June 16, 2025

Re: City of Spearfish's Policies Regarding Permitted Events

Dear Mayor Senden, City Attorney Knox, Chief Smith, and Members of the City Council,

ACLU
AMERICAN CIVIL LIBERTIES UNION
South Dakota

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We are writing today on behalf of the American Civil Liberties Union of South Dakota ("ACLU") to express our concern with the City of Spearfish's ordinances and policies requiring a permit from the City before speakers can exercise their First Amendment right to peacefully assemble within Spearfish. For the reasons explained in this letter, the City's current ordinances and policies intrude upon protected First Amendment rights and we urge the City to repeal or amend its rules to better protect free speech. Specifically, we are concerned with City Ordinances §§ 94.01, 94.06, and multiple provisions in the City's "Special Event Handbook: A Guide to Planning Your Event in Spearfish, South Dakota" ("the Handbook"). The ACLU would like to partner with Spearfish to revise these documents and ensure that the City's permitting rules reflect its commitment to the freedoms of speech and assembly.

"[I]t is a prized American privilege to speak one's mind."[1] The First Amendment was designed "to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people."[2] And it reflects our "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open[.]"[3] Such speech "is more than self-expression; it is the essence of self-government."[4] For this reason, political protest "has always rested on the highest rung of the hierarchy of First Amendment values."[5]

And in no location are the "rights of the state to limit expressive activity [more] sharply circumscribed[]" than in traditional public forums.[6] "A traditional public forum is public property that has traditionally been available for public expression and the free exchange of ideas."[7] Streets, sidewalks, and public parks—areas the City's Ordinances and Handbook specifically reference and regulate—are the "quintessential examples" of traditional public forums.[8] This is because "[w]herever the title of streets and parks may rest, they have immemorially been held in trust for the use of the public and, time out of mind,

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[1] *New York Times Co. v. Sullivan*, 376 U.S. 254, 269 (1964).
[2] *Roth v. United States*, 354 U.S. 476, 484 (1957).
[3] *New York Times*, 376 U.S. at 270.
[4] *Garrison v. Louisiana*, 379 U.S. 64, 74–75 (1964).
[5] *Carey v. Brown*, 447 U.S. 455, 467 (1980).
[6] *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45 (1983).
[7] *Ball v. City of Lincoln, Nebraska*, 870 F.3d 722, 730 (8th Cir. 2017) (cleaned up).
[8] *Id.*

have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions."[9]

While a city may "regulate competing uses" of a traditional public forum, like a park or sidewalk, by "impos[ing] a permit requirement[,]" there is a "heavy presumption" against the validity of such regulations,[10] and permitting schemes are only allowed to regulate the time, place, and manner of speech in a traditional public forum.[11] However, even time, place, and manner restrictions "can be applied in such a manner as to stifle free expression[,]"[12] so all such restrictions must satisfy four criteria: (1) they must be narrowly tailored to serve a significant governmental interest; (2) they must be justified without reference to the content of the regulated speech; (3) they must not delegate overly broad licensing discretion to a government official and must contain narrow, objective, and definite standards to guide licensing authorities; and (4) they must leave open ample alternative channels for communication of the information.[13] The City's Ordinances and Handbook as currently drafted fail to satisfy any of these criteria.

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First, the City's Ordinances and Handbook are not narrowly tailored to serve a significant government interest. The ACLU recognizes that the City has legitimate interests in maintaining public order, preventing traffic and sidewalk obstructions, promoting safety, and protecting itself from liability for injuries associated with the use of its property.[14] However, for a multitude of reasons, Spearfish's Ordinances and Handbook are not narrowly tailored to serve these interests.

To begin with, City Ordinance § 94.01 states that "[i]t shall be unlawful for any person to organize or hold or participate in any parade, meeting, assembly, outdoor concert or procession of persons and/or vehicles on the streets, sidewalks or public parks of this city unless such activity shall have first been authorized by a written permit issued by the Chief of Police therefor." Critically, nothing in this ordinance limits its permit requirement to only large groups and gatherings; instead, it requires groups of any size to obtain a permit before lawfully exercising their First Amendment rights in traditional public forums within the City. Courts around the country have routinely held that ordinances which require small groups of protestors to obtain permits are not narrowly tailored to any government interest.[15]

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[9] *Hague v. Committee for Indus. Org.*, 307 U.S. 496, 515 (1939).
[10] *Forsyth Cty. v. Nationalist Movement*, 505 U.S. 123, 130 (1992).
[11] *Clark v. Cmty. for Creative Non–Violence*, 468 U.S. 288, 293 (1984).
[12] *Thomas v. Chicago Park Dist.*, 534 U.S. 316, 323, 122 S.Ct. 775, 151 L.Ed.2d 783 (2002)
[13] *Josephine Havlak Photographer, Inc. v. Vill. of Twin Oaks*, 864 F.3d 905, 913 (8th Cir. 2017).
[14] *See Schenck v. Pro–Choice Network of W. New York*, 519 U.S. 357, 376 (1997); *Jacobsen v. Harris*, 869 F.2d 1172, 1174 (8th Cir.1989).
[15] *See Douglas v. Brownell*, 88 F.3d 1511, 1523 (8th Cir. 1996) (questioning whether a permit requirement that applied to groups as small as ten people was sufficiently tailored to the city's interest); *Grossman v. City of Portland*, 33 F.3d 1200, 1206-07 (9th Cir. 1994)

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Additionally, City Ordinance § 94.01 is not narrowly tailored since it applies to groups protesting or marching on sidewalks even when they are not interfering with other pedestrians' ability to navigate the space. Without a "provision tailoring the regulation to events that realistically present serious traffic, safety, and competing use concerns, significantly beyond those presented on a daily basis by ordinary use of the streets and sidewalks, a permitting ordinance is insufficiently narrowly tailored to withstand time, place, and manner scrutiny."[16] For a permitting scheme to be narrowly tailored, its application must be limited to "events that *actually* implicate the governmental interest in enforcement of established traffic regulations[]"[17]—which City Ordinance § 94.01 fails to do.

The City's Handbook similarly does not limit the permitting requirement to large groups or those that will interfere with the public's use of a traditional public forum. Instead, the Handbook's section on "Assemblies and Demonstrations" states that all "[a]ssemblies, demonstrations, or rallies, require a Special Event Permit" and that "[f]or the protection of the public, groups using streets or public ways for demonstrating must complete a Special Events Application."[18] Therefore, just like the ordinance itself, this Handbook's restrictions on "Assemblies and Demonstrations" are not narrowly tailored to a significant interest of the City.

Additionally, City Ordinance § 94.06—which prohibits "any activity authorized under this chapter to commence within five days

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(comparing the ordinance in question to the participant requirements of other cities, and concluding that the other cities' ordinances which, in general, had participant requirements of at least 50 persons, "appear much more narrowly tailored"); *Cox v. City of Charleston*, 416 F.3d 281, 285 (4th Cir. 2005) ("We ... believe that the unflinching application of the Ordinance to groups as small as two or three renders it constitutionally infirm.").

[16] *Santa Monica Food Not Bombs v. City of Santa Monica*, 450 F.3d 1022, 1039 (9th Cir. 2006).

[17] *Id.*

[18] The Handbook contains additional statements that groups are always required to obtain a Special Events Permit before engaging in organized First Amendment activities in public spaces. *See* Handbook at 2 ("[P]er Spearfish City Ordinances, all events intended for public participation in our parks, facilities, or in the public right of way must be properly permitted."); at 3 ("A special event application is required for events or activities open to the public, held outdoors on public property, a city street, downtown, or in a city park."). However, other portions of the Handbook imply that permits are not always required. See Handbook at 2 (implying that no permit is needed if an event does not "require[] restricted or exclusive use of any public property[;] . . . impede[] the normal flow of traffic[;] . . . impede[] the enjoyment or use of the property by the general public[;] or charge[] admission, fees, or fees for goods or services[.]"); at 2 (noting that a permit is only required for "any event the City, in its sole discretion, determines to meet the definition of a special event[.]); at 7 (stating that prior approval for events is only required "if any exclusive use of public property will be utilized."). These conflicting statements make it impossible for an applicant to know whether they are required to obtain a permit and present their own constitutional issue of the Policy being unconstitutionally vague. *See Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972) ("It is a basic principle of due process that an enactment is void for vagueness if its prohibitions are not clearly defined.").

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from the date of the application thereof"—is also not narrowly tailored to any significant governmental interest. This restriction bars spontaneous speech and ignores the fact that "[t]iming is of the essence in politics.... [W]hen an event occurs, it is often necessary to have one's voice heard promptly, if it is to be considered at all."[19] For that reason, the Eighth Circuit Court of Appeals has determined that a five-day notice requirement, like that contained in City Ordinance § 94.06, is not narrowly tailored because it "restricts a substantial amount of speech that does not interfere with the city's asserted goals of protecting pedestrian and vehicle traffic, and minimizing inconvenience to the public[.]"[20] The lack of narrowing tailoring becomes even more egregious in the City's Handbook where, rather than the already constitutionally flawed five-day notice requirement, the City demands that an application for a permit be submitted "no less than 60 days before the proposed event."

Another example of the Handbook's lack of narrow tailoring is the fact that it requires all applicants—regardless of the type of special event or number of participants—to obtain liability insurance and to indemnify the City from any liability. Specifically, the Handbook requires any permitted event to obtain "minimum coverage" of "[o]ccurrence-based general liability insurance or an equivalent form with a limit of not less than $1,000,000 per occurrence" and a "general aggregate limit . . . no less than two times the occurrence limit." Additionally, every applicant for a permit to assemble must sign the City's "Hold Harmless and Indemnification Agreement" which broadly indemnifies the City against "all liability, damages, actions, claims, demands, expenses, judgments, fees, and costs of whatever kind of character arising from, by reason of, or in connection with the special event." However, a federal appellate court has struck down nearly identical insurance and indemnification requirements because even if the "required coverage amounts were necessary in some cases, [the government] does not narrowly tailor its insurance requirement to those situations or to any objective characteristic of the" event despite the fact that "the location of [an event], its duration, and the number of participants might all affect the likelihood of an accident resulting in liability[.]"[21] Similarly, the indemnification requirement was not narrowly tailored because "existing tort and criminal law" were sufficient "to regulate the behavior of the permittees themselves."

Various other portions of the Handbook demonstrate that it is not narrowly tailored and places too great of a burden on First Amendment rights. For instance, the Handbook warns that "[b]reaches of the peace or criminal act by or against any participant may result in legal actions

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[19] *Shuttlesworth v. City of Birmingham*, 394 U.S. 147, 163 (1969) (Harlan, J., concurring).
[20] *Douglas v. Brownell*, 88 F.3d 1511, 1524 (8th Cir. 1996).
[21] *iMatter Utah v. Njord*, 774 F.3d 1258 (10th Cir. 2014).

against the organizer or individuals, including possible arrest or prosecution." However, it is well-settled law that 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."[22] Additionally, the Handbook requires that "[a]ll signage must have prior approval" before any signs can be displayed. Signs are a protected "form of free expression" and requiring every sign to be displayed at a demonstration to obtain prior approval by the City is not narrowly tailored to any interest of the City.[23]

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In short, the City's Ordinances and Handbook fall far short of being narrowly tailored to a significant governmental interest and they should be repealed or revised.

As well as failing to be narrowly tailored, the Ordinance and Handbook also contain numerous provisions that violate the First Amendment by considering the content of the speech when determining whether to approve a permit application and by providing the City with unlawful discretion when determining which applications to approve. First, the Handbook states that when reviewing a permit application the City will consider whether the event will "promote[] the community as a whole." Determining whether an event will "promote[] the community as a whole" inherently requires the City to examine the message of the applicant and is an impermissible content-based consideration. The same provision also impermissibly grants too much discretion to the City as "a municipality may not empower its licensing officials to roam essentially at will, dispensing or withholding permission to speak, assemble, picket, or parade according to their own opinions regarding the potential effect of the activity in question on the 'welfare,' 'decency,' or 'morals' of the community."[24]

Next, the Handbook explains that one of the factors the City will consider when deciding whether to issue a permit is whether "[t]he event is reasonably likely to cause injury to persons/property, create a disturbance, cause disorderly conduct, or result in a violation of the law." However, permit schemes may not allow a city official to deny an application for a permit to demonstrate "based on his belief that the proposed parade might cause unlawful conduct."[25] Similarly flawed is

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[22] *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 920 (1982).
[23] *City of Ladue v. Gilleo*, 512 U.S. 43, 48 (1994).
[24] *Shuttlesworth v. City of Birmingham, Ala.*, 394 U.S. 147, 153 (1969).
[25] *Douglas v. Brownell*, 88 F.3d 1511, 1523 (8th Cir. 1996); *see also Hague v. Committee for Industrial Organization*, 307 U.S. 496, 502 & n. 1 (1939) (striking down a similar ordinance which authorized a public official to deny a permit application if the official thought the proposed event would result in unlawful activity).

the fact that the City considers an applicant's "performance regarding previous permit conditions" when reviewing their application. Considering past behavior when determining whether to grant or deny a permit application vests a municipality with too great discretion to survive constitutional scrutiny.[26]

Finally, the Ordinances and Handbook are flawed because they fail to "leave open ample alternative channels for communication of the information."[27] As discussed above, these rules require a permit before engaging in organized First Amendment activities on any of the streets, sidewalks, and public parks of the City of Spearfish. By denying anyone seeking to demonstrate in a traditional public forum within the City the ability to do so without engaging in the City's flawed permitting process, the City's Ordinances and Policy do not leave open ample alternative channels for communication since any alternative channels do not exist "within the forum in question."[28]

For all of these reasons, the ACLU has grave concerns about the First Amendment rights of Spearfish's citizens. We would like to collaborate with the City of Spearfish to revise its policies to ensure that both the City's interests and residents' First Amendment rights are protected. After you have reviewed this letter, please contact us at amalone@aclu.org and schapman@aclu.org to continue this dialogue.

Sincerely,

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[26] *See Kunz v. People of State of New York*, 340 U.S. 290, 294 (1951) (finding that an administrative official exercised unconstitutional discretion when curtailing free speech rights because the speaker's "meetings had, in the past, caused some disorder"); *Collin v. Chicago Park Dist.*, 460 F.2d 746, 754 (7th Cir. 1972) (finding that a city had imposed an unconstitutional prior restraint on speech when it denied a permit under the assumption that "because a person has resorted to violence on some past occasions that he will necessarily do so in the future").

[27] *United States v. Whitsitt*, 2022 WL 1091346, at *5 (D.S.D. Apr. 12, 2022) (quotations and citations omitted).

[28] *Id.* at *5 (explaining that the ample alternatives for communication must exist "within the forum in question").