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VIA EMAIL

Re: Proposed Revisions to City Ordinance Sections 1-9 and 21-29

Dear Mayor Mulvaney-Stanak and City Councilors:

We write as counsel to William Oetjen to express concerns with proposed amendments to Burlington's Code of Ordinances. *See* Proposed Amendments to Code of Ordinances of the City of Burlington §§ 1-9, 21-29 (Oct. 28, 2024) (collectively, "Proposed Amendments"). As detailed below, the Proposed Amendments present significant legal concerns with respect to both the Vermont and United States Constitutions as well as the City's charter authority.

I. Factual Background

The proposed amendment to § 1-9 of the Code of Ordinances of the City of Burlington (hereinafter, "City Code") adds a private right of action under a subsection (f) (hereinafter, "Private Right of Action Amendment" or the "Amendment"). The Private Right of Action Amendment establishes an unprecedented penalty for violation of a municipal ordinance: the ability for "any member of the public" to bring a lawsuit when they "suffer[] damage arising from any violation of *any* provision" in the City Code. "In case of anything declared by this code to be a civil or criminal offense done maliciously and with the intent to intimidate or harass another person because of, or in any manner reasonably related to, associated with, or directed toward" that person's membership within a defined protected class, a plaintiff shall recover presumed damages of at least $100, as well as attorneys' fees and costs. The Private Right of Action Amendment, moreover, is cumulative, subjecting

violators of the City Code not only to sanction by the government, but to punishment by "any member of the public," any number of times for any single offense. The proposed amendment to City Code § 21-29 adds a subsection (e) (hereinafter, "Graffiti Crowdsourcing Amendment" or the "Amendment"). The Graffiti Crowdsourcing Amendment creates an email address "or similar electronic means" for members of the public to report violations of § 21-29.

II. The City Lacks Authority to Enact the Private Right of Action Amendment.

Neither the State of Vermont nor the Burlington City Charter provides the City the power to enact the Private Right of Action Amendment. Because the City lacks authority under its current charter, passage of the Amendment would be *ultra vires* and may subject the City to legal liability.

As the Council is certainly aware, Vermont follows Dillon's Rule, meaning that the City "possesses only such powers or rights as are expressly granted to it by the [state] Legislature." *City of Montpelier v. Barnett*, 49 A.3d 120, 129 (2012) (quoting *E.B. & A.C. Whiting Co. v. City of Burlington*, 175 A. 35, 42 (1935)). Under Dillon's Rule, "cities only have the authority to prescribe a private right of action when specifically permitted to do so by state law." *Id.* at 129–30. Any ambiguity as to whether a city has been granted a specific power is resolved against the municipality. *E.B. & A.C. Whiting Co.*, 175 A. at 42 ("The general rule is that the charter of a municipal corporation is to be strictly construed against it; the presumption being that the Legislature granted in clear and unmistakable terms all that it intended to grant."); *see also Valcour v. Vill. of Morrisville*, 158 A. 83, 86 (1932) ("[I]f any fair, reasonable, substantial doubt exists concerning [a grant of power,] it must be resolved against the [municipality], and its power denied.").

The Burlington City Charter and state law provisions cited in the Private Right of Action Amendment do not support the City's authority to enact the Amendment. Vermont law enumerates 30 distinct municipal powers, 24 V.S.A § 2291; the Amendment purports to rely on the City's authority to define public nuisance and to provide penalties for violation of any ordinance, *id.* §§ 2291(14)-(15). However, neither subsection grants a city the authority to create a private right of action.[1] Even if the law is vague on the City's authority to enact a private cause of action, it is important to recognize that ambiguity in the authorizing law is generally resolved against a municipality. *See Valcour*, 158 A. at 86.

[1] Tellingly, the City Code does not presently include a private right of action anywhere within its numerous rules.

To the extent the authority to pass the Private Cause of Action Amendment rests on the City's Charter, that authorization appears to be misplaced. While Section 3-49 of the Charter provides that the City Council may "alter, amend, or repeal … ordinances" including by "provid[ing] penalties for the breach thereof" but it may not pass ordinances that are "repugnant to the Constitution or the laws of the State . . . ," *see* 24 App. V.S.A. § 3-49. As discussed below, the creation of a private right of action such as the one in the Amendment violates both the U.S. and Vermont constitutions, *see infra* Section III(b).

Even to the extent that Section 3-54 does authorize some form of a private cause of action—although it is worth noting that Section 3-54 on its face only defines *liability*, not *enforcement*—liability still only exists if a person sustains "damage as a direct result of [an ordinance] violation." Even though the Private Right of Action Amendment ostensibly creates $100 in presumed damages that does not satisfy Section 3-54's requirement that the damages be the "direct result" of an ordinance violation. To make matters worse, the Vermont Supreme Court has opined that an individual lacks standing to sue for a public nuisance. *See Parker v. City of Milton*, 169 Vt. 74, 78 (1998). Public damages on their face are not personal damages. In short, while the City certainly has authority to prosecute ordinance violations, it does not have authority to delegate that authority to private individuals.

III. The Proposed Amendments Run Afoul of the First Amendment to the U.S. Constitution and Chapter I, Article 13 of the Vermont Constitution.

The First Amendment to the U.S. Constitution and the Vermont Constitution at Chapter I, Article 13 coextensively protect the right of individuals in Vermont to speak and express themselves freely. The Proposed Amendments are an affront to those rights, and ought to be rejected.

A. Creation of a Private Right of Action Does Not Exempt the City from Liability for Passing an Unconstitutional Amendment to an Ordinance.

Here, the creation of a private right of action does not and cannot insulate the City from suit for violations of the Federal Constitution under 42 U.S.C. § 1983, which provides that state and municipal governments may be sued for violations of constitutional rights. While it is true that the First Amendment only applies to government regulation of speech, what constitutes government regulation, or "state action" for the purposes of a 1983 suit, is broadly defined in the free speech context.

The Supreme Court has repeatedly held that "the application of state [or municipal] rules of law in state [or municipal] courts in a manner alleged to restrict First Amendment freedoms constitutes 'state action' under the Fourteenth Amendment." *Cohen v. Cowles Media Co.*,

501 U.S. 663, 668 (1991); *see also New York Times Co. v. Sullivan*, 376 U.S. 254, 265 (1964); *N. A. A. C. P. v. Claiborne Hardware Co.*, 458 U.S. 886, 916 (1982); *Cardtoons, L.C. v. Major League Baseball Players Ass'n*, 95 F.3d 959, 968–69 (10th Cir. 1996) (municipal laws that "involve application of a state [or municipal] statute" that "imposes restrictions on [a parties'] right to free expression" will implicate the "state action requirement of [a] First Amendment claim."). Other courts have extended the Supreme Court's logic, finding that "enactment of an ordinance which has a chilling effect on speech is sufficient, without more, to constitute state action under § 1983." *Pac. Frontier, Inc. v. City of St. George*, No. 2:04-CV-780-TC, 2005 WL 3334749, at *5 (D. Utah Dec. 7, 2005).

Likewise, the enactment of the Private Right of Action Amendment would be anathema to the Vermont Constitution, which provides, *inter alia*, affirmative rights to "freedom of speech, and of writing and publishing … sentiments, concerning the transactions of government." VT Const. ch. 1, art. 13. The proposed Amendment seeks to curtail those rights, making the City vulnerable to a lawsuit for the same. *See Mazdabrook Commons Homeowners' Ass'n v. Khan*, 210 N.J. 482, 492 (2012) (finding New Jersey city liable for violations of free speech rights enshrined in state constitution, even though law was enforced through private cause of action).

B. The Private Right of Action Amendment is Likely Overbroad, Vague, and Viewpoint Discriminatory in Violation of the U.S. and Vermont Constitutions.

Because the City's enactment of the Private Right of Action Amendment would subject it to the possibility of suit, *see supra* Section III(A), the City would face constitutional challenges in court. Each of the three constitutional issues described below applies similarly under both the Vermont and United States Constitutions.

First, the Amendment is substantially overbroad on its face, meaning that "it prohibits a substantial amount of protected speech," *United States v. Williams*, 553 U.S. 285, 292 (2008). Speech that is personally offensive—or even upsetting to the majority of Burlingtonians—is plainly protected by the First Amendment. *See Snyder v. Phelps*, 562 U.S. 443, 458 (2011) ("If there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable."). In other words, harassing or intimidating speech is not *de facto* constitutionally unprotected just because it is undesirable—such speech must fall into one of several enumerated categories of unprotected speech to be proscribable. For instance, "intimidating" speech, on its own, cannot be curtailed by the government, though the Amendment seeks to do just that. By contrast, a "true threat," which constitutes not only "intimidation," but intimidation accompanied by additional requirements, not least of which is a subjective *mens rea*. *See Counterman v. Colorado*, 600 U.S. 66 (2023).

The Amendment is also unconstitutionally vague because it "fails to provide people of ordinary intelligence a reasonable opportunity to understand what conduct is prohibited" and "authorizes or encourages arbitrary [and] discriminatory enforcement." *Hill v. Colorado*, 530 U.S. 703, 732 (2000). It is entirely unclear how the terms "maliciously" and "with intent to intimidate or harass another person… in any manner reasonably related to" the enumerated characteristics are defined. Proposed City Code § 1-9(f). Likewise, it is impossible to discern what constitutes "association with or support for individuals" who possess the listed characteristics. *Id.* Worse yet, in many cases—such as violations of City Code § 21-29—determining the meaning of this language will require a value judgment on the content of pure speech. *See generally Reed v. Town of Gilbert*, 576 U.S. 155, 163–64 (2015). If the Amendment depends on the perceived value of controversial speech, an ordinary person cannot adequately predict what conduct is truly prohibited. The proposed Amendment furthermore encourages arbitrary and discriminatory enforcement by delegating enforcement of an already ambiguous law to private citizens, who are incentivized to bring lawsuits against their neighbors by the prospect of winning both nominal and actual damages, attorneys' fees, and other costs, *see* Proposed City Code § 1-9(f).

Finally, the Amendment is not only a content-based restriction on speech—the Amendment clearly and unambiguously seeks to punish speech based on how disfavored content makes others feel—but also viewpoint discriminatory. Viewpoint discrimination renders a law presumptively unconstitutional. *See R.A.V. v. City of St. Paul*, 505 U.S. 377 (1992) (holding that laws cannot selectively penalize speech based on the ideas expressed, thus hate crime ordinance was constitutionally invalid because it targeted hateful viewpoints). The Amendment deputizes the public to silence unpopular and controversial viewpoints, including core political speech, on the City's behalf. This the City cannot do without running afoul of the First Amendment.

C. The Private Right of Action Amendment and Graffiti Crowdsourcing Provision Encourage Unconstitutional Selective Enforcement.

As explained, *supra*, the Private Right of Action Amendment is unconstitutionally vague because it encourages arbitrary and discriminatory enforcement. But even a facially valid ordinance, like the Graffiti Crowdsourcing Amendment, which gives sharper teeth to City Code § 21-29, may be unconstitutionally enforced when an individual is "selectively treated" and that "selective treatment was based on impermissible considerations such as . . . intent to inhibit or punish the exercise of constitutional rights." *LaTrieste Rest. & Cabaret Inc. v. Village of Port Chester*, 40 F.3d 587, 590 (2d Cir. 1994); *see also Frederick Douglass Found., Inc. v. District of Columbia*, 82 F.4th 1122 (D.C. Cir. 2023) (allowing a free speech

selective enforcement claim against the District of Columbia when individuals were prosecuted for protest activity advocating that "Black Pre-Born Lives Matter" but those advocating that "Black Lives Matter" were not). Given that the City has previously engaged in selective enforcement of an otherwise neutral ordinance, we raise anew concerns that the Proposed Amendments will not just encourage, but ensure, arbitrary and discriminatory enforcement against disfavored viewpoints.

IV. Conclusion

While the City's goals of addressing harmful conduct and fostering inclusivity are laudable, the Proposed Amendments are not the right way to address those concerns and should not be passed because they infringe on fundamental First Amendment and Vermont constitutional rights.

Sincerely,

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[2] Clinic Students Alexander Venditti, Gregory Jameson, Jae Hyung "John" Seo, and Grace Braider drafted portions of this letter. The Cornell Law School First Amendment Clinic is housed within Cornell Law School and Cornell University. Nothing in this letter should be construed to represent the views of these institutions, if any.