

FREEDOM FROM RELIGION *foundation*

P.O. BOX 750 | MADISON, WI 53701 | (608) 256-8900 | FFRF.ORG

October 18, 2016

SENT VIA MAIL & EMAIL: lsrichards@pa.gov

The Honorable Leslie Richards
Secretary, Pennsylvania Department of Transportation
Keystone Building, 8th Floor West
Harrisburg, PA 17120

Re: Unconstitutional Rejection of Personalized Plate

Dear Ms. Richards:

I am writing on behalf of the Freedom From Religion Foundation regarding a violation of the First Amendment by the Bureau of Motor Vehicles. FFRF is a nationwide nonprofit organization with more than 23,500 members across the country, including more than 700 members in Pennsylvania and a state chapter. We work to protect the constitutional principle of separation between state and church.

We were contacted by an FFRF member who sought one of three personalized license plates:

ATHEIST
NO GOD
NO GOD

All three of the plates requested were and are still available according to the BMV's personalized registration plate availability website: https://www.dot3.state.pa.us/vehicle_services/vrvanity.jsp. "ATHEIST" is already taken according to that tool.

He received an October 11, 2016 rejection letter stating, "We are unable to process your application because; The Department reserves the right to deny issuance of any requested personalized plate." Under the enclosures line, it reads "DENIED.....ATHEIST, NO GOD, NO GOD."

No specific reason was given for the rejection, just the blanket reservation of right. After consulting Pennsylvania statutes, it appears that the BMV is relying on 67 Pa. Code § 49.3(b)(1):

"A personal registration plate may not contain a combination of letters or numbers, or both, which, in the judgment of the Department, has connotations offensive to good taste and decency or would be misleading. The Department reserves the right to recall a personal registration plate which it later determines to be offensive or misleading."

If this is the case, we request that the BMV immediately approve the personalized plates listed above (they are listed in order of preference if the BMV has another, legitimate reason for refusing

one). The Pennsylvania regulations concerning the wording of personalized plates are unconstitutional on their face, and as applied here.

The BMV's restriction of the message because of the viewpoint being expressed violates the free speech clause of the First Amendment. The Supreme Court has continually struck down viewpoint discrimination by the government. See *Lamb's Chapel v. Center Moriches Union Free School District*, 508 U.S. 384 (1993); *Rosenberger v. Rector and Visitors of the University of Virginia*, 515 U.S. 819 (1995); and *Good News Club v. Milford Central School*, 533 U.S. 98 (2001). Restrictions on speech may not be imposed as part of "an effort to suppress expression merely because public officials oppose the speaker's view," *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 46 (1983), and "the government must abstain from regulating speech when the specific motivating ideology or the opinion or perspective of the speaker is the rationale for the restriction," *Rosenberger*, 515 U.S. at 829.

The proposed plate cannot be considered obscene under any interpretation of the First Amendment jurisprudence concerning obscenity. As such, the plate was improperly denied as "offensive to good taste and decency" under 67 Pa. Code § 49.3(b)(1).

This same overbroad language (and unbridled discretion granted to government actors) has been challenged in a number of other states, with the ultimate result being approval of the license plates. See *Byrne v. Rutledge*, 623 F.3d 46 (2d Cir. 2010) (Striking down Vermont personalized plate restriction on plates referring to religion or a deity); *Lewis v. Wilson*, 253 F.3d 1077 (8th Cir. 2001) (Striking down Missouri restriction on plates that are "obscene...inflammatory or contrary to public policy."); *Morgan v. Martinez*, No. CIV. 3:14-02468 FLW, 2015 WL 2233214 (D.N.J. May 12, 2015) (The state initially rejected an "8THEIST" plate. The court allowed the case to proceed and found "that the Plaintiff has alleged sufficient facts to state a claim that the Rule is facially overbroad, because Plaintiff has alleged that the Rule delegates "unbridled discretion" to the MVC that "invites viewpoint discrimination," and has provided numerous factual assertions in support of this allegation...").

A nearly identical "good taste and decency" restriction was invalidated in Michigan. In *Matwyuk v. Johnson*, the state initially rejected an "INF1DL" plate under a regulation that prohibited combinations "that might carry a connotation offensive to good taste and decency." 22 F. Supp. 3d 812, 815 (W.D. Mich. 2014), The court said, "The 'offensive to good taste and decency' language impermissibly permits the Department of State to deny a license plate application based on viewpoint because the statute lacks objective criteria, and thus confers unbounded discretion on the decisionmaker." *Id.* at 824. The state ultimately was enjoined from enforcing the "offensive to good taste and decency" restriction. Consent Judgment, *Matwyuk v. Johnson*, (No. 2:13-cv-284, W.D. Mich., Sept. 3, 2014), available as document no. 50.

It should be plain to see that a state government may not restrict an "ATHEIST" or "NO GOD" personalized plate. An individual has a protected free speech right to select that message, as they would to select a religious message or any other message.

We are confident any Pennsylvania court would agree. A federal court in Pennsylvania took up a case similar to this in 2010. George Kalman wanted to name his film company "I Choose Hell

Productions.” His choice was rejected by the state because it was “blasphemous.” The court held that this denial violated both the Establishment and Free Speech Clauses of the First Amendment. *Kalman v. Cortes*, 723 F. Supp. 2d 766 (E.D. Pa. 2010).

Our government is not charged with protecting the religious sensibilities of citizens. As the Supreme Court put it, “from the standpoint of freedom of speech and the press, it is enough to point out that the state has no legitimate interest in protecting any or all religions from views distasteful to them which is sufficient to justify prior restraints upon the expression of those views. It is not the business of government in our nation to suppress real or imagined attacks upon a particular religious doctrine...” *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495, 505 (1952).

We request a written response stating that the BMV will approve the ATHE1ST or NO GOD plate and will no longer enforce the “offensive to good taste and decency” restriction. Ultimately, 67 Pa. Code § 49.3(b)(1) should be amended to comport with the First Amendment. If there are other reasons for this denial, legitimate reasons which do not infringe the First Amendment, we would be happy to hear them. Please contact me at your earliest convenience.

Sincerely,



Andrew L. Seidel
Staff Attorney

CC: Special Tag Unit
Bureau of Motor Vehicles
Pennsylvania Department of Transportation
1101 South Front Street
Harrisburg, PA 17104