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December 7, 2009

Elizabeth A. Goreham, President  
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720 South Atherton St.  
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VIA FACSIMILE TO (814) 231-3082 and (814) 234-1549

Re: Revised "Nuisance Gathering Ordinance"

Dear Ms. Goreham and Mr. Williams:

The American Civil Liberties Union of Pennsylvania (ACLU-PA) appreciates the State College Borough Council's efforts to revise its draft "Nuisance Gathering Ordinance" to comport with the U.S. Constitution. Nevertheless, it is our view that the revised proposal, if passed, would still be unconstitutional in several respects.

I. Fourteenth Amendment Due Process

The revised Ordinance persists in assigning criminal culpability to individuals who neither intend to engage in criminal conduct nor bear any "responsible relation" to those who do. *See U.S. v. Park*, 431 U.S. 658, 673-76 (1975) (upholding fine imposed on national retail food corporation president for violating law by maintaining rodent-infested warehouses because president had a "responsible relation" with the actors); *Lady J. Lingerie, Inc. v. City of Jacksonville*, 176 F.3d 1358 (11<sup>th</sup> Cir. 1999) (absent element of intent, portion of statute punishing by imprisonment adult establishment owners for illegal

acts of employees violative of due process). The Fourteenth Amendment's Due Process Clause requires that people bear some personal responsibility for the illegal conduct before they can be convicted. The U.S. Supreme Court has ruled that a statute violates due process when it "impermissibly imputes guilt to an individual merely on the basis of his associations and sympathies, rather than because of some concrete, personal involvement in criminal conduct." *Scales v. U.S.*, 367 U.S. 203, 220 (1961) (finding unconstitutional a statute criminalizing membership in an organization advocating the violent overthrow of the United States because membership in an organization engaged in illegal advocacy is insufficient to satisfy requirement of personal guilt). Mere association with individuals who commit crimes, absent specific intent to further their unlawful goals, cannot be criminalized without running afoul of the Due Process Clause and First Amendment. *Id. Accord Elfbrandt v. Russell*, 384 U.S. 11, 17 (1966) (striking statute punishing mere membership in communist party); *U.S. v. Taleb-Jedi*, 566 F.Supp.2d 157 (E.D.N.Y. 2008) (upholding statute prohibiting material support of terrorist organizations because statute requires a showing of personal criminal conduct—furtherance of the organization's unlawful goals by providing tangible support). By criminalizing anyone who "sponsors, conducts, hosts, invites, or overtly permits" (Ordinance § 1006(a)) a gathering that "results in" enumerated criminal offenses (Ordinance § 1004), the revised Ordinance punishes association absent specific intent to aid in unlawful conduct and, if applied, would violate the Due Process Clause.

Furthermore, by criminalizing hosts of gatherings which "result in" enumerated "illegal activities" (Ordinance § 1004), the revised Ordinance permits a host's conviction because of the "illegal activit[y]" of guests who have not themselves been convicted of any offense. This is putting the cart before the horse, and if applied, would violate the promise of procedural due process, which also is guaranteed by the Fourteenth Amendment. In order to comport with procedural due process, the revised Ordinance must incorporate, as an element of the offense, a requirement that the nuisance gathering result in *convictions of attendees* under enumerated criminal statutes.

## II. First Amendment Rights to Association and Expression

Despite the changes, the Ordinance continues to chill First Amendment rights, such as association and expression. While the revised Ordinance excludes political and religious gatherings from regulation, it remains broad enough to encompass and unconstitutionally burden other First Amendment activity. The freedom to associate is not limited to associations for political and religious purposes. *See, e.g., Boy Scouts of America v. Dale*, 530 U.S. 640, 648 ("implicit in the right to engage in activities protected by the First Amendment is "a corresponding right to associate with others in pursuit of a wide variety of political, social, economic, educational, religious, and cultural ends.") One's right to associate with her family, for example, is a fundamental right protected by the First Amendment. *See, e.g., Lyng v. Castillo*, 477 U.S. 635, 638 (1986) (recognizing choice of family living arrangements as a fundamental right). A family gathering of more than ten, such as a wedding or Thanksgiving dinner, would trigger regulation under the revised Ordinance. Similarly, freedom of expression is not limited to that which is political or religious. *See, e.g., Time Inc. v. Hill*, 385 U.S. 374, 388 (1967) (freedom of expression "must embrace all issues" not just "political expression or comment upon public affairs"). A resident and art collector

may wish to display paintings at her home during the annual Festival of the Arts and invite others onto her property to view the work. As soon as ten people gather, the art collector becomes criminally responsible for any "illegal conduct or condition which injures, or endangers the safety, health, or welfare of the neighborhood" so long as the illegal activity takes place within 100 feet of her home. (Ordinance § 1004.)

Lastly, the revised Ordinance is unconstitutional because it may subject people to police-service fees, of an uncertain amount, for the misconduct of others who are independent actors beyond the person's control (Ordinance § 1008). In effect, the fee will depend on whom one chooses to associate with and on how other people, beyond the gathering sponsor's control, behave. Fees cannot be determined by such arbitrary and uncontrollable reasons. In *Forsyth County, Ga. v. Nationalist Movement*, 505 U.S. 123, 134-35 (1992), the County attempted to impose higher fees on a gathering of white supremacists because they were likely to attract more people and evoke a more hostile public response, thereby requiring a larger police presence. The U.S. Supreme Court reasoned that onerous financial consequences, imposed on a group because of its unpopularity, may effectively produce the same results as an outright prohibition on the group's event. *Id.* (reasoning that "[s]peech cannot be financially burdened any more than it can be punished or banned"). Under the proposed ordinance, a gathering could be assessed greater fees because it is more popular, or unpopular (if people come to cause a disruption). Thus, as in *Forsyth County*, indexing fees based on how many people attend or on how other people, who may or may not have been invited, behave is unconstitutional.

The ACLU of PA appreciates the Borough's struggle to control wild parties and criminal misconduct that often result from such activities, but the approach proposed by the "Nuisance Gathering Ordinance" raises troubling constitutional issues that may be impossible to overcome with any amount of revisions. Punishing people for crimes they neither committed themselves nor had any intent to facilitate violates fundamental due process rights. The answer is to punish those who commit the crimes. Or, as apparently is now being considered by Penn State fraternities, to allow the fraternity houses to police themselves. The Ordinance, even as revised, is likely to draw a constitutional challenge, and we thus urge State College to abandon it altogether. If you would like to discuss further the ACLU of PA's constitutional objections to the proposed Ordinance, you can reach me at 717-236-6827 extension 12.

Sincerely,



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Witold J. Walczak  
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