evidence to directly contradict the government's evidence that the rate of domestic violence recidivism is high[,] [n]or has he directly proved that if a domestic abuser has not committed domestic violence for fifteen years, that abuser is highly unlikely to do so again. In the absence of such evidence, we conclude that the application of § 922(g)(9) to Chovan is substantially related to the government's important interest of preventing domestic gun violence.

Chovan, 735 F.3d at 1142. Similarly, here, the government has presented evidence that those who have been committed to a mental institution or who otherwise have a history of mental illness are statistically more at risk of committing violence to themselves or others, with a firearm. This is enough to show that the regulation at issue is substantially related to the government's interest in promoting public safety and preventing suicide. On this basis, and the various other reasons described in the Defendants' Motion to Dismiss, Plaintiff's as applied challenge to 18 U.S.C. § 922(g)(4) fails.

III. CONCLUSION

For the foregoing reasons, the United States respectfully requests that Plaintiff's claims be dismissed, without costs to be awarded to either party. Plaintiff's Second Amendment challenge to Section 922(g)(4) fails because (1) that provision does not burden a right protected by the Second Amendment; and (2) even if this Court finds that the provision burdens a right protected by the Second Amendment, the provision still meets intermediate scrutiny. Plaintiff's due process challenge to Section 922(g)(4) fails because, as Plaintiff appears to concede, Ninth

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Circuit precedent indicates that claims such as his are more appropriately considered under the Second Amendment.

DATED this 14th day of July 2017.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that she is an employee in the Office of the United States Attorney for the Western District of Washington and is a person of such age and discretion as to be competent to serve papers;

That on the below date she electronically filed the foregoing document(s) with the Clerk of Court using the CM/ECF system, which will send notification of such filing to the following ECF participants:

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She also certifies that on the below date she served copies of the foregoing document(s) on the following non-ECF participants by depositing copies of the document(s) in the United States mail, postage prepaid, addressed as follows:

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DATED this 14th day of July 2017.

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