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April 4, 2019

Herb Frierson, Mississippi Department of Revenue Commissioner
commissioner@dor.ms.gov
cc: Dianne Perry, Motor Vehicle Licensing Director
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Clinton, MS 39056
(601) 923-7700

Jim Hood, Mississippi Attorney General
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Via Email

Re: "In God We Trust" First Amendment Violation

Dear Attorney General Hood and Commissioner Frierson,

We are writing on behalf of several Mississippi residents and the Mississippi Humanist Association regarding the new rule making the default state license plate bear the words "In God We Trust." It is our understanding that, in order to avoid publicly displaying this theistic phrase, vehicle owners must purchase a variety plate at a higher cost ($30). On May 11, 2018, our office sent the governor a letter apprising him of the First Amendment implications of this statutory scheme. We sought assurances that non-theistic residents would not have to pay an additional fee for a non-theistic plate. Our concerns, regrettably, went unanswered.

This letter serves as our final warning. We hereby demand written assurances that steps will be taken so that Mississippi drivers can, without paying any additional charge, display a state-issued license plate that does not make a theistic affirmation. Ideally, this would mean the state adopting a neutral design as the standard default plate.[1] In the alternative, the "In God We Trust" plate could remain as one standard plate, but other options could also be made available at the

[1] The State could, for instance, offer "*E Pluribus Unum*" instead. This motto, Latin for "Out of Many, One," has appeared on the Great Seal of the United States since 1782 and on U.S. currency since 1795. It simultaneously recognizes the federal nature of our government (out of many states, one nation) and the pluralistic character of the American people. The divisive phrase "In God We Trust" became the official national motto only in 1956, at the height of Cold War hysteria.

standard-plate rate.[2] If no alternative is provided and Mississippians are forced to display "In God We Trust" or pay an additional charge, the State will be in violation of the First Amendment, leaving those who object to the theistic reference with little choice but to seek recourse in federal court.

The American Humanist Association (AHA) is a national nonprofit organization based in Washington, D.C., with over 650,000 supporters and members across the country, including many in Mississippi. The mission of AHA's legal center is to protect the most fundamental principles of our democracy: First Amendment liberties, including free speech and church-state separation. We have successfully litigated First Amendment cases in state and federal courts from coast to coast, including in Mississippi. *See M.B. v. Rankin Cty. Sch. Dist*., 2015 U.S. Dist. LEXIS 117289 (S.D. Miss. 2015).

"If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein." *West Virginia State Bd. of Ed. v. Barnette*, 319 U.S. 624, 642 (1943) (ruling that students cannot be forced to pledge allegiance to the flag). Since *Barnette*, the Supreme Court has consistently "prohibit[ed] the government from telling people what they must say." *Rumsfeld v. Forum for Acad. & Institutional Rights, Inc.*, 547 U.S. 47, 61 (2006). "[O]ne important manifestation of the principle of free speech is that one who chooses to speak may also decide what not to say." *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Boston*, 515 U.S. 557, 573 (1995) (quotations omitted).

In fact, controlling Supreme Court precedent makes clear that a state cannot force someone to display a particular message on his or her license plate. In *Wooley v. Maynard*, 430 U.S. 705, 714 (1977), the Supreme Court affirmed that the First Amendment protects "both the right to speak freely and the right to refrain from speaking at all." A "state measure which forces an individual, as part of his daily life—indeed constantly while his automobile is in public view—to be an instrument for fostering public adherence to an ideological point of view he finds unacceptable" violates this latter right. *Id.* at 715.

In *Wooley*, as here, the petitioners objected to the inclusion of New Hampshire's motto "Live Free or Die"—on the State's standard license plates because it was "repugnant to their moral, religious, and political beliefs" as Jehovah's Witnesses. 430 U.S. at 707. The Supreme Court held that because a vehicle is "readily associated with its operator," *id.* at 717 n.15, and driving an automobile is "a virtual necessity for most Americans," the State had forced the petitioners to use their car as a "'mobile billboard' for the State's ideological message," *id.* at 715. The Court explained that a state cannot "require an individual to participate in the dissemination of an ideological message by displaying it on his private property in a manner and for the express purpose that it be observed and read by the public." *Id.* at 713.

Crucially, the *Wooley* Court assuaged the dissent's concern that its holding would implicate the inscription of the motto on currency by highlighting the critical differences between currency and license plates. *Id.* at 717 n.15. It explained that currency "differs in significant respects from an automobile, which is readily associated with its operator. Currency is generally carried in a

[2] One alternative would be offering a plate with the opposite message: "In Reason We Trust." *See Summers v. Adams*, 669 F.Supp.2d 637 (D.S.C. 2009) (indicating that the state could make "In God We Trust" an available option where "In Reason We Trust" was also offered).

purse or pocket and need not be displayed to the public. The bearer of currency is thus not required to publicly advertise the national motto." *Id.* Thus, to impose a standard license plate that displays that theistic phrase, with no alternative at an equal cost that avoids such a statement, violates the First Amendment's Free Speech Clause.

Several courts recently held that displaying the motto on currency—in contrast to a license plate—is not compelled speech, reasoning that the motto is attributed only to the government and that no one must *display* currency. *See Doe v. United States*, 901 F.3d 1015, 1024-25 (8th Cir. 2018) (highlighting "the many differences between currency and license plates"); *Mayle v. United States*, 891 F.3d 680, 686 (7th Cir. 2018) (explaining that if a person involved in a commercial transaction "thought about it at all, she would understand that the government designed the currency and is responsible for all of its content, including the motto," and "[s]he would not regard the motto as [an individual's] own speech"); *Doe v. Cong. of the United States*, 891 F.3d 578, 593-94 (6th Cir. 2018) (distinguishing "between government speech on currency and license plates based on the risk to the carrier of perceived association with the message."). "But currency is not personalized; it says not a word about the person who holds it. Nor is currency displayed; it is exchanged. Hundreds of people may spend the same dollar bill. Identification cards [like license plates], by contrast, are personalized. They are meant to convey substantive personal information about their holders. They are meant to be displayed, never to be given away." *Doe v. Marshall*, 2019 U.S. Dist. LEXIS 21578, at *17-18 (M.D. Ala. Feb. 11, 2019).

In contrast to currency, "speech on a license plate is sufficiently linked to the driver of the automobile displaying the license plate to raise compelled speech concerns." *Cressman v. Thompson*, 719 F.3d 1139, 1157 (10th Cir. 2013).[3] *See also Frudden v. Pilling*, 742 F.3d 1199, 1208 (9th Cir. 2014) (holding a school motto, "Tomorrow's Leaders," on school uniforms was unconstitutional compelled speech). Thus, in *Mayle*, the Seventh Circuit indicated that requiring a citizen to display the motto on her license plate would run afoul of the First Amendment:

> Inscribing the motto on currency, Mayle argues next, violates the Free Speech Clause because the national motto conveys a religious message, which he is being forced to convey: that he "trusts" in a deity. But Mayle is not in any meaningful way affirming the motto by using currency. See *Wooley v. Maynard*, 430 U.S. 705, 717 n.15 (1977). *He is not wearing a sign or driving a car displaying a slogan*. See *id.* at 717.

891 F.3d at 686 (emphasis added).

The Supreme Court itself recently affirmed *Wooley* in *Walker v. Tex. Div., Sons of Confederate Veterans, Inc.*, 135 S. Ct. 2239, 2252-53 (2015) when it declared:

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[3] *Cressman v. Thompson*, 798 F.3d 938, 950-51 (10th Cir. 2015) is not to the contrary. The court distinguished a written motto from a symbolic image and held: "Mr. Cressman's claim fails because he cannot demonstrate that the Native American image is, in fact, speech to which he objects." The court reasoned: "The image may constitute symbolic speech, but the only conceivable message a reasonable observer would glean from the license plate is one to which Mr. Cressman emphatically does not object—namely, a message that communicates Oklahoma's Native American culture and heritage. As such, Mr. Cressman's compelled-speech claim fails." *Id.*

> Our determination that Texas's specialty license plate designs are government speech does not mean that the designs do not also implicate the free speech rights of private persons. We have acknowledged that drivers who display a State's selected license plate designs convey the messages communicated through those designs. See *Wooley* v. *Maynard*, 430 U.S. 705, 717, n.15 (1977) (observing that a vehicle "is readily associated with its operator" and that drivers displaying license plates "use their private property as a 'mobile billboard' for the State's ideological message").
>
> And we have recognized that the First Amendment *stringently* limits a State's authority to compel a private party to express a view with which the private party disagrees. [Citations omitted]. But here, compelled private speech is not at issue. And just as Texas cannot require SCV to convey "the State's ideological message," *Wooley*, *supra*, at 715, SCV cannot force Texas to include a Confederate battle flag on its specialty license plates.

(emphasis added).

It is no defense to say that non-theists can pay an additional $30 for a non-theistic plate. The "State cannot force someone to choose between carrying a government message and paying extra money." *Doe v. Marshall*, 2019 U.S. Dist. LEXIS 21578, at *22 (M.D. Ala. Feb. 11, 2019). *See Cressman v. Thompson*, 719 F.3d 1139, 1148 (10th Cir. 2013) (holding speech is compelled when one "must choose between (1) prosecution and criminal penalties . . . and (2) paying additional fees"). *See also Mayle v. United States*, 891 F.3d 680, 687 (7th Cir. 2018) (in upholding the motto on currency, it was relevant that the plaintiff "has not suffered a financial burden because of his religious beliefs, nor has he altered his behavior to avoid violating his religious beliefs."); *Frain v. Baron*, 307 F.Supp. 27, 33-34 (E.D.N.Y. 1969) (enjoining school from "excluding [students] from their classrooms during the Pledge of Allegiance, or from treating any student who refuses for reasons of conscience to participate in the Pledge in any different way from those who participate.").

Even in *Wooley*, George Maynard could have avoided displaying the state motto if he had spent extra money: License plates for antique automobiles did not include the motto. 430 U.S. at 707 n.1. But the Court still found that the state had compelled speech. *Id.* at 715.[4]

Beyond violating the Free Speech rights of non-theistic Mississippians, compelling such citizens to display "In God We Trust" or pay a penalty contravenes the Religion Clauses of the First Amendment. *See Torcaso v. Watkins*, 367 U.S. 488 (1961); *Separationists, Inc. v. Herman*, 939 F.2d 1207, 1215 (5th Cir. 1991). In *Torcaso*, the Supreme Court ruled that the state cannot require individuals to affirm a belief in God. The Court made clear that "[n]either a state nor the federal government can constitutionally force a person 'to profess a belief or disbelief in any religion.'" 367 U.S. at 495. More generally, the government cannot "impose requirements which aid all religions as against non-believers," or aid "those religions based on a belief in the existence

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[4] It is our understanding that atheists cannot legally conceal the "God" portion of the plate. Mississippi Code § 27-19-31 provides a penalty for covering up any portion of the plate, which is analogous to the statutory scheme found unconstitutional in *Wooley*, 430 U.S. at 707 ("Another New Hampshire statute makes it a misdemeanor 'knowingly [to obscure]… the figures or letters on any number plate.'").

of God as against those religions founded on different beliefs." *Id.* The Court held that doing so violates the mandate of "'separation between church and State.'" *Id.*

In *Summers v. Adams*, 669 F. Supp.2d 637 (D.S.C. 2009) an action was brought challenging the constitutionality of South Carolina's "I Believe" Act, which authorized the Department of Motor Vehicles to issue a license plate containing words "I Believe" and a cross superimposed on a stained-glass window. The court held that the act violated the Establishment Clause explaining, "[w]hether motivated by sincerely held Christian beliefs or an effort to purchase political capital with religious coin, the result is the same. The statute is clearly unconstitutional and defense of its implementation has embroiled the state in unnecessary (and expensive) litigation." *Id.* at 640.

Significantly, the court in *Summers* compared the legislatively-sponsored "I Believe" plate to South Carolina's non-legislatively-sponsored "In God We Trust" plate. The reason the court found the "In God We Trust" license plate constitutional was because it was not the default plate and the department offered many others at no additional cost, one in particular bearing the opposite viewpoint. *Id.* at 644 n.11. South Carolina offered an "In Reason We Trust" plate, which the court saw as "a counterpoint to the 'In God We Trust' plate." *Id.* at 647 n.14.

In addition to violating the Free Speech and Establishment Clauses of the First Amendment, compelling an atheist to affirm the existence of a "God" is also "a violation of the Free Exercise Clause." *Separationists, Inc. v. Herman*, 939 F.2d 1207, 1215 (5th Cir. 1991).[5] "[F]ree exercise of religion means, first and foremost, the right to believe and profess whatever religious doctrine one desires. Thus, the . . . government may not compel affirmation of religious belief." *Employment Div. v. Smith*, 494 U.S. 872, 876-77 (1990) (citing *Torcaso*, 367 U.S. 488). In *Thomas v. Review Bd. of Ind. Employment Sec. Div*., 450 U.S. 707, 717-18 (1981), the Supreme Court declared:

> Where the state conditions receipt of an important benefit upon conduct proscribed by a religious faith, or where it denies such a benefit because of conduct mandated by religious belief, thereby putting substantial pressure on an adherent to modify his behavior and to violate his beliefs, a burden upon religion exists. While the compulsion may be indirect, the infringement upon free exercise is nonetheless substantial.

In view of the foregoing authorities, we kindly ask for written assurances within thirty (30) days that a reasonable alternative will be furnished, at no additional charge, for those drivers who object to a theistic plate. If you don't comply with this reasonable request, you should understand that you face potential litigation.

Sincerely,
Monica Miller, Esq.
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[5] *See also Sherbert v. Verner*, 374 U.S. 398, 402 (1963) (citing *Torcaso*) (Free Exercise Clause does not allow government to "compel affirmation of a repugnant [religious] belief"); *Ferguson v. Commissioner*, 921 F.2d 588, 590-91 (5th Cir. 1991); *Nicholson v. Board of Comm'rs*, 338 F. Supp. 48, 56-58 (M.D. Ala. 1972) (required oath containing words "so help me God" violates Free Exercise Clause).