THE STATE OF NEW HAMPSHIRE
SUPREME COURT

CASE NO. 2012-0624

David Montenegro (n/k/a human)

v.

New Hampshire Division of Motor Vehicles

Appeal Pursuant to Rule 7

BRIEF FOR THE AMICUS CURIAE NEW HAMPSHIRE CIVIL LIBERTIES UNION

Respectfully Submitted,

New Hampshire Civil Liberties Union

By Its Attorneys,

Nixon Peabody LLP

David A. Vicinanzo, Esquire (NH Bar No. 9403)
Anthony J. Galdieri, Esquire (NH Bar No. 18954)
900 Elm Street, 14th Floor
Manchester, NH 03101-2031
(603) 628-4000

ORAL ARGUMENT REQUESTED

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

NEW HAMPSHIRE SUPREME COURT CASES

NEW HAMPSHIRE SUPERIOR COURT CASES

UNITED STATES SUPREME COURT CASES

FEDERAL CIRCUIT COURT CASES

FEDERAL DISTRICT COURT CASES

OTHER STATE CASES

CONSTITUTIONAL PROVISIONS

STATUTES AND REGULATIONS

TREATISES

OTHER SOURCES

QUESTIONS PRESENTED

A. In denying the petitioner's requested vanity license plate on the basis that a reasonable person would find it offensive to good taste, did the New Hampshire Division of Motor Vehicles violate his rights under Part I, Article 22 of the New Hampshire Constitution and the First Amendment of the United States Constitution?

TEXT OF RELEVANT AUTHORITY

Saf-C 514.61 Vanity or Initial Registration Plate.

(a) Pursuant to RSA 261:89, an initial or vanity registration plate shall be issued in lieu of the classifications listed in (b) below, providing the applicant has complied with the requirements of (c) below.

(b) The following classifications, pursuant to (a) above, may be substituted for vanity or initial plates:

(1) Passenger plates;

(2) Commercial plates;

(3) Antique plates;

(4) Motorcycle plates;

(5) Veteran's plates, to include disabled veteran's plates;

(6) Trailer plates;

(7) Street rod plates;

(8) Walking disability plates;

(9) Purple heart plates; and

(10) Apportioned plates.

(c) A vanity or initial registration plate shall:

(1) Not have the identical or similar combination of characters as any other classification;

(2) Not be capable of an obscene interpretation;

(3) Not be ethnically, racially or which a reasonable person would find offensive to good taste;

(4) Not have more than 7 characters;

(5) Not have more than one ampersand, numeral, plus sign, or minus sign in sequence;

(6) Not have any characters other than ampersands, numerals, plus signs, minus signs, or letters;

(7) Not have only numerals or only numerals and ampersands, plus signs, or minus signs; and

(8) Not have characters or combinations of characters which may cause difficulty of distinction or identification.

(d) The director shall recall any vanity or initial registration plate that has been issued which does not conform with the requirements of (c) above.

(e) A person whose vanity or initial plate has been recalled or rejected pursuant to (c) above, may submit a written request to the director setting forth a detailed explanation as to the reasons why such a vanity or initial plate should be issued. The director's decision shall be final.

IDENTITY OF THE AMICUS CURIAE

The New Hampshire Civil Liberties Union ("NHCLU") is the New Hampshire affiliate of the American Civil Liberties Union, a nationwide, nonpartisan, public interest organization with over 500,000 members (including 3,500 New Hampshire members) dedicated to advancing and preserving the Bill of Rights, and, in particular, the First Amendment and its state counterpart, Part I, Article 22 of the New Hampshire Constitution. The First Amendment and Part I, Article 22 protect and preserve the people's right to speak freely and to contribute without restriction to the marketplace of ideas. They drive public and private ingenuity and stimulate social, economic, and political change by protecting the people's right to speak openly in support of or against their government. Accordingly, the First Amendment and Part I, Article 22 rigorously defend against the arrogation of power that occurs when administrative agencies enact vague, overbroad, and viewpoint discriminatory laws such as Saf-C 514.61(c)(3), use those laws to suppress speech critical or negative of the government, and, on a *post hoc* basis, attempt to interpret those laws retroactively through counsel to make them constitutional.

The NHCLU strongly opposes this governmental practice in all of its forms and firmly believes that the First Amendment and Part I, Article 22 prohibit it.

STATEMENT OF THE CASE AND THE FACTS

The DMV is authorized to issue vanity license plate numbers "under such rules as the director deems appropriate." RSA 261:89. The DMV has a regulation implementing RSA 261:89. *See* N.H. Admin. R. Saf-C 514.61. Under Saf-C 514.61(a), the DMV must issue a vanity license plate if it complies with the requirements of Saf-C 514.61(c). One of those requirements, Saf-C 514.61(c)(3), provides that a vanity license plate shall "[n]ot be ethnically, racially or which a reasonable person would find offensive to good taste."

On May 4, 2010, the petitioner submitted an application for a vanity license plate to the New Hampshire Department of Safety, Division of Motor Vehicles ("DMV") requesting the vanity license plate "COPSLIE," the intended meaning of which was "COPS LIE." (Addendum, Joint Stip. Of Facts, at ¶3.) Dianne Sanfacon, a DMV employee, presented the application to her supervisor, Lauren Flanders, another DMV employee. (*Id.* at ¶4.) Ms. Sanfacon then denied the application based on "a belief that [COPSLIE] was insulting." (*Id.*) Ms. Sanfacon also represented that the petitioner's application had been denied by two other DMV employees, Dale Berube and Anne Farley. (*Id.*)

On May 5, 2010, the petitioner appealed the denial to DMV Director Richard C. Bailey, Jr. (*Id.* at ¶6.) On May 12, 2010, Director Bailey denied the appeal stating only that "a reasonable person would find COPSLIE offensive to good taste." (*Id.* at ¶7.) On July 9, 2010, the petitioner appealed Director Bailey's decision to the Commissioner of the New Hampshire Department of Safety, John J. Barthelmes. (*Id.* at ¶8.) On July 14, 2010, Commissioner Barthelmes denied the petitioner's application for the reason stated by Director Bailey. (*Id.* at ¶9.)

On August 30, 2012, the petitioner filed another application for a vanity license plate and requested the following license plates: "COPSLIE," "GR8GOVT," "LUVGOVT," "GOVTSUX," "SEALPAC," and "GOVTLAZ." (*Id.* at ¶10.) Tami Hewett, a DMV employee, presented the application to Ms. Flanders. (*Id.*) Ms. Hewett subsequently rejected the petitioner's first choice of license plate based on "a belief that [COPSLIE] was insulting." (*Id.* at ¶11.) Ms. Hewett then issued the petitioner his second choice of license plate, "GR8GOVT." (*Id.* at ¶14.)

The petitioner appealed to the superior court challenging the DMV's denial of his application as unconstitutional under Part I, Article 22 of the New Hampshire Constitution and the First Amendment of the United States Constitution. The petitioner argued that Saf-C 514.61(c)(3) was unconstitutionally vague, overbroad, and viewpoint discriminatory. On July 3, 2012, the superior court affirmed the DMV's decision finding no violation of the petitioner's constitutional rights. The trial court adopted the DMV's *post hoc* rationalization made through counsel that DMV officials denied the petitioner's license plate because the expression COPSLIE constituted an "accusation of moral turpitude," though the State presented no evidence that this unwritten agency policy existed or formed the basis for any DMV official's decision and the existence and application of such an agency policy was not a stipulated fact. (*See generally* Addendum, Joint Stip. Of Facts.) The superior court also made no attempt to decipher the meaning and scope of Saf-C 514.61(c)(3) and found that the "offensive to good taste" standard "may be seen as facially broad, though constrained to cover only what a 'reasonable person' would so find 'offensive.'" *Montenegro v. N.H., Div. of Motor Vehicles*, Strafford County, Docket No. 217-2010-CV-00480, slip op. at 9 (N.H. Super. Ct. 2012). The petitioner appealed the superior court's decision to this court.

SUMMARY OF THE ARGUMENT

In any forum, Saf-C 514.61(c)(3) is unconstitutionally vague, overbroad, and viewpoint discriminatory on its face under Part I, Article 22 of the New Hampshire Constitution and the First Amendment of the United States Constitution. As a prior restraint that regulates speech based on its content, Saf-C 514.61(c)(3) is presumptively unconstitutional. Saf-C 514.61(c)(3) is also unconstitutionally vague and overbroad because no one can decipher its meaning, it permits and encourages arbitrary and discriminatory enforcement, and it lacks any plainly legitimate sweep.

Saf-C 514.61(c)(3) is also facially overbroad because a substantial number of its applications are unconstitutional. Even assuming Saf-C 514.61(c)(3) has a plainly legitimate sweep that reaches accusations of moral turpitude, the regulation can be used to censor any expression or word that is critical, negative, or controversial or is capable of a critical, negative, or controversial interpretation regardless of whether it constitutes an accusation of moral turpitude. For example, Saf-C 514.61(c)(3) could be used to ban the following vanity license plates: "ABRTION," "ISLAM," "NRARULZ," "SATAN," "DODRUGS," "LUVSIN," "GAYPWR," "KILCATS," or "OSAMABL." In fact, it appears that the DMV has already used Saf-C 514.61(c)(3) in the past to ban the following expressions: "EVIL1," "CHRIST," "DARWIN," "DNTHATE," "DRUNK," "EATBUG," "EVLMNKY," "FAIRY," "GNPOSTL," "GOD4ME," "GOTFUR," "GUNRUNR," and "IRAQUSA."[1] Accordingly, Saf-C 514.61(c)(3) is unconstitutionally overbroad because a substantial number of its applications are unconstitutional when judged in relation to a purported legitimate sweep that reaches accusations of moral turpitude.

[1] *See* WMUR New Hampshire, *Banned license plates in New Hampshire* (May 9, 2013) (available at http://www.wmur.com/marketplace/automotive/-/9859690/20071496/-/9x2npu/-/index.html?utm_campaign=wmur+facebook&utm_medium=facebook&utm_source=hootsuite).

Saf-C 514.61(c)(3) is also facially viewpoint discriminatory because it does not ban an entire subject matter of speech from being discussed, but bans all subject matter from being discussed from a limitless number of viewpoints that DMV officials deem "offensive to good taste." The DMV demonstrated this when it issued the petitioner the license plate GR8TGOVT while denying him the license plate COPSLIE. Both expressions have as their core subject matter the government and its officials. The only difference between the expressions is that one is critical or negative of the government and its officials while the other is praiseworthy or positive of the government and its officials. This result is viewpoint discriminatory and demonstrates that Saf-C 514.61(c)(3) is facially unconstitutional.

The ramifications of holding Saf-C 514.61(c)(3) unconstitutional will be minimal. Such a holding will require the DMV to issue the petitioner his chosen license plate. It will also require the DMV to promulgate a new regulation that contains an ascertainable standard capable of objective application. Such a regulation will have to provide DMV officials with sufficient guidance to make fair and consistent decisions that are not viewpoint discriminatory. This new regulation will go through a public rulemaking process where it will be publicly debated and refined through public comment. Once a constitutional regulation is promulgated, the DMV is free to decide whether petitioner's license plate continues to meet the requirements of this new regulation when the petitioner renews his license plate at the end of the current year. The DMV may not, however, continue to skew and manipulate the public debate by using a vague, overbroad regulation to censor viewpoints with which it does not agree. Part I, Article 22 and the First Amendment flatly prohibit this practice.

Accordingly, for the above reasons, Saf-C 514.61(c)(3) is unconstitutionally vague, overbroad, and viewpoint discriminatory on its face.

ARGUMENT

I. In Any Forum, Saf-C 514.61(c)(3) Is Unconstitutionally Vague, Overbroad, and Viewpoint Discriminatory On Its Face.

Part I, Article 22 of the New Hampshire Constitution ("Part I, Article 22") and the First Amendment of the United States Constitution ("First Amendment"), through the Fourteenth Amendment, protect the freedom of speech. N.H. CONST. pt. 1, art. 22; U.S. CONST. amends. I and XIV. Because Part I, Article 22 is at least as protective as the First Amendment, the court should analyze the plaintiff's claims under the state constitution first citing federal case law as guidance. *Doyle v. Comm'r, N.H. Dept. of Res. & Econ. Dev.*, 163 N.H. 215, 220 (2012). The court reviews the constitutionality of state regulations *de novo*. *Id.*

A law that regulates speech based on its content is presumptively unconstitutional. *See Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 828 (1995) ("Discrimination against speech because of its message is presumed to be unconstitutional."); *R.A.V. v. City of St. Paul*, 505 U.S. 377, 382 (1992) ("Content-based regulations are presumptively invalid."). Additionally, prior restraints on speech "bear a heavy presumption against [their] constitutional validity." *N.Y. Times Co. v. United States*, 403 U.S. 713, 714 (1971) (internal quotation omitted). "Courts and commentators define [a] prior restraint as a judicial order or administrative system that restricts speech, rather than merely punishing it after the fact." *The Mortgage Specialists, Inc. v. Implode-Explode Heavy Industries, Inc.*, 160 N.H. 227, 240 (2010).

Saf-C 514.61(c)(3) is a prior restraint that regulates speech based on its content. (*See* Brief for the Director, Division of Motor Vehicles ("DMV's Brief"), Appendix, at 37 (conceding that Saf-C 514.61(c)(3) "is not content-neutral")). Specifically, Saf-C 514.61(c)(3) vests DMV officials with unfettered discretion to determine whether "a reasonable person would find" the content of a particular a vanity license plate "offensive to good taste" and to censor any vanity

license plate those officials believe meets this standard in advance of publication. Thus, Saf-C 514.61(c)(3) is a prior restraint that regulates speech based on its content and is therefore presumptively unconstitutional.

In Part I, Article 22 and First Amendment cases, the court typically applies the speech forum doctrine. *See Doyle*, 163 N.H. at 221. In this case, however, the court need not decide what forum a vanity license plate constitutes because in any forum, even a limited or nonpublic forum, Saf-C 514.61(c)(3) is unconstitutionally vague, overbroad, and viewpoint discriminatory on its face. *See, e.g., Bd. of Airport Comm'rs v. Jews for Jesus, Inc.*, 482 U.S. 569, 573-574 (1987) (holding that because "the resolution is facially unconstitutional under the First Amendment overbreadth doctrine, regardless of the proper standard, [the court] need not decide whether LAX is indeed a public forum, or whether the *Perry* standard is applicable when access to a nonpublic forum is not restricted"); *Lewis v. Wilson*, 253 F.3d 1077, 1079 (8th Cir. 2001) (holding in facial vagueness and overbreadth challenge that "we need not determine precisely what kind of forum, if any, a personalized license plate is because the statute at issue is unconstitutional whatever kind of forum a license plate might be.").

A. The Petitioner's Speech Is Protected Under Part I, Article 22 Because It Touches On A Matter Of Intense Public Concern—Integrity In Law Enforcement.

"'[S]peech on public issues occupies the highest rung of the hierarchy of First Amendment values, and is entitled to special protection.'" *Snyder v. Phelps*, 131 S. Ct. 1207, 1215 (2011) (quoting *Connick v. Myers*, 461 U.S. 138, 145 (1983)). "That is because 'speech concerning public affairs is more than self-expression: it is the essence of self-government.'" *Id.* (quoting *Garrison v. Louisiana*, 379 U.S. 64, 74-75 (1964)). Indeed, speech on public issues critical of the government is at the greatest risk of being suppressed by the government and is therefore accorded a high level of constitutional protection. *See Ridley v. Mass. Bay Transp.*

Auth., 390 F.3d 65, 86 (1st Cir. 2004) ("Suspicion that viewpoint discrimination is afoot is at its zenith when the speech restricted is speech critical of the government, because there is a strong risk that the government will act to censor ideas that oppose its own.").

"Speech deals with matters of public concern when it can 'be fairly considered as relating to any matter of political, social, or other concern to the community . . . .'" *Snyder*, 131 S. Ct. at 1216 (quoting *Connick*, 461 U.S. at 146). "The arguably 'inappropriate or controversial character of a statement is irrelevant to the question of whether it deals with a matter of public concern.'" *Id.* (quoting *Rankin v. McPherson*, 483 U.S. 378, 387 (1987)). In "[d]eciding whether speech is of public or private concern," the court examines "the 'content, form, and context' of th[e] speech 'as revealed by the whole record.'" *Id.* (quoting *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 761 (1985)).[2]

The content of speech is on a matter of public concern if it "relates to broad issues of interest to society at large, rather than matters of 'purely private concern.'" *Id.* (quoting *Dun & Bradstreet, Inc.*, 472 U.S. at 759). For example, in *Snyder*, the United States Supreme Court held that placards reading, among other things, "God Hates the USA/Thank God for 9/11," "Fag Troops," "Semper Fi Fags," and "Maryland Taliban," "plainly relate[d] to broad issues of interest to society at large" and highlighted "matters of public import" because they addressed "the political and moral conduct of the United States and its citizens," "the fate of our Nation," and "homosexuality in the military." *Id.* at 1216-17. Similarly, the expression COPSLIE highlights matters of public import because it addresses important, newsworthy issues such as integrity in law enforcement, police corruption, police misconduct, and police tactics.[3] *See, e.g.*,

[2] *See also Snelling v. City of Claremont*, 155 N.H. 674, 682 (2007); *Porter v. City of Manchester*, 151 N.H. 30, 49 (2004).

[3] Indeed, integrity in law enforcement, police corruption, police misconduct, and police tactics are frequently a subject of legitimate news interest in New Hampshire and in the United States. *See, e.g.*, Manchester Union Leader,

McMurphy v. City of Flushing, 802 F.2d 191, 196 (6th Cir.1986) ("Obviously, the public is concerned with how a police department is operated, and efforts to give public exposure to alleged misconduct are protected."); *Marohnic v. Walker*, 800 F.2d 613, 616 (6th Cir. 1986) ("Public interest is near its zenith when ensuring that public organizations are being operated in accordance with the law . . . ."); *Brockell v. Norton*, 732 F.2d 664, 668 (8th Cir. 1984) ("The public has a vital interest in the integrity of those commissioned to enforce the law.").

The proposed form and context also demonstrates that the petitioner's speech is on a matter of public concern. License plates function as "mobile billboards." *Wooley v. Maynard*, 430 U.S. 705, 715 (1977). Members of the public would see the petitioner's message primarily when they are driving on highways and roads. While driving on highways and roads, the public has a heightened sense of awareness about law enforcement. Thus, the proposed form and context of the petitioner's speech is uniquely suited to reach a large segment of the public when the public is actively thinking about law enforcement. Accordingly, the petitioner's speech is on a matter of intense public concern, *i.e.*, integrity in law enforcement, and is therefore entitled to significant constitutional protection.[4]

Lawyer: Expect lawsuit against former New London chief (April 5, 2013) (available at http://www.unionleader.com/article/20130406/NEWS03/130409408); Manchester Union Leader, *Detective arrested in hit-and-run had been visiting at fellow officer's home* (March 26, 2013) (available at http://www.unionleader.com/article/20130327/NEWS03/130329299/0/OBITUARIES) ; New York Times, *Why Police Lie Under Oath*, (Feb. 2, 2013) (available at http://www.nytimes.com/2013/02/03/opinion/sunday/why-police-officers-lie-under-oath.html?_r=0); Manchester Union Leader, *Officers on list for honesty concerns* (Oct. 6, 2012) (available at http://www.newhampshire.com/article/20121007/NEWS07/710079927/0/news06) (discussing the fact that the State keeps a *Laurie* list of law enforcement officials who have engaged in conduct that would damage their credibility as a witness in court).

[4] The DMV appears to argue in passing that the petitioner's speech is not entitled to constitutional protection because it is defamatory. (*See* DMV's Brief, at 5, 16.) The DMV does not appear to have addressed this argument in any significant way at trial, (*see id.*, Appendix, at 32), and the trial court treated the petitioner's speech as constitutionally protected. Accordingly, this argument should be deemed waived. *See City of Manchester v. Sec'y of State*, 163 N.H. 689, 696 (2012) (declining to address undeveloped Federal Constitutional arguments).

However, to the extent the court is inclined to address this argument, it bears noting that broad statements about large groups of people are not defamatory as a matter of law because no reasonable person would understand those words to have personal application. *See* Restatement (Second) Torts § 564A, and Comment a (1976).

B. Saf-C 514.61(c)(3) Is Facially Vague And Overbroad Because No One Can Decipher Its Meaning, It Permits Arbitrary and Discriminatory Enforcement, and It Lacks Any Plainly Legitimate Sweep.

To succeed on a facial vagueness or overbreadth challenge, the petitioner must show that no set of circumstances exists under which Saf-C 514.61(c)(3) would be valid, *see Doyle*, 163 N.H. 187, 220-21, or that the regulation lacks any plainly legitimate sweep, *see United States v. Stevens*, 130 S. Ct. 1577, 1587 (2010). A law is "impermissibly vague . . . [if]: (1) it fails to provide people of ordinary intelligence a reasonable opportunity to understand the conduct it prohibits; or (2) it authorizes or even encourages arbitrary and discriminatory enforcement." *State v. Hynes*, 159 N.H. 187, 200 (2009); *see F.C.C. v. Fox Television Stations, Inc.*, 132 S. Ct. 2307, 2317 (2012) (setting forth same test). These prohibitions are "based in part on the need to eliminate the impermissible risk of discriminatory enforcement, for history shows that speech is suppressed when either the speaker or the message is critical of those who enforce the law." *Gentile v. State Bar of Nev.*, 501 U.S. 1030, 1051 (1991).

"When speech is involved, rigorous adherence [to the vagueness doctrine's] requirements is necessary to ensure that ambiguity does not chill protected speech." *Fox Television Stations, Inc.*, 132 S. Ct. at 2317; *see Reno v. A.C.L.U.*, 521 U. S. 844, 871-872 (1997) ("The vagueness of [a content-based regulation of speech] raises special First Amendment concerns because of its obvious chilling effect"); *Village of Hoffman Estates v. The Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 499 (1982) (holding that when a vague law "interferes with the right of free speech . . . a more stringent vagueness test . . . appl[ies]").

Whether Saf-C 514.61(c)(3) is unconstitutionally vague and overbroad requires the court to attempt to ascertain the regulation's meaning and scope. *See United States v. Williams*, 553 U.S. 285, 293 (2008); *Indigo Room, Inc. v. City of Fort Myers*, 710 F.3d 1294, 1302 (11th Cir.

2013). The terms "offensive," "good," and "taste" are not defined in the regulation. *See generally* Saf-C 502. However, Saf-C 514.61(c) already prohibits vanity license plates that are "capable of an obscene interpretation," Saf-C 514.61(c)(2), are "ethnically . . . offensive to good taste," Saf-C514.61(c)(3), and are "racially . . . offensive to good taste." *Id.* Thus, the phrase "which a reasonable person would find offensive to good taste" does not encompass expressions or words related to obscenity, ethnicity, or race. *See Winnacunnet Coop. Sch. Dist. v. Town of Seabrook*, 148 N.H. 519, 526-527 (2002) (explaining that "[the court] must give effect to all words in a statute [or regulation] and presume that the legislature [or administrative agency] did not enact superfluous or redundant words")).

Examining the plain meaning of Saf-C 514.61(c)(3) lends no further clarity. *See Doyle*, 163 N.H. at 224. The word "offensive" means, in part, "unpleasant, as to the senses; disgusting; repugnant; causing resentment, anger, etc.; insulting." Webster's New World College Dictionary 1001 (4th ed. 2000). "Good," means, in part, "proper; becoming; correct; socially acceptable." *Id.* at 611. "Taste" means, in relevant part, "a liking; inclination; fondness; bent [to have no taste for business] – in (good, poor, etc.) taste in a form, style, or manner showing a (good, poor, etc.) sense of beauty, excellence, fitness, or propriety, etc. . . . ." *Id.* at 1466. Applying these definitions to the regulation results in phrases such as "insulting to proper manner" or "unpleasant to socially acceptable form." These phrases are as vague, overbroad, and lacking in standards as phrases like "treating the flag contemptuously" or "annoying to persons passing by." *See Smith v. Goguen*, 415 U.S. 566, 578 (1974) (law prohibiting "treating the flag contemptuously" unconstitutionally vague because the law "simply has no core" and lacks "ascertainable standards"); *Coates v. City of Cincinnati*, 402 U.S. 611, 614 (1971) (law prohibiting conduct "annoying to persons passing by" unconstitutionally vague because

"[c]onduct that annoys some people does not annoy others," "no standard of conduct is specified at all," and "men of common intelligence must necessarily guess at its meaning").[5]

The DMV's views are also of no help in determining what "a reasonable person would find offensive to good taste." As the stipulated record indicates, the petitioner's license plate was initially rejected based on "a belief" that it was "insulting." (Addendum, Joint Stip. Of Facts, at ¶¶3, 11.) The director and commissioner upheld the rejection only by regurgitating the language of Saf-C 514.61(c)(3). (*Id.* at ¶¶6-9.) As a *post hoc* rationale for its denial, the DMV stated through counsel after litigation had commenced that it interprets Saf-C 514.61(c)(3) to encompass accusations of moral turpitude and that the expression COPSLIE is such an accusation.[6] "Moral turpitude," however, is generally defined as something more than merely lying. *See* 50 Am Jur. 2d Libel and Slander § 165, at 454 (1995) ("Moral turpitude means, in general, shameful wickedness—so extreme a departure from ordinary standards of honest, good morals, justice or ethics as to be shocking to the moral sense of community.").

---

[5] Looking to the construction of other laws to determine the meaning of Saf-C 514.61(c)(3) affords no help either. The "offensive to good taste" standard is used in only one other New Hampshire law and only with respect to vanity license plates for off-highway recreation vehicles and snowmobiles. *See* Fis 1503.04(g)(3). Fis 1503.04(g)(3) provides that: "A vanity registration decal shall: . . . Not be morally, ethnically, racially, or in any other manner offensive to good taste." This regulation uses different language than Saf-C 514.61(c)(3), such as "morally" and "manner," and does not include the term "reasonable person," making it impossible to tell whether Saf-C 514.61(c)(3) imposes substantively different requirements on vanity license plates for highway vehicles than Fis 1503.04(g)(3) imposes on vanity license plates for off highway recreation vehicles and snowmobiles.

[6] The trial court erroneously relied on this *post hoc* rationalization made through counsel for the purposes of this litigation as evidence in this case to uphold the DMV's decision. *See Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 419 (1971), *overruled on other grounds* by *Califano v. Sanders*, 430 U.S. 99, 105 (1977) (observing that "'post hoc' rationalizations . . . have traditionally been found to be an inadequate basis for review" of agency action); *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 168 (1962) ("The courts may not accept appellate counsel's *post hoc* rationalizations for agency action."); *McGrady v. Winter*, 810 F. Supp.2d 281, 290 (D.D.C. 2011) ("[T]he rule barring consideration of post-hoc agency rationalizations applies where an agency has provided a particular justification for a determination at the time the determination is made, but provides a different justification for the same determination when it is later reviewed by another body.") (internal quotation omitted).

In marked contradiction to this rationale, the DMV also argued to the trial court that accusations of moral turpitude could appear on vanity license plates if the language used was diluted to the point where the expression lost its intended meaning and effect. (*See* DMV's Brief, Appendix, at 37.) Specifically, the DMV contended that Saf-C 514.61(c)(3) is viewpoint neutral because virtually any viewpoint can be expressed "non-offensively." (*Id.*) Based on this reasoning, the DMV stated that it might be permissible for the petitioner to put the following expression on his license plate if it would fit: "Some human beings are untruthful; police officers are human beings; one shouldn't assume police officers are truthful only because they're police officers." (*Id.*) This interpretation is similarly defective because: (1) it ignores the plain language of Saf-C 514.61(c)(3), which does not ban all offensive statements but only those statements that are "offensive to good taste"; and (2) it demonstrates that Saf-C 514.61(c)(3) is facially viewpoint discriminatory because the regulation permits the petitioner to speak about government officials but only from a viewpoint of which the DMV approves. These defects highlight the fact that no one, not even DMV officials, know what Saf-C 514.61(c)(3) means or how to apply it fairly, consistently, and in a viewpoint neutral way.

For this reason, courts have frequently struck down laws as facially vague and overbroad that contain language substantially similar to Saf-C 514.61(c)(3). *See, e.g., Air Line Pilots Assoc. v. Dept. of Aviation of City of Chicago*, 45 F.3d 1144, 1154 n.5 (7th Cir. 1995) ("The contract between the City and [Transportation Media Incorporated] actually bans 'political, immoral or illegal' dioramas and dioramas 'not in good taste.' The district court correctly determined that taste and morality were standards too vague to be enforced."); *Aubrey v. City of Cincinnati*, 815 F. Supp. 1100, 1104 (S.D. Ohio 1993) (striking down banner policy that prohibited signs and banners "not in good taste" as facially vague and overbroad); *Stanton v.*

Brunswick Sch. Dept., 577 F. Supp. 1560, 1572 (D. Me. 1984) (holding in First Amendment vagueness challenge that "[f]ree public expression cannot be burdened with governmental predictions or assessments of what a discrete populace will think about good or bad 'taste'"); *Penthouse Int'l, LTD v. Koch*, 599 F. Supp. 1338, 1351 (S.D.N.Y. 1984) (finding "offensive to good taste" standard in municipal contract "too vague and subjective to meaningfully circumscribe the discretion of subway officials").[7]

Of these cases, *Aubrey* presents a good example. In *Aubrey*, the Cincinnati Reds, under authority granted by the City of Cincinnati, established a banner policy for the 1990 World Series. *Id.* at 1102. The policy read in relevant part:

> ballpark patrons are permitted to bring signs and banners to the stadium. They must be in good taste (as determined by Reds [sic] management) or the banner will be removed . . . . Reds [sic] management reserves the right to remove any banner or sign that is viewed to be in bad taste or is causing an obstruction.

Id. (emphasis added). The plaintiff, a reverend, put up a sign reading "Go Reds, John 3:16," which refers to a well-known Bible passage. *Id.* at 1103. Stadium security and city police forced the plaintiff to remove the sign pursuant to the banner policy because the sign was not "baseball-related." *Id.*

In analyzing the plaintiff's vagueness and overbreadth challenges to the banner policy, the court concluded that it was impossible to determine what the banner policy meant by "good taste." *Id.* at 1104. The court stated:

> The Reds' banner policy permits fans to hang signs in [the stadium] only if they are in 'good taste.' What is good taste? It is not defined in the banner policy. The Reds assert that good taste means 'base-ball-related.' However, not even

[7] *See also Schneider v. New Jersey (Town of Irvington)*, 308 U.S. 147, 158 (1939) (holding statute requiring officer to refuse canvassing license if "the canvasser is not of good character" unconstitutional because it made exercise of liberty "depend[] upon the exercise of the officer's discretion"); *Child Evangelism Fellowship of S.C. v. Anderson Sch. Dist. Five*, 470 F.3d 1062, 1069 (4th Cir. 2006) ("While an adequate policy must contain 'narrow, objective, and definite standards,' 'the best interest of the district' is as subjective a notion as good government, good taste, or good character.") (emphasis added).

> Reds' employees can agree upon what constitutes good taste as they have informally defined it.

Id. Accordingly, the court stated that it had "no hesitancy in concluding that the Red's banner policy of good taste is substantially overbroad and vague on its face." *Id.* The court explained that "[t]he Reds' policy leaves too much discretion in the decision maker without any standards for that decision maker to base his or her determination [on]." *Id.*

Like the banner policy in *Aubrey*, the standard set out in Saf-C 514.61(c)(3)—"which a reasonable person would find offensive to good taste"—is unconstitutionally vague and overbroad on its face. Under any set of circumstances, the standard is entirely subjective, incapable of definition, wholly devoid of ascertainable standards, and limitless in breadth.[8] *See Williams*, 553 U.S. at 306 (observing that the United States Supreme Court has struck down statutes as unconstitutionally vague that tied an individual's conduct to "wholly subjective judgments without statutory definitions, narrowing context, or settled legal meanings"). Within the DMV itself, the standard apparently takes on multiple meanings, encompassing everything from "a belief" that an expression is "insulting," to "accusations" that DMV officials believe rise to a level of "moral turpitude," to statements that are not sufficiently diluted to the point where they lose their intended meaning and effect. *See Lewis*, 253 F.3d at 1080 (observing that the fact that the government can "so readily switch justifications for its rejection of the plate illustrates the constitutional difficulty with the statute"). Consequently, every application of Saf-C 514.61(c)(3)'s "which a reasonable person would find offensive to good taste" standard creates

[8] This is not a novel conclusion. Over 250 years ago the German philosopher Immanuel Kant observed that: "Proofs are of no avail for determining the judgment of taste, and in this connection matters stand just as they would were that judgment simply subjective." Immanuel Kant, *The Critique of Aesthetic Judgment*, Book II, Section 33, translated by James Creed Meredith (1911); *see id.*, Book II, Section 34 ("An objective principle of taste is not possible."). As the Roman maxim put it, "De gustibus non est disputandum" ("There is no arguing about taste").

an impermissible risk of arbitrary and discriminatory enforcement. *See id.* Accordingly, for the above reasons, Saf-C 514.61(c)(3) is unconstitutionally vague and overbroad on its face.

C. Saf-C 514.61(c)(3) Is Facially Overbroad Because, Even Assuming It Has A Plainly Legitimate Sweep, A Substantial Number Of Its Applications Are Unconstitutional.

Under Part I, Article 22, a regulation may also be overbroad in that "a substantial number of its applications are unconstitutional, judged in relation to the [regulation's] plainly legitimate sweep." *Doyle*, 163 N.H. at 220-21. The DMV has not identified what the "plainly legitimate sweep" of Saf-C 514.61(c)(3)'s "which a reasonable person would find offensive to good taste" standard is, and the trial court did not attempt to define it. The best the DMV has been able to offer on a *post hoc* basis through counsel is that Saf-C 514.61(c)(3) encompasses accusations of moral turpitude. However, even assuming Saf-C 514.61(c)(3) has a plainly legitimate sweep that reaches accusations of moral turpitude, Saf-C 514.61(c)(3) is facially overbroad because a substantial number of its applications are unconstitutional.

"Although '[t]he concept of substantial overbreadth' is not readily reduced to an exact definition,' it generally means that [the court] will not invalidate a statute on its face unless 'there [is] a realistic danger that the statute itself will significantly compromise recognized First Amendment protections of parties not before the Court.'" *See Acosta v. City of Costa Mesa*, __ F.3d __, 2013 U.S. App. LEXIS 9066, at *16 -*17 (9th Cir. May 3, 2013) (quoting *City Council v. Taxpayers for Vincent*, 466 U.S. 789, 800-01 (1984)).

As the trial court observed, Saf-C 514.61(c)(3) is "facially broad." *Montenegro v. N.H., Div. of Motor Vehicles*, Strafford County, Docket No. 217-2010-CV-00480, slip op. at 9 (N.H. Super. Ct. 2012). As demonstrated *in* Section I, B, *supra*, Saf-C 514.61(c)(3) is incapable of definition and lacks objectively identifiable limits. Instead, the plain language of the regulation

appears to encompass all speech regardless of subject matter and is not limited to accusations of moral turpitude. Specifically, the DMV could use Saf-C 514.61(c)(3) to censor a litany of controversial words and statements expressed from various viewpoints that are unrelated to accusations of moral turpitude such as: "USEGUNS," "ABRTION," "ISLAM," "NRARULZ," "SATAN," "DODRUGS," "SMOKEMJ," "LUVSIN," "GAYPWR," "KILCATS," "OSAMABL," "GODLIES," "H8TAXES,"[9] "HITLER," "JESUS," "ALLAH," "SADDAM," and "LUVDRGS." In fact, it appears that the DMV has already used Saf-C 514.61(c)(3) in the past to ban the following similar expressions and words: "EVIL1," "EVIL – 1," "EVLONE," "BADMONKY," "CHRIST," "DARWIN," "DOIN – IT," "DNTHATE," "DRUNK," "EATBUG," "EVLMNKY," "FAIRY," "GNPOSTL," "GOD4ME," "GOTFUR," "GUNRUNR," "H8PIGS," "IRAQUSA," "-JIHAD-," "JUDAS," "KIDNAP," "KIKBUTT," "NAKED," "NHMAFIA," "NOCOPS," "NSANE," "OLDBAG," "OLDNAG," "O-SAMA," "PSTL," "RDRAGE," "SHO-ME," "SLEEZE," "SNIPER," "STUD," "TRYME," "WANT2," "WHTBOY," and "WLDMAN."[10]

The above lists demonstrate that Saf-C 514.61(c)(3) is substantially overbroad when judged in relation to its purported legitimate sweep of prohibiting accusations of moral turpitude because it allows the DMV in practice to prohibit a seemingly limitless amount of speech that

[9] The DMV already appears to use Saf-C 514.61(c)(3) to censor all expressions that include the initials "H8," apparently meaning "hate." Specifically, the DMV's Initial Plate Registry website states: "Certain letter/character combinations, such as H8, will not be allowed." *See* New Hampshire Department of Safety, Division of Motor Vehicles, Initial Plate Search, http://www4.egov.nh.gov/platecheck/platecheck.aspx. This policy is very disturbing. It has not been reduced to a formal rule or regulation and does not appear to have been taken through the formal administrative rulemaking process. Moreover, such a policy is facially viewpoint discriminatory because it prevents individuals from discussing permissible subject matter from a particular viewpoint. *See Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819, 829 (1995) ("When the government targets not subject matter, but particular views taken by speakers on a subject, the violation of the First Amendment is all the more blatant.").

[10] *See* WMUR New Hampshire, *Banned license plates in New Hampshire* (May 9, 2013) (available at http://www.wmur.com/marketplace/automotive/-/9859690/20071496/-/9x2npu/-/index.html?utm_campaign=wmur+facebook&utm_medium=facebook&utm_source=hootsuite).

has nothing to do with accusations of moral turpitude. "As the Supreme Court observed in *Jews for Jesus*, 'the opportunity for abuse, especially where a statute has received a virtually open-ended interpretation, is self-evident.'" *Aubrey*, 815 F. Supp. at 1104 (quoting *Jews for Jesus, Inc.*, 482 U.S. at 576). Indeed, the fact alone that DMV officials can use Saf-C 514.61(c)(3) to prohibit permissible subject matter from being discussed from a religious or political viewpoint that they believe is "offensive to good taste" renders Saf-C 514.61(c)(3) substantially overbroad and viewpoint discriminatory on its face. *See R.A.V.*, 505 U.S. at 388 ("[A State] may not prohibit, for example, only that obscenity which includes offensive political messages.") (emphasis added); *Byrne v. Rutledge*, 623 F.3d 46, 49 (2d Cir. 2010) (holding that Vermont's ban "on all vanity plate combinations that 'refer, in any language, to a . . . religion' or 'deity'" seeks to exclude speakers who wish to comment on appropriate subject matter from a religious viewpoint and is therefore facially unconstitutional).

Accordingly, because a substantial number of Saf-C 514.61(c)(3)'s applications prohibit a broad range of protected speech that does not constitute accusations of moral turpitude, Saf-C 514.61(c)(3) is unconstitutionally overbroad on its face.

D. Saf-C 514.61(c)(3) Is Facially Viewpoint Discriminatory Because It Bans All Subject Matter From Being Discussed From A Limitless Number Of Viewpoints That Are "Offensive To Good Taste."

"It is axiomatic that the government may not regulate speech based on its substantive content or the message it conveys." *Rosenberger v. Rector and Visitors of Univ. of Va.*, 515 U.S. 819, 828 (1995). "Discrimination against speech because of its message is presumed to be unconstitutional." *Id.* "When the government targets not subject matter, but particular views taken by speakers on a subject, the violation of the First Amendment is all the more blatant." *Id.* at 829. "These principles ... forbid[] the State from exercising viewpoint discrimination, even

when the limited public forum is one of its own creation." *Id.* "A restriction on speech is viewpoint-based if . . . on its face, it distinguishes between types of speech or speakers based on the viewpoint expressed . . . ." *Moss v. United States Secret Service*, 675 F.3d 1213, 1224 (9th Cir. 2012).

On its face, Saf-C 514.61(c)(3) distinguishes between types of speech based on the viewpoint expressed. It does not ban all ethnically or racially offensive statements or all statements which a reasonable person would find offensive. Rather, it bans a discrete subset of these statements that are "offensive to good taste." This fact alone renders Saf-C 514.61(c)(3) facially viewpoint discriminatory. However, even if Saf-C 514.61(c)(3) banned all offensive statements, the regulation would still be facially viewpoint discriminatory because plate holders expressing a viewpoint praising a particular ethnicity, race, person, government, or group may make that expression while others wishing to express the opposite viewpoint may not.

For example, in *Bujno*, the Virginia Department of Motor Vehicles attempted to revoke vanity tags for the petitioner's vehicle that read "ICUHAJI." *See Bujno v. Commonwealth of Virginia, Dept. of Motor Vehicles*, 2012 WL 6617333, at *1 (Vir. Cir. Ct. Nov. 2, 2012). The DMV denied the petitioner's vanity tags because, according to the DMV, the tags disparaged Middle Easterners and therefore violated the DMV's guidelines, which prohibited in part all letter combinations that "may be reasonably seen by a person viewing a license plate as socially, racially, or ethnically offensive or disparaging." *Id.* The petitioner subsequently challenged this guideline as unconstitutionally viewpoint discriminatory in violation of the First and Fourteenth Amendments. *Id.* at *2.

After thoroughly analyzing United States Supreme Court precedent, the court in *Bujno* observed that "[v]iewpoint discrimination occurs when (1) the government discriminates against

offensive, unpopular, or disfavored views or messages, or (2) when the government removes a competing perspective from a forum or debate." *Id.* at *6. Applying these principles, the court found that the DMV guideline at issue was viewpoint discriminatory. *Id.* at *6-7. The court explained:

> Although the DMV could have reasonably prohibited all letter combinations that refer to race or ethnicity, it has only prohibited letter combinations that might be viewed as racially or ethnically offensive or disparaging. Thus, plate holders expressing a viewpoint honorific of a particular ethnicity or race may make that expression, but others wishing to express a racially or ethnically disparaging viewpoint may not.

Id. The court ultimately concluded that "[b]ecause the Guidelines would allow Petitioner to praise Middle Easterners, but prohibits him from denigrating them, the Guidelines are unconstitutionally viewpoint discriminatory." *Id.* at *7.

Similarly, in this case, Saf-C 514.61(c)(3)'s "which a reasonable person would find offensive to good taste" standard discriminates against disfavored viewpoints and is designed to remove competing unpopular or offensive perspectives from the vanity license plate forum. The DMV demonstrated this when it denied the petitioner the license plate COPSLIE and instead issued him the license plate GR8GOVT. The subject matter of both plates is the government and its officials. The only material difference between the two license plates is the viewpoint expressed by them; one praises the character and integrity of the government and its officials, while the other is critical or negative of the character and integrity of the government and its officials. Thus, like the DMV guideline in *Bujno*, Saf-C 514.61(c)(3) is unconstitutionally viewpoint discriminatory because it allows individuals to express positive views about a particular ethnicity, race, government, or group of government officials but does not permit individuals to criticize, question the veracity of, or speak negatively about those same groups, entities, or persons. *See Rosenberger*, 515 U.S. at 831 ("If the topic of debate is, for example,

racism, then exclusion of several views on that problem is just as offensive to the First Amendment as exclusion of only one."); *R.A.V. v. City of St. Paul*, 505 U.S. 377, 391 (1992) ("The First Amendment does not permit St. Paul to impose special prohibitions on those speakers who express views on disfavored subjects.").

The State's reliance on *Perry v. McDonald*, 280 F.3d 159 (2d Cir. 2001) and *General Media Communications, Inc. v. Cohen*, 131 F.3d 273 (2d Cir. 1997) for a different conclusion is misplaced. In *Perry*, the Vermont DMV accidentally issued the plaintiff a vanity license plate that contained scatological profanity. 280 F.3d at 163-64. The DMV tried to recall it, but a hearing officer determined that the DMV lacked the statutory authority to do so. *Id.* at 165. The plaintiff subsequently sued the DMV arguing that it violated her First Amendment rights and requested prospective declaratory and injunctive relief and damages. *Id.* at 165-66.

In denying the plaintiff's requests for relief, the Second Circuit observed that the Vermont enabling statute banned offensive vanity license plates and that the DMV had enacted specific regulations interpreting this broad grant of authority. *Id.* at 172 ("While [the statute] grants the state the power to revoke 'offensive' or 'confusing' vanity plates, the regulation limits this discretion by specifying content and includes the right to a prerevocation hearing."). Specifically, the DMV had enacted a detailed regulation that banned in part all "[c]ombination of letters, or numbers with any connotation, in any language that is . . . scatological . . . ." *Id.* at 172 n.9. The Second Circuit held that this subject matter ban on scatological references was reasonable and viewpoint neutral and could be applied to keep scatological profanity off vanity license plates. *Id.* at 170, 172-73.

In *General Media Communications, Inc.*, the statute at issue prohibited "the sale or rental of recordings and periodicals 'the dominant theme of which depicts or describes nudity,

including sexual or excretory activities or organs, in a lascivious way'" on military bases. 131 F.3d at 281 (quoting 10 U.S.C. § 2489a(d)). The plaintiff argued in part that the statute discriminated based on viewpoint because it prohibited only those materials that were lascivious. *Id.* The Second Circuit disagreed holding that the term lascivious, which was defined in the statute, helped identify what recordings and periodicals were prohibited. *Id.* at 281-82. The Second Circuit explained that the United States Supreme Court has equated lasciviousness to obscenity, a class of speech that has historically been considered its own subject matter. *Id.* at 282. The Second Circuit further observed throughout its opinion that government restrictions on speech on military bases are entitled to "far more deference" than similar laws in civil society. *Id.* at 275, 282-83, 286.

In this case, the speech at issue is not scatological profanity or a description of lascivious nudity, but speech on a matter of intense public concern, *i.e.*, integrity in law enforcement. The expression COPSLIE is not being censored because it contains a profane word or lascivious description that has long been considered obscene; it is being censored because of the message, viewpoint, and ideas it conveys. The regulation at issue, Saf-C 514.61(c)(3), does not ban an entire subject matter of speech that is capable of definition, such as scatological references or lascivious descriptions of nudity, but bans a limitless amount of speech, including a limitless number of viewpoints, religious, political, or otherwise, that the DMV deems "offensive to good taste." Indeed, Saf-C 514.61(c)(3)'s "offensive to good taste" standard is as broad and open-ended as the statutory grant of authority in *Perry*.[11] Additionally, in *Perry*, the Vermont legislature's broad grant of statutory authority was limited by regulations that specified the subject matter prohibited. Similarly, in *General Media Communications, Inc.*, the statute

[11] Though not germane to the Second Circuit's holding, the regulation in *Perry* also contained the following subject matter ban: "Combinations of letters, or numbers that suggest, in any language, a government or governmental agency." *Id.* at 172 n.9. (emphasis added).

identified the specific subject matter regulated and defined the term "lascivious." By contrast, Saf-C 514.61(c)(3)'s "which a reasonable person would find offensive to good taste" standard provides no limits on the DMV's authority or discretion, does not specify the subject matter prohibited, and does not define the regulation's terms.[12]

These material differences make *Perry* and *General Media Communications, Inc.* inapplicable to this case, and the State's attempt to make these cases applicable by providing *post hoc* rationalizations for the DMV's decisions works only to undermine the administrative process and the function of judicial review. *See Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 168, 169 (1962) ("The courts may not accept appellate counsel's *post hoc* rationalizations for agency action. . . . For the courts to substitute their or counsel's discretion for that of the [agency] is incompatible with the orderly functioning of the process of judicial review.").

Accordingly, because Saf-C 514.61(c)(3)'s "which a reasonable person would find offensive to good taste" standard does not ban a specific subject matter of speech, but bans all permissible subject matter from being discussed from a limitless number of viewpoints, Saf-C 514.61(c)(3) is facially viewpoint discriminatory.

E. The Protections Afforded By Part I, Article 22 And The First Amendment Far Outweigh Any Minimal Consequences That May Result From Holding Saf-C 514.61(c)(3) Unconstitutional.

The ramifications of holding Saf-C 514.61(c)(3) unconstitutional will be minimal. Such a holding will require the DMV to issue the petitioner his requested license plate. It will also require the DMV to promulgate more specific viewpoint neutral regulations that allow ordinary people to understand what expressions may be used on vanity license plates. By passing more specific viewpoint neutral regulations, the DMV will significantly diminish the risk that DMV

[12] Additionally, because a vanity license plate is not a military base or installation, the broad level of deference the Second Circuit accorded the statute in *General Media Communications, Inc.* does not apply to Saf-C 514.61(c)(3).

officials will engage in arbitrary and discriminatory enforcement, will increase confidence in state government, and will restore objectivity to an entirely subjective agency process.

These new, more specific regulations will be taken through the administrative rulemaking process and will be subject to public notice and comment. *See* RSA 541-A:3, IV. The public notice-and-comment process is an integral part of the administrative process that is substantially undermined when agencies promulgate vague, overbroad regulations with the intent to interpret them more specifically on a *post hoc* basis after litigation is commenced to make them apply to nearly any situation or set of circumstances. *See Burlington Truck Lines, Inc.*, 371 U.S. at 168; *Sprint Corp. v. F.C.C.*, 315 F.3d 369, 373 (D.C. Cir. 2003) (observing that the public notice-and-comment process "does not simply erect arbitrary hoops through which [agencies] must jump without reason," but is designed to improve the rulemaking process for agencies by exposing proposed rules "to diverse public comment, ensur[ing] fairness to effected parties, and provid[ing] a well-developed record that enhances the quality of [future] review.") (internal quotations omitted). Once a new constitutional regulation is promulgated, the DMV may then apply that regulation annually to the petitioner's vanity license plate to decide whether it may be properly renewed. *See* RSA 261:89 ("Plates shall be renewed on an annual basis for $40 per set.").

Given the vast power administrative agencies wield and the limited ability of the Executive to oversee them, requiring the DMV to enact more specific constitutional regulations is a minimal burden and a necessary check on the government's power under Part I, Article 22 and the First Amendment. Administrative agencies combine the executive, legislative, and judicial functions. *See Arlington v. F.C.C.*, 568 U.S. __, 2013 U.S. LEXIS 3838, at *42 (May 20, 2013) (Roberts, C.J., and Kennedy and Alito, JJ., dissenting) (observing that administrative

agencies combine the executive, legislative, and judicial powers and noting that it may be a bit much "to describe th[is] . . . as 'the very definition of tyranny,' but the danger posed by the growing power of the administrative state cannot be dismissed").

Left unchecked, this combination of governmental functions into a single entity has the tendency to permit and encourage unconstitutional conduct particularly in areas where the priorities of the Executive are not focused. *See id.*; *Free Enter. Fund v. Public Co. Accounting Oversight Bd.*, 130 S. Ct. 3138, 3156 (2010) ("The growth of the Executive Branch, which now wields vast power and touches almost every aspect of daily life, heightens the concern that it may slip from the Executive's control, and thus from that of the people."). For this reason, it is critical that the judiciary rigorously police the boundary between permissible agency regulation and the freedoms protected by Part I, Article 22 and the First Amendment.

There is also no meritorious argument that it would be inefficient or somehow too inconvenient for the DMV to promulgate more specific constitutional regulations. The United States Supreme Court has expressly held that "the 'fact that a given law or procedure is efficient, convenient, and useful in facilitating functions of government, standing alone, will not save it if it is contrary to the Constitution,' for '[c]onvenience and efficiency are not the primary objectives—or the hallmarks—of democratic government.'" *Free Enter. Fund*, 130 S. Ct. at 3156 (quoting *Bowsher v. Synar*, 478 U.S. 714, 736 (1986)). Indeed, a regulation of seemingly limitless breadth like Saf-C 514.61(c)(3) is easy to write and efficient and convenient to apply, but Part I, Article 22 and the First Amendment demand more; they demand that laws regulating speech speak clearly and precisely to the subject matter regulated so ordinary people may understand what topics they may discuss and government officials may understand how to apply

those laws fairly, consistently, and in a viewpoint neutral way. Crafting such a regulation may not be easy, efficient, or convenient, but that is what our state and federal constitutions demand.

Holding Saf-C 514.61(c)(3) unconstitutional will also reaffirm the principle under Part I, Article 22 and the First Amendment that the government cannot engage in viewpoint discrimination, no matter the forum. Part I, Article 22 declares that free speech is "essential to the security of freedom in a state: [It] ought, therefor, to be inviolably preserved." This constitutional declaration is an affirmative restriction on the State's power that prohibits it from violating the freedom of speech by censoring particular viewpoints and skewing the public debate. *See Rosenberger*, 515 U.S. at 894 (Souter, dissenting) ("[T]he prohibition on viewpoint discrimination serves that important public purpose of the Free Speech Clause, which is to bar the government from skewing public debate.").

In this regard, the trial court's finding that the State has an interest in controlling the perspective from which subject matter may be discussed on property the State has opened for public debate is dangerous and troubling. *See Montenegro v. N.H., Div. of Motor Vehicles*, Strafford County, Docket No. 217-2010-CV-00480, slip op. at 9 (N.H. Super. Ct. 2012) (finding that Saf-C 514.61(c)(3) "operates to keep such obviously offensive expressions off plates issued by the government—expression as to which the government does not want to be associated"). Moreover, this finding directly conflicts with United States Supreme Court precedent. *See, e.g.*, *R.A.V.*, 505 U.S. at 393-394 ("[St. Paul] has proscribed fighting words of whatever manner that communicate messages of racial, gender, or religious intolerance. Selectivity of this sort creates the possibility that the city is seeking to handicap the expression of particular ideas. That possibility would alone be enough to render the ordinance presumptively invalid, ..."); *Texas v. Johnson*, 491 U.S. 397, 414 (1989) (holding that under the First Amendment, the government

may not "prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable").

The government will always have an interest in controlling the viewpoints expressed on its property and will always desire to distance itself from viewpoints that oppose its own, that are unpopular, or that it does not want to be associated with. *See Gentile v. State Bar of Nev.*, 501 U.S. 1030, 1051 (1991) (observing that "history shows that speech is suppressed when either the speaker or the message is critical of those who enforce the law"); *Arkansas Writers' Project v. Ragland*, 481 U.S. 221, 235 (1987) (Scalia, J. and Rehnquist, C.J., dissenting) ("All government displays an enduring tendency to silence, or to facilitate silencing, those voices that it disapproves."). This governmental tendency is precisely the encroaching evil Part I, Article 22 and the First Amendment were designed to protect against. Under these constitutional provisions, the State cannot manipulate the public debate by allowing some individuals to express perspectives on vanity license plates that praise the character and integrity of a particular ethnicity, race, government, or group of government officials, while prohibiting other individuals from expressing perspectives that are critical, negative, or question the character or integrity of those same groups, entities, or persons.

CONCLUSION

In sum, Saf-C 514.61(c)(3)'s "which a reasonable person would find offensive to good taste" standard is unconstitutionally vague, overbroad, and viewpoint discriminatory on its face regardless of forum. The standard is wholly subjective and incapable of definition, permits and encourages arbitrary and discriminatory enforcement based on viewpoint, and lacks any plainly legitimate sweep. Even assuming the regulation has a plainly legitimate sweep that reaches accusations of moral turpitude, a substantial number of Saf-C 514.61(c)(3)'s applications are unconstitutional because Saf-C 514.61(c)(3) may be used to prohibit a limitless amount of

protected speech that does not constitute accusations of moral turpitude. Moreover, Saf-C 514.61(c)(3) is facially viewpoint discriminatory because it does not ban specific subject matter from being discussed on vanity license plates, but bans all permissible subject matter from being discussed from a limitless number of viewpoints that DMV officials deem to be "offensive to good taste." Accordingly, for the above reasons, Saf-C 514.61(c)(3) is unconstitutional on its face under Part I, Article 22 and the First Amendment.

REQUEST FOR ORAL ARGUMENT

The NHCLU respectfully requests oral argument to be presented by Anthony J. Galdieri in accordance with its motion filed this day pursuant to Supreme Court Rule 30(4).

Respectfully Submitted,

New Hampshire Civil Liberties Union

By Its Attorneys,
NIXON PEABODY LLP

Date: June 17, 2013

David A. Vicinanzo, Esq.
(NH Bar No. 9403)
dvicinanzo@nixonpeabody.com
Anthony J. Galdieri, Esq.
(NH Bar No. 18954)
agaldieri@nixonpeabody.com
900 Elm Street, 14th Floor
Manchester, NH 03101-2031
Tel: (603) 628-4000

CERTIFICATE OF SERVICE

I hereby certify that a copy of forgoing *Brief for the Amicus Curiae New Hampshire Civil Liberties Union* was served this 17th day of June, 2013, by electronic mail on the Petitioner, David Montenegro (n/k/a human), and on Suzanne Gorman, Esq., Senior Assistant Attorney General, New Hampshire Department of Justice.

Anthony J. Galdieri, Esquire