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New England First Amendment Coalition

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SENT VIA EMAIL

Alan Casavant, Mayor (acasavant@biddefordmaine.org)
James Bennett, City Manager (jbennett@biddefordmaine.org)
John McCurry, City Council President (john.mccurry@biddefordmaine.org)

October 16, 2017

**RE: Ordinance No. 2017.103
Delivery of Unsolicited Printed or Written Materials**

Dear Mayor Casavant, City Manager Bennett and Council President McCurry:

I am writing on behalf of the New England First Amendment Coalition, a regional non-profit organization that advocates for freedom of the press and government transparency. Our coalition includes members of the media, First Amendment attorneys, academics and other proponents of the public's right to know.

NEFAC is deeply troubled by a recently passed ordinance that limits the delivery of unsolicited printed or written materials. We urge you to rescind or substantially modify Ordinance 2017.103, and to resume your joint efforts with local press toward a collaborative agreement.

We recognize the concerns the ordinance addresses and appreciate the need to keep your neighborhoods clean. We oppose, however, the prescribed means of addressing these concerns and respectfully recommend an alternative approach. This ordinance raises serious First Amendment concerns given its restrictions on the press and your constituents; the financial burden it places on newspapers and the City of Biddeford; and the impropriety of the intensive government involvement in private business operations this new ordinance demands.

Our chief concern is that the ordinance calls for information regulation and restriction in ways that are impermissible under the First Amendment. Courts have consistently struck down as violative of free speech and free press rights similar rules enacted by cities and towns across the country. Biddeford, like all cities, has a valid interest in preventing litter and protecting its aesthetics. However, as an Illinois court stated in a decision invalidating an anti-littering, press-implicating rule:

“Tossing a newspaper onto a private yard is different than tossing a discarded hamburger wrapper onto that yard.”

Biddeford does a disservice to newspapers, donor-supported charities, and community organizations in equating all freely delivered printed or written material with unsightly debris that ought to be promptly discarded. More harmfully, it does so with regulations too burdensome and unreasonable to effectuate its purpose in a way that would pass constitutional review.

Second, the financial burden placed on media organizations and individuals is exorbitant and excessively punitive. It is important to bear in mind the reason non-sub-

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scription newspaper delivery is protected by the First Amendment: With the often prohibitive expense of subscriber-requested mail delivery, the long-standing tradition of freely distributing newspapers along a paper route is typically a publisher's sole means of mass communication. For many publishers, running afoul of the new rules — with attendant penalties, court costs, legal counsel expenses, city attorneys' fees, and undefined "relief" for the aggrieved, beyond licensing and renewal fees — could make continued operation untenable. Consider how easily a small community outfit could fold under the weight of even a single \$2,500 fine, to say nothing of the cumulative strain on ventures of all sizes bracing for indeterminate potential financial hits going forward. (Section 34-33 of the ordinance releases the City from liability for any opt-out list "errors or omissions," making especially egregious the steep price newspapers could pay for errors or omissions in list-based delivery and recovery procedures.)

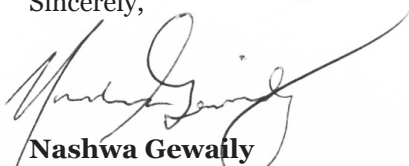
Third, the ordinance transfers a private business operation to the government while shifting expenses to the public. The bloated, redundant system it establishes is unnecessary, improper, and wasteful. The time, funds, and resources diverted from important conventional governance to manage the delivery lists of independent enterprises, license processing and monitoring, and revocation hearings before the City Council amount to unreasonable government involvement.

The City also monopolizes a specific type of communication by exempting itself from the ban on placing printed or written material in public spaces. Here, Biddeford anoints itself the sole arbiter of written communications in public fora: It grants itself blanket pre-approval to place notices on drivers' windshields en masse, but bans a resident's written objections to those notices (or, say, a friendly note from a neighbor) placed on the same windshields, on the same public streets. Moreover, it betrays Biddeford's stated purpose in combatting litter: Printed papers circulated in public crumple and scatter just the same without regard to their authors. Coupled with the onerous burden placed on newspapers, these inconsistencies and needless impositions further separate the ordinance from the more reasonable, narrowly tailored measures the First Amendment requires.

In light of the above, we strongly encourage you to rescind or substantially modify Ordinance 2017.103 and instead work toward an amicable agreement with local media publishers. Partnering with primary distributors to internally implement or improve opt-out, delivery suspension, and clean-up mechanisms better serves the interests of your residents as well as the press.

We welcome the opportunity to assist the City and local publishers in this matter. We hope that Biddeford can find an effective, suitable alternative that respects the interests of all parties.

Sincerely,



Nashwa Gewaily
NEFAC Media and First Amendment Attorney



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