No. 19-1927

In the United States Court of Appeals for the Third Circuit

JOHN DOE I; JOHN DOE II,

Plaintiffs-Appellants,

v.

GOVERNOR OF PENNSYLVANIA; ATTORNEY GENERAL PENNSYLVANIA; COMMISSIONER PENNSYLVANIA STATE POLICE; PENNSYLVANIA STATE POLICE,

Defendants-Appellees.

On Appeal from the United States District Court
for the Eastern District of Pennsylvania
Case No. 2:16-CV-06039-JHS
The Honorable Joel H. Slomsky

REPLY BRIEF OF APPELLANTS JOHN DOE I AND JOHN DOE II

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SUMMARY OF THE ARGUMENT

Defendant Commissioner asks this Court to sanction Pennsylvania's established procedure that takes away a protected liberty interest without providing due process of law before that deprivation occurs. Because the Supreme Court's decision in *Zinermon v. Burch*, 494 U.S. 113, 132 (1990), precludes that result, Defendant obfuscates the question before this Court. This is not a case about substantive due process (Red Br. 27-29), facial versus as-applied challenges (*id.* at 26-27), or whether people adjudicated to be mentally ill possess the Second Amendment right to keep and bear arms (U.S. CONST. amend. II; Red Br. 29-35). Nor do Plaintiffs challenge this Court's previous holding that the Due Process Clause, U.S. CONST. amend. XIV, § 1, permits the brief loss of personal freedom during a temporary emergency evaluation under Pennsylvania's Mental Health Procedures Act ("MHPA") Section 302, 50 Pa. Stat. § 7302. (*See* Blue Br. 27.).

Plaintiffs address one narrow but important question: Does Pennsylvania Uniform Firearms Act ("PUFA") Section 6105(c)(4), 18 Pa. C.S. § 6105(c)(4), violate the Due Process Clause because it divests everyone certified committable under MHPA Section 302 of a protected liberty interest without adequate pre-deprivation process by prohibiting them from exercising their fundamental Second Amendment rights? The answer under *Zinermon* is yes. MHPA Section 302 certification cannot be a predicate for operation of PUFA Section 6105(c)(4).

PUFA Section 6105(c)(4) takes away—automatically and immediately—the protected Second Amendment liberty interests of everyone certified under MHPA Section 302. Pennsylvania's application of this prohibition is not ad hoc, random, or unpredictable; rather, it is an established procedure applied by operation of law at the time of certification. Because the procedure is established, Pennsylvania must provide adequate pre-deprivation process, but operation of PUFA Section 6105(c)(4) provides none to MHPA Section 302 certifications. This ends the inquiry under *Zinermon*.

Rather than refute *Zinermon*'s application, Defendant attacks the district court's holdings that the Second Amendment right is a liberty interest protected by the Due Process Clause and that Plaintiffs retain their protected Second Amendment liberty interest notwithstanding MHPA Section 302 certification. (Red Br. 29-34). Defendant also denigrates that protected liberty interest, dismissing Plaintiffs and all law-abiding, responsible citizens who wish to exercise their fundamental Second Amendment rights as "firearms aficionados" (*id*. at 40) and likening them to mass shooters (*id*. at 42).

None of Defendant's arguments refute Plaintiffs' showing that PUFA Section 6105(c)(4) is unconstitutional as written because it includes as a predicate MHPA Section 302 certification. Plaintiffs respectfully request that this Court reject

Defendant's erroneous arguments, reverse the judgment of the district court, and enter judgment for Plaintiffs.

ARGUMENT

Under the Fourteenth Amendment Due Process Clause, Pennsylvania is forbidden from depriving "any person of life, liberty, or property, without due process of law." U.S. CONST. amend. XIV, § 1. The Court evaluates the application of this prohibition in two stages, considering: (1) whether the asserted interest is a protected life, liberty, or property interest; and (2) whether the available procedure provides "due process of law." *Robb v. City of Philadelphia*, 733 F.2d 286, 292 (3d Cir. 1984).

Procedural due process requires the "right to be heard before being condemned to suffer grievous loss of any kind." *See Mathews v. Eldridge*, 424 U.S. 319, 335 (1976). "In situations where the State feasibly can provide a predeprivation hearing before taking [a constitutionally protected interest], it generally must do so regardless of the adequacy of a postdeprivation tort remedy to compensate for the taking." *Zinermon*, 494 U.S. at 132. To determine whether procedural protections are constitutionally adequate, the Court must balance three factors: (1) "the private interest that will be affected by the official action" against (2) "the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards" and (3) "the

Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail." *Mathews*, 424 U.S. at 335.

Defendant does not meaningfully discuss the *Mathews* factors as they apply to PUFA Section 6105(c)(4). Rather, Defendant applies the *Mathews* factors to the certification process under MHPA Section 302, arguing that the exigency of a temporary evaluation under MHPA Section 302 is enough to justify the deprivation of Plaintiffs' protected Second Amendment liberty interest by operation of PUFA Section 6105(c)(4). (Red Br. 41-42). But including MHPA Section 302 certification as a predicate in PUFA Section 6105(c)(4) results in the unconstitutional deprivation of a protected liberty interest by an established state procedure lacking adequate pre-deprivation process. *See Zinermon*, 494 U.S. at 132. MHPA Section 302 certification does not provide the pre-deprivation process required by law that would justify anything but a brief loss of personal freedom during the temporary emergency evaluation. PUFA Section 6105(c)(4) is unconstitutional under *Matthews* and *Zinermon*.

I. PUFA Section 6105(c)(4) operates—automatically and immediately upon MHPA Section 302 certification—to deprive Plaintiffs of a protected liberty interest.

The district court correctly held both that the fundamental Second Amendment right to keep and bear arms is a constitutionally protected liberty

interest (JA Vol. 1 at 29–33) and that "a temporary emergency commitment to a mental institution is not sufficient to consider the individual 'mentally ill' for the purposes of the [*District of Columbia v. Heller*, 554 U.S. 570 (2008)] mental health exception." (JA Vol. 1 at 33). Based on these holdings, the district court correctly held: "Thus, an individual committed under Section 302 still retains a protected liberty interest in the right to bear arms." (*Id*.). This ruling is consistent with the decisions of other courts. *See United States v. Rehlander*, 666 F.3d 45, 48 (1st Cir. 2012) (concluding that a temporary emergency commitment like a certification under MHPA Section 302 was insufficient "to work a permanent or prolonged loss of a constitutional liberty or property interest"); *United States v. Laurent*, 861 F. Supp. 2d 71, 107 (E.D.N.Y. 2011) ("Individuals under indictment have a procedural due process right not to be needlessly deprived of their liberties, including their Second Amendment rights.").

Defendant attacks the district court's holdings (Red Br 29-34) while relying upon the district court's subsequent erroneous and inconsistent statement that Plaintiffs' liberty interest is somehow weakened by their certification under MHPA Section 302 and too diluted to warrant due process protections. (*Id.* at 40). This circular argument—that Plaintiffs cannot challenge the unconstitutional deprivation of their protected liberty interest because that deprivation already has occurred—would render the protections of the Due Process Clause meaningless. The district

court got it right in the first instance. Plaintiffs have never been adjudicated mentally ill and retain a protected Second Amendment liberty interest.

A. Plaintiffs' Second Amendment right to keep and bear arms is a constitutionally protected liberty interest.

The Supreme Court held the Second Amendment right to keep and bear arms is an individual right, *Heller*, 554 U.S. at 595, "[t]he inherent right of self-defense [is] central to the Second Amendment right," *id*. at 628, and the Second Amendment "elevates above all other interests the right of law-abiding, responsible citizens to use arms in defense of hearth and home," *id*. at 635. The right of personal security is "'a historic liberty interest' protected substantively by the Due Process Clause." *Youngberg v. Romeo*, 457 U.S. 307, 315 (1982) (quoting *Ingraham v. Wright*, 430 U.S. 651, 673 (1977)). "No right is held more sacred, or is more carefully guarded by the common law, than the right of every individual to the possession and control of his own person, free from all restraint or interference of others." *Union Pac. Ry. Co. v. Botsford*, 141 U.S. 250, 251 (1891).

The Supreme Court has also analyzed the Second Amendment through the prism of substantive due process, extending the protections of the Second Amendment against state action. *McDonald v. City of Chicago*, 561 U.S. 742, 790 (2010). *McDonald* concluded that the Second Amendment right is "deeply rooted in this Nation's history and tradition" and is "fundamental to our scheme of ordered liberty" because it is "highly valued for purposes of self-defense." *Id*. at 767, 770.

"[F]undamental rights and liberties" that are "deeply rooted" in our national tradition are substantively protected by the Due Process Clause. *See Washington v. Glucksberg*, 521 U.S. 702, 720–21 (1997).

As a fundamental right protected by substantive due process, exercise of the Second Amendment right to keep and bear arms is a constitutionally protected liberty interest for purposes of procedural due process. "The liberty rights protected by procedural due process are broader than those protected by substantive due process; they 'may arise from the Constitution itself, by reason of guarantees implicit in the word liberty, or they may arise from an expectation or interest created by state laws or policies.'" *Steele v. Cicchi*, 855 F.3d 494, 507 (3d Cir. 2017) (quoting *Wilkinson v. Austin*, 545 U.S. 209, 221 (2005)). "Interests protected by procedural due process" also include "liberty interests guaranteed by the Bill of Rights 'independently of state law.'" *Poirier v. Hodges*, 445 F. Supp. 838, 843 (M.D. Fla. 1978) (quoting *Paul v. Davis*, 424 U.S. 693, 710–11 & n.5 (1976)); *see also Jordan v. City of Indianapolis*, 2002 WL 32067277, at *7 (S.D. Ind. Dec. 19, 2002) ("A person's liberty interest includes, among other things, the freedoms protected by the Bill of Rights . . . .").

Defendant makes much of the analytical differences between substantive and procedural due process claims, erroneously suggesting Plaintiffs are attempting to disguise a substantive due process claim as a case about procedural due process.

(Red Br. 27–29). But Plaintiffs' claim is and always has been rooted in procedural due process. As discussed above, some reference to substantive due process is necessary to prove the existence of a constitutionally protected liberty interest. Defendant's arguments related to substantive due process are simply irrelevant.

The district court correctly concluded that the Second Amendment right to keep and bear arms is a constitutionally protected interest. (JA Vol. 1 at 33). Other courts agree. *E.g.*, *Rehlander*, 666 F.3d at 48; *Laurent*, 861 F. Supp. 2d at 107. The government cannot take away the Second Amendment right to keep and bear arms without procedural due process protections. *See Tyler v. Hillsdale Cty. Sheriff's Dep't*, 837 F.3d 678, 690, 699 (6th Cir. 2016) (en banc) (holding that plaintiff stated a plausible claim as a matter of law that a firearm ban following a temporary emergency commitment violated his Second Amendment rights); *Rehlander*, 666 F.3d at 48. Plaintiffs' Second Amendment right to keep and bear arms is a constitutionally protected liberty interest under the Due Process Clause.

B. Plaintiffs' protected Second Amendment liberty interest remains fully intact notwithstanding their MHPA Section 302 certification.

The district court extensively analyzed the record and constitutional precedent and correctly held that Plaintiffs have a protected Second Amendment liberty interest that they retain notwithstanding their MHPA Section 302 certification. (JA Vol. 1 at 30). Defendant attacks this holding (Red Br. 29-34), preferring instead the district court's later remark that Plaintiffs' interest was "weakened" because they

were certified under MHPA Section 302 (JA Vol. 1 at 35). Unlike the well-supported holding Defendant attacks, the district court did not provide any analysis of why or how that interest is weakened or even really what "weakened" means in this context. (JA Vol. 1 at 35). Defendant seizes upon this offhand language to argue that people certified under MHPA Section 302 "do not . . . possess the same Second Amendment right enjoyed by others." (Red Br. 29–35).

Defendant labels Plaintiffs "indubitably" "mentally ill" as that phrase is used in *Heller*. (Red Br. 31). But Plaintiffs were never adjudicated to be mentally ill and are not "mentally ill" under *Heller*. *See Rehlander*, 666 F.3d at 48. As described in more detail below, the exigent nature of the need to hold someone briefly for an emergency mental-health evaluation may justify temporary loss of personal freedom under MHPA Section 302 but it cannot justify automatic and immediate taking of anyone's protected Second Amendment liberty interest.

Nothing in *Heller* supports the weakening, let alone the destruction, of a constitutionally protected liberty interest based on a certification under MHPA Section 302. Defendant rests his argument solely on *Heller*'s dictum acknowledging there have been "longstanding prohibitions on the possession of firearms by . . . the mentally ill." *See Heller*, 554 U.S. at 626–27; (Red Br. 31). But the district court correctly held that "a temporary emergency commitment to a mental institution is not sufficient to consider the individual 'mentally ill' for the purposes of the *Heller*

mental health exception." (JA Vol. 1 at 33). The referenced discussion in *Heller* encompasses only those adjudicated mentally ill, which requires provision of due process of law. *See Rehlander*, 666 F.3d at 48. "[N]othing suggests that the Court [in *Heller*] was there addressing a permanent ex parte deprivation of its newly recognized constitutional right." *Id.* Defendant cannot avoid providing constitutionally required pre-deprivation procedures before taking away a protected liberty interest from an entire swath of law-abiding, responsible citizens simply by labeling them "mentally ill."

Heller's acknowledgement of prohibitions on the ownership of firearms by the mentally ill is beside the point. Pennsylvania's established procedure deprives all persons certified under MHPA Section 302 of the exercise of their protected Second Amendment interests without first providing them a chance to even address whether they are mentally ill or meaningfully challenge their certification for a temporary emergency mental health evaluation. In contrast, anyone committed under MHPA Sections 303 or 304 has been adjudicated mentally ill by a court or other tribunal where evidence was presented and due process protections provided. Plaintiffs were not adjudicated mentally ill and committed under MHPA Sections 303 or 304, which demonstrates that their evaluation under MHPA Section 302 concluded that they were not mentally ill.

Defendant concedes that an MHPA Section 302 certification is not an involuntary commitment like MHPA Sections 303 and 304 but rather only a voluntary evaluation, admitting that "a § 302 committee who in fact needs further mental health treatment may simply leave the hospital or other facility prematurely, 'against medical advice.'" (Red Br. 32). One of the two Plaintiffs was not required to remain at the hospital after a MHPA Section 302 certification, but was allowed to leave immediately. (JA Vol. 2 at 248). Even if sufficient to justify the temporary deprivation of personal freedom during a temporary evaluation, the MHPA Section 302 process cannot be sufficient to deem anyone "mentally ill" under *Heller*'s dictum and automatically and immediately divest their Second Amendment liberty interests.

Other courts have agreed with the district court here that temporary emergency evaluations, like those under MHPA Section 302, do not adjudicate mental illness. *E.g.*, *Tyler*, 837 F.3d at 690, 699; *Rehlander*, 666 F.3d at 50; *Wilborn v. Barr*, No. 1:18-cv-3597, 2019 WL 3731731, at *8 (E.D. Pa. Aug. 8, 2019) (holding that a certification under MHPA Section 302 does not constitute an "adjudication of mental illness" or "commitment to a mental institution" under federal law). Certification under MHPA Section 302 is imposed "without the right to counsel or an adversarial proceeding" and is based on an *ex parte* determination by a single certifying physician. *Wilborn*, 2019 WL 3731731, at *6. Because

certifications of committability under MHPA Section 302 are made "without the involvement of any judicial or quasi-judicial decision-maker," they are insufficient to adjudicate mental illness. *See Franklin v. Sessions*, 291 F. Supp. 3d 705, 715 (W.D. Pa. 2017) (holding that a certification under MHPA Section 302 does not constitute an "adjudication of mental illness" or "commitment to a mental institution" under federal law).

Defendant relies upon *Beers v. Attorney General*, 927 F.3d 150 (3d Cir. 2019) (Red Br. 32-34), but *Beers* demonstrates Plaintiffs' point. Unlike Plaintiffs, Beers was adjudicated mentally ill, and his temporary emergency commitment was extended under MHPA Sections 303 and 304. *Id*. at 152. He received the full panoply of procedural protections—including adjudication before a judicial or quasi-judicial decision-maker (50 Pa. Stat. §§ 7303(a)–(b), 7304(b)), and the right to be represented by an attorney, to present evidence, and to cross-examine witnesses (*id*. §§ 7303(b)–(c), 7304(e))—before being divested of his protected Second Amendment liberty interest. Defendant's argument that "[a]ll MHPA commitments can and should be treated consistently" (Red Br. 34) is unsupported by *Beers*.

The procedural protections provided prior to MHPA Sections 303 and 304 commitment demonstrate what is lacking in an MHPA Section 302 certification: the fundamental right to be heard prior to the deprivation of a liberty interest. Because PUFA Section 6105(c)(4) uses MHPA Section 302 certification as a predicate to

automatically and immediately take away Plaintiffs' protected liberty interest by prohibiting exercise of their fundamental Second Amendment right, it is unconstitutional as written.

II. PUFA Section 6105(c)(4) is facially unconstitutional because it deprives everyone certified under MHPA Section 302 of their protected Second Amendment liberty interest without adequate pre-deprivation process.

Defendant misstates the law and suggests Plaintiffs cannot succeed because they have not carried the "very heavy burden" associated with sustaining a facial challenge. (Red Br. 26–27) (citing *Salerno*, 481 U.S. 739, 745 (1987) (requiring plaintiffs to demonstrate that there is "no set of circumstances under which [the statute] would be valid.")). Because PUFA Section 6105(c)(4) is a criminal statute without a *scienter* requirement, Plaintiffs need not meet the *Salerno* standard. *See United States v. Morales*, 527 U.S. 41 (1991) (plurality) (refusing to apply the *Salerno* standard to a criminal statute containing no *scienter* requirement). The distinction between the *Morales* and *Salerno* standards is irrelevant here, however, because PUFA Section 6105(c)(4) automatically and immediately deprives everyone certified under MHPA Section 302 of their protected liberty interest without due process of law, making it "unconstitutional in all of its applications." *See Washington State Grange v. Washington State Republican Party*, 552 U.S. 442, 449 (2008).

In support of his argument that the government need not provide any hearing before divesting Plaintiffs of their protected liberty interests (Red Br. 36–37), Defendant cites *National Amusements, Inc. v. Borough of Palmyra,* 716 F.3d 57, 62 (3d Cir. 2013) (relying upon *Gilbert v. Homar*, 520 U.S. 924, 930 (1997)). *Gilbert*, in turn, relies upon *Zinermon*. *Gilbert,* 520 U.S. at 930. *Zinermon*, as discussed above, makes clear that there must be a hearing with due process protections before established government procedure divests an individual of a protected interest. 494 U.S. at 132. Although *Zinermon* acknowledged there may be exigent circumstances requiring the government to act quickly in response to a random and unpredictable event, for which post-deprivation hearings may satisfy due process, *Zinermon*'s core holding is that pre-deprivation process must be provided before established state procedures—like PUFA Section 6105(c)(4) —take away a protected liberty interest. *Id*.

National Amusements, Inc. is simply an illustration of one of the circumstances identified in *Zinermon* where the government is reacting to a random event. *National Amusements, Inc.* considered whether it was a violation of the Due Process Clause for the government to temporarily preclude the plaintiff from operating a business on a particular field once unexploded munitions were discovered. That discovery was a random and unpredictable event requiring the government to act quickly and justifying the absence of pre-deprivation process.

Had the government in *National Amusements, Inc.* decided to also seize the field, it would not have been able to do so without first holding a hearing because the exigent circumstances from the random event of discovering the munitions had been addressed by the temporary closing of the field.

Similarly, any temporary loss of personal freedom during an MHPA Section 302 commitment is based on the random and unpredictable event of an individual being certified for temporary mental health evaluation. In contrast, Defendant concedes the operation of PUFA Section 6105(c)(4) is automatic and immediate upon each and every MHPA Section 302 certification. (Red Br. 39). PUFA Section 6105(c)(4) is an established state procedure, rather than an ad hoc response to a random and unpredictable act as in in *National Amusements, Inc.* Under this Court's precedent, a pre-deprivation hearing is required before PUFA Section 6105(c)(4) takes away Plaintiffs' protected Second Amendment liberty interest. *See Higgins v. Beyer*, 293 F.3d 683, 694 (3d Cir. 2002); *Stana v. Sch. Dist. of City of Pittsburgh*, 775 F.2d 122, 127 (3d Cir. 1985); *Hicks v. Feeney*, 770 F.2d 375, 378–79 (3d Cir. 1985); *see also* (Blue Br. 28–29 (discussing these cases)).

Contrasting certification under MHPA Section 302 with commitment under MHPA Sections 303 and 304 illustrates the two scenarios discussed in *Zinermon* and refutes Defendant's argument under *National Amusements, Inc*. MHPA Section 302 permits a temporary deprivation of personal freedom during a brief mental health

evaluation. These evaluations arise randomly and unexpectedly because they can be initiated by any of a number of individuals for any reason at any time, precluding any advance notice to the government allowing a hearing and other due process procedures. If an individual certified under MHPA Section 302 is evaluated and determined to require extended inpatient treatment, he is then provided due process protections before he can be adjudicated "mentally ill" and committed under MHPA Sections 303 and 304. An MHPA Section 303 or 304 commitment is an established state procedure that is predictable.

PUFA Section 6105(c)(4) imposes collateral consequences based upon certain predicate statuses, all of which are based on some sort of adjudication, save only certification under MHPA Section 302. (Blue Br. 5–9). PUFA Section 6105(c)(4) is an established state procedure that operates predictably. It is not ad hoc or random. No due process issue is raised when PUFA Section 6105(c)(4) operates with MHPA Sections 303 or 304 commitment as a predicate. Anyone committed under MHPA Sections 303 and 304 already was afforded the full panoply of rights before being adjudicated mentally ill at their hearings. No one certified under MHPA Section 302, however, is provided any such due process protection. As a result and by operation of PUFA Section 6105(c)(4), anyone certified under MHPA Section 302 is divested of a fundamental right without a pre-deprivation hearing as required by *Zinermon*.

Defendant also makes much of the fact that Plaintiffs have not shown how such a hearing could be had consistent with the automatic and immediate operation of PUFA Section 6105(c)(4). (Red Br. 38-40). That demonstrates precisely why the statute is unconstitutional: it does not provide the pre-deprivation hearing required by *Zinermon* with respect to MHPA Section 302 certification. Anyone committed under MHPA Sections 303 and 304 has had that hearing. PUFA Section 6105(c)(4) as written is unconstitutional as to all persons certified under MHPA Section 302 because it operates without providing a pre-deprivation hearing.

III. Pennsylvania's post-deprivation remedies are irrelevant because the constitutional violation occurs at the time the protected liberty interest is taken away without adequate pre-deprivation process.

Defendant belatedly attempts to introduce evidence of an "important development" in Pennsylvania's post-deprivation remedies. (Red Br. 48). But this new evidence is nothing more than misdirection—an eleventh-hour effort to save this unconstitutional statute by distracting from the central issue. It does not change the constitutional analysis or Plaintiffs' entitlement to relief.[1]

[1] The irrelevance of this evidence is merely one reason this Court should not consider it. This evidence was never presented to nor considered by the district court and raises significant fact issues that were not tested during the discovery process. *See* Opposition to Motion to Expand the Record and/or Take Judicial Notice of Pertinent Post-Decision Development (filed on Aug. 26, 2019). If the Court finds that this evidence may be relevant to the Court's analysis, the case should be remanded for discovery and further proceedings, not resolved on Defendant's untested representations.

Plaintiffs have previously demonstrated that Pennsylvania's post-deprivation remedies were insufficient to restore the Second Amendment rights of a person certified committable under MHPA Section 302 because there was no way to alleviate the firearms prohibition that simultaneously arose under federal law. (Blue Br. 36–38). Conceding this point, Defendant claims that the Bureau of Alcohol, Tobacco, Firearms, and Explosives ("ATF") reversed itself without explanation and approved Pennsylvania's relief-from-disabilities program just in time for Defendant's answering brief. (Red Br. 47). Defendant proclaims: "Now, individuals who successfully petition for relief in state court pursuant to [18 Pa. C.S. § 6105(f)(1)] will be eligible for federal relief as well" (Red Br. 47–48). Defendant does not say how or when such relief can be obtained once restoration has been obtained under state law.

This is all beside the point. Plaintiffs' central position—that pre-deprivation remedies are required but not provided—is unaffected by this development and compels reversal of the district court's ruling and the entry of judgment in Plaintiffs' favor. Plaintiffs' argument about the sufficiency of post-deprivation remedies could become an alternative reason to reverse the judgment of the district court. Because Defendant fails to even address how this new development will operate to cure the lack of meaningful post-deprivation relief, Plaintiffs' alternate ground for reversal remains viable.

As explained above, Pennsylvania is constitutionally obligated to provide pre-deprivation procedural protection when an established state procedure deprives someone of his constitutionally protected liberty interest. *See Zinermon*, 494 U.S. at 132. Defendant does not argue that pre-deprivation process is provided. (*See* Red Br. 35–43). This concession alone demonstrates the procedural due process violation, which is complete at the time PUFA Section 6105(c)(4) operates to prohibit exercise of the protected Second Amendment liberty interest by anyone certified under MHPA Section 302. Because adequate pre-deprivation process is not provided, Pennsylvania's post-deprivation remedies cannot cure the due process violation that PUFA Section 6105(c)(4) effects immediately upon MHPA Section 302 certification.

Defendant's own statistics demonstrate this to be true. Defendant claims that less than half of individuals certified under MHPA Section 302 were subsequently adjudicated mentally ill and committed under MHPA Sections 303 and 304 or subjected to another MHPA Section 302 certification. (Red Br. 16–17). By Defendant's own measure, over half of the individuals certified under MHPA Section 302 are not determined to be a sufficient threat to themselves or others to be adjudicated "mentally ill" and committed under MHPA Sections 303 or 304. This raises obvious questions about the likelihood of erroneous deprivation of the Second Amendment liberty interest by operation of PUFA Section 6105(c)(4) in more than

half the MHPA Section 302 certifications. When the government is required to prove to a neutral arbiter that a person is mentally ill, and when that person is afforded an opportunity to defend against that charge, over half of the time the government is unwilling or unable to satisfy its burden. This demonstrates why adequate pre-deprivation process is required before taking away exercise of a protected liberty interest based only on MHPA Section 302 certification. *See Zinermon*, 494 U.S. at 132.

* * *

CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that the Court reverse the judgment of the district court and enter judgment for Plaintiffs declaring PUFA Section 6105(c)(4) unconstitutional insofar as it includes within its sweep everyone certified under MHPA Section 302.

Dated: October 7, 2019

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains 4490 words.

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word in Times New Roman 14-point font.

Dated: October 7, 2019

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on October 7, 2019, I filed the forgoing with the Clerk of the Court via CM/ECF, which will serve the following counsel of record:

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