
HORWITZ

LAW PLLC

DANIEL A. HORWITZ
DANIEL@HORWITZ.LAW

4016 WESTLAWN DR.
NASHVILLE, TN 37209
WWW.HORWITZ.LAW
O: (615) 739-2888

LINDSAY E. SMITH
LINDSAY@HORWITZ.LAW

Jenny Charles
jennycharles@jisnashville.gov

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Transmitted via e-mail

Re: Unconstitutionality of Prohibiting Private Citizens from Using License Plate Scanners Installed on Private Property

Dear General Charles:

You have retained me to evaluate the constitutionality of BL2020-581, a proposed amendment to Section 13.08.080 of the Metropolitan Code of Nashville and Davidson County.¹ If enacted, BL2020-581 would permit certain additional law enforcement uses of license plate scanners, while otherwise making it “unlawful to operate any license plate scanner, regardless of the physical location of the scanning equipment” subject to specified exceptions. BL2020-581 is presently pending before the Metro Council, but it has not been enacted into law.

For the reasons detailed below, it is my opinion that, if enacted, BL2020-581 would violate the First Amendment as applied to private citizens to the extent that it prohibits private citizens from using license plate scanners that are installed on their own private property. Accordingly, unless modified to permit private use, BL2020-581 would be unconstitutional as applied to private citizens if it is ultimately enacted into law.

I. Background

At present, Sections 13.08.080(G)-(H) of the Metropolitan Code provide that:

- G. It is unlawful to operate any license plate scanner installed onto or within the public right-of-way, with the exception of uses that meet each of the following requirements:

¹ BL2020-581, Nashville and Davidson Co. Metro. Council (Tenn. 2020), <https://nashville.legistar.com/LegislationDetail.aspx?ID=4728844&GUID=036464F6-D379-41D0-ABF3-4F46B316C773>.

(1) The license plate scanner is used solely and exclusively in conjunction with a vehicle emissions sensor as part of an emissions inspection program authorized under local, state or federal law;

(2) The data from the license plate scanner and vehicle emissions sensor is used solely and exclusively for purposes of determining compliance with vehicle emissions standards and aggregating data in a manner which does not allow the identification of a person or persons;

(3) A determination by the vehicle emissions sensor that a vehicle identified by the license plate scanner is not in compliance with applicable emissions standards shall not lead to any penalty or punitive action against the registered vehicle owner;

(4) No fewer than two such license plate scanners shall be in operation within Davidson County at any given time; and

(5) Data that can be used to pair a specific vehicle's license plate number, VIN, or other unique identifier with a specific geographic location shall not be retained for more than one week.

H. Notwithstanding the foregoing, the provisions of this section shall not apply to the Nashville Electric Service, the Metropolitan Nashville Airport Authority, the Metropolitan Development and Housing Agency, and the Metropolitan Transit Authority.

NASHVILLE, TENN., CODE OF ORDINANCES §13.08.080(G)-(H) (2020), [https://library.municode.com/tn/metro_government_of_nashville_and_davidson_county/codes/code_of_ordinances?nodeId=CD_TIT13STSIPUPL_DIVIGERE_CH13.08S_TALSI#:~:text=%2D1%2D4.1\)-.13.08.,way%20requires%20metropolitan%20council%20approval.](https://library.municode.com/tn/metro_government_of_nashville_and_davidson_county/codes/code_of_ordinances?nodeId=CD_TIT13STSIPUPL_DIVIGERE_CH13.08S_TALSI#:~:text=%2D1%2D4.1)-.13.08.,way%20requires%20metropolitan%20council%20approval.)

Consequently, based on the above provisions, the Metropolitan Government is presently prohibited from using license plate scanners in most circumstances subject to specified exceptions.

BL2020-581, which is pending before the Metro Council, would amend Section 13.08.080(G) of the Metropolitan Code. In particular, if enacted, BL2020-581 would amend Section 13.08.080(G) by deleting the phrase, “It is unlawful to operate any license plate scanner installed onto or within the public right-of-way, with the exception of uses that meet each of the following requirements:”, and replacing it with the following:

“It is unlawful to operate any license plate scanner, regardless of the physical location of the scanning equipment, for the purpose of scanning license plates within the public rights-of-way, with the exception of those

that are located within or on a law enforcement vehicle and those employed for uses that meet each of the following requirements:”

See BL2020-581, Nashville and Davidson Co. Metro. Council (Tenn. 2020), <https://nashville.legistar.com/LegislationDetail.aspx?ID=4728844&GUID=036464F6-D379-41D0-ABF3-4F46B316C773>. Thus, although BL2020-581 would create a new exemption permitting the Metropolitan Government to operate license plate scanners that are “located within or on a law enforcement vehicle” and those employed for uses that meet specified requirements, BL2020-581 would otherwise ban the use of license plate scanners “regardless of the physical location of the scanning equipment, for the purpose of scanning license plates within the public rights-of-way” subject to the exceptions set forth in Section 13.08.080(G) and Section 13.08.080(H).

If enacted, a practical effect of BL2020-581 would be to prohibit private citizens from installing and using license plate scanners—even on their own private property. Specifically, by modifying the current prohibition against “license plate scanner[s] installed onto or within the public right-of-way” and extending it to “any license plate scanner, regardless of the physical location of the scanning equipment,” private citizens would be prohibited from operating license plate scanners in virtually all circumstances. By contrast, a private citizen’s use of a license plate scanner installed on private property is presently unrestricted by Metro Code Section 13.08.080(G), because definitionally, a “public right-of-way” is not private property.

II. First Amendment Rights Implicated by License Plate Scanners

The U.S. Supreme Court “has held that the creation and dissemination of information are speech within the meaning of the First Amendment.” See *Sorrell v. IMS Health Inc.*, 564 U.S. 552, 570 (2011). See also *Brown v. Entm’t Merchants Ass’n*, 564 U.S. 786, 793, n.1 (2011) (“Whether government regulation applies to creating, distributing, or consuming speech makes no difference.”); *Sandvig v. Sessions*, 315 F. Supp. 3d 1, 15 (D.D.C. 2018) (“The Supreme Court has made a number of recent statements that give full First Amendment application to the gathering and creation of information.”) (collecting cases); *Project Veritas v. Ohio Election Comm’n*, 418 F. Supp. 3d 232, 253 (S.D. Ohio 2019) (“The Supreme Court has generally recognized that ‘the creation and dissemination of information are speech within the meaning of the First Amendment.’”) (quoting *Sorrell*, 564 U.S. at 570). Cf. *Houchins v. KQED, Inc.*, 438 U.S. 1, 11 (1978) (“There is an undoubted right to gather news ‘from any source by means within the law’”) (quoting *Branzburg v. Hayes*, 408 U.S. 665, 681–82 (1972)).

The act of creating audiovisual records—whether due to the protected act of recording itself, or else, as a corollary First Amendment right—also generally receives First Amendment protection. See, e.g., *Animal Legal Def. Fund v. Wasden*, 878 F.3d 1184, 1203-04 (9th Cir. 2018) (finding that creating an audiovisual recording is speech because “[t]he act of recording is itself an inherently expressive activity”); *Am. Civil Liberties Union of Ill. v. Alvarez*, 679 F.3d 583, 595 (7th Cir. 2012) (“The act of making an audio or audiovisual recording is necessarily included within the First Amendment’s guarantee of speech and press rights as a corollary of the right to disseminate the resulting

recording.”); *Animal Legal Def. Fund v. Herbert*, 263 F.Supp.3d 1193, 1198 (D. Utah 2017) (collecting cases and noting that “it appears the consensus among courts is that the act of recording is protectable First Amendment speech.”); *Knight v. Montgomery Cty., Tennessee*, 470 F. Supp. 3d 760, 766 (M.D. Tenn. 2020) (“nationwide, there is a growing trend of courts adopting the view that video recording is indeed speech for First Amendment purposes.”). Cf. *Project Veritas Action Fund v. Rollins*, 982 F.3d 813, 832 (1st Cir. 2020) (noting “the decisions of several of our sister circuits that similarly have held that such recording warrants some degree of First Amendment protection as a type of newsgathering.”); *Massachusetts v. Oakes*, 491 U.S. 576, 591 (1989) (holding that “photography” is an activity that “ordinarily qualif[ies] for First Amendment protection.”); *Kaplan v. California*, 413 U.S. 115, 119 (1973) (“The Court has applied similarly conceived First Amendment standards to moving pictures, to photographs, and to words in books.”); *Smith v. City of Cumming*, 212 F.3d 1332, 1333 (11th Cir. 2000) (“The First Amendment protects the right to gather information about what public officials do on public property, and specifically, a right to record matters of public interest.”).

The First Amendment additionally protects the right to “read.” See, e.g., *Bd. of Airport Comm'rs of City of Los Angeles v. Jews for Jesus, Inc.*, 482 U.S. 569, 575 (1987) (listing “reading” as an example of a First Amendment-protected activity); *Armstrong v. D.C. Pub. Library*, 154 F. Supp. 2d 67, 75 (D.D.C. 2001) (referencing “protected First Amendment activities such as reading”); *Lubin v. Agora, Inc.*, 882 A.2d 833, 843 (Md. 2005) (“The First Amendment protects broadly the rights of individuals to read”); *NGC Theatre Corp. v. Mummert*, 489 P.2d 823, 827 (Ariz. 1971) (“reading within one’s home is, for example, protected by the First Amendment”); *Reynolds v. Mattson*, No. 2:07-CV-59, 2009 WL 2591638, at *1 (W.D. Mich. Aug. 19, 2009) (“reading religious books is protected under the First Amendment.”).

As detailed below, because BL2020-581’s prohibition on private citizens’ use of license plate scanners contravenes all of these First Amendment protected activities—and because it additionally abridges private individuals’ right to receive information—if enacted, BL2020-581 would violate the First Amendment as applied to private citizens.

III. Unconstitutionality of BL2020-581 As Applied to Private Citizens

As applied to private citizens’ use of license plate scanners installed on their own private property, there is little doubt that BL2020-581 would present serious First Amendment issues.² Cf. *Digital Recognition Network, Inc. v. Hutchinson*, 803 F.3d 952,

² The same cannot be said of government-imposed restrictions on the government’s *own* use of license plate readers. Although, to date, the U.S. Supreme Court has not decided whether, or to what extent, government entities have First Amendment rights, see *United States v. Am. Library Ass’n, Inc.*, 539 U.S. 194, 211 (2003) (finding that “[w]e need not decide this question” in case involving public libraries), many “courts have expressed doubt that the First Amendment’s protections apply at all to government actors,” at least when it comes to an issue such as the use of license plate readers. See generally *Mosdos Chofetz Chaim, Inc. v. Vill. Of Wesley Hills*, 701 F. Supp. 2d 568, 599 (S.D.N.Y. 2010). Cf. *Columbia Broadcasting System, Inc. v. Democratic National Committee*, 412 U.S. 94, 139 (1973) (Stewart, J., concurring) (“The First Amendment protects the press *from* governmental interference; it confers no analogous protection *on* the government”);

957 (8th Cir. 2015) (finding that license plate scanning “is ‘arguably affected with a constitutional interest,’ *Babbitt v. United Farm Workers Nat’l Union*, 442 U.S. 289, 298 (1979), because the ‘creation and dissemination of information are speech within the meaning of the First Amendment.’”) (quoting *Sorrell*, 564 U.S. at 570)). License plate scanners create valuable information by filming, reading, and disseminating the data that they have gathered. See CODE § 13.08.080(B) (“‘License plate scanner’ shall mean one or more fixed high-speed cameras combined with computer algorithms to convert images of license plates into computer-readable data.”). See also *Automated License Plate Readers* (ALPRs), ELECTRONIC FRONTIER FOUNDATION, <https://www EFF.org/pages/automated-license-plate-readers-alpr> (last updated August 28, 2017) (noting that license plate readers “automatically capture all license plate numbers that come into view, along with the location, date, and time. The data, which includes photographs of the vehicle and sometimes its driver and passengers, is then uploaded to a central server.”). As detailed above, all of these acts are also protected by the First Amendment. See *supra* pp. 3–4. Significantly, the *recipients* of the information created and disseminated by license plate scanners have a constitutional right to receive the information that they provide as well. See *Stanley v. Georgia*, 394 U.S. 557, 564 (1969) (“the Constitution protects the right to receive information”); *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 756 (1976) (“the protection afforded is to the communication, to its source and to its recipients both.”).

If enacted, the speech restriction imposed by BL2020-581 would also be content-based. By its express terms, BL2020-581 would function to prohibit private citizens from using equipment “to convert *images of license plates*”—but no other type of image—“into computer-readable data” by “scanning license plates within the public rights-of-way.” CODE § 13.08.080(B); BL2020-581. As a consequence, BL2020-581 would be a content-based speech regulation. See *Reed v. Town of Gilbert, Ariz.*, 576 U.S. 155, 169 (2015) (“a speech regulation targeted at specific subject matter is content based even if it does not discriminate among viewpoints within that subject matter.”). Cf. Daniel A. Horwitz, *A Picture’s Worth a Thousand Words: Why Ballot Selfies are Protected by the First Amendment*, 18 SMU SCI. & TECH. L. REV. 247, 249 (2015) (“Because ballot selfie prohibitions forbid individuals from sharing one type of image—a photograph of a marked election ballot—but not other images, there is little doubt that such laws represent a content-based restriction on speech.”) (citing *Rideout v. Gardner*, No. 14-CV-489-PB, 2015 WL 4743731, at *9 (D.N.H. Aug. 11, 2015) (“the law under review is content based on its face because it restricts speech on the basis of its subject matter. The only digital or photographic images that are barred . . . are images of marked ballots that are intended to disclose how a voter has voted. Images of unmarked ballots and facsimile ballots may be shared with others without restriction. In fact, the law does not restrict any person from sharing any other kinds of images with anyone.”). Thus, if enacted, BL2020-581 would extend a facially content-based speech regulation to the realm of private speech.

Because BL2020-581 would impose “a restriction on the content of protected speech,” *Brown v. Entm’t Merchants Ass’n*, 564 U.S. 786, 799 (2011) (citing *R.A.V. v. City*

id., at 139, n. 7 (“‘The purpose of the First Amendment is to protect private expression’” (quoting T. Emerson, *The System of Freedom of Expression* 700 (1970))).

of *St. Paul, Minn.*, 505 U.S. 377, 395 (1992)), if enacted into law, BL2020-581 would be “invalid unless [Metro] can demonstrate that it passes strict scrutiny—that is, unless it is justified by a compelling government interest and is narrowly drawn to serve that interest.” *Id.* To satisfy strict scrutiny, Metro must also “specifically identify an ‘actual problem’ in need of solving,” *id.* (quoting *United States v. Playboy Entertainment Group, Inc.*, 529 U.S. 803, 822–23 (2000)), and Metro’s regulation “must be actually necessary to the solution,” *id.* (citing *R.A.V.*, 505 U.S. at 395). As the U.S. Supreme Court has cautioned, strict scrutiny “is a demanding standard[,]” and consequently, “[i]t is rare that a regulation restricting speech because of its content will ever be permissible.” *Id.* (citing *Playboy*, 529 U.S. at 818).

As written, BL2020-581 cannot plausibly survive strict scrutiny. The stated goals of BL2020-581 appear to be twofold: (1) to prevent governmental overreach through the use of surveillance technology, and (2) to prevent abuse of public records. See Tosin Fakile, *License Plate Reader Bills Paused Until February*, WSMV (Jan. 6, 2021), https://www.wsmv.com/news/license-plate-reader-bills-paused-until-february/article_b2bed634-500f-11eb-b22b-5716eb164127.html (noting that a sponsor of the bill had “expressed his objection to the use of the technology on Twitter, saying it would make too much personal data available and would enhance police power.”); Alex Apple, *Nashville Man Installs License Plate Readers at Home, Catches Criminals on His Street*, WZTV (Jan. 6, 2021), <https://fox17.com/news/local/nashville-man-installs-license-plate-readers-at-home-catches-criminals-on-his-street> (stating that a sponsor’s concern “is that when the data becomes public record, it could allow stalkers, abusers, and malicious actors to use the data to stalk or harass someone.”). Even assuming that these concerns were compelling, however, they would not be addressed by banning private citizens from using license plate readers on their own private property.

With respect to the first stated goal—to prevent governmental overreach—the government’s ability to use license plate scanners can be curbed without simultaneously restricting private citizens’ ability to use license plate scanners for purely private purposes. Notably, the fact that one of BL2020-581’s own sponsors has noted the significant distinction between restricting public and private use also suggests that BL2020-581’s restrictions on private use of license plate scanners may have been unintentional, rather than designed to promote a compelling governmental interest. See 11/10/20 Council Committee Meeting Traffic & Parking, Personnel, Public Safety and Public Works, YOUTUBE, <https://www.youtube.com/watch?v=pG3On94ibso&t=1838s> (last visited Jan. 21, 2021) (1:03:59) (noting that “I understand that private citizens may choose to install private surveillance systems as a personal choice. I think that is a wholly separate issue from the issues of privacy and public policy,” and expressing concern about “the state expand[ing] its surveillance capability.”).

The second stated goal of BL2020-581—preventing bad actors from exploiting and abusing public records—would not be addressed by BL2020-581’s restrictions on private use of license plate scanners, either. Although the Tennessee Supreme Court has recognized the legitimacy of similar concerns, see, e.g., *Tennessean v. Metro. Gov’t of Nashville*, 485 S.W.3d 857, 873 (Tenn. 2016) (expressing concern about a proposed framework regarding public records that would “potentially compromise criminal

investigations, prevent defendants from having fair trials, and further victimize crime victims”); *id.* at 874 (worrying about an approach to public records that “would throw open police files on pending investigations and criminal prosecutions, not only to responsible media sources, but also to suspected perpetrators under investigation and their allies, gang members, voyeurs, pornographers, anyone.”) (Kirby, J., concurring), records generated by *private* citizens’ use of *privately* owned license plate scanners installed on *private* property necessarily would not be public records. *See* Tenn. Code Ann. § 10-7-503(a)(1)(A)(i) (“‘Public record or records’ or ‘state record or records’: (i) Means all documents, papers, letters, maps, books, photographs, microfilms, electronic data processing files and output, films, sound recordings, or other material, regardless of physical form or characteristics, made or received **pursuant to law or ordinance or in connection with the transaction of official business by any governmental entity**”) (emphasis added). Accordingly, as to private citizens, this concern is inapplicable, too, and BL2020-581 does nothing to address it.

Thus, as written, BL2020-581 would be fatally overinclusive if enacted—restricting substantially more speech than necessary to achieve the sponsors’ stated goals. *See Thomas v. Bright*, 937 F.3d 721, 735 (6th Cir. 2019) (“A content-based law regulating speech is overinclusive if it implicates more speech than necessary to advance the government’s interests.”), *cert. denied*, 141 S. Ct. 194, 207 L. Ed. 2d 1119 (2020). As a matter of law, an overinclusive speech regulation that is not narrowly tailored to achieve its stated purposes also cannot withstand strict scrutiny. *See id.* *See also City of Ladue v. Gilleo*, 512 U.S. 43, 51 (1994) (“such provisions are subject to attack on the ground that they simply prohibit too much protected speech.”). Consequently, if enacted into law, BL2020-581 would not be able to withstand strict constitutional scrutiny as applied to private citizens.

IV. Conclusion

For the foregoing reasons, it is my opinion that, if enacted as written, BL2020-581 would be unconstitutional as applied to private citizens.

Very truly yours,



Daniel A. Horwitz