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**IN THE CHANCERY COURT FOR THE TWENTIETH JUDICIAL DISTRICT
DAVIDSON COUNTY, TENNESSEE**

LEAH GILLIAM, *Plaintiff,* *v.* DAVID GERREGANO, COMMISSIONER OF THE TENNESSEE DEPARTMENT OF REVENUE, and HERBERT H. SLATERY III, TENNESSEE ATTORNEY GENERAL, *Defendants.*	§ § § § § § § § § § § § § § §	Case No.: _____

PLAINTIFF'S MEMORANDUM OF LAW IN SUPPORT OF HER APPLICATION FOR TEMPORARY INJUNCTION

I. INTRODUCTION

When Leah Gilliam purchased a vanity plate to celebrate her interests in astronomy and gaming, it did not occur to her that her constitutionally protected speech could land her in jail. Due to Tenn. Code Ann. § 55-4-210(d)(2), though—a facially unconstitutional, viewpoint-based speech restriction that requires the Commissioner of the Tennessee Department of Revenue to "refuse to issue any combination of letters, numbers or positions that may carry connotations offensive to good taste and decency or that are misleading"—Ms. Gilliam now faces immediate civil consequences and a risk of criminal prosecution if she continues to display a vanity license plate that she has harmlessly displayed on her own vehicle for more than a decade. Accordingly, Ms. Gilliam applies to this Court for a temporary injunction enjoining the Defendants from enforcing Tenn. Code Ann. § 55-4-210(d)(2) against her pending the conclusion of judicial review.

II. TEMPORARY INJUNCTION FACTORS

Pursuant to Tenn. R. Civ. P. 65.04(2), this Court considers the following four factors when determining whether a temporary injunction should issue:

(1) The threat of irreparable harm to the plaintiff if the injunction is not granted;

(2) The balance between this harm and the injury that granting the injunction would inflict on defendant;

(3) The probability that plaintiff will succeed on the merits; and

(4) The public interest.

Moody v. Hutchinson, 247 S.W.3d 187, 199-200 (Tenn. App. 2007) (citing *Mosby v. Colson*, 2006 WL 2354763 (Tenn. Ct. App. Aug.14, 2006)).

"Where, as here, [a] temporary injunction is sought on the basis of an alleged constitutional violation, the third factor—likelihood of success on the merits—often is the determinative factor." *Fisher v. Hargett*, 604 S.W.3d 381, 394 (Tenn. 2020) (collecting cases). Significantly, several courts that have recently adjudicated essentially the same claims presented here have also determined that materially indistinguishable statutes were unconstitutional on multiple grounds. *See, e.g.,* Order Granting Plaintiffs' Motion for Summary Judgment and Denying Defendant's Motion for Summary Judgment at 8, *Ogilvie v. Gordon*, No. 4:20-cv-01707-JST (N.D. Cal. Nov. 24, 2020), ECF No. 54 ("the Court holds that California's prohibition on personalized license plate configurations 'that may carry connotations offensive to good taste and decency' constitutes viewpoint discrimination under *Tam* and *Brunetti*."); *Carroll v. Craddock*, 494 F. Supp. 3d 158, 170 (D.R.I. 2020) ("the Court finds that Mr. Carroll has satisfied the criteria for issuance of a preliminary injunction on his claims that the R.I.G.L. § 31-3-17.1 is unconstitutional both

as applied in this case and on its face as overbroad and void for vagueness."); *Kotler v. Webb*, No. CV 19-2682-GW-SKX, 2019 WL 4635168 (C.D. Cal. Aug. 29, 2019). *See also Lewis v. Wilson*, 253 F.3d 1077 (8th Cir. 2001); *Hart v. Thomas*, 422 F. Supp. 3d 1227 (E.D. Ky. 2019); *Montenegro v. New Hampshire Div. of Motor Vehicles*, 166 N.H. 215, 225, 93 A.3d 290, 298 (2014) ("We conclude that the restriction in Saf–C 514.61(c)(3) prohibiting vanity registration plates that are 'offensive to good taste' on its face 'authorizes or even encourages arbitrary and discriminatory enforcement,' *see MacElman*, 154 N.H. at 307, 910 A.2d 1267, and is, therefore, unconstitutionally vague."); *Matwyuk v. Johnson*, 22 F. Supp. 3d 812, 826 (W.D. Mich. 2014) ("the 'offensive to good taste and decency' language grants the decisionmaker undue discretion, thereby allowing for arbitrary application.").

Regardless, because all four factors governing a temporary injunction favor Ms. Gilliam, a temporary injunction should issue. Additionally, because the Defendant Commissioner's summary, pre-hearing revocation of Ms. Gilliam's vanity plate violates Ms. Gilliam's constitutionally guaranteed due process rights, a temporary injunction enjoining the Defendant Commissioner from enforcing Tenn. Code Ann. § 55-4-210(d)(2) on a pre-hearing basis should issue for that independent reason as well.

III. ARGUMENT

A. THE DEFENDANTS SHOULD BE TEMPORARILY ENJOINED FROM ENFORCING TENN. CODE ANN. § 55-4-210(d)(2)—A PRESUMPTIVELY UNCONSTITUTIONAL SPEECH RESTRICTION THAT WILL CAUSE THE PLAINTIFF TO SUFFER IRREPARABLE HARM ABSENT AN INJUNCTION.

1. The Plaintiff will suffer irreparable harm if an injunction is not granted.

This is a First Amendment case. By enforcing Tenn. Code Ann. § 55-4-210(d)(2) against Ms. Gilliam, the Defendant Commissioner and his Department have subjected Ms. Gilliam to immediate civil consequences and exposed Ms. Gilliam to the threat of

criminal prosecution. Specifically, Ms. Gilliam is now prohibited from renewing her vehicle registration and risks a fine and up to 30 days in jail for harmlessly displaying a vanity plate—"69PWNDU"—that combines the year of the moon landing (1969) with a gaming term.[1] *See* Pl.'s Verified Compl. at Ex. 1.

The risk of enforcement against Ms. Gilliam is neither abstract nor hypothetical. To the contrary, it has already occurred on a summary, pre-hearing basis, and it remains ongoing. In particular, Ms. Gilliam has received a threat letter from the Tennessee Department of Revenue that summarily prohibits her from displaying her innocuous vanity plate. *See* Pl.'s Verified Compl. at Ex. 2. The threat letter transmitted by the Defendant Commissioner's Department states, in pertinent part, as follows:

> **Re: Personalized License Plate 69PWNDU**
>
> Dear Leah,
>
> The Tennessee Department of Revenue (the "Department") is writing this letter to notify you that the above-referenced personalized plate has been deemed offensive. Pursuant to Tenn. Code Ann. § 55-5-117(a)(1) (2012) and Tenn. Code Ann. § 55-4-210(d)(2) (2012), the Department may revoke a personalized registration plate that has been deemed offensive to good taste or decency. Therefore, the Department hereby revokes the above-referenced plate.
>
> You may apply for a different personalized plate or request a regular, non-personalized plate to replace the revoked plate. The law requires you to immediately return the revoked plate. Tenn. Code Ann. § 55-5-119(a) (2012). . . . You will be unable to renew your vehicle registration until this plate has been returned.

Id.

As this threat letter makes clear, Ms. Gilliam is presently "unable to renew [her] vehicle registration" unless she returns her vanity plate. *See id.* And while that civil

[1] Pwn, Dictionary.com (*last visited* June 28, 2021), https://www.dictionary.com/browse/pwn (defining "pwn" as: "Slang. to totally defeat or dominate, especially in a video or computer game[.]")

consequence is not trivial and harms her, it pales in comparison to the fact that the Department's summary revocation of Ms. Gilliam's vanity plate exposes her to the immediate threat of *criminal* liability—and up to 30 days in jail—if she does not acquiesce to the Department's pre-hearing prior restraint by ceasing to display her constitutionally protected speech. *See* Tenn. Code Ann. § 55-5-120(a) ("It is a Class C misdemeanor for any person to violate any of the provisions of chapters 1-6 of this title unless such violation is by chapters 1-6 of this title or other law of this state declared to be a felony.").

Given this context, if Ms. Gilliam is correct that the statute that forbids her harmless vanity plate is facially unconstitutional, then the "irreparable harm" factor of the temporary injunction inquiry is necessarily satisfied. *See, e.g., Connection Distrib. Co. v. Reno*, 154 F.3d 281, 288 (6th Cir. 1998) ("it is well-settled that 'loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury.'") (quoting *Elrod v. Burns*, 427 U.S. 347, 373 (1976)); *Newsom v. Norris*, 888 F.2d 371, 378 (6th Cir. 1989) ("The Supreme Court has unequivocally admonished that even minimal infringement upon First Amendment values constitutes irreparable injury sufficient to justify injunctive relief."). *See also Young v. Giles Cty. Bd. of Educ.*, 181 F. Supp. 3d 459, 465 (M.D. Tenn. 2015) ("Under case law applicable to free speech claims, the loss of First Amendment freedoms, for even minimal periods of time, is presumed to constitute irreparable harm.") (quotation omitted).[2]

Further, as several other courts have already held in similar contexts, Ms. Gilliam *is* correct that Tenn. Code Ann. § 55-4-210(d)(2) is facially unconstitutional on multiple grounds. *See, e.g.,* Order at 8*, Ogilvie*, No. 4:20-cv-01707-JST ("the Court holds that

[2] Given the similarities between the Federal Rules of Civil Procedure and the Tennessee Rules of Civil Procedure, "opinions of federal courts are persuasive authority in this area." *Bayberry Assocs. v. Jones*, 783 S.W.2d 553, 557 (Tenn. 1990).

California's prohibition on personalized license plate configurations 'that may carry connotations offensive to good taste and decency' constitutes viewpoint discrimination under *Tam* and *Brunetti*."); *Carroll v. Craddock*, 494 F. Supp. 3d 158, 170 (D.R.I. 2020) ("the Court finds that Mr. Carroll has satisfied the criteria for issuance of a preliminary injunction on his claims that the R.I.G.L. § 31-3-17.1 is unconstitutional both as applied in this case and on its face as overbroad and void for vagueness."); *Kotler v. Webb*, No. CV 19-2682-GW-SKX, 2019 WL 4635168 (C.D. Cal. Aug. 29, 2019). *See also Lewis v. Wilson*, 253 F.3d 1077 (8th Cir. 2001); *Hart v. Thomas*, 422 F. Supp. 3d 1227 (E.D. Ky. 2019); *Montenegro v. New Hampshire Div. of Motor Vehicles*, 166 N.H. 215, 225, 93 A.3d 290, 298 (2014) ("We conclude that the restriction in Saf–C 514.61(c)(3) prohibiting vanity registration plates that are 'offensive to good taste' on its face 'authorizes or even encourages arbitrary and discriminatory enforcement,' *see MacElman*, 154 N.H. at 307, 910 A.2d 1267, and is, therefore, unconstitutionally vague."); *Matwyuk v. Johnson*, 22 F. Supp. 3d 812, 826 (W.D. Mich. 2014) ("the 'offensive to good taste and decency' language grants the decisionmaker undue discretion, thereby allowing for arbitrary application.").

That conclusion is hardly surprising. Governmental discrimination based on viewpoint is forbidden in any forum, and "[g]iving offense is a viewpoint." *See Matal v. Tam*, 137 S. Ct. 1744, 1763 (2017). Accordingly, despite the Defendant Commissioner's insistence that the State of Tennessee may revoke Ms. Gilliam's license plate because it "has been deemed offensive," *see* Pl.'s Verified Compl. at Ex. 2, the U.S. Supreme Court has clearly established otherwise. *See Matal*, 137 S. Ct. at 1763. Put directly: The First Amendment prohibits the government from serving as the arbiter of taste, *see Cohen v. California*, 403 U.S. 15, 25 (1971) ("one man's vulgarity is another's lyric."), which is precisely what the Defendant Commissioner purports to do here.

Neither is the government's interference with Ms. Gilliam's expression trivial. Vanity plates offer citizens a uniquely effective and inexpensive way to express themselves. *Cf. Baker v. Glover*, 776 F. Supp. 1511, 1515 (M.D. Ala. 2001) ("for those citizens without wealth or power, a bumper sticker may be one of the few means available to convey a message to a public audience.") (citing *Members of City Council v. Taxpayers for Vincent*, 466 U.S. 789, 812 n. 30 (1984) ("the Court has shown special solicitude for forms of expression that are much less expensive than feasible alternatives and hence may be important to a large segment of the citizenry")). In the words of one federal judge: "The very essence of vanity plates is personal expression." *Carroll v. Craddock*, 494 F. Supp. 3d 158, 166 (D. R.I. 2020) (citing *Lewis v. Wilson*, 253 F.3d 1077, 1079 (8th Cir. 2001) (likening vanity plates to bumper stickers, intended to give vent to the driver's personality, to reflect the views of the holder of the plate)). Thus, definitionally, vanity plates represent "personalized" expression that the First Amendment protects. *Kotler v. Webb*, No. CV 19-2682-GW-SKx, 2019 WL 4635168, at *7 (C.D. Cal. Aug. 29, 2019) ("Turning to audience perception, the Court thinks it strains believability to argue that viewers perceive the government as speaking through personalized vanity plates.").

In summary: Ms. Gilliam is living under a compelled restraint if she continues to display her vanity plate—protected speech that she has harmlessly displayed for more than a decade. Based on long-settled First Amendment jurisprudence, suspending Ms. Gilliam's right to protected expression for any length of time—let alone exposing her to civil and criminal consequences for doing so—also qualifies as an irreparable injury. *See Connection Distrib. Co.,* 154 F.3d at 288 (quoting *Elrod*, 427 U.S. at 373); *Newsom*, 888 F.2d at 378; *Young*, 181 F. Supp. 3d at 465. As a result, the first factor of the temporary injunction inquiry favors Ms. Gilliam.

2. The Defendants will not be harmed if this Court issues a temporary injunction.

Granting Ms. Gilliam a temporary injunction also will not harm the Defendants in any material way. Ms. Gilliam has harmlessly displayed her vanity plate for more than a decade without any known harm resulting from her constitutionally protected expression. The government also may not lawfully claim any interest in protecting society from speech that it deems "offensive." *See, e.g., Texas v. Johnson*, 491 U.S. 397, 398 (1989) ("The government may not prohibit the verbal or nonverbal expression of an idea merely because society finds the idea offensive or disagreeable").

Further, Tenn. Code Ann. § 55-4-210(d)(2)—which has been enforced by operation of Tenn. Code Ann. § 55-5-117(a)(1) on the asserted basis that Ms. Gilliam's vanity plate was "erroneously issued," *id.*—is a presumptively unconstitutional, viewpoint-based speech restriction, and "[n]o substantial harm can be shown in the enjoinment of an unconstitutional policy." *Chabad of S. Ohio v. City of Cincinnati*, 233 F. Supp. 2d 975, 987 (S.D. Ohio 2002), *aff'd sub nom. Chabad of S. Ohio & Congregation Lubavitch v. City of Cincinnati*, 363 F.3d 427 (6th Cir. 2004). *See also Deja Vu of Nashville, Inc. v. Metro. Gov't of Nashville & Davidson Cty., Tennessee*, 274 F.3d 377, 400 (6th Cir. 2001) ("if the plaintiff shows a substantial likelihood that the challenged law is unconstitutional, no substantial harm to others can be said to inhere in its enjoinment."). Consequently, the second factor of the temporary injunction inquiry favors Ms. Gilliam as well.

3. The Plaintiff is likely to succeed on the merits of this action.

The third and "often determinative" factor—the Plaintiff's likelihood of success on the merits—also favors issuing a temporary injunction. *See Fisher*, 604 S.W.3d at 394. *See also Obama for Am. v. Husted*, 697 F.3d 423, 436 (6th Cir. 2012) ("When a party

seeks a preliminary injunction on the basis of a potential constitutional violation, 'the likelihood of success on the merits often will be the determinative factor.'") (quoting *Jones v. Caruso*, 569 F.3d 258, 265 (6th Cir.2009)). Tenn. Code Ann. § 55-4-210(d)(2) obligates the Defendant Commissioner to refuse to issue any vanity plate "that may carry connotations offensive to good taste and decency[.]" *See id.* ("The commissioner shall refuse to issue any combination of letters, numbers or positions that may carry connotations offensive to good taste and decency or that are misleading."). Further, even after being issued, Tenn. Code Ann. § 55-5-117(a)(1) permits the summary, pre-hearing revocation of a vanity plate "[w]hen the department is satisfied that the registration or that the . . . plate . . . was . . . erroneously issued[.]" *See id.*; Tenn. Code Ann. § 55-5-119(a) ("Whenever the department as authorized hereunder cancels, suspends, or revokes the registration of a . . . plate or plates, . . . the owner or person in possession of the same shall immediately return the evidence of registration, title or license so cancelled, suspended, or revoked to the department."). For the reasons detailed below, these provisions violate clearly established First Amendment law and constitutionally guaranteed due process.

a. Tenn. Code Ann. § 55-4-210(d)(2) is a presumptively unconstitutional, content-based, and viewpoint-based speech restriction that contravenes the First Amendment.

"Regulations which permit the Government to discriminate on the basis of the content of the message cannot be tolerated under the First Amendment." *Regan v. Time, Inc.*, 468 U.S. 641, 648–49 (1984) (citations omitted). Here, Tenn. Code Ann. § 55-4-210(d)(2) requires the Defendant Commissioner to "refuse to issue any combination of letters, numbers or positions that may carry connotations offensive to good taste and decency . . . ." *Id.* Thus, Tenn. Code Ann. § 55-4-210(d)(2) facially discriminates on the basis of content—certain "connotations" are banned, others are permitted—and it triggers

strict constitutional scrutiny as a consequence. *See, e.g., Reed v. Town of Gilbert*, Ariz., 576 U.S. 155, 163 (2015) ("Content-based laws—those that target speech based on its communicative content—are presumptively unconstitutional and may be justified only if the government proves that they are narrowly tailored to serve compelling state interests."); *Sable Commc'ns of Cal., Inc. v. F.C.C.*, 492 U.S. 115, 126 (1989)

Significantly, beyond just discriminating on the basis of content generally, Tenn. Code Ann. § 55-4-210(d)(2) discriminates further on the basis of *viewpoint*. *See Matal*, 137 S. Ct. at 1763 ("Giving offense is a viewpoint."); *see also* Mary Beth Herald, *Licensed To Speak: The Case of Vanity Plates*, 72 Col. L. Rev. 595, 637 (2001) ("Offensiveness is in the eye of the beholder and is inherently viewpoint based."). Viewpoint discrimination is presumptively forbidden, *see Members of City Council of L.A. v. Taxpayers for Vincent*, 466 U.S. 789, 804 (1984) ("[T]he First Amendment forbids the government to regulate speech in ways that favor some viewpoints or ideas at the expense of others.") (collecting cases), and it is regarded as "an egregious form of content discrimination[,]" *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 829 (1995). Accordingly, regardless of the type of forum involved, viewpoint discrimination triggers strict scrutiny. *See Manhattan Cmty. Access Corp. v. Halleck*, 139 S. Ct. 1921, 1936 (2019) (Sotomayor, J., dissenting) ("while many cases turn on which type of 'forum' is implicated, the important point here is that viewpoint discrimination is impermissible in them all.") (citing *Good News Club v. Milford Central School*, 533 U.S. 98, 106 (2001).

Application of strict scrutiny requires the Defendants to demonstrate that Tenn. Code Ann. § 55-4-210(d)(2) is "narrowly tailored to serve compelling state interests." *Reed*, 135 S. Ct. at 2226. *See also Bible Believers v. Wayne Cty.*, 805 F.3d 228, 248 (6th Cir. 2015) ("Both content- and viewpoint-based discrimination are subject to strict

scrutiny." (citing *McCullen v. Coakley*, 134 S. Ct. 2518, 2530, 2534 (2014))). Based on a wealth of both recent and longstanding precedent, though, the Defendants cannot hope to satisfy strict scrutiny where Tenn. Code Ann. § 55-4-210(d)(2) is concerned. The U.S. Supreme Court has recently invalidated similar bans on "offensive" speech in two decisions. *See Matal*, 137 S.Ct. 1744 (striking down ban on "disparaging" trademarks); *Iancu v. Brunetti*, 139 S.Ct. 2294 (2019) (striking down ban on "immoral or scandalous" trademarks). In so doing, the Supreme Court also held without ambiguity that "[g]iving offense is a viewpoint." *Matal*, 137 S.Ct. at 1763. The Supreme Court further held that "a law disfavoring ideas that offend discriminates based on viewpoint, in violation of the First Amendment." *Brunetti*, 139 S.Ct. at 2301.

Based on these decisions and others, courts in other states have recently invalidated similar statutes that purported to permit the government to regulate vanity plates on the basis of "good taste and decency." *See, e.g.*, Order at 8, *Ogilvie*, No. 4:20-cv-01707-JST ("the Court holds that California's prohibition on personalized license plate configurations 'that may carry connotations offensive to good taste and decency' constitutes viewpoint discrimination under *Tam* and *Brunetti*."); *Carroll v. Craddock*, 494 F. Supp. 3d 158, 170 (D.R.I. 2020) ("the Court finds that Mr. Carroll has satisfied the criteria for issuance of a preliminary injunction on his claims that the R.I.G.L. § 31-3-17.1 is unconstitutional both as applied in this case and on its face as overbroad and void for vagueness."); *Kotler v. Webb*, No. CV 19-2682-GW-SKX, 2019 WL 4635168 (C.D. Cal. Aug. 29, 2019). *See also Lewis v. Wilson*, 253 F.3d 1077 (8th Cir. 2001); *Hart v. Thomas*, 422 F. Supp. 3d 1227 (E.D. Ky. 2019). And Tenn. Code Ann. § 55-4-210(d)(2), for its part, fares no better. It is a facially content- and viewpoint-based speech restricting statute, and no governmental interest supports it. As a consequence, the Government cannot

plausibly meet its heavy burden of overcoming Tenn. Code Ann. § 55-4-210(d)(2)'s presumptive unconstitutionality. The Plaintiff is likely to succeed on the merits of her constitutional challenge as a consequence.

b. Tenn. Code Ann. § 55-4-210(d)(2) is unconstitutionally vague.

Tenn. Code Ann. § 55-4-210(d)(2) is also facially unconstitutional because it is too vague to satisfy constitutional review. Vague laws chill speech and invite discriminatory enforcement, offending threshold requirements of due process. *See City of Knoxville v. Ent. Res., LLC,* 166 S.W.3d 650, 655 (Tenn. 2005) ("Due process of law requires, among other things, notice of what the law prohibits."); *id.* ("A statute is unconstitutionally vague, therefore, if it does not serve sufficient notice of what is prohibited, forcing men of common intelligence [to] necessarily guess at its meaning.") (cleaned up). "A statute is unconstitutionally vague if it denies fair notice of the standard of conduct for which the citizen is to be held accountable, or if it is an unrestricted delegation of power which leaves the definition of its terms to law enforcement officers." *American–Arab Anti–Discrimination Comm. v. City of Dearborn*, 418 F.3d 600, 608–09 (6th Cir.2005) (citing *Leonardson v. City of East Lansing*, 896 F.2d 190, 196 (6th Cir.1990)); *see also United Food & Commercial Workers*, 163 F.3d at 359 ("We will not presume that the public official responsible for administering a legislative policy will act in good faith and respect a speaker's First Amendment rights; rather, the vagueness doctrine requires that the limits the [government] claims are implicit in its law be made explicit by textual incorporation, binding judicial or administrative construction, or well-established practice."); *Coates v. City of Cincinnati*, 402 U.S. 611, 611–14 (1971) (invalidating as facially unconstitutional law that prohibited conducting an assembly "in a manner annoying to persons passing by" on the basis that it was "unconstitutionally vague because

it subjects the exercise of the right of assembly to an unasertainable [sic] standard"). Of note, vagueness also "raises special First Amendment concerns because of its obvious chilling effect on free speech." *Reno v. ACLU*, 521 U.S. 844, 872 (1997).

With these considerations in mind, the New Hampshire Supreme Court recently invalidated a similar state law permitting vanity plates to be rejected if they were "offensive to good taste" on vagueness grounds, holding that "speech that one reasonable person finds 'offensive to good taste' may not be offensive to the good taste of another reasonable person." *Montenegro v. Div. of Motor Vehicles*, 93 A.3d 290, 297 (N.H. 2014). So, too, did a recent District Court decision from the Western District of Michigan reach this conclusion. *See Matwyuk v. Johnson*, 22 F. Supp. 3d 812, 824 (W.D. Mich. 2014) ("The 'offensive to good taste and decency' language impermissibly permits the Department of State to deny a license plate application based on viewpoint because the statute lacks objective criteria, and thus confers unbounded discretion on the decisionmaker."). Other decisions are in accord as well. *See, e.g., Carroll v. Craddock*, 494 F. Supp. 3d 158, 170 (D.R.I. 2020) ("the Court finds that Mr. Carroll has satisfied the criteria for issuance of a preliminary injunction on his claims that the R.I.G.L. § 31-3-17.1 is unconstitutional both as applied in this case and on its face as overbroad and void for vagueness."). *Cf. Lewis v. Wilson*, 253 F.3d 1077, 1080 (8th Cir. 2001) ("The very fact that the DOR could so readily switch justifications for its rejection of the plate illustrates the constitutional difficulty with the statute."); *Aubrey v. City of Cincinnati*, 815 F. Supp. 1100, 1104 (S.D. Ohio 1993) (invalidating banner policy prohibiting signs and banners "not in good taste" as facially vague and overbroad); *Stanton v. Brunswick Sch. Dept.*, 577 F. Supp. 1560, 1572 (D. Me. 1984) ("[f]ree public expression cannot be burdened with governmental predictions or assessments of what a discrete populace will think about

good or bad 'taste'"); *Penthouse Intl, LTD v. Koch*, 599 F. Supp. 1338, 1351 (S.D.N.Y. 1984) (finding "offensive to good taste" standard was "too vague and subjective to meaningfully circumscribe the discretion of subway officials"); *Schneider v. New Jersey (Town of Irvington)*, 308 U.S. 147, 158 (1939) (holding statute requiring officer to refuse canvassing license if "the canvasser is not of good character" unconstitutional because it made exercise of liberty "depend[] upon the exercise of the officer's discretion"); *Child Evangelism Fellowship of S.C. v. Anderson Sch. Dist. Five*, 470 F.3d 1062, 1069 (4th Cir. 2006) ("While an adequate policy must contain 'narrow, objective, and definite standards,' 'the best interest of the district' is as subjective a notion as good government, good taste, or good character.").

Tenn. Code Ann. § 55-4-210(d)(2) fails on vagueness grounds for the same reason. No person can reasonably predict with any degree of precision when the Defendant Commissioner will determine that a vanity plate "may carry connotations offensive to good taste and decency . . . ." *Id.* The Roman maxim "de gustibus non est disputandum"—which has repeatedly proved its worth over thousands of years—succinctly identifies the problem: "there is no disputing matters of taste." *Patsy's Brand, Inc. v. I.O.B. Realty, Inc.*, No. 99 CIV 10175 JSM, 2001 WL 170672, at *13 (S.D.N.Y. Feb. 21, 2001) (citing B. Evans, Dictionary of Quotations 679 (1968)).

For all of these reasons, Tenn. Code Ann. § 55-4-210(d)(2) is fatal for unconstitutional vagueness, and the Plaintiff is likely to succeed on the merits of her vagueness challenge as a result.

c. Tenn. Code Ann. § 55-5-117(a)(1) and Tenn. Code Ann. § 55-5-119(a) violate due process.

Ms. Gilliam has been subjected to a summary, *pre-hearing* suspension of her

vanity plate. *See* Pl.'s Verified Compl. At Ex. 2 ("the Department hereby revokes the above-referenced plate. . . . The law requires you to immediately return the revoked plate. . . . . You may request a hearing to challenge this revocation under the Uniform Administrative Procedures Act by submitting a written request for a hearing within ten days of the date of this letter."). *See also* Tenn. Code Ann. § 55-5-117(a)(1); Tenn. Code Ann. § 55-5-119(a) ("Whenever the department as authorized hereunder cancels, suspends, or revokes the registration of a . . . plate or plates, . . . the owner or person in possession of the same shall immediately return the evidence of registration, title or license so cancelled, suspended, or revoked to the department."). However, "it is fundamental that except in emergency situations (and this is not one) due process requires that when a State seeks to terminate an interest such as that here involved, it must afford 'notice and opportunity for hearing appropriate to the nature of the case' before the termination becomes effective." *Bell v. Burson*, 402 U.S. 535, 542 (1971). "[T]he deprival of driving privileges" also is not exempt from such considerations. *Dixon v. Love*, 431 U.S. 105, 113 (1977).

To determine whether a pre-hearing deprivation of a right comports with due process, courts consider

> "three distinct factors: first, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail."

Id. at 112–13 (quoting *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976).

As to the first factor: the private interest that will be affected—Ms. Gilliam's free speech—carries surpassing importance. As mentioned above, "it is well-settled that 'loss

of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury.'" *Connection Distrib. Co. v. Reno*, 154 F.3d 281, 288 (6th Cir. 1998) (quoting *Elrod v. Burns*, 427 U.S. 347, 373 (1976)). Accordingly, the first *Mathews* factor militates in favor of a pre-deprivation hearing, as compared with a hearing only after a vanity plate has been summarily revoked.

As to the second *Mathews* factor: the risk of an erroneous deprivation prior to a hearing is unusually high. In contrast to circumstances when a revocation is "largely automatic," *Dixon*, 431 U.S. at 113, here, a deprivation is subject to unconstitutionally vague and necessarily arbitrary determinations by the Defendant Commissioner about what "may carry connotations offensive to good taste and decency[.]" *See* Tenn. Code Ann. § 55-4-210(d)(2). Nearly all such determinations will also be unconstitutional for the reasons detailed at length above. Accordingly, the second *Mathews* factor militates in favor of a pre-deprivation hearing as well.

Finally, the Government has no legitimate interest in summarily effecting pre-hearing prior restraints against speech that could not plausibly harm the public, and the public has fundamental rights to hear what others have to say. *See, e.g., Sindicato Puertorriqueno de Trabajadores v. Fortuno*, 699 F.3d 1, 15 (1st Cir. 2012) ("the Supreme Court noted in *Citizens United* that the suppression of political speech harms not only the speaker, but also the public to whom the speech would be directed[.]"). *See also Citizens United*, 558 U.S. at 339 ("The right of citizens to inquire, **to hear**, to speak, and to use information to reach consensus is a precondition to enlightened self-government and a necessary means to protect it.") (emphasis added). Summarily revoking a vanity plate on a pre-hearing basis also is not akin to, for instance, ensuring "the prompt removal of a safety hazard." *Dixon*, 431 U.S. at 114. Accordingly, the third *Mathews* factor militates

in favor of a pre-deprivation hearing as well.

Taken together, then, due process requires that the Defendants afford Ms. Gilliam a hearing *before* revoking her vanity plate. Affording Ms. Gilliam only a post-deprivation administrative hearing that will not result in a final adjudication for at least several months is insufficient. Accordingly, Ms. Gilliam is likely to succeed on the merits of her claim that as applied to vanity plate revocations, Tenn. Code Ann. § 55-5-117(a)(1) and Tenn. Code Ann. § 55-5-119(a) violate due process.

For the foregoing reasons, Ms. Gilliam is likely to succeed on the merits of her claims that Tenn. Code Ann. § 55-4-210(d)(2) is facially unconstitutional on two grounds: (1) viewpoint discrimination, and (2) vagueness. She is also likely to succeed on the merits of her claim that with respect to vanity plates, Tenn. Code Ann. § 55-5-117(a)(1)'s and Tenn. Code Ann. § 55-5-119(a)'s provisions authorizing summary, pre-hearing revocations violate due process. Accordingly, the third factor of the temporary injunction inquiry favors issuing a temporary injunction as well.

4. The public interest will be advanced by granting an injunction.

The fourth and final temporary injunction factor favors Ms. Gilliam, too, for several reasons.

First, "it is always in the public interest to prevent the violation of a party's constitutional rights." *G & V Lounge, Inc. v. Michigan Liquor Control Comm'n*, 23 F.3d 1071, 1079 (6th Cir. 1994). Accordingly, because Ms. Gilliam has established a strong likelihood of success on the merits of her constitutional claims, the public interest favors issuing an injunction. *See id. See also Young v. Giles Cty. Bd. of Educ.*, 181 F. Supp. 3d 459, 465 (M.D. Tenn. 2015) ("Because Plaintiff has established a strong likelihood that

Defendants' prohibition of speech violates the First Amendment, the public interest also favors the issuance of a preliminary injunction."); *Chabad of S. Ohio & Congregation Lubavitch v. City of Cincinnati*, 363 F.3d 427, 436 (6th Cir. 2004) ("the public interest is served by preventing the violation of constitutional rights.").

Second, when the First Amendment is at stake, it is not only the speaker's interests that are implicated; the First Amendment similarly protects the right of the public to receive information. *See, e.g., Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 757 (1976) ("in *Kleindienst v. Mandel*, 408 U.S. 753, 762-763 (1972), we acknowledged that this Court has referred to a First Amendment right to 'receive information and ideas,' and that freedom of speech 'necessarily protects the right to receive.'"). *See also id.* (collecting cases).

Thus, the public interest will be advanced by granting an injunction, and the fourth and final factor of the temporary injunction inquiry favors granting Ms. Gilliam's application as well.

IV. CONCLUSION

For the foregoing reasons, all four factors of the temporary injunction inquiry favor issuing a temporary injunction. Accordingly, this Court should grant Ms. Gilliam's application for a temporary injunction, and a temporary injunction should issue that:

(1) Enjoins the Defendant Commissioner from enforcing Tenn. Code Ann. § 55-4-210(d)(2) against Ms. Gilliam pending the conclusion of judicial review; and

(2) Enjoins the Defendant Commissioner from summarily revoking Ms. Gilliam's vanity plate on a pre-hearing basis under Tenn. Code Ann. § 55-5-117(a)(1) and Tenn. Code Ann. § 55-5-119(a).

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CERTIFICATE OF SERVICE

I hereby certify that on this 28th day of June, 2021, a copy of the foregoing was served via the Court's electronic filing system, via USPS mail, postage prepaid, and/or hand-delivered to the following parties:

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