

**IN THE UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF PENNSYLVANIA**

**KATHY DAVIS and HUNTERS)
UNITED FOR SUNDAY HUNTING)**

Plaintiffs,)

vs.)

**PENNSYLVANIA GAME)
COMMISSION,)**

Defendant,)

**TYPE OF PLEADING:
COMPLAINT FOR
DECLARATORY
JUDGMENT and
INJUNCTIVE RELIEF**

**COMPLAINT FOR DECLARATORY JUDGMENT
AND INJUNCTIVE RELIEF**

AND NOW, COMES, the Plaintiffs, Kathy Davis and Hunters United for Sunday Hunting, by and through its undersigned attorney, and files this Petition for Review in the Nature of a Complaint for Declaratory Judgment and Injunctive Relief pursuant to 42 U.S.C. Section 1923 seeking a judgment declaring certain sections of the game and wildlife code to be unconstitutional under the First, Second and Fourteenth Amendments to the United States Constitution; to issue a declaratory ruling that certain sections of the game and wildlife code do not apply to Petitioner; to declare the prohibition on hunting certain species on Sunday

pursuant to the Pennsylvania Game Commission unconstitutional under the First, Second and Fourteenth Amendments to the United States Constitution. Petitioner further asks the Court to permanently enjoin the enforcement of the subject statutes and to grant supplemental relief as permitted by law.

JURISDICTION

1. This suit is brought pursuant to 42 U.S.C. Section 1983:

Every person who, under color of any statute, ordinance, regulation, custom, or usage of any state or territory or the District of Columbia, subject, or causes to be subject, any citizen of the United States or other person in the jurisdiction therefore to the deprivation of any rights, privileges or immunities secured by the Constitution and laws shall be liable to the party injured in the action at law, suit and equity, or other proceedings for redress.

2. This Court has “Federal Question” jurisdiction pursuant to 28 U.S .C. § 1331 to hear cases arising under the Constitution of the United States, under 28 U.S.C. §1343(3) to redress the deprivation under color of state law of any right, privilege or immunity secured by the Constitution, and

under 28 U.S.C. § 1343(4) to secure equitable or other relief for the protection of civil rights.

3. The Court has the authority to issue declaratory judgments and permanent injunctions pursuant to 28 U.S.C. §2201 and 2202, and Fed.R.Civ.P 65.
4. This Court may enter an award of attorney's fees pursuant to 42 U.S.C. §1988.
5. This Complaint seeks declaratory and injunctive relief to prevent violations of the Plaintiffs rights, privileges and immunities under the Constitution of the United States and 42 U.S.C. §1983 and 1988, specifically seeking redress for the deprivation under color of state statute, ordinance, regulation, custom or usage of rights, privileges, and immunities secured by the Constitution and laws of the United States. The rights sought to be protected in this cause of action arise and are secured under the First and Fourteenth Amendments to the Constitution.
6. This Court has supplemental jurisdiction over Plaintiffs state law claims pursuant to 28 U.S.C. § 1366.
7. This Petition seeks declaratory and injunctive relief to prevent violations of the Plaintiffs rights, privileges and immunities under the Constitution of the United States and redress for the deprivation under color of state

statute, ordinance, regulation, custom or usage of rights, privileges, and immunities secured by the United States Constitution and laws of the United States. The rights sought to be protected in this cause of action arise and are secured under the First and Fourteenth Amendments to the United States Constitution.

8. As a commission of the State of Pennsylvania, organized and operating under the laws of the State of Pennsylvania, Pennsylvania Game Commission and their governing officials were, and are, acting under color of state law and authority in interpreting and enforcing the subject sections of the game and wildlife code.
9. The enforcement and threatened enforcement of the subject Ordinances against Plaintiffs is an action taken under color of state law and constitutes state action.

VENUE

10. Pennsylvania Game Commission is located in the Harrisburg Division of the Middle District of Pennsylvania and all acts complained of herein have occurred in that District and Division. Venue is proper in this Court under 28 U.S.C. §1391(b).

COLOR OF STATE LAW

11. As a commission of the State of Pennsylvania, organized and operating under the laws of the State of Pennsylvania, Pennsylvania Game Commission and their governing officials were, and are, acting under color of state law and authority in adopting and enforcing the subject statutes.
12. The enforcement and threatened enforcement of the subject Ordinances against Plaintiffs is an action taken under color of state law and constitutes state action within the meaning of 42 U.S.C. §1983.

PARTIES

13. Petitioner, Kathy Davis (“Davis”) is an adult individual citizen of the Commonwealth of Pennsylvania.
14. Petitioner, Hunters United for Sunday Hunting (“HUSH”) is a Pennsylvania non-profit company in good standing in the Commonwealth of Pennsylvania having a principal office located at P.O. Box 255, Lititz, Pennsylvania 17543.
15. Defendant Pennsylvania Game Commission, (hereinafter “Commission”) is a statutorily created state agency responsible for wildlife conservation and management in Pennsylvania having its

offices located at 2001 Elmerton Avenue, Harrisburg, Pennsylvania 17110.

BACKGROUND FACTS

16. Section 2303 (a) of Title 34 of the Pennsylvania Consolidated Statutes provides, “Except as otherwise provided in this title, it is unlawful for any person to hunt for any furbearer or game on Sunday.”
17. Davis and the members of HUSH wish to hunt furbearer, big game¹ and/or small game² on public and/or private lands within the Commonwealth of Pennsylvania during established seasonal periods as promulgated by the Pennsylvania Game Commission.
18. However, Davis and the members of HUSH are permitted to hunt deer, bear, elk, turkey, and small game on public and/or private lands within the Commonwealth of Pennsylvania during established seasonal periods as promulgated by the Pennsylvania Game Commission with the exception of Sunday.
19. Section 2303 (b.1) of Title 34 of the Pennsylvania Consolidated Statutes provides exceptions Section 2303 (a) of Title 34 of the Pennsylvania

¹ Big game consists of White-Tailed Deer, Black Bear, Elk and Wild Turkey.

² Small game consists of Woodcock, Rabbit, Pheasant, Northern Bobwhite, Quail, Ruffed Grouse, Groundhog, and Squirrel.

- Consolidated Statutes which permits the hunting of crow, foxes, coyotes, furbearer and feral hog.
20. Pursuant to Section 2303 (b.1) of Title 34 of the Pennsylvania Consolidated Statutes, Plaintiffs are permitted to hunt furbearer, big game and/or small game which occurs on noncommercial regulated hunting grounds.
 21. Among other requirements, Section 2928 of Title 34 of the Pennsylvania Consolidated Statutes requires a minimum of 100 acres of land to be eligible to be licensed as a “regulated hunting grounds.”
 22. The Pennsylvania Game Commission has enacted regulations which further differentiate the rights of hunters, specifically:
 - a. Feral swine or wild hogs may be taken on all days including Sunday;
and
 - b. Deer and elk may be taken by farmers on their private property on all days including Sunday if the deer create damage in accordance with 58 PA Code.
 23. At any time, the Commission has the right and power to enact its own regulations.
 24. Should the Plaintiffs disregard Section 2303 (a) of Title 34 of the Pennsylvania Consolidated Statutes they risk:

- a. prosecution of a summary offense of the fifth degree; and
 - b. adverse administrative action against their licenses.
25. For these reasons, the Petitioner is entitled to declaratory and permanent injunctive relief barring the Pennsylvania Game Commission from enforcing section 2304 of Title 34.
26. In light of the above, Petitioner needs temporary, preliminary, and permanent injunctive relief from Section 2303 of Title 34 of the Pennsylvania Consolidated Statutes.
27. Petitioner can establish a likelihood of success on the merits of each of the counts below, including showing that Section 2303 of Title 34 of the Pennsylvania Consolidated Statutes violates the U.S. Constitution.
28. If Plaintiffs are not granted temporary relief from Section 2303 of Title 34 of the Pennsylvania Consolidated Statutes the Ordinance, they will miss irreplaceable time during each seasonal hunting period.
29. Given that most people work Monday through Friday and children under 18 years of age are in school Monday through Friday, Sundays comprise fifty percent (50%) of the available time to hunt in Pennsylvania.
30. If a temporary injunction is not granted, prohibiting Sunday hunting of furbearer, big game and/or small game will result in irreparable harm because 1) a constitutional deprivation will occur; 2) money damages are

not available against the defendant Commission; and 3) Plaintiffs will suffer irreparable loss of the opportunity to hunt during the periods set forth above.

31. Defendant Commission will not suffer irreparable harm if temporary relief is granted because enjoining temporary enforcement of the Section 2303 of Title 34 of the Pennsylvania Consolidated Statutes will merely restore the parties to the prior status quo, under which both parties operated without irreparable harm for many years.
32. The public interest is served by enjoining temporary enforcement of a Constitutionally suspect ordinance and by permitting the lawful act of hunting.

COUNT I
RIGHT TO HUNT
SECOND AMENDMENT

33. Plaintiffs incorporate the above paragraphs 1 – 32 as if fully set forth herein.
34. The Second Amendment to the United States Constitution provides:

A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed.

35. Section 21 of the Pennsylvania Constitution provides:

The right of the citizens to bear arms in defense of themselves and the State shall not be questioned.

36. Supreme Court Justice Stevens in McDonald v. Chicago³ recognized that part of the rights contemplated by the Second Amendment included hunting and sport.⁴

37. The Supreme Court in District of Columbia v. Heller noted “[t]he prefatory clause does not suggest that preserving the militia was the only reason Americans valued the ancient right; most undoubtedly thought it even more important for self-defense and hunting.”⁵

38. Pursuant to the United States Constitution and the Pennsylvania Constitution, Pennsylvanians are permitted to bear arms, which right include, but are not limited to, hunting.

39. To limit selected Pennsylvanian’s right to hunt and bear arms on Sunday is arbitrary and without a secular purpose.

40. There is no substantial governmental interest advanced by the prohibition on hunting furbearer, big game and/or small game.

³ McDonald v. Chicago, 561 U.S. 3025, 130 S. Ct. 3020, 177 L. Ed. 2d 894 (2010).

⁴ “Guns may be useful for self-defense, as well as for hunting and sport...” McDonald at 3108.

⁵ District of Columbia v. Heller, 554 U.S. 570, 128 S. Ct. 2783, 171 L. Ed. 2d 637 (2007).

41. Therefore, Section 2303 of Title 34 of the Pennsylvania Consolidated Statutes violates the Second Amendment to the United States Constitution and plaintiffs are entitled to relief.

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs prays for relief as follows:

- a) For the entry of injunctive relief pursuant to Fed. R. Civ. P. 65 to temporarily, preliminarily, and permanently prohibit further enforcement of Section 2303 of Title 34 of the Pennsylvania Consolidated Statutes; and
- b) That the Court awards such other relief as it deems just and proper.

COUNT II
RIGHT TO HUNT
PENNSYLVANIA CONSTITUTION - ARTICLE I – SECTION 1

42. Plaintiffs incorporate the above paragraphs 1 – 41 as if fully set forth herein.

43. Article I, Section 1 of the Pennsylvania Constitution provides:

All men are born equally free and independent, and have certain inherent and indefeasible 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.

44. Article I, Section 21 of the Pennsylvania Constitution provides:

The right of the citizens to bear arms in defense of themselves and the State shall not be questioned.

45. Supreme Court Justice Stevens in McDonald v. Chicago⁶ recognized that part of the rights contemplated by right to bear arms under the Second Amendment included hunting and sport.⁷

46. The Supreme Court in District of Columbia v. Heller noted “[t]he prefatory clause does not suggest that preserving the militia was the only reason Americans valued the ancient right; most undoubtedly thought it even more important for self-defense and hunting.”⁸

47. Pursuant to the United States Constitution and the Pennsylvania Constitution, Pennsylvanians are permitted to bear arms, which right include, but are not limited to, hunting.

48. To limit selected Pennsylvanian’s right to hunt and bear arms on Sunday is arbitrary and without a secular purpose.

49. There is no substantial governmental interest advanced by the prohibition on hunting furbearer, big game and/or small game.

⁶ McDonald v. Chicago, 561 U.S. 3025, 130 S. Ct. 3020, 177 L. Ed. 2d 894 (2010).

⁷ “Guns may be useful for self-defense, as well as for hunting and sport...” McDonald at 3108.

⁸ District of Columbia v. Heller, 554 U.S. 570, 128 S. Ct. 2783, 171 L. Ed. 2d 637 (2007).

50. Therefore, Title 34 of the Pennsylvania Consolidated Statutes violates Article One, Section 1 and Article One, Section 21 of the Pennsylvania Constitution and Plaintiffs are entitled to relief.

PRAYER FOR RELIEF

WHEREFORE, pursuant to Pa. R. Civ. Pro. 1602 and the Declaratory Judgments Act, 42 Pa.C.S.A. § 7532, *et seq.*, Plaintiffs respectfully demand judgment in their favor and against the Defendant as follows:

- a) For the entry of injunctive relief to temporarily, preliminarily, and permanently prohibit further enforcement of Section 2303 of Title 34 of the Pennsylvania Consolidated Statutes; and
- b) That other relief the Court deems just and proper.

COUNT III
EQUAL PROTECTION
FOURTEENTH AMENDMENT

51. Plaintiffs incorporate the above paragraphs 1 – 50 as if fully set forth herein.

52. The Equal Protection Clause of the Fourteenth Amendment to the United States Constitution provides:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

53. Plaintiffs are treated differently by Title 34 of the Pennsylvania Consolidated Statutes than other Pennsylvania citizens who are similarly situated.
54. Title 34 of the Pennsylvania Consolidated Statutes and the Commission's regulations create different classes of hunters; one class who are not permitted to hunt furbearer, big game and/or small game on Sunday and other classes that permit furbearer, big game and/or small game to be taken on Sundays.
55. Pennsylvania's Legislature and the Commission have intentionally passed statutes and regulations, thereby creating the multiple classes of similarly situated but differently treated hunters.

56. There is no longer a rational basis for the difference in treatment between the various classes.
57. Therefore, Section 2303 of Title 34 of the Pennsylvania Consolidated Statutes violates the Fourteenth Amendment to the United States Constitution and plaintiffs are entitled to relief.

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs prays for relief as follows:

- c) For the entry of injunctive relief pursuant to Fed. R. Civ. P. 65 to temporarily, preliminarily, and permanently prohibit further enforcement of Section 2303 of Title 34 of the Pennsylvania Consolidated Statutes; and
- d) That the Court award such other relief as it deems just and proper.

COUNT IV
EQUAL PROTECTION – DISPARATE TREATMENT
PENNSYLVANIA CONSTITUTION - ARTICLE I – SECTION 1

58. Plaintiffs incorporate the above paragraphs 1 – 57 as if fully set forth herein.
59. Article I, Section 1 of the Pennsylvania Constitution has been generally considered to provide citizens of the Commonwealth equal protection

under the law. Fischer v. Department of Public Welfare, 509 Pa. 293, 502 A.2d 114 (1985).

60. Article I, Section 1 of the Pennsylvania Constitution provides:

All men are born equally free and independent, and have certain inherent and indefeasible 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.

61. Article I, Section 27 of the Pennsylvania Constitution provides:

The people have a right to clean air, pure water, and to the preservation of the natural, scenic, historic and esthetic values of the environment. Pennsylvania's public natural resources are the common property of all the people, including generations yet to come. As trustee of these resources, the Commonwealth shall conserve and maintain them for the benefit of all the people.

62. Plaintiffs are treated differently by Title 34 of the Pennsylvania than other Pennsylvania citizens who are similarly situated.

63. Title 34 of the Pennsylvania Consolidated Statutes and the Commission's regulations create different classes of hunters; one class who are not permitted to hunt furbearer, big game and/or small game on Sunday and other classes that permit furbearer, big game and/or small game to be taken on Sundays.

64. Pennsylvania's Legislature and the Commission have intentionally passed statutes and regulations, thereby creating the multiple classes of similarly situated but differently treated hunters.
65. There is no longer a rational basis for the difference in treatment between the various classes.
66. As a result of creating the multiple classes of similarly situated but differently treated hunters, the citizens of the Commonwealth no longer have equal access to the natural resources of the Commonwealth.
67. Therefore, Section 2303 of Title 34 of the Pennsylvania Consolidated Statutes violates the Article I, Section 1 and Article I, Section 27 of the Pennsylvania Constitution and Plaintiffs are entitled to relief.

PRAYER FOR RELIEF

WHEREFORE, pursuant to Pa. R. Civ. Pro. 1602 and the Declaratory Judgments Act, 42 Pa.C.S.A. § 7532, *et seq.*, Plaintiffs respectfully demand judgment in their favor and against the Defendant as follows:

- a) For the entry of injunctive relief to temporarily, preliminarily, and permanently prohibit further enforcement of Section 2303 of Title 34 of the Pennsylvania Consolidated Statutes; and
- b) That other relief the Court deems just and proper.

COUNT V
EQUAL PROTECTION – “BLUE LAWS”
PENNSYLVANIA CONSTITUTION - ARTICLE III – SECTION 32

68. Plaintiffs incorporate the above paragraphs 1 – 67 as if fully set forth herein.
69. Section 2303 of Title 34 of the Pennsylvania Consolidated Statutes restricts a hunter’s ability to hunt on Sunday.
70. Section 2303 of Title 34 of the Pennsylvania Consolidated Statutes restricts what can be hunted on Sunday.
71. Section 2303 of Title 34 of the Pennsylvania Consolidated Statutes restricts where a hunter’s may hunt on Sunday.
72. The Pennsylvania Supreme Court Kroger⁹ stated “when a law which prohibits business activity is riddled with exception after exception, a time comes when the general scheme is so diluted that it violates the equal protection of the laws.”
73. The restriction contained in the statute is without rational and substantial relation to the object of the legislation as it grants certain classes of hunters the ability to hunt while simultaneously denying another class of hunters.

⁹ Kroger v. O'Hara Township, 392 A.2d 266, 273 (Pa. 1978)

74. Any rational and substantial relation to the object of the legislation the statute had when created is no longer applicable.
75. House Resolution 535 was introduced to the Pennsylvania General Assembly on January 23, 2012 as a Noncontroversial Resolution under Rule 35.
76. House Resolution 535 declared 2012 as the “Year of the Bible” in Pennsylvania.
77. While the Court in *McGowan*¹⁰ found that Sunday closure laws were permissible when they were enacted for secular reasons, the Plaintiffs contend that the secular reasons for Title 34 of the Pennsylvania Consolidated Statutes and the Commission are no longer applicable.
78. It is Petitioner’s assertion that the Defendant prohibition on Sunday hunting no longer has a secular basis but instead a religious basis.
79. Therefore, Section 2303 of Title 34 of the Pennsylvania Consolidated Statutes violates the Article III, Section 32 of the Pennsylvania Constitution and the First Amendment to the United States Constitution and therefore Plaintiffs are entitled to relief.

¹⁰ *McGowan v. Maryland*, 366 U.S. 420 (1961)

PRAYER FOR RELIEF

WHEREFORE, pursuant to Pa. R. Civ. Pro. 1602 and the Declaratory Judgments Act, 42 Pa.C.S.A. § 7532, *et seq.*, Plaintiffs respectfully demand judgment in their favor and against the Defendant as follows:

- a) For the entry of injunctive relief to temporarily, preliminarily, and permanently prohibit further enforcement of Section 2303 of Title 34 of the Pennsylvania Consolidated Statutes; and
- b) That other relief the Court deems just and proper.

COUNT VI
RELIGIOUS FREEDOM PROTECTION ACT

- 80. Plaintiffs incorporate the above paragraphs 1 – 79 as if fully set forth herein.
- 81. The Religious Freedom Protection Act (“RFPA”) forbids state and local government agencies from substantially burdening a person’s free exercise of religion, including a burden which results from a statute of general applicability, unless the burden is justified by a compelling interest and is the least restrictive means of furthering the compelling interest. 71 P.S. § 2404.

82. The General Assembly specifically intended that the protections afforded by the RFPA extend to state statutes enacted before the enactment of the RFPA. 71 P.S. § 2402(2).
83. The RFPA defines “substantially burden” in part as “conduct or expression which violates a specific tenet of a person's religious faith.” 71 P.S. § 2403(4).
84. Section 2303 of Title 34 of the Pennsylvania Consolidated Statutes compels conduct that violates specific tenets of the religious beliefs of some H.U.S.H members.
85. Section 2303 of Title 34 of the Pennsylvania Consolidated Statutes, affected H.U.S.H members’ religious freedoms are burdened by the imposition of an arbitrary prohibition on Sunday hunting.
86. Therefore, by definition, Section 2303 of Title 34 of the Pennsylvania Consolidated Statutes imposes a substantial burden on the exercise of the religious freedoms of H.U.S.H. members.
87. The RFPA specifically authorizes Pennsylvania Game Commission to remedy the substantial burden on H.U.S.H. members’ free exercise of religion. 71 P.S. 2405(d).

88. Pennsylvania Game Commission has been provided the opportunity to remedy the substantial burden on H.U.S.H. members' free exercise of religion but have refused to remedy the substantial burden.
89. The RFPA provides that a person whose free exercise of religion has been substantially burdened or likely will be burdened in violation of section 2404 may assert that violation against an agency as a claim or defense in any judicial or administrative proceeding. 71 P.S. § 2405(a).
90. This Court has the jurisdiction to award declaratory and injunctive relief pursuant to 71 P.S. § 2405(f).

PRAYER FOR RELIEF

WHEREFORE, pursuant to Pa. R. Civ. Pro. 1602, the Declaratory Judgments Act, 42 Pa.C.S.A. § 7532, *et seq.*, and 71 P.S. § 2405(f) Plaintiffs respectfully demand judgment in their favor and against the Defendant as follows:

- c) For the entry of injunctive relief to temporarily, preliminarily, and permanently prohibit further enforcement of Section 2303 of Title 34 of the Pennsylvania Consolidated Statutes; and
- d) That other relief the Court deems just and proper.

THE LAW OFFICES OF PETER J. RUSSO, P.C.
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Date: 7/16/2013

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VERIFICATION

I, Bradley E Gehman, the Director, of Hunters United for Sunday Hunting, verify that the statements made in the foregoing document(s) are true and correct. I understand that false statements made herein are subject to the penalties of 18 Pa.C.S. § 4904 relating to unsworn falsification to authorities.

HUNTERS UNITED FOR SUNDAY HUNTING

Date: 5-7-13


