Atlantic Commonwealth
Court of Chancery

DEWEY-CHEATEM *v.* _MYHOUSEISONFIRE_, GOVERNOR
IN RE: ATLANTIC DEFENSE OF FIREARMS ACT

No. 21-04 Filed August 21, 2021—Decided December 24, 2021

Before: HurricaneofLies, C.; Mika3740, V.C.; Cold_Brew_Coffee, V.C.

Plaintiff Dewey-Cheatem brings action against Defendant, Governor _MyHouseIsOnFire_, challenging the facial constitutionality of the Atlantic Defense of Firearms Act under the Supremacy Clause (U.S. Const., art. VI, cl. 2).

HurricaneofLies, C., delivered the opinion of a unanimous court. Dewey-Cheatem argued the case for Plaintiff. lily-irl argued the case for Defendant as *amicus curiae*.

Held: Insofar as the Atlantic Defense of Firearms Act purports to supersede federal law or regulate federal officers, it is void and of no effect because it is conflict-preempted and violative of intergovernmental immunity under the Supremacy Clause of the U.S. Constitution. Because the remainder of the Act is inseverable, it is unconstitutional in its entirety.

Cite as: Full opinion: *Dewey-Cheatem v. _MyHouseIsOnFire_*, (2021) Atl. 04.
Paragraph: *Dewey-Cheatem v. _MyHouseIsOnFire_*, (2021) Atl. 04, [para].

1. While the Legislature has every right to advocate for any constitutional interpretation of its choosing, it absolutely has no right to use the breadth of its legislative power to pass substantial regulations nullifying federal law and impeding the just supremacy of the United States. [paras 12-14]
2. A state cannot impose liability on respect for federal law. [paras 15-18]
3. The doctrine of intergovernmental immunity unambiguously sets out that federal officers 'acting under and in pursuance of the laws of the United States' enjoy absolute immunity from state regulation except as waived. [paras 20-25]
4. The presence of a generic, *pro forma* severability clause has never been conclusive in our severability analysis, especially when there are serious reasons to doubt whether the Legislature would have enacted the remainder of the statute. [paras 26-28]

HURRICANEOFLIES, C.:

[1] On August 21, 2021, Governor Fire signed into law A.B. 75, the Atlantic Defense of Firearms Act. The Act invokes the Second, Ninth and Tenth Amendments to the United States Constitution and argues that the intrastate trade in firearms is not subject to federal regulations. Consequently, it declares all "ammunition, firearms, firearms parts, and firearms accessories manufactured, sold, purchased, and possessed solely within the state lines of Atlantic" to be exempt from federal law, bars state officers from enforcing federal laws or cooperating with federal law enforcement officers, and orders all firearms introduced into intrastate commerce to bear a "Made in Atlantic" imprint.

[2] Plaintiff Dewey Cheatem brings the instant action under the Supremacy Clause, U.S. Const., art. VI, cl. 2, and suggests that the statute is preempted by federal law, the Commonwealth's invocation of the Tenth Amendment notwithstanding. Plaintiff argues that nullification is *per se* in conflict with federal law and subject to preemption.

Cite as: Full opinion: *Dewey-Cheatem v. _MyHouseIsOnFire_*, (2021) Atl. 04.
Paragraph: *Dewey-Cheatem v. _MyHouseIsOnFire_*, (2021) Atl. 04, [para].

[3] We agree. The Commonwealth's assertions to the contrary are rooted in an erroneous, literalist reading of the Constitution and precluded by *Gonzales v. Raich*, 545 U.S. 1 (2005). To the extent that A.B. 75 purports to nullify federal law, to prohibit cooperation with federal law enforcement, or to regulate the conduct of federal officers, we hold, and separately declare, that the statute is unconstitutional on its face.

I

[4] The Commonwealth's position is summarized as that the enactment is not unconstitutional because it is "in effect, a nullity." Br. of Amicus at 1-2. In other words, it is asserted that the Act is not unconstitutional because it has no effect and therefore cannot obstruct the operation of federal law. But this reading is unnatural and not supported by the letter of the statute: after all, the Act's long title states that its purpose is to "exempt from federal law and regulations" the manufacture, sale, purchase and possession of various firearms. To exempt is to remove an existing obligation, and we therefore believe on the balance of probabilities that the use of the active verb 'exempt' here is an acknowledgment by the Legislature that its bill alters the *status quo*.

[5] Of course, that is not to say that we must strictly construe the wording used by the Legislature, and indeed we have in the past rejected attempts to invalidate legislation "simply because the Legislature failed to use the most exact phraseology available." *JacobinAustin v. _MyHouseIsOnFire_*, (2020) Atl. 10, 15, n. 2. Instead, "[i]n the absence of an unambiguous textual answer, we approach this question purposively." *KellinQuinn__ v. _MyHouseIsOnFire_*, (2021) Atl. 03, 31.

[6] The purpose of lawmaking is "to devise novel policy absent existing statutory authority." *JacobinAustin v. _MyHouseIsOnFire_*, (2020) Atl. 10, 31. We are therefore with good reason wary of an extraordinary claim that the legislative purpose behind A.B. 75 was to do nothing at all—to simply reaffirm constitutional

truisms that everyone's known all along. Our doubt is especially grave because "we take it for granted that [policymakers are] intelligent men and women whose choice of language was both intentional and meaningful." *_MyHouseIsOnFire_ v. TheCloudCappedStar*, (2020) Atl. 01, 3. It seems unlikely in our view that the Legislature would etch a nullity onto the Commonwealth's legal codes, especially given that no indication of such intent is visible from the four corners of the admittedly sparse legislative record.

[7] Upon due consideration of all arguments on the record, we regrettably cannot concur with the Commonwealth's interpretation. Several reasons animate our conclusion, which we proceed to explain below.

[8] *First*, the Commonwealth's argument in effect attempts to argue that "in interstate [...] commerce" as used in federal firearms law and "solely within the state lines of Atlantic" as used in A.B. 75 are two discrete categories with zero overlap. But this is not a colorable argument, because interstate commerce "extends to those activities intrastate which so affect interstate commerce [...] as to make regulation of them appropriate means to the attainment of a legitimate end." *U.S. v. Wrightwood Dairy Co.*, 315 U.S. 110, 119 (1942). The strict interstate/intrastate distinction espoused by the Commonwealth, whereby any activity strictly within its borders is totally exempt from federal regulation, reflects an antediluvian view of the Commerce Clause that the federal courts have not entertained in nearly a century.

[9] *Second*, the preamble's criticism of the federal government for "[failing] to recognize the Second Amendment" and for its "[implementation of] the Commerce Clause [...] to restrict the production, distribution, and use of firearms" is all but definitive evidence that the Legislature was consciously engaging in nullification of federal law based on political disagreements, and not simply partaking in an academic exercise in constitutional restatement. In our estimation, the presence of inflammatory rhetoric denying the supremacy of the federal government is almost

per se indication that the ambiguity—if any exists—must be resolved as to infer an intent of nullification.

[10] *Third*, the Act's preamble cites the Ninth Amendment, a constitutional dead letter, to claim substantive rights against federal regulation. Since Ninth Amendment rights do not exist and have never existed, *United Public Workers v. Mitchell*, 330 U.S. 75, 96 (1947), we do not find it plausible that the law is a mere restatement of the current constitutional law.

[11] *Fourth*, we are acutely conscious that no federal court agrees with the Commonwealth on the limited scope of federal firearms law. *See*, *Notthedarkweb_MNZP v. _MyHouseIsOnFire_*, (2021) Atl. 01, 11 (collecting cases where federal courts have upheld the 'almost unlimited' scope of federal firearms regulation under the Commerce Clause). Indeed, the National Firearms Act's application to intrastate commerce has been routinely upheld by the federal courts, *see, e.g., U.S. v. Stewart*, 451 F.3d 1071 (9th Cir. 2006), and the U.S. Supreme Court has stated in no unambiguous terms that the Commerce Clause "allows Congress to criminalize" even "home [manufacturing]" of goods with substantial value in interstate commerce. *In re Controlled Substances Act*, 100 M.S.Ct. 102 (2016), citing *Gonzales v. Raich*, 545 U.S. 1 (2005). *See generally*, *Wickard v. Filburn*, 317 U.S. 111 (1942); *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241 (1964). If the congressional power over interstate commerce extends even to possession of drugs, *Controlled Substances Act*, *supra*, use of cannabis, *Gonzales* at 12, and growing wheat for personal consumption, *Wickard* at 128, then it surely encompasses the distribution of weapons frequently used in and affecting interstate commerce.

[12] Based on the foregoing textual evidence, we must reject the Commonwealth's theory of legislative purpose and instead agree with Plaintiff that the Legislature was engaging in a conscious and deliberate nullification of federal firearms law.

[13] This, obviously, the Commonwealth cannot do. *See generally*, *Ableman v. Booth*, 62 U.S. 506 (1859); *Cooper v. Aaron*, 358 U.S. 1 (1958). Yet this is exactly what it has done. Like the Wisconsin legislature in *Ableman* and the Arkansas legislature in *Cooper*, the Atlantic legislature has decided to ignore the just supremacy of the federal laws and judiciary and to instead declare itself the arbiter of the U.S. Constitution. While the Legislature has every right to advocate for any constitutional interpretation of its choosing, it absolutely has no right to use the breadth of its legislative power to pass substantial regulations nullifying federal law and impeding the just supremacy of the United States.

[14] Neither the courts of the United States nor the courts of this state have declared unconstitutional the applications of the federal firearms statutes and regulations which A.B. 75 seek to restrain within the Commonwealth. These same statutes and regulations are thus presumptively constitutional, and the Legislature cannot interpose itself in between the federal government and the people to prevent the lawful execution of federal law. We feel no need to belabor this point any further: subsection 1 of Executive Law § 1001 as created by A.B. 75 is entirely conflict-preempted by federal law under the Supremacy Clause.

[15] Subsection 3, which imposes criminal penalties upon any state officer "who attempts to enforce federal laws, regulations, or restrictions" upon the firearms listed in subsection 1, requires even less analysis: the outcome has already been decided by the U.S. Supreme Court in *U.S. v. Central State*, 101 M.S.Ct. 104 (2018).

[16] Per *Central State*, "there is absolutely no authority for the State to refuse the sharing of any information or assistance with the Federal Government in all circumstances." Here, Atlantic goes even further than did the State of Superior: it imposes criminal penalties for cooperating with federal law enforcement on firearms regulation, *even when required by federal law*. Such an outcome is entirely alien to a system of dual federalism that presupposes, at the very minimum, a working, if not

comitable, relationship between the two sovereigns. As the Second Circuit observed in *City of New York v. United States*:

> A system of dual sovereignties cannot work without informed, extensive, and cooperative interaction of a voluntary nature between sovereign systems for the mutual benefit of each system. The operation of dual sovereigns thus involves mutual dependencies as well as differing political and policy goals.
>
> Without the Constitution, each sovereign could, to a degree, hold the other hostage by selectively withholding voluntary cooperation as to a particular program(s). The potential for deadlock thus inheres in dual sovereignties, but the Constitution has resolved that problem in the Supremacy Clause, which bars states from taking actions that frustrate federal laws and regulatory schemes.

179 F.3d 29, 35 (1999), citing *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941) (state law is preempted when it frustrates purpose of valid congressional enactment).

[17] Thus this regulation is unprecedented and in direct violation of not only the Supremacy Clause but also the Commonwealth's own constitution. Every public officer of this Commonwealth is bound by solemn oath or affirmation to "support the constitution of the United States," Atl. Const., art. VI, § 1, and it would be plain dereliction of duty in violation of that sacred vow to refuse all cooperation with federal law enforcement, the Legislature's order notwithstanding.

[18] Needless to say, this subsection is also conflict-preempted. A state cannot impose liability on respect for federal law.

[19] Even if we accept that the Legislature intended its enactment to do nothing, as the Commonwealth asserts, the criminal provision of the statute is still unconstitutional. The state cannot use its police power to enact irrational,

nonsensical criminal laws that do not address any discernible harm to society.[1] *See generally*, *People v. Marx*, 99 N.Y. 377 (1885) (state cannot criminalize manufacture of margarine). By definition, a criminal law that does nothing serves no government interest.

II

[20] We now turn to subsection 2 of the same section, which states that "[n]o official in the Atlantic Commonwealth shall be required or compelled by federal law enforcement officials to enforce federal laws, regulations, or restrictions in regard to the ammunition, firearms, firearms parts, and firearms accessories prescribed under subsection (a) of this section." In response to a question from the Court, Plaintiff interpreted the section as a direct regulation upon federal officers. Tr. of Oral Args. The Commonwealth disagrees.

[21] When the plain meaning of a statute is absolutely clear, we need not invoke any interpretive tools. *Dewey-Cheatem v. _MyHouseIsOnFire_*, (2020) Atl. 04, 7. This is such an instance. There is no plausible alternative interpretation of this section: it is a prohibition against any requirement or compulsion upon state officials, which is by its plain language intended to regulate the behavior of a single group—federal law enforcement officers.

[22] This is patently unconstitutional.

[23] The doctrine of intergovernmental immunity unambiguously sets out that federal officers "acting under and in pursuance of the laws of the United States" enjoy absolute immunity from state regulation except as waived. *Johnson v. Maryland*,

[1] Although the police power "empowers [the Legislature] to proscribe whatever it so desires for whatever reason it desires," *Nat'l Org. for Reform of Marijuana Laws v. MyHouseIsOnFire*, (2021) Atl. 02, 8, the Legislature can only invoke the police power to begin with when it acts "to protect public and private rights and to punish public wrongs." *Id.* at 4, quoting *Lawton v. Steele*, 119 N.Y. 226, 233 (1890). If the Legislature does nothing, it is not protecting anyone's rights or preventing wrongs done to anyone or anything.

254 U.S. 51, 57 (1920). *See generally*, *McCulloch v. Maryland*, 17 U.S. 316, 317 (1819) ("The states have no power [...] to retard, impede, burden, or in any manner control the operations of the constitutional laws enacted by [C]ongress"). A federal law enforcement officer who demands information from a state officer under lawful authority is *ipso facto* acting under and in pursuance of the laws of the United States. As such, the Supremacy Clause protects their activities from state regulation.

[24] Put another way, if Atlantic claims that the United States cannot tell its state officers what to do, it cannot then turn around and try to tell the United States' officers what to do. Dual sovereignty works both ways; the Commonwealth cannot have its cake and eat it too.

[25] Therefore, subsection 2 violates the intergovernmental immunity of the United States and must be held invalid under the Supremacy Clause of the U.S. Constitution.

III

[26] Section 4(b) of the Act provides for the severability of "this section and amendments made by this section and the application of such provision or amendment to other persons or circumstances." But the presence of a generic, *pro forma* severability clause has never been conclusive in our severability analysis, especially when there are serious reasons to doubt whether the Legislature would have enacted the remainder of the statute.

[27] In other words, because the Act is entitled "A Bill to amend the Executive law to provide that all firearms manufactured, sold, purchased, and possessed exclusively within the Atlantic Commonwealth shall be exempt from federal law and regulations," and every provision of the Act to that effect has been held unconstitutional, there is nothing left to sever. The "Made in Atlantic" labelling

requirement is incoherent and serves no cogent purpose without the preceding sections of the statute and falls alongside them. *See*, *Aubrion v. Parado-I*, (2019) Atl. 11, 3-4 ("Whether or not an offending provision may be severed [...] requires an examination of [...] whether the remaining provisions of the statute can function in accordance with the legislative scheme"), quoting *St. Joseph Hosp. v. Novello*, 15 Misc. 3d 333, 338 (Sup. Ct. 2007).

[28] Nothing in the Act hints at any other purpose that this labelling requirement could serve independently from the sections previously held unconstitutional. The Commonwealth's brief also does not attempt to make such an identification. The lack of any evidence in the four corners of the record suggesting severability instead clearly indicates that the Legislature sought for the statute to operate as a single, indivisible organism. *See generally*, *Notthedarkweb_MNZP v. MyHouseIsOnFire*, (2021) Atl. 01, 31 ("[W]e will not accept *post hoc* rationales not supported by the record or come up with our own rationales if the [policymaker's] proves insufficient."). Accordingly, the statute is inseverable and therefore unconstitutional in its entirety.

IV

[29] We do not make this determination lightly. In our government of divided powers, the courts owe "quintessential expression[s] of legislative power," such as lawmaking and budgeting, great deference and every presumption of constitutionality. *JacobinAustin*, (2020) Atl. 10, 23, n. 3. However, when, such as here, a statutory enactment is irreconcilable with the United States Constitution, it is also clear which must yield.

[30] Though it brings us no joy to do so, A.B. 75 must be and now is held unconstitutional.

[31] Judgment is directed for Plaintiff. A declaratory judgment will be entered declaring A.B. 75 unconstitutional. The Court thanks both counsel for their briefing in this case, and appreciates their thoughtful arguments and their time devoted to this matter despite understandably hectic schedules.

It is so ordered.

Cite as: Full opinion: *Dewey-Cheatem v. _MyHouseIsOnFire_*, (2021) Atl. 04.
Paragraph: *Dewey-Cheatem v. _MyHouseIsOnFire_*, (2021) Atl. 04, [para].