

THE CHILDREN FIRST FOUNDATION,  
INC., a New York non-profit organization,

Plaintiff,

vs.

RAYMOND P. MARTINEZ, individually;  
NANCY A. NAPLES, in her official capacity  
as Commissioner of the New York Department  
of Motor Vehicles; JILL A. DUNN,  
individually and in her official capacity as  
Deputy Commissioner and Counsel for the  
New York Department of Motor Vehicles; and  
GEORGE E. PATAKI, individually and in his  
official capacity as Governor of the State of  
New York.

Defendants,

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF NEW YORK

Civil Action No.: 04-CV-927 NPM/RFT

**PLAINTIFF'S FIRST  
AMENDED COMPLAINT**

**PLAINTIFF'S FIRST AMENDED COMPLAINT FOR  
DECLARATORY AND INJUNCTIVE RELIEF AND DAMAGES**

Now comes Plaintiff, and for its complaint against Defendants avers the following:

**I.**

**INTRODUCTION**

1. The Children First Foundation, through its director and president Dr. Elizabeth Rex, sought authorization from the State of New York Department of Motor Vehicles ("DMV") for a specialty license plate under the DMV's custom plates program for organizations and causes. Children First Foundation's plate would bear its "Choose Life" corporate logo. Despite submitting multiple applications and design revisions, and fulfilling all existing criteria to obtain a custom plate, Children First Foundation's application was flatly denied because Defendants believed its message to be "patently offensive" and "too political and controversial."

2. Defendants thus denied Children First Foundation access to the speech forum for organizations and causes created by the custom plates program. Children First Foundation therefore seeks declaratory and injunctive relief to redress irreparable harm to its civil rights and seeks damages to redress its past legal injuries.

## **II.**

### **JURISDICTION AND VENUE**

3. The Court has subject matter jurisdiction over this case under 28 U.S.C. § 1331, as this action arises under the First and Fourteenth Amendments to the United States Constitution; under 28 U.S.C. § 1343(a)(3), in that it is brought to redress deprivations, under color of state law, of rights, privileges and immunities secured by the United States Constitution; under 28 U.S.C. § 1343(a)(4), in that it seeks to recover damages and secure equitable relief under an Act of Congress, specifically, 42 U.S.C. § 1983, which provides a cause of action for the protection of civil rights; under 42 U.S.C. § 1988(b) to award attorneys fees; under 28 U.S.C. § 2201(a) to secure declaratory relief; and under 28 U.S.C. § 2202 to secure preliminary and permanent injunctive relief and damages.

4. Venue is proper in the United States District Court for the Northern District of New York under 28 U.S.C. § 1391(b), because the events giving rise to the claim occurred within the District and because defendants are residents of the District.

## **III.**

### **IDENTIFICATION OF PLAINTIFF**

5. Plaintiff Children First Foundation is a non-profit organization incorporated in the State of New York. Children First Foundation is further registered in New York under the alternate names of “Fund-Adoption.org” and “NYChoose-Life.org.” Children First Foundation

maintains its headquarters in West Chester County, New York.

#### IV.

##### **IDENTIFICATION OF DEFENDANTS**

6. Defendant Raymond P. Martinez was the Commissioner of the State of New York Department of Motor Vehicles at times relevant to this Complaint, and is sued in his individual capacity.

7. Defendant Nancy A. Naples is the current Commissioner of the State of New York Department of Motor Vehicles, and is sued in her official capacity as the Commissioner. Upon information and belief, Ms. Naples resides in Albany County, New York.

8. Defendant Jill A. Dunn is the Deputy Commissioner and Counsel for the New York Department of Motor Vehicles, and is sued in her official and individual capacities. Upon information and belief, Ms. Dunn resides in Albany County, New York.

9. Defendant George E. Pataki is the Governor of the State of New York. He is sued in his official and individual capacities. He resides in Albany County, New York.

#### V.

##### **STATEMENT OF FACTS**

###### ***Three Categories of Custom License Plates***

10. The general provisions governing the registration of motor vehicles in the State of New York are contained in the New York Vehicle and Traffic Law statutes, § 401, *et seq.*

11. Section 404(1) provides the Commissioner of the DMV (“Commissioner”) with authority to issue special number plates, and specifies that “[a]pplication for special number plates shall be made in accordance with regulations promulgated by the commissioner with respect to issuance of such number plates.”

12. Section 404(1) further provides that “the commissioner may establish specific categories of plates.”

13. Defendants have created and made available three distinct categories of custom license plates: “Special Number Plates;” “Historical and Vintage Plates;” and “Picture Plates.”

14. As presented on the DMV website, “Special Number Plates” (sometimes also referred to by Defendants as “personalized plates”) are standard series Empire State plates that have a combination of numbers and letters selected by the registrant. The combination of numbers and letters that a registrant can request is restricted. The registrant pays specified additional fees when the personalized plates are ordered and when the registration is renewed.

15. “Historical and Vintage Plates” are made available for vehicles that are more than twenty-five years old, or that have some other unique feature that allow them to qualify for a historical registration. The DMV determines if the vehicle has historical, classic or exhibit value, although no objective criteria is provided to guide the decision maker.

16. “Picture Plates” (also referred to by Defendants as “logo plates”) are those that have the words “New York” contained in a blue banner, and a picture or logo next to the plate number. There are many categories of picture plates. Some personalized picture plates are available for an additional fee.

***The Licensing Scheme for Picture Plates***

17. Defendants have created seven sub-categories of Picture Plates. These include: Organizations and Causes; Sports Teams and NASCAR; Professions; Emergency Services; Counties and Regions of New York State; Colleges, Fraternities and Sororities; and Military and Veterans.

18. The Commissioner has never promulgated formal regulations with regard to the

application for or issuance of Picture Plates.

19. No statute or regulation exists to provide for or govern the procedure for the issuance of new Picture Plates, nor are the terms “picture plate” or “custom plate” referenced or defined in any statute or regulation.

20. According to the DMV website, there are currently fifty-nine available Picture Plates under the category of “Organizations and Causes.”

21. Only twenty of the fifty-nine available Picture Plates supporting Organizations and Causes have been authorized by the state legislature (*via* NY CLS Veh & Tr §§ 404-b through 404-u).

22. The remaining thirty-nine Picture Plates supporting Organizations and Causes have been approved by the DMV Commissioner upon application by petitioning organizations.

23. According to the DMV website current at the time of Plaintiff’s various applications, there are three initial requirements for an organization or cause to qualify for a Picture Plate:

- a. The group must be a not-for-profit organization, registered with the New York Department of State;
- b. The group must have a sponsoring agency or organization as the main point of contact;
- c. The group must pay a \$5,000.00 deposit and sign a Memorandum of Understanding agreeing that said deposit will be refunded when 200 sets of the Picture Plates are sold within a three-year period, or if that goal is not reached, refunded on a pro-rated schedule provided at the time of development.

24. If a non-profit organization requested further information about developing a

custom plate to promote its mission or cause, the DMV sent a “custom plate development kit.” The “kit” includes a brief cover letter, which explains that if the organization would like to proceed, it must submit: 1) artwork which meets certain measurement criteria; 2) a completed group information form; and 3) a draft of its marketing plan.

25. The “kit” also explains in brief paragraphs: the possibility of collecting 200 advance orders and corresponding fees as an alternative to the required \$5,000.00 advance deposit; the initial costs for a “standard custom plate” (\$43.00) and a “personalized custom plate” (\$68.00); the extra steps involved if the organization would like to use its plate sales as a fundraising tool (which requires deputization as an agent of DMV); plate number configurations; and the instruction that marketing the plate is the responsibility of the applicant.

26. The “kit” explains that “new license plate designs are added to the DMV computerized ordering system on a quarterly basis” once three requirements for the establishment of a new plate design are met:

- a. Submission of the deputization request;
- b. Submission of the marketing plan; and
- c. “Sign-off” on the plate design/metal prototypes.

27. There is no set time within which the DMV must approve or reject an organization’s submitted plate design.

28. There are no objective standards or written criteria to govern the DMV’s decision regarding whether an eligible organization’s plate design is approved beyond those criteria set forth above.

29. There are no guidelines, objective standards, or written prohibitions against the use of any logo, slogan, phrase or advocacy message on an organization’s Picture Plate.

*Approved “Organizations and Causes” Plates*

30. According to the DMV website, included among the fifty-nine Picture Plates that have been approved under the category “Organizations and Causes” are the following examples:

- a. Life Pass It On Trust Fund: Bears the group’s logo with the bold advocacy messages “Donate Life” and “Be an Organ & Tissue Donor”;
- b. “Union *Yes*”: Three alternative plates bear the large, bold “Union *Yes*” logo with a check mark inside a ballot box, and either an AFL-CIO, NYSUT, or blank tagline;
- c. Ancient Order of the Hibernians: Bears the organization’s logo. Plate recipients are required to be Irish and Catholic;
- d. Knights of Columbus: Bears the organization’s logo. Plate recipients must be Catholic men who are members of the organization, which supports the Catholic Church;
- e. Martin Luther King, Jr.: Bears his image and the slogan, “The Dream Lives”;
- f. Masonic Member: Two alternative plates bear the Masonic symbol and designation of either general Mason or Prince Hall of African-American Masons;
- g. New York Racing Association: Bears the Association logo with the word, “Racing,” and tagline, “Aqueduct - Belmont – Saratoga;”
- h. Tech Valley: Bears the logo of the institution, and includes the domain name “techvalley.org” as its tagline;

- i. National Police Defense Foundation: Bears the organization's logo, and includes the toll-free number "888-Safe-Cop" as the tagline; and
- j. Ski Areas of New York: Bears a graphic drawing of a skier and the message, "Ski It To Believe It!"

***Children First Foundation's Purpose and Corporate Identifiers***

31. Children First Foundation exists to raise funds and awareness to promote and support adoption as a positive choice for women with unwanted pregnancies or newborns in the Tri-State Area (New York, New Jersey and Connecticut).

32. Examples of pro-adoption grants provided in New York State by Children First Foundation include but are not limited to:

- a. the award of \$10,000 to the Children of Hope Baby Safe Haven Foundation in Mineola that serves the tri-state area and beyond;
- b. the award of \$1,000 to Expectant Mother Care with eight crisis pregnancy center locations in New York City;
- c. the award of \$500 to the Nazareth Life Center, a maternity home in Garrison for pregnant women who are making adoption plans;
- d. the award of \$500 to Pregnancy Care Center, a crisis pregnancy and Safe Haven center in New Rochelle.

33. Children First Foundation uses the words "Choose Life" as an integral part of its corporate identity within its official logo, domain names, legal alternate names, and toll-free telephone and facsimile numbers in the tri-state area.

- a. The official corporate logo is a yellow sun behind the faces of two smiling children that are drawn as if in crayon by a child, and beneath



them, the words “Choose Life” which appear also as if scrawled in crayon by a child. The above described logo (without the yellow sun) is copyrighted and owned by Choose Life, Inc., a non-profit organization based in Ocala, Florida. Children First Foundation requested and was granted permission by Choose Life, Inc., on December 26, 2001, to use its copyrighted “Choose Life” logo with the slight addition of the yellow sun behind the smiling children’s faces as its corporate logo.

- b. At times relevant hereto, the corporate website and active, registered domain names of Children First Foundation have been: [www.thechildrenfirst.org](http://www.thechildrenfirst.org); [www.fund-adoption.org](http://www.fund-adoption.org); [www.safehavens-adoption.org](http://www.safehavens-adoption.org); [www.nychoose-life.org](http://www.nychoose-life.org); [www.njchoose-life.org](http://www.njchoose-life.org); and [www.ctchoose-life.org](http://www.ctchoose-life.org).
- c. The domain names “NYCHOOSE-LIFE.ORG” and “NJCHOOSE-LIFE.ORG” have each been duly registered as a legal alternate name of Children First Foundation with the State of New York and the State of New Jersey, respectively. “FUND-ADOPTION.ORG” was likewise duly registered as a legal alternate name of Children First Foundation in the States of New York, New Jersey and Connecticut.
- d. At all times relevant hereto, to promote further name recognition, Children First Foundation has owned and operated the toll-free telephone/facsimile number: 1-877-FUND-ADOPTION (1-877-386-3236) which mirrors its legal alternate name, FUND-ADOPTION.ORG. In December, 2003, Children First Foundation began operation of a

second toll-free telephone/facsimile number: 1-888-NJCHOOSE-LIFE (for use in New Jersey), to promote its alternate legal name in New Jersey, NJCHOOSE-LIFE.ORG.

- e. The official slogan and message of Children First Foundation is the phrase, “*Adoption...it’s a good choice.*” The slogan is used and printed on the organization’s website, letterhead, and other materials and publications.

34. The slogan of Children First Foundation is intrinsically related to its logo and other corporate identifiers. In order to choose adoption, a woman must first choose life.

35. However, the official, registered logo and corporate identifiers of Children First Foundation are distinguished from the organization’s slogan. The words “Choose Life” are not the slogan of Children First Foundation; they are an integral, copyrighted part of the organization’s corporate logo.

36. Plaintiffs’ above-described corporate logo, legal and domain names, and telephone numbers are similar to a myriad of other non-profit and for-profit corporations that use words or phrases as their corporate identifiers as a means of successfully marketing their corporations to the public.

***Children First Foundation’s Request for a New York Picture Plate***

37. On September 6, 2001, Children First Foundation requested and received from the DMV an application packet, or, “custom plate development kit.”

38. The events of September 11, 2001, caused a delay in the organization’s immediate plans to submit its completed application.

39. On December 28, 2001, Children First Foundation submitted its application for

the organization's pro-adoption Picture Plate.

40. Children First Foundation satisfied all relevant criteria set forth in the application packet instructions when it submitted the following with its written request:

- a. Artwork in accordance with the specified design measurements and requirements;
- b. The completed group information form;
- c. The completed Memorandum of Understanding;
- d. The completed deputization document; and
- e. Its draft marketing plan.

41. The requested plate was similar in design to a plate approved in the State of Florida, and had the same purpose of the Florida plate, *i.e.*, to raise funds to support adoption.

***Children First Foundation's Efforts to Secure Approval of a Plate Design***

42. In mid-January, 2002, Dr. Elizabeth Rex, director and president of the Children's First Foundation, contacted the DMV Marketing and Custom Plate Development Office for an update, and was told that the application had been forwarded to the office of Defendant, Commissioner Martinez.

43. On February 8, 2002, Dr. Rex sent a letter to Commissioner Martinez requesting a status report and explaining the urgency of the Children First Foundation's application. Dr. Rex explained in the letter that the organization's annual fundraiser was scheduled for February 24, 2002, and that they were anticipating unveiling the approved Picture Plates there as part of a marketing strategy to raise substantial funds for New York's Children of Hope Safe Haven Program.

44. The day after the said fundraiser, on February 25, 2002, Commissioner Martinez

sent Dr. Rex a rejection letter. The letter explained that the rejection was based upon “analysis previously made by the Department” regarding “a similar request ... received by the Department in 1998.”

45. The said 1998 request was made by an organization unrelated to Plaintiff.

46. Commissioner Martinez told at least one witness that the Children First Foundation plate design was “too political and controversial,” and would not be approved for that reason.

47. On March 22, 2002, an attorney for Children First Foundation, Brian W. Raum, issued a letter and Freedom of Information Law (Pub. Off. Law §87, *et seq.*) request to Commissioner Martinez that explained the DMV’s error regarding the unrelated group’s plate denial, and requested a copy of all custom plate applications from the program’s inception to date.

48. When no response to his March 22, 2002, letter was received by the following month, Mr. Raum sent a demand letter (dated April 28, 2002) to Commissioner Martinez which explained that the DMV’s conduct regarding the Children First Foundation’s plate application was unconstitutional, and provided ten days for a response.

49. On May 22, 2002, Defendant, Deputy Commissioner and Counsel Jill Dunn, sent a short reply to Mr. Raum explaining that a detailed response would be sent within ten days.

***Defendants’ Rejection of Application***

50. On June 10, 2002, Defendant Dunn sent a response letter to Mr. Raum, and proposed a rationale for the DMV’s denial of the Children First Foundation’s plate application.

51. Ms. Dunn, in her letter, stated that the plate was rejected because “the message

is patently offensive and could provoke outrage from members of the public.” Ms. Dunn further explained that if Children First Foundation desired, it could submit a new application for a plate that would display a message “unrelated to the controversial issues cited above.” In that case, the DMV “would certainly give that application all due consideration.”

52. The Dunn letter also argued that DMV’s authority to deny the Children First Foundation plate’s message as “patently offensive” was based upon 15 NYCRR § 16.5.

53. 15 NYCRR § 16.5, read on its own, and certainly when read and interpreted *in pari materia* with 15 NYCRR § 16.1, *et seq.*, does not apply to Picture Plates at all. Rather, those provisions are expressly limited in application to “Special Number Plates.” (*See, e.g.*, §§ 16.2, 16.3(a), and 16.4(a).)

54. Defendants had no statutory or regulatory standard upon which to deny the Children First Foundation’s Picture Plate application.

55. On May 15, 2002 Children First Foundation applied for a non-profit special interest plate in Connecticut bearing the organization’s official “Choose Life” logo on one side of the plate and using their legal alternate name/domain name “FUND-ADOPTION.ORG” at the bottom of the plate as required by Connecticut’s state regulations. The plate design was approved by July, 2002, and manufacturing began in August, 2002.

56. On August 26, 2002, Children First Foundation attorney Brian W. Raum was finally sent a response to his March 22, 2002, Freedom of Information Law request for “copies of all applications submitted to the DMV, requesting to participate in the custom plate program, from the time of the program’s inception to the present.”

57. The August 26, 2002, letter was unsigned and sent from an unnamed representative of the DMV. It purported to send the “records that are responsive to [Mr.

Raum's] request," but noted that portions of the records were "redacted from disclosure" and records that pre-dated the March 2002 request by more than four years were omitted.

58. Among the records produced was a certified copy of the June 6, 1998, letter sent by former DMV Commissioner Richard E. Jackson, Jr., to a Mr. John J. Walsh.

59. The letter explains why the DMV rejected Mr. Walsh's apparent request for "a 'Choose Life' custom plate similar to the one recently introduced in Florida," and states, in part, that "[i]t is the State of New York's policy not to promote or display politically sensitive messages on our license plates," and that the DMV would not approve the "Choose Life" plate for New York so that it could avoid "a plate advocating politically sensitive and emotionally charged issues."

60. Defendants' February 25, 2002 rejection letter to Plaintiff explained that Children First Foundation's plate request was rejected for the same reasons cited to Mr. Walsh.

61. Defendants have no statute or regulation which defines the essential phrases "politically sensitive messages" or "emotionally charged issues," nor are there any standards to guide DMV officials in any such determination.

#### ***Children First Foundation's Second Application***

62. On October 16, 2003, Dr. Rex submitted a detailed letter and accompanying plate design revision to Defendants. The revised design replaced the large tagline phrase at the bottom of the plate from "Choose Life" to its official domain name "FUND-ADOPTION.ORG." The revised plate design also included the organization's official copyrighted logo, containing the graphic of the smiling children's faces and the words "Choose Life."

63. The October 16, 2003, letter requested a review by the DMV of the revised

design and application, and noted examples of the many diverse Picture Plates previously authorized by DMV officials which could be construed as controversial, political or even patently offensive by many motorists.

64. No reply was received, and receipt of the October 16, 2003, letter was not acknowledged by Defendants. In early February, Dr. Rex called the DMV and requested an update on the status of her new submission. On February 17, 2004 Commissioner Martinez sent a short, two-paragraph letter that stated, "it does not appear the issues are fully resolved," and that Children First Foundation would be contacted "once a decision has been made."

65. On February 19, 2004, Mr. Raum sent another letter to Commissioner Martinez, demanding a decision on the revised plate design within ten days, and informing him that a failure to respond would be deemed as a rejection.

66. On February 20, 2004, former Yonkers, New York mayor, John Spencer, spoke with Governor Pataki's chief of staff, John Cahill, about DMV's unconstitutional conduct regarding Children First Foundation's plate application. Mr. Cahill offered to follow up with Commissioner Martinez to obtain an explanation.

67. On February 24, 2004, Mr. Raum submitted a packet of materials regarding the Children First Foundation plate application situation to Governor Pataki and Attorney General Eliot Spitzer.

68. On March 4, 2004, the demand period imposed by Mr. Raum expired without DMV response. Mr. Raum notified Commissioner Martinez that Plaintiffs were left with no choice but to seek judicial intervention.

***Defendants' Rejection of Second Application***

69. On March 31, 2004, Commissioner Martinez sent an official rejection letter of

the revised Children First Foundation plate design and application (which had been submitted more than five months previously on October 16, 2003), reiterating therein the arguments set forth in Deputy Commissioner Dunn's initial rejection letter of June 10, 2002.

70. In the letter, Commissioner Martinez stated: "Moreover, in issuing a special plate, control over the design, marketing and issuance of any custom plate series is *solely within my discretion*, unless otherwise directed by State law, and is governed by contracts entered into with organizations whose applications are approved." (Emphasis added.)

***New York's Public Policy and Children First Foundation's Third Application***

71. On July 18, 2000, Governor Pataki signed into law the Abandoned Infant Protection Act, L.2000, c.156 (popularly called the "Safe Haven Law"). This law permits the anonymous surrender of a newborn in a safe environment without liability of criminal conviction. (See McKinney's Penal Law §260.03 (defense to crime of child abandonment); §260.15 (defense to crime of endangering the welfare of a child).)

72. The Safe Haven law additionally provides that "the office of children and family services shall develop and implement a public information program to inform the general public of the provisions of the abandoned infant protection act." The program may include educational and informational materials in various media, public service announcements and advertisements, and establishment of toll-free telephone hotlines to provide information. McKinney's Social Services Law §372-g.

73. The Safe Haven law provides legal protection to women who choose to protect the life of their newborns by leaving them with persons who can find adoptive families for these infants, rather than disposing of and cutting short the life of the infants; and requires a State agency to use communicative methods to provide announcement of this State policy.



74. On July 26, 2004, Dr. Rex faxed a letter to Commissioner Martinez in which she related the highly publicized fact that another dead newborn had been found in a garbage can in the Bedford Stuyvesant neighborhood of New York City. She also mentioned in her letter that Governor Pataki had signed into law the Safe Haven Law in 2000, but virtually no funding had been allocated to publicize it or support Safe Haven programs. She related that Children First Foundation had donated \$10,000.00 to one such program in New York.

75. In the July 26 letter, Dr. Rex proposed that the Commissioner accept the updated design of Children First Foundation's organization plate with its logo containing the graphic of the children's smiling faces over the phrase "Choose Life," along with the words and web domain "SafeHavens-Adoption.org" along the bottom of the plate. She explained that this plate communicates an uncontroversial message in favor of protecting the lives of unwanted newborns, consistent with the State's recently legislated policy on this matter. (Letter and enclosures attached hereto as Exhibit A.)

76. Dr. Rex petitioned a response to this request before Wednesday, July 28, 2004. In a postscript, Dr. Rex mentioned that another alternate design, which contains the web address "NYChoose-Life.org" on the bottom of the plate, would also be agreeable to the organization.

77. In telephone conversation on or about July 27, 2004, Defendant Dunn communicated to Dr. Rex that the Children First Foundation plate indeed would be approved by the DMV.

78. In that telephone call, Defendant Dunn asked Dr. Rex to discuss the Children First Foundation's plate application. Ms. Dunn asked Dr. Rex for confirmation that the plate would be a "membership only" plate, and requested confirmation in writing from Children First

Foundation that this indeed was the case, as this was an apparent departure from the application for the first plate design that CFF had submitted.

79. In the telephone conversation, Defendant Dunn told Dr. Rex that Children First Foundation's original application could be easily amended and requested that Dr. Rex fax the DMV a letter indicating that Children First Foundation wished to make the plate available only to those who are members of the organization. Ms. Dunn did not request an entire resubmission of all material unchanged from its prior application, but to the contrary gave the assurance that the recently-submitted new plate designs and the information which she now petitioned (the membership-only availability) would be sufficient to comprise an application.

80. Ms. Dunn stated to Dr. Rex that the DMV was going to approve the plate, and that she simply needed a few days to obtain the final clearance on the decision. When prompted by Dr. Rex to put the approval in writing, Ms. Dunn stated she was unable to do so without obtaining authorization therefore from certain other persons. When Dr. Rex reiterated that the lawsuit was ready to be filed, Ms. Dunn urged Dr. Rex to trust her that the plate was approved.

81. On or about July 27, 2004, Children First Foundation attorney J. Michael Johnson faxed a letter to Defendant Dunn thanking her for her telephone call with Dr. Rex in which she had indicated that the newly proposed Children First Foundation plate would be approved. Mr. Johnson further reiterated to Defendant Dunn that, as she well knew, Children First Foundation was preparing to file a lawsuit against the DMV because of its unconstitutional exclusion of Children First Foundation from the plate program, and indeed intended to do so on the next day, July 28, unless Defendant Dunn provided a written confirmation that the DMV was going to approve the CFF plate as requested. (Letter attached

hereto as Exhibit B.)

82. On July 28, 2004, Dr. Rex faxed a letter to Defendant Dunn in which Dr. Rex thanked her for her telephone call of the day before to discuss Children First Foundation's custom plate, and Dr. Rex expressed her appreciation for the DMV's willingness to approve the plate. Dr. Rex reiterated that a written confirmation of the approval of the plate needed to be sent by 4:00 p.m. of that day. (Letter attached hereto as Exhibit C.)

83. In a separate letter sent on July 28, 2004, Dr. Rex responded to Defendant Dunn's request that she provide written confirmation that the license plate which Children First Foundation sought would be a "membership-only plate," requiring an annual membership renewal payment to Children First Foundation from the plate holder in order for the plate holder to maintain the plate. Enclosed with the letter was a copy of the resolution in which the board of directors of Children First Foundation had voted to establish the membership requirement for plate qualification. Dr. Rex concluded the letter by thanking Defendant Dunn for allowing Children First Foundation to amend its original application on that matter. (Letter and enclosure attached hereto as Exhibit D.)

84. During a telephone call with Dr. Rex on or about July 28, 2006, Defendant Dunn requested that Children First Foundation allow her until the following week in which to finalize the approval of the plate. Ms. Dunn admonished Dr. Rex that the filing of a lawsuit would only delay the approval of the plate, and that it was thus in Children First Foundation's best interest to give her an additional number of days in which to conclude the approval process.

85. On or about July 28, 2004, Dr. Rex called Ms. Dunn and left a message on her voicemail identifying that Dr. Rex had been in contact with Children First Foundation's legal

counsel and he confirmed that he would honor her request and forego filing of the lawsuit if counsel heard from DMV in writing before 5:00 p.m. on Monday August 2, 2004. Dr. Rex subsequently faxed a letter to Ms. Dunn communicating this same message.

86. On the evening of Monday, August 2, 2004, Defendant Dunn faxed a letter to Children First Foundation in which Ms. Dunn announced that Commissioner Martinez had that day suspended the custom plate program, and that Children First Foundation had no plate application that was ripe for consideration. (Letter attached hereto as Exhibit E.)

87. In a flat repudiation of the repeated promises she had earnestly presented to Dr. Rex just days before, Defendant Dunn in the August 2 letter then characterized Children First Foundation's pending application as nothing more than a request for "reconsideration" of the denial of the first plate application from 2002. Defendant Dunn did not explain what came of her prior recognition of the legitimacy of the application for the SafeHaven-Adoption.org plate and her assurances that the Children First Foundation plate was approved by the DMV. Nor did Ms. Dunn explain her request that Children First Foundation delay filing the lawsuit so that the DMV approval of the its plate design could be finalized.

88. In her August 2 letter, Defendant Dunn further stated to Dr. Rex that "[y]ou have also advised me that some of the information contained in your application, as originally submitted, has changed." This, presumably, was Miss Dunn's newly styled characterization of Children First Foundation's latest application for which Ms. Dunn had herself petitioned certain data, had accepted as complete, and had repeatedly insisted had been approved, thus justifying her pleas that a lawsuit not be filed while she obtained final approvals.

89. Defendant Dunn further stated in her letter that the Department would not consider any applications seeking administrative approval of a custom plate series, until further

notice.

90. Upon information and belief, Governor Pataki was informed and consulted by multiple persons regarding the various Children First Foundation plate applications.

91. Upon information and belief, Governor Pataki disapproved of the Children First Foundation plate design and contributed to the final rejection decisions made by Defendant Martinez.

***Damages Sustained by Children First Foundation***

92. Most of the organizations and causes with custom plates approved by the DMV use their Picture Plates as fundraising tools. If Children First Foundation's application had been approved on February 28, 2002, their non-profit organization would have received a substantial increase in its membership and funding.

93. Because Children First Foundation would receive a \$10.00 Membership Fee in the first year of each plate's purchase, and would receive a \$25.00 Membership Fee in each subsequent year that each plate is maintained, the organization would receive a substantial amount of revenue from the plate sales. A large number of individuals have notified Children First Foundation of their interest in obtaining a New York plate bearing its logo.

94. The proposed Children First Foundation plate uses almost the identical copyrighted logo of Choose Life, Inc.'s specialty plate authorized and sold in the State of Florida. Since August 11, 2000, over 216,361 of such plates in Florida have been purchased or renewed by motorists, and have raised over \$4.3 million to promote and support the adoption option for women facing crisis pregnancies.

95. Children First Foundation's substantial losses, due to Defendants' unlawful actions, have caused further financial losses to the many New York crisis pregnancy centers,

maternity homes and safe havens that would have been the primary beneficiaries of the substantial funds raised by the sales of the organization plate at issue, and thereby prevented many New York women and infant children from obtaining the invaluable free services of these non-taxpayer funded organizations.

96. Other non-profit organizations in New York use custom designed and approved Picture Plates as a means to increase name identification, raise funds, and/or increase membership, as well as promote organizations and causes.

## VI.

### STATEMENT OF LAW

97. Each and all of the acts herein alleged of the Defendants, their officers, agents, servants, employees, or persons acting at their behest or direction, were done and are continuing to be done under the color of state law, including the statutes, regulations, customs, policies, and usages of the State of New York.

98. The Defendants have an affirmative duty to authorize a Picture Plate that complies with the rules and requirements for the forum created by the State DMV.

99. As a matter of law, New York has a legitimate interest in promoting life and the choice of adoption for women with unwanted infants. New York also has a statutory obligation to publicly communicate the existence and content of its Safe Haven law.

## VII.

### FIRST CAUSE OF ACTION: VIOLATION OF THE RIGHT TO FREEDOM OF SPEECH UNDER THE UNITED STATES CONSTITUTION

100. Plaintiffs hereby incorporate by reference all foregoing allegations as if set forth fully herein.

101. The DMV's plate program provides that eligible not-for-profit organizations and their individual members be issued a custom Picture Plate when they comply with the plate program requirements.

102. As evidenced by previously approved Picture Plates, other organizations have been permitted to use their official corporate logos and communicate viewpoints, including political viewpoints, via slogans, advocacy messages, phrases, domain names, and toll-free numbers.

103. As evidenced by previously approved plates and by the DMV's website, "logo plate" has been used interchangeably with the phrase "picture plate," and has been interpreted to allow presentation of the official, corporate logo of a not-for-profit organization, as designed and used by the corporation to identify and market itself.

104. Within the custom plate program, the government may not exclude protected speech on the basis of its content, absent a compelling governmental interest.

105. Regardless of the type of speech forum that the plate program constitutes (fora are typically identified as traditional, designated or limited, or nonpublic), the government may not discriminate based upon the viewpoint expressed by the speaker.

106. The plate program is a prior restraint on private speech. Defendants maintain a standardless licensing scheme, which violates the First Amendment's viewpoint neutrality principle.

107. Because the DMV required Plaintiff to obtain permission before issuance of its Organization plate, and vested Defendants with unfettered discretion to decide whether to permit the speech on such plate, and did not provide in that process the appropriate procedural protections, this program constitutes a prior restraint on Plaintiffs' speech in violation of the

First and Fourteenth Amendments to the United States Constitution. The Defendants exercised this unbridled discretion in their refusal to approve the Children First Foundation's requested plates.

108. There does not exist any statutory, regulatory, or other applicable standards imposing limits on the length of time in which the DMV must respond to a request for a custom Picture Plate design under the custom plate scheme.

109. The Defendants denied Children First Foundation's original and subsequent plate applications based upon their opposition to the life-affirming viewpoint contained on the plate design.

110. Defendants' denial of Plaintiff's plate designs on the basis of a concern over the ostensive opposition to the plates' communicated viewpoint by a segment of the population constitutes an unconstitutional "heckler's veto" of constitutionally protected speech.

111. Defendants continue to approve and allow other organizations to use political, controversial or even offensive slogans and/or advocacy messages of various types.

112. Defendants engaged in and facilitated content-based and viewpoint-based discrimination and the exercise of unbridled discretion during the course of their review and ultimate denial of the requested plate designs.

113. Children First Foundation has suffered irreparable harm to its constitutional rights as a result of the DMV defendants' failure to approve its requested plate designs.

114. Unless and until the Defendants are enjoined from discriminating against the Children First Foundation's speech as found in the requested organizational plate designs, Children First Foundation will continue to suffer irreparable harm to its constitutional rights.

115. Unless and until the Defendants cease their unlawful discrimination against the



Children First Foundation's speech, Children First Foundation will suffer the loss of membership and plate income it would otherwise have obtained from the sale of Children First Foundation organizational plates.

116. The Defendants have no compelling government interest to justify excluding Children First Foundation from the plate program.

### VIII.

**SECOND CAUSE OF ACTION:**  
**VIOLATION OF THE RIGHT TO DUE PROCESS**  
**UNDER THE UNITED STATES CONSTITUTION**

117. Plaintiffs hereby incorporate by reference all foregoing allegations as if set forth fully herein.

118. The Defendants exercised unfettered discretion when they refused to approve the Children First Foundation's requested plates.

119. The Defendants in rejecting or failing to approve Children First Foundation's requested plates purported to rely upon vague and overbroad policies, which policies do not adequately notify persons of what expression is prohibited and what is permitted on a Picture Plate.

120. The Defendants have enforced their policies in an *ad hoc* and arbitrary manner.

121. Children First Foundation has suffered irreparable harm as a result of the Defendants' refusal to approve its requested plates, in violation of the Due Process Clause of the Fourteenth Amendment.

**IX.**

**THIRD CAUSE OF ACTION:**  
**VIOLATION OF THE RIGHT TO EQUAL PROTECTION**  
**UNDER THE UNITED STATES CONSTITUTION**

122. Plaintiffs hereby incorporate by reference all foregoing allegations as if set forth fully herein.

123. Defendants have allowed other similarly-situated, not-for-profit organizations to participate in the New York custom license plate program using names and logos that include slogans, mottos, symbols, advocacy messages, phrases, and telephone numbers, and include speech on divisive political issues.

124. The Equal Protection Clause requires that the government treat equally all persons similarly situated.

125. The Defendants denied Children First Foundation similar access to the plate program because of the content and viewpoint of its speech, thereby violating the Equal Protection Clause of the Fourteenth Amendment.

126. Defendants have no compelling governmental interest to justify this disparate treatment of the Children First Foundation.

**PRAYER FOR RELIEF**

WHEREFORE, Plaintiffs respectfully pray that this Honorable Court:

A. Adjudge, decree and declare the rights and other legal relations of the parties to the subject matter in controversy in order that such declarations shall have the force and effect of final judgment and that the Court retain jurisdiction of this matter for the purpose of enforcing the Court's Orders;

B. Enter a Declaratory Judgment stating that Defendants' failure to approve

Children First Foundation's requests for organizational plates violates the First and Fourteenth Amendments to the United States Constitution;

C. Enter preliminary and permanent injunctions enjoining the Defendants, their agents, servants, employees, officials or any other person acting in concert with them or on their behalf, from discriminating against a license plate applicant based upon the content or viewpoint expressed by the corporate identifiers of the applicant or the speech on their plate design;

D. Enter preliminary and permanent injunctions enjoining the Defendants, their agents, servants, employees, officials and any other person acting in concert with them or on their behalf, to approve Children First Foundation's preferred custom plate design application submitted prior to the institution by defendants of the moratorium on acceptance of new plate applications;

E. Award nominal damages to vindicate the past constitutional injury suffered by Children First Foundation, to be paid by Defendants in their individual capacities;

F. Award actual damages to Children First Foundation in an amount to be determined by the finder of fact in accordance with the proof, plus interest at the legal rate until paid, to be paid by Defendants in their individual capacities;

G. Award Children First Foundation's costs and expenses of this action, including a reasonable attorneys' fee award, in accordance with 42 U.S.C. § 1988, and other applicable state and federal law;

H. Grant such other and further relief as the Court deems equitable, just, and proper.

**JURY DEMAND**

Plaintiffs hereby request a trial by jury for all issues so triable in conformity with Rule 38(b) of the Federal Rules of Civil Procedure.

Dated: August 31, 2006  
Washington, D.C.

Attorneys for Plaintiffs,

*/s/ Jeffrey A. Shafer*  
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## **CERTIFICATE OF SERVICE**

I, Jeffrey A. Shafer, undersigned attorney for Plaintiffs, certify that on September 8, 2006, I electronically filed this document with the Clerk of the Court using the ECF system which will send notification of such filing to Counsel for Defendants.

By: /s/ Jeffrey A. Shafer (513236)