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CONFIDENTIAL

January 3, 2019

The Honorable Kevin B. Hornberger
410 House Office Building
Annapolis, Maryland 21401-1991

Dear Delegate Hornberger:

You have asked for advice concerning State laws limiting hunting on Sunday. Specifically, you have asked whether these laws violate the Free Exercise Clause of the First Amendment to the United States Constitution or the Due Process or Equal Protection provisions of Clause 1 of the Fourteenth Amendment. It is my view that they do not.

The first Maryland law against Sunday hunting that I can find was adopted as Chapter 1 of 1678, which provided, in part:

> That no person or persons from & after the time aforesaid shall profane or abuse the said Lords day as aforesaid by drunkenness, swearing, gaming at cards, dice, billiards, shuffle boards, bowls, ninepins, horserace, fowling, or hunting or any other unlawful sports or recreations

Proceedings and Acts of the General Assembly, October 1678 - November 1683. (Archives Volume 7, page 51) (spelling and grammar modernized). The modern version of this law at the time of *McGowan v. Maryland*, 366 U.S. 420 (1961) was initially enacted by Chapter 16, § 10 of 1723 and was not amended at any time between its adoption and the decision in that case. It read:

> No person whatsoever shall work or do any bodily labor on the Lord's day, commonly called Sunday; and no person having children or servants shall command, or wittingly or willingly suffer any of them to do any manner of work or labor on the Lord's day (works of necessity and charity always excepted), nor shall suffer or permit any children or servants to profane the Lord's day by gaming, fishing, fowling, hunting or unlawful pastime or recreation; and every person transgressing this section and being hereof convicted before a justice of the peace shall forfeit five dollars, to be applied to the use of the county.

Article 27, § 492, Maryland Code Annotated (1971 Replacement Volume).

The specific provision upheld in the *McGowan* case was Article 27, § 521, which at that time prohibited the sale of articles of merchandise on Sunday with exceptions for certain items sold at retail. While only § 521 was challenged, the Court found that "in order properly to consider several of the broad constitutional contentions" it was necessary to "examine the whole body of Maryland Sunday laws." *McGowan*, 366 U.S. at 423. The equal protection challenge to the statute was based on the exceptions to the statute and the alleged irrationality between what was permitted and what was not. The Court applied the rational basis test, which provides that "statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it." *Id.* at 426. Furthermore, the test places the burden of showing the lack of any rational basis on the party challenging the statute. *Id.* at 426-427. The Court also rejected the argument that the variations in the laws applicable to different counties violated the requirement of equal protection, saying that "the Equal Protection Clause relates to equality between persons as such, rather than between areas and that territorial uniformity is not a constitutional prerequisite." *Id.* at 427.

While the hunting laws apply to a leisure activity rather than a commercial activity, hunting is not a fundamental right, and thus the rational basis test would apply to a challenge of the Sunday hunting laws as well. *Hartly Hill Hunt Club v. County Commission of Ritchie County*, 647 S.E.2d 818, 828 (W. Va. 2007); *Lee v. South Carolina Department of Natural Resources*, 530 S.E.2d 112, 113 (S.C. 2000). Both *Hartley Hill* and *Lee* involved challenges to Sunday hunting laws, and both cases held that the laws did not violate the Equal Protection Clause. In *Lee* the court found that the law helped with the enforcement of wildlife management laws and gave "other recreational users-hikers, bird watchers, photographers, and other non-hunters-a chance to enjoy the outdoors without hearing the large-caliber gunshots of a big game hunter or being accidentally shot by a big game hunter" and thus had a rational basis. *Id.* at 114-115. In *Hartley Hill* the court held that the law was rationally related to the legitimate state purpose of the management of the wildlife resources of the State, including preserving the "economic contributions" of wildlife for the "best interests of the people of this State." *Id.* at 828. Each court also found no violation based on the differences in the law applicable to different counties. *Hartley Hill*, 647 S.E.2d at 828; *Lee*, 530 S.E.2d at 114.

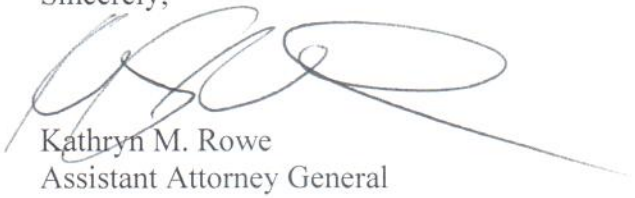
It is also my view that Maryland's Sunday hunting laws would withstand challenge under the Equal Protection Clause for the reasons discussed in *Hartley Hill* and *Lee*. In addition, because hunting is not a fundamental right, a Due Process Clause analysis would have the same result.

Neither *Hartley Hill* nor *Lee* dealt with a Free Exercise Clause claim. Such a claim was raised in *Frank v Alaska*, 604 P.2d 1068 (Alaska 1979), a case involving a fine imposed on a member of the Athabascan tribe for hunting moose out of season. In that case, the court found that the moose hunt in question was undertaken to provide moose meat for a religious ceremony and that the consumption of moose meat at that ceremony was a practice deeply rooted in the Athabascan religion, *id.* at 1073. The court interpreted the case of *Sherbert v. Verner*, 374 U.S. 398 (1963), to mean that the Free Exercise Clause required the government to accommodate such religious practices by creating exemptions from general laws. *Id.* at 1070. The court did not hold, however, that this rendered the statute invalid, but only that the statute could not be applied to this practice by members of the Athabascan tribe.

Thus, even if the *Frank* case were good law, it would not require a holding that the statutes barring hunting on Sunday are invalid, but only that they could not apply to those with a sincere religious belief requiring them to engage in hunting at certain times, some of which fell on Sundays. *Frank*, however, is not good law. In *Employment Division v. Smith*, 494 U.S. 872 (1990) the Supreme Court held that the case of *Sherbert v. Verner*, 374 U.S. 398 (1963), which was relied on in the *Frank* case, did not apply outside the context of the denial of unemployment compensation. *Smith*, 494 U.S. at 883. Instead, the Court held that the Free Exercise Clause "does not relieve an individual of the obligation to comply with a valid and neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes)." *Id.* at 879. Thus, in the absence of a showing that the statute in question "represents an attempt to regulate religious beliefs, the communication of religious beliefs, or the raising of one's children in those beliefs" a generally applicable law will apply. *Id.* at 882.

While you have noted that some Hindu and Sikh teachings speak highly of hunting, none seem to require it. In any event, it is clear that the Maryland Sunday hunting laws that have been in place for over 300 years apply generally to everyone in the areas where they are applicable, and are in no way aimed at practices of Hindus and Sikhs in the State. Therefore it is my view that the Sunday hunting laws do not violate the Free Exercise Clause of the First Amendment.

Sincerely,



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