IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 19-1927

JOHN DOE I; JOHN DOE II,

Appellants

v.

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

BRIEF FOR APPELLEES

APPEAL FROM THE JUDGMENT OF THE UNITED STATES
DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA,
ENTERED JANUARY 11, 2019

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STATEMENT OF JURISDICTION

This is a civil rights action brought pursuant to 42 U.S.C. § 1983. The district court had subject matter jurisdiction under 28 U.S.C. §§ 1331 and 1343.

This appeal is from a final order and judgment, entered January 11, 2019 (JA004-JA048), and from a subsequent order, entered April 8, 2019, denying a motion to alter that judgment (JA049-JA052). The notice of appeal was filed on April 23, 2019 (JA001-JA003). This Court has appellate jurisdiction by virtue of 28 U.S.C. § 1291.

STATEMENT OF ISSUES

I. For due process purposes, do individuals who were involuntarily committed for mental health treatment pursuant to § 302 of Pennsylvania's Mental Health Procedures Act, 50 P.S. § 7302, retain in every respect the same Second Amendment right to possess firearms as others not so committed?

Answer of the district court: yes

Suggested answer: no

II. Even if individuals who were involuntarily committed pursuant to 50 P.S. § 7302 retain a protected right to possess firearms, is Pennsylvania's statutory firearms prohibition, 18 Pa. C.S. § 6105(c)(4), facially constitutional, given that adequate post-deprivation remedies are available to safeguard the right at issue?

Answer of the district court: yes

Suggested answer: yes

STATEMENT OF THE CASE

Appellants John Doe I and John Doe II ("plaintiffs") contend that one subsection of the Pennsylvania Uniform Firearms Act ("PUFA"), 18 Pa. C.S. § 6105(c)(4), is facially unconstitutional. This is so, they argue, because pursuant to that provision, everyone "who has been involuntarily committed" pursuant to § 302 of the Commonwealth's Mental Health Procedures Act ("MHPA") – the constitutionality of which they do *not* question[1] – automatically suffers a violation of their Second Amendment Rights without "pre-deprivation process." Plaintiffs appeal from the district court's rejection of this due process challenge.

In their initial complaint (JA065-JA083), plaintiffs pled a single Fourteenth Amendment claim for declaratory and injunctive relief (*see id.*, at ¶¶ 76-87) against four Commonwealth defendants: the Governor of Pennsylvania, Tom Wolf; the Attorney General, then Bruce Beemer; the Commissioner of the Pennsylvania State Police, then Colonel Tyree Blocker; and the Pennsylvania State Police itself (*see id.*, at ¶¶ 17-20). Jointly, the four defendants moved to dismiss (ECF No. 13). After all parties to the case had duly responded and replied (*see* ECF Nos. 14, 15,

[1] In plaintiffs' own words, they "do not challenge the validity of their Section 302 commitments or the constitutionality of Section 302" (JA188, at ¶ 6. *See also* Brief of Appellants ["Pl. Brf."], at 17).

18), the district court granted the defendants' motion in part (*see* JA087-JA123). Thus, the Governor, the Attorney General, and the State Police were dismissed as from the case.[2] But the Commissioner of the State Police, Colonel Blocker, was ordered to file an answer to the plaintiffs' claim against him (*Id.*).

Colonel Blocker answered as directed (ECF No. 36), and discovery went forward (*see* ECF Nos. 40, 47-56).[3] In due course, the parties filed extensive

[2] The district court found that Sovereign immunity under the Eleventh Amendment barred the plaintiffs' federal lawsuit against the State Police, a Commonwealth agency (*See* JA105). Further, the court found that, by virtue of *Ex Parte Young*, 209 U.S. 123 (1908), the Governor and the Attorney General, in their official capacities, could potentially be sued for prospective injunctive relief notwithstanding the Eleventh Amendment, but the plaintiffs could not pursue such a claim against them in this instance because neither the Governor nor the Attorney General is responsible for enforcing the statutory provision at issue (*See* JA106-JA109). The plaintiffs do not question these rulings on appeal. *See* Pl. Brf., at 1 n.1.

[3] Meanwhile, by agreement, plaintiffs amended their complaint to substitute a new "John Doe II" for the "John Doe II" originally named (*See* ECF Nos. 41, 42). Aside from this, there is no material difference between the amended complaint (ECF No. 41) and the original complaint (ECF No. 1). (Indeed, for reasons that are not readily apparent, in the amended complaint, the Governor, the Attorney General, and the Pennsylvania State Police all continued to be listed as defendants in the case caption and in the body of that filing (*see* JA124-JA142, at ¶¶ 17, 18, 20), even though their motion to dismiss the claims against them had been granted months earlier.) Also, Colonel Blocker retired around this same time. He was succeeded by Colonel Robert Evanchick, who was substituted as the defendant pursuant to Fed.R.Civ.P. 25(d) (*See* JA122, at n.1).

cross-motions for summary judgment (*see* JA153-JA331, JA332-JA388) and responded to each other's motions at length (*see generally* JA446-JA553).

By memorandum and order dated January 10, 2019, the district court granted the defendants' dispositive motion and, concomitantly, denied the plaintiffs' motion (*See* JA004-JA048). The court began its opinion by thoroughly summarizing the relevant provisions of both the Mental Health Procedures Act, 50 P.S. § 7101 *et seq.*, and the Uniform Firearms Act, 18 Pa. C.S. § 6101 *et seq*. (*See* JA008-JA012 and JA012-JA020, respectively).[4] For further background, the court went on to recount the MHPA-related experiences of each plaintiff (*see* JA020-JA024) before undertaking its analysis of their constitutional claim.

Substantively, the district court agreed with plaintiffs that, notwithstanding ostensibly limiting language in *District of Columbia v. Heller*, 554 U.S. 570, 626-627 (2008), individuals – like them – committed under MHPA § 302 still have a protected liberty interest, conferred by the Second Amendment, in asserting and maintaining an ongoing right to bear arms (JA029-JA033). The court went on to find, however, that the enforcement of PUFA § 6105(c)(4) as written does not deprive § 302 committees of their right to bear arms without due process (*See* JA034-JA047). This is so, the court reasoned, because PUFA as a whole affords

[4] The district court opinion has since been reported. *See Doe v. Evanchick*, 355 F. Supp. 3d 197 (E.D. Pa. 2019).

constitutionally sufficient post-deprivation procedures under which § 302 committees can vindicate their claimed right to possess and use firearms when circumstances warrant (*Id.*).

Dissatisfied, the plaintiffs filed a motion to alter the judgment against them (ECF Nos. 82-83). That motion was denied (JA049-JA052). Plaintiffs then promptly filed this appeal (JA001-JA002).

STATEMENT OF FACTS

By their own account, both John Doe I and John Doe II were evaluated on an emergency basis pursuant to MHPA § 302, were found to be in need of inpatient treatment, and – in light of that experience – were later prevented from purchasing firearms (*See generally* JA208-JA212). In a nutshell, that is what led them to file this lawsuit. However, as this is solely a facial challenge to one section of a state statute, 18 Pa. C.S. § 6105(c)(4), the particulars pertaining to each plaintiff's personal journey need not be described in minute detail.[5] Instead, the focus here will be on the MHPA and PUFA in general, as well as the discrete provisions giving rise to the present challenge. As a practical matter, the statutory terms themselves, along with certain agreed-to explanatory information about the

[5] According to the declaration of John Doe I, in 2011, at age 16, he was "melancholy" because he had been bullied. Concerned that he might harm himself following a breakup, his high school contacted his mother, who took him to a local emergency room, where he was evaluated by a physician, who determined that he should be transferred to another facility for emergency inpatient treatment. Instead, John Doe I left the emergency room with his mother and did not receive the prescribed treatment (*See* JA247-JA250). According to the declaration of John Doe II, in 1996, he and his then-wife were having marital problems. He got drunk; they argued; and he threatened to kill himself using a homemade noose. In response to an emergency call by his wife, the police transported him to one hospital, after which he was transferred to a different hospital, where he was held overnight in a locked room and released the next day (*See* JA306-JA310).

kinds of situations in which they come into play (and how), are the essential "facts" of this case.

Involuntary Commitments under the MHPA.

Pursuant to the MHPA, it is the policy of the Commonwealth "to assure the availability of adequate treatment to persons who are mentally ill," consistent with "principles of due process." 50 P.S. § 7102. To that end, the procedural framework under which treatment is afforded to those who need it is spelled out in the law.

MHPA § 301(a) defines who in Pennsylvania may be required to undergo involuntary emergency examination and mental health treatment. It provides that "[w]henever a person is severely mentally disabled and in need of immediate treatment," that person "may be made subject to involuntary emergency examination and treatment." 50 P.S. § 7301(a). By definition, a "person is severely mentally disabled when, as a result of mental illness, [that person's] capacity to exercise self-control, judgment and discretion in the conduct of [their] affairs or social relations or to care for [their] own personal needs is so lessened that [the person] poses a *clear and present danger* of harm to others or [themself]." *Id.* (emphasis added) (*See* JA361, at ¶ 3; JA474, at ¶ 3).

Whether someone presents a "clear and present danger" is determined in accordance with MHPA § 301(b). Under that provision, a clear and present danger

to "others" exists if, within the past 30 days, the person being evaluated has "inflicted or attempted to inflict serious bodily harm on another" and is reasonably likely to do so again. 50 P.S. § 7301(b)(1).[6] A clear and present danger to the person being evaluated (as opposed to someone else) exists if any of three situations has arisen within the past 30 days: either that person has been so unable to care for themself that, absent adequate treatment, "death, serious bodily injury or serious physical debilitation would ensue with 30 days;" *or* that person "has attempted suicide" and, absent adequate treatment, is reasonably likely to actually commit suicide; *or* that person has engaged in substantial actual or attempted self-mutilation and, absent adequate treatment, actual self-mutilation is reasonably probable. 50 P.S. § 7301(b)(2) (*See* JA361, at ¶ 4; JA474, at ¶ 4).

MHPA § 302, in turn, is central to this case. It authorizes emergency examinations "at a treatment facility upon the certification of a physician stating the need for such examination," *or* upon a warrant issued by the County mental health administrator, *or* "upon application by a physician or other authorized person who has personally observed conduct showing the need for such an

[6] Here and elsewhere, some statutory language is paraphrased for readability, but the actual words of any referenced statutory provisions are of course controlling.

examination." 50 P.S. § 7302(a) (*See* JA362, at ¶ 6; JA474, at ¶ 6).[7] A person taken to a facility for this purpose must be examined by a physician "within two hours of arrival" to determine whether the person is "severely mentally disabled … and in need of immediate treatment."[8] If so, the person's involuntary commitment commences at that point, and "treatment shall be begun immediately." If, on the other hand, the physician concludes that the person is *not* so ill as to satisfy the statutory standard for commitment, or if "at any time it appears there is no longer a need for immediate treatment," the person must be discharged. 50 P.S. § 7302(b) (*See* JA362-JA363, at ¶¶ 7, 9-10; JA474-JA475, at ¶¶ 7, 9).

Consistent with this statutorily-prescribed process, thoughtful assessment and reassessment are expected – indeed essential – in every case. This stands to reason because a § 302 proceeding is an inherently serious matter. Only individuals who – following an examination by a physician – are found to be

[7] An example of the standard, 7-page MHPA "Application for Involuntary Emergency Examination and Treatment" form, completed for John Doe I in this instance, is in the record (twice) (*See* JA264-JA270, JA272-JA278). Evidently, any such documentation pertaining to John Doe II is no longer available.

[8] A Dr. George Groftisza examined John Doe I and certified that he was severely mentally disabled and in need of emergency inpatient treatment (JA270, JA278. *See also* JA256-JA258, JA291-J292 – ER summary). The hospital to which John Doe II was taken back in 1996 has no records pertaining to him (*See* JA316-JA321

"severely mentally disabled" and to pose a "clear and present danger" to themselves or to others can be involuntarily committed pursuant to MHPA § 302.

A person who does receive an emergency examination and involuntary treatment pursuant to MHPA § 302 must be discharged "whenever it is determined that [the person] no longer is in need of treatment and in any event within 120 hours," *unless* the individual "is admitted to voluntary treatment" *or* "a certification for extended involuntary emergency treatment is filed pursuant to [MHPA § 303]." 50 P.S. § 7302(d). Procedures for extended involuntary emergency treatment, certified by a judge or "mental health review officer," lasting a maximum of 20 days, are set forth in 50 P.S. § 7303. Beyond that, extended involuntary treatment must be court-ordered, as spelled out in 50 P.S. §§ 7304-7305.

The State Police has no role in carrying out the above-described procedures relating to the examination and commitment of individuals (such as John Doe I and John Doe II) pursuant to MHPA § 302 (JA-143 – stip. ¶1). Similarly, the State Police is not responsible for providing any type of notification (or other information) to such individuals before or during the § 302 commitment process (*Id. See also* JA144 – stip. ¶¶ 3-4).

Mandatory notification to the State Police.

Section 109(d) of the MHPA requires designated officials to notify the State Police "on a form developed by the Pennsylvania State police of the identity of any individual … who has been involuntarily committed to a mental institution for inpatient care and treatment under [the MHPA] or who has been involuntarily treated as described under 18 Pa. C.S. § 6105(c)(4) (relating to persons not to possess, use, manufacture, control, sell or transfer firearms)." 50 P.S. § 7109(d). The statutorily mandated notification form is known as an "Act 77 form" (JA145 – stip. ¶ 9). These Act 77 forms "shall be transmitted … within seven days of the adjudication, commitment or treatment." *See* 50 P.S. § 7109(d) (*See also* JA145-JA146 – stip. ¶¶ 9-11).[9]

Relatedly, PUFA § 6105(c)(4) provides that a person "who has been involuntarily committed to a mental institution for inpatient care and treatment under [MHPA §§ 302, 303, or 304]" is "subject to the prohibition" mandated under § 6105(a) of that statute. What that means is that – pursuant to the PUFA – any person who has been involuntarily committed in accordance with the MHPA

[9] The State Police accepts notice of § 302 commitments not only via paper forms but also through an online portal and by telephone (JA145 – stip. ¶ 9). As a matter of policy, practice, and procedure, the State Police handles all such notices the same way, regardless of whether a given notice was received in a timely fashion (JA148 – stip., ¶ 28).

cannot "possess, use, control, sell, transfer or manufacture or obtain a license to possess, use control, sell, transfer or manufacture a firearm in this Commonwealth." 18 Pa. C.S. § 6105(a)(1).[10] A similar prohibition exists under federal law. *See* 18 U.S.C. § 922(g)(4) (barring people who have been "committed to a mental institution" from owning or possessing firearms).[11]

It is the responsibility of the State Police to determine, when the occasion arises, whether an individual is subject to these prohibitions. As far as the State Police is concerned (both as a matter of law and as a matter of policy, practice, and procedure), an individual committed pursuant to § 302 is subject to the PUFA

[10] The statute includes a qualifier for § 302 cases (as opposed to commitments pursuant to MHPA §§ 303 or 304): the (a)(1) firearms prohibition does not apply in § 302 situations – which are not meant to last as long as those under §§ 303 or 304 – "unless the examining physician has issued a certification that inpatient care was necessary or that the person was committable." 18 Pa. C.S. § 6105(c)(4).

[11] The State Police has taken (and, as of this writing, continues to take) the position that all MHPA involuntary commitments, including commitments under MHPA § 302 in particular, are disqualifying not only under Pennsylvania law but also for purposes of the federal prohibition (*See* JA367, at ¶¶ 34-35). Details regarding MHPA involuntary commitments are therefore duly relayed to appropriate federal authorities (*Id.*). The State Police is aware of two recent district court decisions suggesting that, legally, the *federal* firearms prohibition is *not* triggered if one is committed pursuant to MHPA § 302. *See Wilborn v. Barr*, No. 18-3597, 2019 WL 3731731 (E.D. Pa. Aug. 8, 2019); *Franklin v. Sessions*, 291 F. Supp.3d 705 (W.D. Pa. 2017). For purposes of the present appeal, these decisions are legally irrelevant, because the scope of the differently-worded *federal* firearms prohibition is not at issue here; this is, again, a purely facial challenge to an entirely separate *state* statutory provision, PUFA § 6105(c)(4).

prohibition, set forth at 18 Pa. C. S. §§ 6105(a)(1) and 6105(c)(4), by virtue of the commitment itself (JA148 – stip. ¶ 30), regardless of when, or even whether, the commitment has been entered into the PICS mental health database (discussed below). Having said that, the creation of a mental health record in that database facilitates the enforcement of the statutory prohibition (JA148-JA149 – stip. ¶ 31).

PICS, and its mental health database.

To facilitate background checks, in Pennsylvania and elsewhere, commitment information (and other potentially pertinent information) is compiled in computerized databases. The National Instant Criminal Background Check System ("NICS") is the federal database maintained by the Bureau of Alcohol, Tobacco, Firearms and Explosives ("ATF") (*See generally* https://fbi.gov.services/cjis/nics/about-nics). Pennsylvania has established, and maintains, its own firearms background check database, the Pennsylvania Instant Check System ("PICS") (*See* JA364, ¶ 15).

Users of PICS have instantaneous access to a variety of databases, including the Master Name Index (PA), III, NCIC, NCIS, records of active protection-from-abuse orders, records regarding drug users, the PICS research database, and – most relevant here, the mental health database created by the State Police itself (JA365, at ¶¶ 16, 19. *See also* JA373 – Price decl., ¶¶ 4, 6). The purpose of the mental health database is to maintain a record of all individuals who are prevented,

pursuant to 18 Pa. C.S. § 6105(c)(4), from possessing firearms due to a qualifying involuntary commitment to a mental institution, such as a § 302 commitment (JA365, at ¶ 16).

The mental health database includes information drawn from Act 77 forms, documenting § 302 commitments, which are sent to the State Police's PICS Unit for review before actually being added to the database (JA146 – stip. ¶ 11).[12] By this process, if the PICS Unit receives such a form and the certifying physician has filled out the portion of the form designated "Notification of Physician's Determination That No Severe Mental Disability Exists," and the appropriate county mental health administrator verifies this, *no* entry about the individual in question is added to the mental health database (JA146 – stip. ¶ 14). In addition, if a submitted form lacks all required information, the PICS Unit will attempt to obtain it but, failing that, *no* mental health record in the PICS mental health database will be created for the individual in question (JA147 – stip. ¶¶ 18-19).

Overall, the State Police, through its PICS Unit, relies on the entities providing notification of commitments to furnish complete and accurate information, as applicable regulations require (JA147 – stip. ¶ 16. *See also* 37 Pa.

[12] Organizationally, the PICS Unit is within the Firearms Division of the State Police (JA146 – stip. ¶ 11).

Code § 33.120(b)). In most instances, the PICS Unit simply confirms that all necessary information has been provided, without independently confirming the accuracy of every detail that has been supplied (*See* JA146 – stip. ¶¶ 12-16).[13]

As soon as the PICS Unit is satisfied that it has the necessary information regarding a particular individual, a mental health record is created in the PICS mental health database, indicating that the referenced individual was committed under MHPA § 302 (JA147 – stip. ¶ 17). Typically, this occurs on the same day that the PICS Unit receives the initial information regarding a person's § 302 commitment for review (JA147 – stip. ¶ 20). Once a mental health record is created and added to the PICS mental health database, the State Police automatically transmits, in real time, that record to NICS via Pennsylvania's CLEAN portal (JA147 – stip. ¶ 21. *See also Id.* at ¶ 23).

The PICS mental health database contains 119,250 entries for unique individuals committed under MHPA § 302 between January 1, 2011, and May 31, 2018 (JA368, at ¶ 36). Of those, 58,696 individuals – or 49.22% – also had one or more *other* involuntary mental health commitment (under MHPA §§ 302, 303, or

[13] In addition, the State Police does try to verify that county mental health administrators throughout the Commonwealth have duly reported all § 302 commitments in their respective counties (JA147-JA148 – stip. ¶¶ 24-28).

304, or an adjudication of incompetency) in addition to the initial § 302 commitment (*Id.*).

Background checks.

At the point of proposed purchase, a firearms seller is required, among other things, to submit a criminal and mental health history check of the buyer to the State Police. *See* 18 Pa. C.S. § 6111(b) (duties of seller). This is known as a PICS check (JA365, at ¶ 17).

When a PICS check is undertaken, PICS automatically and instantaneously goes through its various databases, in search of any disabling records relating to the person seeking to purchase a firearm (JA365, at ¶ 19).[14] If there are no "hits," the system issues a unique approval number, and the proposed purchase can go forward (*Id.*). Any initiated checks that do result in database "hits" are directed to a PICS operator for review, after which the PICS operator will either "approve" (clearing the way for the purchase); "delay" (for further research); or "deny" or designate as "undetermined" (JA365, at ¶ 20).

[14] In addition to involuntary mental health commitments, further discussed in the text, *infra*, potential disqualifications reported through the PICS system include certain criminal convictions, indictment for a felony or Class I misdemeanor, being a fugitive from justice, being an unlawful drug user, being the subject of a protection-from-abuse order, and convictions for domestic violence (*See* JA368-JA369, at ¶ 39).

Among other possible issues, when there is a "hit" from the mental health database, the PICS operator must review the flagged information to determine whether the individual seeking to buy a firearm meets any of the criteria enumerated in 18 Pa. C.S. § 6105(c)(4). This is necessary because, as discussed earlier, that statutory provision – at issue in this litigation – specifies that a person who has been involuntarily committed pursuant to the MHPA (or adjudicated incompetent) is subject to the prohibition in 18 Pa. C.S. § 6105(a)(1), and therefore cannot purchase, or otherwise possess, a firearm.

Between January 1, 2011, and June 1, 2018, the PICS system returned 7,753 denials for individuals based on any period of disqualifying mental health commitment (JA368, at ¶ 38). Out of that total, the system returned denials for 1,670 individuals based on a single § 302 commitment (*Id.*).

Avenues for seeking relief from a firearm disability.

As plaintiffs acknowledge (Pl. Brf., at 11), under Pennsylvania law, three specific processes are available to individuals who wish to obtain relief from a firearm disability imposed in accordance with 18 Pa. C.S. § 6105(c)(4).

First, 18 Pa. C.S. § 6111.1(e)(1) allows any person who has been "denied the right to receive, sell, transfer, possess, carry, manufacture or purchase a firearm" due to a commitment under MHPA § 302 to "challenge the accuracy of that person's … mental health record … by submitting a challenge to the

Pennsylvania State Police within 30 days from the date of the denial." The State Police's PICS Challenge Section receives such challenges (*See* JA369, at ¶¶ 42-43). Procedurally, the State Police has the burden of proof; must notify the challenger "of the basis for the denial" within 20 days; and must afford the challenger "an opportunity to provide additional information for purposes of the review." 18 Pa. C.S. § 6111.1(e)(2). The State Police's final decision must be rendered within 60 days after receipt of the challenge, and "shall include all information which formed a basis for the decision." *Id.*

If a person's "accuracy" challenge is rejected, the challenger then has 30 days to appeal to the Office of Attorney General, where an Administrative Law Judge will conduct a *de novo* hearing. *See* 18 Pa. C.S. § 6111.1(e)(3) (*See also* JA369, at ¶¶ 43-44). At such a hearing, the State Police again has the burden of proving the accuracy of the mental health record relied upon. *Id.* Finally, if dissatisfied with the hearing decision, the challenger can seek further review (and, if appropriate, raise constitutional arguments) in Commonwealth Court. *See* 18 Pa. C.S. § 6111.1(e)(4) (*See also* JA369, at ¶¶ 45-46).[15]

[15] Apparently John Doe I filed a PICS challenge, including a first-level appeal to the Attorney General (which was unsuccessful), but he did not then file a second-level appeal to Commonwealth Court (*See* JA295-JA305).

Second, individuals involuntarily committed pursuant to MHPA § 302, and therefore subject to the firearms prohibition set forth in 18 Pa. C.S. § 6105(c)(4), are entitled under 18 Pa. C.S. § 6105(f)(1) to petition the court of common pleas for relief from their state firearms disability. This may be done any time after one's § 302 commitment (that is, either before or after denial of a firearms purchase) (JA370, at ¶¶ 47-48). This is the proper route for those who claim they are no longer committable or mentally ill (*Id.*).

A petitioner who proceeds under 18 Pa. C.S. § 6105(f)(1) goes through a standard civil proceeding with a full evidentiary hearing, including the right to present documentary and testimonial evidence, and the right to cross-examine adverse witnesses (JA370, at ¶ 49). The purpose of a hearing under § 6105(f)(1) is to demonstrate that the petitioner "may possess a firearm without risk to the applicant or any other person," notwithstanding the petitioner's earlier involuntary commitment (*Id. See also* JA370, at ¶¶ 49-50). If the court agrees that the petitioner no longer poses a risk and can safely possess firearms, that person's state disability will be lifted (*Id.*).

Until very recently, even after such a court victory, the record of the petitioner's commitment in the PICS mental health database could not be expunged because the petitioner would still be subject to the analogous *federal* firearms

disability provision at 18 U.S.C. § 922(g)(4) (*See* JA370, at ¶ 50).[16] That, however, has changed. On July 1, 2019, ATF (the federal Bureau of Alcohol, Tobacco, Firearms and Explosives) approved Pennsylvania's "Certification of Qualifying State Relief from Disabilities Program." Consequently, individuals whose right to possess firearms has been restored in Pennsylvania pursuant to 18 Pa. C.S. § 6105(f)(1) *will* now be entitled to have their federal rights restored as well.[17]

Third, an individual who was involuntarily committed under MHPA § 302 may file an expungement petition in the appropriate court of common pleas, pursuant to 18 Pa. C.S. § 6111.1(g)(2). Such a petition asks the court to "review the sufficiency of the evidence upon which the commitment was based." *Id.* Here, too, in practice, a standard civil proceeding – including a full evidentiary hearing,

[16] Then only recourse for the petitioner would be to bring a separate, individual, as-applied challenge to the federal firearms law in federal court, and prevail in that forum as well (JA370, at ¶ 50). In that event, the PICS Challenge Section would then expunge the record of the petitioner's commitment from the PICS mental health database (*Id.*). Appellants note in their brief, at 37, that since 2011, only three people have mounted successful as-applied challenges to the federal disqualification provision at 18 U.S.C. § 922(g)(4).

[17] No information about this change is in the record because it occurred months after the entry of judgment in the district court (and a few days after appellants filed their opening brief). Along with this brief, appellees are therefore filing a formal motion, asking this Court to expand the record accordingly and/or take judicial notice of ATF's recent action.

with documentary and testimonial evidence, subject to cross-examination – ensues (*See* JA371, at ¶ 53). If the court determines that the evidence upon which the petitioner's commitment was based was insufficient, the court will order the record of the commitment that was submitted to the State Police to be expunged (JA371, at ¶ 54). Upon receipt of such an order, the record of the petitioner's commitment is immediately expunged from the PICS mental health database (*Id.*). As a result, the petitioner's state and federal firearms rights will both be restored (*See* JA238-JA239 – Price dep. at 56-58).

STATEMENT OF RELATED CASES

This case has not previously been before this Court. There are no pending or completed cases to which it is related.

SUMMARY OF ARGUMENT

Under PUFA § 6105(c)(4), individuals who have been involuntarily committed pursuant to MHPA § 302, after being found seriously mentally ill and dangerous, are prohibited from possessing firearms. Plaintiffs contend that § 6105(c)(4) is facially unconstitutional because it deprives all § 302 committees of procedural due process. Having raised this facial challenge, the plaintiffs obligated themselves to establish that *no* set of circumstances exists under which the questioned provision would be valid. Because they did not and cannot carry this particularly heavy burden, summary judgment was properly entered against them.

To prevail on their procedural due process theory, plaintiffs first had to establish that, despite their mental health histories, § 302 committees have an unqualified Second Amendment right to possess handguns. They do not, however. Under the watershed *Heller d*ecision (recently reinforced by this Court in *Beers*), "longstanding prohibitions on the possession of firearms by … the mentally ill" were recognized as "presumptively lawful regulatory measures." Moreover, even assuming that a protected Second Amendment right is implicated here, there still is no constitutional violation. Consistent with *Mathews v. Eldridge*, no pre-deprivation process is feasible before a § 302 committee becomes subject to the PUFA § 6105(c)(4) prohibition. Crucially, though, three distinct statutory post-deprivation remedies are available, and they afford all the process that is due.

ARGUMENT

Plaintiffs do not contend that Pennsylvania's involuntary commitment procedures are themselves unconstitutional, and they do not – indeed could not – now question the constitutionality of their own commitments under MHPA § 302 some years ago. They nevertheless maintain that PUFA § 6105(c)(4) is facially unconstitutional because it automatically deprives all individuals who have been committed pursuant to § 302 of their Second Amendment rights without first affording them pre-deprivation notice and an opportunity to be heard.

By mounting a facial attack on a single Pennsylvania statutory provision, the plaintiffs shouldered a daunting legal burden that they have not carried and cannot carry. In their zeal to reinforce their claimed, virtually unqualified Second Amendment right to possess firearms, they have conflated some applicable legal principles and misunderstood others. Their rights are not as absolute as they suggest, and in any event there is no basis for the attempted but unsuccessful facial due process challenge they now seek to revive. The entry of summary judgment against the plaintiffs was correct and should be affirmed.

* * * * *

Standard of review: This Court exercises plenary review over an order granting a motion for summary judgment. *E.g., Jones v. Southeastern Pa. Transp. Auth.*, 796 F.3d 323, 325 (3d Cir. 2015).

I. Preliminarily, Two Relevant Legal Dichotomies Warrant Mention.

Before delving into the merits of plaintiffs' due process contentions, brief discussion of two over-arching concepts is warranted. Plaintiffs have not tarried over either of them.

A. A facial challenge must fail unless the statute at issue cannot operate constitutionally in *any* conceivable situation.

Throughout their brief, plaintiffs argue that PUFA § 6105(c)(4) is unconstitutional on its face,[18] not simply as applied to them. "The difference between the two [theories] is significant." *Heffner v. Murphy*, 745 F.3d 56, 65 (3d Cir. 2014). Plaintiffs, however, have not grappled with this distinction.

A party asserting a facial challenge to a legislative Act – as plaintiffs evidently are – must establish that *no* set of circumstances exists under which the Act would be valid. *See, e.g., United States v. Salerno*, 481 U.S. 739, 745 (1987); *United States v. Mitchell*, 652 F.3d 387, 405 (3d Cir. 2011). This is a particularly demanding standard. *Heffner*, 745 F.3d at 65.[19] Even if a legislative Act might operate unconstitutionally in some conceivable situation, that is insufficient to

[18] *See* Pl. Brf., at 1, 3, 20, 21, 26, 30, 34, 41.

[19] "An as-applied attack, in contrast, does not contend that a law is unconstitutional as written but that its application to a particular person under particular circumstances deprived that person of a constitutional right." *United States v. Marcavage*, 609 F.3d 264, 273 (3d Cir. 2010).

render the statute wholly invalid. *Salerno*, 481 U.S. at 745. Thus, "this court will not invalidate a statute on its face simply because it *may* be applied unconstitutionally, but only if it *cannot* be applied consistently with the Constitution." *Brown v. City of Pittsburgh*, 586 F.3d 263, 269 (3d Cir. 2009) (internal quotation marks and citations omitted; emphases in original). This is a very heavy burden, and the plaintiffs have not even come close to carrying it.

B. Substantive and procedural due process claims differ analytically.

The Due Process Clause, upon which this action is based, broadly prohibits the States from "depriv[ing] any person of life, liberty, or property without due process of law." U.S. CONST. amend. XIV, § 1. By its terms, this provision "speaks to the adequacy of state procedures," but the clause "also has a substantive component." *Nicholas v. Pennsylvania State University*, 227 F.3d 133, 139 (3d Cir. 2000). In accordance with the substantive due process rubric, certain governmental actions are prohibited "regardless of the fairness of the procedures used to implement them." *Alexander v. Whitman*, 114 F.3d 1392, 1402 (3d Cir. 1997) (quoting *Daniels v. Williams*, 474 U.S. 327, 331 (1986)).

In turn, the concept of substantive due process encompasses two types of claims: challenges to legislative acts and challenges to non-legislative (or executive) action by the state. *See Nicholas*, 227 F.3d at 139. Although plaintiffs

do not couch their present legal claim in such terms, their claim – challenging PUFA § 6105(c)(4) – would appear to fit into the former category.

Generally, a legislative act will withstand a substantive due process challenge if there is a legitimate state interest that the legislature could rationally conclude was served by the statute, although legislative acts that burden fundamental rights are subject to stricter scrutiny. *Nicholas*, 227 F.3d at 139. *See also Alexander*, 114 F.3d at 1403. While plaintiffs, in their brief, allude to their "fundamental Second Amendment rights" at least nine times,[20] they have not clearly characterized their facial attack on PUFA § 6105(c)(4), a state statute, as a substantive due process claim.[21] Whether such an approach would have borne fruit is unknown (and certainly not conceded); the point is, it is now too late for plaintiffs to argue substantive due process. *See Garza v. Citigroup Inc.*, 881 F.3d 277, 284 (3d Cir. 2018) (arguments not raised before district court are waived on appeal). *See also Spireas v. Commissioner of Internal Revenue*, 886 F.3d 315, 321 (3d Cir. 2018).

[20] *See* Pl. Brf., at 3, 17, 18, 19, 20, 21, 23, 31, 34.

[21] Near the beginning of their procedural-due-process legal argument, plaintiffs do mention that *McDonald v. City of Chicago*, 561 U.S. 742 (2010), "incorporate[es] the Second Amendment rights into the concept of substantive due process." Pl. Brf., at 22-23. They do not, however, develop any substantive due process claim as such.

This appeal will stand or fall, then, depending upon whether plaintiffs have shown both that § 302 committees have a constitutional right to possess handguns, and that the challenged statute, in all its applications, abridges that right without affording sufficient pre-deprivation and post-deprivation protection to those affected (thereby denying them procedural due process). Plaintiffs cannot make that showing.

II. Individuals Who Have Been Found Seriously Mentally Ill And Involuntarily Committed Under MHPA § 302 Do Not Enjoy A Constitutionally Protected Interest In Possessing Firearms.

As noted, the due process clause constrains deprivations of life, liberty, or property. No deprivation of "life" is at issue here, and in this Court plaintiffs have chosen not to couch their due process claim in "property" terms. *See* Pl. Brf., at 22 n.3. That claim therefore hinges on whether a constitutionally protected liberty interest was implicated on the present facts.

Plaintiffs do not separately address the antecedent liberty interest issue at this juncture, which is unsurprising, since the district court accepted their position on this sub-issue (*See* JA029-JA033). Appellees, however, continue to disagree and respectfully urge this Court to reexamine the point, in general and in light of this Court's recent decision in *Beers v. Attorney General United States*, 927 F.3d 150 (3d Cir. 2019), which was decided after issuance of the district court ruling in

this matter (and therefore could not have been taken into consideration at that stage).[22]

Without question, *District of Columbia v. Heller*, 554 U.S. 570 (2008), found, based on both text and history, that the Second Amendment conferred a fundamental right to keep and bear arms in this country. *Id.*, 554 U.S. at 595. And in *McDonald v. City of Chicago*, 561 U.S. 742, 778 (2010), that right was extended to the states, through the Fourteenth Amendment. *Heller* had added, however, that, "[l]ike most rights, the right secured by the Second Amendment is not unlimited." *Id.*, 554 U.S. at 626. Indeed, the Court explained, "nothing in [its] opinion should be taken to cast doubt on *longstanding prohibitions on the possession of firearms by felons and the mentally ill*, or laws forbidding the carrying of firearms in sensitive places such as schools and government buildings, or laws imposing" other "presumptively lawful regulatory measures[.]" *Id.*, 554 U.S. at 626-627 & n.26 (emphasis added).

Citing *Heller* and *McDonald*, the district court recognized that the issue in this case "is not merely whether an individual has a protected liberty interest in the

[22] Appellees offer this no-liberty-interest argument as an alternative ground for affirmance of the district court judgment. *See, e.g., In re Mushroom Transp. Co. Inc.*, 382 F.3d 325, 344 (3d Cir. 2004). *See also, e.g., EF Operating Corp. v. American Bldgs.*, 993 F.2d 1046, 1048 (3d Cir. 1993) (without taking cross appeal, appellee may support judgment as entered through any matter appearing in the record, even through argument that attacks lower court's reasoning).

right to bear arms; instead, [the issue is] whether an individual who has been temporarily committed for mental health reasons under Section 302 has a protected liberty interest in the right to bear arms" (JA031). That is, does a person who was subject to a relatively short-term commitment still have an ongoing right to bear arms? The district court answered that question in the affirmative (JA033), but should not have done so.

Logically and factually, individuals committed pursuant to MHPA § 302 are, indubitably, "mentally ill" for purposes of the "longstanding prohibition" affirmatively ratified in *Heller* and therefore do *not* then continue to possess the same Second Amendment right enjoyed by others. Recall that one can only be involuntarily committed, for emergency examination and treatment, if a physician confirms that that person is "*severely* mentally disabled and in need of immediate treatment." 50 P.S. § 7301(a) (emphasis added). To reach such a conclusion, the physician must have a basis for finding that the person has acted in such a way as to pose a "clear and present *danger*" (to the person him- or herself or to others). 50 P.S. § 7301(b) (emphasis added). Put differently, one cannot be involuntarily committed merely because one has just had a proverbial "bad day;" one must be seriously mentally ill and dangerous.

Nor, based on the possibility that someone's commitment was comparatively short, can it be assumed that the person is not mentally ill. For one thing, in some

instances a § 302 committee who in fact needs further mental health treatment may simply leave the hospital or other facility prematurely, "against medical advice."[23] That does not mean the person is, in fact, fine.

Importantly, too, the PICS mental health database indicates that almost half of all the individuals committed pursuant to MHPA § 302 over a period of years also had one or more *other* involuntary mental health commitment (under MHPA §§ 302, 303, or 304, or an adjudication of incompetency) in addition to their initial § 302 commitments (JA368, at ¶ 36). From this it may be inferred that, for any given person, being involuntarily committed is likely not an isolated event; as often as not, the person committed has experienced or will experience further serious mental health issues and, hence, further formal commitments.

The "longstanding prohibition" referred to in *Heller*, against possession of firearms by the mentally ill, is straightforward and unambiguous. It therefore follows that anyone who was ill enough to be involuntarily committed does *not* enjoy the same, broad constitutional right to possess firearms as most other people. This conclusion is reinforced by this Court's analysis in *Beers.*

Beers involved an attempt, by an individual, who had been involuntarily committed in Pennsylvania pursuant to the MHPA, to have the federal firearms

[23] In fact, the record suggests that John Doe I did this (JA259).

prohibition against him – analogous to PUFA § 6105(c)(4) – lifted. This Court concluded that the prohibition did not violate the Second Amendment as applied in that instance.

Beers explicitly followed the analytical approach to non-mental illness firearms prohibitions that this Court had taken in two recent, post-*Heller* cases, *United States v. Mazzarella*, 614 F.3d 85 (3d Cir. 2010), and *Binderup v. Attorney General*, 836 F.3d 336 (3d Cir. 2016).[24] As synthesized by this Court, *Mazzarella* and *Binderup* require a challenger to demonstrate that the prohibition at issue burdens the Second Amendment by, first, "identify[ing] the traditional justifications for excluding from Second Amendment protections the class of which he appears to be a member," and then "present[ing] facts about himself and his background that distinguish his circumstances from those of persons in the historically barred class." *See Beers*, 927 F.3d at 157. Mr. Beers was unable to satisfy either prong of this test. *Id.*, at 157-159.

Just as Mr. Beers, who had been committed under the MHPA, could not "distinguish himself from the historically-barred class of mentally ill individuals who were excluded from Second Amendment protection because of the danger

[24] This effectively negates the district court's observation, in this case, that *Mazzarella* did not involve a person who was mentally ill and therefore "has little bearing here" (*See* JA032).

they had posed to themselves and to others," plaintiffs here – similarly – must be deemed "excluded from Second Amendment protection." *See Beers*, 927 F.3d at 157-159.[25] This is so because, as this Court explained, "the traditional justification for disarming mentally ill individuals was that they were considered dangerous to themselves and/or to the public at large," *id.*, at 158, and because "neither passage of time nor evidence of rehabilitation 'can restore Second Amendment rights that were forfeited,'" *id.*, at 159 (quoting *Binderup*, 836 F.3d at 350).[26]

In sum, the reasoning in *Beers* carries over to this case. All MHPA commitments can and should be treated consistently. That is to say, the Second Amendment carve-out in *Heller* – prohibiting the possession of firearms by the "mentally ill" – should apply in all situations where a person has been found so ill as to pose a danger, and therefore to be involuntarily committed, without regard to a given individual's personal circumstances, including the duration of the

[25] In addition to finding that Mr. Beers could not undermine the traditional justification for the longstanding prohibition against possession of firearms by the mentally ill, this Court also discounted his explicit argument (seemingly made by John Doe I and John Doe II as well, at least implicitly) that he is different, because he has recovered and is no longer mentally ill. *Beers*, 927 F.3d at 159.

[26] In arriving at this conclusion, and ruling against Mr. Beers, this Court explicitly disagreed with *Tyler v. Hillsdale County Sheriff's Dept.*, 837 F.3d 678 (6th Cir. 2016) (*en banc*), which the district court had found persuasive in the instant case (*See* JA032-JA033). Being a precedential opinion of this Court, *Beers* is binding here, while *Tyler*, an out-of-circuit decision, is not.

commitment. The gun-rights "solution," for individual committees, is to pursue relief through an as-applied challenge to one's own firearms disqualification. Constitutionally adequate avenues for doing so are discussed in Part III, below.[27]

III. Even Assuming Individuals Who Were Involuntarily Committed Under MHPA § 302 Retain A Protected Right To Possess Firearms, Pennsylvania's Statutory Firearms Prohibition Is Not Vulnerable To A Facial Due Process Challenge.

Even assuming that plaintiffs do have a fundamental Second Amendment right to possess firearms notwithstanding their involuntary commitments that only gets them so far. They still cannot prevail on their facial due process challenge to PUFA § 6105(c)(4), as the district court correctly held (*See* JA034-JA047).

Plaintiffs' central point is that the state law they challenge on its face – imposing a firearms prohibition on § 302 committees – deprives them of procedural due process because it fails to afford them constitutionally adequate "pre-deprivation procedural protections." *See, e.g.,* Pl. Brf., at 26-28. They also question the sufficiency of available post-deprivation remedies. *See,* Pl. Brf., at

[27] As an aside, Mr. Beers had succeeded in having his state law right to possess firearms restored pursuant to 18 Pa. C.S. § 6105(f). *See Beers*, 927 F.3d at 153 n.9. At the time, this did not "satisfy federal requirements allowing for acknowledgement by the federal government of the state's restoration of gun rights," so Mr. Beers remained subject to the federal prohibition (which, presumably, is what prompted his federal lawsuit). *Id.* As of July 1, 2019, however, this obstacle no longer exists. *See* above at 20-21 & n. 17.

36-41. But the extent to which pre-deprivation process is legally required is not as clear-cut as plaintiffs appear to believe; depending on the situation, post-deprivation process may well suffice – as is true here. *See, e.g., National Amusements, Inc. v. Borough of Palmyra* 716 F.3d 57, 62 (3d Cir. 2013) (citing *Gilbert v. Homar*, 520 U.S. 924, 930 (1997)). Particularly in the present context, plaintiffs' more absolutist position cannot be squared with applicable due process principles and precedents.

The basic analytical framework is well-established and familiar: "Whether any procedural protections are due [in a particular situation] depends on the extent to which an individual will be condemned to suffer grievous loss." *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972) (internal quotation marks and citations omitted). If – as assumed *arguendo* now – "it is determined that due process applies, the question remains what process is due." *Id.* By definition, "due process is flexible and calls for such procedural protections as the particular situation demands. … [N]ot all situations calling for procedural safeguards call for the same kind of procedure." *Id*. *See also Gilbert*, 520 U.S. at 930 ("where a State must act quickly, or where it would be impractical to provide predeprivation process, postdeprivation process satisfies the requirements of the Due Process Clause").

Identifying "the specific dictates of due process generally requires consideration of three distinct factors[.]" *Mathews v. Eldridge*, 424 U.S. 319, 335

(1976). These include "*the private interest that will be affected* by the official action; … *the risk of an erroneous deprivation* of such interest through the procedures used [including] the probable value, if any of additional or substitute procedural safeguards; and … *the Government's interest*, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement[s] would entail." *Id.* (emphases added). *Accord, e.g.*, *Augustin v. City of Philadelphia*, 897 F.3d 142, 149-152 (3d Cir. 2018) (engaging in thorough *Mathews* analysis and concluding challenged procedures did *not* violate due process).[28]

[28] In their brief, at 21, plaintiffs cite *Rogin v. Bensalem Twp.*, 616 F.2d 680, 694 (3d Cir. 1980), for the proposition that there are eight separate "elements" of procedural due process, which plaintiffs then list – implying that all are essential. Plaintiffs conveniently omit, however, the sentence that follows the *Rogin* list: "Whether all or any one of these safeguards are required in a particular situation depends on the outcome of the [*Mathews*] balancing test[.]" *Rogin*, 616 F.2d at 694. In other words, while "an opportunity to give oral testimony" or to utilize "other trial-type procedures" may – in *some* situations – be necessary in order for a procedural regime to comport with due process requirements that certainly is not always the case. *See Biliski v. Red Clay Consol. School Dist. Bd. of Educ.*, 574 F.3d 214, 223 (3d Cir. 2009). *See also Holland v. Rosen*, 895 F.3d 272, 297 (3d Cir. 2018) ("not every potential loss of liberty requires the full panoply of procedural guarantees available at a criminal trial") (citation omitted).

A. Applying *Mathews*, no additional pre-deprivation procedures are required for § 302 committees before a firearms prohibition under PUFA takes effect.

Exactly *what* pre-deprivation procedures plaintiffs believe § 302 committees should be afforded, and *when*, is not entirely clear. Nor does a step-by-step *Mathews* analysis lead to the conclusion they urge.

1. Conceptually, plaintiffs' argument is unconvincing.

To justify their claimed entitlement to greater due process protection, plaintiffs repeatedly intone the phrase "established state procedure," suggesting that *that* – presumably, the MHPA itself, in conjunction with the PUFA – is what has harmed them (from a constitutional standpoint).[29] The implication is that (unspecified) pre-deprivation protections should have been provided before the infliction of any statutorily-dictated legal harm upon them. What are they talking about?

The constitutionality of Pennsylvania's "state procedure" for involuntarily committing people who are seriously mentally ill and dangerous is not in contention in this litigation.[30] And the "state procedure" – or, more precisely, the

[29] *See* Pl. Brf., at 3, 20, 26, 27, 28, 29, 30, 34, 35.

[30] Aside from plaintiffs' concession to this effect, *see, e.g.*, Pl. Brf., at 17, a number of court decisions recognize that the MHPA is structured to afford due process to committees, and to operate in accordance with constitutional principles. *See, e.g., Benn v. Universal Health System, Inc.*, 371 F.3d 165, 174 (3d Cir. 2004)

state *statute* – mandating the imposition of a firearms prohibition on § 302 committees, PUFA § 6105(c)(4), is clear-cut. Basically, it comes into play automatically when someone has in fact been involuntarily committed.

Plaintiffs seem to believe that some sort of inquiry, or official "pause," above and beyond a § 302 commitment *per se*, needs to happen before a firearms prohibition pursuant to PUFA § 6105(c)(4) can take effect. But it is the commitment itself that is the prerequisite for disqualification. Any suggestion that something *else* could or should be done, as a procedural matter, to forestall that outcome does not make sense.[31]

When plaintiffs think their asserted right to pre-deprivation protection would attach, as a factual matter, is also hard to pinpoint. Again, they do not question the MHPA itself, or their own commitments, so they must believe that pre-deprivation

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(remarking that MHPA "does not deny due process"); *Doby v. DeCrescenzo*, 171 F.3d 858, 870 (3d Cir. 2004) (suggesting that MHPA § 302 is constitutional, especially considering that it was "created to deal with emergencies"); *In re J.M.*, 726 A.2d 1041, 1047 n.9 (Pa. 1999) (with MHPA, legislature established "treatment scheme under which … procedural protections expand progressively as the deprivation of liberty gradually increases"); *In re R.D.*, 739 A.2d 548, 556 (Pa. Super. 1999) (interests of individuals and Commonwealth "are both served by *measured* due process protections … provided by the statute itself") (emphasis in original).

[31] Without attempting to parse them one by one, suffice it to say that no case cited in Part I of plaintiffs' brief is comparable to this one or otherwise illuminating.

protection is needed the moment an involuntary commitment ends, possibly even before information about that commitment has been entered into the PICS mental health database. That, however, seems both over-inclusive and unproductive. Obviously, not every § 302 committee is a firearms aficionado, immediately focused on the possible Second Amendment implications of an involuntary commitment from the get-go. By the same token, it can hardly be assumed that all § 302 committees will immediately want to invoke the pre-deprivation protections that plaintiffs envision, whatever they are; the right to possess firearms simply may not be a concern then (or even later). If so, why should some elusive form of pre-deprivation protection be mandatory in every case?

2. Plaintiffs' approach to *Mathews* is flawed.

Focusing more precisely on the three *Mathews* factors: the district court's analysis was spot-on (*see* JA035-JA041), and plaintiffs have not undercut it (*see* Pl. Brf., at 31-34).

First, the plaintiffs' private interest in possessing firearms obviously means a lot to them personally. At the same time, as the district court aptly observed, their *legal* interest in possessing firearms is at least "weakened" in light of their involuntary commitments (*See* JA035).

Second, imposing the statutory firearms prohibition on § 302 committees, in the wake of their having been found seriously mentally ill and dangerous, under

stringent procedures, is relatively straightforward in and of itself. Moreover, the record suggests that the PICS Unit handles its responsibilities conscientiously, further contributing to a low risk of error in these matters.

Plaintiffs – who inexplicably lump their consideration of the first and second *Mathews* factors together (*see* Pl. Brf., at 31-32) – seem to opine that people subject to § 302 commitments ought to have mental-health-related hearings and other due process protections comparable to those afforded to individuals committed under MHPA §§ 303, 304, and 305.[32] That suggestion, however, is ill-informed and illogical.

To the extent that individuals who are involuntarily committed under MHPA §§ 303, 304, and 305 are afforded progressively more elaborate procedural protections (compared to committees under MHPA § 302), it is because those individuals have more complex mental health treatment needs and will require lengthier hospitalizations, under more restrictive conditions, resulting in greater immediate limitations on their liberty. That does not change the fact that no person – including those "only" within the ambit of MHPA § 302 – can be involuntarily committed under without being found seriously mentally ill and dangerous. For present purposes, that is what matters. And the legislature has determined that *all*

[32] *Amicus Curiae* Pennsylvania Federation of Sportsmen and Conservationists makes a similar argument in their brief, at 13-14

committees, from the least impaired to the most, are subject to the statutory firearms disqualification.

Finally (and as recent events surely confirm), there is an unquestionable and overriding governmental interest in public safety. In light of that interest, the corresponding need for the Commonwealth to comply, expeditiously, with the legislature's explicit dictate, in PUFA § 6105(c)(4), cannot be gainsaid. Plaintiffs seem to pooh-pooh this concern, because they (individually) were released without having their commitments extended and, since then, have never hurt anyone. But that fortuitous circumstance is beside the point; this is a facial challenge, seeking a statutory change that would – if judicially approved – affect the entire Commonwealth and allow an entire class of potentially unstable individuals access to firearms. Some of the worst mass shooting events in this country, including the 2007 "Virginia Tech" incident in which 32 people were killed, were perpetrated by individuals with a documented history of mental illness.[33]

This is not to compare the individual plaintiffs in this case to the Virginia Tech shooter directly. Rather it is to emphasize, in the context of a facial challenge to a Pennsylvania statute, that the government has an overwhelming public safety

[33] *See* NICS Improvement Amendments Act of 2007, Pub. L. No. 110-180, § 2(9), 121 Stat. 2559, 2560 (2008) (Congressional finding, citing importance of information-sharing, in light of Virginia Tech shooter's ability to purchase firearms despite existence of "disqualifying mental health information").

concern. Quite simply, not all people who have been involuntarily committed under MHPA § 302 – having been found to be seriously mentally ill – and who might want to reacquire firearms thereafter, can be presumed healthy and trusted prospectively.[34] In this realm, and in light of the unambiguous statutory provision at issue, the government cannot be lax. Tying the government's hands to mollify people such as John Doe I and John Doe II – in the guise of affording them "pre-deprivation protection" – is neither constitutionally required nor consistent with sound public policy.

B. The post-deprivation remedies available to plaintiffs are constitutionally sufficient.

Although MHPA § 302 committees seeking to avoid the firearms prohibition called for under PUFA § 6105(c)(4) are not entitled to *pre*-deprivation process, the present due process inquiry remains unfinished. In the end, though, because available post-deprivation remedies pass muster, the plaintiffs' broad, facial, procedural due process challenge fails.

In general, a constitutional violation "is not complete unless and until the State fails to provide due process." *Zinermon v. Burch*, 494 U.S. 113, 126 (1990).

[34] Again, it bears noting that a significant proportion of individuals committed under MHPA § 302 have already had, or will go on to have, additional commitments (*See* JA368, at ¶¶ 36, 38).

Whether that obligation has been met depends, in turn, on just what "process" the State has provided and "whether it was constitutionally adequate." *Id.* In this context, adequacy hinges not only on "the procedural safeguards built into the statutory or administrative procedure [for] effecting the deprivation" (that is, the pre-deprivation measures considered in Section A, above) but also on "any [post-deprivation] remedies for erroneous deprivations provided by statute[.]" *Id.* Here, available remedies through which individuals can, potentially, secure relief from the applicable firearms prohibition are adequate.

Preliminarily – and notwithstanding what appears to be plaintiffs' implicit assumption (*see* Pl. Brf., at 36-41) – post-deprivation remedies may be constitutionally "meaningful" (as *Mathews* commands, 424 U.S. at 333) even if securing relief is not a sure bet for everyone who might seek it. Stated another way, the existence of one or more post-deprivation remedies is not a guarantee that every questioned deprivation will ultimately be undone.[35] By legislative design, regaining one's right to own firearms in the aftermath of a § 302 commitment is not particularly easy or automatic, but state law does afford avenues of redress.

[35] By way of example, the petitioner in *Gorry v. Pa. State Police*, 144 A.3d 214 (Pa. Cmwlth. 2016), invoked PUFA § 6111.1(e)(1) and pursued a challenge to the accuracy of his mental health record, but the Commonwealth Court affirmed the administrative ruling against him.

That being so, the challenged statutory provision cannot be unconstitutional on its face.

To recap, there are three PUFA avenues, available to § 302 committees who seek to regain their right to possess firearms:

- One may challenge the accuracy of one's mental health records, pursuant to PUFA § 6111.1(e)(1). Such a challenge is initiated with the State Police, after which the person may file an administrative appeal with the Office of Attorney General and, thereafter, seek judicial review of an unfavorable ALJ decision in Commonwealth Court;[36]
- One may file an application for relief in the court of common pleas, pursuant to PUFA § 6105(f)(1), seeking to demonstrate that "the applicant may possess a firearm without risk to the applicant or any other person." If granted, such an application has always resulted in

[36] In *Pa. State Police v. Brandon*, No. 1848 C.D. 2016, 2017 WL 2836187 (Pa. Cmwlth. July 3, 2017) (unreported), this procedure was invoked by an individual who, after being denied a license to carry a firearm, successfully challenged the accuracy of his PICS history. (As mentioned earlier, at 19 n.15, John Doe I appears to have invoked this procedure as well, but he did not follow it through to completion.)

the removal of the applicant's *state* firearms disability.[37] Now (after July 1, 2019), obtaining such relief in state court is expected to, correspondingly, result in the removal of such an applicant's *federal* firearms disability as well.

- One may file a petition pursuant to PUFA § 6111.1(g)(2) in the court of common pleas, seeking review of "the sufficiency of the evidence upon which [an involuntary] commitment was based." If granted, all records of the petitioner's commitment are expunged and, with that, the petitioner's state and federal firearms rights will be restored.[38]

And, incidentally, one need not choose among these three available avenues. *See Commonwealth v. Smerconish*, 112 A.3d 1260, 1261-1262 & n.1 (Pa. Super. 2015)

[37] For example, the plaintiff in *Beers* had secured such relief in state court. *See Id.*, 927 F.3d at 153 n.9. *See also Keyes v. Sessions*, 282 F. Supp.2d 858, 860 (M.D. Pa. 2017) (noting that state court had issued PUFA § 6105(f) order relieving plaintiff of state firearm disability); *Franklin*, 291 F. Supp. 2d at 711 (same). For some reason – perhaps because they assumed federal relief would not also ensue – neither John Doe I nor John Doe II appears to have attempted to secure relief pursuant to PUFA § 6105(f)(1). But the existence of this avenue, successfully utilized by others, confirms that PUFA § 6105(c)(4) is not unconstitutional on its face. What is more, the plaintiffs' failure to invoke this available post-deprivation remedy themselves undercuts any individual denial-of-due-process they might have had. *See Alvin v. Suzuki*, 227 F.3d 107, 116-119 (3d Cir. 2000).

[38] So, for instance, full expungement relief was ordered in *In re A.J.N.*, 144 A.3d 130 (Pa. Super. 2016). *See also In re Vencil*, 152 A.3d 235 (Pa. 2017) (construing PUFA § 6111.1(g)(2); vacating commitment order; remanding for further proceedings).

(noting expunction request under PUFA § 6105(f)(1) had been granted earlier, but affirming denial of request to expunge § 302 commitment records).

Scrutinizing these statutorily-conferred Pennsylvania post-deprivation remedies through a *Mathews* lens, it follows that they do afford sufficient due process for erstwhile § 302 committees. The district court's conclusion to this effect was entirely correct (*See* JA041-JA047).

First, as acknowledged earlier, *supra* at 40, some individuals with a history of serious mental illness may indeed have a personal interest in regaining the right to possess firearms for self-defense or for legitimate recreational purposes. The post-deprivation remedies that are available serve this interest. At the same time, this private interest cannot trump the competing interests that are in play in this context. Most notably, there are countervailing interests in ensuring that unstable individuals are *not* granted unfettered access to firearms and, relatedly, in doing whatever is realistically possible to minimize known risks to other people.

Second, with three different statutory paths available for regaining one's gun rights, any suggestion that an individual who has truly overcome past serious (disqualifying) mental illness will nevertheless remain under a firearms disability forever is fanciful. This is especially true in light of ATF's very recent approval of Pennsylvania's "Certification of Qualifying State Relieve from Disabilities." *See supra*, at 20-21 & n.17. Now, individuals who successfully petition for relief in

state court pursuant to PUFA § 6105(f)(1) will be eligible for federal relief as well. This is an important development. Indeed, it would appear to neutralize plaintiffs' strident criticism of PUFA remedies as virtually "nonexistent," unrealistic, limited, "nearly impossible," permanent, and "irreversible." *See* Pl. Brf., at 36-41. Whatever plaintiffs may have asserted before, they can hardly complain now.[39] That there will inevitably be some denials, for whatever reason, does not mean that the available post-deprivation procedures, as recently updated, are constitutionally flawed.[40]

Finally, it is beyond peradventure that the government has to proceed in an orderly, cautious manner before permitting people who were formerly seriously mentally ill, and dangerous, to acquire (or reacquire) firearms. The point of doing so is not to mindlessly impair the Second Amendment rights of anyone with a

[39] Requiring former § 302 committees to follow prescribed processes and demonstrate compliance with reasonable prerequisites before obtaining the relief they desire is entirely reasonable. As already noted, not everyone will necessarily attain their goal, *see* above at 44 & n. 35, but some people have succeeded in the past (*see* JA375-JA383 – Price decl., ¶ 17 and Ex. A thereto), and – especially in light of ATF's recent action – others will in the future.

[40] In *United States v. Rehlander*, 666 F.3d 45, 49 (1st Cir. 2012), the First Circuit found that procedures for emergency hospitalization under Maine law were not sufficient to remove a person's right to bear arms when there was no chance of restoration. The Court went on to say, however, that the result in such situations might be different if one's right to bear arms could be restored "on reasonable terms." Unlike Maine, Pennsylvania does provide such adequate process, as the district court specifically found (JA046-JA047) (discussing *Rehlander*).

mental health history. Rather, the point is to serve the public as a whole by ensuring – systematically, to the extent possible – that any known or suspected risk of gun violence is minimized.

Existing procedures and remedies take everyone's interests into account. Contrary to plaintiffs' view, the Constitution does not compel the Commonwealth to make it easier for § 302 committees to have their gun rights restored.

CONCLUSION

For the foregoing reasons, this Court should affirm the judgment of the district court.

Respectfully submitted,

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CERTIFICATE OF COUNSEL

I, Claudia M. Tesoro, Senior Deputy Attorney General, hereby certify as follows:

1. I am a member of the bar of this Court.

2. The text of the electronic version of this brief is identical to the text of the paper copies.

3. A virus detection program was run on the file and no virus was detected.

4. This brief contains 10,840 words within the meaning of Fed.R.App.P. 32(a)(7)(B). In making this certificate, I have relied on the word count of the word-processing system used to prepare the brief.

/s/ Claudia M. Tesoro

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CERTIFICATE OF SERVICE

I, Claudia M. Tesoro, Senior Deputy Attorney General, hereby certify that the foregoing Brief For Appellees is this day being filed electronically, using the Court's CM/ECF system, and thus will be served electronically on any/all Filing User(s) involved in this case, including **Jonathan S. Goldstein** and **John Parker Sweeney,** counsel for appellants, at jonathan@goldsteinlp.com and jsweeney@bradley.com, respectively.

I further certify that seven paper copies of this Brief were duly sent to the Clerk of the United States Court of Appeals for the Third Circuit in Philadelphia, Pennsylvania, as required under the Court's procedures.

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DATE: August 26, 2019