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RECENT DEVELOPMENT

MITCHELL V. MD. MOTOR VEHICLE ADMIN.: VANITY LICENSE PLATES CONSTITUTE PRIVATE SPEECH IN A NONPUBLIC FORUM, WHICH REQUIRE RESTRICTIONS TO BE REASONABLE AND VIEWPOINT NEUTRAL.

By: Sarah J. Jentilet

The Court of Appeals of Maryland held that the Motor Vehicle Administration acted within constitutional boundaries when it recalled a vanity license plate displaying the word "MIERDA." *Mitchell v. Md. Motor Vehicle Admin.*, 450 Md. 282, 288, 148 A.3d 319, 323 (2016). The court found that the message on a vanity plate is considered private speech in a nonpublic forum, and accordingly government speech restrictions must be reasonable and viewpoint neutral. *Id.*

In 2009, the Motor Vehicle Administration ("MVA") issued vanity plates with the term "MIERDA" to John T. Mitchell ("Mitchell"). Two years later, Mitchell renewed the plates. Thereafter, the MVA received a complaint about the use of the term "MIERDA" on the plates. After an investigation, the MVA determined that "MIERDA" is a Spanish profanity that translates to "shit" in English. "Shit" is a term listed on the MVA's "objectionable plate list;" therefore, pursuant to COMAR 11.15.29.02(D), which authorizes rescission of plates containing "profanities, epithets, or obscenities," the MVA informed Mitchell that it would be recalling his plates.

Mitchell sought an administrative appeal, and an Administrative Law Judge ("ALJ") found that the offensive meaning of the plates justified the MVA's rescission. Mitchell then filed a petition for judicial review, and the Circuit Court for Prince George's County affirmed the ALJ's ruling. Thereafter, the Court of Special Appeals of Maryland affirmed, holding that the MVA's rescission of the vanity plates was reasonable and viewpoint neutral, and therefore met the constitutional requirements of speech restrictions in a nonpublic forum. The court of appeals then granted Mitchell's *writ of certiorari*.

The Court of Appeals of Maryland began its analysis by considering whether content on personalized vanity plates is private speech under the First Amendment public forum doctrine. *Mitchell*, 450 Md. at 292, 148 A.3d at 325. The court first determined that the use of the term "MIERDA" on vanity plates is private speech, not government speech. *Id.* Using the analysis in *Walker v. Texas Div. Sons of Confederate Veterans, Inc.*, the court looked at three factors to make this determination. *Id.* (discussing *Walker v. Texas Div. Sons of Confederate Veterans, Inc.*, 135 S.Ct. 2239, 2247 (2015)). The first factor the court considered was historical usage. *Mitchell*, 450 Md. at 294, 148 A.3d at 326. In the instant case, the court determined whether the government historically used vanity plates "to speak to the public." *Id.* (quoting *Pleasant Grove City v. Summum*, 555 U.S. 460,

470 (2009)). The court concluded that although license plates are used for vehicle identification, vanity plates display a personalized message that is specific to the owner. *Mitchell*, 450 Md. at 294, 148 A.3d at 326.

The second factor the court analyzed was whether the audience might attribute the message as government speech. *Mitchell*, 450 Md. at 294, 148 A.3d at 326-27. The court concluded that, although the speech takes place on government property, the personal nature of the vanity plate makes it unlikely that the public would think the message on the plate is endorsed by the State. *Id.* at 295, 148 A.3d at 327.

The court considered the third and final factor by determining whether the government exercises so much control over the content of the speech that it is considered government speech. *Id.* at 295, 148 A.3d at 327. In doing so, the court examined whether the State had direct control over the content of the vanity plates. *Id.* Ultimately, it found that the power of the MVA to deny or rescind a vanity plate based on its content is not enough control to be considered government speech. *Id.* Based on these three factors, the court of appeals concluded that vanity plates constitute private speech. *Id.* at 296, 148 A.3d at 328.

The court of appeals next determined that vanity plates are a nonpublic forum, requiring the MVA's restrictions to be reasonable and viewpoint neutral. *Mitchell*, 450 Md. at 297, 148 A.3d at 328. In making this determination, the court first noted that a traditional public forum is a place that has historically been intended for assembly and debate. *Id.* at 298, 148 A.3d at 328 (citing *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45 (1983)). Agreeing with both parties, the court found that vanity plates do not qualify as a traditional public forum. *Mitchell*, 450 Md. at 303, 148 A.3d at 332.

The court then considered whether vanity plates are a designated public forum or a nonpublic forum. *Mitchell*, 450 Md. at 304-10, 148 A.3d at 332-36. The court established that Maryland's history of issuing standardized license plates revealed that the purpose was and remains vehicle identification. *Id.* at 306, 148 A.3d at 333. The court further clarified that the purpose of the vanity plate program has always been to raise money, and thus does not demonstrate any intent by the State to facilitate free expression of ideas. *Id.* Additionally, it was found that Maryland constrains the expressive content of vanity plates to carry out the purpose of vehicle identification. *Id.* at 306, 148 A.3d at 334. As such, the court concluded that the constraints put on the content of vanity plate messages do not rise to the level of "direct control" as is the case with government speech. *Id.* at 306-07, 148 A.3d at 334.

Quoting the court of special appeals, the court stated that "[p]ublic access is a hallmark of a public forum[;]" therefore, restrictions placed on vanity plates do not convey an intent to create a public forum. *Mitchell*, 450 Md. at 307, 148 A.3d at 334. The nature of vanity plates, i.e., the size, shape, and extent of public access, was determined to be unfit for the type of expression protected under the public forum doctrine. *Id.* at 308, 148 A.3d at 335. The

court decided not to consider whether vanity plates are a limited public forum since the standard of review is the same for the nonpublic forum. *Mitchell*, 450 Md. at 304, 148 A.3d at 332. In light of all these findings, the court held that vanity plates are a nonpublic forum. *Id.* at 310-11, 148 A.3d at 336.

The court then determined that the State's rescission of Mitchell's plates was reasonable and viewpoint neutral. *Mitchell*, 450 Md. at 311, 148 A.3d at 337. In making its decision, the court pointed out that there are indecent or offensive words recognized by our society. *Id.* Because the State has an interest in protecting citizens from offensive language, the court concluded that prohibiting such language on vanity plates is reasonably related to the purposes of vehicle identification and revenue generation. *Id.* The court also found that neither the MVA's regulation nor its response constituted viewpoint discrimination, because it does not target any person's viewpoint about the term. *Id.* at 312, 148 A.3d at 337. In doing so, the court noted that the regulation only targets the content of the term, not the speaker's viewpoint about such term. *Id.*

Finally, the court of appeals considered whether the MVA's recession of the vanity plates was proper, giving deference to the agency's prior decision. *Mitchell*, 450 Md. at 314, 148 A.3d at 339. The court found that the MVA based their rescission on substantial evidence, and did not draw any erroneous conclusions of law in determining that "MIERDA" fell into the category of "profanities, epithets, or obscenities." *Id.* at 314-15, 148 A.3d at 339. Therefore, the court upheld the MVA's decision to recall the vanity plates. *Id.* at 317, 148 A.3d at 341.

In *Mitchell*, the Court of Appeals of Maryland held that the MVA acted reasonably and viewpoint-neutrally when it recalled Mitchell's vanity plates displaying the term "MIERDA." In its analysis, the court declared that vanity plate issues should be assessed using the nonpublic forum analysis. Therefore, as the highest court in Maryland, the court of appeals has set precedent on the scope of discretion that Maryland vehicle owners possess regarding the messages they choose to display on vanity plates. Furthermore, courts in subsequent cases will be able to develop consistent holdings as they continue to follow an identical analysis to the one in this case.