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## THE STATES, A PLATE, AND THE FIRST AMENDMENT: THE “CHOOSE LIFE” SPECIALTY LICENSE PLATE AS GOVERNMENT SPEECH

If the phrase “Choose Life” sounds vaguely familiar to you, you may have read it on the road. Though simple, the phrase is stirring significant controversy because it appears on state-owned, driver-selected specialty license plates.<sup>1</sup> Currently, drivers in seventeen states can decorate their vehicles with “Choose Life” plates.<sup>2</sup> In many states, the “Choose Life” plates depict the crayon-sketched, smiling faces of a boy and girl and the words “Choose Life” in wobbly print across the top or bottom.<sup>3</sup> Two states, Hawaii and Montana, offer both a “Choose Life” plate and a pro-choice plate.<sup>4</sup>

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1. See, e.g., Tom Brejcha, Editorial, *License to Speak: “Choose Life” Plates Promote Adoptions, Spur Healthy Debate*, USA TODAY, Feb. 27, 2007, at 10A; Dahlia Lithwick, *Poetic Licenses: Are “Choose Life” License Plates Free Speech or State-Sponsored Infomercials?*, SLATE, Feb. 6, 2003, <http://www.slate.com/id/2078247/> (“[I]t’s probably safe to say that a ‘Choose Life’ tidal wave—and its litigation backlash—is poised to hit the nation.”); Harry Reynolds, Editorial, *State Shouldn’t Waste Money, Time Fighting ‘Choose Life’ Plates*, JOURNAL GAZETTE-TIMES COURIER ONLINE, Feb. 2, 2007, <http://www.jg-tc.com/articles/2007/02/02/opinion/columns/column001.txt> (“From a practical standpoint, I don’t understand why the State of Illinois is wasting taxpayer money going to court to try to suppress a specialty license plate as innocuous as ‘Choose Life.’”); Editorial, *License to Offend*, CHI. TRIB., Jan. 26, 2007, at C22.

2. These states are Alabama, Arkansas, Connecticut, Florida, Georgia, Hawaii, Indiana, Kentucky, Louisiana, Maryland, Mississippi, Montana, Ohio, Oklahoma, Pennsylvania, South Dakota, and Tennessee. See Choose Life Newsletter, <http://www.choose-life.org/newsletter.html> (last visited Feb. 3, 2007) (listing states where “Choose Life” plates have been approved).

In South Dakota and Hawaii, the “Choose Life” logotype is actually a “decal” sticker to be placed in the corner of an “organizational” specialty plate with a standard background. See Choose Life, <http://www.sdchoose-life.org> (last visited Aug. 18, 2007); Organization License Plate/Decal Program, <http://www.co.honolulu.hi.us/csd/vehicle/mvdecal.htm> (last visited Aug. 18, 2007).

3. For a picture, see Choose Life, Inc. Homepage, <http://www.choose-life.org/> (last visited Feb. 16, 2007). A few plates are unique. For example, on Louisiana’s plate, the state bird, the pelican, appears in a red heart carrying a bundled child. See Choose Life Louisiana, <http://www.chooselifela.org/index.html> (last visited Feb. 16, 2007). Tennessee’s plate features a laughing baby. See Tennessee.gov, Department of Revenue, <http://www.tennessee.gov/revenue/vehicle/licenseplates/misc/miscdesc.htm> (last visited July 29, 2007).

4. The pro-choice plate in Montana proclaims “Pro family, Pro Choice.” See Montana Department of Justice, Service Organizations and Associations Plate Designs and Fees, <http://www.doj.mt.gov/driving/platedesign/serviceorganizations.asp> (last visited Feb. 18, 2007). Hawaii has a “Respect Choice” plate. See Organization License Plate/Decal Program, <http://www.co.honolulu.hi.us/csd/vehicle/mvdecal.htm> (last visited Aug. 18, 2007).

As a specialty plate, “Choose Life” raises funds for the pro-life cause.<sup>5</sup> The plate has generated over eight million dollars<sup>6</sup> since its first appearance on Florida vehicles in 2000.<sup>7</sup> Although states have different ways of creating “Choose Life” plates,<sup>8</sup> their revenue-raising function is similar across states. Drivers pay an additional fee for the plate, which flows, in whole or part, to pregnancy resource centers, nonprofit organizations which counsel women facing stressful pregnancies to choose adoption rather than abortion.<sup>9</sup> Organizations that perform or recommend abortions are sometimes expressly excluded from receiving “Choose Life” revenues.<sup>10</sup>

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5. In this Note, the term “specialty license plates” refers to license plates which display a unique picture or phrase above, below, or to the side of the alphanumeric sequence and which are available to drivers for an additional fee. The fee, or a portion thereof, benefits organizations identified with the picture or phrase displayed on the plate.

Other types of nonstandard license plates exist throughout the states. “Vanity” or “personalized” plates display a driver-selected alphanumeric sequence, such as “IGVHUGS,” which is available only to the applicant driver. The state typically retains the additional fee in full. *See, e.g.*, FLA. STAT. ANN. § 320.0805 (West 2006); OKLA. STAT. ANN. tit. 47, § 1135.4 (West 2005). Honorary plates are available only to individuals who submit proof of an award or status and, in some cases, do not cost an additional fee. *See* TENN. CODE ANN. §§ 55-4-235 to -240 (2006) (creating free, honorary plates for former prisoners of war, disabled veterans, and military award recipients).

6. Choose Life, Inc. estimates total revenues of \$8,095,839 from all states as of September 30, 2007. Choose Life Newsletter, <http://www.choose-life.org/newsletter.html> (last visited Oct. 23, 2007).

7. The idea for the “Choose Life” plate originated with a Florida County Commissioner, Randy Harris, as he was driving one day in 1996. Choose Life, Inc., About Us, <http://www.choose-life.org/aboutus.html> (last visited Feb. 17, 2007). He incorporated the nonprofit organization Choose Life, Inc., organized a grassroots effort, and promoted the idea to state legislators. Choose Life, Inc., Choose Life Story, <http://www.choose-life.org/story.html> (last visited Feb. 17, 2007). The Florida legislature passed a “Choose Life” bill in 1998, but it was vetoed by former governor Lawton Chiles. *Id.* Newly elected in 1999, Governor Jeb Bush signed a second bill into law. *Id.*

8. *See infra* Part I for a discussion of specialty plate creation models.

9. Denise M. Burke, *Pregnancy Resource Centers: On the Frontline in the Cause for Life*, DEFENDING LIFE 2007 151–52 (2007), available at [http://www.aul.org/xm\\_client/client\\_documents/DL07/abortion/DL07-PregnancyResourceCentersAndMap.pdf](http://www.aul.org/xm_client/client_documents/DL07/abortion/DL07-PregnancyResourceCentersAndMap.pdf). For example, in Oklahoma twenty dollars of the thirty-five dollar fee flows to nonprofit pregnancy resource centers. *See* Oklahoma Choose Life License Plate, <http://www.ecognizant.net/okchooselife/> (last visited July 28, 2007). Sixty percent of the money is used to provide goods and services for the women, including food, clothing and transportation, and forty percent funds counselor training and materials. *Id.* *See also* TENN. CODE ANN. § 55-4-306 (2006) (providing for a portion of “Choose Life” revenues to go to New Life Resources, an organization which provides “counseling” and “financial assistance” to pregnant women in Tennessee).

Oklahoma’s “Choose Life” plate (and its “Adoption Creates Families” plate) is currently embroiled in litigation. Recently, the Tenth Circuit affirmed the district court’s dismissal on subject matter jurisdiction grounds of the claim by a nonprofit pregnancy counseling center that the state unconstitutionally discriminated against the pro-choice viewpoint in offering specialty license plates. *Hill v. Kemp*, 478 F.3d 1236, 1241–42, 1262 (10th Cir. 2007). However, the Tenth Circuit remanded the organization’s claim that the statute’s express prohibition of funds from flowing to organizations which counseled abortion represented an “unconstitutional condition.” *Id.* at 1242, 1262. The plaintiff organization counseled women regarding both adoption and abortion. *Id.* at 1241.

10. Burke, *supra* note 9, at 151. *See also*, *e.g.*, LA. REV. STAT. ANN. § 47:463.61(F)(2) (2006).

Although the message “Choose Life” unequivocally indicates support for the pro-life side of the abortion debate, the right to abortion is not at issue when federal courts are brought into the controversy. Courts have disposed of “Choose Life” plate cases on three grounds:<sup>11</sup> standing,<sup>12</sup> federal subject matter jurisdiction,<sup>13</sup> and constitutionality on the merits.<sup>14</sup>

Not only is there a tripartite trail of federal precedent on the “Choose Life” plate, but courts ruling on the merits also disagree with each other. The constitutional provision implicated is the First Amendment’s Free Speech Clause, which protects individual freedom of speech against governmental abridgement.<sup>15</sup> Two types of state actions with respect to the

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11. In addition, two courts have rendered decisions on procedural grounds, allowing the cases to proceed, and a third lawsuit has been filed. *See* *Children First Found., Inc. v. Martinez*, No. 05-0567-CV, 05-1979-CV, 169 Fed. Appx. 637 (2d Cir. Mar. 6, 2006) (denying qualified immunity to state officials sued by a nonprofit organization for denying its application to sponsor a “Choose Life” plate); *Children First Found., Inc. v. Legreide*, No. 04-2137 (MLC), 2005 U.S. Dist. LEXIS 28703 (D. N.J. Nov. 17, 2005) (denying state officials’ request for abstention of federal jurisdiction pending resolution of a question in state court and the state officials’ motion for interlocutory appeal to the federal appellate court); *Alliance Defense Fund, Mo. Pro-Life Organization Challenges Ban on “Choose Life” License Plates*, <http://www.alliancedefensefund.org/news/pressrelease.aspx?cid=3769> (announcing pro-life group’s initiation of lawsuit against Missouri for denying the group’s application to sponsor a “Choose Life” plate) (last visited Dec. 30, 2007).

12. Plaintiffs’ standing to challenge issuance of a “Choose Life” plate is unsettled because courts have struggled to determine whether a plaintiff has actually suffered injury, and if so, whether it may be judicially redressed. The Eleventh Circuit held that a pro-choice organization challenging Florida’s “Choose Life” statute had no injury in fact because the group had not actually sought a pro-choice plate from the state. *Women’s Emergency Network v. Bush*, 323 F.3d 937, 946 (11th Cir. 2003). Moreover, even if an injury existed, an injunction of the statute would not provide redress. Effective relief would require offering state funds to the plaintiff group rather than simply “level[ing] the playing field” by cutting off funds to the “Choose Life” beneficiaries. *Id.* at 948.

In disagreement with the Eleventh Circuit, the Fourth Circuit held that a plaintiff was not required actually to request a pro-choice plate. *Planned Parenthood of S.C. v. Rose*, 361 F.3d 786 (4th Cir. 2004). The court also held that “level playing field analysis” of redressability was appropriate under the First Amendment. *Id.* at 790–91. For more detailed discussion of the standing question, *see* Jeremy T. Barry, Comment, *Licensing a Choice: “Choose Life” Specialty License Plates and Their Constitutional Implications*, 51 EMORY L.J. 1605, 1612–21 (2002); Susan V. Stromberg, Comment, *Advice to a Potential Litigant: How to Challenge the Constitutionality of the “Choose Life” Specialty License Plate*, 33 STETSON L. REV. 623, 630–38 (2004).

13. Courts have held that the Tax Injunction Act (TIA) removes “Choose Life” plate cases from the subject matter jurisdiction of the federal judiciary. The TIA directs federal courts not to enjoin the collection of a state tax where a “plain, speedy, and efficient” remedy is available in state court. 28 U.S.C. § 1341 (2000). The Tenth Circuit, Fifth Circuit, and Northern District of Ohio have held that the additional amount charged for the “Choose Life” plate is a “tax” under the TIA. *See Hill*, 478 F.3d at 1236; *Henderson v. Stalder*, 407 F.3d 351 (5th Cir. 2005); *NARAL Pro-Choice Ohio v. Taft*, No. 1:05 CV 1064, 2005 U.S. Dist. LEXIS 21394 (N.D. Ohio Sept. 27, 2005).

14. *See infra* Part III for discussion of these cases.

15. “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.” U.S. CONST. amend. I. (emphasis added). Although at least one constitutional claim has been raised under the Establishment Clause, the Free Speech Clause is the center of most constitutional challenges. *See*

“Choose Life” plate have been challenged under the First Amendment: offering a “Choose Life” plate without a counterpart pro-choice plate<sup>16</sup> (which will be referred to as a “solo ‘Choose Life’ plate” throughout this Note) and refusing to offer the “Choose Life” plate.<sup>17</sup> Courts must decide whether the contested state action implicates individual free speech or whether the action is properly considered “government speech.” The Fourth<sup>18</sup> and Sixth Circuits<sup>19</sup> and federal district courts in Illinois,<sup>20</sup> Arizona,<sup>21</sup> and Louisiana<sup>22</sup> have considered the constitutionality of state actions regarding the “Choose Life” plate.<sup>23</sup>

Plaintiffs in “Choose Life” plate cases, whether challenging a plate’s issuance or denial, raise the free speech question by alleging viewpoint discrimination: that the state abridged their freedom of speech by suppressing the expression of their viewpoint on an issue.<sup>24</sup> States have defended viewpoint-based decisions to offer or to deny the “Choose Life” plate as “government speech.” The government speech doctrine holds that

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*Women’s Emergency Network*, 323 F.3d at 945 (rejecting on standing grounds plaintiff’s argument that distribution of revenues from Florida’s “Choose Life” plate to Catholic Charities violated the Establishment Clause).

16. See, e.g., *ACLU v. Bredesen*, 441 F.3d 370, 372 (6th Cir. 2005); *Rose*, 361 F.3d at 787–88.

17. See, e.g., *Choose Life of Ill. v. White*, No. 04 C 4316, 2007 WL 178455, at \*1 (N.D. Ill. Jan. 19, 2007); *Ariz. Life Coal. v. Stanton*, No. CV-03-1691-PHX-PGR, 2005 U.S. Dist. LEXIS 21960, at \*1–5 (D. Ariz. Sept. 26, 2005).

18. *Rose*, 361 F.3d 786 at 800 (invalidating South Carolina’s “Choose Life” plate offered without a pro-choice counterpart).

19. *Bredesen*, 441 F.3d at 372 (upholding Tennessee’s “Choose Life” plate offered without a pro-choice counterpart).

20. *White*, 2007 WL 178455, at \*9 (holding that Illinois’ refusal to offer “Choose Life” plate was unconstitutional).

21. *Stanton*, 2005 U.S. Dist. LEXIS 21960, at 31 (holding that Arizona’s refusal to offer “Choose Life” plate was constitutional). The decision in *Stanton* was appealed, and the Ninth Circuit recently heard oral arguments. See Mike Sunnucks, *State, Anti-Abortion Groups Battle Over “Choose Life” Plates*, PHOENIX BUSINESS JOURNAL, Oct. 16, 2007, <http://phoenix.bizjournals.com/phoenix/stories/2007/10/15/daily23.html>.

22. *Henderson v. Stalder*, 265 F. Supp. 2d 699 (E.D.L.A. 2003) (enjoining legislative specialty plate scheme), *rev’d*, 407 F.3d 351 (5th Cir. 2005). The Fifth Circuit reversed the district court’s decision on the ground that the Tax Injunction Act deprived the court of subject matter jurisdiction. *Henderson v. Stalder*, 407 F.3d 351, 360 (5th Cir. 2005).

23. In addition, one district court has considered the constitutionality of a state’s entire specialty plate system, challenged by an organization whose application for a “Choose Life” plate was rejected. *Women’s Resource Network v. Gourley*, 305 F. Supp. 2d 1145 (E.D. Cal. 2004). However, rather than challenge this rejection as viewpoint discriminatory, the plaintiff organization sought to enjoin California from issuing any more specialty plates and sought to invalidate existing statutes providing for specialty plates. See *id.* at 1147–48. The court enjoined California from issuing any new specialty plates but upheld existing specialty plate statutes. *Id.* at 1154–55, 1157–61.

24. See *infra* notes 70–72 and accompanying text for a fuller explanation of viewpoint discrimination. In brief, viewpoint discrimination is when the government restricts the speech of individuals based on “the specific motivating ideology or the opinion or perspective of the speaker.” *Rosenberger v. Rector and Visitors of the Univ. of Va.*, 515 U.S. 819, 829 (1995).

there is no constitutional violation when a governmental entity espouses a particular viewpoint as its own and favors it above competing views.<sup>25</sup> The two appellate courts to reach the First Amendment question differed in their view of the applicability of government speech in the context of a solo “Choose Life” plate.<sup>26</sup> Faced with challenged refusals to offer the plate, the district courts to consider the merits also diverged in their analyses of government speech.<sup>27</sup> As a result, South Carolina’s “Choose Life” plate was struck down, while Tennessee’s was upheld.<sup>28</sup> Arizona was allowed to refuse the plate, while Illinois was ordered to begin production.<sup>29</sup>

This Note will consider whether a state that acts on the basis of the “Choose Life” viewpoint—either by offering a solo “Choose Life” plate or by refusing to offer the plate—may constitutionally justify its action as government speech. Part I will describe the origin of “Choose Life” plates, illustrating the basic models of specialty plate creation in the states. Part II will explain the Supreme Court cases which form the constitutional backdrop of the “Choose Life” dispute, highlighting the tension between the viewpoint neutrality principle of the First Amendment’s public forum doctrine and the evolving doctrine of government speech. Part III will examine recent “Choose Life” plate cases and discuss the courts’ analyses of the government speech question. Part VI will critique the courts’ analyses in light of Supreme Court precedent regarding government speech and public forum. Part V will propose a “forum-accountability” principle by which to determine the proper application of the government speech doctrine in the “Choose Life” context. This principle holds that government speech should apply to a state’s viewpoint-based action regarding the “Choose Life” plate only if the state’s specialty license plate scheme does not amount to a speech forum and the state’s action clearly

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25. See *infra* Part II for a discussion of the government speech doctrine. It has been summarized as “the principle that the government can speak for itself.” *Bd. of Regents of Univ. of Wis. Sys. v. Southworth*, 529 U.S. 217, 229 (2000).

26. Compare *Bredesen*, 441 F.3d at 376–77, 380 (upholding plate as government speech), with *Rose*, 361 F.3d at 794, 799–800 (rejecting government speech argument and invalidating plate). See discussion of these cases *infra* Part III.

27. Compare *Stanton*, 2005 U.S. Dist. LEXIS 21960, at \*17, \*31 (holding that state’s specialty plates represented government speech and upholding refusal to offer plate), with *White*, 2007 WL 178455, at \*7, \*9 (holding that state’s specialty plates represented a private speech forum and invalidating refusal to offer plate). See discussion of these cases *infra* Part III.

28. See *Planned Parenthood of S.C. v. Rose*, 361 F.3d 786 (4th Cir. 2004); *ACLU v. Bredesen*, 441 F.3d 370 (6th Cir. 2006). See *infra* Part III for discussion of these cases.

29. See *Choose Life III, Inc. v. White*, No. 04 C 4316, 2007 WL 178455 (N.D. Ill. Jan. 19, 2007); *Ariz. Life Coal. v. Stanton*, 2005 U.S. Dist. LEXIS 21960 (D. Ariz. Sept. 26, 2005). See *infra* Part III for discussion of these cases.

communicates a discernible message for which it can be held politically accountable. Part V will also apply the proposed principle to a state with a hybrid specialty plate creation model.

#### I. “CHOOSE LIFE” PLATES IN THE STATES: SPECIALTY PLATE CREATION MODELS

While “Choose Life” plates have a similar function and appearance across state lines, their creation processes may vary. Three conceptual models of specialty plate creation exist: the “legislative” model, the “administrative” model, and a hybrid of the two.<sup>30</sup> In the legislative model, the state legislature enacts a specific statutory provision for each specialty plate.<sup>31</sup> A member, either of his own initiative or at the request of private organization, sponsors a bill or amendment describing the plate, setting its price, and appropriating its expected revenues. In the administrative model, the state legislature enacts a generic “specialty plate” statute, setting forth a process by which qualifying organizations may apply to a designated state agency to initiate production of a new plate.<sup>32</sup> Typically, organizations must be nonprofit and promote community welfare to qualify. In some states, the specialty state creation process blends legislative and administrative elements into a hybrid model.<sup>33</sup> Montana and Tennessee provide an instructive comparison of the legislative and administrative models. A hybrid model will be illustrated in Part V. C.

In 2001, the Montana legislature passed the Montana Generic Specialty License Plate Act.<sup>34</sup> The statute allows private organizations and governmental bodies to design and sponsor a specialty plate by applying to a state agency.<sup>35</sup> Sponsor organizations must be nonprofit and operate primarily to promote “public health, education, or general welfare.”<sup>36</sup> The agency may reject an application only on statutory grounds, which must be stated in writing.<sup>37</sup> An approved plate will not be manufactured until a

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30. See Leslie Gielow Jacobs, *Free Speech and the Limits of Legislative Discretion: The Example of Specialty License Plates*, 53 FLA. L. REV. 419, 434–41 (2001) (drawing a distinction between specialty plates created by legislative action and specialty plates created by administrative action).

31. See *infra* text accompanying notes 45–54 for an illustration of the legislative model.

32. See *infra* text accompanying notes 34–44 for an illustration of the administrative model.

33. See *infra* text accompanying notes 330–42 for an illustration of the hybrid model.

34. MONT. CODE ANN. §§ 61-3-472 to -481 (2005).

35. § 473.

36. *Id.*

37. *Id.*

\$4000 reimbursement fee is paid by the sponsor or four hundred prepaid driver applications are received.<sup>38</sup>

The statute also lays out guidelines for plate design. The display of a name, phrase, or graphic must not be offensive, advertise a good or service, or infringe intellectual property rights.<sup>39</sup> In addition, a sponsor may propose a “donation fee” to be paid by drivers selecting the plate,<sup>40</sup> the entirety of which is remitted to the sponsor.<sup>41</sup> The state of Montana charges an additional fee of fifteen dollars, which flows to its county and state general funds.<sup>42</sup> In 2004, Montana Right to Life was approved to sponsor the “Choose Life” plate.<sup>43</sup> Planned Parenthood sponsors a “Pro Family, Pro Choice” plate.<sup>44</sup>

In contrast to Montana, Tennessee has no administrative process allowing private organizations to initiate the production of specialty license plates. Instead, they are created by legislative enactments which describe the plates and allocate their revenues.<sup>45</sup> A Tennessee statute classifies the various types of nonstandard plates.<sup>46</sup> “Specialty earmarked” and “new specialty earmarked” plates (collectively, “earmarked plates”) raise revenue enabling nonprofit organizations and government entities “to fulfill a specific purpose or to accomplish a specific goal.”<sup>47</sup> In order for a new earmarked plate to be created, an enabling statute must be passed.<sup>48</sup> The enabling statute may specifically name the beneficiary of the plate’s revenues and may restrict the beneficiary’s use of the funds.<sup>49</sup> Many enabling statutes provide for plates to be designed “in consultation” with the beneficiary organization.<sup>50</sup> The Tennessee Commissioner of Safety

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38. § 478.

39. § 475.

40. § 475.

41. § 480.

42. *Id.*

43. Choose Life Newsletter, *supra* note 6.

44. Montana Department of Justice, Service Organizations and Associations Plate Designs and Fees, <http://www.doj.mt.gov/driving/platedesign/serviceorganizations.asp> (last visited Feb. 18, 2007).

45. *See, e.g.*, TENN. CODE ANN. § 55-4-277 (2006) (creating plate to benefit the Tennessee Wildlife Federation); § 55-4-268 (creating plate to benefit Mothers Against Drunk Driving); § 55-4-254 (creating plate to benefit Support Our Troops).

46. §§ 55-4-201 to -202, -209.

47. § 55-4-209.

48. § 55-4-201(a)(1) (“No plate, other than those issued under part 1 of this chapter [dealing with standard license plates], shall be issued or renewed unless authorized in this part [dealing with “special” license plates].”).

49. For example, the “Children First!” plate raises money for the Department of Human Services, which is “to be used solely” for child abuse prevention programs. § 55-4-273.

50. *See, e.g.*, TENN. CODE ANN. §§ 55-4-306(b), 55-4-313(b), 55-4-271(c) (2006).



must approve the final design.<sup>51</sup> An earmarked plate created by statute will not be manufactured unless five hundred orders are received within one year after the statute's effective date.<sup>52</sup> The "Choose Life" enabling statute was enacted in 2003,<sup>53</sup> and the plate became available in 2006.<sup>54</sup>

## II. CONSTITUTIONAL BACKDROP OF THE "CHOOSE LIFE" PLATE LITIGATION

### A. *Public Forum Doctrine and Viewpoint Discrimination*

An allegation of viewpoint discrimination forms the core of a "Choose Life" dispute. Thus, it is important to understand the constitutional basis of this claim. The First Amendment guarantees all Americans the right to speak free of governmental abridgement.<sup>55</sup> While a few jurists have held that the Free Speech Clause prohibits any restriction of speech,<sup>56</sup> current free speech jurisprudence balances individual freedom of speech against legitimate governmental interests in limitation.<sup>57</sup> Public forum doctrine is one such balancing principle, governing speech which occurs on government-owned property.<sup>58</sup> Courts weigh the government's proprietary interest in reserving its property for its own uses against the individual's interest in unrestricted use of the property for expressive purposes.<sup>59</sup>

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51. § 55-4-201(b)(4).

52. §§ 55-4-201(b)(3)(B), 55-4-201(e).

53. § 55-4-306.

54. Illinois Choose Life, Links to Other Web Sites, <http://www.ilchoose-life.org/links.htm> (last visited July 29, 2007). The litigation embroiling the Tennessee "Choose Life" plate was resolved when the Sixth Circuit upheld the plate in March 2006, *see* *ACLU v. Bredeesen*, 441 F.3d 370 (6th Cir. 2006), and the Supreme Court denied certiorari, *see* *ACLU v. Bredeesen*, 126 S. Ct. 2972 (2006).

55. *See supra* note 15.

56. In Justice Hugo Black's view, "the First Amendment's unequivocal command that there shall be no abridgment of the rights of free speech and assembly shows that the men who drafted our Bill of Rights did all the 'balancing' that was to be done in this field." *Konigsberg v. State Bar of Cal.*, 366 U.S. 36, 61 (1961) (Black, J., dissenting).

57. Two main balancing principles organize free speech jurisprudence: the "categorization principle" and the "content distinction principle." KEITH WERHAN, *FREEDOM OF SPEECH: A REFERENCE GUIDE TO THE UNITED STATES CONSTITUTION* 70 (2004). The categorization principle excludes certain types of expression from First Amendment protection. *Id.* Unprotected categories of speech include fighting words, *see* *Gooding v. Wilson*, 405 U.S. 518 (1972), and obscenity, *see* *Miller v. Cal.*, 413 U.S. 15 (1973). The content distinction principle is discussed *infra* note 68.

58. *Cornelius v. NAACP Legal Def. and Educ. Fund*, 473 U.S. 788, 800 (1985). *See generally* Robert C. Post, *Between Governance and Management: The History and Theory of the Public Forum*, 34 *UCLA L. REV.* 1713 (1987).

59. *Cornelius*, 473 U.S. at 800. The balancing principle of public forum doctrine was first articulated in *Hague v. Committee for Industrial Organization*, 307 U.S. 496 (1939). WERHAN, *supra* note 57, at 130-31. The Supreme Court held that a city acted unconstitutionally in refusing to allow a group to disseminate information regarding the National Labor Relations Act. The reason:

Public forum doctrine categorizes certain government-owned properties as speech fora, either public or nonpublic.<sup>60</sup> On public forum properties, the individual has a stronger interest in self-expression, rendering governmental restrictions subject to strict judicial scrutiny.<sup>61</sup>

Two types of public forum property exist. “Traditional” public fora are properties which individuals have historically used for speech,<sup>62</sup> such as streets, parks, and sidewalks.<sup>63</sup> “Designated” public fora are properties which have not been historically used for expressive activities but which the government has intentionally opened to the public<sup>64</sup> or a subset of the public for speech.<sup>65</sup> Designated public fora need not be real property; even government subsidies may fall into this category.<sup>66</sup> A nonpublic speech forum is created when the government “reserve[s] eligibility for access to the forum to a particular class of speakers, whose members must then, as individuals, obtain permission to use it.”<sup>67</sup>

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Wherever the title of streets and parks may rest, they have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions. Such use of the streets and public places has, from ancient times, been a part of the privileges, immunities, rights, and liberties of citizens. The privilege of a citizen of the United States to use the streets and parks for communication of views on national questions may be regulated in the interest of all; it is not absolute, but relative, and must be exercised in subordination to the general comfort and convenience, and in consonance with peace and good order; but it must not, in the guise of regulation, be abridged or denied.

*Hague*, 307 U.S. at 515–16.

The *Hague* decision symbolized the Court’s increasing recognition of free speech as a fundamental right. WERHAN, *supra* note 57, at 130–31. Prior decisions had treated the government’s rights as property owner as absolute. *Id.* (citing *Davis v. Massachusetts*, 167 U.S. 43 (1897)).

60. *Int’l Soc’y for Krishna Consciousness v. Lee*, 505 U.S. 672, 678–79 (1992).

61. *See id.* at 678.

62. *See Perry Educ. Ass’n v. Perry Local Educators Ass’n*, 460 U.S. 37, 44 (1983).

63. *Id.*

64. *Id.*

65. “A public forum may be created for a limited purpose such as use by certain groups . . . or for the discussion of certain subjects.” *Id.* at 46 n.7. For example, a state university may open its meeting rooms to student organizations, *see Widmar v. Vincent*, 454 U.S. 263 (1981), or a school district may allow community groups to use its facilities, *see Lamb’s Chapel v. Center Moriches Union Free Sch. Dist.*, 508 U.S. 384 (1993). This type of forum has been termed a “limited public forum,” a subset of the designated public forum. *See, e.g., Rosenberger v. Rector and Visitors of the Univ. of Va.*, 515 U.S. 819, 829 (1995); *Good News Club v. Milford Cent. Sch.*, 533 U.S. 98, 106–07 (2001). Some scholars and courts argue, however, that a limited *public* forum is actually a subset of the *nonpublic* forum because the government is not subject to strict scrutiny when it sets content-based requirements which limit the forum to particular groups or subjects. *See Mary Jean Dolan, The Special Public Purpose Forum and Endorsement Relationships: New Extensions of Government Speech*, 31 HASTINGS CONST. L.Q. 71, 77–78 (2004) (summarizing the debate).

66. *See Rosenberger*, 515 U.S. at 830 (characterizing the availability of printing subsidies for university student publications as a “metaphysical” limited public forum and holding that “the same principles are applicable” for a metaphysical as a “spatial” or “geographic” forum).

67. *Ark. Educ. Television Comm’n v. Forbes*, 523 U.S. 666, 678–79 (1998) (holding that a

The government's power to limit speech in a public forum is constrained. The government may not restrict expression based on the subject matter—"content-based discrimination"—or viewpoint of a speaker's message unless the restrictions meet the familiar requirements of strict scrutiny: necessary to serve a compelling state interest and narrowly drawn to achieve that end.<sup>68</sup> Viewpoint discrimination, an "egregious" form of content-based discrimination,<sup>69</sup> occurs when the government limits a speaker because of his or her viewpoint on a subject but allows others with a favored viewpoint on that same subject to speak.<sup>70</sup> Viewpoint discrimination can also occur in the absence of an explicit viewpoint-based action, where a government entity is vested with "unbridled discretion" over access to a public forum.<sup>71</sup> This allows government officials to make hidden viewpoint-based access decisions.<sup>72</sup>

In properties which are not public fora, the government has greater leeway to limit individual speech. Content-based distinctions in nonpublic fora are constitutionally acceptable if "reasonable in light of the purpose of

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televised candidate debate was a nonpublic forum because a government agency reserved the debate for candidate participation only and made "candidate-by-candidate" assessments of public support in deciding which candidates would be included).

68. *Int'l Soc'y for Krishna Consciousness v. Lee*, 505 U.S. 672, 678 (1992). The prohibition on content-based discrimination in speech fora illustrates the second organizing principle of free speech jurisprudence: the content distinction principle. WERHAN, *supra* note 57, at 70. It subjects government restrictions of protected speech to a higher level of judicial scrutiny when they target the content of speech rather than its other aspects, such as time, place, or manner. *Id.* at 72. "The content distinction principle registers the Court's judgment that 'government censorship' is the central evil against which the First Amendment is directed . . ." *Id.* (citing *Police Dep't v. Mosley*, 408 U.S. 92, 96 (1972)).

69. *Rosenberger*, 515 U.S. at 829.

70. Viewpoint discrimination is well illustrated by the facts of *Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384 (1993). A school district implemented a policy permitting the use of its facilities during off-school hours for "social, civic, and recreational uses." *Id.* at 387. It stipulated, however, that no use could be for "religious purposes." *Id.* *Lamb's Chapel*, a church, sought to show a film series in the school building during off-school hours. *Id.* at 387-389. The series discussed childrearing "from a Christian perspective." *Id.* at 389. Citing its policy, the school district denied the church's request. *Id.* The Court held that the school district unconstitutionally discriminated against the religious viewpoint of *Lamb's Chapel*. *Id.* at 394. The Court reasoned that the school district's policy and practice had opened its facilities as a speech forum in which childrearing was an acceptable topic of discussion. *Id.* at 392-94. *Lamb's Chapel* was denied access to the forum simply because it would have approached the topic from a "religious perspective." *Id.* at 394.

71. *Child Evangelism Fellowship of Md. v. Montgomery County Pub. Schs.*, 457 F.3d 376, 386-87 (4th Cir. 2006).

72. *Child Evangelism Fellowship* is illustrative. The court held that a school district policy vesting school officials with complete discretion to control which organizations could distribute flyers for take home to parents was viewpoint discriminatory under the unbridled discretion theory. *Id.* at 388-89. It explained: "[V]iewpoint neutrality requires not just that a government refrain from explicit viewpoint discrimination, but also that it provide adequate safeguards to *protect* against the improper exclusion of viewpoints." *Id.* at 384.

the property” and viewpoint-neutral.<sup>73</sup> Sometimes, however, courts have allowed the government to make viewpoint-based distinctions without satisfying strict scrutiny. Such cases have not been decided under the public forum framework; instead, government speech doctrine has provided the justification.<sup>74</sup>

Whether a particular piece of government property constitutes a public forum is an important question because it demarcates the scrutiny which will apply to governmental speech restrictions. Courts have declined to expand the category of traditional public forum beyond streets, parks, and sidewalks;<sup>75</sup> thus, regarding other types of property, the key inquiry is into governmental creation of a forum by designation. The Supreme Court, in *Cornelius v. NAACP Legal Defense and Educational Fund*,<sup>76</sup> set forth an analysis to guide this inquiry, focusing on the government’s intent with respect to the property. The Court explained that the government cannot “create a public forum by inaction or by permitting limited discourse, but only by intentionally opening a nontraditional forum for public discourse.”<sup>77</sup> As illustrated by the facts, holding, and rationale of *Cornelius*,<sup>78</sup> the analysis proceeds in two steps.

First, the court should identify the alleged forum by “focus[ing] on the access sought by the speaker.”<sup>79</sup> Second, the court should utilize three factors to analyze the government’s intent with respect to the property<sup>80</sup>:

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73. *Cornelius v. NAACP Legal Def. and Educ. Fund*, 473 U.S. 788, 806 (1985).

74. *Legal Servs. v. Velazquez*, 531 U.S. 533, 541 (2001) (“We have said that viewpoint-based funding decisions can be sustained in instances in which the government itself is the speaker . . . .”); *Child Evangelism Fellowship*, 457 F.3d at 381 n.2 (“Of course, when the government alone speaks, it need not remain neutral as to its viewpoint.”). See *infra* Part II.B for a fuller discussion of government speech.

75. *Ark. Educ. Television Comm’n v. Forbes*, 523 U.S. 666, 679 (1998). See also *Int’l Soc’y for Krishna Consciousness v. Lee*, 505 U.S. 672, 680 (1992) (holding that airport terminals are not traditional public fora because they “have only recently achieved their contemporary size and character”).

76. 473 U.S. 788 (1985).

77. *Id.* at 802.

78. The *Cornelius* plaintiffs argued that the exclusion of legal organizations fighting for civil rights from a charitable solicitation campaign in the federal workplace amounted to content-based discrimination in a public forum. *Id.* at 790–95. The Court identified the campaign as the alleged forum because it was the access point sought by the plaintiffs. *Id.* at 805–06. The federal government had organized the campaign in order to minimize workplace disruption from solicitation, which indicated a policy not to open the campaign to the public at large and suggested that federal offices were not compatible with expressive activities. *Id.* at 804–09. Further, in practice, the government had consistently required would-be participants to apply and had accepted only organizations providing social services to the needy. *Id.* at 806. Thus, the Court concluded that the government had not designated the campaign as a public forum. *Id.* Rather, because the government had a consistent policy and practice of selective access based on admission criteria, it had created a nonpublic forum. *Id.*

79. *Id.* at 801.

80. *Id.* at 803–04.

the government's policy regarding the property, its practice with respect to the property, and the compatibility of the property's objective nature with expressive activity.<sup>81</sup>

In sum, public forum jurisprudence balances the government's First Amendment obligations toward individuals with the government's own interests. If a forum for speech exists, whether traditionally or by the government's designation, neutrality toward all viewpoints espoused in the forum is the government's constitutional obligation. However, government speech doctrine, another constitutional framework relating to the use of state-owned property for expressive activity, has developed further in recent years, coming into tension with public forum doctrine.<sup>82</sup>

### B. Government Speech

Through unique life experiences, individuals develop viewpoints on the best ways to improve society and persuade others of their ideas through speech. Because they represent the citizenry collectively at the federal, state, and local levels, government entities also have a perspective on what it means to better the community.<sup>83</sup> In the American republic, citizens send candidates to government positions in order to enact the societal views with which they agree.<sup>84</sup> In order to structure societal change, officials not only make law but also directly communicate with the public.<sup>85</sup> For instance, they may employ persuasive speech as a way to encourage

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81. *Id.* at 802–03.

82. See Randall P. Bezanson & William G. Buss, *The Many Faces of Government Speech*, 86 IOWA L. REV. 1377 (2001). This article analyzes the intersection between government speech and public forum doctrine in eight emerging areas of government speech. The authors observe that “[t]his bipolar universe is, of course, an artifice, for government speech is necessarily accomplished through the speech of individuals . . . . By insisting on the artifice, however, the Court has become theoretically and analytically stuck . . . . at the edge of a chasm between government speech and the public forum.” *Id.* at 1381.

83. See *id.* at 1380. “In the modern state,” government fulfills many societal roles: “a creator of rights and programs, a manager of economic and social relationships, a vast employer and purchaser, an educator, investor, curator, librarian, historian, patron, and on and on.” *Id.* Acting in these capacities, the “[g]overnment must explain, persuade, coerce, deplore, congratulate, implore, teach, inspire, and defend with words.” *Id.*

84. See *Nat’l Endowment for the Arts v. Finley*, 524 U.S. 569, 598 (1998) (Scalia, J., concurring) (“It is the very business of government to favor and disfavor points of view on (in modern times, at least) innumerable subjects—which is the main reason we have decided to elect those who run the government, rather than save money by making their posts hereditary.”).

85. For example, the Environmental Protection Agency designs informational programs to communicate with the public regarding environmental and health concerns, see EPA Newsroom, Public Service Announcements, <http://www.epa.gov/newsroom/psa.htm> (last visited Feb. 23, 2007) (describing educational campaigns which are disseminated through broadcast and print media).

desirable social behavior, even regarding controversial matters.<sup>86</sup> At times, individuals may feel that the government's speech has unconstitutionally drowned out their own voices.<sup>87</sup> Recently, some courts have upheld viewpoint-based exclusions from government property on the theory that the exclusion served a government speech interest.<sup>88</sup>

The government must speak in order to function.<sup>89</sup> However, the government's ability to select one viewpoint from among many to promote as its own could allow the government to diminish robust social dialogue, to mask its own advocacy, or to coerce private speakers into parroting the state-sanctioned line.<sup>90</sup> The Supreme Court has reasoned that political accountability is the principal way to balance the need for government speech against its inherent dangers:

The latitude which may exist for restrictions on speech where the government's own message is being delivered flows in part from our observation that, 'when the government speaks, for instance to promote its own policies or to advance a particular idea, it is, in the

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86. For example, the government has employed doctors for the purpose of encouraging women to choose childbirth over abortion. See *Rust v. Sullivan*, 500 U.S. 173 (1991), discussed *infra* text accompanying notes 93–113.

87. See, e.g., *Ark. Educ. Television Comm'n v. Forbes*, 523 U.S. 666, 678 (1998) (involving political candidate excluded from a candidate debate broadcast on public television); *Legal Servs. Corp. v. Velazquez*, 531 U.S. 533, 541 (2001) (involving prohibition on recipients of funds under the Legal Services Corporation Act from seeking change in the welfare laws through litigation).

88. See, e.g., *ACLU v. Bredesen*, 441 F.3d 37 (6th Cir. 2006) (allowing state to offer "Choose Life" license plate without a counterpart pro-choice plate as an exercise of government speech); *Wells v. City and County of Denver*, 257 F.3d 1132 (10th Cir. 2001) (holding that a local government's holiday display, which included Christian and secular symbols, as well as a sign acknowledging the display's corporate sponsors, was government speech and allowing the government to exclude the plaintiff's anti-religious sign); *Knights of the Ku Klux Klan v. Curators of the Univ. of Mo.*, 203 F.3d 1085 (8th Cir. 2000) (holding that a university radio station's on-air acknowledgement of its sponsors was government speech and allowing the station to reject an offer of sponsorship from the Ku Klux Klan).

For a thorough discussion of the many ways modern governments speak, see Bezanson & Buss, *supra* note 82. The authors explore several paradigms of government speech and how these have been treated by courts: implementation of government policy as speech, government as educator, allocation of fees in higher education, government as editor, government as patron of the arts, and government's right not to speak. On government speech generally, see MARK G. YUDOF, *WHEN GOVERNMENT SPEAKS: POLITICS, LAW, AND EXPRESSION IN AMERICA* (1983); Abner S. Greene, *Government Speech on Unsettled Issues*, 69 *FORDHAM L. REV.* 1667 (2001); Robert C. Post, *Subsidized Speech*, 106 *YALE L.J.* 151 (1996); Steven Shriffrin, *Government Speech*, 27 *UCLA L. REV.* 565 (1980).

89. *Johanns v. Livestock Mktg. Ass'n*, 544 U.S. 550, 574 (Souter, J., dissenting) ("To govern, government has to say something . . .").

90. See Bezanson & Buss, *supra* note 82, at 1488–94, 1509–11, for a thoughtful analysis of the dangers of monopolization, deception, and coercion. See Abner S. Greene, *Government of the Good*, 53 *VAND. L. REV.* 1 (2000), for the argument that government speech is essentially a good thing for society as long as these dangers are avoided.

end, accountable to the electorate and the political process for its advocacy. If the citizenry objects, newly elected officials later could espouse some different or contrary position.’<sup>91</sup>

The government speech doctrine is relatively new to First Amendment jurisprudence,<sup>92</sup> originating in a controversial decision regarding government funding for family planning services. Although the decision did not contain the words “government speech,” *Rust v. Sullivan*<sup>93</sup> has been recognized subsequently as the “fountainhead” of that doctrine.<sup>94</sup> In *Rust*, the Supreme Court upheld regulations designed to prevent federal grant money from flowing to health clinics which performed or promoted abortion services.<sup>95</sup> The Department of Health and Human Services promulgated the regulations under Title X of the Public Health Service Act, which authorized grants for contraceptive family planning.<sup>96</sup> Title X grantees, typically private health clinics,<sup>97</sup> were prohibited from using the funds to promote abortion either through medical counsel or general advocacy.<sup>98</sup> Certain Title X clinics and their employee doctors challenged the regulations under the First Amendment as viewpoint discriminatory.<sup>99</sup> The Court affirmed the constitutionality of the regulations, holding that they were a proper exercise of the government’s right to “make a value judgment favoring childbirth over abortion, and . . . implement that judgment by the allocation of public funds.”<sup>100</sup>

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91. *Velazquez*, 531 U.S. at 541–42 (quoting Bd. of Regents of the Univ. of Wis. Sys. v. Southworth, 529 U.S. 217, 235 (2000)).

92. *Johanns v. Livestock Mktg. Ass’n*, 544 U.S. 550, 574 (2005) (“The government-speech doctrine is relatively new, and correspondingly imprecise.”) (Souter, J., dissenting); Post, *supra* note 88, at 151 (explaining that the perception of the First Amendment as a protection against government restriction of speech means that “traditional First Amendment doctrine has had rather little to say about the speech of the government itself”).

93. 500 U.S. 173 (1990).

94. Note, *The Curious Relationship Between the Compelled Speech and Government Speech Doctrines*, 117 HARV. L. REV. 2411, 2411 (2004). See also *Legal Servs. Corp. v. Velazquez*, 531 U.S. 533, 541 (2001) (“The Court in *Rust* did not place explicit reliance on the rationale . . . [of] governmental speech; when interpreting the holding in later cases, however, we have explained *Rust* on this understanding.”). But see *Velazquez*, 531 U.S. at 554 (Scalia, J., dissenting) (“If the private doctors’ confidential advice to their patients at issue in *Rust* constituted ‘government speech,’ it is hard to imagine what subsidized speech would *not* be government speech.”).

95. *Rust*, 500 U.S. at 179–181, 203.

96. *Id.* at 178–79. Section 1008 of Title X provided that “none of the funds appropriated under this subchapter shall be used in programs where abortion is a method of family planning.” *Id.* at 178 (quoting 42 U.S.C. § 300a-6 (1970)).

97. *Id.* at 196.

98. *Id.* at 179–80.

99. *Id.* at 181.

100. *Id.* at 192–93 (quoting *Maier v. Roe*, 432 U.S. 464, 474 (1977)).

The subsequent recognition of *Rust* as a government speech case hinges on two governmental prerogatives that the Court relied on in its rationale.<sup>101</sup> First, the government has the right to set and fund policy preferences.<sup>102</sup> Second, the government has a legitimate need to ensure that funds dedicated to a preferred policy effectively advance that policy.<sup>103</sup> Regarding the *Rust* regulations, Congress had decided that contraception was a better means of family planning than abortion and had created a program to implement that policy judgment.<sup>104</sup> The Title X regulations were “designed to ensure that the limits of the federal program [were] observed.”<sup>105</sup>

The *Rust* Court legitimized the exercise of these two prerogatives, even though this amounted to a viewpoint-based limitation on the doctors’ speech.<sup>106</sup> Essentially, the Court treated the doctors as agents of the federal government, private speakers conveying a governmental message.<sup>107</sup> Because the doctors voluntarily accepted Title X funds and the restriction did not extend to abortion-related speech outside the Title X-funded programs,<sup>108</sup> their freedom of expression as “employees” was

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101. When the *Velazquez* Court identified *Rust* as an implicit government speech case, *see supra* note 94, it explicitly delineated these two prerogatives. *See* *Legal Servs. Corp. v. Velazquez*, 531 U.S. 533, 541 (2001). The Court described *Rust* as an instance in which the government implemented “its own program” through private speakers. *Id.* It affirmed that when so using private speakers, the government “may take legitimate and appropriate steps to ensure that its message is neither garbled nor distorted.” *Id.*

102. *Rust*, 500 U.S. at 193. Earlier cases established the legitimacy of a government policy preference for childbirth, even though abortion is a fundamental right. *See* *Harris v. McRae*, 448 U.S. 297 (1980) (upholding restrictions on public funding for abortion); *Maher v. Roe*, 432 U.S. 464, 475 (1977) (holding that the government may subsidize childbirth without subsidizing abortion).

103. *Rust*, 500 U.S. at 193–94.

104. *Id.* at 178–79.

105. *Id.* at 193.

106. The Court did not explicitly acknowledge the discriminatory effect of the Title X regulations. It stated that the government’s choice “to fund one activity to the exclusion of the other” did *not* mean it had “discriminated on the basis of viewpoint.” *Id.* Clearly, however, the government objected to the pro-abortion viewpoint of the doctors. Presumably, this did not amount to “discrimination” in the mind of the Court because of its prior conclusion regarding the legitimacy of selective subsidization of preferred policy.

107. *See id.* at 198–99. The Court does not use the term “agents,” but commentators have explained the court’s rationale on an agency theory. *See* *Bezanson & Buss*, *supra* note 82, at 1391–93 (explaining two competing views of *Rust*, in one of which the “agency factor” is “critical”); *Jacobs*, *supra* note 30, at 450–52 (characterizing *Rust* as a government-agent case).

108. That the speech restriction was tied to the use of Title X funds was a key fact. It allowed the Court to distinguish its “unconstitutional conditions” cases, in which the question of whether the government can restrict speech when it doles out benefits depends on whether the restrictions apply to activities of recipients which do not utilize the benefits. *Rust*, 500 U.S. at 197–98. *Compare* *FCC v. League of Women Voters of Cal.*, 468 U.S. 364 (1984) (invalidating a statute which prohibited editorializing by noncommercial, educational TV, and radio stations which received federal funding) *and* *Regan v. Taxation with Representation of Wash.*, 461 U.S. 540 (1983) (upholding statute



appropriately limited.<sup>109</sup> The Court also noted that the doctors were free to inform patients that abortion advice was simply outside the scope of the clinic's services.<sup>110</sup>

The tension between the government's control over its agents' speech and the government's obligation to be viewpoint-neutral toward speakers in a public forum was not lost on the *Rust* Court. It noted that the ability to be viewpoint-selective would not apply where the government "subsidy" at issue was physical property constituting either a traditional or designated public forum.<sup>111</sup> Speakers availing themselves of such property would not thereby become government agents, subject to viewpoint discriminatory restrictions.<sup>112</sup>

As one scholar posits, the *Rust* Court "essentially confessed to the irrelevance of the criterion of viewpoint discrimination" in certain contexts.<sup>113</sup> The unshakable question after *Rust*: When is the government free to promote its viewpoint while displacing the opposite views of individuals, such as the doctors in *Rust*? *Rust* could be read as limiting that ability to instances when the government hires private speakers to promulgate a constitutionally legitimate, discrete message, such as "Childbirth is preferable to abortion." In the government speech cases following *Rust*, the Supreme Court attempted to map out, more by example than principle,<sup>114</sup> the boundaries of government speech as a defense to claims of impermissible viewpoint discrimination.

*Rosenberger v. Rector and Visitors of the University of Virginia*<sup>115</sup> allowed the Court to explore the distinction between the government subsidizing private agent-speakers and the government offering monetary resources as a forum for speech. Students at the University of Virginia (the University) alleged viewpoint discrimination when the school denied printing subsidies for their Christian newspaper.<sup>116</sup> University policy

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prohibiting nonprofit organizations from using tax-deductible contributions for lobbying because such organizations could lobby with non-deductible contributions).

This reasoning of the *Rust* Court is controversial. See Bezanson & Buss, *supra* note 82, at 1382 (explaining a view of *Rust* which sees "little or no significance" in the fact that the restricted speech was government-funded); Post, *supra* note 88, at 169 (arguing that *Rust*'s distinction between restrictions on funded and unfunded speech is "not constitutionally determinative").

109. *Rust*, 500 U.S. at 198–99.

110. *Id.* at 200.

111. *Id.* at 199–200.

112. *Id.*

113. Post, *supra* note 88, at 170.

114. See Bezanson & Buss, *supra* note 82, at 1509 (noting the "patchwork quilt quality of the government speech cases").

115. 515 U.S. 819 (1995).

116. *Id.* at 822–27.

provided that student groups could receive funding for activities related to “student news, information, opinion, [and] entertainment” (the activity funding policy).<sup>117</sup> Explicitly excluded were the “religious activities” of student groups.<sup>118</sup> The newspaper, which covered topics such as “racism, crisis pregnancy, [and] stress,” was denied printing subsidies under this exception.<sup>119</sup>

The Court held that the University discriminated against the newspaper’s religious viewpoint.<sup>120</sup> The Court rejected an argument that the newspaper was the University’s speech,<sup>121</sup> reasoning instead that the activity funding policy created a “metaphysical” public forum.<sup>122</sup> Contrasting the facts of *Rosenberger* with *Rust*, the Court found that the University did not attempt to enlist the student groups as bearers of its own message.<sup>123</sup> First, the purpose of the activity funding policy was to “encourage a diversity of views,” rather than to convey a discrete message.<sup>124</sup> Second, the University affirmatively distanced itself from the views of the funded groups, declaring in a signed agreement that they were not its agents or subject to its control.<sup>125</sup>

*Rosenberger* has been referred to as the “standard bearer for one of two poles in the Court’s government speech jurisprudence,” the opposite pole being borne by *Rust*.<sup>126</sup> *Rosenberger* teaches that speech subsidization does not amount to government speech when two conditions are present: intent to encourage the expression of diverse views coupled with the absence of a discrete governmental message and explicit disavowal of the funded speakers. Because, in *Rosenberger*, the University was clearly not trying to communicate its own message through the student groups, the Court was not compelled draw out the full implications of *Rust*’s holding that selective viewpoint subsidization is sometimes justified as government speech.<sup>127</sup>

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117. *Id.* at 824.

118. *Id.* at 825.

119. *Id.* at 826–27.

120. *Id.* at 837. The Court further held that the viewpoint-based denial of funding was not justified by the University’s interest in avoiding the establishment of religion. *Id.* at 846–46.

121. *Id.* at 834–35.

122. *Id.* at 830.

123. *Id.* at 833.

124. *Id.* at 834.

125. *Id.* at 834–35.

126. Bezanson & Buss, *supra* note 82, at 1407.

127. *See id.* at 1407–08 (“What more is needed to convert forum management actions into expressive actions is a critical question, one the Court did not address at all . . .”).

Two cases with facts falling between the *Rust* and *Rosenberger* poles forced the Court to consider whether the government could claim relatively indiscrete messages as its own speech. In *Arkansas Educational Television Commission v. Forbes*,<sup>128</sup> a political candidate unsuccessfully argued that his exclusion from a debate broadcast on public television amounted to discrimination based on his political ideology.<sup>129</sup> The Court disposed of the case in favor of the public broadcaster on the ground that the candidate's exclusion was viewpoint-neutral<sup>130</sup> and exploited the opportunity to explore the nature of government speech.<sup>131</sup>

In the Court's view, public broadcasting should be classified as government "speech activity" rather than as a forum for speech.<sup>132</sup> It is the role of public broadcasters to exercise "editorial discretion," selecting from among "speakers expressing different viewpoints" in order to create programming in the public interest.<sup>133</sup> Although this discretion can be abused, broadcaster liability for viewpoint discrimination would essentially transfer control over program content from entities accountable to the public to would-be plaintiffs.<sup>134</sup> Additionally, in the candidate debate context, a rule that every candidate be included, regardless of popularity, could result in logistical complexity and reduce the educational value of programming, leading the broadcaster to forgo debates altogether.<sup>135</sup>

The Court recognized candidate debates, however, as "the narrow exception" to its rule that editorial discretion is government speech.<sup>136</sup> In a candidate debate, the broadcaster "implicit[ly]" represents that the "views expressed [are] those of the candidates, not his own."<sup>137</sup>

In *National Endowment for the Arts v. Finley*,<sup>138</sup> the Supreme Court considered whether Congress constitutionally could require the National Endowment for the Arts (NEA) to consider "artistic excellence and artistic

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128. 523 U.S. 666 (1998).

129. *Id.* at 669. Ralph Forbes was an independent candidate for a seat in the House of Representatives. *Id.* at 670. Motivated by the limited time for debate, the Arkansas Educational Television Commission invited only the Republican and Democratic candidates to participate. *Id.*

130. The Court held that Forbes's exclusion was based on his lack of public support. *Id.* at 682–83.

131. *Id.* at 672–76.

132. *Id.* at 674.

133. *Id.*

134. *Id.* at 674–75.

135. *Id.* at 681.

136. *Id.* at 675. The Court further concluded that the candidate debate represented a nonpublic forum. *Id.* at 677–80.

137. *Id.* at 675.

138. 524 U.S. 569 (1998).

merit” and “general standards of decency” as criteria for grants.<sup>139</sup> Artists denied funding argued that the statute required unconstitutional discrimination based on the controversial content of their work.<sup>140</sup> The Court affirmed the constitutionality of the statute.<sup>141</sup>

The phrase “government speech” does not appear in the Court’s rationale; however, the Court implicitly relied on that doctrine by contrasting the *Finley* facts with *Rosenberger*’s.<sup>142</sup> The Court reasoned that the University in *Rosenberger* had “indiscriminately encourage[d]” student groups to apply for funding, thus creating a speech forum.<sup>143</sup> By contrast, the NEA’s standard of excellence implied up-front that artistic merit would be a discriminating criterion.<sup>144</sup> Content-based considerations inevitably play a role in measuring excellence.<sup>145</sup> Selective subsidization of artwork was further justified by the fact that Congress clearly articulated its purpose for the new criteria in the NEA statute: to enhance ““public support and confidence in the use of taxpayer funds.””<sup>146</sup>

In the Court’s most recent government speech case, it faced a different issue: the government speech doctrine was not invoked to shield alleged viewpoint discriminatory acts. Instead, *Johanns v. Livestock Marketing Association*<sup>147</sup> concerned the constitutionality of compelled subsidies for generic beef advertising.<sup>148</sup> Congress authorized an advertising campaign to encourage American consumption of beef and provided general content guidelines for the ads, which were to be designed by the Agriculture Department.<sup>149</sup> The campaign was subsidized by a mandatory assessment on beef producers, and many ads bore the tagline “Funded by America’s Beef Producers.”<sup>150</sup> Members of the advertising design committee were either appointed by the Secretary of Agriculture or elected by industry

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139. *Id.* at 572. These criteria were added to the basic standard of “artistic and cultural significance” after controversial works were funded. *Id.* at 573–76 (citing 20 U.S.C. § 954(d)(1)).

140. *Id.* at 577–78.

141. *Id.* at 584.

142. *Id.* at 586, 588. Commentators also recognize *Finley* as a government speech decision. See Bezanson & Buss, *supra* note 82, at 1452–67; Dolan, *supra* note 65, at 102–04; Jacobs, *supra* note 30, at 456–60.

143. *Finley*, 524 U.S. at 586.

144. *Id.* 585–86.

145. *Id.* at 585 (reasoning that “absolute neutrality is simply inconceivable”).

146. *Id.* at 588 (quoting 20 U.S.C. § 951(5)).

147. 544 U.S. 550 (2005).

148. *Id.* at 555, 565.

149. *Id.* at 553–54, 561. The purpose of the campaign was to “advance the image and desirability of beef,” and general content guidelines included a prohibition on brand names. *Id.* at 561–62. The campaign’s most successful ad ran “Beef. It’s What’s For Dinner.” *Id.* at 554.

150. *Id.* at 554.

councils.<sup>151</sup> Agriculture Department officials provided design input and reviewed the ads before dissemination.<sup>152</sup> Plaintiff beef producers<sup>153</sup> alleged two First Amendment claims based on compulsion: compelled subsidy of private speech through the mandatory assessment<sup>154</sup> and compelled speech by audience attribution of the ads to them.<sup>155</sup> The Court ruled that the ads were government speech and rejected both claims.<sup>156</sup>

In holding that the ad campaign represented government speech, the Court reasoned that authority for the “overall message” of the campaign and “final approval authority” over all its details lay in the government’s hands. The “overall message” of the campaign was set by Congress in statute.<sup>157</sup> The Secretary of Agriculture (the Secretary) retained “final approval authority” for all details of the published ads.<sup>158</sup> The fact that the Secretary could reject or rewrite all proposed ads supported the ads’ character as government speech, even though private individuals sat on the design committee.<sup>159</sup> Moreover, Congress could alter the statute at any

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151. *Id.*

152. *Id.* at 561.

153. Beef producers complained because they viewed the generic advertising as harming their efforts to distinguish superior grades of beef. *Id.* at 556.

154. *Id.* at 556. It is a violation of the First Amendment for the government to compel citizens to fund private speech which is not “germane” to the government purpose in exacting the fee. *See, e.g.*, *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209 (1977) (holding that a school board could not require teachers to finance the political activities of their union); *Keller v. State Bar of Cal.*, 496 U.S. 1, 14 (1990) (holding that lawyers’ mandatory dues could not be expended for purposes not “necessarily or reasonably incurred for the purpose of regulating the legal profession”). *See Note, supra* note 94, at 2418–22 for a fuller discussion of compelled-subsidy doctrine.

155. *Johanns*, 544 U.S. at 564. Compelled speech is a violation of the First Amendment right not to speak. *W. Va. Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943) and *Wooley v. Maynard*, 430 U.S. 705 (1977), are cases commonly cited for this proposition. In *Barnette*, the Court ruled that a public school could not require objecting children to recite the Pledge of Allegiance. 319 U.S. at 642. *See infra* text accompanying notes 173–76 for a brief discussion of *Wooley*. Although the *Johanns* plaintiffs were not forced to speak literally, Justice Thomas noted that “associating individuals or organizations involuntarily with speech by attributing an unwanted message to them” also violates this right. *Johanns*, 544 U.S. at 568 (Thomas, J., concurring).

156. The Court distinguished its prior compelled-subsidy cases, such as *Abood*, on the ground that the speech there was presumed to be non-governmental. *Johanns*, 544 U.S. at 559. However, citizens “have no right not to fund government speech.” *Id.* at 562.

The Court rejected the compelled-speech argument because the plaintiffs’ challenge was facial, rather than as-applied, and the statute did not *require* the allegedly attributive tagline. *Id.* at 565. However, the Court left open the possibility than an as-applied challenge, based on facts indicating that the audiences actually attributed the ads to the plaintiffs, might succeed. *Id.* at 565–66.

157. *Id.* at 561–62.

158. *Id.*

159. *Id.* at 561.

time.<sup>160</sup> The Court reasoned that such “political safeguards [were] more than adequate to set [the ads] apart from private messages.”<sup>161</sup>

Appellate courts faced with government speech defenses to viewpoint discrimination claims have attempted to synthesize and apply the Supreme Court’s government speech cases. The circuit courts have considered government speech in cases involving, *inter alia*, a bulletin board at a public school,<sup>162</sup> a holiday display outside a city building,<sup>163</sup> on-air sponsor acknowledgement by a public radio station,<sup>164</sup> a specialty license plate displaying the Confederate flag,<sup>165</sup> and issuance of “Choose Life” license plates.<sup>166</sup> Generally, these courts have employed two steps in analyzing whether government speech is a constitutionally permissible justification for viewpoint discrimination. First, courts consider the nature of the particular speech being challenged, evaluating whether it is governmental, private, or “mixed.”<sup>167</sup> As a balancing framework by which to analyze this question, courts often utilize a four-factor test (the four-factor test), which examines the purpose of the speech, the state’s degree of editorial control over the speech, the identity of the literal speaker, and whether the government or citizen bears ultimate responsibility for the

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160. *Id.* at 563–64.

161. *Id.* at 563.

162. *Downs v. L.A. Unified Sch. Dist.*, 228 F.3d 1003, 1016–17 (9th Cir. 2000) (holding that school bulletin board postings promoting gay and lesbian awareness were government speech and allowing the school to prohibit the plaintiff-teacher from posting his own anti-homosexuality materials).

163. *Wells v. City and County of Denver*, 257 F.3d 1132, 1144 (10th Cir. 2001) (holding that a local government’s holiday display, which included Christian and secular symbols, as well as a sign acknowledging the display’s corporate sponsors, was government speech and allowing the government to exclude the plaintiff’s anti-religious sign).

164. *Knights of the Ku Klux Klan v. Curators of the Univ. of Mo.*, 203 F.3d 1085, 1096 (8th Cir. 2000) (holding that a university radio station’s on-air acknowledgement of its sponsors was government speech and allowing the station to reject an offer of sponsorship from the Ku Klux Klan).

165. *Sons of Confederate Veterans v. Comm’r of the Va. Dep’t of Motor Vehicles*, 288 F.3d 610 (4th Cir. 2002). In Virginia’s specialty plate scheme, nonprofit organizations could contact a member of the state legislature and request a specialty plate for the organization’s members. *Id.* at 614. If statutorily approved, the Department of Motor Vehicles would coordinate design of the plate; normally, it was acceptable for an organization to display its logo on the plate. *Id.* The Sons of Confederate Veterans (SCV) received legislative approval for a specialty plate. *Id.* at 613. However, the enabling statute disallowed the display of any logo. *Id.* at 614. The SCV’s logo contained a Confederate flag. *Id.* at 613. The Fourth Circuit held that the plate represented private speech and that Virginia had impermissibly discriminated against the SCV’s expression of pride in the “Southern heritage and ideals of independence.” *Id.* at 621, 624.

166. *Planned Parenthood of S.C. v. Rose*, 361 F.3d 786 (4th Cir. 2004); *ACLU v. Bredesen*, 441 F.3d 370 (6th Cir. 2006). *See infra* Part III for discussion of these cases.

167. *See, e.g., Rose*, 361 F.3d at 794 (deciding “Choose Life” specialty license plate represented “mixed speech”); *Sons of Confederate Veterans*, 228 F.3d at 621 (deciding that specialty license plate for the SCV represented private speech).

speech.<sup>168</sup> Second, given the governmental or private nature of the speech itself and the context in which it occurs, courts consider whether viewpoint neutrality toward the message it conveys is required.<sup>169</sup> Specifically, they consider whether the state has created a forum for speech<sup>170</sup> or whether the state should be able to restrict other speakers in order to further its own speech.<sup>171</sup>

### III. “CHOOSE LIFE” PLATES IN THE COURTS

The Supreme Court has four times declined to weigh in on the “Choose Life” controversy.<sup>172</sup> In its sole case considering license plate speech, *Wooley v. Maynard*,<sup>173</sup> the Court held that it was unconstitutional for a state to require drivers to display the motto “Live Free or Die” on their standard license plates.<sup>174</sup> To do so would compel objecting drivers to speak the state’s message<sup>175</sup> because the license plates were “readily associated with” the drivers.<sup>176</sup>

Lower courts that have reached the merits in “Choose Life” plate cases have grappled with the questions of whose speech is represented by the message “Choose Life” and whether a state should be bound to viewpoint neutrality or free to further its own viewpoint within its specialty license plate scheme.<sup>177</sup> In these cases, an individual or organization claims that

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168. See, e.g., *Sons of Confederate Veterans*, 228 F.3d at 619; *Wells*, 257 F.3d at 1141–42; *Ku Klux Klan*, 203 F.3d at 1093–94. But see *Bredesen*, 441 F.3d at 380 (declining to apply the four-factor test and instead applying the Supreme Court’s recent analysis in *Johanns* to determine whether a state’s “Choose Life” plate was government or private speech).

169. See, e.g., *Downs v. L.A. Unified Sch. Dist.*, 228 F.3d 1003, 1013 (9th Cir. 2000) (deciding that school bulletin board postings were government speech and then considering whether the school could prevent messages contrary to its own from being posted); *Wells v. City and County of Denver*, 257 F.3d 1132, 1143 (10th Cir. 2001) (deciding that local government’s holiday display was government speech and then considering whether government could prevent an organization from including its own sign in the display); *Sons of Confederate Veterans*, 228 F.3d at 616, 622 (deciding that a requested specialty plate which would bear the Confederate Flag logo was private speech and then considering whether the state could refuse to issue it on the basis of viewpoint); *Rose*, 361 F.3d at 794–95 (deciding “Choose Life” specialty license plate was “mixed speech” and then considering whether the state could offer the “Choose Life” plate without a counterpart pro-choice plate).

170. See *Sons of Confederate Veterans*, 228 F.3d at 622–23; *Rose*, 361 F.3d at 798.

171. See *Downs*, 228 F.3d at 1013; *Wells*, 257 F.3d at 1143.

172. See *ACLU v. Bredesen*, 126 S. Ct. 2972 (2006); *Keeler v. Stalder*, 126 S. Ct. 2967 (2005); *Rose v. Planned Parenthood of S.C.*, 543 U.S. 1119 (2005); *Henderson v. Stalder*, 537 U.S. 1048 (2002).

173. 430 U.S. 705 (1977).

174. *Id.* at 707, 717. The plaintiff, a Jehovah’s Witness, objected because he believed life to be “more precious than freedom.” *Id.* at 708 n.2.

175. See *supra* note 154 for a discussion of compelled speech.

176. *Wooley*, 430 U.S. at 717 n.15.

177. *ACLU v. Bredesen*, 441 F.3d 370 (6th Cir. 2006); *Planned Parenthood of S.C. v. Rose*, 361

the state had opened its specialty license plates as a forum for speech, thereby requiring the state to be neutral toward whatever views drivers wish to express on a plate. The state counters that its action of either offering a solo “Choose Life” plate or of refusing to offer a “Choose Life” plate is constitutionally permissible as its own speech. Perhaps due to the lack of a full-bodied judicial conception of government speech and the intuitive notion that the speech of both state and citizen is implicated in a specialty license plate, courts have disagreed on the constitutionality of the “Choose Life” plate.

In *Planned Parenthood v. Rose*,<sup>178</sup> the Fourth Circuit held that South Carolina had engaged in viewpoint discrimination by creating a “Choose Life” plate without a pro-choice counterpart.<sup>179</sup> Although South Carolina had an administrative application process for the creation of certain types of specialty plates,<sup>180</sup> the “Choose Life” plate was created by statute.<sup>181</sup>

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F.3d 786 (4th Cir. 2004); *Choose Life Ill., Inc. v. White*, No. 04 C 4316, 2007 WL 178455 (N.D. Ill. Jan. 19, 2007); *Ariz. Life Coal. v. Stanton*, 2005 U.S. Dist. LEXIS 21960 (D. Ariz. Sept. 26, 2005).

178. 361 F.3d 786 (4th Cir. 2004).

179. *Id.* at 788–89. Judge Michael wrote the lengthiest opinion and announced the judgment of the court. His two colleagues, Judge Luttig and Judge Gregory, each wrote an opinion concurring in the judgment. *Id.* at 800–01 (Gregory & Luttig, JJ., concurring); In his concurrence, Judge Gregory explained that he continued to disagree with the result in *Sons of Confederate Veterans, Inc. v. Commissioner of the Virginia Department of Motor Vehicles*, 288 F.3d 610 (4th Cir. 2002), in which the Fourth Circuit applied the four-factor test concluding, that a requested specialty plate bearing a Confederate flag logo was private speech, and held that Virginia could not refuse to issue the plate. *Id.* at 801 (Gregory, J., concurring). Judge Gregory dissented from the denial of rehearing en banc in *Sons of Confederate Veterans* because he concluded that the four-factor test did not adequately consider the state’s interest in not displaying a racially hostile symbol on its license plates. *Sons of Confederate Veterans v. Comm’r of the Va. Dep’t of Motor Vehicles*, 305 F.3d 241, 251 (4th Cir. 2002) (denying reh’g en banc) (Gregory, J., dissenting). However, he concurred in *Rose* because “the judgment reached [in *Rose*] applies the factors set forth in *Sons of Confederate Veterans* in a manner that begins to recognize the government speech interests that are implicated in the vanity license plate forum.” *Rose*, 361 F.3d at 801 (Gregory, J., concurring). Because Judge Gregory appears to have concurred in order to express continuing disagreement with *Sons of Confederate Veterans* and indicates some support for Judge Michael’s reasoning, I will refer to Judge Michael’s opinion as the opinion of the “*Rose* court” throughout the text.

Concurring in *Rose*, Judge Luttig relied on the reasoning in his opinion respecting denial of rehearing en banc in *Sons of Confederate Veterans*. *Id.* at 800 (Luttig, J., concurring). In that opinion, he expressed the view that his colleagues were caught in a false dichotomy, believing that speech had to be either private or governmental. *Sons of Confederate Veterans v. Comm’r of the Va. Dep’t of Motor Vehicles*, 305 F.3d 241, 245–47 (4th Cir. 2002) (reh’g denied en banc) (Luttig, J., writing separate opinion respecting denial of reh’g en banc). Judge Luttig thought that “speech that appears on the so-called ‘special’ or ‘vanity’ license plate could prove to be the quintessential example of speech that is both private and governmental.” *Id.* at 245. He also opined that where the private speech interest was “significant” and the governmental interest was “less than compelling,” the government would be forbidden from viewpoint discrimination. *Id.* at 247.

180. A South Carolina statute allowed nonprofit organizations to apply to an administrative department for a plate which would bear the group’s identifying logo or seal and be sold only to the group’s members. *Rose*, 361 F.3d at 788 (citing S.C. CODE ANN. § 56-3-8000).



Acting on their own initiative, two legislators introduced a bill creating the plate and, despite initial failure, successfully persuaded fellow lawmakers to enact a “Choose Life” provision as an addition to another specialty plate bill.<sup>182</sup> Revenues from the “Choose Life” plate were designated for a special fund “to be used to support local crisis pregnancy programs.”<sup>183</sup> Organization which provided, promoted, or referred women for abortion services were ineligible to receive grants from this fund.<sup>184</sup>

The *Rose* court employed the four-factor test to analyze whether the speech on the “Choose Life” plate was “government” or “private.”<sup>185</sup> The first two factors, the purpose of the “Choose Life” plate and the state’s degree of editorial control over it, pointed to government speech.<sup>186</sup> The plate was created at the initiative of state legislators, rather than a pro-life organization, and revenues flowed only to crisis pregnancy centers that did not advise women to have an abortion.<sup>187</sup> These facts indicated that the state intended to express its “preference for the pro-life position.”<sup>188</sup> By specifying the words “Choose Life” in the enabling statutory provision, South Carolina retained “complete editorial control” over the plate’s message.<sup>189</sup>

Analyzing the third and fourth factors together, the *Rose* court concluded that the individual driver was both the “literal speaker” of the “Choose Life” message and bore “ultimate responsibility” for it.<sup>190</sup> Drawing on the idea in *Wooley* that a standard license plate is “associated with” the vehicle driver,<sup>191</sup> the court reasoned that a specialty plate is more

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181. *Id.* at 788–89 (citing S.C. CODE ANN. § 56-3-8910). The legislature had created other plates by statute as well, some available only to honorees, such as plates for Purple Heart recipients and volunteer firemen, and some available to any driver, such as “Keep South Carolina Beautiful.” *Id.* at 788 (citing S.C. CODE ANN. §§ 56-3-3310, 56-3-2810, 56-3-3950).

With both the administrative and legislative branches able to originate specialty plates, South Carolina followed a hybrid model of specialty plate creation. *See infra* Part V.C for an illustration of a hybrid model. Because of the outcome in *Rose*, South Carolina has modified its specialty plate creation process to be purely administrative. *See* Choose Life Newsletter, *supra* note 6.

182. *Rose*, 361 F.3d at 788–89. The initial bill creating the “Choose Life” plate died in committee in the South Carolina House of Representatives after a representative from Planned Parenthood South Carolina testified that a pro-choice specialty plate should be offered as well. *Id.* at 788. The “Choose Life” plate was eventually added to a bill creating a “NASCAR” specialty plate. *Id.* at 789.

183. S.C. CODE ANN. § 56-3-8910(B) (2006).

184. *Id.*

185. *Rose*, 361 F.3d at 793. In particular, *Rose* relied heavily on *Sons of Confederate Veterans*. *See Rose*, 361 F.3d at 792–94.

186. *Id.* at 793.

187. *Id.*

188. *Id.*

189. *Id.*

190. *Id.* at 793–94.

191. *See supra* text accompanying note 176.

strongly associated with the driver because it must be selected at additional cost.<sup>192</sup> With evenly balanced factors, the court concluded that the “Choose Life” plate was “mixed” speech.<sup>193</sup>

The *Rose* court further decided that viewpoint discrimination was impermissible because the state had opened its specialty license plate scheme as a speech forum.<sup>194</sup> A review of Supreme Court cases involving government speech and viewpoint discrimination led the court to believe that the nature of the speech “medium,” not only the identity of the speaker, was important.<sup>195</sup> The court reasoned that South Carolina did not “enlist” drivers to display the “Choose Life” plate as it would enlist employees for a project.<sup>196</sup> Instead, drivers selected and paid extra for the plate in order to express agreement with its message.<sup>197</sup> On this ground, the court distinguished *Rust*, in which the government was allowed to restrict the speech of doctors it employed.<sup>198</sup> Thus, the court concluded that “[t]he medium here—the specialty license plate scheme—is more like a limited forum for expression than it is like a school, museum, or clinic.”<sup>199</sup> Having created a speech forum, South Carolina could not exclude the pro-choice viewpoint from its specialty plates.<sup>200</sup> This result was further supported by the court’s perception that the state’s advocacy of the “Choose Life” message was not obvious to the public, allowing the state to evade political accountability for its pro-life view.<sup>201</sup>

Two years after *Rose*, the Sixth Circuit in *ACLU v. Bredesen*<sup>202</sup> broke ranks with the Fourth Circuit and upheld a solo “Choose Life” plate as government speech.<sup>203</sup> *Bredesen* involved a challenge to Tennessee’s

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192. *Rose*, 361 F.3d at 794 (citing *Wooley v. Maynard*, 430 U.S. 705, 717 (1977)).

193. *Id.* (“The State speaks by authorizing the Choose Life plate and creating the message, all to promote the pro-life point of view; the individual speaks by displaying the Choose Life plate on her vehicle.”).

194. *Id.* at 795–99.

195. *Id.* at 795–98. In addition to *Rust*, the court considered *Rosenberger v. Rector and Visitors of the University of Virginia*, 515 U.S. 819 (1995) (holding that a state university engaged in viewpoint discrimination when it refused to subsidize printing of a student newspaper for a Christian organization) and *Legal Services v. Velazquez*, 531 U.S. 533 (2001) (holding that the federal government engaged in viewpoint discrimination when it prohibited recipients of funds under the Legal Services Corporation Act from seeking change in the welfare laws through litigation).

196. *Rose*, 361 F.3d at 798.

197. *Id.*

198. *Id.*

199. *Id.*

200. *Id.* at 795.

201. *Id.* at 798–99.

202. 441 F.3d 370 (6th Cir. 2006).

203. *Id.*

“Choose Life” plate, which had been created by legislative enactment.<sup>204</sup> The enabling statute specified the words “Choose Life” and explicitly designated half of the plate’s revenues to New Life Resources, a pro-life pregnancy resource center, which would distribute a portion of the funds to similar organizations, including adoption organizations, across Tennessee.<sup>205</sup> The statute also mandated that New Life Resources use the funds “exclusively for counseling and financial assistance, including food, clothing, and medical assistance for pregnant women in Tennessee.”<sup>206</sup> The plate would be designed “in consultation with” New Life Resources,<sup>207</sup> but final design would be “determined by the commissioner [of safety].”<sup>208</sup> In addition, Tennessee retained the right to “withdraw authorization” for any license plate.<sup>209</sup>

The Sixth Circuit declined to use the four-factor test to analyze whether the message “Choose Life” was government or private speech.<sup>210</sup> The court reasoned that the Supreme Court’s recent decision in *Johanns*, which held that agricultural advertising financed by compelled subsidies on producers was government speech,<sup>211</sup> set forth the “authoritative test” for identifying government speech.<sup>212</sup> Following the reasoning in *Johanns*, the court ruled that “Choose Life” was a message “crafted” by the state of Tennessee.<sup>213</sup> Not only did the state “set the overall message” of the plate but it also delineated in statute the specific wording “Choose Life.”<sup>214</sup> In addition, the state retained “final approval authority” over the plate because a state official supervised plate design and retained the

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204. *Id.* at 372. See *supra* text accompanying notes 45–54 for a more detailed description of Tennessee’s specialty plate scheme. An amendment to the “Choose Life” enabling statute proposing a pro-choice specialty plate was defeated in the legislature. *Bredesen*, 441 F.3d at 372.

205. See TENN. CODE ANN. §§ 55-4-306(a), (c). The statute lists dozens of organizations which will receive a portion of the funds, such as Crisis Pregnancy Center of Cookeville, Care Net Pregnancy Services, and Hope Clinic. § 55-4-306(d)(6)(B).

206. § 55-3-306(c). In addition, New Life Resources was prohibited from using any of the funds for “purposes of lobbying, promoting legislation or the election or defeat of any political candidate.” § 55-4-36(d)(5).

207. § 55-4-306(b).

208. § 55-4-202(b)(2). See § 55-1-111 (defining “commissioner”).

209. *Bredesen*, 441 F.3d at 376.

210. *Id.* at 380.

211. See *supra* text accompanying notes 147–61 for a discussion of *Johanns*.

212. *Bredesen*, 441 F.3d at 380. The *Bredesen* court felt that “the Fourth Circuit opinions in *Rose* [were] in tension with the intervening case of *Johanns*. . . . *Rose* relied instead on a pre-*Johanns* four-factor test of the Fourth Circuit’s own devising . . . .” *Id.*

213. *Id.* at 375.

214. *Id.* at 376.

prerogative to cancel the plate.<sup>215</sup> Thus, “Choose Life” was “Tennessee’s own message.”<sup>216</sup>

The *Bredesen* court further concluded that Tennessee had not opened its specialty license plates as a speech forum.<sup>217</sup> The ACLU argued that the state’s use of “volunteer” drivers to disseminate a message created a speech forum.<sup>218</sup> Rejecting this contention, the court invoked *Rust*.<sup>219</sup> The government did not create a forum in *Rust* by hiring doctors to disseminate its pro-childbirth message.<sup>220</sup> In the court’s view, even had the doctors offered to serve in the Title X clinic without pay, the government would still have been allowed to restrict them from advising abortion.<sup>221</sup> Thus, the court ruled that volunteer dissemination of a government-crafted message, such as “Choose Life,” did not “create” a speech forum.<sup>222</sup> Rather, drivers who choose to display the “Choose Life” plate “pay out of their own pockets for the privilege of putting the government-crafted message on their private property.”<sup>223</sup> Because Tennessee had not created a forum, it was not obliged to allow the pro-choice viewpoint onto a specialty plate.<sup>224</sup>

In the two most recent “Choose Life” district court cases, the ideologies of plaintiff and defendant were reversed. Pro-life plaintiffs alleged that the states’ refusal to issue “Choose Life” plates was viewpoint discriminatory. In *Arizona Life Coalition v. Stanton*,<sup>225</sup> an organization whose application for a “Choose Life” plate had been denied by Arizona brought suit.<sup>226</sup> Arizona Life Coalition (AZLC), a group of over forty pro-life organizations, had applied for a specialty plate according to the state’s

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215. *Id.* at 375–76.

216. *Id.* at 376.

217. *Id.* at 377–78.

218. *Id.* at 377.

219. *Id.* at 378. See discussion of *Rust supra* text accompanying notes 93–113.

220. *Bredesen*, 441 F.3d at 378.

221. *Id.*

222. *Id.* The *Bredesen* court was also troubled by the perceived implications of holding that volunteer dissemination of a governmental message creates a forum. *Id.* at 378–79. A large amount of “long-accepted,” privately disseminated governmental messages would become unconstitutional unless speech from the opposite viewpoint was also allowed access to the relevant forum. *Id.* at 380. For example, government-produced pins advocating “Register and Vote” would be unconstitutional unless the government also agreed to produce “Don’t Vote” pins upon request. *Id.* at 379. The “unstated distinction” between “Choose Life” and “Register and Vote”—that “Choose Life” is controversial—is “entirely indefensible as a matter of First Amendment law.” *Id.*

223. *Id.* at 378.

224. *Id.* at 377.

225. No. CV-03-1691-PHX-PGR, 2005 U.S. Dist. LEXIS 21960 (D. Ariz. Sept. 26, 2005).

226. *Id.* at \*3–5.

administrative process set forth in statute.<sup>227</sup> In accordance with the statute, the Department of Motor Vehicles (DMV) evaluated whether AZLC met the organizational standards to qualify for a specialty plate: a service-oriented and nondiscriminatory primary activity or interest, not promoting a specific product or brand, and not promoting a specific religion.<sup>228</sup> Finding that AZLC met these requirements, the DMV forwarded the group's application to the License Plate Commission (the Commission),<sup>229</sup> vested with the responsibility to decide "whether to authorize [specialty] plates."<sup>230</sup> The Commission denied the application, "concerned that other groups, with differing abortion-related viewpoints, would also apply for a license plate."<sup>231</sup>

Ultimately, the *Stanton* court held that Arizona's denial of AZLC's "Choose Life" application was acceptable as viewpoint-neutral. First, however, the court analyzed whether the speech on Arizona's specialty license plates was governmental or private in nature, employing the four-factor test.<sup>232</sup> With regard to the "primary purpose" factor, the court reasoned that the purpose of Arizona's specialty plate scheme was primarily governmental.<sup>233</sup> The plates served the "central" function of vehicle identification.<sup>234</sup> In addition, while the message on Arizona plates indicated a measure of private expression, the state had legislated standards to control which organizations could receive a specialty plate.<sup>235</sup> Regarding the "editorial control" and "ultimate responsibility" factors, the court again focused on the statutory standards an organization has to meet to qualify for a plate.<sup>236</sup> In the court's view, these standards established the state's editorial control over and ultimate responsibility for the plates.<sup>237</sup>

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227. *Id.* at \*3–4. The statute which delineates the application process for a specialty plates is ARIZ. REV. STAT. ANN. § 28-2404 (2003).

228. *Stanton*, 2005 U.S. Dist. LEXIS 21960, at \*2–3. The standards are set forth in ARIZ. REV. STAT. ANN. § 28-2404(B) (2003). In addition, an organization either had to have at least two hundred members or agree to pay the "production and program" costs of the plate. § 28-2404(G)(2).

229. *Stanton*, 2005 U.S. Dist. LEXIS 21960, at \*3.

230. ARIZ. REV. STAT. ANN. § 28-2405(D)(3) (2003). The Commission is composed of a variety of administrative department officials and two members of the community. § 28-2405(A). The Commission is also charged with, inter alia, prescribing the "color and design" of license plates. § 28-2405(D)(1)–(4).

231. *Stanton*, 2005 U.S. Dist. LEXIS 21960, at \*3. An organization that received approval from the Commission would be subject to additional statutory requirements regarding the submission of driver applications and fees to the state. *See* ARIZ. REV. STAT. ANN. § 28-2404(C) (2003).

232. *Stanton*, 2005 U.S. Dist. LEXIS 21960, at \*7–17.

233. *Id.* at \*11.

234. *Id.* at \*10.

235. *Id.* at \*10–11.

236. *See id.* at \*12–14, \*16–17.

237. *See id.*

Finally, the “literal speaker” factor was indeterminate because the court found the “license plate itself” to be the “literal speaker.”<sup>238</sup>

The *Stanton* court further considered “whether license plates constitute a designated public forum or a nonpublic forum.”<sup>239</sup> The court held that Arizona’s specialty plate scheme represented a nonpublic forum because the state had established a selective application process in order to obtain a plate, imposing standards on organizations applying for a plate.<sup>240</sup> The court further held that Arizona’s exclusion of AZLC from the forum was viewpoint-neutral.<sup>241</sup> The state was simply trying to avoid altogether the “politically sensitive arena of abortion politics.”<sup>242</sup>

In the recent decision of *Choose Life of Illinois v. White*,<sup>243</sup> an Illinois organization alleged that the state legislature’s repeated refusal to create a “Choose Life” plate represented viewpoint discrimination.<sup>244</sup> In Illinois’ hybrid specialty plate creation process, no statute delineates a step-by-step procedure for the creation of specialty plates. However, a statute relating to the issuance of specialty plates provides that the Secretary of State (the Secretary) is not to authorize a new specialty plate unless ten thousand applications have been received.<sup>245</sup> This statute also vests the Secretary with discretion to accept a smaller number of applications if sufficient to cover the state’s production-related costs.<sup>246</sup> Another statute allows the Secretary to refuse to issue any plate with a confusing, misleading, or offensive combination of letters and numbers.<sup>247</sup> The Secretary developed policies and practices regarding the issuance of specialty plates which went beyond these basic obligations. Specifically, the Secretary required that every application for a specialty plate be approved by the state

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238. *Id.* at \*16–17. The court reasoned that considering the license plate to be the literal speaker “implicate[d] government and private speech” because the state owned the license plate but it was mounted on a privately owned vehicle. *Id.*

239. *Id.* at \*17.

240. *Id.* at \*22.

241. *Id.* at \*24.

242. *Id.* The court also rejected AZLC’s argument that the state had engaged in viewpoint discrimination by vesting the Commission with “unbridled discretion” to reject specialty plate applications because it found no evidence that the Commission had engaged in the “sporadic abuse of power” by denying AZLC’s application. *Id.* at \*26–27. See brief discussion of unbridled discretion at *supra* text accompanying notes 71–72.

243. No. 04 C 4316, 2007 WL 178455 (N.D. Ill. Jan. 19, 2007).

244. *Id.* at \*3.

245. 625 ILL. COMP. STAT. ANN. § 5/3-600 (West 2006). The statute also requires the Secretary to inform law enforcement of the appearance of the new plate. § 5/3-600(b).

246. § 5/3-600. Pursuant to this discretion, the Secretary reduced the number of required applications to 850. *White*, 2007 WL 178455, at \*2.

247. ILL. COMP. STAT. ANN. § 5/3-405.2 (West 2006).

legislature and signed into law by the governor.<sup>248</sup> In addition, the Secretary placed “sole responsibility” for plate “promotional materials” on the applicant organization.<sup>249</sup> Two state senators had introduced several “Choose Life” bills over the course of two legislative sessions.<sup>250</sup> Although the legislature passed several other specialty plate bills, it refused to act on the “Choose Life” bill.<sup>251</sup> The “politically controversial” message of the plate was the “undisputed” reason for its de facto denial.<sup>252</sup>

Employing the four-factor test, the *White* court held that Illinois’ specialty plates represented private rather than governmental speech.<sup>253</sup> The court found that the “central purpose” of Illinois’ specialty plate system was to facilitate private expression while raising revenue for the state.<sup>254</sup> The court relied on the facts that an additional fee was charged for the plate and a minimum number of applications required before production.<sup>255</sup> The “editorial control” factor weighed in favor of private speech because the “Choose Life” message was crafted by a private organization, rather than the legislature, and the Secretary had delegated full responsibility for specialty plate promotional materials to private organizations.<sup>256</sup> Finally, finding that the “literal speaker” and “ultimate responsibility” factors tipped toward private speech, the court emphasized that a specialty plate message was closely associated with an individual driver, who selected the plate at additional cost.<sup>257</sup> Thus, relying on three of four factors, the court held that Illinois’ specialty license plates represented private speech.<sup>258</sup>

In choosing to employ the four-factor test, the *White* court explicitly rejected the Sixth Circuit’s argument in *Bredesen* that the Supreme Court’s *Johanns* decision had supplanted the four-factor test.<sup>259</sup> While the Sixth Circuit interpreted drivers purchasing the “Choose Life” plate as volunteering to display a state message,<sup>260</sup> the Illinois district court viewed

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248. *White*, 2007 WL 178455, at \*2.

249. *Id.*

250. *Id.* at \*3.

251. *Id.* At the time of suit, Illinois had created approximately sixty specialty plates through individual statutes, twenty-seven of which were “sponsored” by private organizations. *Id.* at \*1.

252. *Id.* at \*3.

253. *Id.* at \*7.

254. *Id.* at \*4–5.

255. *Id.* at \*5.

256. *Id.* at \*6.

257. *Id.* (“Indeed, no one who sees a specialty license plate imprinted with the phrase “Choose Life” would doubt that the owner of that vehicle holds a pro-life viewpoint.”).

258. *Id.* at \*7.

259. *Id.*

260. *ACLU v. Bredesen*, 441 F.3d 370, 378 (6th Cir. 2006).

them as “pay[ing] to give expression to their private causes and viewpoints.”<sup>261</sup> The Sixth Circuit’s reasoning was “forced.”<sup>262</sup>

Unlike the *Rose*, *Bredesen*, and *Stanton* courts, the *White* court did not separately consider whether Illinois had created a specialty plate speech forum. After concluding that the state’s specialty plates represented private speech, the court apparently proceeded on the assumption that a forum had been created<sup>263</sup> and considered whether Illinois had discriminated against the viewpoint expressed on the “Choose Life” plate.<sup>264</sup> The court held that the state “wishe[d] to suppress what it considers a controversial idea.”<sup>265</sup> Refusing to create a specialty plate “[w]hen a group, such as Choose Life Illinois, has met the numerical and financial requirements of the specialty plate program . . . is to discriminate against those who hold a pro-life viewpoint.”<sup>266</sup>

#### IV. ANALYSIS: HOW THE “CHOOSE LIFE” PLATE COURTS HAVE DECIDED WHETHER VIEWPOINT-SELECTIVE ACTIONS SHOULD BE JUSTIFIED AS GOVERNMENT SPEECH

In both solo plate and plate rejection cases, courts analyzing the applicability of government speech have improperly analyzed or obscured a crucial issue: whether a state’s specialty license plate creation process has been opened as a speech forum. Courts in the solo plate cases improperly focused on the “Choose Life” plate alone, rather than the broader specialty plate creation process. Courts in the plate rejection cases examined facts relating to the states’ specialty plate schemes but did so under the circuit-developed four-factor test, rather than the forum creation framework set forth in *Cornelius*. The appropriate method of analyzing whether a state’s preference for or against the “Choose Life” plate should be constitutionally legitimated as government speech is to examine the

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261. *White*, 2007 WL 178455, at \*7.

262. *Id.*

263. *See id.* at \*7–8 (ending a paragraph with “[Illinois] specialty license plates constitute[] private speech” and beginning the next paragraph with “[w]here the government voluntarily provides a forum for private expression, the government may not discriminate”).

264. *Id.* at \*8.

265. *Id.*

266. *Id.* at \*8. Choose Life of Illinois had met the numerical requirement by collecting signatures of approximately 35,000 people indicating that they would apply for a “Choose Life” plate if available. *See* Illinois Choose Life, Status Report, [http://www.ilchoose-life.org/status\\_report.htm](http://www.ilchoose-life.org/status_report.htm) (last visited Oct. 18, 2007).



state's specialty plate creation process under the *Cornelius* factors relating to governmental intent in forum creation.<sup>267</sup>

#### A. Solo "Choose Life" Plate Cases

Two of the "Choose Life" plate courts adjudicated a solo plate case, in which a state's creation of a "Choose Life" plate without a pro-choice counterpart was alleged to be viewpoint discriminatory. The Fourth Circuit in *Rose* and the Sixth Circuit in *Bredesen* reached opposite conclusions regarding the constitutionality of a solo plate.<sup>268</sup> Yet, both courts failed to take proper account of the respective state's broader specialty plate creation process. Although they employed different legal tests, both courts focused on the "Choose Life" plate in isolation by considering whether its message was governmental or private in nature. This single-plate focus spilled over into the courts' analyses of whether a speech forum had been created. Rather than examining facts relating to the specialty plate creation process, both courts focused on the motives of individual drivers who chose to display the "Choose Life" plate. Ultimately, the Fourth and Sixth Circuits reached different outcomes by emphasizing a different aspect of the complex motive of such drivers.

##### 1. *The Four-Factor Test and the Johanns Test Both Lead Courts to View the "Choose Life" Plate in Isolation*

The Fourth Circuit in *Rose* and Sixth Circuit in *Bredesen* disagreed on whether to employ the four-factor test or the Supreme Court's recent *Johanns* decision to evaluate the nature of the speech of the "Choose Life" plate.<sup>269</sup> However, while only the four-factor test takes account of the fact that drivers choose to display the plate, the two tests both inquire into facts regarding the individual "Choose Life" plate, rather than the broader license plate scheme.

Under the four-factor test, the first two factors inquire into the purpose of the challenged speech and the state's degree of editorial control over it. Under the purpose factor, the *Rose* court focused on the South Carolina's motive for legislatively creating a "Choose Life" plate,<sup>270</sup> while the *Bredesen* court evaluated whether or not Tennessee set the "overall

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267. See *infra* Part V.A for development of this argument.

268. See *supra* text accompanying notes 179, 203.

269. See *ACLU v. Bredesen*, 441 F.3d 370, 380 (6th Cir. 2006) (explicitly declining to rely on the "pre-*Johanns* four-factor test" utilized in *Rose*).

270. See *supra* text accompanying notes 186–88.

message” of the plate.<sup>271</sup> Essentially, both courts inquired into the extent to which the states were committed to the pro-life viewpoint and found facts pointing toward government speech.<sup>272</sup> *Rose* and *Bredesen* also examined the states’ degree of control over the substantive content of the “Choose Life” plate. Although *Rose* labeled this factor “editorial control” and *Bredesen* termed it “final approval authority,” both courts found that the facts regarding substantive control indicated government speech.<sup>273</sup> However, under the “literal speaker” and “ultimate responsibility” factors of the four-factor test, the *Rose* court additionally considered the fact that drivers chose to pay extra in order to display the “Choose Life” plate. This fact, which also figures prominently in the court’s forum creation analysis, led the *Rose* court to find that private speech interests were also implicated by the “Choose Life” plate.

## 2. *Regarding Forum Creation, Courts Focus on the Motives of Individual Drivers*

Considering whether the respective states had created a specialty plate speech forum, the *Rose* and *Bredesen* courts each focused on a different motive of the driver who purchases and displays a “Choose Life” plate. In concluding that South Carolina had created a forum, the Fourth Circuit in *Rose* focused on drivers’ self-expressive motives in displaying the “Choose Life” plate. A key fact supporting the court’s conclusion was that drivers freely chose to display the “Choose Life” plate without compensation from the state; quite the reverse, drivers paid extra into state coffers for the plate.<sup>274</sup> On this ground, the court distinguished *Rust*, where the government’s control over a message conveyed by individuals was held permissible. The *Rust* doctors were hired to convey the state’s pro-life message. This crucial distinction revealed that South Carolina drivers who selected the “Choose Life” plate were not government agents. Self-expression, communicating their deeply held beliefs, was their motive.

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271. See *supra* text accompanying note 214.

272. See *Planned Parenthood of S.C. v. Rose*, 361 F.3d 786, 793 (4th Cir. 2004) (“[T]he [‘Choose Life’ statute’s] purpose is to promote the State’s preference for the pro-life position . . . .”); *Bredesen*, 441 F.3d at 376 (“[‘Choose Life’] is Tennessee’s own message.”).

273. See *supra* text accompanying notes 189, 215; *Rose*, 361 F.3d at 793 (“[T]he legislature determined that the plate will bear the message ‘Choose Life.’”); *Bredesen*, 441 F.3d at 376 (“[Tennessee has] the right to wield final approval authority over every word used on the ‘Choose Life’ plate.”) (internal quotation omitted).

274. *Rose*, 361 F.3d at 798.

By contrast, the Sixth Circuit in *Bredesen* concluded that Tennessee had not created a specialty plate speech forum when it offered a solo “Choose Life” plate. The *Bredesen* court also relied on the fact that drivers voluntarily choose to display the “Choose Life” plate at additional cost.<sup>275</sup> However, *Bredesen* interpreted the constitutional significance of this fact very differently from *Rose*. In the *Bredesen* court’s view, this demonstrated a driver’s desire to cooperate with the state in disseminating a state-authored message. While the *Rose* court viewed as central the fact that the *Rust* doctors were hired, the *Bredesen* court hypothesized that even volunteer doctors would have been compelled to convey the government’s anti-abortion message.<sup>276</sup> The *Bredesen* court then analogized Tennessee drivers displaying the “Choose Life” plate to the hypothetical volunteer doctors in *Rust*.<sup>277</sup> The drivers’ willingness to promote the message “Choose Life” without pay did not alter its governmental character or create a speech forum.

### 3. *The Solo Plate Courts Fail to Consider Whether the States’ Specialty Plate Creation Processes Are Speech Fora*

Although *Rose* and *Bredesen* interpret differently the fact that drivers voluntarily select the “Choose Life” plate, in a sense, both courts’ interpretations are correct. Each focuses on a desire truly motivating a driver who displays a “Choose Life” plate on his or her vehicle. In reality, such a driver has a complex motive, desiring to express his or her own pro-life beliefs, as *Rose* highlighted, and to share them with others, as *Bredesen* emphasized. Yet, the outcome for a plaintiff in a “Choose Life” plate case should not turn on which aspect of this motive strikes the court’s fancy as it analyzes the plate in isolation from the broader specialty plate scheme. When both courts focus on the individual “Choose Life” plate and drivers’ motives for displaying it, they miss the bigger picture of what is happening in the respective state’s specialty plate system as a whole.

The analysis of the *Rose* court leads to the conclusion that a state inevitably opens a forum for speech simply by offering specialty license plates. Drivers will always select and pay extra only for plates related to causes they wish to promote. This one-size-fits-all reasoning does not focus on the actor who has power to create a public forum. An individual’s

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275. See *supra* text accompanying note 223.

276. *Bredesen*, 441 F.3d at 378.

277. *Id.*

own decision to use government property for expressive purposes does not create a forum. As the Supreme Court explained in *Cornelius*, a key element of forum creation is manifest governmental intent to invite individuals to use state-owned property for speech.<sup>278</sup> Moreover, post-*Rust* government speech cases indicate that even where private individuals are not strictly government agents, their participation with the government in expressive activity does not of itself mean that the government has opened a public forum. The Supreme Court in *Forbes* reasoned that public broadcasting was generally not a public forum even though programming was full of private speakers.<sup>279</sup> Similarly, in *Finley*, Congress did not create a speech forum by authorizing competitive grants for artists.<sup>280</sup> Thus, the fact that the displaying of specialty plates is unquestionably expressive activity by individuals does not necessarily mean that the state's specialty plate creation process constitutes a speech forum. Instead, an individualized analysis should be undertaken to determine whether a state intended to open its specialty plate creation process as a speech forum. This inquiry should track the governmental intent factors laid out in *Cornelius*: the compatibility of specialty plates with expressive activity, the state's policy regarding its specialty plates, and the state's real life practice with respect to the plates.<sup>281</sup>

*Bredesen's* analysis is problematic because it does not provide a principled way to distinguish between individuals acting as "volunteers" in spreading a governmental message and individuals speaking for themselves. The court's reasoning that drivers displaying the "Choose Life" plate are volunteering for the state rests on its prior determination, relying on *Johanns*, that "Choose Life" is a governmental message.<sup>282</sup> Presumably, if "Choose Life" represented private speech, then drivers would not become government "volunteers" by displaying the plate; they would be exercising the right of free speech.

The *Bredesen* court invoked *Rust* for the proposition that dissemination of a governmental message by volunteer citizens does not "create" a forum for speech.<sup>283</sup> The logical flaw in this reasoning is that it does not account for the possibility that the state may be using individuals to spread its message in a speech forum already existing. In other words, it is possible

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278. See *supra* text accompanying notes 76–77.

279. See *supra* text accompanying notes 132–33.

280. See *supra* text accompanying notes 141–45.

281. See *supra* text accompanying note 80–81.

282. See *supra* text accompanying notes 223, 216.

283. See *supra* text accompanying notes 220–22.

for a state to open its specialty plate scheme as a speech forum, despite the fact that an individual plate, such as “Choose Life,” represents a government-crafted message when viewed in isolation.<sup>284</sup> *Bredesen*’s holding that volunteer dissemination of a governmental message allows the state to exclude opposing viewpoints from a specialty plate greatly expands the government speech doctrine in a way unjustified by *Rust* or *Johanns*.

*Rust* tied the government’s ability to limit the clinic doctors’ speech to the fact that the government was financially subsidizing a limited program.<sup>285</sup> In a proviso, the *Rust* Court explicitly noted that when the government “subsidizes” individual speakers by offering physical property for their use, the First Amendment rights of the speakers are implicated.<sup>286</sup> If the government has created a speech forum through an offering of physical property, then it must be viewpoint-neutral.<sup>287</sup> In *Johanns*, the Court did not need to analyze whether a speech forum had been created through the generic beef advertising campaign because the plaintiff producers did not allege viewpoint discrimination.<sup>288</sup> They complained of First Amendment harm through compelled subsidy and compelled speech.<sup>289</sup> Neither of these compulsion-based arguments required inquiry into whether the government had created a forum for speech. The legitimacy of a compelled subsidy turns solely on the governmental or private identity of the subsidized speaker. While the government may compel citizens to pay for its own speech, it cannot mandate the subsidization of private speech.<sup>290</sup> Compelled speech is never justified; the success of this claim depends on whether or not the compulsion was real.<sup>291</sup> By contrast, the legitimacy of a viewpoint-based action is unrelated to compulsion and does not turn solely on the governmental or private nature of a challenged message.<sup>292</sup> The dispositive question is whether or not the government has created a forum for speech. To apply *Johanns* as the “authoritative test” for government speech no matter what type of

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284. See *ACLU v. Bredesen*, 441 F.3d 370, 386 n.10 (6th Cir. 2006) (Martin, J., dissenting) (arguing that the majority’s analysis is “misleading” because it focuses on the “Choose Life” plate rather than the “broader license plate forum”).

285. See *supra* text accompanying notes 108–09.

286. See *supra* text accompanying notes 111–12.

287. See *supra* text accompanying note 112.

288. See *supra* text accompanying note 148.

289. See *supra* text accompanying notes 154–55.

290. See *supra* note 154.

291. See *supra* note 155.

292. See *Bredesen*, 441 F.3d at 385 (Martin, J., dissenting) (“The majority errs by applying the compelled speech/subsidy doctrine in a case where nothing is compelled.”).

harm is alleged ignores prior Supreme Court cases involving government speech in the context of viewpoint discrimination. In these cases, such as *Forbes*, the Court carefully considered whether the government's viewpoint-selective action could be justified on grounds of political accountability.<sup>293</sup>

### B. "Choose Life" Plate Rejection Cases

Two of the "Choose Life" plate courts considered cases in which a state refused to offer the "Choose Life" plate. The differing conclusions of the courts in *Stanton* and *White* regarding the constitutionality of this action is due, at least in part, to their divergence on the factual question of whether the respective state was actually discriminating against the pro-life viewpoint. However, both courts also considered whether government speech doctrine should apply, employing the four-factor test.<sup>294</sup> The use of the four-factor test is analytically confusing in plate rejection cases. While in a solo plate case it leads to a focus on the "Choose Life" plate in isolation,<sup>295</sup> courts in plate rejection cases necessarily consider facts regarding the state's specialty creation process. This is due to the fact that no "Choose Life" plate exists. Yet, the four-factor test does not purport to determine whether or not the state's specialty plate creation process has been opened as a forum. Rather, in setting forth the four-factor test, courts, including *Stanton* and *White*, declare that it distinguishes between "government" and "private" speech.<sup>296</sup> When a "Choose Life" plate court is faced with a state arguing that exclusion of a viewpoint from a specialty plate is constitutionally permissible as its own speech, the appropriate question is whether a speech forum has been opened, requiring neutrality—not whether messages on specialty plates represent "government" or "private" speech as such. *Stanton* and *White* illustrate the

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293. See *supra* text accompanying notes 91, 134. See also *Bredesen*, 441 F.3d at 385 (Martin, J., dissenting) ("The majority apparently takes *Johanns* to mean that the sleeping doctrine of 'government speech' has been awakened and now controls all First Amendment analysis. I disagree.")

294. See *Ariz. Life Coal. v. Stanton*, No. CV-03-1691-PHX-PGR, 2005 U.S. Dist. LEXIS 21960, at \*7–17 (D. Ariz. Sept. 26, 2005); *Choose Life of Ill. v. White*, No. 04 C 4316, 2007 WL 178455, at \*4–7 (N.D. Ill. Jan. 19, 2007.)

295. See discussion *supra* Part IV.A.1.

296. See, e.g., *Ariz. Life Coal. v. Stanton*, No. CV-03-1691-PHX-PGR, 2005 U.S. Dist. LEXIS 21960, at \*7 (D. Ariz. Sept. 26, 2005); *Choose Life of Ill. v. White*, No. 04 C 4316, 2007 WL 178455, at \*4 (N.D. Ill. Jan. 19, 2007); *Planned Parenthood of S.C. v. Rose*, 361 F.3d 786, 792 (4th Cir. 2004); *Sons of Confederate Veterans v. Comm'r of the Va. Dep't of Motor Vehicles*, 288 F.3d 610, 618 (4th Cir. 2002). See also *supra* notes 167–68 and accompanying text.

unhelpfulness of the four-factor test. Instead, *Cornelius* provides the proper framework in which to analyze forum creation.<sup>297</sup>

1. *The Use of the Four-Factor Test in Stanton Appears Unnecessary*

Applying the four-factor test to Arizona's specialty plate scheme, the *Stanton* court first concluded that the state's specialty plates displayed messages that were governmental, rather than private, in nature. The court proceeded to determine "whether license plates constitute a designated public forum or a nonpublic forum,"<sup>298</sup> and concluded that a nonpublic forum existed. In both its four-factor analysis and its analysis relating to forum, the court cited essentially the same facts regarding Arizona's administrative specialty plate creation process.<sup>299</sup> Thus, the four-factor analysis appears unnecessary; the existence of a nonpublic forum requires viewpoint neutrality toward private speakers, even if government speech is also occurring within it.

2. *The Use of the Cornelius Factors Instead of the Four-Factor Test in White Would Sharpen the Court's Analysis*

The *White* court concluded that Illinois' specialty plates displayed messages that were private, rather than governmental, in nature by analyzing the state's specialty plate scheme according to the four-factor test.<sup>300</sup> Unlike *Stanton*, *White* did not consider as a separate question whether any type of speech forum existed. Rather, based on its conclusion that the plate messages were private speech, the court apparently assumed that a forum had been created.<sup>301</sup> Because the court considered facts relating to Illinois' specialty plate creation process under the four-factor test—not a single plate in isolation—this assumption appears valid. However, the *Cornelius* factors provide a better framework to analyze facts relating to specialty plate creation because they clearly signal that the question at issue is the existence of a speech forum rather than the nature of the speech on individual plates.

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297. For development of this argument, see *infra* Part V.

298. *Stanton*, 2005 U.S. Dist. LEXIS 21960, at \*17.

299. *See id.* at \*8–17, \*22 (relying on facts relating to standards applicable to organizations applying for specialty plates to support the four-factor analysis and forum analysis).

300. *White*, 2007 WL 178455, at \*4–7.

301. *See supra* note 263.

## V. PROPOSAL: FORUM-ACCOUNTABILITY ANALYSIS IN “CHOOSE LIFE” PLATE CASES

### A. *Toward a Constitutional Analysis of the “Choose Life” Plate as Government Speech*

The question of whether a state’s viewpoint-based action regarding a “Choose Life” plate is constitutionally permissible as government speech should be decided in a manner more closely tied to the Supreme Court’s precedents regarding both public forum doctrine and government speech. This suggests that courts should consider whether a forum has been created and whether the government’s message is one for which it can be held politically accountable.

The Supreme Court has not yet set forth a comprehensive test for when viewpoint-selective acts by government entities should be considered constitutionally legitimate as government speech. Instead, its government speech cases simply pinpoint instances of “yes” and “no.”<sup>302</sup> Lower courts should not sweepingly analogize from the facts of these cases, where the government acted in such discrete roles as doctor,<sup>303</sup> public broadcaster,<sup>304</sup> and funder of the arts,<sup>305</sup> to wholly different factual situations. The imprimatur of government speech allows the exclusion of individual speech from government property. It thus threatens to overwhelm the carefully constructed public forum structure which free speech jurisprudence has traditionally erected around individuals.<sup>306</sup> The Supreme Court has justified this potential danger on the ground that the government is politically accountable for its speech.<sup>307</sup> Therefore, government speech

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302. See *supra* note 114 and accompanying text.

303. *Rust v. Sullivan*, 500 U.S. 173 (1990).

304. *Ark. Educ. Television Comm’n v. Forbes*, 523 U.S. 666 (1998).

305. *Nat’l Endowment for the Arts v. Finley*, 524 U.S. 569 (1998).

306. See *Bezanson & Buss, supra* note 82, at 1488–1501. The dangers of a broad concept of government speech include monopoly of a speech market, deception (government hiding its role as speaker) and distortion (government silencing other views). *Id.* Further, these dangers are difficult to limit.

[G]iven the government’s power as speaker—the facts at its disposal, its resources, and its self-interest—it is likely that the people who receive the government’s message will not be in a position to act collectively to limit government speech. A telling example of this is the campaign finance system, which in reality represents a form of government-supported, self-interested speech, which the ‘people’ collectively seem unable to control from the outside.

*Id.* at 1504.

307. See *Legal Servs. Corp. v. Velazquez*, 531 U.S. 533, 541–42 (2001). See also *supra* text accompanying note 91 for a discussion of the political accountability rationale.



doctrine should be interpreted narrowly, tied to forum creation and accountability.

In situations not closely analogous to a Supreme Court government speech case, courts should never sanction viewpoint selectivity as government speech without analyzing whether a speech forum has been created.<sup>308</sup> This forum creation analysis<sup>309</sup> should not focus on whether a particular speaker is governmental or private because the fact that a government entity may be “speaking” in a public forum does not give it constitutional license to exclude other speakers from the forum based on viewpoint.<sup>310</sup> Instead, according to *Cornelius*, whether a forum has been created, requiring viewpoint neutrality, depends upon governmental intent regarding the property to which access is sought: either to invite individuals to use the property for expressive activity or to reserve the property for its own use.<sup>311</sup> *Cornelius* sets forth three factors to guide the inquiry: the government’s policy regarding the property, its practice with respect to the property, and the compatibility of the property’s objective nature with expressive activity.<sup>312</sup>

The Supreme Court’s government speech cases illustrate both the importance of governmental intent regarding its property and the existence of safeguards serving to hold the government politically accountable for

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308. The tension between public forum doctrine and government speech has been recognized by lower courts in other government speech cases. *See, e.g.*, *Knights of the Ku Klux Klan v. Curators of the Univ. of Mo.*, 203 F.3d 1085, 1095 n.11 (8th Cir. 2000) (finding the radio broadcasting speech at issue “sufficiently editorial in character to fall within the scope of *Forbes*,” thus obviating the need to distinguish between government speech and forum creation); *Downs v. L.A. Unified Sch. Dist.*, 228 F.3d 1003, 1013 (9th Cir. 2000) (describing the *Ku Klux Klan* court as “refusing to decide whether speech’s status as ‘government speech’ is enough to preclude forum analysis altogether” but concluding that “when a public high school is the speaker, its control of its own speech is not subject to the constraints of constitutional safeguards and forum analysis”).

309. The question whether a speech forum has been created should be a conceptually distinct question from which kind of forum has been created. If the court finds that the state has opened a speech forum, as opposed to reserving its property for state use, then the court may need to consider which kind of forum has been created. The *Cornelius* factors will also guide this inquiry. *See supra* Part II.A. for a discussion of *Cornelius* and the various types of speech fora. Viewpoint neutrality, however, is required in every type of forum, public or nonpublic. *See supra* text accompanying notes 68, 73. If a state argued that its exclusion was based on subject matter rather than viewpoint, *see infra* note 319, then the type of forum would become relevant.

310. To help understand this point, consider a speech forum in a less abstract context than license plates: a public park, which is a traditional public forum. Imagine a city mayor giving a speech in the park, while protestors stand at the gate with signs. The Supreme Court has never held that the fact that the mayor is speaking in the park allows the city to exclude protestors from the park. In fact, *Rust* indicates that this would be impermissible. *Rust v. Sullivan*, 500 U.S. 173, 199–200 (1991). *Rust* notes that providing physical property for the use of individual speakers does not allow the government to favor some over others. *Id.*

311. *Cornelius v. NAACP Legal Def. and Educ. Fund*, 473 U.S. 788, 802 (1985).

312. *Id.* at 803–04.

its viewpoint-selective message. In *Rust* and *Finley*, cases in which government speech defense was successful, the government arguably both manifested intent to reserve state-owned property for its own expressive use and remained politically accountable for the message expressed.<sup>313</sup> In these cases, the government's intention to use its funds to encourage childbirth and decent art, respectively, was clearly delineated in statute.<sup>314</sup> Additional accountability in *Rust* arguably stemmed from the fact that the clinic doctors were free to inform patients that abortion counsel was simply outside the scope of the clinic's statutorily designated services.<sup>315</sup>

Conversely, *Forbes's* holding that candidate debates are not government speech relied on the fact that the government did not intend to speak, as the public broadcaster "implicit[ly]" disclaims the candidates' speech as his own.<sup>316</sup> Dicta in *Forbes* indicating that other types of public broadcasting are normally government speech relied on the fact that public broadcasters are more publicly accountable when not operating under the threat of viewpoint discrimination lawsuits.<sup>317</sup> Also, in *Rosenberger*, the state university's purpose in offering newspaper printing subsidies was to "encourage a diversity of views" from student groups.<sup>318</sup> The school explicitly distanced itself from the opinions expressed by the groups. Thus, in sum, lower courts should allow government speech as a defense to alleged viewpoint discrimination only where a speech forum has not been created and the government is seeking to communicate a message for which it can be held politically accountable.<sup>319</sup>

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313. See discussion of *Rust* and *Finley* *supra* text accompanying notes 92–113, 138–46.

314. See *supra* text accompanying notes 96–98, 139–40.

315. See *supra* text accompanying note 110.

316. *Ark. Educ. Television Comm'n v. Forbes*, 523 U.S. 666, 675 (1998).

317. *Id.* at 674–75.

318. *Rosenberger v. Rector and Visitors of the Univ. of Va.*, 515 U.S. 819, 834 (1995).

319. This Note argues that when these two conditions are not met, the state should not be able to justify viewpoint discrimination on the grounds of government speech. This does not mean, however, the state will necessarily be required to offer either a "Choose Life" or pro-choice plate. The state could also argue that its license plates are a limited public forum or a nonpublic forum and that the subject matter of abortion, whether from a pro-life or pro-choice perspective, is simply not included in the forum definition. See *supra* note 65 and accompanying text for a brief discussion of the limited public forum. It is unsettled whether excluding a plate because its subject matter is controversial constitutes viewpoint discrimination. *Compare* *Choose Life Ill. v. White*, No. 04 C 4316, 2007 WL 178455, \*8 (N.D. Ill. Jan. 19, 2007) (holding that a state's rejection of a "Choose Life" plate was based on its desire to "suppress what it considers a controversial idea" and thus the state was "discriminating against a viewpoint"), *with* *Ariz. Life Coal. v. Stanton*, No. CV-03-1691-PHX-PGR, 2005 U.S. Dist. LEXIS 21960, \*25 (D. Ariz. Sept. 26, 2005) (holding that a state's rejection of a "Choose Life" plate was simply "steer[ing] clear of the abortion debate" without showing "political favoritism" to either side).

*B. Forum-Accountability Analysis: Examining Forum Creation and Message Communication in the “Choose Life” Plate Context*

The concerns of preserving public forum doctrine and ensuring political accountability suggest a method by which “Choose Life” plate courts should analyze government speech. They should consider two questions, which can together be termed “forum-accountability analysis”: (1) whether the state has opened its specialty plate creation process as a speech forum by inviting individuals to express their views on specialty plates, and (2) whether the state’s viewpoint-based action—either offering or refusing to offer the plate—communicates a discernible message subject to political accountability. Viewpoint selectivity respecting the “Choose Life” plate should be justified as government speech only where the state has not created a speech forum and its viewpoint-based action clearly conveys a message for which the citizenry can hold it accountable.

*1. Forum Creation*

Whether the state has created a specialty plate speech forum depends on how it structures and administers its specialty license plate scheme. This reveals whether the state intended to open a speech forum or to reserve the plates for its own speech. According to *Cornelius*, the factors to consider are the government’s policy and practice regarding public access to its specialty plate creation process as well as the plates’ compatibility with expression. Under *Cornelius*, it would be possible for a state to create specialty plates under the legislative model of specialty plate creation without opening a speech forum; however, a state utilizing the administrative model necessarily opens a speech forum.

The first step under *Cornelius* is to identify precisely the property which is the alleged speech forum. This is done with a view to where the plaintiff is seeking access.<sup>320</sup> The plaintiff in a “Choose Life” plate case, whether pro-choice or pro-life, desires viewpoint-neutral access to the specialty license plate creation process. Thus, the relevant property is the state’s broader license plate scheme rather than any individual plate.

Next, the state’s policy with regard to its specialty plates should be considered. In a state adopting the legislative model of specialty plate creation, the enabling statutes for specialty plates, which delineate their substantive message and earmark their revenues to specified organizations,

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320. See *supra* text accompanying note 79.

evinced a government policy to use specialty plates for the goals set forth. In essence, the state demonstrates intent to structure the specialty plate scheme to financially support organizations viewed as beneficial to the community. By contrast, a state following the administrative model of specialty plate creation thereby declares its purpose to allow members of the public to use specialty plates to promote their own causes. A statute setting forth a procedure by which nonprofit organizations can apply and receive a plate after meeting basic criteria is an invitation for public expression.<sup>321</sup>

The state's actual practice with regard to its specialty plates is the second factor to consider. If two specialty plates clearly contradict each other, this seems to indicate that the state has opened specialty plates as a forum for speech; self-contradiction does not seem an expressive purpose for which the government would reserve the plates. A state's issuance of specialty plates having little or nothing to do with a legitimate governmental interest may also raise an inference of forum creation, at least if the state's intent with respect to its plates is otherwise unclear.<sup>322</sup> The state's marketing techniques are also a revealing source of clues regarding the state's intent. If the state appeals to drivers' desire for self-expression, this looks like opening specialty plates for public expressive use.<sup>323</sup> In this vein, promotional materials regarding specialty plates, such as inserts in vehicle registration mailings or transportation department websites, should be examined. Additional evidence of intent is whether ideas for specialty plates generally originate with the legislature or with private groups which lobby legislators.

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321. See also Jacobs, *supra* note 30, at 447 (classifying the administrative specialty plate model as a forum for speech).

322. Judge Martin, dissenting in *Bredesen*, made this point by noting that Tennessee had issued specialty plates for the University of Florida, Tennessee's "arch-rival" in football. *Bredesen*, 441 F.3d at 382 n.4 (Martin, J., dissenting). A circuit court which resolved a "Choose Life" dispute on standing grounds noted the relevance of a discernible governmental interest in specialty plate messages. See *Women's Emergency Network v. Bush*, 323 F.3d 937, 946 n.9 (11th Cir. 2003) ("While none of the specialty plates [issued in Florida] represent an issue with which we think the State of Florida would disagree, neither do they universally concern issues of the greatest importance to the State. . . . We fail to divine sufficient government attachment to the messages on Florida specialty license plates to permit a determination that the messages represent government speech.").

Similarly, one commentator has argued that government speech should be justified only in relation to issues "germane" to the state's governance, importing the germaneness principle from compelled subsidy doctrine. See Note, *supra* note 94, at 2432.

323. Judge Martin, dissenting in *Bredesen*, highlighted such facts in Tennessee: the application for a specialty plate stated "Support your cause and community" and a governor's press release described the plates as representing "drivers' special interests." *Bredesen*, 441 F.3d at 384 (Martin, J., dissenting).

*Cornelius* also instructs that the alleged forum's compatibility with expression is relevant. This factor is the least helpful because it is hard to gauge in the specialty plate context. While some argue that the proliferation of specialty plates distorts their primary identification function,<sup>324</sup> expression is clearly occurring on the plates, either by the state itself or by private speakers at the state's invitation.

If a state with a legislative specialty plate creation process consistently treats specialty plates as tools for its own expressive purposes, then a court should not find that the state has created a speech forum.<sup>325</sup> However, if the state's practice contradicts its policy and tends to show abdication of specialty plates to the public for speech, then a court should find that the specialty plate scheme is a forum for speech. If a forum exists, then discrimination toward the pro-life or pro-choice viewpoint should not be considered constitutional as government speech.

## 2. *Communication of a Discernible Message*

If the court finds that a state has reserved specialty plates for its own use rather than opening a forum, a second question is raised: whether the state's viewpoint-based action respecting the "Choose Life" plate communicates a discernible message from the state to its citizenry. This element is crucial because citizens cannot hold government officials politically accountable for a policy of which they are unaware.

In the case of a solo "Choose Life" plate, a court may find that the state is conveying a clear pro-life preference through the plate.<sup>326</sup> The message of a solo "Choose Life" plate visibly stakes out the government's position on abortion. The words "Choose Life" urge women of the state to carry pregnancies to term rather than to abort. Second, the enabling statute earmarks funds from sales of the plate to specific pro-life organizations. In addition, the statute may limit the use of the funds and explicitly render abortion-related organizations ineligible.<sup>327</sup> This visible display and

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324. See Editorial, *License to Offend*, *supra* note 1.

325. One scholar has argued that the legislative model of specialty plates is categorically unconstitutional because viewpoint discrimination is defined to include not only discriminatory access decisions but also control of a forum by government officials with unbridled discretion over access. See Jacobs, *supra* note 30, at 469. See also *supra* text accompanying notes 71–72. Although this Note argues that the legislative model of specialty plates may be operated without creating a forum, if the court does find that a specialty plate forum exists, this Author agrees that the legislature is an inappropriate body to manage it. To avoid viewpoint discrimination by unbridled discretion, the state should switch to an administrative model with clear statutory qualifications for specialty plate creation.

326. While no state has yet issued one, the same would be true of a solo pro-choice plate.

327. See *supra* notes 9–10 and accompanying text.

specific enactment of a clear policy preference, backed up by financial appropriation, tends to promote political debate and attract media attention.<sup>328</sup>

The factors supporting the solo “Choose Life” plate as government speech—the “Choose Life” display, statutory designation of policy, and the financial earmark—serve to limit the government speech doctrine. They ensure that the state cannot simply convert all viewpoint-based decisions into government speech by redefining exclusions from its property as broad, ambiguous policy goals.<sup>329</sup>

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328. See *supra* note 1.

329. For example, *Rosenberger v. Rector and Visitors of the University of Virginia*, 515 U.S. 819 (1995), held that a state university engaged in impermissible viewpoint discrimination by broadly offering funding to student groups but specifically denying funding for their “religious activities.” See *supra* text accompanying notes 115–20. Imagine that a university phrases a similar policy not as a ban on religious activities but instead as a goal of funding student groups which “contribute to intellectual development and achievement.” Then, a university official denies funding to a religious group for its student newspaper, explaining that the group’s view of ultimate truth tends to repress intellectual development.

In this hypothetical, the university will not be able to justify its policy on the grounds of “government speech” because the policy does not clearly advocate one point of view over another. The goal of “intellectual development” is much more ambiguous in meaning than “Choose Life.” Further, the decision as to which groups receive funding is made on a case-by-case basis at an administrative level, rather than designated in a statute as a matter of public record. Thus, in this *Rosenberger*-type hypothetical, the government entity has not visibly identified itself with a discernible message and thus lacks accountability for its viewpoint-based decisions.

For a recent, real-life example of the danger of a broad view of government speech without a consideration of forum creation or accountability, consider *People for the Ethical Treatment of Animals, Inc. v. Gittens*, 414 F.3d 23 (D.C. Cir. 2005). The District of Columbia Arts Commission (the Commission) sponsored an art project to showcase animal art of a “festive and whimsical” nature. *Id.* at 26. The project included both an artistic competition and a sponsorship component, in which exhibits could be sponsored for \$5,000. *Id.* The Commission announced that it would “reserve[] the right of design approval” over exhibits. *Id.* PETA submitted an application with \$5,000 to sponsor an exhibit depicting a sad elephant, a circus victim. *Id.* Other exhibits accepted by the Commission included references to the “butterfly ballot” and September 11. *Id.* at 27. PETA’s application was rejected, as inconsistent with the “goals, spirit, and theme” of the art project. *Id.* at 26.

The court upheld the rejection. *Id.* at 31. It cited *Forbes* and *Finley*, which speak of the government’s need to exercise “journalistic discretion” and “make aesthetic judgments.” *Id.* at 29 (quoting *Ark. Educ. Television Comm’n v. Forbes*, 523 U.S. 666, 674 (1998); *Nat’l Endowment for the Arts v. Finley*, 524 U.S. 569, 586 (1998)). The court then stated: “The same is true here.” *Id.* It did not consider whether there were differences between the government’s role as public broadcaster or funder of the arts which could reduce accountability for viewpoint-based decisions. The court highlighted the fact that the Commission had “reserved the right” to approve design, *id.* at 30, but did not consider whether the rejection decisions made pursuant to this discretion would clearly communicate a message of “festiveness” to the public, given the fact that other political exhibits had been allowed. As in the *Rosenberger*-type hypothetical, the Commission’s viewpoint-based decisions were made at a less visible administrative level and did not communicate a discernible message to the public. Under the proposed forum-accountability analysis, such decisions would not qualify as government speech. For a contrary view on this point, see Dolan, *supra* note 65, at 111 (arguing that the government speech paradigm should replace forum analysis in certain situations in which the government has “broad and thematic” policy goals).

By contrast, the refusal to offer a “Choose Life” or a pro-choice plate where no abortion-related plate yet exists does not send any intelligible message to the public, and therefore, should not constitute government speech. Consider: in a state in which a mix of specialty plates have been created legislatively, none relating to abortion, a driver would not draw any conclusions regarding the state’s preference on abortion. Nor would he or she conclude that the state was unconcerned with the issue. The absence of an abortion-related plate simply sends no message from the state regarding abortion. Thus, even when a state has not opened its specialty plates as a speech forum, refusing to offer either a “Choose Life” or a pro-choice plate should not be justified as government speech unless a plate from the opposite viewpoint already exists.

### *C. Applying Forum-Accountability Analysis to a Hybrid Model of Specialty Plate Creation*

When specialty license plates are created through a process integrally involving both the legislature and an administrative agency, the question of whether the state has opened a forum may be more difficult to answer. In order to flesh out the proposed forum-accountability analysis, it is helpful to see how it applies to such hybrid models of specialty plate creation. Missouri provides a useful illustration.

A Missouri statute allows organizations to “initially petition” the Department of Revenue (DOR) “to establish a new specialty license plate.”<sup>330</sup> Eligible organizations must be registered as nonprofits and agree to use revenues from the plate to carry out their “charitable mission.”<sup>331</sup> The organization must also secure a legislative “sponsor,” a member of the state legislature.<sup>332</sup> The DOR maintains a downloadable application on its website for nonprofit organizations to complete, thereby initiating the specialty plate creation process.<sup>333</sup> The DOR then forwards the application to a legislative committee, the Joint Committee on Transportation

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Nor did the court analyze whether the Commission created a speech forum through its policy and practice regarding the sponsorship component of the project. Although the Commission’s apparent policy was to maintain a festive theme, PETA argued that by allowing other politically themed exhibits in practice, the Commission had created a forum for speech. *Id.* at 28. PETA persuaded the district court on this point. *Id.*

330. MO. ANN. STAT. § 301.3150 (West 2006).

331. § 301.2999(3).

332. § 301.3150(1)(1).

333. *See* Missouri Department of Revenue, Specialty License Plate Development Process, <http://dor.mo.gov/mvdl/motorv/plateprocess/> (follow “DOR-5052” hyperlink under “Initial Application” section) (last visited Feb. 28, 2007).

Oversight (the Committee).<sup>334</sup> The Committee reviews each application “for approval or denial.”<sup>335</sup> The Committee may not approve an application if either five representatives or two senators sign a petition opposing it.<sup>336</sup> If the Committee denies an application, the organization has fifteen days to request a hearing for review.<sup>337</sup> If the Committee approves a plate, it is subsequently authorized in a statute.<sup>338</sup> Missouri specialty plates include those benefiting the Alpha Phi Omega National Service Fraternity<sup>339</sup> and the Missouri 4-H.<sup>340</sup>

The following facts tend to indicate that Missouri has a policy of retaining specialty plates for its own speech: a legislative committee has statutory authority to approve or to deny all specialty plate applications and it considers the views of other legislators. Yet, this policy seems contradicted by the statute which allows nonprofit organizations to “initially petition”<sup>341</sup> for a plate, thereby inviting a subset of the public to use state-owned plates for expression. Additionally, in practice, specialty plate ideas originate with private groups rather than the legislature. That the DOR provides easy access to a plate application on its website further supports this inference of forum creation. Combined with the fact that specialty plates are available for causes that seem more relevant to private than governmental interests, it appears that at least Missouri’s practice, if not policy, is to allow individuals to express their views through specialty license plates. Thus, the state has created speech forum and should not be able to justify viewpoint-based rejections of specialty plate applications as government speech.<sup>342</sup>

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334. § 301.3150(7).

335. § 21.795(6).

336. *Id.*

337. § 301.3152.

338. *See* §§ 301.2999 to 301.4000 (authorizing specialty plates).

339. § 301.3137.

340. § 301.481.

341. § 301.3150.

342. Choose Life of Missouri submitted an application to the Department of Revenue in June 2005. Choose Life of Missouri, [http://www.ecognizant.net/chooselife/show\\_page.tcl?org\\_id=12&page\\_type=0](http://www.ecognizant.net/chooselife/show_page.tcl?org_id=12&page_type=0) (last visited Feb. 18, 2007). According to the complaint filed in June 2006 by Choose Life of Missouri, two state senators submitted a letter to the committee opposing the application. Complaint ¶ 43, *Choose Life of Mo. v. Vincent*, No. 06-443-CV-W-SOW (W.D. Mo. filed June 1, 2006), available at <http://www.telladf.org/UserDocs/VincentComplaint.pdf>. It was denied in February 2006, and again, after review, in May 2006. *Id.* ¶¶ 47–51.



## VI. CONCLUSION

Specialty license plates are a creative, effective, and popular way for states to advocate causes and raise money for organizations serving their citizens. Yet, their constitutional status is unclear. Federal courts disagree over whether it is constitutional for a state to offer or reject a “Choose Life” plate because of the abortion-related viewpoint it expresses. While the Supreme Court has chosen to remain silent on the “Choose Life” plate question, its precedents regarding public forum doctrine and government speech serve as guide to constructing an intelligible framework for the evaluation of “Choose Life” plate cases.

Under the proposed forum-accountability framework, a “Choose Life” plate court should consider two questions. First, the court should consider whether the state has created a specialty plate speech forum, examining the state’s policy and practice regarding its specialty license creation process. Second, the court should consider whether the state’s viewpoint-based action regarding the “Choose Life” plate communicates a discernible message regarding abortion. Only if a forum has not been created and a discernible message regarding abortion is communicated should viewpoint-based action be justified as government speech. In this way, both individual citizens, through their First Amendment speech, and the state, through politically accountable advocacy, can have a say in the continuing community dialogue about life and all its choices.

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