

Atlantic Commonwealth Court of Chancery

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

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

ORDER GRANTING PETITIONER'S APPLICATION FOR A PRELIMINARY INJUNCTION

- [1] This application for a preliminary injunction arises out of Commonwealth Governor House O. Fire's executive order of February 11, 2021 ("Executive Order 02"; "the Order"), entitled "The Defense of the People."
- [2] The Order, which purports to "uphold" section 17 of the Commonwealth Bill of Rights and to vindicate the public policy of the defunct state of New Hampshire, orders a variety of measures aimed at frustrating the enforcement of firearms legislation that the Governor has, for reasons unstated in the record and otherwise unknown to the Court, deemed to be bad.
- [3] Such measures include (1) the non-prosecution of a variety of firearms-related offenses, (2) the withdrawal of funds from local governments that enforce such offenses, (3) a policy of non-cooperation with the U.S. Bureau of Alcohol, Tobacco,

Cite as: Full order: *Notthedarkweb_MNZP v. _MyHouseIsOnFire_*, (2021) Atl. 01-B.
Paragraph: *Notthedarkweb_MNZP v. _MyHouseIsOnFire_*, (2021) Atl. 01-B, [para].

Firearms and Explosives (ATF), (4) releasing local police from a state gun trafficking mandate, (5) establishing a public gun range, (6) nullifying “any and all” mandates, laws and excise taxes relating to firearms that the Governor considers to be unconstitutional, and (7) pardoning all non-violent offenders convicted of the aforementioned firearms-related offenses.

- [4] Petitioner Notthedarkweb_MNZP filed suit the following day and moved for a temporary restraining order and preliminary injunction enjoining the enforcement of the Order. On the same day, this Court conducted an *ex parte* hearing in the presence of the Chancellor and granted a temporary restraining order against the enforcement of the Order pending a hearing on the application for a preliminary injunction. On February 16, Petitioner clarified in the oral record that the application only applied to sections I-III and V of the Order. Tr. of Oral Arg. (Feb. 16, 2021).
- [5] The hearing having concluded, and upon considering the papers filed by both parties, this Court **GRANTS** Petitioner’s application for a preliminary injunction and enjoins the enforcement of this Order until the conclusion of the case at bar, for the reasons stated below.

Legal Standard

- [6] “The purpose of a preliminary injunction is to preserve the *status quo* pending trial,” though it is “a drastic [remedy] which should be used sparingly.” *McLaughlin, Piven, Vogel, Inc. v. W.J. Nolan & Co.*, 114 A.D.2d 165, 172 (1986).
- [7] A preliminary injunction, of course, is not a decision on the merits, and may be appropriate even if “grave doubts regarding the likelihood of plaintiffs’ success on the merits” are present if “any subsequent judgment might be rendered ineffectual” by the failure to grant interim equitable relief. *Schlosser v. United Presbyterian Home*, 391 N.Y.S.2d 880, 881 (App. Div. 1977).

- [8] The well-established test in the Commonwealth for the grant of interim relief requires the moving party to establish (1) a likelihood of ultimate success on the merits; (2) the prospect of irreparable injury if the provisional relief is withheld; and (3) a balance of equities tipping in the moving party's favor. *UnorthodoxAmbassador v. _MyHouseIsOnFire_*, (2020) Atl. 11, 20, citing *Doe v. Axelrod*, 73 N.Y.2d 748, 750 (1988).

Analysis

A. Irreparable Injury

- [9] “[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).
- [10] Petitioner advances several theories of irreparable harm. Although not every theory is of equal legal strength or compulsion, on the aggregate they clearly establish that failure to provide interim relief would unduly prejudice Petitioner and result in injuries that cannot be adequately remedied monetarily. *Poling Transp. Corp. v. A & P Tanker Corp.*, 84 A.D.2d 796, 797 (1981).
- [11] First, Petitioner advances the theory that the erosion of public safety as a result of the Governor’s order irreparably harms him as an Atlantic citizen. Although this is not generally a legally cognizable harm because there is no positive right to safety, *see*, Atl. Const., art. I, § 19 (“The provisions of this constitution are mandatory and prohibitory...”), it may constitute imminent harm in this specific instance since the Order is seemingly contradictory with the public policy of the Commonwealth as established by the legislative department. This is because the frustration of a duly-enacted legislative enactment by a coequal branch of government—i.e., the Governor’s obstruction of the legislative purpose of promoting gun safety—can

constitute irreparable and ongoing harm. *Maryland v. King*, 567 U.S. 1301, 1303 (2012) (Roberts, C.J., in chambers).

- [12] Second, Pennsylvania case law, being highly persuasive albeit non-binding, suggests that “where the offending conduct sought to be restrained through a preliminary injunction violates a statutory mandate, irreparable injury will have been established.” *SEIU Healthcare Pennsylvania v. Commw.*, 628 Pa. 573, 594 (2014). Petitioner has clearly identified legislative mandates, most notably particularly the disbursement of funds to local governments, which this Order seems to frustrate, thereby raising the rebuttable presumption that irreparable injury will be incurred by Petitioner in the absence of equitable relief.
- [13] Finally, and perhaps most compellingly, Petitioner advances a meritorious claim that the Governor has acted *ultra vires* his statutory authority. As we have previously held, an *ultra vires* challenge to gubernatorial action is an action for the enforcement of the Commonwealth Constitution. *JacobinAustin v. _MyHouseIsOnFire_*, (2020) Atl. 10, 42. Since “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), a probable violation of the Commonwealth Constitution’s delineation of powers constitutes *prima facie* irreparable harm.

B. Likelihood of Success

- [14] “Likelihood of success must be evident on the basis of the law and the facts as presented in the trial record.” *UnorthodoxAmbassador*, *supra*, at 21. “Though no single prong is determinative of the outcome, likelihood of success must be both real and significant for injunctive relief to follow on account of its drastic nature.” *Id.* at 20.
- [15] However, here Petitioner has also clearly demonstrated that he will suffer significant irreparable harm in the absence of injunctive relief. “Where [...] the

denial of injunctive relief would render the final judgment ineffectual, the degree of proof required to establish the element of likelihood of success on the merits should be reduced.” *State v. City of New York*, 275 A.D.2d 740, 741 (2000). As a result, our inquiry does not necessarily require Petitioner to show that it is “necessarily likely [he] will succeed in this case,” Commw.’s Opp. Br., but rather that he has a *reasonable* likelihood of success. *Weissman v. Kubasek*, 493 N.Y.S.2d 63, 64 (App. Div. 1985).

Non-Enforcement of Statutes

- [16] Petitioner alleges that the non-enforcement of a variety of regulatory and penal statutes by the Governor regarding firearms regulation is unlawful. As we noted in the TRO of February 12, 2021, this Court’s decision in *Ibney00 v. TheCloudCappedStar*, (2019) Atl. 15, seemingly foreclosed on this possibility.
- [17] However, *Ibney* may not be determinative in this instant case, as the new Commonwealth Constitution, unlike the basic law at the time of *Ibney*, includes a constitutional duty upon the Governor to take care that the laws are faithfully executed. Atl. Const., art. IV, § 2. Crucially, this clause is identical in phraseology to its federal counterpart at U.S. Const., art. II, § 3, cl. 5. Although “our willingness to depart from the Supreme Court’s jurisprudence is informed by many considerations,” *Dewey-Cheatem v. _MyHouseIsOnFire_*, (2020) Atl. 04, 8, we have often applied such precedent when there is “no cogent reason” to do otherwise. *Nat’l Popular Front v. Republican Nat’l Comm.*, (2020) Atl. 13, 24.
- [18] Accordingly, the U.S. Supreme Court’s interposing decision in *In re Executive Order 002*, 101 M.S.Ct 118 (2020), which invalidated a similarly sweeping non-prosecution directive, may be of significant relevance and there remains a reasonable likelihood of success.

Non-Cooperation with ATF

- [19] Citing *U.S. v. Central State*, 101 M.S. Ct 104 (2018), Petitioner advances that a blanket policy of non-cooperation with ATF violates the Supremacy Clause of the U.S. Constitution, which establishes federal law to be “the supreme Law of the Land [...] any thing in the Constitution or Laws of any State to the Contrary notwithstanding.” U.S. Const., art. VI, cl. 2.
- [20] In response, the Commonwealth offers the sole argument that the Commonwealth is not obligated to respect the just supremacy of the United States because the very existence of ATF is facially unconstitutional. This argument strains credulity.
- [21] To first state the obvious, it is not up to the Governor to decide whether or not a federal statute is constitutional. That responsibility belongs to the federal judiciary of the United States. *See generally, Ableman v. Booth*, 62 U.S. 506 (1859); *Cooper v. Aaron*, 358 U.S. 1 (1958). Regardless, this preposterous argument fails as a matter of law.
- [22] That the Constitution grants the federal government “almost unlimited” power to regulate the trade in firearms is well established. *U.S. v. Rothacher*, 442 F. Supp. 2d 999, 1007 (D. Mont. 2006). *See, e.g., U.S. v. Kirk*, 105 F.3d 997 (5th Cir. 1997); *United States v. Danks*, 221 F.3d 1037 (8th Cir. 1999); *U.S. v. Hemmings*, 258 F.3d 587, (7th Cir. 2001); *U.S. v. Dorsey*, 418 F.3d 1038 (9th Cir. 2005); *U.S. v. Stewart*, 451 F.3d 1071 (9th Cir. 2006); *U.S. v. Jordan*, 635 F.3d 1181 (11th Cir. 2011). *See generally*, U.S. Const., art. I § 8, cl. 3 (“The Congress shall have Power [...] to regulate Commerce [...] among the several States”). In light of this clearly established fact, and of controlling precedent that reads the Commerce Clause expansively, it is manifestly obvious that ATF lawfully exercises a delegation of Congress’ constitutional authority to regulate interstate commerce when it enforces federal firearms statutes.

- [23] For broadly the same reason, the Commonwealth’s 21st Amendment argument falls flat. Alcohol, as an article of interstate commerce, is clearly subject to the control of the federal government. *See, Granholm v. Heald*, 544 U.S. 460 (2005) (21st Amendment does not abrogate Commerce Clause). Regardless, a facial challenge can only succeed if *every application* is unconstitutional, rendering the question of ATF’s power to regulate alcohol irrelevant if its power to regulate firearms is lawful. *In re Death Penalty Abolition Reaffirmation Act*, 101 M.S.Ct. 120 (2020).
- [24] Accordingly, we see at the present no reason to distinguish the U.S. Supreme Court’s decision in *U.S. v. Central* and find accordingly that Petitioner has demonstrated a strong likelihood of success on his federal preemption claim.

Financial Matters

- [25] The enactment of the budget is “the quintessential expression of legislative power.” *JacobinAustin*, *supra*, at 24, n. 3. As a result, our constitutional structure recognizes no role for the Governor in the budgeting process beyond the power to sign or veto the legislature’s enactment and the exercise of delegated legislative power pursuant thereto. *Aubrion v. Parado-I*, (2019) Atl. 11, 3; *JacobinAustin*, *supra*, at 39.
- [26] Because the Governor orders in the Order to (1) potentially withhold monies from local governments, citing conditions that are without statutory basis or constitutional authority, and (2) refuse to collect taxes lawfully imposed by the General Assembly, Petitioner shows a strong likelihood of success on this claim.

C. Balance of Equities

- [27] When the government is the non-moving party, the public interest is considered within the broader balancing of equities. *Nken v. Holder*, 556 U.S. 418, 435 (2009). Here, the public interest clearly favors the prevention of probable unconstitutional

harms to Petitioner, as “no party has any interest in the enforcement of an unconstitutional law.” *ACLU v. Reno*, 929 F. Supp. 824, 849 (E.D. Pa. 1996).

- [28] Likewise, because the balance of equities favors the preservation of the status quo pending the resolution of the action, *Cong. Machon Chana v. Machon Chana Women's Inst.*, 162 A.D.3d 635, 637-38 (2018), Petitioner’s proposed temporary injunction against a sweeping reorganization of the Commonwealth’s criminal and law enforcement priorities is favored. This is especially the case when the injunction covers the short timeframe of this court proceeding. *Cf.*, *Chicago v. Sessions*, 264 F. Supp. 3d 933, 951 (N.D. Ill. 2017) (“...maintaining the status quo [is] unlikely to affect a substantial public interest in the short time of the injunction.”).

Conclusion

- [29] For the aforementioned reasons, the Court **GRANTS** Petitioner’s application for a preliminary injunction with respect to sections I through III and V of the Order.
- [30] **IT IS HEREBY ORDERED** that the Commonwealth, by and through any agent or officer, is hereby enjoined from enforcing sections I-III and V of Executive Order 02 until the final mandate of this Court issues in the instant case.
- [31] **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 the final mandate of this Court issues in the instant case.
- [32] **IT IS FURTHER ORDERED** that the Commonwealth, by and through any agent or officer, is hereby enjoined from withholding or impounding monies pursuant to this Order that have been appropriated by the General Assembly for local government assistance until the final mandate of this Court issues in the instant case.

[33] **IT IS FURTHER ORDERED** that the temporary restraining order entered by this Court on February 12, 2021 against the Commonwealth is dissolved.

It is so ordered.

Dated: February 20, 2021		<u>/s/ Hurricane</u>
_____		Hon. HurricaneofLies
BY THE COURT.		Chancellor
