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Re: Resolution 86 and District Attorney Martin’s Memorandum
in Response

To Council President Hendricks, Council Vice-President Guridy, and
Council Members Affa, Gerlach, Mota, Siegel and Zucal:

The American Civil Liberties Union of Pennsylvania has been made aware of the memorandum written by District Attorney Martin in opposition to proposed Resolution No. 86, which details Community Strategies for Police Oversight Review and Recommendations. Unfortunately, in raising his concerns, District Attorney Martin seems to have misinterpreted Pennsylvania law and its applicability.

Based on growing community demands for police reform, Resolution No. 86 proposes to begin a dialogue on various police reform proposals. Several of these reforms originate from the Eight Can’t Wait agenda, which have been adopted by municipalities and police professionals from across the country, including by other officials in Pennsylvania. The Resolution does not mandate the adoption of any specific proposal at this time, but would only commit the City Council to make recommendations based on these discussions within three months—with the aim to produce legislation on any accepted recommendations. Finally, the resolution calls for the City to begin to draft a plan to reassign resources from the police department and reallocate them to other sectors that more appropriately address mental health, drug and alcohol treatment, housing, and various social services.

District Attorney Martin's memorandum suggests that the proposed reforms enumerated in Resolution 86 are forbidden by state law. With due respect for his expertise, the ACLU disagrees with most of his analysis.¹ The analysis that follows is informed by decades of both litigation and policy work and, especially, a firm grounding in the law of "preemption," the principle that a local law conflicting with or undermining a state statute is void, because a municipality cannot displace state law.

We begin, as a first principle, with the scope of Allentown's municipal power. As a Third Class City government by a Home Rule Charter, Allentown "may exercise any power or perform any function not denied by this Constitution, by its home rule charter or by the General Assembly at any time." Pa. Const. art. IX, § 2. Pennsylvania's Legislature has been explicit as to Home Rule Law "that the grant of municipal power to a municipality governed by a home rule charter shall be liberally construed in favor of the municipality." *Hartman v. City of Allentown*, 880 A.2d 737, 742 (Pa. Commw. Ct. 2005) (citing 53 Pa.C.S. § 2961). As a municipality with a home rule charter, Allentown has broad police powers in order to "respond in an appropriate and effective fashion to changing social, economic and political circumstances." *Id.* at 743; *see also Nat'l Wood Preservers, Inc. v. Dep't of Envtl. Res.*, 414 A.2d 37, 42 (Pa. 1980).

The Supreme Court of Pennsylvania has held that "a home rule municipality's exercise of power is presumed to be valid absent a specific constitutional or statutory limitation, and ambiguities are to be resolved in favor of the municipality." *In re Petition to Recall Reese*, 665 A.2d 1162, 1164 (Pa. 1995); *see also Bell v. Lehigh Cnty. Bd. of Elections*, 729 A.2d 1259, 1265 (Pa. Commw. Ct. 1999) (in interpreting "the grant of municipal power to a home rule municipality . . . ambiguities are to be resolved in favor of the municipality"); *McSwain v. City of Farrell*, 624 A.2d 256, 258 (Pa. Commw. Ct. 1993) (same). In Pennsylvania, the General Assembly must "clearly show its intent to preempt a field in which it has legislated" by "retaining *all* regulatory and legislative power for itself" in order for state law to preempt local rules. *Hartman v. City of Allentown*, 880 A.2d 737, 747 (Pa. Commw. Ct. 2005).

District Attorney suggests that the reforms proposed in Resolution 86 would violate provisions of the Pennsylvania Crimes Code. With all due respect, he has misapplied the law.

The Crimes Code sets the conditions for criminal liability. It does not bear any relationship to the employment policies of a municipal police department. None of the proposed reforms would create criminal or civil liability for the officers; they would, instead, set internal personnel and administrative policies for the Allentown Police Department. Municipalities with home rule charters are given much freedom to regulate the personnel and administrative matters of their local offices and departments.

¹ District Attorney Martin is correct that Allentown cannot assign investigations of use of force to the Attorney General. However, as the Resolution explicitly states, the goal of the resolution is to open a dialogue to discuss possible reforms. Furthermore, the resolution itself acknowledges that some reforms may require a higher authority to implement them.

As the Pennsylvania Commonwealth Court stated in *In re Pittsburgh Citizen Police Review Board*, “The General Assembly may negate ordinances enacted by home rule municipalities when the General Assembly has enacted a conflicting statute concerning substantive matters of statewide concern . . . [that] do not include matters affecting merely the *personnel* and *administration* of the offices local to [a specified municipality] and which are of no concern to citizens elsewhere,” 36 A.3d 631, 635 (Pa. Commw. Ct. 2011) (quoting *Devlin v. City of Philadelphia*, 862 A.2d 1234, 1242 (Pa. 2004)). Limitations on the use of certain types of force as a matter of Police Department policy would be a restriction on personnel, and its enforcement would be part of the administration of local government and policy, neither of which are otherwise preempted by any state law.

For a similar reason, there is no legal barrier to the City of Allentown forbidding its police from using “stop and frisk.” While brief investigative stops are permitted by the Fourth Amendment when an officer has reasonable suspicion that the person stopped is engaging in criminal behavior, such stops are not *required*. Many cities, most notably New York, Chicago, and Philadelphia, have been sued for their racially discriminatory stop-and-frisk policies. As a result of these suits, these cities were forced to amend their stop-and-frisk policies—with New York City abandoning the program altogether. While some uses of “stop and frisk” may still be constitutional, many major cities are adopting policies that abandon the practice. Allentown may join these cities in setting a new policy on the use of “stop and frisk” for its police department. It may also ban the use of tear gas, limit use of force, and, if it wishes, require its police to have probable cause for any seizure of a person (which is what it would mean to ban “stop and frisk”).

District Attorney Martin likewise misrepresents barriers in state law to the release of body camera audio and/or video footage by the City. Pennsylvania’s Right to Know Law governs how public entities must respond to citizens’ requests for information; this law does not impede a public entity in deciding what to make public to its constituents. While some body camera footage may implicate the CHRIA, the CHRIA is not an outright bar to releasing such footage and its relevance would need to be determined on a case-by-case basis. These laws do not tie the hands of a City in moving toward increased transparency and public accountability. In its move toward increased transparency, the City must also take care to protect civilians’ constitutional privacy and reputational rights by redacting images of victims of and witnesses to crime, as well as bystanders.

Similarly, District Attorney Martin’s concerns over the proposed Citizens Review Board are also misplaced. District Attorney Martin relies on *In re Pittsburgh* in his memo, a case which arose after the Pittsburgh Citizen Review Board initiated an investigation of the police department and issued subpoenas to the City’s Chief of Police for arrest reports and related documents pertaining to arrests made in connection with the G-20 conference. 36 A.3d 631, 633 (Pa. Commw. Ct. 2011). The Board also requested a large number of documents relating to the activities of the Pittsburgh Bureau of Police and police officers from other jurisdictions temporarily assigned for the event. *Id.* In response, the City refused to release certain police reports without redactions, arguing that the CHRIA prevented it from providing the

information at issue to a non-criminal justice agency. *Id.* at 634. The Board argued in response, relying on *In re Addison*, 122 A.2d 272 (Pa. 1956), that a home rule municipality is empowered to legislate over a wide range of local interests—despite the presence of an inconsistent or conflicting law of statewide application—where the local ordinance pertains to municipal personnel and administration. *Id.* at 634.

Ultimately, the Commonwealth Court found that CHRIA preempted the home rule charter and that the investigative, intelligence, or treatment information was protected from dissemination by Section 9106. *Id.* at 637. However, what District Attorney Martin fails to acknowledge in his brief reference to this decision is that this CHRIA holding was grounded in the fact that the Board requested documents pertaining to individuals who were *not* connected to the City and to law enforcement personnel who were only temporarily assigned to the City. *Id.* at 636. Importantly, the Court acknowledged that “although it could be argued that the information is being used for personnel or administrative purposes because an investigation using the documents could result in the discipline of City police officers, *the information at issue* is not necessarily about the City's personnel.” *Id.* (emphasis added). The Court *did not* find that requests for information related to City personnel, such as its police department, would be outside the reach of Civilian Review Boards.

While we hope that District Attorney Martin’s memo was based on actual concern about legal avenues of achieving police reform and not simply an attempt to derail reform efforts, Resolution No. 86 provides an opportunity for the community to come together to address all concerns regarding law enforcement and propose solutions to best meet the needs of the people of Allentown. The American Civil Liberties Union of Pennsylvania supports the work of community leaders and Allentown City Council in proposing Resolution No. 86, and urges the Council to vote in favor of the resolution in order to begin the much needed conversation about the role of law enforcement in our communities.

Respectfully,

ACLU of Pennsylvania
Lehigh Valley Stands Up
Cohesion Network
Change Now! Lehigh Valley
POWER Lehigh Valley
Black Lives Matter Lehigh Valley
Lehigh Valley Democratic Socialists of America
Action Town Activists

cc: Michael Hanlon, City Clerk, Michael.Hanlon@AllentownPA.gov