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July 5, 2017

Doug Young, President
Glen Rock Borough Council
1 Manchester Street
P.O. Box 116
Glen Rock, PA 17327

BY FAX TO (717) 235-0798

BY EMAIL TO glenrockborough@comcast.net

RE: Lt. Commander Joshua Corney's nightly playing of "Taps"

Dear Mr. Young:

The American Civil Liberties Union of Pennsylvania ("ACLU-PA") represents U.S. Navy Lt. Commander Joshua Corney. For reasons set forth below, we believe that Glen Rock Borough's recent order restricting our client's amplified broadcast of "Taps" from his home is unconstitutional. Treating Lt. Commander Corney's daily "Taps" broadcasts differently from other loud music permitted in the Borough—like church bells, hymns or amplified outdoor music at a local restaurant—or indeed differently from ordinary noises associated with the appropriate and customary uses of a home that are louder and longer lasting, violates the First Amendment. Unless the Borough notifies us in writing by the close of business on Friday, July 7, that the June 23 cease-and-desist edict to our client has been withdrawn, the ACLU-PA will petition a federal court next week for an injunction to allow Lt. Commander Corney to resume broadcasting "Taps," in the same manner he has done for the past two years, from his home every evening. Our reasoning follows.

Since 2015, Lt. Commander Corney has played a recording of "Taps" every evening just before 8:00 p.m. from speakers mounted on a pole on the 5-acre property. The recording lasts less than a minute. "Taps" is an official bugle call of the U.S. military. Our client is an active-duty naval officer who has served his country in several overseas combat deployments. He engages in this ritual to honor the servicemen and servicewomen who have died fighting for the United States, as a daily reminder of their sacrifice and the sacrifice of all veterans. He hopes that service members who hear him playing "Taps" will know they are valued and supported.

As you know, the Borough has ordered Lt. Commander Corney not to play the amplified broadcast of the "Taps" recording except on Sundays or "flag" holidays, on penalty of a $300 criminal fine, per violation. In a cease-and-desist letter dated June 23, the Borough proscribed Lt. Commander Corney's nightly ritual as an alleged violation of the Borough's nuisance ordinance, citing the following two provisions:

> (h) Any noise or other disturbance that occurs continuously or intermittently for an extended period, which annoys or disturbs a person of normal sensitivities, including, without limitation,
>
> > (1) the loud playing of radios, televisions, amplifiers and other sound devices so as to be heard beyond the boundaries of the Property from which the same shall emanate.
>
> (i) Any other activity, conduct, use or condition of a Property that shall cause annoyance or discomfort beyond the boundaries of such Property, which disturbs a reasonable Person of normal sensitivities.

Glen Rock Borough Ordinance No. 450 Sections 3(A)(1)(h)(1) and 3(A)(1)(i) (dated May 21, 2008).

It is our understanding that the Borough has not deemed other, similarly loud or louder amplifications of music—including broadcasts that last even longer than "Taps"—to be nuisances. A nearby church is permitted to play amplified recordings of hymns twice a day, church bells are allowed to peal at regular intervals, and a local restaurant has been granted permission to amplify its live outdoor music performances. In addition, Borough residents regularly produce sounds louder than Lt. Commander Corney's "Taps," emitted from such common household appliances as lawnmowers, hedge trimmers, leaf blowers, and chainsaws, or by the exuberant cries of children playing a raucous game.

"Music, as a form of expression and communication, is protected under the First Amendment."[1] "Taps" is an iconic musical piece that has been a standard component of U.S. military funerals since 1891. It has profound meaning to Lt. Commander Corney, who suffered the death of military colleagues during his service, to all veterans and indeed to most Americans.

Although the government may regulate the volume of musical performances, such regulations must be content-neutral—that is, they must apply even-handedly to all kinds of music.[2]

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[1] *Ward v. Rock Against Racism*, 491 U.S. 781, 790 (1989).

[2] *See generally Ward*, 491 U.S. at 790–93.

As the Supreme Court has observed, any governmental regulation of musical performances that serves "purely esthetic goals" or imposes subjective, value-laden standards about what types of music may be played "would raise serious First Amendment concerns[.]"[3] When the Borough singles out Lt. Commander Corney's "Taps" performances on private property for censorship as a "nuisance" while allowing other similarly loud or louder, longer-lasting religious or commercial musical performances on private property to continue, it is engaging in content-based discrimination.

Content-based discrimination is *presumptively unconstitutional* unless the government can demonstrate that the restriction on speech is narrowly tailored to further a compelling government interest.[4] We see no way in which the Borough could sustain its high burden of proof under this standard with respect to its prohibition on Lt. Commander Corney's performances, while simultaneously allowing the other musical expression referenced above.

It also does not matter that the Borough may have received complaints about the "Taps" broadcasts. The government may not censor protected expression merely because others find it inconvenient, annoying, uncomfortable, or a nuisance.[5] Prohibiting expression because of how others might react to the speech is known as a "heckler's veto," which is anathema to the First Amendment.[6] "[T]he Supreme Court and the courts of appeals have consistently held unconstitutional regulations based on the reaction of the speaker's audience to the content of expressive activity."[7]

Finally, *arguendo,* even if the Borough's regulation of our client's free expression were deemed a content-neutral time, place and manner regulation, it is unlikely a reviewing court would find the censorship to be "narrowly tailored." "Valid regulations of the time, place, or manner of speech must also be narrowly tailored to serve a significant government interest and must leave open ample alternative channels of communication."[8]

Regularly used household appliances like lawn mowers, hedge trimmers and chainsaws emit sounds louder, and in some instances significantly louder, than the decibel level of Lt. Commander Corney's "Taps" recording. Those loud and often "annoying" sounds emanate from residential properties regularly. Homeowners mow lawns and clip hedges at least weekly; both appliances are much louder than the level of "Taps" at the property's edge. Older cars with noisy carburetors, motorcycles, and trucks regularly drive on residential roads, also making noises louder than the "Taps" broadcast. Indeed, sounds louder than the decibel level of the "Taps" recording are a routine part of residential neighborhoods, including those in Glen Rock Borough.

Even if the Borough's regulation were considered content-neutral, i.e., if it had not singled out the "Taps" broadcast for unusual treatment, the Borough still would have to show that the sound

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[3] *Ward,* 491 U.S. at 793.

[4] *See, e.g., Reed v. Town of Gilbert, Az.,* 135 S. Ct. 2218, 2226 (2015) (citations omitted).

[5] *Texas v. Johnson,* 491 U.S. 397, 414 (1989) ("If there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable.") (citation omitted).

[6] *See Startzell v. City of Philadelphia,* 533 F.3d 183, 200 (3d Cir. 2008) (citing *Brown v. Louisiana,* 383 U.S. 131, 133 n.1 (1966); *Forsyth County v. Nationalist Movement,* 505 U.S. 123, 134–35 (1992)).

[7] *United States v. Marcavage,* 609 F.3d 264, 282 (3d Cir. 2010).

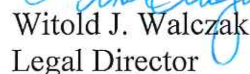
[8] *McCullen v. Coakley,* 134 S. Ct. 2518, 2529 (2014).

of the "Taps" recording was "something above and beyond the ordinary noises associated with the appropriate and customary uses of [the residential area]."[9] In *Doe*, a federal appeals court ruled that the National Park Service could not punish a protester for using a drum that exceeded the decibel limit for the park when many ordinary noises in the park and vicinity were even louder, and the Service took no action. Other courts also have enjoined enforcement of content-neutral noise ordinances that unreasonably restrict political expression, citing the prevalence of other similarly loud and even louder sounds in the vicinity as evidence that the law was not narrowly tailored.[10] Given the Borough's willingness to allow other daily musical sounds, and to tolerate other routine noises, that are as loud or louder than the "Taps" recording, we do not believe a reviewing court would consider the prohibition of Lt Commander Corney's observance to be "narrowly tailored."

Because there is no conceivable legal rationale sufficient to allow the Borough to constitutionally restrict Lt. Commander Corney's amplified "Taps" performances to once a week and "flag" holidays, on pain of criminal punishment, while regularly allowing other similar amplified musical sounds and other loud noises, we must respectfully request that you rescind forthwith the order directing our client to cease his daily "Taps" ritual. Your failure to do so will subject the Borough to time-consuming and potentially expensive litigation. If we are forced to take legal action, it will be to declare that the "nuisance" ordinance is unconstitutional as applied to the instant facts (and maybe even facially unconstitutional as overbroad and unduly vague), to enjoin its enforcement against our client, and to recover our attorneys' fees and costs under 42 U.S.C. § 1988. Our preference would be to discuss this with you and to resolve the matter without costly and time-consuming litigation.

Because this matter involves a restriction on free expression, which courts consider to be irreparable harm, we must ask that you respond quickly. Please confirm, in writing, by 5 p.m. on Friday, July 7, 2017, that the Borough will lift the order against Lt. Commander Corney limiting him to playing "Taps" on Sundays and "flag" holidays. If we do not hear from you by the appointed time, we will construe your silence as a refusal of this request and will proceed with appropriate and necessary legal action to vindicate our client's First Amendment rights. We look forward to your anticipated cooperation.

Respectfully,



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CC (by email): Michelle Pokrifka, Solicitor (mpokrifka@cgalaw.com)

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[9] *United States v. Doe*, 968 F.2d 86, 90 (D.C. Cir. 1992).

[10] *See, e.g., Deegan v. City of Ithaca*, 444 F.3d 135, 142-44 (2d Cir. 2006); *Casey v. City of Newport, R.I.*, 308 F.3d 106 (1st Cir. 2002); *Reeves v. McConn*, 631 F.2d 377, 388 (5th Cir. 1980); *United States Labor Party v. Pomerleau*, 557 F.2d 410, 413 (4th Cir. 1977); *Hassay v. Mayor*, 955 F. Supp. 2d 505 (D. Md. 2013); and *Lilly v. City of Salida*, 192 F. Supp. 2d 1191, 1194 (D. Col. 2002).