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By Email & U.S. Mail

Florida Department of Management Services
Office of the Secretary
4050 Esplanade Way
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Dear Sir or Madam:

We represent the Satanic Temple and the Satanic Temple Florida (collectively the "Satanic Temple") in connection with the attached application to place a display in the public forum, established by the state in Florida's State Capitol, during the holiday season. *See* Exhibit A (2014 application). Given the manner in which the Department of Management Services rejected the Satanic Temple's application last year, we remind the Department of its obligations under the First and Fourteenth Amendments to the U.S. Constitution. The Department may not, as it did last year, reject the Satanic Temple's display—even if the Department finds the display to be "offensive." A rejection of the proposed display would violate the Free Speech Clause, Establishment Clause, and Free Exercise Clause of the First Amendment, as well as the Equal Protection Clause of the Fourteenth Amendment.

Members of the religious majority are sometimes offended by the beliefs of religious minorities, and vice/versa. But the Satanic Temple is not required to censor itself in order to take advantage of a forum supposedly open to all. Indeed, "[t]he First Amendment is not a majority rule, and government may not seek to define permissible categories of religious speech." *Town of Greece v. Galloway*, 134 S. Ct. 1811, 1822 (2014). The Department must open its public forum to the Satanic Temple's holiday display—even if the Department disagrees with the Satanic Temple's religious beliefs or message.

Background

In December of 2013, the Department designated as a public forum the rotunda of Florida's State Capitol. *See* Tia Mitchell, *Nativity Scene, Festivus Pole and Atheists… But No Satanist Display for the Capitol*, Tampa Bay Times, Dec. 19, 2013, http://tinyurl.com/qytkhqt. During the 2013 holiday season, the Department

approved several holiday displays, including a Nativity Scene, a Festivus Pole, and a rendering of the Pastafarian Flying Spaghetti Monster. *Id*.

The Satanic Temple is a religious organization dedicated to principles of empathy, personal autonomy, and empirical reasoning. On December 5, 2013, it submitted its application to present a holiday display in the State Capitol. *See* Exhibit B (2013 application). The display depicts an angel falling from the sky into flames, accompanied by bible verses and the message "Happy Holidays from the Satanic Temple." *See* Exhibit C (pictures of display).

On December 18, 2013, the Department notified the Satanic Temple that its application had been denied on the ground that the proposed display was "grossly offensive during the holiday season." Exhibit D at 1 (2013 correspondence between Satanic Temple and the Department). A representative of the Satanic Temple responded and offered to address the Department's concerns, but the Department did not respond. *Id*. at 2. The Department has since adopted a formal policy of excluding displays that "may be potentially harmful, offensive, or threatening in nature." Department of Management Services, *Use of State Space Guidelines For Florida's Capitol Complex and Adjacent Grounds* at 6 (2014), *available at* http://tinyurl.com/lqcrv23.

Discussion

The Department's policy of banning displays it deems religiously offensive violates the Free Speech Clause, Establishment Clause, Free Exercise Clause, and Equal Protection Clause of the U.S. Constitution. These constitutional provisions require the Department to accept the Satanic Temple's display this year.

A. Free Speech Clause

Any rejection of the Satanic Temple's display based on its potential offensiveness would constitute viewpoint discrimination in violation of the First Amendment's Free Speech Clause. In addition, the policy provision banning "offensive" speech is unconstitutional on its face, because it gives the Department unfettered discretion to suppress unpopular messages.

First, in excluding the Satanic Temple's display on the ground that it is "offensive," the Department collided with the "bedrock principle underlying the First Amendment … that the government may not prohibit the expression of an idea simply because society finds the idea itself *offensive* or disagreeable." *Texas v. Johnson*, 491 U.S. 397, 414 (1989) (emphasis added). It is well settled that the "First Amendment generally prevents government from proscribing speech, or even expressive conduct, because of disapproval of the ideas expressed." *R.A.V. v. City of St. Paul*, 505 U.S. 377, 382 (1992) (citations omitted). These rules apply even when the government has created a public forum, limited or otherwise. Although the Department itself created the forum in question by opening the Florida State

Capitol rotunda to the public, the First Amendment "forbid[s] the State to exercise viewpoint discrimination, even when the limited public forum is one of its own creation." *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 829 (1995).

Second, the Department's exclusion of displays that "may be potentially harmful, offensive, or threatening in nature" is invalid on its face, because the provision does not provide meaningful standards to constrain government discretion. There is no objective basis for determining whether speech "may be potentially … offensive." The First Amendment prohibits government restrictions on speech that lack "narrow, objective, and definite standards." *Forsyth Cnty. v. Nationalist Movement*, 505 U.S. 123, 131 (1992) (quoting *Shuttlesworth v. City of Birmingham*, 394 U.S. 147, 151 (1969)). As explained by the Eleventh Circuit, which has jurisdiction over Florida, laws that permit government officials "virtually any amount of discretion" in banning speech "beyond the merely ministerial [are] suspect" under the First Amendment. *Lady J. Lingerie, Inc. v. City of Jacksonville*, 176 F.3d 1358, 1362 (11th Cir. 1999). And this First Amendment rule turns "not on whether [an official] has exercised his discretion in a content-based manner, but whether there is anything in the ordinance preventing him from doing so." *Forsyth Cnty.*, 505 U.S. at 133 n.10.

Courts have blocked similar policies allowing government officials to ban "offensive" speech. Earlier this year, the Fifth Circuit prohibited a state from refusing to issue vanity license plates that "might be offensive to any member of the public," because the policy "lacks specific limiting standards, which gives the state unbridled discretion that permits viewpoint discrimination." *TX Div., Sons of Confederate Veterans, Inc. v. Vandergriff*, 759 F.3d 388, 398 (5th Cir. 2014) (quotation marks omitted). Likewise, the Third Circuit prohibited a public university from banning "offensive" speech because "offensive is, on its face, sufficiently broad and subjective that it could conceivably be applied to cover any speech that offends someone." *McCauley v. Univ. of the V.I.*, 618 F.3d 232, 248–49 (3d Cir. 2010) (quotation marks and alterations omitted).

As a result, the Department may not constitutionally apply this policy to exclude the attached application—or, for that matter, any other application. The Satanic Temple is permitted to convey its message, even if the Department is offended by the Temple's religious beliefs.

B. Establishment Clause

The Department rejected the Satanic Temple's previous application because it deemed the "proposed display … grossly offensive during the holiday season." The reference to "the holiday season" suggests that the Department rejected the Satanic Temple's display, which depicted symbols associated with Satanism, because some Christians (or others who celebrate Christmas) might be offended by the Satanic Temple's beliefs.

If it censors the Satanic Temple because the display might offend those who celebrate certain other religious holidays, the Department would violate the First Amendment's Establishment Clause. The Establishment Clause "mandates governmental neutrality between religion and religion, and between religion and nonreligion." *McCreary Cnty. v. ACLU of Ky.*, 545 U.S. 844, 860 (2005) (quotation marks omitted). The government may not take sides in debates between different religions; to the contrary, "the clearest command of the Establishment Clause" is that the government may not prefer "one religious denomination … over another." *Larson v. Valente*, 456 U.S. 228, 244 (1982).

This rule applies fully to the Satanic Temple's religious speech. As the Supreme Court has explained, censoring "sacrilegious" speech raises "substantial questions under the First Amendment's guaranty of separate church and state." *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495, 505 (1952). As illustrated by the Department's decision last year, even "the most careful and tolerant censor would find it virtually impossible to avoid favoring one religion over another, and he would be subject to an inevitable tendency to ban the expression of unpopular sentiments sacred to a religious minority." *Id.*

Religions that are small, new, or unpopular are especially likely to be considered "offensive"—especially by members of the majority who are unfamiliar with the group's beliefs. But even "small, new, or unpopular denominations" are entitled to "the very same treatment." *Larson*, 456 U.S. at 245. The Satanic Temple is entitled to the same religious-expression rights as everyone else.

C. Free Exercise Clause

In rejecting the Satanic Temple's display based on its religious content, the Department also violated the Free Exercise Clause. Under the Free Exercise Clause, the government may not "discriminate[ ] against some or all religious beliefs." *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 532 (1993).

The Department has permitted the display of a variety of religious and satirical displays, including a Christian crèche, a Festivus Pole, and a depiction of the Pastafarian Flying Spaghetti Monster. *See* Mitchell, *supra*. This suggests that the Department disliked the Satanic Temple's specific invocation of Satanic imagery and practice. But even if the Department thinks that the Satanic Temple's religious display is "an abomination to the Lord," "[t]he Free Exercise Clause commits government itself to religious tolerance." *Church of the Lukumi Babalu Aye*, 508 U.S. at 541, 547.

D. Equal Protection

Finally, rejection of the Satanic Temple's display based on its "offensiveness" would constitute religious discrimination in violation of the Equal Protection

Clause. Discrimination based on religion, like that based on race, is "inherently suspect." *City of New Orleans v. Dukes*, 427 U.S. 297, 303 (1976). As with the Establishment Clause and the Free Exercise Clause, the Equal Protection Clause provides that "[a]bsent the most unusual circumstances, one's religion ought not affect one's legal rights or duties or benefits." *Bd. of Educ. of Kiryas Joel Vill. Sch. Dist. v. Grumet*, 512 U.S. 687, 715 (1994) (O'Connor, J., concurring). Even if the Department is offended by the Satanic Temple's religious beliefs, it may not discriminate against the Satanic Temple on that basis.

* * *

We trust that the Department will accept the Satanic Temple's application, as required by the First and Fourteenth Amendments. Because the holiday season is approaching, please provide us a response within fourteen days. If you have any questions or concerns, you may contact Charles Gokey at (202) 466-3234, or by email at gokey@au.org.

Sincerely,

Ayesha N. Khan, Legal Director
Gregory M. Lipper, Senior Litigation Counsel
Charles Gokey, Steven Gey Fellow*

**Admitted in California only. Supervised by Ayesha N. Khan, a member of the D.C. Bar.*

Enclosures:
Exhibit A: 2014 application
Exhibit B: 2013 application
Exhibit C: photos of display
Exhibit D: 2013 correspondence between the Department/Satanic Temple Florida