AMERICAN CIVIL LIBERTIES UNION FOUNDATION
New Jersey

P.O. Box 32159
Newark, NJ 07102

Tel: 973-642-2086
Fax: 973-642-6523

info@aclu-nj.org
www.aclu-nj.org

LIZA WEISBERG
Supervising Attorney

lweisberg@aclu-nj.org
973-854-1705

September 12, 2025

VIA EMAIL

Stephen P. Wolsky, West Caldwell Township Council President
Joseph Tempesta Jr., Mayor of West Caldwell
30 Clinton Road
West Caldwell, NJ 07006
swolsky@westcaldwell.com
jtempesta@westcaldwell.com

Re: Unconstitutionality of Ordinance No. 1898

Dear Council President Wolsky and Mayor Tempesta:

The American Civil Liberties Union of New Jersey has learned from West Caldwell residents about Ordinance No. 1898, which is scheduled to face a vote at the upcoming meeting of the Township Council on September 16, 2025. We write to advise you that the Ordinance suffers several serious constitutional infirmities and to urge you to withdraw consideration of the Ordinance.

We highlight here certain prominent areas of constitutional concern, but caution that the Ordinance presents additional flaws. We would welcome the opportunity to discuss these issues with you.

I. Legal Background

Ordinance No. 1898 ("the Ordinance") applies to events in "'public places' historically associated with the free exercise of expressive activities, such as streets, sidewalks, and parks." *United States v. Grace*, 461 U.S. 171, 177 (1983). These places "are considered, without more, to be 'public forums.'" *Id.*; *Hague v. Comm. for Indus. Org.*, 307 U.S. 496, 515 (1939) ("[S]treets and parks . . . have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions."). Public fora occupy a "'special position in terms of First Amendment protection,' . . . [in that] the government's ability to restrict expressive activity 'is very limited.'" *Boos v. Barry*, 485 U.S. 312, 318 (1988).

An ordinance that imposes a permitting scheme and fee requirements "'before authorizing public speaking, parades, or assemblies' in traditional public fora 'is a prior restraint on speech' and therefore subject to a heavy presumption against its validity." *Nationalist Movement v. City of*

York, 481 F.3d 178, 183 (3d Cir. 2007) (quoting *Forsyth County v. Nationalist Movement*, 505 U.S. 123, 130 (1992)). Such a prior restraint will be found constitutional only if it does not "delegate overly broad licensing discretion to a government official." *Forsyth County*, 505 U.S. at 130. In addition, any restriction on "the time, place, and manner of speech must not be based on the content of the message, must be narrowly tailored to serve a significant governmental interest, and must leave open ample alternatives for communication." *Id.* Content-based restrictions generally "cannot be tolerated under the First Amendment." *Regan v. Time, Inc.*, 468 U.S. 641, 648-49 (1984).

Notably, the New Jersey Constitution's protections for free expression are even stronger and broader than the First Amendment's. Under the New Jersey Constitution, "[e]very person may freely speak, write and publish his sentiments on all subjects, being responsible for the abuse of that right. No law shall be passed to restrain or abridge the liberty of speech or of the press." *N.J. Const.* art. I, ¶ 6. This affirmative provision is "broader than practically all others in the nation," *Green Party of N.J. v. Hartz Mountain Indus., Inc.,* 164 N.J. 127, 145 (2000), and easily "more sweeping in scope than the language of the First Amendment," *State v. Schmid*, 84 N.J. 535, 557 (1980). It is fortified and enhanced by a sister provision protecting the right of New Jerseyans "freely to assemble together, to consult for the common good, to make known their opinions to their representatives, and to petition for redress of grievances," *N.J. Const.* art. I, ¶ 18. Accordingly, our courts have extended constitutional protection to expressive activities that the First Amendment does not reach. *Schmid*, 84 N.J. at 558 (deviating from federal constitutional state-action doctrine to recognize protections against encroachment on free speech rights by certain private entities based on the unique language of the New Jersey Constitution).

* * *

The provisions discussed in the following sections run afoul of the robust First Amendment protections that apply to speech in public fora and the unique guarantees of the New Jersey Constitution.

II. Reimbursement for Police Services and Other Costs

The Ordinance's reimbursement requirements are glaringly unconstitutional. They require permit applicants to agree to "reimburse the Township for any reasonable and foreseeable expenses incurred by the Township resulting from [an] event, including but not limited to police service, setup and cleanup costs." § 22-3.6(f). The necessity of police services—to be furnished at an extra-duty rate with a four-hour minimum—is a determination confined to the discretion of the Chief of Police. *Id.* The ordinance also mandates reimbursement for the "use of Township assets" and for "Extraordinary Costs," § 22-3.6(g), defined as "[a]ny costs incurred by the Township that, at the Township's sole discretion, has been determined to be unanticipated, excessive or unduly burdensome to the Township," § 22-3.3.

First, security and maintenance services are basic public functions and they serve no higher purpose than enabling the exercise of constitutional rights. "It is society that benefits by the free exchange of ideas, not only the person whose ideas are being shared. [Thus], it is society that should bear the expense, however great, of guaranteeing that every idea, no matter how

offensive, has an opportunity to present itself in the marketplace of ideas." *Invisible Empire Knights of the KKK v. City of West Haven*, 600 F. Supp. 1427, 1434 (D. Conn. 1985). For this simple reason alone, "[t]he cost of police protection may not be imposed on those who wish to exercise their right to freedom of expression." *Invisible Empire of the Knights of the KKK v. Mayor of Thurmont*, 700 F. Supp. 281, 286 (D. Md. 1988).

In addition, this variety of police reimbursement obligation is an "unconstitutional content-based fee." *City of York*, 481 F.3d at 185. While, "[a]t first blush, a provision that charges for the policing of an event seems like a content-neutral restriction because it serves a purpose unrelated to content," the U.S. Supreme Court has "dispelled any such idea." *Id.* at 185 n.7 (citing *Forsyth County*, 505 U.S. at 134). In reality, "[t]he broad language of the reimbursement provision clearly allows the City to charge a speaker not only for costs rightfully associated with its event, but with numerous other, content-based, costs." *Id.* at 185. For instance, "the City would incur expenses planning for the public's reaction to the speech, making available the necessary resources to contain potential counter-demonstrators, providing an appropriate level of police presence to control and pacify counter-demonstrators, and generally protecting the speaker." *Id.* at 185-86. And all of these measures "necessarily require a consideration of the content of the proposed speech and the anticipated reaction of the public." *Id.* at 186. They cannot be "countenanced" without "ignoring precedent of long standing holding that speech cannot be burdened because of the reaction of others." *Id.* (citing *Terminiello v. Chicago*, 337 U.S. 1, 5 (1949); *Schneider v. New Jersey*, 308 U.S. 147, 162 (1939)).

What's more, reimbursement policies of the type found here are particularly "offensive to the First Amendment" because a permit applicant who agreed to it "would have no way of knowing the scope of the liability to which it might be subjecting itself." *Id.* The Ordinance purports to burden an applicant with only foreseeable costs, but even an applicant who "can plan for the level of participation by members of its organization . . . simply cannot accurately anticipate the actions of others or the anticipated reaction of the police." *Id.* To require a permit applicant to hand over a blank check before speaking—that is, to "agree to pay this unquantified fee [] which is based substantially on the anticipated and actual reaction of others"—represents "an unconstitutional chilling of speech." *Id.* It would be untenable even if the fee were "calculated with scrupulous precision by a battalion of cost accountants." *Id.* (quoting *Church of the Am. Knights of the KKK v. City of Gary*, 334 F.3d 676, 681 (7th Cir. 2003)).

Relatedly, under the Ordinance, the Township has unfettered discretion to decide what funds and resources to allocate to an event and thus how much to charge the speaker. "In deciding how best to police the event and charge the speaker, the City is given unlimited discretion which could easily be used to punish (or intimidate) speakers based on the content of their messages." *Id.* at 186-87. For example, the "Extraordinary Costs" the Township may choose to levy against a speaker have no discernible or coherent boundaries, and can include "any costs" that fit a vague, flexible, and circular definition (i.e., those that, "at the Township's sole discretion," are considered "to be unanticipated, excessive or unduly burdensome to the Township."). Likewise, the Township is free to expend any security, setup, and cleanup costs it deems reasonable, and then to saddle the speaker with the bill. "Given the substantial expense that could be levied upon a speaker, and the almost limitless possibility of abuse, it is an understatement to conclude that this provision chills constitutionally-protected speech." *Id.* at 187.

Finally, the reimbursement provisions contain no exception for indigency and thus risk driving poorly financed speakers out of the marketplace of ideas. Organizations with modest budgets or groups of loosely affiliated individuals united by shared values have an affirmative right to assemble and speak; that right cannot be confiscated based on an inability to afford police fees, cleanup costs, and other unspecified, unquantified, and unknowable expenses. *See Mayor of Thurmont*, 700 F. Supp. at 286 ("[T]he Town gave no indication that the reimbursement condition would be waived or modified for indigents. This aspect of the condition is also an unconstitutional restraint on free speech.").

New Jersey courts have taken great care to ensure that rights are not granted or denied based on relative wealth. *See, e.g.*, *S. Burlington Cnty. N.A.A.C.P. v. Mount Laurel Township*, 67 N.J. 151 (1975) (right to affordable housing); *Abbott v. Burke*, 119 N.J. 287 (1990) (holding that the state had to correct the disparity of funding for education between poor and wealthy districts that was created by linking school funding to property taxes). The *Mount Laurel* decision is of special significance here. In that case, the New Jersey Supreme Court held that a municipality's regulatory powers could not be implemented to exclude poor persons from its benefits. Rather, the Court explained, the municipality must safeguard the rights and needs of all people regardless of their economic status. 119 N.J. at 178-79. The same principles apply here. Public fora do not belong behind velvet ropes. They must remain accessible to all.

III. Insurance Requirements

For several similar reasons, insurance requirements like the ones involved here[1] are unconstitutional and routinely struck down.

As an initial matter, the requirement operates as a de facto ban on speech for any group unable to afford the insurance, and the Ordinance contains no exception based on financial burden. It thus violates the bedrock principle that free speech must be "available to all, not merely to those who can pay their own way." *Murdock v. Commonwealth of Pennsylvania*, 319 U.S. 105, 111 (1943).

Regardless of financial status, some speakers may simply be unable to secure an insurance policy because underwriters are unwilling to offer them one. "In denying an application for an insurance policy, brokers or underwriters often consider political beliefs of those who have applied for insurance coverage, the likelihood of adverse publicity to the insurance company, the lack of business experience of the group, and other invidious or irrelevant factors." *E. Conn. Citizens Action Grp. v. Powers*, 723 F.2d 1050, 1056 n.2 (2d Cir. 1983). In this way, insurance requirements are a backdoor for impermissible content- and viewpoint-based discrimination. *See Van Arnam v. Gen. Servs. Admin.*, 332 F. Supp. 2d 376, 396-97 (D. Mass. 2004) ("I have concluded that a private insurer would apply content-, speaker-, and viewpoint-based criteria in determining whether to offer event liability insurance and, if so, how much to charge.") (collecting cases); *E. Conn. Citizens Action Grp. v. Powers*, 723 F.2d at 1056 n.2 (insurance companies often consider factors such as political beliefs, the likelihood of adverse publicity to

[1] The Ordinance requires a permit applicant to submit proof of $2,000,000 in general liability insurance, $2,000,000 in auto liability insurance, and workers' compensation. § 22-3.14.

the insurance company, and the organization's lack of business experience in deciding whether to accept or reject applications for insurance coverage); *Collin v. Smith*, 578 F.2d 1197, 1208 (7th Cir. 1978) (insurance is typically unavailable to those controversial groups as to which the municipality's interest in having insurance would presumably be the greatest).

Even if an insurance requirement in some form could survive constitutional scrutiny, the amounts set forth in the Ordinance are arbitrary and excessive. *See iMatter Utah v. Njord*, 774 F.3d 1258, 1269 (10th Cir. 2014) ("Utah must offer *some* evidence that this amount [minimum coverage of $1,000,000 per occurrence and $2,000,000 in aggregate], and not some lesser amount, is necessary."); *E. Conn. Citizens Action Grp.*, 723 F.2d at 1057 ("[N]o basis has been offered for the amount of coverage required."); *Green Party of N.J.*, 164 N.J. at 157-58 ("[T]his record fall[s] far short of demonstrating that the insurance requirements posed [of $1,000,000] . . . are required to achieve legitimate . . . objectives"). The exorbitant insurance requirements in the Ordinance are without any trace of justification and bear no relation to the government's liability risks for a particular event. They thus closely resemble the legions of insurance requirements struck down in the courts for failure of narrow tailoring, among other reasons. *See Courtemanche v. Gen. Serv. Admin.*, 172 F.Supp.2d 251, 268-69 (D. Mass. 2001) ("The lower courts have generally found mandatory insurance provisions to be unconstitutional prior restraints on speech under various prongs of the *Forsyth County* test.") (citations omitted).

Lastly, insurance requirements like the ones here are "substantially broader than necessary to achieve the government's interests" because they are duplicative of other forms of liability protection the municipality already enjoys. *Long Beach Lesbian & Gay Pride, Inc. v. City of Long Beach*, 17 Cal. Rptr. 2d 861, 878 (Cal. Ct. App. 1993) (quoting *Ward v. Rock Against Racism*, 491 U.S. 781, 802 (1989)). These protections include Tort Claims Act legislation, *see id.* at 340, and standard, preexisting liability insurance arrangements, *See Mayor of Thurmont*, 700 F. Supp. at 284. Likewise, courts have struck down insurance requirements after concluding that the government's interests could be served less restrictively by applying ordinary civil and criminal sanctions to wrongdoers. *See, e.g.*, *iMatter Utah*, 774 F.3d at 1271 ("Utah has offered no evidence that its existing tort and criminal law is insufficient to regulate the behavior of the permittees"); *E. Conn. Citizens Action Grp.*, 723 F.2d at 1057; *Collin*, 578 F.2d at 1209; *Lewis v. Wilson*, 253 F.3d 1077, 1080 (8th Cir. 2001).

The ACLU of New Jersey has a record of mounting successful litigation against unconstitutional insurance requirements. *See* Consent Order, *People's Org. for Progress v. Newark*, No. ESX-C-268-04 (N.J. Sup. Ct. 2004) (prohibiting Newark from enforcing any indemnification or insurance requirement against plaintiffs for any march, vigil, or demonstration). The insurance requirements in the Ordinance, like countless across the county and here in New Jersey, would not survive a constitutional challenge.

IV. Permit Fees and Advance-Notice Requirements

The Ordinance's permit scheme contains other similarly unlawful provisions.

First, the Ordinance appears to require payment of a fee and, in certain circumstances, an additional security deposit, without specifying the amount, the criteria used to determine the

amount, or the availability of any exceptions based on ability to pay.[2] Thus, on its face, these requirements seem to operate without "standards directing the setting of the fee, such that it [is] 'left to the whim of the administrator.'" *City of York.*, 481 F.3d at 183 (quoting *Forsyth County*, 505 U.S. at 133). Vesting "'such unbridled discretion in a government official'" is unconstitutional "because such power could be easily used in a political fashion." *Id.* Assuming the Township intends to establish a non-discretionary fee schedule before enforcing any fee requirement, the Township should be cautioned that only fees that are "nominal," not content-based, and narrowly tailored to recoup the actual and discrete cost of processing a permit application are likely to pass constitutional muster. *See City of York*, 481 F.3d at 183. And for the reasons outlined in the previous sections, any fee scheme must contain an exception based on ability to pay.

The Ordinance's thirty-day advance-notice requirement is also constitutionally infirm.[3] "Any notice period is a substantial inhibition on speech." *Am.-Arab Anti-Discrimination Comm. v. City of Dearborn*, 418 F.3d 600, 605 (6th Cir. 2005) (finding a thirty-day notice provision facially invalid). Indeed, the "simple knowledge that one must inform the government of his desire to speak and must fill out appropriate forms and comply with applicable regulations discourages citizens from speaking freely." *N.A.A.C.P., W. Region v. City of Richmond*, 743 F.2d 1346, 1355 (9th Cir. 1984). Because notice provisions tend to "stifle our most paradigmatic examples of First Amendment activity," courts take "special care" in assessing the government's stated justifications for them. *Am.-Arab Anti-Discrimination Comm.*, 418 F.3d at 605. In *American-Arab Anti-Discrimination Committee v. City of Dearborn*, for example, the Sixth Circuit rejected the "necessity" of a thirty-day notice period, citing evidence that other municipalities require substantially less time (average municipality: 36 hours; San Franscisco: 24 hours; Boston: 3 hours; Denver, Oakland, and Dallas: no notice requirement). 418 F. 3d at 606 n.2. The Sixth Circuit is far from alone. Other courts have also found thirty-day notice provisions invalid[4]; so too twenty-day[5], ten-day[6], seven-day[7], and five-day provisions[8].

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[2] The Ordinance gestures without citation to a fee schedule "set forth by resolution of the Township Council from time to time except as prohibited by law." § 22-3.8. It also requires applicants to deposit an unspecified "additional security deposit with the Township to cover any unanticipated or Extra Ordinary expenses" for events with anticipated attendance of more than one thousand people. *Id.*

[3] "An application for a demonstration permit shall be filed on forms provided by the Township Administrator not less than thirty (30) calendar days in advance of any proposed demonstration." § 22-3.9(a)(1).

[4] *See Long Beach Lesbian & Gay Pride, Inc.*, 17 Cal. Rptr. 2d at 871-72; *World Wide Street Preachers' Fellowship v. City of Grand Rapids*, No. 1:07-cv-57, 2007 WL 1462130, at *6 (W.D. Mich. May 16, 2007); *Sullivan v. City of Augusta*, 511 F.3d 16, 39 (1st Cir. 2007); *York v. City of Danville*, 152 S.E.2d 259, 264 (Va. 1967).

[5] *See City of Richmond*, 743 F.2d at 1355.

[6] *Hotel Emps. & Restaurant Emps. Union, Loc. 2850 v. City of Lafayette*, No. C-95-3519, 1995 WL 870959, at *3 (N.D. Cal. Nov. 2, 1995).

[7] *Grossman v. City of Portland*, 33 F.3d 1200, 1204 (9th Cir. 1994).

[8] *Douglas v. Brownell*, 88 F.3d 1511, 1524 (8th Cir. 1996).

The theoretical availability of a waiver to an advance-notice requirement, including for demonstrations in response to exigent or breaking events, is insufficient to save its constitutionality. In fact, that a municipality regularly relaxes its notice requirements can provide additional evidence of the requirements' lack of narrow tailoring. *See Am.-Arab Anti-Discrimination Comm.*, 418 F.3d at 607.

Moreover, the waiver language here is ripe for intrusions of content-based bias.[9] The Township Administrator retains complete discretion to "consider" applications filed less than thirty days ahead of a proposed demonstration, and, in this context, shall "consider" the exigency of "an event or occurrence sought to be protested." Because they "raise[] the spectre of selective enforcement on the basis of the content of speech," discretionary waiver provisions like this one are frequently facially invalidated. *City of Richmond*, 743 F.2d at 1357 (City Council authorized to waive application deadline "at its 'discretion' . . . 'if it finds unusual circumstances'"); *See also Mardi Gras of San Luis Obispo v. City of San Luis Obispo*, 189 F. Supp. 2d 1018, 1033-34 & n.16 (C.D. Cal. 2002) (late-filed applications could be considered "if good cause is shown"); *SEIU, Local 660 v. City of Los Angeles*, 114 F. Supp. 2d 966, 973-74 (C.D. Cal. 2000) (there were "no rules governing the exercise of the Board's discretion" in waiving application deadline); *City of Danville*, 152 S.E.2d at 264 (late-filed applications could be considered "where good cause is shown").

A "good cause" waiver, like that in the Ordinance, is also an "inadequate" device to cure a lengthy advance-notice requirement because it shoulders speakers with the burden of convincing the relevant authority that the vague and subjective standard is met. *Sullivan v. City of Augusta*, 511 F.3d 16, 40 (1st Cir. 2007). In *Sullivan*, for example, the First Circuit found that this device "curtails an applicant's free speech rights, both because of the additional effort the applicant need make in order to claim those rights and the risk that the City Manager may not realize from the phrase 'good cause' that many applicants will be entitled, routinely, to a shortening of the period." *Id.* The court thus held that a thirty-day notice requirement was unconstitutional, and a good-cause exception could not disturb that conclusion. *Id.* The same is true here. [10]

* * *

[9] "The Township Administrator, where good cause is shown therefore, shall have the authority to consider any application hereunder which is filed less than thirty (30) days in advance of any proposed demonstrations. In so doing, the Township Administrator shall consider the exigency of an event or occurrence sought to be protested." § 22-3.9(e).

[10] This is not to suggest that an exception to an advance notice requirement has no place. On the contrary, if a municipality insists on enforcing (and can legally justify) a permit scheme with an application deadline, such an exception is essential. To "comport with the First Amendment, a permitting ordinance must provide some alternative for expression concerning fast-breaking events." *Santa Monica Food Not Bombs v. City of Santa Monica*, 450 F.3d 1022, 1047 (9th Cir. 2006). But the exception is insufficient to render lawful a notice requirement that, due to its length, is otherwise unconstitutional. And an exception that is vague or discretionary is, of course, independently objectionable on constitutional grounds.

The Ordinance is unconstitutional and should not face a vote. Fundamentally and fatally, it "treats the First Amendment as a privilege to be bought rather than a right to be enjoyed." *City of West Haven*, 600 F. Supp. at 1434.

In light of the clarity of the law in this area, I trust that the Township will not consider the Ordinance further. The Township risks liability if it does not. I would be very grateful for a written response confirming the Township's plans to withdraw the Ordinance. Please do not hesitate to reach out should you wish to discuss these plans or if I can be of any assistance.

Sincerely,

Liza Weisberg
Supervising Attorney

cc: Councilman Joseph P. Cecere
Councilman Michael Docteroff
Councilwoman Kathy L. Canale
Councilman Michael Crudele
Councilman Robert Schott
Paul Jemas, Esq.