No. 18-36071

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

DUY T. MAI,

Plaintiff-Appellant,

v.

UNITED STATES, et al.,

Defendants-Appellees.

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

BRIEF FOR THE APPELLEES

JOSEPH H. HUNT
Assistant Attorney General

BRIAN T. MORAN
United States Attorney

MICHAEL S. RAAB
ABBY C. WRIGHT
(202) 514-0664
Attorneys, Appellate Staff
Civil Division, Room 7252
U.S. Department of Justice
950 Pennsylvania Avenue, NW
Washington, DC 20530

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Cases: **Page(s)**

Statutes:

Rules:

Legislative Materials:

Other Authorities:

STATEMENT OF JURISDICTION

Plaintiff filed suit on April 11, 2017, invoking the district court's jurisdiction under 28 U.S.C. §§ 1331, 1346. ER 71. The district court granted the government's motion to dismiss on February 8, 2018. Plaintiff filed a motion for relief from judgment under Fed. R. Civ. P. 60(b) within 28 days of the judgment. ER 79; *see* Fed. R. App. P. 4(a)(4)(A)(vi). The district court denied that motion on December 21, 2018, and plaintiff filed a timely notice of appeal the same day. ER 79. This Court has jurisdiction under 28 U.S.C. § 1291.

STATEMENT OF THE ISSUE

Whether the district court correctly rejected plaintiff's as-applied challenge to 18 U.S.C. § 922(g)(4).

STATUTORY AND REGULATORY PROVISIONS

Section 922(g)(4) of Title 18 of the United States Code makes it unlawful for an individual who "has been adjudicated as a mental defective or has been committed to a mental institution" to "ship or transport in interstate or foreign commerce, or possess in or affecting commerce, any firearm or ammunition; or to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce."

STATEMENT OF THE CASE

A. The Federal Gun Control Act

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

During the hearings, federal law enforcement officials noted the "number of tragedies and crimes" resulting from the circumvention of local firearms laws, including an incident involving a "mentally ill youth who bought a gun in a Fairfax gunshop . . . and used it to kill a high school student." *Juvenile Delinquency: Hearings Before the Subcomm. to Investigate Juvenile Delinquency of the S. Comm. on the Judiciary*, 88th Cong. 3375 (1963) (pt. 14) (statement of James Bennett, Director, U.S. Bureau of Prisons). The evidence before Congress also addressed suicide, showing that "[i]n 1966, 6,855 Americans were murdered by gun[] [whereas] 10,407 suicides and 2,600 fatal accidents involved firearms," 114 Cong. Rec. 21,774 (1968) (statement of Rep. Rosenthal), and that "[i]n the last decade, 92,747 Americans took their own lives with a firearm, reflecting the fact that the surest and easiest way to commit suicide is with a gun," *id.* at 21,811 (statement of Rep. Schwengel).

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

As originally enacted, the Gun Control Act included a provision under which an individual barred from firearm possession due to certain non-firearm offenses could apply to the federal government for "relief from the disabilities imposed by Federal laws," based on a showing "that the circumstances regarding the conviction, and the applicant's record and reputation, are such that the applicant will not be likely to act in a manner dangerous to public safety and that the granting of the relief would not be contrary to the public interest." Pub. L. No. 90-618, § 102, 82 Stat. at 1225. In 1986, Congress expanded that relief-from-disabilities program to cover any person whom the Gun Control Act "prohibited from possessing, shipping, transporting, or receiving firearms." Firearms Owners' Protection Act, Pub. L. No.

99-308, § 105(1)(A), 100 Stat. 449, 459 (1986) (codified as amended at 18 U.S.C. § 925(c)). As relevant here, the federal program for "relief from the disabilities imposed by Federal [firearms] laws," 18 U.S.C. § 925(c), was in effect from 1986 until 1992, when Congress suspended its funding through an appropriations restriction on the Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF), which administered the program. *See* Treasury, Postal Service, and General Government Appropriations Act, 1993, Pub. L. No. 102-393, tit. I, 106 Stat. 1729, 1732 (1992); *United States v. Bean*, 537 U.S. 71, 74-75 (2002).

Congress subsequently found deficiencies in the reporting of information to the National Instant Criminal Background Check System (NICS) that made it possible for individuals with documented mental health problems to purchase and misuse firearms notwithstanding 18 U.S.C. § 922(d)(4) and (g)(4). It accordingly enacted the NICS Improvement Amendments Act of 2007, Pub. L. No. 110-180, 121 Stat. 2559 (2008). The Act, *inter alia*, authorizes federal grants to assist States to improve the quality of information they make available to the databases searched by NICS. *Id.* § 103(b)(1), 121 Stat. at 2567. To be eligible for such a grant, a State must certify to ATF that it has implemented a program under which persons who "pursuant to State law" have been adjudicated mentally defective or committed to a mental institution may "apply to the State for relief from the disabilities imposed by [18 U.S.C. § 922(d)(4) and (g)(4)]." *Id.* § 103(c), 121 Stat. at 2568; *id.* § 105(a), 121 Stat. at 2569. At present, approximately thirty States—though not Washington—

have created qualifying programs.

B. Facts and Prior Proceedings

Plaintiff, Duy T. Mai, was involuntarily committed for mental health treatment by court order in 1999. ER 72; *see also* ER 26 (providing court's determination that plaintiff posed a "likelihood of serious harm to others"); ER 51 (describing history of involuntary hospitalization). That commitment expired by August 8, 2000. Pl. Br. 7. Because of this commitment, plaintiff was prohibited under both federal and Washington state law from possessing a firearm. Plaintiff contends that he has not had an episode of clinical depression since at least 2010. *See* Pl. Br. 25.

In 2014, plaintiff filed a petition in Washington state court for restoration of his firearms rights. ER 73. The state court granted his request. *Id.*; Pl. Br. 8. Plaintiff then attempted to purchase a firearm. *Id.* The federal firearms dealer informed plaintiff that the National Instant Criminal Background Check System indicated that plaintiff was prohibited from possessing a firearm. *Id.*

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

Applying this Court's "two-step inquiry for addressing Second Amendment challenges," ER 62, the district court rejected plaintiff's as-applied challenge at step one, explaining that "the Ninth Circuit has consistently rejected arguments that the constitutionality of a prohibition on possession turns on whether there is evidence

that the specific plaintiff is violent or non-violent," ER 65. "Thus," the court held, plaintiff's "argument that the Court should find that his involuntary commitment and alleged past mental health issues do not provide a constitutional basis for a prohibition on his right to bear arms is unpersuasive." *Id.*

The court next explained that "[p]laintiff also fails to plead sufficient facts to distinguish himself from those historically barred from Second Amendment protections: the mentally ill." ER 65. The court noted that although "[p]laintiff provides very few details regarding his commitment for mental health treatment," the record made clear that he was committed by a King County Superior Court in October of 1999 for a span of nearly one year. *Id.* The court rejected plaintiff's contention that the restoration of his firearm rights under Washington state law indicated that he was no longer mentally ill, explaining that the Washington state court instead found that plaintiff no longer posed a substantial danger to himself or the public. ER 66.

The court further held that "[e]ven if [p]laintiff could show that [the] challenged law burdens conduct protected by the Second Amendment, Plaintiff's claim fails under the second step of the two-pronged analysis established by the Ninth Circuit." ER 66. The court recognized the government's compelling interest in preventing gun violence, and asked "whether prohibiting those who have been committed to a mental institution from bearing arms is substantially related to these stated objectives." ER 67. Relying on the historical and social science evidence set

forth by the government, the court concluded that there was a substantial fit between the government's prohibition on firearms prohibition by individuals who have been committed to a mental institution and its interest in preventing gun violence and suicide. ER 67-68.

As a final matter, the district court held that plaintiff failed to state a due process claim under the Fifth Amendment, as he had alleged no defects in his involuntary commitment proceeding, but rather asserted only a Second Amendment right. ER 68-69.

SUMMARY OF ARGUMENT

A. Plaintiff was involuntarily committed by court order in 1999 for a period extending for months.[1] History and common sense confirm that restricting the firearm possession of persons with a history of mental disturbance is not inconsistent with "the right of law-abiding, responsible citizens to" keep and bear arms. *District of Columbia v. Heller*, 554 U.S. 570, 635 (2008). The Second Amendment is thus not violated by the application to plaintiff of section 922(g)(4)'s "longstanding prohibition[] on the possession of firearms by . . . the mentally ill." *Id.* at 626. This Court should affirm the district court's order on this categorical basis, as it has done in the context of section 922(g)'s prohibition on firearm possession by

[1] Although the record of plaintiff's involuntary commitment is not entirely clear, the record reflects the fact that the commitment expired by August 8, 2008, and plaintiff has not argued that an earlier date applies. *See, e.g.,* ER 19; *see also* ER 51 (describing initial commitment, subsequent discharges, and revocations of discharge).

felons. *See United States v. Vongxay*, 594 F.3d 1111, 1115 (9th Cir. 2010).

B. Even assuming that history does not foreclose plaintiff's claims, section 922(g)(4)'s restriction on plaintiff's firearm possession readily withstands the means-end scrutiny this Court has applied to determine whether the prohibitions contained in 18 U.S.C. § 922(g) run afoul of the Second Amendment. Congress enacted section 922(g)(4) to address the problem of "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). The Supreme Court has long recognized the government's "legitimate and compelling" interest "in protecting the community from crime," *Schall v. Martin*, 467 U.S. 253, 264 (1984) (quotation marks omitted), and its "unquestionably important and legitimate" interest in suicide prevention, *Washington v. Glucksberg,* 521 U.S.702, 735 (1997). And there is plainly a substantial fit between the compelling interests animating section 922(g)(4) and Congress's choice to address the problem of gun violence through a prohibition on firearm possession by individuals who have suffered from such severe mental illness that they were committed to a mental institution.

STANDARD OF REVIEW

This Court reviews de novo a district court's dismissal of a complaint under Federal Rule of Civil Procedure 12(b)(6) for failure to state a claim. *Sacks v. Office of Foreign Assets Control,* 466 F.3d 764, 770 (9th Cir. 2006).

ARGUMENT

PLAINTIFF'S CONSTITUTIONAL CHALLENGE TO SECTION 922(g)(4) LACKS MERIT.

A. The District Court Correctly Held That Congress May Disarm Plaintiff Based on His Involuntary Commitment to a Mental Institution.

1. The Supreme Court in *District of Columbia v. Heller*, 554 U.S. 570, 626 (2008), recognized that, "[l]ike most rights, the right secured by the Second Amendment is not unlimited." Based on the reasoning of *Heller*, a court should discern the scope of the Second Amendment by first turning to the Amendment's text, the history of the right to keep and bear arms before ratification, and the tradition of gun regulation after ratification. In *Heller,* the Supreme Court expressly provided a non-exhaustive list of "presumptively lawful regulatory measures," including "longstanding prohibitions on the possession of firearms by felons and the mentally ill." *Id.* at 626-27, 627 n.26. The Court explained that "nothing in [its] opinion should be taken to cast doubt on" such measures, *id.* at 626, and "repeat[ed] those assurances" in *McDonald v. City of Chicago*, 561 U.S. 742, 786 (2010) (plurality opinion).

Following the dictates of *Heller*, this Court determines the amendment's reach "based on a 'historical understanding of the scope of the [Second Amendment] right.'" *Jackson v. City & County of San Francisco*, 746 F.3d 953, 960 (9th Cir. 2014) (alteration in original) (quoting *Heller*, 554 U.S. at 625). A law does not violate the Second Amendment if it is "one of the 'presumptively lawful regulatory measures'

identified in *Heller* or regulates conduct that historically has fallen outside the scope of the Second Amendment." *United States v. Torres*, 911 F.3d 1253, 1258 (9th Cir. 2019) (quoting *Heller*, 554 U.S. at 627 n.26); *see also id.* (*Heller*'s "non-exhaustive examples of presumptively lawful regulations . . . 'comport with the Second *Amendment* because they affect individuals or conduct unprotected by the right to keep and bear arms.'") (quoting *Binderup v. Attorney Gen. U.S.*, 836 F.3d 336, 343 (3d Cir. 2016) (en banc)). For example, in *United States v. Vongxay*, 594 F.3d 1111 (9th Cir. 2010), this Court ruled that Section 922(g)(1) did not violate the Second Amendment because the restriction on possession of firearms by felons was a "presumptively lawful" regulation listed by *Heller*, and because "felons are categorically different from the individuals who have a fundamental right to bear arms." *Id.* at 1115 (emphasis omitted); *see also United States v. Rozier*, 598 F.3d 768, 771 (11th Cir. 2010) (per curiam) (*Heller* "suggests that statutes disqualifying felons from possessing a firearm under any and all circumstances do not offend the Second Amendment.").

Applying this reasoning, three courts of appeals, including this one, have issued unpublished opinions summarily rejecting Second Amendment challenges to section 922(g)(4)'s prohibition on firearm possession by individuals who have been involuntarily committed to a mental institution. *See Petramala v. U.S. Dep't of Justice*, 481 F. App'x 395 (9th Cir. 2012); *Heller v. Bedford Cent. Sch. Dist.,* 665 F. App'x 49, 54 (2d Cir. 2016); *United States v. McRobie*, No. 08-4632, 2009 WL 82715 (4th Cir. Jan.

14, 2009) (per curiam). In *Petramala*, this Court explained that "[t]he district court properly dismissed Petramala's Second Amendment claim because" the plaintiff's firearms prohibition "imposed constitutionally permissible limits on his right to bear arms." 481 F. App'x at 396.

The Supreme Court's inclusion of firearm prohibitions based on mental illness in its list of "presumptively lawful regulatory measures," *Heller*, 554 U.S. at 626-27, 627 n.26, reflects the historical record, which makes clear that "the right of law-abiding, responsible citizens" to possess firearms, *id.* at 635, does not extend to individuals who have been "committed to a mental institution," 18 U.S.C. § 922(g)(4). In the American colonies, disarmament of dangerous individuals was considered consistent with the right to bear arms. *See Vongxay,* 594 at 1118 (noting that most scholars of the Second Amendment agree that the right to bear arms was "inextricably . . . tied to" the concept of a "virtuous citizen[ry]" that would protect society through "defensive use of arms against criminals, oppressive officials, and foreign enemies alike," and that "the right to bear arms does not preclude laws disarming the unvirtuous citizens (i.e. criminals)") (alterations in original) (quoting Don B. Kates, Jr., *The Second Amendment: A Dialogue,* 49 Law & Contemp. Probs. 143, 146 (1986)); *see also United States v. Emerson*, 270 F.3d 203, 226 n.21 (5th Cir. 2001) (noting that "lunatics" and "those of unsound mind" were historically prohibited from firearm possession); *United States v. Yancey*, 621 F.3d 681, 684-85 (7th Cir. 2010) (per curiam). The documentary record surrounding adoption of the

Constitution confirms this view. *Heller* identified "as a 'highly influential' 'precursor[]' to the Second Amendment the Address and Reasons of Dissent of the Minority of the Convention of the State of Pennsylvania to Their Constituents." *United States v. Skoien*, 614 F.3d 638, 640 (7th Cir. 2010) (en banc) (quoting 554 U.S. at 604). "The report asserted that citizens have a personal right to bear arms unless for crimes committed, or real danger of public injury." *Id.* at 648 (quotation marks omitted).

The colonial public did not view persons with a history of mental disturbance as being among those who could bear arms without "real danger of public injury." *Skoien*, 614 F.3d at 640; *see also Emerson*, 270 F.3d at 226 n.21. "[M]ost scholars of the Second Amendment agree that the right to bear arms was tied to the concept of a virtuous citizenry," which did not include individuals with a history of mental illness. *Yancey*, 621 F.3d at 684-85. Indeed, such individuals were often physically isolated from the community at large through confinement at home or in welfare and penal institutions. *See, e.g.,* Gerald N. Grob, *The Mad Among Us: A History of the Care of America's Mentally Ill* 5-21, 29, 43 (1994).

2. In stating that "nothing in [*Heller*] should be taken to cast doubt" on "presumptively lawful regulatory measures" like section 922(g)(4), *Heller*, 554 U.S. at 626-27, 627 n.26, the Supreme Court did not suggest that the statute nonetheless could be subject to a successful as-applied constitutional challenge.

Nevertheless, plaintiff (Pl. Br. 17-18) relies on language in this Court's

decision in *United States v. Phillips*, 827 F.3d 1171, 1174 (9th Cir. 2016), to argue that the statute as applied to him is unconstitutional. But plaintiff misapprehends the import of *Phillips*. The defendant in *Phillips* argued that his felony could not constitutionally support a prohibition on his firearm ownership because it was, in his view, non-violent and "passive." *Id.* at 1173. This Court, recognizing that the Supreme Court and its own precedent supported the "propriety of felon firearm bans," *id.* at 1175, rejected that argument, concluding that because the relevant felony had "always been a federal felony," *id.* at 1176, it could permissibly provide the basis for a firearm prohibition and subsequent conviction. Unlike the plaintiff in *Phillips*, plaintiff here offers no argument as to why he does not fall within the category of persons with a history of mental disturbance who have historically been disarmed.

Indeed *Phillips* only underscores the correctness of the district court's determination that plaintiff's conduct following his involuntary commitment has no bearing on whether he is entitled to Second Amendment protection. In *Phillips*, the Court did not look to the individual circumstances of the defendant, but rather the Court considered whether the prohibiting felony at issue was categorically different from crimes historically prohibited as felonies. Indeed, plaintiff is unable to identify any decision in this Circuit in which the Court, in determining whether a section 922(g) prohibition was constitutional, considered the dangerousness of an individual following a prohibiting event. *See Vongxay*, 594 F.3d at 1118 (felony conviction);

Petramala, 481 F. App'x at 396 (commitment to a mental institution); *United States v. Chovan*, 735 F.3d 1127, 1141 (9th Cir. 2013) (domestic violence misdemeanor conviction) (upholding section 922(g)(9) against as-applied Second Amendment challenge and rejecting the plaintiff's argument that "§ 922(g)(9) is unconstitutional as applied . . . because his 1996 domestic violence conviction occurred fifteen years before his § 922(g)(9) conviction, he is unlikely to recidivate, and he has in fact been law-abiding for those fifteen years"); *see also Rozier*, 598 F.3d at 771; *Binderup*, 836 F.3d at 349 (Opinion of Ambro, J.) (sustaining an as-applied challenge to section 922(g)(1), but rejecting the relevance of post-conviction conduct and declining to accept the argument that "the passage of time or evidence of rehabilitation will restore the Second Amendment rights of people who committed serious crimes").

Instead plaintiff relies primarily (Pl. Br. 18-20) on the Sixth Circuit's fractured decision in *Tyler v. Hillsdale County Sheriff's Department*, 837 F.3d 678 (6th Cir. 2016) (en banc), arguing that this Court should adopt the reasoning of the controlling decision in that case "especially when the Sixth Circuit has already done all of the difficult legwork," and, in petitioner's view, reached the correct conclusion. Pl. Br. 20. But, to the extent the reasoning of *Tyler* supports plaintiff's arguments, that approach misunderstood *Heller*'s reference to the presumptive lawfulness of the ban on the possession of firearms by the mentally ill, questioning "whether the *Heller* Court had in mind § 922(g)(4) as opposed to state restrictions, or no particular restriction at all." *Tyler*, 837 F.3d at 687 (Gibbons, J.). In fact, the language in *Heller* tracks particular

provisions of the Gun Control Act and the description of those provisions in the government's amicus brief in *Heller*. *See* U.S. Amicus Br. at 25-26, *District of Columbia v. Heller*, 554 U.S. 570 (2008) (No. 07-290), 2008 WL 157201; *see also Vartelas v. Holder*, 566 U.S. 257, 271 n.7 (2012) (describing section 922(g)(4) as addressing the issue of "mentally unstable persons purchasing guns"). Plaintiff similarly errs in suggesting that the reasoning of *Tyler* would not conflict with this Court's case law addressing section 922(g)(4). Pl. Br. 20. As explained, this Court has rejected a challenge to section (g)(4) in an unpublished decision, *Petramala*, 481 F. App'x at 396, and has made clear that it will uphold those regulations expressly described as "presumptively lawful" in *Heller*, *see Jackson*, 746 F.3d at 960; *Vongxay,* 594 F.3d at 1115, and has further rejected the idea that the passage of time is relevant to the inquiry, *Chovan*, 735 F.3d at 1142. In any event, plaintiff's challenge here would fail even under the Sixth Circuit's approach. A majority of the Sixth Circuit in *Tyler* held that section 922(g)(4) is subject to intermediate scrutiny, which is satisfied here. *See infra* Part B.

That plaintiff was a juvenile when he was first committed does not alter the result. *See* Pl. Br. 20-21. As an initial matter, plaintiff did not develop this argument in the district court, and this Court need not consider it. *See Peterson v. Highland Music, Inc.,* 140 F.3d 1313, 1321 (9th Cir. 1998). Nor is the issue even directly presented in this case: plaintiff turned 18 before his commitment ended in August 2000. In any event, plaintiff acknowledges that federal law makes no distinction between juvenile and adult commitments. And plaintiff has not argued that the commitment

proceedings he underwent did not comport with due process or that something in those proceedings was lacking because of his age. Indeed, plaintiff's own submissions to this Court demonstrate that he was determined to present "a likelihood of serious harm to others" after a hearing, ER 26, and committed for a period of time extending for months.

Plaintiff offers no other grounds for distinguishing his circumstances from those of persons subject to longstanding prohibitions on the possession of firearms. His involuntary commitment was undoubtedly serious and therefore properly resulted in disarmament. Plaintiff's as-applied challenge therefore fails.

B. Section 922(g)(4) Permissibly Restricts Firearm Possession by Individuals Due to Their History of Mental Illness.

Because a firearm prohibition based on plaintiff's involuntary commitment does not violate the Second Amendment right as originally understood, and as explicated in *Heller*, this Court need go no further to affirm the judgment. If, however, this Court were to hold that application of the challenged law implicates Second Amendment rights, then—under this Circuit's precedent—the Court proceeds to means-end scrutiny of the law. *See Chovan*, 735 F.3d at 1134. And application of section 922(g)(4) to plaintiff satisfies the intermediate scrutiny this Court applies in this context. *See id.* at 1135-46 (applying intermediate scrutiny to evaluate constitutionality of section 922(g)(9)); *Silvester v. Harris*, 843 F.3d 816, 823 (9th Cir. 2013) (observing that Ninth Circuit precedent "clearly favors the

application of intermediate scrutiny in evaluating the constitutionality of firearms regulations, so long as the regulation burdens to some extent conduct protected by the Second Amendment"); *see also* Pl. Br. 22 (accepting that this Court's precedent requires application of intermediate scrutiny).

1. For a challenged statute to survive intermediate scrutiny, it must have (1) a "significant, substantial, or important" government objective; and (2) "a reasonable fit between that objective and the conduct regulated." *Chovan*, 735 F.3d at 1139. This Court has recognized that "[s]ome categorical disqualifications are permissible," so long as they satisfy that strong showing. *Id.* at 1142 (quoting *Skoien*, 614 F.3d at 641). Although a regulation cannot be significantly over-inclusive, *see Sorrell v. IMS Health Inc.*, 564 U.S. 552, 575 (2011) (holding that a "broad" regulation was significantly over-inclusive for the "few" applications implicating an interest asserted); *Thompson v. Western States Med. Ctr.*, 535 U.S. 357, 371-72 (2002) (explaining that, under intermediate scrutiny, a regulation may not be substantially "more extensive than necessary"), it need not utilize "the least restrictive means of achieving its interest" in order to withstand intermediate scrutiny. *Fyock v. City of Sunnyvale*, 779 F.3d 991, 1000 (9th Cir. 2015); *Ward v. Rock Against Racism*, 491 U.S. 781, 798 (1989) ("Lest any confusion on the point remain, we reaffirm today that a regulation … need not be the least restrictive or least intrusive means" in order to satisfy intermediate scrutiny.).

The government's interest "in protecting the community from crime" is

"legitimate and compelling," *Schall v. Martin*, 467 U.S. 253, 264 (1984) (quotation marks omitted), as is its interest in preventing suicide, *see Washington v. Glucksberg,* 521 U.S. 702, 735 (1997) (recognizing government's interest in suicide prevention as "unquestionably important and legitimate"). And there is a substantial fit between these interests and disarming "persons with a history of mental disturbances," 114 Cong. Rec. 21,784 (statement of Rep. Celler).

Congress enacted section 922(g)(4) following a multi-year inquiry that revealed "a serious problem of firearms misuse in the United States." S. Rep. No. 89-1866, at 3, 53. In order 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), Congress enacted statutory provisions addressed to "individuals who by their previous conduct or mental condition or irresponsibility have shown themselves incapable of handling a dangerous weapon in the midst of an open society," *id.* at 21,809-10 (statement of Rep. Tenzer), such as "persons with a history of mental disturbances," *id.* at 21,784 (statement of Rep. Celler). Among other things, Congress's investigation of firearm-related killings revealed that firearms were used in over half of all suicides. S. Rep. No. 88-1340, at 3. The evidence before Congress showed that "[i]n 1966, 6,855 Americans were murdered by gun [whereas] 10,407 suicides and 2,600 fatal accidents involved firearms," 114 Cong. Rec. 21,774 (statement of Rep. Rosenthal), and that "[i]n the last decade, 92,747 Americans took

their own lives with a firearm, reflecting the fact that the surest and easiest way to commit suicide is with a gun," *id.* at 21,811 (statement of Rep. Schwengel).

When it subsequently enacted the NICS Improvement Amendments Act of 2007, Pub L. No. 110-180, § 103(a)(1), 121 Stat. at 2567 (2008), Congress found that individuals with disqualifying mental health histories were continuing to acquire and misuse firearms. In April 2007, "a student with a history of mental illness at the Virginia Polytechnic Institute and State University shot to death 32 students and faculty members, wounded 17 more, and then took his own life." *Id.* § 2(9), 121 Stat. at 2560. "In spite of a proven history of mental illness, the shooter was able to purchase the two firearms used in the shooting," which was "the deadliest campus shooting in United States history." *Id.* A March 2002 "senseless shooting, which took the lives of a priest and a parishioner at the Our Lady of Peace Church in Lynbrook, New York," likewise demonstrated "the need to improve information-sharing" between State and federal authorities. *Id.* § 2(8), 121 Stat. at 2560. As Congress found, "[t]he man who committed this double murder had a prior disqualifying mental health commitment and a restraining order against him, but passed a Brady background check because NICS did not have the necessary information to determine that he was ineligible to purchase a firearm under Federal or State law." *Id.*

Beyond this legislative history, empirical evidence demonstrates that Congress acted constitutionally in determining that persons who have been involuntarily

committed should not be trusted with firearms. Research suggests that persons who suffer from significant mental illness pose an increased risk of harm to themselves or others. *See* Seena Fazel & Martin Grann, *The Population Impact of Severe Mental Illness on Violent Crime*, 163 Am. J. Psychiatry 1397, 1401 (2006) (reporting increased risk "in patients with severe mental illness compared with the general population"). A National Institute of Mental Health study showed that patients with serious mental illness "were two to three times as likely as people without such an illness to be assaultive. In absolute terms, the lifetime prevalence of violence among people with serious mental illness was 16% . . . compared with 7% among people without mental illness." Richard A. Friedman, V*iolence and Mental Illness – How Strong Is the Link?,* 355 New Eng. J. Med. 2064, 2065 (2006). Other research has shown that discharged mental patients with coexisting substance-abuse diagnoses have a dramatically increased violence rate. *See* Henry J. Steadman et al., *Violence by People Discharged From Acute Psychiatric Inpatient Facilities and by Others in the Same Neighborhoods*, 55 Arch. Gen. Psychiatry 393 (1998). And a more recent study indicates that, irrespective of substance abuse status, individuals with severe mental illness were more likely to be violent than those without any history of mental or substance abuse disorder. *See* Richard Van Dorn et al., *Mental Disorder and Violence: Is There a Relationship Beyond Substance Use?*, 47 Soc. Psychiatry & Psychiatric Epidemiology 487 (2012).

Persons with mental illness have a significantly increased risk of suicide, and a high rate of suicide persists among persons who have previously been committed.

See Virginia A. Hiday, *Civil Commitment: A Review of Empirical Research*, 6 Behav. Sci. & L. 15, 25 (Winter 1988) (among 189 patients who entered commitment process, ten committed suicide within nineteen months). Moreover, firearms are much more likely to cause injury or death than other available weapons. As one commentator observed, "[a] suicide attempt with a firearm rarely affords a second chance," while "[a]ttempts involving drugs or cutting, which account for more than 90% of all suicidal acts, prove fatal far less often." Matthew Miller & David Hemenway, *Guns and Suicide in the United States*, 359 New Eng. J. Med. 989, 989-90 (2008). As a result, firearms account for approximately half of all suicide deaths each year. *See* Center for Disease Control & Prevention, Nat'l Ctr. for Health Statistics, *Suicide and Self-Inflicted Injury* (reporting that, in 2016, firearms accounted for 22,938 of the 44,965 suicide deaths).[2] Because there are an estimated 12 to 25 attempted suicides for every suicide death, the inference is strong that removing firearms from the hands of mentally ill persons saves lives. *See* 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. Psychiatry L. 330, 338 (2007) (concluding that "individuals with psychiatric diagnoses may be at higher risk of suicide if there are firearms in their households"); Mark A. Ilgen et al., *Mental Illness, Previous Suicidality, and Access to Guns in the United*

[2] https://www.cdc.gov/nchs/data/nvsr/nvsr67/nvsr67_05.pdf, at 35 (last visited June 4, 2019).

States, 59 Psychiatric Service 198, 198-200 (2008) (explaining that restricting access to lethal means is one of only two suicide interventions with reasonable empirical support).

2. Because section 922(g)(4) satisfies intermediate scrutiny, plaintiff cannot succeed in an as-applied challenge to the application of the restriction to his unique set of circumstances. *See United States v. Edge Broad. Co.*, 509 U.S. 418, 430 (1993); *Board of Trs. of State Univ. of N.Y. v. Fox*, 492 U.S. 469, 480 (1989). It cannot seriously be disputed that plaintiffs' prior involuntary commitment—following a judicial finding that an individual is mentally disturbed and in need of medical treatment—is relevant to the risk of current or future mental illness. *See Florida Bar v. Went For It, Inc.*, 515 U.S. 618, 628 (1995) (relying on "history, consensus, and simple common sense" to judge fit under means-end scrutiny) (quotation marks omitted). Congress, its "concern having been reasonably aroused by the possibility of an abuse which it legitimately desired to avoid," concluded that disarming involuntarily committed individuals "would protect against [that] occurrence, and that the expense and other difficulties of individual determinations justified the inherent imprecision of a prophylactic rule." *Weinberger v. Salfi*, 422 U.S. 749, 777 (1975); *see also Dickerson v. New Banner Inst., Inc.,* 460 U.S. 103, 116-17 (1983) ("[A] person committed to a mental institution later may be deemed cured and released. Yet Congress made no exception for subsequent curative events. . . . Congress obviously felt that such a person, though unfortunate, was too much of a risk to be

allowed firearms privileges."); *Chovan*, 735 F.3d at 1142 (holding that, in section 922(g)(9), "Congress permissibly created a broad statute" with limited exceptions).

And nothing about the circumstances of this case suggests that plaintiff's as-applied challenge should succeed under intermediate scrutiny. Plaintiff's involuntary commitment was based on behavior that a court determined posed a serious risk of harm to others and required commitment extending for months. *See* ER 26. Plaintiff contends that the statute fails intermediate scrutiny because his commitment "occurred long ago" and has been followed "by decades of peaceable activity," a physician's report indicates that he has not experienced clinical depression since at least 2010, and the King County Superior Court determined that he no longer presented a threat of harm to others. Pl. Br. 24-25. But that merely suggests that plaintiff is not currently suffering a mental health crisis like the one that led to his commitment. As discussed, that does not mean that plaintiff is not at higher risk of a future episode of threats of violence against others. And for this reason the district court did not err in denying leave to amend. *See* Pl. Br. 26-27; *Gabrielson v. Montgomery Ward & Co.,* 785 F.2d 762, 766 (9th Cir. 1986) (explaining that leave to amend may be denied where amendment would be futile). Additional "updated psychological evaluations" would have no bearing on the correct outcome in this case. Pl. Br. 27.

In sum, Congress constitutionally determined that the class of persons who have been involuntarily committed should not be entitled to possess firearms. It is impossible to predict future dangerousness with absolute certainty, and Congress

acted constitutionally in adopting a highly probative objective indicator.

CONCLUSION

For the foregoing reasons, the judgment of the district court should be affirmed.

Respectfully Submitted,

JOSEPH H. HUNT
Assistant Attorney General

BRIAN T. MORAN
United States Attorney

MICHAEL S. RAAB
ABBY C. WRIGHT
(202) 514-0664
Attorneys, Appellate Staff
Civil Division, Room 7252
U.S. Department of Justice
950 Pennsylvania Avenue, NW
Washington, DC 20530

JUNE 2019

STATEMENT OF RELATED CASES

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

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

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

I further certify that this brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 32(a)(7)(B) and Ninth Circuit Rule 32-1 because it contains of 5,858 words, according to the count of Microsoft Word.

/s/ Abby C. Wright
ABBY C. WRIGHT
Counsel for defendants

CERTIFICATE OF SERVICE

I hereby certify that on June 5, 2019, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

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

/s/ Abby C. Wright
ABBY C. WRIGHT
Counsel for defendants