

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

Gene Stilp,	:	
	:	
Plaintiff,	:	
	:	
vs.	:	Civil Action No. _____
	:	
CITY OF HARRISBURG and	:	JURY TRIAL DEMANDED
Curt TOPPER, Secretary of the	:	
Pennsylvania Department of	:	
General Services, in his Official	:	
Capacity only,	:	
	:	
Defendants.	:	

Complaint

Plaintiff Gene Stilp by undersigned counsel Mette, Evans & Woodside files this complaint to challenge the City of Harrisburg’s absolute ban on burning in all public places in violation of his First Amendment right to burn political flags as a form of expressive conduct.

I. Parties

1. Plaintiff is Gene Stilp, an adult individual.
2. Defendant City of Harrisburg is a political subdivision of the Commonwealth of Pennsylvania that maintains a principal office at 10 North 2nd Street, Suite 202, Harrisburg, Dauphin County, Pennsylvania 17101.
3. Defendant Curt Topper (“Topper”) is the Secretary of the Pennsylvania Department of General Services (“DGS”), the highest executive

official of DGS, a department of the Commonwealth's government that maintains a principal office at 515 North Office Building, Harrisburg, Dauphin County, Pennsylvania 17125.

4. Defendant Topper is sued in his official capacity only.

II. Jurisdiction and Venue

5. Jurisdiction is founded upon 28 U.S.C. § 1331.

6. Venue is proper in this Court pursuant to 28 U.S.C. § 1391(b)(1), because the City of Harrisburg and the principal office of the Secretary are located in the Middle District of Pennsylvania.

III. Facts

7. The allegations of the foregoing paragraphs are incorporated by reference.

8. Stilp is a prominent political activist in Pennsylvania who frequently publicly protests political corruption and racial injustice.

9. Over the past several years, Stilp has publicly burned political flags in various locations throughout the United States as a means of protesting politicians and political ideologies he opposes.

10. As part of such protests, Stilp has often burned flags bearing images and slogans supporting the reelection of Donald J. Trump as President of the United States.

11. On November 26, 2019, after having made application to the Pennsylvania Department of General Services (“DGS”), Stilp obtained a permit (“Permit”) to hold a protest on the grounds immediately surrounding the Pennsylvania Capitol (“Capitol Grounds”) near a large fountain situated on the west side of Commonwealth Avenue (“Capitol Fountain Plaza”). A copy of the Permit is attached as Exhibit A.

12. Pennsylvania has by statute vested DGS with authority “to control and supervise” the grounds around the Capitol, which includes the Capitol Fountain Plaza.¹

13. The Capitol Police are subject under the authority of Topper.

14. The Permit acknowledged the event as a “Trump Impeachment Press Conference and Trump Campaign Flag Burning.” *Id.*

15. The protest was permitted for December 5, 2019.

16. Stilp intended at the protest to burn three flags: a Trump campaign flag sewn together with a Nazi flag, a Trump campaign flag sewn together with a flag of the former Soviet Union, and a Trump campaign flag bearing the words “No More Bullshit” (“Trump Protest Flags”).

¹ Act of April 9, 1929, P.L. 177, art. XXIV, § 2402, as amended; 71 P.S. § 632(a).

17. Stilp's intended purpose in burning the Trump Protest Flags was to publicly oppose policies of the Trump Administration and Trump reelection campaign which Stilp asserts are racist and not beneficial for children.

18. The Capitol Fountain Plaza is a public forum that is open to the public at all times of day and night without restriction and has been so open for at least several decades.

19. On December 5, 2019, Stilp appeared at the permitted location and prepared to burn one of the Trump Protest Flags in a steel trash can.

20. At such time, Sergeant Michael C. Schmidt ("Schmidt") of the Capitol Police, a law enforcement unit under the control of the Pennsylvania Department of General Services, appeared and ordered Stilp not to burn the flags despite the authorization Stilp had been given under the Permit.

21. Stilp proceeded to ignite one of the flags in the can anyway and after only approximately two square inches were burned, Schmidt used a fire extinguisher to put out the flame.

22. Schmidt cited Stilp for violating the portion of Harrisburg Ordinance Section 6-311 pertaining to burning ("Burn Ordinance").

23. The Burn Ordinance states in relevant part the following,

§ 6-311.19 Burning of materials.

The burning of, or permitting to be burned on public or private property or on the streets, alleys or sidewalks within the City, any

materials of any kind, rubbish, garbage, leaves, grass, or other waste materials of any kind is prohibited, except that rubbish, leaves, grass, and other waste materials may be burned in incinerators approved by the Health Officer in or on the premises of manufacturing and commercial buildings, hotels and apartment houses.

§ 6-311.20 Abatement of violations.

In addition to the penalties prescribed for violations of this Public Health Code generally, violations of the provisions of this chapter may be abated as a public nuisance in the manner prescribed by law.

§ 6-311.99 Penalty.

Any person who violates the provisions of this chapter shall be subject to Chapter 6-103, Enforcement and Penalty, of these Codified Ordinances.

A copy of the relevant sections of the Burn Ordinance are attached as Exhibit B.

24. Stilp pled not guilty to the charge.

25. At trial before Judge David O’Leary of Magisterial District Court 12-1-04, Schmidt testified that the Burn Ordinance was fully enforceable by the Capitol Police on Capitol Grounds, including the Capitol Fountain Plaza.

26. Schmidt further testified that the Department of General Services may not have had authority to issue the Permit to Stilp in the first place, although Schmidt equivocated on such point.

27. Schmidt also testified that ordinances of the City of Harrisburg were fully enforceable on Capitol Grounds and that the Burn Ordinance was properly

applied to Stilp for his act of burning one of the Trump Protest Flags on December 5, 2019.

28. The Burn Ordinance facially admits of no exception for burning flags in public protest.

29. Because of the actual and threatened enforcement of the Burn Ordinance against him, Stilp fears conducting further protests involving flag burning in public places within the City of Harrisburg.

30. In addition to issuance of a citation for summary offense against him, Stilp also reasonably fears the prosecution of a civil action against him for public nuisance as the Burn Ordinance authorizes. Ordinance § 6-311.20.

31. Stilp desires to hold one or more additional flag burning protests within the City of Harrisburg, including both on Capitol Grounds and in public areas not part of the Capitol Grounds.

FIRST CAUSE OF ACTION
Violation of Right to Free Speech (Facial Challenge)
U.S. Const. amend. I; 42 U.S.C. § 1983
(Against All Defendants)

32. The averments of the foregoing paragraphs are incorporated by reference.

33. The Burn Ordinance facially violates the First Amendment and is overly broad by prohibiting flag burning in all public places at all times under all circumstances within the geographic limits of the City of Harrisburg.

34. The Burn Ordinance facially inhibits Stilp's right to free speech by preventing him from publicly protesting through flag burning which has chilled the exercise of his free speech rights.

35. Stilp is in reasonable fear of prosecution for a summary offense and also civil prosecution for public nuisance under the Burn Ordinance if he would again attempt to burn flags publicly as expressive conduct.

WHEREFORE, Plaintiff Gene Stilp prays the Court to:

- a. DECLARE the Burn Ordinance FACIALLY UNCONSTITUTIONAL under the First Amendment;
- b. PERMANENTLY ENJOIN enforcement of the Burn Ordinance by the City of Harrisburg and Topper in his official capacity; and
- c. AWARD attorneys fees pursuant to 42 U.S.C. § 1988, costs of suit and such other relief as is just and equitable.

SECOND CAUSE OF ACTION
Violation of Right to Free Speech (As Applied Challenge)
U.S. Const. amend. I; 42 U.S.C. § 1983
(Against All Defendants)

36. The averments of the foregoing paragraphs are incorporated by reference.

37. Defendants have both applied and threatened to apply the Burn Ordinance in violation of Stilp's right to free speech under the First Amendment.

38. Defendants have both applied and threatened to apply the Burn Ordinance to Stilp in an arbitrary and capricious manner.

39. Stilp is in reasonable fear of prosecution under the Burn Ordinance if he would again attempt to burn flags publicly irrespective of whether a permit purporting to allow such activity would be issued inasmuch as he was issued a summary citation for burning a political flag on December 5, 2019 despite having been awarded the Permit.

40. The Burn Ordinance facially inhibits Stilp's right to free speech by preventing him from publicly protesting through flag burning which has chilled the exercise of his free speech rights.

41. Stilp is in reasonable fear of prosecution for a summary offense and also civil prosecution for public nuisance under the Burn Ordinance if he would again attempt to burn flags publicly as expressive conduct.

WHEREFORE, Plaintiff Gene Stilp prays the Court to:

- a. **DECLARE** the Burn Ordinance **UNCONSTITUTIONAL AS APPLIED** under the First Amendment;
- b. **PERMANENTLY ENJOIN** enforcement of the Burn Ordinance by the City of Harrisburg and Topper in his official capacity; and
- c. **AWARD** attorneys fees pursuant to 42 U.S.C. § 1988, costs of suit and such other relief as is just and equitable.

THIRD CAUSE OF ACTION
Violation of Right to Free Speech (Damages)
U.S. Const. amend. I; 42 U.S.C. § 1983
(Against Defendant City of Harrisburg)

42. The averments of the foregoing paragraphs are incorporated by reference.

43. Stilp's First Amendment right to free speech and expression were suppressed and violated by virtue of the Burn Ordinance, an official ordinance of the City of Harrisburg.

44. As a direct and proximate result of such suppression of Stilp's First Amendment right to free speech and expression, Stilp has suffered damages for which he must be compensated.

WHEREFORE, Plaintiff Gene Stilp prays the Court to ENTER JUDGMENT in his favor and against the City of Harrisburg for nominal and compensatory damages for the actual suppression of Stilp's First Amendment rights under the city's Burn Ordinance, attorneys fees pursuant to 42 U.S.C. § 1988, costs of suit and such other relief as is just and equitable.

Respectfully submitted,

METTE, EVANS & WOODSIDE

/s/ Aaron D. Martin

By: _____

Aaron D. Martin
Pa. Atty. I.D. 76441
3401 North Front Street
Harrisburg, PA 17110
(717) 232-5000 (phone)
(717) 236-1816 (fax)
admartin@mette.com

*Attorneys for Plaintiff,
Gene Stilp*

Dated: March 5, 2020.