

TO BE ELECTRONICALLY FILED

**UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
FRANKFORT DIVISION
CIVIL ACTION NO. 16-CV-92-GFVT**

BENNIE L. HART

PLAINTIFF

**V. MEMORANDUM IN SUPPORT OF MOTION FOR
JUDGMENT ON THE PLEADINGS**

**GREG THOMAS, in his official
capacity as Secretary of the
KENTUCKY TRANSPORTATION
CABINET**

DEFENDANT

Comes now Defendant, Greg Thomas, in his official capacity as Secretary of the Kentucky Transportation Cabinet, by counsel, and files this Memorandum of Law in support of its Motion for Judgment on the Pleadings pursuant to CR 12(b) and (c)(1).

INTRODUCTION

Plaintiff brings this civil rights action under 42 U.S.C Section 1983 against the Secretary of the Kentucky Transportation Cabinet in his official capacity alleging First Amendment violations arising from the denial by the Kentucky Transportation Cabinet of Plaintiff's application for a personalized license plate. As will be demonstrated below, Plaintiff's claims are legally deficient and must be dismissed.

STANDARD OF REVIEW

A motion for a judgment on the pleadings pursuant to Fed. R. Civ. P. 12(c) is analyzed under the same de novo standard employed under a Fed. R. Civ. P. 12(b)(6)

motion to dismiss. *Sensations, Inc. v. City of Grand Rapids*, 526 F.3d 291, 295 (6th Cir. 2008). When ruling on a Fed. R. Civ. P. 12(c) motion, the Court must assume that the complaint's factual allegations are true and should construe all inferences from them in the non-moving party's favor. *U.S. v. Ford Motor Co.*, 532 F.3d 496, 502 (6th Cir. 2008); *Bovee v. Coopers & Lybrand C.P.A.*, 272 F.3d 356, 360 (6th Cir. 2001). The Court is not bound to accept bare legal conclusions unsupported by factual allegations. *Booker v. GTE.net LLC*, 350 F.3d 515, 517 (6th Cir. 2003)(quoting *In re Sofamor Danek Group, Inc.*, 123 F.3d 394, 400 (6th Cir. 1997)). Dismissal is appropriate because Plaintiff is not able to set forth a cognizable cause of action or prove any facts that would entitle her to relief. *Kostrzewa v. City of Troy*, 247 F.3d 633 (6th Cir. 2001).

In the instant case, Plaintiff's 42 U.S.C. Section 1983 claims are barred by eleventh (11th) amendment immunity and are otherwise legally deficient. The complaint must be dismissed.

PRELIMINARY FACTS

Plaintiff alleges that the denial of his request for a personalized license plate reading "IM GOD" is an unconstitutional denial of his right to freedom of expression under the First and Fourteenth Amendments of the U.S. Constitution. The Commonwealth of Kentucky, by and through the legislature, has provided residents the opportunity to obtain both specialized license plates and personalized license plates. KRS 186.174 is the statutory authority for the issuance of personalized license plates in the Commonwealth. The Division of Motor Vehicle Licensing denied the application because the letter-number combination "IM GOD" violated the requirements for a personalized license plate, as set forth in KRS 186.174 and KRS 186.164(9)(c)–(g) as incorporated.

KRS 186.174(3) directs that a personalized license plate may not be issued if it (1) “conflicts with or duplicates the alphabetical-numerical system used for regular license plates or any other license plates issued in the Commonwealth”; (2) “contains a combination of more than six (6) letters of the alphabet and Arabic numerals, including spaces”; or (3) “fails to comply with the conditions specified in KRS 186.164(9)(c) to (g)”. The Kentucky legislature expressly incorporated limitations imposed on specialized plates into its requirements for personalized plates. KRS 186.164 is the authorizing statute for specialized plates. The conditions incorporated into the personalized program are:

- (c) The group, or the group's lettering, logo, image, or message to be placed on the license plate, if created, shall not discriminate against any race, color, religion, sex, or national origin, and shall not be construed, as determined by the cabinet, as an attempt to victimize or intimidate any person due to the person's race, color, religion, sex, or national origin;
- (d) The group shall not be a political party and shall not have been created primarily to promote a specific political belief;
- (e) The group shall not have as its primary purpose the promotion of any specific faith, religion, or antireligion;
- (f) The name of the group shall not be the name of a special product or brand name, and shall not be construed, as determined by the cabinet, as promoting a product or brand name; and
- (g) The group's lettering, logo, image, or message to be placed on the license plate, if created, shall not be obscene, as determined by the cabinet.

KRS186.164(9)(c)-(g).

Plaintiff challenges the constitutionality of these statutes as-applied and on their face. Hart is requesting the court to declare KRS 186.174 and KRS 186.164(9)(c)-(g) unconstitutional and to issue a permanent injunction barring the defendant from denying his application for a personalized license plate containing the alphabetical-numerical designation “IM GOD” under these statutes.

ARGUMENT

I. THE ELEVENTH AMENDMENT TO THE UNITED STATES CONSTITUTION BARS ANY CAUSE OF ACTION AGAINST A STATE AND/OR AN AGENCY OF THE STATE

As this Court well-knows, the Eleventh Amendment preserves sovereign immunity of the states and bars suit in federal court brought against non-consenting states. *Edelman v. Jordan*, 415 U.S. 651, 663 (1974). The Commonwealth has not consented to suit. The Eleventh Amendment provides:

The Judicial power of the United States shall not be construed to extend to any suit in law or in equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of Any Foreign State. [*Although the text of the amendment suggests that only citizens of another state are barred from suing a state in federal court, it has long been held that the amendment also prohibits suits by citizens against his own state. Papasan v. Allain*, 478 U.S. 265, 276, 106 S.Ct. 2932, 2939, 92 L.Ed.2d 209 (1986) (citing *Hans v. Louisiana*, 134 U.S. 1, 10 S.Ct. 504 (1890).]

As the Sixth Circuit stated in *Hutsell v. Sayre*, 5 F.3d 996, 999 (6th Cir. 1993)(citations omitted), “it is well-settled that ‘a suit in federal court by private parties seeking to impose a liability which must be paid from public funds in the state treasury is barred by the Eleventh Amendment.’” The Court also stated that “when suit is brought against a public agency or institution, ‘the application of the Eleventh Amendment turns on whether said agency or institution can be characterized as arm or alter ego of the state,’...and ‘that the most important question is whether any monetary judgment would be paid out of the state treasury.’” *Id.* In *Cox v. Kentucky Department of Transportation*, 53 F.3d 146 (6th Cir. 1995), a Transportation Cabinet employee sued the Cabinet and others for age discrimination and further alleged he suffered adverse employment action

because of his political affiliation. The District Court, Judge Bertelsman, granted summary judgment on Plaintiff's constitutional claims to the "Kentucky Department of Transportation." The Sixth Circuit upheld the dismissal of the Cabinet and found that "the First Amendment claims against the Kentucky DOT are barred by Eleventh Amendment Immunity...Eleventh Amendment Immunity bars all suits, whether for injunctive or monetary relief, against the state and its departments." *Id.* at 152; *See also Grimes v. Mazda North American Operations*, 355 F.3d 566 (6th Cir. 2004).

The Commonwealth of Kentucky has not waived its Eleventh Amendment immunity and Congress did not abrogate the immunity of the states in Section 1983. *Quern v. Jordan*, 440 U.S. 332, 345 (1979). In addition, KRS 44.073 reserves the sovereign immunity of the Commonwealth of Kentucky and its agencies. Where immunity exists, only the Kentucky legislature can waive it. Ky. Const. § 231. There has been no waiver by the legislature for claims such as the one before this Court, and accordingly, Plaintiff's Complaint must be dismissed for failure to state a claim for which relief can be granted.

The U.S. Supreme Court held in *Will v. Michigan Dept. of State Police*, 491 U.S. 58, 70-71 (1989), that neither states nor their officials acting in their official capacity are "persons" suable under Section 1983; see also *Blackburn v. Floyd County Bd. of Ed.*, 749 F.Supp. 159, 161 (E.D. Ky. 1990) (holding that *Will* stands for the proposition that entities which are agencies or arms of the state, thus protected by Eleventh Amendment immunity, cannot be 'persons' within the scope of liability under § 1983.) Accordingly, Plaintiff has not set forth a cognizable claim against the Cabinet or Commonwealth of Kentucky as the state (and its agencies) are not a person suable under Section 1983, and

therefore, Plaintiff's Complaint should be dismissed with prejudice for failure to state a claim for which relief can be granted.

II. THE FIRST AMENDMENT DOES NOT PRECLUDE REGULATION OF GOVERNMENT SPEECH

Plaintiff has not asserted a cognizable claim for relief under the First Amendment because the personalized license plate at issue constitutes government speech not private speech. When the government speaks, it may express the views it intends without being subject to the constraints of the First Amendment. See, e.g., *Walker v. Texas Division, Sons of Confederate Veterans, Inc.*, 135 S. Ct. 2239, 2245 (2015); *Pleasant Grove City v. Sumnum*, 555 U.S. 460, 467 (2009). The government may refrain from speech it does not want to communicate or refuse to lend its imprimatur to speech it does not want to be associated with without implicating First Amendment protections. *Walker*, 135 S. Ct. at 2248-50.

In *Walker*, the United States Supreme Court held that Texas specialized license plates, which contain logos and phrases of nonprofit organizations, constituted government speech. As such, the Texas Department of Motor Vehicles was not subject to First Amendment constraints and could deny a specialized plate application by the Sons of Confederate Veterans. The Court used three factors to distinguish between government and private speech. The first factor is whether the government has historically used the medium to communicate messages from the states; second, is the speech often closely identified in the public mind with the state; and finally, does the state maintain direct control over the message conveyed. *Id.* at 2248. The *Walker* decision was limited to a finding that the Texas *specialized* plate was government speech,

however, when the *Walker* criteria is applied to the Kentucky *personalized* plate it is clear that it too must be government speech.

In regard to personalized plates, the state must approve every proposed alphabetical-numerical combination. The result is that the public understands that every message displayed on a personalized plate was reviewed and approved by the state. There is significant demand for state issued personalized plates in the Commonwealth. In part, this demand must be attributed to the desire to have a state issued and approved message on your vehicle. As stated in *Walker*, “a person who displays a message on a Texas license plate likely intends to convey to the public that the State has endorsed that message”. *Id.* The Cabinet does not deny an individual, such as Plaintiff, from asserting a message on his vehicle since the same message can easily be displayed on the individual’s vehicle via a sticker, ribbon, decal, or license plate frame. However, it does refrain from endorsing certain messages on its own property.

The *Walker* criteria is the benchmark analysis for government speech. When applied to the Kentucky personalized plates, the criteria indicate that these plates are government speech just as the Texas specialized plates were. As in *Walker*, Kentucky should be permitted to exclude messages it deems inappropriate from its license plates. The state can no more be compelled to give its stamp of approval to a religious or non-religious plate alphabetical-numerical combinations than it can be compelled to give its imprimatur to an inflammatory logo. This is especially true since the driver has alternative means to communicate his message--bumper stickers. The Supreme Court of Indiana came to this same conclusion in its review of the Indiana personalized license program. See *Commissioner of Indiana Bureau of Motor Vehicles v. Vawter*, 45 N.E.3d 1200, (Ind.

2015), *cert. denied sub nom.*, *Vawter v. Abernathy*, 136 S. Ct. 2011, 195 L. Ed. 2d 215 (2016).

In *Vawter*, Plaintiffs sued the Indiana Bureau of Motor Vehicles challenging the constitutionality of Indiana's personalized license plate program on First Amendment free speech vagueness and overbreadth grounds. The Indiana Supreme Court, applying *Walker supra* expressly held that personalized license plates are government speech and thus do not provide any forum for protected First Amendment expressive conduct.

The *Vawter* court applied the *Walker* three factor standard for identifying government speech to its personalized license plates and found them to be government speech. Accordingly, the Kentucky Transportation Cabinet's personalized license plate program falls squarely within the parameters set forth in the *Walker* analysis and as in *Vawter*, constitutes government speech.

a. Historical use of license plates

As to the first factor, the *Vawter* Court correctly noted: "license plates have long been used for government purposes." *Id.* First and foremost, the alphanumeric combinations provide identifiers for public, law enforcement, and administrative purposes and are thus, "...messages from the states". *Id.* at 1204 citing *Walker* at 2248. Moreover, the Court noted, "all fifty states have included graphics on their plates, including...Kentucky's Churchill Downs". *Id.* at 1204.

Kentucky, like most states, mandates license plates consisting of letters of the alphabet and numerical digits for all registered motor vehicles. KRS 186.005(2). This statutory requirement illustrates the governmental purpose of automobile license plates, which is to identify the motor vehicles registered in the Commonwealth.

In *Vawter*, the Court rejected Plaintiff's argument that the individually chosen alphanumeric combinations of personalized license plates somehow altered the governmental nature of the license plate. "...this difference is secondary and does not change the principle function of state-issued license plates as a mode of unique vehicle identification" *Vawter* at 1205. "The fact that private parties take part in the design and propagation of a message does not extinguish the governmental nature of the message". *Id.* at 1205 quoting *Walker* at 135 S. Ct. 2251. License plates have historically and continue to be utilized by states as a means of driver/owner identity. The *Vawter* Court also noted that Indiana communicated messages through its license plates recognizing Abraham Lincoln and other civic messages. Kentucky does the same¹, demonstrating the governmental purpose of Kentucky's motor vehicle license plate program. The first prong of the *Walker* analysis is thus satisfied.

b. License plate identity with state

Just as in Indiana, Kentucky law mandates that all registered motor vehicles must display a Kentucky issued license plate. KRS 186.005. Furthermore, the Transportation Cabinet must approve the alphanumeric combination before it can be displayed. KRS 186.162, KRS 186.164, 601 KAR 9:012. Thus, Kentucky "license plates are, essentially, government ID's and license plate observers 'routinely-and-reasonably interpret them as conveying some message on the [issuers] behalf'". *Vawter* at 1205 quoting *Walker* at 135 S. Ct. 2249 quoting *Sumnum* 555 U.S. at 471. The *Vawter* Court rejected the argument that some observers might more closely identify the message of a personalized license plate with that of the vehicle owner than of the state. "[Personalized license plates]

¹ Kentucky law specifically provides for specialty license plates recognizing members of congress, the state's general assembly, judges, veterans and others. KRS 186.164(15).

do not cease to be government speech simply because some observers may fail to recognize that personalized license plate alphanumeric combinations are government issued and approved speech in every instance”. *Id.* at 1205. The same considerations apply here. Kentucky license plates are mandated by law and every personalized license plate is approved by the Transportation Cabinet and is thus government speech registering and identifying a specific vehicle. The Kentucky statutory scheme therefore clearly satisfies the second prong of the *Walker* government speech test.

c. State control

The issuance of personalized license plates is under the exclusive control of the Kentucky Transportation Cabinet. KRS 186.005 sets forth specific limitations on the content of special license plates. By statute, the same criteria utilized for specialty license plates is to be utilized for issuance of personalized license plates. KRS 186.174(3). Thus, the Kentucky Transportation Cabinet clearly maintains control of the issuance of these plates. Moreover, Kentucky’s use of the specialty plate criteria for scrutiny of personalized plates only emphasizes the fact that the holding of *Walker*, which held that specialty plates were government speech, applies foursquare with the Kentucky statutory scheme which treats specialty plates and personalized plates the same. Kentucky clearly controls the issuance of license plates. The third, and final element of the *Walker* analysis has been met.

Kentucky’s personalized license plates meet the three part test enunciated by the *Walker* Court and adopted the Indiana Supreme Court for personalized license plates. Kentucky’s personalized license plates are government speech. “When government speaks, it is not barred by the Free Speech Clause from determining the content of what

it says.” *Walker* at 2245, *Summum* at 55 U.S. 467-468. Accordingly, all of Plaintiff’s First Amendment claims are legally deficient and must be dismissed for this reason alone.

III. VIEWPOINT NEUTRAL REGULATION

Assuming arguendo that personalized license plates are not deemed government speech, the Kentucky restriction on religious and nonreligious messages would still not violate First Amendment free speech considerations because license plates are a nonpublic forum and restrictions in this forum are valid if they are both viewpoint neutral and reasonable. *Cornelius v. NAACP Legal Def. & Educ. Fund, Inc.*, 473 U.S. 788, 800, 105 S.Ct. 3439, 87 L.Ed.2d 567 (1985); *Perry Educ. Ass’n v. Perry Local Educators’ Ass’n*, 460 U.S. 37, 46, 103 S.Ct. 948, 74 L.Ed.2d 794 (1983).

a. Public Forums

Traditional public forums refer to government property which has been historically used for the purpose of “assembly, communicating thoughts between citizens, and discussing public questions.” *Pleasant Grove City, Utah v. Summum*, 555 U.S. 460, 469, 129 S. Ct. 1125, 1132, 172 L. Ed. 2d 853 (2009). License plates have historically been used for identification purposes so they would clearly not fall into this category.

A designated public forum is created when the government intentionally opens up a forum that was not previously used as a public forum into a venue for those purposes. *Id.* Government restriction of speech in these two forums are analyzed under a strict scrutiny standard. *Id.* However, the Court has clarified that “[t]he government does not create a [designated] public forum by inaction or by permitting limited discourse, but only by intentionally opening a nontraditional forum for public discourse.” *Cornelius*, 473 U.S. 788, 802, 105 S. Ct. 3439, 3449, 87 L. Ed. 2d 567. While it is true that Kentucky has

allowed individuals to vary the letter number identification on their personalized plates to express identities or ideas, it has also expressly limited the degree and manner in which they may do so.

In *Walker*, the Court explained that “in order ‘to ascertain whether [a government] intended to designate a place not traditionally open to assembly and debate as a public forum,’ this Court ‘has looked to the policy and practice of the government’ and to ‘the nature of the property and its compatibility with expressive activity.’” 135 S. Ct. 2239, 2250, 192 L. Ed. 2d 274 quoting, *Cornelius*, 473 U.S. 788, 802, 105 S. Ct. 3439, 3449, 87 L. Ed. 2d 567. The purpose of license plates in general has been to identify vehicles, which has no connection with public expression of ideas. The purpose of the personalized plate program specifically was to raise revenue for the state. There is no intention on the part of the state to create an unrestricted forum for the free expression of ideas on its license plates. The expression here is incidental to the primary functions of vehicle identification and revenue. Furthermore, the policy of giving the state final authority over the issuance of the personalized plates and of explicitly not allowing discriminatory, religious or nonreligious, political, vulgar or commercial brand messages is a clear indication that the state never intended its personalized license plates to be a forum for indiscriminate expression of ideas by the public.

b. Nonpublic Forums

Alternatively, the court has held that the government may create forums that limit expression to certain people or topics where it is not open for “indiscriminate use by the general public.” *Perry Educ. Ass’n*, 460 U.S. at 47. This characterizes both the limited public forum and the nonpublic forum. In these forums the state may regulate the content

of speech so long as it is “reasonable in light of the purpose served by the forum and are viewpoint neutral.” *Cornelius* 473 U.S. 788, 806, 105 S. Ct. 3439, 3451, 87 L. Ed. 2d 567; See also *Good News Club v. Milford Central School*, 533 U.S. 98, 106–107, 121 S.Ct. 2093, 150 L.Ed.2d 151 (2001). Kentucky’s restriction of religious and nonreligious messages from its personalized license plates are reasonable in light of its desire to avoid government association with ideas it would not want to be seen as promoting. This is significant given the Constitutional prohibitions on government establishment of religion. It is also reasonable action to promote highway safety and avoid potentially controversial messages that could lead to confrontation or distraction on its highways.

There is a long line of cases that have found personalized plates to be a nonpublic forum and held that various government regulations are both reasonable and viewpoint neutral. See *Perry v. McDonald*, 280 F.3d 159, 164 (2d Cir. 2001) (concluding that a Vermont statute that restricted vanity plates that were offensive or confusing to the public was viewpoint neutral and reasonable and that neither the policy nor its application violated the first amendment); See *Byrne v. Terrill*, 2005 WL 2043011 (D. Vt. 2005) (denying a preliminary injunction against Vermont for rejecting a request for JOHN316 on a vanity plate because it referred to a deity, finding the plates to be a nonpublic forum and the rejection was viewpoint neutral because it excluded a subject matter); See *Kahn v. Department of Motor Vehicles*, 16 Cal. App. 4th 159, 20 Cal. Rptr. 2d 6 (2d Dist. 1993) (upholding a California statute that authorized the rejection of vanity plates that were offensive to good taste and decency).

IV. KRS CHAPTER 186 IS NOT VAGUE OR OVERBROAD

As the *Vawter* Court held, a finding that the personalized license plate program is government speech renders Plaintiff's vagueness and overbreadth arguments moot. Even if the Court were to hold otherwise, the statutes and regulation in question easily withstand vagueness and overbreadth scrutiny. The Kentucky regulation on speech is viewpoint neutral. Plaintiff complains that his religious viewpoint was prohibited. However, the statute does not prohibit any particular viewpoint. It prohibits the entire category of messages that promote any specific "faith, religion or anti-religion." KRS 186.164(9)(e). The state is only guilty of viewpoint discrimination when it "targets...particular views taken by speakers on a subject." *Rosenberger v. Rector and Visitors of Univ. of Va.*, 515 U.S. 819, 829, 115 S.Ct. 2510 (1995).

Plaintiff complains that the statute is overbroad. The Sixth Circuit has opined that a Michigan statute which allowed personalized license plates to be rejected if "offensive to good taste and decency" violated the first amendment because the phrase was unconstitutionally broad. *Matwyuk v. Johnson*, 22 F.Supp.3d 812 (6th Cir. 2014). In a similar Eighth Circuit case, the court stated "[w]here a regulation requires that a speaker receive permission to engage in speech, the official charged with granting the permission must be provided specific standards on which to base his or her decisions." *Lewis v. Wilson*, 253 F.3d 1077, 1080 (8th Cir. 2001). These cases were decided prior to the *Walker* decision, which has significantly rebuffed their reasoning in regards to government speech. As stated in *Vawter*, "Because the government is speaking, the [Bureau of Motor Vehicles] may deny or revoke the [personalized plate] regardless of the challenged regulations." *Id.* at 1209. Plaintiff's vagueness and overbreadth claims are rendered non-

justiciable because Kentucky's license plates are government speech and are otherwise without merit.

CONCLUSION

For the foregoing reasons, Defendants respectfully request that the Court GRANT the Motion to Dismiss and issue an Order dismissing Plaintiff's complaint in its entirety.

Respectfully submitted,

/s/ Paul Kevin Moore
PAUL KEVIN MOORE, Esq.
Executive Director/General/Counsel

/s/ Matthew D. Henderson
MATTHEW D. HENDERSON, Esq.
Deputy Executive Director

/s/ William H. Fogle
WILLIAM H. FOGLE, Esq.

Kentucky Transportation Cabinet
200 Mero St.
Frankfort, KY 40601
Tele: 502-564-7650
Email: Kevin.moore@ky.gov
Matt.henderson@ky.gov
William.fogle@ky.gov

*Counsel for Defendant Greg Thomas, in his
official capacity as Secretary of the Kentucky
Transportation Cabinet*

CERTIFICATE OF SERVICE

I certify that on this 21st day of March, 2017, I electronically filed the foregoing document through the CM/ECF system with the clerk, which will send a notice of electronic filing to the following:

William E. Sharp, Esq.
Legal Director
American Civil Liberties Union of Kentucky
315 Guthrie St., Suite 300
Louisville, KY 40202
Counsel for Plaintiffs

Patrick C. Elliot, Esq.
Rebecca S. Market, Esq.
Freedom From Religion Foundation
10 N. Henry Street
Madison, WI 53703
Counsel for Plaintiffs

/s/ Paul Kevin Moore
Hon. Paul Kevin Moore