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New England First Amendment Coalition

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SENT VIA EMAIL TO OAG.GENERALCIVIL@MAINE.GOV, GOVERNOR@MAINE.GOV

RE: **Objections to LD 130: “An Act To Create Appropriate Standards for the Secretary of State To Follow When Approving the Assignments of Vanity Registration Plates”**

May 17, 2021

Dear Attorney General Frey,

I’m writing on behalf of the New England First Amendment Coalition, the region’s leading advocate for First Amendment freedoms and the public’s right to know about its government.¹

The Maine Transportation Committee earlier this month voted to advance LD 130, legislation that would give the Secretary of State broad power to ban or recall vanity plates deemed, among other things, “vulgar.”² While the state is not obligated to provide a vanity plate program, once it opens a forum to citizen speech it should not discriminate against constitutionally-protected expression even if vulgar or otherwise offensive.

We believe that at least some of the restrictions on speech imposed by LD 130 are unconstitutionally broad and vague. The restrictions will undoubtedly lead to subjective and inconsistent interpretation at local DMVs as well as future litigation against the state. The bill is also an ineffective way to further the government’s interest in protecting minors from offensive expression. It is our hope that despite the legislation’s passage in committee, you will deem the bill unconstitutional — or at the very least, too problematic — and advise that it not be signed into law.

While this letter will summarize our primary concerns with the bill, we encourage you to review a recent order in a Rhode Island case involving a similar vanity plate program.³ The order provides valuable guidance on questions of forum analysis and government speech.

As federal judge Mary S. McElroy wrote in that order blocking Rhode Island officials from enforcing their own content-based vanity plate policy: “Private speech in a nonpublic forum may still be regulated by the government. However, it may not be prohibited in a way that is either unreasonable or content based. Any regulation or implementation of a regulation must be viewpoint neutral.”

“The very essence of vanity plates,” Judge McElroy added, “is personal expression.”

Unconstitutionally Broad

LD 130 permits the Secretary of State to prohibit or recall any vanity plate that is “vulgar or obscene or constitutes racial or ethnic epithets;” consists “of language that encourages violence or may result in an act of violence or other unlawful activity;” describes “breasts, genitalia, the pubic area or buttocks or relates to sexual or eliminatory functions;” refers to “an intoxicant or drug;” or refers to “gender, gender identity, sexual orientation or disability status,” among other categories of speech.

Some of these categories lack First Amendment protection and may be rightfully prohibited by the state. Obscenity as defined in cases such as *Miller v. California*, 413 U.S. 15 (1973), is wholly exempt from constitutional protection. Incitement of violence is another category of speech outside First Amendment protected activity. So-called “fighting words” are to a limited degree outside constitutional protection as well.

But written into LD 130 are categories of speech that are protected by the First Amendment despite the likelihood of causing offense to others. Words that describe one’s gender or anatomy are protected speech. Profanity — regardless of individual sensibilities — is protected. Even certain references to drugs fall within First Amendment protection. While we believe these reasons alone should give you pause, it should also be noted that when coupled with other words and abbreviations these examples can become the most heavily protected of all expression: political speech.

As the U.S. Supreme Court said in *Texas v. Johnson*, 491 U.S. 397 (1989), “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.” If the state is to continue allowing its license plates to be used for the expression of ideas, it should not limit the ways those ideas are expressed based on its own judgment of what is or is not appropriate.

Unlikely to Be Interpreted Objectively and Consistently

Terms such as “vulgar” are vague in that they provide little clarity to the list of words that LD 130 restricts and in what context they can appear. Before the prior restrictions on vanity plates were lifted in 2015, residents regularly complained that DMV clerks were not consistently applying obscenity and incitement standards despite those standards having specific legal definitions. Decisions to issue vanity plates were being made subjectively and, in some cases, arbitrarily. Administrative guidance was often not provided.

Re-applying these prior restrictions while incorporating new ones based on vague terminology will be even more problematic. The letters “FK,” for example, can represent numerous words. Are those letters preceded by the word “GAS” automatically considered profane? Or could they mean “fake” as the electric car-driving plaintiff in the Rhode Island case claimed? Perhaps they are initials or an abbreviation used in the name of a local gas station. These are the types of considerations DMV clerks will be required to make under LD 130. We don’t believe these determinations can be made in an objective, consistent manner that doesn’t infringe on the First Amendment protected expression of Maine drivers.

Ineffective Means to Advance Governmental Interest

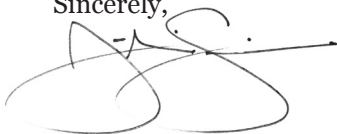
Secretary of State Shenna Bellows testified in support of vanity plate restrictions by citing the need to protect children from the offensive speech.⁴ Even assuming that protecting minors from seeing “vulgar” speech were a compelling governmental interest, the statute cannot be effective in accomplishing that goal. Most children in this case do not need the protection.

As Bellows acknowledged in our testimony: “The obscene plates are a minority. Mainers love their vanity plates with approximately 119,169 on the road today. While most Mainers show common sense and decency in their choice of slogans, at least 421 have not.” In other words, the concern over vanity plates involves less than one-half percent of all registrants in the program. Of the more than 1.5 million vehicles registered in 2020,⁵ the number of license plates LD 130 is targeting represents .028 percent. Offensive vanity plates are not overwhelming our roadways. Most Maine residents and their children are unlikely to ever see them.

But even if there were more objectionable plates being issued, LD 130 is not a narrowly tailored means to protect children from offensive expression. Citizens are free to display offensive messages outside their homes visible from the road or on a bumper sticker adjacent to their vehicle’s license plate. Children in cars are far more likely to encounter this expression than they are to see one of the 421 offensive vanity plates in question.

Thank you for considering our objections to LD 130. On behalf of the New England First Amendment Coalition, I welcome the opportunity to provide additional guidance on this legislation and any other bill implicating the First Amendment or the public’s right to know about government.

Sincerely,



Justin Silverman
Executive Director

¹ The New England First Amendment Coalition, a non-partisan non-profit organization, is led by some of the most esteemed attorneys, journalists and publishers in the region. Our Board of Directors includes Judith Meyer, executive editor at Sun Media Group, and Sigmund Schutz, attorney at Preti Flaherty in Portland. Please visit nefac.org to learn more about us and our leadership.

² See <https://legislature.maine.gov/bills/getPDF.asp?paper=SP0065&item=1&num=130>

³ See https://riaclu.org/sites/default/files/field_documents/decision_100220.pdf

⁴ See <http://legislature.maine.gov/legis/bills/getTestimonyDoc.asp?id=159481>

⁵ See <https://www.maine.gov/sos/bmv/stats/Reg20.pdf>