IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

JOHN DOE I, et al.,	)	
	)	
	)	
Plaintiffs,	)	**Case No.: 16-6039**
	)	
v.	)	
	)	
THOMAS W. WOLF, in his official capacity as Governor of the Commonwealth of Pennsylvania, et al.,	)	
	)	
	)	
	)	
Defendants.	)	

PLAINTIFFS' OPPOSITION TO DEFENDANTS' MOTION TO DISMISS

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I. INTRODUCTION

Pennsylvania permits any physician to commit a law-abiding citizen for up to 120 hours for emergency treatment without a hearing or other due process. *See* 50 P.S. § 7302 ("Section 302"). Defendants permanently deprived Plaintiffs of their Second Amendment rights based solely on a physician's opinion that a person is committable under Section 302 without due process of law. *See* 18 Pa. C.S. § 6105(c)(4) ("Section 6105"). Plaintiffs have filed suit challenging Pennsylvania's statutory scheme because their fundamental right to keep and bear arms was not protected by a pre-deprivation hearing.

Defendants' arguments that this Court lacks jurisdiction over Governor Thomas W. Wolf and Attorney General Josh Shapiro are without merit.[1] Even if Defendant Blocker has authority to enforce the challenged law, Defendants Wolf and Shapiro also are alleged to have that authority, which is all that is required under Rule 12(b)(1).

Defendants argue that Plaintiffs cannot challenge the loss of their Second Amendment rights resulting from their Section 302 commitments because those commitments deprived them of their Second Amendment rights. That circular argument is wrong as a matter of law and is precisely the kind of unjust result the Due Process Clause of the Fourteenth Amendment is designed to prevent.

Defendants contend that post-deprivation remedies are sufficient to meet the requirements of the Due Process Clause. Defendants' premature merits arguments regarding the existence and adequacy of post-deprivation remedies must fail. Plaintiffs have alleged facts sufficient to support their claim that they were entitled to a hearing before being divested of their Second Amendment rights. Plaintiffs were not required to have alleged the inadequacy of post-

[1] Plaintiffs filed suit against Bruce Beemer, in his official capacity as Attorney General. Josh Shapiro has since succeeded Mr. Beemer as Attorney General. Plaintiffs agree that Mr. Shapiro should be substituted as a defendant under Fed. R. Civ. P. 25(d).

deprivation remedies. In any event, those post-deprivation remedies do not meet due process standards.

This Court should deny Defendants' Motion to Dismiss ("Defendant's Motion") because the Complaint alleges facts sufficient both to establish jurisdiction over Defendants and to state a claim under the Due Process Clause of the Fourteenth Amendment.

II. FACTS

A. Both Plaintiffs were subject to commitment under only Section 302.

At the age of sixteen, a physician determined that Mr. Doe I could be committed under Section 302, Complaint at ¶ 25, although he was never actually committed. Instead, he left the hospital with his mother immediately following his evaluation. *Id.* at ¶ 26. Mr. Doe I cannot possess a firearm because Defendants are enforcing Section 6105 against him. *Id.* at ¶ 37. Mr. Doe II was briefly detained in a hospital for less than twenty-four hours and was never told during this time that he was determined to be committable. *Id.* at ¶ 40-41. Mr. Doe II cannot possess a firearm because Defendants are enforcing Section 6105 against him. *Id.* at ¶ 52. Neither Plaintiff has been subject to commitment other than under Section 302. *Id.* at ¶¶ 34, 50. But for Defendants' enforcement of Section 6105, Plaintiffs would exercise their right to keep and bear arms for self-defense and other lawful purposes. *Id.* at ¶¶ 37, 52. Plaintiffs are law-abiding, responsible citizens who have been deprived without due process of law of their fundamental right to keep and bear arms guaranteed by the Second Amendment. *Id.* at ¶¶ 36-37, 51-52, 77, 87. In sharp contrast to Section 302, more extended commitments provide additional procedural rights.

B. Section 302 commitment – 120 hours.

The Section 302 commitment process begins with an examination by a physician within two hours of the patient's arrival at the hospital for evaluation.[2] If the physician has reasonable grounds to believe that the person "poses a clear and present danger of harm to others or to himself," 50 P.S. § 7301(a), the physician orders immediate emergency treatment, which may result in commitment lasting up to 120 hours. Complaint at ¶ 57. Pennsylvania's statutory scheme provides no hearing or judicial involvement for emergency commitments under Section 302, as it does for extended commitments. Complaint at ¶ 58. Plaintiffs and other citizens who have been committed only under Section 302 are not given notice, the right to a review by a neutral arbiter, the opportunity to review a written record of the factors that contributed to the decision to commit, an opportunity to present evidence and call witnesses, or the right to counsel. *Id.*

An individual committed under Section 302 is divested of fundamental Second Amendment rights under Pennsylvania law, 18 Pa. C.S. § 6105(c)(4), and because the Pennsylvania State Police ("PSP") reports this Pennsylvania divestment to federal authorities as a disqualifying factor for possession of a firearm under federal law, an individual so reported becomes divested under federal law as well. 18 U.S.C. § 922(g)(4); Complaint at ¶¶ 73, 82-87. Defendants strip Plaintiffs and all other individuals committed only under Section 302 of their fundamental rights without notice, the right to review by a neutral arbiter, the opportunity to

[2] An individual can be transported to a hospital for evaluation in either of two ways. First, any "physician or responsible party" may apply to the county administrator for a warrant if there are "facts constituting reasonable grounds to believe a person is severely mentally disabled and in need of immediate treatment." Complaint at ¶ 54. Second, "a physician or peace officer, or anyone authorized by the county administrator" may take an individual to a treatment facility without a warrant based upon personal observation of conduct "constituting reasonable grounds to believe a person is severely mentally disabled and in need of immediate treatment." *Id.* at ¶ 55.

review a written record of the factors that contributed to the decision to commit, the ability to present evidence or call witnesses, and the right to an attorney.

As summarized by the Pennsylvania Supreme Court, there is "no judicial involvement in the decision to effectuate a 302 commitment and no right to appeal the physician's decision, and section 6111.1(g)(2) does not create a right to judicial intervention into a 302 commitment decision." *In re Vencil*, --- A.3d ---, 2017 WL 227792, (Pa. Jan. 19, 2017).[3] This lack of process contrasts sharply with the procedures for more extended commitments.

C. Section 303 commitment – 20 days.

If a treatment facility believes that continued involuntary treatment beyond 120 hours is necessary, it must file an application with the court of common pleas requesting an extended commitment under 50 P.S. § 7303 ("Section 303"). *Id.* at ¶ 61. If an application for extended commitment under Section 303 is filed, the court must appoint an attorney for the patient, "unless it shall appear that the person can afford, and desires to have, private representation." 50 P.S. § 7303(b); Complaint at ¶ 61. "Within 24 hours after the application is filed, an informal hearing shall be conducted by a judge or by a mental health review officer and, if practicable, shall be held at the facility." *Id.*

At the "informal hearing" mandated by Section 303, the judge or hearing officer must inform the patient as to the nature of the proceedings and must conduct an independent review of

[3] Section 6111.1 provides, in pertinent part:

> (2) A person who is involuntarily committed pursuant to section 302 of the Mental Health Procedures Act may petition the court to review the sufficiency of the evidence upon which the commitment was based. If the court determines that the evidence upon which the involuntary commitment was based was insufficient, the court shall order that the record of the commitment submitted to the Pennsylvania State Police be expunged. A petition filed under this subsection shall toll the 60-day period set forth under section 6105(a)(2).

18 Pa. C.S. § 6111.1(g)(2). This review is available to an individual only after the 302 commitment has taken place and solely for the purpose of expunging the record, not to justify the commitment in the first instance, as required for a Section 303 commitment.

the available evidence to determine if extended involuntary treatment is necessary. Complaint at ¶ 62. In contrast to the limited process for a commitment under Section 302, a patient "shall have the right to ask questions of the physician and of any other witnesses and to present any relevant information" at a hearing under Section 303. *Id.* If extended treatment is ordered, the patient must be given: "(1) findings by the judge or mental health review officer as to the reasons that extended involuntary emergency treatment is necessary; (2) a description of the treatment to be provided together with an explanation of the adequacy and appropriateness of such treatment, based upon the information received at the hearing; (3) any documents required by the provisions of section 302; (4) the application as filed pursuant to section 303(a); (5) a statement that the person is represented by counsel; and (6) an explanation of the effect of the certification, the person's right to petition the court for release under subsection (g), and the continuing right to be represented by counsel." 50 P.S. § 7303(d); Complaint at ¶ 63. Although Section 303 permits the "informal hearing" to take place before a hearing officer rather than a judge, a patient has a right to judicial review of a hearing taking place before a hearing officer. 50 P.S. § 7303(g); Complaint at ¶ 64. That judicial review includes a review of the certification by the hearing officer as well as any new evidence that is submitted to the court. *Id.* A patient can be committed for up to twenty days under Section 303. 50 P.S. § 7303(h); Complaint at ¶ 65.

D. Sections 304 and 305 commitments – 90 days, plus.

If the treatment facility believes that the patient requires further involuntary treatment, it must petition the court of common pleas for further commitment under 50 P.S. § 7304 ("Section 304"). Complaint at ¶ 65. Patients for whom a court-ordered commitment under Section 304 is sought are given substantial rights. They have a right to a public hearing (which can be closed at the request of the patient), the right to counsel and to the assistance of an expert in mental health (for which a fee is provided by the court if the patient cannot afford his or her own expert), the

right not to be called as a witness without consent, the right to cross-examine witnesses and present evidence, and the right to a decision within 48 hours of the hearing. 50 P.S. § 7304(e); Complaint at ¶ 69. A court may order treatment under Section 304 only if it finds "clear and convincing evidence that the person is severely mentally disabled and in need of treatment." 50 P.S. § 7304(f); Complaint at ¶ 67. Furthermore, "[i]npatient treatment shall be deemed appropriate only after full consideration has been given to less restrictive alternatives. Investigation of treatment alternatives shall include consideration of the person's relationship to his community and family, his employment possibilities, all available community resources, and guardianship services. An order for inpatient treatment shall include findings on this issue." *Id.* Court-ordered involuntary commitment under Section 304 may last for 90 days, at which point the treatment center must either release the patient or reapply for further court-ordered commitment under P.S. § 7305, triggering another hearing. 50 P.S. §§ 7304(g)(1); 7305(a); Complaint at ¶ 68.

E. No meaningful post-deprivation remedies for Section 302 commitments.

The only procedure for challenging a commitment under Section 302 lies in a petition for expungement under 18 Pa. C.S. § 6111.1(g). Last month, the Pennsylvania Supreme Court set forth the process that courts must follow in deciding whether to grant a petition to expunge a commitment under Section 302. *In re Vencil*, --- A.3d ---, 2017 WL 227792. There, the court held that a hearing on a petition to expunge a Section 302 commitment is limited to "the findings recorded by the physician and the information he or she relied upon in arriving at those findings, and requires deference to the physician, as the original factfinder[.]" *Id.* at *10. There is no ability for an individual committed under Section 302 to present evidence or cross-examine witnesses, and the hearing itself is weighted against the petitioner because deference must be given to the physician creating the record of the commitment. *Id.* Nothing in Section 6111.1

provides for the restoration of an individual's ability to possess a firearm under state law or requires the PSP to remove a successful petitioner's name from the database of prohibited persons. *See generally* 18 Pa. C.S. § 6111.1(g).

An individual who has been committed under Section 302 may also petition the court for a restoration of his right to possess firearms under Pennsylvania law. 18 Pa. C.S. § 6105(f)(1). While a successful petition under this section restores an individual's right to possess firearms under Pennsylvania law, it does not, and cannot, restore the right to possess firearms under federal law. *See, e.g., In re Keyes*, 83 A.3d 1016, 1026-1027 (Pa. Super. 2013).

There are no post-deprivation remedies available to individuals committed under Section 302 that would restore their rights in a manner consistent with the due process required before extinguishing a core fundamental right.

III. STANDARD OF REVIEW

Because Defendants have not raised facts beyond the allegations of the Complaint, their motion is necessarily a facial attack. *Nelson v. Com. of Pennsylvania Dep't of Pub. Welfare*, 244 F. Supp. 2d 382, 386 (E.D. Pa. 2002). When a 12(b)(1) motion presents a facial attack, the court "must accept the complaint's allegations as true," *Turicentro v. Am. Airlines*, 303 F.3d 293, 300 n.4 (3d Cir. 2002) (*overruled on other grounds by Animal Sci. Prods., Inc. v. China Minmetals Corp.*, 654 F.3d 462 (3d Cir. 2011)), and "must only consider the allegations of the complaint and documents referenced therein and attached thereto, in the light most favorable to the plaintiff." *Gould Elecs. Inc. v. United States*, 220 F.3d 169, 176 (3d Cir. 2000).

In considering a Rule 12(b)(6) motion, courts must "accept all factual allegations as true, construe the complaint in the light most favorable to the plaintiff, and determine whether, under any reasonable reading of the complaint, the plaintiff may be entitled to relief." *Fowler v. UPMC Shadyside*, 578 F.3d 203, 210 (3d Cir. 2009) (internal quotation marks omitted). In considering a

motion to dismiss, the district court is also bound not to "go beyond the facts alleged in the Complaint and the documents on which the claims made therein [are] based." *In re Burlington Coat Factory Sec. Litig.*, 114 F.3d 1410, 1425 (3d Cir. 1997).

The United States Court of Appeals for the Third Circuit has stated, "the distinction [between facial and as-applied constitutional challenges] goes to the breadth of the remedy provided, but 'not what must be pleaded in a complaint.'" *Bruni v. City of Pittsburgh*, 824 F.3d 353, 363 (3d Cir. 2016) (*quoting Citizens United v. F.E.C.*, 558 U.S. 310, 331 (2010)). When a facial challenge is presented, the court considers it "simply by applying the relevant constitutional test to the challenged statute, without trying to dream up whether or not there exists some hypothetical situation in which application of the statute might be valid." *Id.* With respect to claims arising under the Due Process Clause, the Third Circuit has clarified that all that is necessary is "some showing sufficient to justify moving the case beyond the pleadings to the next stage of litigation" and that "a plaintiff must plead a deprivation of a constitutional right and that the constitutional deprivation was caused by a person acting under the color of state law." *Phillips v. Cty. of Allegheny*, 515 F.3d 224, 234–35 (3d Cir. 2008). There are no set of facts that could exist in which a divestment of Second Amendment rights occurring only as a result of a Section 302 commitment could satisfy due process requirements. Complaint at ¶5. Plaintiffs' facial challenge is well-pled. *Bruni*, 824 F.3d at 363.

IV. ARGUMENT

A. Plaintiffs have alleged facts sufficient to state a claim against Defendants Wolf and Shapiro.

Defendants argue that Governor Wolf and Attorney General Shapiro are not proper parties to this suit because there is an insufficient "connection" between these two government officials and the challenged law. Defendants' Motion at 12. To support this argument,

Defendants rely upon *Rode v. Dellarciprete*, 845 F.2d 1195, 1208 (3d Cir. 1980) and *1st Westco Corp. v. School Dist. Of Phila.*, 6 F.3d 108, 112-116 (3d Cir. 1993) ("*Westco*"). These cases are wholly inapposite.

In *Rode*, the Third Circuit considered whether the Governor and Attorney General were proper defendants in a suit challenging the constitutionality of PSP regulations applicable only to PSP employees. *Rode*, 845 F.2d at 1208. In affirming the dismissal of the Governor and Attorney General, the court noted that the constitutional challenge concerned only the application of internal PSP regulations to a PSP administrative assistant. *Id.* Under these facts, the court held that "there is no realistic potential that the Governor's general power to enforce the laws of the state would have been applied" to the plaintiff. *Id.* The Third Circuit acknowledged, however, that the general duty to enforce the laws of a state is sufficient to bring an action against a public official. *Id.* (*citing Allied Artists Pictures Corp. v. Rhodes*, 473 F.Supp. 560, 568 (S.D. Ohio 1979)).

In *Westco*, the Third Circuit confirmed that a public official is a proper defendant to a suit challenging the constitutionality of a statute when that official has the authority to enforce it. *Westco*, 6 F.3d at 113. The Third Circuit held that the Governor and Attorney General were not proper parties to a lawsuit challenging the constitutionality of a Pennsylvania statute that allowed a school district to refuse payment to a contractor who failed to meet residency requirements. *Id.* The statute at issue declared that for contracts entered into by any school district, "a contractor's failure to comply with the residency requirement shall be sufficient reason 'to refuse payment of the contract price to the contractor.'" *Id.* at 113. The court reasoned that it was the School District who pays, or refuses to pay, therefore, "it is the School District, not the [Governor and Attorney General] that has the authority and the right to enforce" the challenged statute. *Id.* The

facts of the case and the court's holding make clear only that the Governor and Attorney General were not proper parties in a constitutional challenge to a School District contracting statute. This case provides no guidance here, where Plaintiffs challenge a criminal statute of general applicability – not an agency-specific law.

When there is a "realistic potential" that a government official with the general authority and duty to enforce the laws of the Commonwealth will enforce the challenged statutes, that official is a proper defendant. *Rode*, 845 F.2d at 1208. In this case, Plaintiffs' allegations, which must be taken as true for purposes of a facial motion to dismiss under Rule 12(b)(1), *Gould Elecs. Inc.*, 220 F.3d at 176, credibly charge that Defendants Wolf and Shapiro have the duty to enforce the challenged laws. *See* Complaint at ¶¶ 17-18; 37, 52. The facts as alleged in the Complaint are sufficient to maintain a suit against Defendants Wolf and Shapiro. In any event, this case will go forward because Defendants have not moved to dismiss the Complaint with respect to Defendant Blocker, conceding that he has the authority to enforce the challenged law and that this Court has subject matter jurisdiction over Plaintiffs' claims.

B. Defendants' circular argument that Plaintiffs lack a protected interest in their Second Amendment rights demonstrates the need for a pre-deprivation hearing.

Defendants argue that Plaintiffs do not have a protected interest in their fundamental Second Amendment rights because Defendants took them away.[4] If Defendants are right, no one could ever challenge the deprivation of these rights under Pennsylvania's scheme. Defendants' argument provides powerful support for Plaintiffs' claim that they were entitled to a pre-deprivation hearing.

[4] Defendants incorrectly assert that the Complaint "does not identify the nature of [Plaintiffs'] alleged interest." Defendants' Motion at 23 n.14. Plaintiffs plainly alleged that the enforcement of Section 6105 with respect to individuals committed under Section 302 "unlawfully deprived Plaintiffs, and all other similarly situated, of their Second Amendment rights without due process." Complaint at ¶ 83.

Defendants argue: (1) the mentally ill have no Second Amendment rights; (2) Plaintiffs' Section 302 commitments establish they are mentally ill; (3) Plaintiffs do not have Second Amendment rights because they are mentally ill; (4) Plaintiffs do not have protected interests under the Due Process Clause because they do not have Second Amendment rights; and (5) Plaintiffs cannot challenge the Section 302 process because they do not have protected interests. *See* Defendants' Motion at 22-27. This argument makes no sense, except to demonstrate the dramatic unfairness to Plaintiffs of Defendants' enforcement of the Pennsylvania Section 302 scheme and to further highlight the need for a pre-deprivation hearing.

Plaintiffs have alleged that their fundamental Second Amendment rights were taken from them by virtue of Pennsylvania's unconstitutional statutory scheme. Plaintiffs are challenging that process, which Defendants say established that Plaintiffs were mentally ill and justified Defendants' divestment of Plaintiffs' Second Amendment rights. Defendants cannot use their unconstitutional divestment of Plaintiffs' rights as a basis to deny them the ability to challenge the process by which Defendants took those rights. This would be like holding that an individual who has had his property taken cannot mount a due process challenge to the manner in which that property was taken because he has already lost the property and, therefore, no longer has a protected interest. Defendants' position would preclude any judicial review of the deprivations the Due Process Clause was designed to prevent. *See Aultman v. Cmty. Educ. Ctrs. Inc.*, 606 Fed. App'x 665, 668 (3d Cir. 2015) (reversing the dismissal under Rule 12(b)(6) of a due process claim involving an inmate who had $100 taken from his commissary account because he was not required to allege the inadequacy of post-deprivation remedies in his complaint and "it is well established that a prisoner has a property interest in the money in his inmate account" even after that money had been taken out).

Defendants' argument presumes that Plaintiffs' Section 302 commitments were adequate to determine they were sufficiently mentally ill to divest Plaintiffs of a fundamental right[5] and satisfied the requirements of due process. The latter issue, of course, is the heart of Plaintiffs' dispute, and Defendants' circular argument would prevent Plaintiffs from ever being able to challenge the permanent loss of their fundamental rights.

Additionally, Defendants' position is simply wrong as a matter of law. *See Keyes v. Lynch*, --- F.Supp.3d ---, No. 1:15-CV-457, 2016 WL 5799111, at *3 (M.D. Pa. Oct. 4, 2016) (following a Section 302 or 303 commitment, a plaintiff retains a Second Amendment interest and may allege a violation of due process "to the extent that there were facts, if true, which supported his due process claims"). In any event, Defendants' contention that Plaintiffs have lost any protected interest underscores their lack of faith in the adequacy of post-deprivation remedies and the need for a pre-deprivation hearing.

C. Plaintiffs have alleged facts demonstrating their entitlement to a pre-deprivation hearing.

Defendants misstate the nature of Plaintiffs' claim. Defendants assert that "Plaintiffs complain they did not have the opportunity to a hearing after they were committed under section 302 but before they sought to purchase a firearm." Defendants' Motion at 27 (citing Complaint at ¶ 78). Plaintiffs' allegation in paragraph 78 of the Complaint, however, was that "[u]nder the Fourteenth Amendment, governments must provide adequate due process procedures **before** divesting citizens of fundamental rights." Complaint at ¶ 78 (emphasis in original). Under the

[5] Pennsylvania seems to be an outlier in considering temporary emergency treatment to be a permanently disqualifying event. *See Furda v. State*, 997 A.2d 856, 879-87 (Md. App. 2010) (holding Maryland's emergency evaluation statute did not trigger disqualification as a commitment under 18 U.S.C. 922(g)(4) and reviewing cases involving similar state emergency commitment procedures); *see also United States v. Rehlander*, 666 F.3d 45, 49 (1st Cir. 2012) (holding Maine's emergency treatment statute, which, like Section 302, is *ex parte* and includes no due process protections, could not justify a permanent deprivation of Second Amendment rights and an indictment under 18 U.S.C. 922(g)(4)).

challenged Pennsylvania law, this divestment occurred following Plaintiffs' commitment, Complaint at ¶ 77, not when they were denied the ability to purchase a firearm. Defendants' misapprehension as to when they divested Plaintiffs of their fundamental rights infects Defendants' arguments and only underscores the necessity of a pre-deprivation hearing.

Bolstering their misreading of Plaintiffs' claim, Defendants argue they need not give Plaintiffs a pre-deprivation hearing because post-deprivation remedies are adequate, and the allegedly exigent nature of a Section 302 commitment justifies the lack of process prior to the deprivation.[6] Defendants' Motion at 17, 27. Defendants rely heavily upon *Parratt v. Taylor*, 451 U.S. 527 (1981), and *Hudson v. Palmer*, 468 U.S. 517 (1984), to support the adequacy of post-deprivation remedies. The more recent holding of the Supreme Court in *Zinermon v. Burch*, however, demonstrates that Defendants' reliance on these cases is misplaced. 494 U.S. 113, 132 (1990).

In *Zinermon*, the plaintiff alleged he was admitted as a "voluntary" mental patient but was not competent to give consent. *Id.* at 115. He alleged that the admitting physicians should have given him pre-deprivation "procedural safeguards required by the Constitution before involuntary commitment of a mentally ill person, and that petitioners' failure to do so violated his due process rights." *Id.* The district court granted the defendants' motion to dismiss, explaining that "a postdeprivation tort remedy is all the process the State can be expected to provide, and is constitutionally sufficient." *Id.*

[6] Defendants fail to explain how post-deprivation relief can be adequate to satisfy due process when Plaintiffs allegedly have no protected interest that would allow them to seek post-deprivation relief. It is clear from Defendants' irreconcilable positions and binding precedent that due process requires a hearing prior to the permanent deprivation of a fundamental right that occurs following a Section 302 commitment.

Affirming the reversal of the district court, the Supreme Court declared that "the root requirement of the Due Process Clause is that an individual be given an opportunity for a hearing before he is deprived of any significant protected interest[.]" *Id.* at 127. The Court noted, "[i]n some circumstances . . . a postdeprivation hearing, or a common-law tort remedy for erroneous deprivation, satisfies due process." *Id.* at 128 (citing, among other cases, *Parratt* and *Hudson*). The Court explained, however, that "*Parratt* and *Hudson* represent a special case of the general *Mathews v. Eldridge* analysis, in which postdeprivation tort remedies are all the process that is due, simply because they are the only remedies the State could be expected to provide." *Id.*

The Court distinguished deprivations occurring as a result of an "established state procedure," from deprivations occurring as a result of "random, unauthorized" actions by officials. *Id.* at 128-131; *see also Parratt*, 451 U.S. at 541. When an "established state procedure" deprives an individual of a protected interest – either a property interest or a liberty interest – due process requires a pre-deprivation remedy. *Zinermon*, 494 U.S. at 128-129. Where the deprivation results from "a random and unauthorized act by a state employee," however, the Supreme Court has explained that post-deprivation remedies may satisfy due process because the random and uncertain nature of the act precludes pre-deprivation process. *Parratt*, 451 U.S. at 543-544, 541. "In situations where the State feasibly can provide a predeprivation hearing," however, due process mandates that the State "do so **regardless of the adequacy of** a[ny] postdeprivation [remedies]." *Zinermon*, 494 U.S. at 132 (citations omitted) (emphasis added); *see also Alvin v. Suzuki*, 227 F.3d 107, 120 (3d Cir. 2000) ("[I]f the Constitution requires pre-termination procedures, the most thorough and fair post-termination hearing cannot undo the failure to provide such procedures.").

The Supreme Court explained that its decision in *Parratt* is "an application of that test to the unusual case in which one of the variables in the *Mathews* equation—the value of predeprivation safeguards—is negligible in preventing the kind of deprivation at issue." *Zinermon*, 494 U.S. at 129. That seminal due process decision, *Mathews v. Eldridge*, identifies three factors for courts to consider in determining "what process is due" in a given set of circumstances: (1) "the private interest that will be affected by the official action[;]" (2) "the risk of an erroneous deprivation of [the protected] interest through the procedures used" and the value of "additional or substitute procedural safeguards;" and (3) the governmental interest involved, which includes "the fiscal and administrative burdens" of additional or alternative procedures. *Mathews v. Eldridge*, 424 U.S. 319, 334-35 (1976). In *Parratt*, the *Zinermon* Court explained, post-deprivation remedies were deemed adequate under *Matthews* because of the random and unpredictable nature of the deprivation at issue. *Zinermon*, 494 U.S. at 128-129 (citing *Parratt*, 451 U.S. at 543-544, 541).

Defendants' heavy reliance on *Parratt* and *Hudson* is inappropriate because this case does not present the "special instance" where a post-deprivation process will suffice. Section 302 and the resulting deprivation of Second Amendment rights are not random, unpredictable, or unauthorized. Rather, in every instance when an individual is committed under Section 302, "established state procedures" deprive that individual of his core Second Amendment rights.

Where "established state procedures" are involved, the Third Circuit requires a pre-deprivation remedy "where the pre-deprivation safeguards would be of use in preventing the kind of deprivation alleged[.]" *Montanez v. Secretary Pennsylvania Dept. of Corrections*, 773 F.3d 472, 483 (3d Cir. 2014) (citations omitted). In *Montanez*, Pennsylvania automatically extracted variable amounts of funds from inmate accounts to satisfy court-ordered obligations.

Id. at 484. The Court required a pre-deprivation hearing, emphasizing the efficacy of additional pre-deprivation procedures, specifically the ability of those procedures to reduce the risk of error in determining the correct amount and to do so without causing administrative burdens. *Id.* at 484-485; *see also Higgins*, 293 F.3d at 694 n. 3; *Burns v. Pa. Dep't of Corr.*, 642 F.3d 163, 171–73 (3d Cir. 2011). The test is quite simple: "[t]aken together, these cases make clear that when pre-deprivation process could be effective in preventing errors, that process is required." *Montanez*, 773 F.3d at 484 (citing *Burns*, 642 F.3d at 171–73 and *Higgins*, 293 F.3d at 693–94). The Third Circuit mandates pre-deprivation remedies because they are highly effective in preventing formal state procedures from erroneously depriving individuals of a protected interest.

The Third Circuit has ruled that post-deprivation remedies are constitutionally adequate only in very narrow, exceptional circumstances. *See Tillman v. Lebanon County Corr. Facility*, 221 F.3d 410 (3d Cir. 2000); *Reynolds v. Wagner*, 128 F.3d 166, 174 (3d Cir. 1997). These cases addressed established procedures that assessed uniform fees in a fixed and systematic manner against inmate accounts to defray costs for medical treatment and living expenses. *See Tillman*, 221 F.3d at 421-22; *Reynolds*, 128 F.3d at 174. Unlike the facts in *Montanez*, the Third Circuit found (1) the minimal risk of error and (2) the "fixed" and "uniform" nature of the assessments to be decisive factors in the analysis. *See Tillman*, 221 F.3d at 421-422. According to the Third Circuit, necessitating pre-deprivation remedies would create fiscal and administrative burdens by "significantly increase[ing] transaction costs" for "essentially ministerial matters" presenting a "low risk of error." *Tillman*, 221 F.3d at 422. Due process does not require a pre-deprivation remedy in these circumstances, the Third Circuit explains, because "[i]t is impractical" and "the

value of predeprivation safeguards . . . is negligible in preventing" the low risk of a **ministerial** error. *Id.* at 421-422 (citations omitted).

Commitments under Section 302 are not ministerial because they involve fact-dependent analyses that call for the highly varied exercise of judgment by a diverse population of committing physicians. The decision to commit an individual under Section 302 is based upon a physician's personal opinion that there are "reasonable grounds to believe that [the individual in question] is severely mentally disabled and in need of immediate treatment." 50 P.S. § 7302(a), (b). After merely two hours, the physician must certify that the individual is a danger to self or others, and the individual committed an act in furtherance thereof. 50 P.S. § 7302(b). Because reasonable physicians might disagree as to whether a particular patient constitutes such a danger, especially given only two hours for evaluation, the risk of erroneous deprivation in the context of a Section 302 commitment is necessarily quite high. Because of the limited duration of a Section 302 commitment, a physician may easily err on the side of finding a person committable. Defendants permanently deprive Plaintiffs, and all others similarly situated, of their Second Amendment rights based upon the subjective opinions of treating physicians after brief evaluations under non-uniform conditions.

At the heart of the matter, Defendants argue that exigent circumstances and Pennsylvania's interest in preventing the mentally ill from possessing firearms justify the lack of pre-deprivation procedures. Defendants' Motion at 30. Defendants rely upon the Pennsylvania Superior Court's reasoning in *In re Keyes*, 83 A.3d 1016, 1026-1027 (Pa. Super. 2013), which identifies an important government interest in "controlling the availability of firearms for those who have been adjudicated mentally defective or [who] have ever been committed to a mental institution[.]" *Id.* Defendants' argument misses the point.

Although the requirement to provide meaningful pre-deprivation process may be relaxed if quick action by the State is needed to hold an individual for emergency treatment, exigent circumstances do not justify denial of pre-deprivation procedural safeguards before the permanent loss of Second Amendment rights following Section 302 commitments. Again, Defendants have misstated Plaintiffs' claim. Plaintiffs are not alleging that a hearing is required before committing an individual under Section 302. Rather they allege only that a pre-deprivation hearing was required before Defendants permanently divested Plaintiffs, and others similarly situated, of their Second Amendment rights as a result of such commitments. Third Circuit precedent makes clear that such a pre-deprivation hearing is required. *Tillman*, 221 at 421.

D. Plaintiffs are not required to allege the inadequacy of post-deprivation remedies.

Defendants argue that Plaintiffs were required to allege that any available post-deprivation remedies are inadequate. Defendants' Motion at 27. This argument ignores settled Third Circuit precedent.

To state a claim for the denial of due process, a plaintiff need allege only the following: "(1) that he was deprived of a protected liberty or property interest; (2) that this deprivation was without due process; (3) that the defendant subjected the plaintiff, or caused the plaintiff to be subjected to, this deprivation without due process; (4) that the defendant was acting under color of state law; and (5) that the plaintiff suffered injury as a result of the deprivation without due process." *Sample v. Diecks*, 885 F.2d 1099, 113 (3d Cir. 1989); *see also Haley v. Kintock Group*, 587 Fed. App'x 1, 3 (3d Cir. 2014) (unpublished) (citing *Sample* for the elements of a due process claim).

Plaintiffs have alleged: that they have been deprived of their fundamental Second Amendment rights (Complaint at ¶¶ 3, 7-9, 77, 83); that this deprivation was without due process of law (*id.* at ¶¶ 53-59, 69-74); that the Defendants caused the deprivation (*id.* at ¶¶ 17-20, 82-84); that Defendants were acting under color of law (*id.* at ¶¶ 10, 75, 83); and that Plaintiffs suffered injury as a result of the deprivation (*id.* at ¶¶ 3, 36-37, 52, 83). Accordingly, Plaintiffs have alleged the facts required to support their cause of action under Third Circuit precedent.

Defendants cite only one Third Circuit case (unpublished) involving a Rule 12(b)(6) motion, and there the court determined that the complaint demonstrated the complained-of process was constitutionally adequate.[7] The remaining cases from this Circuit relied upon by Defendants were decided not on the pleadings, but on summary judgment after discovery. None of those cases held that a complaint was deficient for failing to allege the inadequacy of post-deprivation remedies. *Alvin v. Suzuki*, 227 F.3d 107, 116-119 (3d Cir. 2000) (reviewing the record evidence on summary judgment); *Elsmere Park Club v. Town of Elsmere*, 542 F.3d 412, 423 (3d Cir. 2008) (affirming the grant of summary judgment on the record); *Deorio v. Delaware County*, 2009 WL 2245067, Case No. 8-5762 (E.D. Pa. July 27, 2009) (granting summary judgment on the evidence); *Welsch v. Twp. of Upper Darby*, 2008 WL 3919354, Case No. 7-4578 (E.D. Pa. Aug. 26, 2008) (granting summary judgment). Defendants cite no Third

[7] *Companiony v. Murphy*, 658 Fed. App'x 118, 121-122 (3d Cir. 2016) (unpublished). There, the court stated that "due process entitled [Companiony] to a pretermination opportunity to respond, coupled with post-termination administrative proceedings." *Id.* The court upheld the district court's order dismissing the case for failure to state a claim because the complaint laid out both pre-termination and post-termination processes that were constitutionally adequate in that context.

Circuit case that declares Plaintiffs must allege affirmatively the inadequacy of post-deprivation remedies at this state of litigation.[8]

Third Circuit precedent demonstrates that Plaintiffs are not required to plead the inadequacy of post-deprivation remedies. In the Third Circuit, Plaintiffs need only plead a deprivation "under the authority of an established state procedure." *Higgins v. Beyer*, 293 F.3d 683, 694 (3d Cir. 2002) (reversing dismissal of a complaint, stating that allegations of state actors taking money from an inmate's account pursuant to statutory authority was sufficient to state a claim, and rejecting defendants' argument that there was an adequate post-deprivation remedy that made dismissal appropriate). Defendants enforce an unconstitutional statutory scheme against Plaintiffs and other similarly situated. The enforcement of that scheme deprives Plaintiffs and others similarly situated of core fundamental rights. Plaintiffs have alleged that this deprivation of fundamental rights occurs without pre-deprivation due process. Complaint at ¶ 37, 52. Based on the well-pled allegations, Complaint at ¶ 3, 5, 37, 52, 70, 73, 74, 79-87, Plaintiffs were entitled to a hearing before they were divested of their fundamental rights. *Higgins*, 293 F.3d at 694; *see also Schmidt v. Creedon*, 639 F.3d 587, 597 (3d Cir. 2011) ("[A]bsent extraordinary circumstances, due process requires notice and a hearing prior to suspension

[8] The out-of-jurisdiction cases Defendants cite to support their argument are similarly unavailing. Defendants' Motion at 16. For example, *Prescott v. Florida*, 343 Fed. App'x 395, 399-400 (11th Cir. 2009), is an unpublished decision where the court cited authority applying the *Parratt/Hudson* exception to the Supreme Court's rule that a pre-deprivation hearing is required to safeguard protected interests; this exception is not applicable here. *See also Jefferson v. Jefferson County*, 360 F. 3d 583, 585, 588 (6th Cir. 2004) (noting that plaintiff received "an appropriate predeprivation, right-of-reply hearing that complies with the due process requirements for such hearings"); *Mansfield Apt. Owners Ass'n v. City of Mansfield*, 988 F.2d 1469, 1474 (6th Cir.1993) (finding "several pertinent policies of the City of Mansfield provide landowners adequate procedural safeguards against an erroneous deprivation of property" including notice and an opportunity for a hearing prior to the deprivation); *Marino v. Ameruso*, 837 F. 2d 45, 47 (2d Cir. 1988) (plaintiff was given a full hearing before an administrative law judge prior to the deprivation); *Kinavey v. D'Allesandro*, C.A. No. 10-364, 2010 WL 3896491, at *1 (W.D. Pa. Sept. 29, 2010) (stating that plaintiff was given a pre-deprivation hearing).

without pay, even where union grievance procedures, after the fact, fully compensate erroneously suspended employees.").

At this stage of the proceeding, Plaintiffs are required only to have alleged facts sufficient to support their cause of action. *Phillips*, 515 F.3d at 234-35. Plaintiffs have alleged facts sufficient to support each element of a claim under the Due Process Clause as those elements were set forth by the Third Circuit in *Sample*.

E. Defendants rely on post-deprivation remedies that do not satisfy due process.

Despite Third Circuit law to the contrary, Defendants rely upon the post-deprivation remedies of expungement and restoration of rights to justify the lack of pre-deprivation process.[9] Neither of these remedies meets the requirements of due process, even if post-deprivation remedies could be sufficient to overcome the patent inadequacy of the lack of any pre-deprivation process. The Third Circuit has held that a claim involving procedural due process must be resolved by weighing the private interest affected by the governmental action and the value of additional procedural safeguards against the burdens those additional procedural safeguards would impose. *Rogin v. Bensalem Twp.*, 616 F.2d 680, 694 (3d Cir. 1980). The key procedural safeguards necessary to provide individuals with adequate due process are: (1) notice of the basis of the governmental action; (2) a neutral arbiter; (3) an opportunity to make an oral presentation; (4) a means of presenting evidence; (5) an opportunity to cross-examine witnesses

[9] Defendants also assert that the availability of an administrative appeal to challenge an erroneous denial of the ability to purchase a firearm is a sufficient post-deprivation remedy. Defendants' Motion at 20-22. Plaintiffs are not challenging the sufficiency of the investigatory process involved with Pennsylvania background checks or the sufficiency of the process to challenge an erroneous denial. Plaintiffs alleged that they have been committed under Section 302. Complaint at ¶¶ 2, 21-52. Therefore, their rights to acquire and keep firearms were denied in accordance with Pennsylvania law. The processes available to those who have been **improperly** denied are simply inapplicable to the instant challenge, which goes to the process by which Plaintiffs were divested of their Second Amendment rights in the first place. Defendants' reliance on this process as a "remedy" is misplaced.

or to respond to written evidence; (6) the right to be represented by counsel; and (7) a decision based on the record with a statement of reasons for the result. *Id.*

First, the Complaint alleges that none of the safeguards identified in *Rogin* are observed before the loss of Second Amendment rights following a Section 302 commitment. Complaint at ¶ 81. Defendants have not argued that the process for a commitment under Section 302 itself contains any of these procedural safeguards because the process plainly does not offer these procedural safeguards.

Second, Defendants mischaracterize the nature of an expungement proceeding under Pennsylvania law. Defendants incorrectly assert that an expungement hearing is "a full evidentiary hearing at which the petitioner and PSP may present documentary and testimonial evidence, cross-examine witnesses and enjoy the full panoply of evidentiary and procedural rights reflected in the Pennsylvania Rules of Civil Procedure." Defendants' Motion at 20. Defendants cite to numerous Pennsylvania cases to support this statement, but they hold only that an expungement is possible. *See id*. None of these cases supports Defendants' erroneous characterization of an expungement hearing.

Although Defendants have omitted any reference to it, the Pennsylvania Supreme Court recently established the process for considering expungement of a commitment under Section 302. *In re Vencil*, --- A.3d ---, 2017 WL 227792 (Pa. Jan. 19, 2017). The court held that an expungement hearing is limited to "the findings recorded by the physician and the information he or she relied upon in arriving at those findings, and requires deference to the physician, as the original factfinder[.]" *Id.* at *10. Contrary to Defendants' characterization, the expungement process does not provide what Defendants say it does. Rather, it is a limited proceeding in which a petitioner cannot present new evidence, cannot call witnesses, cannot cross-examine witnesses,

and has nothing even approximating a written record of findings from a neutral arbiter upon which to draw to aid him in making his case. As *In re Vencil* makes clear, the hearing is not even conducted *de novo*.

The expungement process affords Plaintiffs none of the procedural safeguards identified in *Rogin*, 616 F.2d at 694, except for the opportunity to hire an attorney and appear in court. That process subjects Plaintiffs to a review dramatically skewed towards upholding their commitments. *See In re Vencil*, --- A.3d ---, 2017 WL 227792 at *10 (holding that the review is to be conducted in a light most favorable to the committing physician). This does not satisfy due process because it does not provide a meaningful opportunity for judicial review of a Section 302 commitment as required by *Rogin*. Moreover, nothing in the statute governing expungement of a Section 302 commitment addresses Second Amendment rights. An expungement cannot restore those rights. *See, e.g., In re Keyes*, 83 A.3d at 1026-1027.

Defendants also rely upon the process by which individuals can petition to restore their right to possess a firearm under state law to justify the complete, permanent deprivation of Plaintiffs' Second Amendment rights. As alleged in the Complaint, Plaintiffs' Section 302 commitment results in disqualification under both Pennsylvania and federal law. Complaint at ¶¶ 33-37, 49-52. A restoration of state firearms rights cannot restore firearms rights under federal law. *In re Keyes*, 83 A.2d at 1019–20 ("The court entered an order [pursuant to Section 6105(f)(1)] restoring appellant's rights to possess a firearm . . . [but] [b]ecause these commitments remained on appellant's record, although he could again possess a firearm under Pennsylvania law, he was still barred from possessing a firearm under the federal Gun Control Act."). This insufficiency is fatal to Defendants' argument because the state restoration process

cannot actually remedy the deprivation of Plaintiffs' Second Amendment rights. Accordingly, this post-deprivation process cannot support dismissal of the Complaint.

Plaintiffs have adequately alleged facts sufficient to satisfy each element of a due process claim under Third Circuit precedent. Any distinction between an as-applied challenge and a facial challenge "goes to the breadth of the remedy provided, but 'not what must be pleaded in a complaint.'" *Bruni*, *supra*, 824 F.3d at 363. Plaintiffs have satisfied their burden. Regardless, Defendants' additional arguments fail because Plaintiffs are entitled to a pre-deprivation hearing before they are permanently deprived of their fundamental rights, and the post-deprivation processes relied upon by Defendants do not provide adequate procedural safeguards.

V. CONCLUSION

For the reasons stated above, Plaintiffs respectfully request that this Court deny Defendants' Motion.

Respectfully submitted,

/s/

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 13th day of February, 2017, copies of this Opposition to Defendants' Motion to Dismiss Complaint were served, via electronic delivery through the Court's ECF filing system, which will distribute copies to all counsel of record.

/s/
Shawn M. Rodgers

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

JOHN DOE I, et al.,	)	
	)	
	)	
Plaintiffs,	)	**Case No.: 16-6039**
	)	
v.	)	
	)	
THOMAS W. WOLF, in his official capacity as Governor of the Commonwealth of Pennsylvania, et al.,	)	
	)	
	)	
	)	
Defendants.	)	

(PROPOSED) ORDER

Upon consideration of Defendants' Motion to Dismiss Complaint, Plaintiffs' Opposition thereto, and any hearing thereon, it is hereby ORDERED this __ day of _____, 2017, that Defendants' Motion is DENIED.

.

_____
Judge, United States District Court
for the Eastern District of Pennsylvania