07-4375

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

SHAWN W. BYRNE,
Plaintiff-Appellant,

v.

BONNIE RUTLEDGE, in her official capacity as Vermont Commissioner of Motor Vehicles, *et al.*,
Defendants-Appellees.

On Appeal from the United States District Court
For the District Of Vermont

BRIEF *AMICUS CURIAE* OF THE NATIONAL LEGAL FOUNDATION,
in support of Plaintiff-Appellant
Urging Reversal

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, *Amicus Curiae*, The National Legal Foundation, certifies that it has no parent company, subsidiary, or affiliate that has issued shares to the public.

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INTEREST OF AMICUS

The National Legal Foundation (NLF) is a public interest law firm dedicated to the defense of First Amendment liberties and to the restoration of the moral and religious foundation on which America was built. The NLF and its donors and supporters are vitally concerned with the outcome of this case because of the effect it will have on First Amendment liberties and First Amendment jurisprudence.

This Brief is file pursuant to consent by both parties.

SUMMARY OF THE ARGUMENT

This Brief makes one argument not made by the party it supports, Mr. Byrne, the Appellant; and expands upon one argument made by Mr. Byrne. First, *Amicus* shows that the District Court[1] erred when it held that Mr. Byrne withdrew his facial challenge to the statute and regulations (hereinafter statute) at the preliminary injunction stage. Second, *Amicus* expands upon Mr. Byrne's discussion regarding the statute's viewpoint discrimination. *Amicus's* argument is compatible with, but different from, Mr. Byrne's argument concerning viewpoint discrimination.

As to the first point, the Magistrate Judge erred when he held that Mr. Byrne's facial challenge to Vermont's vanity license plate statute was resolved or

[1] Because the District Court affirmed, approved, and adopted the Magistrate Judge's Report and Recommendation, this Brief will sometimes refer to the District Court and sometimes refer to the Magistrate Judge, as the context makes appropriate.

withdrawn at the preliminary injunction state. When a court rules on a motion for preliminary injunction it does not *directly* rule on the merits of the case, only the *likelihood* that the party moving for the preliminary injunction may prevail on the merits. Thus, the facial challenge could not have been resolved, in the sense of having been adjudicated on the merits. Additionally, Mr. Byrne affirmatively denied that he voluntarily withdrew the facial challenge after the preliminary injunction hearing. Thus, the Magistrate Judge erred when he did not address Mr. Byrne's facial challenge in his Report and Recommendation of August 9, 2007.

As to the second point, the Brief argues that the lower court erred when it held that the statute was not viewpoint discriminatory. While the Magistrate Judge was correct in noting that the distinction between content and viewpoint discrimination is murky, when this Court pierces through the haze regarding the issue, it will see that the statute is viewpoint discriminatory. When religious content is barred from a forum, it is often appropriate—and is appropriate in the instant case—to consider religion as a viewpoint rather than as a subject. Thus, the Magistrate Judge erred when he held that excluding religious speech from the forum was not viewpoint discriminatory.

ARGUMENT

I. THIS COURT IS FREE TO ADDRESS MR. BYRNE'S FACIAL CHALLENGE TO THE STATUTE BECAUSE HE DID NOT WITHDRAW IT BELOW.

In the Magistrate Judge's Report and Recommendation regarding the Defendant's Motion for Summary Judgment, which the District Court adopted, the Magistrate Judge wrote that Mr. Byrne had withdrawn his facial challenge to the statute. (Mag. Judge's Report & Recom. of Aug. 9, 2007 at 9). However, Mr. Byrne challenged that assertion in his Objection, writing that the Magistrate's claim was "not accurate." (Pl's. Objection to the Mag. Judge's Report & Recom. of Aug. 9, 2007 at 4 n.1.) The Magistrate Judge also asserted that "Byrne's facial challenges to the statute were resolved at the preliminary injunction stage when the court found that the . . . statute's subject matter prohibition was viewpoint neutral." (Mag. Judge's Report & Recom. of Aug. 9, 2007 at 9 n.6.) However, the merits of the case are not directly ruled upon at the preliminary injunction stage, so the court could not have found the regulation to be viewpoint neutral. The court only considers the likelihood of success on the merits during a preliminary injunction hearing. *Rumsfeld v. Forum for Academic & Institutional Rights, Inc.*, 547 U.S. 47, __, 126 S. Ct. 1297, 1303 (2006).

And, in the instant case, it is abundantly clear that that is exactly the approach the District Court took, as indeed it was bound to do. The Magistrate

Judge noted that he was refusing to recommend the issuance of the Preliminary Injunction because Mr. Byrne's legal "assertions are simply not enough to show a *clear likelihood of success* on the merits." (Mag. Judge's Report & Recom. of Aug. 1, 2005 at 9 n.6 (emphasis added).) Accordingly, the Magistrate was incorrect to claim in his second Report and Recommendation that the facial challenge to the regulation's viewpoint neutrality had been resolved at the Preliminary Injunction stage. Therefore, the District Court erred when it affirmed, approved, and adopted that portion of the Report and Recommendation.

Thus, the only way Mr. Byrne's facial challenge to the statute could have been resolved would have been if he had withdrawn it, as the Magistrate also asserted. However, as noted above, Mr. Byrne affirmatively denied having withdrawn his facial challenges in his Objection to the Report and Recommendation, supporting that denial with a citation to the transcript. (Pl's. Objection to the Mag. Judge's Report & Recom. of Aug. 9, 2007 at 4 n.1 (*citing* Transcript of Oral Argument at 21-22, Exhibit 37).) Thus, since the District Court could not have resolved the facial challenge before it reached the merits and because Mr. Byrne did not withdraw his facial challenge, the District Court erred when it refused to rule on the facial challenge.

It is important to note two reasons *why* this Court should hold that the facial challenge has been preserved. The first, of course, is that a facial challenge will

produce different results than an as-applied challenge. The latter will only impact Mr. Byrne; the former will impact many other citizens of Vermont.

Second, this case presents the unusual situation in which an as-applied challenge may fail and a facial challenge may succeed. *Amicus* agrees with Mr. Byrne's statement in his Objection that

> [t]he gravamen of Mr. Byrne's complaint, and all that is required for Mr. Byrne to prevail, is a finding of the viewpoint discriminatory application of Vermont's laws to his vanity plate request. However, the facts and testimony collected during discovery fail to demonstrate a single application of Vermont's restriction on religious references that would be constitutionally sound. A facial finding that the law is unconstitutional is certainly supported by the record but is unnecessary to grant Mr. Byrne relief.

(Objection at 4 n.1 (citations omitted).)

However, the District Court has now rejected Mr. Byrne's as-applied challenge. Normally, if an as-applied challenge fails, any associated facial challenge must of necessity fail, since the statute can be applied constitutionally in at least the plaintiff's situation.

But in this case, the District Court's analysis of Mr. Byrne's arguments does not foreclose a facial challenge. Thus, this Court *could*—although *Amicus* does not believe it *should*—agree with one or more of the District Court's three reasons for rejecting the as-applied challenge (Mag. Judge's Report & Recom. of Aug. 9,

2007 at 16, 18-19), and still find the statute facially unconstitutional.[2] Specifically, this Court could agree that the DMV's objective/subjective method for determining whether to issue a plate is permissible. (*Id.* at 16.) Yet that would say nothing about the facial constitutionality of the statute. Second, this Court could agree that issuing religious plates in error to others but rejecting Mr. Byrne's plate does not amount to viewpoint discrimination aimed at him. (*Id.* at 18-19.) But that would say nothing about the facial constitutionality of the statute. Finally, this Court could agree that Mr. Byrne has not shown that the DMV has a "desire to suppress *his* particular point of view about religion or the Bible." (*Id.* at 19.) However, that would say nothing about the facial constitutionality of the statute, since religion *per se* should be seen as a viewpoint, not a subject. Part II. of this Brief will explain why this is so.

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[2] Although the District Court adduced the three specific reasons to be discussed in the remainder of this paragraph, the heart of its analysis is that administrative errors that have permitted some religious plates to issue do not constitute viewpoint discrimination. (Mag. Judge's Report & Recom. of Aug. 9, 2007 at 10 ("The DMV defends . . . that any vanity plates referencing religion since May 2004 were issued in error, not amounting to viewpoint discrimination . . . .") and *id.* at 11-12 ("Accordingly, the Court need only address viewpoint neutrality and equal protection, that is, whether the number of plates issued in error under the same law applied to Byrne subjected him to viewpoint discrimination . . . .").) This emphasis is key to understanding how the as-applied challenge could fail and the facial challenge could succeed. It is one thing to discriminate. It is another thing to make a mistake. Thus, this Court could agree with the District Court that DMV personnel merely made mistakes; yet the statute could be facially unconstitutional.

II. THE DISTRICT COURT ERRED BECAUSE RELIGION CONSTITUTES A VIEWPOINT NOT A SUBJECT.

In his Report and Recommendation, the Magistrate Judge acknowledged that "[i]n the context of vanity plates, the 'murkiness of the term viewpoint neutrality' persists . . . ." (*Id.* at 13.) The "murkiness," of course, refers to whether a governmental regulation discriminates on the basis of subject matter, and thus remains viewpoint neutral, or whether it, in fact, discriminates on the basis of viewpoint. Picking up on this acknowledgement, Mr. Byrne argues that "[t]he lower court erred by treating the State's religious exclusion as a subject matter restriction, and thereby failing to undertake any analysis on Mr. Byrne's claim that the State excluded his religious viewpoint on other subject matters." (Appellant's Br. 30.) He correctly cites *Lamb's Chapel v. Center Moriches Union Free School District*, 508 U.S. 384 (1993), and other cases to show that excluding all religious discussions from a forum, no matter its type, does not preclude a finding of viewpoint discrimination. (Appellant's Br. 29-31.) Mr. Byrne then explains how, under the facts of this case, Vermont's exclusion of religious expressions from vanity license plates is viewpoint discriminatory. (*Id.* at 31.)

The purpose of this Part of the Brief is to point out additional problems with the District Court's misunderstanding of the "murkiness" and to provide additional reasons why Mr. Byrne is correct that impermissible viewpoint discrimination, not permissible subject matter discrimination, results under the statute.

The District Court misanalyzed the question presented to it. Rather than looking at all relevant case law, it only considered cases that were "[i]n the context of *vanity* license plates," (Mag. Judge's Report & Recom. of Aug. 9, 2007 at 13 (emphasis added)) and then, in a footnote, pointed out the existence of several *specialty* license plate cases from other courts (*id.* at n.7).[3] While the Magistrate Judge was correct in noting the "murkiness," that confusion is not limited to vanity license plates cases, and any case discussing viewpoint neutrality is relevant to this Court's determination. Had the District Court looked to such cases, it might have realized that the statute *does* discriminate on the basis of viewpoint.

While the parties disagree regarding what type of forum vanity license plates constitute, it is black letter law that the requirement of viewpoint neutrality remains regardless of whether it is a designated, limited public, or a nonpublic forum. *See*, *e.g.*, *Sons of Confederate Veterans v. Dep't of Motor Vehicles*, 288 F.3d 610, 623 (4th Cir. 2002).

Many courts have noted that distinguishing between subject matter/content discrimination and viewpoint discrimination is not always easy. Doing so, however, is essential. The Ninth Circuit has illustrated the problem:

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[3] The Magistrate Judge did cite some non-vanity license plate cases in his initial discussion of the difference between viewpoint and content discrimination. Mag. Judge's Report & Recom. of Aug. 9, 2007 at 12-13 However, when he analyzed Vermont's statute, he restricted himself to cases involving vanity license plates.

> The coherence of the distinction between "content discrimination" and "viewpoint discrimination" is tenuous. While the former describes the subject matter of speech, and the latter the specific positions taken on the matter, the level at which "subject matter" is defined can control whether discrimination is held to be on the basis of content or viewpoint. For example, should a library's decision to exclude all books concerning astrology be treated as content discrimination, because astrology is a subject matter about which astrologers (and others) may have different views, and the library has excluded all discussion of that subject matter? Or should such a policy be treated as viewpoint discrimination because with respect to the subject matter of the study of the heavens, the library affords preferential treatment to the science of astronomy and bans the study of astrology?

Giebel v. Sylvester, 244 F.3d 1182, 1188 n.10 (9th Cir. 2001).

An illustrative case involved a holiday display. The Seventh Circuit reversed a district court in a "religious viewpoint" case involving a non-public forum, after wrestling with the distinction between viewpoint and content discrimination. *Grossbaum v. Indianapolis-Marion County Building Authority*, 63 F.3d 581, 587-92 (7th Cir. 1995). The Indianapolis-Marion County Building Authority (hereinafter Building Authority) had permitted the plaintiffs to place in the City-County Building a menorah during Hanukah for a number of years. *Id.* However, a controversy arose over the placement of religious displays, and the Building Authority adopted a policy excluding all religious displays from the forum. *Id.* at 583. The plaintiffs sued alleging that the Building Authority had opened its forum for the subject of the "holiday season," and that it was discriminating against plaintiffs because of their religious viewpoint. *Id.* The

Building Authority defended on the ground that the purpose of its new policy was to prohibit the subject of religion. *Id.* at 588. Furthermore, it asserted that post-policy, the "holiday season" was no long a subject for which the forum was open. *Id.* The Seventh Circuit accepted the plaintiff's argument and rejected the Building Authority's argument. *Id.* It reasoned that the sole reason for the adoption of the policy was to shut out the plaintiffs' religious viewpoint. *Id.* at 589.

The Seventh Circuit noted that "the distinction between content and viewpoint 'is not a precise one.'" *Id.* at 591 (citation omitted). The court further noted that "the treatment of religious thought as a viewpoint rather than a 'comprehensive body of thought' is 'something of an understatement' when such issues 'have been subjects of philosophic inquiry throughout human history.' And yet, within this context, it is a viewpoint.'" *Id.* (citation omitted). In order to draw this conclusion, the Seventh Circuit cited *Rosenberger v. Rector & Visitors of the University of Virginia*, 515 U.S. 819 (1995). In *Rosenberger*, the University of Virginia agreed to pay the printing costs of student newspapers from its Student Activities Fund, however the University excluded Rosenberger's newspaper because it "primarily promotes or manifests a particular belief in or about a deity or an ultimate reality." *Id*. at 823. The Seventh Circuit followed the *Rosenberger* Court's reasoning that "'viewpoint discrimination is the proper way to interpret the University's objections to [the excluded organization].'" *Grossbaum*, 63 F.3d at

591 (*quoting Rosenberger*, 515 U.S. at 831) (alteration in original).

In the instant case, Vermont has decided to raise additional revenue by allowing private citizens to express their thoughts on a wide variety of subjects on their license plates for an additional fee. (Appellant's Br. 20.) Just like the Building Authority in *Grossbaum* and the University in *Rosenberger*, so here the state of Vermont has categorically excluded religious expressions by declaring them to be a separate subject. However, whether it is the exclusion of a menorah, denial of generally disbursed funds, or a religious message on a vanity license plate, the state has overextended its definition of "separate subject matter" and has engaged in viewpoint discrimination. Under this statute, where the forum that the government has established has so many possible subjects, the exclusion of a religious expression on each of them makes that exclusion facially viewpoint discriminatory.

This distinction can also be seen in a case that involved the exclusion of religious expression from a limited forum. *Demmon v. Loudoun County Pub. Schs.*, 342 F. Supp. 2d 474 (E.D. Va. 2004). A parents' group proposed a "walk of fame" fund-raiser. Parents and students could purchase bricks and have them engraved with a message and symbol for a student, and then the bricks would be used to pave a path on the high school grounds. *Id.* at 476. Some people chose to have their bricks engraved with religious language and engraved a Latin cross as

their symbol. *Id.* at 477. Other individuals complained to the school district, however, and the school officials removed the bricks with religious messages. *Id.* At trial the school district argued that they had not engaged in viewpoint discrimination because the forum was not open to "religious, philosophical, evolutionary, or political" subjects. *Id.* at 487. However, the court did not accept that distinction. It held that in a limited public forum, *id.* at 482, "[p]reventing speakers to discuss otherwise permitted subjects . . . except from a religious, philosophical, evolutionary, or political viewpoint is exactly what the Supreme Court emphatically found unconstitutional in *Good News Club*." *Id.* at 487. The court opined that school district engaged in the viewpoint discrimination because "those who honor a star athlete may adorn their bricks with a symbol, but those who honor a pious student may not." *Id.* at 487.

As in *Demmon*, where the school would allow a symbol for an athletic student but would not allow a symbol for a religious student, Vermont has enacted a statute that allows a personal or political belief, personal qualities, or encouragement for others to be imprinted on a license plate; but prohibits those with a religious viewpoint from doing the same. (Appellant's Br. 21.) Just like the *Demmon* court, this Court should hold that the exclusion of religion is not content discrimination, but rather viewpoint discrimination on variety of different subjects. While Vermont will allow a license plate to speak on an almost limitless number of

subjects it will not allow a religious perspective on any of those subjects. Regardless of the type of forum vanity license plates are, whether nonpublic, as in *Grossbaum*, or a limited public forum, as in *Demmon*, Vermont's statute commits viewpoint discrimination in violation of the First Amendment.

CONCLUSION

For the foregoing reasons, this Court should reverse the judgment of the district court.

Respectfully submitted,
this 30th day of November 2007

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CERTIFICATE OF SERVICE

I hereby certify that I have duly served the attached Brief *Amicus Curiae* of The National Legal Foundation in the case of *Byrne v. Rutledge*, *et al.*, No. 07-4375 on all required parties by depositing the required number of paper copies in the United States mail, first class postage, prepaid on November 30, 2007, addressed as listed below. I also served a digital copy of the brief via e-mail as required by local rule 32. The required number of paper and digital copies were filed in the same manner on the same date.

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CERTIFICATE OF ANTI-VIRUS SCANNING

Pursuant to Second Circuit Local Rule 32(a) (1) (E)

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