

**IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA**

Joshuaa Brubaker,	:	
	:	
Plaintiff,	:	
	:	
	:	
v.	:	
	:	Civil Action No. _____
Allegheny Township and Leo Berg III,	:	
Allegheny Township Police Chief,	:	
	:	
Defendants.	:	

COMPLAINT

I. Introduction

1. In May 2014, Assistant Allegheny Township Police Chief Leo Berg III arrested Plaintiff Joshuaa Brubaker and charged him with violating Pennsylvania’s flag desecration statutes in retaliation for using his American flag to express his political views. Brubaker purchased the flag, spray painted the initials “A.I.M.” (American Indian Movement) on its face, and hung it upside down on his front porch to communicate his distress over a Pennsylvania Supreme Court decision and the United States government’s proposed Keystone Pipeline routing through a sacred Native American site, Wounded Knee, South Dakota. Brubaker, who is part Native American by birth, used his flag to prompt people to “think” about their freedoms and to teach his children “that when you believe in something strongly, you have to take a stance, no matter whether it’s popular or unpopular.” After receiving a citizen complaint, Assistant Allegheny Township Police

Chief Leo Berg III arrested Brubaker because he felt that the flag display was “very offensive,” “disgraceful,” and “unpatriotic.” On April 28, 2015, Blair County Court of Common Pleas Judge Daniel Milliron dismissed the charges, holding that the arrest and prosecution violated the First Amendment. Joshua Brubaker brings this civil rights action under 42 U.S.C. §1983 seeking damages from Allegheny Township and Police Chief Leo Berg to compensate him for violating his right to free expression and due process of law. Mr. Brubaker also seeks a judgment declaring 18 Pa. Cons. Stat. Ann. §§ 2102 and 2103 unconstitutional and enjoining further prosecutions under these unconstitutional statutes.

II. Jurisdiction and Venue

2. Jurisdiction of this matter is predicated on 28 U.S.C. §1331 and 1343, which confer original jurisdiction on U.S. district courts in actions arising under the Constitution and civil rights statutes of the United States. This Court has authority pursuant to 28 U.S.C. §2201 to provide declaratory relief.

III. Parties

3. Plaintiff, Joshua Brubaker, is a resident of Allegheny Township, Blair County, Pennsylvania.

4. Defendant Leo Berg III was the Assistant Chief and is now the Chief of the Allegheny Township Police, which has its offices at 3131 Colonial Drive, Duncansville, Blair County, Pennsylvania. At all times relevant to this case, Chief Berg acted under color of state law, and was and is a top level supervisor within the police department with final day-to-day decision making authority over policies and practices

regarding the enforcement of Pennsylvania's crimes code generally, and the two flag desecration statutes specifically. Chief Berg is sued in his individual capacity.

5. Defendant Allegheny Township is a municipal subdivision organized under the laws of Pennsylvania.

IV. Facts

6. In May of 2014, Joshua Brubaker purchased an American flag, spray painted the initials "A.I.M." (American Indian Movement) on its face, and hung it upside down on his front porch. See Exhibit 1 (photo of flag hanging on house).

7. Mr. Brubaker's home is located directly across the street from and facing the Allegheny Township Municipal Building, which houses the Township's police headquarters.

8. Mr. Brubaker hung the flag upside down to communicate his distress over two recent news items: a Pennsylvania Supreme Court decision that police need not get a warrant before searching a vehicle and the United States government's proposed Keystone Pipeline routing through Wounded Knee, South Dakota, which is an historically important Native American site.

9. Mr. Brubaker, who is part Native American by birth, wanted people to see his flag and to make them think about how our freedoms are taken away from us more and more every day. He also wanted to teach his children that when you believe in something strongly, you have to take a stance, no matter whether it is popular or unpopular.

10. On May 13, 2014, after receiving a citizen complaint, Allegheny Township Police Chief Leo Berg III decided to file flag desecration charges against Mr.

Brubaker because he found the flag display “very offensive” and “disgraceful”; the “A.I.M.” initials were not written in a “neat, orderly way”; and the flag “wasn’t ... displayed ... patriotically ... or in an honorable ... decent way.”

11. On May 13, 2014, Chief Berg was the assistant chief of police.

12. Chief Berg felt that Mr. Brubaker had not “earned [the] privilege” to “utilize a United States symbol for his personal use” because of his political views.

13. Chief Berg seized the flag from Mr. Brubaker’s front porch without a warrant or consent when Mr. Brubaker was not at home.

14. When Mr. Brubaker returned, he went to the police headquarters to report that his flag had been stolen.

15. Chief Berg ordered a subordinate officer to ask Mr. Brubaker to complete a stolen item report as a prosecutorial tactic to secure Mr. Brubaker’s admission that it was his flag.

16. Chief Berg stopped Mr. Brubaker as he was leaving the station to tell him that he was criminally charging him with flag desecration. Mr. Brubaker apologized to Chief Berg for upsetting him and explained that “A.I.M.” stood for the “American Indian Movement” and the upside-down flag was a long recognized symbol of distress.

17. Mr. Brubaker returned to the station later that day and explained to Chief Berg why he felt the country was in distress. Mr. Brubaker handed Chief Berg highlighted copies of two U.S. Supreme Court cases, *Texas v. Johnson*, 491 U.S. 397 (1989) and *United States v. Eichman*, 496 U. S. 310 (1990), to help Chief Berg understand why he felt that it was legal to use his flag to express his political views.

18. After the encounter, Chief Berg filed flag desecration charges under 18 Pa. Cons. Stat. Ann. § 2102, Desecration of Flag, and 18 Pa. Cons. Stat. Ann. § 2103, Insults to National or Commonwealth Flag.

19. 18 Pa. Cons. Stat. Ann. § 2103, Insults to National or Commonwealth flag, states: “A person is guilty of a misdemeanor of the second degree if he maliciously takes down, defiles, injures, removes or in any manner damages, insults, or destroys any American flag ... which is displayed anywhere.” A second degree misdemeanor is punishable by up to two years imprisonment and a \$5,000 fine.

20. 18 Pa. Cons. Stat. Ann. § 2102, Desecration of Flag, states in part: “(a) A person is guilty of a misdemeanor of the third degree if, in any manner, he: (4) publicly or privately mutilates, defaces, defiles, or tramples upon, or casts contempt in any manner upon any flag” with an exception at (b) for “any patriotic or political demonstration or decorations.” A third degree misdemeanor is punishable by up to one year imprisonment and a \$2,000 fine.

21. On June 3, 2014, District Magistrate Jackson found probable cause to proceed with the charges after a preliminary hearing, thereby sending the case to the Court of Common Pleas for Blair County.

22. Blair County District Attorney Richard Consiglio represented the Commonwealth at the preliminary hearing.

23. By order of court dated April 28, 2015, Blair County Court of Common Pleas Judge Daniel Milliron quashed the criminal information and dismissed the charges after finding that Mr. Brubaker’s speech was protected by the First Amendment.

24. As a direct and proximate result of the defendants' actions, Mr. Brubaker suffered injuries and damages, which include unlawful deprivation of his right to freedom of speech and expression.

25. Mr. Brubaker has not displayed his American flag with "A.I.M." painted on it since Chief Berg confiscated the flag and prosecuted him criminally.

26. Mr. Brubaker would like to use the American flag to express his beliefs in the future, including displaying it in an upside-down manner.

27. Mr. Brubaker reasonably fears that if he continues to fly his flag upside down, or wants to communicate a message by writing or drawing on the flag, he will be subject to summons and his expressive conduct will be stifled because of the provisions of 18 Pa. Cons. Stat. Ann. §§ 2102 and 2103.

28. Upon information and belief, Chief Berg, in his position as assistant chief of police, had final day-to-day decision-making authority over policies and practices regarding the enforcement of Pennsylvania's crimes code generally, and the two flag desecration statutes specifically.

29. Mr. Brubaker has received no assurances from Allegheny Township or Chief Berg that flag desecration charges will not be filed against him in the future if he displays his American flag for an expressive purpose in a manner they find objectionable.

30. Nor has Blair County District Attorney Consiglio provided any assurance that he would refuse to prosecute Mr. Brubaker if flag desecration charges were brought against him again.

**Count One – Right to Be Free from Retaliation
under First Amendment to the U.S. Constitution**

31. Mr. Brubaker flew his flag upside down with A.I.M. written on it to communicate his political views, which is core First Amendment-protected expression.

32. Chief Berg was offended by Mr. Brubaker’s political beliefs and the manner in which Mr. Brubaker expressed himself.

33. Chief Berg charged Mr. Brubaker with flag desecration and insulting the flag in retaliation for Mr. Brubaker’s exercise of his constitutionally protected right to free expression in violation of the First Amendment to the U.S. Constitution.

34. Defendant Allegheny Township is responsible for the violation of Mr. Brubaker’s rights under the First Amendment to the U.S. Constitution because Chief Berg is and was a policymaking official for Allegheny Township.

**Count Two – Right to be Free from Unreasonable Seizure of Property under Fourth
Amendment to the U.S. Constitution**

35. Chief Berg’s warrantless seizure of Mr. Brubaker’s American flag from his home violated Mr. Brubaker’s rights under the Fourth Amendment to the U.S. Constitution.

36. Defendant Allegheny Township is responsible for the violation of Mr. Brubaker’s rights under the Fourth Amendment to the U.S. Constitution because Chief Berg is and was a policymaking official for Allegheny Township.

**Count Three – Pennsylvania’s Flag Desecration Statute, 18 Pa. Cons. Stat. Ann. §
2102, Is Impermissibly Vague in Violation of the Due Process Clause of the
Fourteenth Amendment to the U.S. Constitution and the First Amendment to the
U.S. Constitution**

37. Pennsylvania’s flag desecration statute, 18 Pa. Cons. Stat. Ann. § 2102, violates due process by failing to provide meaningful notice to the public of what is

prohibited conduct and by permitting law enforcement unfettered discretion in applying their subjective opinions and judgments as criteria for enforcement. Accordingly, 18 Pa. Cons. Stat. Ann. § 2103 is unconstitutionally void for vagueness.

38. The statute thus deprives Mr. Brubaker of rights secured by the Due Process Clause of the Fourteenth Amendment and by the First Amendment to the U.S. Constitution.

39. This constitutional violation is causing Mr. Brubaker irreparable harm for which there is no adequate remedy at law.

Count Four – Pennsylvania’s Flag Insult Statute, 18 Pa. Cons. Stat. Ann. § 2103, Violates the First Amendment to the U.S. Constitution on Its Face

40. Pennsylvania’s flag insult statute, 18 Pa. Cons. Stat. Ann. § 2103, is overly and impermissibly broad because it directly proscribes speech that is protected under the U.S. Constitution.

41. The statute thus deprives Mr. Brubaker of rights secured by the First Amendment to the U.S. Constitution.

42. This constitutional violation is causing Mr. Brubaker irreparable harm for which there is no adequate remedy at law.

Count Five – Pennsylvania’s Flag Insult Statute, 18 Pa. Cons. Stat. Ann. § 2103, Is Impermissibly Vague in Violation of the Due Process Clause of the Fourteenth Amendment to the U.S. Constitution and the First Amendment to the U.S. Constitution

43. Pennsylvania’s flag insult law, 18 Pa. Cons. Stat. Ann. § 2103, is impermissibly vague because its essential terms are undefined and undefinable and as a result, the statute fails to establish adequate standards for those who apply it.

44. The statute thus deprives Mr. Brubaker of rights secured by the Due Process Clause of the Fourteenth Amendment and by the First Amendment to the U.S. Constitution.

45. This constitutional violation is causing Mr. Brubaker irreparable harm for which there is no adequate remedy at law.

WHEREFORE Plaintiff respectfully requests that this Court:

A. Enter a declaratory judgment that Pennsylvania's flag insult statute, 18 Pa. Cons. Stat. Ann. § 2103, is unconstitutional on its face in violation of the First Amendment to the U.S. Constitution;

B. Enter a declaratory judgment that Pennsylvania's flag insult statute, 18 Pa. Cons. Stat. Ann. § 2103, violates the Due Process Clause of the Fourteenth Amendment to the U.S. Constitution and violates the First Amendment to the U.S. Constitution, as applied to the states by the Fourteenth Amendment to the U.S. Constitution, because it is impermissibly vague;

C. Enter a declaratory judgment that Pennsylvania's flag desecration statute, 18 Pa. Cons. Stat. Ann. § 2102 violates the Due Process Clause of the Fourteenth Amendment to the U.S. Constitution and violates the First Amendment to the U.S. Constitution, as applied to the states by the Fourteenth Amendment to the U.S. Constitution, because it is impermissibly vague;

D. Enter injunctive relief permanently enjoining Defendants from enforcing 18 Pa. Cons. Stat. Ann. § 2102 and 18 Pa. Cons. Stat. Ann. § 2013.

E. Award compensatory damages against all Defendants;

F. Award punitive damages against Chief Berg for his intentional, and/or reckless, disregard of Plaintiff's constitutional rights, as described hereinabove;

G. Award costs of suit, including reasonable attorneys' fees pursuant to 42 U.S.C. § 1988; and

H. Allow to Plaintiff such other relief as is just.

Respectfully submitted,

/s/ Witold J. Walczak
Witold J. Walczak, Esq.
PA ID No. 62976

/s/ Sara J. Rose
Sara J. Rose, Esq.
PA ID No. 204936

American Civil Liberties Union
of Pennsylvania
247 Fort Pitt Boulevard
Pittsburgh, PA 15222
412-681-7864 (t)
412-681-8707 (f)
vwalczak@aclupa.org
srose@aclupa.org

/s/ Andrew J. Shubin
Andrew J. Shubin, Esq.
PA ID No. 63263
333 South Allen Street
State College, PA, 16801
814-867-3115 (t)
814-867-8811 (f)
shubin@statecollegelaw.com

Attorneys for Plaintiff