No. 19-1927

In the United States Court of Appeals for the Third Circuit

JOHN DOE 1, ET AL
Plaintiffs–Appellants

v.

GOVERNOR OF PENNSYLVANIA, ET AL
Defendants–Appellees

Appeal from the United States District Court
for the Eastern District of Pennsylvania
Case No. 2:16-cv-06039

BRIEF OF *AMICI CURIAE* ALLEGHENY COUNTY SPORTSMEN'S LEAGUE, FIREARM OWNERS AGAINST CRIME, GUN OWNERS FOUNDATION AND SECOND AMENDMENT ORGANIZATION IN SUPPORT OF APPELLANT AND REVERSAL

Joshua Prince, Esquire
Adam Kraut, Esquire
Counsel of Record
CIVIL RIGHTS DEFENSE FIRM, P.C.
646 Lenape Road
Bechtelsville, PA 19505
(888) 202-9297
Joshua@civilrightsdefensefirm.com

Counsel for Amici Curiae

CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26, *Amici Curiae* make the following statements:

Allegheny County Sportsmen's League is a nonprofit corporation, incorporated in Pennsylvania. It has no parent companies, nor is there any publicly held corporation that owns more than 10% of its stock.

Firearm Owners Against Crime is a nonpartisan Political Action Committee registered in Pennsylvania. It has no parent companies, nor is there any publicly held corporation that owns more than 10% of its stock.

Gun Owners Foundation is a nonprofit corporation, incorporated in Virginia. It has no parent companies, nor is there any publicly held corporation that owns more than 10% of its stock.

Second Amendment Organization is a nonprofit corporation, incorporated in Texas. It has no parent companies, nor is there any publicly held corporation that owns more than 10% of its stock.

/s/ *Joshua Prince*
Joshua Prince
Counsel for *Amici Curiae*

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

Rules

Constitutional Provisions

STATEMENT OF *AMICI CURIAE* [1]

Allegheny County Sportsmen's League (ACSL) is a Pennsylvania non-profit corporation, whose mission is to promote and foster, conservation of wildlife and natural resources, advance hunting and fishing, and to defend and protect, the Constitutions of the United States and the Commonwealth of Pennsylvania, especially the Second Amendment and Article 1, Section 21, respectively.

Firearm Owners Against Crime (FOAC) is a non-partisan Political Action Committee organized to empower all gun owners, outdoors enthusiasts and supporters of the Second Amendment to the U.S. Constitution and Article 1, Sections 21 and 25 of the Pennsylvania Constitution with the tools and information necessary to protect freedom from transgression. FOAC is a member-driven organization with more than 1600 members within the Commonwealth. As a Pennsylvania organization with members being citizens of the Commonwealth, the questions before this Court and the decision this Court has been tasked to render, are of great significance to FOAC and its members.

[1] Pursuant to Fed. R. App. P. 29, counsel for *amici* states that all parties have consented to the filing of this brief. Further, no party's counsel authored any part of this brief and no person other than *amici* made a monetary contribution to fund its preparation or submission.

Gun Owners Foundation (GOF) is a Virginia non-stock corporation, with its principle place of business in Virginia. GOF is organized and operated as a non-profit legal defense and educational foundation that is exempt from federal income taxes under Section 501(c)(3) of the U.S. Internal Revenue Code. GOF is dedicated to defending and promoting the Second Amendment to the United States Constitution through its research, education, and legal efforts.

Second Amendment Organization (2AO) is a gun rights and responsibilities advocacy organization based in the United States. 2AO is focused on educating gun owners and non-gun owners on gun rights issues, responsible gun ownership and grass roots activities in defense of our right to keep and bear arms.

This case concerns *amici* because it involves the constitutionally affirmed inviolate right of all individuals to be afforded due process.

ARGUMENT

The Commonwealth of Pennsylvania, in direct defiance of the U.S. and Pennsylvania Constitutions and legion of precedent, including from the U.S. Supreme Court, that one cannot be stripped of a constitutional right in the absence of due process, takes the constitutionally unsupportable position that it can deprive,

pursuant to 18 Pa.C.S. § 6105(c)(4), an individual's inviolate [2] right to keep and bear arms [3] as a result of an evaluation and treatment, pursuant to 50 P.S. § 7302, [4] which occurs, as recently acknowledged by the Pennsylvania Supreme Court, [5] in the absence of all tenets of due process.

I. An evaluation and treatment, pursuant to 50 P.S. § 7302, is insufficient under the Fourteenth Amendment, due to the lack of due process, to trigger a disability, pursuant to 18 Pa.C.S. § 6105(c)(4)

Initially, it is important to note that John Does do not contend that 18 Pa.C.S. § 6105(c)(4) or Section 302 of the Mental Health and Procedures Act (hereinafter, "MHPA") must be ruled, in total, unconstitutional; rather, they merely contend that as a result of the lack of due process provided, a Section 302

[2] *See*, Article 1, Section 25 of the Pennsylvania Constitution declaring "To guard against transgressions of the high powers which we have delegated, we declare that everything in this article is excepted out of the general powers of government and shall forever remain inviolate."
[3] *See*, Article 1, Section 21 of the Pennsylvania Constitution declaring "The right of the citizens to bear arms in defense of themselves and the State shall not be questioned;" and the Second Amendment to the U.S. Constitution declaring "A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed."
[4] Hereinafter referred to as "Section 302".
[5] *In re Nancy White Vencil*, 638 Pa. 1 (2017). *cert. denied sub nom.* 137 S.Ct. 2298, 198 L.Ed.2d 751 (2017).

evaluation and treatment is constitutionally insufficient to strip an individual of a core constitutional right, including the inviolate right to keep and bear arms.[6]

While the Commonwealth contends that an involuntary evaluation and treatment, pursuant to Section 302, results in the deprivation of the individual's right to purchase, possess and utilize firearms as a result of 18 Pa.C.S. § 6105(c)(4), this contention comes despite the undisputable fact that a Section 302 evaluation and treatment is perfected in the absence of all tenets of due process, as required by Article 1, Section 1 of the Pennsylvania Constitution and the Fourteenth Amendment to the U.S. Constitution, as the individual is not: (1) advised of the right to have an attorney; (2) provided an attorney; (3) provided a right to confront witnesses; (4) provided an opportunity to offer witnesses; (5) provided an opportunity to challenge evidence; (6) provided any opportunity to submit evidence; (7) provided a hearing; (8) provided a neutral arbiter; or, (9) provided a verbatim transcript or full record of the commitment proceedings. *See,* 50 P.S. § 7302. Instead, a Section 302 evaluation and treatment is merely perfected by a doctor's signature certifying that the individual needs "immediate treatment," where, even more disconcertingly, the doctor is not required to have any mental health training or certifications. 50 P.S. § 7302(b).

[6] *See* FN 2, 3.

If this was not egregious enough, the Commonwealth is acutely aware, as discussed *infra*, that the Pennsylvania Supreme Court in *In re Nancy White Vencil*, 638 Pa. at 17, held that "[b]y legislative design, there is no judicial involvement in the decision to effectuate a 302 commitment and no right to appeal the physician's decision" and the Bureau of Alcohol, Tobacco, Firearms and Explosives previously issued a determination that a Section 302 commitment was legally insufficient to trigger a disability pursuant to Section 922(g)(4) because of the "the *lack of due process provisions* afforded by 50 Pa. Cons. [sic] Stat. § 7302, the limited duration of a detention pursuant to it, the fact that its apparent primary purpose is to provide mental health officials to observe a detainee and make an assessment, and the existence of more formal commitment procedures under Pennsylvania law." *Franklin v. Sessions*, 291 F.Supp.3d 705, 717 n. 13 (W.D. Pa. 2017)(discussing the ATF's September 4, 1998 determination, which was submitted as Exhibit B to the Complaint).

As the United States Supreme Court held in *District of Columbia v. Heller*, 554 U.S. 570, 595 (2008), an individual has a constitutional right, pursuant to the Second Amendment, to keep and bear arms, which the Court found was incorporated against the states in *McDonald v. City of Chicago*, 561 U.S. 742, 130 S. Ct. 3020, 177 L. Ed. 2d 894 (2010), and as such, an individual cannot be stripped of that constitutional right in the absence of strict adherence to due

process. *See e.g.*, *Willner v. Comm. on Character & Fitness*, 373 U.S. 96, 102-03 (1963); *United States v. Fla. E. Coast Ry. Co.*, 410 U.S. 224, 244-45 (1973); Friendly, *Some Kind of Hearing*, 123 U. Pa. L. Rev. 1267 (1975); Nowak & Rotunda, *Constitutional Law* §§ 13.7 & 13.8, at 547-557 (5th ed. 1995).

Section 1 of the Fourteenth Amendment to the U.S. Constitution provides, *inter alia*, that "nor shall any state deprive any person of life, liberty, or property, without due process of law." U.S. Const. amend. XIV. The cornerstone of due process is the prevention of abusive governmental power. *Weimer v. Amen*, 870 F.2d 1400, 1405 (8th Cir. 1989) (citing to *Daniels v. Williams*, 474 U.S. 327, 330-31 (1986)). Thus, the issue becomes whether a Section 302 evaluation and treatment violates due process protections of the Fourteenth Amendment, which if it does as *Amici* contend, in turn results in the prohibition contained in 18 Pa.C.S. § 6105(c)(4) being rendered unconstitutional, as it applies to Section 302 evaluations and treatments.

a. A Section 302 Commitment Violates Due Process

Due process of the law has a dual aspect – substantive and procedural. *Howard v. Grinage*, 82 F.3d. 1343, 1349 (6th Cir. 1996).

> A procedural due process limitation, unlike its substantive counterpart, does not require that the government refrain from

> making a substantive choice to infringe upon a person's life, liberty, or property interest. It simply requires that the government provide "due process" before making such a decision. The goal is to minimize the risk of substantive error, *to assure fairness in the decision-making process*, and to assure that the individual affected has a participatory role in the process. The touchstone of procedural due process is the fundamental requirement that an individual be given *the opportunity to be heard "in a meaningful manner*."

Id. (citing to *Loudermill v. Cleveland Bd. Of Educ*., 721 F.2d 550, 563 (6th Cir. 1983) (emphasis added).

As declared by U.S. Supreme Court in *Marshall v. Jerrico, Inc.*, 446 U.S. 238, 242 (1980):

> The Due Process Clause entitles a person to an impartial and disinterested tribunal in both civil and criminal cases. This requirement of neutrality in adjudicative proceedings safeguards the two central concerns of procedural due process, the prevention of unjustified or mistaken deprivations and the promotion of participation and dialogue by affected individuals in the decision making process. *See Carey v. Piphus*, 435 U.S. 247, 259-262, 266-267 (1978). The neutrality requirement helps to guarantee that life, liberty, or property will not be taken on the basis of an erroneous or distorted conception of the facts or the law. *See Mathews v. Eldridge*, 424 U.S. 319, 344 (1976). At the same time, it preserves both the appearance and reality of fairness, 'generating the feeling, so important to a popular government, that justice has been done,' *Joint Anti-Fascist Committee v. McGrath*, 341 U.S. 123, 172 (1951) (Frankfurter, J., concurring), by ensuring that *no person will be deprived of his interests in the absence of a proceeding in which he may present his case with assurance that the arbiter is not predisposed to find against him*. (emphasis added).

As further declared by the U.S. Supreme Court, the right to due process is "absolute." *Carey v. Piphus*, 435 U.S. 247, 266 (1978), *Higgins v. Beyer*, 293 F.3d 683, 694 (3d Cir. 2002). The right to due process is triggered when the government

seeks to deprive citizens of legally cognizable liberty or property interests. *See*, *Piecknick v. Commonwealth of Pennsylvania*, 36 F.3d 1250, 1256 (3d Cir. 1994); *Cipriani v. Lycoming County Housing Authority*, 177 F.Supp.2d 303, 319 (M.D. Pa. 2001). Stated in a slightly different manner, a *prima facie* violation of due process occurs where a plaintiff demonstrates that (1) he was deprived of a protected liberty or property interest and (2) the procedures afforded him failed to comport with the requirements of due process. *Hill v. Borough of Kutztown*, 455 F.3d 225, 233-34 (3d Cir. 2006) (*citing, Alvin v. Suzuki*, 227 F.3d 107, 116 (3d Cir. 2000)).

1. The Second Amendment is a protected liberty and property interest

The liberty or property interests to which due process attaches are those identified in the text of the federal and state constitutions or which are otherwise considered fundamental rights. *Vitek v. Jones*, 445 U.S. 480, 495-96 (1980); *Rochin v. California*, 342 U.S. 165, 169 (1952); *Snyder* v. *Massachusetts*, 291 U.S. 97, 105 (1934); *Palko* v. *Connecticut*, 302 U.S. 319, 325 (1937). In *Specht v. Patterson*, 386 U.S. 605, 608 (1967), the U.S. Supreme Court held that "commitment proceedings whether denominated civil or criminal are subject … to

the Due Process Clause." [7] As discussed *supra*, this matter involves the Commonwealth's contention that the John Does were stripped of their constitutional right to Keep and Bear Arms, as protected by Article 1, Section 21 of the Pennsylvania Constitution and the Second Amendment to the U.S. Constitution, as a result of a mere Section 302 evaluation and treatment, which fails to provide any form of hearing. Even more egregious, as discussed *infra*, the Pennsylvania Supreme Court in *In re Nancy White Vencil* recently held that there exists *no legal process* by which an individual can challenge a 302 commitment after release. Clearly, the Commonwealth's contention implicates the deprivation of a constitutional right, for which there exists a liberty and property interest and therefore triggers the strictures of due process.

[7] *See also*, *Minnesota ex rel. Pearson v. Probate Court*, 309 U.S. 270, 276-277 (1940) declaring:

> We fully recognize the danger of a deprivation of due process in proceedings dealing with persons charged with insanity or, as here, with a psychopathic personality as defined in the statute, and the special importance of maintaining the basic interests of liberty in a class of cases where the law though "fair on its face and impartial in appearance" may be open to serious abuses in administration and courts may be imposed upon if the substantial rights of the persons charged are not adequately safeguarded at every stage of the proceedings.

2. The procedures and lack of a standard provided by Section 302 of the MHPA fail to comport with the requirements of due process

Once a protected liberty or property interest is identified, at an absolute minimum, due process requires "fair [and formal] notice" and "the opportunity to be heard" before a fair and impartial tribunal. *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976); *see also*, *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965) (due process requires a meaningful opportunity to be heard, at a "meaningful time and in a meaningful manner."), *Marshall v. Jerrico, Inc.*, 446 U.S. at 242. Under normal circumstances, an informal *pre*-deprivation hearing followed by a more comprehensive *post*-deprivation hearing must be provided. *Cipriani*, 177 F. Supp.2d at 319; *citing Cleveland Board of Education v. Loudermill*, 470 U.S. 532, 545-546 (1985). In certain emergency situations, especially where the loss of rights will be addressed in an expeditious *post*-deprivation hearing, the *pre*-deprivation hearing may be omitted. *Boddie v. Connecticut*, 401 U.S. 371, 379 (1971); *Benn v. Universal Health System, Inc.*, 371 F.3d 165, 174 (3d Cir. 2004). However, even where an exigent situation exists permitting a deprivation in the absence of an initial hearing, where a statute provides for a *post*-deprivation hearing but fails to provide the *timeframe* for that hearing, it violates due process. *Barry v. Barchi***,** 443 U.S. 55, 66 (1979). Perhaps most importantly, the U.S. Supreme Court "has not . . .

embraced the general proposition that a wrong may be done if it can be undone." *Stanley v. Illinois*, 405 U.S. 645, 647 (1972).

A. The absence of procedural due process in Section 302

"It is well-settled that involuntary civil commitment of mentally ill persons constitutes deprivation of liberty and may be accomplished only in accordance with due process protections." *In Re Hutchinson*, 500 Pa. 152, 156 (1982) citing *Appeal of Niccoli*, 472 Pa. 389, 395 n. 4, 372 A.2d 749, 752 n. 4 (1977); *Commonwealth v. McQuaid*, 464 Pa. 499, 517, 347 A.2d 465, 475 (1975); *Commonwealth ex rel. Finken v. Roop*, 234 Pa.Super. 155, 163, 339 A.2d 764, 768 (1975), appeal dismissed, 424 U.S. 960, 96 S.Ct. 1452, 47 L.Ed.2d 728 (1976). *See also Commonwealth v. Hubert*, 430 A.2d 1160, 1162 (Pa. 1981). Besides the physical restraints imposed, "[c]ollateral consequences, too, may result from the stigma from of having been adjudged mentally ill." *Hubert*, 430 A.2d at 1162.

Here, it cannot be disputed that in direct contravention to both the U.S. and Pennsylvania Constitutions and Supreme Court precedent, Section 302 lacks all procedural safeguards required by due process, which was recently acknowledged by the Pennsylvania Supreme Court in *In re Nancy White Vencil*, discussed *infra*. In point of fact, an individual is not (1) advised of the right to have an attorney; (2)

provided an attorney; (3) provided a right to confront witnesses; (4) provided an opportunity to offer witnesses; (5) provided an opportunity to challenge evidence; (6) provided any opportunity to submit evidence; (7) provided a hearing; [8] (8) provided a neutral arbiter; or, (9) provided a verbatim transcript or full record of the commitment proceedings. *See*, 50 P.S. § 7302. [9]

Some of these same issues caused the U.S. District Court for the Middle District of Pennsylvania in 1971 to issue an injunction regarding the enforcement of a prior version of Pennsylvania's mental health act. *See*, *Dixon v. Attorney Gen. of Pa.*, 325 F. Supp. 966, 973-74 (M.D. Pa. 1971). There, the court required that any individual being involuntarily committed be (1) "informed of his right to counsel and an attorney shall be appointed to represent him unless he can afford to

---

[8] The MHPA's failure to provide for *any* hearing, whether *pre-* or *post*-deprivation, relative to a 302 commitment is, alone, dispositive of John Does' claim, as Section 302 cannot meet the minimum requirement of a hearing, as required by the United States Supreme Court's legion of precedent. *See e.g.*, *Matthews*, 424 U.S. at 333; *Marshall v. Jerrico, Inc.*, 446 U.S. at 242; *Cleveland Board of Education v. Loudermill*, 470 U.S. at 545-546; *Boddie v. Connecticut*, 401 U.S. at 379; *Barry v. Barchi***,** 443 U.S. at 66.

[9] For an extensive review of the due process requirements, including that a clear and convincing standard be utilized, for a civil commitment, *see Lynch v. Baxley*, 386 F.Supp. 378, 388-396 (M.D. Ala. 1974).

See also, *Heryford v. Parker*, 396 F.2d 393, 396 (10th Cir. 1968) declaring that a state "has the inescapable duty to vouchsafe due process [during civil commitments], and this necessarily includes the duty to see that a subject of an involuntary commitment proceedings is afforded the opportunity to the guiding hand of legal counsel at every step of the proceedings, unless effectively waived by one authorized to act in his behalf."

retain an attorney"; (2) "entitled to independent expert examination and assistance in preparation for the hearing, through court appointment where the subject cannot afford to retain these services"; (3) "entitled to a full hearing at which he shall have the right to present evidence in his own behalf, to subpoena witnesses and documents, and to confront and cross-examine all witnesses against him"; (4) that "[t]he standard for commitment and the burden of proof shall be as follows: the evidence found to be reliable by the factfinder must establish clearly, unequivocally and convincingly that the subject of the hearing requires commitment because of manifest indications that the subject poses a present threat of serious physical harm to other persons or to himself"; and (5) "[t]here shall be a verbatim transcript and full record made of the commitment proceedings, and any member of the class committed pursuant to these proceedings shall have the right to state appellate court review, including provision for assistance of counsel and record and transcript without cost if he is unable to pay the cost thereof. Any person committed will be advised of his rights with respect to appeal by the court at the time of commitment." *Id*. at 974. [10]

[10] *See also Lynch v. Baxley*, 386 F.Supp. at 388 (declaring, in relation to emergency detentions, "[a]t the very least, however, due process does require that the hearing be preceded by adequate notice informing the person (or his counsel) of the factual grounds upon which the proposed commitment is predicated and the reasons for the necessity of confinement; that the person be represented by counsel,

(footnote continued)

Even if, *arguendo*, it was determined that a 302 evaluation and treatment would constitute an emergency situation, which would allow for the omission of a *pre*-deprivation hearing consistent with the holdings in *Boddie* and *Benn*, Section 302 would still be unconstitutional and therefore legally insufficient to strip one of a constitutional right under both of those decisions, as it does not provide for any *post*-deprivation hearing, and therefore, consistent with *Barchi*, would also be unconstitutional because the statute fails to provide any timeframe for a *post*-deprivation hearing.

Accordingly, it is explicitly clear, that a Section 302 evaluation and treatment is legally insufficient due to the lack of due process afforded the individual.

B. The lack of a standard of proof necessary for a 302 commitment violates due process

In relation to the standard of proof necessary for an involuntary

---

(footnote continued)

appointed if necessary; and that the person [] be present at the hearing unless his presence is waived by counsel and approved by the court after an adversary hearing at the conclusion of which the court judicially finds and determines that the detainee is so mentally or physically ill as to be incapable of attending the probable cause hearing.")

commitment, in order to "meet due process demands, the process has to inform the factfinder that the proof must be greater than the preponderance-of-the-evidence standard applicable to other categories of civil cases." *Addington v. Texas*, 441 U.S. 418, 432-33 (1979). Accordingly, the Court concluded that due process requires *at least* a clear and convincing evidentiary standard of proof, since an individual's physical liberty is not the only liberty interest at stake in a civil commitment proceeding – involuntary commitments bring with them "adverse . . . consequences," which may have a "a very significant impact on the individual." *Id*. at 425-26, 432-33. [11] In accordance therewith, an involuntary evaluation and treatment may have "a more lasting abridgement of personal freedom than imprisonment for commission of a crime." *Bartley v. Kremens*, 402 F.Supp. 1039, 1046 (E.D.Pa. 1975), *vacated* and *remanded*, *Kremens v. Bartley*, 431 U.S. 119 (1977) (reversing on procedural grounds).

Nowhere within Section 302 did the Pennsylvania General Assembly set-forth the standard of proof for civil commitments. While the Pennsylvania Superior Court has held that a clear and convincing standard is to be utilized in the context

[11] *See also Lynch v. Baxley,* 386 F.Supp. at 393. (In relation to civil commitment proceedings, "[c]onsequently, the trier of fact must be persuaded by *clear, unequivocal, and convincing evidence*…"); *In re Ballay*, 482 F.2d 648, 650 (D.C. Cir. 1973) ("[w]e align ourselves with those courts that have held that proof of mental illness and dangerousness in involuntary civil commitment proceedings *must be beyond a reasonable doubt*.").

of Section 303 commitments (*In re Hancock*, 719 A.2d 1053, 1055 (Pa. Super. Ct. 1998)), *Amici* is unaware of any court in Pennsylvania declaring that a clear and convincing standard of proof is required for a Section 302 evaluation and treatment and even if, *arguendo*, a Pennsylvania court were to so hold, it would not change the fact that the lack of such standard within the MHPA would fail to place the physicians performing 302 evaluations and treatments on notice of the requisite standard.

As there is no standard of proof specified in the MHPA and there exists no evidence that the John Does were putatively committed pursuant to a clear and convincing standard of proof, their treatment and evaluation under Section 302 is legally insufficient to strip them of their right to keep and bear arms.

b. The Pennsylvania Supreme Court recently held that Section 302 lacks all forms of due process, including any way to challenge a 302 commitment

Recently, the Pennsylvania Supreme Court in *In re Nancy White Vencil*, reviewed the 302 commitment process in relation to a sufficiency challenge, for purposes of firearm ownership. After acknowledging that an individual is committed in the absence of due process by the mere signature of a physician and that "the MHPA does not provide for judicial review of a 302 commitment", the

Court explained that, unlike with a 303 commitment, "[b]y legislative design, 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." 638 Pa. at 12, 17. Unfortunately for Ms. Vencil, as the Court acknowledged, she did "not challenge[] the due process protections provided by section 302 of the MHPA. Nor has she raised a due process argument in connection with her right to bear arms under the United States and/or Pennsylvania Constitutions." *Id*. at 19. It is important to note that since this decision by the Pennsylvania Supreme Court interprets Pennsylvania's statutory provisions under the MHPA, not even the U.S. Supreme Court can overturn it. *Herb v. Pitcairn*, 324 U.S. 117, 126 (1945).

c. ATF previously admitted that Section 302 was legally insufficient due to "the lack of due process"

As mentioned *supra*, the Bureau of Alcohol, Tobacco, Firearms and Explosives previously held that a commitment, pursuant to Section 302, was insufficient for purposes of triggering a disability, pursuant to 18 U.S.C. § 922(g)(4). Specifically, after noting that unlike a person being detained pursuant to

Section 303 of the MHPA, [12] a person being involuntarily detained under Section 302 is *not* provided a variety of due process rights, including counsel, notice, and a hearing, ATF concluded that "[g]iven the lack of due process provisions afforded [by Section 302], the limited duration of detention…, [that its] apparent primary purpose is to provide mental health officials time to observe a detainee and make an assessment, and the existence of more formal commitment procedures…we conclude that a detention under [Section 302] does not constitute a commitment for the purposes of 18 U.S.C. § 922(g)(4)." *Franklin*, 291 F.Supp.3d at 717 n. 13 (discussing the ATF's September 4, 1998 determination, which was submitted as Exhibit B to the Complaint).

d. Other Courts Have Found Section 302 and Other Similar Evaluation and Treatment Provisions, Which Lack Due Process, Are Constitutionally Infirm to Strip a Constitutional Right

If there was any doubt left as to whether a Section 302 evaluation and treatment can strip an individual of a core constitutional right, this Court only need examine how other courts have decided similar matters.

---

[12] *See, In re Nancy White Vencil*, 638 Pa. at 16 (likewise concluding after juxtaposing the process for an evaluation and treatment under Section 302 with that of a commitment under Section 303 of the MHPA).

1. *Franklin v. Sessions*

Recently, Judge Kim R. Gibson of the U.S. District Court for the Western District of Pennsylvania issued an opinion in *Franklin*, where he held that a 302 evaluation and treatment did not trigger a prohibition pursuant to 18 U.S.C. § 922(g)(4). In so holding, he declared

> Section 302 of the MHPA describe mandated medical care of a temporary and observational nature. Section 302 of the MHPA provides only for involuntary medical treatment lasting up to 120 hours. *See* 50 Pa. Stat. and Cons. Stat. Ann. § 7302(d). And, this Pennsylvania statute, tellingly, never uses the term "commitment." *See id.* Instead, Section 302 of the MHPA consistently and uniformly uses the terms "involuntary emergency examination and treatment" or "emergency examination."
>
> 291 F.Supp.3d at 717.

2. *U.S. v. Rehlander*

The First Circuit examined Maine's emergency evaluation and treatment provisions in *U.S. v. Rehlander*, 666 F.3d 45 (1st Cir. 2012), where it held that that the statute – which has further safeguards than Pennsylvania's [13] – was insufficient to strip an individual of his/her right to keep and bear arms.

---

[13] Maine's statute additionally requires a judge to sign off on the doctor's certification, which is not required in Pennsylvania. *Id.* at 48. *See also*, *Franklin*, 291 F.Supp.3d at 722 (finding that "Maine law provides more robust procedural protections than Section 302 of the MHPA" and that Maine's evaluation and treatment statutes, unlike Pennsylvania's, "requires (1) an application by a health or law enforcement officer, (2) a certifying medical examination by a medical

(footnote continued)

The court concluded that "…the right to possess arms (among those not properly disqualified) is no longer something that can be withdrawn by government on a permanent and irrevocable basis without due process. Ordinarily, to work a permanent or prolonged loss of a constitutional liberty or property interest, an adjudicatory hearing, including a right to offer and test evidence if facts are in dispute, is required." *Id*. at 48.

3. *U.S. v. Mark McMichael*

In *U.S. v. Mark McMichael*, 350 F.Supp.3d 647, 656, 661 (W.D. Mich. 2018), Chief Judge Robert Jonker held that "a commitment does not occur until the completion of an adversary process that results in an adjudicative decision in favor of hospitalization" and that "an *ex parte* hearing is not enough to fall within the Section 922(g)(4) prohibition; some adversary process is necessary for a 'commit[ment]' under Section 922(g)(4)."

(footnote continued)

practitioner, and (3) an endorsement by a judge or justice of the peace confirming these procedures have been followed.").

4. *Tyler v. Hillsdale County Sheriff's Department*

Mental health commitments were also addressed by the Sixth Circuit in *Tyler v. Hillsdale County Sheriff's Department*, 837 F.3d 678 (6th Cir. 2016). The Court began its examination of the relevant background by stating "Federal regulations make clear that 'committed to a mental institution' applies only to persons who are involuntarily committed by an appropriate judicial authority following due process safeguards." *Id*. at 682.

5. *Furda v. State*

The Court of Special Appeals of Maryland likewise found that to comport with due process an involuntary emergency evaluation and treatment "at the very least" provide "an evidentiary hearing, held either by a court or a hearing officer," that "the patient or the defendant has a right to appear and has the right to counsel; and findings are made by the factfinder, based on competent medical evidence." *Furda v. State*, 997 A.2d 856, 879 (2010).

* * *

For these reasons, it is explicitly clear that since a Section 302 evaluation and treatment is constitutionally insufficient, due to the lack of due process afforded, to strip an individual of a constitutional right, the prohibition found in 18 Pa.C.S. § 6105(c)(4) is resultantly unconstitutional.

II. The Absence of Historical Justifications of Stripping the Right to Keep and Bear Arms From Those Who Are Not Currently Mentally Ill

While it is unlikely that this Court will embark upon a review of historical justifications for depriving individuals from purchasing and possessing firearms, as it is not relevant to the claim or its analysis, in the event this Court were to do so, *Amici* respectfully point out there are neither long standing prohibitions relating to non-violent crimes nor the mentally ill. As recently and exhaustively reviewed in Section III of the *Amici* brief submitted by Firearm Policy Coalition, *et al.*, in *Folajtar v. Barr, et al.*, Third Circuit docket number 19-1687, "[t]here is no tradition in American history of banning peaceable citizens from owning firearms." Likewise, as acknowledged by U.S. District Court Judge John Jones, III in *Keyes, et al. v. Lynch*, 195 F.Supp.3d 702, 718 (M.D. Pa. 2016)(granting Plaintiff Yox relief), [14] *Keyes, et al. v. Sessions*, 282 F.Supp.3d 858, 871 (M.D. Pa. 2017)(granting Plaintiff Keyes relief) and the Sixth Circuit in *Tyler* (837 F.3d at 689), "[o]ne searches in vain through eighteenth-century records to find any laws specifically excluding the mentally ill from firearms ownership." [15] Professor Larson concludes that "[s]pecific eighteenth-century laws disarming the mentally

[14] Although the Government initially appealed the decision to this Court, docket no. 16-3576, on February 10, 2017, it withdrew its appeal.
[15] Quoting, Carlton F.W. Larson, *Four Exceptions in Search of A Theory: District of Columbia v. Heller and Judicial Ipse Dixit*, 60 Hastings L.J. 1371, 1376 (2009).

ill … simply do not exist." Carlton F.W. Larson, *Four Exceptions in Search of A Theory: District of Columbia v. Heller and Judicial Ipse Dixit*, 60 Hastings L.J. 1371, 1378 (2009).

Even an examination of the closest historical predecessor to the Second Amendment falls short of proving that a one-time commitment was historically understood as sufficient to forever disarm an individual. The 1689 English Bill of Rights is widely acknowledged as the predecessor to the American Bill of Rights. *Heller*, 554 U.S. at 593. It recognized and protected the "ancient right[]" of Protestant subjects to "have arms for their defence suitable to their conditions and as allowed by law." 1 W.&M., c. 2, in 3 Eng. Stat. at Large 441 (1689).

Notably, there was no guidance as to what the phrase "suitable to their conditions and allowed by law" meant. Regardless, in practice a broad right of all Protestants to keep arms was recognized in the years following its enactment. Joyce Lee Malcolm, *The Role of the Militia in the Development of the Englishman's Right to be Armed--Clarifying the Legacy*, 5 J. on Firearms & Pub. Pol'y 139 (1993). The right to have arms for defense and use them for lawful purposes was "clear and undeniable." W. Blizard, *Desultory Reflections on Police* 59-60 (1785).

The lack of support does not begin and end there. Historically society could only disarm "any person or persons" judged "dangerous to the Peace of the

Kingdome" under the 1662 Militia Act. 13 & 14 Car. 2, c. 3, § 1 (1662) (Eng.). The operative phrase being "dangerous to the Peace". There is a substantial lack of evidence to show that a person who was involuntarily committed in an isolated instance under Section 302 poses a danger to the peace, particularly many years after the commitment. [16] Moreover, the right to arms was "limited to those members of the polity who were deemed capable of exercising it in a virtuous manner." Saul Cornell, *''Don't Know Much About History" The Current Crisis in Second Amendment Scholarship*, 29 N. KY. L. Rev. 657, 671 (2002). Nothing suggests that an individual previously committed involuntarily and then released without being further detained under Sections 303, 304, or 305 are incapable of exercising the right to bear arms in a virtuous manner. To hold such would be the equivalent of declaring everyone who once suffered from a mental condition to be an unvirtuous citizen forever – and this "unvirtuousness" would be the result of no volitional act of the individual. Regardless, the right to arms was only limited when an individual presented a "real danger of public injury." *The Address and Reasons of Dissent of the Minority of the Convention of the State of Pennsylvania to Their*

[16] See, *Keyes*, 282 F.Supp.3d at 871 (declaring that "the person's potential danger to society *is* the traditional justification for dispossessing the mentally ill").

Constituents (1787), reprinted in 2 Bernard Schwartz, *The Bill of Rights, A Documentary History 665* (1971) (emphasis added).

At best, courts have speculated that historical evidence supported the idea that it was possible to disarm mentally ill individuals because they were a danger to themselves or others. However, such a conclusion is the result of errant guesswork rather than concrete examples. And there exists no support for the proposition that a person was unable to obtain a firearm after they were no longer deemed to be a danger. "[L]egal limits on the possession of firearms by the mentally ill ... are of 20th Century vintage." *U.S. v. Skoien*, 614 F.3d 638, 641 (7th Cir. 2010). Hardly a "long standing" prohibition let alone a historically significant one.

In fact, it was not until the Fortieth Annual Conference of National Conference of Commissioners on Uniform State Laws and Proceedings that the Uniform Fire Arms Act of 1930 was proposed and which "prohibited delivery of a pistol to any person of 'unsound mind'" that states first-partially restricted [17] Second Amendment rights to those with any form of mental illness. *Id*. at 1376. More importantly, it was not until 1968 – when Section 922(g)(4) was enacted as

[17] Individuals of "unsound mind" were not prohibited under the Act from possessing pistols they already owned nor were they prohibited from possessing and acquiring rifles and shotguns.

part of the Gun Control Act – that the U.S. Congress prohibited firearm possession by those who had been committed to a mental institution or adjudicated mentally ill. *United States v. Yancey*, 621 F.3d 681, 685 (7th Cir. 2010) (*citing* Pub.L. 90-618, 82 Stat. 1213, 1220). Thus, approximately 177 years passed from the time the Bill of Rights became effective until the time where individuals who were committed to a mental institution or adjudicated mentally ill were barred from possessing firearms.

Although *Amici* diligently searched, they have been unable to uncover any other historical source that suggests that the right to possess a firearm was denied to any individual who had ever been committed to a mental institution and released, regardless of time, circumstance, or present condition. Even the U.S. Supreme Court's decision in *Heller* supports that any presumptive prohibition *only* relates to individuals who are *currently* mentally ill. *Heller*, 554 U.S. at 626 (declaring that "nothing in our opinion should be taken to cast doubt on longstanding prohibitions on the possession of firearms by … *the mentally ill*"). The Court specifically utilized the present tense, reflecting that any prohibition is in relation to those that are *currently* mentally ill and not those, who on a single, short, isolated occasion were involuntarily committed. The class of individuals constituting those ever previously treated for mental health reasons is not identical to, or even closely equivalent to, the class of individuals that are presently mentally

ill.

The U.S. Congress even agrees, as it enacted 18 U.S.C. § 925(a)(1) which permits an individual, *post*-commitment and in the absence of a psychological examination, to possess firearms while serving the "United States or any department or agency thereof or any State or any department, agency, or political subdivision thereof." [18]

Accordingly, even if analyzed in the historical context, 18 Pa.C.S. § 6105(c)(4)'s prohibition imposes a burden on already established conduct falling within the Second Amendment,[19] as there is no support for the proposition that those who were temporarily committed on a single, isolated occasion were excluded from the protections of the Second Amendment in 1791.

---

[18] Congress also enacted the NICS Improvement Amendments Act of 2007 ("NIAA") which allowed states to create a program that could provide an individual with relief from a disability imposed under 18 U.S.C. § 922(g)(4), provided the state followed certain requirements. *See* 34 U.S.C. § 40915. Currently, Pennsylvania does not have a program that allows for relief under NIAA. Regardless, the question in the present matter is not whether the theoretical potential for relief under some other avenue exists but rather "did the commitment provide the due process required to strip an individual of their constitutional right in the first place?" The answer, as catalogued *supra* and in Appellant's Brief, is a resounding "no".

[19] *See also*, *Tyler*, 837 F.3d at 690 (holding that "people who have been involuntarily committed are not categorically unprotected by the Second Amendment.")

CONCLUSION

As recently declared by the Pennsylvania Supreme Court in *Commonwealth v. Hicks*, 56 MAP 2017, 2019 WL 2305953, at *23 (Pa. May 31, 2019)(internal quotations omitted), constitutional protections:

> remain an essential bulwark against the overreaches and abuses of governmental authority over *all* individuals. Notwithstanding the dangers posed by the few, we must remain wary of the diminution of the core liberties that define our republic, even when the curtailment of individual liberty appears to serve an interest as paramount as public safety. Experience should teach us to be most on our guard to protect liberty when the government's purposes are beneficent. Men born to freedom are naturally alert to repel invasion of their liberty by evil-minded rulers. The greatest dangers to liberty lurk in insidious encroachment by men of zeal, well-meaning but without understanding.

For the foregoing reasons, the decision below should be reversed and Section 6105(c)(4) found unconstitutional, as it applies to Section 302 evaluations and treatments, due to lack of due process afforded.

Respectfully Submitted,

Date: July 3, 2019

Joshua Prince, Esq.
Adam Kraut, Esq.
Counsel of Record
Civil Rights Defense Firm, P.C.
646 Lenape Rd
Bechtelsville, PA 19505
888-202-9297
610-400-8439
Joshua@civilrightsdefensefirm.com

CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the type-volume limitation of Fed. R. App. P. 29(a)(5) because this brief contains 6,498 words, excluding the parts of the brief excluded by Fed. R. App. P. 32(f).

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

The text of the electronic brief as well as the hard copies of the brief are identical.

The PDF was scanned with Bitdefender Virus Scanner v. 3.12.10781 and no malware was reported.

I hereby certify that Adam Kraut, Esq. and myself are admitted to practice in the Third Circuit Court of Appeals. I further certify that Adam Kraut, Esq. and myself are members in good standing.

Respectfully Submitted,

/s/ Joshua Prince

Joshua Prince, Esq. (306521)
Adam Kraut, Esq. (318482)
Civil Rights Defense Firm, P.C.
646 Lenape Road
Bechtelsville, PA 19505
888-202-9297 (t)
610-400-8439 (f)

AKraut@civilrightsdefensefirm.com
Joshua@civilrightsdefensefirm.com
Counsel for Amici Curiae

CERTIFICATE OF SERVICE

I hereby certify that on July 3, 2019, I served the foregoing brief via the CM/ECF system for the United States Court of Appeals for the Third Circuit, which will distribute the brief to all attorneys of record in this case. No privacy redactions were necessary.

Dated this 3rd day of July 2019.

/s/ *Joshua Prince*
Joshua Prince, Esq.
Counsel for Amici Curiae