

IN THE
**COMMONWEALTH COURT OF
PENNSYLVANIA**

Docket No. 694 MD 2019

LANDMARK FIREARMS LLC, *et al.*
Petitioners

v.

**ROBERT EVANCHICK,
COMMISSIONER OF THE
PENNSYLVANIA STATE POLICE**
Respondent

**Brief of Petitioner in Support of Application for Special Relief
in the Nature of a Preliminary Injunction**

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I. STATEMENT OF JURISDICTION

Jurisdiction in this matter is conferred upon the Commonwealth Court of Pennsylvania pursuant to the Judicial Code, Act of July 9, 1976, P.L. 586, No. 142, § 2, effective June 27, 1978, 42 Pa.C.S. § 761(a)(1), which provides, in pertinent part, “[a]gainst the Commonwealth government, including any officer thereof, acting in his official capacity.”

II. STATEMENT OF BASIS FOR SPECIAL RELIEF

Special relief, in the nature of injunctive relief, is provided for by Pa.R.A.P. 1532(a), which provides:

Special relief. At any time after the filing of a petition for review, the court may, on application, order the seizure of property, dispose of seized property, issue a preliminary or special injunction, appoint a temporary receiver or grant other interim or special relief required in the interest of justice and consistent with the usages and principles of law.

III. ACTION IN QUESTION

Pennsylvania Attorney General Joshua Shapiro’s Opinion of December 16, 2019 (hereinafter “Legal Opinion”), which is attached hereto as Exhibit A ¹ and the Pennsylvania State Police’s interpretation and enforcement of the December 16,

¹ Also available at, [https://www.attorneygeneral.gov/wp-content/uploads/2019/12/19.12.16-
Receivers-Legal-Opinion.pdf](https://www.attorneygeneral.gov/wp-content/uploads/2019/12/19.12.16-Receivers-Legal-Opinion.pdf)

2019 Opinion, which is attached as Exhibit B.² For ease of reference, hereinafter the PSP’s practice, policy, regulation, rule, or interpretation construing and applying the Attorney General’s December 16, 2019 Opinion, will be referred to as “PSP’s Policy.”

IV. STATEMENT OF QUESTIONS INVOLVED

1. Whether this Court should issue an emergency, *ex parte* injunction enjoining the Pennsylvania State Police from implementing or enforcing any practice, policy, regulation, rule, or interpretation construing and applying (1) that an object that is not a “firearm” under federal law meets the definition of “firearm” under the Pennsylvania Uniform Firearms Act or (2) the Attorney General’s December 16, 2019 Opinion, until such time as this Court can hold a hearing on Petitioners’ Motion for Preliminary Hearing and issue a further order.

Suggested Answer in the *Affirmative*

2. Whether, after holding a hearing on Petitioners’ Motion for a Preliminary Hearing, this Court should enjoin the Pennsylvania State Police from implementing or enforcing any practice, policy, regulation, rule, or interpretation construing and applying (1) that an object that is not a

² Also available at, <https://epics.pa.gov/Pics>

“firearm” under federal law meets the definition of “firearm” under the Pennsylvania Uniform Firearms Act or (2) the Attorney General’s December 16, 2019 Opinion, until such time as this Court renders a final determination in this matter.

Suggested Answer in the *Affirmative*

V. BASIS FOR EMERGENCY, *EX PARTE* RELIEF

As recounted in the Petition for Review, the Application for Special Relief in the Nature of a Preliminary Hearing, and *infra*, unless this Court issues an emergency, *ex parte* injunction enjoining the PSP’s Policy, until such time as this Court can hold a hearing on Petitioners’ Application for Special Relief in the Nature of a Preliminary Hearing, Petitioners and those similarly situated to them could be subjected to criminal prosecution of varying degrees from misdemeanors and felonies, as well as loss of substantial revenue, all without proper notice and in violation of the law. Therefore, to maintain the status quo, and provide this Court with ample time to consider and fully address the arguments of the Parties, it is necessary that an emergency, *ex parte* injunction issue to protect a manifest injustice from occurring.

VI. STATEMENT OF FACTS

Procedural Background

On December 16, 2019, Attorney General Joshua Shapiro, along with Governor Tom Wolfe, held a press conference to announce that the Attorney General had issued a Legal Opinion (*see* Exhibit A.),³ which putatively determined “that under Pennsylvania law, 80% receivers are firearms and can be treated, regulated, and enforced as such.” *See* Exhibit C.⁴ Interestingly, the Legal Opinion makes no reference to any such thing (*i.e.* “80% receivers”) and as the Bureau of Alcohol, Tobacco, Firearms and Explosives has held as far back as 2003, “50%, 80% and 90% complete receivers...have no legal or technical meaning.” *See* Exhibit D. Moreover, after acknowledging that the UFA “does not provide statutory definitions of [‘designed’ or ‘may readily be converted’],” the Legal Opinion purports to set forth a framework for determining whether a non-firearm object⁵ was designed or could be readily converted to be a frame or receiver,

³ Also available at: <https://www.attorneygeneral.gov/wp-content/uploads/2019/12/19.12.16-Receiver-Legal-Opinion.pdf>.

⁴ Also available at: <https://www.attorneygeneral.gov/taking-action/press-releases/ag-shapiro-gov-wolf-80-receivers-are-firearms>.

⁵ As used herein and in the Declarations of Petitioners, “non-firearm object” refers to a piece of matter (*i.e.*, any substance that has mass and takes up space by having volume), such as an object made of metal or plastic that is not a firearm pursuant to federal law, but that Respondent and his Pennsylvania State Police calls a “partially-manufactured (often referred to as 80%) frames and receivers and kits which include the same,” or also “80% receivers,” “80% frames,” “unfinished receivers,” or “unfinished frames.” *See* Declaration of David Borges at ¶ 2, Declaration of Benjamin Brown at ¶ 2, and Declaration of Timothy Mulverhill at ¶ 4.

which the PSP was to follow “when enforcing or issuing an interpretive guidance regarding the Applicable Sections of the UFA.” *See* Legal Opinion at 5-6. In part, the Legal Opinion concludes “[a] receiver is a firearm under the Applicable Sections if it is: 1) ‘designed’ to expel or 2) ‘may readily be converted’ to expel a projectile by the action of an explosive.” *Id.* at 5. In formulating this conclusion, the opinion purports to utilize seven (7) factors (time, ease, expertise, equipment, availability, expense, and feasibility) in order to establish a framework to determine whether a non-firearm object is a firearm for the purposes of the UFA and that no single factor is dispositive. *Id.* at 4-5. In short, the Legal Opinion presents a test that must be utilized on a case-by-case basis to determine whether an object is a firearm for the purposes of the Applicable Sections.

On December 18, 2019, absent any notification to the public that there was a change in interpretation as to what constitutes a firearm or that non-firearm objects could now constitute firearms, the Pennsylvania Instant Check System (“PICS”) background check website, run by the PSP, displayed a message which stated:

As of 12-16-19, the sale of partially-manufactured (often referred to as 80%) frames and receivers and kits which include the same, require a background check through the Pennsylvania Instant Check System, in accordance with the Attorney General’s binding opinion and applicable requirements within the UFA. No sales may occur by a licensed firearms dealer without such a check. PSP is not yet ready to process such checks and is working diligently to have a process in place as soon as possible within the next thirty days to allow these checks to occur in a lawful manner.

See Exhibit B.

*Facts Specific to Petitioners and
Those Similarly Situated*

In relation to Petitioner Firearms Policy Coalition, it has a Pennsylvania member, who ordered several non-firearm objects.⁶ Upon learning that the Attorney General issued a Legal Opinion, which has putatively now classified non-firearm objects as “firearms” under Pennsylvania law, the member attempted to cancel his order with the retailer but was informed by the retailer that it was too late.⁷ The member attempted to contact the common-carrier responsible for the transportation of the non-firearm objects in an effort to have the shipment returned but was informed that due to the manner in which the common-carrier was transporting the non-firearm objects, return of the shipment was impossible.⁸ As of today, the shipment has not yet been received by the member and the member does not know whether the non-firearm objects that he ordered are subject to the Legal Opinion and PSP’s policy, as they lack specificity or any guidance that would allow a person of ordinary intelligence to determine what is being regulated or enforced.⁹ As a result, the member and Firearms Policy Coalition fear the

⁶ See Declaration of Brandon Combs at ¶ 4.

⁷ *Id.* at ¶¶ 5-6.

⁸ *Id.* at ¶¶ 7-8.

⁹ *Id.* at ¶¶ 9, 11, 14.

member's prosecution, as well as those similarly situated, and seizure of the member's non-firearm objects, as a result of the PSP's Policy.¹⁰

In relation to the other Petitioners, on December 20-22, 2019, the annual holiday Oaks Gun Show, which features 1,700 tables, will be held.¹¹ Petitioners Landmark Firearms and US Rifle, have purchased table space at the show and plan to attend.¹² In preparation for the show, Landmark Firearms and US Rifle have been building inventory of non-firearm objects to offer for sale at the show.¹³ Landmark Firearms expects to lose between \$1,800 and \$3,600 in revenue should they be unable to conduct transactions involving non-firearm objects.¹⁴ US Rifle expects to lose up to \$12,000 in revenue should they be unable to conduct transactions involving non-firearm objects.¹⁵ More concerning, both Landmark Firearms and US Rifle fear their own prosecution and seizure of their non-firearm objects sold in Pennsylvania, as a result of the PSP's Policy, as well as, the prosecution of their Pennsylvania customers and the seizure of their customers' property, including their non-firearm objects, as a result of the PSP's Policy.¹⁶

¹⁰ *Id.* at ¶ 19.

¹¹ *See* Declaration of Benjamin Brown at ¶¶ 9-10, and Declaration of Timothy Mulverhill at ¶¶ 10-11; *see also*, <http://www.eagleshows.com>.

¹² *Id.*

¹³ *See* Declaration of Benjamin Brown at ¶ 15, and Declaration of Timothy Mulverhill at ¶ 15.

¹⁴ *See* Declaration of Benjamin Brown at ¶ 14.

¹⁵ *See* Declaration of Timothy Mulverhill at ¶ 16.

¹⁶ *See* Declaration of Benjamin Brown at ¶¶ 25-28, and Declaration of Timothy Mulverhill at ¶¶ 28-29.

Polymer80 sells non-firearm objects it produces directly to individuals on its website www.polymer80.com.¹⁷ The Bureau of Alcohol, Tobacco, Firearms and Explosives (“ATF”) has determined that Polymer80’s non-firearm objects (*i.e.* its products) are not firearms.¹⁸ In the past fourteen (14) days, Polymer80 has had five (5) orders from Pennsylvanians.¹⁹ Polymer80 wishes to continue to be able to sell their products in Pennsylvania but, like both Landmark Firearms and US Rifle, it fears its own prosecution and seizure of its non-firearm objects sold in Pennsylvania, as a result of the PSP’s Policy, as well as, the prosecution of their Pennsylvania customers and the seizure of their customers’ property, including their non-firearm objects, as a result of the PSP’s Policy.²⁰

In relation to all Petitioners, they are unsure what objects the Legal Opinion and the PSP’s Policy are applicable to, as they lack specificity or any guidance that would allow a person of ordinary intelligence to determine what is being regulated or enforced.²¹ They all also recount that there has been no formal notice of the Legal Opinion or PSP’s Policy to Federal Firearm Licensees, non-licensees, or the

¹⁷ See Declaration of David Borges at ¶ 3.

¹⁸ See Declaration of David Borges at ¶ 6.

¹⁹ *Id.* at ¶ 16.

²⁰ *Id.* at ¶¶ 17-18.

²¹ See Declaration of David Borges at ¶¶ 7-8, 10-11, Declaration of Benjamin Brown at ¶¶ 17-22, and Declaration of Timothy Mulverhill at ¶¶ 21, 26.

public; thereby, resulting in their possible prosecution and seizure of their property, in the absence of any notice, as a result of the PSP's Policy.²²

VII. ARGUMENT

- A. Petitioners Can Show that (1) an injunction is necessary to prevent immediate and irreparable harm; (2) greater injury will result from refusing the injunction than from granting it; (3) the injunction restores the parties to the status quo ante; and (4) the petitioners' right to relief is clear.

The prerequisites of a preliminary injunction are: 1) the injunction is necessary to prevent immediate and irreparable harm not compensable in money damages; 2) greater injury will result from refusing the injunction than from granting it; 3) the injunction restores the parties to *status quo ante*; and 4) the activity sought to be restrained is actionable and the plaintiff's right to relief is clear. *Dillon v. City of Erie*, 83 A.3d 467, 470 n.1 (Pa. Cmwlth. 2014) (*en banc*).

i. Petitioners' Right to Relief is Clear

As discussed *infra*, the Petitioners' right to relief is clear under multiple legal bases.

²² See Declaration of David Borges at ¶¶ 9, Declaration of Benjamin Brown at ¶¶ 23-27, and Declaration of Timothy Mulverhill at ¶¶ 19, 20, 23-25.

a. The Legal Opinion and PSP’s Policy Violate Article II, Section 1

Article II, Section 1 of the Pennsylvania Constitution, commonly referred to as the non-delegation provision, provides:

The legislative power of this Commonwealth shall be vested in a General Assembly, which shall consist of a Senate and a House of Representatives

The Pennsylvania Supreme Court has long held that “[i]t is axiomatic that the Legislature cannot constitutionally delegate the power to make law to any other branch of government or to any other body or authority.” *State Board of Chiropractic Examiners v. Life Fellowship of Pennsylvania*, 441 Pa. 293, 297 (1971). It has been recognized that the legislature may “confer authority and discretion in connection with the execution of the law; it may establish primary standards and impose upon others the duty to carry out the declared legislative policy in accordance with the general provisions of the act.” *Belovsky v. Redevelopment Authority*, 357 Pa. 329, 342 (1947). However, that is not a blank check to rewrite the law.

As the Pennsylvania Supreme Court declared in *Gilligan v. Pennsylvania Horse Racing Comm’n*, 492 Pa. 92, 96 (1980), “[t]he principal limitations on this power are twofold: (1) the basic policy choices must be made by the Legislature, and (2) the ‘legislation must contain adequate standards which will guide and restrain the exercise of the delegated administrative functions.’” (internal citations

omitted). More recently in finding that Section 696(i)(3) of the School Code was unconstitutional under Article II, Section 1, the Pennsylvania Supreme Court declared that the purpose of the non-delegation provision of Article II, Section 1, is “to ensure the Pennsylvania Legislature makes basic policy choices, and to protect against the arbitrary exercise of unnecessary and uncontrolled *discretionary power*” and where such delegation is constitutional “the legislative body *must surround such authority with definite standards, policies and limitations* to which such administrative officers, boards or commissions, must strictly adhere and by which they are strictly governed.” *W. Phila. Achievement Charter Elem. Sch. v. Sch. Dist. of Phila.*, 132 A.3d 957, 966 (Pa. 2016)(emphasis added).

Similarly, this Court, in finding that Section 306(a.2) of the Workers Compensation Act was an unconstitutional delegation of authority under Article II, Section 1, reaffirmed that Article II, Section 1 “vests legislative power in our General Assembly, ‘embod[ying] the fundamental concept that only the General Assembly may make laws, and cannot constitutionally delegate the power to make law to any other branch of government or to any other body or authority’.” *Protz v. Workers’ Comp. Appeal Bd. (Derry Area Sch. Dist.)*, 124 A.3d 406, 412, 415 (Pa. Cmwlth. Ct. 2015)(quoting *Association of Settlement Companies v. Department of Banking*, 977 A.2d 1257, 1265 (Pa. Cmwlth. 2009) (*en banc*)). Thereafter, the Pennsylvania Supreme Court, in affirming this Court’s decision, declared that one

of the major purposes of Article II, Section 1 is “to protect against the arbitrary exercise of unnecessary and uncontrolled discretionary power.” *Protz v. Workers' Comp. Appeal Bd. (Derry Area Sch. Dist.)*, 639 Pa. 645, 655 (2017). More importantly, the Court declared

the General Assembly cannot delegate to any other branch of government or to any other body or authority the power to make law. Or, as John Locke put it, legislative power consists of the power to make laws, and not to make legislators. Indeed, the rule is essential to the American tripartite system of representative government. The framers of the Constitution believed that the integrity of the legislative function was vital to the preservation of liberty. (internal citations and quotations omitted) (emphasis added)

In passing the UFA, the General Assembly, as noted in the Legal Opinion, defined the term “firearm” in several provisions; yet, as acknowledged the Attorney General, the General Assembly did not include definitions for the terms “designed” or “may readily be converted.” *See* Legal Opinion at 2, 5. Nevertheless, the Legal Opinion provides that the “PSP shall utilize the legal framework set forth in this Opinion when enforcing or issuing interpretative guidance regarding the Applicable Sections of the UFA.” *Id.* at 5-6. However, the General Assembly has never considered, let alone enacted, the framework provided in the Legal Opinion. Nor, as discussed *infra*, has the PSP properly entered into rulemaking to enact any such framework or to define “designed” or “may readily be converted.” Rather, the Legal Opinion and the resultant PSP Policy, as the Pennsylvania Supreme Court warned of in *Protz*, is merely the arbitrary exercise of uncontrolled discretionary

power resulting in the PSP making new law without the General Assembly's oversight or the public involvement. As such, there can be no doubt that such violates the non-delegation provision contained in Article II, Section 1.

b. The Legal Opinion and PSP's Policy Violate the Regulatory Review Act

Even if, *arguendo*, the Legal Opinion and PSP's Policy did not violate Article II, Section 1, as the PSP has failed to comply with the Pennsylvania Regulatory Review Act, 71 P.S. § 745.1, *et seq.* ("RRA"), the PSP's Policy is void.

If one assumes, *arguendo*, that the PSP has authority, pursuant to 18 Pa.C.S. § 6111.5, to implement a regulation either establishing the framework provided in the Legal Opinion²³ or defining "designed" and "may readily be converted,"²⁴ it has failed to take any of the necessary steps under the RRA to promulgate such a regulation.

The Legal Opinion was putatively issued in accordance with 71 P.S. § 732-204(a)(1) which states, *inter alia*, "[u]pon the request of...the head of any

²³ Petitioners respectfully note that to the extent this Court finds that the PSP has such authority, that authority has not been provided to the Attorney General and therefore, the Legal Opinion is meaningless. Where the General Assembly has desired to empower the Attorney General, it is acutely aware of how to do such, as reflected in 18 Pa.C.S. § 6109(k)(1)(empowering the Attorney General to enter into reciprocity agreements).

²⁴ Petitioners do not believe the PSP has this authority and only provide this argument based on anticipated arguments of the PSP.

Commonwealth agency, the Attorney General shall furnish legal advice concerning any matter or issue arising in connection with the exercise of the official powers or the performance of the official duties of the...agency.” Notably Section 732-204(a)(1) is devoid of any language which suggests that a legal opinion rendered allows for a new enforcement practice, such as setting forth a framework or defining previously undefined terms, absent following procedures spelled out in the RRA.

71 P.S. § 745.2(a) states, *inter alia*,

It is the intent of this act to establish a method for ongoing and effective legislative review and oversight in order to foster executive branch accountability; to provide for primary review by a commission with sufficient authority, expertise, independence and time to perform that function; to provide ultimate review of regulations by the General Assembly; and to assist the Governor, the Attorney General and the General Assembly in their supervisory and oversight functions. (emphasis added).

Thus, there does not exist any power of the Attorney General or the PSP to merely set forth a new framework for determining whether something is regulable, without complying with the requirements of the RRA. To hold otherwise, would be to strip the General Assembly of its stated supervisory and oversight role and divest it of its “ultimate review of regulations.”

And let there be no dispute that the PSP has neither previously enacted any regulations relating to the Legal Opinion’s framework or the terms “designed” or “may be readily converted” nor has it provided notice of its intent to do so.

37 Pa. Code § 31.102 sets forth definitions applicable to Standards for Licensed Retail Dealers Under the Uniform Firearms Act. It defines the term “firearm” to mean “[u]nless otherwise defined a weapon which is designed to or may readily be converted to expel a projectile by the action of an explosive or the frame or receiver of the weapon.”²⁵ 37 Pa. Code § 33.102 sets forth definitions applicable to Procedures and Specifications for Firearm Record Forms Under the Uniform Firearms Act. It defines the term “firearm” in two different manners, one as applicable to Section 6102 of the UFA and one as applicable to Section 6111.2 of the UFA (one of the Applicable Sections of the Legal Opinion). As defined in relation to Section 6111.2 the term “firearm” means “[a] weapon which is designed to or may readily be converted to expel a projectile by the action of an explosion or the frame or receiver of the weapon.”²⁶

Notably devoid from both of the definitions and the other pertinent sections in the regulations promulgated by the PSP, is a framework for determining what it means to be “readily be converted to expel a projectile by action of an explosion.” Perhaps more importantly, the terms “designed” and “may readily be converted” are also not defined.

²⁵ Thus, utilizing the identical terms “designed” and “may be readily converted” as enacted by the General Assembly.

²⁶ *Id.*

Without recounting the entire rulemaking process, it is clear that the RRA was not complied with in any manner,²⁷ as there was no review of a proposal by the Attorney General²⁸ nor was there, thereafter, a submission of an Attorney General-approved proposed regulation to the Legislative Reference Bureau for publication in the Pennsylvania Bulletin as required by 71 P.S. § 745.5. Nor is there any indicia that there was a submission of a proposed regulation or analysis form to the commission or committees as required by 71 P.S. § 745.5.

As a result, the General Assembly has been denied its supervisory and oversight role and divested it of its “ultimate review of regulations.” Perhaps more importantly, the public was denied notice and meaningful opportunity to comment as to this proposed change in assessing whether an object is now a firearm for the purposes of the UFA. Accordingly, the Legal Opinion and PSP’s Policy are violative of the RRA and must be voided.

²⁷ In passing the RRA in 1982, the General Assembly established the Independent Regulatory Review Commission (“IRRC”) to provide uniform oversight of the rulemaking process in Pennsylvania, and which produces a manual on the regulatory review process in Pennsylvania, which is available at www.irrc.state.pa.us/resources/docs/Regulatory_Review_Process_Manual.PDF. As set forth therein, the Commonwealth Attorneys Act does not provide the Attorney General with the power to set forth a framework or to define previously undefined terms (pgs 3-5) and the PSP has failed to comply, in every manner, with the RRA. Pgs. 8-22. Furthermore, a search of IRRC’s website - <http://www.irrc.state.pa.us> - for any proposed regulation, which it publishes there upon receipt of such, yields no results; yet, an agency must provide a copy of the proposed regulation “to the Committees, the LRB, and IRRC on the same day.” *Id.* at 8.

²⁸ This is evident by the Legal Opinion, as it explicitly states, in the first sentence, that Commissioner Evanchick only sought “legal advice” and makes no mention of a proposal by the PSP.

c. The Legal Opinion and PSP’s Policy are Void for Vagueness and Pursuant to the Rule of Lenity

Even if, *arguendo*, the Legal Opinion and PSP’s Policy did not violate Article II, Section 1 and were not violative of the Regulatory Review Act, they would be void for vagueness and pursuant to the Rule of Lenity.

A law is void on its face if it is so vague that persons “of common intelligence must necessarily guess at its meaning and differ as to its application.” *Connally v. General Construction Co.*, 269 U.S. 385, 391 (1926). The void for vagueness doctrine incorporates the due process notions of fair notice or warning (*Grayned v. Rockford*, 408 U.S. 104, 108-109 n. 4 (1972)) and mandates that lawmakers set reasonably clear guidelines for law enforcement officers and triers of fact in order to prevent “arbitrary and discriminating enforcement.” *Smith v. Goguen*, 415 U.S. 566 (1973).

In this matter, there can be no dispute, as discussed *supra*, that the PSP’s Policy flies directly in the face of a ATF’s interpretation of the definition of the term “firearm” found in the Gun Control Act, 18 U.S.C. § 921, *et seq.*, which is, for all intents and purposes, identical to the definition of the term “firearm” in the UFA. *Cf.* 18 U.S.C. § 921(a)(3) and 18 Pa.C.S. § 6105(i).²⁹ In fact, Polymer80 has

²⁹ See also Declaration of David Borges at ¶¶ 3, 11, 13, Declaration of Benjamin Brown at ¶¶ 7, 21 and Declaration of Timothy Mulverhill at ¶¶ 5, 24.

received a formal determination from ATF that its non-firearm objects (*i.e.* its products) are not firearms.³⁰

The “principle of legality,” the “first principle” or otherwise known as the *nulla poena sine lege* of criminal law, requires that criminal laws be explicitly and unambiguously specified in advance by statute. *Liparota v. United States*, 471 U.S. 419, 424 (1985) (“The definition of the elements of a criminal offense is entrusted to the legislature.” (citation omitted)). While “a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application violates the first essential of due process of law” (*Connally v. Gen. Const. Co.*, 269 U.S. at 391), the rule of lenity – a compliment to the vagueness doctrine – provides that when a criminal statute³¹ is ambiguous, rather than vague, courts are to resolve the ambiguity in the favor of the narrower scope of criminal liability.

As Professor Sunstein has explained:

³⁰ See Declaration of David Borges at ¶ 6.

³¹ The rule of lenity applies equally to civil and criminal cases, where the applicable definition is contained within a criminal statute. *Leocal v. Ashcroft*, 543 U.S. 1, 12 (2004)(declaring “Because we must interpret the statute consistently, whether we encounter its application in a criminal or noncriminal context, the rule of lenity applies.”); *FCC v. Am. Broad. Co.*, 347 U.S. 284, 296 (1954)(declaring “There cannot be one construction for the Federal Communications Commission and another for the Department of Justice.”). In no better example, the U.S. Supreme Court, in addressing ATF’s interpretation of the definition of “making” under the National Firearms Act found that the rule of lenity applied to the ambiguity in the statute because the it had “criminal applications.” *United States v. Thompson/Ctr. Arms Co.*, 504 U.S. 505, 517-18 (1992).

One function of the lenity principle is to ensure against delegations. Criminal law must be a product of a clear judgment on Congress's part. Where no clear judgment has been made, the statute will not apply merely because it is plausibly interpreted, by courts or enforcement authorities, to fit the case at hand. The rule of lenity is inspired by the due process constraint on conviction pursuant to open-ended or vague statutes. While it is not itself a constitutional mandate, it is rooted in a constitutional principle, and serves as a time-honored nondelegation canon.

Cass R. Sunstein, *Nondelegation Canons*, 67 U. Chi. L. Rev. 315, 332 (2000).

As the Supreme Court likewise recognizes, “when choice has to be made between two readings of what conduct Congress has made a crime, it is appropriate, before we choose the harsher alternative, to require that Congress should have spoken in language that is clear and definite.” *United States v. Universal C.I.T. Credit Corp.*, 344 U.S. 218, 221-22 (1952); *see also Lewis v. United States*, 445 U.S. 55, 65 (1980) (“[T]he touchstone” of the lenity principle “is statutory ambiguity.”); *United States v. Gradwell*, 243 U.S. 476, 485 (1917) (“before a man can be punished as a criminal under the federal law his case must be ‘plainly and unmistakably’ within the provisions of some statute.”)

As further explained by the Supreme Court, because agencies have a natural tendency to broadly interpret the statutes they administer, deference in the criminal context “would turn the normal construction of criminal statutes upside-down, replacing the doctrine of lenity with a doctrine of severity.” *Crandon v. United States*, 494 U.S. 152, 178 (1990) (Scalia, J., concurring).

The result in the instant matter would suffer the same fate should the PSP be allowed to run wild within the “framework” of the Legal Opinion – a framework, in and of itself, that allows for unequal application. As the Legal Opinion sets out a “framework” that is amorphous and highly subjective, there is no manner in which it would survive under the Rule of Lenity, as penalties under the Applicable Sections range from misdemeanors of the third degree up to felonies of the second degree.

Thus, regardless of whether this Court reviews the Legal Opinion and PSP’s Policy under a vagueness standard or the Rule of the Lenity, the outcome is the same – they are void.

d. The Legal Opinion and PSP’s Policy Violate Due Process

“The touchstone of due process is protection of the individual against arbitrary action of government.” *Wolff v. McDonnell*, 418 U.S. 539, 558 (1974).

“In terms of procedural due process, government is prohibited from depriving individuals of life, liberty, or property, unless it provides the process that is due.”

Com. v. Turner, 622 Pa. 318, 335 (2013).

Article I, Section 1 of the Pennsylvania State Constitution states

All men are born equally free and independent, and have certain inherent and inalienable rights, among which are those of enjoying and defending life and liberty, of acquiring, possessing and protecting property and reputation, and of pursuing their own happiness.

“Substantive due process is the esoteric concept interwoven within our judicial framework to guarantee fundamental fairness and substantial justice.” *Com. v. Stipetich*, 539 Pa. 428, 439 (1995). As explained by the Pennsylvania Supreme Court, “[f]or substantive due process rights to attach, there must be a deprivation of a constitutionally protected interest or property right. *Germantown Cab Co. v. Philadelphia Parking Auth.*, 206 A.3d 1030, 1042 (Pa. 2019). This Court in *Caba v. Weaknecht*, 64 A.3d 39, 58 (Pa.Cmwlth. 2013) acknowledged that the right to keep and bear arms, pursuant to Article I, Section 21, is an “enumerated right predating even the ratification of the Second Amendment.” Furthermore, all citizens have a protected interest in being free from arbitrary exercise of uncontrolled discretion and ensuring the laws are complied with, including, but not limited to, being provided notice and opportunity to be heard under the RRA. Accordingly, the Legal Opinion and the PSP’s Policy violate due process and are void.

ii. *An Injunction is Necessary to Prevent Immediate and Irreparable Harm*

Pennsylvania law does not require a person to be prosecuted to find that he

has suffered irreparable harm. *See City of Erie v. Northwestern Food Council*, 322 A.2d 407, 411-12 (Pa. Cmwlth. 1974), quoting *Harris-Walsh, Inc. v. Borough of Dickson City*, 216 A.2d 329, 331 (Pa. 1966) (holding that petitioner was not required to undergo criminal prosecution before availing himself of an equitable remedy). Threats to fundamental rights, including the right to be free of threat of prosecution for lawful activity, constitute immediate and irreparable harm and warrant a preliminary injunction. *See Pa. State Educ. Ass'n ex rel. Wilson v. Commonwealth Dep't of Cmty. & Econ. Dev., Office of Open Records*, 981 A.2d 383, 386 (Pa. Cmwlth. Ct. 2009) (granting a preliminary injunction to prevent public disclosure of employees' home addresses, a threat to their protected privacy rights), *aff'd*, 606 2 A.3d 558 (Pa. 2010). As this Court stated in *Firearm Owners Against Crime v. Lower Merion Twp.*, 151 A.3d 1172, 1180 (Pa.Cmwlth. 2016), "the violation of an express statutory provision constitutes *per se* irreparable harm and a preliminary injunction may issue where the other necessary elements are met." (citing *Council 13, American Federation of State, County and Municipal Employees, AFL-CIO v. Casey*, 595 A.2d 670, 674 (Pa.Cmwlth. 1991)).

First, it cannot be disputed that Petitioners are under threat of immediate and irreparable harm, as the PSP's website makes explicitly clear that it now contends that it is unlawful to sell or transfer "partially-manufactured (often referred to as 80%) frames and receivers" in the absence of "a background check through the

Pennsylvania Instant Check System” and that “PSP is not yet ready to process such checks and is working diligently to have a process in place as soon as possible within the next thirty days to allow these checks to occur in a lawful manner.” Exhibit B. Furthermore, the Petitioners have all declared that they fear their own and their customers’ and members’ prosecution and seizure of their respective property, including, but not limited to, during the Oaks Gun Show, as a result of the PSP’s Policy.³² Thus, the PSP has caused the immediacy of this matter by implementing the PSP’s Policy immediately upon the Attorney General’s issuance of the Legal Opinion. In fact, it has rushed to implement its Policy so hastily that it does not even have “a process in place...to allow these checks to occur in a lawful manner.” *Id.*

Even more disconcerting, while there are varying degrees of criminal penalties – everything from misdemeanors of the second degree to felonies of the second degree – associated with the PSP’s Policy, one of the most applicable to the Petitioners is 18 Pa.C.S. §§ 6111(b), (c), which, pursuant to Section 6111(g)(1), (2), is either a misdemeanor of the second degree or a felony of the second degree. As a misdemeanor of the second degree is punishable by up to two years in jail³³

³² See Declaration of David Borges at ¶¶ 17-18, Declaration of Benjamin Brown at ¶¶ 25-28, Declaration of Timothy Mulverhill at ¶¶ 28-29, and Declaration of Brandon Combs at ¶¶ 19.

³³ See 18 Pa.C.S. § 106(b)(7)

and a felony of the second degree is punishable by up to ten years in jail,³⁴ the Petitioners have clearly established threat of immediate and irreparable harm.³⁵

Second, if Petitioners do not sell their product at the upcoming gun shows, including the Oaks Gun Show this weekend, they, and those similarly situated, expect to lose upwards of \$12,000, per show.³⁶ This immediate and irreparable harm cannot be compensated through monetary damages, as the PSP has sovereign immunity against any financial judgments. *See* 1 Pa.C.S. § 2310; 42 Pa.C.S. § 8521.

Third, as discussed *supra* in relation to Petitioners' right to relief being clear, as the PSP has failed to comply with the Regulatory Review Act, the PSP violated an express statutory provision, which constitutes *per se* irreparable harm. *Firearm Owners Against Crime v. Lower Merion Twp.*, 151 A.3d at 1180.

³⁴ *See* 18 Pa.C.S. § 106(b)(3)

³⁵ As the Legal Opinion also contends that it applies to 18 Pa.C.S. § 6111.2 – Firearm Sales Surcharges – it would also seemingly impose a penalty of a misdemeanor of the first degree, pursuant to 18 Pa.C.S. § 6119, for every past sold item coming within its purview, each violation of which could be punished by upwards of five years in jail, pursuant to 18 Pa.C.S. § 106(b)(6). Moreover, each violation would appear to be a violation of the Tax Reform Code of 1971 and which would constitute “a misdemeanor, and, upon conviction thereof, shall be sentenced to pay a fine not exceeding one thousand dollars (\$1000) and costs of prosecution, or undergo imprisonment not exceeding one year,” pursuant to 72 P.S. § 7268.

³⁶ *See* Declaration of Timothy Mulverhill at ¶ 16; *see also*, Declaration of Benjamin Brown at ¶ 14.

Thus, there simply cannot be any dispute that Petitioners are under threat of immediate and irreparable harm that cannot be compensated through monetary damages.

iii. Greater Injury Will Result From Refusing the Injunction Than Granting It

As Petitioners are under threat of criminal prosecution and civil penalties for the *pre-* and *post-*PSP Policy sale of non-firearm objects that have not been specified in a manner that a person of ordinary intelligence is able to determine what is being regulated or enforced, there simply cannot be any greater injury than the refusal to grant an injunction, as Petitioners are facing misdemeanor and felony threats of prosecution, fines, and monumental loss of revenue, including for conduct that when they performed it, there was not dispute that it was lawful.

iv. Status Quo

“The *status quo ante* to be preserved by a preliminary injunction is the last actual, peaceable, lawful, noncontested status which preceded the pending controversy.” *Dillon*, 83 A.3d at 472 n.7.

In this case, there can be no dispute that the last noncontested status existed immediately prior to the Attorney General’s Legal Opinion of December 16, 2019,

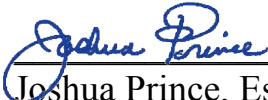
and the PSP's interpretation, implementation, and enforcement of it, immediately thereafter through the PSP's Policy.

VIII. CONCLUSION

For the foregoing reasons, Petitioners respectfully initially request that this Court issue an emergency, *ex parte* injunction enjoining the Pennsylvania State Police from implementing or enforcing any practice, policy, regulation, rule, or interpretation construing and applying (1) that an object that is not a "firearm" under federal law meets the definition of "firearm" under the Pennsylvania Uniform Firearms Act or (2) the Attorney General's December 16, 2019 Opinion, as well as, placing notice of the same on the PSP's website and on the ePICS website. Thereafter, Petitioners respectfully request that this Court issue a final preliminary injunction, of the same nature, after the Parties have opportunity to be heard.

Respectfully Submitted,

Date: December 20, 2019



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