

Atlantic Commonwealth Court of Chancery

NOTTHEDARKWEB_MNZP, <i>Petitioner,</i>		
v.		Case No. 21-01
		Doc. No. 21-01-A
MYHOUSEISONFIRE, GOVERNOR, <i>Respondent,</i>		
IN RE: EXECUTIVE ORDER 02		

Before: HurricaneofLies, C., in chambers

MEMORANDUM ORDER GRANTING PETITIONER’S *EX PARTE* **APPLICATION FOR TEMPORARY RESTRAINING ORDER**

On February 11, 2011, Commonwealth Governor House O. Fire issued Executive Order 02 (“the Order”), which purports to “[focus] on the right to bear arms” by ordering a variety of measures, including but not limited to: (1) the non-prosecution of various firearm possession offenses, (2) ending all assistance and cooperation with firearms-related investigations of the Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF), (3) the non-collection of excise taxes on firearms and ammunition, (4) the establishment of a public rifle range, and (5) the pardon of non-violent offenders who violated the offenses covered by (1).

Petitioner Notthedarkweb_MNZP filed suit the following day and now moves for a temporary restraining order and preliminary injunction enjoining the enforcement of the Order. For the reasons below, the Court **GRANTS** Petitioner’s ex parte application for a TRO and enjoins the enforcement of the Order until a hearing is conducted on the application for a preliminary injunction.

UNPUBLISHED AND NON-PRECEDENTIAL

Legal Standard

The purpose of a temporary restraining order is to maintain the *status quo* until the application for a preliminary injunction may be heard by the Court. “A temporary restraining order may be granted pending a hearing for a preliminary injunction where it appears that immediate and irreparable injury, loss or damage will result unless the defendant is restrained before the hearing can be had.” CPLR § 6301.

The same test governs the grant of a temporary restraining order and a preliminary injunction. In determining whether temporary injunctive relief should issue, the courts of the Commonwealth must consider: (1) the likelihood of success on the merits; (2) irreparable injury absent granting the preliminary injunction; and (3) a balancing of the equities. *W. T. Grant Co. v. Srogi*, 52 N.Y.2d 496, 517 (1981). Although no single prong of the test is determinative, *cf. Danae Art Int’l Inc. v. Stallone*, 163 A.D.2d 81, 82 (1990), “a showing of probable irreparable harm is the single most important prerequisite for the issuance of a preliminary injunction.” *Reuters v. United Press Int’l*, 903 F.2d 904, 907 (2d Cir. 1990).

Analysis

A. Likelihood of Success

Federal Preemption

When the Atlantic Commonwealth ratified the Articles of Confederation, and then the Constitution, to become one of the United States, it irreversibly exchanged its unlimited sovereignty for the benefits of perpetual union. *Texas v. White*, 74 U.S. 700, 726 (1869). The lynchpin of this historic agreement was the principle that valid federal laws are supreme over state laws, along with the corollary that states could not act to impede the objectives of Congress. U.S. Const., art. VI, cl. 2.

Accordingly, as Petitioner notes, the U.S. Supreme Court has held that any blanket prohibition on information sharing with a federal law enforcement agency is presumptively unconstitutional. *Cf. U.S. v. Central State*, 101 M.S. Ct 104 (2018), at part III. As section II of the Order undoubtedly constitutes such a blanket

prohibition, its presumptive unconstitutionality unquestionably gives Petitioner a strong likelihood of success on the merits.

Abrogation of Legislative Acts

This Court has consistently taken a dim view of attempted “executive [usurpations] of the legislative branch’s domain.” *JacobinAustin v. _MyHouseIsOnFire_*, (2020) Atl. 10, 33. Accordingly, we have exacted executive actions that blur the separation of powers with the legislative branch to heightened scrutiny. *UnorthodoxAmbassador v. _MyHouseIsOnFire_*, (2020) Atl. 11, 35-37.

Because the imposition of taxes is a core legislative function in which the Governor has no role outside the legislative process, *Aubrion v. Parado-I*, (2019) Atl. 11, 2, it is likely that a similar proscription extends to the Governor’s attempt to nullify validly adopted taxes via executive order. Moreover, the dismantlement of various legislative mandates and statutory regulatory schemes clearly poses a separation-of-powers concerns, raising unsettled and viable questions about whether the Governor has acted *ultra vires* his constitutional powers. Accordingly, Petitioner demonstrates a likelihood of success on this claim.

Non-Prosecution

This Court has previously upheld the exercise of executive power to decline to prosecute a particular criminal offense. *Ibney00 v. TheCloudCappedStar*, (2019) Atl. 15, 2. However, the question was resolved on unitary-executive grounds and did not consider other potentially relevant questions, including the constitutional duty to take care that the laws are faithfully executed. Atl. Const., art. IV, § 2.

We further observe that, in the time since *Ibney* was decided, the U.S. Supreme Court has injected significant uncertainty into the jurisprudence surrounding the absolute prosecutorial discretion of the executive branch by invalidating a blanket non-prosecution directive for federal immigration offenses. *In re Executive Order 002*, 101 M.S.Ct 118 (2020).

Accordingly, there is significant legal uncertainty on this question and Petitioner’s claim has a reasonable likelihood of success.

B. Irreparable Injury

Petitioner has suggested that the systematic dismantlement of firearms safety legislation in the Commonwealth would undermine public safety and cause harm to citizens from the proliferation of unlawful firearms, contrary to the public policy adopted by the Legislature. This is an irreparable injury, because it cannot be adequately remedied by monetary damages. *Poling Transp. Corp. v. A & P Tanker Corp.*, 84 A.D.2d 796, 797 (1981).

In addition, it is well-established that “constitutional violations cannot be adequately remedied through damages and therefore generally constitute irreparable harm.” *Nelson v. Nat’l Aeronautics & Space Admin.*, 530 F.3d 865, 882 (9th Cir. 2008). As Petitioner’s claims that the Governor has acted *ultra vires* are constitutional in nature, irreparable harm is incurred in the absence of temporary equitable relief.

C. Balance of Equities

Petitioner has demonstrated a likelihood of success on constitutional challenges to the powers of the Governor to exercise the purported powers outlined in the Order. Accordingly, the balance of equities tilts in Petitioner’s direction because there is never a public interest in the enforcement of unconstitutional laws. *ACLU v. Ashcroft*, 322 F.3d 240, 247 (3d Cir. 2003).

Moreover, the balance of equities favors the preservation of the status quo pending the resolution of the action, which is best served by suspending the implementation of sweeping executive actions that would drastically alter the legal and regulatory landscape of the Commonwealth. *See, Cong. Machon Chana v. Machon Chana Women's Inst.*, 162 A.D.3d 635, 637-38 (2018).

Conclusion

For the aforementioned reasons, the Court **GRANTS** Petitioner’s *ex parte* application for a temporary restraining order.

IT IS HEREBY ORDERED that the Commonwealth, by and through any agent or officer, is hereby enjoined from enforcing any provision of Executive Order 02 until February 26, 2021.

IT IS FURTHER ORDERED that the Commonwealth, by and through any agent or officer, is hereby enjoined from modifying or terminating any cooperation or mutual-aid arrangement with the Bureau of Alcohol, Tobacco, Firearms and Explosives until February 26, 2021.

IT IS FURTHER ORDERED that the Commonwealth shall, by no later than February 17, 2021, **SHOW CAUSE** why the Court should not enter a preliminary injunction imposing the terms set forth herein.

It is so ordered.

Dated: February 12, 2021		<u>/s/ Hurricane</u>
_____		Hon. HurricaneofLies
_____		Chancellor