APPENDIX

APPENDIX A

PRECEDENTIAL

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 17-3010

BRADLEY BEERS;
JOSEPH DIVITA*,

Appellants,

v.

ATTORNEY GENERAL UNITED STATES OF AMERICA; DEPARTMENT OF JUSTICE; UNITED STATES BUREAU OF ALCOHOL TOBACCO FIREARMS & EXPLOSIVES; THOMAS E. BRANDON, DEPUTY DIRECTOR OF THE ATF; RONALD B. TURK, ASSOCIATES DEPUTY DIRECTOR/CHIEF OPERATING OFFICE OF THE ATF; FEDERAL BUREAU OF INVESTIGATION; DIRECTOR FEDERAL BUREAU OF INVESTIGATION; UNITED STATES OF AMERICA; PENNSYLVANIA ATTORNEY GENERAL; PENNSYLVANIA STATE POLICE; TYREE BLOCKER, COMMISSIONER OF THE PENNSYLVANIA STATE POLICE; EDWARD DONNELLY, BUCKS COUNTY SHERIFF; BUCKS COUNTY SHERIFFS DEPARTMENT; BUCKS COUNTY DISTRICT ATTORNEY.

*(Party Dismissed Pursuant to Court Order dated 02/13/18)

On Appeal from the United States District Court
for the Eastern District of Pennsylvania
(D. C. Civil No. 2-16-cv-06440)
District Judge: Honorable Legrome D. Davis

Argued on July 12, 2018

Before: SHWARTZ, ROTH and RENDELL, Circuit Judges

(Opinion filed: June 20, 2019)

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OPINION

ROTH, *Circuit Judge*

INTRODUCTION

Federal law prohibits the possession of firearms by anyone who has previously been adjudicated as mentally ill or committed to a mental institution. Bradley Beers challenges this law on the ground that, as applied to him, it violates the Second Amendment.

Mentally ill individuals have traditionally been prohibited from possessing guns because they were considered to be a danger to themselves and to others. Beers cannot factually distinguish himself from this historically-barred class because a court has determined that Beers was a danger to himself and thereby required that he be committed to a mental institution. Beers contends, however, that, although he was previously involuntarily institutionalized, he has since been rehabilitated. For this reason, he argues that his rehabilitation distinguishes his circumstances from those in the historically-barred class.

The issue that we must consider then is whether passage of time and evidence of rehabilitation are relevant to our inquiry concerning the constitutionality of the prohibition of the possession of firearms by Beers.

BACKGROUND

Beers was involuntarily committed to a psychiatric inpatient hospital on December 28, 2005, after he told his mother that he was suicidal and put a gun in his mouth. Beers's mother was particularly concerned because Beers kept a gun in his room and had the means to kill himself. Beers was involuntarily admitted to the hospital for up to 120 hours pursuant to Section

302 of Pennsylvania's Mental Health Procedures Act (MHPA).[1] The examining physician determined that Beers was suicidal and that inpatient treatment was required for his safety.

On December 29, 2005, and again on January 3, 2006, a Pennsylvania court extended Beers's involuntary commitment pursuant to Sections 303 and 304 of the MHPA, concluding that he presented a danger to himself or to others.[2] At the court hearings for the extensions, the Bucks County Court of Common Pleas determined that Beers was "severely mentally disabled and in need of treatment."[3]

Beers has had no mental health treatment since 2006. A physician who examined Beers in 2013 opined that Beers was able "to safely handle firearms again without risk of harm to himself or others."[4] Shortly after he was discharged from his commitment in 2006, Beers attempted to buy a firearm but was denied because a background check revealed that he had been involuntarily committed to a mental institution.

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[1] 50 Pa. C.S. § 7302 ("Emergency examination may be undertaken at a treatment facility upon the certification of a physician stating the need for such examination . . . .").

[2] *See* 50 Pa. C.S. § 7303(a) ("Application for extended involuntary emergency treatment may be made for any person who is being treated pursuant to section 302 whenever the facility determines that the need for emergency treatment is likely to extend beyond 120 hours."); *id. §* 7304(a)(2) ("Where a petition is filed for a person already subject to involuntary treatment, it shall be sufficient to represent, and upon hearing to reestablish . . . that *his condition continues to evidence a clear and present danger to himself or others* . . . . ." (emphasis added)).

[3] App. 8-9; Supp. App. 9-10.

[4] App. 10.

Beers subsequently filed a complaint in the United States District Court for the Eastern District of Pennsylvania, asserting that 18 U.S.C. § 922(g)(4),[5] the federal statute prohibiting him from possessing a gun, was unconstitutional as applied to him.[6] The government moved to dismiss the complaint.

Applying the two-part test derived from our rulings in *United States v. Marzzarella*[7] and *Binderup v. Attorney General*,[8] the District Court first determined that Beers could not distinguish his circumstances from those of mentally ill individuals who were subject to the longstanding prohibitions on firearm possession. The court next held that, pursuant to our ruling in *Binderup*, evidence of Beers's rehabilitation was irrelevant; thus, Beers could not rely on such evidence to distinguish his circumstances. As a result, the court ruled that § 922(g)(4) did not impose a burden on conduct falling within the scope of the Second Amendment and was therefore constitutional as applied to Beers. The District Court dismissed Beers's complaint. Beers appeals the District Court's rejection of his as-applied Second Amendment challenge to § 922(g)(4).[9]

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[5] "It shall be unlawful for any person . . . who has been adjudicated as a mental defective or who has been committed to a mental institution . . . to . . . 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. § 922(g)(4).

[6] Beers also asserted due process and equal protection violations. These claims were not raised on appeal.

[7] 614 F.3d 85 (3d Cir. 2010).

[8] 836 F.3d 336 (3d Cir. 2016).

[9] While the government's motion to dismiss Beers's complaint in the District Court was still pending, a Pennsylvania court

DISCUSSION[10]

I. The Framework for Second Amendment Challenges

When a challenge is made to a law prohibiting the possession of firearms, we follow our rulings in *Marzzarella* and *Binderup*. Pursuant to these cases, we are required to conduct a two-part inquiry. First, we look at the historic, traditional justifications for barring a class of individuals from possessing guns and ask whether the challenger can distinguish his circumstances from those of individuals in the historically-barred class. If the challenger makes such a showing, we proceed to the second step, which requires the government to demonstrate that the challenged law satisfies some form of heightened scrutiny.

A. The Supreme Court's Decision in *District of Columbia v. Heller*

Our jurisprudence in Second Amendment cases is based on the Supreme Court's ruling in *District of Columbia v. Heller*.[11] The Second Amendment provides that "[a] well-regulated Militia, being necessary to the security of a free State, the right of the people to keep

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restored Beers's state law right to possess a firearm, pursuant to 18 Pa. C.S. § 6105(f), which allows the restoration of state gun ownership rights. Because § 6105(f) does not satisfy federal requirements allowing for acknowledgement by the federal government of the state's restoration of gun rights, Beers remains subject to the prohibition of § 922(g)(4). *See* Pub. L. No. 110-180 § 105, 121 Stat. 2559, 2569-70 (2008).

[10] The District Court had jurisdiction under 28 U.S.C. §§ 1331, 2201, 2202, and 2412, and we have jurisdiction under 28 U.S.C. § 1291.

[11] 554 U.S. 570 (2008).

and bear Arms, shall not be infringed."[12] *Heller* involved a challenge to a District of Columbia law that banned handgun possession, including the possession of handguns in the home. The Supreme Court held in *Heller* that the Second Amendment guarantees to an individual the right – not unlimited – to keep and bear arms.[13] The Court recognized that "[a]t the 'core' of the Second Amendment is the right of 'law-abiding, responsible citizens to use arms in defense of hearth and home.'"[14] Because the District of Columbia law in question violated this core Second Amendment right, the Court ruled that it was unconstitutional.

However, in articulating the guarantee to keep and bear arms, the Supreme Court recognized that "the right was not a right to keep and carry any weapon whatsoever in any manner whatsoever and for whatever purpose."[15] Indeed, nothing in *Heller*, according to the Court, "should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons and the mentally ill."[16] The Court therefore identified such prohibitions as "presumptively lawful," because they affect classes of individuals who, historically, have not had the right to keep and bear arms.[17]

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[12] U.S. CONST. amend. II.

[13] *Heller*, 554 U.S. at 595.

[14] *Binderup*, 836 F.3d at 343 (quoting *Heller*, 554 U.S. at 634-35).

[15] *Heller*, 554 U.S. at 626.

[16] *Id.*

[17] *Id.* at 627 n.26; *see also Binderup*, 836 F.3d at 343 ("These measures comport with the Second Amendment because they affect individuals or conduct unprotected by the right to keep and bear arms." (citing *Heller*, 554 U.S. at 631, 635)); *United States v. Barton*, 633 F.3d 168, 171 (3d Cir. 2011) (list of presumptively

B. The Third Circuit's Two-Part Test for Analyzing Second Amendment Challenges

Our first occasion after *Heller* to decide a Second Amendment challenge involved a statute prohibiting the possession of handguns with obliterated serial numbers. In *Marzzarella*, we applied a two-part test for evaluating Second Amendment challenges: "First, we ask whether the challenged law imposes a burden on conduct falling within the scope of the Second Amendment's guarantee."[18] If it does not, we need not proceed to the second step. If it does, however, we assess the law under heightened scrutiny.[19] Where the law survives heightened scrutiny, it is constitutional; if not, it is invalid.[20] In *Marzzarella*, we held that even if the law did impose a burden on protected conduct, in view of the government's interest in tracing weapons through serial numbers, the law survived intermediate scrutiny.[21]

A year later, in *United States v. Barton*, we heard a challenge to 18 U.S.0 § 922(g)(1), the federal statute banning felons from gun possession.[22] In *Barton*, we

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lawful regulations reflects historical understanding of Second Amendment right), *overruled on other grounds by Binderup*, 836 F.3d at 349, 350.

[18] *Marzzarella*, 614 F.3d at 89.

[19] The *Heller* Court stopped short of announcing the level of scrutiny that applies when a law infringes on Second Amendment rights. It cautioned nevertheless that rational basis review would not suffice. 544 U.S. at 628 n.27 ("If all that was required to overcome the right to keep and bear arms was a rational basis, the Second Amendment . . . would have no effect.").

[20] *Marzzarella*, 614 F.3d at 89.

[21] *Id.* at 95, 98-99.

[22] 633 F.3d at 173-75. In *Barton*, we also denied the challenger's facial attack of the statute "because *Heller* requires that

determined that, even though felon dispossession statutes were presumptively lawful under *Heller*, § 922(g)(1) could still be challenged as it applied to individuals.[23] In evaluating such a challenge, we turned to the traditional justifications underlying the § 922(g)(1) ban on gun possession by felons to determine whether these justifications supported permanent disarmament. This review was informed by the historical approach the Court applied in *Heller*. There, the Court explained that it would "expound upon the historical justifications for" presumptively lawful regulations "if and when those [regulations] come before [it]."[24]

In *Barton*, our historical review informed us that, traditionally, individuals who committed violent offenses were barred from gun possession; "the common law right to keep and bear arms did not extend to this group."[25] We then held that to successfully raise an as-applied challenge, the challenger had to distinguish his circumstances from those of persons historically-barred from possession of a firearm by demonstrating either (1) that he was convicted of a minor, nonviolent crime and thus "he is no more dangerous than a typical law-abiding citizen"; or (2) that a significant time has passed so that he has been "rehabilitated" and "poses no continuing threat to society."[26] Applying this standard, we concluded that the challenger failed to

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we 'presume,' under most circumstances, that felon dispossession statutes regulate conduct which is unprotected by the Second Amendment." *Id.* at 172.

[23] *Id.* at 173.

[24] *Id.* (quoting *Heller*, 554 U.S. at 635).

[25] *Id.*

[26] *Id.* at 174.

distinguish his circumstances, which included prior convictions for possession of cocaine with intent to distribute and for receipt of a stolen firearm.[27] As a result, we held that the statute was constitutional as applied to him.[28]

Five years after *Barton*, in *Binderup*, we decided another as-applied challenge to § 922(g)(1), this time by two individuals, Daniel Binderup and Julio Suarez, seeking to distinguish themselves from the historically-barred class of felons. Many years earlier, the challengers had been convicted of potentially serious offenses, defined by the state as misdemeanors. They had since led lives free of criminal convictions, except for Suarez who had one conviction for driving under the influence of alcohol.[29] We were tasked with determining whether § 922(g)(1) was unconstitutional as applied to the challengers, given their "rehabilitation" after the offenses they had committed.

In deciding the as-applied challenge, we clarified the applicable test. We explained that, at step one of *Marzzarella*, a challenger "must (1) identify the traditional justifications for excluding from Second Amendment protections the class of which he appears to be a member, and then (2) present facts about himself and his background that distinguish his circumstances from those of persons in the historically barred class."[30] If a challenger passes these two hurdles, "the burden shifts to the Government to demonstrate

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[27] *Id.*

[28] *Id.* at 175.

[29] *Binderup*, 836 F.3d at 340.

[30] *Id.* at 346-47 (internal citations omitted).

that the regulation satisfies some form of heightened scrutiny . . . at step two of the *Marzzarella* analysis."[31]

In making this clarification, we overruled *Barton* insofar as, at the first step, it allowed a challenger to distinguish himself from a historically-barred class by demonstrating the passage of time or evidence of rehabilitation.[32] As we noted in *Binderup*, the historical justification for disarming felons was that they were "unvirtuous," a term historically applied to individuals who had committed "serious" crimes.[33] Where the historical justification for disarming felons was because they had committed serious crimes, risk of violent recidivism was irrelevant, "and the seriousness of the purportedly disqualifying offense is our *sole focus* throughout *Marzzarella's* first step."[34] We therefore emphasized that neither passage of time nor evidence of rehabilitation "can restore Second Amendment rights that were forfeited."[35] After *Binderup*, the only way a felon can distinguish himself from the historically-barred class of individuals who have been convicted of serious crimes is by demonstrating that his conviction was for a non-serious crime, *i.e.*, that he is literally not a part of the historically-barred class.[36]

Three factors supported our conclusion that *Barton's* emphasis on rehabilitation evidence was misplaced. First, there was no historical support for the proposition that Second Amendment rights could be restored

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[31] *Id.* at 347.

[32] *Id.* at 349.

[33] *Id.* at 348.

[34] *Id.* at 350 (emphasis added).

[35] *Id.*

[36] *Id* at 349-50

after they were forfeited, and historical context was the guiding principle for our Second Amendment analysis.[37] Second, to the extent such a restoration remedy was available, it was a matter of congressional grace.[38] Third, and most importantly, we held that courts are "not 'institutionally equipped' to conduct 'a neutral, wide-ranging investigation' into post-conviction assertions of rehabilitation."[39]

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[37] *Id.* at 350.

[38] *Id.* As Judge Fuentes explained in his concurrence, by a separate provision of the federal gun laws, 18 U.S.C. § 925(c), Congress provided an opportunity for individuals who were prohibited from possessing guns to apply to the Attorney General for "relief from the disabilities imposed by Federal laws." *Id.* at 402. The Attorney General was given the power to "grant such relief if it is established to his satisfaction that the circumstances regarding the disability, and the applicant's record and reputation, are such that the applicant will not be likely to act in a manner dangerous to public safety . . . ." 18 U.S.C. § 925(c). Pursuant to the statute, an applicant who is denied relief by the Attorney General may petition a district court for relief.

This relief provision, however, has been "rendered inoperative" because Congress defended this program in 1992, and an "embargo on funds has remained in place ever since." *Binderup*, 836 F.3d at 402-03 (Fuentes, J., concurring). "Congress effectively wr[ote] § 925(c) out of the statute books" because it concluded that the task of granting individual applications was "a very difficult and subjective task which could have devastating consequences for innocent citizens if the wrong decision is made." *Id.* at 403 (quoting S. Rep. No. 102-353, at 19). A House report also stated that "too many of these felons whose gun ownership rights were restored went on to commit violent crimes with firearms." *Id.* (citing H.R. Rep. No. 104-183, at 15). Congress therefore concluded that a system for restoring gun rights was unworkable. *Id.*

[39] *Id.* at 350 (quoting *United States v. Bean*, 537 U.S. 71, 77 (2002)). After Congress defended the § 925(c) restoration program described above, individuals barred from possessing firearms under federal law began filing suits asking federal district courts

II. Whether § 922(g)(4) Burdens Conduct Falling Within the Scope of the Second Amendment

Turning to the case before us and the constitutionality of § 922(g)(4) as applied to Beers, *Marzzarella* and *Binderup* require Beers to demonstrate that this statute burdens conduct protected by the Second Amendment. To do so, he must "(1) identify the traditional justifications for excluding from Second Amendment protections the class of which he appears to be a member, and then (2) present facts about himself and his background that distinguish his circumstances from those of persons in the historically barred class."[40]

Beers has not been able to do so. Even though he claims to be rehabilitated, Beers cannot distinguish himself from the historically-barred class of mentally ill individuals who were excluded from Second Amendment protection because of the danger they had posed to themselves and to others.

Section 922(g)(4) prohibits the possession of firearms by anyone "who has been adjudicated as a

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to review their restoration applications in the first instance. We ruled in *Pontarelli v. United States Department of Treasury* that Congress's denial of funds to process § 925(c) restoration applications stripped the federal district courts of jurisdiction to review the Justice Department's refusal to act on those applications. 285 F.3d 216, 230 (3d Cir. 2002). We also noted the institutional limitations and lack of resources of federal courts to conduct detailed investigations of applicants' backgrounds and their recent conduct. *Id.* at 230-31. The Supreme Court later confirmed this understanding in holding that the § 925(c) "inquiry into [an] applicant's background [is] a function best performed by the Executive, which, unlike courts, is institutionally equipped for conducting a neutral, wide-ranging investigation." *Bean*, 537 U.S. at 77.

[40] *Binderup*, 836 F.3d at 346-47 (internal citations omitted).

mental defective or who has been committed to a mental institution." The Code of Federal Regulations defines "adjudicated as a mental defective" to include, among other definitions, "[a] determination by a court, board, commission, or other lawful authority that a person, as a result of . . . mental illness . . . [i]s a danger to himself or to others . . . ."[41] The Code defines "committed to a mental institution" as a "[f]ormal commitment of a person to a mental institution by a court, board, commission, or other lawful authority," including "commitment to a mental institution involuntarily" and "commitment for mental defectiveness or mental illness."[42] Because the Code has defined the terms employed in § 922(g)(4) and because Beers was committed involuntarily by the Pennsylvania court to a psychiatric hospital in conformity with 27 CFR § 478.11 and with 50 Pa. C.S. §§ 7302-7304, we conclude that Beers has properly been identified as a member of the class described in § 922(g)(4).

To support our conclusion, we will review the traditional justifications for prohibiting the mentally ill from possessing guns in order to consider then if the imposition of the § 922(g)(4) ban is justified.

A. The Traditional Justifications for Excluding Mentally Ill Individuals from Second Amendment Protections

Traditionally, individuals who were considered dangerous to the public or to themselves were outside of the scope of Second Amendment protection. Although laws specifically excluding the mentally ill from firearm possession did not begin appearing until later,

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[41] 27 C.F.R. § 478.11.

[42] *Id.*

such laws were not necessary during the eighteenth century.[43] At that time, judicial officials were authorized to "lock up" so-called "lunatics" or other individuals with dangerous mental impairments.[44] Thus, courts analyzing the traditional justifications for disarming the mentally ill have noted that "if taking away a lunatic's liberty was permissible, then we should find the 'lesser intrusion' of taking his or her firearms was also permissible.[45]

The historical record cited in *Binderup* supports this conclusion. In *Binderup*, we turned to the precursor to the Second Amendment, the Address and Reasons of Dissent of the Minority of the Convention of the State of Pennsylvania to Their Constituents. That Address states that citizens did not have a right to bear arms if they had committed a crime. The Address goes on to note that citizens were excluded from the right to bear arms if they were a "real danger of public injury."[46] We can therefore ascertain that the traditional justification for disarming mentally ill individuals was that

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[43] *See* 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, 13773 (2009).

The tools of deduction employed here to conclude that the mentally ill were historically-barred from gun ownership, where there is little evidence of *specific* historic prohibitions, are the same means we employed in *Binderup.* Indeed, laws prohibiting felons from gun possession were also relatively new. *See Barton*, 633 F.3d at 173.

[44] Larson, *supra* note 43, at 1377-78 (citations omitted).

[45] *Jefferies v. Sessions*, 278 F. Supp. 3d 831, 841 (E.D. Pa. 2017) (quoting *Keyes v. Lynch*, 195 F. Supp. 3d 702, 718 (M.D. Pa. 2016)).

[46] *Binderup*, 836 F.3d at 349 (quoting 2 Bernard Schwartz, *The Bill of Rights: A Documentary History* 662, 665 (1971)).

they were considered dangerous to themselves and/or to the public at large.

B. Beers's Circumstances

Having identified the traditional justification for denying the mentally ill the right to arms—that they present a danger to themselves or to others—we now ask whether Beers has presented sufficient facts to distinguish his circumstances from those of members in this historically-barred class.[47] Beers's only bases for distinguishing himself, however, are that a substantial amount of time has passed since he was institutionalized and that he is now rehabilitated.

We established in *Binderup* that neither passage of time nor evidence of rehabilitation "can restore Second Amendment rights that were forfeited."[48] There was no historical support for the proposition that forfeited rights could be restored.[49]

In *Binderup*, we held that a challenger to § 922(g)(1) could distinguish his circumstances only by demonstrating that he was not convicted of a serious crime, but not by demonstrating that he had reformed or been rehabilitated. We reached this conclusion after analyzing the historical underpinnings of such a ban, which indicated that individuals who had committed serious crimes were traditionally prohibited from gun possession. Because the challengers in *Binderup* had not committed serious crimes, a ban on their right to bear arms was unconstitutional as it applied to them. Passage of time and evidence of rehabilitation, however, had no bearing on whether the challengers were

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[47] *Binderup*, 836 F.3d at 349.

[48] *Id.* at 350

[49] *Id.*

convicted of serious crimes. Such evidence, therefore, was irrelevant in our analysis at step one.

Here, the historical underpinnings of § 922(g)(4) were to keep guns from individuals who posed a danger to themselves or to others.[50] Beers was committed to a mental institution for this very reason: he was suicidal, and a court determined that he was a danger to himself or to others. The doctor who examined Beers noted that inpatient treatment was needed for Beers's safety. Additionally, Pennsylvania courts extended Beers's involuntary commitment on two occasions.

Beers cannot distinguish his circumstances by arguing that he is no longer a danger to himself or to others. Acceptance of his argument would sidestep the ruling we made in *Binderup* that neither passage of time nor evidence of rehabilitation "can restore Second Amendment rights that were forfeited."[51] Instead, the only way Beers can distinguish his circumstances is by demonstrating that he was never determined to be a danger to himself or to others. This Beers cannot do.

Moreover, the reasons that justified disregarding passage of time or rehabilitation in *Binderup* apply

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[50] In *Tyler v. Hillsdale County Sheriff's Department*, the Sixth Circuit reached the opposite result to the one we reach here, concluding that § 922(g)(4) burdened the Second Amendment rights of the challenger, an individual who was also involuntarily committed because of the danger he posed to himself or to others. 837 F.3d 678, 683 (6th Cir. 2016) (en banc). In reaching that conclusion, the Sixth Circuit found lacking the historical support for prohibitions on the possession of firearms by the mentally ill. *Id.* at 689-90. For the reasons we have stated above, we disagree that there is an absence of historical evidence that mentally ill individuals, who were considered a danger to themselves or to others, were banned from possessing guns.

[51] *Binderup*, 836 F.3d at 350.

here with equal force. First, there is no historical support for such restoration of Second Amendment rights. In addition, as was the case in *Binderup*, federal courts are ill-equipped to determine whether any particular individual who was previously deemed mentally ill should have his or her firearm rights restored.[52]

Because Beers cannot distinguish his circumstances, we conclude that § 922(g)(4) as applied to him does not burden conduct falling within the scope of the Second Amendment.[53]

Nothing in our opinion should be read as perpetuating the stigma surrounding mental illness. Although Beers may now be rehabilitated, we do not consider this fact in the context of the very circumscribed, historical inquiry we must conduct at step one. Historically, our forebearers saw a danger in providing mentally ill individuals the right to possess guns. That understanding requires us to conclude that § 922(g)(4) is constitutional as applied to Beers.

CONCLUSION

For the foregoing reasons, we will affirm the judgment of the District Court.

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[52] *Id. See supra* n.39. We realize that state courts participate in the involuntary commitment of mentally ill persons who are a danger to themselves or to others, see, *e.g.*, 50 Pa. C.S. § 7302. The federal courts do not, however, participate in such commitments, nor do they have the resources to conduct detailed investigations of an individual's mental state or his recent conduct. *Cf. Pontarelli*, 285 F.3d at 230-31 (holding that, in regard to restoration of gun right to felons, federal courts lack resources to conduct detailed investigations of applicants' background and their recent conduct.)

[53] Beers therefore fails to surpass the first step of our Second Amendment framework, and we need not proceed to step two.

APPENDIX B

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

Civil Action No. 2:16-cv-6440

BRADLEY BEERS, *et al.*,

v.

LYNCH, *et al.*

ORDER

AND NOW, this 5th day of September 2017, upon consideration of Defendants' Motion to Dismiss (Doc. No. 19), Plaintiffs' Answer and Memorandum in Opposition (Doc. Nos. 24, 24-1), and Defendants' Reply (Doc. No. 26), it is hereby ORDERED that the Defendants' Motion (Doc. No. 19) is GRANTED. Plaintiffs' complaint is DISMISSED with prejudice.

This action challenges federal and Pennsylvania law disqualifying individuals who had been committed to mental institutions from owning firearms. Plaintiffs Bradley Beers and Joseph DiVita, who had been committed pursuant to Pennsylvania law, sued federal and Pennsylvania agencies and officials, alleging violations of their rights under the Second Amendment of the U.S. Constitution, the Due Process Clause under the Fifth Amendment, and Equal Protection and Due Process Clauses of the Fourteenth Amendment. Plaintiffs subsequently dismissed their suit against Pennsylvania Defendants. Federal Defendants moved to dismiss under Federal Rule of Civil Procedure

12(b)(6). Because Plaintiffs have failed to state a claim under the Second Amendment, and their Fifth Amendment Claims likewise fail, Defendants' motion to dismiss is granted.

I. Background

Bradley and DiVita bring this suit against the Jefferson B. Sessions, III, Attorney General of the United States; the U.S. Department of Justice; Thomas E. Brandon, Acting Director of the Bureau of Alcohol, Tabacco, Firearms, and Explosives, ("ATF"); Ronald B. Turk, Deputy Director of the ATF; the ATF; James B. Comey, Director of the Federal Bureau of Investigation ("FBI"); the FBI; and the United States of America ("Federal Defendants"), as well as Josh Shapiro, Attorney General of Pennsylvania; the Pennsylvania State Police; Tyree Blocker, Commissioner of the Pennsylvania State Police; Edward J. Donnelly, Sheriff of Bucks County; and Matthew D. Weintraub, District Attorney of Bucks County ("Pennsylvania Defendants").

Plaintiffs allege that they had been involuntarily committed pursuant to Pennsylvania's Mental Health Procedures Act ("MPHA"), 50 P.S. §§ 7101 et seq, which provides for civil commitment of mental ill persons. Under the MPHA, an individual may receive involuntary emergency examinations and treatment authorized by a physician, not to exceed 120 hours, where there is "reasonable grounds to believe [the individual] is severely mentally disable and in need of immediate treatment." 50 P.S. § 7302. Involuntary emergency treatment may be extended if a judge or mental health review officer finds that the individual is "severely mentally disabled," provided that the treatment does not exceed 20 days. *Id.* § 7303.

Beers was committed on December 28, 2005, pursuant to § 7302. At the time, Beers was in college, and was depressed and suicidal. Compl. Ex. A at 1 (Doc. No. 1). He told his mother that he had put a gun in his mouth, that he had nothing to offer his family and nothing to live for, and that he was "going to fucking kill [him]self." *Id.* at 3; Compl. ¶¶ 26-27. Beers owned and had in his bedroom a musket, gun powder, and lead mini balls, items he used when participating in Civil War reenactments. Compl. ¶¶ 36-37; Ex. A at 4. His mother, concerned with his well-being and the fact that "he does have the means to carry out his plan to kill himself," took Beers to the Lower Bucks Hospital for inpatient mental health evaluation, which Beers had refused. Compl. Ex. A at 2-4. A physician examined Beers, who expressed "feelings of depression" and "no way out." *Id.* at 7. The physician determined Beers was depressed and suicidal, and that inpatient treatment was needed for his safety. *Id.* In light of this determination, the physician further determined that Beers was "severely mentally disabled" and certified that Beers should be admitted to a facility for treatment not to exceed 120 hours. *Id.*

Subsequently, Beers was admitted for extended involuntary emergency treatment following a hearing before the Bucks County Court of Common Pleas, at which Beers was represented by an attorney from the public defender's office. A mental health review officer found Beers was severely mentally disabled and in need of treatment, and ordered Beers committed for a period not to exceed 7 days, pursuant to § 7303 of the MHPA. Compl. Ex. B at 1. In January 2006, at another hearing before the Bucks County Court of Common Pleas, at which Beers was represented by another public defender, a judge found Beers was severely mentally disabled and in need of treatment, and

ordered Beers committed for a period not to exceed 90 days. Compl. Ex. C at 1.

Approximately midyear in 2006, Beers attempted to buy a gun, and was denied because he was listed in the Pennsylvania State Police Instant Background Check as a person "adjudicated as mentally defective or involuntarily committee to a mental institution or incompetent to handle their own affairs." Compl. ¶¶ 48, 52. Beers did not appeal the denial. *Id.* ¶ 54.

Joseph DiVita was involuntarily committed on November 7, 1988.[1] DiVita had taken some LSD and was experiencing hallucination and paranoia. Compl. Ex. E at 1-2. In addition, he threatened his father with a knife and refused to put the knife down. *Id.* at 2. He also stated, "I would kill myself if I could get my hands on a gun." *Id.* DiVita's father had a gun collection in his house, where DiVita also lived. *Id.* at 4. Concerned with DiVita's health and safety, DiVita's oldest sister took him to Doylestown hospital, where a physician found that DiVita was suicidal and a danger to himself, and certified that his commitment under § 7302.[2] *Id.* DiVita received treatment at Horsham Clinic and continued to receive therapy after his release. *Id.* at 2-3. In 2015, DiVita was denied a concealed carry license on the basis of his commitment. Compl. ¶ 67.

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[1] DiVita, unlike Beers, did not attach the records and forms underlying his involuntary commitment with the Complaint. Rather, information regarding the circumstances of his involuntary commitment was provided in the report of Bruce Eimer, PhD. Compl. Ex. E.

[2] To the extent DiVita alleges in the complaint that his involuntary commitment was improper, the record does not reflect any attempt to challenge that commitment pursuant to Pa. C.S.A. § 6111.1(g), which provides for review of the sufficiency of evidence upon which the commitment was based.

The Complaint alleges three counts. Count I asserts that federal and state prohibition of individuals who have been involuntarily committed from owning or possessing firearms, under 18 U.S.C. § 992(g)(4) and 18 Pa. C.S.A. § 6105(c)(4), violates Plaintiffs' rights under the Second Amendment of the U.S. Constitution. Compl. ¶¶ 79-82. Count II asserts the ban of a certain class of individuals—those who have been involuntarily committed—from acquiring a firearm "without providing for a means to seek review and relief" violates Plaintiffs' rights under the Due Process Clause of the Fifth Amendment. Compl. ¶¶ 87-88. Count III asserts the ban of individuals who have been involuntarily committed from acquiring firearms "without providing for a means to seek review and relief" violates Plaintiffs' rights under the Equal Protection and Due Process Clauses of the Fourteenth Amendment. Compl. ¶¶ 93-95. For Counts I, II, and III, Plaintiffs seek declaratory relief that 18 U.S.C. § 992(g)(4) and 18 Pa. C.S.A. § 6105(c)(4) violate Plaintiffs' rights under the Second, Fifth, and Fourteenth Amendments. Plaintiffs also seek injunctive relief from enforcement of these laws against them. Finally, Plaintiffs request costs and fees.

Additionally, in Counts IV and V, Plaintiffs seek relief from their disability from possessing firearms under 18 Pa. C.S.A. § 6105(c)(4). Subsequently, the Court of Common Pleas of Bucks County entered orders, pursuant to 18 Pa. C.S.A. § 6105, relieving Beers and DeVita "from any and all disabilities with respect to a person's right to own, possess, use, control, sell, purchase, transfer, manufacture, receive, ship or transport firearm." Beers Stip. Ex. A (Doc. No. 29); DiVita Stip. Ex. A (Doc. No. 30). Plaintiffs stipulated to the dismissal of their claims against the state Defendants. Beers Stip. (Doc. No. 29); DiVita Stip. (Doc. No. 30).

Federal Defendants move to dismiss the complaint.

II. Legal Standard

Federal Rule of Civil Procedure 12(b)(6) authorizes dismissal of a complaint for "failure to state a claim upon which relief can be granted." In evaluating a motion to dismiss under Rule 12(b)(6), a district court must "accept all factual allegations as true, construe the complaint in the light most favorable to the plaintiff, and determine whether, under any reasonable reading of the complaint, the plaintiff may be entitled to relief." *Fowler v. UPMC Shadyside,* 578 F.3d 203, 210 (3d Cir. 2009). A complaint must plead "enough facts to state a claim to relief that is plausible on its face." Fed. R. Civ. P. 8(a)(2); *Ashcroft v. Iqbal,* 556 U.S. 662, 678 (2009); *Bell Atlantic Corp. v. Twombly,* 550 U.S. 544, 555, 570 (2007). A claim has "facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Iqbal,* 556 U.S. at 678 (citing *Twombly,* 550 U.S. at 556). In assessing the sufficiency of a complaint, the court may consider the pleadings, public record, orders, exhibits attached to the complaint, and documents incorporated into the complaint by reference. *Tellabs, Inc. v. Makor Issues & Rights, Ltd.,* 551 U.S. 308, 322 (2007). Ordinarily, a plaintiff must be afforded an opportunity to amend his or her complaint when it is dismissed for failure to state a claim, unless a curative amendment "would be inequitable or futile." *Phillips v. Cty. of Allegheny,* 515 F.3d 224, 245 (3d Cir. 2008).

III. Discussion

a. Second Amendment Claims

The Supreme Court held that the Second Amendment conferred an individual right to keep and bear arms.

Dist. of Columbia v. Heller, 554 U.S. 570, 595, 626 (2008). However, the Supreme Court also recognized, the right to bear arms, though venerable, is qualified. See id. *Heller* made clear 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." *Id.* Federal law prohibits an individual who "has been committed to a mental institution" from possessing a firearm. 18 U.S.C. § 922(g)(4).

In applying *Heller,* the Third Circuit has established a two-pronged approach for Second Amendment challenges:

> First, we ask whether the challenged law imposes a burden on conduct falling within the scope of the Second Amendment's guarantee. If it does not, our inquiry is complete. If it does, we evaluate the law under some form of means-end scrutiny. If the law passes muster under that standard, it is constitutional. If it fails, it is invalid.

United States v. Marzzarella, 614 F.3d 85, 89 (3d Cir. 2010); *see also Binderup v. Att'y Gen.,* 836 F.3d 336, 356 (3d Cir. 2016).

Defendants argue that, applying this standard, Plaintiffs' Second Amendment claims should be dismissed because (1) § 922(g)(4) affects conduct that falls outside the scope of the Second Amendment's protection; and (2) in any event, § 922(g)(4) as applied to Plaintiffs passes muster under constitutional scrutiny. Plaintiffs argue that under *United States v. Greeno,* 679 F.3d 510 (6th Cir. 2012), the burden is on the government to "conclusively demonstrate" that the regulated activity fell outside the right to keep or bear arms, although Plaintiffs neither address Third Circuit precedent on point nor explain why this Court

should apply an out-of-circuit test rather than Third Circuit authority.

The Third Circuit has made clear that "*Heller* delineates some of the boundaries of the Second Amendment right to bear arms." *Marzzarella,* 614 F.3d at 92. Among those limitations on the Second Amendment right to bear arms is the disqualification of persons who were previously involuntarily committed for prior mental illness. *Id.* 614 F.3d at 91-92. Here, Plaintiffs assert Second Amendment claims based on their disqualification under § 922(g)(4), which prohibits gun ownership by any individual "who has been adjudicated as a mental defective or who has been committed to a mental institution[.]" 18 U.S.C. § 922(g)(4). Beers was committed to a mental institution based on threats of harm to himself under §§ 7302 and 7303; DiVita was committed to a mental institution for threats of harm to himself and others under § 7302. Nowhere in the pleadings have Plaintiffs distinguished their circumstances from those of persons subject to "longstanding prohibitions on the possession of firearms." *See Marzzarella,* 614 F.3d at 89. Therefore, under the first prong of the *Marzzarella* inquiry—whether the challenged law imposes a burden on conduct falling within the scope of the Second Amendment's guarantee—Plaintiffs' claims fail because the conduct at issue falls outside the scope of the Second Amendment's protection. *See Heller,* 554 U.S. at 595, 626.

Plaintiffs' argument regarding their "current fitness" to possess firearms is of no moment, because § 922(g)(4) does not include an exception for current fitness for gun possession. The Third Circuit has not addressed the "current fitness" argument in the context of § 922(g)(4); however, it has rejected the argument in

the context of § 922(g)(1), the provision that disqualifies felons from gun possession. The Third Circuit stated, "evidence of a challenger's rehabilitation or his likelihood of recidivism is not relevant to the step-one analysis" in the *Marzzarella* test, that is, whether the challenged law imposes a burden on conduct falling within the scope of the Second Amendment's guarantee. *See Binderup v. Att'y Gen.,* 836 F.3d at 344, 356. Furthermore, at least in the § 922(g)(1) context, "[t]here is no historical support for the view that the passage of time or evidence of rehabilitation can restore Second Amendment rights that were forfeited." *Id.* 836 F.3d at 350.

Given that § 922(g)(4) is a "presumptively lawful regulatory measure" and that, here, there is no burden on conduct falling within the scope of the Second Amendment's guarantee, under the *Marzzarella* test, "our inquiry is complete." *Marzzarella,* 614 F.3d at 89. Although Plaintiffs argue that § 922(g)(4) is unconstitutional as applied to them because they are "safe, sane, [and] mentally stable" and pose no risk of harm to oneself or others, Plaintiffs' Opp. at 6, no Supreme Court or Third Circuit precedent has allowed an as-applied challenge to § 922(g)(4).[3] Furthermore, although

[3] Indeed, the Supreme Court has noted that courts are not "institutionally equipped" to conduct wide-ranging investigations into whether a person dispossessed under § 922(g) is likely to act in a manner dangerous to public safety. *United States v. Bean,* 537 U.S. 71, 77 (2002). Further, regarding another provision under § 922(g), the Third Circuit has stated that this is not an inquiry that courts are well suited to conduct. Presented with an argument for an as-applied challenge under § 922(g)(1), the Third Circuit stated, "courts possess neither the resources to conduct the requisite investigations nor the expertise to predict accurately predict which felonFs may carry guns without threatening the

Plaintiffs urge the application of *United States v. Barton's* test for as-applied challenges under § 922(g)(1), 633 F.3d 168 (3d Cir. 2011), the Third Circuit specifically overruled *Barton* in this respect: "[t]o the extent *Barton* holds that people convicted of serious crimes may regain their lost Second Amendment rights after not posing a threat to society for a period of time, it is overruled." *Binderup,* 836 F.3d at 350. This Court declines to Plaintiffs' invitation to depart from Third Circuit authority or follow precedent that has been overruled.

Given that, in Count I, Plaintiffs have not stated a claim for which relief may be granted, Defendants' motion to dismiss the Second Amendment Claim is granted. Next, this Court must consider whether an opportunity to amend the complaint would be futile. Under § 922(g)(4), any individual "who has been adjudicated as a mental defective or who has been committed to a mental institution" is disqualified from gun ownership. 18 U.S.C. § 922(g)(4). Beers and DiVita plead that they were committed to mental institutions pursuant to Pennsylvania law, and attached documentation supporting those assertions. As such, Plaintiffs are disqualified from firearms ownership under § 922(g)(4). Therefore, as a matter of law, Plaintiffs cannot show that § 922(g)(4) imposes a burden on conduct falling within the scope of the Second Amendment's guarantee, and opportunities for amending the complaint would be futile. *See Phillips v. Cty. of Allegheny,* 515 F.3d at 245. Accordingly, Count I is dismissed with prejudice.

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public's safety." *Pontarelli v. U.S. Dep't of Treasury,* 285 F.3d 216, 231 (3d Cir. 2002) (en banc).

b. Fifth Amendment Due Process Claims

The Fifth Amendment Due Process Clause protects the individuals against arbitrary action of government, *Cty. of Sacramento v. Lewis,* 523 U.S. 833, 845 (1998), and includes substantive and procedural components. *Washington v. Glucksberg,* 521 U.S. 702, 719-20 (1997) ("The Due Process Clause guarantees more than fair process . . . The Clause also provides heightened protection against government interference with certain fundamental rights and liberty interests."); *Combs v. Homer-Center Sch. Dist.,* 540 F.3d 231, 247 (3d Cir. 2008). However, the Supreme Court has sharply circumscribed substantive due process, limiting its protections to only those that are "carefully described," and unenumerated rights that are "deeply rooted in this Nation's history and tradition" and "implicit in the concept of ordered liberty." *Chavez v. Martinez,* 538 U.S. 760, 775 (2003) (citing *Glucksberg,* 521 U.S. at 720-21) (internal quotations omitted).

Plaintiffs allege that they "have been deprived of their Second Amendment right . . . without being afforded notice and an opportunity to be heard on the matter prior to the deprivation" and were without "a post-deprivation proceeding to seek and obtain relief from the deprivation." Compl. ¶ 88. This Court construes Plaintiffs as making both substantive and procedural due process claims and considers them in turn. First, as to substantive due process, Plaintiffs' claims are premised on the assertion that their Second Amendment rights have been violated. However, because Plaintiffs have not sufficiently alleged any Second Amendment violation, they fail to sufficiently allege substantive due process claims. *See Dist. Att'y's Office for Third Judicial Dist. v. Osborne,* 557 U.S. 52, 69 (2009) (refusing to recognize a liberty interest

protected by due process unless it is "so rooted in the traditions and conscience of our people as to be ranked as fundamental" (internal quotation marks and citation omitted)).

Next, Plaintiffs' procedural due process claims are based on their allegation that they were not provided pre- and post-deprivation hearings. Compl. ¶ 88. Procedural due process protects an individual's fundamental opportunity to be heard at a meaningful time and in a meaningful manner. *Mathews v. Eldridge,* 424 U.S. 319, 333 (1976). The Supreme Court has made clear that "due process does not require the opportunity to prove a fact that is not material to the . . . statutory scheme." *Conn. Dep't of Pub. Safety v. Doe,* 538 U.S. 1, 4 (2003). Under the statutory scheme at issue, § 922(g)(4) prohibits gun ownership by any individual "who has been adjudicated as a mental defective or who has been committed to a mental institution[.]" 18 U.S.C. § 922(g)(4). Plaintiffs' current mental health is distinct from and irrelevant to the issue of whether Plaintiffs had been adjudicated as a mental defective or committed to a mental institution. As the Supreme Court stated, regarding disqualification from gun ownership under § 922(g)(4):

> A person adjudicated as a mental defective may later be adjudged competent, and a person committed to a mental institution later may be deemed cured and released. Yet Congress made no exception for subsequent curative events. The past adjudication or commitment disqualifies. Congress obviously felt that such a person, though unfortunate, was too much of a risk to be allowed firearms privileges.

Dickerson v. New Banner Inst. Inc., 460 U.S. 103, 116-17 (1983). Additionally, neither the Supreme Court

nor the Third Circuit has held that due process requires a hearing to determine whether an individual who had been disqualified from gun ownership for involuntarily commitment is currently dangerous. *See, e.g., Keyes v. Lynch,* 195 F.Supp.3d 702, 723 (M.D. Pa. 2016). Further, in a procedural due process challenge to another provision under § 922(g), the Third Circuit specifically rejected the argument that a felon was entitled to a hearing to determine his future dangerousness. *Bell v. United States,* 574 F.App'x 59, 61 (3d Cir. 2014) (discussing disqualification under § 922(g)(1)). In *Bell*, the Third Circuit affirmed the District Court's holding that "due process does not entitle [a felon] to a hearing to determine whether he is currently dangerous because the results of such a hearing would have no bearing on whether he is subject to the disability imposed by § 922(g)(1)." *See Id.*; *Bell v. United States,* 2013 WL 5763219, at *3 (E.D. Pa. Oct. 24, 2013). Therefore, Plaintiffs have not sufficiently alleged that they are entitled procedural due process.[4] Accordingly, Plaintiffs' Fifth Amendment due process claim fails, and Defendants' motion to dismiss the claim is granted.[5]

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[4] To the extent DiVita attempts to attack his 1988 commitment in this action, a federal proceeding is an improper venue to collaterally attack a § 922(g) disqualifying event. *See United States v. Leuschen,* 395 F.3d 155, 158-59 (3d Cir. 2005) (holding that because § 922(g)(1) is triggered by the fact of a felony conviction rather than its validity, a defendant "cannot collaterally attack his predicate conviction in defense of his prosecution under § 922(g)(1)"); *United States v. McIlwain,* 772 F.3d 688, 698 (11th Cir. 2014) (stating, in the § 922(g)(4) context, a plaintiff is not entitled "to collateral attack in federal court on a commitment he did not—and has not in any way—challenged in state court").

[5] To the extent Plaintiffs allege equal protection claims under the Fifth Amendment, pleading that a "ban on a certain class

c. Fourteenth Amendment Claims

In Count III, Plaintiffs assert claims against the Pennsylvania Defendants that the prohibition on possession of firearm under federal law infringes their rights under the Fourteenth Amendment. The Fourteenth Amendment mandates that "no State shall . . . deprive any person of life, liberty, or property, without due process of law." U.S. CONST. amend. XIV, § 1. The Fourteenth Amendment describes a legal obligation of all states. *See Dusenbery v. United States,* 534 U.S. 161, 167 (2002). In light of Plaintiffs' stipulation that the Court of Common Pleas in Bucks County, Pennsylvania, has relieved them of disabilities with respect to gun possession, their claims against the Pennsylvania Defendants are moot. As to the Federal Defendants, the Fourteenth Amendment's Equal Protection Clause applies to the federal government through the Fifth Amendment's Due Process Clause, and this Court has addressed Plaintiffs' Fifth Amendment claims in the prior section. Therefore, Count III is dismissed with prejudice.

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of individuals—individuals who have ever been involuntarily committed—[from] acquiring a firearm . . . violates plaintiffs' rights to equal protection," Compl. ¶ 87, Plaintiffs have not alleged that they are members of any suspect class, and have failed to allege how the statute would fail under rational basis review. *See United States v. One (1) Vyatskie Polyany Mach. Bldg. Plant Molot VERP Rifle,* 473 F.Supp.2d 374, 377-78 (E.D.N.Y. 2007); *see also United States v. Huitron-Guizar,* 678 F.3d 1164, 1167 (10th Cir. 2012); *United States v. Vongxay,* 594 F.3d 1111, 1119 (9th Cir. 2010).

IV. Conclusion

For the reasons stated above, Defendants' motion to dismiss is granted. Plaintiffs' complaint is dismissed with prejudice.

BY THE COURT:

/s/ Legrome D. Davis
Legrome D. Davis, J.

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 17-3010

BRADLEY BEERS;
JOSEPH DIVITA*,

Appellants

v.

ATTORNEY GENERAL UNITED STATES OF AMERICA; DEPARTMENT OF JUSTICE; UNITED STATES BUREAU OF ALCOHOL TOBACCO FIREARMS & EXPLOSIVES; THOMAS E. BRANDON, Deputy Director of the ATF; RONALD B. TURK, Associates Deputy Director/Chief Operating Office of the ATF; FEDERAL BUREAU OF INVESTIGATION; DIRECTOR FEDERAL BUREAU OF INVESTIGATION; UNITED STATES OF AMERICA; PENNSYLVANIA ATTORNEY GENERAL; PENNSYLVANIA STATE POLICE; TYREE BLOCKER, Commissioner of the Pennsylvania State Police; EDWARD DONNELLY, Bucks County Sheriff; BUCKS COUNTY SHERIFFS DEPARTMENT; BUCKS COUNTY DISTRICT ATTORNEY

*(Party Dismissed Pursuant to Court Order dated 02/13/18)

(D.C. Civil Action No. 2-16-cv-06440)

SUR PETITION FOR REHEARING

Present: SMITH, *Chief Judge*, MCKEE, AMBRO, CHAGARES, JORDAN, HARDIMAN, GREENAWAY, JR., SHWARTZ, KRAUSE, RESTREPO, BIBAS, PORTER, MATEY, PHIPPS, *ROTH and *RENDELL, *Circuit Judges*

The petition for rehearing filed by **appellant** in the above-entitled case having been submitted to the judges who participated in the decision of this Court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the judges of the circuit in regular service not having voted for rehearing, the petition for rehearing by the panel and the Court en banc, is denied.

BY THE COURT,

s/ JANE R. ROTH
Circuit Judge

Dated: September 11, 2019

PDB/cc: All Counsel of Record

* The votes of the Honorable Jane R. Roth and Marjorie O. Rendell are limited to panel rehearing only.

APPENDIX D

18 U.S.C. § 922 – Unlawful acts

(g) 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.

34 U.S.C. § 40915 – Relief from disabilities program required as condition for participation in grant programs

(a) Program described

A relief from disabilities program is implemented by a State in accordance with this section if the program—

(1) permits a person who, pursuant to State law, has been adjudicated as described in subsection (g)(4) of section 922 of title 18 or has been committed to a mental institution, to apply to the State for relief from the disabilities imposed by subsections (d)(4) and (g)(4) of such section by reason of the adjudication or commitment;

(2) provides that a State court, board, commission, or other lawful authority shall grant the relief, pursuant to State law and in accordance with the principles of due process, if the circumstances regarding the disabilities referred to in paragraph (1), and the person's record and reputation, are such that the person will not be likely to act in a manner dangerous to public safety and that the granting of the relief would not be contrary to the public interest; and

(3) permits a person whose application for the relief is denied to file a petition with the State court of appropriate jurisdiction for a de novo judicial review of the denial.

(b) Authority to provide relief from certain disabilities with respect to firearms

If, under a State relief from disabilities program implemented in accordance with this section, an application for relief referred to in subsection (a)(1) of this section is granted with respect to an adjudication or a commitment to a mental institution or based upon a removal of a record under section 40912(c)(1)(B) of this title, the adjudication or commitment, as the case may be, is deemed not to have occurred for purposes of subsections (d)(4) and (g)(4) of section 922 of title 18.

18 Pa. Cons. Stat. § 6105 – Persons not to possess, use manufacture, control, sell or transfer firearms

(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.

(2) If application is made under this subsection for relief from the disability imposed under subsection (c)(6), notice of such application shall be given to the person who had petitioned for the protection from abuse order, and such person shall be a party to the proceedings. Notice of any court order or amendment to a court order restoring firearms possession or control shall be given to the person who had petitioned for the protection from abuse order, to the sheriff and to the Pennsylvania State Police. The application and any proceedings on the application shall comply with 23 Pa.C.S. Ch. 61 (relating to protection from abuse).

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

(4)(i) The owner of any seized or confiscated firearms or of any firearms ordered relinquished under 23 Pa.C.S. § 6108 shall be provided with a signed and dated written receipt by the appropriate law enforcement agency. This receipt shall include, but not limited to, a detailed identifying description indicating the serial number and condition of the firearm. In addition, the appropriate law enforcement agency shall be liable to the lawful owner of said confiscated, seized or relinquished firearm for any loss, damage or sub-

stantial decrease in value of said firearm that is a direct result of a lack of reasonable care by the appropriate law enforcement agency.

(ii) Firearms shall not be engraved or permanently marked in any manner, including, but not limited to, engraving of evidence or other identification numbers. Unless reasonable suspicion exists to believe that a particular firearm has been used in the commission of a crime, no firearm shall be test fired. Any reduction in the value of a firearm due to test firing, engraving or permanently marking in violation of this paragraph shall be considered damage, and the law enforcement agency shall be liable to the lawful owner of the firearm for the reduction in value caused by the test firing, engraving or permanently marking.

(iii) For purposes of this paragraph, the term "firearm" shall include any scope, sight, bipod, sling, light, magazine, clip, ammunition or other firearm accessory attached to or seized, confiscated or relinquished with a firearm.