SUPREME COURT
OF THE STATE OF NEVADA

Case No. 49350

STATE OF NEVADA, DEPARTMENT OF MOTOR VEHICLES,

Petitioner,

v.

WILLIAM JUNGE,

Respondent.

FILED

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Brief of invited Amicus Curiae American Civil Liberties Union of Nevada

APPEAL FROM THE EIGHT JUDICIAL DISTRICT COURT

DISCTRICT COURT CASE No. A529007

Allen Lichtenstein
General Counsel
ACLU of Nevada
NV Bar No. 3992
3315 E. Russell Rd., #222
Las Vegas, NV 89120
Phone: (702) 433-2666
Fax: (702) 433-9591

Lee Rowland
Staff Attorney
ACLU of Nevada
NV Bar No. 10209
1325 Airmotive Way,
Suite 202
Reno, NV 89502
Phone: (775) 786-1033
Fax: (775) 786-0805

Maggie McLetchie
Staff Attorney
ACLU of Nevada
NV Bar No. 10931
732 South 6th St.
Suite 200A
Las Vegas, NV 89101
Phone: (702) 366-1902
Fax: (702) 366-1331

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I. STATEMENT OF INTEREST

Pursuant to the Nevada Supreme Court's June 13, 2008 order inviting its Amicus Curiae participation in the above-captioned case, the American Civil Liberties Union of Nevada (ACLU of Nevada) respectfully submits this brief.

II. INTRODUCTION

The fundamental issue in this case involves whether the unbridled discretion that the DMV exercises regarding the approval or denial of personalized expression contained in individualized license plates violates the First Amendment to the United States Constitution. It is the view of amicus, the ACLU of Nevada, that it does. The specific issue concerns Plaintiff/ Respondent William Junge's desire to continue to display the personalized license plate containing the word "HOE", and the DMV's conclusion that the word is "inappropriate."

The particular constitutional concern for the ACLU is the process of determining "inappropriate" content. The process is, in fact, totally discretionary. A content-based regulation on protected expression, such as the instant case, where a governmental official must approve the expression in question is a prior restraint, invoking strict constitutional scrutiny. Such unfettered discretion involving the approval process cannot withstand such constitutional analysis.

NAC 482.320(6)(f) permits the DMV to revoke or refuse to issue or renew any plate "determined by the Department to be inappropriate." The DMV determined that the word "HOE" on Petitioner's license plate was inappropriate. Thus, it prohibited Mr. Junge from renewing his plates thereby denying his continued use of them. Mr. Junge appealed that denial.

This case does not turn on the definition of the word "hoe," but rather on the constitutional issues concerning the unbridled discretion a state employee has to determine what is "inappropriate" in the absence of guidelines or standards for determining inappropriateness. The DMV code that allows officials to prohibit plates "determined by the Department to be inappropriate" is inherently problematic because, on its face, it leaves determination as to "appropriateness" within the individual unfettered discretion of DMV employees.

The U.S. Supreme Court and the Ninth Circuit Court of Appeals make clear that people have certain free speech rights with respect to personalized license plates. The First Amendment does not allow arbitrary determinations of "offensiveness" by state officials to trump those rights.

III. FACTUAL AND PROCEDURAL HISTORY

The facts in this case are not in dispute. In 1999, Plaintiff/Respondent William Junge, applied for and was granted personalized prestige license plates with the letters "HOE" from the Nevada Department of Motor Vehicles ("DMV"). He put them on his 1999 Chevrolet Tahoe and renewed them every year without incident until 2006, when Mr. Junge went to the DMV office on 2701 E. Sahara Avenue to renew the plates. (DMV Appendix p. 4 ll. 1; DMV App. p. 6, ll. 4-28). He and the DMV employee handling the renewal had difficulty getting along and the employee later brought the plates to the attention of her supervisor, Betty Shaw. (DMV App. p. 3-4). Ms. Shaw sent several emails to members of the Special Plate Committee regarding the plate, stating in one of them: "Would everyone please vote on recalling the personalized plate, HOE! This is very derogatory." (DMV App. p. 54-56, petitioner's exhibit D).

On April 7, 2006, Ms. Shaw sent Junge 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). The letter further stated "you will have to order something entirely different ... if you want to have personalized plates." *Id.*

On appeal to Administrative Law Judge Toni Boone, Ms. Shaw testified "It was derogatory, that's how we looked at it." (DMV App. p. 11, Transcript of Administrative Hearing, Aug. 8, 2006). She also testified that the Urban Dictionary was the only criteria used to determine whether a word was appropriate. (*Id.* at p. 7).

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). Mr. Junge appealed.

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

IV. REVOCATION OF JUNGE'S PERSONALIZED LICENSE PLATE UNDER NAC 482.320(6)(F), PROHIBITING PLATES DEEMED "INAPPROPRIATE" BY THE DMV, VIOLATES FIRST AMENDMENT FREE SPEECH RIGHTS BECAUSE IT GIVES UNFETTERED DISCRETION TO DMV EMPLOYEES TO RESTRICT SPEECH.

The United State Supreme Court made clear that license plate messages implicate the First Amendment rights of the vehicle owner. *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). Following *Wooley*, numerous federal and state courts have ruled that

personalized messages on state-issued license plates constitute private speech on governmental property. Just as car owners have the right to *not* express a message for the state, they also have the affirmative right to free expression whenever states allow personalized plates.

By allowing the public to obtain personalized license plates displaying private messages, Nevada has created a limited public forum in which certain First Amendment free speech protections apply. NAC 320(6)(f) is unconstitutional on its face because it provides unfettered discretion to state employees to restrict the speech on personalized plates, thus creating the opportunity for impermissible viewpoint discrimination.

a. Messages displayed on personalized and specialized license plates constitute private speech on government property.

In 1977, *Wooley* established that messages on license plates may be considered speech by the vehicle owner. 430 U.S. at 715. In 2008, the Ninth Circuit Court of Appeals held that privately crafted messages on specialized license plates[1] constitute primarily private speech – while retaining some governmental speech aspects for vehicle registration purposes – with the plate's message being attributable to the vehicle owner, not the issuing state. *Arizona Life Coalition v. Stanton*, 515 F.3d 956 (9th Cir. 2008). In *Stanton*, a pro-life coalition applied for a special organizational license plate design that would display the organization's logo, images of two children, and the motto "Choose Life." Although the coalition qualified for the plate under state law, the state denied the application because it feared the general public would think the state was endorsing the motto. *Id.* at 961.

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[1] In Nevada, a vanity or prestige plate is a license plate bearing a combination of letters and/or numbers created by the vehicle owner rather than chosen randomly by the DMV. A specialty plate is a plate displaying a background, color scheme, and logo different from the standard-issue license plate. The specialty plate may display specially chosen letter and number combinations or state-selected random combinations. In Arizona, certain organizations may apply for special organizational plates which are designed by the organization and may be displayed by members of the organization in lieu of the standard state plate. NV offers specialty plates as well; however this case deals with personalized prestige plates which are plates of any design on which the vehicle owner may craft a personalized message.

To determine whether messages on specialty plates are private or governmental speech, and thus whether First Amendment protections apply, the Ninth Circuit adopted a four-factor test examining: (1) the "central purpose" of the program in which the speech occurs; (2) the degree of "editorial control" exercised by the government or private entity over the content of the speech; (3) the identity of the "literal speaker"; and (4) whether the government or the private entity bears the "ultimate responsibility" for the content of the speech. *Id.* at 964-65. Based on the rule adopted in *Stanton*, license plate messages created through Nevada's personalized prestige plate program also qualify as private speech.

i. The "Central Purpose" of the Program in Which the Speech Occurs

In *Stanton*, the court rejected the state's contention that the purpose of the specialty plate program was merely to identify the vehicle (something done through standard plates) and found that the purpose behind the specialty plates was to offer private entities the opportunity to identify themselves through individualized messages. Additionally, both the state and the organization requesting the plate benefit from the $25 fee charged when someone chose that plate. Based on this, the court concluded that the "central purpose" of the program was to raise state revenue by offering a chance for expressive private speech on license plates. *Id.* at 966.

Like Arizona, Nevada's plate program allows privately crafted messages to be placed on state-issued license plates for an initial fee of $36 and an annual renewal fee of $20. *See,* http://www.dmvnv.com/platespersonalized.htm#Personalized (*last visited Sept. 18, 2008).* The messages on personalized Nevada plates do more than just identify the vehicle; they tell the public something about the vehicle owner and thus constitute private rather than governmental speech. The small variations between the Arizona's plate program and Nevada's plate program are irrelevant because the central purpose behind both Arizona's and Nevada's plate program is

the same: raising money from extra fees for personalized plates bearing individualized messages.

ii. The Degree of "Editorial Control" Exercised By the Government or Private Entities Over the Content of the Speech

In *Stanton*, the court found the state's "de minimis" control over a plate's appearance and content did not rise to the level of "editorial control" required to constitute government speech. *Id.* at 966. The state could determine whether the coalition met the requirements for a plate, it could reject any plate message that promoted a specific religion, faith, or antireligious belief, and it could limit the plate's design and color scheme. *Id.* The state could not reject or modify the "Choose Life" motto regardless of how the state felt about it, because the motto did not violate any of the state's restrictions. *Id.* The motto was private speech rather than government speech because the substantive message originated from a private entity and, because it complied with the prohibitions on content, the state could not change or delete it. *Id.*

Similarly, Nevada's control over the content of messages displayed on personalized prestige plates is limited to the restrictions in NAC 482.320(6), which provides that:

> 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.***[2]

[2] A latter section of this brief will establish that NAC 482.320(6)(f) is facially unconstitutional.

Like Arizona, Nevada's plate regulations contain some formatting and content restrictions. However, once the individual requesting the plate has satisfied these requirements, the Nevada DMV cannot reject the plate simply because it disapproves of the message. If the message complies with the above requirements, the DMV must grant the plate regardless of how unpopular, ridiculous, or nonsensical the message may be. Therefore, the vehicle owner has more editorial control over the message than the DMV, thus making the message private rather than governmental speech.

iii. The Identity of the "Literal Speaker" of the Contested Speech

In *Stanton*, the court regarded the state's ownership of the specialty plates as a valid consideration of whether the plates are governmental speech; however, it gave more weight to the Supreme Court's ruling in *Wooley v. Maynard,* 430 U.S. 705, and concluded that the private coalition was the literal speaker of the "Choose Life" message on the license plate because the public would associate the plate's message with the vehicle owner's views on abortion. 515 F.3d at 967. In *Wooley*, the Supreme Court found that 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 vehicle disagreed. 430 U.S. at 715.

Subsequent cases involving specialized or personalized plates have relied on *Wooley* to find that such messages are private speech on governmental property because the message is attributed to the vehicle owner. *See e.g., Perry v. McDonald,* 280 F.3d 159, 166 (2d Cir. 2001) (a restriction on vanity plates that might be "offensive or confusing to the general public" is government regulation of private individuals' speech on government-owned property); *Planned Parenthood of South Carolina, Inc. v. Rose*, 361 F.3d 786, 794 (4th Cir. 2004) ("The literal speaker of the [ ] message on the specialty plate therefore appears to be the vehicle owner, not

the State, just as the literal speaker of the bumper sticker message is the vehicle owner, not the producer of the bumper sticker."); *Lewis v. Wilson,* 253 F.3d 1077, 1079 (8th Cir. 2001) (a restriction prohibiting vanity plates that were "contrary to public policy" is an unconstitutional restriction on private individuals' speech); *Women's Emergency Network v. Bush*, 323 F.3d 937, 946-47 (11th Cir. 2003) ("We fail to divine sufficient government attachment to the messages to permit a determination that the messages represent government speech"); *Sons of Confederate Veterans v. Commissioner of the Virginia Dept. of Motor Vehicles*, 288 F.3d 610, 621 (4th Cir. 2002) (special plates showing confederate flag constitute private speech).

iv. Whether the Government or the Private Entity Bears the "Ultimate Responsibility" for the Content of the Speech

In *Stanton*, the court found that the private coalition was ultimately responsible for the content of the speech, thus making it private speech because the private coalition bore the burden of taking the affirmative steps of applying for the plate and conforming to state-mandated plate requirements. 515 F.3d at 968. First, the private coalition controlled the message and individual members could choose whether or not to purchase the plates and thus adopt the message as their own. Secondly, Arizona had no intention of adopting the messages, and creating a special plate with the "choose life logo" did not amount to state endorsement of the message. *Id.*

Similarly in Nevada, if an individual wishes to place a personalized message on a license plate, he must submit an application, pay the extra fee, and comply with all constitutional limitations under NAC 482.320. The individual chooses the message and the state cannot force him to accept an altered or different message. Finally, the state is under no obligation to adopt the messages as state approved speech. Therefore the vehicle owner bears the ultimate responsibility for the personalized message displayed on his license plate.

In conclusion, a personalized message on a license plate is clearly expressive speech by the vehicle owner; therefore, Nevada's personalized prestige plate program, which allows personalized messages on license plates, amounts to constitutionally-protected speech by the vehicle owner. Restrictions on protected expression, such as those appearing in NAC 482.320(6), are thus content-based restrictions on fully-protected expression.

b. When a state allows individuals to craft - under limited restrictions - personalized license plates, it has created a Limited Public Forum and must abide by certain First Amendment standards for regulating speech.

In a First Amendment claim relating to private speech on government property, the extent to which the government may limit speech depends on whether the forum is public or nonpublic. *Sammartano v. First Judicial Dist. Court,* 303 F.3d 959, 965 (9th Cir. 2002). The categories of government-run fora run the spectrum from public to nonpublic. At the "traditionally public" end of the spectrum are areas, such as streets and parks, which have historically been held open for public speech. *Perry Education Association v. Perry Local Educators' Association,* 460 U.S. 37, 44-45 (1983). On the "traditionally nonpublic" end of the spectrum are those government properties, such as court rooms, that have never been open for public speech, nor designated by the government for use as such. *Id.* at 46. In between these two extremes are limited public fora,[3] which are created when the government intentionally opens a nonpublic forum to limited expressive activity by a certain class of speakers or for certain topics. *Cogswell v. City of Seattle,* 347 F.3d 809, 814 (9th Cir. 2003).

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[3] In the Ninth Circuit, a limited public forum should not be confused with a "designated public forum." A designated public forum is created when the government intentionally allows expressive public speech in a nonpublic forum with "virtually unlimited restrictions" on speech content or speaker identity. *Hopper v. City of Pasco*, 241 F.3d 1067, 1075-1079 (9th Cir. 2001). In a designated public forum, restrictions must be both content and viewpoint neutral and must serve a compelling governmental interest. *Id.* In a limited public forum, speech content may be restricted by predetermined and consistently-enforced regulations, so long as the restrictions are viewpoint neutral and reasonable. *Id.*

In *Stanton*, the Ninth Circuit concluded that Arizona license plates had historically served the purely governmental function of vehicle identification and had been a nonpublic forum; however, once Arizona began allowing private entities access to license plates for expressive conduct, the state created a limited public forum subject to the First Amendment. 515 F.3d at 969. *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").

The *Stanton* court stopped short of finding Arizona's specialty plate program to be a public forum or a designated public forum because Arizona retained some substantive control over the plates' content and could limit the forum to certain groups (nonprofit organizations) and certain topics (no specific religions or antireligious sentiment). Furthermore, the specialized plates were granted only after a successful application process; therefore the plate program was not "open for indiscriminate use" and fell into the limited public forum category. 515 F.3d at 969.

Nevada's personalized prestige plate program also creates a limited public forum because the state took affirmative steps to open up a once nonpublic forum –license plates – to limited use by certain people. NRS 482.3667(2) limits the forum to certain groups (privately owned vehicles) and NAC 482.320 requires the vehicle owner to submit an application and comply with certain formatting and content regulations. Therefore, Nevada's personalized plate program is a limited public forum and must comply with First Amendment requirements regarding restrictions on speech in the forum.

c. NAC 482.320 constitutes prior restraint on private speech, and subsection (6)(f) of this regulation is facially unconstitutional because it grants unfettered discretion to state officials to restrict speech.

The government may restrict speech in a limited public forum so long as the restrictions are "viewpoint neutral and reasonable." *Hopper v. City of Pasco*, 241 F.3d 1067, 1075 (9th Cir. 2001). 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 government officials entrusted with granting permission do not have unbridled discretion. *Cox v. State of Louisiana*, 379 U.S. 536, 557 (1965) (finding unconstitutional a city ordinance requiring prior permission from city officials before any parade because "the ordinance provides no standards for the determination of local officials as to which assemblies to permit or which to prohibit....[T]he lodging of such broad discretion in a public official allows him to determine which expressions of view will be permitted and which will not.").

Nevada's personalized prestige plate program requires vehicle owners to submit an application for a personalized plate and the plate's message must comply with the formatting and content restrictions listed in NAC 482.320 before the owner can receive the plate. In other words, a vehicle owner must obtain DMV approval before he or she can display personalized speech on a license plate. The restrictions in NAC 482.320(6) constitutes prior restraint on private speech and must therefore set standards that are specific enough to prevent DMV employees from having unfettered discretion.

A prior restraint exists when the enjoyment of protected expression is contingent upon the approval of government officials. *Near v. Minnesota*, 283 U.S. 697, 713 (1931). A scheme that makes the ability to engage in constitutionally protected expression contingent upon having permission from the government, or its designee, constitutes a prior restraint. *See, Freedman v. Maryland*, 380 U.S. 51, 58 (1965); *FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215, 227 (1990).

Unfettered discretion on the part of governmental agencies is an impermissible prior restraint. *City of Lakewood v. Plain Dealer Publishing Co.*, 486 U.S. 750, 770 (1988):

> The city asks us to presume that the mayor will deny a permit application only for reasons related to the health, safety, or welfare of Lakewood citizens, and that additional terms and conditions will be imposed only for similar reasons. This presumes the mayor will act in good faith and adhere to standards absent from the ordinance's face. But this is the very presumption that the doctrine forbidding unbridled discretion disallows. *E.g., Freedman v. Maryland*, 380 U.S. 51 (1965).

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)); *Freedman v. State of Maryland*, 380 U.S. 51, 57 (1965); *Vance v. Universal Amusement Co.*, 445 U.S. 308, 315-16 (1980); *Carey v. Brown*, 447 U.S. 455, 461-63 (1980); *Lovell v. Griffin*, 303 U.S. 444, 451-52 (1938); *Cox v. New Hampshire*, 312 U.S. 569, 574-75 (1941); *Shuttlesworth v. Birmingham*, 394 U.S. 147, 150-51 (1969); *Staub v. Baxley*, 355 U.S. 313, 321 (1958); *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 70 (1963). This is because of the very real possibility that the regulatory scheme will be used to support certain content or viewpoints and to stifle less favored ones. Such is the situation with the "inappropriate" standard of NAC 482.320(6)(f).

Under strict scrutiny the government bears the burden of showing that its regulation of the content of constitutionally protected speech is necessary to achieve a compelling interest. *Cornelius v. NAACP Legal Defense and Educational Fund*, 473 U.S. 788, 800 (1985). This is particularly true about content-based bans on fully-protected expression in a public forum. *Perry Education Assn. v. Perry Local Educators' Assn.*, 460 U.S. 37, 45 (1983). The exacting nature of strict scrutiny insures that few speech restrictions can meet the rigid standard. As Justice Souter noted in his dissent in *City of Los Angeles v. Alameda Books, Inc.*, 535 U.S. 425,

455 (2002), "strict scrutiny leaves few survivors." "Only rarely are statutes sustained in the face of strict scrutiny." *Bernal v. Fainter*, 467 U.S. 216, 220, n. 6 (1984). "Strict-scrutiny review is 'strict' in theory but usually 'fatal' in fact." *Id.*

Here, the state of Nevada has made no showing that the unfettered discretion given to DMV officials in NAC 482.320(6)(f) serves any compelling governmental interest. Because the decision-making is completely arbitrary and discretionary, it certainly is not narrowly tailored, nor the least restrictive method.

A successful facial challenge to a law giving state officials unfettered discretion over whether to grant or deny speech does not require proof that an official has actually exercised discretion in an unconstitutional manner, but rather that the law does not prevent the official from doing so. *Forsyth Co, GA v. Nationalist Movement*, 505 U.S. 123, 131 (1992); *Lewis v. Wilson*, 253 F.3d 1077 (8th Cir. 2001). In other words, if a law gives a state employee unfettered discretion to impose a prior restraint on speech, the law is facially unconstitutional because the opportunity exists for unconstitutional restraints on speech regardless of whether or not the employee abuses that discretion.

In *Lewis v. Wilson*, the plaintiff was not required to show that the state's refusal to issue an "ARYAN-1" license plate was based on viewpoint discrimination. 253 F.3d. at 1080. Rather, the court found the law allowing officials to deny any plate that was "against public policy" or "inflammatory" was facially unconstitutional because it gave officials nearly unfettered discretion in deciding what to accept and reject, and nothing prevented them from discriminating based on viewpoint. *Id.* "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.

In contrast, the Second Circuit upheld a state's denial of a "SHTHPNS"[4] plate because it was "offensive;" however, the main difference in that case was that the state had painstakingly crafted a detailed and descriptive list of what was prohibited. *Perry v. McDonald*, 280 F.3d 159, 172 (2d Cir. 2001) (examining VT.CODE R. 14-050-025I(f) describing types of letter and number combinations that were prohibited).[5] The code in *Perry v. McDonald* prohibited any:

> (1) Combination of letters, or numbers with any connotation, in any language, that is vulgar, derogatory, profane, scatological or obscene;
> (2) Combinations of letters, or numbers that connote, in any language, breast, genitalia, pubic area, or buttocks or relate to sexual or eliminatory functions. Additionally, "69" formats are prohibited unless used in combination with the vehicle make, for example, "69 CHEVY";
> (3) Combinations of letters, or numbers that connote, in any language:
> (i) any illicit drug, narcotic, intoxicant, or related paraphernalia;
> (ii) the sale, the user, or the purveyor of such a substance; or
> (iii) the physiological state produced by such a substance;
> (4) Combination of letters, or numbers that refer, in any language, to a race, religion, color, deity, ethnic heritage, gender, sexual orientation, disability status, or political affiliation; provided, however, the commissioner shall not refuse a combination of letters or numbers that is a generally accepted reference to a race or ethnic heritage (for example, IRISH);
> (5) Combinations of letters, or numbers that suggest, in any language, a government or governmental agency;
> (6) Combinations of letters or numbers that suggest, in any language, a privilege not given by law in this state;
> (7) Combinations of letters or numbers that form, in any language, a slang term, abbreviation, phonetic spelling or mirror image of a word described in (1) through (6).

The Vermont restrictions in *Perry v. McDonald* provide much greater detail and guidance about what is permitted when compared to Nevada's content restrictions under NAC 482.320(6).

The state of Nevada has a legitimate interest in controlling the content of private speech on state-issued license plates and most of NAC 482.320 constitutionally serves that interest; however, First Amendment constitutional violations arose in the instant case because NAC

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[4] Shit Happens.
[5] The court also ruled that license plates were a nonpublic forum and that the state had not created a designated public forum; however no analysis was done concerning a limited public forum.

482.320(6)(f) is so vague and ambiguous that DMV officials have unfettered discretion in regulating speech, thus making it facially unconstitutional.

NRS 482.3667(1) directs the DMV to establish the personalized prestige license plate program and all necessary procedures. NRS 482.3667(5) allows the DMV to prohibit any "inappropriate letters or combination of letters and number." Standing alone, NRS 482.3667(5) would also be facially unconstitutional as a prior restraint on speech by placing unlimited discretion in the hands of state employees; however, the DMV has attempted to set guidelines for what is inappropriate by drafting NAC 482.320.

NAC 482.320 which was created pursuant to NRS 482.3667, states that:

1. The letter "O," the letter "I" and the letter "Q" must not be used alone but may be used with a combination of other letters and numbers if the combination does not create confusion between the letter "O" or "Q" and the number "0" or between the letter "I" and the number "1."
2. Only letters, numbers and spaces may be used on personalized prestige license plates. Letters, numbers and spaces may be used in any combination not prohibited by NRS 482.3667 or this section.
3. A blank plate will not be issued.
4. No letter or number may be placed on a personalized prestige license plate upside down or backwards or in other than its normal legible position.
5. No more than seven characters may be on any one personalized prestige license plate.
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)(a) through (6)(e) set out clear content restrictions on plate messages; however, NAC 482.320(6)(f) is a "catch-all," probably drafted to cover possibilities that the DMV couldn't anticipate. Unfortunately, the side effect of being a catch-all is that (6)(f) provides DMV employees nearly unfettered discretion over which plates to grant or deny. If a DMV employee disagrees with a plate, and can not deny it under one of the other (6)(a) – (6)(e) restrictions, the employee can simply say the plate is "inappropriate" under (6)(f). This aspect of the forum is facially unconstitutional under the First Amendment because no standard governs the decision of what speech is prohibited and it gives state employees the opportunity to apply a prior restraint on private speech based on viewpoint.

V. THE DISTRICT COURT WAS PERMITTED TO SUBSTITUTE ITS OWN JUDGMENT FOR THAT OF THE ADMINISTRATIVE LAW JUDGE BECAUSE THE ISSUE INVOLVED A MATTER OF STATUTORY CONSTRUCTION, NOT AN ISSUE OF FACT.

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.

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). *See also*

State Dept. of Motor Vehicles and Public Safety v. Lovett, 110 Nev. 473, 476; 874 P.2d 1247, 1249 (1994) (The construction of a statute is a question of law subject to review *de novo* by the Court under NRS 233B.135(3)(d)).

In the instant case, the Administrative Law Judge was not asked to make a factual determination: there were no facts were in dispute. Rather the judge was asked to determine whether the DMV had rightly revoked plaintiff/appellee's "HOE" license plate because it was "inappropriate." 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 ALJ's decision *de novo* pursuant to NRS 233B.135(3)(d).

Unfortunately, statutory construction of NAC 482.320(6)(f) is nearly impossible because the DMV has not established guidelines for what it may deem to be "inappropriate." The Administrative Judge's opinion about the inappropriateness of "HOE" was just as valid as the District Court's opinion about its appropriateness because, without clear guidelines, the standard for what is inappropriate becomes a personal standard.

VI. CONCLUSION

The ultimate question in this case, and one that's missing from both lower court opinions, is not "what is the meaning of "HOE?" but rather "what is the meaning of "inappropriate"? This case arose because a supervisor at the DMV was given nearly unfettered discretion to decide whether to grant or deny a personalized plate based on its message. When confronted with a word that has more than one meaning, the supervisor was free to choose the derogatory meaning over the ordinary meaning.

Without any guidelines on what is "inappropriate," a handful of employees were free to apply the definition suggested by the supervisor and apply their own standard for

inappropriateness. Had there been a clear and predetermined standard for what is inappropriate under NAC 482.320(6)(f), this case would likely have been resolved at the administrative level.

NAC 482.320(6)(f) grants state employees nearly unfettered discretion to impose prior restraints on private speech in a limited public forum. It creates the opportunity for DMV employees to impermissibly restrict speech based on viewpoint and therefore is a violation of First Amendment free speech protections and is facially unconstitutional.[6]

Dated this 19th day of September, 2008.

By: _____

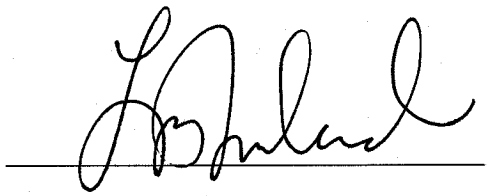
Lee Rowland
Staff Attorney
ACLU of Nevada
NV Bar No. 10209
1325 Airmotive Way, Suite 202
Reno, NV 89502
Phone: (775) 786-1033
Fax: (775) 786-0805
Attorney for Amicus Curiae

[6] Although not at issue in this case, the standard for "vulgar, derogatory, profane or obscene" in NAC482.320(6)(c), may also be vague and open discretional enforcement by DMV employees. This is shown by the fact that Ms. Shaw used the words "unsuitable," "inappropriate" and "derogatory" interchangeably when referring to the "HOE" plate. *See*, (DMV App. p. 54-56, petitioner's exhibit D);(DMV App. p. 39, petitioner's exhibit A).

CERTIFICATE OF COMPLIANCE

I, Lee Rowland, hereby certify that I have read this entire 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 19th day of September, 2008.

By: 

Lee Rowland
Staff Attorney
ACLU of Nevada
NV Bar No. 10209
1325 Airmotive Way, Suite 202
Reno, NV 89502
Phone: (775) 786-1033
Fax: (775) 786-0805
Attorney for Amicus Curiae

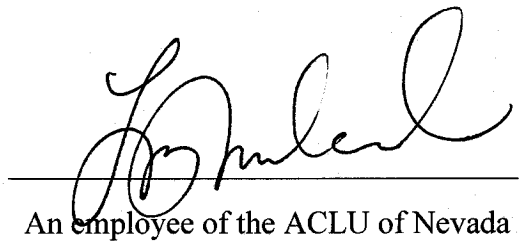
CERTIFICATE OF SERVICE

I certify that on the 19th day of September, 2008, 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:

WILLIAM JUNGE
5409 CONTERA COURT
LAS VEGAS, NEVADA 89102

CATHERINE CORTEZ MASTO
OFFICE OF NEVADA ATTORNEY GENERAL
100 N. CARSON STREET
CARSON CITY, NEVADA 89701

CAROLYN L. WATERS
TRANSPORTATION DIVISION
555 EAST WASHINGTON AVE
SUITE 3900
LAS VEGAS, NEVADA 89101



An employee of the ACLU of Nevada