ACLU
AMERICAN CIVIL LIBERTIES UNION
South Carolina

November 16, 2026

Charleston City Council
P.O. Box 652
Charleston, SC 29402

Via email

RE: First Amendment Ordinance

Dear Mayor Cogswell and Councilmembers,

It has come to our attention that the Charleston City Council is considering revisions to its First Amendment ordinance. During this process, the Council has the opportunity to remedy serious constitutional flaws that plague the current ordinance. Unfortunately, however, the proposed ordinance fails to do that.

I write on behalf of the American Civil Liberties Union of South Carolina to urge you to reject the current proposal and continue the drafting process in consultation with legal experts and affected community members. To that end, this letter outlines some of the most glaring constitutional problems with the current and proposed ordinances.

I. The ban on group speech within fifteen feet of any "monument or memorial" sweeps too broadly and is unconstitutionally vague.

Under both the current ordinance (at Section 25-52(a)(2)) and the proposed ordinance (Section 25-44(a)(2)), it is "unlawful for a demonstration to occur within fifteen (15) feet from the outermost edge of any monument or memorial[.]" "Monument or memorial" is defined as "any monument or memorial, including any fountain, sculpture, plaque, statue, marker, gazebo, object, or other architectural element or structure, with commemorative, historical, symbolic, aesthetic, or artistic significance." Charleston, S.C. Mun. Code § 25-52(a)(2); Proposed Ord. § 25-25.

That prohibition sweeps far too broadly. To start, it applies to all gatherings, regardless of size. As a result, no expressive gathering whatsoever can occur within

fifteen feet of, among other things, any "object" or "architectural element or structure" that has "commemorative, historical, symbolic, aesthetic, or artistic significance." That is an extraordinarily broad category—particularly in Charleston, one of the most beautiful and historic cities in the country.

Moreover, whether something has "symbolic, aesthetic, or artistic significance" is wholly subjective. As a result, the definition of "monument or memorial" is unconstitutionally vague because it "fails to provide people of ordinary intelligence a reasonable opportunity to understand what conduct it prohibits" and "authorizes . . . discriminatory enforcement." *See Hill v. Colorado*, 530 U.S. 703, 732 (2000).

II. Neither the current nor the proposed ordinance contains sufficient safeguards to cabin officials' unfettered discretion.

The government "may not possess unfettered discretion to burden or ban speech, because 'without standards governing the exercise of discretion, a government official may decide who may speak and who may not based upon the content of the speech or view-point of the speaker.'" *Child Evangelism Fellowship of S.C. v. Anderson Sch. Dist. Five*, 470 F.3d 1062, 1068 (4th Cir. 2006) [*CEF of S.C.*]. "In a standardless environment, speakers might engage in self-censorship out of the fear they would be discriminated against based upon their views." *Id.*

"[A] licensing scheme confers too much discretion on a governmental decisionmaker when it allows the decisionmaker to deny an application based solely on the decisionmaker's own ideas of public welfare, peace, safety, health, decency, good order, morals or convenience." *Am. Entertainers, LLC v. City of Rocky Mount, N.C.*, 888 F.3d 707, 720 (4th Cir. 2018) (quoting *Shuttlesworth v. City of Birmingham, Ala.*, 394 U.S. 147, 150 (1969)) (quotation marks omitted).

At various points in the current and proposed ordinances, the city and the chief of police are vested with unconstitutional discretion to restrict, alter, or revoke a permit and to require a special events permit. *See* Proposed Ord. §§ 25-28; 25-37, 25-42.

For example, both Section 25-28 and Section 25-42 allow restrictions based on the "best interest of the public health, safety, and welfare of the city and its citizens." But binding precedent unequivocally establishes that a "best interest" does not sufficiently cabin discretion. *CEF of S.C.*, 470 F.3d at 1069–70. "Indeed, the Supreme Court offered a modest variation on this 'best interest' language as an archetype of excessive discretion in" a prior decision. *Id.* at 1070 (citing *City of Lakewood v. Plain Dealer Publ'g Co.*, 486 U.S. 750, 769 (1988)).

Another provision, Section 25-37, empowers the chief of police "to authorize the conduct of the demonstration on an alternate day, at an alternate time, or over a

route different from that named" instead of "approving an application as submitted," without any standards whatsoever to guide that decision.

But "placing unbridled discretion in the hands of a government official or agency, thus potentially resulting in censorship," is an "evil[] that will not be tolerated in licensing schemes," *Am. Entertainers*, 888 F.3d at 720 (alterations, quotation marks, and citation omitted), and any such provision should be stricken from Charleston's ordinance.

III. The current and proposed ordinances create an unconstitutional strict liability offense.

Both the current ordinance (at Section 25-39(a)) and the proposed ordinance (at Section 25-27(a)) provide that "[n]o person shall engage in, participate in, aid, form or start" any demonstration of twenty-five or more people "unless a First Amendment demonstration permit shall have been obtained[.]" Violation of the provision is a criminal offense punishable by up to thirty days in jail or a fine of up to $500. Charleston, S.C. Mun. Code §§ 25-55, 1-16; Proposed Ord. § 25-46.

Because that provision contains no *mens rea* requirement, it essentially creates a strict liability offense. It "places the onus upon every participant to be aware of whether the march has a permit, and would hold any participant liable for its violation, even in cases where the participant was mistakenly advised that a permit was issued." *American-Arab Anti-Discrimination Comm. v. City of Dearborn*, 418 F.3d 600, 612 (6th Cir. 2005). As the Sixth Circuit explained:

> A good-faith belief is no excuse, and thus the potential protestor cannot rely upon the assurances of participants in the march. Rather, the potential protestor would be well-advised to seek personal verification from a city official that the demonstration has been authorized, or run the risk of being thrown in jail. Requiring potential march participants to seek authorization from city officials before joining a public procession or risk being jailed is antithetical to our traditions, and constitutes a burden on free expression that is more than the First Amendment can bear.

Id. at 612; *see also Smith v. California*, 361 U.S. 147, 155 (1959). So too here.

We hope that the Council will take this opportunity to remedy the unconstitutional provisions in Charleston's First Amendment ordinance so that the City can foster its residents' exercise of their constitutional rights and avoid substantial legal liability.

Please do not hesitate to reach out if you have questions or if I can be of assistance during this process.

Sincerely,



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