

**IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MICHIGAN
NORTHERN DIVISION**

MICHAEL MATWYUK and
DAVID DEVARTI,

Plaintiffs,

Case No. 2:13-cv-284

vs.

Hon. Gordon J. Quist

RUTH JOHNSON, in her official capacity
as Michigan's Secretary of State, and
MICHAEL FILDEY, in his individual
capacity,

Defendants.

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AMENDED COMPLAINT

INTRODUCTION AND OVERVIEW

1. This is a federal civil rights action brought to protect the First Amendment rights of Michigan motorists whose speech has been, is being, or will be unconstitutionally censored.

2. Through its personalized license plate program, Michigan allows its vehicle-owning residents to choose their own configuration of letters and numbers for their license plate if they pay an additional fee of approximately \$30. Vehicle owners who participate in this program typically select a configuration of letters and numbers that convey a meaningful (albeit brief) expression of their personal identity, values, or sense of humor.

3. Plaintiff Michael Matwyuk is a retired U.S. Army sergeant who was deployed as an American soldier in Iraq during the height of hostilities in that country. He and his fellow troops were constantly under attack by insurgent extremists whose word for the American soldiers was “infidel.” Seeking to reclaim or reappropriate this term as a source of American pride and patriotism, Sgt. Matwyuk and other soldiers came to embrace their identity as “infidels.” He and other American veterans proudly refer to themselves as “infidels” as a reminder of the bond they share as survivors of a bloody war in a hostile part of the world.

4. To honor the sacrifices of his fellow soldiers and to express his pride and patriotism as a veteran of the war in Iraq, Sgt. Matwyuk wished to obtain a personalized Michigan license plate that reads “INFIDEL,” or a variation on that word such as “INFIDL” or “INF1DL.”

5. When Sgt. Matwyuk applied for such a plate, the Department of State refused to issue it because a Michigan statute prohibits personalized license plate configurations “that might carry a connotation offensive to good taste and decency.” M.C.L. § 257.803b(1).

6. After this lawsuit was filed, the Department of State decided to issue Sgt. Matwyuk the personalized license plate that he requested. However, despite the issuance of the plate to

Sgt. Matwyuk, the Department of State continues to enforce the “offensive to good taste and decency” law.

7. Plaintiff David DeVarti was informed on October 14, 2013 that his request for a personalized license plate with the configuration “WAR SUX” is being denied because that message “might carry a connotation offensive to good taste and decency.”

8. The “offensive to good taste and decency” restriction allows state officials to censor personalized license plates arbitrarily and on the basis of viewpoint. It is vague and overbroad in violation of the First and Fourteenth Amendments to the United States Constitution.

9. Plaintiffs challenge the “offensive to good taste and decency” provision of M.C.L. § 257.803b as unconstitutional on its face and as applied. They seek a declaratory judgment, permanent injunction, and compensatory or nominal damages.

JURISDICTION AND VENUE

10. Jurisdiction is proper under 28 U.S.C. §§ 1331 and 1343 because this is a civil action seeking redress for the deprivation of rights secured by the United States Constitution.

11. Venue is proper under 28 U.S.C. § 1391(b) because this is the judicial district where the defendant resides in her official capacity, and because it is where a substantial part of the events or omissions giving rise to this action occurred or will occur.

PARTIES

12. Plaintiff Michael Matwyuk is a resident of Dickinson County, Michigan. He served in our nation’s armed forces for 22 years, including in the war in Iraq. Sgt. Matwyuk saw combat in Fallujah in 2004 and 2005, and while deployed he sustained multiple injuries including traumatic brain injury and hearing loss. Sgt. Matwyuk currently works for the U.S.

Department of Veteran Affairs providing assistance to other veterans. He is licensed to drive in Michigan and owns at least one motor vehicle that is registered in Michigan.

13. Plaintiff David DeVarti is a resident of Washtenaw County, Michigan. He is licensed to drive in Michigan and owns at least one motor vehicle that is registered in Michigan.

14. Defendant Ruth Johnson is sued in her official capacity as Secretary of State for the State of Michigan. For official-capacity purposes she is a resident of Ingham County. As Secretary of State, she administers, and has supervisory control over, the personalized license plate program as described in this complaint and in section 803b of the Motor Vehicle Code, M.C.L. § 257.803b.

15. Defendant Michael Fildey is sued in his individual capacity. As a manager in the office of the Michigan Department of State that handles personalized license plates, he made the decision to reject Sgt. Matwyuk's application based on the "offensive to good taste and decency" provision of M.C.L. § 257.803b.

FACTS

The Personalized License Plate Program

16. On a standard Michigan license plate, the letter and number configuration is computer-generated by the Department of State and is not intended to convey a particularized message or idea.

17. For an additional fee of approximately \$30, Michigan allows vehicle owners to select their own unique letter and number configuration for their license plates. These plates are known as "personalized" plates (or, unofficially, "vanity" plates).

18. Vehicle owners who participate in the personalized license plate program typically select a configuration of letters and numbers that convey a meaningful (albeit brief) expression of their personal identity, values, or sense of humor.

19. Thus, in contrast to the standard Michigan license plate, the personalized license plate contains a letter and number configuration that is personally crafted by the vehicle owner and is typically intended to convey a particularized message or idea by the vehicle owner.

20. For example, Sgt. Matwyuk currently has a personalized license plate that reads “SGT MAT,” which reflects his military rank and an abbreviation of his last name.

The “Offensive to Good Taste and Decency” Restriction

21. Personalized license plates are subject to several content-neutral limitations, such as the number of characters allowed on a single plate and the requirement that no two cars in Michigan can have the same configuration of letters and numbers on their license plates.

22. Additionally, section 803b of the Motor Vehicle Code contains a content-based restriction: it prohibits defendants from issuing a personalized license plate “that might carry a connotation offensive to good taste and decency.” M.C.L. § 257.803b(1).

23. The phrase “offensive to good taste and decency” is not defined by statute, but the Department of State has internal guidelines interpreting the restriction to include license plate configurations in the following categories:

- a. Phrases or letter combinations commonly perceived as indecent (i.e., profanity, obscene language). As used here, “profanity” means irreverence towards sacred things, particularly an irreverent or blasphemous use of the name of God. “Obscene language” means something that is morally abhorrent; its predominant appeal is to a prurient interest, socially taboo, or otherwise grossly repugnant to generally accepted notions of what is appropriate, such as references to excretion.
- b. Configurations of a sexual nature, including those that denote sexual organs, functions, or acts.

- c. Words or phrases that portray a negative image of a given racial, religious, ethnic or socioeconomic group, including persons of a particular gender or sexual orientation.
- d. Configurations that are unacceptable with respect to society's collective values, such as "COPKILR."
- e. Words or phrases dealing with illegal drugs or their usage.

The Application Review Process

24. Vehicle owners who wish to order a personalized license plate may visit a Secretary of State branch office or go to the "Plate It Your Way" page on the Department of State website for an initial screening of whether their desired plate configuration is available.

25. When a vehicle owner who wishes to order a personalized license plate submits a proposed configuration of letters and numbers, the configuration is automatically rejected if (a) it is already in use; or (b) it is on a preexisting list of prohibited configurations compiled by the Department of State.

26. The prohibited configurations list contains thousands of entries that the Department of State has already determined are offensive to good taste and decency. The list is updated as the Department of State learns of new potential configurations that it deems offensive to good taste and decency.

27. If the proposed configuration is not rejected automatically by a computer for one of the reasons set forth above, it is further reviewed by Department of State personnel to determine whether it would violate the "offensive to good taste and decency" law. If the proposed configuration appears to be offensive, it is rejected. Otherwise, the personalized plate is manufactured and sent to the vehicle owner.

The Meaning of “Infidel”

28. The word “infidel” refers to a non-believer of a particular faith, or of any faith.

29. When Sgt. Matwyuk was deployed in Iraq, he and other American soldiers were constantly under attack from insurgent extremists who referred to the American soldiers as “infidel.”

30. The use of the term “infidel” by enemy extremists to describe American soldiers in Iraq and Afghanistan has been widely reported and reliably documented.

31. Many American soldiers, under near-constant attack and facing death on a daily basis, came to embrace their identity as “infidels” in the eyes of their enemies. They reclaimed the term as a source of pride and patriotism.

32. In their 2010 book *Infidel*, the award-winning journalists Tim Hetherington and Sebastian Junger wrote:

Their name for us was ‘infidel’. We were in the Korengal Valley, in eastern Afghanistan, and the US military could listen in on enemy radio communications in the area. ‘The infidel are climbing the hill,’ enemy fighters would report to each other. ‘The infidel are at their base.’ Sometimes they called us much worse things, but ‘infidel’ was their favourite, and after a while the men began to tattoo the word in huge letters across their chests. A certain amount of warfare is posturing, but in the Korengal the fighting happened at several hundred metres, so for the most part this posturing was lost on the enemy. It was mainly meant to be appreciated by the other men in the unit. . . .

When asked why ‘infidel’, one of them replied that this was what the enemy called them on the radio, so why not?

33. Thus, it became common for American soldiers in Iraq and Afghanistan to publicly and proudly embrace their identity as “infidels” by:

- a. tattooing the word “infidel” onto their chests, arms or legs;
- b. sewing patches with the word “infidel” onto their uniforms; and

- c. wearing hats, t-shirts and other clothing bearing the word “infidel.”

The Denial of Sgt. Matwyuk’s Request for a Personalized License Plate

34. In 2012, Sgt. Matwyuk decided to order a personalized license plate that would express his identity as a so-called “infidel” when he served in Iraq.

35. He began by visiting the “Plate It Your Way” page on the Department of State website.

36. Sgt. Matwyuk selected an Iraq War Veteran service plate, which allows six characters for personalized plates.

37. Because the word “infidel” contains seven characters, Sgt. Matwyuk typed “INFIDL” into the spaces provided on the webpage and clicked “Check Plate Availability.”

38. The return page stated “This selection is not available, please select another.”

39. Upon information and belief, “INFIDL” was on the Department of State’s list of prohibited license plate configurations.

40. Sgt. Matwyuk did not know that there was a list of prohibited configurations, so he assumed that “INFIDL” was already in use by another driver.

41. Sgt. Matwyuk typed “INF1DL” into the spaces provided, replacing the letter I with a number 1.

42. The return page stated “This plate configuration is currently available.”

43. Based on that information, Sgt. Matwyuk ordered the “INF1DL” plate.

44. In a letter dated November 26, 2012, the Department of State’s “Renewal by Mail Unit, Office of Customer Services” informed Sgt. Matwyuk that his requested license plate could not be issued because it might carry a connotation offensive to good taste and decency in violation of the Motor Vehicle Code.

45. Sgt. Matwyuk responded by letter dated December 5, 2012, objecting to the denial of his request for the “INF1DL” plate and asking the Department to reconsider his request. Sgt. Matwyuk noted that many personalized license plates espouse religious sentiments, and an infidel is a non-believer. Sgt. Matwyuk added that the word was used by radical Islamic terrorists in Iraq, which should not prevent him from using the same word as an exercise of his constitutional rights of freedom of speech and expression in the United States.

46. Defendant Michael Fildey responded in a letter dated December 20, 2012, denying Sgt. Matwyuk’s request. The letter identified Mr. Fildey as “Manager, Enhanced Services Section, Office of Customer Services, Michigan Department of State.”

47. Mr. Fildey’s letter stated: “As you note in your letter we have issued plates that encompass a wide range of religious sentiments. Where we draw the line is if the sentiment could be construed as offensive to the general public. In the case of infidel we believe it does carry an offensive connotation now because of the way it’s being used by radical elements.”

48. Sgt. Matwyuk sent a second letter dated December 28, 2012, renewing his request that the Department of State reconsider and issue the plate. Sgt. Matwyuk clarified that his use of the term was “an expression of my service as an Iraqi combat veteran and that I am, in fact, an Infidel.”

49. Defendant Fildey responded by letter dated January 17, 2013, stating that after a final review of Sgt. Matwyuk’s request for the “INF1DL” plate, the decision to deny the plate was confirmed and the plate would not be issued.

50. This lawsuit was filed on September 11, 2013.

51. On September 13, the Department of State changed its position and decided to issue the “INF1DL” plate to Sgt. Matwyuk.

The Continued Enforcement of the “Offensive to Good Taste and Decency” Law

52. Despite the Department of State’s change of position regarding Sgt. Matwyuk’s personalized license plate after this lawsuit was filed, the Department of State continues to enforce the “offensive to good taste and decency” law.

53. Plaintiff David DeVarti is a politically engaged citizen and anti-war activist who wishes to obtain a personalized license plate that reads “WAR SUX.”

54. On or about October 11, 2013, Mr. DeVarti visited a Secretary of State branch office and ordered a personalized license plate with the configuration “WAR SUX.”

55. In a letter dated October 14, 2013, the Department of State’s “Renewal by Mail Unit, Office of Customer Services” informed Mr. DeVarti that his requested license plate could not be issued because it might carry a connotation offensive to good taste and decency in violation of the Motor Vehicle Code.

56. Because the Department of State continues to enforce the “offensive to good taste and decency” law, Sgt. Matwyuk fears that it will again be used to deny him a personalized license plate.

57. Sgt. Matwyuk intends to continue participating in the personalized license plate program and wishes to craft different messages for his plates in the future.

58. In fact, Sgt. Matwyuk owns a motorcycle that does not currently have a personalized license plate. He intends to order a personalized license plate for the motorcycle, but he fears that the “offensive to good taste and decency” law could be used to deny him the configuration he requests.

COUNT ONE
FIRST AMENDMENT FACIAL CHALLENGE
42 U.S.C. § 1983

59. The First Amendment to the United States Constitution prohibits abridgement of the freedom of speech and expression. The First Amendment is incorporated against the States by the Fourteenth Amendment. Persons violating the First Amendment under color of state law are liable at law and in equity under 42 U.S.C. § 1983.

60. The “offensive to good taste and decency” restriction of M.C.L. § 257.803b is facially unconstitutional under the overbreadth doctrine of the First Amendment because there is a realistic danger of it being used to prohibit a substantial amount of constitutionally protected speech on the basis of viewpoint.

61. As a result, defendant Fildey is liable for the violation of Sgt. Matwyuk’s First Amendment rights by having enforced the “offensive to good taste and decency” law against him; Sgt. Matwyuk and Mr. DeVarti seek a declaratory judgment that the “offensive to good taste and decency” restriction is unconstitutional on its face; and Mr. DeVarti seeks a permanent injunction against defendant Johnson’s continued enforcement of this unconstitutional law.

COUNT TWO
VOID-FOR-VAGUENESS FACIAL CHALLENGE
42 U.S.C. § 1983

62. The Fourteenth Amendment to the United States Constitution prohibits the deprivation of due process of law. Persons violating the Fourteenth Amendment under color of state law are liable at law and in equity under 42 U.S.C. § 1983.

63. The “offensive to good taste and decency” restriction of M.C.L. § 257.803b is facially unconstitutional under the void-for-vagueness doctrine of the Due Process Clause of the Fourteenth Amendment because its terms are not clearly defined such that a person of ordinary

intelligence can readily identify the applicable standard for inclusion and exclusion, and because its lack of clear standards and objective criteria allows public officials to limit speech based on ambiguous, subjective, arbitrary or discriminatory reasons.

64. As a result, defendant Fildey is liable for the violation of Sgt. Matwyuk's due process rights by having enforced the "offensive to good taste and decency" law against him; Sgt. Matwyuk and Mr. DeVarti seek a declaratory judgment that the "offensive to good taste and decency" restriction is unconstitutional on its face; and Mr. DeVarti seeks a permanent injunction against defendant Johnson's continued enforcement of this unconstitutional law.

COUNT THREE
FIRST AMENDMENT AS-APPLIED CHALLENGE
42 U.S.C. § 1983

65. Alternatively (that is, if plaintiffs do not prevail on Counts One or Two), M.C.L. § 257.803b is unconstitutional under the First Amendment as applied to plaintiffs because:

- a. defendant Fildey used it to discriminate against Sgt. Matwyuk's speech on the basis of viewpoint; and/or
- b. defendant Fildey's enforcement of the provision against Sgt. Matwyuk was unreasonable; and/or
- c. defendant Johnson's continued enforcement of the provision against Mr. DeVarti is unreasonable.

66. As a result, defendant Fildey is liable for having violated Sgt. Matwyuk's First Amendment rights; and Mr. DeVarti seeks a declaratory judgment that the "offensive to good taste and decency" restriction is unconstitutional as applied to his speech and a permanent injunction against defendant Johnson's continued application of this law to his speech.

COUNT FOUR
VOID-FOR-VAGUENESS AS-APPLIED CHALLENGE
42 U.S.C. § 1983

67. Alternatively (that is, if plaintiffs do not prevail on Counts One or Two), M.C.L. § 257.803b(1) is unconstitutional as applied to plaintiffs under the vagueness doctrine of the Due Process Clause of the Fourteenth Amendment because a person of ordinary intelligence would not know that plaintiffs' speech is prohibited by the statute, and because the statute's lack of clear standards and objective criteria has caused, or is causing, defendants to prohibit plaintiffs' speech based on ambiguous, subjective, arbitrary or discriminatory reasons.

68. As a result, defendant Fildey is liable for having violated Sgt. Matwyuk's due process rights; and Mr. DeVarti seeks a declaratory judgment that the "offensive to good taste and decency" restriction is unconstitutional as applied to his speech and a permanent injunction against defendant Johnson's continued application of this law to his speech.

RELIEF REQUESTED

For the reasons set forth above, plaintiffs request that the court:

- a. assert jurisdiction over this matter;
- b. enter judgment in favor of plaintiffs and against defendants;
- c. declare that the "offensive to good taste and decency" provision of M.C.L. § 257.803b is unconstitutional on its face and enjoin defendant Johnson from enforcing it;
- d. declare that the "offensive to good taste and decency" provision of M.C.L. § 257.803b is unconstitutional as applied to Mr. DeVarti and enjoin defendant Johnson from enforcing it against his selection of a personalized license plate configuration that reads "WAR SUX";

- e. award Sgt. Matwyuk compensatory or nominal damages for defendant Fildey's violation of his constitutional rights;
- f. award plaintiffs costs and a reasonable attorney's fee pursuant to 42 U.S.C. § 1998; and
- g. grant or award other such relief that the court deems just and proper.

Respectfully submitted,

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Dated: November 7, 2013

CERTIFICATE OF SERVICE

I hereby certify that on November 7, 2013, I electronically filed this document with the clerk of the court using the ECF system, which will send notification of such filing to defendants' counsel at shermana@michigan.gov.

/s/ Daniel S. Korobkin