UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF VIRGINIA
LYNCHBURG DIVISION

CURTIS M. WHATELEY,
Plaintiff,

v.

GERALD F. LACKEY,
in his official capacity as the
COMMISSIONER OF VIRGINIA
DEPARTMENT OF MOTOR VEHICLES,
Defendant.

CASE NO. 6:25-cv-00010

MEMORANDUM OPINION

JUDGE NORMAN K. MOON

Plaintiff Curtis Whateley brings this *pro se* civil rights action against the Commissioner of the Virginia Department of Motor Vehicles (DMV), Gerald F. Lackey, alleging that the Commissioner revoked his personalized license plate in violation of his First and Fourteenth Amendment rights. The license plate read "FTP&ATF," which Plaintiff acknowledges stood for "Fuck the police & [the Bureau of] Alcohol, Tobacco, and Firearms." Although DMV initially approved and issued the plate, the Commissioner later determined that the plate was offensive and invoked his authority under Virginia Code § 46.2-726 to prohibit its use. Based on these actions, Plaintiff now seeks declaratory and injunctive relief pursuant to 42 U.S.C. § 1983, claiming that:

(i) Virginia Code § 46.2-726 is facially unconstitutional under the First Amendment because it is vague and overbroad;

(ii) the statute is unconstitutional as applied to Plaintiff, because it discriminates based upon viewpoint and restricts his pure political speech regarding "the current state of policing in this country;" and

(iii) the Commissioner's decision to revoke his license plate provided insufficient process under the Fourteenth Amendment's guarantee of procedural due process.

See Dkt. 01. The Commissioner moves to dismiss the complaint for failure to state a claim under Federal Rule of Civil Procedure 12(b)(6). *See* Dkt. 07 (motion); Dkt. 08 (mem. in support).

Upon review of the filings and the applicable law, the Court concludes that the motion shall be **GRANTED**. Because Plaintiff's license plate amounts to an object of government speech, he neither has a First Amendment interest nor a Due Process interest at stake in this case.

I. Legal Standard

A motion to dismiss pursuant to Fed. R. Civ. P. 12(b)(6) tests the legal sufficiency of a complaint to determine whether a plaintiff has properly stated a claim. The complaint's "[f]actual allegations must be enough to raise a right to relief above the speculative level," *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007), with all its allegations taken as true and all reasonable inferences drawn in the plaintiff's favor. *King v. Rubenstein*, 825 F.3d 206, 212 (4th Cir. 2016). A motion to dismiss "does not, however, resolve contests surrounding the facts, the merits of a claim, or the applicability of defenses." *Id.* at 214.

Although the complaint "does not need detailed factual allegations, a plaintiff's obligation to provide the 'grounds' of his entitle[ment] to relief requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." *Twombly*, 550 U.S. at 555. A court need not "accept the legal conclusions drawn from the facts" or "accept as true unwarranted inferences, unreasonable conclusions, or arguments." *Simmons v. United Mortg. & Loan Inv., LLC*, 634 F.3d 754, 768 (4th Cir. 2011) (quotation marks omitted). This is not to say Rule 12(b)(6) requires "heightened fact pleading of specifics," instead the plaintiff must plead "only enough facts to state a claim to relief that is plausible on its face." *Twombly*, 550 U.S. at

570; *see Ashcroft v. Iqbal*, 556 U.S. 662, 679 (2009) ("[O]nly a complaint that states a plausible claim for relief survives a motion to dismiss.").

II. Background

In early 2023, Plaintiff "requested a personalized license plate" from DMV which read "FTP&ATF." Dkt. 01 at 5. The plate was approved and issued to Plaintiff, and it was later re-issued when Plaintiff and DMV discovered that the "&" symbol had been erroneously omitted. *Id.* Plaintiff received the re-issued plates and began displaying them on his vehicle. *Id.* He used them for roughly one year. *Id.*

In May 2024, DMV received a complaint about the license plate. A citizen claimed over email that the license plate was "most offensive" because "the F stands for Fuck and the plate means Fuck the Police & the [Bureau of] Alcohol, Tobacco, and Firearms." Dkt. 01 at 5. DMV's "Personalized License Plate Review Board" voted 9-1 to recall the license plate, as they believed "it could reasonably be viewed as profane, obscene, or vulgar" and because it could be used to condone or encourage violence. *Id*. Plaintiff received notice of DMV's decision in the mail, along with a new set of randomized plates, which he began to use immediately. *Id*.

Plaintiff then sought an "Informal Administrative Hearing" on the matter. Dkt. 01 at 5. After some delay by DMV, a hearing was scheduled. *Id*. at 5-6. Plaintiff represented himself at the hearing. *Id*. at 6. One month later, Plaintiff received notice of "the Informal Conference Decision upholding the revocation" of his license plate. *Id*.

III. Discussion

Plaintiff brings three claims. First, Plaintiff argues that Virginia Code § 46.2-726 is facially unconstitutional for overbreadth and vagueness, because it "grants unfettered discretion to the Commissioner on matters of content and viewpoint expression." Dkt. 01 at 4. Second,

Plaintiff argues that the statute is unconstitutional as applied to him because it is viewpoint discriminatory and restricts "categories of protected [speech] including political" speech. *Id*. Finally, Plaintiff argues that revocation of his license plate violated his Fourteenth Amendment right to due process. *Id*. at 3.

The Commissioner argues that all claims must be dismissed because Plaintiff fails the pleading standards of Rule 12(b)(6) or misapprehends the applicable Constitutional law. *See* Dkt. 08. Among Commissioner's substantive arguments, one takes priority: whether vanity plates in the Commonwealth of Virginia constitute government speech. The Commissioner argues that because the Commonwealth's vanity plates constitute government speech, Plaintiff has no First Amendment right to expression on his vanity plate, and his free speech claims must therefore fail. If Plaintiff has no First Amendment interest, the Commissioner argues, then he also has no liberty interest protected by the Due Process clause, such that his Fourteenth Amendment claim must also fail. Accordingly, the government speech question is a threshold determination which we address first.

A. Government Speech

The First Amendment to the United States Constitution prohibits the government from "abridging the freedom of speech," U.S. CONST. amend. I, but the First Amendment's guarantee of free speech does not apply when the government is speaking for itself. *See, e.g., Pleasant Grove City v. Summum*, 555 U.S. 460, 467 (2009) ("The Free Speech Clause restricts government regulation of private speech; it does not regulate government speech."). **To assess whether speech is government speech, we conduct "a holistic inquiry designed to determine whether the government intends to speak for itself or to regulate private expression."** *Shurtleff v. City of Boston, Massachusetts*, 596 U.S. 243, 252 (2022). This review "is not

mechanical" and instead "is driven by a case's context rather than the rote application of rigid factors." *Id*. Nonetheless, past cases have looked consistently to three factors which guide the government speech inquiry: (1) "the history of the expression at issue;" (2) "the public's likely perception as to who (the government or a private person) is speaking;" and (3) "the extent to which the government has actively shaped or controlled the expression." *Shurtleff*, 596 U.S. at 252 (citing *Walker v. Texas Div., Sons of Confederate Veterans, Inc*., 576 U.S. 200, 209-14 (2015)). In *Walker*, the Supreme Court applied these factors in holding that **specialty license plates** issued by the state of Texas, pursuant to its statutory registration of motor vehicles, constituted government speech, such that the plaintiffs in that case (the Sons of Confederate Veterans) had no First Amendment right to display the Confederate flag on the specialty plates issued on their behalf. *Walker*, 576 U.S. at 208-14.

Following *Walker*, courts in the Fourth Circuit have held that North Carolina's and Virginia's specialty plate programs are forms of government speech not subject to First Amendment scrutiny. *See, e.g., ACLU v. Tennyson*, 815 F.3d 183, 185 (4th Cir. 2016) (holding that, per *Walker*, North Carolina's specialty plate program is government speech not subject to First Amendment scrutiny); *Sons of Confederate Veterans, Inc. v. Holcomb*, 2015 WL 4662435, at *4 (W.D. Va. Aug. 6, 2015) (holding that, per *Walker*, Virginia's specialty license plate program is government speech). However, *Walker* only considered "specialty plates," *i.e*., plates which bear a design other than the state's default plate, often issued on behalf of a certain cause or organization, like wildlife conservation or Confederate veterans. It specifically did not address vanity plates, *i.e*., plates bearing a personalized series of alphanumeric characters. *See Walker*, 576 U.S. at 204 ("Finally, Texas law provides for personalized plates (also known as vanity plates) . . . . Pursuant to the personalization program, a vehicle owner may request a particular

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