



Valerie A. Burch  
Staff Attorney  
Central Region Office  
[vburch@aclupa.org](mailto:vburch@aclupa.org)  
717-236-6827 Ext. 12

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Elizabeth A. Goreham, President  
State College Borough Council  
243 South Allen St.  
State College, PA 16801  
[boro@statecollegepa.us](mailto:boro@statecollegepa.us)

AMERICAN CIVIL  
LIBERTIES UNION FOUNDATION  
OF PENNSYLVANIA  
105 N. FRONT STREET, STE 225  
HARRISBURG, PA 17101  
T/717-236-6827  
F/717-236-6895  
[WWW.ACLUPA.ORG](http://WWW.ACLUPA.ORG)

*VIA FASCIMILE TO (814) 231-3082*

Re: Draft "Nuisance Gathering Ordinance"

Dear Ms. Goreham:

The American Civil Liberties Union of Pennsylvania (ACLU-PA) respectfully requests that the Borough of State College reconsider certain provisions of its draft "Nuisance Gathering Ordinance." Although the Borough of State College raises legitimate concerns regarding the health, safety and welfare of the community when social gatherings grow unruly, the Ordinance, as drafted, violates several constitutional principles encompassed by the First and Fifth Amendments to the U.S. Constitution.

First, the Ordinance is overbroad. By criminalizing the hosting of any event or gathering "that results in" enumerated illegal activities (Ordinance § 1004), the Ordinance prohibits a wide range of constitutionally protected activities, such as political and religious gatherings that may inadvertently "result in" a named illegal activity (e.g. disorderly conduct, excessive noise, public drunkenness, littering, etc.). For example, if a local political party hosts a pre-election meeting and an individual who opposes that party stands outside the meeting, shouting through a microphone about the evils of the party's candidates and littering the street with handbills, the party members who hosted the event could be fined up to \$600 and imprisoned for up to 30 days for a first offense. Such an ordinance chills the right to freely associate, protected by the First Amendment. "A law or regulation is invalid on its face under the overbreadth doctrine if it 'does not aim specifically at the evils within the allowable area of control [by the government] but ... sweeps within

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its ambit other [constitutionally protected] activities.’ *Thornhill v. Alabama*, 310 U.S. 88, 97 (1940).” *Waterman v. Farmer*, 183 F.3d 208 (3d Cir. 1999). Thus, although the Ordinance aims to eliminate unruly gatherings at which liquor is served (Ordinance § 1001), it actually prohibits far more than this and unconstitutionally so.

Second, to the extent that the Ordinance holds those exercising First Amendment rights responsible for the actions of others, it violates the First Amendment. The First Amendment does not allow government to hold an event organizer categorically responsible for the actions of others. *See NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 920 (1982) (“Civil liability may not be imposed merely because an individual belonged to a group, some members of which committed acts of violence. For liability to be imposed by reason of association alone, it is necessary to establish that the group itself possessed unlawful goals and that the individual held a specific intent to further those illegal aims”). Thus, an event organizer or host cannot be held liable for the illegal acts of attendees or others, loosely resulting from the event.

Similarly, the way in which the Ordinance attempts to shift the costs of police service to the organizer of events that twice or more result in enumerated illegal activities in a 180 day period (Ordinance § 1007) also raises First Amendment concerns. The government cannot shift police costs to the organizer of an event that encompasses core political speech, religious exercise and other protected activities. *Forsyth County, Ga. v. Nationalist Movement*, 505 U.S. 123 at 130, 134 (1992); *Nationalist Movement v. City of York*, 481 F.3d 178, 186 (3d Cir. 2007); *Church of the American Knights v. City of Gary*, 334 F.3d 676, 680-81 (7<sup>th</sup> Cir. 2003). To do so would result in a *de facto* enforcement scheme whereby gatherings more likely to result in any of the enumerated illegal activities are subject to police response fees. When Forsyth County, Georgia attempted to impose higher police costs on the Nationalist Movement, a white supremacist organization whose proposed event was likely to evoke a public response requiring a large police presence to keep public order, the U.S. Supreme Court prohibited the higher fees, ruling thus: “The costs . . . are those associated with the public's reaction to the speech. Listeners' reaction to speech is not a content-neutral basis for regulation. Speech cannot be financially burdened, any more than it can be punished or banned, simply because it might offend a hostile mob.” *Forsyth County*, 505 US. at 134-35. Forsyth County’s attempt to charge increased fees for an unpopular event is not unlike State College’s billing of police fees to hosts of events likely to result in named illegal activities (Ordinance § 1007). To more heavily burden the constitutionally protected gatherings of those whose members or foes are more likely to litter or create excessive noise is to create a content-based scheme that disfavors certain groups. While the Borough of State College may aim only to impose police costs on unruly partiers who violate certain laws, the Ordinance, by its broad terms, actually would do far more than this.

Third, the Ordinance violates a person’s right to due process under the Fifth Amendment. Individuals cannot be held criminally liable for the conduct of others absent conspiracy to carry out the act or a “responsible relation” to the person who actually performs the criminal act. *See e.g., U.S. v. Park*, 421 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); *U.S. v. McDonald & Watson Waste Oil Co.*, 933 F.2d 35 (1<sup>st</sup> Cir. 1991) (striking corporate officer’s conviction for illegal hazardous waste disposal where government failed to prove that officer had actual knowledge of dumping). By punishing the owner, occupant, tenant or anyone else with possession of the premises of an event or gathering that results in an enumerated illegal activity, the Ordinance holds responsible those who lack both intent to act illegally and a “responsible relation” to the illegal actors. The Ordinance falls far short of providing due process required by the Fifth Amendment because it does not require that a liable person act illegally, intend for others to act illegally, or hold any position of responsibility through which she may exercise the “power to prevent” such illegal activity. *Lady J. Lingerie, Inc.*, 176 F.3d at 1367.

The ACLU of PA urges the Borough of State College to carefully consider its proposed “Nuisance Gathering Ordinance.” The Borough can and should enforce laws already in place which prohibit the illegal conduct sought to be eliminated by the Ordinance. But the liability scheme designed by the Ordinance runs roughshod over and through well-established constitutional rights. Please be advised that if the Borough passes the Ordinance, the ACLU of PA will entertain requests to challenge it in court. If you would like to discuss further the ACLU of PA’s constitutional objections to the proposed Ordinance, please contact us at 717-236-6827 extension 12.

Sincerely,



Valerie A. Burch  
Staff Attorney

Witold J. Walczak  
Legal Director

Cc: Terry Williams, Solicitor, State College Borough (814) 234-1549 (fax)

Log for  
Jamie Mullen  
7172366895  
10/30/2009 4:47PM

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Last Transaction

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Jamie Mullen  
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