IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH DAKOTA
CENTRAL DIVISION

LYNDON HART, Plaintiff, vs. MICHAEL HOUDYSHELL, in his individual and official capacity as Secretary of the South Dakota Department of Revenue; BRENDA KING employee of the South Dakota Motor Vehicle Division, in her individual and official capacity, Defendants	Case No.: 3:23-cv-03030 RAL PLAINTIFF LYNDON HART'S MOTION FOR PRELIMINARY INJUNCTION

Plaintiff Lyndon Hart ("Mr. Hart"), pursuant to Rule 65 of the Federal Rules of Civil Procedure, respectfully requests that the Court enter an Order for Preliminary Injunction enjoining the Defendants' enforcement of S.D.C.L. § 32-5-89.2 "offensive to good taste and decency" standard and Department of Revenue Policy #MV118 to Mr. Hart and all others. Unless such an injunction is issued, Mr. Hart will suffer immediate and irreparable harm due to the challenged law's infringement on his First and Fourteenth Amendment rights as further reflected in the legal memorandum filed in support of this motion.

Additionally, Mr. Hart moves for the Court to waive the bond requirement normally associated with the issuance of a preliminary injunction. A bond is

inappropriate in this case because the state of South Dakota will not suffer any loss in security or financial harm of the type typically remedied through a bond.

ORAL ARGUMENT and EVIDENTIARY HEARING REQUESTED

Pursuant to D.S.D. Civ. LR 7.1(C), Mr. Hart respectfully requests oral argument and an evidentiary hearing on this motion.

Dated this 6th day of November 2023.

American Civil Liberties Union of South Dakota

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CERTIFICATE OF SERVICE

I hereby certify that on November 6, 2023, the foregoing Motion for Preliminary Injunction was served upon the following counsel for the Defendants via e-mail:

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Defendants

Case No.: 3:23-cv-03030 RAL

PLAINTIFF LYNDON HART'S LEGAL MEMORANDUM IN SUPPORT OF HIS MOTION FOR PRELIMINARY INJUNCTION

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CASES:

Plaintiff Lyndon Hart ("Mr. Hart") submits this Legal Memorandum pursuant to Rule 65 of the Federal Rules of Civil Procedure and D.S.D. Civ. LR 7.1(B) in support of his Motion for Preliminary Injunction. Mr. Hart requests that the Court issue an order to preliminarily enjoin enforcement of S.D.C.L. § 32-5-89.2's "offensive to good taste and decency standard" and Department of Revenue Policy #MV118 because they violate the First and Fourteenth Amendments to the United States' Constitution.

STATEMENT OF FACTS

I. The Denial of Lyndon Hart's REZWEED Personalized Plate.

On May 31, 2022, Mr. Hart applied for a personalized license plate with the South Dakota Department of Revenue ("Department") reading REZWEED. Mr. Hart, an enrolled Tribal member of the Yankton Sioux Tribe, owns a business called Rez Weed Indeed and intended the REZWEED plate to raise awareness of his business' message supporting Tribal Sovereignty. Rez Weed Indeed 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". While Mr. Hart considered adding weed killing services to the business, he decided not to do so, and his original business purpose remained. Dkt. #1 p. 5; ¶ ¶ 112, 114.

The application Mr. Hart completed and submitted states,

> Personalized plate requests will be denied if they contain any of the following:
> - Special characters such as (#, $, &, @, etc.)
> - Vulgar words, terms, or abbreviations, characters that express, represent, or imply a profane, obscene, or sexual meaning
> - Words or terms that are offensive or disrespectful of a race, religion, color, deity, ethnic heritage, gender, sexual orientation, disability status or political affiliation
> - Words or terms that support lawlessness, unlawful activities, or that relate to illegal drugs or paraphernalia

- Foreign words or terms that fall into any of the previous categories
- Combinations of letters and/or numbers that conflict with or are a duplicate of another South Dakota license plate or plate series
- Combinations of letters and/or numbers that could be misinterpreted or are confusing from a readability standpoint for law enforcement purposes. Dkt. #1 ¶ 68.

The application does not define any of the words prohibited but it asks the applicant to "Please explain the meaning of the requested personalized plate." On the application form for REZWEED, Mr. Hart indicated that the "meaning behind the requested personalized plates" is "WEED KILLER. HIS COMPANY IS CALLED REZ WEED INDEED." Dkt. #1 ¶ ¶ 68-70, 114. This meaning was provided because it was during the time Mr. Hart had considered adding weed killing services to Rez Weed Indeed's already existing purpose: to raise awareness of Tribal Sovereignty.

On June 6, 2022, Brenda King, an employee with the Department of Revenue's Motor Vehicle Division ("MVD"), issued a denial letter to Mr. Hart informing him that his requested plate had "been denied under statute 32-5-89.2 as it was found to be in poor taste." Id. at ¶ ¶ 116, 117. Following the denial of his application, the Moody County Treasurer's office was unable or unwilling to tell Mr. Hart why his plate was found to be in poor taste. Id. at ¶ 125.

Several months later, on September 28, 2022, the MVD reversed its decision and granted Mr. Hart the REZWEED plate informing him of its decision by email without any explanation. However, Mr. Hart had been denied the REZWEED plate for several months. Dkt. #1 ¶ ¶ 86, 128. Because the Department of Revenue Secretary is authorized by S.D.C.L. § 32-3-48 and Policy #MV118 to recall a previously issued personalized plate at any time, and has in fact recalled previously approved personalized plates, the Secretary at any time can decide to recall the REZWEED plate or simply choose not to renew it. Dkt. # 1 ¶ ¶ 32-38, 130.

II. Mr. Hart Intends to Renew the REZWEED Plate Annually and Apply for Another Personalized Plate.

Mr. Hart intends to renew his REZWEED plate annually for as long as he is allowed to do so by the state. Id. ¶ 128. He also has another vehicle for which he intends to apply for a personalized license plate reading REZBUD or REZSMOK. Id. at ¶ 131. He intends REZBUD or REZSMOK to express the same message as REZWEED which is to promote the legal selling of marijuana on Tribal reservations and to promote Tribal Sovereignty. Mr. Hart meets all of the statutory requirements to apply for such a plate. Id. at ¶ 132. However, it is likely that this application will be denied for allegedly being "offensive to good taste and decency" under S.D.C.L. § 32-5-89.2 because it consists of similar language as REZWEED. It is also likely that this plate could be recalled by the Secretary of the Department of Revenue since the Department has previously recalled other approved plates later for being in poor taste. As a result, not only is Mr. Hart currently under threat of having his REZWEED plate revoked but his speech is chilled due to the future enforcement of both S.D.C.L. § 32-5-89.2's "offensive to good taste and decency" standard and Policy #MV118's recall authority against him. Id. at ¶ ¶ 131-135.

III. South Dakota's Personalized Plate Program.

All motor vehicles registered in South Dakota are issued license plates by the Department of Revenue, which requires them to be displayed on the front and rear bumper of a vehicle. See, §32-5-98. The standard license plates display a randomly generated combination of letters and numbers. However, for an additional fee, the Department of Revenue allows vehicle owners to select their own letter and number combination and to receive a "personalized license plate." The specific alphanumeric combination that appears on a personalized plate is created entirely by the individual who owns the registered vehicle. People like Mr. Hart use the personalized plate system to convey a message about anything they choose, including a reflection of their personal identity, values, an idea, belief, or their sense of humor. Dkt. # 1 ¶ ¶ 16-19.

A. The Personalized Plate Statutes.

The issuance of personalized plates is governed by S.D.C.L. §§ 32-5-89.2 through 32-5-89.5. Mr. Hart seeks to enjoin the last sentence of S.D.C.L. § 32-5-89.2, which reads in its entirety:

> Any owner of a motor vehicle, including a motorcycle, who is a resident of this state, and who has complied with all laws of this state in regards to the registration of a motor vehicle, may have the license plates replaced by special personalized license plates which shall conform in size and color combinations as may be provided by the secretary. No personalized license plate for a motor vehicle other than a motorcycle may contain more than seven letters nor the single numeral one or two. No personalized license plate for a motorcycle may contain more than six letters nor the single numeral one or two. There may be no duplication of the personalized license plates issued by the secretary. *The secretary may refuse to issue any letter combination which carries connotations offensive to good taste and decency.*

S.D.C.L. § 32-5-89.2 (emphasis added). By granting Defendant Houdyshell the authority and discretion to "refuse to issue any letter combination which carries connotations offensive to good taste and decency," S.D.C.L. § 32-5-89.2 also facially contains a content-based and viewpoint-based restriction. Id. The statute contains no definitions to guide government officials concerning which messages are "offensive to good taste and decency." Dkt. #1 ¶¶ 27-28.

B. The Department of Revenue Tries to Repeal S.D.C.L. § 32-5-89.2 as Unconstitutional.

On January 15, 2008, Debra Hillmer, then-Director of the Department of Revenue's Motor Vehicle Division, testified before the State Legislature that S.D.C.L. § 32-5-89.2 was unconstitutional and should be repealed. She explained to them that in the last year the Department of Revenue "started reviewing our process and the legal basis for approval or denial" of personalized plates and "It became evident that based upon the Eighth Circuit Court decision, which we are bound by, we have little ground to stand on to deny plates." Ex. 1 - Hillmer Legis.

Testimony at 31:15 - 31:30. During her testimony, Director Hillmer also distributed copies of the Eighth Circuit Court of Appeals case of Lewis v. Wilson, 253 F.3d 1077 (8th Cir. 2001), to the members of the Senate Transportation Committee and stated,

> The Court upheld in essence that once the state opens up the avenue for citizens to put personal messages on their plates then the free speech rule applies. . . the Court held that the state did not have the right to censor free speech and therefore could not deny the issuance of the plate. They also found in this particular case that because the plaintiff was prevailing, the state was liable for all attorney's fees as well. The amount of revenue that is collected from our personalized license plates, which amounts to about $250,000 per year, is not even a drop in the bucket to what we would have to pay for defending any one of these cases….So regardless of what the intent of the applicant is to put a message on a plate, the recipient, the reader of that may receive that because of their perspective in a totally different manner and it really puts the state in the position of having to decide what should or should not be on the plates and we do not think that is in the best interest of the state.

Id. at 32:00 to 34:55.

Following Director Hillmer's testimony to repeal the law, Daniel C. Mosteller, then-Superintendent of the South Dakota Highway Patrol, also testified in favor of repealing it. Superintendent Mosteller stated that the law did not assist law enforcement and that state troopers would sometimes initiate revocation of a personalized plate for being offensive.

> From my perspective, the personalized plates for law enforcement serve little purpose.
> ***
> Over the years, there have been a number of times where we've called Deb's office, troopers have called in and said 'what on earth is this personalized plate being issued on a vehicle for?' And when we go into what is on the plate and explain to them what is actually they are trying to say on the plate then the plate has been removed from the vehicle. So not only have there been instances in other states, there have a number of instances in this state as well where we've called in and we've had to asked to have plates taken off the vehicle because of the obscene nature of what was printed on the plates. I think in many instances unfair for one person or one or two persons being tasked or charged with being able to decipher what is

> being said and what isn't being said either out front or underlying some of these plates and as a result things occasionally get through." Id. at 36:30-37:55.

After listening to the testimony from Director Hillmer and Superintendent Mosteller, the legislature decided not to repeal the law. Id. at 54:30-55:40.

C. The Department of Revenue's Policies and Procedures for Personalized Plates.

Despite seeking to repeal S.D.C.L. § 32-5-89.2 due to its admittedly unconstitutional language, the Department of Revenue enacted Policy #MV118 in December 2015, which further censored speech by giving the Department unfettered discretion—with no time limitation—to recall a previously issued personalized plates. The 2015 version of Policy #MV118 was in effect when Mr. Hart applied for the REZWEED plate, and its stated purpose was to "clarify the approval process for personalized plates and allowable messages." Dkt. #1 ¶¶ 53-57, Ex. 2 – 2015 Policy #MV118. The policy states:

> Personalized license plates cannot contain any of the following:
> - No special characters (such as #, $, &, @, etc.) may be used.
> - DU#1
> - FUN@MV
> - No vulgar words, terms, or abbreviations may be used.
> - The characters in the order used cannot express, represent, or imply a profane, obscene, or sexual meaning.
> - Includes definitions in the dictionary or found through internet searches.
> - No word or term that is offensive or disrespectful of a race, religion, color, deity, ethnic heritage, gender, sexual orientation, disability status, or political affiliation.
> - No words or terms that support lawlessness, unlawful activities, or that relates to illegal drugs or paraphernalia.
> - No foreign words or terms that fall into any of the above categories.

Id. ¶ 54. In addition to these restrictions, the 2015 version of Policy #MV118 reads "[i]t is also very important for the applicant to make sure that the application is fully completed, ***including a clear description of the plate meaning.***" Id.(emphasis added). The policy also states a personalized

license plate which has already been issued may be recalled if the Department determines that it "does not meet the standards of good taste and decency." Id. at ¶ 57. This provision is actively used as the Department of Revenue has recalled at least three previously issued plates for being offensive to good taste and decency in 2022 alone. Id. at ¶ 106, Ex. 3 – Open Records Response.

Policy #MV118 was revised on September 14, 2023. It removed the requirement that an applicant state the meaning behind the requested plate and changed prohibited word and letter categories without removing its problematic provisions. Now, Policy #MV118 reads in pertinent part:

> Personalized license plates may not contain any of the following:
> • No special characters (such as #, $, &, @, etc.) may be used.
> o DU#1
> o FUN@MV
> • No combination of letters and/or numbers that conflict with or is a duplicate of another South Dakota license plate or plate series.
> o Go to www.sdcars.org to "CK A PL8" to check the availability of specific plate options
> • No combination of letters and/or numbers that could be misinterpreted or is confusing from a readability standpoint for law enforcement purposes.
> o e.g.: 88B88B
> • No combination of letters and/or numbers that mimic or pretend to represent any law enforcement agency or emergency service provider.
> o e.g.: SDHP 1; FBI 2; RCPD 3
> • No vulgar or swear words as defined in Merriam-Websters online dictionary as vulgar, profane, offensive, or having a sexual connotation.

Dkt. #1 at ¶ ¶ 58-59. The current version of Policy #MV118 also states that the Department can recall any previously approved plate at any time. It reads,

> Standards have been developed to help the Department review and either approve or deny applications in a consistent manner. **The Department may refuse to issue, or recall previously issued, personalized license plates determined to be in violation of statute or this policy.** The Department will comply with the

> provisions of SDCL 32-3-48 if it decides to revoke any personalized license plate determined to be in violation of statute or this policy.

Id. (emphasis added). The MVD's Procedure Manual also addresses the issuance of personalized license plates and includes the required application to be completed which contains similar language to Policy #MV118. Ex. 4 – MVD Procedure Manual. The application form that Mr. Hart completed states:

> Personalized plate requests will be denied if they contain any of the following:
> - Special characters such as (#, $, &, @, etc.)
> - Vulgar words, terms, or abbreviations, characters that express, represent, or imply a profane, obscene, or sexual meaning
> - Words or terms that are offensive or disrespectful of a race, religion, color, deity, ethnic heritage, gender, sexual orientation, disability status or political affiliation
> - Words or terms that support lawlessness, unlawful activities, or that relate to illegal drugs or paraphernalia
> - Foreign words or terms that fall into any of the previous categories
> - Combinations of letters and/or numbers that conflict with or are a duplicate of another South Dakota license plate or plate series.
> - Combinations of letters and/or numbers that could be misinterpreted or are confusing from a readability standpoint for law enforcement purposes.

Ex. 5 – Application of Mr. Hart. Also similar to the language in the 2015 version of Policy MV#118, the application required that an applicant for a personalized plate "explain the meaning of the requested plate." Id. This is likely so the Department of Revenue employee reviewing the application could make a subjective determination of whether they believe the plate is "offensive to good taste and decency," based on the meaning provided by the applicant. When Policy #MV118 was revised on September 14, 2023, the application form was also revised and while it no longer requires an applicant to state the meaning behind their requested message, the requirement did exist when Mr. Hart and 673 applicants were denied a personalized plate due to it

being in poor taste and the procedure manual has not been revised. Dkt. #1 ¶¶ 66, 83, 104, Ex. 6 – 2023 Application Form.

D. The Department of Revenue Does not Define "Offensive to Good Taste and Decency" Which is a Viewpoint Protected by the First Amendment.

The Department of Revenue denied 2,135 personalized plate applications between June 2018 and July 2023 and of that amount, 673 denials were because they were "offensive to good taste and decency." Dkt. #1 ¶¶ 103-04. The department uses S.D.C.L. § 32-5-89.2's "offensive to good taste and decency" standard regularly to deny applications for personalized license plates in an inconsistent, arbitrary, content-based, and viewpoint-based manner. For instance, applications requesting plates reading HELLBOY and HELLHRS have been denied, while HELLBRD and HELLCAT have been approved. Similarly, BEERMOM was denied while BEERMAN was approved just as WHTWDOW was denied but BKWIDOW was approved. Id. at ¶ ¶ 82, 88, 89, 95. Similarly arbitrary are the denied applications for license plates reading FRITOS, DRACO, and HELMET, which are seemingly benign words without objectively any negative or positive connotations. Id. at ¶ 99. Plate applications for both WINE and CBDGRL were denied; then they were subsequently approved. Id. at ¶ 97. This is but a small sample of the substantial inconsistent applications of S.D.C.L. § 32-5-89.2's "offensive to good taste and decency" standard made by the department.[1]

The "offensive to good taste and decency" standard, on its face and as applied to Mr. Hart and others, allows the Defendants to engage in viewpoint discrimination. Applications for plates that express hatred, such as IH8UALL and IH8U, are regularly denied as offensive to good taste

[1] The Department of Revenue supplied, in response to an open records request, thousands of plates they approved, denied and recalled, thus this list of arbitrary decisions by the department is not exhaustive.

and decency, while applications for personalized plates that discourage hatred, such as DNTH8 and DNTH8ME, are approved. Defendants regularly approved personalized plates that conveyed a message in support of God or Jesus—1GOD, 1TRUGOD, LIV$GOD, LUV4GOD, GODBLSS, JESUS, JESUS4U—but regularly denied plates that reference the Devil or Satan—SATAN, S8N, SIX66, TRIPL6, 666DOA, and DEV1L. Id. at ¶ ¶ 101, 102.

There is no objective basis by which the statute's "offensive to good taste and decency" standard can be interpreted or uniformly applied since it is undefined by statute, policy or procedure and allows for discretionary denials on its face. This is illuminated by state official's arbitrary and selective denial of some personalized plate applications, approval of others, and seemingly random recall of personalized plates previously approved. The lack of objective basis, discretionary language, and failure to define the term "offensive", which itself is a protected viewpoint under the First Amendment, is clearly reflected in the subsequent approval of personalized plate applications that were previously denied, like Mr. Hart's. That the department can recall Mr. Hart and other's approved personalized plate at any time continuously exposes drivers to the inconsistent and limitless authority of state officials to suppress protected speech.

LAW AND ARGUMENT

I. Applicable Standards

a. Preliminary Injunction

When considering whether to grant a preliminary injunction, a court must consider four factors: "(1) the threat of irreparable harm to the movant; (2) the state of the balance between this harm and the injury that granting the injunction will inflict on other parties; (3) the probability that the movant will succeed on the merits; and (4) the public interest." Dataphase Sys., Inc. v. C L Sys., Inc., 640 F.2d 109, 113 (8th Cir. 1981). In order to obtain preliminary relief, the movant is

not required to show a greater than 50% chance of success on the merits of the claim; instead, the question is whether the balance of equities so favors the movant that justice requires the court to intervene until the merits are determined. Id. at 113; S. Div. First Premier Bank v. U.S. Consumer Fin. Protection Bureau, 819 F. Supp. 2d 906, 912 (D.S.D. 2011) ("A plaintiff is required to make only a prima facie showing that there has been an invasion of [his][] rights . . . ." (citation omitted)).

"Where a preliminary injunction is sought to enjoin the implementation of a duly enacted statute, [] district courts [must] make a threshold finding that a party is likely to prevail on the merits." Planned Parenthood Minn., N.D., S.D. v. Daugaard, 799 F. Supp. 2d 1048, 1053 (D.S.D. 2011) (alterations in original) (quoting Planned Parenthood Minn., N.D., S.D. v. Rounds, 530 F.3d 724, 732-33 (8th Cir. 2008) (en banc)). At the same time, "[w]hen a Plaintiff has shown a likely violation of his or her First Amendment rights, the other requirements for obtaining a preliminary injunction are generally deemed to have been satisfied." Phelps-Roper v. Troutman, 662 F.3d 485, 488 (8th Cir. 2011), overruled on other grounds by Phelps-Roper v. City of Manchester, 545 F.3d 678 (8th Cir. 2012).

b. Government Restricted Speech

"When the Government restricts speech, the Government bears the burden of proving the constitutionality of its actions," United States v. Playboy Entertainment Group, Inc., 529 U.S. 803, 816 (2000). Once a litigant has made the initial showing that their speech has been restricted, the burden falls on the government to advance a constitutional justification. Lewis v. Wilson, 253 F.3d 1077, 1082 (8th Cir. 2001).

Here, Mr. Hart is entitled to a preliminary injunction. He has a strong likelihood of success because S.D.C.L. § 32-5-89.2's "offensive to good taste and decency" provision and Policy

#MV118 discriminate based on content, viewpoint, are vague, and overbroad. The remaining Dataphase factors also weigh in favor of granting a preliminary injunction.

II. Plaintiff is Likely to Succeed on the Merits.

In 2008, then-Director of the Department of Revenue's Division of Motor Vehicles Debra Hillmer testified that "Our statute says that the secretary may refuse to issue any letter combination which carries connotations offensive to good taste and decency. One thing I've learned over the years is that 'good taste and decency' is different depending on your perspective on issues and your moral upbringing." Ex. 1 at 30:55 to 31:15. Director Hillmer was correct, because "the Constitution does not permit the government to decide which types of otherwise protected speech are sufficiently offensive to require protection for the unwilling listener or viewer. Rather, ... the burden normally falls upon the viewer to avoid further bombardment of [his] sensibilities simply by averting [his] eyes." Snyder v. Phelps, 562 U.S. 443, 459 (2011) (internal quotation marks omitted) quoting Erznoznik v. Jacksonville, 422 U.S. 205, 210–211(1975). Therefore, S.D.C.L. § 32-5-89.2's "offensive to good taste and decency" provision contains constitutional deficiencies, and the Plaintiff is likely to succeed on the merits of both his facial and as-applied challenges.

A. Personalized License Plate Messages are Private Speech.

Messages on personalized license plates are private speech and not government speech. The personalized message that is selected by the vehicle owner is entirely their own and no part of it is selected by the Department of Revenue, such that it would fall within the realm of government speech. As the Eighth Circuit explained in Lewis v. Wilson, "a personalized plate is not so very different from a bumper sticker that expresses a social or political message. The evident purpose of such a 'forum,' . . . is to give vent to the personality, and to reveal the character or views of the plate's holder." 253 F.3d 1077, 1079 (8th Cir. 2001). The issuance of the plate by the Department

of Revenue does not control the analysis because it is the message itself and opportunity for the message that the law deems central to the characterization of speech. In Lewis, the Eighth Circuit recognized that even though "the state . . . technically owns the physical metal plate on which" a personalized license plate message is displayed, the core nature of personalized plates is private, not government, expression. Id. Thus, because the message is entirely and purely that of the personalized plate-holder and because the Department of Revenue had no part in the message selected, S.D.C.L. § 32-5-89.2 and Policy #MV118 involves private speech.

The Eighth Circuit's Lewis decision is still good law. It is not altered by the Supreme Court's subsequent ruling in Walker v. Texas Division, Sons of Confederate Veterans, Inc. where the Court found that Texas' specialty license plates, not its personalized license plate program, constituted government speech. 576 U.S. 200, 208 (2015). The Court stated, "This opinion does not address whether the unique combination of letters and/or numbers assigned to each vehicle, even when selected by the motorist, is private speech." Id. at n 4 (Alito, J., dissenting).

The Texas' specialty license plates at issue in Walker, in contrast to South Dakota's personalized plates whereby "a vehicle owner may request a particular alphanumeric pattern for use as a plate number[,]" contained "the word 'Texas,' a license plate number, and one of a selection of designs prepared by the State." Id. at 204.[2] None of the plate's messaging was crafted by the applicant in Walker. Further, the Walker Court emphasized that its ruling was limited only to specialty license plates over which the state of Texas had exclusive control of the design ***and message*** used to espouse a state's interest. Id. at 204-05. Because the Supreme Court limited its holding entirely to the specialty plate program and did not decide whether "the unique combination

[2] South Dakota's special interest plate statute, found at S.D.C.L. § 32-5-180, is not being challenged in this lawsuit.

of letters and/or numbers assigned to each vehicle, even when selected by the motorist, is private speech", the Eighth Circuit's holding in Lewis is still the binding law in this district.

Furthermore, two years after Walker, the Court cautioned lower courts against expanding the doctrine of government speech in new ways by noting that Walker "likely marks the outer bounds of the government-speech doctrine." Matal v. Tam, 582 U.S. 218, 238 (2017). And since Walker, district courts have regularly held that personalized license plates are private, not government speech. Gilliam v. Gerregano, No. M202200083COAR3CV, 2023 WL 3749982, at *15 (Tenn. Ct. App. June 1, 2023); Ogilvie v. Gordon, 540 F. Supp. 3d 920, 927 (N.D. Cal. 2020); Carroll v. Craddock, 494 F. Supp. 3d 158 (D.R.I. 2020); Hart v. Thomas, 422 F. Supp. 3d 1227, 1233 (E. D. Ky. 2019); Kotler v. Webb, No. CV 19-2682-GW-SKX, 2019 WL 4635168, at *7 (C.D. Cal. Aug. 29, 2019); Mitchell v. Md. Motor Vehicle Admin., 126 A.3d 165 (Md. Ct. App. 2015), aff'd by 148 A.3d 319 (Md. 2016). Therefore, the speech at issue in this case—messages displayed on personalized license plates—is private, not government speech.

B. S.D.C.L. § 32-5-89.2's "Offensive to Good Taste and Decency" Standard Impermissibly Discriminates Based on Viewpoint thus is Presumptively Unconstitutional.

S.D.C.L. § 32-5-89.2's "offensive to good taste and decency" standard and Policy #MV118 implementing it impermissibly discriminate based on viewpoint making it presumptively unconstitutional. "Discrimination against speech because of its message is presumed to be unconstitutional." Rosenberger v. Rector & Visitors of Univ. of Virginia, 515 U.S. 819, 828 (1995) citing Turner Broadcasting System, Inc. v. FCC, 512 U.S. 622, 641–643 (1994). Viewpoint discrimination occurs whenever a government targets "particular views taken by speakers on a subject." Rosenberger, 515 U.S. at 829. At its core, then, "viewpoint discrimination is an egregious form of content discrimination, that is "presumptively unconstitutional" Id. at 829, 830.

i. "Offensive" Speech is Protected by the First Amendment.

The personalized plate statute's "offensive to good taste and decency" standard allows for discrimination against certain messages an applicant seeks to convey on a personalized plate. However, fundamentally, the Supreme Court has long recognized constitutional protection for speech that may give offense to some people. See, Cohen v. California, 403 U.S. 15, 16 (1971) (Reversing conviction for disturbing the peace after defendant wore jacket reading "Fuck the Draft" in courthouse corridor). Even though some language is deemed distasteful to some people, "it is nevertheless often true that one man's vulgarity is another's lyric[,]" and government officials should not be trusted to make "principled distinctions" concerning "matters of taste and style." Id. The danger of allowing the government to "forbid particular words" is that "governments might soon seize upon the censorship of particular words as a convenient guise for banning the expression of unpopular views." Id. at 26. Such a result is both untenable and oppressive.

The Court explained that when a state tries to prohibit the use of a specific word or words as "offensive" that "[a]t most it reflects an 'undifferentiated fear or apprehension of disturbance (which) is not enough to overcome the right to freedom of expression.'" Id. at 23 citing Tinker v. Des Moines Indep. Community School Dist., 393 U.S. 503, 508 (1969). This is because, as the Court explained, offensive speech not only must be tolerated in our society but it is actually necessary under the First Amendment. Id. at 25 (noting that while "offensive utterance" can be a consequence of free speech that it is "in truth [a] necessary side effect[] of the broader enduring values which the process of open debate permits us to achieve" and that this is "not a sign of weakness but of strength").

As such, "[g]iving offense is a viewpoint[,]" Matal v. Tam, 582 U.S. 218, 243 (2017), and "a law disfavoring 'ideas that offend' discriminates based on viewpoint, in violation of the First

Amendment." Iancu v. Brunetti, 139 S.Ct. 2294, 2301 (2019) (striking down a portion of a federal law after it had been used to deny a trademark to the brand FUCT). "[F]acial viewpoint bias in the law results in viewpoint-discriminatory application." Id. at 2300. When the government censors speech solely because the meaning behind the speech is considered offensive, then the government is engaging in viewpoint discrimination.

In Ogilvie v. Gordon, a California court held that a statute prohibiting the issuance of personalized license plates "that may carry connotations offensive to good taste and decency"—language identical to what Plaintiff is challenging—"constitutes viewpoint discrimination under Tam and Brunetti." 540 F. Supp. 3d 920, 928 (N.D. Cal. 2020). The Ogilvie Court explained that rejecting applications under this standard "reflects both the assessment of a viewpoint – an assessment that may or may not be correct, depending on the context – and the regulation's effect of disfavoring ideas that offend." Id. (cleaned up). Because of this, Ogilive found the "good taste and decency" language to be an unconstitutional viewpoint-based criteria that "sets up a facial distinction between societally favored and disfavored ideas." Id. The Court noted that under this standard, the California DMV had denied applications for plates that had endorsed approval for hate such as GOAHDH8 but had approved comparable plates endorsing love such as BLUVED and that a rule mandating such distinctions constituted a "happy-talk clause." Id. (cleaned up).

Here, not only is the challenged language identical to what the Ogilvie Court found to be unconstitutional, but the Department has also engaged in the same discriminatory enforcement that the Ogilvie Court found problematic; namely, the Department has denied applications for the plates IH8UALL and IH8U as offensive to good taste and decency but approved DNTH8 and DNTH8ME. Dkt. #1 at ¶ 101. The Defendants also regularly approve personalized plates that convey a message in support of God or Jesus—1GOD, 1TRUGOD, LIV$GOD, LUV4GOD,

GODBLSS, JESUS, JESUS4U—but regularly deny plates that reference the Devil or Satan—SATAN, S8N, SIX66, TRIPL6, 666DOA, and DEV1L. Dkt. #1 at ¶ 102. As Ogilvie ruled, such a "happy-talk clause" constitutes unconstitutional viewpoint discrimination. As the Eastern District of Kentucky similarly ruled, a transportation authority's history of approving the personalized license plates IM4GOD and LUVGOD while rejecting IMGOD "belies viewpoint neutrality." Hart v. Thomas, 422 F. Supp. 3d 1227, 1234 (E.D. Ky. 2019). As such, the Defendants and other Department employees unconstitutionally discriminate based on viewpoint every time they deny or recall a plate for being "offensive to good taste and decency." Additionally, the "facial viewpoint bias in the law" has resulted in "viewpoint discriminatory application." Id. Therefore, the "offensive to good taste and decency" standard in S.D.C.L. § 32-5-89.2 and its implementation under Policy #MV118 is unconstitutional and should be enjoined.

C. S.D.C.L. § 32-5-89.2 is Void for Vagueness.

S.D.C.L. § 32-5-89.2's "offensive to good taste and decency" standard is also impermissibly vague in violation of the Fourteenth Amendment. "It is a basic principle of due process that an enactment is void for vagueness if its prohibitions are not clearly defined." Grayned v. City of Rockford, 408 U.S. 104, 108 (1972). Due process requires clarity for two reasons. First, a vague law "fails to give ordinary people fair notice of the conduct it punishes," Johnson v. United States, 135 S. Ct. 2551, 2556 (2015); Duhe v. City of Little Rock, 902 F.3d 858, 864 (8th Cir. 2018), and second, it invites "arbitrary and discriminatory application" by failing to provide "explicit standards for those who apply [it]." Grayned, 408 U.S. at 108.

Because clarity in the law is especially important when a law interferes with First Amendment rights courts apply "a more stringent vagueness test" when protected speech is implicated. Vill. of Hoffman Estates v. Flipside, Hoffman Estates, Inc., 455 U.S. 489, 497-99

(1982); Video Software Dealers Ass'n v. Webster, 968 F.2d 684, 689–90 (8th Cir. 1992). This increased scrutiny is necessary because if a law "abuts upon sensitive areas of basic First Amendment freedoms[,]" then it "inevitably leads citizens to steer far wider of the unlawful zone . . . than if the boundaries of the forbidden areas were clearly marked." Stahl v. City of St. Louis, Mo., 687 F.3d 1038, 1041 (8th Cir. 2012) (quoting Grayned, 408 U.S. at 109). Additionally, "[s]peech is an activity particularly susceptible to being chilled, and regulations that do not provide citizens with fair notice of what constitutes a violation disproportionately hurt those who espouse unpopular or controversial beliefs." Id. Another reason such clarity is required when a law implicates free speech is "based in part on the need to eliminate the impermissible risk of discriminatory enforcement, for history shows that speech is suppressed when either the speaker or the message is critical of those who enforce the law." Gentile v. State Bar of Nevada, 501 U.S. 1030, 1051 (1991) (citations omitted).

Here, S.D.C.L. § 32-5-89.2 is void for vagueness because it fails to inform applicants adequately what messages are permitted to obtain a plate and it chills speech by lacking clear guidelines for state officials. This is evident in the previously approved plates that were later recalled and Mr. Hart's plate which was denied and then approved. On May 31, 2022 Mr. Hart applied for the REZWEED plate, under the belief his plate met the requirements of the statute. His application was denied on June 6, 2022. Then on September 28, 2022, he was notified by email that REZWEED was approved without any explanation whatsoever after he was denied his plate for several months. The plates WINE and CBDGRL were also denied initially but then approved and issued. Dkt. #1 at ¶ ¶ 86, 97, 179. The vagueness of the statute has also resulted in discriminatory enforcement when the Department denied plate applications for IH8UALL and IH8U, but approved DNTH8 and DNTH8ME. Id. ¶ 101.

Additionally, courts have been especially willing to invalidate statutes like S.D.C.L. § 32-5-89.2 and policies like Policy #MV118 for vagueness when they create restrictions based on the reaction of others to certain speech or behavior. In Coates v. City of Cincinnati, the Court held that a law which prohibited "annoy[ing]" passersby was impermissibly vague because "[c]onduct that annoys some people does not annoy others." 402 U.S. 611, 614 (1971). Allowing the law to stand, the Court reasoned, would invite discriminatory enforcement against those who people found "annoying" because "their ideas, their lifestyle, or their physical appearance is resented by the majority of their fellow citizens." Id. at 616.

The same is true of S.D.C.L. § 32-5-89.2's "offensive to good taste and decency" standard. What is offensive or in poor taste to one person is not necessarily offensive or in poor taste to another. Applicants are left guessing whether their personalized vanity plate application might be rejected simply because one cannot know if a particular government employee may subjectively interpret or impose offensive meaning behind the sought-after plate message. Courts around the country have held similar laws to be unconstitutionally vague. Carroll v. Craddock, 494 F. Supp. 3d 158, 169 (D.R.I. 2020) (granting a preliminary injunction prohibiting enforcement of Rhode Island's "offensive to good taste and decency" personalized plate law on vagueness grounds); Morgan v. Martinez, No. CIV. 3:14-02468 FLW, 2015 WL 2233214, at *9 (D.N.J. May 12, 2015) (denying motion to dismiss void for vagueness claim against New Jersey's "offensive to good taste and decency" personalized plate law)(unpublished); Montenegro v. New Hampshire Div. of Motor Vehicles, 93 A.3d 290, 296 (2014) (invalidating as vague New Hampshire's statute which prohibited personalized plates "which a reasonable person would find offensive to good taste").

Likewise, Policy #MV118 is so open-ended and allows for the use of the same vague standard, that at any time a plate holder could find their previously approved plate recalled because an employee found it to be offensive to good taste and decency.

In short, neither S.D.C.L. § 32-5-89.2 nor Policy #MV118 provide notice to a person of common intelligence of what personalized plates will be approved, denied, or recalled including Mr. Hart. Therefore, the law and policy invite arbitrary and discriminatory enforcement and are unconstitutionally vague in violation of the Fourteenth Amendment.

D. The "Offensive to Good Taste and Decency" Standard is Unconstitutionally Overbroad.

When a statute "prohibits a substantial amount of protected speech" relative to its "plainly legitimate sweep, then society's interest in free expression outweighs its interest in the statute's lawful applications, and a court will hold the law facially invalid." United States v. Hansen, 599 U.S. 762, 769–70 (2023) (internal citations omitted). S.D.C.L. § 32-5-89.2's "offensive to good taste and decency" standard clearly suppresses a substantial amount of protected speech because it suppresses ***all*** "offensive" speech and here, that was determined to be present in 673 applications for personalized plates from June 2018 to July 2023. Dkt. #1 ¶ 104. This is not a case where only an isolated application or one or two circumstances can be determined "offensive to good taste and decency". Instead, because the department is applying the "offensive to good taste and decency" to all applications submitted, a substantial amount of protected speech is suppressed. Additionally, because the statute's prohibition against "offensive" speech is an unconstitutional restriction on a protected viewpoint, the standard has little to no "legitimate sweep."

The standard is also a prime example of the "unbridled discretion" subset of speech falling

within the overbreadth doctrine.[3] See, Morgan v. Martinez, No. CIV. 3:14-02468 FLW, 2015 WL 2233214, at *8 (D.N.J. May 12, 2015) (analyzing New Jersey's "offensive to good taste and decency" vanity plate law and noting that cases dealing with unbridled discretion "are treated as a subset of 'overbreadth' cases").

Analyzing the unbridled discretion granted by the statute is also consistent with Eighth Circuit precedent. The Eighth Circuit Court of Appeals has held that when examining the constitutionality of a statute which regulates the issuance of personalized license plates, a statute is overbroad and unconstitutional when it "delegate[s] unbridled discretion to the government officials entrusted to enforce the regulation." Lewis, 253 F.3d at 1079. Both S.D.C.L. § 32-5-89.2 and Policy #MV118 unquestionably delegate unbridled discretion to government officials through its "offensive to good taste and decency" standard making them overbroad.

In Lewis, the Eighth Circuit was faced with a statute similar to South Dakota's personalized plate statute. The plaintiff in Lewis applied for a personalized license plate reading ARYAN-1 which was initially issued. Following an anonymous complaint, the state refused to reissue it because an employee subjectively decided it was "contrary to public policy" and thus was "obscene, profane, inflammatory or contrary to public policy." Id. at 1078-79. The plaintiff sued, arguing that the law was unconstitutionally vague, overbroad, and viewpoint discriminatory. Id. at 1079. The plaintiff also sought an injunction requiring the state to issue her the license plate. The district court held "the Missouri statute allowing the DOR to refuse to issue license plates that are

[3] "[T]he overbreadth doctrine allows a party to whom the law may constitutionally be applied to challenge the statute on the ground that it violates the First Amendment rights of others." See, e.g., Board of Trustees of State Univ. of N.Y. v. Fox, 492 U.S. 469, 483 (1989) ("Ordinarily, the principal advantage of the overbreadth doctrine for a litigant is that it enables him to benefit from the statute's unlawful application to someone else,"); see also Ohralik v. Ohio State Bar Assn., 436 U.S. 447, 462, n. 20, (1978) (describing the doctrine as one "under which a person may challenge a statute that infringes protected speech even if the statute constitutionally might be applied to him").

'contrary to public policy' was unconstitutionally overbroad" but refused to issue the injunction or award attorney's fees. Id. On appeal, the Eighth Circuit affirmed the overbreadth ruling and reversed the district court's other denials, granting the plaintiff all relief sought. Id.

The Eighth Circuit stated that laws which require "a speaker to obtain official permission to engage in a particular type of speech" have "generally been held to violate the first amendment" when they "enable a public official to determine which expressions of view will be permitted and which will not ... by use of a statute providing a system of broad discretionary licensing power[.]" Id. at 1080 (cleaned up). The Court also held that a plaintiff "need not show" that her license plate was denied because of her viewpoint, but rather "that there was nothing in the ordinance to prevent the DOR from denying her the plate because of her viewpoint," id., thereby approving a pre-enforcement First Amendment challenge to a licensing plate law.

The Court upheld the district court's finding that the law in question was fatally overbroad because "[t]he Missouri statute simply authorizes the DOR to reject license plates bearing messages that are 'contrary to public policy,' language that gives the DOR nearly unfettered discretion in choosing what license plates should be rejected and in deciding what alleged 'public policy' supports its decision." Id. The Eighth Circuit also reiterated the district court's finding that the phrase "contrary to public policy" "is so nebulous and malleable [that it could mean] anything presently politically expedient[.]" Id. (alterations in original). Such language allowed a "public official with even marginal creative ability [to] frequently invent a 'public policy' basis for rejecting a plate containing a message with which he or she disagrees" and thus created an "impermissible risk of suppression of ideas" that violated the First Amendment. Id. at 1081.

The same untenable outcome occurs as a result of S.D.C.L. § 32-5-89.2 and Policy #MV118's authority to use the "offensive to good taste and decency" standard. The accompanying

personalized plate statutes or policies do not adequately define or otherwise provide guidance to the government officials applying this standard thus granting unbridled discretion to government officials to impose their own subjective interpretation of which application's messages are "offensive to good taste and decency."

The unbridled discretion Defendants have exercised is demonstrated in the examples of the widely varying denials and approvals of personalized plate applications. Applications were denied that contained similar letters or messages to others that were approved. IH8UALL and IH8U were denied but DNTH8 and DNTH8ME were approved; HELLBOY and HELLHRS were denied, while HELLBRD and HELLCAT were approved; BEERMOM was denied while BEERMAN was approved; WHTWDOW was denied but BKWIDOW was approved. Dkt. #1 ¶¶ 88, 89, 95, 101. Similar inconsistent decisions are demonstrated through plates that were initially denied such as WINE and CBDGRL, but then were later approved, and Mr. Hart's plate for REZWEED was initially denied then later approved. Id. ¶¶ 97, 128. Then there exists the category of plates that were approved but then recalled later as authorized under Policy #MV118 – SPOOK, SICA, and BIGSXY – using the same offensive to good taste and decency standard. Id. ¶ 107.

Equally problematic from a constitutional perspective is the limitless authority Policy #MV118 grants to the Defendants to recall plates *at any time* if they are determined to carry connotations offensive to good taste and decency. Both the version of Policy #MV118 that was in place when the Plaintiff submitted his application, and the current 2023 version of Policy #MV118 allow the Defendants and other Department employees to recall previously issued plates. The current version of the policy states that "[t]he Department may . . . recall previously issued, personalized license plates determined to be in violation of statute or this policy." Dkt. #1 ¶ 64. This means people whose personalized plates were already approved and issued never know

whether their plate is going to be recalled and whether they will find themselves suddenly driving without a validly registered vehicle, which subjects them to traffic violations and criminal sanctions.[4]

As in Lewis, South Dakota's standard is "is so nebulous and malleable" that it could mean any message is offensive and it allows a "public official with even marginal creative ability [to] frequently invent a . . . basis for rejecting a plate containing a message with which he or she disagrees[.]" This is demonstrated by the Department's denials of applications for seemingly benign plates such as FRITOS, DRACO, and HELMET. Id. ¶ 99, 159. For these reasons alone, this Court should find that S.D.C.L. § 32-5-89.2's "offensive to good taste and decency" standard and Policy #MV118 create an "impermissible risk of suppression of ideas" that violate the First Amendment.

Finally, that the Defendants initially denied but then later granted Plaintiff's requested REZWEED plate around four months later further shows that the statute is overbroad and allows the department to deny applications at whim. In the factually similar case of Matwyuk v. Johnson, the plaintiff was denied a personalized license plate under Michigan's personalized license plate statute which also applied an "offensive to good taste and decency" standard. 22 F. Supp. 3d 812 (W.D. Mich. 2014). While his plate was eventually issued, the applicant sued and alleged, amongst other things, that this statute was unconstitutionally overbroad. Id. at 824. In denying the state's motion to dismiss the case, the Court found that "the state's inconsistent application" of the

[4] The current version of Policy #MV118 states that "[t]he Department will comply with the provisions of SDCL 32-3-48 if it decides to revoke any personalize license plate determined to be in violation of statute or this policy." While S.D.C.L. § 32-3-48 grants the owner of personalized plates the opportunity for a hearing if they believe their plates should not be revoked, such a hearing provides no actual protection since any hearing will have to determine if S.D.C.L. § 32-5-89.2's facially unconstitutional "offensive to good taste and decency" standard was violated.

"offensive to good taste and decency" standard to the plaintiff was evidence of the "potential for viewpoint discrimination inherent in the statute" as the state had repeatedly denied the plaintiff's requested plate before eventually acknowledging that it should have been granted in the first place. Id. at 825. The same logic applies here. Mr. Hart was initially denied his requested plate before the Defendant Secretary suddenly reversed his position and granted it. As in Matwyuk, this inconsistent application of the standard to the Plaintiff shows the "potential for viewpoint discrimination inherent in" S.D.C.L. § 32-5-89.2's "offensive to good taste and decency" standard.

Therefore, it is not surprising that courts around the country—relying on similar logic and often citing to Lewis—have found that personalized license plate statutes that prohibit plates which are "offensive to good taste and decency" are overbroad or likely to be held overbroad. See Carroll v. Craddock, 494 F. Supp. 3d 158, 169 (D.R.I. 2020) (relying on Lewis to enjoin Rhode Island's personalized license plate law's prohibition on plates that are "offensive to good taste and decency"); Matwyuk v. Johnson, 22 F. Supp. 3d 812, 825 (W.D. Mich. 2014); Morgan v. Martinez, No. CIV. 3:14-02468 FLW, 2015 WL 2233214 at *8 (D.N.J. May 12, 2015).

"A restriction on speech is constitutional only if certain principles are adhered to." Lewis, 253 F.3d at 1079. However, S.D.C.L. § 32-5-89.2's "offensive to good taste and decency" standard clearly violates the principles above. This Court should find that S.D.C.L. § 32-5-89.2's "offensive to good taste and decency" standard is unconstitutionally overbroad and enjoin it from being used.

E. Policy #MV118 Exacerbates Censorship of Protected Speech by Allowing the Recall of Personalized Plates at Any Time Using the Unconstitutional "Offensive to Good Taste and Decency" Standard.

The present version of Policy #MV118 purports to "clarify the approval process for personalized plates," but it does not accomplish this. The current version of Policy #MV118 states that "[p]ersonalized license plates may not contain . . . vulgar or swear words as defined in

Merriam-Websters online dictionary as vulgar, profane, offensive, or having a sexual connotation." It also states, "The Department may refuse to issue, or recall previously issued, personalized license plates determined to be in violation of statute or this policy," thereby still applying the "offensive to good taste and decency" standard on its face. Dkt. #1 ¶ 59. Because the Policy does not prevent the Department from relying on the viewpoint discriminatory, vague and overbroad standard to deny personalized license plate applications, it does not remedy the statute's constitutional shortcomings. The appropriate question is whether there is anything "in the [policy or] ordinance to prevent the DOR from denying [an applicant's] plate because of [their] viewpoint." Lewis, 253 F.3d at 1080. Here, despite the existence of Policy #MV118, there is nothing in it that prevents S.D.C.L. § 32-5-89.2's "offensive to good taste and decency" provision from being applied in a viewpoint discriminatory manner and in fact, expands viewpoint discrimination beyond just the application phase to a limitless span of time. Policy #MV118 should be enjoined from applying the standard as well.

F. As Applied to Mr. Hart, the Government Cannot Demonstrate any Constitutionally Sound Basis for Restricting Speech in the Personalized Plate Program.

In addition to being facially unconstitutional in violation of the First and Fourteenth Amendments, S.D.C.L. § 32-5-89.2 and Policy #MV118 are unconstitutional as applied to Mr. Hart. Mr. Hart applied for the personalized plate REZWEED in order to convey a message about his values and beliefs; specifically, to "support and promote 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." He has articulated his intent to continue to renew the plate annually. Dkt. #1 ¶¶ 112, 128. Due to S.D.C.L. § 32-3-48 and Policy #MV118, he is presently and will be constantly under threat of having his REZWEED plate recalled at any time. He also intends to apply for the plate reading REZBUD or REZSMOK

but this application can and likely will be denied under S.D.C.L. § 32-5-89.2's "offensive to good taste and decency" standard given the department's history of rejecting plates with the word REZ in it like REZWEED and other arbitrary denials.

Courts around the country have determined that personalized license plates are nonpublic forums. Hart v. Thomas, 422 F. Supp. 3d 1227, 1233 (E.D. Ky. 2019); Carroll v. Craddock, 494 F. Supp. 3d 158, 168 (D.R.I. 2020); Mitchell v. Md. Motor Vehicle Admin'y, 148 A.3d 319, 336 (2016); Byrne v. Rutledge, 623 F.3d 46, 54 (2nd Cir. 2010); Perry v. McDonald, 280 F.3d 159, 169 (2nd Cir. 2001); Matwyuk v. Johnson, 22 F. Supp. 3d 812 (W.D. Mich. 2014). And in Lewis, the Eighth Circuit implied that personalized plates should be granted greater First Amendment protections than other nonpublic forums receive. Lewis, 253 F.3d at 1079 ("We express some initial skepticism about characterizing a license plate as a nonpublic forum, because it occurs to us that a personalized plate is not so very different from a bumper sticker that expresses a social or political message."). However, S.D.C.L. § 32-5-89.2's "offensive to good taste and decency" standard fails the test for any forum, including a nonpublic forum.

Assuming personalized plates are nonpublic fora, in order to be constitutional, the Department of Revenue's denial of Plaintiff's application would have to be both viewpoint neutral and reasonable. See Ball v. City of Lincoln, Nebraska, 870 F.3d 722, 730 (8th Cir. 2017); Craddock, 494 F. Supp. 3d at 168. Here, the Department's denial of REZWEED cannot satisfy either of these criteria.

Plaintiff's plate was denied for being "in poor taste" and "offensive to good taste and decency." Dkt. #1 ¶¶ 83, 84, 117. As discussed above, the Supreme Court has explained that when the government denies a benefit to a person because the requested speech is allegedly offensive, it

has engaged in viewpoint discrimination. Iancu v. Brunetti, 139 S.Ct. at 2301. Therefore, the denial of REZWEED was clearly unconstitutional for this reason alone.

Mr. Hart intended REZWEED to convey an important message which is not offensive, nor is the use of the word REZ. Even if it were, however, suppressing his protected speech on these matters is not a reasonable action for the Department of Revenue to take. The Department deprived Mr. Hart of the ability to express this message for several months after REZWEED was initially denied. The Department could revoke his REZWEED plate at any time under the statute's "offensive to good taste and decency" standard, and Policy #MV118. And the Department has the capability under the statute's "offensive to good taste and decency" standard to further suppress his speech by denying his intended application for a REZBUD or REZSMOK plate.

The government cannot establish any constitutional basis to allow S.D.C.L. § 32-5-89.2 "offensive to good taste and decency" standard and Policy #MV118's recall authority under the same standard to continue, even while this case is pending. They are facially viewpoint based, overbroad and vague, and their application to Mr. Hart is discriminatory, unreasonable, and arbitrary. Both the statute and policy are unconstitutional.

III. The Remaining Dataphase Factors Favor Enjoinment of S.D.C.L. § 32-5-89.2.

The likelihood that a plaintiff will succeed on the merits of their claim is the most important factor when considering whether to grant a preliminary injunction. SD Voice v. Noem, 570 F. Supp. 3d 743, 746 (D.S.D. 2021). Additionally, "[w]hen a Plaintiff has shown a likely violation of his or her First Amendment rights, the other requirements for obtaining a preliminary injunction are generally deemed to have been satisfied." Phelps-Roper v. Troutman, 662 F.3d 485, 488 (8th Cir. 2011), overruled on other grounds by Phelps-Roper v. City of Manchester, 545 F.3d 678 (8th Cir. 2012). Here, in addition to the Plaintiff being likely to succeed on the merits of his claim, the

remaining Dataphase factors—the threat of irreparable harm to Mr. Hart, the balance between this harm and the injury that granting the injunction will inflict on the Defendants, and the public interest—all favor preliminarily enjoining S.D.C.L. § 32-5-89.2's "offensive to good taste and decency" standard as this case progresses.

First, "[t]he loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." Elrod v. Burns, 427 U.S. 347, 373 (1976). Plaintiff's speech is currently chilled because an application for REZBUD or REZSMOK can and likely will be denied as "offensive to good taste and decency," thereby causing Plaintiff to wait to apply until the Court rules on this motion. Therefore, Plaintiff is currently experiencing the irreparable harm of a loss of First Amendment freedoms.

Additionally, the balance of harms favors the protection of Plaintiff's constitutionally protected rights. As noted above, Plaintiff is currently experiencing an irreparable injury in the loss of his First Amendment rights. In contrast, Defendants will suffer no injury by ceasing to enforce an unconstitutional statute as this case proceeds.

Finally, the public interest favors an injunction. "[T]he public interest, as reflected in the principles of the First Amendment, is served by free expression[.]" Kirkeby v. Furness, 52 F.3d 772, 775 (8th Cir. 1995). In the absence of an injunction, the public will be denied a full range of free expression.

Therefore, the remaining Dataphase factors favor granting Plaintiff's Motion for Preliminary Injunction.

CONCLUSION

Authorizing government employees to stifle any speech they determine to be "offensive" or "in poor taste" is an affront to the free speech rights of Mr. Hart and all South Dakotans. The law and policy prohibit a substantial amount of protected speech relative to its plainly legitimate

sweep, and Secretary Houdyshell and Department of Revenue employees are granted unfettered discretion to decide what messages are allowed or disallowed based on their subjective determination. S.D.C.L. § 32-5-89.2's "offensive to good taste and decency" standard suffers from myriad of constitutional violations. It contains "nothing . . . to prevent the DOR from denying [an applicant's] plate because of [their] viewpoint," thus making it constitutionally overbroad. It is so vague that no person of ordinary intelligence would know what speech was being forbidden. And it facially discriminates against offensive viewpoints—viewpoints necessary for the First Amendment to function properly.

Therefore, this Court should grant Plaintiff's Motion for Preliminary Injunction and enjoin the offensive to good taste and decency standard from being enforced as the case moves forward.

Dated this 6th day of November 2023.

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CERTIFICATE OF SERVICE

I hereby certify that on November 6th, 2023, the foregoing Legal Memorandum in Support of Motion for Preliminary Injunction was served upon the following counsel for the Defendants via e-mail:

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH DAKOTA
CENTRAL DIVISION

LYNDON HART,

Plaintiff,

vs.

MICHAEL HOUDYSHELL, in his individual and official capacity as Secretary of the South Dakota Department of Revenue; BRENDA KING, in her individual and official capacity,

Defendants

Case No.: 3:23-cv-03030 RAL

EXHIBIT 1
PLACEHOLDER

This document is a placeholder for Plaintiff's Exhibit 1 attached to the Plaintiff's Legal Memorandum in Support of his Motion for Preliminary Injunction. Exhibit 1 is an audio file of the January 15, 2008 South Dakota Legislative Hearing regarding the proposed Senate Bill 20, to repeal S.D.C.L. § 32-3-89.2 and the personalized plate statutes, downloaded from the South Dakota Legislature at https://sdlegislature.gov/Session/Bill/4889, which has been delivered to the Clerk of Court's office and to opposing counsel on a USB drive.

South Dakota Department of Revenue
445 East Capitol Avenue
Pierre, SD 57501

Policy # **MV118**	**Policy Initial Date: 12/08/2015**

Policy Issue/Name

PERSONALIZED PLATES

Purpose:
To clarify the approval process for personalized plates and the allowable messages.

Applicable Statutes: 32-5-89.2

Action Plan/Process:

Each personalized license plate must meet the criteria in SDCL 32-5-89.2, which includes:

- Must be a noncommercial registered vehicle
- Regular passenger vehicles, such as a car, truck, or motorhome, may use up to seven characters
- Motorcycles may use up to six characters
- Each plate must contain at least one letter or number
  - Cannot be a single 1 or 2
- Alphabet characters must be uppercase
- A space counts as a character towards the maximum allowed
- Characters must be in an upright position

The Department may refuse to issue, or recall previously issued, personalized license plates. Personalized license plates must be in good taste and decency. Standards have been set to help the Department review and either approve or deny applications fairly and consistently.

Personalized license plates cannot contain any of the following:

- No special characters (such as #, $, &, @, etc.) may be used.
  - DU#1

    - FUN@MV
- No vulgar words, terms, or abbreviations may be used.
    - The characters in the order used cannot express, represent, or imply a profane, obscene, or sexual meaning.
    - Includes definitions in the dictionary or found through internet searches.
- No word or term that is offensive or disrespectful of a race, religion, color, deity, ethnic heritage, gender, sexual orientation, disability status, or political affiliation.
- No words or terms that support lawlessness, unlawful activities, or that relates to illegal drugs or paraphernalia.
- No foreign words or terms that fall into any of the above categories.
- No combination of letters and/or numbers that conflicts with or is a duplicate of another South Dakota license plate or plate series.
    - Go to www.sdcars.org to "CK A PL8" to check the availability of specific plate options
- No combination of letters and/or numbers that could be misinterpreted or is confusing from a readability standpoint for law enforcement purposes.
    - 88B88B

Applicants are encouraged to submit two personalized license plate choices. The second choice will be considered for approval and availability if the first choice is denied for any reason. It is also very important for the applicant to make sure that the application is fully completed, including a clear description of the plate meaning. Applications with missing information will be denied.

If an application is denied, the applicant will be notified of the reason for the denial and the personalized plate application fee will be refunded. The applicant may reapply with new plate choices by submitting a new application and fee.

The Department will review any complaints received regarding issued personalized license plates. The plate in question may be revoked if the Department finds that it does not meet the standards of good taste and decency. If the Department decides to revoke the personalized license plate, a certified letter will be sent to the owner notifying them of the reason for the revocation. The personalized plates are required to be returned to the Department. The revocation is effective ten days from the date of receipt of the letter, refusal to accept the certified letter date, or the last day the postal service attempted delivery of the letter. The owner has a right to make a written request for a hearing if they believe that the personalized license plate was revoked in error. The request for the hearing must be made prior to the effective date of the revocation.

South Dakota Motor Vehicle Division – Procedure Manual

The following information has been pulled from the motor vehicle procedures manual.

Personalized License Plates

1. Application for special personalized license plates shall be made to the applicant's county treasurer in the applicant's county of residence or through the customer online portal at http://mysdcars.sd.gov.

   I. An application for personalized plates, the registration fee, plus a $25 fee for the special license plates is required. A $5 mailing fee is assessed.

      a. If an applicant's vehicle currently has regular or special plates assigned to it, the applicant may choose to retain the regular or special license plates that are being removed for future reassignment to a newly acquired vehicle or the applicant may choose to turn in the regular or special plates to the county treasurer and receive credit for any remaining months on the plates toward the registration fees.

   2. Personalized plates can consist of no more than seven letters, nor less than 1. Spaces should be indicated on the application if desired.

2. Applicant shall state the meaning behind the requested personalized plate, on the application form.

3. Applicant must be a South Dakota resident and may be required to provide proof of residency.

4. The special plates may be used on a noncommercial licensed or a noncommercial declared gross weight vehicle or a motorcycle. B. Renewal.

   1. Personalized license plates shall be renewed each year on a staggered registration basis and are valid only for the registration year for which such stickers are issued.

   2. The renewal fee is $25, plus the registration fee.

   3. If a plate owner fails to renew their registration within 60 days of expiration the plate message will be available for another applicant to apply for

C. In the event an owner has purchased personalized license plates and then wants different personalized license plates for the vehicle, the owner can turn in the personalized license plates, receive credit for remaining months on the plates, and pay the $25 plate fee (prorated). A duplicate plate fee is not assessed.

32-5-89.2; 32-5-89.3; 32-5-89.4; 32-5-89.5

[redacted]

EXHIBIT 4

SD EForm - 1794 V9

Please type in a _ for spaces between numbers/letters.
No characters are permitted, numbers and letters only.

VALIDATION AND OFFICE USE ONLY

South Dakota Department of Revenue

State of South Dakota
Division of Motor Vehicles
445 E. Capitol Avenue
Pierre, SD 57501
605-773-3541 | http://dor.sd.gov/Motor_Vehicles/

SDCL 32-5-89.2,32-5-89.3, 32-5-89.4, 32-5-89.5

Application for Personalized License Plate

Complete and submit this application to your County Treasurer's Office with the applicable fees.

A Instructions

- Personalized license plates may be requested for a non-commercial passenger vehicle, motor home or motorcycle.
- Commercial vehicles and interstate registrations are NOT eligible for personalized plates.
- Must be a South Dakota resident. Proof of residency may be required.
- The Department of Revenue may refuse to issue or recall any message that does meet standards of good taste.
- The annual fee for a car, truck or mobile home is $25. Initial applications require an additional $5 mailing fee.
- The annual fee for a motorcycle is $20. Initial applications require an additional $5 mailing fee.
- If your plate message choice(s) is not available or denied, your fee will be refunded.
- Current license plates MUST be surrendered at the time of application.
- See page two of this form for the policy governing personalized plates.

B Application Information

Name LYNDON HART

[redacted] Street | FLANDREAU City | SD State | 57028-0002 Zip

[redacted] Phone | [redacted] Email

C Vehicle Information

Application Type — Car, Truck or Motor Home [X] Motorcycle [ ]

[redacted] Year | [redacted] Make | [redacted] Model

[redacted] Title Number | [redacted] Serial/VIN Number

/ Primary License Plate Number/ Registration Expiration Date

D Personalized Plate Request

If your first choice is not available or denied, you second choice will be considered.
Please leave the boxes blank for spaces between numaber and letters.

Car, Truck or Motor home Characters		Motorcycle Characters	
1st Choice	REZWEED	1st Choice	
2nd Choice		2nd Choice	

Please explain the meaning behind the requested personalized plates.

1st Choice: WEED KILLER. HIS COMPANY IS CALLED REZ WEED INDEED

2nd Choice:

E Signature

Applicant Signature — 05/31/2022 Date

Revised 12/15

[redacted]

EXHIBIT 5

Form# 1300

State of South Dakota
Motor Vehicle Division
445 E. Capitol Avenue
Pierre, SD 57501
605-773-3541 http://dor.sd.gov

Personalized License Plate Application

A Instructions

Complete and submit this application to your county treasurer's office with the applicable fees. The Motor Vehicle Division may refuse to issue or recall previously issued personalized license plates. To qualify for a personalized plate an applicant must be a South Dakota resident (proof may be required). Personalized plates are only available on the following vehicles: non-commercial passenger vehicles or motor homes for a $25 annual fee, and motorcycles for a $20 annual fee. Initial applications require an additional $7.50 mailing fee. Commercial vehicles and interstate registrations are NOT eligible for personalized plates.
Current license plates MUST be surrendered at the time of application.

B Applicant Information

Applicants Name: _____ Address: _____

City: _____ State: _____ Zip Code: _____

Phone Number: _____ Email Address: _____

C Vehicle Information

Year: _____ Make: _____ Model: _____

VIN/HIN: _____ Title Number: _____ Current Plate #: _____

D Personalized Plate Request

Indicate any spaces you would like on the license plate. An applicant can check plate availability of specific plate option on www.sdcars.org "CK A PL8". Personalized plate requests will be denied if they contain any of the following:

- Special characters such as (#, $, &, @, etc.)
- Vulgar words, terms, or abbreviations, characters that express, represent, or imply a profane, obscene, or sexual meaning
- Words or terms that are offensive or disrespectful of a race, religion, color, deity, ethnic heritage, gender, sexual orientation, disability status or political affiliation
- Words or terms that support lawlessness, unlawful activities, or that relate to illegal drugs or paraphernalia
- Foreign words or terms that fall into any of the previous categories
- Combinations of letters and/or numbers that conflict with or are a duplicate of another South Dakota license plate or plate series
- Combinations of letters and/or numbers that could be misinterpreted or are confusing from a readability standpoint for law enforcement purposes.

☐ Car, Truck, Motor Home ☐ Motorcycle ☐ Rear Plate Only -Current Mileage Required _____

- Current Mileage must be submitted annually at the time of renewal.
- Note: To qualify for this plate, your vehicle must travel less than 7,500 miles per renewal year.

1st Choice: _____ **(7-character limit for car, truck or motorhomes, 6-character limit for motorcycles)**

2nd Choice: _____ **(7-character limit for car, truck or motorhomes, 6-character limit for motorcycles)**

E Applicant's Signature

Applicant's Signature: _____ Date: _____

EXHIBIT 6

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH DAKOTA
CENTRAL DIVISION

LYNDON HART, Plaintiff, vs. MICHAEL HOUDYSHELL, in his individual and official capacity as Secretary of the South Dakota Department of Revenue; BRENDA KING employee of the South Dakota Motor Vehicle Division, in her individual and official capacity, Defendants	Case No.: 3:23-cv-03030 RAL PLAINTIFF LYNDON HART'S MOTION FOR PRELIMINARY INJUNCTION

Plaintiff Lyndon Hart ("Mr. Hart"), pursuant to Rule 65 of the Federal Rules of Civil Procedure, respectfully requests that the Court enter an Order for Preliminary Injunction enjoining the Defendants' enforcement of S.D.C.L. § 32-5-89.2 "offensive to good taste and decency" standard and Department of Revenue Policy #MV118 to Mr. Hart and all others. Unless such an injunction is issued, Mr. Hart will suffer immediate and irreparable harm due to the challenged law's infringement on his First and Fourteenth Amendment rights as further reflected in the legal memorandum filed in support of this motion.

Additionally, Mr. Hart moves for the Court to waive the bond requirement normally associated with the issuance of a preliminary injunction. A bond is

inappropriate in this case because the state of South Dakota will not suffer any loss in security or financial harm of the type typically remedied through a bond.

ORAL ARGUMENT and EVIDENTIARY HEARING REQUESTED

Pursuant to D.S.D. Civ. LR 7.1(C), Mr. Hart respectfully requests oral argument and an evidentiary hearing on this motion.

Dated this 6th day of November 2023.

American Civil Liberties Union of South Dakota

/s/ Stephanie R. Amiotte
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Sioux Falls, SD 57104
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CERTIFICATE OF SERVICE

I hereby certify that on November 6, 2023, the foregoing Motion for Preliminary Injunction was served upon the following counsel for the Defendants via e-mail:

Kirsten E. Jasper, Chief Legal Counsel
South Dakota Department of Revenue
445 East Capitol Avenue
Pierre, SD 57501
Kirsten.Jasper@state.sd.us

Marty Jackley, Attorney General of South Dakota
445 East Capitol Avenue
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Marty.Jackley@state.sd.us

American Civil Liberties Union of South Dakota

/s/ Stephanie R. Amiotte
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Page 4: Open Records Request – South Dakota Personalized License Plate – Lyndon Hart request for "REZWEED"

- A list of all personalized license plates currently approved and registered in the state of South Dakota to the date of this letter.

  This list is attached to this email in the file labeled: ActivePersonalPlateRegs91522
  Note of disclosure related to the personalized plates list provided: Some of the plates with only number ones (1) have preceding zeros that didn't hold when bringing over from SQL.

- Every personalized license plate application which has been denied since September 1, 2018.

  This information is not readily available and will require specialized services to pull the information. The information requested will be pulled in a prior request.
  Not Approved by Requestor

- A list of all personalized license plates which have been recalled after initially being approved since September 1, 2018.

  Prior to July 1, 2022, our office did not keep track of recalled personalized plates. We are including a list of plates recalled after this time. Your request for recalled plates between September 1, 2018, and July 1, 2022, would be included in the in the specialized services to pull plate applications listed previously.

  A list of recalled plates is listed below:

Date	Plate #	Recall Reason
09/09/2019	VETTE1	Plate already in use - issued in error
10/22/2019	0K0B0JI	Readability issues
10/22/2019	0TO60	Readability issues
10/22/2019	0MGM0VE	Readability issues
10/23/2019	0TO60N3	Readability issues
01/21/2021	1XJ434	Conflicts with current series
03/24/2022	WEST1	Conflicts with current series
03/24/2022	WEST2	Conflicts with current series
03/24/2022	WCMH1	Conflicts with current series
06/01/2022	SPOOOK	Poor Taste
06/22/2022	SICA	Poor Taste
11/03/2022	BIGSXY	Poor Taste