ACLU
AMERICAN CIVIL LIBERTIES UNION FOUNDATION
West Virginia

**P O Box 3952**
**Charleston WV 25339-3952**

**(304) 345-9246**
**www.acluwv.org**

January 14, 2021

Members of the Public Safety
Committee and
the Charleston City Council
*sent via email*

*cc: Mayor Amy Goodwin*
*Kevin Baker, Esq., City Attorney*

Re: Bill No. 7889—Prohibiting Activities at Intersections and Highways

Dear Members of the Public Safety Committee and the Charleston City Council:

I am writing to you regarding Bill No. 7889—a proposed ordinance that, if passed, will unlawfully restrict protected free speech activity in violation of both the West Virginia Constitution and the United States Constitution. I understand that the ordinance is to be discussed at tonight's public safety committee meeting. The American Civil Liberties Union of West Virginia seeks to protect the rights and civil liberties of all West Virginians, and we request that you consider our organization's concerns, outlined in this letter, before moving forward with this unconstitutional proposed ordinance.

The proposed ordinance states as follows:

> No person or persons shall willfully stand or congregate within 25 feet of an inherently dangerous intersection or highway with the intent of attracting or distracting the attention of the operator of a motor vehicle for any reason.

The breadth of protected activity this would prohibit within 25 feet of certain intersections and highways is expansive. In addition to panhandling, the ordinance would, for example, prohibit politicians from engaging in honk-and-waves, union members from exercising their rights to picket, newspaper reporters from gathering information, and individuals and groups from participating in protests on public sidewalks and walkways near these highways and intersections. That these areas may experience heavier traffic underscores precisely *why* the sidewalks and public areas that fall within the scope of this proposed ordinance are valuable forums within which individuals must be free to engage in protected speech.

A recent opinion issued by the Tenth Circuit Court of Appeals is instructive. In *McCraw v. City of Oklahoma City*, the Tenth Circuit examined a municipal ordinance which stated that, providing some exceptions:

> [N]o individual shall stand, sit, or stay for any purpose on any portion of a median located within a street or highway open for use by vehicular traffic if the posted speed limit for such street or highway is 40 mph or greater; provided, if no speed limit is posted for such street or highway, then for the purpose of applying the restrictions imposed by this subsection, the speed limit of such street or highway shall be presumed to be 25 miles per hour.

*See McCraw*, 973 F.3d 1057 (10th Cir. 2020) (analyzing OKLA. CITY, OK. § 32-458). The Court found that the ordinance violated plaintiffs First Amendment rights and was therefore unconstitutional.

The proposed ordinance in Charleston is similar to the Oklahoma City ordinance in that it does not single out any specific activity (*e.g.*, panhandling, protests, newsgathering, or picketing). In Charleston, the activity prohibited is defined as conduct that is initiated "with the intent of attracting or distracting the attention of the operator of a motor vehicle for any reason."

It is not in question that much of the activity that would fall within the scope of the proposed Charleston ordinance is protected speech. *See e.g., Clatterbuck v. City of Charlottesville*, 708 F.3d 549, 553 (4th Cir. 2013) ("The Supreme Court has held that the solicitation of 'charitable contributions' is protected speech.") (quoting *Riley v. Nat'l Fed'n of the Blind of N.C.*, 487 U.S. 781, 789 (1988); *Kelly v. City of Parkersburg*, 978 F. Supp. 2d 624, 627 (S.D. W. Va. 2013) ("Charitable solicitation by individuals is protected by the First Amendment."). *See also Morse v. Frederick*, 551 U.S. 393, 403 (2007) (noting that political speech is "at the core of" the First Amendment; *Branzburg v. Hayes*, 408 U.S. 640, 647 (noting that newsgathering is protected activity under the First Amendment).

A prohibition on protected activity will only survive constitutional muster if it is a valid "time, place, and manner" restriction. When a city restricts speech near busy streets, it "regulates a quintessential public forum over which the First Amendment's shield is strongest." *Clatterbuck*, 708 F.3d at 555. "In public places which by long tradition or governmental fiat have been devoted to assembly and debate, the rights of the state to limit expressive activity are sharply circumscribed." *Perry Educ. Ass'n v. Perry Local Educ. Ass'n*, 460 U.S. 37, 45 (1983). "[P]laces such as parks, streets, and sidewalks fall into the category of public property traditional held open to the public for expressive activity." *Clatterbuck*, 708 F.3d at 555 (internal quotation marks omitted).

Because public streets and sidewalks are traditional public fora, the government may only "impose reasonable content-neutral time, place, and manner restrictions that are narrowly tailored to serve a significant government interest and leave open ample alternative channels of communication." *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989)). Content-based restrictions are subject to the higher level of "strict scrutiny." *See Reed*, 576 U.S. 155 (2015) ("A law that is content based on its face is subject to strict scrutiny regardless of the government's benign motive, content-neutral justification, or lack of animus toward the ideas contained in the regulated speech.").

It may be arguable as to whether or not this proposed ordinance is truly content neutral. As the Tenth Circuit noted in *McCraw*, ordinances that appear facially neutral in content may be considered content-based under certain circumstances. *McCraw*, 973 F.3d 1057, 1070 n.8 (10th Cir. 2020) (citing *McCullen v Coakley*, 573 U.S. 464, 486 (2014) ("Where certain speech is associated with particular problems, silencing the speech is sometimes the path of least resistance. But by demanding a close fit between ends and means, the tailoring requirement prevents the government from too readily sacrificing speech for efficiency." (quotation and alteration omitted)); *Reed*, 576 U.S. 155, 164 (2015) (facially content-neutral restrictions "will be

considered content-based regulations of speech" if they "were adopted by the government because of disagreement with the message the speech conveys.").

Regardless, this proposed ordinance fails to survive even the intermediate level of scrutiny required for content-neutral restrictions.

Since the Supreme Court's decision in *McCullen v. Coakley*, 573 U.S. 464 (2014), the Fourth Circuit has held that intermediate scrutiny requires "the government to present actual evidence supporting its assertion that a speech restriction does not burden substantially more speech than necessary; argument unsupported by the evidence will not suffice to carry the government's burden." *Reynolds*, 779 F.3d at 229. "Except in those rare circumstances in which each activity within the proscription's scope is an appropriately targeted evil, a complete ban [on speech] is the very antithesis of a narrowly tailored law." *Hassay v. Mayor & City Council of Ocean City*, 955 F. Supp. 2d 505, 524-25 (D. Md. 2013) (internal quotation marks omitted). "[A] content-neutral restriction on speech in a traditional public forum is facially unconstitutional if it does not survive the narrow tailoring inquiry, even though that ordinance might seem to have a number of legitimate applications." *Cutting v. City of Portland*, 802 F.3d 79, 87-88 (1st Cir. 2015) (citing *McCullen*, 573 U.S. 464).

Even when an ordinance is content-neutral and subject to intermediate scrutiny, the government must still present evidence to demonstrate that it is narrowly tailored and leaves open ample alternative channels of communication. *See Reynolds v. Middleton*, 779 F.3d 222, 227-29 (4th Cir. 2015). "Government may not regulate expression in such a manner that a substantial portion of the burden on speech does not serve to advance its goals." *Ward*, 491 U.S. at 799.

The Tenth Circuit in *McCraw*, in analyzing the Oklahoma City ordinance restricting activity on medians under the time, place, and manner framework, found that the ordinance did not survive intermediate scrutiny because there was insufficient evidence to demonstrate that the "recited harms are real" or that the ordinance would "in fact alleviate these harms in a direct and material way." *See McCraw*, 973 F.3d at 1071 (citing *Citizens for Peace in Space v. City of Colo. Springs*, 477 F.3d 1212, 1221 (10th Cir. 2007).[1]

Similarly, the proposed Charleston ordinance will not survive intermediate scrutiny is if the passage of the ordinance is based on speculative harm or mere complaints. The underlying rationale for this proposed ordinance is "complaints about people standing, congregating, and not paying attention to traffic flow." *See* Joe Severino, CHARLESTON GAZETTE-MAIL, *Proposed City Bill Would Make Standing, Disrupting Traffic on High Speed Roads and Intersections a Nuisance,* https://www.wvgazettemail.com/news/kanawha_valley/proposed-city-bill-would-make-standing-disrupting-traffic-on-high-speed-roads-and-intersections-a/article_f867a71d-023a-585e-87b4-1401eb6a4120.html. It is not apparent underlying data exists sufficient to demonstrate such a high number of pedestrian accidents have occurred to justify this ordinance.

I hope this letter informs you of the constitutional concerns with the proposed ordinance that the public safety committee is considering. Please do not hesitate to contact me if I could be of additional assistance in your consideration of this issue. I can be reached via email at lstark@acluwv.org.

[1] Specifically, the *McCraw* Court found that "[Oklahoma] City has provided ample evidence of citizen complaints about panhandling across the City, including instances of panhandlers stepping into the streets, but these complaints do not meet the City's burden. The City must demonstrate that its articulated interest of "protect[ing] pedestrians on medians from encroaching traffic, and drivers from distractions caused by pedestrians on medians," is concrete and non-speculative. It cannot meet this burden by proffering only evidence that there are panhandlers on medians or that those panhandlers are unpopular without showing that panhandlers in medians create a public safety risk." *McCraw v. City of Okla. City*, 973 F.3d 1057, 1072 n.12 (10th Cir. 2020).

Sincerely,

Loree Stark
Legal Director, ACLU-WV