Appignani Humanist Legal Center

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October 8, 2019

Via U.S. Mail and Email
Mr. Charles L. Norman
Registrar of Motor Vehicles
Ohio Bureau of Motor Vehicles
PO Box 16520
Columbus, OH 43216-6520
registrar@dps.ohio.gov

Re: Constitutional Violation

Dear Registrar Norman,

We are writing on behalf of Mr. Richard Moser III, an Ohio resident, regarding the Ohio Bureau of Motor Vehicles' ("BMV") refusal to allow Mr. Moser to wear a religious head covering in his drivers' license photo, in contradiction of both established principles of religious accommodation under the First Amendment and the BMV's own internal policy regarding religious head coverings.

The American Humanist Association ("AHA") is a national nonprofit organization based in Washington, D.C. with over 34,000 members across the country, including many in Ohio. The mission of AHA's Legal Center is to protect the most fundamental principles of our democracy: our First Amendment liberties, including free speech, the free exercise of religion, and church-state separation. We have successfully litigated dozens of First Amendment cases in state and federal courts from coast to coast.

We understand that while the BMV does not currently have a publicly available policy regarding wearing religious head coverings in driver's license photos, the BMV does maintain an internal policy—available only via an "internal broadcast"—entitled, "Photographs Shall Be Without Head Coverings or Face Covering."[1] As the title makes plain, we understand that the BMV's general policy is to disallow any kind of head or face covering in a drivers' license photos.

But we also understand that the BMV is willing to accommodate drivers who wish to wear certain types of head coverings in their photos, which are enumerated in an internal BMV policy: "the only exceptions to [the prohibition on head or face coverings] are a wig, or hairpiece if customarily worn by the applicant, *a head covering worn for recognized religious purposes*, or a head covering worn in conjunction with recognized medical treatments, provided that such head

[1] Online Interview by Nicholas Copley with Shelly G., Live Chat Service Representative, Ohio Bureau of Motor Vehicles, Ohio BMV Live Chat Services (Sep. 26, 2019) (emphasis added).

coverings shall not cover any facial features. Face coverings of any type are strictly prohibited; there are no exceptions to this prohibition. In all photographs, all facial features, including forehead, eyes, nose, mouth, cheeks, and chin must be clearly visible."[2] *See also State v. Henry*, 110 N.E.3d 103 (Ohio Ct. App. 2018) (multiple BMV employees stating under oath that head coverings are allowed in Ohio driver's license photos if worn for religious purposes).

We write to formally request that the BMV promptly reverse course and permit Mr. Moser to be pictured in his drivers' license photo with his religious head covering displayed.

This simple and reasonable accommodation would certainly not be unprecedented for the Ohio BMV. There are well-documented instances of the BMV extending this accommodation to members of other religions in the past, such as adherents of Islam who wish to photographed in a hijab.[3] Much like a hijab, Mr. Moser wears a religious head covering as part of his religious practice of Pastafarianism. His religious head covering is worn in a manner consistent with the BMV internal policy: it does not cover any facial features, specifically the forehead, eyes, nose, mouth, cheeks, and chin are all clearly visible during the adornment of the religious head covering. There is simply no permissible, non-discriminatory reason to foreclose this simple accommodation to Pastafarians like Mr. Moser. Other state departments of motor vehicles have reached the same conclusion.[4] The Ohio BMV should follow suit.

Should the BMV persist in its refusal to allow Mr. Moser to wear the religious head covering associated with his faith while allowing adherents of other faiths to do likewise, it should be advised that it has committed discrimination on the basis of religion in violation of the First and Fourteenth Amendments of the United States Constitution.

The First Amendment to the U. S. Constitution provides that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof…" U.S. CONST. AMEND. I. The "clearest command of the Establishment Clause is that one religious denomination cannot be officially preferred over another." *Larson v. Valente*, 456 U.S. 228, 244 (1982). The Establishment Clause equally prohibits the government from favoring "religious belief over disbelief." *Allegheny v. ACLU*, 492 U.S. 573, 593 (1989). It demands neutrality between "religion and nonreligion." *McCreary Cty. v. ACLU*, 545 U.S. 844, 860 (2005).

The Supreme Court held over seventy years ago that the Establishment Clause of the First Amendment "means at least" that "[n]either a state nor the Federal Government . . . can pass laws which aid one religion, aid all religions, or prefer one religion over another." *Everson v. Bd. of Educ.*, 330 U.S. 1, 15 (1947); *see also Am. Atheists, Inc. v. City of Detroit Downtown Dev. Auth.*, 567 F.3d 278, 288 (6th Cir. 2009) ("From the outset, the Court has construed the give-and-take language of [the Establishment Clause and the Free Exercise Clause] to forbid government from

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[2] *Id.*

[3] "CAIR Helps OH Muslims Obtain Driver Photos with Hijab," Council on American-Islamic Relations Research Center, (Jul. 12, 2007)
(https://www.cair.com/cair_helps_oh_muslims_obtain_driver_photos_with_hijab).

[4] "Massachusetts Pastafarian Wins Right to Wear a Colander in Drivers License Photo, Thanks to Humanist Group." American Humanist Association, official website. (Nov. 13, 2015).
(https://americanhumanist.org/press-releases/2015-11-massachusetts-pastafarian-wins-right-to-wear-a-colan/)

using its power either to 'favor' or to 'handicap' any one religion or religion in general."). Not only must the government not advance, promote, affiliate with, or favor any particular religion, it must also be even-handed in its treatment of *all* religions, both theistic and non-theistic. *Torcaso v. Watkins*, 367 U.S. 488, 495, & n.11 (1961).

The government may not grant some benefit or privilege to adherents of one faith and withhold that same benefit from others merely because those other faiths are novel, unpopular, or esoteric. *See Hernandez v. CIR*, 490 U.S. 680, 699 (1989) ("It is not within the judicial ken to question … the validity of particular litigants' interpretations of [their] creeds."); *Thomas v. Ind. Review Bd*., 450 U.S. 707, 714 (1981) ("[R]eligious beliefs need not be acceptable logical, consistent, or comprehensible to others to be entitled to protection under the First Amendment."); *Fulwood v. Clemmer*, 206 F. Supp. 370, 373 (D.D.C. 1962) ("[It is not] the function of the court to consider the merits or fallacies of a religion or to praise or condemn it, however excellent or fanatical or preposterous it may be."). *See, e.g., EEOC v. United Health Programs of Am*., *Inc.*, 213 F. Supp. 3d 377, 396 (E.D.N.Y. 2016) ("courts regularly determine that non-traditional beliefs can qualify as religions"); *id.* at 398 ("the court concludes that Onionhead qualifies as a religion").

A government's "level of familiarity with a specific religion is not a permissible criterion through which to determine the rights of the members of that religion." *Hummel v. Donahue,* 2008 U.S. Dist. LEXIS 47534 at *18 (S.D. Ind. 2008). "While fear of the strange or unknown is not uncommon, it does not justify treating members of a lesser known religion less favorably." *Id.* at *20. *See also Tenafly Eruv Ass'n, Inc. v. Borough of Tenafly*, 309 F.3d 144, 171 (3d Cir. 2002) (whether religious practices at issue are "mandatory" or "optional" is irrelevant, as the religious beliefs merely need be "sincerely held"). *See also Koger v. Bryan*, 523 F.3d 789, 797, 800 (7th Cir. 2008) (holding that where Thelema religion had no general dietary requirements but where individual Thelemites often included dietary restrictions as part of "personal regimen of spiritual discipline," prisoner's request for special diet was "based on his religious beliefs and practices" and protected by RLUIPA); *Parkell v. Senato*, 2016 U.S. Dist. LEXIS 172419, at *8 (D. Del. Dec. 13, 2016); *Varsanyi v. Piazza*, 2015 U.S. Dist. LEXIS 46473, at *5 (M.D. Pa. Apr. 9, 2015) ("The law is also clear that a religious practice is protected even if it is not deemed to be mandatory or practiced by every member of the religion."); *Grayson v. Schuler*, 666 F.3d 450, 455 (7th Cir. 2012) (citation omitted) ("No more can the prison permit Rastafarians to wear long hair and without justification forbid a sincere African Hebrew Israelite of Jerusalem to do so, even if he is more zealous in his religious observances than his religion requires him to be.").

Here, the Ohio BMV has an internal policy allowing head coverings to be worn in drivers' license photos if, among other reasons, they are worn for religious purposes. As such, the BMV is not at liberty to decide which religions may be afforded this privilege and which religions may not. To deny any person the right to afford themselves of this accommodation merely because their religion is not sufficiently well-known or understood by the BMV would be a plain violation of the First Amendment. "Neutrality is essential to the validity of an accommodation." *Ctr. for Inquiry, Inc. v. Marion Circuit Ct. Clerk*, 758 F.3d 869, 872 (7th Cir. 2014) ("*CFI*") (citing *Cutter v. Wilkinson*, 544 U.S. 709, 723-24 (2005); *Bd. of Educ. v. Grumet*, 512 U.S. 687, 703 (1994)). If the BMV is not willing to be truly neutral in its application of the religious exemption from its head-covering prohibition, then that accommodation is plainly discriminatory, invalid and unconstitutional under the First Amendment.

Furthermore, the Fourteenth Amendment dictates that a state government may not "deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. AMEND. XIV § 1. The Supreme Court and lower federal courts have long held that the Equal Protection Clause bars discrimination on the basis of any "suspect classification," which includes religion. *See, e.g.*, *Burlington N. R.R. Co. v. Ford*, 504 U.S. 648, 651 (1992) (Equal Protection Clause prohibits classification "along suspect lines like race or religion"); *City of New Orleans v. Dukes*, 427 U.S. 297, 303 (1976) (Equal Protection Clause prohibits classifications "drawn upon inherently suspect distinctions such as race, religion, or alienage"); *Patel v. U.S. Bureau of Prisons*, 515 F.3d 807, 816 (8th Cir. 2008) ("Religion is a suspect classification."); *Ball v. Massanari*, 254 F.3d 817, 823 (9th Cir. 2001) (listing "race, religion, or national origin" as suspect classes).

By refusing to accommodate adherents of the Pastafarian religion while accommodating other religions, the BMV has abridged the Equal Protection Clause. *See generally Cruz v. Beto*, 405 U.S. 319, 321 (1972) ("If [a Buddhist prisoner] was denied a reasonable opportunity of pursuing his faith comparable to the opportunity afforded fellow prisoners who adhere to conventional religious precepts, then there was palpable discrimination by the state against the Buddhist religion . . . ."). Unlike a Free Exercise claim, the Equal Protection Clause does not require a practice be "central to his own religious observance." *Abdulhaseeb v. Saffle*, 65 F. App'x 667, 673-74 (10th Cir. 2003). All a plaintiff must show "is that he was personally denied equal treatment on the basis of his religion." *Id.* The "denial of [a] privilege to adherents of one faith while granting it to others is discrimination on the basis of religion." *Native Am. Council of Tribes v. Solem*, 691 F.2d 382, 384-85 (8th Cir. 1982) (emphasis added).[5]

In view of the foregoing authorities, we kindly ask for written assurances that within thirty (30) days Mr. Moser will be permitted to take his driver's license photo with his religious head covering displayed, consistent with the Constitution, the BMV's internal policy, and past actions by the BMV in similar circumstances. Thank you for your time and attention to this matter.

Sincerely,
Monica L. Miller
Legal Director and Senior Counsel
American Humanist Association

[5] *See also Brown v. Johnson*, 743 F.2d 408, 413 (6th Cir. 1984) ("by allowing prisoners of other faiths and their respective churches to hold group worship services, while denying plaintiffs the same privilege" undoubtedly "is a distinction among religious faiths."); *CFI*, 758 F.3d at 875 (statute violated Equal Protection because it arbitrarily discriminated against Humanists); *Reed v. Faulkner*, 842 F.2d 960, 964 (7th Cir. 1988) ("defendants are treating the Rastafarians differently from American Indians (and doing so deliberately) for no reason at all; and if so this is a denial of equal protection of the laws in an elementary sense."); *Fulwood,* 206 F. Supp. at 374 ("By allowing some religious groups to hold religious services" while "denying that right to petitioner and other Muslims, respondents have discriminated" on the basis of religion). *See also Shabazz v. Norris*, 1991 U.S. App. LEXIS 12285, *7-8 (6th Cir. 1991); *Wright v. Fayram*, 2012 U.S. Dist. LEXIS 84804, *47 (N.D. Iowa 2012) ("the refusal to allow group worship [for non-theistic religion 'Nation of Gods and Earths'] is not reasonably related to legitimate penological objectives."); *Rupe v. Cate*, 688 F. Supp. 2d 1035, 1049-50 (E.D. Cal. 2010) ("[N]o [legitimate] justification" for denying Pagans opportunities to practice their religion that were available to mainstream religions.").