August 29, 2023

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RE: Constitutional Violations - SDCL § 32-5-89.2 and Policy #MV118

Dear Mr. Jackley and Mr. Houdyshell:

I am writing to notify you that SDCL § 32-5-89.2, the South Dakota personalized license plate statute, and Motor Vehicle Division Policy # MV118 are in violation of the First and Fourteenth Amendments to the U.S. Constitution and infringe on the free speech rights of all South Dakotans.

Personalized Plate Statute

SDCL § 32-5-89.2 allows drivers to apply to the state's Department of Revenue, Motor Vehicle Division ("MVD") to receive a "special personalized license plate".[1] However, the Secretary of Revenue can deny "any letter combination which carries connotations offensive to good taste and decency." Id. While the statute itself provides no clarity about what is considered "offensive to good taste and decency[,]" the MVD's internal policy #MV118 states that personalized plate requests will be denied if they contain, among other things, "vulgar words, terms, or abbreviations[;]" that are "offensive or disrespectful of a race, religion, color, deity, ethnic heritage, gender, sexual orientation, disability status or political affiliation[;]" or "words or terms that support lawlessness, unlawful activities, or that relate to illegal drugs or paraphernalia[.]" See, Department of Revenue, Policy # MV118.

In the past five years, the South Dakota MVD has denied 2,135 personalized license plate applications for violating any provision of SDCL § 32-5-89.2. Of these 2,135 denied applications, 673 applications were denied because the MVD determined that they allegedly carried "connotations offensive to good taste and decency" as prohibited by SDCL

[1] This is also commonly known as a "vanity plate" as opposed to a "special interest" plate permitted under South Dakota law which is designed by the secretary and may or may not be personalized. See, SDCL § 32-5-180.

§ 32-5-89.2. This means 31.52% of the denied personalized license plate applications were denied for this reason.

As a result of this policy and statute, the MVD has recalled previously approved personalized plate applications. Some of these recalled plates include SPOOK, SICA and BIGSXY as allegedly carrying connotations offensive to good taste and decency. It is clear that even if a personalized plate has been approved, it is at risk of being recalled and denied at a later date, at the whim of the MVD.

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Comparing lists of personalized license plates that the MVD has approved and denied reveals that the "offensive to good taste and decency" standard is not applied consistently and appears to be highly subjective. For example, the MVD has denied applications seeking personalized license plates for the following: HELLBOY, HELBOY, RZNHELL, RAZNHEL, and HELLHRS. However, the MVD has approved applications seeking license plates that are similar to those that were denied, specifically: HELLA, HELLBEND, HELLBIRD, and HELLCAT.

The MVD has denied BEERUS, HLDMYBR, BEER4ME, and BEERMOM but approved BEER30, BEERRUN, BEERBUS, and BEERMAN. Also, the MVD denied applications for IH8UALL and IH8U but approved YUH8ME, DNTH8, H8FULL, and DNTH8ME. Equally inconsistent is the denial of the application for WHTWDOW but then an approval was made for BKWIDOW. The MVD denied JRKFACE but approved JRKYBOY; and has previously both approved and denied WINE.

The MVD has also rejected seemingly benign personalized plate applications for supposedly being offensive to good taste and decency. These include PBS, FRITOS, MIMSI, HLZ, HVNHL, OJO, SNAFU, SIXFIVE, HFO, SFX, DRACO, WURST, SHROOM, HELMET, NARDDOG, IDIOT, BELUSHI, RED22, MIYAGI1, CAUSTIC, and DORF.

The MVD regularly engages in viewpoint discrimination in the manner in which it treats personalized plate applications. The above examples clearly demonstrate that the personalized license plate statute violates the First Amendment and Fourteenth Amendment to the U.S. Constitution. The MVD regularly and persistently infringes on the free speech rights of all South Dakotans.

Lyndon Hart's Denied Personalized License Plate

The MVD used SDCL § 32-5-89.2 to stifle the free speech of Mr. Lyndon Hart in June 2022. Mr. Hart owns and manages a business called

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Rez Weed Indeed. The website for Rez Weed Indeed explains that the company does not sell any marijuana products but instead "support[s] and promote[s] the legal selling and use of Medical and Recreational Marijuana on all Federally recognized Indian reservations . . . in America" as a way of "respecting and honoring and supporting our Tribal Sovereignty lands."[2]

On May 31, 2022, Mr. Hart submitted an "Application for Personalized License Plate" at the Moody County Treasurer's office requesting the personalized license plate REZWEED. Mr. Hart intended the requested REZWEED plate to refer to his business Rez Weed Indeed and its mission of promoting Tribal Sovereignty.

But on June 6, 2022, the South Dakota Department of Revenue sent Mr. Hart a letter rejecting his application for the personalized license plate REZWEED "under statute 32-5-89.2 as it was found to be in poor taste."

After advocacy by the ACLU of South Dakota, the MVD eventually relented and granted Mr. Hart the REZWEED plate. However, the initial denial of Mr. Hart's attempt to advocate for Tribal Sovereignty as being allegedly "in poor taste" highlights the unbridled discretion granted to MVD employees by SDCL § 32-5-89.2, which has resulted in the blatant trampling of Mr. Hart's freedom of speech, along with all other South Dakotans.

First Amendment Claims

The First Amendment to the United States Constitution prohibits abridgement of the freedom of speech and expression. All manner of speech—from "pictures, films, paintings, drawings, and engravings," to "oral utterance and the printed word"—qualify for the First Amendment's protections. Kaplan v. California, 413 U. S. 115, 119–120 (1973). "[T]he freedom to speak one's mind is not only an aspect of individual liberty--and thus a good unto itself--but also is essential to the common quest for truth and the vitality of society as a whole." Bose Corp. v. Consumers Union of U.S., Inc., 466 U.S. 485, 503-04 (1984). As such, the United States Supreme Court has consistently recognized "[I]t is a central tenet of the First Amendment that the government must remain neutral in the marketplace of ideas." FCC v. Pacifica Found., 438 U.S. 726, 745-46 (1978). 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.

[2] https://rezweedindeed.com/

Here, the South Dakota MVD has stifled the freedom to speak one's mind, thus suppressing an important recognized liberty of all South Dakotans, including Indigenous Peoples. The MVD is actively censoring the free speech protected by the First Amendment, and is inserting its own voice – which is often changing – in the place of the citizens' voices of South Dakota. The MVD's violation of free speech creates an actionable claim under federal law by Mr. Hart and those whose personalized plate applications are being denied for carrying alleged "connotations offensive to good taste and decency."

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A. As Applied Challenge—Viewpoint Discrimination

"It is axiomatic that the government may not regulate speech based on its substantive content or the message it conveys." Police Dept. of Chicago v. Mosely, 408 U.S. 92, 96 (1972). And when "the government targets not only subject matter, but particular views taken by speakers on a subject, the violation of the First Amendment is all the more blatant." Rosenberger v. Rector and Visitors of University of Virginia, 515 U.S. 819, 828-29 (1995).

The MVD has admitted in a response to our open records request that the denial of Mr. Lyndon Hart's application for the personalized license plate REZWEED "was based on the provision allowed in SDCL § 32-5-8 which allows the department to refuse to issue any letter combination which [allegedly] carries connotations offensive to good taste and decency. Upon a subsequent review, the request for a personalized plate was approved."[3] Mr. Hart's request was clearly denied based on his viewpoint. The fact that he intended the plate to reference marijuana or a reservation using the abbreviation "REZ" does not change this outcome.

Medical marijuana is legal throughout the state of South Dakota as well as on the Flandreau Reservation where he lives and sells his clothing. "REZ" is a commonly used abbreviation for a reservation in South Dakota and elsewhere. And even if marijuana was outlawed, "free speech . . . do[es] not permit a State to forbid or proscribe advocacy of . . . law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action." Brandenburg v. Ohio, 395 US 444, 447 (1969). Therefore, Mr. Hart and the 673 individuals whose applications were denied because they allegedly carry "connotations offensive to good taste and decency" are likely to succeed in an as-applied challenge.

B. Facial Challenge—Overbreadth and Vagueness

[3] South Dakota Department of Revenue Response to ACLU Open Records Request dated Nov. 9, 2022.

The Supreme Court permits "a party to challenge an ordinance under the overbreadth doctrine in cases where every application creates an impermissible risk of suppression of ideas, such as an ordinance that delegates overly broad discretion to the decisionmaker...." Forsyth Cnty., Ga. v. Nationalist Movement, 505 U.S. 123, 129 (1992). In the Eighth Circuit, a driver bringing a facial overbreadth challenge against a personalized plate statute does not need to show that they were denied their requested plate because of their viewpoint; rather, they "need show only that there was nothing in the ordinance to prevent the [state] from denying . . . the plate because of [their] viewpoint." Lewis v. Wilson, 253 F.3d 1077, 1080 (8th Cir. 2001). Similarly, a statute is void for vagueness if it invites "arbitrary and discriminatory application" by failing to provide "explicit standards for those [government actors] who apply [it]." Grayned v. City of Rockford, 408 U.S. 104, 108 (1972).

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In Lewis v. Wilson the Eighth Circuit relied on both the overbreadth and vagueness doctrines to find Missouri's personalized plate law to be facially unconstitutional after it was used to deny a driver the personalized plate "ARYAN-1." 253 F.3d at 1080-81. The plate was initially issued but, following an anonymous complaint, the state refused to reissue it because they found it to be in violation of a Missouri statute which prohibited the issuance of personalized license plates that are "obscene, profane, inflammatory or contrary to public policy." Id. at 1078-79. The driver sued, seeking an injunction because the law was unconstitutional for being vague, overly broad, and viewpoint discriminatory. The Eighth Circuit found the statute to be facially unconstitutional. Id. at 1079. Specifically, the Court "struck down the part of the statute that allowed license plates to be rejected as contrary to public policy because it was vague and overbroad, thereby creating an impermissible risk that the government's suppression of unpopular ideas would violate the First Amendment." Roach v. Stouffer, 560 F.3d 860, 864 (8th Cir. 2009) (summarizing the holding in Lewis).

Additionally, the ACLU has successfully sued in several states where personalized plate statutes violated free speech rights. Courts throughout the country have struck down laws similar to South Dakota's law prohibiting personalized license plates that are allegedly "offensive to good taste and decency." See Carroll v. Craddock, 494 F.Supp.3d 158 (D. R.I. Oct. 2, 2020); Matwyuk v. Johnson, 22 F. Supp. 3d 812 (W.D. Mich. 2014); Morgan v. Martinez, 2015 WL 2233214 (D.N.J. May 12, 2015). Therefore, South Dakota's law prohibiting personalized plates that allegedly carry "connotations offensive to good taste and decency" is also overly broad and void for vagueness on its face.

Conclusion

We demand that the Motor Vehicle Division, within 14 days of the date of this letter:

1) approve all personalized plate applications previously denied or recalled since August 1, 2022 for the reason that they allegedly carried "connotations offensive to good taste and decency."

2) agree not to deny any future applications for personalized license plates based on the reason that they allegedly carry "connotations offensive to good taste and decency."

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Sincerely,

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