Atlantic Commonwealth
Court of Chancery

NOTTHEDARKWEB_MNZP *v.* _MYHOUSEISONFIRE_, GOVERNOR
IN RE: EXECUTIVE ORDER 02

No. 21-01 Filed February 12, 2021—Decided April 5, 2021

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

Petitioner, Notthedarkweb_MNZP brings action against Respondent, Governor _MyHouseIsOnFire_, challenging the legality of Executive Order 02 on various grounds.

HurricaneofLies, C., delivered the opinion of a unanimous court. Notthedarkweb_MNZP argued the case for petitioners. Parado-I, former Attorney General, argued the case for respondents.

Held: Sections I–III and V of the Order are unlawful exercises of gubernatorial power and consequently invalid.

1. When the Atlantic Commonwealth joined with her fellow states in perpetual Union, she made the irreversible decision to tether her destiny to that of the

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Paragraph: *Notthedarkweb_MNZP v. _MyHouseIsOnFire_*, (2021) Atl. 01, [para].

United States. Because section II of the Order impinges upon the just supremacy of the United States by frustrating the legitimate activities of federal law enforcement, it is conflict-preempted under the Supremacy Clause and of no force and effect. [paras 5-12]

2. The Governor's abrogation of the firearms licensing regime would defeat the Legislature's clear policy decision to establish a "'may-issue' concealed carry system" for the Commonwealth. Therefore, parts III and V(1) of the Order are contrary to the public policy of the Commonwealth and, in directing the wholesale nullification of a fine-wrought statutory regime, breach the Take Care Clause of the Commonwealth Constitution. [paras 14-17]
3. Within our constitutional framework, it is clearly established that "[t]he power of taxation is one that is innate to, and vested exclusively in, the legislative branch." The Governor must make a good-faith attempt to collect all taxes established by the Legislature. [paras 18-22]
4. We will uphold the Governor's non-prosecution order unless there exists "no rational basis for the exercise of discretion or the action complained of is arbitrary and capricious." The types of penal statutes targeted by the Governor are clearly constitutional, as we have repeatedly reaffirmed and to which the broad agreement of the federal courts lends strong support. Accordingly, the Governor's determination that the statutes in question violated the U.S. and Commonwealth Constitutions is arbitrary and capricious and an abuse of discretion. [paras 25-36]

HURRICANEOFLIES, C.:

[1] The right to bear arms situates itself "among those fundamental rights necessary to our system of ordered liberty." *McDonald v. Chicago*, 561 U.S. 742, 778 (2010). However, "[that] is where the agreement on this issue ends." *Darthholo v. Attorney General*, (2020) Atl. 08, 1.

[2] Identifying a vacuum in the interpretation of the right to keep and bear arms under the Federal and Commonwealth Constitutions, the Governor has chosen to take matters into his own hands and issued Executive Order 02, entitled "the Defense of the People", which purports to enforce his own interpretation of this right. The Order accordingly directs various state officers to nullify a variety of criminal, regulatory and financial statutes, while also barring state cooperation with the Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF).

[3] Petitioner brought suit the following day, seeking declaratory and injunctive relief against the enforcement of the Order. We granted a temporary restraining order, and then a preliminary injunction pending final adjudication. We now decide this complex, sprawling case that involves a variety of federal and state constitutional questions. To assist in our analysis, we identify four distinct legal questions arising from this action:

(1) Whether the Governor may order a blanket policy of non-cooperation with the ATF.
(2) Whether the Governor may direct a blanket non-prosecution policy for firearms offenses.
(3) Whether the Governor may wholesale suspend statutory firearms regulation and taxation schemes.
(4) Whether the Governor breaches a duty of protection through the non-enforcement of firearms safety statutes.

[4] For the reasons below, we invalidate sections I, II, III and V and sever them from the body of the Order.

I

[5] We begin, despite the Commonwealth's best efforts to sidestep controlling precedent on this matter, with the simplest and most clear-cut element of this case: whether the Governor can order executive departments to terminate all cooperation with ATF. Obviously, it cannot, for reasons we now proceed to explain, though the conclusion should require very little explanation.

[6] When the Atlantic Commonwealth joined with her fellow states in perpetual Union, she made the irreversible decision to tether her destiny to that of the United States. *See*, *Texas v. White*, 74 U.S. 700, 726 (1869). At the heart of this inviolable compact is a promise to respect the just supremacy of the federal government, as the Federal Constitution clearly enshrines in the Supremacy Clause. The clause reads, in part, that the Constitution and laws of the United States "shall 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. IV, cl. 2. Central to this covenant is the proposition that "the duty of state officials under federal law is [nothing less] than not to obstruct the operation of federal law." *In re Police Reform Act of 2015*, 100 M.S.Ct. 112 (2016), at part II (cleaned up).

[7] Accordingly, the Supreme Court has held that "there is absolutely no authority for the State to refuse the sharing of any information or assistance with the Federal Government in all circumstances, no matter how mundane, as it relates to the U.S. Immigration and Customs Enforcement or the U.S. Drug Enforcement Administration." *U.S. v. Central State*, 101 M.S. Ct 104 (2018), at part III. The same fundamental principle applies in full to the Bureau of Alcohol, Tobacco, Firearms,

and Explosives, as a duly empowered federal law enforcement agency that is entitled to the respect of the just supremacy of the United States in its operations.

[8] The Commonwealth demurs in its response to this unambiguously controlling authority, only advancing a meritless argument that the very existence of ATF is unconstitutional because the agency's mandate supposedly exceeds Congress' power because the Twenty-First Amendment reserves the regulation of alcohol to the states. As we have previously observed, that line of reasoning "strains credulity" and "fails as a matter of law". Order Granting Prelim. Inj., Feb. 20, 2021, at 20-21.

[9] To first state the obvious, this is a firearms policy case, not an alcohol regulation one. Even accepting, *arguendo*, that the ATF's delegated power over liquors exceeded the power of Congress, the Commonwealth has offered little reason to suggest that these powers would not be severable. "If unconstitutional provisions can be stricken without offending Congressional intent," courts are bound to do so. *In re Presidential Succession Act*, 20-18 M.S.Ct. 1, 29 (2020). Thus, the constitutionality of the ATF's jurisdiction over liquors has no bearing on this case.

[10] Moreover, this argument fails even on the merits, because the Twenty-First Amendment is not a reservation of exclusive state power but rather a reaffirmation of "the basic structure of federal-state alcohol regulatory authority that prevailed prior to the adoption of the Eighteenth Amendment." *Tenn. Wine & Spirits Retailers Ass'n v. Thomas*, 139 S.Ct. 2449, 2463 (2019). In other words, the Commerce Clause continues to apply in full to alcohol regulation, enabling federal regulation over those aspects which generally relate in some manner to interstate commerce. *Compare Granholm v. Heald*, 544 U.S. 460 (2005), *with Wickard v. Filburn*, 317 U.S. 111 (1942).

[11] Indeed, the Commerce Clause, whose existence the Commonwealth's brief conveniently omits, plants the final stake in the heart of this specious line of argument. Because "Congress' power under the Commerce Clause is almost

unlimited where the prohibited product has significant economic value such as with drugs or guns," *United States v. Rothacher*, 442 F. Supp. 2d 999, 1007 (D. Mont. 2006), there is simply no avenue by which ATF's exercise of regulatory authority over the firearms industry can be facially attacked. Decades of expansive Commerce Clause jurisprudence and the unanimity of the federal courts on this question compel us to reject the Commonwealth's constitutional argument wholesale. *See, e.g., U.S. v. Kirk*, 105 F.3d 997 (5th Cir. 1997) (Commerce Clause permits Congress to regulate interstate trade in firearms); *United States v. Danks*, 221 F.3d 1037 (8th Cir. 1999) (likewise); *U.S. v. Hemmings*, 258 F.3d 587, (7th Cir. 2001) (same); *U.S. v. Dorsey*, 418 F.3d 1038 (9th Cir. 2005) (yup); *U.S. v. Stewart*, 451 F .3d 1071 (9th Cir. 2006) (ditto); *U.S. v. Jordan*, 635 F.3d 1181 (11th Cir. 2011) (you guessed it).

[12] Although there are limited circumstances where non-cooperation is justified, such as when the aid requested commandeers state employees or imposes an onerous burden on state resources, *Central State*, *supra*, at part IV, the policy espoused by the Order is neither limited nor grounded in a legitimate Tenth Amendment objection to the exercise of federal jurisdiction. Because section II of the Order impinges upon the just supremacy of the United States by frustrating the legitimate activities of federal law enforcement, it is conflict-preempted under the Supremacy Clause and of no force and effect.

II

[13] We now turn to the provisions of the Order in section III and V which purport to suspend a variety of firearms statutes and regulations. These provisions can be grouped into three distinct categories: (1) the suspension of firearms licensing regulations, (2) the non-collection of excise taxes on firearms and ammunition, and (3) the creation of a mechanism by which further laws can be suspended. We address—and invalidate—each part in turn.

A. State Firearms Licensing Regime

[14] Section V(1) of the Order provides that "[a]ny and all mandates, such as acts and prior executive orders, to gun licencing or concealed carry for a non-felon, are to not be enforced." Likewise, section III instructs all state law enforcement agencies to cease mandatory reporting of gun trafficking. This is, in effect, a sweeping mandate to effectively terminate the enforcement of all firearms licensing measures, whether civil or penal, and attempts to render the Atlantic Commonwealth a 'constitutional carry' state by executive fiat. Unfortunately for the Governor, that is not his role in our constitutional order.

[15] Since the ratification of the first New York State Constitution in 1777, it has been established that "the [Atlantic Commonwealth] Constitution authorizes the Legislature and not the Governor to set policy." *Saratoga Cty. Chamber of Com. v. Pataki*, 100 N.Y.2d 801, 825–26 (2003). This fundamental truism about the relationship between the executive and legislative branches derives from the basic law's twin guarantees that "[t]he legislative power of this state shall be vested in the unicameral Congress" (Atl. Const., art. III, § 1) and that "[t]he Governor [...] shall take care that the laws are faithfully executed (Atl. Const., art. IV, § 1). In conjunction, they impose a mandatory constitutional duty on the Governor to execute the legislative acts of the people's elected representatives.

[16] Although we accord broad leeway to the Governor's discretion in executing the law, *see generally*, *UnorthodoxAmbassador v. _MyHouseIsOnFire_*, (2020) Atl. 11, deference is not abdication. Although "the actual delineation of power between the executive and the Legislature has never been at all clear-cut," *Fullilove v. Beame*, 48 N.Y.2d 376, 385 (1979), we need not establish a brightline rule today to precisely circumscribe gubernatorial discretion because it surely does not extend as far as to indemnify wholesale abrogation of all laws, especially when his changes would

defeat the Legislature's clear policy decision to establish a "'may-issue' concealed carry system" for the Commonwealth. *Darthholo*, (2020) Atl. 08, 4.

[17] Therefore, parts III and V(1) of the Order are contrary to the public policy of the Commonwealth and, in directing the wholesale nullification of a fine-wrought statutory regime, breach the Take Care Clause of the Commonwealth Constitution under any imaginable standard of review.

B. Non-Collection of Excise Taxes

[18] The following subsection directs the Department of Taxation and Finance to suspend the collection of "[a]ny excise taxes on firearms or ammunitions [sic]." In other words, it directs an executive department to totally shut down the administration of a tax validly levied by the Legislature, based solely on public policy differences. This is entirely impermissible under our precedent.

[19] Within our constitutional framework, it is clearly established that "[t]he power of taxation is one that is innate to, and vested exclusively in, the legislative branch." *Aubrion v. Parado-I*, (2019) Atl. 11, 2. Much as the executive branch lacks "a standalone power to impose taxes upon the people," *id.*, it plainly also lacks the power to *reduce* taxes upon the people. *Cf. Armstrong v. U.S.*, 759 F.2d 1378 (9th Cir. 1985) (measure lowering taxes is still a tax measure). In other words, to comport with our constitutional framework, the Legislature must consent to any attempt to establish, raise, lower or abolish a tax.

[20] This interpretation is firmly grounded in the text of the Constitution, which provides at art. III, § 1 that "the general power of taxation of any goods, services, or other actions vested in the legislature shall never be surrendered, suspended or contracted away." To hold otherwise today would grant sanction to the Governor's ability to unilaterally abrogate the Legislature's tax policy decisions, making a mockery out of a budgetary process which we have long described as "the

quintessential expression of legislative power." *JacobinAustin v. _MyHouseIsOnFire_*, (2020) Atl. 10, 24 (n. 3).

[21] However, we also decline Petitioner's invitation to review this provision using the heightened scrutiny standard enumerated by this Court in *UnorthodoxAmbassador*. In that case, we dealt with the Governor's exercise of legislative powers delegated to him by the Legislature under the Executive Law, and the question turned on whether his exercise of emergency powers comported with the language and intent of the statute.

[22] Here, the Governor can cite no statute that would even offer the mildest hint or encouragement that he may cancel a tax based on policy disagreement with the Legislature. Unlike in *UnorthodoxAmbassador*, which concerned a fairly *sui generis* case which "blurs the separation of powers," *id.* at 34, the provision at issue simply invades a protected bastion of legislative power by brute force, without even a perfunctory suggestion of an invitation. No executive interest, no matter how compelling or tailored, can defeat the unconstitutionality of such an act. Accordingly, this provision is null and void and the Governor must make a good-faith attempt to collect all taxes established by the Legislature.

C. Statute Non-Enforcement Mechanism

[23] The final subsection provides for a mechanism by which further statutes may be nullified under the procedure enumerated in subsection (1). Because we have already invalidated that clause as a violation of the Governor's duty to execute the laws, we need not examine this provision separately because it is inseverable from subsection (1) and falls alongside it.

III

[24] Finally, we examine the Governor's directive to all state prosecutors and law enforcement agencies to cease the arrest and prosecution of individuals for a variety

of firearms-related penal statutes. Applying a deferential standard of review, we find the Governor's decision *ultra vires* because it is arbitrary and capricious.

A. Standard of Review

[25] That the exercise of prosecutorial discretion is a core executive function is not under dispute. *See*, *e.g.*, *Kuttner v. Cuomo*, 147 A.D.2d 215, 220 (1989), *aff'd*, 75 N.Y.2d 596 (1990). Indeed, we have previously described legislation that attempted to interfere with this fundamental prerogative as "highly troublesome," *Forti v. New York State Ethics Comm'n*, 75 N.Y.2d 596, 616 (1990), and we reaffirm today that officers of the executive branch must be granted broad discretion in how they enforce criminal statutes and who they choose to prosecute.

[26] However, the exact breadth of this discretion is ultimately determinative of this case's outcome, and it is a question which we now settle in Petitioner's favor. One approach, favored in the federal courts, simply accords absolute discretion to all prosecutorial charging decisions which do not implicate some other constitutional right. *See generally*, *Heckler v. Chaney*, 470 U.S. 821 (1985). Indeed, this principle finds broad support in our own case law, as we have held that prosecutors, who are executive branch officials, possess "the sole discretion [...] to orchestrate the prosecution of those who violate the criminal laws of this state." *Soares v. Carter*, 25 N.Y.3d 1011, 1014 (2015). Put another way, we recognize that the Commonwealth Constitution's separation of powers grants executive officers the "discretionary power to determine whom, whether and how to prosecute." *People v. Davidson*, 27 N.Y.3d 1083, 1093 (2016) (cleaned up).

[27] Indeed, we have extended akin deference to the Governor, determining that it was within his broad discretion to supersede the determination of district attorneys in charging matters. *Johnson v. Pataki*, 91 N.Y.2d 214, 223 (1997). And although the U.S. Supreme Court has refused to extend prosecutorial discretion to "wholesale non-enforcement," *In re Reforms to Immigration Agencies*, 101 M.S.Ct. 118 (2020),

at part IV, our case law fails to suggest the existence of such a categorical exception. Since it is evidently within an individual prosecutor's power to prioritize certain crimes for prosecution over others, our case law transfers this discretion to the Governor when he employs his authority as the chief executive of the Commonwealth to direct prosecutors.

[28] However, that the executive branch has "broad discretion" (*People v. Di Falco*, 44 N.Y.2d 482, 486 (1978)) "to allocate and utilize both the manpower and resources of his office in the manner believed to be most effective to the discharge of his duties" (*Murphy ex rel. Rensselaer Cty. v. Dwyer*, 101 A.D.2d 376, 378 (1984)) does not mean that such decisions are totally insulated from judicial review, especially when there may be "a clear showing of an abuse [of] that exercise of discretion." *People v. Maldonado*, 97 N.Y.S.3d 408, 415 (Dist. Ct. 2019).

[29] To clear up this body of law, we find it useful, much like the U.S. Supreme Court, to distinguish between individualized prosecutorial determinations and broad policy determinations about prosecutions; however, unlike the high court, we do not go so far as to proscribe the latter. Whereas the former is entitled to unimpeachable absolute discretion,[1] we hold today that the latter, while still within the executive's powers, must withstand a basic and deferential standard of review for broad, policy-based executive actions.

[30] Since the objective of judicial review in this case is to control "flagrant executive usurpations of the legislative branch's domain" while leaving anything short of usurpation unperturbed, *UnorthodoxAmbassador*, *supra*, at 28 (cleaned up), we will uphold the Governor's non-prosecution order unless there exists "no rational basis

[1] Of course, this discretion may still be defeated by a clear showing of discriminatory treatment in violation of established constitutional rights. *Wayte v. United States*, 470 U.S. 598, 608 (1985).

for the exercise of discretion or the action complained of is arbitrary and capricious." *Pell v. Board of Education*, 34 N.Y.2d 222, 231 (1974).

B. Analysis

[31] "It is the settled rule that judicial review of an administrative determination is limited to the grounds invoked by the agency." *Scherbyn v. Wayne-Finger Lakes Bd. of Co-op. Educ. Servs.*, 77 N.Y.2d 753, 758 (1991). In other words, we will analyze the Governor's decision based on his textual findings in issuing the Order, and we will not accept *post hoc* rationales not supported by the record or come up with our own rationales if the Governor's proves insufficient.

[32] Accordingly, we reject the Commonwealth's assertion that the Governor issued the directive because "funds are being freed to prosecute other cases." Answering Br. at 6. This suggestion finds absolutely no support in the text of the Executive Order, which instead frames the decision in terms of a desire to "fight for the rights of the citizens and uphold the constitution" and opposition to the enforcement of "unjust inherited laws." Exec. Order 02, pream. Because the Governor has never implied that cost efficiency is a motivating factor, we decline to read this *post hoc* justification, as rational as it may be, into the text of the Order.

[33] We now turn to the actual basis for the Governor's action. "An action is arbitrary and capricious when it is taken without sound basis in reason or regard to the facts." *Peckham v. Calogero*, 12 N.Y.3d 424, 431 (2009). The inquiry thus turns on whether a belief in the unconstitutionality of penal statutes regulating firearms ownership is a rational basis for the Governor's action. We hold that it is not.

[34] Although we owe broad and liberally construed deference to the executive branch in administrative rulemaking, we owe none when it arises out of a clearly erroneous interpretation of the Constitution since "an order may not stand if the agency has misconceived the law." *SEC v. Chenery*, 318 U.S. 80, 94 (1943). *Cf. Dep't of*

Homeland Security v. Regents of Univ. of Cal., 591 U.S. ___ (2020) (impliedly rejecting argument that belief in unconstitutionality of program permits otherwise arbitrary and capricious rescission). The types of penal statutes targeted by the Governor are clearly constitutional, as we have repeatedly reaffirmed and to which the broad agreement of the federal courts lends strong support. *See*, *e.g.*, *Cold_Brew_Coffee v. Nothedarkweb*, (2019) Atl. 06; *Darthholo*, *supra*. *See also*, *Gould v. Morgan*, 907 F.3d 659, 673 (1st Cir. 2018) (upholding licensing scheme); *New York State Rifle & Pistol Ass'n, Inc. v. Cuomo*, 804 F.3d 242, 261 (2d Cir. 2015) (upholding ban on particularly hazardous weapons); *United States v. Focia*, 869 F.3d 1269, 1285 (11th Cir. 2017) (upholding ban on transfer of firearms). *See generally*, *District of Columbia v. Heller*, 554 U.S. 570, 626-7 (2008) (Second Amendment does not bar "longstanding prohibitions" or protect "dangerous and unusual" weapons).

[35] Accordingly, the Governor's determination that the statutes in question violated the U.S. and Commonwealth Constitutions is arbitrary and capricious and an abuse of discretion. It is invalidated to the extent that it directs state prosecutors to disregard validly enacted penal statutes due to clearly erroneous constitutional objections.

[36] Our decision today on this question is narrow. We do not purport to foreclose the Governor's ability to direct the efficient use of resources by state prosecutors, nor do we impose an affirmative duty to prosecute firearms offenses. However, the Governor must have a reason grounded in law and fact to restrain the blanket prosecution of an offense—and he has proffered none. We therefore invalidate section I of the Order.

C. Duty of Protection

[37] Having found the Governor's order of non-prosecution invalid under a basic abuse of discretion standard, we do not proceed to address the constitutional duty of protection argument advanced by Petitioner in depth.

[38] However, we find it unlikely that there exists such an affirmative right. Such a possibility is likely foreclosed by the requirement that all rights in the Commonwealth Constitution be construed as prohibitory (i.e., negative), rather than as positive entitlements. Atl. Const., art. I, § 19 (provisions are "mandatory and prohibitory"). Moreover, to the extent that a duty of protection from state-created danger exists, the actions encompassed in the Order fall far short of the established standard for a constitutional violation because they are entirely passive. *Bowers v. DeVito*, 686 F.2d, 616 618 (state-created danger doctrine requires state to act as "active tortfeasor" akin to "[throwing injured party] into a snake pit").

IV

[39] Although this case is complex, its resolution is less so. While there is nothing inherently suspect in the chief executive of the Commonwealth directing his subordinates to follow a reasonable interpretation of statute, the Governor goes above and beyond any semblance of reason and moderation, instead directly attacking the just supremacy of the United States and greatly exceeding the constitutional powers accorded to his office by the Commonwealth Constitution. That we cannot countenance, and for that reason we now invalidate sections I–III and V of the Order.

[40] Accordingly, it is hereby ordered that judgment is entered for Plaintiff and section I–III and V of Executive Order 02 are held in violation of the U.S. and Commonwealth Constitutions and invalidated. The preliminary injunction entered on February 20, 2021 is dissolved.

The mandate will issue forthwith.

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It is so ordered.