

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

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

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I. ARGUMENT

Although the PSP's Policy¹ is clearly legislative which is in and of itself dispositive in the favor of Petitioners, regardless of whether this Court treats it as legislative or interpretative, the Petitioners are entitled to relief in the nature of an injunction, as Respondent admits that the statutory text requires "clarification" (PSP Brief at 8, 27, 28; "clarifies" at 8, 9, 17, 18, 23, 33) and is therefore vague and thus unenforceable under both the vagueness doctrine and rule of lenity.

A. Respondent's Policy is Legislative, not Interpretive and Therefore, Petitioners are Entitled to Relief

While Petitioners acknowledge that interpretive rules have been held to fall outside of the requirements of the Pennsylvania Documents Law (45 P.S. §§ 1102, *et seq.*) and Regulatory Review Act (71 P.S. § 745.1, *et seq.*), the PSP's Policy is clearly legislative, as enunciated by the Pennsylvania Supreme Court in *Lopata v. Com., Unemployment Comp. Bd. of Review*, 507 Pa. 570 (1985).

In *Lopata*, as acknowledged by Respondent (PSP Brief at 13, fn. 5), the Court differentiated between legislative and interpretative rules by explaining that

¹ Consistent with Petitioners' Brief in Support of Application for Special Relief, pg. 9, the PSP's practice, policy, regulation, rule, or interpretation construing and applying the Attorney General's December 16, 2019 Opinion is referred to herein as "PSP's Policy."

a legislative rule is a “substantive rule [that] establishes a standard of conduct which has the force of law ... The underlying policy embodied in the rule is not generally subject to challenge before the agency;” whereas, an interpretative rule is “[a] general statement of policy...[that] does not establish a binding norm ... A policy statement announces the agency’s tentative intentions for the future.” *Id.* at 575 (citations and quotations omitted).

Stated slightly differently,

an administrative body or officer, under the guise of its regulatory power, may not broaden the scope of a proscription contained in its enabling legislation,² read into a statute conditions or requirements not plainly expressed therein,³ or attempt to supply essential substantive provisions that are missing from, or unclear in, the statute.⁴

§ 166:21. Legislation or rulemaking—Limits of power, 36 Standard Pennsylvania Practice 2d § 166.

In this matter, there can be no dispute that the PSP’s Policy establishes a “standard of conduct which has the force of law.” Not only does Respondent admit this throughout its brief (*see*, PSP Brief at, *inter alia*, 1, 2, 4, 14, 20) but after filing this action, on January 9, 2020, the PSP issued the attached letter and promulgated form (SP 4-121), which unequivocally sets forth a standard of conduct which has

² *Commonwealth v. Di Meglio*, 385 Pa. 119 (1956).

³ *Firemen’s Relief Ass’n of Washington v. Minehart*, 430 Pa. 66 (1968).

⁴ *Murray v. City of Philadelphia*, 364 Pa. 157 (1950); *Ruch v. Wilhelm*, 352 Pa. 586, 592 (1945).

the force of criminal and civil law.⁵ A copy of the PSP's January 9, 2020 letter and promulgated form are attached hereto and incorporated herein as Exhibit E. As explicitly set forth in the letter,

In accordance with the Pennsylvania Attorney General's binding opinion and applicable requirements within the Pennsylvania Uniform Firearms Act, 18 Pa.C.S., Chapter 61, Firearms and Other Dangerous Articles, effective December 16, 2019, a partially-manufactured frame or receiver (PMFR) for a pistol or rifle is considered a "firearm" for purposes of the state firearm prohibition found under 18 Pa.C.S. § 6105.

...

Moreover, pursuant to 18 Pa.C.S. § 6111(b) and (f)(1), a PICS background check and unique approval number must be completed and received in order to facilitate a lawful sale/transfer of a PMFR under Pennsylvania law.

...

...dealers holding a current license to sell firearms shall utilize the following procedures for completing a sale/transfer of a PMFR.

...

Completed Application for Purchase (Partially Manufactured Frame or Receiver for a Rifle or Pistol) forms shall be retained by the dealer in a separate file/binder and available for inspection.

⁵ As Petitioners detailed in their Brief in Support of Application for Special Relief, pgs. 23-24, including fn. 35, PSP's Policy now results in varying criminal penalties of everything from a misdemeanor of the second degree to a felony of the second degree and also civil (and criminal) penalties relative to the firearm sales surcharge tax. None of which applied, prior to the PSP's Policy, and which now seeks to retroactively criminalize past conduct, which is violative of 1 Pa.C.S. § 1926, as *only* the General Assembly can retroactively apply statutes.

Perhaps even more dispositive of the binding effect and retroactive nature of the PSP's Policy is the fact that the PSP's letter is dated January 9, 2020 and explicitly states that the PSP's Policy is effective as of December 16, 2019; thus, acknowledging that the PSP's Policy was in effect for approximately three weeks before it issued the letter on complying with its new Policy.

Exhibit E, pgs. 1-2.

The very first sentence, *alone*, establishes Respondent's position that the PSP's Policy has the force of law and the remainder sets forth the standard of conduct that dealers are to comply with, if they do not wish to have criminal and civil penalties brought against them for failure to comply with the PSP's Policy.

Respondent cannot claim with a straight face that the PSP's Policy is "[a] general statement of policy...[that] does not establish a binding norm ... [and merely] announces the agency's tentative intentions for the future," which is required for its Policy to be an interpretative rule,⁶ when it has, beyond admitting it has established a standard of conduct that has the force of law, has issued a letter and promulgated a form requiring compliance in the present, not the possible future.

⁶ See also, *Borough of Pottstown v. Pennsylvania Mun. Ret. Bd.*, 551 Pa. 605, 610 (1998) (declaring that an interpretative rule cannot "establish an extrinsic substantive standard.") In this matter, there also cannot be any dispute, as Respondent admits (PSP Brief at 4-5), that the PSP's Policy is based upon several factors, specified in the Attorney General's Opinion, including "time," "expertise," "equipment," and "availability;" thereby, creating an extrinsic substantive standard, which is to be utilized by law enforcement for enforcement (PSP Brief at 20).

Moreover, consistent with the Pennsylvania Supreme Court's holding in *Protz v. Workers' Comp. Appeal Bd.* (Derry Area Sch. Dist.), 639 Pa. 645 (2017) and explained in Petitioners' Brief in Support of Application for Special Relief, pgs. 10-13, the establishment of or enforcement of a non-legislatively enacted framework would be violative of Article II, Section 1 of the Pennsylvania Constitution. Consistent with *Protz* and legion of Article II, Section 1 cases, at a minimum, only the General Assembly could enact the proposed framework and even then, as explained *infra* pgs. 11-13, it would likely be too vague, at least as specified in the Attorney General's Opinion, to be enforceable.

As Respondent puts forth no argument that the PSP's Policy would be valid as a legislative or substantive rule – nor could it, since it would be violative for all the reasons specified in Petitioners' Brief in Support of Application for Special Relief, pgs. 10-16 – the fact that the PSP's Policy is legislative is dispositive that Petitioners are entitled to relief.

B. Even if, *Arguendo*, the PSP's Policy was an Interpretive Rule, Petitioners are Entitled to Relief

Even if this Court were to hold that the PSP's Policy was an interpretive rule, Petitioners would still be entitled to relief, as Respondent admits that the statutory text is not clear, requires “clarification,” and therefore is violative of the vagueness doctrine and rule of lenity, as set forth in Petitioners' Brief in Support of Application for Special Relief, pgs. 17-20.

It is textbook law that penal statutes “shall be strictly construed” and “that where ambiguity exists in the language of a penal statute, such language should be interpreted in the light most favorable to the [challenger]. More specifically, where doubt exists concerning the proper scope of a penal statute, it is the [challenger] who should receive the benefit of such doubt.” *Commonwealth v. McCoy*, 599 Pa. 599, 614 (2009)(citing 1 Pa.C.S. § 1928(b)(1); *Commonwealth v. McClintic*, 589 Pa. 465 (2006)). The *McCoy* Court continued on to declare that a statute that “fails

to give fair notice of what conduct the statute prohibits” cannot be enforced as the “Court has long held that a court may not achieve an acceptable construction of a penal statute by reading into the statute terms that broaden its scope.” *Id.* at 615.

As further declared by the Pennsylvania Supreme Court, in a case similar in nature to this case, 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. *Pennsylvania State Bd. of Pharmacy v. Cohen*, 448 Pa. 189, 200 (1972)(quotation and citations omitted). More importantly, “(n)o one may be required at peril of life, liberty or property to speculate as to the meaning of penal statutes. All are entitled to be informed as to what the State commands or forbids.” *Id.* (quotation and citations omitted). Perhaps more importantly, the *Cohen* Court explicitly held that an administrative agency’s “power [to determine what constitutes unprofessional conduct] on a case by case basis not based on statute or rule suffers from constitutional infirmities of vagueness.” *Id.* at 200-201.

In this matter, as additionally detailed in the following four reasons, there can be no dispute that the statutory text is vague and therefore fails under the vagueness doctrine and rule of lenity.

- i. *The Respondent's position is contrary to the statutory text and there exists no definition of "frame" or "receiver"*

First, as noted in the Attorney General's Opinion at 1, "[t]he definition of firearm contained in the Applicable Sections includes any weapon which is 'designed to or may readily be converted to expel any projectile by the action of an explosive; or the frame or receiver of any such weapon.'" The definition is purposefully silent as to *readily convertible frames or receivers*. In fact, by any person's reading of the statute, "designed to" and "may readily be converted" only apply to a "weapon", not the frame or receiver of any such weapon. To read the language as to include unconverted frames or receivers is to ignore the plain construction of the statute, which must be strictly construed, pursuant to 1 Pa.C.S. § 1928.

Further, and perhaps more importantly, the terms "frames" and "receivers" are not defined anywhere in the UFA nor the Pennsylvania Code. Thus, it would appear that the General Assembly has apparently relied on the federal definition of the same, found in 27 C.F.R. § 478.11.⁷ Which then begs an important question, what is a frame or receiver for the purpose of Pennsylvania law? If, *arguendo*, this

⁷ "Firearm frame or receiver. That part of a firearm which provides housing for the hammer, bolt or breechblock, and firing mechanism, and which is usually threaded at its forward portion to receive the barrel."

Court were to determine that the federal definition of frame or receiver was applicable, would it not logically follow that the legion of determinations made by the agency tasked with enforcing the law – *i.e.* ATF – also be applicable? ⁸

Alternatively, regardless of whether the federal definition of frame or receiver is or is not applicable, would not the PSP's Policy, at the very least, require, to the extent it has such power, that it promulgate a regulation as to what is a frame or receiver? Without clear guidance as to what defines a frame or receiver, an individual is left to guess as to whether the object they possess *may* fall under that definition.

Further eroding the Commonwealth's position, recent caselaw has emerged calling further into question the regulatory regime surrounding the definition of firearm frames and receivers, in relation to the AR-15 rifle. In *United States v. Jimenez*, 191 F. Supp. 3d 1038, 1040 (N.D. Cal. 2016), the Northern District of California Court held that a criminal statute prohibiting the unlawful possession of a machinegun receiver was unconstitutionally vague as applied to the defendant.

Mr. Jimenez was found in possession of alleged machinegun receivers in violation

⁸ Interestingly, although Respondent contends that this Court should not provide any weight or deference to the ATF's determinations as to what constitutes a firearm, even though the applicable text is verbatim under state and federal law (PSP Brief at 14, 18), the PSP's Policy, resulting from the Attorney General's Opinion, relies almost wholly on federal case law, interpreting the federal definition of a firearm. In fact, as acknowledged in the Opinion at 3, the seven-factor test came from *U.S. v. One TRW Model m14, 7.62 Caliber Rifles from William K. Alversion*, 441 F.3d 416 (2006).

of the National Firearms Act, 26 U.S.C. § 5801, *et seq.* (“NFA”). Because, like Pennsylvania’s UFA, the NFA does not expressly define firearm “frames” or “receivers”, the court applied the federal definition found at 27 C.F.R. § 478.11, which requires a receiver to contain, “the hammer, bolt or breechblock, and firing mechanism . . .” The *Jimenez* court held that the lower receiver of AR-15 style rifles does *not* satisfy this conjunctive list of requirements because it does not house the “bolt or breechblock,” and therefore falls outside the statutory definition. Accordingly, Mr. Jimenez could not be found to have been in possession of a firearm receiver for the purposes of prosecution under the NFA.

The *Jimenez* case only serves to reinforce Petitioners’ position that the relative state of firearm receiver regulation is a patchwork of opacity and impermissible vagueness. As discussed further *infra*, the PSP’s new policy sets forth a seven-factor test defining when a “frame” or “receiver” is “readily convertible” into a firearm; yet, neither frame nor receiver is defined within the UFA or elsewhere in the Pennsylvania Code. Where they *are* defined in the federal code, however, recent case law suggests that AR-15 receivers, even when fully operational and complete, do not meet the definition. It is simply inconceivable that a citizen of average intelligence could make stem nor stern of this legal regime.

ii. *Respondent admits that the statutory and regulatory text require “clarification”*

Second, Respondent admits that the statutory and regulatory text⁹ requires “clarification” (PSP Brief at 8, 27, 28; “clarifies” at 8, 9, 17, 18, 23, 33); thereby, clearly establishing the vagueness of the statutory and regulatory text.

iii. *Respondent could not determine “the stage of manufacture at which a receiver meets the definition of a firearm”*

Third, and perhaps in no better point of fact that the statutory and regulatory text is *so* vague that even the PSP did not know “the stage of manufacture at which a receiver meets the definition of ‘firearm’,” is the Attorney General’s Opinion, pg. 1, stating that the PSP submitted a request for “legal advice” on that exact issue. If the PSP – which has arguably been tasked with regulating the UFA¹⁰ – cannot determine “the stage at which a receiver meters the definition of a ‘firearm’,” how can any reasonable, lay-person determine such?

⁹ 37 Pa. Code § 31.102; 37 Pa. Code § 33.102.

¹⁰ *See*, Petitioners’ Brief in Support of Application for Special Relief, pg. 13 including fns. 23-24.

- iv. *The seven-factor test requires an individual to “guess” as to what constitutes a firearm*

Fourth, in setting forth the apparently applicable seven-factor test that forms the basis for the PSP’s Policy (PSP Brief at 4-5), it acknowledges that “[n]o single factor is dispositive.” AG Opinion at 5. Rather, it tasks the PSP with “weigh[ing] all the applicable factors together to determine whether a receiver ‘may readily be converted’ to expel any projectile by action of an explosive.” *Id.* Thus, assuming, *arguendo*, that the PSP has the power to enact a framework for further defining when a receiver meets the definition of “firearm”, to ensure that a reasonable, lay-person can determine whether an object is a firearm and to ensure equal application of the law, the factors must be explicit, leaving nothing to guess.

In relation to the factors provided, the first is “time.” *Id.* at 4. It does not specify how much or how little time is too much or too little. In fact, it acknowledges that courts have held that readily means “modification that was capable of being completed in two minutes”¹¹ to its meaning performed within 8 hours.¹² If the courts cannot agree on what “readily” means in relation to time, how is a reasonable, lay-person to be able to ascertain that conduct which is unlawful?

¹¹ *U.S. v. Woodlam*, 527 F.2d 608, 609 (6th Cir. 1976)

¹² *U.S. v. Smith*, 477 F.2d 399, 400 (8th Cir. 1973)

The second factor is “ease” but only provides that it “measures the level of difficulty converting a receiver.” How is the level of difficulty to be measured? Against whom is it measured? If the individual, what factors are to be considered (*i.e.* education, work, upbringing, *etc*)? Also, how is an individual or entity that merely sells objects, which are not firearms under federal law, to be judged? The third factor is “expertise” and provides that it “weighs the knowledge and skill required to convert the weapon.” But, once again, it is devoid of whose knowledge and skill. The individuals? If so, is it specific knowledge and skill or generic? What about an individual who only sells objects, which are not firearms under federal law? The fourth factor is “equipment” and suggests that the outcome varies depending on whether a “skilled machinist with proper equipment” or “an unskilled person with basic tools, limited knowledge, and approximately one hour to accomplish the task.” What are basic tools? Is a drill or dremel a basic tool? Again, what about an individual who only sells objects, which are not firearms under federal law? While the fifth factor of “availability” is somewhat clear, the sixth factor of “expense” provides no context as to what is deemed expensive and what is not. Is expense measured in relation to one’s income or is it compared to the cost of the object itself? In relation to the seventh factor, “feasibility,” it would seem to inure to every non-machinist’s favor, since those individuals would have a high likelihood of causing “damage...or cause it to malfunction.”

Perhaps more problematic than the vagueness of the factors for Respondent is that the specified framework, with its seven-factors, would seemingly result in the same object constituting a firearm and not constituting a firearm, depending on the person who possesses it.

* * * *

These types of issues, and the lack of specificity, is exactly why it is for the General Assembly – not an administrative agency – to enact a framework with specificity, if it so chooses, that ensures not only that a reasonable, lay-person can ascertain that conduct which is unlawful, but also ensure equal application of the law to everyone.

C. Other Factors for a Preliminary Injunction

As set forth in Petitioners’ Brief in Support of Application for Special Relief, pgs. 21-26, Petitioners are entitled to an injunction under all the pertinent factors. Nevertheless, Petitioners respond to Respondents’ contention (PSP Brief at 20-26) that Petitioners have not met the requisite factors, even though Petitioners have been unable to find any case law denying a preliminary injunction, where the party shows likely success on the merits.

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

In its response, Respondent posits that lawful citizens face no threat of prosecution, and therefore irreparable harm because of the availability of the plain language of statute and the PSP’s new and “clearly outlined” enforcement policy under the UFA. This argument fails on its face, as the very lack of clarity of the underlying statutory definitions *is* the reason PSP has elected to put forward the new enforcement policy. In fact, the newly enacted position *confuses* the definitions under the statute – disconnecting them from their equivalents under the federal regulation and the decades of associated case law– and in its place, instituting an opaque multi-factor analysis that must be executed on a “case-by-case basis” (PSP Brief at 12).

As it stands, Pennsylvanians are left in the position to guess – in violation of *Cohen* – under what circumstances a non-firearm object requires state-mandated background checks. To guess wrong is to submit one’s self to misdemeanor and felony prosecution, incarceration, forfeiture of property, and civil penalties.¹³ The Commonwealth appears to argue, that in the face of this lack of clarity, the easy answer is to just undergo a background check. This position is untenable, as it presumes that one knows under which circumstances one needs to submit

¹³ *See*, fn. 5, *supra*.

him/herself to a background check. If one purchases a metal bar, does he/she need to undergo a background check? What about a 2x4 piece of lumber or piece of pipe? Let there be no question that these have previously been utilized to build a firearm. See, <http://mindtomachine.blogspot.com/2014/08/12-gauge-pipe-shotgun.html>. Does this mean that every Lowes and Home Depot now require a state firearms license and to comply with the PSP's January 9, 2020 letter? What about all the contractors that have these items in inventory? Moreover, the Respondent seems to ignore the fact that an individual, in having a background check performed, is divested of the applicable firearm surcharge, per 18 Pa.C.S. § 6111.2. The vagueness doctrine, rule of lenity, and common sense dictate that the Commonwealth cannot permissibly chill the exercise of lawful conduct under threat of criminal and civil penalty. Perhaps more importantly, as declared by the Pennsylvania Supreme Court, "unlawful conduct constitutes irreparable injury." *Pennsylvania Pub. Util. Comm'n v. Israel*, 356 Pa. 400, 406 (1947).

ii. 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, fn.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, 26 and the PSP's interpretation, implementation, and enforcement of it, immediately thereafter, through the PSP's Policy and letter of January 9, 2020.

The PSP has been processing background checks for the transfer of properly defined firearms under the UFA since its passage. Granting of the injunction does nothing to prevent the PSP from continuing to do so.

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, forfeiture, civil penalties, and monumental loss of revenue, including for conduct that when they performed it, there was not dispute that it was lawful. *See, Cohen*, 448 Pa. at 200 (declaring “(n)o one may be required at peril of life, liberty or property to speculate as to the meaning of penal statutes. All are entitled to be informed as to what the State commands or forbids.”) Because, as discussed above, the status quo does nothing to prevent the

PSP from continuing to properly enforce the UFA, the greater injury will result from denying the injunction than from granting it.

iv. The Injunction Would not Adversely Affect the Public

The Commonwealth asserts that a “proliferation” of weapons converted from non-firearm objects recovered from the streets of Philadelphia indicate that the public interest would be harmed by the granting of the requested injunction. Without question, keeping illegal firearms out of the hands of those with criminal intent is in the public interest. However, the Pennsylvania Constitution sets forth proper procedures for adoption of new legislation in the pursuit of such goals. If the General Assembly sees fit, it is within their purview to enact new law adopting a new and clearly articulated definition of Firearm under the UFA. Until that point, it is not in the public interest of all Pennsylvanians for the Attorney General and PSP to attempt to deter crime – which is *already* proscribed by a legion of other criminal statutes – via executive fiat that threatens to criminalize the otherwise lawful conduct of thousands of citizens. Perhaps in no better point, as this Court, *en banc*, held in *Dillon*, “[t]he argument that a violation of law can be a benefit to the public is without merit.” 83 A.3d at 474.

v. The Injunction is Reasonably Suited to Abate the Offending Activity

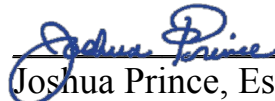
The requested injunction directly and exclusively abates the offending activity by enjoining the PSP from implementing and enforcing the PSP Policy.

II. CONCLUSION

For the foregoing reasons, Petitioners respectfully request that this Court issue an 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.

Respectfully Submitted,

Date: January 20, 2020



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CERTIFICATE OF SERVICE

I, Joshua Prince, Esq., hereby certify that on January 20, 2020, I caused to be served a true and correct copy of the foregoing document on the following:

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