

TO BE ELECTRONICALLY FILED

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

BENNIE L. HART

PLAINTIFF

V. REPLY TO PLAINTIFF'S RESPONSE TO DEFENDANT'S  
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 Reply to Plaintiff's Response, as follows:

The parties are in agreement that *Walker v. Texas Division, Sons of Confederate Veterans, Inc.*, 135 S.Ct. 2239, 192 L. Ed. 2d 274 (2015) sets forth the controlling standard for determining whether personalized plates constitute government speech. The *Walker* Court did not extend its holding to personalized plates. However, this should not be interpreted to mean, as the Plaintiff alludes, that the Court believed their conclusions would not apply equally to personalized plates. To extend the holding in *Walker* to personalized plates would have been overreach as the facts before the Court dealt solely with specialized plates. However, Kentucky statutes governing personalized plates and specialized plates have a unique nexus that makes clear the

Kentucky legislature intended both plates to be treated the same under the law. The personalized program was created after the specialized program, but in both cases, the legislature gave the Transportation Cabinet the directive to exclude the same categories of messages from being used on its plates.<sup>1</sup> The legislature crafted the personalized plate program to exist as government communication to be subject to government regulation in an identical manner to the specialized plate program.

In his analysis of the historical use of license plates, the first of the three *Walker* factors, the Plaintiff distinguishes between the historical use of standard plates and that of personalized plates. He claims that the long history of Kentucky using its standard license plates to communicate to its citizens is irrelevant to the question of personalized plates. This is not the approach of the *Walker* court. In their analysis of specialized plates, they referenced the historical use of standard plates to support the fact that Texas had long used this medium to communicate to the public. See *id.*, at 2248, 192 L. Ed. 2d 274. Plaintiff fails to appreciate that both standard and personalized plates are the same medium of communication and the history of both should be considered when looking to see if the state has traditionally used them to communicate. Plaintiff makes the assertion that personalized plates have not been used by the state as a communication device. However, such reliance is misplaced. Personalized plates are used in the same manner as standard plates to communicate the identification of vehicles, the state and county of registration of vehicles and from time to time phrases or images integrated into the design of the plate. As to the historical use factor, it is

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<sup>1</sup> KRS 186.174 incorporated the restrictions previously placed on the content of specialized plates in KRS 186.164(9)(c)-(g).

plain that both standard and personalized plates have been a means of vital state communication to the public for a historically significant amount of time.

Plaintiff chooses to focus on the statutory phrase “issued with personal letters or numbers significant to the applicant” in attempt to substantiate his claim that the plates are not government speech but rather private in nature. See KRS 186.174 (1). The numerical alphabetical combinations found on personalized license plates are chosen by individuals and have personal meaning. However, this fact is incidental and does not alter the fact that the primary function of these plates is the communication of vehicle identification. KRS186.174 (3) requires that the personalized plate alphabetical-numerical combinations not duplicate other license plate combinations and shall not contain more than six alphabetical-numerical digits. These requirements are included because the essential function of the plate is to identify vehicles. As the Indiana Supreme Court emphasized in *Commissioner of Indiana Bureau of Motor Vehicles v. Vawter*, 45 N.E.3d 1200 (Ind. 2015), “while the alphanumeric combinations on PLP’s [personalized license plates] are individually chosen instead of created by the state, this difference is secondary and does not change the principle function of state issued license plates as a mode of unique identification.” *Id.* at 1205.

The *Walker* Court similarly explained that even if private parties take part in the “propagation” of a message, it does not eliminate the governmental nature of the communication. See *id.*, at 2251 192 L. Ed. 2d 274. The primary purpose of all license plates in the Commonwealth is to communicate vital state information. *Vawter* specifically applied the factors found in *Walker* and concluded that because Indiana personalized plates are government property and a means of essential government

communication, the state should have the authority to regulate their content as they deem appropriate. Both *Vawter* and *Mitchell v. Maryland Motor Vehicle Admin.*, 450 Md. 282, 148 A.3d 319 (2016), *as corrected on reconsideration* (Dec. 6, 2016), provide analysis of personalized plates under the *Walker* factors. Plaintiff relies on the rationale of *Mitchell* as the foundation of his analysis of the *Walker* factors and does not even attempt to address *Vawter*-even though *Vawter* is directly on point to the case at bar. Plaintiff's reliance on *Mitchell* is particularly dubious considering *Mitchell* ultimately validated government restrictions on personalized license plates under a nonpublic forum analysis. Yet, Plaintiff ignores the holdings in *Mitchell* when it comes to his forum analysis. Any reliance upon *Mitchell* in this case must be distinguished by the fact that there are significant differences in the Maryland statutory scheme for personalized license plates and the Kentucky statutory scheme for personalized license plates. As mentioned above, the Kentucky statute specifically incorporates the regulations imposed on specialized plates to personalized plates indicating that the legislature intended the personalized to be tantamount to the specialized while Maryland's personalized and specialized plates are scrutinized under two separate distinct statutes (Maryland Code Section 13-631 and Maryland Code Section 13-619 respectively).

*Walker* articulated the second factor as whether or not the personalized plates "are often closely identified in the public mind with the [State]." *Walker*, at 2248, 192 L. Ed. 2d 274 (quoting *Pleasant Grove City, Utah v. Sumnum*, 555 U.S. 460, at 472, (2009)). It should be pointed out that this test does not require that in every instance the public perceive the personalized plate as a message *originating* with the state. See *Vawter*, at 1206. The question is whether or not the plate is *often closely identified* with

the state. Because these messages have the imprimatur of the state, they are inevitably often identified by the public with the State. This can be evidenced the fact that the public makes complaints to the Transportation Cabinet for plates they find inappropriate.

As to the third and final factor, the parties are in agreement that the state maintains exclusive control over the approval of the messages on personalized license plates. The Court in *Mitchell* reasoned that the combination of numbers and letters on a personalized plate chosen by the plate applicant somehow transforms the plate into a mode of private expression "...the message on a vanity plate necessarily will be one of a kind." *Mitchell* at 561. This completely ignores the fact that Kentucky's statute requiring unique alphanumeric combinations for all license plates, be they specialty, personalized or regular, renders them all one of a kind. KRS 186.005 (2). This emphasizes the governmental purpose of registration and identification of vehicle owners and the method of determining the alphanumeric combination on license plates is of little consequence and furtherance of this purpose. Accordingly, the holding in *Walker*, which held that specialty designs are government speech, should be extended to personalized plates since the alphanumeric combinations at issue here actually serve a compelling governmental interest of registering and identifying vehicles.

### **CONCLUSION**

An application of *Walker*, along with *Mitchell* and *Vawter*, to the Kentucky personalized plates results in a finding that the messages contained therein must be considered government speech and may be rightfully regulated by the government without limitation by the First Amendment. For the foregoing reasons, the Defendants

respectfully request that the Court GRANT this Motion and DISMISS the Plaintiff's suit in its entirety.

Respectfully submitted,

/s/ Paul Kevin Moore

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**CERTIFICATE OF SERVICE**

I certify that on this 2<sup>nd</sup> day of May, 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:

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