ORIGINAL

SUPREME COURT
OF THE STATE OF NEVADA

Case No. 49350

STATE OF NEVADA, DEPARTMENT OF MOTOR VEHICLES,

Petitioner,

v.

WILLIAM JUNGE,

Respondent.

Reply Brief of Amicus Curiae American Civil Liberties Union of Nevada

APPEAL FROM THE EIGHT JUDICIAL DISTRICT COURT

DISCTRICT COURT CASE No. A529007

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I. INTRODUCTION

The Nevada regulation that allows DMV employees to determine what is and is not "appropriate" content on a vanity license plate, NAC 482.320(6)(f), runs afoul of the Constitution because it gives the government unfettered discretion to censor protected speech. It operates as a prior restraint, and is accordingly presumptively unconstitutional. In its Response to the American Civil Liberties Union of Nevada's (ACLUN) Amicus Brief, Appellant State of Nevada Department of Motor Vehicles (DMV) ignores this key problem. Under the current code, the personal speech of an individual vehicle owner may be censored, based on the subjective opinion of a DMV employee as to whether a plate's message is "inappropriate." The law is clear that the First Amendment applies to personal expression on license plates, and it is equally clear that the vague, subjective means granted to the DMV to censor speech before it occurs do not pass constitutional muster.

Rather than focus on this issue, Appellant attempts to cloud the argument with numerous red herrings. First, ignoring Nevada law that squarely authorizes this court to do so, and instead strangely relying on irrelevant cases from Vermont, Appellant argues that this Court cannot rule on the constitutional issues at hand. Second, Appellant argues that the plate at issue here is individual speech (a vanity plate) not group speech (specialty plates) and that somehow this merits less First Amendment protections. Third, Appellant contends that the vanity plate application process is not a prior restraint on speech, simply because Mr. Junge had his plate for six years, even though in practice all vanity plate messages must meet the content restrictions before they will be issued. Fourth, Appellant tries to argue that allowing the DMV to prohibit any vanity plate it determines to be inappropriate does not give officials unfettered discretion in

applying the law. Fifth and finally, Appellant argues that because the state gives the DMV the authority to regulate content any content regulation is constitutional. These arguments fail.

This Court does have the authority to consider the issues at hand. The vanity plate program established by the DMV constitutes a limited public forum in which the First Amendment protects individual expression from viewpoint discrimination and prohibits the DMV from granting themselves unfettered discretion to censor speech. The vanity plate application process operates as a prior restraint on speech because plate messages must meet content restrictions before they are issued. Prior restraints on speech in a limited public forum are subject to the same heightened scrutiny, and vague restrictions that grant unfettered discretion to discriminate based on viewpoint are facially unconstitutional. A state grant of authority to regulate content does not give the DMV *carte blanche* to write the type of vague, undefined regulation at issue here, precisely because such a regulation grants unfettered discretion to discriminate against proposed messages based on viewpoint.

II. PROCEDURAL HISTORY

In 1999, Respondent Mr. Junge applied for and was granted a personalized license bearing the word "HOE." In 2006, while applying to renew the plate, a supervisor at the DMV office decided that the plate might be inappropriate and asked the DMV's Special Plate Committee to vote to revoke it, which it did. (DMV Appendix p. 4 ll. 1; DMV App. p. 6, ll. 4-28.) Mr. Junge then received a letter stating that the HOE plates were being recalled because "these special plates are unsuitably (sic) and inappropriate." (DMV App. p. 39, Petitioner's Exhibit A.) Mr. Junge appealed the denial of his HOE vanity plate.

The Administrative Law Judge ruled as a conclusion of law that (under NAC 482.320, the regulation governing review of license plate content, hereinafter "DMV Regulation") the

DMV has authority to prohibit any personalized license plate that is "determined by the Department to be inappropriate" as well as any plates that *may* be offensive or inappropriate, and the that the "HOE" plate was inappropriate. (DMV App. p. 72, Findings of Fact, Conclusions of Law and Decision, Sept. 18, 2006.) Mr. Junge appealed.

The Eighth Judicial District Court of Nevada then reversed the Administrative Law Judge's decision (DMV App. p. 87-88, Decision and Order, Case No. A529007) because "the word 'Hoe' means a gardening tool" and therefore was not inappropriate. (Transcript of Dist. Crt. Proceedings, Case No. A-529007, Feb. 28, 2007, p. 17.) The DMV appealed.

On June 13, 2008, this Court issued an order inviting the ACLUN to participate as Amicus Curiae in order to examine, *inter alia*, the constitutional free speech issues raised in this case. The ALCUN filed its brief on September 19, 2008 ("ACLU Brief"), and Appellant State of Nevada filed a response brief on December 26, 2008 ("Response"). On January 27, 2009, this Court granted ACLUN's motion for leave to file a reply to Appellant's Response brief. This Reply is submitted pursuant to that order.

III. ARGUMENT

Personalized messages displayed on license plates are the personal expression of the vehicle owner. In Nevada, there are two types of personalized plates: vanity plates and specialty plates. Vanity plates (referred to in NRS 482.3667 and NAC 482.320 as "personalized prestige plates") bear a combination of letters and/or numbers crafted by the vehicle owner rather than chosen randomly by the DMV. *See* http://www.dmvnv.com/platespersonalized.htm. A specialty plate is a plate displaying a background, color scheme, and logo different from the standard-issue license plate. *See e.g.* http://www.dmvnv.com/platesorganization.htm. In Nevada, specialty plates are designed by the organization and may be displayed by members of

the organization, or the general public depending on the specific plate. Nev. Rev. Stat. 482.367002 (2007); *see also* http://www.dmvnv.com/platescharitable.htm#How. A plate can be both a vanity plate and a specialty plate – a car owner can request a specific combination of letters and/or numbers on a specialty plate background. *See* http://www.dmvnv.com/pdfforms/sp66.pdf. Examples of vanity plates and specialty plates are also attached as Exhibit 1.

Both types of personalized license plates are protected by the First Amendment. By allowing the public to create and display specialized messages, Nevada has created a limited public forum. In a limited public forum the government can regulate the content of speech in that forum but it must do so in a manner that is reasonable and viewpoint neutral. The threat of viewpoint discrimination is highest when there is a prior restraint on speech, *i.e.*, when the government knows what the speech will be before it occurs and can prohibit the message before it is spoken. Such prior restraints are presumptively unconstitutional and must provide clear guidelines on what is prohibited because vague guidelines give government officials unfettered discretion to discriminate against speech based on viewpoint.

A car owner must apply to the Nevada DMV and comply with all content regulations before receiving a personalized plate. This is a classic prior restraint. The DMV Regulation used to revoke Mr. Junge's vanity plate is vague and undefined, and it allows the DMV to deny any plate that is "determined by the Department to be inappropriate." This unfettered discretion to deny vanity plates based on viewpoint offends the Constitution.

A. <u>It Is Appropriate To Address The Constitutional Issues Raised In This Case.</u>

This Court can and should address the important constitutional issues raised by this case. Citing only to *Vermont* state cases, and ignoring binding law from this Court, Appellant argues

that this Court should not consider the free speech issues raised by this case because they were brought to light for the first time on appeal (Response, 2:26-3:2 and 3: n.1.).[1] This is *not* the law in Nevada. First, the general rule that the Appellant relies on does not bar a *respondent* from raising issues for the first time on appeal. Thus, the Appellant is ignoring the basic procedural posture of the case. It is only the *Appellants*, not a respondent or an invited amicus, that is limited to the issues raised in the case appealed. As this Court has repeatedly held, "[a] respondent may advance any argument to support a judgment even if the district court rejected or did not consider the argument." *Paul v. Imperial Palace, Inc.*, 111 Nev. 1544, 1549, 908 P.2d 226, 229 (1995) (citing *Ford v. Showboat Operating Co.*, 110 Nev. 752, 755 (1994)).

Second, and more importantly, the general rule is totally inapplicable when constitutional issues are at hand. This Court has repeatedly held that "issues of a constitutional nature may be addressed when raised for the first time on appeal." *Levingstone v. Washoe Co. By and Through Sheriff of Washoe Co.*, 112 Nev. 479, 482; 916 P.2d 163, 166 (1996) (examining for first time on appeal appellant's argument that a civil forfeiture statute was constitutional). Similarly, in *McCullough v. State*, this Court explained that "...when constitutional questions are raised on appeal, we have the power to address them." 99 Nev. 72, 74, 657 P.2d 1157, 1158 (1983) (examining for first time on appeal appellant's argument that

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[1] While it is true that neither the Administrative Law Court nor the Eighth Judicial District Court directly examined or ruled on First Amendment issues, the issues were alluded to by the parties both at the administrative hearing and in the district court. At the Administrative Court hearing Mr. Junge's counsel attempted to raise the free speech issues. ("...the First Amendment prohibits the free exercise thereof by bridging (sic) the freedom of speech or also inflicting us with your religious beliefs." (DMV App. p. 17 ll. 5-28, p. 18 ll. 1-21, Transcript of Admin. Ct. hearing). In the district court, the attorney for the DMV touched on First Amendment issues by quoting from a case which argued that license plate regulations were unrelated to the suppression of speech. (Dist. Ct Trans. 15:12 – 16:22) In any event, as explained *infra*, this Court certainly has the ability to review the First Amendment issues presented in this appeal.

judge's numerical quantification of reasonable doubt standard was unconstitutional prejudicial error); *see also Diaz v. State*, 95 Nev. 710, 713, 601 P.2d 706, 708 (1979) (examining for first time on appeal, an objection to testimony based on the Confrontation Clause).

Indeed, even if no party raises them, this Court may *sua sponte* address constitutional issues that were not raised in the district court. *See Hamm v. Arrowcreek HOA*, 124 Nev. 28, __, 183 P.3d 895, 903 (2008) ("[w]hile [appellants] failed to raise their constitutional arguments below, we choose to analyze them *sua sponte* for plain error") (examining *sua sponte* whether state mediation and arbitration law violated constitutional jury trial rights); *see also Kirkpatrick v. Eighth Judicial Dist. Crt*, 119 Nev. 66, 70 n.8; 64 P.3d 1056, 1059 n.8 (2003) ("Because this petition raises important constitutional issues, we will consider them") (citing to *McNair v. Rivera*, 110 Nev. 463, 468 n.6; 874 P.2d 1240, 1244 n.6 (1994) for rule that the Court can consider constitutional issues *sua sponte*).[2]

This Court exercised its authority to address these issues *sua sponte* by asking the ACLUN to participate as Amicus Curiae and to brief the issue of whether Mr. Junge's right to

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[2] Appellant is incorrect that no free speech issues were raise below. In addition to being nonbinding Vermont cases, the cases that the Appellant relies upon (see Response, .3: fn. 1) are inapplicable to the procedural history of the instant case and do not support Appellant's claim that this Court should not address constitutional issues raised for the first time on appeal. Most markedly, in *Herald Ass'n, Inc. v. Ellison*, 419 A.2d 323 (Vt. 1980) the court refused to examine constitutional issues because it was not necessary, but stated that "**given a case in which determination of the issues presented demands that this Court decide such questions, it would be our duty to do so.**" *Id.* at 326 (emphasis added). In other words, the Court indicated that it would examine constitutional issues raised *on appeal* if it were necessary. In *Martin v. State Agency of Trans. Depart. of Motor Vehicles*, 819 A.2d 742, 748 (Vt. 2003) the motorist seeking a license plate was appealing the lower court's affirmance of the Vermont Department of Motor Vehicles' denial of a vanity license application, and the Vermont court granted the appeal on other grounds. In contrast, here, Mr. Junge is defending against a DMV's appeal and is the respondent. Similarly, in *In re Sealed Documents*, 772 A.2d 518 (Vt. 2001) the court decided the issue in favor of the appellant based on state law and simply declined to examine appellant's First Amendment argument. *Id.* at 155-56.

free speech has been violated. (Supreme Court Order Inviting Amicus Curiae Participation, p. 2, filed June 13, 2008: "the court requests [ACLUN] participate in this appeal...by filing a brief addressing...[w]hether the DMV's rejections of Junge's personalized license plate...violated Junge's right to free speech...") Appellant's argument that this Court should abstain from reviewing newly raised constitutional issues is simply not supported by Nevada law. This Court may review constitutional issues raised by either party on appeal or it may examine them *sua sponte*.

B. Nevada Vanity Plates And Specialty Plates Allow For Personal Expression By The Vehicle Owner And Therefore Both Are Equally Protected By The First Amendment.

Appellant spends pages highlighting the fact that it is vanity plate at issue here rather than a specialty plate (Response, 4:4 - 5:1; 8:11-12, 7:10-18), arguing that "a message by one person often does not express any 'view'" whereas messages by groups, such as on specialty plates "tend to support a particular cause or idea or 'view.'" (Response, 4:9-13.) This argument is centered on the false premise that group speech deserves more First Amendment protection.

Whether a statement is made by an individual or a group is not relevant, let alone dispositive, in First Amendment analysis. Indeed, the pivotal First Amendment license plate case addressed an individual's preference not to express a message: in 1977, the United States Supreme Court held that messages on license plates can constitute speech by the vehicle owner, thus bringing such messages under the purview of the First Amendment. *Wooley v. Maynard,* 430 U.S. 705, 715 (1977) (requiring a vehicle owner to display the state's motto, "Live Free or Die," on his license plate was unconstitutional because it amounted to state-compelled speech of a message with which the owner disagreed). Applying *Wooley*, in 2008 the Ninth Circuit Court

of Appeals held that personalized messages on Arizona specialty plates[3] constitute primarily private speech and that the plate's message is attributable to the vehicle owner, not the organization that requested the design, nor the issuing state. *Arizona Life Coalition v. Stanton*, 515 F.3d 956 (9th Cir. 2008) (state's refusal to create "Choose Life" specialty plate after organization had satisfied all content and formatting requirements amounted to viewpoint discrimination against private expressive speech in violation of First Amendment).

Appellant has cited no case law supporting its argument that vanity plates deserve less First Amendment protection than specialty plates because the former is requested by an individual and the background of the latter is requested by a group. The Sixth Circuit case and the district court cases cited by Appellant do not address the idea that vanity plate messages are somehow inferior to specialty plate messages and deserve and deserve fewer protections.

Appellant does rely on *ACLU v. Bredesen*, 441 F.3d 370, 378 (6th Cir. 2006) (cited by Appellant at Response, 4:13-18) for the proposition that only specialty plates bear protection. However it should be noted that, in contrast to other circuits, especially the Ninth and the Fourth, the Sixth Circuit in *ACLU v. Bredesen*, completely disregarded *Wooley* and found that the *specialty plate* at issue invoked no First Amendment protections because it was government speech in a private forum and therefore the state could discriminate based on viewpoint. 441 F.3d at 378 (state law creating "choose life" specialty plate, but not permitting pro-choice plates, was permissible and not viewpoint discrimination because plate message was government speech.) The *Bredesen* court noted that it was at odds with the Fourth Circuit, which reached the

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[3] Arizona's specialty plate program is nearly identical to Nevada's specialty plate program in that certain groups or organizations can request special background plate designs provided they meet certain content restrictions and show that a certain number of people will request the plate. Compare Az Rev. Stat. 28-2404 with Nev. Rev. Stat. 482.367002. The minor formatting and cosmetic differences between vanity plates and specialty plates are irrelevant when discussing First Amendment issues.

opposite result in the nearly identical case of *Planned Parenthood of S.C. Inc. v. Rose*, 361 F.3d 786, 795-96 (4th Cir. 2009) *Id.* at 380. In *Planned Parenthood of S.C.*, the Fourth Circuit held that license plate messages are both government and private speech, thereby creating a limited forum, and that the state discriminated based on viewpoint in violation of First Amendment by issuing "Choose Life" plates but refusing to issue pro-choice plates. 361 F.3d. at 798. The Ninth Circuit, *in addressing a factual scenario like the one at hand*, rejected the Sixth Circuit's *Bredesen* analysis, and instead followed the Fourth Circuit's analysis and held that all factors weighed in finding license plate messages to be individual speech, not government speech, and that the state had created a limited public forum. *Arizona Life Coalition v. Stanton*, 515 F.3d 956 964-65, 971 (9th Cir. 2008).

It should be noted that not only is the Sixth Circuit opinion in *ACLU of Tennessee* v. *Bredesen,* 441F.3d 370 (6th Cir. 2006) erroneously relied upon by the Appellant for its proposition that only specialty plates raise free speech issues (Response, 4:11-20), as further discussed below in Subsection C, part 3, page 17, it is also at odds with the Ninth Circuit *Stanton* decision. The ALCUN urges this Court to follow the Ninth Circuit's reasoning in *Stanton* to decide both the federal constitutional issues raised by this case as well as the state constitutional issues. While this Court may not be bound to follow it,[4] Ninth Circuit decisions are most certainly persuasive authority. *See e.g.*, *Yninguez v. Arizona*, 939 F.2d 727, 736-77 (1991) (holding that states should, but are not required to follow the Ninth Circuit's constitutional rulings in order to avoid inconsistency).

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[4] *See Kindred v. Second Judicial Dist. Court ex rel. County of Washoe*, 116 Nev. 405, 141, 996 P.2d 902, 909 (2000) (stating that "when the federal circuits are in conflict, the authority of the Ninth Circuit ... is entitled to no greater weight than decisions of other circuits.")

This Court has often applied the Ninth Circuit's interpretation of the First Amendment, although it is now required to do so. *See e.g., Burgess v. Storey County Bd. of Com'rs,* 116 Nev. 121,124-25, 992 P.2d 856, 859 (2000) (relying on Ninth Circuit interpretation of First Amendment to determine that appellant had First Amendment right to associate with Hell's Angels); *Johanson v. Eighth Judicial Dist. Court of State of Nev. ex rel. County*, 182 P.3d 94, (Nev. 2008) (citing and relying on Ninth Circuit to find that a gag order issues by the district court was unconstitutionally vague and overbroad). In addition to being the correct rule, the Ninth Circuit's interpretation of the First Amendment protections in *Stanton* should guide this court in determining whether the DMV violated Mr. Junge's federal constitutional speech protections, because doing so avoids inconsistencies with a circuit court, as the Ninth Circuit in *Yninguez v. Arizona*, 939 F.2d 727 explained:

> Despite the authorities that take the view that the state courts are free to ignore decisions of the lower federal courts on federal questions, we have serious doubts as to the wisdom of this view. Having chosen to create the lower federal courts, Congress may have intended that just as state courts have the final word on questions of state law, the federal courts ought to have the final word on questions of federal law. The contrary view could lead to considerable friction between the state and federal courts as well as duplicative litigation. Furthermore, the sparse authority on the subject appears to be concerned largely with the stare decisis effect of federal district court decisions on subsequent state court actions, rather than the effect of decisions of the federal courts of appeals; there may be valid reasons not to bind the state courts to a decision of a single federal district judge-which is not even binding on the same judge in a subsequent action-that are inapplicable to decisions of the federal courts of appeals. Finally, if decisions of the federal courts of appeals invalidating state laws carry no authority, it would be difficult to comprehend why for so many years a right of appeal to the Supreme Court was provided in all cases in which federal circuit courts held state statutes unconstitutional.

Id. at 736-77 (1991)(internal citations omitted).

As for Mr. Junge's state constitutional rights, this Court has interpreted Nevada's constitutional free speech protections as being on par with the U.S. Constitution's. *See e.g.*

S.O.C. Inc. v. Mirage Casino-Hotel, 117 Nev. 403, 415, 23 P.3d 243, 251 (2001)(stating that "our decisions addressing accommodation of speech on public and private property have relied equally on the First Amendment and the Nevada Constitution without distinguishing between them.").

The other two cases cited by Appellant do not support the proposition that vanity plates deserve less protection than specialty plates. (See Response, 3: n. 2, 4: n. 4) *Henderson v. Stalder*, 265 F.Supp.2d 699 (E.D. La. 2003) explained in a footnote the factual difference between vanity plates and specialty plates, but made no other ruling on the difference between the two or otherwise discussed it. *Henderson* is no longer good law because the entire decision was vacated and remanded with orders to dismiss by the Fifth Circuit. *See Henderson v. Stalder*, 407 F.3d 351 (5th Cir. 2005). *Byrne v. Lundeville*, 2007 WL 2892620 n.7 (D.Vt. 2007) held that the denial of a Bible verse vanity plate was not viewpoint discrimination because all religious references where prohibited. The court noted in a footnote that there are more cases dealing with specialty plates, specifically "Choose Life" plates, but made no ruling on whether vanity plates deserve less protection.

Although each vanity plate must be unique and several people could have the same specialty plate background design (with different letter-number combinations of course). it is still the individual vehicle owner, not the requesting group, who must choose to put the plate on his car. In other words, once the individual chooses the specialty plate design and places it on his car, he has adopted the group message as his individual message. Therefore, arguing that "there are different purposes for a vanity plate (a message for and by one person) versus a specialty plate (a message by a group)" (Response, 4:7-8) is asking this court to grant greater First Amendment protections to group speech rather than individual speech because somehow

the "purpose" of group speech is more important. This argument is untenable. The fact that a vanity plate uses letter-number combinations to express a view and a specialty plate uses a special design on the plate background to express a view is a distinction without a difference. Both types of plates carry a message attributable to the individual and First Amendment principles apply equally to *an individual's* expression made via either type of plate.

In sum, the main case that the Appellant relies on to support its suggestion that speciality plates are protected but vanity plates are not actually held that specialty plates – not vanity plates – do not carry constitutional protection. Regardless, the distinction is meaningless. The Supreme Court has made clear that an individual has free speech rights that apply to license plates, and the Ninth Circuit, in a case directly on point, has held that personalized plates carry protection.

C. Vanity Plates, Like Specialty Plates, Create a Limited Public Forum and The Content Restriction Used to Deny Mr. Junge's Vanity Plate Violates the Constitution.

1. Nevada's Vanity Plate Program Creates A Limited Public Forum.

Personalized license plates constitute a limited public forum in which all content restrictions must be reasonable and viewpoint neutral. *Stanton*, 515 F.3d at 971; *see also Sons of Confederate Veterans, Inc. v. Holcomb,* 129 F.Supp.2d 941, 948 (W.D. Va. 2001) ("allowing groups to place various slogans and designs on license plates represents the [State's] intentional action to open up a nontraditional forum for public discourse"). Appellant argues that there is no First Amendment protection for vanity plates because they create neither a public forum nor a designated public forum. (Response, 7:10-18.) This argument is a red herring. It ignores the fact that there is such a thing as a *limited public forum* and that the Ninth Circuit has made crystal clear that license plates do carry First Amendment protection. *See Stanton*, 515 F.3d at 960. Further, even if Appellant were correct and license plates are a nonpublic forum, a scheme that allows the kind of unfettered discretion at issue here would not pass constitutional muster

because it still allows for viewpoint discrimination. *See, e.g., Cornelius v. NAACP Legal Def. & Educ. Fund*, 473 U.S. 788, 806 (1985) (noting that viewpoint discrimination was unconstitutional even in a nonpublic forum).

Although the Supreme Court in *Wooley* did not articulate which type of forum was created by personalized license plate messages, it did make clear that the First Amendment applied. Subsequently, in *Stanton*, the Ninth Circuit held that the state creates a limited public forum when it permits certain actors to place certain types of messages or designs on state issued license plates. *Stanton*, 515 F.3d at 969, 971.

Appellant argues that vanity plates should be considered a "nonpublic forum" because they are not a public forum nor a designated public forum. (Response, 7:14-16.) In other circuits, the terms "limited public forum" and "designated public forum" are used interchangeably, but in the Ninth Circuit the two terms have different meanings and different standards. *Hopper v. City of Pasco*, 241 F.3d 1067, 1074-1075 (9th Cir. 2001). In a designated public forum, the government intentionally allows expressive speech in a nonpublic forum with "virtually unlimited restrictions" on content or speaker identity and so restrictions on speech must be both content and viewpoint neutral, and serve a compelling governmental interest. *Hopper*, 241 F.3d at 1075-1079. In a limited public forum, speech content may be restricted by predetermined and consistently-enforced regulations, as so long as the restrictions are viewpoint neutral and reasonable in light of the forum. *Id.*

Regardless of whether other circuits have held vanity plates to be non-public fora, the rule in the Ninth Circuit is that they are a limited public forum in which content regulations must be reasonable and viewpoint neutral. Appellant concedes as much. (Response, 7 n.8 – "the bottom line is that the analysis is the same: whether the statutes and regulations are 1)

reasonable, and 2) viewpoint neutral.") It should also be noted that all cases cited by Appellant holding that vanity plates to be a non-public fora or that the messages are attributable to the state, pre-date the *Stanton* ruling and most are not from courts within the Ninth Circuit.

In 2008, the *Stanton* Court adopted a four factor test from the Fourth Circuit for determining whether personalized messages on license plates constituted private speech or state speech. 515 F.3d at 965 (adopting the four factor test that was used in *Planned Parenthood of S.C. v. Rose*, 361 F.3d 786 and rejected by the Sixth Circuit in *ACLU v. Bredesen*, 441 F.3d 370). The *Stanton* Court found that more factors weighed in favor of finding such messages to be private speech with the message attributable to the vehicle owner, not the state. 515 F.3d at 965-69. As noted above, Appellant ignores *Stanton*: it does not address or dispute the application of the four factor test in *Stanton* set forth in ACLUN's amicus brief. (Amicus brief, 3-11.)

In a limited public forum, the government may restrict the content of speech so long as the restrictions are "viewpoint neutral and reasonable." *Hopper v. City of Pasco*, 241 F.3d at 1075. The issue in this case in not *what* speech the DMV can prohibit, but *how* they prohibit it. The DMV may regulate the content of speech on both vanity plates and specialty plates; however, these restrictions must be clearly and concisely articulated so that when someone applies for a vanity plate, the DMV official in charge of approving the plate can simply look at the regulations and know exactly what is not allowed. There can be no "gray area" in which the employee's personal feelings can sway a decision. The provision must not give the employee unfettered discretion to impose his or her viewpoint on the matter. Such provisions, as discussed below, are presumptively unconstitutional when they operate as a prior restraint on speech.

In sum, Mr. Junge's "HOE" vanity plate is a limited public forum and while the DMV can regulate the content on his license plate, it must do so in a manner that does not permit viewpoint discrimination. As discussed below, the DMV Regulation used to deny Mr. Junge's license plate does not pass constitutional muster precisely because it provides DMV officials with unfettered discretion to censor speech and is thus facially unconstitutional.

2. The DMV's Vanity Plate Approval Process Constitutes A Prior Restraint And Is Unconstitutional Because It Creates The Possibility For Viewpoint Discrimination.

Any government regulation that makes the ability to engage in protected expression contingent upon getting permission from the government before speaking constitutes a prior restraint, and such restraint comes "bearing a heavy presumption against it constitutional validity." *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546, 558 (1976); *Johanson v. Eighth Judicial Dist. Court of State of Nev. ex rel. County*, 182 P.3d 94, 98 (Nev. 2008) ("Prior restraints are subject to strict scrutiny" citing to *Levine v. U.S. Dist. Ct for C. Dist. of Cal.*,764 F.3d 590 (9th Cir. 1985). "We adopt this standard."). In Nevada, a vehicle owner must apply for a vanity plate and must comply with the formatting and content restrictions listed in the DMV Regulation before the DMV will grant the plate. The vanity plate message, along with an explanation of its meaning must be submitted for review before it will be granted. *See* http://www.dmvnv.com/pdfforms/sp66.pdf for a copy of the vanity plate application form. In other words, a vehicle owner must obtain DMV approval before he or she can display personalized speech on a vanity plate. Thus, the content restrictions in the DMV Regulation operate as a prior restraint on speech in a limited public forum.

When a regulation requires a speaker to apply for permission prior to engaging in speech, there must be specific standards regarding what speech is allowed so that those persons

entrusted with granting permission do not have unbridled discretion. *Cox v. State of Louisiana*, 379 U.S. 536, 557 (1965). If a regulation is vague, ambiguous, or imprecise, or a term is not clearly defined, then the employee must use his judgment as to what it means, and this creates the possibility for viewpoint discrimination. *Id.* at 557. Because of the inherent risk of censorship, any prior restraint which grants unfettered discretion to state officials to engage in viewpoint discrimination is facially unconstitutional. *Id.* at 557-58.

The U.S. Supreme Court has repeatedly stated that "[a]ny system of prior restraint" bears "a heavy presumption against its constitutional validity." *FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215, 225 (1990) (quoting *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546, 558 (1975). This is because of the very real possibility that the prior restraint scheme will be used to support certain content and to stifle less favored material. *See, e.g., City of Lakewood v. Plain Dealer Publishing Co.*, 486 U.S. 750 (1988) (city ordinance giving mayor unfettered discretion over whether to grant or deny applications to place newsracks on public property was unconstitutional prior restraint on speech because no standards existed to govern the decision).

Even in a limited public forum, such as the one created by the DMV's vanity plate program, a prior restraint on speech is still subject to heightened scrutiny. *See e.g., Planned Parenthood of Southern Nevada, Inc. v. Clark County School Dist.*, 941 F.2d 817, 834 n.7 (9th Cir. 1991) (noting in the dissent that the U.S. Supreme Court in *Southeastern. Promotions, Ltd. v. Conrad*, 420 U.S. 546 had applied heightened scrutiny to a prior restraint on speech in a limited public forum).

The approval process set forth in the DMV Regulation constitutes a prior restraint on private speech because any vanity plate application must comply with these restrictions before the DMV will issue the plate. A DMV official is tasked with applying the restrictions to all

vanity plate applications. While the DMV can permissibly regulate content by using a prior restraint system, they must set standards that are specific enough to prevent DMV employees from having unfettered discretion to deny a plate based his own personal feelings about the plate's message. As discussed below, the DMV Regulation, which prohibits any message "determined by the Department to be inappropriate," is facially unconstitutional because it gives DMV officials the unrestrained ability to deny messages that they personally believe are inappropriate.

Appellant's argument that Mr. Junge had his "HOE" plate for six years before it was revoked does not negate the fact that the DMV's vanity plate application process still functions as a prior restraint on speech. (Response, 15:6-15.). The fact that Mr. Junge's application passed through the prior restraint system the first time does not mean that we are no longer dealing with a prior restraint regulation. Furthermore, the same regulations that are used to prevent a vanity plate message from ever being displayed are the same regulations that are used to revoke a plate once it has been issued or to deny the renewal of a plate. Thus, whether the provisions grant unfettered discretion to discriminate on viewpoint now or later is irrelevant.

3. Because The DMV Regulation Allows The DMV To Reject Speech It Determines To Be "Inappropriate", The Regulation Is A Facially Unconstitutional Prior Restraint On Speech.

The DMV Regulation sets forth content restrictions for vanity plates:

6. No combination of letters, numbers or spaces is allowed if it:
   (a) Creates confusion with any combination on other license plates.
   (b) Expresses contempt, ridicule or superiority of:
      (1) Race;
      (2) Ethnic heritage;
      (3) Religion;
      (4) Gender; or
      (5) Political affiliation.
   (c) Contains any connotation that is sexual, vulgar, derogatory, profane or

obscene.
(d) Contains a direct or indirect reference to a:
(1) Drug or drug paraphernalia; or
(2) Gang.
(e) Makes a defamatory reference to a person or group.
(f) *Is determined by the Department to be inappropriate.*

NAC 482.320(6) (emphasis added),

Subsection 6(f) of the DMV Regulation allows the DMV to prohibit anything it determines to be "inappropriate" in addition to the specific types of content that sections 6(a)-(e) prohibit. The "inappropriate" provision is likely meant to serve as a catch-all, but it also serves as a vehicle for viewpoint discrimination, because "inappropriate" is a vague term and is not defined in the DMV Regulation. It gives DMV officials unfettered discretion to discriminate against vanity plate messages based on viewpoint.

The term "inappropriate" does not provide adequate guidance and is in essence a circular definition: the DMV uses the word "inappropriate" as a factor to determine what is inappropriate, but never gives a definition of "inappropriate." This leaves the term open to interpretation by DMV officials and gives them unfettered discretion to apply it in a manner that discriminates based on viewpoint. This necessarily violates the Constitution and renders the DMV Regulation facially unconstitutional. This is similar to the unconstitutional city ordinance in *City of Lakewood* which gave the mayor unfettered discretion over whether to grant or deny applications to place newsracks on public property because, like the mayor in *City of Lakewood*, the DMV official could use the "inappropriate" restriction to grant or deny applications based on his own personal opinion. *See also Cox v. State of Louisiana*, 379 U.S. 536 at 557-58 (finding unconstitutional a city ordinance which had no standards for permitting parades or demonstrations other than by "arrangements made with officials" because the "lodging of such broad discretion in a public official allows him to determine which expressions of view will be

permitted... It is clearly unconstitutional to enable a public official to determine which expressions of view will be permitted and which will not...").

Appellant does not and cannot refute this position. Its argument that what is at issue in this case is not unconstitutional rings hollow. Appellant relies on *Perry v. McDonald*, 280 F.3d 159 (2d Cir. 2001) (Response, 8:19 – 9:16) for the proposition that the DMV can, despite the clear authority to the contrary, revoke plates it determines to be "inappropriate," but *Perry* is distinguishable because the revocation examined in that case was supported by clear standards.

In *Perry*, the court did find that there was no impermissible viewpoint discrimination at issue when Vermont revoked a "SHTHPNS" plate for being "offensive." However, the court's reasoning was not, as appellant argues, because the prohibition of "offensive" terms is viewpoint neutral, but rather *because the state had crafted a detailed, clear cut guidelines regarding content* it deemed "offensive" and "scatological terms" was listed as one of the many types of offensive content. (See Amicus Brief at 14, or *Perry*, 280 F.3d at 172, n.9 for the detailed list of content restrictions.) In *Perry*, unlike here, the individual DMV employees did *not* have unfettered discretion, and that was why the scheme passed constitutional scrutiny. The *Perry* court explained that "while [the code] grants the state the power to revoke 'offensive' or 'confusing' vanity plates, the regulation limits this discretion by specifying content..." *Id.* at 172. Unlike Nevada, Vermont did not use the word "offensive" to define "offensive" and did not use an offensive catch-all provision at the end of the regulation to prohibit the plate.

The two other cases cited by Appellant, *Kahn v. Dept. of Motor Vehicles*, 20 Cal. Rptr.2d 6 (Cal. Ct. App. 1993) and *Katz v. Dept. of Motor Vehicles*, 108 Cal. Rptr. 424 (Cal. Ct. App. 1973) (Response, 9:18, 10:17), are nonbinding California state cases that predate *Stanton* and were distinguished by the Ninth Circuit in that decision. *See Stanton*, 515 F.3d at 965

(disagreeing with *Kahn* that specialty plates constitute primarily government speech). As discussed above, *Stanton* clearly held that (1) privately crafted messages on license plates are expressive speech not expressive conduct; (2) the messages are attributable to the person, not the state; and (3) that by allowing the public to put certain messages on license plates, the state has opened a once non-public forum into a limited public forum. 515 F.3d at 968, 971.[5]

Appellant's reliance on *Higgins v. Driver and Motor Vehicle Services Branch,* 72 P.3d 628 (Or. 2003) (Response, 11:7-25) is similarly misplaced. In that case, the request for a "INVINO" "VINO" and/or "WINE" plate was denied because these were words for alcohol and fell within the clearly defined prohibition against "drug related words." *Id.* at 630-31. There was no vague "inappropriate" nor "offensive" standard at issue. Furthermore, the *Higgins* court, in 2003, found the vanity plate to be a nonpublic forum with the message attributable to the state, not the individual. *Id.* at 489, 490-91. Again, Appellant is citing to a state case that is

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[5] In *Katz v. Dept. of Motor Vehicles*, 108 Cal. Rptr. 424 (Cal. Ct. App. 1973), the California appellate court ruled that the DMV could deny an "EZ LAY" plate based on the vague standard of "offensive to good taste and decency" because the court ruled that messages on licenses plates were "expressive conduct" rather than "speech per se" and not entitled to the same level of First Amendment protections. *Id.* at 426. The *Katz* court applied the standard enunciated in *U.S. v. O'Brian*, 391 US 367 (1968) which holds that a sufficiently important governmental interest in regulating conduct can justify incidental limitations on First Amendment freedoms. *Id.* at 426-27. The *Katz* court further found the plates to be a nonpublic forum. *Id.* at 428. Thus by holding the plates to be a expressive conduct in a nonpublic forum, the *Katz* court was able to rule that the vehicle owner's "First Amendment rights, if any in fact exists, is at best negligible and incidental." *Id.* at 427. *Kahn v. Dept. of Motor Vehicles*, 20 Cal. Rptr.2d 6 (Cal. Ct. App. 1993) followed the reasoning in *Katz* almost word for word, and ruled that vanity plates were a nonpublic forum and a sufficiently important governmental interest could justify almost any limitation on First Amendment freedoms. *Id.* at 10. Appellant tries to argue that because the vague term of "offensive" was constitutional in *Kahn* and *Katz* last century, that Nevada's DMV use of the undefined term "inappropriate" should also be constitutional because "there is really no difference in stating a plate is 'offensive' or stating a plate is 'inappropriate'." (Response, 12:11-12.) What Appellant has actually just demonstrated is that the term "inappropriate" has no set meaning because it can be substituted with other vague terms.

now at odds with the Ninth Circuit's 2008 ruling in *Stanton*, which found messages on plates to be attributable to the individual and implicated some First Amendment protections.

Finally, it is simply irrelevant to the issues in this case that the Iowa Supreme court in *McMahon* (cited by Appellant at Response, 10:26) found the use of a slang dictionary to be "reasonable" when determining whether the "3MTA3" tag was "sexual in connotation." *McMahon v. Iowa Dept. of Trans.* 522 N.W.2d 51 (Iowa 1994). *McMahon* dealt with a due process challenge over procedures for reviewing a plate once it fell within a prohibited content category, not whether the content category itself allowed for unfettered discretionary application. The present case is about the vague standard which allows the DMV to deny anything "determined by the Department to be inappropriate" pursuant to NAC 482.320(6)(f), not how the DMV special plate committee reviews plates that may fall within this nebulous category of 6(f).

4. The DMV Used The Vague "Determined To Be Inappropriate" Standard To Revoke Mr. Junge's Vanity Plate.

Appellant now argues that the Mr. Junge's "HOE" plate could possibly have been denied under other content restrictions such as NAC 482.320(6)(b)(4) (expressing contempt of gender); 6(c) (any connotation that is sexual, vulgar, derogatory, profane or obscene); or 6(e) (a defamatory reference to a person or group, (Response, 14:6-7). However, the record clearly shows that DMV did not rely on these other content restrictions to revoke the "HOE" plate.

The record shows that the DMV, the attorneys, the Administrative Law Judge, and the district court, were all discussing the use of the "deemed to be inappropriate standard" to revoke the HOE plate. NAC 482.320(6)(f) allows the DMV to deny anything "determined by the Department to be inappropriate." In the Administrative Law Judge's Findings of Fact and

Conclusions of Law and Decision, Sept. 18, 2006, the Administrative Law Judge rules as a Conclusion of Law that NAC 482.320 allows the DMV to prohibit any personalized plate "determined by the Department to be inappropriate." This is the vague and ambiguous standard of "inappropriate" under 6(f). The Administrative Judge's decision never mentions any prohibition against expressing contempt of gender or that the "HOE" plate contained a sexual, vulgar or derogatory connotation or that the plate made a defamatory reference.

The facts of this case are nearly identical to those of *Lewis v. Wilson*, 253 F.3d. 1077 (8th Cir. 2001) which Appellant tries to distinguish. (Response, 16: n. 17) In *Lewis*, a law allowing Missouri officials to deny any plate that was "against public policy" or "inflammatory" was ruled unconstitutional because it gave officials nearly unfettered discretion in deciding what to accept and reject. *Id.* at 1080. This was true because neither the "against public policy" nor the "inflammatory" restriction was defined or explained and therefore nothing prevented state employees from using these provisions to discriminate based on viewpoint. *Id.* As the court explained: "A public official with even marginal creative ability could frequently invent a 'public policy' basis for rejecting a plate containing a message with which he or she disagreed." *Id.* at 1081. The same is true in the present case. Nevada law allows the DMV to prohibit inappropriate content, and while NAC 482.320(6)(a)-(e) may arguably include clearer guidelines about what content may be banned, 6(f) renders any clarity meaningless because it prohibits anything determined by the Department to be inappropriate.

Any DMV employee tasked with reviewing vanity plate applications can hazard a guess as to what might be inappropriate and exercise his authority according to his own notions of inappropriateness. The fact that Appellant is arguing that 6(f) can be interchangeable with 6(b)(4), 6(c) and 6(e) proves that the term "inappropriate" is vague, open to interpretation by

DMV employees, and therefore creates the possibility for impermissible viewpoint discrimination. Further, and more to the point, even if a plate request is not impermissible under the other provisions, a DMV employee could use his or her wild card ability to censor it under 6(f). While it is arguable that some of the provisions in 6(c) are vague and may allow for discretionary application, none of the restrictions in 6(a)-(e) were used to revoke Mr. Junge's "HOE" vanity plate; therefore, the ACLU has refrained from discussing them.

Finally it is worth pointing out that, contrary to Appellant's suggestion, viewpoint discrimination is not limited to discriminating against the speaker's view. (See Response, 13:6-17, arguing that DMV could not have discriminated based on viewpoint because Mr. Junge "does not even seem set on what his view might be".) This is nonsensical: the DMV clearly believed that Mr. Junge was expressing something – something offensive enough to censor.

5. Creating Regulations Pursuant To A Statutory Grant Of Authority Does Not Automatically Make The Regulations Constitutional.

Without any legal authority, Appellant argues that because the State of Nevada permits the DMV to regulate the content on vanity plates, and because DMV created such content regulations, that the regulation can include anything. (See Response, subsection B, part 3.) However, the statutes which authorize the DMV to regulate vanity plates simply put the burden on the DMV to develop content regulations that are in "compliance with all applicable laws" including the U.S. and Nevada constitutional provisions regarding speech restrictions. *See* Nev. Rev. Stat. 482.3669, 482.3667(5). Arguing that the DMV content regulations are reasonable and content neutral simply because they were created pursuant to a state law is like arguing that the tail can wag the dog.

D. The Trial Court Did Not Abuse Its Discretion By Reversing The Decision Of The Administrative Law Judge.

NRS 233B.135 authorizes judicial review of an administrative court decision and states in relevant part:

> 3. The court shall not substitute its judgment for that of the agency as to the weight of evidence on a question of fact. The court may remand or affirm the final decision or set it aside in whole or in part if substantial rights of the petitioner have been prejudiced because the final decision of the agency is:
>
> (a) In violation of constitutional or statutory provisions;
> (b) In excess of the statutory authority of the agency;
> (c) Made upon unlawful procedure;
> (d) Affected by other error of law;
> (e) Clearly erroneous in view of the reliable, probative and substantial evidence on the whole record; or
> (f) Arbitrary or capricious or characterized by abuse of discretion.

The Administrative Law Judge ruled as a conclusion of law that under NAC 482.320 the DMV has authority to prohibit any personalized license plate that is "determined by the Department to be inappropriate" as well as any plates that *may* be offensive or inappropriate. (DMV App. p. 72, Findings of fact, conclusions of law and decision, Sept. 18, 2006). Determining whether the "HOE" license plate met the standard of "inappropriate" under NAC 482.320(6)(f) was a question of statutory interpretation because the judge had to decide whether the law applied to the facts; therefore the District Court was permitted to review the Administrative Law Judge's decision *de novo* pursuant to NRS 233B.135(3)(d).

The ALCU is arguing that the DMV Regulation prohibiting any message "determined by the Department to be inappropriate" is facially unconstitutional, therefore, the Administrative Court's decision is arguably reversible under either NRS 233B.135(3)(a) or (3)(b).

Appellant argues that deciding whether the word "HOE" is inappropriate or not is question of fact. (Response, 17:10-12). On questions of fact, the reviewing court should not

substitute its own judgment for that of the agency; however, "independent appellate review of an agency decision, rather than a more deferential standard of review, is appropriate when the agency's decision rests on questions of law." *Diamond v. Swick,* 117 Nev. 671, 674; 28 P.3d 1087, 1089 (2001). The construction of a statute is a question of law, subject to review *de novo* by the Court under NRS 233B.135(3)(d). *State Dept. of Motor Vehicles v. Lovett*, 110 Nev. 473, 476; 874 P.2d 1247, 1249 (1994); *State Dept. of Motor Vehicles v. Terracin*, 125 Nev. 4, __P.3d __ (2009).

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IV. CONCLUSION

By allowing individuals to place personally crafted messages on Nevada license plates, the state has created a limited public forum. In this forum, the state can regulate content as long as such regulations are viewpoint neutral and reasonable. The DMV regulation requires vanity plate messages to be review by the DMV to verify that they comply with certain content restrictions before the DMV will issue the plate. This creates a prior restraint on speech and, because such restraints create the possibility for viewpoint discrimination, they are subject to heightened scrutiny. If a prior restraints is vague enough to permit a state official the discretion to discriminate based on view point, then it is facially unconstitutional. The DMV Regulation at issue in this case does just that. By prohibiting any message that is "determined by the Department to be inappropriate" the state has given DMV officials unfettered discretion to discriminate based on viewpoint because the standard for inappropriateness is vague and subject to personal opinion. The DMV regulation is unconstitutional on its face and Mr. Junge's free speech rights have been violated.

Dated this the 11th Day of February, 2009.

Respectfully Submitted By: _____

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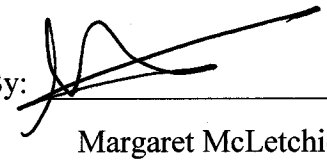
CERTIFICATE OF COMPLIANCE

I, Margaret McLetchie, hereby certify that I have read this entire appellate brief, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular N.R.A.P. 28(e), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page of the transcript or appendix where the matter relied on is to be found. I understand that I may be subject to sanctions in the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

Dated this 11th day of February, 2009.

By: 

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CERTIFICATE OF SERVICE

I certify that on the 11th day of February, 2009, I served a copy of the Amicus Curiae ACLU of Nevada's Amicus Brief, on all parties by mailing, postage prepaid, a true copy thereof, addressed to:

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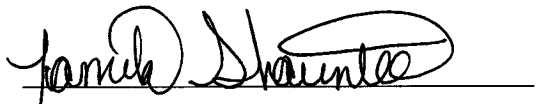

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