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TESTIMONY ON HOUSE BILL 1880
BEFORE THE PENNSYLVANIA HOUSE OF REPRESENTATIVES
SUBCOMMITTEE ON CRIME AND CORRECTIONS

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Good afternoon. My name is Larry Frankel and I am the Executive Director of the American Civil Liberties Union of Pennsylvania. The ACLU has a long-standing and well-known commitment to free speech no matter how unpopular the subject matter or speaker. We thank you for inviting us to testify on House Bill 1880 and to explain why we believe that this legislation violates the First Amendment's guarantee of free speech.

House Bill 1880 would criminalize the wearing of a "mask, hood or device by which any portion of the face is so hidden, concealed or covered as to conceal the identity of the wearer" in public places or on private property unless the occupier of the property permits the wearing of the mask, hood or device.

This legislation seeks to prevent public speakers from speaking anonymously. The citizens of this country, and this Commonwealth, however, have a constitutional right to maintain anonymity in connection with the expression of their ideas, beliefs and associations. In 1995, the United States Supreme Court struck down an Ohio statute that required all campaign literature to bear the name of the person or group responsible for the distribution of that

literature. McIntyre v. Ohio Elections Commission, 115 S.Ct. 1511 (1995). In finding the statute to be unconstitutional the Court looked to the history of anonymous political communications. That legacy includes the Federalist papers which advocated the ratification of the United States Constitution.

The constitutional right to remain anonymous has been particularly important to members of political and advocacy organizations. In 1958, the United States Supreme Court held that the NAACP could not be required to turn over its membership lists to the state of Alabama. NAACP v. State of Alabama, 357 U.S. 449 (9158). The Court found that requiring the disclosure of the names of members would discourage membership and ultimately restrain the First Amendment right to associate for the purpose of advocating ideas or beliefs. See also Talley v. State of California, 362 U.S. 80 (1960) (Ordinance requiring that handbills and pamphlets contain name of person responsible for distribution is unconstitutional.)

These decisions show that the Supreme Court recognizes that anonymity plays an important role in the dissemination of ideas. It is the right of the speaker, whatever his or her point of view may be, to decide whether to reveal his or her name and identity. It is not the role of government to dictate that speaker's decision.

Courts have also recognized that wearing a mask of costume can be very powerful and protected symbolic speech. In Aryan v. Mackey, 462 F. Supp. 90 (N.D. Texas 1978), the federal trial court held that a prohibition on students wearing masks during a demonstration against the Shah of Iran was unconstitutional. The Court found that the masks had a communicative function - they were a symbol of protest against the Shah's regime. The Court held that the university had not demonstrated that the prohibition on the masks furthered a legitimate interest

of the university.

Another federal court has struck down an ordinance which prohibited parade participants and individuals from wearing masks or disguises. Ku Klux Klan v. Martin Luther King Worshippers, 735 F. Supp. 745 (M.D. Tenn. 1990). The Court wrote that:

In the context of parades and demonstrations, certain masks and disguises may constitute strong symbolic political expression that is afforded protection by the First Amendment.

735 F. Supp. at 751. The Court went on to find that the ban on masks and disguises was unconstitutional because it could “be used to stifle symbolic political expression which is protected by the First Amendment.” 735 F. Supp. at 751.

A little closer to home, a federal judge for the Western District of Pennsylvania, less than one year ago, addressed the very issue raised by this legislation. In American Knights of the Ku Klux Klan v. County of Bedford (Civil Action 97-114J), Judge Smith found an ordinance passed by Bedford County to be unconstitutional. The ordinance in question included a prohibition on the wearing of masks “in connection with or during operation or use of” a display, exhibit or structure. The Court found that the ordinance was a content-based restriction on the First Amendment rights of the plaintiffs. The Court also found that the mask provision was “a transparent attempt to restrict public rallies of the Ku Klux Klan.” (Page 3 of Opinion). The Court went on to hold that the ordinance banning masks was unconstitutional because it could be used to stifle symbolic political expression.

The ACLU believes that Judge Smith decided this case correctly, after all we represented the plaintiffs in that litigation. We are confident in predicting that this bill, if it were enacted, would also be found to be unconstitutional. The First Amendment protects the rights of those of

us who have unpopular views. It prevents our government from trying to silence us or censor our symbolic speech.

The First Amendment permits a person who wants to come to Harrisburg to protest against the Governor's policies to don a Tom Ridge mask as part of his demonstration. The First Amendment allows another person who wants to make fun of the loquaciousness or pomposity of a member of the General Assembly to appear in the rotunda quoting from the legislative record while wearing a clown's mask. Under our form of government, we do not allow the state to force citizens to disclose their identity as a condition for being permitted to convey their message to the public.

The constitution teaches us that the way to fight what one deems to be "bad" speech or "hate" speech is with more speech. Rather than attempting to silence those we disagree with, we need to speak louder and more persuasively. Government should not focus on trying to exclude speakers from the marketplace of ideas. Government can address the criminal acts that may be the consequences of hate speech and to that end I would suggest that you consider a piece of legislation similar to that introduced in the Senate. Senate Bill 1220 would create the Prevention of Hate Activity Fund and appropriate \$1,000,000 to that fund for the purpose of enhancing the Pennsylvania Human Relation Commission's efforts in combating "intergroup tension, ethnic intimidation and hate group activities." Educating the citizens about the consequences of bigotry and hatred, rather than attempting to silence unpopular speakers, is consistent with our Constitution and the principles of free speech that have served this country so well.