UNITED STATES DISTRICT COURT

DISTRICT OF SOUTH DAKOTA

WESTERN DIVISION

DAKOTA RURAL ACTION, DALLAS GOLDTOOTH, INDIGENOUS ENVIRONMENTAL NETWORK, NDN COLLECTIVE, SIERRA CLUB, and NICHOLAS TILSEN, Plaintiffs, v. KRISTI NOEM, in her official capacity as Governor of the State of South Dakota, JASON RAVNSBORG, in his official capacity as Attorney General, and KEVIN THOM, in his official capacity as Sheriff of Pennington County, Defendants.	)	CIV.19-5026-LLP STATE DEFENDANTS' REPLY IN SUPPORT OF THEIR MOTION FOR JUDGMENT ON THE PLEADINGS OR, IN THE ALTERNATIVE, FOR CERTIFICATION TO THE SOUTH DAKOTA SUPREME COURT

COME NOW, Defendants South Dakota Governor Kristi Noem, and South Dakota Attorney General Jason Ravnsborg, in their official capacities (collectively, State Defendants), by and through their counsel of record, and hereby submit this Reply in Support of Their Motion for Judgment on the Pleadings or, in the Alternative, Their Motion for Certification to the South Dakota Supreme Court.

INTRODUCTION

Plaintiffs renew the arguments from their Motion for Preliminary Injunction and assert that South Dakota Codified Laws §§ 22-10-6 and 22-10-6.1 and South Dakota S.B. 189, 2019 Leg. Session (S.D. 2019) (hereinafter,

collectively the "Challenged Laws")[1] do not regulate incitement speech, but rather advocacy, and do not fulfill the prongs of the test set forth in *Brandenburg v. Ohio*, 395 U.S. 444 (1969). Plaintiffs also assert that the Challenged Laws are overbroad, vague, and suffer defects that would not even survive a reading of the statute in alignment with *Brandenburg*. Finally, Plaintiffs argue that certification to the South Dakota Supreme Court, by granting Defendants' motion in the alternative, is inappropriate.

State Defendants' primary response to these arguments, in addition to those detailed below, is that Plaintiffs continue to misconstrue the plain language of the Challenged Laws. In numerous prior filings, Plaintiffs insist that this Court should read specific sentences, phrases, or individual words of the statute in isolation and without context. Plaintiffs' Memorandum in Support of Their Motion for Preliminary Injunction, Dkt. #9, p. 20-29; Plaintiffs' Memorandum in Response to Defendants' Motion for Judgment on the Pleadings or, in the Alternative, Motion for Certification, Dkt. #38, p. 2-22. This is contrary to the canons of statutory construction promulgated by the South Dakota Supreme Court and utilized by this Court when construing legislative enactments of the state. *Roubideaux v. N. Dakota Dep't of Corr. & Rehab.*, 570 F.3d 966, 972 (8th Cir. 2009) (citing *Fargo Women's Health Org. v. Schafer,* 18 F.3d 526, 530–31 (8th Cir. 1994)) (noting that when interpreting a

[1] South Dakota S.B. 189, 2019 Leg. Session (S.D. 2019) (the Act) has been codified at SDCL §§ 20-9-53 to 20-9-57. For consistency with prior filings, State Defendants will continue to refer to the Challenged Laws in general, or separately to the Act or challenged criminal laws as necessary.

state statute, federal courts apply the construction principles of that state's rules of statutory interpretation). These canons are at the forefront of this Court's review of the Challenged Laws and require a comprehensive, well-rounded analysis of the statutes as a whole, to read the provisions in harmony, and to construe statutes in such a manner as to avoid absurd or illogical results. *See In re Taliaferro*, 2014 S.D. 82, ¶ 6, 856 N.W.2d 805, 806-07 (citations omitted) (The intent of a statute "must be determined from the statute as a whole, as well as enactments relating to the same subject."); *Kauth v. Bartlett*, 2008 S.D. 20, ¶ 9, 746 N.W.2d 747, 750 (citations omitted) ("Statutes are to be construed to give effect to each statute [ ] so as to have them exist in harmony."); *In re Estate of Hamilton*, 2012 S.D. 34, ¶ 7, 814 N.W.2d 141, 144 (quoting *Martinmaas v. Engelmann*, 2000 S.D. 85, ¶ 49, 612 N.W.2s 600, 611) ("But, in construing statutes together it is presumed that the legislature did not intend an absurd or unreasonable result.").

As explained below, State Defendants' Motion for Judgment on the Pleadings should be granted because the language of the Challenged Laws regulates incitement speech and does not suffer from additional constitutional defects. Should the Court find, however, that the Challenged Laws need significant interpretation, Defendants respectfully request that this Court grant the State Defendants' alternative motion for Certification to the South Dakota Supreme Court.

ARGUMENT

As a preliminary matter, the appropriate scope of review in this case is intermediate scrutiny, which was recently utilized in *U.S. v. Daley* when construing the Federal Anti-Riot Act. --- F.Supp.3d ---, 2019 WL 1951586, at *8 (W.D. Va. May 2, 2019). "The level of First Amendment scrutiny a court applies to determine the 'plainly legitimate sweep' of a regulation depends on the purpose for which the regulation was adopted." *Id.* (quoting *Am. Entertainers, L.L.C. v. City of Rocky Mount, N. Carolina*, 888 F.3d 707, 715 (4th Cir. 2018)). "If the provision at issue 'was adopted for a purpose unrelated to the suppression of expression—e.g., to regulate conduct, or the time, place, and manner in which expression may take place—a court must apply … intermediate scrutiny.'" *Id.* "Under intermediate scrutiny, a statute will be upheld 'if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest.'" *Id.*

Like the statutory framework in *Daley*, the Challenged Laws only regulate violence committed in furtherance of a riot or the unprotected incitement or instigation of riotous conduct. "[T]he gravamen of the crime of riot in South Dakota is violence or immediate threat thereof. As such, it relates to and prohibits certain conduct rather than forms of expression." *State v. Bad Heart Bull*, 257 N.W.2d 715, 722 (S.D. 1977). As such, the appropriate scope of review is intermediate scrutiny.

The Challenged Laws, as further explored below, advance the State's substantial interest in preventing the unlawful use of force or violent conduct and are narrowly tailored specifically to incitement speech wherein only the direction, advisement, encouragement, or solicitation of riot participants to force or violence is restricted. As such, the Challenged Laws do not proscribe and are unrelated to the general advocacy of ideas, expression, or beliefs. The Challenged Laws therefore pass muster under the scope of intermediate scrutiny. *Daley*, --- F.Supp.3d ---, 2019 WL 1951586, at *8–9. Even if the Court were to hold the Challenged Laws to a higher level of scrutiny, the Challenged Laws pass constitutional muster, as described in State Defendants' initial briefing, Dkt. #28, and as argued herein.

I. The Challenged Laws Regulate Incitement Speech.

A large portion of Plaintiffs' arguments targets a single phrase of four words—"directs, advises, encourages, or solicits"—and conflates them with "mere advocacy" seemingly because the word "encourages" is found within the string of verbs. This fails to take into account the actual language of the Challenged Laws, as well as how that language operates within the overall statutory framework and in conjunction with the applicable constitutional tests.

"The constitutional guarantees of free speech and free press do not permit a State to forbid or proscribe advocacy of the use of force or of law violations *except where such advocacy is directed to inciting or producing imminent lawless action and is likely to invite or produce such action*."

Brandenburg v. Ohio, 395 U.S. 444, 447 (1969) (emphasis added). "The *Brandenburg* test precludes speech from being sanctioned as incitement to riot unless (1) the speech explicitly or implicitly encouraged the use of violence or lawless action, (2) the speaker intends that his speech will result in the use of violence or lawless action, and (3) the imminent use of violence or lawless action is the likely result of his speech." *Nwanguma v. Trump*, 903 F.3d 604, 609 (6th Cir. 2018) (*quoting Bible Believers v. Wayne Cty., Mich.*, 805 F.3d 228, 246 (6th Cir. 2015) (en banc) (footnote omitted)). [2]

As extensively briefed in their Memorandum in Opposition to Preliminary Judgment and in Support of their Motion for Judgment on the Pleadings, Dkt. #28, State Defendants' position is that the language contemplated by the Challenged Laws is more concrete than sharing ideas, expressing support for a cause in general, or suggesting future courses of action. Rather, the Challenged Laws seek to prevent the incitement and use of force or violence within the context of an ongoing riot, not mere advocacy of a general idea at an undetermined point in time. This is fulfilled by the laws' inclusion of language that requires 1) that the direction, advice, encouragement, or solicitation be specific to force or violence, 2) the requirement that the direction, advice, encouragement, or solicitation be made to a specific audience (others

[2] The State does not contend that severability is necessary to maintain constitutionality of the Challenged Laws, but this Court could undertake to sever portions of the law it finds cannot sustain constitutional scrutiny where the remainder of the law can stand by itself and it appears that the legislature would have intended remainder to take effect absent an invalid section. *American Meat Institute v. Barnett*, 64 F.Supp.2d 906, 922 (D.S.D. 1999).

participating in an ongoing riot), and 3) the requirement that the advocacy occur at a specific time (during the commission of an ongoing riot). As such, the numerous hypotheticals posed by Plaintiffs' are attempts at distraction and are simply not applicable to the issues at hand.

Further, the Challenged Laws, when read in context, fulfill all of the elements of the *Brandenburg* test. Therefore, the Challenged Laws proscribe incitement speech and not mere advocacy.

a. The element of intent should be "read into" the language of the Challenged Laws.

Although the Challenged Laws, on their face, do not include an intent requirement, this Court should read an intent requirement into the Challenged Laws, as the South Dakota Supreme Court did in *State v. Bad Heart Bull*. 257 N.W.2d at 719. In that case, the court held that "[t]he crime of riot is an offense against public peace and good order. . . . It necessarily is a group crime requiring proof of a common intent or mutual criminal intent." *Id.* (internal citations omitted).

The United States Supreme Court has also weighed in on the inclusion of a scienter requirement in a statute that does not expressly contain one. In *Elonis v. U.S.*, Chief Justice Roberts wrote:

> The fact that the statute does not specify any required mental state, however, does not mean that none exists. We have repeatedly held that "mere omission from a criminal enactment of any mention of criminal intent" should not be read "as dispensing with it." . . . We therefore generally "interpret [ ] criminal statutes to include broadly applicable scienter requirements, even where the statute by its terms does not contain them."

135 S.Ct. 2001, 2009 (2015) (internal citations omitted).

Pertinently, the South Dakota Supreme Court has established a test for when it will undertake to read a scienter requirement into a statute. *Planned Parenthood, Sioux Falls Clinic v. Miller*, 63 F.3d 1452, 1464 (8th Cir. 1995) (citing *State v. Barr*, 237 N.W.2d 888, 891-93 (S.D. 1976), *State v. Stone*, 467 N.W.2d 905, 906 (S.D. 1991)). "Whether criminal intent or guilty knowledge is an essential element of a statutory offense is to be determined by the language of the act in connection with its manifest purpose and design." *Miller*, 63 F.3d at 1464 (citing *State v. Nagel*, 279 N.W.2d 911, 915 (S.D. 1979)). With that concept in mind, the test considers:

> what courts in other jurisdictions have done with similar statutes, particularly where there is a need to maintain uniformity; it then determines whether lesser crimes include a scienter element, making the lack of scienter in the greater crime anomalous; and finally it looks at whether the State contends that there is a scienter element in the statute.

Miller, 63 F.3d at 1464 (citing *Barr*, 237 N.W.2d at 891-93, *Stone*, 467 N.W.2d at 906).

The first step in the analysis reviews what courts in other jurisdictions have done with similar statutes. Other courts have read intent into statutes regarding incitement to riot. In *People v. Upshaw*, a New York court analyzed Penal Law § 240.08, which provided that a person is guilty of inciting a riot "when he urges ten or more persons to engage in tumultuous and violent conduct of a kind likely to create public alarm." 190 Misc. 2d 704, 706, 741 N.Y.S.2d 664 (2002). The court went on to find that "[a]lthough Penal Law § 240.08 does not expressly provide for the element of intent, courts have

recognized that in order to pass constitutional muster the incitement statute necessarily includes the 'elements of 'intent' and 'clear and present danger' before one's freedom of speech may be abridged under the First Amendment.'" *Id.* (citing *People v. Tolia*, 214 A.D.2d 57, 63-64 (1st Dept 1995) (citing *Brandenburg*, 395 U.S. at 447-448 (1969)); *People v. Winston*, 64 Misc. 2d 150, 156 (Monroe County Ct. 1970)).

More recently, a Colorado court made a similar finding in *People v. Mullins*, 209 P.3d 1147, 1150 (2008). In *Mullins*, the court analyzed § 18-9-102(1)(a), C.R.S.2008, which provides that a person is guilty of inciting a riot "if he or she '[i]ncites or urges a group of five or more persons to engage in a current or impending riot.'" *Id.* In construing this statute, the court also looked at the offense of engaging in a riot, § 18-9-104(1), C.R.S.2008, which states: "A person commits an offense if he or she engages in a riot." *Id.* The court concluded that "[t]he mental state 'knowingly' is implied in the statute and required for the offense of engaging in a riot. . . . Logically, the same, or even higher, mental state (i.e. intentionally) would apply to the offense of inciting others to engage in a riot." *Id.* (internal citations omitted).

The second step of the analysis considers whether lesser crimes include a scienter element, making the lack of scienter in the greater crime anomalous. The challenged criminal statutes are SDCL §§ 22-10-6 and 22-10-6.1.

SDCL § 22-10-6 is categorized as a class 2 felony, while SDCL § 22-10-6.1 is categorized as a class 5 felony. In relation, the crime of riot (SDCL § 22-10-1) is a class 4 felony and aggravated riot (SDCL § 22-10-5) is a class 3

felony. None of these statutes contain an intent element on their face, but, as previously cited, the South Dakota Supreme Court read intent into the crime of riot (SDCL § 22-10-1) in *Bad Heart Bull*. *See* 257 N.W.2d at 719 ("The crime of riot is an offense against public peace and good order. . . . It necessarily is a group crime requiring proof of a common intent or mutual criminal intent.")

However, within the South Dakota criminal code, the lesser crimes of unlawful assembly (SDCL § 22-10-9; class 1 misdemeanor) and refusal to disperse or refrain from riot or unlawful assembly (SDCL § 22-10-11; class 1 misdemeanor) both contain language discussing an intent element.[3]

As there are at least two lesser crimes related to riot and incitement of riot that require an intent element, "it would be anomalous to hold that the

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[3] SDCL § 22-10-9 states:

> Any person who assembles with two or more persons for the purpose of engaging in conduct constituting riot or aggravated riot or who, being present at an assembly that either has or develops such a purpose, remains there, *with intent* to advance that purpose, is guilty of unlawful assembly. Unlawful assembly is a Class 1 misdemeanor.

(emphasis added).

SDCL § 22-10-11 states:

> Any person who, during a riot or unlawful assembly, *intentionally* disobeys a reasonable public safety order to move, disperse, or refrain from specified activities in the immediate vicinity of the riot, is guilty of a Class 1 misdemeanor. A public safety order is any order, the purpose of which is to prevent or control disorder or promote the safety of persons or property, issued by a law enforcement officer or a member of the fire or military forces concerned with the riot or unlawful assembly.

(emphasis added).

legislature intended to require a lesser burden of proof on the part of the state in those offenses carrying the more serious maximum possible penalty than in [the lesser crimes]." *Barr*, 237 N.W.2d at 891.

Finally, the analysis examines whether the State contends there is a scienter element in the statute, which it does. State Defendants' posit that intent should be read into the statute. This position is logical in light of the holding of the South Dakota Supreme Court in *Bad Heart Bull* to require intent as an element of riot though not specifically enumerated in the language of SDCL § 22-10-1, and the inclusion of intent in lesser crimes related to riot, such as the misdemeanors of unlawful assembly (SDCL § 22-10-9) and refusal to disperse or refrain from riot or unlawful assembly (SDCL § 22-10-11).

A careful analysis of these three factors indicates that the South Dakota Supreme Court would read intent into the challenged criminal laws. Because the Act is a civil codification of the challenged criminal laws and in fact specifically incorporates the very definition of riot therefrom, it is likely that the South Dakota Supreme Court would further conclude that intent is inherent in the language of the Act, as well.[4]

[4] Although State Defendants' posit that analysis of the test factors weighs in favor of reading intent into the statute, this aspect of construction also weighs in favor of granting State Defendants' motion for certification to the South Dakota Supreme Court. Certification to that court would negate the need for this Court to speculate what the South Dakota Supreme Court would do and allow that court to make the definitive determination.

b. An imminence requirement is included in the challenged laws.

Contrary to Plaintiffs' argument, the language of the Challenged Laws does require imminence. The temporal proximity of the speech made to direct, advise, encourage, or solicit is, under the language of the statute, made by a participant or a non-participant in a riot to a "person participating in the riot." This is the language set out in both Section 2, subsections 1 and 2, of the Act, as well as the challenged criminal statutes. The second reference to riot in these sections is not to "any riot," it is to "the riot" which indicates that the listener is participating in the same riot used to categorize the speaker via participation or non-participation. Therefore, if speech made to direct, advise, encourage, or solicit a riot participant to force or violence occurs during *a riot* and must be made to a participant in *that riot*, it is unreasonable to reach any other conclusion than the speech regulated by the statute must have or be able to have an imminent impact. This is further supported by the definition of riot, itself a part of the Act via the incorporation of the criminal definition in Section 1, which requires that the use of force or violence or threat to use force or violence be accompanied by "immediate power of execution." SDCL § 22-10-1; SB 189, Section 1(4).

Neither is underinclusion an issue under the Challenged Laws. Speech made prior to a riot could be considered incitement speech on other grounds or be covered by other criminal statutes within the South Dakota Codified Laws on riot or unlawful assembly. SDCL ch. 22-10. Under the holding of *Bad Heart Bull*, for example, one who incites a riot could be held liable as a principal and

thus fall under under SDCL § 22-10-1. *See Bad Heart Bull*, 257 N.W.2d at 719 (additional citations omitted) ("Mere presence alone does not make one a rioter but *any person who encourages, incites, promotes, or actively participates in a riot is guilty as a principal.*") (emphasis added).

Instead, the challenged criminal laws regard the use of force or violence in an ongoing riot at the direction of others. Plaintiffs consistently disregard the existing language of the statute that specifically denotes that the speech be made to persons "participating in a riot" and would have this Court read that portion of the statute instead as "persons who may cause or participate in a potential or future riot."

c. Likely causation of lawlessness is included in the challenged laws.

When this Court follows the applicable canons of construction and examines the language of the Challenged Laws as a whole and with other enactments on the subject, several portions of the statutes support the conclusion that the Challenged Laws include likely causation of lawlessness. The statute requires that speech occur and be heard during the same time period—an ongoing riot. A reasonable person, reading the actual language set forth in the statute, would understand that the force or violence required by the statute be the outcome of that interaction, as the statute requires that a person direct, advise, encourage, or solicit a riot participant *to acts of force or violence.* The definition of riot, codified in SDCL § 22-10-1 and merged into the Act in Section 1(4), supports this reading of the Challenged Laws, because a riot is any use of force or violence or threat to use force or violence, *if*

accompanied by immediate power of execution, by three or more persons, acting together and without authority of law. SDCL § 22-10-1 (emphasis added).

This reading of the Challenged Laws is bolstered by the fact that there is no offense of attempted riot or attempted aggravated riot in South Dakota. SDCL § 22-10-5.1. Therefore, an occurrence of lawlessness is a prerequisite for prosecution under the challenged criminal laws, and for potential civil liability under Section 2 of the Act.

Thus, the existence of the ongoing riot, combined with the requirement of immediate power of execution of force or violence by those participating, can be reasonably construed as the likely causation of lawlessness. Ultimately, "the gravamen of the crime of riot in South Dakota is *violence or immediate threat thereof*. As such, it relates to and prohibits certain conduct rather than forms of expression." *Bad Heart Bull*, 257 N.W.2d at 722 (emphasis added).

II. The Challenged Laws are Not Overbroad or Vague.

"According to our First Amendment overbreadth doctrine, a statute is facially invalid if it prohibits a substantial amount of *protected speech*. The doctrine seeks to strike a balance between competing social costs." *United States v. Williams*, 553 U.S. 285, 292–93, 128 S.Ct. 1830, 1838 (2008) (quoting *Virginia v. Hicks,* 539 U.S. 113, 119–120, 123 S.Ct. 2191, 156 L.Ed.2d 148 (2003) (emphasis added)).

As the Challenged Laws are limited to regulation of unprotected speech, a conclusion supported through statutory construction and application of the *Brandenburg* test, no protected speech is implicated in the case at hand. This

is further evident through State Defendants' showing that the Challenged Laws are narrowly tailored to the area of incitement, or the specific advocacy of force or violence. The Challenged Laws reach no further than necessary to protect the public from an ongoing riot being aggravated or worsened by incitement speech.

As briefed at length in State Defendants' Memorandum in Response to Plaintiffs' Motion for a Preliminary Injunction and discussed above, the plain language of the Challenged Laws lends itself to understanding by reasonable, ordinary people. They do not deprive those impacted from the knowledge of what or whom it regulates and thus cannot be considered vague. *See United States v. Demars*, No. 5:15-MJ-00130-DW, 2016 WL 4148249, at *2 (D.S.D. Aug. 3, 2016) (quoting *Planned Parenthood Minnesota, North Dakota, South Dakota v. Daugaard*, 799 F.Supp.2d 1048, 1067 (D.S.D. 2011) ("A statute will be held unconstitutionally vague if the 'forbidden conduct is so poorly defined that persons of common intelligence must necessarily guess at its meaning and differ as to its application.'")

III. The Challenged Laws Do Not Contain Defects that Need to Be Cured.

a. Section 4 of the Act constitutes an additional penalty for acts prohibited under Section 2.

Section 4's "solicitation or compensation" provision must be read in conjunction with the rest of the Act. Section 2 informs Section 4 because it ties the conduct of a defendant together. In order to be subject to Section 4, a person must already be a defendant under Section 2. Violations of Section 2

require, at their core, intentional incitement to violence. Similar to the Supreme Court's holding in *Bad Heart Bull* that the state is only obligated to prove the common or mutual intent of the group to commit an unlawful act by force or violence or the threat thereof, an intention to violate Section 2 is sufficient to sustain liability under Section 4. *See Bad Heart Bull*, 257 N.W.2d at 719 ("[The crime of riot] necessarily is a group crime requiring proof of a common or mutual criminal intent."). This is because Section 4 is merely an additional penalty for the conduct incited under Section 2. A defendant has already formed the requisite intent to violate the law and incite violence and is liable for his or her actions thereafter. This is merely an additional penalty for incitement of the original unlawful act committed in Section 2.

b. The Challenged Laws do not encroach on the right to associate.

Nothing in the Challenged Laws prohibits or criminalizes membership or participation in, or the promotion or support of, organizations that seek to protest in the manner Plaintiffs describe as their ultimate objective. Rather, the Challenged Laws do not permit individuals or organizations to intentionally direct or solicit any riot participant (whether that participant is a member of an organization or not) to force or violence. In other words, the Challenged Laws forbid persons or organizations from engaging in unlawful conduct in the form of incitement speech. As such incitement does not fall under the protections of the First Amendment, the right to associate is not infringed. *See Holder v. Humanitarian Law Project*, 561 U.S. 1, 40 (2010) (emphasizing the Ninth Circuit's correct holding that the right to associate was not infringed because

the statute at issue did not penalize mere association with an organization in the form of membership or promotion of a group's political goals, but rather penalized actions which constituted furtherance of the group's illegal terrorist activities.)

IV. In the Alternative, State Defendants' Motion for Certification to the South Dakota Supreme Court Should Be Granted.

a. Interpretation of the challenged laws would provide dispositive answers to the primary legal questions posed by Plaintiffs.

As argued above and in State Defendants' Memorandum in Support of their Motion for Certification to the South Dakota Supreme Court and Memorandum in Support of Their Motion for Judgment on the Pleadings and in Opposition to Plaintiffs' Motion for a Preliminary Injunction, Dkt. #28 and 29, every issue facing this court is impacted by a threshold question, which is whether or not the challenged laws proscribed incitement speech unprotected by the First Amendment? That is a core question that, once answered by the South Dakota Supreme Court, would assist this court in swiftly and judiciously disposing of all the claims at issue.

b. Interpretation of the challenged laws poses questions in a novel or uncertain area of law.

While the South Dakota Supreme Court has issued certain judicial rulings related to the crime of riot, those rulings are not specific to §§ 22-10-6 and 22-10-6.1. Nor are there judicial rulings directly on point regarding SB 189, as that law is new, original to South Dakota, and not based on existing laws or concepts found in other states. Thus, the issues presented to this Court are novel and untested.

Though prior rulings of the South Dakota Supreme Court, addressed above, are useful guidance to this Court in interpreting the Challenged Laws, it is in the best interest of judicial economy and to maintain judicial consistency to certify this question to the South Dakota Supreme Court and allow that court to ensure that the state laws at issue are construed in harmony and consistency with that court's prior rulings. This preserves and respects the place of state courts in the federal system. *See Harrison v. Nat'l Ass'n for the Advancement of Colored People*, 360 U.S. 167, 176 (1959) (internal citations omitted) ("To minimize the possibility of such interference[,] a 'scrupulous regard for the rightful independence of state governments should at all times actuate the federal courts,' as their 'contribution in furthering the harmonious relation between state and federal authority.")

c. The challenged laws are susceptible to a constitutional interpretation.

As argued above and in State Defendants' Memorandum in Support of Their Motion for Judgment on the Pleadings and in Opposition to Plaintiffs' Motion for a Preliminary Injunction, Dkt. #28 at 2-29, several legal principles and authorities, in addition to the plain language of the statutes, support the interpretation that the Challenged Laws regulate unprotected incitement speech. Such regulation passes constitutional muster in light of the public interest served by protecting the public and public property from injury and damage.

d. Plaintiffs will not be prejudiced by granting the motion for certification.

Plaintiffs do not assert any specific or concrete prejudice other than a general statement that First Amendment rights will be curtailed by the delay certification to the South Dakota Supreme Court would pose. While delay can be an appropriate argument, it must also be persuasive. *See Nissan Motor Corp. in U.S.A. v. Harding*, 739 F.2d 1005, 1011 (5th Cir. 1984) ("Nissan's claim of undue delay is an appropriate claim, but not a persuasive one."). Plaintiffs did not offer evidence that certification to the state court would be "unusually protracted, and has made no showing of any harm resulting from the alleged delay that is the equivalent to the chilling of First Amendment rights." *Id.* Rather, Plaintiffs have not specified any instances, events, or plans that have not taken place or will not take place because of the Challenged Laws. Nor can they, as political opposition and protests are not regulated under the Challenged Laws. These failings work against a conclusion that any alleged delay constitutes prejudice to Plaintiffs. *Id.*

As previously and extensively argued, State Defendants can and have shown that the Challenged Laws fall within the bounds of regulation excepted from the First Amendment. Prejudice to Plaintiffs is tenuous at best.

CONCLUSION

Based on the foregoing arguments, State Defendants' Motion for Judgment on the Pleadings or, in the Alternative, Motion for Certification to the South Dakota Supreme Court should be granted. Plaintiffs' Motion for Preliminary Injunction should be denied.

ORAL ARGUMENT

Pursuant to D.S.D. Civ. LR 7.1(C), State Defendants' respectfully request oral argument on this motion.

Dated this 4th day of June, 2019.

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CERTIFICATE OF SERVICE

I hereby certify that on the 4th day of June 2019, I electronically filed the foregoing with the Clerk of the Court for the United States District Court for the Western Division by using the CM/ECF system. Participants in the case who are registered CM/ECF users will be served by the CM/ECF system.

/s/ *Richard M. Williams*
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Deputy Attorney General