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

JOHN DOE, et al.,	:	CIVIL ACTION
	:	
Plaintiff,	:	No. 16-6039
	:	
v.	:	
	:	
THOMAS WOLF, et al.,	:	
	:	
Defendants.	:	

ORDER

AND NOW, this day of , 2017, upon consideration of Motion to Dismiss the Complaint by Governor Thomas Wolf, Attorney General Josh Shapiro, Col. Tyree Blocker and the Pennsylvania State Police, it is ORDERED and DECREED that the Motion is GRANTED. The Complaint is hereby DISMISSED with prejudice.

BY THE COURT:

_____
Slomsky, J.

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GOVERNOR WOLF, ATTORNEY GENERAL SHAPIRO, COL. BLOCKER AND THE PENNSYLVANIA STATE POLICE'S MOTION TO DISMISS COMPLAINT

Governor Thomas Wolf, Attorney General Josh Shapiro,[1] Col. Tyree Blocker and the Pennsylvania State Police, pursuant to Fed. R. Civ. P. 12 (b)(1) and (b)(6), hereby move to dismiss the Complaint for the reasons contained in the attached Memorandum of Law.

Wherefore, defendants request that the Complaint be dismissed.

JOSH SHAPIRO
ATTORNEY GENERAL

BY: /s/ Barry N. Kramer
Barry N. Kramer
Chief Deputy Attorney General
Id. No. 41624

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Telephone: (215) 560-1581
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[1] The Complaint names Attorney General Bruce Beemer as a defendant in his official capacity only. As of January 17, 2017, Josh Shapiro replaced Bruce Beemer as the Pennsylvania Attorney General. Pursuant to Fed. R. Civ. P. 25(d), the present occupant of that office should be substituted for the past occupant. This Motion will refer to the present official of the office.

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MEMORANDUM OF LAW IN SUPPORT OF GOVERNOR WOLF, ATTORNEY GENERAL SHAPIRO, COL. BLOCKER AND THE PENNSYLVANIA STATE POLICE'S MOTION TO DISMISS COMPLAINT

I. INTRODUCTION

Plaintiffs are two "John Doe's" who, pursuant to 42 U.S.C. § 1983, mount a facial challenge to sections of the Pennsylvania Uniform Firearms Act, 18 Pa.C.S. §§ 6101-6127 ("UFA"),[2] specifically 18 Pa.C.S. § 6105(a)(1), (c)(4), which prohibit persons who have been "involuntarily committed to a mental institution" under 50 P.S. § 7302 ("section 302") of the Mental Health Procedures Act, 50 P.S. §§ 7101-7503 ("MHPA"),[3] from acquiring or possessing a firearm. Plaintiffs allege that as juveniles they were involuntarily committed under section 302 and that, now as adults, they are prevented from purchasing a firearm for self-defense in their homes. Alleging a violation of procedural due process rights under the Fourteenth Amendment, plaintiffs seek equitable relief and sue Governor Thomas Wolf, Attorney General Josh

[2] The Complaint refers to the UFA as the "Firearms Disqualification Statute." Complaint, ¶¶ 3, 37, 52, 75, 81-84, 87. This nomenclature is not found in the statute and seems to be a fabricated shorthand. Defendants will refer to the proper statutory name. See 18 Pa.C.S. § 6101.

[3] Here too the Complaint incorrectly refers to the name of a Pennsylvania statute. The Complaint refers to the MHPA, specifically section 7109 as the "Involuntary Commitment Reporting Statute." Complaint, ¶¶ 4, 71. See also Complaint, ¶¶ 36, 41, 71-72, 77, 86-87 (referencing the "Temporary Emergency Commitment Statute"). This nomenclature is not found in the statute. Defendants will refer to the proper statutory name, that is, the MHPA. See 50 Pa.C.S. § 7101.

Shapiro and Commissioner of the Pennsylvania State Police ("PSP") Tyree Blocker, all named in their official capacity. Plaintiffs also sue the PSP. Defendants now move to dismiss the Complaint for lack of subject matter jurisdiction as against the PSP and for failure to state a procedural due process claim. Insofar as they had been involuntarily committed under section 302, plaintiffs lack a protected interest in purchasing a firearm until their rights are restored under Pennsylvania law, because Pennsylvania provides state remedies to pursue restoration of those rights and because plaintiffs fail to allege they pursued those state remedies.

II. ARGUMENT

A. Standard on a Motion to Dismiss

A **Rule 12(b)(1)** motion is the proper mechanism for raising the issue of whether Eleventh Amendment immunity bars federal subject matter jurisdiction. Blanciak v. Allegheny Ludlum Corp., 77 F.3d 690, 694 n. 2 (3d Cir.1996), citing Pennhurst State Sch. & Hosp. v. Halderman, 465 U.S. 89, 98-100 (1984). "An actual determination must be made whether subject matter jurisdiction exists before a court may turn to the merits of the case." Tagayun v. Stolzenberg, 239 Fed. Appx. 708, 710 (3d Cir. 2007). When a defendant challenges subject matter jurisdiction, plaintiff must show that the case is properly before the court. Kehr Packages, Inc. v. Fidelcor, 926 F.2d 1406, 1409 (3d Cir.1991); Jaffess v. Council Rock Sch. Dist., C.A. No. 06-0143, 2006 WL 1722416, at *2 (E.D. Pa. June 19, 2006).

Under the **Rule 12(b)(6)** standard established by Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 556 (2007), and Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009), a court reviewing the sufficiency of a complaint must take three steps. First, it must "tak[e] note of the elements [the] plaintiff must plead to state a claim." Iqbal, 556 U.S. at 675. Second, it should identify allegations that, "because they are no more than conclusions, are not entitled to the assumption of truth." Id., at 679. See also Burtch v. Milberg Factors, Inc., 662 F.3d 212, 224 (3d Cir.2011)

("Mere restatements of the elements of a claim are not entitled to the assumption of truth.") Finally, "[w]hen there are well-pleaded factual allegations, [the] court should assume their veracity and then determine whether they plausibly give rise to an entitlement to relief." Id., 556 U.S. at 679; Connelly v. Lane Const. Corp., No. 14-3792, 2016 WL 106159, at *3-4 (3d Cir. Jan. 11, 2016). A complaint must "show" an entitlement with its facts. Iqbal, 556 U.S. at 678-79.

B. Factual Allegations

Doe I became melancholy at age 16. Complaint, ¶¶ 21, 23. His mother, fearing he might harm himself, took him to a hospital Emergency Room ("ER"), where a physician conducted an emergency evaluation under section 302(a), (b). Id., ¶¶ 23-24. On September 11, 2011, the physician committed Doe for emergency involuntary treatment under section 302 because he "pose[d] a clear and present danger of harm to others or to himself" under 50 P.S. § 7301 ("section 301"). Id., ¶ 25.[4] While at the hospital, Doe I's mother acknowledged in writing the physician's determination to commit her son, but left the ER that evening with Doe I after about 7 hours; he was not treated or held involuntarily. Id., ¶¶ 22, 26. As a result of the physician's commitment, PSP entered Doe I's name into the Pennsylvania Instant Check System ("PICS") database and/or reported that information to the National Instant Check System ("NICS") database as a person prohibited from purchasing and/or owning a gun under Pennsylvania and/or federal law. Id., ¶ 33. In fall 2015, Doe I sought to purchase a firearm "for self-defense at his home," but was prevented from doing so because the PICS/NICS background check reflected that he had been committed under section 302. Id., ¶¶ 36-37.[5]

[4] Neither plaintiff claims that at the time of commitment he did not "pose a clear and present danger of harm to others or to himself."

[5] Note that Pennsylvania law does not require a license to merely possess firearms if one is otherwise lawfully able to do so; a license is only is required for concealed carrying of a firearm.

On August 17, 2011, Doe II was taken a hospital ER. Id., ¶ 38. Due to his behaviors, he was placed in a locked room for approximately nine hours. Id., ¶¶ 39-40. He claims he did not learn that he had been committed under section 302 until he sought to purchase a firearm in 2013 "for self-defense at his home." Id., ¶¶ 41-42, 52. He was prevented from doing so because the PICS/NICS background check reflected that he had been committed under § 302. Id., ¶ 52.

C. Legal Background

1. The MHPA

Section 301(a) provides that "a person [who] is severely mentally disabled and in need of immediate treatment, [] may be made subject to involuntary emergency examination and treatment. A person is severely mentally disabled when, as a result of mental illness, his capacity to exercise self-control, judgment and discretion in the conduct of his affairs and social relations or to care for his own personal needs is so lessened that he poses a clear and present danger of harm to others or to himself." Section 301(b) sets the standard for determining if someone presents a "clear and present danger" to himself or others.[6]

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[6] Section 301(b)(1) provides that "Clear and present danger to others shall be shown by establishing that within the past 30 days the person has inflicted or attempted to inflict serious bodily harm on another and that there is a reasonable probability that such conduct will be repeated….
(2) Clear and present danger to himself shall be shown by establishing that within the past 30 days:
(i) the person has acted in such manner as to evidence that he would be unable, without care, supervision and the continued assistance of others, to satisfy his need for nourishment, personal or medical care, shelter, or self-protection and safety, and that there is a reasonable probability that death, serious bodily injury or serious physical debilitation would ensue within 30 days unless adequate treatment were afforded under this act; or
(ii) the person has attempted suicide and that there is the reasonable probability of suicide unless adequate treatment is afforded under this act. For the purposes of this subsection, a clear and present danger may be demonstrated by the proof that the person has made threats to commit suicide and has committed acts which are in furtherance of the threat to commit suicide; or

Section 302 provides, inter alia, for an application for and emergency mental examination of a person who presents a "clear and present danger" to himself or others under delineated circumstances. Section 302(a) and (b)[7]. At the facility, the person has certain rights, including being informed of the reasons for emergency examination, to communicate with others, be kept informed of his status and given reasonable telephone use. Id., § 302(c). A patient must be examined within two hours after arrival at the facility. Section 302(b). If the examination reveals

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(iii) the person has substantially mutilated himself or attempted to mutilate himself substantially and that there is the reasonable probability of mutilation unless adequate treatment is afforded under this act. For the purposes of this subsection, a clear and present danger shall be established by proof that the person has made threats to commit mutilation and has committed acts which are in furtherance of the threat."

[7]Section 302 (a) **Application for Examination**.--Emergency examination may be undertaken at a treatment facility upon the certification of a physician stating the need for such examination; or upon a warrant issued by the county administrator authorizing such examination; or without a warrant upon application by a physician or other authorized person who has personally observed conduct showing the need for such examination.
(1) Warrant for Emergency Examination.--Upon written application by a physician or other responsible party setting forth facts constituting reasonable grounds to believe a person is severely mentally disabled and in need of immediate treatment, the county administrator may issue a warrant requiring a person authorized by him, or any peace officer, to take such person to the facility specified in the warrant.
(2) Emergency Examination Without a Warrant.--Upon personal observation of the conduct of a person constituting reasonable grounds to believe that he is severely mentally disabled and in need of immediate treatment, and physician or peace officer, or anyone authorized by the county administrator may take such person to an approved facility for an emergency examination. Upon arrival, he shall make a written statement setting forth the grounds for believing the person to be in need of such examination.
(b) Examination and Determination of Need for Emergency Treatment.--A person taken to a facility shall be examined by a physician within two hours of arrival in order to determine if the person is severely mentally disabled within the meaning of section 301 and in need of immediate treatment. If it is determined that the person is severely mentally disabled and in need of emergency treatment, treatment shall be begun immediately. If the physician does not so find, or if at any time it appears there is no longer a need for immediate treatment, the person shall be discharged and returned to such place as he may reasonably direct. The physician shall make a record of the examination and his findings. In no event shall a person be accepted for involuntary emergency treatment if a previous application was granted for such treatment and the new application is not based on behavior occurring after the earlier application.

the patient needs treatment, it must begin immediately. Id. If treatment is not necessary, the patient must be discharged. Id. In any event, the patient must be discharged within 120 hours unless further treatment is ordered by the court or he voluntarily seeks additional treatment. Section 302(d). The MHPA, in further vindication of a patient's rights, also contains a reservation of rights that preserves all rights and remedies otherwise available to those individuals, including actions for injunction, mandamus, and habeas corpus. 50 P.S. § 7113.

2. The Pennsylvania UFA

The UFA, which regulates firearms use in Pennsylvania, provides in pertinent part:

§ 6105. Persons not to possess, use, manufacture, control, sell or transfer firearms
(a) Offense defined.--
(1) A person who has been convicted of an offense enumerated in subsection (b), within or without this Commonwealth, regardless of the length of sentence or whose conduct meets the criteria in subsection (c) shall not possess, use, control, sell, transfer or manufacture or obtain a license to possess, use, control, sell, transfer or manufacture a firearm in this Commonwealth….

(c) Other persons.--In addition to any person who has been convicted of any [enumerated] offense listed under subsection (b), the following persons shall be subject to the prohibition of subsection (a):
…
(4) A person who has been adjudicated as an incompetent or who has been involuntarily committed to a mental institution for inpatient care and treatment under section 302, 303 or 304 of the provisions of the act of July 9, 1976 (P.L. 817, No. 143), known as the Mental Health Procedures Act. This paragraph shall not apply to any proceeding under section 302 of the Mental Health Procedures Act unless the examining physician has issued a certification that inpatient care was necessary or that the person was committable.
…
(9) A person who is prohibited from possessing or acquiring a firearm under 18 U.S.C. § 922(g)(9) (relating to unlawful acts)….

(f) Other exemptions and proceedings.--
(1) Upon application to the court of common pleas under this subsection by an applicant subject to the prohibitions under subsection (c)(4), the court may grant such relief as it deems appropriate if the court determines that the applicant may possess a firearm without risk to the applicant or any other person.
…

(3) All hearings conducted under this subsection shall be closed unless otherwise requested to be open by the applicant.

…

(h) License prohibition.--Any person who is prohibited from possessing, using, controlling, selling, purchasing, transferring or manufacturing any firearm under this section shall not be eligible for or permitted to obtain a license to carry a firearm under section 6109 (relating to licenses).
(i) Firearm.—[defined]
(j) Copy of order to State Police.--If the court grants relief from the disabilities imposed under this section, a copy of the order shall be sent by the prothonotary within ten days of the entry of the order to the Pennsylvania State Police and shall include the name, date of birth and Social Security number of the individual.

Under the UFA, at the point of proposed purchase, a firearm seller is required, among other things, to submit a criminal and mental health history check of the buyer to the PSP. This is known as the PICS check. See 18 Pa. C.S. § 6111(b) (duties of seller); Complaint, ¶¶ 36, 49, 52. The PSP reviews the buyer's criminal and mental health history to determine if he is prohibited under federal or state law from possessing firearms. Id. If the PSP determines that a buyer cannot legally purchase a firearm--for example, if he has a disabling condition under 18 Pa. C.S. § 6105(c)(4)--the sale is prohibited.

D. This Court Lacks Subject Matter Jurisdiction over Plaintiffs' Claim for Equitable Relief Against the PSP

Plaintiffs' claim for equitable relief against the PSP under § 1983 for violation of the Fourteenth Amendment is barred by the Eleventh Amendment. Absent consent by the State, the Eleventh Amendment[8] bars federal subject matter jurisdiction of suits by private parties against states and state agencies. Idaho v. Coeur d'Alene Tribe of Idaho, 521 U.S. 261, 267-270 (1997); Seminole Tribe of Florida v. Florida, 517 U.S. 44, 54, 58 (1996); Kentucky v. Graham, 473 U.S. 159, 169 (1985). This bar specifically extends to suits against departments or agencies that have no existence apart from the state. Laskaris v. Thornburgh, 661 F.2d 23, 25 (3d Cir. 1981) (citing

[8] The Eleventh Amendment provides that "The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State."

Mt. Healthy City Board of Ed. v. Doyle, 429 U.S. 274, 280 (1977)) cert. denied, 469 U.S. 886 (1984). As when the State itself is named as the defendant, a suit against a state agency is barred, regardless of the relief requested. Coeur d'Alene Tribe, 521 U.S. at 270; Seminole Tribe, 517 U.S. at 58; Graham, 473 U.S. at 167 n.14; Green v. Mansour, 474 U.S. 64, 68 (1985); Pennhurst, 465 U.S. at 101; Alabama v. Pugh, 438 U.S. 731 (1978); Edelman v. Jordan, 415 U.S. 651, 667 (1974); Lavia v. PA DOC, 224 F. 3d 190, 195 (3d Cir. 2000).

Although a State may consent to be sued in federal court, Kimel v. Florida Board of Regents, 528 U.S. 62, 73 (2000); Pennhurst, 465 U.S. at 99 (consent must be "unequivocally expressed"), Pennsylvania has expressly withheld consent. 42 Pa. C.S. § 8521(b); Laskaris, 661 F. 2d at 25. While Congress may abrogate a state's sovereign immunity through certain legislation, Seminole Tribe, 517 U.S. at 59, Section 1983 claims are barred because Congress has not abrogated immunity for civil rights actions against the Commonwealth or its agencies. Quern v. Jordan, 440 U.S. 332, 341-42 (1979). See Zelinski v. Pennsylvania State Police, 282 F. Supp. 2d 251, 264 (M.D. Pa. 2003), aff'd in part, vacated in part and remanded, 108 Fed. Appx. 700, 2004 WL 1799234 (3d Cir. 2004). Neither supplemental jurisdiction nor any other basis of jurisdiction, including diversity jurisdiction under 28 U.S.C. § 1332, overrides the Eleventh Amendment. Pennhurst, 465 U.S. at 100, 121.

The PSP is an agency within the Commonwealth's executive branch of government. See 71 P.S. §§ 61, 732-102; Dyche v. Bonney, C.A. No. 04-1833, 2005 WL 3118034, at * 3 (M.D. Pa. Nov. 22, 2005) (PSP is an "arm of the State" for purposes of the Eleventh Amendment), aff'd, 277 Fed. Appx. 244 (3d Cir. 2008); Altieri v. PSP, C.A. No. 98-5495, 2000 WL 427272, at * 5 (E.D. Pa. April 20, 2000); Zelinski, 282 F. Supp. 2d. at 264. See also Complaint, ¶ 20. As PSP is an agency within the Commonwealth's executive branch of government, the Eleventh

Amendment bars federal subject matter jurisdiction over any § 1983 claim against it, regardless of the relief sought.

E. Wolf and Shapiro Are Not Proper Defendants

Two individual defendants--Governor Wolf and Attorney General Shapiro--are sued solely because of their positions as Governor and Attorney General and not as a result of any action on their part. These defendants may not be held accountable for the equitable relief that plaintiffs seek because they have no authority over or responsibility for administering the UFA.

The Ex Parte Young, 209 U.S. 123 (1908), exception to the Eleventh Amendment allows a suit for equitable relief against a State official in his official capacity. However, when challenging the constitutionality of a state statute by suing a state official, the pleadings must allege a "close official connection" between the official and enforcement of the law. Id., 209 U.S. at 156. In dismissing state officials as defendants in the constitutional challenge asserted in that seminal case, the Supreme Court wrote that

> neither of the state officers named held any special relation to the particular statute alleged to be unconstitutional. They were not expressly directed to see to its enforcement. If, because they were law officers of the state, a case could be made for the purpose of testing the constitutionality of the statute, by an injunction suit brought against them, then the constitutionality of every act passed by the legislature could be tested by a suit against the governor and the attorney general, based upon the theory that the former, as the executive of the state, was, in a general sense, charged with the execution of all its laws, and the latter, as attorney general, might represent the state in litigation involving the enforcement of its statutes. That would be a very convenient way for obtaining a speedy judicial determination of questions of constitutional law which may be raised by individuals, but it is a mode which cannot be applied to the states of the Union consistently with the fundamental principle that they cannot, without their assent, be brought into any court at the suit of private persons. In making an officer of the state a party defendant in a suit to enjoin the enforcement of an act alleged to be unconstitutional, it is plain that such officer must have some connection with the enforcement of the act, or else it is merely making him a party as a representative of the state, and thereby attempting to make the state a party.

Id., 209 U.S. at 157.

The "connection" between the official and the challenged law must reflect a "real, not ephemeral, likelihood or realistic potential that the connection will be employed against the plaintiff's interests." Rode v. Dellarciprete, 845 F.2d 1195, 1208 (3d Cir. 1980) (citation omitted). In Rode, the Circuit agreed that there was "no realistic potential that the Governor's general power to enforce the laws of the state would have been applied to" plaintiff in that case. Id. A government official's general authority to enforce the laws of the state is not sufficient to make him a proper party to litigation challenging the law. Id., at 1208. See 1st Westco Corp. v. School Dist. of Phila., 6 F.3d 108, 112-116 (3d Cir.1993) (Governor and Attorney General's general duty to enforce the laws of the Commonwealth do not supply a proper predicate for liability where there is little likelihood that officials actually would have enforced the particular statute against the particular plaintiff), rehearing en banc denied. As the Court wrote in 1st Westco Corp., 6 F.3d at 114-16:

> If we were to allow Westco to join the Commonwealth Officials in this lawsuit based on their general obligation to enforce the laws of the Commonwealth, we would quickly approach the nadir of the slippery slope; each state's high policy officials would be subject to defend every suit challenging the constitutionality of any state statute, no matter how attenuated his or her connection to it. Such a result is undesirable, a drain on resources of time and money, and contrary to Rode.

Plaintiffs sue Governor Wolf and Attorney General Shapiro only because they are "responsible for enforcing the laws of the Commonwealth." Complaint, ¶¶17-18. The Complaint fails to allege any facts connecting these defendants to the implementation and application of the UFA. Case law makes clear that an official's general authority to enforce and execute the laws or authority of the state or state agency is not sufficient to make him a proper party to litigation challenging the law, particularly where there is no factual allegation that the official is clothed with some duty to enforce or actually enforced the particular statute against the particular plaintiff. The official may not properly be made a defendant on the theory

that as a state or agency chief executive he is charged generally with the execution of its laws. The claims against the defendants should be dismissed.

F. The Complaint Fails to State a Facial Constitutional Challenge to procedural Due Process

1. Courts disfavor facial constitutional challenges

Before delving into the merits of plaintiffs' constitutional challenge, it is worthwhile noting that there are two different types of challenges, facial and as-applied. The Complaint mounts only a facial challenge. Complaint, ¶ 5.

The distinction between facial and as-applied challenges goes to the scope of the statute's claimed constitutional infirmity and the breadth of the remedy sought. Citizens United v. FCC, 558 U.S. 310, 331 (2010). A facial challenge "seeks to vindicate not only [plaintiff's] own rights, but those of others who may also be adversely impacted by the statute in question." [9] City of Chicago v. Morales, 527 U.S. 41, 55 n. 22 (1999). Courts disfavor facial challenges. Washington State Grange v. Wash. State Rep. Party, 552 U.S. 442, 450 (2008). As the Supreme Court wrote:

> Facial challenges are disfavored for several reasons. Claims of facial invalidity often rest on speculation. As a consequence, they raise the risk of "premature interpretation of statutes on the basis of factually barebones records." Facial challenges also run contrary to the fundamental principle of judicial restraint that courts should neither "anticipate a question of constitutional law in advance of the necessity of deciding it" nor "formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied." Finally, facial challenges threaten to short circuit the democratic process by preventing laws embodying the will of the people from being implemented in a manner consistent with the Constitution. We must keep in mind that "[a] ruling of unconstitutionality frustrates the intent of the elected representatives of the people."

[9] In contrast, "[a]n as-applied attack ... 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." U.S. v. Marcavage, 609 F.3d 264, 273 (3d Cir. 2010).

Id. See U.S. v. Salerno, 481 U.S. 739, 745 (1987) (a facial challenge is "the most difficult challenge to mount successfully."); Heffner v. Murphy, 745 F.3d 56, 65 (3d Cir. 2014) (facial challenge succeeds only when there is "no set of circumstances" under which the statute at issue would be valid).

For these reasons, plaintiffs' particular personal background is irrelevant to the Court's analysis. Plaintiffs seek to invalidate the UFA not just for them, but for **anyone** in any scenario who has been committed under section 302 and thereafter was barred from purchasing a firearm. The Court may uphold plaintiffs' challenge only if the Commonwealth unconstitutionally restricts the procedural due process rights of **everyone** committed under section 302 who is later prohibited from purchasing a firearm. In this light, there can be no constitutional basis for plaintiffs' claim and their challenge fails.

2. The procedural due process standard

Plaintiffs allege that their procedural due process rights under the Fourteenth Amendment were violated because they were not afforded notice and an opportunity to be heard before being prevented from purchasing a firearm by virtue of their section 302 involuntary commitment. The claim fails because, as persons who have been committed under section 302, they lack a protected interest in purchasing a firearm until their rights are restored under Pennsylvania law, because Pennsylvania provides adequate state remedies to pursue restoration of those rights, which remedies plaintiffs did not pursue.

The Due Process Clause provides that no state shall "deprive any person of life, liberty or property, without due process of law." See Planned Parenthood v. Casey, 505 U.S. 833, 846-47 (1992); Parratt v. Taylor, 451 U.S. 527, 537 (1981), overruled on other grounds, Daniels v. Williams, 474 U.S. 327 (1986); Nicholas v. Pa. State Univ., 227 F.3d 133, 139 (3d Cir. 2000). A

procedural due process claim entails a two part inquiry. The first step is to determine whether defendants acted under color of state law to deprive plaintiff of a property interest that is created by state law and entitled to protection under the Due Process Clause. Alvin v. Suzuki, 227 F. 3d 107, 116 (3d Cir. 2000). See Hill v. Borough of Kutztown, 455 F. 3d 225, 233-34 (3d Cir. 2006). "It is axiomatic that a cognizable liberty or property interest must exist in the first instance for a procedural due process claim to lie." Mudric v. Attorney General, 469 F. 3d 94, 98 (3d Cir. 2006). Only after finding a protected interest does the court look to whether the state procedures for challenging the deprivation comport with due process; absent an interest founded in state law, there is no entitlement to due process. Cleveland Bd. of Ed. v. Loudermill, 470 U.S 532, 538 (1985). See Kentucky Dep't. of Corrections v. Thompson, 490 U.S. 454, 460, (1989); Morrissey v. Brewer, 408 U.S. 471, 481 (1972).

At bar, because Pennsylvania provides state remedies that satisfy procedural due process and, in any event, plaintiffs failed to pursue those procedures, their procedural due process claim can be disposed of without inquiring whether they have a protected interest in acquiring a firearm Thus, the second prong of the analysis will be discussed first. Then, while not necessary for the court to dismiss the claim, defendants will show that plaintiffs lack a protected interest

3. Pennsylvania provides adequate state remedies

A state's deprivation of liberty or property does not violate the Due Process Clause where the State provides adequate post-deprivation remedies. Parratt v. Taylor, 451 U.S. 527, 540-41 (1981); Hudson v. Palmer, 468 U.S. 517, 533 (1984). A due process violation "is not complete when the deprivation occurs; it is not complete unless and until the State fails to provide due process." Zinermon v. Burch, 494 U.S. 113, 126, 132 (1990) (procedural due process claim is not actionable "unless and until the State fails to provide due process"). Only if there were no post-

deprivation remedy could plaintiff prevail on a procedural due process claim. Hudson, 468 U.S. at 533. See Alfaro Motors, Inc. v. Ward, 814 F. 2d 883, 888 (2d Cir. 1986) ("In reviewing state administrative proceedings, it is the function of the federal courts to determine only whether the state has provided adequate avenues of redress to review and remedy arbitrary action…."); Deorio v. Delaware County, C.A. No. 08-5762, 2009 WL 2245067, at *1-2 (E.D. Pa. June 27, 2009) (only if there were no post-deprivation remedy could plaintiff prevail on a procedural due process claim where his gun license was taken away). See Welsch v. Twp. of Upper Darby, C.A. No. 07–4578, 2008 WL 3919354, 7 (E.D. Pa. Aug. 26, 2008). That the state does not provide all the procedures or remedies available in a lawsuit does not make the process constitutionally inadequate. Hudson, 468 U.S. at 535.

In procedural due process cases, plaintiff has the burden of pleading and then showing that the state's remedy is not adequate. Prescott v. Florida, 343 Fed. Appx. 395, 399–400 (11th Cir.2009) (procedural due process claim that fails to allege that post-deprivation remedies were inadequate is subject to dismissal); Jefferson v. Jefferson County, 360 F. 3d 583, 585, 588 (6th Cir. 2004) (citations omitted); Mansfield Apt. Owners Ass'n v. City of Mansfield, 988 F.2d 1469, 1475 (6th Cir.1993); Marino v. Ameruso, 837 F. 2d 45, 47 (2d Cir. 1988) (plaintiff must prove the inadequacy of state remedies as an element of her constitutional tort); Kinavey v. D'Allesandro, C.A. No. 10-364, 2010 WL 3896491, at *3 (W.D. Pa. Sept. 29, 2010).

Where a state appears to provide adequate procedures, plaintiffs "cannot skip that process and use the federal courts as a means to get back what [they] want." Alvin, 227 F. 3d at 116. A § 1983 suit is barred if a constitutionally adequate state process was available but not used. Hudson, 468 U.S. at 533 (to maintain an action for intentional or negligent deprivation of property under Section 1983, a plaintiff must show that he has no adequate post-deprivation state

remedy to redress the wrong); Parratt, 451 U.S. at 541–42. See Isabel Cristina Companiony v. Murphy, 658 Fed. Appx. 118, 2016 WL 4245428, at *3 (3d Cir. Aug. 11, 2016) (plaintiff's failure to take advantage of state's procedures means that it cannot claim a constitutional injury); Elsmere Park Club, L.P. v. Town of Elsmere, 542 F.3d 412, 423 (3d Cir. 2008); McDaniels v. Flick, 59 F.3d 446, 460 (3d Cir.1995); Boston Environmental Sanitation Inspector's Assoc. v. City of Boston, 794 F. 2d 12, 13 (1st Cir. 1986); Riggins v. Board of Regents, 790 F.2d 707, 711-12 (8th Cir.1986); Dwyer v. Regan, 777 F.2d 825, 834-35 (2d Cir.1985), modified on other grounds, 793 F.2d 457 (2d Cir.1986); Bohn v. County of Dakota, 772 F.2d 1433, 1441 (8th Cir.1985), cert. denied, 475 U.S. 1014 (1986); Dusanek v. Hannon, 677 F.2d 538, 543 (7th Cir.) ("State cannot be held to have violated due process requirements when it has made procedural protection available and the plaintiff has simply refused to avail himself of them."), cert. denied, 459 U.S. 1017 (1982); Mamouzette v. Jerome, C.A. No. 13-117, 2014 WL 211402, at *4 (D.V.I. Jan. 19, 2014); Black v. City of Harrisburg, C.A. No. 11-1912, 2013 WL 6506756, at *6 (M.D. Pa. Dec. 12, 2013).

Pennsylvania law provides for three specific processes, both before and after a firearm purchase is proscribed, for a person seeking relief from a firearm disability imposed by 18 Pa. C.S. § 6105(c)(4).[10] State procedures allow restoration of the firearm disability under state law by statute or by way of expungement of the section 302 commitment. First, the UFA itself allows the citizen to petition the court of common pleas for relief from his state firearm disability

[10] 18 U.S.C. § 922(g) is the federal counterpart to, and which mirrors, 18 Pa.C.S. § 6105(c)(4). It reads: "It shall be unlawful for any person—(4) who has been adjudicated as a mental defective or who has been committed to a mental institution; to ship or transport in interstate or foreign commerce, or possess in or affecting commerce, any firearm or ammunition; or to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce." 18 U.S.C.A. § 922(g)(4). See Complaint, ¶ 4.

pursuant to 18 Pa. C.S. § 6105(f)(1). He may pursue this procedure after he is considered legally disabled for a firearm purchase by virtue of a section 302 commitment and either before or after the purchase was denied; this is the proper route where the citizen claims he is no longer committable or mentally ill. Section 6105(f)(1) provides

> **Other exemptions and proceedings.--**
> (1) Upon application to the court of common pleas under this subsection by an applicant subject to the prohibitions under subsection (c)(4), the court may grant such relief as it deems appropriate if the court determines that the applicant may possess a firearm without risk to the applicant or any other person.

18 Pa. C.S. § 6105(f)(1).[11]

This process allows for a full evidentiary hearing in the county court of common pleas. Both parties have a right to present documentary and testimonial evidence, with cross-examination, regarding petitioner's current mental health as relates to his ability to safely possess firearms following an involuntary commitment. The court considers the evidence and lifts the state firearms disability if shown the petitioner is not a risk to himself or others. Id. See In re Keyes, 83 A.3d 1016, 1019 (Pa. Super. 2013) (state trooper was involuntarily committed to a mental health facility, first under section 302 and subsequently under the more restrictive provisions of 50 P.S. § 7303. As a result, he was barred from possessing firearms under 18 Pa.C.S.A. § 6105. More than two years after his commitment, upon the trooper's petition under § 6105(f)(1), the court reinstated his state firearm rights), appeal denied, 101 A. 3d 104 (Pa. 2014). See Comm. v. Smerconish, 112 A.3d 1260, 1264-65 (Pa. Super. 2015) (section 6105 provides the procedure for reinstating the right to possess firearms and noting that the court of common pleas had granted applicant's petition for restoration of firearm rights pursuant to § 6105(f)(1) as it determined that he may possess a firearm without risk to himself or another);

[11] The hearing "shall be closed unless otherwise requested to be open by the applicant." 18 Pa. C.S. § 6105(f)(3).

J.C.B. v. Pennsylvania State Police, 35 A.3d 792, 795-97 (Pa.Super.) (under 18 Pa. C.S. § 6105(f)(1) petition, the Court weighed expert medical testimony and medical records from the petitioner's involuntary commitment and hospitalization as well as current mental health status), appeal denied, 49 A. 3d 444 (Pa. 2012), cert. denied, 133 S. Ct. 1808 (2013). See also 18 Pa. C.S. § 6105(j) ("If the court grants relief from the disabilities imposed under this section, a copy of the order shall be sent by the prothonotary within ten days of the entry of the order to the Pennsylvania State Police and shall include the name, date of birth and Social Security number of the individual").

Another alternative for an individual barred from possessing a firearm under 18 Pa. C.S. § 6105(c)(4), which he may pursue after he has been committed under section 302 and either before or after the firearms purchase was prevented is to petition the court of common pleas, pursuant to 18 C.S. § 6111.1(g) for expungement of the section 302 commitment records.[12] Section 6111.1(g)(2) provides that a person involuntarily committed under section 302 "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

[12] Section 6111.1(g) reads as follows:

(g) Review by court.—

(1) Upon receipt of a copy of the order of a court of competent jurisdiction which vacates a final order or an involuntary certification issued by a mental health review officer, the Pennsylvania State Police shall expunge all records of the involuntary treatment received under subsection (f).

…

(3) The Pennsylvania State Police shall expunge all records of an involuntary commitment of an individual who is discharged from a mental health facility based upon the initial review by the physician occurring within two hours of arrival under section 302(b) of the Mental Health Procedures Act and the physician's determination that no severe mental disability existed pursuant to section 302(b) of the Mental Health Procedures Act. The physician shall provide signed confirmation of the determination of the lack of severe mental disability following the initial examination under section 302(b) of the Mental Health Procedures Act to the Pennsylvania State Police. 18 Pa.C.S.A. § 6111.1(g).

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).” An expungement proceeding is civil in nature. Commonwealth v. Moto, 23 A.3d 989, 997 (Pa. 2011)

This 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. See In re Keyes, 83 A.3d at 1022-23; Smerconish, 112 A.3d at 1263-1267 (the process for expunging mental health records is provided at 18 Pa.C.S.A. § 6111.1(g)(2)); J.C.B., 35 A.3d at 795-97; In re Kevin Jacobs, 15 A. 3d 509, 511 (Pa. Super. 2011) (expungement of an involuntary commitment record under section 302 is available under § 6111.1(g)); In re R.F., 914 A.2d 907, 916 (Pa.Super.2006), appeal denied, 929 A.2d 1162 (Pa. 2007); In re Expungements, 938 A.2d 1075, 1078 n. 2 (Pa.Super.2007), appeal denied, In re Grable, 951 A.2d 1164 (Pa. 2008). Cf., Wolfe v. Beal, 384 A. 2d 1187, 1189 (Pa. 1978) (a person who has been unlawfully committed to a state mental hospital has a constitutional right to the destruction of hospital records which were created as a result of the illegal commitment). See also In re T.B., 113 A.3d 1273, 1275 (Pa.Super. 2015) (Wolfe’s rationale has been extended to require that court records also be expunged when an illegal commitment occurs) (citing In re R.F., 914 A.2d at 908–09).

Finally, if the purchase has been denied, the buyer may challenge the accuracy of his mental health records and seek restoration of his firearm rights by submitting an administrative challenge to that determination to the PSP. 18 Pa. C.S. § 6111.1(e)(1) (applicant may “challenge the accuracy of that person’s ... mental health record” to the PSP). Upon review of the record, if the PSP finds the challenge invalid, the buyer has the right to appeal the PSP decision to the

Pennsylvania Office of Attorney General where an Administrative Law Judge will hold a hearing de novo in accordance with Pennsylvania's Administrative Agency Law. 18 Pa. C.S. § 6111.1(e)(3). At the hearing, the PSP bears the burden to prove the accuracy of the mental health record. Id., § 6111.1(e)(4). See Gorry v. Pennsylvania State Police, 144 A.3d 214, 216–17 (Pa. Cmwlth. 2016). The ALJ's determination may be appealed to Commonwealth Court. 18 Pa.C.S. § 6111.1(e)(4). See also 2 Pa. C.S. § 702.

On appeal to the Commonwealth Court, a challenger is not restricted to the arguments made at the agency level; he may assert that his constitutional rights were violated. Gorry, 144 A.3d at 2117. See Pa. State Police v. Heggenstaller, 784 A.2d 853, 856 n. 6 (Pa. Cmwlth. 2001). See also 2 Pa. C.S. § 703(a). In interpreting this provision allowing a challenge to the validity of a statute, the Pennsylvania Supreme Court has held that both facial and as-applied constitutional challenges may be raised at the administrative level and reviewed by the courts. Lehman v. Pa. State Police, 839 A.2d 265, 275-76 (Pa. 2003) (holding that facial constitutional challenges may be raised either at the administrative level or in the Commonwealth Court for the first time, while as-applied challenges must be raised at the administrative level to be preserved for court review).

At bar, at plaintiffs' point of purchase, the firearm seller electronically submitted a PICS check. See 18 Pa. C.S. § 6111(b) (duties of seller); Complaint, ¶¶ 36, 49, 52. The PSP reviewed plaintiffs' criminal and mental health history and determined that pursuant to18 Pa. C.S. § 6105(c)(4) they were prohibited from possessing firearms because each had been involuntarily committed under section 302. Id. The purchase was barred. Neither plaintiff alleges that either before or after the attempted purchase he petitioned the court of common pleas for restoration of firearms rights pursuant to 18 Pa. C.S. § 6105(f)(1) or for expungement of the section 302 treatment records under 18 C.S. § 6111.1(g). Further, neither plaintiff alleges that after the

transaction was denied he sought restoration of his firearm rights by challenging the accuracy of his mental health records under 18 Pa. C.S. § 6111.1(e)(1). These judicial and administrative remedies were and remain available to plaintiffs. The absence of allegations that plaintiffs pursued these remedies calls for the Complaint to be dismissed. That Pennsylvania provides these remedies calls for the Complaint to be dismissed with prejudice. Regardless of what they plead, plaintiffs cannot state a procedural due process claim.

4. Plaintiffs have no protected interest in obtaining a firearm because of the section 302 commitment

In a case involving executive action, to establish the "threshold matter" of a protected interest, a plaintiff must show not merely an interest at stake but a "particular quality" of interest sufficient to invoke constitutional protection. Nicholas, 227 F.3d at 139-40. "A liberty interest may arise from the Constitution itself, by reason of guarantees implicit in the word 'liberty,' or it may arise from an expectation or interest created by state laws or policies." Wilkinson v. Austin, 545 U.S. 209, 221 (2005) (internal citations omitted). Constitutionally protected liberty interests include "most of the rights enumerated in the Bill of Rights" and "certain personal choices central to individual dignity and autonomy." Obergefell v. Hodges, __ U.S. __, 135 S. Ct. 2584, 2597-98 (2015). By contrast, "[p]rotected interests in property are normally 'not created by the Constitution. Rather, they are created and their dimensions are defined' by an independent source such as state statutes or rules entitling the citizen to certain benefits." Goss v. Lopez, 419 U.S. 565, 572-73 (1975). See Board of Regents v. Roth, 408 U.S. 564, 575-77 (1972); Mudric, 469 F.3d at 98 (the threshold issue with respect to a procedural due process claim is whether there exists a protected property interest).

"The Fourteenth Amendment's procedural protection of property is a safeguard of the security of interests that a person has already acquired in specific benefits.... [T]o have a property

interest in a benefit, a person clearly must have more than an abstract need or desire for it. He must have more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it." Roth, 408 U.S. at 575-77. See U.S. v. One Palmetto State Armory PA-15 Machinegun, 115 F.Supp.3d 544, 573 (E.D. Pa. 2015) (no legitimate claim under Pennsylvania law to possession of machinegun), aff'd, 822 F. 3d 136 (3d Cir. 2016) A "legitimate claim of entitlement" must be created by state law by language of a mandatory character. Roth, 408 U.S. at 575. See Hewitt v. Helms, 459 U.S. 460, 466 (1983).[13]

Plaintiffs have neither a protected liberty nor property interest at stake.[14] Although the Supreme Court in District of Columbia v. Heller, 554 U.S. 570 (2008), recognized for the first time that the Second Amendment affords an individual right to possess firearms unconnected with service in a militia, the Court specifically observed that "[a]lthough we do not undertake an

[13] Courts must identify the specific constitutional right allegedly infringed and then judge the claim by reference to the specific constitutional standard which governs that right. Graham v. Conner, 490 U.S. 386, 393-94 (1989); Albright v. Oliver, 510 U.S. 266, 267-81 (1994). Here, the only claim asserted is procedural due process. Complaint, ¶¶ 76-87. Nonetheless, the Complaint invokes and conflates several distinct legal theories, which approach is misplaced as these allegation implicate inquiries not applicable at bar. The Complaint, ¶ 9, references "fundamental, individual rights," citing Rochin v. California, 342 U.S. 165, 169 (1952). Rochin, however, is an early substantive due process case and does not implicate procedural due process. See Regents of the University of Michigan v. Ewing, 474 U.S. 214, 229-30 (1985) (Justice Powell's concurrence notes that in contrast to the procedural due process cases where the protected interests originate under state law, substantive due process rights are created by the federal constitution). A substantive due process violation must, inter alia, "shock the conscience." See DeShaney v. Winnebago County Department of Social Services, 489 U.S. 189 (1989); County of Sacramento v. Lewis, 523 U.S. 833, 846-47 (1998); Dixon v. Alabama State Board of Education, 294 F. 2d 150, 152 n. 3, 157 (5th Cir.), cert. denied, 368 U.S. 930 (1961) (African-American students were expelled from a tax-supported college for seeking to purchase lunch at a publicly owned grill in the basement of the county courthouse). Additionally, the Complaint invokes the Second Amendment right to bear arms, ¶¶ 7-8, which involves a separate analysis, see U.S. v. Marzzarella, 614 F.3d 85, 89-92 (3d Cir. 2010), although it does not assert a claim under the Second Amendment. Determining the scope of Second Amendment rights must be pursued under the standards applicable to that specific provision of the Constitution and not indirectly under procedural due process. Id.

[14] The Complaint does not identify the nature of their alleged interest.

exhaustive historical analysis today of the full scope of the Second Amendment, nothing in our 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,…" Id., 554 U.S. at 626-67. Subsequently, the Third Circuit held that the possession of firearms by the mentally ill does not fall within the conduct that the Second Amendment was intended to protect. Marzzarella, 614 F.3d at 89-92. See In re Keyes, 83 A.3d at 1026 (agreeing with Marzzarella that the possession of firearms by the mentally ill is not protected by the Second Amendment); J.C.B., 35 A.3d at 797 (dismissing constitutional challenges to 18 Pa. C.S.A. § 6105(c)(4), and citing Heller for the proposition that such prohibitions are "presumptively lawful."). State restriction on firearms possession by the mentally ill is one of several longstanding limitations on the right to bear arms identified as "presumptively lawful regulatory measures." Heller, 554 U.S. at 627 n. 26. See Marzzarella, 614 F.3d at 89-92 (holding that the language in Heller provides that the identified restrictions are presumptively lawful because they regulate conduct outside the scope of the Second Amendment). See also McDonald v. City of Chicago, 561 U.S. 742, 786 (2010) (plurality opinion of Alito, J.) (reiterating the limited nature of the right to bear arms).[15] Cf. Erdelyi v. O'Brien, 680 F.2d 61, 63 (9th Cir.1982) (no liberty interest in carrying a concealed firearm); Haeker v. Linder, C.A. No. 16-26, 2016 WL 3976610 (D. Mont. July 22, 2016) (no liberty interest in retaining concealed-carry firearm permit); Martinkovich v. Oregon Legislative Body, C.A. No. 11–3065, 2011 WL 7693036, at *4 (D. Or. Aug. 24, 2011) (no liberty interest in carrying concealed weapon); Potts v. City Of Philadelphia, 224 F.Supp.2d 919, 939 (E.D. Pa.

[15]In McDonald, the Court held that the Second Amendment is fully applicable to the States by virtue of the Fourteenth Amendment.

2002) (no liberty interest in gun permit). Consequently, the particular interest asserted here--the right to possess a firearm notwithstanding a mental health commitment--is not one guaranteed by the Second Amendment. There is no liberty interest at stake.

There is also no state-created property interest. Although the Pennsylvania Constitution recognizes a right to bear arms similar to the Second Amendment,[16] the right is not absolute and the legislature may impose restrictions on the possession of firearms. See Caba v. Weaknecht, 64 A.3d 39, 58 (Pa.Cmwlth. 2013). See Comm. v. McKown, 79 A.3d 678, 690 (Pa. Super. 2013) ("neither the Second Amendment to the United States Constitution, nor the Pennsylvania Constitution, bestows on any person the right to carry a concealed firearm or transport a loaded firearm in a vehicle… [T]he right to keep and bear arms is not absolute, and governmental restrictions on possession of firearms are permitted") (citing Heller, 554 U.S. at 626-27); Perry v. State Civil Service Com'n, 38 A.3d 942, 954–55 (Pa. Cmwlth. 2011) (citing Heller, 554 U.S. at 626-27, which provides that "nothing in our opinion should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons and the mentally ill"); R.H.S. v. Allegheny County Dep't. of Human Services, 936 A.2d 1218, 1229 (Pa.Cmwlth. 2007), re-argument denied, appeal denied 954 A.2d 579 (Pa. 2008); Minich v. County of Jefferson, 919 A.2d 356, 360–61 (Pa. Cmwlth.), appeal denied 932 A.2d 1290 (Pa. 2007).

Pennsylvania statutory law also does not create a property interest. The UFA provides that someone "who has been involuntarily committed to a mental institution for inpatient care and treatment under section 302," 18 Pa.C.S. § 6105(c)(4),[17] "shall not possess, use, control, sell,

[16] The Pennsylvania Constitution provides that "[t]he right of the citizens to bear arms in defence of themselves and the State shall not be questioned." Pa. Const. art. 1, § 21.

[17] For the section 6105(c)(4) firearm prohibition to apply, section 6105(a)(1) also requires that "the examining physician has issued a certification that inpatient care was necessary or that the

transfer or manufacture or obtain a license to possess, use, control, sell, transfer or manufacture a firearm in this Commonwealth." Id., § 6105(a)(1). The UFA is clear on its face that once a person has been committed under section 302 he does not have the right to bear arms under Pennsylvania law until he succeeds in restoring those rights or expunging the mental health history under the statutory vehicles provided by Pennsylvania. Plaintiffs acknowledge they were committed under section 302 and have a disabling condition under 18 Pa.C.S. § 6105 (c)(4).[18] They can point to no language of a mandatory character that would confer upon them a "legitimate claim of entitlement" under Pennsylvania law to purchase a firearm. In light of the UFA's express language barring plaintiffs from possessing a firearm, their "interest" in possessing a firearm is confined to their mere "abstract need or desire" or "unilateral expectation." Absent a legitimate claim of entitlement to possessing a firearm under state law, plaintiffs lack a property interest that is protected by the Fourteenth Amendment.

Moreover, because plaintiffs were involuntarily committed and, at least then, considered mentally ill, they cannot assert a Second Amendment claim. Because they cannot assert a Second Amendment claim, they cannot state a due process claim, the success of which would be

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person was committable." Although not alleged, since both Does were committed under section 302 and claim a disabling condition under 18 Pa.C.S. § 6105(a)(1), (c)(4), presumably the examining physician issued the requisite certification.

[18] Cf. Reilly v. Lebanon County, C.A. No. 16-1469, 2016 WL 7404591, at *3–4 (M.D. Pa. Dec. 22, 2016); Hain v. DeLeo, C.A. No. 08-2136, 2010 WL 4514315, *6-7 (M.D. Pa. Nov. 2, 2010) (because the state's firearm licensing statute, 18 Pa.C.S. § 6109, invested the licensing official with discretion in granting or denying a license to carry a firearm, the court found that such a license was not a protected property interest for the purposes of procedural due process); Potts, 224 F.Supp.2d at 938-942 (plaintiff's firearm license was revoked after he was arrested for recklessly endangering another person. The court observed that 18 Pa.C.S. § 6109 confers broad discretion to the city in both issuing and revoking firearm licenses and that, therefore, plaintiff did not have a protected property interest in his gun permit for purposes of procedural due process); Harris v. Sheriff of Del.Cnty., 675 A.2d 400, 403 (Cmwlth. Ct.1996) (same).

contingent on the success of the Second Amendment claim. See Fisher v. Kealoha, 49 F.Supp.3d 727, 748 (D. Hawaii, 2014) (because plaintiff cannot establish a liberty or property interest under the Second Amendment, he cannot establish that his Fourteenth Amendment due process rights were violated). In any event, even if they had a protected interest, the remedies provided by Pennsylvania satisfy due process.

5. Due Process does not entitle plaintiffs to a pre-deprivation hearing

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. See Complaint, ¶ 78. Plaintiffs wholly ignore the Pennsylvania remedies that provide them the opportunity in the court of common pleas to seek restoration of their firearms rights and/or expungement of the involuntary commitment both before and they sought to purchase a gun, as well as the opportunity to challenge the mental health commitment after the purchase was barred. In any event, plaintiffs are wrong as a matter of law. Procedural due process does not require a pre-deprivation hearing in this context.

Where a protected interest is involved, the court applies the methodology found in Mathews v. Eldridge, 424 U.S. 319 (1976), to assess whether the state action offends the Fourteenth Amendment's due process guarantees. In analyzing whether a pre-deprivation hearing is required, the Court considers three factors: (1) the private interest that will be affected by the official action; (2) the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and (3) the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail. Id., 424 U.S. at 335. Where there is "the necessity of quick action by the State," or where "providing

any meaningful predeprivation process" would be impractical, the Government is relieved of the usual obligation to provide a predeprivation hearing. Parratt, 451 U.S. at 539. See Munoz v. City of Union City, 481 Fed. Appx. 754, 758 (3d Cir. 2012); Elsmere Park Club, L.P., 542 F.3d at 417. This issue is typically reserved for the Court's determination as a matter of law. Munoz, 481 Fed. Appx. at 758; Alston v. Monmouth County Prosecutor's Office, C.A. No. 12-5633, 2014 WL 1095716, at *4 (D.N.J. Mar. 19, 2014).

Considering these factors, courts have resoundingly held that the revocation of a firearms license without a pre-deprivation hearing is justified by concerns for public health and safety; due process does not require that a hearing take place before a gun license may be revoked. Hightower v. City of Boston, 693 F.3d 61, 84–85 (1st Cir. 2012) ("The revocation of a firearms license, particularly a license to carry a concealed, large capacity weapon, without a predeprivation hearing is justified by concerns as to public health and safety."); Kuck v. Danaher, 600 F.3d 159, 165-66 (2d Cir. 2010) (firearm permit renewal applicants are entitled to opportunity to be heard after a denial or revocation in light of state's "strong and compelling interest in ensuring that firearm permits are not issued to those 'lacking the essential character or temperament necessary to be entrusted with a weapon'") (citation omitted); Spinelli v. City of New York, 579 F.3d 160, 170–71 (2d Cir.2009) (holding that pre-deprivation process was not required to suspend gun dealer's license where there were security lapses at the gun store, given the interest in public safety); Rhein v. Coffman, 118 F.Supp.3d 1093, 1102 (N.D. Ill. 2015) (under Matthews standard, firearms owner not entitled to pre-deprivation hearing when state police officials revoked his firearm license and firearms); Alston, 2014 WL 1095716, at *4 (pre-deprivation hearing not required when former police chief's state-issued and personal firearms were confiscated); Razzano v. County of Nassau, 765 F.Supp.2d 176 (E.D. N.Y. 2011) (post-

deprivation process satisfied due process following seizure of plaintiff's long arm rifles and shotguns from his residence by county police officers, who observed that owner appeared "mentally unstable."); Hain, 2010 WL 4514315, at *8 (rejecting claim that revocation of a firearms license requires a pre-deprivation hearing, in part because "state interest in protecting the public safety through the enforcement of licensure requirements is compelling. Though a pre-deprivation hearing may lessen the risk of erroneous deprivation in some cases, it would significantly burden the state interest in quickly removing licenses from individuals who prove to be dangerous after their license has been issued."); Deorio, 2009 WL 2245067, at *2 (gun owner's due process rights were not violated when he was required to petition the court for return of weapons confiscated during enforcement of a protection from abuse petition because he had an adequate post-deprivation remedy); Potts, 224 F.Supp.2d at 943 (plaintiff was not entitled to a pre-deprivation hearing as a matter of law. Government has prevailing interest in ensuring that persons licensed to carry firearms do not present a danger to public safety. Given the potential fatal consequences of leaving a license to carry a gun in the hands of someone who poses a danger to the community while he pursues a pre-deprivation hearing, the benefit of a pre-deprivation process does not outweigh its costs).

Due process does not entitle plaintiffs to a hearing before they are barred from purchasing a firearm although Pennsylvania permits such a "pre-deprivation" hearing and allows them to petition the court to determine if they may possess a firearm without risk to themselves or others and to restore their rights. 50 P.S. § 301(a)(b). See 18 Pa. C.S. § 6105(f)(1). It must not be forgotten that plaintiffs had been involuntarily committed under section 302. This signifies that they were considered "severely mentally disabled and in need of immediate treatment" and "made subject to involuntary emergency examination and treatment." In the language of section

301, such a person, "as a result of mental illness, [showed that] "his capacity to exercise self-control, judgment and discretion in the conduct of his affairs and social relations or to care for his own personal needs is so lessened that he poses a clear and present danger of harm to others or to himself." Thus, society, as well as plaintiffs and their families, are entitled to some measure of security that plaintiffs no longer pose a risk to themselves or others. This is justified by the state's obvious concerns for the public's safety as well as the safety of plaintiffs themselves. The Pennsylvania Superior Court recently wrote, in rejecting the argument of an individual previously involuntarily committed that his exclusion from the protection of the Second Amendment should not apply to him because he is no longer mentally ill,

> We find that the government has an important interest in keeping firearms out of the hands of those who have ever been adjudicated mentally defective or who have ever been committed to a mental institution (to reflect the language of [18 U.S.C.] section 922(g)(4)). The dangers inherent in the possession of firearms by the mentally ill are manifest. This is even more vital in cases such as appellant, who was involuntarily committed and thus failed to recognize and act upon his own illness…. [A] present clean bill of mental health is no guarantee that a relapse is not possible. Given the extreme potential harm attendant to the possession of deadly weapons by the mentally ill, and the risk of relapse, we see an important government interest in controlling the availability of firearms for those who have ever been adjudicated mentally defective or have ever been committed to a mental institution but are now deemed to be cured. Although appellant has been pronounced cured of his depression, we see a legitimate government interest in still limiting the availability of firearms to him.

In re Keyes, 83 A.3d at 1026–27. See In re J.H., No. 56 WDA 2014, 2014 WL 10752243, at *5 (Pa. Super. Dec. 5, 2014). While due process entitles would-be gun purchasers to a hearing after the purchase is denied, the state has a compelling interest in ensuring that such persons show they may possess a firearm without risk to themselves or others before acquiring a firearm. Although a pre-deprivation hearing may lessen the risk of erroneous deprivation in some cases, it dramatically reduces the risk of such persons from acquiring a firearm instantly, on the spot.

Allowing such persons to acquire a gun pending a pre-deprivation hearing could have potentially fatal and irreversible consequences.

Moreover, in some cases, including that of John Doe II, requiring a pre-purchase hearing makes no sense. Doe II claims he was not even aware that he had been "certified committable" under section 302 until he sought to purchase a firearm two years after the commitment. Complaint, ¶ 41.[19] Since he was unaware of the commitment, he had no reason to petition and would not have petitioned for a hearing before the purchase was denied; he would have sought restoration of his firearm rights only after the purchase was barred. Further Doe II's allegation that he was not aware he had been involuntarily committed dooms the facial challenge which requires him to show that all section 302 commitments are entitled to a pre-purchase hearing. Doe II's situation precisely points to a set of circumstances under which the due process challenge fails since he would not have pursued a pre-deprivation hearing.

Finally, a claim that plaintiffs are no longer committable, see Complaint, ¶¶ 34-35, 50-51, and, therefore, entitled to the restoration of their gun rights as a matter of law, dooms their facial challenge. Plaintiffs' facial challenge succeeds only if there are no circumstances under which the statute would be valid. The Court may uphold plaintiffs' challenge only if the UFA unconstitutionally restricts the procedural due process rights of everyone committed under section 302 who is later prohibited from purchasing a firearm. Even if plaintiffs are no longer committable, other would-be gun purchasers who have been committed under section 302 and released may still be mentally ill or dangerous to society. Even if their illness or dangerousness

[19] Assuming that Doe II was not told that he was being committed (or, more probably, was not aware that he was being committed in light of his intoxicated state, Complaint, ¶ 39), this failure to communicate would have been the hospital staff's failure, and not that of the defendants or the MPHA, which provides that at the facility the person has certain rights, including being informed of the reasons for emergency examination and informed of his status. 50 P.S. § 302(c).

has not been brought to the attention of a physician or the police, they remain "committable" and should not be entrusted with a firearm without a court assessment of whether they may possess a firearm without risk.

There may also be citizens who were committed under section 302 and, instead of being discharged, sought additional voluntary treatment under the MPHA or were determined to be in need of further involuntary treatment under 50 P.S. sections 303-305. Plaintiffs' challenge does not consider these latter categories of persons. The success of plaintiffs' facial challenge would gut section 302 and allow these persons to purchase a firearm, regardless of whether they remain a danger to self or others and regardless of the person's post-release circumstances. Plaintiffs' successful facial challenge would literally wipe out these reasonable safety precautions. In short, there are circumstances under which the statute at issue is useful to society by preventing some persons from acquiring firearms instantly.

In any event, it is irrelevant to a procedural due process claim that plaintiffs are no longer committable. Pennsylvania law provides for the state courts to safeguard society, as well as plaintiffs, and allows hearings both before and after the attempted purchase, to seek restoration of their firearm rights by petitioning the court of common pleas for permission to possess a firearm, 18 Pa. C.S. § 6105(f)(1), and/or for expungement of the section 302 treatment records pursuant to 18 C.S. § 6111.1(g). These procedures satisfy due process. Due Process Clause requires nothing more.

III. CONCLUSION

For the reasons stated above, defendants request that their Motion to Dismiss be granted.

Respectfully submitted,

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

JOHN DOE, et al.,	:	CIVIL ACTION
	:	
Plaintiff,	:	No. 16-6039
	:	
v.	:	
	:	
THOMAS WOLF, et al.,	:	
	:	
	:	
Defendants.	:	

CERTIFICATE OF SERVICE

I, Barry N. Kramer, hereby certify that on January 30, 2017, Motion to Dismiss was filed electronically and is available for viewing and downloading from the Court's Electronic Case Filing System. The ECF System's electronic service of the Notice of Electronic Case Filing constitutes service on all parties who have consented to electronic service.

BY: /s/ Barry N. Kramer
Barry N. Kramer