IN THE SUPREME COURT
OF THE ATLANTIC COMMONWEALTH

/u/JacobInAustin Petitioner, v. /u/_MyHouseIsOnFire_ in their official capacity as Governor of the Commonwealth Respondent.	)	Case No. 20-06

ORDER DENYING APPLICATION FOR PRELIMINARY INJUNCTION AND DISMISSING CLAIMS IN PART

I. PRELIMINARY INJUNCTION

A. Standard

"A preliminary injunction may be granted [...] when the party seeking such relief demonstrates: (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." *Doe v. Axelrod*, 73 N.Y.2d 748, 750 (1988).

Moreover, "[p]reliminary injunctive relief is a drastic remedy which will not be granted unless a clear right thereto is established under the law and the undisputed facts upon the moving papers, and the burden of showing an undisputed right rests upon the movant." *Hoeffner v. John F. Frank*, 302 A.D.2d 428, 429 (2003), quoting *Nalitt v. City of New York*, 138 A.D.2d 580, 581 (1988).

B. Analysis

1. Likelihood of success

Petitioner alleges that the Order "tramples on what is assumed to be the Legislature's authority." This is clarified by the trial record to specifically implicate "the power of the purse; the power to move the capital, and the power to establish a new executive department." Petitioner's Compl.

While the power of the purse is indisputably within the exclusive jurisdiction of the Assembly, we note that the Order simply directs that funding for the program created in section IV be obtained from an

existing appropriation for miscellaneous expenses in the FY 2020 Commonwealth Budget. Our case law recognizes that while "there is no authority for the Governor to appropriate funds from the state treasury independent of the General Assembly," *Aubrion v. Parado-I*, Case No. 19-11, at 3 (Atl. 2019), "a gubernatorial directive for a department within the executive branch to expend its validly-appropriated funds in a manner consistent with law is intra vires the powers of the Governor." *Id.* at 5. As Petitioner has not convincingly established that the use of previously-appropriated miscellaneous funds by the Governor definitively falls outside this exception, we cannot conclude that sufficient evidence has been tendered to demonstrate ultimate success with regards to the claim implicating the power of the purse.

With regards to the creation of the Department of Public Armament, we note that the Commonwealth Constitution at art. IV § F provides that "[t]he Governor may create new positions or reorganize existing positions in the Executive Branch by executive order." While this does not necessarily give him the power to create a new department, it raises sufficient ambiguity that Petitioner fails to dispel. Likewise, as the Governor's powers include the power to "[demand] action by an executive department or branch," Commw. Const. art. IV § C, whether this includes the power to direct their displacement is an unsettled legal question, one that cannot be answered via injunctive relief when Petitioner has made no attempt to fulfill their burden of proof.

Accordingly, we find that the trial record at this time does not convincingly show a likelihood of success, and that this prong weighs against injunctive relief in the instant case.

2. Irreparable injury

It is well-established under the rules of our Commonwealth that, for injunctive relief to issue, "the irreparable harm must be shown by the moving party to be imminent, not remote or speculative." *Golden v. Steam Heat, Inc.*, 216 A.D.2d 440, 442 (1995). The only alleged injury contained within the instant application states that "a civil war may be brewing to overthrow the Commonwealth Government if the Governor is not stopped pending judicial review" on account of the alleged fact that the Order in question enables the distribution of firearms to citizens.

This certainly would be an extremely alarming and palpable injury. It is, however, also not what the Order actually does.

The Order, at section IV § D, in reality provides that "[i]ndividuals may receive anywhere between a partial to full subsidization of firearms or muniotions [sic] or both, to be redeemable at Gun Stores throughout the Atlantic Commonwealth" on select pistols, rifles, and ammunition upon online application.

"For want of a nail the shoe was lost…" While we take judicial notice of the fact that small things can often snowball into chains of events far beyond our individual comprehension, a freewheeling theory without strong evidence of concrete and immediate harm cannot serve as the basis for injunctive relief. A fantastical, meandering tale where what essentially amounts to a state-sponsored discount coupon holds the key to anarchy and civil disorder is not supported by the trial record—especially in the absence of any indication that the Governor is using the program created by the Order to arm seditious groups bent on insurrection—and thus constitutes the essence of a remote and speculative harm.

In the absence of a clear and convincing showing of imminent and concrete harm, the irreparable injury requirement weighs heavily against injunctive relief in the instant case.

3. Balance of equities

While the balance of equities would almost certainly favor the prevention of a civil war, see generally The Temptations, *War* (Motown Records 1970), the trial record fails to give any indication that this is anything but an abstract and highly creative improbability. In such an absence, Petitioner does not make a showing that they would suffer from any actual harm.

Conversely, the Governor has a significant interest in the execution of his Order, one that would undoubtedly be harmed by the issuance of an injunction. This is aggravated by the Order's previously announced deadline of July 4, 2020 for the implementation of the sales subsidy program, as the program's effectiveness may be undermined by uncertainty surrounding its implementation. None of these harms are particularly significant, yet they necessarily outweigh the de minimis harm suffered by Petitioner. The balance of equities correspondingly tips sharply towards the maintenance of the Governor's Order.

However, "[w]hen conducting this balancing, it is also appropriate to take into account any public interest." *Girl Scouts of Manitou Council v. Girl Scouts of America*, 549 F.3d 1079, 1100 (7th Cir. 2008). Although Petitioner makes a conclusory assertion that the public interest would be served by injunctive relief, we cannot agree in light of the trial record. Injunctive relief is, as we have previously stated, a drastic remedy, and public policy suggests that it ought to be employed in a restrained manner that does not excessively frustrate the objectives of a coequal branch of government in the absence of imminent injury or deprivation of constitutional freedoms.

Accordingly, the balance of equities does not favor the grant of injunctive relief.

C. Conclusion

No single prong of the test is determinative of whether injunctive relief should issue. Cf. *Danae Art Int'l Inc. v. Stallone*, 163 A.D.2d 81, 82 (1990). However, as all three prongs weigh against Petitioner's desired relief, we conclude that injunctive relief should not issue.

II. DISMISSAL

A. Standard

While the case law of the former State of New York recognizes that "[a] court's power to dismiss a complaint, sua sponte, is to be used sparingly and only when extraordinary circumstances exist to warrant dismissal," *U.S. Bank v. Emmanuel*, 83 A.D.3d 1047, 1048 (2011), there are significant reasons to reconsider this precedent.

First and foremost, while New York courts regularly enjoy the full benefits of adversarial briefing from alert parties, this is less so the case in the Commonwealth, where many cases have gone poorly defended, or undefended entirely. In the interest of judicial economy, it is appropriate for the Court to proactively sua sponte dismiss claims whose outcomes are inexorable with or without the benefit of full briefing and correspondingly tie up precious resources of the judicial system.

B. Dismissal

Petitioner claims that the Republican Guarantee Clause (U.S. Const, art. IV, § 4) grants the Court "the power to say that such actions by the Governor without the consent of the Legislature is indeed illegal." Petitioner's Compl. We disagree.

Although Petitioner claims that *Luther v. Borden*, 48 U.S. 1 (1849), does not necessarily have to be read in a manner to totally foreclose on the justiciability of the Guarantee Clause, we believe that the absence of any decision to the Supreme Court to the contrary is telling. Controlling precedent, even if occasionally questioned in dicta since, has reaffirmed the fact that "the Court has consistently held that a challenge to state action based on the Guaranty Clause presents no justiciable question." *Baker v. Carr*, 369 U.S. 186, 224 (1962).

And, of course, no court in the history of this Republic has ever held that the division of powers within a state government is a justiciable question within the meaning of the Guarantee Clause, or indeed any clause. See *Beary Landscaping, Inc. v. Costigan*, 667 F.3d 947, 950 (7th Cir. 2012); *Largess v. Supreme Judicial Court of Massachusetts*, 373 F.3d 219, 227 (1st Cir. 2004); *Coniston Corp. v. Hoffman Estates*, 844 F.2d 461, 469 (7th Cir. 1988); *United Beverage Company v. Indiana Alcoholic Beverage Commission*, 760 F.2d 155, 157 (7th Cir. 1985); *Mayor of Philadelphia v. Educ. Equal. League*, 415 U.S. 605, 615 (1974); *Sweezy v. New Hampshire*, 354 U.S. 234, 255 (1957); *Highland Farms Dairy v. Agnew*, 300 U.S. 608, 612 (1937); *Dreyer v. Illinois*, 187 U.S. 71, 84 (1902).

The Supreme Court's "precedent binds and acts with the force of the Constitution itself." *In re Dismemberment Abortion Ban Act*, 101 M.S. Ct. 106 (2018), quoting *In re State of Sacagawea Executive Order 007*, 100 M.S. Ct. 123 (2016). Binding precedent dictates that the Guarantee Clause, especially in the context of tripartite separation of powers, is not justiciable.

C. Conclusion

As a Guarantee Clause claim predicated on an alleged violation of the tripartite division of powers is clearly not justiciable, judicial economy dictates that a full trial on the claim is unnecessary. The claim is dismissed, sua sponte.

III. CONSEQUENTIAL ORDERS

For the reasons stated above,

IT IS HEREBY ORDERED that the application for preliminary injunction in the instant case is **DENIED** and that all claims pertaining to the Republican Guarantee Clause are sua sponte **DISMISSED** without prejudice.

BY THE COURT.

Dated: June 2, 2020