No. _____

In The

Supreme Court of the United States

RODNEY G. VAWTER, *et al.*,

Petitioners,

v.

COMMISSIONER OF THE INDIANA BUREAU OF MOTOR VEHICLES, in his official capacity,

Respondent.

On Petition For Writ Of Certiorari To The Supreme Court Of Indiana

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

In *Walker v. Texas Division, Sons of Confederate Veterans, Inc.*, ___ U.S. ___, 135 S.Ct. 2239 (2015), this Court held that specialty license plates are government speech, not private speech. In doing so, the majority specifically indicated that it was not addressing personalized or vanity license plates, where a vehicle owner is allowed to devise a unique message by requesting a plate with a particular alphanumeric pattern of the owner's design. *Id*. at 2244. This case raises that unanswered question. Specifically, the question presented by this case is:

Whether personalized license plates, which consist of a unique and individualized message crafted by each motorist that purchases one, should properly be deemed a form of private speech implicating First Amendment concerns rather than government speech not subject to any First Amendment constraints.

PARTIES TO THE PROCEEDINGS

Petitioners are Rodney Vawter and Jay Voigt, on their own behalf and on behalf of a certified class of those similarly situated, defined as:

> All applicants or recipients of personalized license plates whose applications will be denied or were denied after May 7, 2011, or whose existing personalized license plates will be revoked or were revoked after May 7, 2011, because of the Bureau of Motor Vehicles' application of Indiana Code § 9-18-15-4(b), 140 IAC 2-5-4, and/or any policies used by the Bureau of Motor Vehicles to interpret the statute.

Respondent is the Commissioner of the Indiana Bureau of Motor Vehicles, sued in his official capacity.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners herein respectfully petition for a writ of certiorari to review the judgment of the Indiana Supreme Court in this case.

OPINIONS BELOW

The opinion of the Indiana Supreme Court, dated November 6, 2015, is reported at ___ N.E.3d ___, 2015 WL 6777765 (Nov. 6, 2015), and is reprinted in the Appendix at App. 1-23. The decision of the trial court is not reported and is reprinted in the Appendix at App. 24-74.

STATEMENT OF JURISDICTION

The decision of the Indiana Supreme Court is dated November 6, 2015. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The First Amendment to the United States Constitution provides in pertinent part:

> Congress shall make no law . . . abridging the freedom of speech, or of the press.

Indiana Code § 9-18-15-1, *et seq*., establishes Indiana's personalized license plate program, allowing motor vehicle owners to create a personalized license plate containing a combination of letters and numbers. Indiana Code § 9-18-15-2 provides that:

> (a) A personalized license plate may be the same color and size and contain similar required information as regular license plates issued for the respective class of vehicle.
>
> (b) A personalized license plate is limited to the:
>
> (1) numerals 0 through 9; or
>
> (2) letters A through Z;
>
> in a continuous combination of numbers and letters with at least two (2) positions.
>
> (c) A personalized license plate may not duplicate a regularly issued plate.
>
> (d) Only one (1) personalized plate, without regard to classification of registration, may be issued by the bureau with the same configuration of numbers and letters.

Indiana Code § 9-18-15-4 provides that:

> (a) A person who applies for:
>
> (1) a personalized license plate; or
>
> (2) the renewal of a personalized license plate in a subsequent period;
>
> must file an application in the manner the bureau [Indiana Bureau of Motor Vehicles]

requires, indicating the combination of letters or numerals, or both, requested by the person.

(b) The bureau may refuse to issue a combination of letters or numerals, or both, that:

(1) carries a connotation offensive to good taste and decency;

(2) would be misleading; or

(3) the bureau otherwise considers improper for issuance.

Title 140, Section 2-5-4 of the Indiana Administrative Code provides:

(a) The bureau may revoke a previously issued PLP [personalized license plate] if the bureau:

(1) receives a substantial number of complaints regarding the previously issued PLP; and

(2) determines the previously issued PLP contains references or expressions that Indiana law prohibits.

STATEMENT OF THE CASE

A. Introduction

This case concerns the propriety of the determination by the Indiana Supreme Court that the unique and idiosyncratic messages that vehicle owners may

devise for their personalized license plates are nevertheless government, not private, speech. This led the Indiana Supreme Court to conclude that these messages can be suppressed, and personalized license plates denied or revoked, without consideration of whether the standards utilized by the Indiana Bureau of Motor Vehicles are vague, overbroad, and not viewpoint neutral. Petitioners have, from the very inception of this litigation, raised the claim that the speech on personalized license plates is private speech protected by the First Amendment (App. 75-78) and this issue was specifically ruled upon by both the trial court (App. 56-64, 71) and the Indiana Supreme Court (App. 6-19, 22).

B. Statement of the Facts and Legal Background

1. Indiana's personalized license plate program and the revocation and denial of personalized license plates

In Indiana, those purchasing personalized license plates may obtain one of two standard license plates and may choose to have the Indiana Bureau of Motor Vehicles ("BMV") select the combination of numbers and/or letters that appear on their plates. Persons may also choose to purchase group recognition or specialty license plates of the sort considered by this Court in *Walker v. Texas Division, Sons of Confederate Veterans, Inc.*, ___ U.S. ___, 135 S. Ct. 2239 (2015), and they may elect to have the BMV select the letter and number combination for these plates as well. For

an additional fee, however, a person buying either a standard plate or specialty plate may instead choose to devise his or her own unique combination of no more than eight letters and/or numbers under the State's personalized license plate program. All license plates in Indiana, including personalized license plates, must be renewed each year.

Indiana Code § 9-18-15-4 is the only statutory standard provided for the BMV to use to assess the propriety of a proposed personalized license plate or to review one that has already been issued. As noted, it allows a personalized license plate to be refused that:

> (1) carries a connotation offensive to good taste and decency;
>
> (2) would be misleading; or
>
> (3) the bureau otherwise considers improper for issuance.

Indiana Code § 9-18-15-4(b). And, the only promulgated regulation in Indiana addressing the propriety of personalized license plates concerns their revocation, noting that a previously issued personalized license plate may be revoked if the BMV receives a "substantial" number of complaints about it and the BMV determines that the plate "contains references

or expressions that Indiana law prohibits." 140 IAC 2-5-4(a).[1]

When a personalized license plate is requested it is automatically reviewed against a list of already rejected plates. It will then go for further review by a committee that is charged with determining if the plate is offensive to good taste and decency or improper. This has led to starkly inconsistent decisions. For example, the following personalized license plates have been approved and denied, as indicated:

JEWJEW	Denied
BLKJEW	Approved
PAKI	Denied
GRINGO	Approved
BIGGSXY	Approved
FOXYGMA	Approved
SEXYGRMA	Denied
BIBLE4M	Approved
1GOD	Approved
GODTHX	Approved
BIBLE H8R	Denied

[1] Historically, the BMV has also used a non-promulgated policy statement that contained less general standards to review personalized license requests. However, the trial court held that the policy statement cannot be used by the BMV because it had not been promulgated under Indiana law and was therefore void. (App. 71-72). This decision was not challenged on appeal by the BMV. (App. 5 n.4).

HATER	Denied
1 HATED	Approved
CANCR SUX	Denied
WINTR SUX	Approved
NOBAMA	Denied
GOBAMA	Approved
UNHOLY	Denied
HOLYONE	Approved

The only explanation offered by the BMV as to why certain of the above personalized license plates were approved and certain plates were denied was that the decisions could be a function of different decision-makers serving on the review committee.

Petitioner Rodney Vawter is a corporal in the Greenfield, Indiana, Police Department who has had a specialty license plate issued by the Fraternal Order of Police. These license plates are limited to sworn law enforcement officers. He created a personalized license plate on his Fraternal Order of Police specialty license plate that stated "0INK." As a police officer who had been called "pig" on numerous occasions by arrestees, he thought that his vanity license plate was both humorous and an expression of pride. He had this license plate for a number of years, but in April of 2013 he was informed by the BMV that his license plate was revoked because it was deemed to be inappropriate or offensive despite the fact that other motorists had been approved for personalized license plates of "OINKS", "OINKY", "OINKI", and "1OINK." Although he never received a notice that

altered this revocation, he was allowed to renew his "0INK" personalized license plate after the class was certified in this case.

Petitioner Jay Voigt previously had a personalized license plate that stated "UNHOLY." However, it was revoked a number of years before the litigation was initiated because it was deemed inappropriate by the BMV and he desires to again obtain the plate.

2. Proceedings below

This case was brought as a class action, seeking declaratory and injunctive relief, on behalf of all Indiana drivers whose personalized license plates have been or will be revoked after May 7, 2011. The trial court ruled in favor of the plaintiff class under the First Amendment, holding that the personalized license plates represented private speech and that the applicable standards being used to assess their validity were vague, overbroad, and not viewpoint neutral. (App. 56-64).[2]

On appeal, the only questions addressed by the Indiana Supreme Court concerned the propriety of

[2] Additionally, the case raised a separate state-law challenge to the fact that the BMV had suspended the personalized license plate program for new applicants after the action was filed. A separate class was certified as to this claim and the trial court ruled in its favor as well. (App. 47, 72-73). The BMV also did not challenge this decision in the Indiana Supreme Court. (App. 5 n.4).

the trial court's federal constitutional determinations. (App. 4-5).

The Indiana Supreme Court reversed the trial court's conclusions that the BMV had violated the First Amendment. (App. 2, 22-23). It interpreted this Court's divided decision in *Walker*, decided after the initial appellate briefing of the case, to require a conclusion that Indiana's personalized license plates represent government, not private, speech. (App. 14). Given its conclusion that the personalized license plates are government speech, the Indiana Supreme Court found that any vagueness or overbreadth in the standards being used to assess the propriety of the personalized license plates was simply not relevant. (App. 19-20).[3]

[3] The trial court had also held that the BMV violated procedural due process by not providing adequate notice after the personalized license plate was revoked or denied. (App. 65-67, 72). The Indiana Supreme Court's decision that the personalized license plates are governmental speech led it to also conclude that procedural due process does not have to attend the revocation or denial of a personalized license plate inasmuch as "government speech on government property, is freely revocable." (App. 21 [footnote omitted]). This procedural due process determination, stemming from the Indiana Supreme Court's erroneous conclusion that personalized license plates are governmental speech, is not being separately challenged.

REASONS FOR GRANTING THE PETITION

Plenary review in this case is appropriate for two reasons. First, the Indiana Supreme Court has decided an issue of great significance to every state, all of which operate personalized or vanity license plate programs. It has entered a holding that is contrary to the great weight of authority that existed prior to *Walker* and the Indiana Supreme Court's decision demonstrates that *Walker* has created doctrinal confusion that must be clarified by this Court. And, second, the Indiana Supreme Court's decision is incorrect and cannot be reconciled with *Walker*.

I. THIS CASE PRESENTS AN ISSUE OF NATIONAL SIGNIFICANCE AFFECTING PERSONALIZED LICENSE PLATE PROGRAMS IN EVERY STATE

Walker leaves an open question – whether personalized license plates are government or private speech. Because all fifty states and the District of Columbia operate personalized license plate programs, it is a question of obvious national significance. (App. 81-83). A 2007 survey reported that there were almost 10 million vehicles in the United States at that time with vanity or personalized license plates.[4] The

[4] *See* AAMVA – LCNS2ROM™ VANITY LICENSE PLATES SURVEY: U.S., Nov. 5, 2007, https://web.archive.org/web/20120415033916/http://www.aamva.org/aamva/DocumentDisplay.aspx?id={FA33703E-1CFE-4797-A288-D02C3BC20781} (last visited Jan. 13, 2016).

criteria that each state applies to determine whether or not to approve such plates has been called into question by *Walker* and this uncertainty should be resolved now for the benefit of each state and all vehicle owners seeking these plates.

It is fundamentally important for both states and license plate applicants to know whether personalized license plates represent government or private speech. The approval process will frequently hinge on whether the plate that is issued is deemed the speech of the state or whether it constitutes individual expression. Unless this question is resolved, states have no way of knowing whether to approve or deny certain plates and vehicle owners will not be able to determine whether the messages they have devised may be properly approved or denied. For instance a plate such as "1 GOD," approved in Indiana, or "GODZGUD," approved after litigation in Virginia, *see Pruitt v. Wilder*, 840 F. Supp. 414, 416 (E.D. Va. 1994), clearly can be acceptable and appropriate as private speech. On the other hand, if the license plate is government speech, then such messages may well represent impermissible government endorsement of religious belief prohibited by the First Amendment. *See County of Allegheny v. American Civil Liberties Union Greater Pittsburgh Chapter*, 492 U.S. 573, 593 (1989) ("[T]he prohibition against governmental endorsement of religion 'preclude[s] government from conveying or attempting to convey a message that religion or a particular religious belief is *favored or preferred*.'" [quoting *Wallace v. Jaffree*, 472 U.S. 38,

70 (1985) (O'Connor, J., concurring)]) (emphasis added by *County of Allegheny*). Similarly, persons with messages with which a state may not want to be associated, for example, "COPSLIE," *see Montenegro v. New Hampshire Div. of Motor Vehicles*, 93 A.3d 290, 292 (N.H. 2014), or "HIV POS," *Dimmick v. Quigley*, No. C96-3987 SI, 1998 WL 34077216, *1 (N.D. Cal. 1998), may find themselves unable to display their chosen plates if their individual expressions are, in fact, government speech. On the other hand, depending on the nature of state regulation of the plates, and with the understanding that the speech may be subject to reasonable, viewpoint neutral regulation, *see, e.g.*, *Lamb's Chapel v. Center Moriches Union Free Sch. Dist.*, 508 U.S. 384, 392-93 (1993), these messages may be required to be allowed by states if they are private speech.

The bottom line is that the rules for approving or denying personalized license plates necessarily depend on whether the plates represent private speech or government speech.

Courts addressing the issue prior to *Walker* generally recognized personalized license plates to be private speech. *See Byrne v. Rutledge*, 623 F.3d 46, 53-54 (2d Cir. 2010); *Perry v. McDonald*, 280 F.3d 159, 168-69 (2d Cir. 2001); *Lewis v. Wilson*, 253 F.3d 1077, 1079-80 (8th Cir. 2001); *Morgan v. Martinez*, Civ. No. 3:14-02468 (FLW/DEA), 2015 WL 2233214, *8-*9 (D.N.J. May 12, 2015); *Matwyuk v. Johnson*, 22 F. Supp. 3d 812, 823-24 (W.D. Mich. 2014); *Dimmick v. Quigley*, 1998 WL 34077216, *3-*4; *Pruitt*, 840

F. Supp. at 417-18; *Montenegro*, 93 A.3d at 294; *Martin v. State Agency of Trans. Dep't of Motor Vehicles*, 819 A.2d 742, 747 (Vt. 2003). *Cf. Higgins v. Driver and Motor Vehicles Services Branch*, 72 P.3d 628, 634 (Or. 2003) (holding that although under the Oregon Constitution a vanity license plate was not "self-expression," the Oregon Court of Appeals was correct in concluding that "under current federal law, a registration plate is a nonpublic forum and the DMV's rules are permissible restraints on speech").

Read in the light of *Walker* these holdings reflect the obvious distinction between a specialty plate (which is designed by the state and placed in wide distribution throughout the state) and a personalized plate (which is designed entirely by a private person and is unique in the state). The Indiana Supreme Court ignored this distinction, and instead seized on this Court's conclusions in *Walker* concerning the history of specialty license plates, their perception by the public, and the control that Texas exercises over them to conclude that the Indiana personalized license plates are also government speech. (App. at 7-14). And, because it treated this Court's decision in *Walker* as resolving a question that this Court expressly did not address, the Indiana Supreme Court also felt free to ignore all the pre-*Walker* cases holding that personalized license plates are private speech.

At the very least, therefore, the decision below demonstrates that *Walker* has created uncertainty as to the proper status of personalized license plates and

the continuing validity of the pre-*Walker* case law. This confusion should be resolved now through a grant of plenary review in this case.

II. THE INDIANA SUPREME COURT'S DECISION MISAPPLIES *WALKER*

In *Walker* this Court concluded that:

> [w]ith respect to specialty license plate designs, Texas is not simply managing government property, but instead is engaging in expressive conduct . . . [W]e reach this conclusion based on the historical context, observers' reasonable interpretation of the messages conveyed by Texas specialty plates, and the effective control that the State exerts over the design selection process. Texas's specialty license plate designs "are meant to convey and have the effect of conveying a government message."

135 S.Ct. at 2251 (quoting *Pleasant Grove City v. Summum*, 555 U.S. 460, 472 (2009)).

Although the Indiana Supreme Court concluded that Indiana has a history of communicating messages on its license plates through specialty plates or messages on the exterior of its plates, there is no similar "historical context" that would justify a conclusion that the individually crafted messages on personalized license plates are messages from the state. The personalized license plates are unique – only a single plate is allowed with that particular

personally designed message. There simply is no history that would justify anyone concluding that such a unique message is a communication from the state.

In *Walker*, the dissent criticized the notion that persons would observe Texas specialty license plates and conclude that they were indeed the views of the State of Texas. 135 S. Ct. at 2255 (Alito, J., dissenting). The majority concluded to the contrary, holding that "Texas license plate designs 'are often closely identified in the public mind with the [State].'" *Id.* at 2248 (quoting *Summum*, 555 U.S. at 472) (alteration in original). Here, although persons will recognize that all license plates, including personalized license plates, are issued by the state and serve a governmental function, no one is going to look at the wide range of individual expressions contained on Indiana's personalized license plates and conclude that they are, in fact, government speech. To point out the obvious, persons seeing a license plate inscribed with such messages as FOXYGMA, BLKJEW, and GOBAMA, or thousands of other messages, will reach only one conclusion – these are individual messages and not messages of the State of Indiana.

Ignoring this distinction, the Indiana Supreme Court focused almost entirely on the fact that license plates are ultimately under the control of the state. To be sure, "the State, no less than a private owner of property, has power to preserve the property under its control for the use to which it is lawfully dedicated." *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460

U.S. 37, 46 (1983) (internal citation and quotation omitted). But the state's control over the forum does not, by itself, convert private speech into government speech, or allow the government to engage in viewpoint discrimination. *See, e.g.*, *Cornelius v. NAACP Legal Defense and Educ. Fund, Inc.*, 473 U.S. 788, 806 (1985).

In short, the Indiana Supreme Court misinterpreted *Walker* and misapplied forum analysis to reach the erroneous conclusion that the idiosyncratic, unique, and personal expressions that the state has allowed on personalized license plates are government speech. They are not.

CONCLUSION

The petition for a writ of certiorari should be granted.

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COMMISSIONER OF the INDIANA BUREAU OF MOTOR VEHICLES in his official capacity,
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Appellees/Plaintiffs below.

No. 49S00-1407-PL-494.
|
Nov. 6, 2015.

Appeal from the Marion Superior Court, No. 49D14-1305-PL-06159; The Honorable James B. Osborn, Judge.

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On Direct Appeal

DICKSON, Justice.

In accord with a recent decision of the United States Supreme Court, we uphold the actions of the

Indiana Bureau of Motor Vehicles in the processing of applications for personalized license plates.

This is a direct appeal from a trial court summary judgment declaring unconstitutional the statute that authorizes the Indiana Bureau of Motor Vehicles ("BMV") to refuse to issue personalized license plates ("PLPs"). The trial court found that the statute and its related policies were vague, overbroad, and lacking in content-neutrality, violating the First and Fourteenth Amendments to the United States Constitution. The trial court also held that the Bureau violates due process under the Fourteenth Amendment by providing insufficient reasons for a denial or revocation of a PLP. The BMV appeals, arguing that because personalized license plates are government speech, the statute and policies are constitutional. For the reasons expressed below, we agree and reverse the trial court's summary judgment for the plaintiffs on these issues and direct the trial court to enter summary judgment for the BMV on these claims.

Indiana allows a registered owner or lessee of certain types of vehicles, including passenger motor vehicles, to apply to the BMV for a PLP. Ind.Code § 9-18-15-1.[1] PLPs display numbers and/or letters in an

[1] Other vehicles eligible for PLPs include motorcycles, recreational vehicles, or vehicles registered as a truck with a declared gross weight of not more than eleven thousand pounds. Ind.Code § 9-18-15-l(a).

alphanumeric combination which identifies the vehicle and is "requested by the owner or the lessee of the vehicle and approved by the bureau." Ind.Code § 9-13-2-125; *see also* Ind.Code § 9-18-15-4(a). Indiana's PLPs have become quite popular: between January 1, 2011 and July 19, 2013, the BMV received 71,452 new applications for these plates.

After receiving a PLP application, the BMV is permitted by statute to reject any PLP alphanumeric combination that "(1) carries a connotation offensive to good taste and decency; (2) would be misleading; or (3) the bureau otherwise considers improper for issuance." Ind.Code § 9-18-15-4(b). The BMV also created both an administrative rule and a policy guide for making rejection and revocation decisions. The administrative rule allowed the BMV to "revoke a previously issued PLP if the bureau: (1) receives a substantial number of complaints regarding the previously issued PLP; and (2) determines the previously issued PLP contains references or expressions that Indiana law prohibits." 140 IAC 2-5-4(a). The policy guide provided that a BMV License Plate/PLP Committee would review PLP applications and prescribed nine categories of reasons why PLP applications "may be prohibited." Appellant's App'x at 87. The Committee, however, had discretion to reject PLPs outside those categories and to accept PLPs within them. As the Committee made decisions, the BMV stored rejected applications – approximately 6,000 by 2013 – on a list to compare with future applications. For each rejection, the BMV mailed the applicant a form

letter indicating that their application was denied "based on the inappropriate content or invalid format." *Id.* at 14.

The plaintiffs, as a certified class,[2] challenged the constitutionality of the PLP program.[3] They argue that "the decisionmaking process used in denying or revoking PLPs," violates the First Amendment and the Due Process Clause of the Fourteenth Amendment. Appellee's Br. at 1. The BMV argues in response that because PLPs are government speech, the challenged standards do not violate the Constitution. The trial court granted summary judgment in favor of the class, concluding that "Indiana Code § 9-18-5-4(b), 140 IAC 2-5-4, and the Policy Statement violate the First Amendment and due process as vague, overbroad,

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[2] The class, Class A, includes "[a]ll applicants or recipients of personalized license plates whose applications will be denied or were denied after May 7, 2011, or whose existing personalized license plates will be revoked or were revoked after May 7, 2011. . . ." Appellant's App'x at 22. The class representative, Rodney Vawter, is a corporal in the Greenfield, Indiana Police Department. For three years, Corporal Vawter displayed a Fraternal Order of Police PLP with the alphanumeric combination "0INK." But when the BMV in 2013 rejected an Indiana Association of Chiefs of Police PLP reading "O1NK," the BMV's computer system flagged Corporal Vawter's plate as similar to a rejected PLP. The BMV then revoked Mr. Vawter's PLP.

[3] A second class, Class B, challenged the BMV's decision to suspend the PLP program. The class included "[a]ll persons who are or will be precluded from applying for and/or obtaining a personalized license plate because the Commissioner of the Bureau of Motor Vehicles has suspended the personalized license plate program." *Id.* Jay Voigt represented Class B.

and lacking in content-neutrality." Appellant's App'x at 29. The trial court also held that "[t]he BMV denies procedural due process to those whose PLPs are denied or revoked" because "there are no specific factual bases given for the determination." *Id.* at 35, 37. The BMV appeals these decisions.[4]

This Court has mandatory and exclusive jurisdiction over this appeal because the trial court declared a state statute unconstitutional. Ind. Appellate Rule 4(A)(1)(b). We review the trial court's grant of summary judgment and any questions of federal constitutional law *de novo. Bleeke v. Lemmon*, 6 N.E.3d 907, 917 (Ind.2014); *Choose Life Ill., Inc. v. White*, 547 F.3d 853, 858 (7th Cir.2008). The material facts are undisputed.

The BMV argues on appeal that its PLP decision-making process is constitutional because "personalized plates are government speech, and even viewpoint discrimination is permissible." Appellant's Br. at 12. The BMV further contends that its "procedures for denying an application or revoking . . . plates satisfy procedural due process" because "[m]otorists have no

[4] Following the commencement of this litigation, the BMV Commissioner suspended the PLP program. The plaintiffs then challenged that decision as well, and the trial court held that "[t]he unilateral suspension of the PLP program by the [BMV] Commissioner is outside the scope of his authority and was invalid." *Id.* at 37. The trial court also held that the BMV's policy statement "is a rule under Indiana law and is void inasmuch as it has not been promulgated." *Id.* at 26. These rulings are not challenged in this appeal.

protected interest in possessing a personalized plate that displays any particular message." Appellant's Br. at 15, 41. The BMV especially relies on the United States Supreme Court's recent decision in *Walker v. Tex. Div., Sons of Confederate Veterans, Inc.*, ___ U.S. ___, 135 S.Ct. 2239, 192 L.Ed.2d 274 (2015), arguing that under *Walker*'s reasoning, personalized license plates must be government speech.[5]

1. The *Walker* Test for Government Speech

In *Walker*, the Supreme Court identified a three-factor standard for identifying government speech. 135 S.Ct. at 2247, 192 L.Ed.2d at 282-83. First, whether the government has historically used the medium to speak to the public; second, whether the message is closely identified in the public mind with the state; and third, the degree of control the state maintains over the messages conveyed. *Id.* Analyzing these factors together, we find that Indiana's PLPs are government speech.

[5] While *Walker* declares that it is "concerned only with . . . [Texas'] specialty license plates, not with [its] personalization program," we find its test for government speech is applicable and instructive here. *Walker*, 135 S.Ct. at 2244, 192 L.Ed.2d at 279. Additionally, *Walker* is especially informative to this case because its analysis frequently considers license plates themselves as well as the designs on them. *Id.* at 2248-50, 283-85.

a. Indiana's Historical Use of License Plates

License plates have long been used for government purposes. First and foremost, the alphanumeric combinations provide identifiers for public, law enforcement, and administrative purposes. Through these identifiers, the government enables the public to provide a unique identifier to others, differentiate between vehicles in a parking garage or lot, and identify their vehicles if they are borrowed or stolen. In addition to license plates providing unique identifiers, they "long have communicated messages from the States." *Id.* at 2248, 283. This is true of plates around the country and in Indiana. All fifty states have included graphics on their plates, including Pennsylvania's keystone in 1910, an Idaho potato in 1928, Florida grapefruits in 1935, a Georgia peach in 1940, a Colorado skier in 1958, and a Maine lobster in 1987. *See generally* James K. Fox, LICENSE PLATES OF THE UNITED STATES: A PICTORIAL HISTORY 1903 – TO THE PRESENT (Interstate Directory Publ'g Co., Inc., 1994).[6] Written messages on

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[6] Because the history of license plates is long and varied, "the appellate brief format" is "ill-suited to provide the background information essential to a thorough and fair consideration of [this] case." *Citimortgage, Inc. v. Barabas*, 975 N.E.2d 805, 808 n. 1 (Ind.2012). So, "in order to facilitate understanding of the facts and application of relevant legal principles, this opinion includes information [on the history of license plates] from identified sources outside the trial record of this case." *A.B. v. State*, 885 N.E.2d 1223, 1224 (Ind.2008) (providing background information about MySpace.com when the charged crime occurred on that website). We also note that because the trial

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license plates have been just as popular, beginning with "IDAHO POTATOES" in 1928. *Id.*; *see Walker*, 135 S.Ct. at 2248, 192 L.Ed.2d at 283-84. Many other states, such as Alabama, California, Maine, Missouri, and Washington, have included their state slogan. Tourist advertising is popular in both words and graphics as license plates have featured New Hampshire's Old Man in the Mountain, South Dakota's Mount Rushmore, Kentucky's Churchill Downs, and Minnesota's 10,000 lakes. *See generally* Fox, LICENSE PLATES OF THE UNITED STATES.

Like other states, Indiana has frequently communicated through its license plates. Indiana's slogans have included, among others, "DRIVE SAFELY" in 1956-1958, "LINCOLN'S YEAR" in 1959, "SAFETY PAYS" in 1960-1962, "150TH YEAR" in 1966, "WANDER" in 1985, "HOOSIER HOSPITALITY" in 1991, and currently "BICENENNIAL 1816-2016." *Id.* at 39, Indiana Antique License Plates 2000-Present, http://www.in.gov/bmv/2834.htm. Indiana has used graphics as well, such as a minuteman in 1976, an Indy 500 car and checkered flag in 1979, and a sunset over a farm from 1993-1997. Fox, LICENSE PLATES OF THE UNITED STATES 39; INDIANA ANTIQUE LICENSE PLATES 1990-1999, http://www.in.gov/bmv/2833.htm. Far more recently, Indiana began offering specialty plates honoring veterans, supporting

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court made its rulings over a year before the Supreme Court decided *Walker*, the parties and trial court would not have focused on the historical aspect of Indiana's PLPs.

colleges and universities, and recognizing dozens of other organizations. INDIANA'S STANDARD AND SPECIALTY LICENSE PLATES, http://www.in.gov/bmv/2352.htm; Indiana's Organizational License Plates, http://www.in.gov/bmv/2404.htm. Not only has Indiana spoken through its license plates since 1956, it continues to do so today. INDIANA ANTIQUE LICENSE PLATES 2000-PRESENT, http://www.in.gov/bmv/2834.htm.

The plaintiffs argue that because PLP alphanumeric combinations are "individually-crafted" and "unique," Indiana's historic practice does not justify the conclusion that they are from the state. Appellee's Supp. Br. at 3. While the alphanumeric combinations on PLPs are individually chosen instead of created by the state, this difference is secondary and does not change the principal function of state-issued license plates as a mode of unique vehicle identification. And the historical context remains helpful to our analysis. Originally, Indiana license plates served only as a unique identifier. But over time, Indiana included first words, then graphics, then eventually specialty designs and personalized plates. This history shows that Indiana often communicates through its license plates and has expanded how it does so. Furthermore, the plaintiffs' distinguishing features are fully compatible with government speech. "The fact that private parties take part in the design and propagation of a message does not extinguish the governmental nature of the message. . . ." *Walker*, 135 S.Ct. at 2251, 192 L.Ed.2d at 287. And, PLPs are no more unique

than public park monuments, which "typically represent government speech." *Pleasant Grove City, Utah v. Summum*, 555 U.S. 460, 470, 129 S.Ct. 1125, 1132, 172 L.Ed.2d 853, 863 (2009).

b. Identification of PLP Alphanumeric Combinations in the Public Mind with the State

PLP alphanumeric combinations "are often closely identified in the public mind with the [State]." *Walker*, 135 S.Ct. at 2248, 192 L.Ed.2d at 284 (quoting *Summum*, 555 U.S. at 472, 129 S.Ct. at 1133, 172 L.Ed.2d at 864) (alteration in original). PLPs belong to the BMV and display "Indiana" prominently at the top of every plate, indicating that Indiana owns and issues them. *See* Ind.Code § 9-18-2-31. Indiana requires motor vehicle owners to display license plates and to obtain them from the BMV, the issuing state agency. Ind.Code §§ 9-18-2-8, -26, -30. Those who apply for an Indiana PLP discover that the BMV must approve every alphanumeric combination before it can be displayed. Ind.Code § 9-13-2-125. Also, PLPs "may not duplicate a regularly issued plate" and "[o]nly one (1) personalized plate . . . may be issued by the bureau with the same configuration of numbers and letters." Ind.Code § 9-18-15-2. Under these facts, Indiana "license plates are, essentially, government IDs"[7] and

[7] Notably, *Walker* identified license plates as essentially government IDs even though it involved specialty designs instead of the combination of letters and numbers that actually identify

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license plate observers "routinely- and reasonably-interpret them as conveying some message on the [issuer's] behalf." *Walker*, 135 S.Ct. at 2249, 192 L.Ed.2d at 284 (quoting *Summum*, 555 U.S. at 471, 129 S.Ct. at 1133, 172 L.Ed.2d at 863) (alteration in original).

Even vehicle owners requesting and displaying PLPs recognize the close association of the message with the state. In about two and a half years the BMV received 71,452 new applications for PLPs. Each applicant, along with vehicle owners displaying previously approved PLPs, could have used bumper stickers, window decals, or similar private methods to display personal messages far more prominently and cost effectively.[8] Instead, many have preferred to have the state approve and authorize individualized alphanumeric combinations for display on government property for the purpose of vehicle identification.

The plaintiffs argue that this second factor supports PLPs as government speech "only if it can be believed that a person who observes, for example, a personalized license plate of 'BIGGSXY' or 'FOXYLDY' or

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the vehicle. 135 S.Ct. at 2249, 192 L.Ed.2d at 284. Therefore, Indiana's PLPs are more clearly government IDs than are the specialty plates in *Walker*.

[8] Indiana's license plates are six inches wide and twelve inches long. Ind.Code § 9-18-2-32. The BMV charges $45 for each PLP, in addition to standard registration fees. PERSONALIZED PLATES, http://www.in.gov/bmv/2824.htm.

'BLKJEW'[9] will conclude that it is the State of Indiana that is making this assertion." Appellee's Supp. Br. at 4. The *Walker* dissent so argues, 135 S.Ct. at 2255, 192 L.Ed.2d at 291 (Alito, J., dissenting), but the majority instead held that all of Texas' specialty plates are government speech. *Id.* at 2253. PLPs do not cease to be government speech simply because some observers may fail to recognize that PLP alphanumeric combinations are government issued and approved speech in every instance. Instead, PLPs "are *often* closely identified in the public mind with the [State]." *Id.* at 2248, 284 (quoting *Summum*, 555 U.S. at 472, 129 S.Ct. at 1133, 172 L.Ed.2d at 864) (emphasis added) (alteration in original). As in *Walker*, a few exceptions do not undermine the conclusion that PLPs are government speech.[10] Rather, a PLP "is a government article serving the governmental purposes of vehicle registration and identification." *Id.* at 2248, 284. The alphanumeric combination, regardless of its content, is government speech specifically identifying a single vehicle.[11]

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[9] Each of these plates was issued under Indiana's PLP program.

[10] Among its specialty plate options, Texas offered designs advertising Remax, Dr. Pepper, and Mighty Fine Burgers. *Walker*, 135 S.Ct. at 2257, 192 L.Ed.2d at 294 (Alito, J., dissenting).

[11] Even the four *Walker* dissenters apparently agree, saying that "the [license plate's] numbers and/or letters identifying the vehicle" are "unquestionably" government speech. *Walker*, 135 S.Ct. at 2255-56, 192 L.Ed.2d at 292.

c. Indiana's Control over PLP Alphanumeric Combinations

Applying the third factor, Indiana "maintains direct control" over the alphanumeric combinations on its PLPs. *Id.* at 2249, 284. In fact, Indiana PLPs by definition must be approved by the BMV. Ind.Code § 9-13-2-125. The BMV may reject any PLP that "(1) carries a connotation offensive to good taste and decency; (2) would be misleading; *or* (3) *the bureau otherwise considers improper for issuance.*" Ind.Code § 9-18-15-4(b) (emphasis added). The BMV not only holds broad authority in reviewing PLPs, but exercises it – rejecting thousands of combinations for reasons including "misleading," "poor taste," "profanity," and "violence." *See* Appellant's App'x at 124-49. Thus, the BMV "has effectively controlled the messages [conveyed] by exercising final approval authority over their selection." *Walker*, 135 S.Ct. at 2249, 192 L.Ed.2d at 285 (quoting *Summum*, 555 U.S. at 473, 129 S.Ct. at 1128, 172 L.Ed.2d at 858) (internal quotations omitted) (alteration in original).

The plaintiffs argue that the BMV "does not exert 'effective control'" over PLPs, because, "aside from the statute challenged in this case and the eight digit limitation imposed by the license plate size, the BMV imposes no limits on the speech that individuals can devise to place on their unique personalized license

plate."[12] Appellee's Supp. Br. at 2-3. But under *Walker*, the BMV's final approval authority establishes effective control regardless of any set list of limits. 135 S.Ct. at 2249, 192 L.Ed.2d at 284-85. The final BMV approval authority is established both in the statute defining PLPs and in the statute challenged here. Ind.Code §§ 9-13-2-125, 9-18-15-4. The BMV applied its authority by creating an internal policy guide, establishing a PLP Committee, and allowing that Committee to approve or reject plates for any reason – whether listed in the policy guide or not. Because the BMV has final approval authority by statute, and exercises effective control, we reject the plaintiffs' argument.

The three *Walker* factors apply with equal or even greater force to Indiana PLPs as they do to Texas' specialty plates, demonstrating that Indiana's PLPs are government speech.

2. Forum Analysis

The plaintiffs argue that PLPs are "private speech in a forum provided by the State." Appellee's Supp. Br. at 4. While the three *Walker* factors alone demonstrate that PLPs are government speech, we

[12] This argument fails to grasp the extent of the BMV's authority. In addition to the statutory limits challenged by the plaintiffs, PLP alphanumeric combinations are also limited because the BMV may not issue PLPs duplicating another plate and must approve every PLP before issuance. Ind.Code §§ 9-13-2-125, 9-18-15-2.

follow *Walker*'s example in addressing this argument even though it is not dispositive. As in *Walker*, "forum analysis is misplaced here," because Indiana's PLPs do not fit into any type of government forum for private speech. *Walker.* 135 S.Ct. at 2250, 192 L.Ed.2d at 286.

a. Traditional Public Forum

First, "PLPs are not a 'traditional public forum,' such as a street or a park," which the government has long held in trust for public assembly, communication, and discussion. *Id.* (quoting *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45, 103 S.Ct. 948, 954-55, 74 L.Ed.2d 794, 804 (1983)). Traditional public forums do not extend beyond their historic confines, thus excluding PLPs from this status. *Id.* (quoting *Ark. Educ. Television Comm'n v. Forbes*, 523 U.S. 666, 679, 118 S.Ct. 1633, 1641, 140 L.Ed.2d 875, 887 (1998)).

b. Designated and Limited Public Forums

Second, PLPs are not a "designated public forum" or a "limited public forum." Designated public forums exist "where government property that has not traditionally been regarded as a public forum is intentionally opened up for that purpose. . . ." *Id.* (quoting *Summum*, 555 U.S. at 469, 129 S.Ct. at 1132, 172 L.Ed.2d at 862) (internal quotation omitted). Limited public forums exist "where a government has reserv[ed a forum] for certain groups or for the discussion of

certain topics." *Id.* (quoting *Rosenberger v. Rector and Visitors of Univ. of Va.*, 515 U.S. 819, 829, 115 S.Ct. 2510, 2516-17, 132 L.Ed.2d 700, 715 (1995)) (internal quotation omitted) (alteration in original). The government creates these forums "only by intentionally opening a nontraditional forum for public discourse." *Id.* (quoting *Cornelius v. NAACP Legal Def. and Educ. Fund, Inc.*, 473 U.S. 788, 802, 105 S.Ct. 3439, 3449, 87 L.Ed.2d 567, 580 (1985)) (internal quotation omitted). In order to determine whether PLPs have been intentionally opened for public discourse, we look to "the policy and practice of the government and to the nature of the property and its compatibility with expressive activity." *Id.* (quoting *Cornelius*, 473 U.S. at 802, 105 S.Ct. at 3449, 87 L.Ed.2d at 580) (internal quotation omitted).

The BMV's policy and practice show that PLPs are not a public forum. Indiana license plates "have traditionally been used for government speech, are primarily used as a form of government ID, and bear the State's name." *Walker*, 135 S.Ct. at 2251, 192 L.Ed.2d at 287. The BMV "exercises final authority over" each PLP alphanumeric combination, "militat[ing] against a determination that [it] has created a public forum." *Id.* at 2251, 286. The BMV has never opened PLPs "for indiscriminate use by the general public" or "granted [PLPs] as a matter of course" to every applicant. *Perry Educ. Ass'n*, 460 U.S. at 47, 103 S.Ct. at 956, 74 L.Ed.2d at 806. Instead, it requires that every alphanumeric combination be

submitted, reviewed, and approved before it can be displayed.

Furthermore, the nature of Indiana's PLPs is not compatible with expressive activity. Because PLPs are small and contain a maximum of eight characters, they cannot realistically promote meaningful discourse, communication, and debate. *See* Ind.Code § 9-18-2-32. The primary purpose of PLPs is to register vehicles, "not to 'encourage a diversity of views from private speakers. . . .'" *United States v. Am. Library Ass'n, Inc.*, 539 U.S. 194, 206, 123 S.Ct. 2297, 2305, 156 L.Ed.2d 221, 233 (2003) (quoting *Rosenberger*, 515 U.S. at 834, 115 S.Ct. at 2519, 132 L.Ed.2d at 718). And, as explained by the United States Supreme Court, "where the principal function of the property would be disrupted by expressive activity, [we are] particularly reluctant to hold that the government intended to designate a public forum." *Cornelius*, 473 U.S. at 804, 105 S.Ct. at 3450, 87 L.Ed.2d at 581. Under this precedent, the primary purpose of PLPs reinforces our conclusion that PLPs are neither a limited nor a designated public forum.

c. Nonpublic Forum

Third, PLPs are not a nonpublic forum, which exists "[w]here the government is acting as a proprietor, managing its internal operations." *Walker*, 135 S.Ct. at 2251, 192 L.Ed.2d at 287 (quoting *Int'l Soc'y for Krishna Consciousness, Inc. v. Lee*, 505 U.S. 672, 678, 112 S.Ct. 2701, 2705, 120 L.Ed.2d 541, 549

(1992)) (alteration in original). When the government "simply manag[es] government property," and that government property is used for private speech, nonpublic forum analysis applies. *Id.* In fact, in some nonpublic forums, government speech may exist alongside private speech. This happened in *Perry Educational Association*, where a nonpublic forum – an interschool mail system – transmitted "official messages," "personal messages," and "messages from various private organizations." 460 U.S. at 39, 103 S.Ct. at 952, 74 L.Ed.2d at 801. But when government property is used for government speech, and that government speech necessarily crowds out all private speech on the same property, nonpublic forum analysis is misplaced. Such is the case here.

As established above, license plates, even those with personalized alphanumeric combinations, are government speech. Private speech on license plates is prohibited and impractical even outside the alphanumeric combinations at issue in this case. In addition to the eight-character PLP limitation, Indiana requires motorists to keep their plates "free from foreign materials and in a condition to be clearly legible" and "not obstructed or obscured by . . . accessories, or other opaque objects." Ind.Code § 9-18-2-26(b)(4)-(5). Moreover, the small area of a license plate leaves little empty space where someone could feasibly display a private message. *See* Ind.Code § 9-18-2-32(a)(1). Under these facts, we find that Indiana's PLPs do not accommodate private speech either

in their alphanumeric combinations or anywhere else on the plate, and therefore are not a nonpublic forum.

PLPs are government speech, and Indiana "is not barred by the Free Speech Clause from determining the content of what it says." *Walker*, 135 S.Ct. at 2245, 192 L.Ed.2d at 281 (citing *Summum*, 555 U.S. at 467-68, 129 S.Ct. at 1131, 172 L.Ed.2d at 861). This is because "the Free Speech Clause restricts government regulation of private speech; it does not regulate government speech." *Summum*, 555 U.S. at 467, 129 S.Ct. at 1131, 172 L.Ed.2d at 861. The plaintiffs' argument that the PLP regulations are not content-neutral therefore cannot succeed. "A government entity," after all, "has the right to speak for itself . . . and to select the views that it wants to express." *Id.* at 467-68, 1131, 861 (quoting *Bd. of Regents of the Univ. of Wis. Sys. v. Southworth*, 529 U.S. 217, 229, 120 S.Ct. 1346, 1354, 146 L.Ed.2d 193, 205 (2000)) (internal quotation omitted). The plaintiffs warn that this conclusion will lead to Establishment Clause and Free Speech Clause violations, equal protection violations, embarrassment for the state, and employment discrimination claims. Because none of these issues are presented by the facts of this case, we decline to address them.

3. Overbreadth, Vagueness, and Adequacy of Notice

The plaintiffs also argue that the PLP regulations are overbroad and vague. We decline to address

these challenges because they are moot. An appeal or issue can become moot in various ways: (1) when it is no longer 'live' or when the parties lack a legally cognizable interest in the outcome; (2) when the principal questions in issue have ceased to be matters of real controversy between the parties; or, (3) when the court on appeal is unable to render effective relief upon an issue. *See Matter of Tina T.*, 579 N.E.2d 48, 52 (Ind.1991). Because the government is speaking, the BMV may deny or revoke PLPs regardless of the challenged regulations. The plaintiffs' involvement is limited to the request for and display of PLP alphanumeric combinations, neither of which is affected by the overbreadth and vagueness challenges. The plaintiffs, then, "lack a legally cognizable interest in the outcome" and this Court "is unable to render effective relief on these challenges. *Id.*

Finally, the plaintiffs claim that the BMV provides inadequate notice after a PLP denial or revocation, violating due process. Specifically, they argue that "custom and practice" create "a property interest secured by due process." Appellee's Br. at 44-45. The BMV responds that "[m]otorists have no protected interest in possessing a personalized plate that displays any particular message" because "there is no 'entitlement' to a personalized license plate." Appellant's Br. at 41; Appellant's Reply Br. at 23. Agreeing with the BMV, we find that the plaintiffs have not been deprived of due process.

"The requirements of procedural due process apply only to the deprivation of interests encompassed

by the Fourteenth Amendment's protection of liberty and property." *Bd. of Regents v. Roth*, 408 U.S. 564, 569, 92 S.Ct. 2701, 2705, 33 L.Ed.2d 548, 556 (1972). The plaintiffs assert that they have a property interest in their PLPs – one created by "rules or understandings that stem from an independent source such as state law. . . ." *Id.* at 577, 2709, 561. But "a benefit is not a protected entitlement if government officials may grant or deny it in their discretion." *Town of Castle Rock v. Gonzales*, 545 U.S. 748, 756, 125 S.Ct. 2796, 2803, 162 L.Ed.2d 658, 669 (2005). Here, the BMV retains full discretion over PLPs. While the BMV is required to issue a regular license plate for registered vehicles, it may decline to issue PLPs for virtually any reason. Ind.Code §§ 9-18-2-30; 9-18-15-1, -4(b). These statutes apply equally to new applications and PLP renewals. Ind.Code § 9-18-15-4(a). The same discretion applies to PLP revocations. No statute, custom, or practice secures a previously-issued PLP or supports a claim of entitlement to its continued display. *See Roth*, 408 U.S. at 577, 92 S.Ct. at 2709, 33 L.Ed.2d at 561. Instead, a PLP, as government speech on government property, is freely revocable.[13]

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[13] This is not to say that the BMV could as easily revoke the vehicle's registration or refuse to provide a replacement plate. In this way, license plates are similar to driver's licenses. *See Bell v. Burson*, 402 U.S. 535, 539, 91 S.Ct. 1586, 1589, 29 L.Ed.2d 90, 94 (1971) ("Once [driver's] licenses are issued . . . their continued possession may become essential in the pursuit of a livelihood. Suspension of issued licenses thus involves state action that

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While the plaintiffs rely on "understanding, custom and practice," they do not specifically identify any supporting relevant understandings, customs, or practices. These vague and undefined references cannot support a property interest under the Fourteenth Amendment. *See Castle Rock.* 545 U.S. at 763-64, 125 S.Ct. at 2807-08, 162 L.Ed.2d at 673-74. "To have a property interest in a benefit, a person *clearly* must have more than an abstract need or desire for it. He must have more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it." *Roth*, 408 U.S. at 577, 92 S.Ct. at 2709, 33 L.Ed.2d. at 561 (emphasis added). The plaintiffs do not have that claim of entitlement, and thus, Due Process Clause protections do not apply. Without due process protections, the applicants whose PLPs are denied or revoked have no entitlement to reasons for the BMV's decision or to a hearing where they can present evidence.

Conclusion

Indiana's personalized license plates are government speech. The Bureau of Motor Vehicles, therefore, does not violate the First or Fourteenth Amendments in denying an application for a PLP or revoking a previously issued PLP. Furthermore,

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adjudicates important interests of the licensees. In such cases the licenses are not to be taken away without that procedural due process required by the Fourteenth Amendment.").

Due Process Clause protections do not apply because vehicle owners do not have a property interest in their personalized license plates. We reverse the trial court's grant of the plaintiffs' motion for summary judgment as to these issues and direct the trial court to enter summary judgment on these claims for the BMV.

RUSH, C.J., and RUCKER, DAVID, and MASSA, JJ., concur.

STATE OF INDIANA	)	IN THE MARION
	)	SUPERIOR COURT
COUNTY OF MARION	)	CIVIL DIVISION, ROOM NO. 14
		CAUSE NO. 49D014-1305-PL-016159

RODNEY G. VAWTER, *et al.*,	)
Plaintiffs,	)
	)
v.	)
	)
COMMISSIONER, OF THE INDIANA BUREAU OF MOTOR VEHICLES, in his official capacity,	)
	)
Defendant.	)

ORDER GRANTING PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

(Filed May 7, 2014)

This case comes before the Court on cross motions for summary judgment asking the Court to determine whether Indiana's personalized license plate program is in violation of the First Amendment to the United States Constitution. Having considered the parties' briefs and oral arguments, the Court now grants summary judgment on behalf of the Plaintiffs.

Findings of Fact

Indiana's personalized license plate program

1. In Indiana those purchasing license plates may purchase one of two standard license plates and may

opt to have the Indiana Bureau of Motor Vehicles ("BMV") select the numbers or letters and their combination on the plate. (Attachment 1 to Plaintiffs' Motion for Summary Judgment, Deposition of Elizabeth Murphy ["Murphy"] at 7-8).

2. Persons may also opt to have a specialty plate from various organizations or schools and may also opt to have the BMV assign the letters and numbers on the plates. (*Id.* at 8; *see also* Ind. Code § 9-18-7-1, *et seq.*).

3. Indiana law also allows, for an extra fee, the person buying a plate to designate the eight numbers and/or letters he or she would like to have on the plate, thereby designing a personalized license plate ("PLP") (Murphy at 8-9; Ind. Code § 9-18-15-1, *et seq.*).

4. A plate may not contain anything but letters and numbers. (Murphy at 99).

5. License plates, including PLPs, are renewed each year and must be approved on an annual basis. (*Id.* at 9-10).

Standards governing the approval and disapproval of PLPs

6. Indiana Code § 9-18-5-4 is the only statute that specifically addresses the BMV's authority to review and disapprove the content of PLP applications. (*Id.* at 10; Ex. 2 to Murphy).

7. Indiana Code § 9-18-5-4 states in its entirety:

> (a) A person who applies for:
>
> (1) a personalized license plate; or
>
> (2) the renewal of a personalized license plate in the subsequent period; must file an application in the manner the bureau requires, indicating the combination of letters or numerals, or both, requested by the person.
>
> (b) The bureau may refuse to issue a combination of letters or numerals, or both, that:
>
> (1) carries a connotation offensive to good taste and decency;
>
> (2) would be misleading; or
>
> (3) the bureau otherwise considers improper for issuance.

8. At the current time there is only one promulgated regulation that addresses the revocation of PLPs because they are deemed to be inappropriate. This is 140 IAC 2-5-4 that is focused exclusively on the revocation of existing PLPs and provides:

> (a) The bureau may revoke a previously issued PLP if the bureau:
>
> (1) receives a substantial number of complaints regarding the previously issued PLP; and

(2) determines the previously issued PLP contains references or expressions that Indiana law prohibits.

(b) The bureau shall notify a person of the bureau's revoking a previously issued PLP under IC 4-21.5-3-1.

(c) A person shall return the revoked PLP to the bureau within thirty (30) days of the date of the notice sent under subsection (b) unless the person timely requests a petition for an administrative review of the bureau's revocation decision.

9. Formerly, the BMV had a promulgated regulation that governed the review of PLP applications and that contained some specific standards for approval and denial of the applications. (Murphy at 12; Ex. 4 to Murphy).

10. This former regulation was repealed on November 12, 2009. (Murphy at 12; Ex. 4 to Murphy; 140 IAC 2-5-2 [repealed by BMV, filed Nov. 12, 2009, 20091209-IR-140090169FRA]).

11. The former regulation was in effect for slightly more than one year. (Murphy at 13)

12. Today, the BMV has no promulgated regulations that contain specific standards, similar to the repealed regulation, for the approval and denial of PLPs because of their content. (*Id.*).

13. The BMV has a non-promulgated policy that it uses to review PLP requests. (*Id.* at 13-14).

14. The policy is entitled Personalized License Plate Standards and is in 7 paragraphs. (Ex. 6 to Murphy).

15. It states, as its purpose, "[t]o establish guidelines for the restriction of certain Personalized License Plates (PLP) request and develop the standard for reviewing questionable PLP applications." (Ex. 6 to Murphy ¶ 1).

16. It states further that its scope is to "establish the standard used to review PLP requests in accordance with Indiana Code (IC) section 9-18-15-4." (*Id.* ¶ 2).

17. It establishes a BMV License Plate/PLP Committee that "is responsible for utilizing the standards implemented by this policy to review PLP requests." (*Id.* ¶ 3).

18. The "Personalized License Plate Standards" also provides, at paragraph 5, a "Policy Statement" that states, in pertinent part:

> The BMV shall prohibit a PLP request if an objective, reasonable person would find that the proposed number and/or letter combination for a particular plate carries a connotation offensive to good taste and decency, is misleading, or is otherwise prohibited. For example, requests that fall into one of the following categories may be prohibited:
>
> > 1. Refers to, relates to, or connotes sexual acts or eliminatory functions, including but not limited to breasts, genitalia, the pubic area, and/or buttocks. References to numbers

with sexual connotations, such as "69", are prohibited unless the combination clearly associates a year with a recognizable person, place or thing. For example, "69 CHEVY," "NAM 59," and "69 HOYA" would be accepted, whereas "69 BILL," "69 BOB," or "69 GIRL" would not be acceptable.

2. Refers to, or suggests, the substance, paraphernalia, sale, use, purveyor of, or physiological state produced by any drug, narcotic, alcoholic beverage, or intoxicant.

3. Refers to race, religion, deity, ethnicity, gender, sexual orientation, political party or affiliation, or governmental entity or official in a manner that is offense to good taste and decency. Generally accepted references to a race or ethnic heritage (i.e. IRISH), are acceptable.

4. Is defamatory, profane, obscene, vulgar or derogatory.

5. Expresses or suggests violence or endangerment to the public welfare.

6. Duplicates another license plate or violates plate format.

7. Number and letter combinations that would substantially interfere with plate identification for law enforcement purposes.

8. Uses linguistics, numbers, phonetics, translations from foreign languages, or upside-down or reverse reading to reference any

other prohibited numeric and letter combination.

9. Uses or refers to a trademark, trade name, service mark, copyright or other proprietary right in conjunction with language that promotes, advertises, or endorses a product, brand, or service provided for a commercial purpose unless the registrant is the verified owner or licensee of the protected mark or authorized to use such mark. (For example, "BUY COKE")

. . . The PLP application will be rejected if a majority of the Committee deems the proposed request is prohibited in accordance with the above standards. . . .

A customer has the right to an administrative hearing should the BMV determine that their PLP request has been prohibited. . . .

(*Id.* ¶ 5).

19. As is clear from the introduction to the nine paragraphs in the Policy Statement, the nine paragraphs are not exclusive and the BMV retains discretion to prohibit the text of a PLP even though it is not covered by any of the nine paragraphs if it determines that "an objective, reasonable person would find that the proposed number and/or letter combination for a particular plate carries a connotation offensive to good taste and decency, is misleading, or is otherwise prohibited." (Murphy at 15, 21; Ex. 6 to Murphy ¶ 5).

20. And, the Policy Statement preserves the discretion of the BMV to approve a PLP even though its text falls within one of nine paragraphs. (Murphy at 15, 21).

21. The Policy Statement is not promulgated, although in her deposition of September 24, 2013, the then-General Counsel of the BMV, testifying as the Commissioner's designate, stated that there were plans to promulgate the Policy Statement as a formal regulation at some point in the future. (*Id.* at 15-16).

22. The Court takes judicial notice that the Policy Statement has not been promulgated.

23. When a PLP application comes into the BMV it is automatically checked by a computer against a list of already rejected plates, called an "objectionable table." (*Id.* at 18).

24. If it matches a listing on this table it will be automatically denied. (*Id.*).

25. If not, it will generate a report that goes to the committee established by the BMV policy noted above. (*Id.*).

26. The committee will review the plates and determine, individually, which ones it thinks are in violation of the policy. (*Id.* at 18-19).

27. The committee will then make a determination on each questionable PLP application as to whether it should be approved or not. (*Id.* at 19).

28. Although the BMV has stated in an affidavit that under current policy it only uses the Policy Statement to review new PLP applications and not PLP renewals (Declaration of Shannon Dickson ¶¶ 12-15, Attached to Defendant's Response in Opposition to Plaintiffs Motion for Summary Judgment and Cross-Motions for Summary Judgment ["Dickson"]), it concedes that at times the Policy Statement has been applied to renewal requests. (*Id.* ¶ 16). And, the Commissioner's designate testified at her deposition that existing PLPs were subject to the Policy Statement. (Murphy at 49).

29. It is also uncontested that the Policy Statement is designed to review PLP requests in accordance with Ind. Code § 9-18-15-4 (Ex. 6 to Murphy ¶ 2), and that the statute specifically applies to the application and renewal of PLPs. Ind. Code § 9-18-15-4(a). Moreover, 140 IAC 2-5-4(a) allows the BMV to revoke a previously issued PLP if the BMV determines that the "PLP contains references or expressions that Indiana law prohibits" and the BMV has received a substantial number of complaints regarding the PLP.

30. Under the above regulation "a substantial number" may be only one complaint. (Murphy at 11-12).

31. It is therefore uncontested that both new PLP applications and renewals are subject to the same statute and regulations and that PLP renewal applications may be subject to the Policy Statement to

which all new PLPs applications are subject to as well.

32. Paragraph 3 of the Policy Statement allows a PLP request to be denied if it "[r]efers to race, religion, deity, ethnicity, gender, sexual orientation, political party or affiliation, or governmental entity or official in a manner that is offensive to good taste and decency. Generally accepted references to race or ethnic heritage (i.e. IRISH), are acceptable." (Ex. 6 to Murphy, Paragraph 5(3)).

33. The term "offensive to good taste and decency" that appears in both the statute, Ind. Code § 9-18-5-4(b)(1), and Policy Statement, is not defined anywhere and this could cause disagreements on the committee as to whether or not something is or is not offensive to good taste and decency. (Murphy at 21).

34. The committee could also have disagreements about whether something in a proposed PLP was a "[g]enerally accepted reference to race or ethnic heritage." (*Id.* at 22).

35. Paragraph 4 of the Policy Statement allows prohibition of a PLP that is "derogatory." (Ex. 6 to Murphy, Paragraph 5(4)).

36. The term "derogatory" is not defined anywhere and the committee could have disagreements as to what it means. (Murphy at 23).

37. The BMV maintains a database of all rejected PLPs with the proposed plate listed, the reason for its

rejection, and the date that the applicant requested the plate. (Murphy at 23-24; Ex. 7 to Murphy).

38. The database discloses the following concerning the approval and denial of PLPs:

Plate Requested	***Disposition***	***Reason if Denied***	***Murphy Cite***
PAKI	Denied	Poor Taste	Ex. 10
GRINGO	Approved		Ex. 11
SXY	Denied	Poor Taste	Ex. 10
BIGGSXY	Approved		Ex. 12
FOXYLDY	Approved		Ex. 13
FOXYGMA	Approved		Ex. 14
SEXYGRMA	Denied	Poor Taste	Ex. 15
FOX*LIES[1]	Denied	Insulting	Ex. 16
FOX NEWS	Approved		Ex. 17
BIBLE*H8R	Denied	Religion	Es. 18
BIBLES	Approved		Ex. 19
BIBLE4M	Approved		Ex. 20
1GOD	Approved		Ex. 21
GODTHX	Approved		Ex. 22
GOD IOU1	Approved		Ex. 23
HATER	Denied	Poor Taste	Ex. 24
HATE*ME	Denied	Poor Taste	Ex. 25
HATE	Approved		Ex. 26

[1] A number of the listed plates have asterisks on them. (Murphy at 24-25). These just represent placeholders. (*Id.*). Therefore, this plate would just read "FOX LIES." (*Id.* at 36).

HATERS	Approved		Ex. 27
I HATED	Approved		Ex. 28
JEWJEW	Denied	Racial	Ex. 29
BLKJEW	Approved		Ex. 30
CNCR*SUX	Denied	Profanity	Ex. 31
WNTR SUX	Approved		Ex. 33
NOBAMA	Denied	Poor Taste	Ex. 35
GOBAMA	Approved		Ex. 36

39. As indicated, a number of the PLP requests were denied for being in "Poor Taste." This term is not mentioned in the Policy Statement that the BMV uses to determine whether or not to approve a PLP. (Ex. 6 to Murphy).

40. The term refers to several different categories in the Policy Statement. (Murphy at 40).

41. The General Counsel of the BMV was produced at a deposition conducted pursuant to Rule 30(B)(6) of the Indiana Rules of Trial Procedure to testify as the designate of the Commissioner of the BMV on a number of matters, including:

> 3. How the BMV determines that a personalized license plate or proposed personalized license plate contains a combination of letters or numerals or both that will not be approved or allowed by the BMV.
>
> 4. All standards, statutory, regulatory, or others, which are used by the BMV to determine

> whether the combination of letters and numerals on the plate or proposed plate are permissible and will be allowed. To the extent that there are standards other than those explicit in Indiana statute or promulgated regulations, how were those standards developed.

(Ex. 1 to Murphy; Murphy at 5-6).

42. The General Counsel for the BMV was unable to explain the seeming inconsistencies in the approval and denials of the above PLP applications, as illustrated by the above listing of approvals and denials of license plates. (Murphy at 34-36).

43. The Commissioner's designate opined, in trying to explain why "HTERS" was approved and "HATER" was rejected that "[i]t could be different people on the committee's opinions." (*Id.* at 41). Similarly, one of her explanations for denying JEWJEW, but allowing BLKJEW, was that "[i]t could be different people on the committee." (*Id.* at 43).

44. In 2010 there were 19,286 PLP requests, although the number may include renewals as well as new requests. (Murphy at 16). New requests for PLPs totaled: 24,660 in 2011; 31,374 in 2012, and 15,418 through July 19, 2013.

45. Those who are denied a personalized license plate, whether as an initial denial or revocation of an existing PLP, are sent a form letter indicating that they have been denied their requested PLP "based on the inappropriate content or invalid format." (Murphy at 52-53; Ex. 42 to Murphy; Stipulation filed

November 15, 2013; Supplementation of Discovery Request at 6, Ex. 2 to Plaintiff's Reply Memorandum in Support of their Motion for Summary Judgment and Response Memorandum in Opposition to Defendant's Motion).

46. These person are given no further information specifying the exact reason that the plate has been denied. (Stipulation filed November 15, 2013; Supplementation of Discovery Request at 6, Ex. 2 to Plaintiff's Reply Memorandum in Support of their Motion for Summary Judgment and Response Memorandum in Opposition to Defendant's Motion).

47. These persons are informed of their right to seek an appeal of the PLP denial. (Ex. 42 to Murphy).

The suspension of the personalized license plate program

48. On July 19, 2013, the Commissioner of the BMV issued a press release announcing that as of 6:00 p.m. on that date he was temporarily suspending the PLP program. (Ex. 39 to Murphy).

49. However, if persons had PLPs on July 19, 2013, they are able to seek renewal of their PLP on an annual basis. (Murphy at 48).

50. The PLP program will continue for those who had PLPs prior to July 19, 2013, but there will be no new PLPs issued during the time of the suspension. (*Id.* at 48-49). All applications pending that day were processed, but nothing thereafter. (*Id.* at 49).

51. Those persons applying annually for their PLP renewals will continue to have assessments made as to whether their PLPs are appropriate. (*Id.*).

52. The PLP program was suspended by the Commissioner based on this litigation "until a judge made a determination one way or the other on the lawsuit." (*Id.* at 50).

53. The PLP program may start again when this litigation is resolved. (*Id.*).

54. The PLP program was established by the General Assembly. (*Id.*).

55. To the best of the knowledge of the designee of the Commissioner, no BMV Commissioner has ever suspended any program established by the legislature and the designee of the Commissioner was not aware of the authority the Commissioner has to do so. (*Id.*).

Corporal Rodney Vawter and the "0INK" PLP

56. Rodney G. Vawter is currently a Corporal in the Greenfield, Indiana, Police Department and serves as the Department's lead crime-scene investigator. (Declaration of Rodney Vawter Attachment 2 to the Plaintiffs' Motion for Summary Judgment ["Vawter"] ¶ 2).

57. Corporal Vawter first served in law enforcement in 2000 as a reserve officer and has been employed full-time as a law enforcement officer since 2004. (*Id.* ¶ 3).

58. For three years Corporal Vawter has had a specialty plate that supports the Fraternal Order of Police and that has Fraternal Order of Police insignia and labels on it. (*Id.* ¶ 4).

59. The Fraternal Order of Police is an organization of sworn law enforcement officers and its membership is restricted to sworn law enforcement officers. (*Id.* ¶ 5).

60. In Indiana, the Fraternal Order of Police specialty license plate is restricted to Fraternal Order of Police members, i.e., sworn law enforcement officers, and those seeking to purchase one from the BMV must have the approval of the Fraternal Order of Police. (*Id.* ¶ 6).

61. For three years Corporal Vawter has paid for, and received from the BMV, a personalized Fraternal Order of Police license plate that contains the following message created by Corporal Vawter – "0INK." (*Id.* ¶ 7).

62. Corporal Vawter's PLP was approved by the Fraternal Order of Police. (*Id.*).

63. The first character in the license plate is a zero because another person in Indiana has created, and been allowed to use, a personalized license plate of "0INK." (*Id.* ¶ 8).

64. Corporal Vawter selected the phrase "0INK" for his license plate because, as a police officer who has been called a "pig" by arrestees, he thought it was

both humorous and also a label that he wears with some degree of pride. (*Id.* ¶ 9).

65. In discussing this with fellow officers, Corporal Vawter found that they also generally found his license plate to be humorous and not derogatory or malicious. (*Id.* ¶ 10).

66. In April of 2013, the BMV rejected as offensive a proposed license plate reading "O1NK" on an Indiana Association of Chiefs of Police specialty license plate. (Murphy at 29-30; Ex. 9 to Murphy (attached e-mails)).

67. Once this decision was made concerning someone else's PLP application, the BMV's computer flagged Corporal Vawter's license plate and the decision was made to revoke Corporal Vawter's license plate as inappropriate inasmuch as it was on a law enforcement license plate and it was a term that is used in a derogatory manner towards law enforcement officers. (Murphy at 31-32; Ex. 8 to Murphy, Interrogatory No. 2).

68. Corporal Vawter received the form letter from the BMV informing him that his license plate was revoked "based on inappropriate, offensive, or misleading content." (Ex. 9 to Murphy [letter to Rodney Vawter of April 11, 2013]). He was given no further information as to specifically how it was inappropriate, offensive or misleading. (Vawter ¶ 11).

69. Corporal Vawter appealed the termination. (Ex. 9 to Murphy [Vawter letter of April 15, 2013]).

However, after the filing of the initial complaint in this case on May 2, 2013, the BMV did not set the matter for a hearing. (Murphy at 32-33).

70. After Corporal Vawter received the April 2013 letter from the BMV that revoked his "0INK" PLP, he received no further communication from the BMV, either written or in some other form, indicating that the BMV had changed its mind and had decided not to revoke his PLP. (Supplemental Declaration of Rodney Vawter ¶ 1, Exhibit 1 to Plaintiffs' Reply Memorandum in Support of their Motion for Summary Judgment and Response Memorandum in Opposition to Defendant's Motion).

71. When Corporal Vawter went to renew his PLP in November of 2013, he had no idea as to whether the plate would be approved or not. (*Id.* ¶ 2).

72. When Corporal Vawter first went into the BMV to renew the plate he was told by the branch manager that there was a "problem." (*Id.* ¶ 3). The BMV manager told Corporal Vawter that the manager did not want to take his money only to have the plate revoked again. (*Id.* ¶ 4).

73. It was only after Corporal Vawter threatened to get his attorney involved that his plate was renewed. (*Id.* ¶¶ 4-5).

74. Although the BMV notified Corporal Vawter that his plate was revoked because its message was deemed to be inappropriate, many other Hoosiers are allowed to have similar license plates. (Ex. 8 to

Murphy, Interrogatory No. 8). Therefore, the following license plates have been approved and are currently active: OOINK, OINKS, OINKY, OINKE, OINKI, 1OINK, and OINKER. (*Id.*).

75. Corporal Vawter continues to want to express himself by displaying his "0INK" PLP. (Vawter ¶ 13).

Jay Voigt and his "UNHOLY" PLP

76. Jay Voigt resides in Allen County, Indiana. (Declaration of Jay Voigt, Attachment 2 to the Motion for Summary Judgment ["Voigt"] ¶ 1).

77. Beginning in 2005, Mr. Voigt was allowed to display a PLP that stated "UNHOLY." (*Id.* ¶ 2).

78. His PLP was a reference to the rock group KISS. (*Id.* ¶ 3).

79. However, in 2007 or 2008 he was notified that his PLP of "UNHOLY" was not appropriate and he had to change it to another license plate. (*Id.* ¶ 4; Dickson ¶ 10).[2]

80. The BMV's computer system does not hold records back to the time when Mr. Voigt had his "UNHOLY" PLP, but the BMV records do indicate that his PLP was not renewed. (Murphy at 47).

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[2] The parties differ as to whether Mr. Voigt "UNHOLY" PLP was replaced in 2007 or 2008. The difference in the dates is not material.

81. Mr. Voigt was not provided any specific reason as to why the plate was not appropriate. (Voigt ¶ 5).

82. Although "UNHOLY" was deemed to be inappropriate, the BMV has approved a PLP that states "B HOLY." (Ex. 37 to Murphy).

83. The BMV has also approved a license plate that states "HOLYONE," which could certainly be offensive to an atheist. (Ex. 38 to Murphy; Murphy at 48).

84. Mr. Voigt would like to reapply for a PLP stating "UNHOLY." (Voigt ¶ 6).

85. However, Mr. Voigt cannot reapply because the PLP program has been suspended. (*Id.* ¶ 7).

Conclusion

86. There are no contested issues of material fact in this case.

87. Any finding of fact is deemed to be a conclusion of law to the extent necessary.

Conclusions of Law

Summary judgment standard

1. Plaintiffs have moved for summary judgment in this cause. The defendant ("BMV") has not filed a formal motion for summary judgment, but has, in its Response in Opposition to Plaintiffs' Motion for Summary Judgment and Cross Motion for Summary Judgment, requested that it be granted summary

judgment. Inasmuch as Rule 56(B) of the Indiana Rules of Trial Procedure allows this Court, upon the filing of summary judgment by one party, to grant it to the other party without a formal motion by that party, this Court therefore considers this case to have been submitted on cross-motions for summary judgment.

2. "Summary judgment is appropriate only if no genuine issues of material fact exist and the moving party is entitled to judgment as a matter of law. Neither the trial court, nor the reviewing court, may look beyond the evidence specifically designated to the trial court." *Best Homes, Inc. v. Rainwater*, 714 N.E.2d 702, 705 (Ind. Ct. App. 1999) (citing *Barnes v. Antich*, 700 N.E.2d 262, 264-65 (Ind. Ct. App. 1998)).

3. This standard is not changed when cross motions for summary judgment are filed. *State Bd. of Tax Com'rs of Indiana v. New Energy Co. of Indiana*, 585 N.E.2d 38, 39 (Ind. 1992), *trans. denied.* Instead, "[w]hen considering cross motions for summary judgment, the trial court must deal with each motion separately, construing the facts in favor of the non-moving party." *Campbell v. Spade*, 617 N.E.2d 580, 584 (Ind. Ct. App. 1993) (citing *Liberty Mutual Ins. Co. v. Metzler*, 586 N.E.2d 897 (Ind. Ct. App. 1992), *trans. denied*; *In re Matter of Garden & Turf Supply Corp.*, 440 N.E.2d 710 (Ind. Ct. App. 1982)). However, in reviewing cross-motions for summary judgment all the evidence designated by each party is before the court in ruling on either or both motions. *Peele v.*

Gillespie, 658 N.E.2d 954, 959 (Ind. Ct. App. 1995), *trans. denied.*

Lack of Contested Issues of Material Fact

4. The Court finds there are no contested issues of material fact.

5. To the extent that the BMV has attempted, through the Declaration of Shannon Dickson, attached to its Response in Opposition to Plaintiffs' Motion for Summary Judgment and Cross Motion for Summary Judgment, to create a conflict with deposition testimony of the BMV's former general counsel, Elizabeth Murphy, who appeared as the designate of the BMV's Commissioner pursuant to Rule 30(B)(6) of the Indiana Rules of Trial Procedure, any apparent conflict is disregarded, as a party may not create a genuine issue of fact in summary judgment through an affidavit that contradicts the party's previous testimony. *See, e.g., Cox v. Northern Indiana Pub. Serv. Co., Inc.*, 848 N.E.2d 690, 698 (Ind. Ct. App. 2006).

6. The BMV also objects to certain statements that the designate of the Commissioner of the BMV made in her deposition as to how different decisions were arrived at concerning the appropriateness or not of very similar PLPs. These questions were well within the scope of the 30(b)(6) deposition notice. The deponent was competent to give her answers to these questions as she was at the time the General Counsel for the BMV and had served in the past on the

committee that reviewed PLPs. As a matter of law, the Court can form its own opinion as to how these different decisions could be arrived at.

7. However, regardless of paragraphs 5 and 6, above, the Court concludes that there are no disputed issues of material fact in this matter and its Findings of Fact reflect the lack of any such dispute.

Class action

8. On August 22, 2013, the parties stipulated that this case should proceed as a class action pursuant to Rule 23(A) and (B)(2) of the Indiana Rules of Trial Procedure and that all the requirements were met to certify two classes.

9. The parties stipulated that one class, denominated as Class A, represented by Rodney Vawter and Jay Voigt as class representatives, should be certified. Class A is defined as:

> All applicants or recipients of personalized license plates whose applications will be denied or were denied after May 7, 2011, or whose existing personalized license plates will be revoked or were revoked after May 7, 2011, because of the Bureau of Motor Vehicles' application of Indiana Code § 9-18-15-4(b), 140 IAC 2-5-4, and/or any policies used by the Bureau of Motor Vehicles to interpret the statute.

10. The parties further stipulated that another class, denominated as Class B, represented by Jay Voigt, should be certified. Class B is defined as:

> All persons who are or will be precluded from applying for and/or obtaining a personalized license plate because the Commissioner of the Bureau of Motor Vehicles has suspended the personalized license plate program.

11. On August 28, 2013, this Court approved the parties' Stipulation entered its Order Certifying Case as a Class Action with the classes as defined above.

12. Although this Court has the right and ability to alter a class determination before the decision on the merits. Rule 23(C)(1), Indiana Rules of Trial Procedure, there is no reason to do so. To the extent that the BMV stipulated to certain facts about the named plaintiffs in the course of its stipulation to class certification, it is bound by the stipulation because "'[a] stipulation of facts is an express waiver by a party or his counsel of the intended issues.' . . . Once the parties enter into a stipulation, and the court approves it, the stipulation is binding on all involved." *Ehle v. Ehle*, 737 N.E.2d 429, 433-34 (Ind. Ct. App. 2000) (internal citations omitted).

There are no justiciability concerns here

13. The BMV argues that the claims of Corporal Vawter are moot, and he has not suffered injury, because his PLP was not revoked.

14. The Court finds, as a matter of law, that Corporal Vawter's PLP was revoked on April 11, 2013, when he received the notice from the BMV that his PLP was "being revoked based on inappropriate, offensive, or misleading content."

15. At no point subsequent to this time did the BMV ever inform Corporal Vawter in any way that the revocation of his PLP had been rescinded. It is erroneous for the BMV to claim that the plate was never revoked. It was revoked, for unknown reasons, but the BMV did not choose to act on the revocation.

16. On August 22, 2013, when the BMV stipulated that Corporal Vawter was a member of the class consisting of persons whose PLPs were revoked, the BMV became bound by the stipulation and may not now claim that Corporal Vawter's PLP was not revoked.

17. When Corporal Vawter went to renew the PLP in November of 2013, the PLP was renewed. However, this does not create mootness as a defendant may not create mootness by voluntarily ceasing unlawful activity unless "'there is no reasonable expectation that the wrong will be repeated.' The burden is a heavy one." *U.S. v. W.T. Grant Co.*, 345 U.S. 629, 633 (1953) (internal citation and footnote omitted). *See also State ex rel. Indiana State Bar Ass'n v. Northouse*, 848 N.E.2d 668, 674 (Ind. 2006) (citing *W.T. Grant*).

18. The BMV has not satisfied this "heavy burden" as Corporal Vawter remains subject to the challenged

law, regulation, and potentially the non-promulgated Policy Statement. There is therefore no mootness.

19. Additionally, once the class was certified on August 28, 2013, any mootness in Corporal Vawter's claim does not moot the case. The case may proceed inasmuch as the class retains a personal stake in the outcome of the case. *See, Franks v. Bowman* 424 U.S. 747, 754 (1976); *Sosna v. Iowa*, 419 U.S. 393, 399-401 (1976); *Matter of Tina T.*, 579 N.2d 48, 52-53 (Ind. 1991). Regardless of Corporal Vawter's current personal stake, the case is not moot.

20. Corporal Vawter remains a proper representative of the class as he continues to meet all pertinent requirements of Rule 23.

21. The BMV argues that Mr. Voigt's claims concerning his "UNHOLY" PLP are speculative and not ripe.

22. It is uncontested that Mr. Voigt wants to reapply for his "UNHOLY" PLP that was revoked in the past as inappropriate and that Mr. Voigt cannot reapply for it given that the PLP program has been suspended.

23. In its stipulating to the class, the BMV stipulated that Mr. Voigt is a proper representative of the class of persons who applications will be denied, or were denied after May 7, 2011, because of application of the BMV's unlawful policy. Given that it is undisputed that Mr. Voigt's "UNHOLY" PLP was revoked prior to May 7, 2011, the BMV has stipulated that

Mr. Voigt will be denied the PLP if the PLP program is reinstated. Again, as noted above, the BMV is bound by this stipulation.

24. Therefore, it is not speculative that Mr. Voigt will be denied his PLP when the program is reinstated and his claim is ripe. "Black's Law Dictionary defines ripeness as the "'circumstance existing when a case has reached, but has not passed, the point when the facts have developed sufficiently to permit an intelligent and useful decision to be made.'" *Thomas ex rel. Thomas v. Murphy*, 918 N.E.2d 656, 663 (Ind. Ct. App. 2009), *trans. denied* (quoting *Black's Law Dictionary* 1328 (7th ed.1999)). The facts are fully developed here. It is uncontested that Mr. Voigt previously had a PLP of "UNHOLY" that was deemed "inappropriate" by the BMV and was revoked. It is also clear that Mr. Voigt wishes to apply again for the "UNHOLY" PLP but he cannot do so because the PLP program has been suspended.

25. The BMV appears to fault Mr. Voigt for not reapplying for his "UNHOLY" plate after it was revoked. However, "[t]he law does not require the doing of a useless thing," *Stropes by Taylor v. Heritage House Childrens Ctr. of Shelbyville, Inc.*, 547 N.E.2d 244, 247 (Ind. 1989), and the BMV does not explain why Mr. Voigt should have been reapplying for a PLP that was revoked or reapplying now when the program has been suspended by the BMV Commissioner. Mr. Voigt's claims are not speculative and are ripe.

26. Mr. Voigt's claims are therefore ripe and justiciable and he is a proper class representative of both Class A and Class B and meets all the requirements of Rule 23.

The argument that the Policy Statement if void because it has not been promulgated may be heard even though the named plaintiffs did not exhaust their administrative remedies

27. Although it is "a basic principle of Indiana administrative law that a claimant who has an available administrative remedy must exhaust that administrative remedy prior to seeking judicial review . . . there are exceptions to the exhaustion requirement." *Ogden v. Robertson*, 962 N.E.2d 134, 144 (Ind. Ct. App. 2012), *trans. denied*.

28. Exhaustion is not required when it would be futile to attempt to do so. *Center Twp. of Marion County v. Coe*, 572 N.E.2d 1350, 1355 (Ind. Ct. App. 1991). And,

> [i]f the administrative procedure is incapable of offering a remedy for the party's complaint and is incapable of addressing the issues presented by a party's claim, exhaustion is not required. . . . "When the character of the question presented is beyond the pale of the agency's competency, expertise, and authority, failure to exhaust will be excused."

Rene v. Reed, 726 N.E.2d 808, 819 (Ind. Ct. App. 2000) (quoting *Rambo v. Cohen*, 587 N.E.2d 140, 144 (Ind. Ct. App. 1992)).

29. In *Rene*, the Court noted that inasmuch as the question presented was a purely legal one, exhaustion was futile or inadequate and did not need to occur as a predicate to filing the case. *Id.* at 820. The Court's position is consistent with the accepted notion that there is no need to exhaust a "pure question of law," which "'is one that requires neither reference to extrinsic evidence, the drawing of inference therefrom, nor the consideration of credibility questions for its resolution.'" *Sun Life Assur. Co. of Canada v. Indiana Comprehensive Health Ins. Ass'n*, 827 N.E.2d 1206, 1210 (Ind. Ct. App. 2005), *trans. denied* (quoting *Bader v. Johnson*, 732 N.E.2d 1212, 1216 (Ind. 2000)). *See also, e.g., Portland Summer Festival and Homecoming v. Dep't of Rev.*, 624 N.E.2d 45, 48 (Ind. Ct. App. 1993).

30. The question of whether the BMV is required to promulgate the Policy Statement as a regulation is a pure legal question and numerous appellate cases support the conclusion that there is no need to exhaust administrative remedies to mount a challenge to the failure to promulgate by allowing such challenges despite the fact that there was no effort to exhaust remedies. *See, Villegas v. Silverman*, 832 N.E.2d 598 (Ind. Ct. App. 2005), *trans. dismissed*; *Res-Care, Inc. v. Indiana Family and Social Services Administration*, 701 N.E.2d 1259 (Ind. Ct. App. 1998); *Gorka v. Sullivan*, 671 N.E.2d 122 (Ind. Ct. App.

1996); *Indiana Department of Mental Health v. State ex rel. Southlake Center for Mental Health, Inc.*, 467 N.E.2d 1256 (Ind. Ct. App. 1994).

31. Therefore, plaintiffs can make this challenge to the failure of the BMV to promulgate the Policy Statement without exhausting administrative remedies.

The Policy Statement is a rule under Indiana law and is void inasmuch as it has not been promulgated

32. The Personalized License Plate Standards and the Policy Statement, paragraph 5 of the Standards, have not been promulgated pursuant to Indiana's Administrative Rules and Procedures Act ("ARPA"), Ind. Code. § 4-22-2-.1, *et seq*.

33. "'[A]dministrative agencies may make reasonable rules and regulations to apply and enforce legislative enactments.'" *Villegas*, 832 N.E.2d at 608 (quoting *Indiana-Kentucky Elec. Corp. v. Comm'r, Ind. Dep't of Environmental Mgmt.*, 820 N.E.2d 771, 779-80 (Ind. Ct. App. 2005)). However, "an administrative agency may only regulate by a new rule if the proper rulemaking procedures have been followed." *Id.* (citing *Indiana Dep't. of Environmental Mgmt. v. Twin Eagle LLC*, 798 N.E.2d 839, 847 (Ind. 2003); *Indiana-Kentucky Elec. Corp.*, 820 N.E.2d at 780). These procedures are set forth by ARPA.

> Specifically, the ARPA's provisions include, among others: (1) publishing notice of intent to adopt rule (Ind. Code § 4-22-2-23); (2)

> publishing notice of hearing (Ind. Code § 4-22-2-24); (3) conducting public hearing and allowing comments (Ind. Code § 4-22-2-26); (4) formally adopting the rule (Ind. Code § 4-22-2-29); (5) obtaining approval from the Attorney General (Ind. Code §§ 4-22-2-31,-32); (6) obtaining approval from the Governor (Ind. Code §§ 4-22-2-33, -34); and (7) submitting the rule to the Secretary of State for filing (Ind. Code § 4-22-2-35).

Id. at 608 n.13.

34. "Thus, in establishing new rules, an administrative agency must comply with the ARPA, which includes provisions for public hearings and review by executive branch officials." *Id.* at 608. (citing *Twin Eagle*, 798 N.E.2d at 847-48; *Indiana-Kentucky Elec. Corp.*, 820 N.E.2d at 780).

35. Indiana Code ' 4-22-2-3(b) defines "rule" as follows:

> "Rule" means the whole or any part of an agency's statement of general applicability that:
>
> (1) has or is designed to have the effect of law: and
>
> (2) implements, interprets, or prescribes:
>
> (A) law or policy; or
>
> (B) the organization, procedure, or practice requirements of an agency.

36. Policies that are internal to the agency are not "rules" that require promulgation. Ind. Code § 4-22-2-13(c)(1).

37. The Policy Statement is clearly a rule. It is not related "solely to internal policy, internal agency organization, or internal procedure and does not have the effect of law." *Id.*

38. Instead, it explicitly "establish[es] the standard used to review PLP requests in accordance with Indiana Code (IC) section 9-18-15-4." (Ex. 6 to Murphy ¶ 2). This is the policy the BMV "uses to determine if the PLP should be allowed or not." (Murphy at 13). PLPs are denied or approved based on this policy.

39. An agency policy is a rule if it: i) is an "agency statement of general applicability to a class;" (ii) "is and was applied prospectively;" (iii) "has been applied as though it had the effect of law;" and (iv) "affects substantive rights . . . " *Blinzinger v. Americana Healthcare Corporation*, 466 N.E.2d 1371, 1375 (Ind. Ct. App. 1984).

40. If the primary impact of an agency policy is external to the agency and provides guidelines for purposes of decision making, it is a rule and must be promulgated under Indiana law. *See Indiana Department of Environmental Mgt. v. AMAX, Inc.*, 529 N.E.2d 1209, 1212-12123 (Ind. Ct. App. 1988).

41. The Policy Statement is clearly a rule under Indiana law and must be promulgated in order to be

valid. Given that it has not been promulgated, all actions taken based on it are "void and without effect." *Villegas*, 832 N.E.2d at 610.

Indiana Code § 9-18-5-4(b), 140 IAC 2-5-4, and the Policy Statement violate the First Amendment and due process as vague, overbroad, and lacking in content-neutrality

42. Contrary to the argument of the BMV, the Court concludes, consistent with overwhelming authority, that the PLP is not government speech, but is private speech in a government-owned forum. *See, e.g., See American Civil Liberties Union of North Carolina v. Tata*, 742 F.3d 563, 574-75 (4th Cir. 2014) (specialty plate); *Roach v. Stouffer*, 560 F.3d 860, 868 n.4 (8th Cir. 2009) (specialty plate); *Choose Life Illinois, Inc. v. White*, 547 F.3d 853, 865-67 (7th Cir. 2008) (specialty plate); *Byrne v. Rutledge*, 623 F.3d 46, 53-54 (2d Cir. 2008) (PLP); *Arizona Life Coalition, Inc. v. Stanton*, 515 F.3d 956, 969-972 (9th Cir. 2008) (specialty plate); *Sons of Confederate Veteran's, Inc. v. Commissioner*, 288 F.3d 610, 623 (4th Cir. 2002); *Lewis v. Wilson*, 253 F.3d 1077, 1079 (8th Cir. 2001) (specialty plate); *Perry v. McDonald*, 280 F.3d 159, 169 (2nd Cir. 2001) (PLP); *Dimmick v. Quigley*, 1998 WL 34077216, *4 (N.D. Cal. July 13, 1998) (PLP); *Pruitt v. Wilder*, 840 F. Supp. 414, 417 (E.D. Va. 1994) (PLP).

43. While a number of the above cases concern specialty license plates and not PLPs, the Court concludes that the argument that a PLP represents private speech is stronger than the argument concerning

specialty plates as PLPs are so obviously crafted by individuals, and not the State.

44. The only case that holds to the contrary to the above cases is *American Civil Liberties Union of Tenn. v. Bredesen*, 441 F.3d 370 (6th Cir. 2006), where the court held that a specialty-license plate ("Choose Life") was government speech. Not only has that case been widely rejected, but, as indicated above, its logic does not extend to a PLP.

45. There is no case in America where a PLP was held to be government speech.

46. The question is whether "[u]nder all the circumstances, would a reasonable person consider the speaker to be the government or a private party?" *White*, 547 F.3d at 863.

47. A reasonable person, observing a PLP, will not view it is the speech of the government, but will view it as individual expression on the government-owned license plate.

48. The PLP represents private speech in a non-public forum. *Id.* at 856, 857. *See also Byrne*, 623 F.3d at 53-54; *Arizona Life Coalition*, 515 F.3d at 969-72 (describing the forum as a "limited public forum" which the court describes as the opening of "a non-public forum to expressive activity." *Id.* at 969); *Perry*, 280 F.3d at 169; *Pruitt*, 840 F. Supp. at 417.

49. In a non-public forum any restrictions on speech "must not discriminate on the basis of viewpoint and 'must be reasonable in light of the forum's purpose.'"

White, 547 F.3d at 864 (internal citations and quotations omitted).

50. Additionally, any restrictions on speech must not be vague. This is essentially a requirement of due process. *United States ex rel. Reed v. Lane*, 759 F.2d 618, 622 (7th Cir. 1985). "[S]tandards of permissible statutory vagueness are strict in the area of free expression." *NAACP v. Button*, 371 U.S. 415, 432 (1963). This is necessary because the uncertain meaning of such vague proscriptions will lead those affected to "'steer far wider of the unlawful zone . . . than if the boundaries of the forbidden areas were clearly marked . . . Free speech may not be so inhibited." *Baggett v. Bullitt*, 377 U.S. 360, 372 (1964) (internal citation omitted). Additionally, "[t]he absence of clear standards guiding the discretion of the public official vested with the authority to enforce the enactment invites abuse by enabling the official to administer the policy on the basis of impermissible factors." *United Food & Commercial Workers Union, Local 1099 v. Southwest Ohio Regional Transit Authority*, 163 F.3d 341, 359 (6th Cir. 1998). Therefore, "[w]here a statute's literal scope, unaided by a narrowing state court interpretation, is capable of reaching expression sheltered by the First Amendment, the doctrine demands a greater degree of specificity than in other contexts." *Smith v. Goguen*, 415 U.S. 566, 573 (1974). For, "the danger of censorship and abridgment of our precious First Amendment freedoms is too great where officials have unbridled

discretion over a forum's use." *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546, 553 (1975).

51. Ultimately, the vagueness doctrine dictates that "a statute or ordinance offends the First Amendment when it grants a public official 'unbridled discretion' such that the official's decision to limit speech is not constrained by objective criteria, but may rest on 'ambiguous and subjective reasons.'" *United Food*, 163 F.3d at 359 (quoting *Desert Outdoor Advertising, Inc. v. City of Moreno Valley*, 103 F.3d 814, 818 (9th Cir. 1996)).

52. "Although the vagueness doctrine was originally used to invalidate – on due process grounds – penal statutes that failed to 'define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited,' . . . , courts have frequently applied it in the First Amendment context." *Jones v. Caruso*, 569 F.3d 258, 276 (6th Cir. 2009) (quoting *Kolendar v. Lawson*, 461 U.S. 352, 357 (1983) and citing *Kreimer v. Bureau of Police for the Town of Morristown*, 958 F.2d 1242, 1266 (3d Cir. 1992)).

53. The vagueness doctrine applies to non-public fora. *See, e.g., Wickersham v. City of Columbia, Mo.*, 371 F. Supp. 2d 1061, 1088, 1092 (W.D. Mo. 2005).

54. A companion to the vagueness doctrine is the prohibition on overbreadth.

> Under the First Amendment overbreadth doctrine, an individual whose own speech or

> conduct may be prohibited is permitted to challenge a statute on its face Abecause it also threatens others not before the court – those who desire to engage in legally protected expression but who may refrain from doing so rather than risk prosecution or undertake to have the law declared partially invalid. *Brockett v. Spokane Arcades, Inc.*, 472 U.S. 491, 503 . . . (1985). A statute may be invalidated on its face, however, only if the overbreadth is substantial. *Houston v. Hill*, 482 U.S. 451, 458-459 . . . (1987).

Board of Airport Commissioners of the City of Los Angeles v. Jews for Jesus, Inc., 482 U.S. 569, 574 (1987). Substantial overbreadth is present if there is "a realistic danger that the statute itself will significantly compromise recognized First Amendment protections of parties not before the Court." *Members of the City Council of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789, 801 (1984).

55. The overbreadth doctrine applies in non-public fora. *Board of Airport Commissioners*, 482 U.S. at 573-74 (noting that the resolution banning "First Amendment activities" was facially unconstitutional because of overbreadth whether the forum was a public forum or non-public forum).

56. Because the Policy Statement is not promulgated it cannot be utilized by the BMV as a standard in assessing PLPs. In making its determinations the BMV can legally rely upon only Indiana Code § 9-18-15-4(b), which allows the prohibition of a PLP that

contains "a connotation offensive to good taste and decency," is misleading, or is "otherwise improper" and, 140 IAC 2-5-4(a), which allows the plate to be revoked if there are have been a substantial number of complaints concerning the plate and a determination has been made that the plate contains references prohibited by Indiana law.

57. Given that the promulgated regulation incorporates the statute, the question is whether the standards in the statute are constitutional.

58. Standards similar to "offensive to good taste and decency" have repeatedly been struck down or questioned as unconstitutionally vague and overbroad. *See e.g., National Endowment for the Arts v. Finley,* 524 U.S. 569, 576 (1998); *Shuttlesworth v. City of Birmingham*, 394 U.S. 147, 151 (1969); *Air Line Pilots Ass'n, Intern. v. Department of Aviation of City of Chicago*, 45 F.3d 1144, 1154 n.5 (7th Cir. 1995); *Aubrey v. City of Cincinnati*, 815 F.Supp. 1100, 1102 (S.D. Ohio 1993), *remanded*, 65 F.3d 168 (6th Cir. 1995); *Coleman v. Ann Arbor Transp. Authority*, 904 F. Supp. 2d 670, 691, 692 (E.D. Mich. 2012); *S.C. v. Dirty World, LLC*, 2012 WL 3335284, *3 n.3 (W.D. Mo. Mar. 12, 2012); *Gay Men's Health Crisis v. Sullivan*, 792 F. Supp. 278, 301 (S.D.N.Y. 1992).

59. The Court finds that to the extent that Indiana Code § 9-18-15-4(b)(1) allows the prohibition of license plates containing "a connotation offensive to good taste and decency" it is unconstitutionally vague and overbroad.

60. To the extent that Indiana Code § 9-18-15-4(b)(3) allows the prohibition of license plates that the BMV "considers improper," it is also unconstitutionally vague and overbroad as it creates a subjective standard entirely dependent on whomever is applying it. *See, e.g., Elam v. Bolling*, 53 F. Supp. 2d 854, 862 (W.D. Va. 1999).

61. A standard of "connotation offensive to good taste and decency" and what the BMV "considers improper" fails viewpoint neutrality as well as it gives the BMV unbridled discretion as to whether or not to allow the expression, which is the hallmark of a lack of viewpoint neutrality. *Southworth v. Board of Regents of University of Wisc. System*, 307 F.3d 566, 579 (7th Cir. 2002).

62. Indiana Code § 9-18-15-4 is therefore unconstitutional as vague, overbroad, and not viewpoint neutral.

63. The promulgated regulation, 140 IAC 2-5-4 is similarly unconstitutional as it merely incorporates the statute.

64. Properly promulgated regulations may be used to interpret statutes and perhaps save them from a finding of unconstitutionality. *MacDonald v. Safir*, 206 F.3d 183, 191 (2d Cir. 2000) ("When evaluating a First Amendment challenge of this sort, we may examine not only the text of the ordinance, but also any binding judicial or administrative construction of it.").

65. However, the Policy Statement is void as it has not been promulgated and therefore cannot be considered in interpreting the unconstitutional statute and promulgated regulation.

66. Even if the Policy Statement could be considered, it does not alter the unconstitutionality of the BMV's regimen for determining whether or not to approve new or renewing PLPs.

67. First, the BMV concedes what is explicit in the text of the Policy Statement: this policy does not present the exclusive reasons for the denial of a PLP and the BMV retains the discretion to prohibit a PLP even though its text is not covered by any of the nine paragraphs in the policy. Moreover, the non-promulgated policy gives the BMV discretion to approve a PLP even though its text falls within the explicit prohibitions of the non-promulgated policy. This is a prime exemplar of unconstitutional "unbridled discretion" as there are no certain standards that are applied and without "narrowly drawn, detailed, and specific guidelines," there is no viewpoint neutrality. *Southworth*, 307 F.2d at 592. The doctrine prohibiting unbridled discretion prohibits the government from utilizing standards that are not apparent. *City of Lakewood v. Plain Dealer Pub. Co.*, 486 U.S. 750, 770 (1988).

68. Second, to the extent that the introduction of the Policy Statement repeats Indiana Code § 9-18-5-4(b), it suffers from the same constitutional infirmities as the statute as noted above.

69. Third, portions of the specific paragraphs of the Policy Statement are vague and overbroad.

70. Paragraph 3 of the Policy Statement allows a PLP to be denied or revoked if it "[r]efers to race, religion, deity, ethnicity, gender, sexual orientation, political party or affiliation, or government entity or official in a manner that is offensive to good taste and decency." As noted above, case law is legion that a standard of "good taste and decency" is vague and overbroad as it is no standard at all, but merely an expression of the subjective viewpoint of the person assessing the PLP. It allows for unbridled discretion and is unconstitutional.

71. Paragraph 4 allows PLPs to be denied or terminated if they are "derogatory." While the term "derogatory" may have a more certain meaning when it is linked to some subject, the ability to ban a PLP because it is generally "derogatory" allows the BMV to ban statements it disagrees with. This is clearly overbroad and vague and allows for unbridled discretion and is unconstitutional.

72. The unconstitutionality of the above standards is demonstrated by the approval and denial decisions set out in paragraph 38 of this Court's factual findings that can be explained – regardless of the deposition testimony of the BMV's designate – only by the fact that different persons were using their own subjective opinions and interpretations. This is obviously a First Amendment violation.

The BMV denies procedural due process to those whose PLPs are denied or revoked

73. "In order for a plaintiff to avail himself of due process protections, he must first show that he had some property interest which was protected by procedural due process." *McQueeney v. Glenn*, 400 N.E.2d 806, 810 (End. Ct. App. 1980) (citing *Gansert v. Meeks*, 384 N.E.2d 1140 (Ind. Ct. App. 1979)).

74. Property interests "are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law – rules or understandings that secure certain benefits and that support claims of entitlement to those benefits." *Board of Regents of State Colleges v. Roth*, 408 U.S. 564, 572 (1972).

75. A property interest may be "created or reinforced through uniform custom and practice." *Nixon v. United States*, 978 F.2d 1269, 1276 (D.C. Cir. 1992) (citing *United States v. Arredondo*, 31 U.S. (6 Pet.) 691 (1832)).

76. The PLP program is established by statute and the BMV concedes that even after the suspension of the program, those who still have PLPs are entitled to keep and renew them each year, subject to termination because of their lack of appropriateness pursuant to Indiana law.

77. Moreover, the BMV does not dispute the assertion that prior to the suspension of the PLP program that applicants for new PLPs were entitled to their

PLPs absent some determination that a PLP was a duplicate or was inappropriate.

78. Given the above, the members of Class A have an entitlement in their PLPs and are therefore entitled to procedural due process if the entitlement is revoked or denied.

79. Due process guarantees the right to some sort of hearing to prevent the arbitrary decision-making that the due process clause guarantees against. *Perdue v. Gargano*, 964 N.E.2d 825, 835 (Ind. 2012) (citing *Zinermon v. Burch*, 494 U.S. 113, 127 (1990); *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976); *Wolff v. McDonnell*, 418 U.S. 539, 558 (1974); *Goldberg v. Kelly*, 397 U.S. 254, 267 (1970)).

80. In order to ensure that this hearing is meaningful, there must be a specific explanation as to the bases for the government's action as "in the absence of an explanation of the reasons underlying the state's action, it is implausible to expect that an individual could prepare, let alone present, a sound defense." *Id*

81. To satisfy this requirement, it is not enough that a person be told the "ultimate reason" for the decision – the specific factual basis for the decision must be given. *Id.* at 835. Instead, "a constitutionally adequate explanation must include the individualized factual bases underlying an adverse determination." *Id.*

82. Given that all that a person whose PLP is denied or revoked because the BMV deems it to be inappropriate is told only that it is inappropriate and nothing more, procedural due process is violated because there are no specific factual bases given for the determination.

The unilateral suspension of the PLP program by the Commissioner is outside the scope of his authority and was invalid

83. The Commissioner of the BMV is required under Indiana law to enforce Title 9 of the Indiana Code "and other statutes concerning the bureau." Ind. Code 9-14-2-1(1)(A).

84. The PLP program is established by Title 9, Indiana Code § 9-18-15-1, *et seq*.

85. Under Indiana law the BMV "shall issue personalized license plates on the same schedule" prescribed for other license plates. Ind. Code § 9-18-15-5.5.

86. There is nothing in Indiana law that allows the Commissioner to suspend a program that has been created by the General Assembly.

87. "[A]n administrative agency has only those powers conferred on it by the legislature, and unless we find the grant of powers and authority in the statute, we concluded that no power exists." *LTV Steel Co. v. Griffin*, 730 N.E.2d 1251, 1257 (Ind. 2000) (citing *Citizens Action Coalition of Ind., Inc. v.*

NIPSCO Northern Ind. Pub. Serv. Co., 485 N.E.2d 610, 612 (Ind. 1985)). Therefore, in Indiana administrative agencies and officers have "no common law or inherent powers, but only such authority as is conferred upon them by statutory enactment." *Vehslage v. Rose Acre Farms, Inc.*, 474 N.E.2d 1029, 1033 (Ind. Ct. App. 1985).

88. Article 3 § 1 of the Indiana Constitution creates the separation of powers and divides the power of government into three separate departments, the Legislative; Executive, including the Administrative; and, the Judicial and further provides that "no person, charged with official duties under one of these departments, shall exercise any of the functions of another, except as in this Constitution expressly provides."

89. For the Commissioner, an officer of the Executive and Administrative branch, to decide to suspend a program created by the Legislature, in the absence of any explicit authority to do so, violates the separation of powers.

90. "Any act of an agency in excess of its power is *ultra vires* and void." *Howell v. Indiana-American Water Co., Inc.*, 668 N.E.2d 1272, 1276 (Ind. Ct. App. 1996), *trans. denied* (citing *Anderson Lumber & Supply Co. v. Fletcher*, 228 Ind. 383, 390, 89 N.E.2d 449. 452 (1950)).

91. Although the Commissioner is given the authority, by statute, to approve or deny individual PLPs,

the Commissioner has no authority to suspend the PLP program.

92. The Commissioner's suspension of the PLP program is therefore void.

93. In suspending the PLP program the Commissioner allowed those with PLPs to keep them, subject to renewal every year.

94. This has resulted in some persons being allowed access to the non-public forum to exercise their constitutional rights and some persons being denied these rights.

95. "The reasonableness of the Government's restriction of access to a nonpublic forum must be assessed in the light of the purpose of the forum and all the surrounding circumstances." *Cornelius v. NAACP Legal Defense and Educational Fund, Inc.*, 473 U.S. 788, 809 (1985). The decision to restrict access to the non-public forum "need not be the most reasonable or the only reasonable limitation," *id.* at 808, but it must be "consistent with [the Government's] legitimate interest." *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 50 (1983).

96. It is not reasonable to allow some, but not others, access to a non-public forum when the sole reason for this is that the standards for access are under judicial review.

97. Therefore, the BMV Commissioner's suspension of the PLP program violates the First Amendment.

The revocation of the named plaintiffs' PLPs was unreasonable, hence unconstitutional

98. As noted, speech in a non-public forum like the PLP allowed by Indiana law, can be regulated and restricted only if the restraint of speech is both view-point neutral and reasonable in light of the forum's purpose. *Choose Life Illinois, Inc.*, 547 F.3d at 864.

99. It was unreasonable for the BMV to revoke Corporal Vawter's PLP, and it would be unreasonable to revoke it again in the future, as it is a humorous message and is perceived as such by follow police officers.,

100. It was unreasonable for the BMV to revoke Corporal Vawter's PLP, and it would be unreasonable to revoke it again in the future, as it is on a Fraternal Order of Police specialty plate, meaning that the Fraternal Order of Police, an organization solely of law enforcement officers, approved of the "0INK" message.

101. It was unreasonable for the BMV to revoke Corporal Vawter's PLP, and it would be unreasonable to revoke it again in the future, as the BMV has approved the following PLPs: OOINK, OINKS, OINKY, OINKE, OINKI, 1OINK, and OINKER.

102. The BMV therefore has no legitimate interest in restricting Corporal Vawter's access to the PLP and any attempt to do so, in the past or future, is unconstitutional.

103. It was unreasonable for the BMV to revoke Mr. Voigt's "UNHOLY" PLP as the BMV has approved overtly religious PLPs such as "B HOLY" and "HOLYONE." It clearly not viewpoint neutral to approve pro-religious speech but not anti-religious speech.

104. Moreover, it is unreasonable to assert that because some persons might be offended by the message of "UNHOLY" – a word that is certainly not inherently offensive – that the idea can be prohibited.

105. Therefore, denial of Mr. Voigt's PLP was unconstitutional.

Conclusion

106. The law is therefore with the plaintiffs and against the defendants and plaintiffs are therefore entitled to judgment as a matter of law.

107. Any conclusion of law should be deemed to be a finding of fact to the extent necessary.

JUDGMENT

IT IS THEREFORE DECLARED that:

1. Indiana Code § 9-18-5-4 and 140 IAC 2-5-4 are unconstitutional for the reasons noted above.

2. The Bureau of Motor Vehicle's non-promulgated Policy Statement within its Personalized License Plate Standards is a rule under

Indiana law and, inasmuch as it has not been promulgated as required by Indiana law, it is void.

3. Even if not void, the Policy Statement is unconstitutional for the reasons noted above.

4. The notice given to persons whose PLPs are revoked or denied is unconstitutional for the reasons noted above.

5. The suspension of the PLP program by the Commissioner is void as *ultra vires* and unconstitutional for the reasons noted above.

6. The revocation of Corporal Vawter's PLP in the past was, and any future revocation would be, unconstitutional.

7. The revocation of Jay Voigt's PLP was unconstitutional.

IT IS THEREFORE ORDERED that defendant is permanently enjoined:

1. To immediately reinstate the PLP program.

2. From denying Jay Voigt the "UNHOLY" PLP when he reapplies for it and from revoking Rodney Vawter's "0INK" PLP.

3. From utilizing the Policy Statement, or any other non-promulgated rule, in any way in determining whether or not to approve a PLP request or to revoke an existing PLP. However, this portion of this paragraph shall not be effective for six months, or until new regulations are promulgated, whichever comes first. But, the BMV shall immediately:

a. Cease using paragraph 3 of the Policy Statement in any PLP determination.

b. Cease using so much of paragraph 4 of the Policy Statement as allows PLPs to be denied or revoked for being "derogatory."

c. Treat the reasons noted in paragraphs 1-2, the remainder of 4, and 5-9 of the Policy Statement as exhaustive and shall cease using any reason to deny or revoke a PLP that is not explicitly articulated in paragraphs 1-2, the remainder of 4, and 5-9 of the Policy Statement.

3. From utilizing Indiana Code § 9-18-5-4 and 140 IAC 2-5-4 to deny a PLP request or to revoke an existing PLP until such time that regulations are formally promulgated to effectuate the statute. This paragraph shall not be effective for four months, or until new regulations are promulgated, whichever comes first.

4. To inform persons denied PLPs or whose existing PLPs are revoked of the precise and particular reasons for the revocations or denials.

5. To inform, by the best means available, all members of Class A whose PLP applications were revoked or denied in the past of this Judgment and their ability to reapply for a PLP.

6. To inform, by the best means available, all members of Class B that new PLPs may again be sought from the BMV.

IT IS FURTHER ADJUDGED AND DECREED that plaintiffs are prevailing parties pursuant to 42 U.S.C. § 1988 and are therefore entitled to their reasonable attorneys' fees and costs. Plaintiffs shall petition for their attorneys' fees and costs 45 days after this Judgment or 45 days after the case is finally resolved on appeal if an appeal is filed, whichever date is later.

So ordered this 7th day of May, 2014.

/s/ James B. Osborn
James B. Osborn
Judge, Marion Superior Court 14
Civil Division, Room 14

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STATE OF INDIANA	IN THE MARION SUPERIOR COURT
COUNTY OF MARION	CAUSE NO. 49D14-1305-PL-0160159

RODNEY G. VAWTER, JAY VOIGT, on their own behalf and on behalf of two classes of those similarly situated,

Plaintiff,

v.

COMMISSIONER OF THE INDIANA BUREAU OF MOTOR VEHICLES, in his official capacity,

Defendant.

Amended Class Action Complaint for Declaratory and Injunctive Relief – Notice of Challenge to Constitutionality of Indiana Statute

(Filed Jul. 30, 2013)

Introduction

1. As a humorous comment on the verbal abuse that has frequently been directed towards him in his career as a law enforcement officer, and also as an ironic statement of pride in his profession, police officer Rodney G. Vawter has, for the last three years, been provided a personalized Fraternal Order of Police specialty license plate from the Indiana Bureau of Motor Vehicles ("BMV") that is inscribed

"0INK." However, the BMV has now revoked the license plate as containing offensive or misleading content. A number of years ago Jay Voigt had a personalized license plate that was inscribed with "UNHOLY," a reference to a song by the rock band KISS. However, after being allowed to display the license plate for two to three years he also received a notice from the BMV indicating that the license plate was revoked because it was deemed offensive. The asserted source of the BMV's authority for revoking the license plates is Indiana Code § 9-18-15-4, which currently allows the BMV to refuse to issue a license plate that contains a combination of letters or numerals that "(1) carries a connotation offensive to good taste and decency; (2) would be misleading; or (3) the bureau otherwise considers improper for issuance." The statute is unconstitutional. Additionally, to the extent that the BMV is utilizing a non-promulgated policy to make decisions concerning Officer Vawter's, Jay Voigt's and others' personalized license-plates, the non-promulgated policy is void. Accordingly, appropriate declaratory and injunctive relief must issue to both Officer Vawter, Jay Voigt, and a class of those similarly situated.

2. Jay Voigt would like to reapply to receive a personalized license plate at the current time. He would again like to receive a plate inscribed with "UNHOLY." However, regardless of what he would like to have placed on the plate he may not even apply for a personalized plate because on July 19, 2013, the Commissioner of the BMV suspending the personalized

license plate program for persons applying after 6:00 p.m. on July 19, 2013. This was unlawful as violating both Indiana law and the United States Constitution and warrants appropriate declaratory and injunctive relief for both Mr. Voigt and a class of those similarly situated.

This action is brought pursuant to 42 U.S.C. § 1983 and Indiana law.

* * *

Legal claims

As to plaintiffs and Class A

52. Indiana Code § 9-18-15-4 is unconstitutional on its face in that:

a. It is not viewpoint neutral, and is substantially overbroad, in violation of the First Amendment to the United States Constitution.

b. It is unconstitutionally vague in violation of the due process clause of the Fourteenth Amendment to the United States Constitution.

53. To the extent that the defendant utilizes standards that are not promulgated as required by Indiana law to make determinations that personalized license plate applications should be denied or that previously allowed personalized license plates should be revoked, the defendant violates Indiana's Administrative Rules and Procedures Act, Indiana Code § 4-22-2-13, *et seq*.

As to plaintiff Voigt an Class B

54. Defendant's suspension of the personalized license plate program violates Indiana law in that Indiana law does not allow the Bureau of Motor Vehicles to suspend the program.

55. The defendant's suspension of the personalized license plate program for future participants, while maintaining it for current participants, means that the defendant has only partially closed the forum and this is not reasonable and violates the First Amendment of the United States Constitution.

As to the named plaintiffs only:

56. Indiana Code § 9-18-15-4 is unconstitutional as applied to Corporal Vawter and his "0INK" license plate and as applied to Jay Voigt and his "UNHOLY" license plate in that it is not reasonable in violation of the First Amendment.

Request for relief

WHEREFORE, plaintiffs request that this Court:

1. Certify this case as a class action with the two classes as defined above.

2. Declare that:

a. Indiana Code § 9-18-5-4 is unconstitutional and unlawful for the reasons noted above.

b. Defendant's suspension of the personalized license plate program is unconstitutional and unlawful for the reasons noted above.

3. Enter a preliminary injunction, later to be made permanent:

a. enjoining defendant from revoking Corporal Vawter's license plate that has the message "0INK" and requiring the defendant to reinstate the license plate and enjoining defendant from denying Mr. Voigt a license plate with the message "UNHOLY."

b. enjoining defendant from utilizing Indiana Code § 9-18-15-4, 140 IAC 2-5-4, and any non-promulgated policies to make determinations that personalized license plate applications should be denied or that previously allowed personalized license plates should be revoked and enjoining the defendant to reverse any such determinations made that utilized Indiana Code § 9-18-15-4, 140 IAC 2-5-4, and any non-promulgated policies.

c. enjoining defendant from suspending the personalized license plate program.

4. Award plaintiff his costs and reasonable attorney's fees pursuant to 42 U.S.C. § 1988.

5. Award all other proper relief.

/s/ Kenneth J. Falk

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SURVEY OF STATE PERSONALIZED/
VANITY LICENSE PLATE STATUTES

STATE	**Statutory Provisions (Personalized Plates)**
Alabama	Ala. Code § 32-6-150
Alaska	Alaska Stat. Ann. § 28.10.181
Arizona	Ariz. Rev. Stat. Ann. § 28-2406
Arkansas	Ark. Code Ann. §§ 27-14-1101 to -1104
California	Cal. Veh. Code §§ 5103, 5105
Colorado	Colo. Rev. Stat. §§ 42-3-211
Connecticut	Conn. Gen. Stat. § 14-49
Delaware	Del. Code Ann. tit. 21, § 2121
District of Columbia	D.C. Mun. Regs. Tit. 18, § 423
Florida	Fla. Stat. §§ 320.0805
Georgia	Ga. Code §§ 40-2-60
Hawaii	Haw. Rev. Stat. § 249-9.1
Idaho	Idaho Code §§ 49-409
Illinois	625 Ill. Comp. Stat. § 5/3-405.1 to -405.2
Indiana	Ind. Code §§ 9-18-15-1 to -12
Iowa	Iowa Code § 321.34
Kansas	Kan. Stat. Ann. § 8-132
Kentucky	Ky. Rev. Stat. Ann. § 186.174
Louisiana	La. Rev. Stat. Ann. § 47:463.2 (check)
Maine	Me. Rev. Stat. tit. 29-A, §§ 453
Maryland	Md. Code Ann., Transp. § 13-613

Massachusetts	Mass. Gen. Laws ch. 90, § 2
Michigan	Mich. Comp. Laws §§ 257.803b
Minnesota	Minn. Stat. §§ 168.12
Mississippi	Miss. Code Ann. §§ 27-19-48
Missouri	Mo. Rev. Stat §§ 301.135, 301.144
Montana	Mont. Code Ann. §§ 61-3-402 to -406
Nebraska	Neb. Rev. Stat. §§ 60-3,118
Nevada	Nev. Rev. Stat. §§ 482.3667
New Hampshire	N.H. Rev. Stat. Ann. § 261:89
New Jersey	N.J. Stat. Ann. §§ 39:3-33a to 33b, 33.3
New Mexico	N.M. Stat. Ann. § 66-3-15
New York	N.Y. Veh. & Traf. Law § 404
North Carolina	N.C. Gen. Stat. §§ 20-79.4
North Dakota	N.D. Cent. Code § 39-04-10.3
Ohio	Ohio Rev. Code §§ 4503.42
Oklahoma	Okla. Stat. tit. 47, § 1135.4
Oregon	Or. Rev. Stat. §§ 805.240
Pennsylvania	75 Pa. Cons. Stat. Ann. §§ 1341
Rhode Island	R.I. Gen. Laws § 31-3-17.1
South Carolina	S.C. Code Ann. §§ 56-3-2010
South Dakota	S.D. Codified Laws §§ 32-5-89.2
Tennessee	Tenn. Code Ann. §§ 55-4-210 to 211
Texas	Tex. Transp. Code Ann. § 504.0051
Utah	Utah Code Ann. §§ 41-1a-410 to -413
Vermont	Vt. Stat. Ann. tit. 23, § 304

Virginia	Va. Code Ann. § 46.2-726
Washington	Wash. Rev. Code § 46.18.275
West Virginia	W. Va. Code § 17a-3-14
Wisconsin	Wis. Stat. § 341.145
Wyoming	Wyo. Stat. Ann. §§ 31-2-221