ORIGINAL

IN THE SUPREME COURT OF THE STATE OF NEVADA

STATE OF NEVADA, DEPARTMENT OF MOTOR VEHICLES,

Appellant,

vs.

WILLIAM JUNGE,

Respondent.

CASE NO. 49350
District Court Case No. A529007

ON APPEAL FROM THE EIGHTH JUDICIAL DISTRICT COURT

APPELLANT'S RESPONSE BRIEF TO THE ACLU'S AMICUS BRIEF

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08-32940

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I.

ISSUES PRESENTED FOR REVIEW

1. Whether the Department of Motor Vehicles has the authority to regulate the content of personalized license plates pursuant to NRS 482.3667, NRS 482.3669, NAC 482.320, and NAC 482.370.
2. Whether the Department of Motor Vehicles can regulate the issuance of its vanity license plates in a reasonable and viewpoint-neutral manner under the First Amendment.
3. Whether the district court erred in substituting its judgment for that of the administrative agency when it reversed the Department of Motor Vehicles' decision to deny the issuance of the license plate, "HOE."

II.

PROCEDURAL STATEMENT OF THE CASE

This is an appeal regarding the denial of a personalized license plate - - more commonly referred to as a vanity plate. The Department of Motor Vehicles found that William Junge's ("Junge") license plate, "HOE," was inappropriate under NRS 482.3667, NRS 482.3669, and NAC 482.320. The Administrative Law Judge upheld the decision to deny Junge the requested plate of "HOE", but District Court Judge Jessie Walsh reversed that decision. Since April 24, 2007, the date the Department filed this appeal in the Nevada Supreme Court, Junge has not filed any pleadings or briefs and, in fact, has completely walked away from this appeal. This Court has not yet, but could still, find that the Department could deny Junge the personalized plate based solely on the fact that he has not defended this appeal under NRAP 31(c)(stating that the failure of respondent to file a brief may be treated by the court as a confession of error and appropriate disposition of the appeal thereafter made).

From the appeal to district court to the appeal before this Court, Junge has not raised First Amendment concerns. However, this Court has invited an amicus brief from the American Civil Liberties Union. While the DMV understands the Court's desire to be briefed

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in this subject, the DMV must respectfully suggest a delicate step into areas of law not pursued by the parties to the appeal.[1] Nonetheless, because the Court has raised issues not otherwise argued by Junge, and because the ACLU has wrongly concluded that there was a First Amendment violation (and also no violation by the district court judge discussed *infra* on p. 17), the DMV feels this response is necessary for the Court's full understanding of these subjects.

III.

ARGUMENT

A. THE "HOE" PLATE IS A VANITY PLATE AND NOT A SPECIALTY PLATE

The starting point for this analysis is first an understanding of what this license plate is and what it is not. The license plate at issue is a request for a "personalized prestige license plate." It is not a request for a "special license plate." A personalized prestige license plate (also known as a vanity plate) is a request by one individual for a license plate that has a certain combination of numbers and letters that he wishes to display on the state manufactured plate for his vehicle. This message will be unique in the sense that no one else will be able to have that same combination of numbers and letters. Conversely, a special license plate (or specialty plate) is typically a request for an organization or a particular group to have a license plate generated (particular groups must show a certain number of applications to support a special plate).[2] Examples of specialty plates include

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[1] The Court will see in the submitted transcript from the district court that Junge did not raise First Amendment issues before District Court Judge Walsh. In *Martin v. State, Agency of Transportation Department of Motor Vehicles*, 819 A.2d 742 (Vt. 2003), the court stated that when there is no direct constitutional challenge and no definitive or controlling law in this area, issues must still be preserved for appeal by the parties. The *Martin* court then cited *In re Sealed Documents*, 772 A.2d 518 523 (Vt. 2001)(stating that our tradition of addressing issues of constitutional significance only when they are "squarely and necessarily presented counsels restraint and forbearance" as to broader First Amendment questions); *Herald Ass'n, Inc. v. Ellison*, 419 A.2d 323, 326 (Vt. 1980)(stating that although the First Amendment appears to be implicated, decisions of the United States Supreme Court do not clearly determine whether First Amendment violation exists; in face of such uncertainty, "the wisdom of our traditional rule of self-restraint – that we do not needlessly decide constitutional issues - - is all the more apparent" (internal citations omitted)).

[2] *See also Henderson v. Stalder*, 265 F.Supp.2d 699 (E.D. La. 2003), *vacated and remanded on other grounds*, 407 F.3d 351 (5th Cir. 2005)(noting a distinction between a "vanity plate" and a "specialty plate" by

collegiate license plates (NRS 482.3747), professional or volunteer firefighters (NRS 482.3753, NRS 482.3754), appreciation of animals (NRS 482.379175), and support of missing or exploited children (NRS 482.3793), among others.[3]

The distinction is factually important, because much of the caselaw cited by the ACLU and much of the caselaw that exists in this arena involves the denial of specialty plates that are not at issue in this case.[4] While there is, of course, overlap in general First Amendment doctrine, there are different purposes for a vanity plate (a message for and by one person) versus a special plate (a message by a group). Notably, a message by one person often does not express any "view." Vanity plates may state a person's name, occupation, initials, etc. However, a special license plate sought by a particular group (much if not most of the caselaw centers on pro-life versus pro-choice applications for plates) does tend to support a particular cause or idea or "view." *See American Civil Liberties Union v. Bredesen*, 441 F.3d 370 (6th Cir.), *cert. denied*, 548 U.S. 906 (2006)(finding that "the unstated distinction is that the "Choose Life" message is highly controversial, and that with this message there are large numbers of participants in the public discourse with an opposing view). As will be explained, this significant factual difference does assist many courts in finding that states do indeed have a rational basis for enforcing their guidelines so that plates are not offensive or inappropriate. It is, therefore, important to keep the facts of this case in mind – namely a request by one man to have the

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stating, "Vanity plates are where a state will customize the arrangement of letter and numbers to create a plate for one individual and it cannot be duplicated . . . . A specialty plate is where a license plate is created to refer to a specific group like the Shriners or a school").

[3] Further, whether or not a special license plate is generated is decided by the Commission on Special License Plates (which is composed, in part, by state legislators). *See* NRS 482.367004(1). Notably, in determining whether to approve an application, the Commission "shall consider, without limitation, whether it would be **appropriate** and feasible for the Department to, as applicable, design, prepare or issue the particular special license plate (emphasis added)." NRS 482.367004(5)(c).

[4] *See, e.g., Byrne v. Lunderville*, 2007 WL 2892620 n.7 (D. Vt. 2007)(recognizing the difference between vanity plates and special plates and stating, "A slightly different, but more developed, body of law has developed around specialty license plates").

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word "HOE" on his license plate -- when examining issues of free speech.

B. THE DMV IS AUTHORIZED BY STATUTE AND REGULATION TO DENY THE ISSUANCE OF PETITIONER'S VANITY PLATE "HOE"

Although discussed in the DMV's Opening Brief, a brief recap of the applicable statutes and regulations governing personalized (vanity) license plates is appropriate here before turning to the issues raised by the Court concerning the First Amendment. DMV has specifically been given the authority by the state legislature to regulate and limit the letters, numbers and words that appear on personalized license plates. NRS 482.3667(5) states as follows: "The Department may limit by regulation the number of letters and numbers used and *prohibit the use of inappropriate letters or combinations of letters* and numbers (emphasis added)."

Additionally, NRS 482.3669 states: "The Department may make such regulations as are necessary to insure compliance with all applicable laws pertaining to the licensing and registration of vehicles before issuing personalized prestige license plates in lieu of the regular Nevada license plate or plates, and all applications for personalized prestige license plates must be made to the Department."

The Department has indeed established regulations. NAC 482.320 establishes a number of guidelines for regulating personalized plates:

> 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:

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. . . .

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(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.

7. The person who first applies for a particular letter or number or combination of letters, numbers or spaces and pays the prescribed fee for registration and for the personalized prestige license plates has priority to receive plates with that particular letter or number or combination of letters, numbers or spaces once the application has been accepted by the Department.

(emphasis added).[5]

After Junge's request for the renewal of his "HOE" plate was brought to her attention by a technician, Supervisor Betty Shaw followed the DMV policy and commissioned input from the DMV Personalized Plate Committee (referred to in the Record on Appeal as the "Special Plate Committee"). It was a unanimous decision by the Special Plate Committee to reject the plate, because the word was inappropriate; more specific comments from the committee members noted that the word was slang for "whore".[6]

After thoroughly detailing the fact that the DMV statute and regulations allow for the DMV to regulate what combination of letters and numbers appear on a government-issued personalized license plates, the ALJ stated: "There is nothing in the law that entitles the Petitioner to compel the DMV to permit a registration plate to be manufactured and displayed that conveys a message that falls outside the scope of the message that the DMV

[5] NRS 233B.040(1) provides that the Nevada Administrative Code has the force of law.

[6] Comments from the Committee include: "Deny, meaning is "whore." (Kathy Holthus); "Absolutely recall, this is short for whore!" "I say deny, contraction for whore" (Kathy Holthus). "My goodness, recall and put on the list, we have been denying anything with HO." (Duane Brunell). "Yes recall it should never have gotten out"; "Deny, this is street word for whore" (Duane Brunell). "What was issued in 1999 does not make it appropriate in 2006, it should not have been issued then. Just because he used the last 3 letters of Tahoe doesn't take the meaning out of the word. He was being sly then and got away with it, he shouldn't be allowed to get away with it now, it still says Whore . . . deny it." (Duane Brunell). "I already said deny and I still say deny. I agree it is derogatory to females" (Tomi Blevins). DMV App. pp. 51-61.

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is willing to use in its regulatory scheme (DMV App. p. 80, ll. 16-18)." In other words, although Junge may not agree with the decision of the Administrative Law Judge, there is nothing that gives him the right to compel the DMV to issue him a plate that the Special Plate Committee in 2006 deemed inappropriate pursuant to its regulations.

C. THERE IS NO VIOLATION OF FREE SPEECH UNDER THE FIRST AMENDMENT OF THE U.S. CONSTITUTION OR OF ARTICLE 1, SECTION 9 OF THE NEVADA CONSTITUTION

1. THE DMV CAN REGULATE VANITY PLATES UNDER THE FIRST AMENDMENT

The ACLU has used the specialty plate case of *Arizona Life Coalition Inc. v. Stanton*, 515 F.3d 956 (9th Cir.), *cert. denied*, 129 S. Ct. 56 (2008)(a pro-life/abortion issue), to lay out a proposed framework.[7] It is really unnecessary to traverse a similar road of generalized First Amendment doctrine. The bottom line here is that both the ACLU and the DMV agree that license plates are not a public forum, and both agree that license plates are not a designated public forum. *See* ACLU's brief at pp. 9-10. The question that remains is whether a vanity plate is a nonpublic forum[8] or whether there is no implication of private speech at all.

While one circuit court has stated that a specialty license plate did not create a forum for speech,[9] it appears that most vanity plate cases have come to the conclusion that

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[7] Interestingly, the Life Coalition membership included approximately 40 organizations and 100,000 individuals all of whom must subscribe to Life Coalition's statement of principles to become a member. *Id.* at 961.

[8] The DMV agrees with the ACLU that the Ninth Circuit in *Stanton* discusses "limited public forum" whereas most courts simply state the license plate in question is a nonpublic forum. Whether one calls it "limited" or "nonpublic," the bottom line is that the analysis is the same: whether the statutes and regulations are 1) reasonable, and 2) viewpoint neutral. *See Choose Life Illinois, Inc. v. White*, 2008 WL 4821759 (7th Cir. 2008)(recognizing that *Stanton* held that the "forum was a limited one (more precisely, a nonpublic forum), meaning that 'any access restriction must be viewpoint neutral and reasonable in light of the purpose served by the forum'"). 2008 WL 4821759 at 9 (*citing Stanton*, 515 F.3d at 971).

[9] *See American Civil Liberties Union of Tennessee v. Bredesen*, 441 F.3d 370 (6th Cir.), *cert. denied*, 548 U.S. 906 (2006), wherein the Sixth Circuit disagreed with the ACLU's interpretation that a specialty plate,

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personalized/vanity license plates are a non-public forum and then look to see if the regulatory scheme is reasonable and viewpoint neutral. The ACLU seems to agree that whether the forum is called "limited public forum" in *Stanton* or "nonpublic" in most other courts, the resulting test is "reasonableness" and "viewpoint neutrality" (*see* footnote 3 on page 9 of the ACLU's brief).[10] However, this is where the ACLU's analysis ends. If the Nevada Supreme Court does not follow *Bredesen* in a finding of no First Amendment implications at all, then the crucial determination of this case is going to be finding if the Department's denial of "HOE" was reasonable and viewpoint neutral. To assist the court in this next level of analysis, it is important to determine what other courts have done as it specifically relates to vanity plate cases (again, a plate requested by one individual for one personal message).

A number of courts that have examined denials of vanity plates have based those decisions on state statutes similar to the statutes and corresponding regulations in Nevada. As explained by those courts, there is no violation of the First Amendment in the non-public forum, because the state governments do in fact have a reasonable basis to regulate the policies they seek to enforce and that they are doing so in a viewpoint-neutral manner.

For example, in *Perry v. McDonald*, 280 F.3d 159 (2d Cir. 2001), a citizen brought an action against the DMV in Vermont alleging a First Amendment right to have the license plate bearing the letters "SHTHPNS." The Circuit Court found no First Amendment violation, because the state statute provided that vanity plates would be issued by paying an

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"Choose Life", required viewpoint neutrality. The circuit court stated that the ACLU's view that a government-crafted message creates a "forum" would force the government to produce messages that fight against its policies or render unconstitutional a large swath of government actions that nearly everyone would consider desirable and legitimate. The court gave examples including plates that said "Spay or Neuter you Pets. While citizens may oppose such a view under the First Amendment, the First Amendment would not require the government to sell license plates that say "Spaying or Neutering your Pet is Cruel." *Id.* at 378-79.

[10] *See Stanton* wherein the court stated that given the overarching purpose of aiding in vehicle identification, expression through vanity plates and special organization plates are subject to numerous restrictions with the general public having only limited access. 515 F.3d at 971.

additional fee *as long as the combination of letters and numbers was not "offensive or confusing to the general public."* *Id.* at 163 (*citing* Vt. Stan. Ann. Title 23, sec. 304(d)(emphasis added)). The Court examined the policy and practice of government and the nature of the property and its compatibility with expressive activity. Concluding that the vanity plate was a nonpublic forum because only Vermont vehicle owners who had *obtained permission* could place a message of their choice on their vanity plate, the *Perry* court next examined whether the restriction was reasonable and viewpoint neutral. Importantly, the court held that although the vehicle owner chose the combination of letters and numbers, the state had a legitimate interest in not communicating the message that it approves of the public display of *offensive* scatological terms on state license plates. The court noted that the plate owner could instead communicate a desired message on a bumper sticker. In determining that the restriction was viewpoint neutral, the court held that Vermont's policy did not oppose the plate owner's philosophical views as expressed in the vanity plate; however, the requested plate contained an offensive combination of letters which properly resulted in its denial.[11]

Likewise, in *Kahn v. Department of Motor Vehicles*, 20 Cal. Rptr.2d 6 (Cal. Ct. App. 1993), the court held that a statute permitting the revocation of a license plate the DMV deemed *offensive to good taste and decency* (or that would also be misleading) was constitutional as it neither sought to prevent the expression of a specific viewpoint, nor promoted a particular opinion. The statute in question provided that the DMV could "cancel and order the return of any environmental license plate . . . containing any combination of letters, or numbers, or both, which the department determines carries connotations *offensive* to good taste and decency or which would be misleading (emphasis added)." *Id.*

[11] Interestingly, the most recent specialty license plate case (another "Choose Life" plate) decided less than two months ago followed the *Perry* court in "the related context of vanity license plates." Following *Perry* and not

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at 164 (*citing* Cal. Veh. Code sec. 5101). The license plate, bearing the letters "TP U BG" had been in use by a court reporter for 17 years. However, the DMV recalled the plate because the combination could also be translated in court reporting language to state the swear term, "F," "U", "K" or "CK". The court agreed that the state had a substantial interest in protecting a mechanical identification symbol such as the license plate from degradation and further that the DMV was reasonably concerned with avoiding the abusive use of its vehicle identification system and preserving the legitimacy, credibility, and reliability of its official emblem.

In response to the driver applicant's argument that it was not enough that the translation of the court reporting symbols was offensive, but that there should be evidence that "TP U BG" in itself is offensive, the court held to have a connotation offensive to good taste and decency a word need not be understood in that manner by every addressee. Rather, the court stated that the appropriate test was what people of ordinary intelligence who know the language in question would understand from the use of the word.

Similarly, even in 1973, the California court in *Katz v. Department of Motor Vehicles*, 108 Cal. Rptr. 424 (Cal. Ct. App. 1973), held that the statute at issue was viewpoint neutral as it was not directed at the suppression of any specific idea or expression on a vehicle; rather, the statute simply excluded those configurations of letters and numbers from license plates that the administrative body deemed *offensive to good taste and decency.* The applicant wanted a license plate bearing the letters, "EZ LAY." The Court held that while First Amendment considerations were at best minimal, the state had an additional compelling interest in protecting a mechanical identification such as the license plate from degradation. Additionally, in *McMahon v. Iowa Department of Transportation*, 522 N.W.2d 51 (Iowa 1994), the Office of Vehicle Registration ("OVR") staff would bring questionable

Stanton, the Seventh Circuit found it reasonable to exempt any specialty cases dealing with the abortion issue.

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plates to the attention of the director who could approve or deny the plate. The license plate in question read "3MTA3" (which read "EATME" in a rear-view mirror). Like the procedure in Nevada, the OVR staff also used a slang dictionary in a balancing process of the driver's interest with that of offensiveness to the public. The Supreme Court of Iowa found that this procedure was reasonable, and reversed a district court which had not upheld the Department of Transportation's revocation decision.

Finally, there is astute guidance coming from the Supreme Court in Oregon. In *Higgins v. Driver and Motor Vehicle Services Branch*, 72 P.3d 628 (Or. 2003), the court noted the interchange between the DMV and the petitioner (the latter of whom wished to display an alcoholic reference on a license by requesting "INVINO", "VINO", and/or "WINE"). Stated the court:

> DMV's customized registration plate rules permitted petitioner to participate, within defined limitations, in the selection of the numerals and letters that would appear on the registration plate for which he applied. But the limitations in DMV's rule confined the possible combinations of characters from which petitioner could select. The state did not open the process to any combination of letters and numbers that a vehicle owner might request. The state, not petitioner, retained control of the parameters within which petitioner could request characters for his customized registration plates.
>
> In our view, DMV's rules allowing a vehicle owner's limited participation in the selection of characters for a customized registration plate do not alter the essential character of a registration plate. It remains a government-controlled device that carries a government-approved identification message that vehicle owners must display on their vehicle for regulatory purposes unrelated to the suppression of speech.
>
> . . . .
>
> DMV's rule identified the parameters within which DMV was prepared to manufacture customized registration plates pursuant to applications that vehicle owners submitted. It is obvious from the rule that DMV was unwilling to manufacture a customized registration plate, as a part of its process for vehicle registration, if the requested characters conveyed a message about alcohol (or drug use, profanity, sexual terms, and the like). *Id.* at 633-34.

Like the Administrative Law Judge in the case at bar, the Oregon court found that the individual could not compel the DMV to manufacture a plate that fell outside the scope of

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Choose Life Illinois, Inc. v. White, 2008 WL 4821759 7th Cir. 2008).

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messages that DMV was willing to use in its regulatory parameters.

Therefore, following the above courts' guidance, a vanity plate can be constitutionally denied where the requested language is simply "offensive" or "offensive to good taste and decency" as they were in *Perry*, *Kahn*, *Katz*, and *McMahon*. *See also Martin v. State, Agency of Transportation Department of Motor Vehicles*, 819 A.2d 742, 747-48 & n.5 (Vt. 2003) (finding that the statute disallowing vanity plates that were "offensive or confusing" was not ambiguous even though the term "offensive" could have different meanings such as aggressive or repugnant). Similarly, based on the persuasive and applicable authority cited above regarding vanity plates, a plate can be constitutionally denied when the requested language is "inappropriate." There is really no difference in stating a plate is "offensive" (or "offensive to good taste and decency") or stating a plate is "inappropriate." Both are constitutionally acceptable. Therefore, it was reasonable and certainly viewpoint-neutral to deny the request for "HOE." While the ACLU improperly states that the discretion of DMV to deny a plate is unfettered, that is simply not the case. Like the Iowa Supreme Court in *McMahon*, there is a process when examining a potential plate that requests an inappropriate combination of letters or numbers. Like *McMahon*, the Nevada DMV used a slang dictionary, wherein the term "HOE" is commonly defined as a "WHORE".[12] It was also not only reviewed by a technician, but also by her supervisor, and the Special Plate Committee. Obviously, there has to be some screening mechanisms, and here (like *McMahon*), it is a multi-step, multi-person process. Furthermore, Junge was entitled to have, and in fact did avail himself to, an administrative hearing wherein (through his

[12] Slang dictionaries are an appropriate mechanism, of course, where there are other variant spellings of inappropriate words. For example, HO is in the *Merriam-Webster* on-line dictionary (www.merriamwebster.com) with reference to WHORE, but HOE is in the slang dictionary (DMV App. 46-50) with similar (and more sexually explicit) references. The test is not how well people spell; but as stated in *Kahn*, "[T]o have a connotation offensive to good taste and decency a word need not be understood in that manner by every addressee. Rather, the court stated that the appropriate test was what people of ordinary intelligence who know the language in question would understand from the use of the word." 20 Cal.Rptr.2d at 13.

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counsel) he cross-examined witnesses, presented evidence, and even testified himself. He thereafter sought judicial review in the district court. These levels of review and presentation are in place so that there is not one decision by a DMV employee. Like the process in *McMahon*, this process is reasonable and constitutional under the First Amendment.

Additionally, unlike the specialty plate cases, the Nevada DMV did not deny the renewal of the plate "HOE" because of any particular view. *See Perry, supra* (finding Vermont's policy did not oppose the plate owner's philosophical views as expressed in the vanity plate; however, the requested plate contained an offensive combination of letters which properly resulted in its denial). In fact, it appeared at the district court that Junge is not really sure what he was trying to convey with "HOE." At the administrative hearing, his counsel argued Junge wanted the "HOE" language, because at the time he had a Tahoe vehicle. However, at the district court, there emerged other after-the-fact justifications: HOE is a farming tool, HOE is a prostitute, prostitution is legal in Nevada. The list went on an on. *See* TR at pp. 3, 5, 7. It can hardly be said that the Department denied Junge's particular view when he does not even seem set on what his "view" might be. Simply put, it was both reasonable and viewpoint-neutral to deny the request for "HOE" under the governing Nevada statutes and regulations and under the similar and persuasive authority of the courts in *Perry*, *McMahon*, *Katz*, *Kahn*, and *Higgins*.

Moreover, in this particular case, the DMV's actions in denying this plate were further protected because, like in the *Higgins* and *McMahon* cases, the language was inappropriate *because it also specifically violated another regulation*. In *Higgins* and *McMahon*, the requested language was offensive because it referred to alcohol in *Higgins* and a sexual innuendo in *McMahon*. Involving Junge's request for "HOE", it was not only "inappropriate"

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under NRS 482.3667(5) and NAC 482.320(6)(f), just like the requested plates were deemed generally "offensive" in *Perry*, *Kahn*, *Katz*, and *McMahon,* but the committee members agreed that "HOE" was short for "whore" and was derogatory toward women. *See* comments from committee: "Deny, meaning is "whore" (Holthus); "Deny, this is street word for whore" (Brunell); "I agree it is derogatory to females" (Blevins) DMV App. p. 51-61. Therefore, it also more specifically violated NAC 482.320(6)(b)(4) and NAC 482.320(6)(c)(e). ***Even the ACLU has pointed out that this specific rejection from the Committee is legally sound.*** *See* ACLU's brief at p. 16 (finding that NAC 482.320(6)(a) through (6)(e) in fact "set out clear content restrictions on plate messages").

Notably, even Junge - - the real party in interest - - agreed and conceded that the rejection of the language "HOE" by the DMV was based on the fact that it was inappropriate because it was derogatory to women.[13] Stated Junge's counsel at the district court argument, "Ms. Shaw determined that it was inappropriate and derogatory towards women", *see* TR pp. 3-4, and "[s]he [Ms. Shaw] is very concerned about women and it being derogatory against them" TR p. 5.[14] Since Junge agreed that the DMV's rejection was based on the determination that "HOE" is derogatory toward women, and since the ACLU said that rejection is appropriate, there should really be no issue as to the denial of the plate "HOE" by the DMV in this instance.

2. THERE WAS NO PRIOR RESTRAINT OF JUNGE'S PLATE AND ANY FACIAL CHALLENGE PASSES CONSTITUTIONAL MUSTER

In contrast to the cases in the previous section, the ACLU next raises an alleged

[13] Other courts deem the word "hoe" (and spelled the same: h-o-e) offensive in a sexual harassment-hostile work environment claim. *See Wilhite v. Safelite Glass Corp.*, 2005 WL 2030487 (W.D. Okla. 2005)(stating that the use of gender-specific words such as "hoe", "bitch", and "slut" are more than mere vulgarities).

[14] Continued Junge's counsel, "And even if you want to go with their contention that "Hoe" is slang for whore, well, we're in Nevada and there is (sic) counties in Nevada where prostitution is legal." TR p. 5.

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issue of "prior restraint" and attempts to broaden the scope of this appeal.[15] In this discussion, the ACLU recognizes the *Perry* case, but tries to distinguish it by stating that the statute in *Perry* was more detailed than the one at issue here. There are a number of problems with this argument. First, prior restraint is a "governmental order or action 'forbidding certain communications when issued in advance of the time that such communications are to occur.'" *Perry*, 280 F.3d at 171. In the instant case involving Junge, he had the "HOE" plate since 1999 before his request for renewal was denied in 2006. DMV App. p. 26, ll. 3-4. Moreover, Junge had notice and a hearing on the issue and was entitled to drive with "HOE" during the pendency of the hearing. DMV App. p. 26, ll. 16-21 (Junge's counsel noting, "We had requested that the plate not be removed or suspended and that was granted. And [it] . . . continues to be on the vehicle while we were waiting for this hearing to occur"). Junge has not been without the "HOE" plate, and is presumably still driving with this license plate. Therefore, there was no prior restraint on Junge's plate as he has been driving with this plate and still is doing so today.

Furthermore, the *Perry* court, in discussing the vanity plate "SHTHPNS", noted that "prior restraints in a nonpublic forum have been upheld as long as they were reasonable and viewpoint-neutral." 280 F.3d at 171. The court went on to explain:

> A nonpublic forum by definition is characterized by "selective access," which necessarily means that the state can select or limit who may speak and what may be said *prior to its expression* as long as the restrictions meet the requirements of reasonableness and viewpoint-neutrality. Accordingly, a restriction on expression which would otherwise be deemed a prior restraint if it had been applied in a public forum is valid in a *nonpublic* forum as long as it is reasonable and viewpoint-neutral (emphasis in original)(internal citations omitted). *Id.*[16]

. . . .

[15] The issue is the denial of the plate, "HOE", wherein there was no issue of prior restraint. The issue for this appeal is not every possible future plate that may cross DMV's path.

[16] The ACLU improperly jumps to a higher standard of strict scrutiny, ignoring its own recognition that regulations on license plates need only be reasonable and viewpoint-neutral.

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Because the rules governing the vanity plate program denial in *Perry* were viewpoint-neutral, there was no prior restraint. *See also Byrne v. Terrill*, 2005 WL 2043011 (D. Vt. 2005) (reasoning that because the statute that excluded religious messages from vanity plates was reasonable and viewpoint-neutral, it was a permissible prior restraint); *Byrne v. Lunderville*, 2007 WL 2892620 (D. Vt. 2007)(stating because the DMV had a multi-step review process and access to hearings and judicial review, a claim of prior restraint based on overbreadth failed).

While the ACLU would like to assert that the regulatory list from *Perry* is somehow *vastly* different from Nevada's NRS 482.3667 and NAC 482.320, a quick comparison of the two shows the similarities. While the Nevada code may include at the end a denial of a combination of letters and numbers that is *inappropriate*, as stated above, that is simply a recitation of the *inappropriate* language found in the controlling statute NRS 482.3667. And as *Perry* and the other cases hold, it is reasonable and viewpoint-neutral to reject a plate that is *offensive*. Again, if it passes constitutional muster to reject a plate that is *offensive*, then it stands to reason that it will pass constitutional muster to reject a plate that is *inappropriate*.[17] Furthermore, as explained above, just as "SHTHPNS" is offensive because it is a profanity, HOE is inappropriate because, as the Committee members stated, it is derogatory toward women. Since the DMV's denial of a renewal for the plate "HOE" was reasonable under the governing statutes and regulations, and was viewpoint-neutral, any possible prior restraint (even if there had been one) would have been permissible under the First Amendment.

[17] Unlike the "offensive" language that has been held constitutional and the similar "inappropriate" language that should be upheld here, the Missouri statute in *Lewis v. Wilson*, 253 F.3d 1077 (8th Cir. 2001)(referred to by the ACLU) seemed to take an unusual stance in directing that the plate "ARYAN-1" be issued. However, the initial reason the driver was told she could not have the plate was because it was generally "contrary to public policy" which is much broader than a particular plate being offensive or inappropriate because it is derogatory. Furthermore, the same plate of ARYAN-1 would presumably properly be denied in Nevada anyway under NAC 482.320(6)(b)(1), which expressly denies a plate showing a superiority of race.

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D. THE DISTRICT COURT ERRED IN REVERSING THE DECISION OF THE ADMINISTRATIVE LAW JUDGE WHO UPHELD THE DMV'S DENIAL OF THE LICENSE PLATE "HOE"

This Court additionally requested the ACLU to address the factual state law issue of District Court Judge Jessie Walsh substituting her own personal judgment during oral argument for that of the administrative agency's decision in violation of the Nevada Administrative Procedure Act. The ACLU does not go in to any real detail in their amicus brief in this area. Its restraint in that regard is proper and respected, since it is neither a party nor a representative in this matter. The DMV would like to emphasize from its Opening Brief that the district court did in fact substitute its judgment on an issue of fact. District Court Judge Walsh surmised that "HOE" was a farming tool despite the fact that Junge stated that was not his intent with the word.

This Court has often stated, "We shall not substitute our judgment for that of the agency in regard to questions of fact, but must determine whether the agency's decision was clearly erroneous or an arbitrary abuse of discretion." *Currier v. State Indus. Ins. Sys.*, 114 Nev. 328, 956 P.2d 810 (1998). *See also Weaver v. State, Dep't of Motor Vehicles*, 121 Nev. 494, 498, 117 P.3d 193, 196 (2005) (stating that "when reviewing an administrative decision neither this court nor the district court may . . . substitute its judgment for that of the administrative agency concerning the weight of the evidence on questions of fact"); *Clements v. Airport Authority of Washoe County*, 111 Nev. 717, 896 P.2d 458 (1995). The Special Plate Committee of the DMV decided that, under the dictates of governing statutes and regulations, that the use of the word "HOE" was inappropriate and derogatory toward women. The DMV Administrative Law Judge agreed. However, the district court improperly substituted its judgment for that of the agency, deciding for itself that the word "HOE" was not inappropriate and ascribing a different meaning.

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During oral argument before the district court, Petitioner, through his counsel, argued repeatedly that the plate "HOE" was part of a "theme" he had for his Tahoe vehicle (TR p. 3, ll. 17-18; p. 5, ll. 24-25; p. 12, ll. 11-14). However, the district court stated, "Ms. Nelson, when I first read these papers and pleadings I thought perhaps your client was a gardener. Any response?" Ms. Nelson replied, "He's not." (TR. p. 12, ll. 3-6).[18] The district court continued, "I will tell you that I don't see, based on my review of the statutes and the information cited by counsel, I don't see anything inappropriate about this plate usage." (TR. p. 14, ll. 4-7). And after DMV counsel tried to persuade the district court otherwise, including the suggestion that Petitioner might not be making the same argument if Petitioner was denied his plate for the first time in 2006, the district court responded, "It might not but the word "HOE" means a gardening tool. So frankly I don't see anything offensive about it..." (TR. p. 17, ll. 5-7). Not only did the district court substitute its judgment for that of the agency, but it completely ignored the common definitions and derogatory connotations of the word "HOE" submitted by Petitioner himself and contained in the Record on Appeal (DMV App. pp. 46-50 (referring to a "HOE" as a whore)).

Here, the district court is clearly substituting its judgment for that of the DMV and has acted contrary to established Nevada Supreme Court precedent. The DMV, through the channels of the technician, her supervisor, the Special Plate Committee, and before an Administrative Law Judge at the DMV, decided that the use of the term "HOE" was inappropriate, slang for "whore" and derogatory toward women. The DMV has the authority to carefully make such determinations under the governing statutes and regulations cited above. The district court improperly substituted its judgment for that of the agency on this

[18] While Petitioner asserted at the administrative hearing that the word "HOE" could be a farm implement (DMV App. p. 14, line 28; App. p. 24, ll. 25-27), and alluded to the same in his district court brief, Petitioner always maintained the purpose of the word was to relate to his Tahoe. Stated Petitioner at his hearing, "...the connection with the Chevrolet Tahoe and the Lake Tahoe plate was the initial connection between the plate, the truck, Lake Tahoe, everything. I think it ties together) (DMV App. p. 24, ll. 21-23). In 2003, Petitioner requested a different plate background instead of the Lake Tahoe plate (DMV App. p. 24, ll. 14-16).

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factual issue and decided for itself that "HOE" is simply a gardening tool and not inappropriate. Incredibly, Junge never even argued that it was his intention in his application that "HOE" was meant to refer to a gardening tool; he said it was for a Tahoe (TR. p. 3, ll. 17-18; p. 5, ll. 24-25; p. 12, ll. 11-14). At oral argument, Junge did recognize the DMV's concerns and tried to discount the practical meaning of the word, "HOE," with references to the supposed loose morals of Nevada; incredibly, Junge asserted that "HOE", even if slang for whore, should be allowed because there are "counties in Nevada where prostitution is legal" and so "HOE" would be a definition for an occupation (TR. p. 5, ll. 15-20). Junge, through his counsel even stated, "Here in Nevada and in several counties it is legal to be a whore. You can go out and you can be a prostitute. We have plenty of brothels. It's no big surprise that people in other states don't view us as a real church going community." (TR. p. 12, ll. 19-24). As stated in DMV's Opening Brief, it is no big surprise, indeed, when vehicles in Nevada are allowed to be driven with inappropriate and derogatory words on state issued license plates.

Simply put, the district court overstepped its bounds when it substituted its judgment for that of the agency pursuant to *Currier*, *Weaver*, and *Clements*, and therefore, the district court's order should be reversed.

IV.

CONCLUSION

The DMV has the authority, and the duty, to regulate what is permissible language on state issued license plates. NRS 482.3667, NRS 482.3669, NAC 482.320, and NAC 482.370. Statutes are presumed to be valid, and the challenger bears the burden of showing that a statute is unconstitutional. *Nevadans for Nevada v. Beers*, 122 Nev. 930, 142 P.3d 339 (2006). In order to meet that burden, the challenger must make a clear showing of invalidity. 142 P.3d at 345. Here the challenger, Junge, has made no showing whatsoever that Nevada's statutes and regulations are unconstitutional. He has, in

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essence, abandoned this appeal. And even the ACLU, as an outside entity filing an amicus brief, has made no such showing regarding this personal vanity plate of "HOE." The DMV, in a manner consistent with its statutory and regulatory scheme, denied this requested plate renewal. As explained in this brief, there is no violation of the First Amendment whether it was denied as inappropriate or as inappropriate because it is also derogatory toward women. Both are constitutionally valid and sound. Nevada's statutes and regulations, like other states, are both reasonable and viewpoint neutral. Further, the ACLU's new issue of "prior restraint" is simply a red herring, and bears no connection to this case at bar. Not only was Junge not *restrained* in any way for he has been and is still presumably driving with "HOE" on his license plate, but Nevada's statutes and regulations pass the test of reasonableness and viewpoint-neutrality. And finally, the district court impermissibly changed the underlying factual context of the case when it superimposed its own "viewpoint" on what "HOE" should mean.

For the reasons in the DMV's Opening Brief and for the additional reasons stated in this Response Brief, the DMV respectfully requests that this Honorable Court enter an Order reversing the decision of the district court and affirming the decision of the Administrative Law Judge of the Department of Motor Vehicles.

DATED this 16th day of December, 2008.

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CERTIFICATE OF COMPLIANCE

I hereby certify that I have read this 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 26th day of December, 2008.

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CERTIFICATE OF SERVICE

I certify that on the 26th day of December, 2008, I served a copy of **APPELLANT'S RESPONSE BRIEF TO THE ACLU'S AMICUS BRIEF** by causing to be delivered to the Department of General Services for mailing at Las Vegas, Nevada, a true copy thereof, addressed to:

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