UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Duy T. Mai,
Appellant,

v.

United States, et al.,
Appellees.

No. 18-36071

Appellant's Opening Brief

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

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II. Introduction

On April 11, 2017, Duy T. Mai filed an action in the United States District Court for the Western District of Washington against the United States and its various entities and officers, asking for a declaration that 18 U.S.C. § 922(g)(4) violates the Second Amendment as it applies to him. 18 U.S.C. § 922(g)(4) prohibits Mr. Mai from possessing a firearm due to a prior involuntary commitment for mental health treatment. On February 8, 2018, the trial court granted the defendants' motion to dismiss under FRCP 12(b)(6) for failing to state a claim. The trial court also denied an FRCP 60 motion for relief from judgment and an FRCP 15 motion to amend the complaint. Mr. Mai timely appeals.

III. Jurisdiction

Mr. Mai filed an action asking for a declaration that a federal statute is unconstitutional as it applies to him. The trial court had subject matter jurisdiction under 28 U.S.C. § 1331 (federal question) and § 1346 (United States as defendant). The trial court dismissed the claim under FRCP 12(b)(6), issued a judgment to that effect, and denied post-judgment motions. This Court has authority to review the trial court's final decision under 28 U.S.C. § 1291.

IV. Issues Presented

1. Can the Second Amendment tolerate a permanent prohibition on the possession of a firearm by Mr. Mai, who had been involuntarily committed for mental health treatment as a juvenile, but who is no longer mentally ill?

2. Can 18 U.S.C. § 922(g)(4) survive intermediate scrutiny as applied to Mr. Mai?

3. Did the trial court err when it granted the defendants' motion to dismiss for failing to state a claim and without leave to amend the complaint?

V. Statement of the Case

On April 11, 2017, Mr. Mai filed a complaint, alleging the following facts: In October 1999, when he was a seventeen-year-old juvenile, the King County Superior Court involuntarily committed Mr. Mai for mental health treatment under cause number 99-6-01555-4. Excerpts of Record, Vol I, at 72 (Complaint). The King County Court later transferred venue of the proceedings to Snohomish County under cause number 00-6-00072-6. *Id.* His commitment expired by August 8, 2000 and he has not been committed since. *Id.*

Following his commitment, Mr. Mai has lived a fruitful and fulfilling life. *Id.* In 2001, he enrolled in Evergreen Community College, completing a GED and earning credits that allowed him to transfer to a university. *Id.* In 2002, he transferred to the University of Washington and graduated with a degree in microbiology and a cumulative 3.7 GPA. *Id.* He then enrolled in a graduate program at the University of Southern California and graduated with a master's degree in microbiology in 2009. *Id.*

He moved back to Seattle, where he began a job at Benaroya Research Institute, studying viruses. *Id.* As part of his job, he successfully passed an FBI background check and is allowed unescorted access and use of a JL Shepherd Mark II Cesium – 137 irradiator. *Id.* In April 2016, he worked briefly as a contractor for Seattle Genetics doing cancer research. *Id.* In October 2016, he

began working for a cancer research center as an immune monitoring specialist and remains employed there as of the time the complaint was filed in April 2017. *Id.* at 73.

While living in Los Angeles and attending USC, Mr. Mai met Michelle Ross and Ms. Ross gave birth to twins. *Id.* Although Mr. Mai and Ms. Ross are no longer together romantically, Mr. Mai continues to be an active father in his children's lives. *Id.*

Mr. Mai has completely recovered from the condition that lead to the involuntary commitment nineteen years ago. *Id.* He no longer uses any medication to control his condition and he no longer has any condition to control in the first instance. *Id.* He lives a socially responsible, well-balanced, and accomplished life. *Id.*

In 2014, Mr. Mai petitioned the King County Superior Court under Wash. Rev. Code § 9.41.047 for restoration of his firearm rights. *Id.* In support of this petition, he supplied the court with medical and psychological examinations and supportive declarations from over ten people. *Id.* The court granted his petition for restoration of firearm rights under Washington state law. *Id.*

Subsequent to have his rights restored, the FBI/NICS denied Mr. Mai's attempt to purchase a firearm. *Id.* After requesting the reason for the denial, NICS indicated that the denial occurred under 18 U.S.C. § 922(g)(4) for an involuntary

commitment. *Id.* Mr. Mai then received a phone call from someone at the ATF, informing him that his firearm restoration under Washington state law does not nullify the federal prohibition in 18 U.S.C. § 922(g)(4). *Id.*

On February 8, 2018, the trial court granted the defendants' motion to dismiss under FRCP 12(b)(6) for failing to state a claim. *Id.* at 57-69 (Order). The trial court ruled that Supreme Court and Ninth Circuit precedent foreclose Mr. Mai's claim because (g)(4) does not burden conduct protected by the Second Amendment where Mr. Mai had previously been involuntarily committed. *Id.* at 64-65. In doing so, it relied on Ninth Circuit precedent denying challenges to (g)(1) (felonies), (g)(9) (domestic violence misdemeanors), and one unpublished decision denying a challenge to (g)(4). *Id.* at 62-64 (citing *United States v. Vongxay*, 594 F.3d 1111 (9th Cir. 2010); *United States v. Chovan*, 735 F.3d 1127 (9th Cir. 2013); *United States v. Phillips*, 827 F.3d 1171 (9th Cir. 2016); *Petramala v. United States Dep't of Justice*, 481 F. App'x 395 (9th Cir. 2012)).

The trial court also found that Mr. Mai failed to "plead sufficient facts to distinguish himself from those historically barred from Second Amendment protections: the mentally ill." *Id.* at 65:6-7. It faulted Mr. Mai for "failing to allege facts sufficient to support [the] contention" that he is no longer mentally ill. *Id.* at 65:23-24. It discounted the complaint's reference to Mr. Mai living a "socially-responsible, well-balanced, and accomplished life" as a "gross generalization that

mischaracterizes what it means to live with a mental illness and implies that the mentally ill cannot have a productive and fulfilling life."[1] *Id.* at 65:26-66:3. Furthermore, it found that Mr. Mai failed to allege facts "showing how the [state] court's grant of his petition [to restore firearm rights] distinguishes him from the mentally ill" because Washington state's restoration of rights statute does not require "a finding that the petitioner no longer suffers from the condition related to the commitment."[2] *Id.* at 66:6-10.

The trial court then moved on to say that even if Mr. Mai could show that (g)(4) burdens conduct protected by the Second Amendment, the statute would still survive intermediate scrutiny. *Id.* at 66-68. The court accepted at face value the government's citations to legislative history and various studies regarding mental illness and propensity for gun violence. *Id.* at 67. Interestingly, the court did not make a single reference to how the government's evidence applies *specifically to Mr. Mai*, given the "as-applied" nature of Mr. Mai's challenge. *Id.* 67-68. Rather, the court appears to have upheld the facial validity of (g)(4) under intermediate scrutiny. *Id.*

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[1] This accusation drips with irony, since the trial court's ruling tacitly adopts the "once mentally ill, always so" rationale that is at the heart of Mr. Mai's claim.

[2] An incorrect statement of Washington state law. Wash. Rev. Code § 9.41.047(3)(c)(iv) requires the state court to find, by a preponderance, that "[t]he symptoms related to the commitment are not reasonably likely to recur."

The same day that the court issued its order, the clerk's office issued a final judgment in the matter. *Id.* at 56 (Judgment in a Civil Case).

Mr. Mai then filed a motion for relief from judgment under FRCP 60 and a motion to amend the complaint under FRCP 15. *Id.* at 7-55 (First Amended Complaint). In the First Amended Complaint, Mr. Mai sought to fix the portions of the original complaint found deficient in the trial court's order dismissing the case. *Id.* Specifically, the First Amended Complaint added further information about the restoration of firearm rights process in King County Superior Court and attached some of the exhibits presented to the state court in making its determination. *Id.* at 10-11.

Dr. Nancy Connolly, M.D. stated that Mr. Mai "has never demonstrated evidence of clinical depression" since at least 2010, and that "[i]n office depression screening has consistently been negative and he has consistently demonstrated healthy lifestyle and behaviors." *Id.* at 40. She further opined that "he [does not] represent[] a significant suicide risk nor do I believe that he is at risk for harming others." *Id.* Dr. Stacy Cecchet, Ph.D. performed a forensic psychological evaluation and risk assessment on Mr. Mai, and opined that Mr. Mai's condition "is now in full remission," and that he "is of low risk for future violent and nonviolent criminal behavior and does not present with any observable psychopathology." *Id.* at 54. Finally, Dr. Brendon Scholtz, Ph.D. performed his

own examination of Mr. Mai and reviewed the report and conclusions of Dr. Cecchet. *Id.* at 45-46. Dr. Scholtz opined that Dr. Cecchet's conclusions were accurate and clinically sound, that he agreed with her conclusions, and that "Mr. Mai does not appear to be currently experiencing any significant psychological distress and he does not appear to have any overt symptoms of a major disorder of thought or mood." *Id.*

Pursuant to Washington state law, the King County Superior Court found that Mr. Mai is no longer required to participate in court-ordered inpatient or outpatient treatment, has successfully managed the condition related to his commitment, no longer presents a substantial danger to himself or the public, and that the symptoms related to the commitment are not reasonably likely to recur. *Id.* at 35-36.

The trial court denied both motions, finding that amending the complaint would be futile in light of (g)(4) being a "presumptively lawful regulatory measure." *Id.* at 5 (Order). Mr. Mai filed this appeal. *Id.* at 1 (Notice of Civil Appeal).

VI. Summary of Argument

The application of 18 U.S.C. § 922(g)(4) to Mr. Mai results in a lifetime ban on possession of a firearm, in violation of the Second Amendment. The challenged statute burdens conduct protected by the Second Amendment because Mr. Mai is not mentally ill. Federal courts recognize that a prior involuntary commitment is not indicative of current mental illness. The U.S. Supreme Court's decision in *Heller* does not foreclose Mr. Mai's as-applied challenge. The challenged statute cannot survive intermediate scrutiny when applied against a person who was involuntarily committed in 1999, has had no issues of any kind since then, and has received a clean bill of mental health. The trial court erred when it dismissed Mr. Mai's complaint for failing to state a claim and without leave to amend the complaint. This Court should reverse and remand for further proceedings.

VII. Standard of Review

"We review the district court's grant of a motion to dismiss *de novo*. When ruling on a motion to dismiss, we accept all factual allegations in the complaint as true and construe the pleadings in the light most favorable to the nonmoving party." *Knievel v. ESPN*, 393 F.3d 1068, 1072 (9th Cir. 2005) (internal citations omitted).

VIII. Argument

A. The Second Amendment cannot tolerate a permanent prohibition on Mr. Mai's right to possess a firearm.

1. Application of federal law results in a permanent prohibition on Mr. Mai's right to possess a firearm.

18 U.S.C. § 922(g)(4) prohibits firearm possession by anyone "adjudicated as a mental defective or . . . committed to any mental institution." ATF regulations further define a commitment as "[a] formal commitment of a person to a mental institution by a court, board, commission, or other lawful authority. The term includes a commitment to a mental institution involuntarily."[3] 27 C.F.R. § 478.11. Unlike the prohibition on felons or domestic violence misdemeanants, the prohibition for those involuntarily committed does not have any "exemption" clauses. *Compare* 18 U.S.C. § 921(a)(20) (providing that felony convictions that are expunged, set aside, pardoned, or for which an individual received a restoration of civil rights are not prohibiting), *and* 18 U.S.C. § 921(a)(33) (same language but for domestic violence misdemeanors), *with* 18 U.S.C. § 922(g)(4). There is a federal restoration of firearm rights statute, 18 U.S.C. § 925(c), but it has been useless for almost thirty years. *See United States v. Bean*, 537 U.S. 71 (2002).

[3] Mr. Mai acknowledges that he was involuntarily committed as a juvenile in 1999 by a Washington state court and that his commitment meets this definition.

In 2008, Congress passed the NICS Improvement Amendments Act of 2007 (NIAA), Pub. L. No. 110-180, 121 Stat. 2559 (2008). In it, Congress exempted involuntarily committed individuals from (g)(4)'s prohibition if the individual received a restoration of firearm rights from a state court, board, commission, or other lawful authority. NIAA § 105. However, the federal government would only recognize such a state restoration if state law matches certain requirements set out in the NIAA. *Id.* Washington state's restoration statute, Wash. Rev. Code § 9.41.047, does not meet the NIAA's requirements. Thus, residents of Washington state with an involuntary commitment are still permanently prohibited from possessing a firearm by federal law even if their right to possess a firearm is restored under Washington state law.

2. The Second Amendment: Heller and the Ninth Circuit.

In the landmark *Heller* decision, the Supreme Court found "that the core of the Second Amendment is to allow 'law-abiding, responsible citizens to use arms in defense of hearth and home.'" *United States v. Chovan*, 735 F.3d 1127, 1133 (9th Cir. 2013) (quoting *Dist. of Columbia v. Heller*, 554 U.S. 570, 635 (2008)). However, the *Heller* Court cautioned that its decision "should [not] be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons and the mentally ill . . . ." *Id.* (quoting *Heller*, 554 U.S. at 626).

This Circuit has issued mixed signals regarding *Heller*'s "longstanding prohibition" language. In *United States v. Vongxay*, it disagreed with Vongxay's contention that the *Heller* language is mere dicta. 594 F.3d 1111, 1115 (9th Cir. 2010). However, the court did not use *Heller* to summarily dispose of Vongxay's challenge to the constitutionality of (g)(1), although it could have done so. *Id.* Instead, it analyzed the impact of case law other than *Heller* to deny the challenge. *Id.* at 1116. This Circuit has only upheld permanent bans when triggered by a criminal conviction. *Chovan*, 735 F.3d 1127 (domestic violence misdemeanor); *Vongxay*, 594 F.3d 1111 (felony).

This Circuit has also never upheld (g)(4) against an as-applied challenge in a published opinion. In *Petramala v. United States Dep't of Justice*, the court denied a challenge to (g)(4) in an unpublished opinion. 481 Fed. Appx. 395 (9th Cir. 2012). It is unclear whether Petramala, who represented himself, was challenging (g)(4) on its face or as applied to him. It is also unclear how much time had passed since Petramala had been adjudicated as a "mental defective," whether he had received updated evaluations clearing his mental health, and whether he had adequately briefed his arguments. What is clear is the court knew that the case did not present an opportunity for full consideration of the issues presented, which is why it chose to leave the opinion unpublished.

Outside of criminal convictions, this Circuit has emphasized the temporal and nonpermanent nature of other disqualifiers. *Wilson v. Lynch*, 835 F.3d 1083 (9th Cir. 2016) (upholding ban on sale of firearms to medical marijuana registry card holder, but noting that "Wilson could acquire firearms and exercise her right to self-defense at any time by surrendering her registry card"); *accord United States v. Carter*, 669 F.3d 411 (4th Cir. 2012) ("First, the limited temporal reach of § 922(g)(3) necessarily means that it is less intrusive than other statutes that impose a permanent prohibition on the possession of firearms. By initially disarming unlawful drug users and addicts while subsequently restoring their rights when they cease abusing drugs, Congress tailored the prohibition to cover only the time period during which it deemed such persons to be dangerous."); *United States v. Mahin*, 668 F.3d 119 (4th Cir. 2012) ("First, § 922(g)(8)'s prohibition on firearm possession is temporally limited and therefore exceedingly narrow. Rather than imposing a lifelong prohibition, section 922(g)(8) applies for the limited duration of the domestic violence protective order (in this case, two years). It is thus a temporary burden during a period when the subject of the order is adjudged to pose a particular risk of further abuse.").

However, this Circuit has recently called into question the "constitutional correctness of categorical, lifetime bans on firearm possession." *United States v. Phillips*, 827 F.3d 1171 (9th Cir. 2016). At least the First, Fourth, Sixth, and

Seventh Circuits, along with a district court in the Eighth Circuit, have all held that *Heller*'s language regarding felons and the mentally ill is precautionary, and does not foreclose challenges to 18 U.S.C. § 922(g). *United States v. Rehlander*, 666 F.3d 45 (1st Cir. 2012); *United States v. Chester*, 628 F.3d 673 (4th Cir. 2010); *Tyler v. Hillsdale Cnty. Sheriff's Dep't.*, 837 F.3d 678 (6th Cir. 2016) (en banc); *United States v. Williams*, 616 F.3d 685, 692 (7th Cir. 2010); *United States v. Johnson*, No. CR15-3035-MWB, 2016 WL 212366, 2016 U.S. Dist. LEXIS 5731 (N.D. IA Jan. 19, 2016). This Circuit should follow its own precedent and the national trend to allow scrutiny of various 922(g) prohibitions as they apply to their challengers. In particular, this Circuit should follow the Sixth Circuit's lead, described below, as it relates to (g)(4) specifically.

3. Tyler v. Hillsdale County Sheriff's Department.

Tyler is the leading case on the cross section of the Second Amendment and involuntary commitments and is directly on point with Mr. Mai's claim. *Tyler v. Hillsdale Cnty. Sheriff's Dep't.*, 837 F.3d 678 (6th Cir. 2016) (en banc). There, Tyler had been involuntarily committed thirty years ago for a brief depressive episode following an emotional divorce. *Id.* at 681. Following a denial of an attempt to purchase a firearm, he filed suit, arguing that 18 U.S.C. § 922(g)(4) was

unconstitutional as it applied to him. *Id.* The trial court granted the government's motion to dismiss for failing to state a claim, reasoning that *Heller*'s statement regarding presumptively lawful prohibitions foreclosed his claim. *Id.* Despite a contentious *en banc* opinion, the Sixth Circuit reversed the dismissal, finding that Tyler did have a valid claim.

Before engaging in the same two-step analysis this Circuit applies to resolve Second Amendment challenges, the court rejected the idea that *Heller* conclusively foreclosed the issue. *Id.* at 687. To do so "would amount to a judicial endorsement of Congress's power to declare, 'Once mentally ill, always so.'" *Id.* at 688.

> *Heller*'s presumption of lawfulness should not be used to enshrine a permanent stigma on anyone who has ever been committed to a mental institution for whatever reason. Some sort of showing must be made to support Congress's adoption of prior involuntary commitments as a basis for a categorical, permanent limitation on the Second Amendment right to bear arms.

Id. "Prior involuntary commitment is not coextensive with current mental illness: a point the government concedes in its brief, and a point Congress recognized when it enacted the NICS Improvement Amendments Act, thereby allowing states to restore the right to possess a gun to persons previously committed." *Id.* at 688-89.

Finding a "lack of conclusive historical support" for the notion that persons who were once committed due to mental illness are forever ineligible to regain their Second Amendment rights, the court held that (g)(4) does burden conduct protected by the Second Amendment, and proceeded to apply intermediate

scrutiny. *Id.* at 692. It reversed the trial court and remanded with instructions to apply intermediate scrutiny while acknowledging that the government may justify (g)(4)'s application to Tyler by either introducing additional evidence explaining the necessity of (g)(4)'s lifetime ban or with evidence showing that Tyler would be a risk to himself or others were he allowed to possess a firearm. *Id.*

This Circuit should adopt *Tyler*'s reasoning, especially when the Sixth Circuit has already done all of the difficult legwork and there is no Ninth Circuit precedent foreclosing agreement with *Tyler*. The *Tyler* decision is comprehensively researched, well written, and sound in its application of law, history, logic, and reason. While *Tyler* is not controlling, it is certainly persuasive and this Court should apply *Tyler* to Mr. Mai's claim.

4. This Court should consider Mr. Mai's juvenile status at the time of commitment.

Mr. Mai's case arguably has even more merit than *Tyler* because Mr. Mai was a juvenile when he was committed. While no case law exists on the applicability of the Second Amendment to juveniles specifically, the U.S. Supreme Court has repeatedly held that, in other contexts, children are inherently different from adults. *See, e.g., Roper v. Simmons*, 543 U.S. 551 (2005) (imposing the death penalty for a crime committed by a juvenile is unconstitutional); *Graham v. Florida*, 560 U.S. 48 (2010) (imposing life imprisonment without possibility of

parole for a non-homicide crime committed by a juvenile is unconstitutional); *Miller v. Alabama*, 567 U.S. 460 (2012) (mitigating factors must be taken into account before a juvenile can be sentenced to life without possibility of parole for homicide); *J.D.B. v. North Carolina*, 564 U.S. 261 (2011) (age is a factor when determining whether someone is "in custody" for the purposes of interrogation and the *Miranda* warnings).

To deny Mr. Mai's relief is to hold that the Second Amendment could tolerate the imposition of a lifetime prohibition on the possession of a firearm due to an involuntary commitment that occurred when he was a child. A lifetime prohibition would be and should be most repugnant to the Second Amendment when the triggering event occurred during the most sensitive years.

This Court should treat *Heller*'s "presumptively lawful" language as precautionary instead of conclusory, which is consistent with the national trend and Ninth Circuit precedent. It should find that (g)(4) does burden conduct protected by the Second Amendment, and it should proceed to intermediate scrutiny.

B. 18 U.S.C. § 922(g)(4) cannot survive intermediate scrutiny as applied to Mr. Mai.

The *Heller* Court did not establish a proper level of scrutiny to apply to Second Amendment challenges, nor has the Supreme Court done so post *Heller*. This Circuit has imposed a two-part test. First, courts ask whether the challenged

law burdens conduct protected by the Second Amendment. *Chovan*, 735 F.3d at 1136. If so, courts apply the appropriate level of scrutiny. *Id.* The level of scrutiny applied depends on how close the law comes to the core of the Second Amendment right and the severity of the law's burden on that right. *Id.* at 1138. This Circuit generally applies intermediate scrutiny to Second Amendment cases, and that is appropriate in this case. *See, e.g., Chovan*, 735 F.3d 1127; *Bauer v. Becerra*, 858 F.3d 1216 (9th Cir. 2017); *Fisher v. Kealoha*, 855 F.3d 1067 (9th Cir. 2017).

The intermediate scrutiny standard requires that the government's stated objective be significant, substantial, or important and it requires a reasonable fit between the challenged regulation and the asserted objective. *Chovan*, 735 F.3d at 1139. The burden of justification is demanding and it rests entirely on the government. *United States v. Virginia*, 518 U.S. 515, 533 (1996). Mr. Mai concedes that the government has a significant interest in keeping firearms from mentally ill individuals. However, imposing a lifetime ban is not a reasonable fit to the stated objective, as applied to Mr. Mai.

The *Tyler* court was skeptical of (g)(4)'s substantial relationship to that interest as applied to Tyler:

> Th[ere] is compelling evidence of the need to bar firearms from those currently suffering from mental illness and those just recently removed from an involuntary commitment. It does not, however, answer why Congress is justified in permanently barring anyone who has been previously committed, particularly in cases like Tyler's, where a

> number of healthy, peaceable years separate the individual from their troubled history.

Tyler, 837 F.3d 678, 695. The court also considered a number of studies submitted by the government, and rejected all of them.

In considering the Brady Center to Prevent Gun Violence's study showing that those with a past suicide attempt are more likely than the general public to commit suicide at a later date, the court found this statistic unpersuasive because "it does not fully justify the need to permanently disarm anyone who has been involuntarily committed for whatever reason. Importantly, nothing in this record suggests that Tyler has ever attempted suicide or that a significant proportion of individuals prohibited by § 922(g)(4) have attempted suicide." *Id.* Likewise, in looking at a study showing that previously involuntarily committed individuals have a greater suicide risk, it pointed out that the study concluded that suicide risk seems highest at the beginning of treatment and diminishes thereafter. *Id.* at 696. Also, "the studies the government relied on only analyzed behavior over 1-year and 22-month periods respectively and, thus, do not explain why a lifetime ban is reasonably necessary." *Id.* Finally, the court cited a study finding "that, when controlling for substance abuse problems, the rates of violent acts perpetrated by involuntarily committed patients and the general population in one community in Pittsburgh was statistically indistinguishable." *Id.*

Given the government's burden in proving a sufficient fit under intermediate scrutiny, the *Tyler* court found that "[n]one of the government's evidence squarely answers the key question at the heart of this case: Is it reasonably necessary to forever bar all previously institutionalized persons from owning a firearm?" *Id.* at 697. Invoking the NICS Improvement Amendments Act of 2007, the court pointed out that even "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.* The court finished:

> We cannot conclude, based on the current record, that the government has carried its burden to establish a reasonable fit between the important goals of reducing crime and suicides and § 922(g)(4)'s permanent disarmament of all persons with a prior commitment. There is no indication of the continued risk presented by people who were involuntarily committed many years ago and who have no history of intervening mental illness, criminal activity, or substance abuse. Indeed, Congress's evidence seems to focus solely on the risk posed by those presently mentally ill and who have been recently committed. Any prospective inference we may draw from that evidence is undercut by Congress's recognition, in the 2008 NICS Amendments, that a prior involuntary commitment need not be a permanent impediment to gun ownership.

Id. at 699.

The facts in Tyler are extremely similar to Mr. Mai's case. Both commitments occurred long ago, followed by decades of peaceable activity, and punctuated by clean bills of health from mental health professionals. Mr. Mai has the additional mitigating factor of having been committed as a juvenile.

Dr. Nancy Connolly, M.D. stated that Mr. Mai "has never demonstrated evidence of clinical depression" since at least 2010, and that "[i]n office depression screening has consistently been negative and he has consistently demonstrated healthy lifestyle and behaviors." Excerpts of Record, Vol. I, at 40. She further opined that "he [does not] represent[] a significant suicide risk nor do I believe that he is at risk for harming others." *Id.* Dr. Stacy Cecchet, Ph.D. performed a forensic psychological evaluation and risk assessment on Mr. Mai, and opined that Mr. Mai's condition "is now in full remission," and that he "is of low risk for future violent and nonviolent criminal behavior and does not present with any observable psychopathology." *Id.* at 54. Finally, Dr. Brendon Scholtz, Ph.D. performed his own examination of Mr. Mai and reviewed the report and conclusions of Dr. Cecchet. *Id.* at 45-46. Dr. Scholtz opined that Dr. Cecchet's conclusions were accurate and clinically sound, that he agreed with her conclusions, and that "Mr. Mai does not appear to be currently experiencing any significant psychological distress and he does not appear to have any overt symptoms of a major disorder of thought or mood." *Id.*

The King County Superior Court has already made a judicial finding that Mr. Mai no longer presents a substantial danger to himself or to the public and that the symptoms related to his commitment are not reasonably like to recur. *Id.* at 35. There is simply no quantity or quality of evidence that the government can proffer

to meet its burden of showing that (g)(4)'s lifetime ban survives intermediate scrutiny as applied to Mr. Mai. A lifetime ban on an individual who was involuntarily committed in 1999, who has had no issues of any kind since, and who is no longer mentally ill, cannot survive intermediate scrutiny.

C. The trial court erred when it dismissed Mr. Mai's claim for failing to state a claim and without leave to amend the complaint.

FRCP 15(a)(2) states that a party may amend its pleadings only with the court's leave, but the court "should freely give leave when justice so requires." The underlying purpose of FRCP 15(a) is "to facilitate decisions on the merits, rather than on technicalities or pleadings." *James v. Piller*, 269 F.3d 1124, 1126 (9th Cir. 2001). A court may deny leave to amend if it finds the existence of "bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue allowance of the amendment, or futility of amendment." *Zucco Partners, LLC v. Digimarc Corp.*, 552 F.3d 981, 1007 (9th Cir. 2009).

Here, the trial court noted in its order dismissing Mr. Mai's claim that Mr. Mai did not sufficiently plead the complaint. Excerpts of Record, Vol. I, at 57-69. The trial court then denied a motion to amend the complaint because doing so would be futile. *Id.* at 2-6. Mr. Mai's proposed amended complaint included information that would have cured some of the defects identified by the trial court.

Id. at 7-55. Namely, it provided evidence of Mr. Mai's updated psychological evaluations showing no signs of mental illness and the King County Superior Court's findings on the restoration of Mr. Mai's firearm rights. *Id.*

Given this procedural posture, the question before this Court is: Are there any set of facts that have been, or can be, pleaded by Mr. Mai that would form a cognizable claim under federal law? Based on this Court's precedent, and the precedent of sister circuits, the answer to that question is an emphatic "yes." This Court should reverse the trial court's dismissal and remand for further proceedings.

IX. CONCLUSION

Based on the foregoing, this Court should reverse the trial court's dismissal and remand for further proceedings.

Respectfully submitted,

Vitaliy Kertchen WA#45183
Attorney for Mr. Mai
3/20/19

X. STATEMENT OF RELATED CASES

Counsel is unaware of any related cases.

9th Circuit Case Number(s) 18-36071

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