Offered in support of LD 289: An Act to Authorize the Secretary of State to Reject Certain Vanity License Plate Requests

Court Cases Upholding State Regulation of Vanity Plate Language

The State of Maine determined in 2015, based upon advice from Secretary of State Dunlap, that courts would not uphold limitations of any kind on characters or messages on vanity license plates. At the time rapidly developing opinions in the courts seemed to culminate with a US Supreme Court case: *Walker v. Texas Division, Sons of Confederate Veterans, Inc.* determining that license plates are government property and that government speech is not to be constrained by First Amendment rights.

The Secretary of State may have interpreted *Walker* as being limited to the design of Commemorative or Specialty license plates such as exist for veterans or the Barbara Bush Children's Hospital. Asking for limitations on language, in 2019, could be interpreted as criticism of the Secretary of State's opinion. That is not the intent of this document. However, the results of the absence of guidance on vanity plate content has had a dramatic, negative impact on many Maine citizens and the perception by noncitizens about the character of the State of Maine.

In 2016, a number of new cases offered compelling expansion and interpretation based upon *Walker* after Secretary of State demurred on offering a more carefully crafted regulation. Further, cases defined language on personalized or vanity license plates as a "limited public forum" or "nonpublic forum" where speech restrictions need only be "reasonable and viewpoint neutral." The most compelling review of language limitations is contained in *John T. Mitchell v. Maryland Motor Vehicle Administration* decided in October 2016. This case was based upon a *writ of certiorari* granted to review a series of decisions in lower courts to determine if there were any irregularities. The lower courts found that Maryland had denied MIERDA on a plate requested by Mr. Mitchell. Mierda is

Spanish for “shit, dirt or compost” and the Maryland Code of Regulations (COMAR 11.15.29.02 (D)) prohibited vanity plates containing “profanities, epithets, or obscenities.” At each lower proceeding determination it was found that Mitchell’s plate violated Maryland regulations and that the regulations are within bounds determined by the US Supreme Court for limited public or nonpublic fora and, as well, the determination was viewpoint neutral.

It is helpful to understand that in a traditional “public forum” the Supreme Court has defined such a forum as a “marketplace of ideas” or a place for full and free expression of ideas that must not be infringed. In the case of *Mitchell*, the findings of the Court of Special Appeals (the subject of the Writ of Certiorari) reasoned that the nature of vanity plates renders them incompatible with “meaningful ‘assembly and debate’ or other expressive activity.” As determined in Mitchell, these “terms suggest a depth of communication that exceeds the inherent limitations of a vanity plate, thus, demonstrating that Maryland did not intend to create a “public forum.”

Looking to another state, *Perry v. McDonald, 280 F.3d (2d Cir. 2001)*, analyzed Vermont vanity plate restrictions under the public forum doctrine. In *McDonald* the finding was that the government’s policy and practice and the nature of expression was incompatible in defining vanity plates as a public forum. The court identified five elements in its determination. First, license plates are an aid to vehicle identification. Second, the Vermont intent in issuing such plates is to raise revenue. Third, vanity plate expression is limited to a small number of characters and, fourth, the State may deny content that is “offensive or confusing to the general public.” And finally, “vanity plates are an unlikely means by which to engage in meaningful “assembly and debate’ or other expressive activity,” especially because of limited “size and shape” as well as by the State’s purpose of vehicle identification.

As was stated in *Mitchell*: "The prohibition of 'profanities, epithets, or obscenities' … relates reasonably to Marylands purpose of vehicle identification and revenue generation, which involves the public display of license plates. Because the State requires motorists to display license plates …, the public is exposed to the messages that appear on vanity plates. For better or worse, our society sets apart particular words as out-of-bounds; their utterance or display can be understood reasonably as indecent, or offensive, especially in the presence of minors." Further, "even though a witness to a vanity plate message will discern easily the vehicle owner as the speaker, because the speech takes place on government property and only with State permission, the message will be associated with the State. *McDonald, 280 F3d* at 169. 'The state has a legitimate interest in not communicating the message that it approves of the public display of offensive scatological terms [shit] on state license plates.' *id*., and it is reasonable, therefore, for Maryland to prohibit "profanities, epithets, or obscenities," content with which it does not wish to associate."

Viewpoint neutrality was mentioned early in this paper and it is important to clarify that in a nonpublic or limited public forum, government may not exercise viewpoint discrimination, i.e., targeting particular views expressed on a subject, for example "to discourage one viewpoint and advance another. *Perry Educ. Ass'n*, 460 U.S. at 49. The Maryland regulation only targets ""profanities, epithets, or obscenities" and not the speaker's viewpoint expressed with such terms.

On the issue of obscenities, *Miller v. California* (1973) established the "Miller Test" as the primary legal test for determining whether an expression constitutes "obscenity." If the so-called "three-prong obscenity test" establishes an

expression as obscene, it is not protected by the First Amendment to the US Constitution. The three parts to the test are:

1. Whether "the average person, applying contemporary community standards'" would find that the work, taken as a whole, appeals to the prurient interest.
2. Whether the work depicts or describes, in a patently offensive way, sexual content or excretory functions specifically defined by applicable state law.
3. Whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value.

The work is considered obscene if all three conditions are satisfied. Relevant to this issue is *Roth v. United States*, 354 U.S. 476 (1957) that provided the major basis used to determine if material is obscene and Constitutionally protected.

It would seem that *Mitchell, Miller, Roth and McDonald* establish ample grounds in multiple states for the State of Maine to establish regulations governing vanity plates prohibiting "profanities, epithets, or obscenities." These case precedents traced all the way to U.S. Supreme Court decision-making, should be able to develop defensible language satisfactory to the Secretary of State and Attorney General, if not the ACLU folks.

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