

“Choose Life” Plates: The States’ License to Discriminate Based on Viewpoint

Brielle C. Goldfaden[†]

I. Introduction	279
II. The First Amendment Analysis.....	282
A. Threshold Issue: Are Specialty Plates Government Speech or Private Speech?	283
B. The Forum Analysis.....	286
III. The Recent Circuit Split.....	288
A. The Fourth Circuit Weighs In: South Carolina’s Denial of a Pro-Choice Plate is Unconstitutional Viewpoint Discrimination.....	288
B. The Sixth Circuit: The “Choose Life” Message is Government Speech, and Therefore Does Not Violate the First Amendment	292
IV. Analysis: Application of First Amendment Principles Based on Supreme Court Precedent	294
V. Conclusion	299

I. INTRODUCTION

Remarkably, the United States Supreme Court did not hear a single case challenging free speech until the twentieth century, even though the First Amendment was effectuated in 1791. Appearing to repeat the Court’s history of avoidance, recently the Court has four-times denied certiorari on perhaps the most omnipresent First Amendment issue of

[†] J.D. Candidate, 2009, Seton Hall University School of Law; B.A., 2006, Boston University. I owe gratitude to my parents and brother for their confidence in me and my abilities, and endless words of encouragement. Also, thank you to Tony for his love and patience during my comment writing process and always. Finally, this comment was only made possible due to the diligence and dedication of the members of the *Seton Hall Circuit Review*.

present-day, the constitutionality of “Choose Life” license plates.¹ Increasingly, license plates have become a new forum for public expression by private organizations and individual car owners.²

Although a seemingly benign place for one to express support for organizations like wildlife conservation or breast cancer research, specialty license plates³ have become the frontline in the battle against government censorship of free speech. Indeed, recent litigation has ensued over state legislatures issuing controversial “Choose Life” plates—plates that bring the abortion debate to the front of Americans’ bumpers.

In 1987, the first specialty license plates were issued⁴ and by 2003 over forty states had adopted a specialty plate program.⁵ Litigation on the issue of free speech in the specialty plate realm began in 1999, when Virginia statutorily authorized issuance of a specialty plate to honor the Sons of Confederate Veterans (“the Sons”).⁶ In *Sons of Confederate Veterans Inc. v. Holcomb*, the Sons, a non-profit organization, argued that a state statutory provision prohibiting the organization’s plates “from bearing a logo or emblem of any kind” violated their free speech rights under the First and Fourteenth Amendments.⁷ The restriction was

¹ The United States Supreme Court denied certiorari to a Fifth Circuit decision in *Henderson v. Stalder*, 407 F.3d 351 (5th Cir. 2005), a Fourth Circuit decision in *Planned Parenthood of S. Carolina, Inc. v. Rose*, 361 F.3d 786 (4th Cir. 2004), a Sixth Circuit decision in *ACLU of Tennessee v. Bredesen*, 441 F.3d 370, 373 (6th Cir. 2006), and most recently, a Ninth Circuit decision in *Arizona Life Coalition v. Stanton*, 515 F.3d 956 (9th Cir. 2008).

² License plates are a more modern forum for speech than newspapers, novels, and public lectures. However, as Justice William Orville Douglas, the longest-standing Justice of the United States Supreme Court, once stated, “the First Amendment draws no distinction between the various methods of communicating ideas.” *Superior Films v. Dep’t. of Educ. of Ohio*, 346 U.S. 587, 589 (1954).

³ Specialty license plates are usually introduced and designed by private organizations, and presented to a state legislature, which has the final word of approval. Vehicle owners may voluntarily purchase these plates for an additional fee, which goes to organizations or the cause for which the plate was designed. For example, if a car owner buys a “Support Breast Cancer Research” plate, proceeds from the license plate fees go to an organization or hospital that conducts or funds breast cancer research. *See, e.g.*, The Cancer Blog, <http://www.thecancerblog.com/2006/02/09/cure-breast-cancer-license-plate-initiative/> (Feb. 9, 2006, 10:26).

⁴ The first specialty plates were issued in Florida to commemorate the astronauts who died in the space shuttle Challenger. 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>.

⁵ *Id.*

⁶ *Sons of Confederate Veterans Inc. v. Holcomb*, 129 F. Supp. 2d 941 (W.D. Va. 2001).

⁷ *Id.* at 942.

intended to ban the Sons' logo, which displays a Confederate battle flag.⁸ The District Court first examined the pivotal issue in First Amendment free speech cases, whether the speech is private or public speech.⁹ The court determined that the plates constitute private speech and therefore is protected under the First Amendment.¹⁰ It is well settled that "when the government speaks for itself and is not regulating the speech of others, it may discriminate based on viewpoint,"¹¹ but may not discriminate based on viewpoint when it regulates private speech.¹² The court held that the logo prohibition was viewpoint discrimination and constituted an illegal, content-based restriction since the provision only affected the Sons' organization.¹³ On appeal, the Fourth Circuit upheld the District Court's decision.¹⁴

The free speech issues that arose in *Sons of Confederate Veteran, Inc.* gave way to constitutional challenges regarding more controversial specialty plates—license plates imprinted with the message "Choose Life." At the same time that the Sons were issued a specialty plate in 1999, Florida became the first state to issue "Choose Life" plates.¹⁵ For a premium, drivers may purchase a "Choose Life" plate, the proceeds of which are "used to facilitate and encourage adoption as a positive choice for women with unplanned pregnancies."¹⁶ These plates admittedly support the anti-abortion view, with a preference for adoption. Organizations that counsel or promote abortion are specifically excluded from receiving proceeds.¹⁷ As of September 2008, "Choose Life" plates

⁸ *Id.*

⁹ *Id.* at 943.

¹⁰ *Id.* The court recognized that some plates "represent speech by the Commonwealth," however, this speech is limited to "speech regarding official governmental matters," like those plates displaying the state's bird or official state motto. *Id.*

¹¹ *Planned Parenthood of S. Carolina, Inc. v. Rose*, 361 F.3d 786, 792 (4th Cir. 2004), *reh'g en banc denied*, 373 F.3d 580, *cert denied*, 543 U.S. 1119 (2005).

¹² *See, e.g., Columbia Broadcasting System, Inc. v. Democratic Nat. Committee*, 412 U.S. 94, 140 n. 7 (stating that "Government is not restrained by the First Amendment from controlling its own expression" and that "[t]he purpose of the First Amendment is to protect private expression and nothing in the guarantee precludes the government from controlling its own expression or that of its agents") (quoting THOMAS EMERSON, *THE SYSTEM OF FREEDOM OF EXPRESSION* 700 (1970)).

¹³ *Sons of Confederate Veterans, Inc.*, 129 F. Supp. 2d at 946.

¹⁴ *Sons of Confederate Veterans, Inc. v. Comm'r of the Va. Dep't of Motor Vehicles*, 288 F.3d 610 (4th Cir. 2002).

¹⁵ About Choose Life, Inc., <http://choose-life.org/story.html> (last visited Sept. 9, 2008).

¹⁶ *Id.*

¹⁷ Alana Hake, "Choose Life" License Plates: Funding the Cause For Life, http://www.aul.org/Choose_Life_Plates.

are available for purchase in eighteen states and at least four states are engaged in ongoing lawsuits regarding the constitutionality of the plates.¹⁸ Unlike the Son's specialty plate dispute, which was isolated to one state, the "Choose Life" plate debate is a nationwide concern.¹⁹

This comment will explore First Amendment jurisprudence in the context of specialty license plates and conclude that states with "Choose Life" plates create a limited public forum for private speech. Therefore, those states that simultaneously deny a plate conveying the pro-choice ideology are engaging in illegal viewpoint discrimination. Section II of this comment will lay out the First Amendment free speech analysis formulated by prior Supreme Court decisions. Section III will examine the recent circuit split between the Fourth and Sixth Circuits on whether "Choose Life" plates are constitutionally protected under the First Amendment. Finally, Section IV will conclude that the Supreme Court should grant certiorari to weigh in on this important and historical issue and hold that the plates are viewpoint discriminatory in violation of the First Amendment.

II. THE FIRST AMENDMENT ANALYSIS

The First Amendment protects against government interference with private speech. The government may not discriminate by filtering out or prohibiting speech based on a speaker's perspective or belief.²⁰ In cases alleging viewpoint discrimination, the Supreme Court employs a step by step analysis to determine the legality of the government conduct: first, the Court determines whether the speech is government or private speech; second, the Court looks to the type of forum at issue; last, the Court analyses whether the government's censorship of the speech at issue is permissible in light of the purposes of the forum.²¹ In the "Choose Life" cases, the plaintiffs have argued that because they were denied the issuance of license plates expressing their ideology, the government discriminatorily regulates private speech by only permitting the pro-life message to be disseminated, filtering out the pro-choice view.²² The recognized danger of viewpoint discrimination is that it

¹⁸ Other States adopting the Choose Life Tag, <http://choose-life.org/states.htm> (last visited Sept. 9, 2008).

¹⁹ Interestingly, most of the states that provide "Choose Life" plates are located on the east coast. With the exception of Montana and Hawaii, no other western states offer the plates. Even more insightful is the fact that Montana and Hawaii are the only states in the U.S. that offer a plate conveying the pro-choice view. *Id.*

²⁰ See *Planned Parenthood of S. Carolina, Inc. v. Rose*, 361 F.3d 786 (4th Cir. 2004).

²¹ *Id.*

²² *Id.*

“raises the specter that the Government may effectively drive certain ideas or viewpoints from the marketplace,”²³ thereby circumventing the protections of the First Amendment. This concern illustrates the importance of the Supreme Court deciding the merits of the “Choose Life” cases and putting an end to the states’ unconstitutional actions.

A. Threshold Issue: Are Specialty Plates Government Speech or Private Speech?

When determining whether a case will be subject to First Amendment analysis, the threshold inquiry is whether the speech in question constitutes government or private speech.²⁴ The query is determinative in free speech cases because of three common assumptions:

first, that all speech is either government speech or private speech; second, that when the government speaks for itself and is not regulating the speech of others, it may discriminate based on viewpoint; and third, that the government may not discriminate based on viewpoint when it regulates private speech.²⁵

These principles derive from the language of the First Amendment, which states in pertinent part that “Congress shall make no law . . . abridging the freedom of speech.”²⁶ Moreover, with the passage of the Fourteenth Amendment, the First Amendment protections were extended to safeguard against *States* abridging individual liberties, not just *Congress*.²⁷ Thus, neither state nor the federal government may discriminate based on viewpoint when regulating the speech of individuals.

The Supreme Court has given no direct test for determining whether speech is private or government.²⁸ This gap in jurisprudence creates a critical dilemma for lower courts faced with drawing this distinction. In addition, the Supreme Court has failed to consider that

²³ *Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd.*, 502 U.S. 105, 116 (1991).

²⁴ *Planned Parenthood of S. Carolina, Inc.*, 361 F.3d at 792 (citing *Legal Servs. Corp. v. Velazquez*, 531 U.S. 533 (2001); *Sons of Confederate Veterans, Inc.*, 288 F.3d at 616; *Planned Parenthood of S. Carolina, Inc. v. Rose*, 236 F.Supp.2d 564 (2002)).

²⁵ *Id.* (discussing the Supreme Court’s analysis in *Rosenberger v. Rector and Visitors of Univ. of Virginia*, 515 U.S. 819 (1995)).

²⁶ U.S. CONST. amend. I. (emphasis added).

²⁷ U.S. CONST. amend. XIV.

²⁸ Traci Daffer, Comment, *A License to Choose or a Plate-ful of Controversy? Analysis of the “Choose Life” Plate Debate*, 75 UMKC L. Rev. 869, 890 (2007).

certain speech may constitute a mix or hybrid of both types of speech.²⁹ Another problem in this analysis is that the little guidance the Supreme Court does provide derives from a variety of cases about free speech, making the license plate analysis confusing and distorted. For example, some free speech principles arise from government subsidy cases with Establishment Clause issues,³⁰ in which the government makes decisions about allocation of private money, while other free speech principles arise from cases involving access to government benefits.³¹ For this reason it is difficult to apply already established Supreme Court principles differentiating between government and private speech to the “Choose Life” debate since specialty plate programs do not involve government subsidy or funding issues.³²

Despite these challenges for lower courts, the Supreme Court has clarified a few important free speech principles applicable to the “Choose Life” debate. In *Wooley v. Maynard*, the Supreme Court held that an individual vehicle owner may not be compelled to carry a state’s motto on his license plate if it offends his religion, even though this is a passive act.³³ In requiring individual drivers to carry the state motto “Live Free or Die”, New Hampshire would “invade[] the sphere of intellect and spirit which it is the purpose of the First Amendment to our Constitution to reserve from all official control.”³⁴ Thus, the Court recognized that an “automobile . . . is readily associated with its operator.”³⁵ Although the Court did not expressly state that the plates constitute private speech, its analysis indicates that the Court recognized that the plates are linked to the individual owners.³⁶ This principle is applicable to the “Choose Life”

²⁹ *Id.*

³⁰ *See, e.g., Rosenberger*, 515 U.S. at 819 (challenging a denial of university funds to a Christian newspaper for printing costs of school papers. The university’s denial of the subsidy amounted to viewpoint discrimination); *Rust v. Sullivan*, 500 U.S. 173 (1991) (challenging family planning funds that prohibit the government doctors to engage in abortion counseling. The court held that the government is permitted “to fund one activity to the exclusion of another” and ensure that *government funds* are used for activities within the scope of the government program) (emphasis added).

³¹ *See, e.g., Perry Educ. Ass’n v. Perry Local Educator’s Ass’n*, 460 U.S. 37 (1983) (challenging a teacher union’s denial of access to school mailboxes). The court held school mailboxes are a limited public forum, and denial of access was not based on viewpoint. *Id.*

³² *See Planned Parenthood of S. Carolina, Inc. v. Rose*, 361 F.3d 786 (4th Cir. 2004).

³³ *Wooley v. Maynard*, 430 U.S. 705, 715 (1977).

³⁴ *Id.*

³⁵ *Id.* at 717 n.15. The Court explained that unlike “currency, which is passed from hand to hand” automobiles “differ[] in significant respects” since they are associated with the individual car owner rather than the government. *Id.*

³⁶ *Id.*

cases in that it supports the notion that specialty plates constitute expression of an individual car owner's personal ideology.

A more recent Supreme Court case held that the level of government control over speech is one factor distinguishing between private and government speech.³⁷ In *Johanns v. Livestock Mktg. Ass'n*,³⁸ the Supreme Court decided for the "third time in eight years . . . whether a federal program that finances generic advertising to promote an agricultural product violates the First Amendment."³⁹ *Johanns* was a government subsidy case—the government was collecting taxes from beef producers and allocating those funds to beef promotions, using the familiar slogan "Beef. It's What's For Dinner," to encourage consumers to eat more beef.⁴⁰ The plaintiffs argued that the ads promoted a message about beef that was inconsistent with their sale efforts. The ads promoted beef as a "general commodity," while the plaintiffs wished to advertise their beef as a superior choice of produce.⁴¹

The Supreme Court reasoned that "[t]he message set out in the beef promotions is *from beginning to end* the message established by the Federal Government."⁴² Congress developed a detailed program of promotion, paid for the entire advertising scheme, and specified "what the promotional campaigns shall contain."⁴³ The plaintiffs argued that the involvement of an independent committee to help design the campaigns supported the conclusion that the speech is either mixed or purely private.⁴⁴ However, the Court concluded that the advertisements constitute pure government speech since the committee's "only relevant involvement is ancillary" and half of the committee members are appointed by the Secretary of Agriculture.⁴⁵ In addition, the amount of control and influence the government exercised in this case was so exacting as to rise to the level of pure government speech.⁴⁶ Therefore, "[w]hen, as here, the government sets the overall message to be communicated and approves every word that is disseminated, it is not precluded from relying on the government-speech doctrine."⁴⁷

³⁷ *Johanns v. Livestock Mktg. Ass'n*, 544 U.S. 550 (2005).

³⁸ *Id.*

³⁹ *Id.* at 553.

⁴⁰ *Id.* at 554.

⁴¹ *Id.* at 556.

⁴² *Johanns*, 544 U.S. at 561 (emphasis added).

⁴³ *Id.*

⁴⁴ *Id.* at 560.

⁴⁵ *Id.* at 560 n.4.

⁴⁶ *Id.* at 560.

⁴⁷ *Johanns*, 544 U.S. at 562.

While the Supreme Court has recognized that license plates are readily associated with the driver, it has held that standard-issue plates constitute government speech because they are mandatory for state identification purposes.⁴⁸ The Court has also determined that a government subsidized message, which the government controls in the entirety, constitutes pure government speech as well.⁴⁹ Although these precedents are informative for courts deciding the “Choose Life” cases, neither case is factually identical to the “Choose Life” cases. The “Choose Life” plates are optional, specialty plates, rather than standard-issue, and are designed and initiated by private citizens and merely ratified by a state legislature.⁵⁰

B. The Forum Analysis

After a court determines that speech is private, the speech is subject to First Amendment protection and the court must engage in a forum analysis—the Supreme Court has articulated a forum analysis methodology to determine the type of forum created by the government, and to review whether the government’s restrictions on the speech allowed in the forum are reasonable and viewpoint neutral.⁵¹ Under the forum analysis, a court first looks to the “nature of the forum, because the extent to which the Government may limit access depends on whether the forum is public or nonpublic.”⁵² Then, the court will look to whether the restriction the government has placed on the speech is reasonable and viewpoint neutral as required by the type of forum.⁵³ Overall, the Supreme Court’s analysis is used to balance the government’s interest in restraining use on its property and individuals’ interest in using the property for a purpose the government does not prefer or did not intend.⁵⁴

There are four types of fora typically created by the government: public fora; designated public fora; limited public fora; and nonpublic fora.⁵⁵ Public forum are places that have traditionally been a place of expression, assembly and communication between citizens.⁵⁶ Public

⁴⁸ *Wooley*, 430 U.S. at 707.

⁴⁹ *Johanns*, 544 U.S. at 562.

⁵⁰ About Choose Life, Inc., <http://choose-life.org/story.html> (last visited Sept. 9, 2008).

⁵¹ *Cornelius v. NAACP Legal Def. & Educ. Fund*, 473 U.S. 788, 800 (1976).

⁵² *Id.* at 797.

⁵³ *Id.*

⁵⁴ *Id.*

⁵⁵ *See Perry Educ. Ass’n*, 460 U.S. at 37.

⁵⁶ *Id.* at 45.

streets and parks are two examples of a public forum.⁵⁷ A designated public forum is a public place or channel of communication that the government has opened for use by the public at large.⁵⁸ For this forum, "the government must make an affirmative choice to open up its property for use as a public forum."⁵⁹ Designated public forum is a non-traditional forum for public discourse which the government has opened to public speech.⁶⁰ Speech in both traditional public fora and designated public fora are subject to the strictest First Amendment protection.⁶¹ In these areas, for the government to make a content-based exclusion it must show the "regulation is necessary to serve a compelling state interest and that it is narrowly drawn to achieve that end."⁶² In contrast to designated public fora, limited public fora do not guarantee access to the public at large. Instead, a limited public forum is a place the government has opened for speech "for its intended purposes, communicative or otherwise."⁶³ The government's limitations on speech in a limited public forum are acceptable, "as long as the regulation on speech is reasonable and not an effort to suppress expression merely because public officials oppose the speaker's view."⁶⁴ Lastly, nonpublic fora are places that the government has the

right to make distinctions in access on the basis of subject matter and speaker identity. These distinctions may be impermissible in a public forum but are inherent and inescapable in the process of limiting a nonpublic forum to activities compatible with the intended purpose of the property.⁶⁵

A low-bar, reasonableness test is applied to nonpublic forums to determine if the exclusion is reasonable in light of the purpose of the forum.⁶⁶ Therefore, the type of forum created is essential in the First Amendment analysis because it dictates the permissible scope of limitations the government may impose on speech.

⁵⁷ *Id.*

⁵⁸ *Id.*

⁵⁹ *United States v. Amer. Liberty Ass'n*, 539 U.S. 194, 206 (2003).

⁶⁰ *Cornelius*, 473 U.S. at 802.

⁶¹ *Amer. Liberty Ass'n*, 539 U.S. at 206.

⁶² *Id.*

⁶³ *Perry Educ. Ass'n*, 460 U.S. at 46.

⁶⁴ *Id.*

⁶⁵ *Id.* at 49.

⁶⁶ *Id.*

III. THE RECENT CIRCUIT SPLIT

Since the inception of the “Choose Life” plates, private organizations and individuals have challenged their constitutionality. For example, Florida was the first state to sign the plates into law in 1999.⁶⁷ That same year, a suit was filed against the Director of the Department of Motor Vehicles to prevent the plates from being distributed.⁶⁸ The District Court for the Middle District of Florida declined to hear the merits of the case for lack of standing and therefore permitted the plates to be issued.⁶⁹ The court’s denial of a hearing on the merits foreshadows a pattern of federal court decisions, which avoid the constitutional question about “Choose Life” plates altogether.

The Federal Circuits are split on the “Choose Life” cases on the threshold issue—whether the plates are government or private speech. The Fourth Circuit determined that the plates are a limited public forum and involve elements of both private and government speech.⁷⁰ Therefore, the Fourth Circuit concluded that denying the issuance of a plate expressing the pro-choice viewpoint constitutes illegal discrimination by South Carolina.⁷¹ On the contrary, the Sixth Circuit found that the plates do not constitute a “forum,” but are rather one method through which the government expresses its own viewpoint.⁷² Because the court found that the plates are pure government speech, the Sixth Circuit held that denial of a pro-choice plate did not circumvent the First Amendment.⁷³

A. The Fourth Circuit Weighs In: South Carolina’s Denial of a Pro-Choice Plate is Unconstitutional Viewpoint Discrimination

In 2001, the South Carolina legislature authorized the issuance of “Choose Life” specialty license plates with the Governor’s approval.⁷⁴ The legislature instructed the state’s Department of Public Safety to

⁶⁷ About Choose Life, Inc., <http://choose-life.org/story.html> (last visited Sept. 9, 2008).

⁶⁸ *Hildreth v. Dickinson*, No. 99-583-CIV-J-21-A, 1999 WL 33603028 (M.D. Fla. Dec. 22, 1999) (failing to reach the merits of the case for lack of standing and ripeness since the plaintiffs had not requested and been denied the development of a pro choice license plate).

⁶⁹ *Id.*

⁷⁰ *Planned Parenthood of S. Carolina, Inc. v. Rose*, 361 F.3d 786, 793 (4th Cir. 2004), *reh’g en banc denied*, 373 F.3d 580, *cert denied*, 543 U.S. 1119 (2005).

⁷¹ *Id.* at 798.

⁷² *ACLU of Tennessee v. Bredesen*, 441 F.3d 370, 378 (6th Cir. 2006).

⁷³ *Id.*

⁷⁴ *Planned Parenthood of S. Carolina, Inc.*, 361 F.3d at 798.

begin production of the specialty plates upon receipt of either a total of \$4,000 in deposits or 400 prepaid applications from interested motorists.⁷⁵ The threshold amount of deposits or applications ensured that the "Choose Life" motto had enough support to make it worthwhile for the state to begin production. Like the Sons' plates, the proceeds earned from the sale of "Choose Life" plates went directly to the private organizations that sponsored the plates—organizations that provide "crisis pregnancy services" and never to an organization that "provides, promotes, or refers for abortion."⁷⁶ Thus, it is obvious and undisputed that the organizations that benefit from the sale of the plates are pro-life and anti-abortion.

At the same time the "Choose Life" slogan was proposed at a subcommittee meeting in the State House of Representatives, a Planned Parenthood representative proposed a plate that expressed the pro-choice view.⁷⁷ While the bill proposing "Choose Life" was approved, the idea for a plate stating the opposite viewpoint on the abortion issue was rejected, thus giving rise to *Planned Parenthood of South Carolina, Inc. v. Rose* ("PPSC").⁷⁸ Unlike the courts that heard "Choose Life" challenges in the past, the District Court of South Carolina heeded the call to decide the merits of PPSC.⁷⁹ In PPSC, Planned Parenthood alleged that the state was engaging in viewpoint discrimination by rejecting their view on the abortion issue after creating a public forum for the controversial topic.⁸⁰ Planned Parenthood alleged that the state was effectively regulating speech based on its substantive content.⁸¹

Employing the First Amendment forum analysis to determine whether the plates are private or government speech, the District Court of

⁷⁵ S.C. Code Ann. § 56-3-8910(C).

⁷⁶ *Id.* at (B).

⁷⁷ *Planned Parenthood of South Carolina, Inc.*, 361 F.3d at 787.

⁷⁸ *Id.*

⁷⁹ *Planned Parenthood v. Rose*, 236 F. Supp. 2d 564 (D.S.C. 2002), *aff'd* by *Planned Parenthood of S. Carolina, Inc. v. Rose*, 361 F.3d 786 (4th Cir. 2004). As a preliminary matter, the District Court of South Carolina determined that the plaintiffs had standing to sue. The court found that the plaintiffs had an injury in fact since they requested a plate for their cause and were denied. In addition, the court held that there was adequate redressability because it could either extend the benefits to the disfavored group (the plaintiffs), or deny the benefits to the favored group. Either of these remedies would put the groups on a "level playing field." *Id.* at 567–68; *Planned Parenthood of S. Carolina, Inc.*, 361 F.3d at 790.

⁸⁰ *Id.* at 567.

⁸¹ *Id.* The court noted that "[t]his is a free speech case. It is not about the merits of the ongoing national controversy between the pro-life and pro-choice movements. In another case, in some other court, the position of the parties with regard to some other state's issuance of a license plate could well be reversed." *Id.*

South Carolina explained that “[w]hile the government’s ability to regulate private speech depends in part on the type of forum involved, viewpoint discrimination is presumed impermissible *in any forum* under any analysis.”⁸² The court determined that the state created a public forum for private organizations to express their views and the state impermissibly engaged in viewpoint discrimination by denying a comparable plate with a pro-choice point of view.⁸³ The District Court granted summary judgment in favor of the plaintiffs.⁸⁴

On appeal, the Fourth Circuit upheld the District Court’s findings. Specifically, the court upheld the District Court’s standing analysis and reviewed the merits of the case. In doing so, the Fourth Circuit applied a First Amendment forum analysis, recognizing that the threshold issue is whether the plates constitute government or private speech.⁸⁵ The court, quoting its opinion in *Sons of Confederate Veterans*,⁸⁶ stated that “[n]o clear standard has yet been enunciated in our circuit or by the Supreme Court for determining when the government is ‘speaking’ and thus able to draw viewpoint-based distinctions, and when it is regulating private speech and thus unable to do so.”⁸⁷ In determining that the plates constitute “hybrid” speech, the Fourth Circuit applied a four factor test:

- (1) the central purpose of the program in which the speech in question occurs;
- (2) the degree of editorial control exercised by the government or private entities over the content of the speech;
- (3) the identity of the literal speaker; and
- (4) whether the government or the private entity bears the ultimate responsibility for the content of the speech.⁸⁸

The court summarily concluded that these factors, when applied in *Sons of Confederate Veterans*, indicated that specialty plates are private and not government speech.⁸⁹

In doing so, however, the court drew a distinction between the license plates at issue in *Sons of Confederate Veterans* and the “Choose Life” plates. While the Sons plates were found to be pure government speech, the Fourth Circuit held that the plates espousing a pro-life view

⁸² *Id.* at 571 (emphasis added).

⁸³ *Id.* at 572.

⁸⁴ *Planned Parenthood*, 236 F. Supp. 2d at 574.

⁸⁵ *Planned Parenthood of South Carolina, Inc.*, 361 F.3d at 792.

⁸⁶ *Sons of Confederate Veterans Inc. v. Holcomb*, 129 F. Supp. 2d 941 (W.D. Va. 2001).

⁸⁷ *Planned Parenthood of S. Carolina, Inc.*, 361 F.3d at 792.

⁸⁸ *Id.* at 792–93.

⁸⁹ *Id.* at 793.

constitute mixed speech involving elements of both government and private speech.⁹⁰ The plates' purpose and the state's exercise of editorial control pointed to government speech, while the individual vehicle owner is the "literal speaker" who also bears "ultimate responsibility" for the displayed message.⁹¹ The court reiterated that license plates are associated with drivers and that the association is stronger with specialty plates since the vehicle owner identifies with, chooses, and displays the message for a fee.⁹² The court determined that, "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."⁹³

After concluding the "Choose Life" plates constitute mixed speech, the Fourth Circuit looked to Supreme Court decisions to determine whether the state engaged in viewpoint discrimination by disallowing the pro-choice view. The court stated "that the 'principal inquiry' in assessing a claim of viewpoint discrimination 'is whether the government has adopted a regulation of speech because of [agreement or] disagreement with the message it conveys.'"⁹⁴ To this end, the Fourth Circuit concluded that because the South Carolina state legislature approved of one viewpoint above others, it engaged in impermissible discrimination.⁹⁵ As the court described,

In the license plate forum, South Carolina has authorized the expression of only one position in the abortion debate, thereby promoting the expression of one viewpoint (pro-life) while preventing the expression of the other viewpoint (pro-choice). By granting access to the license plate forum only to those who share its viewpoint, South Carolina has provided pro-life supporters with an instrument for expressing their position and

⁹⁰ The court noted that in *Sons of Confederate Veterans*, the government was a regulator of an already existing specialty plate forum. *Id.* In contrast, here the state was "a covert speaker within the specialty license plate forum, creating a license plate that promotes one viewpoint in the abortion debate at the expense of another." *Id.*

⁹¹ *Id.* at 793–94 (relying on *Sons of Confederate Veterans* in which the District Court opined that it is oversimplification [to assume] that all speech must be either that of a private individual or that of the government and that a speech event cannot be *both* private and governmental at the same time.").

⁹² *Planned Parenthood of S. Carolina, Inc.*, 361 F.3d at 794 (referencing *Wooley v. Maynard*, 430 U.S. 705 (1977)).

⁹³ *Id.*

⁹⁴ *Planned Parenthood of S. Carolina, Inc.*, 361 F.3d at 795 (quoting *Ward v. Rock Against Racism*, 491 U.S. 781 (1989)).

⁹⁵ *Id.*

has distorted the specialty license plate forum in favor of one message, the pro-life message.⁹⁶

In short, the state adopted the “Choose Life” plate because of its agreement with the pro-life view. Furthermore, the court listed three reasons why the state may not engage in this type of discrimination when the speech in question is a combination of private and government speech: first, the state has created a limited forum;⁹⁷ second, the state has favored its own viewpoint in the forum to the disregard of other views; third, the state is promoting an idea without electoral accountability because the state’s “advocacy of the pro-life viewpoint may not be readily apparent to those who see the [“]Choose Life[“] plate.”⁹⁸

Ultimately, the Fourth Circuit held that South Carolina’s “Choose Life” license plates constitute a violation of the First Amendment rights of plaintiffs who wish to express their pro-choice message. By limiting access to the forum to speakers that agree with the state’s own ideology, South Carolina engaged in viewpoint discrimination.⁹⁹ The court held that the “Choose Life” scheme was prohibited by the First Amendment of the U.S. Constitution.¹⁰⁰

B. The Sixth Circuit: The “Choose Life” Message is Government Speech, and Therefore Does Not Violate the First Amendment

Two years following the Fourth Circuit’s decision in *PPSC*, the Sixth Circuit examined Tennessee’s “Choose Life” program in *ACLU of Tennessee v. Bredesen*,¹⁰¹ expressly creating a Federal Circuit split. In 2003, the Tennessee legislature authorized the issuance of “Choose Life” license plates in its state.¹⁰² Similar to the case in South Carolina, a pro-choice group lobbied for a plate expressing its point of view and its request was denied.¹⁰³ The District Court for the Middle District of Tennessee, following similar reasoning as the Fourth Circuit Court in *PPSC*, found in favor of the plaintiffs, holding that the denial was

⁹⁶ *Id.*

⁹⁷ See *Cornelius v. NAACP Legal Def. & Educ. Fund*, 473 U.S. 788, 802 (1976); *United States v. Amer. Liberty Ass’n*, 539 U.S. 194, 206 (2003).

⁹⁸ *Planned Parenthood of S. Carolina, Inc.*, 361 F.3d at 795.

⁹⁹ *Id.* at 799.

¹⁰⁰ *Id.*

¹⁰¹ *ACLU of Tennessee v. Bredesen*, 441 F.3d 370 (6th Cir. 2006).

¹⁰² *Id.* at 373.

¹⁰³ *Id.*

unconstitutional.¹⁰⁴ However, on appeal, the Sixth Circuit reversed the District Court's holding.¹⁰⁵

Relying entirely on the Supreme Court's recent decision in *Johanns v. Livestock Mktg. Ass'n*,¹⁰⁶ the Sixth Circuit Court concluded that the "Choose Life" plates are a "government-crafted message," and include no private speech.¹⁰⁷ In *Johanns*, the Supreme Court held that "federal government promotional campaigns to encourage beef consumption constituted government speech" because they were completely controlled by the government.¹⁰⁸ In doing so, the Court found that the beef campaigns were a government message "from beginning to end" since the campaigns were controlled and produced by the Government in all aspects.¹⁰⁹ Specifically, Congress "directed the implementation" of the advertisement scheme, completely funded the advertisements, and also chose the overarching message and wording of the advertisements.¹¹⁰ The Sixth Circuit found that, like the character of the beef promotions, "Choose Life" is the government's own message.¹¹¹ The court reasoned that the Tennessee Legislature approved the words of the plate and retained the authority to deny or withdraw a plate.¹¹² The court rejected the plaintiff's assertion that the private organizations' involvement with the specialty plate "demonstrates that the license plate forum was created to facilitate private speech."¹¹³ It was of no consequence to the Sixth Circuit that a private organization proposed the idea for "Choose Life" plates to the Tennessee Legislature and designed the plates itself.¹¹⁴

¹⁰⁴ See *ACLU of Tennessee v. Bredesen*, 354 F.Supp.2d 770 (M.D.Tenn. 2004) (agreeing with the Fourth Circuit that "Choose Life" plates constitute mixed speech and therefore are subject to First Amendment analysis). The court ultimately held that Tennessee engaged in impermissible viewpoint discrimination. *Id.*

¹⁰⁵ See *ACLU*, 441 F.3d 370.

¹⁰⁶ *Johanns v. Livestock Mktg. Ass'n*, 544 U.S. 550 (2005).

¹⁰⁷ *ACLU*, 441 F.3d at 375.

¹⁰⁸ *Id.*

¹⁰⁹ *Johanns*, 544 U.S. at 560.

¹¹⁰ *ACLU*, 441 F.3d at 376. (quoting *Johanns*, 544 U.S. at 561).

¹¹¹ *Id.*

¹¹² *Id.*

¹¹³ *Id.* at 382 (Martin, Jr., Circuit Judge, concurring in part and dissenting in part). The majority stated that *Johanns* resolves that participation of a private organization "has little or no relevance to whether a plate expresses a government message." *Id.* at 377.

¹¹⁴ *Id.* at 382 (Martin, Jr., Circuit Judge, concurring in part and dissenting in part). Judge Martin recognized that "[a]s the majority notes, the specialty plates are created in consultation with private organizations and half of the profits may be devoted to the private non-profit organizations sponsoring the plates. In my opinion, the fact that the state has permitted approximately 150 private organizations to create specialty license plates and the manner in which the state operates its license plate program demonstrates that the forum was created to facilitate private speech." *Id.*

After concluding that “Choose Life” is a purely government motto, the Sixth Circuit further concluded that the plates do not represent a “forum” for speech requiring viewpoint neutrality.¹¹⁵ The Sixth Circuit reasoned that the government does not necessarily create a forum “when it seeks to have private entities disseminate its message.”¹¹⁶ In other words, the court held that individual car owners are simply “private entities” spreading the government’s slogan. The court explained that even though the government, in *Johanns*, paid private entities to broadcast their message, “Beef. It’s What’s for Dinner,” the message was still government speech.¹¹⁷ While the court explained that “[n]o constitutionally significant distinction exists between volunteer disseminators and paid disseminators,”¹¹⁸ the court made no mention of *paying* disseminators who are not simply passive volunteers.

Relying on the Supreme Court’s “*Johanns* standard,” the Sixth Circuit concluded that the “Choose Life” message is pure government speech, despite private organizations’ involvement in the plate scheme.¹¹⁹ Thus, the court held that the specialty plates are not subject to First Amendment scrutiny as they are not a forum for the purpose of facilitating private speech.¹²⁰

IV. ANALYSIS: APPLICATION OF FIRST AMENDMENT PRINCIPLES BASED ON SUPREME COURT PRECEDENT

Specialty license plates are not pure government speech. Rather, the plates represent, at least, mixed government and private speech because both entities have active roles in the plate forum. As such, viewpoint discrimination is intolerable since the states are regulating speech based on the speakers’ perspective. The Sixth Circuit’s failure to accurately apply First Amendment precedent resulted in a critical misunderstanding on the “Choose Life” issue, which should be resolved by the Supreme Court. The Sixth Circuit erred by relying entirely on *Johanns* to conclude that the “Choose Life” plates are constitutionally permissible. Unlike the “Choose Life” scheme, the beef campaigns in *Johanns* were

¹¹⁵ *ACLU*, 441 F.3d at 378.

¹¹⁶ *Id.*

¹¹⁷ *Id.*

¹¹⁸ *Id.*

¹¹⁹ *Id.* at 380.

¹²⁰ *But see* *Children First Foundation, Inc. v. Martinez*, 169 F. Appx. 637 (2d Cir. 2006) (holding that “custom license plates involve, at a minimum, some private speech” and for this reason viewpoint discrimination is intolerable). *See infra* note 118.

government-compelled subsidy cases, involving a message that was controlled by government "from beginning to end."¹²¹

From the outset of the Court's analysis in *Johanns*, the Court recognized and based its decision on the fact that *Johanns* involved a First Amendment challenge to "government-compelled subsidy of the government's own speech."¹²² For this reason the "Choose Life" case is distinguishable on this threshold issue, as the plate scheme is neither "government-compelled" nor a "subsidy." In contrast to *Johanns*, where the government paid for the advertising, the "Choose Life" cases involve the government *being* paid by private individuals. The specialty plate scheme is completely voluntary and individuals wishing to display a "Choose Life" plate must pay a fee, usually seventy dollars, a portion of which goes directly to the government.¹²³ In *Johanns*, beef producers were *mandated* to pay certain head-taxes, which were in turn used to fund the government's program.¹²⁴ The voluntary nature of the "Choose Life" license plate scheme is reason enough to distinguish it from *Johanns*.

Wooley is distinguishable from the "Choose Life" plate scheme for other reasons as well. *Wooley* deals with a citizen's challenge to compelled government speech while the "Choose Life" specialty plate litigation deals with speech that is nonobligatory and is only expressed by an individual's choice. The slogan on the New Hampshire plates was government speech because the slogan appeared on *every* citizen's car since it was a *standard-issue plate*.¹²⁵ By negative inference, slogans on specialty plates are not the states' mottos, but rather the individual owners' viewpoints. A state motto is one that is found on standard license plates, one that citizens do not pay an additional fee for, but are required to display for state identification purposes.¹²⁶ The "Choose Life" plates, on the contrary, are at least partly individual speech because people take affirmative action to obtain a plate, an additional fee is paid for them, and they are not compulsory, standard plates.¹²⁷

Furthermore, "Choose Life" plates involve minimal choice and control by the state government. Although the plates are usually issued

¹²¹ *Johanns*, 544 U.S. at 560.

¹²² *Children First Foundation*, 169 F. Appx. 637 at 557 (emphasis added).

¹²³ *Planned Parenthood of S. Carolina, Inc.*, 361 F.3d at 788.

¹²⁴ *Johanns*, 544 U.S. at 562–63.

¹²⁵ *Wooley*, 430 U.S. at 707.

¹²⁶ For example, New Jersey's standard-issue license plates read "Garden State," and New York's read "The Empire State," signifying the states' mottos or nicknames.

¹²⁷ About Choose Life, Inc., <http://choose-life.org/story.html> (last visited Sept. 9, 2008).

through a state statute, the idea and proposal for the plates does not arise in government. Rather, the idea for the plates is entirely introduced, pioneered, developed, initiated and enthused by private organizations or individuals in support of the “Choose Life” motto. For example, in Tennessee, New Life Resources is the organization that introduced the plate to the state, “consulted” the state on how to design the plate, and dictated to the state how to apportion the proceeds.¹²⁸ Tennessee’s Department of Revenue instructions on how an organization may introduce a specialty plate demonstrates the amount of control private organizations have over the scheme:

Organizations desiring to establish a new specialty plate would need to contact their state senator or representative to sponsor the plate and introduce it into legislation. Once the bill has passed, the Taxpayer and Vehicle Services Division sends the organization an instruction packet that informs the organization that the bill has passed and that *they are responsible for selling* 1000 plates, *collecting* the money for each plate (\$35 next available number \$70 for personalized) and *designing* the artwork. An organization will have one year from the date of the passage of the bill to complete the minimum requirements. If they do not meet the minimum requirements the plate will be deemed obsolete or invalid.¹²⁹

This statement from the Tennessee Government indicates that the “Choose Life” plates originate with and are detailed by private organizations. It is also important to note that in Tennessee, the government is only a “sponsor” of the plates, which is hardly the same as the government participating as a principle actor, like in the beef promotions case.¹³⁰ For these reasons the “Choose Life” plates are not a Government message “from beginning to end,”¹³¹ and therefore do not require a finding of pure government speech.

In addition to the high degree of the private organization’s contribution to the “Choose Life” plates, there is an even higher degree of individual vehicle owners’ involvement in the plates. Not only do private citizens volunteer and pay to display their own “Choose Life” plates, they affix the slogan to their privately owned vehicles. The plates

¹²⁸ See TENN. CODE ANN. § 55-4-202(c)(7).

¹²⁹ Introduce a New Specialty Plate, Tennessee Dep’t of Revenue, <http://state.tn.us/revenue/vehicle/licenseplates/introducenewplate.htm> (last visited Sept. 20, 2007) (emphasis added).

¹³⁰ See TENN. CODE ANN. § 55-4-202(c)(7).

¹³¹ *Johanns*, 544 U.S. at 560–61.

have a personal and intimate meaning for those who elect to display them; the existence of such a meaning supports the theory that the plates represent private speech. Any reasonable person who sees a "Cat & Dog Lover" specialty plate affixed to a mini-van surmises, "that driver must be a huge animal lover." Never would a reasonable observer think to themselves, "our state government must really love cats and dogs." The drivers are disseminating their "Choose Life" point of view. It is not pure government speech.

The "Choose Life" scheme does not rise to the level of government control that *Johanns* involved. The Sixth Circuit made a critical mistake by concluding that the "Choose Life" license plates constitute pure government speech.¹³² This conclusion is of vital importance because it determines the applicability of the First Amendment to the case. The Sixth Circuit's decision precludes further First Amendment analysis on the issue. Thus, the Sixth Circuit's opinion conflicts with the Fourth Circuit's holding in *PPSC* and overlooks the elements of private speech involved in specialty license plates.¹³³

The final reason these plates constitute private, rather than government speech is that many specialty license plates are in conflict with one another. It cannot be believed that the state is conveying a message when there are multiple and contradictory messages being put forth by the state on the same issue. For example, Tennessee authorizes the sale of specialty plates that support "Fish and Wildlife."¹³⁴ The proceeds from these plates are used "exclusively for management, protection, propagation and conservation of fish and wildlife species and the protection and enhancement of such species' habitats."¹³⁵ At the same time, Tennessee issues plates that support "Sportsmen."¹³⁶ The funds earned from the sportsman plates are used "to assure the preservation of the heritage of hunting and fishing in this state for future programs."¹³⁷ If the government was expressing an interest in preserving the lives of fish, and at the same time expressing an interest in fishing programs, the message would be unclear; the government would be disseminating

¹³² *ACLU*, 441 F.3d at 375.

¹³³ The Sixth Circuit's opinion also conflicts with *Children First Foundation v. Martinez*, 169 F. Appx. at 639, which held that "[a]lthough the government may discriminate on the basis of viewpoint when it is speaking only for itself . . . custom license plates involve, at minimum, some private speech." *Id.*

¹³⁴ See TENN. CODE ANN. § 55-4-202.

¹³⁵ Available License Plates, Tennessee Dep't of Revenue, <http://state.tn.us/revenue/vehicle/licenseplates> (last visited Sept. 20, 2008).

¹³⁶ *Id.*

¹³⁷ *Id.*

contradictory messages. Rather than categorize specialty plates as government speech, the plates constitute expression of the individuals who affirmatively choose to purchase and display the plates on their private cars. Since it allows for two opposing viewpoints to be expressed, Tennessee does not discriminate based on viewpoints in the fishing debate. In contrast, by disallowing a pro-choice plate, Tennessee does discriminate based on a governmental view point in the abortion debate.

In the specialty license plate context, the government has intentionally opened a nontraditional forum for expressive activity. The “Choose Life” license plate scheme is a limited forum, not a government program. It is limited because the states have, rightfully so, denied access to certain subject matters and certain categories of speakers altogether.¹³⁸ For instance, Arkansas denied specialty plate access to the Knights of Columbus out of fear that the KKK would want a plate too.¹³⁹ The state effectively banned all speech on the subject matter of religion and race.

Individuals may participate in this public forum on two different levels. First, one may seek to have his or her organization or group express its slogan on an issued plate. In most states, a group is required to get the plate sponsored by a legislator, design the plate, determine a beneficiary organization to which to send the proceeds, get a requisite number of offers to purchase, and collect the money.¹⁴⁰ On another level, an individual may participate in personal expression in the forum by purchasing one of the already existing plates and displaying it on his car. Simply displaying a specialty plate is a way of expressing one’s personal viewpoint.

A First Amendment concern arises when a subject matter is permitted to be spoken about, but only one viewpoint on that subject is permitted while another or others are disallowed. As the Supreme Court has repeatedly articulated, “the government violates the First Amendment when it denies access to a speaker solely to suppress the point of view he espouses on an otherwise includible subject.”¹⁴¹

¹³⁸ See 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>.

¹³⁹ See *id.*

¹⁴⁰ See *supra* note 118 and accompanying text. It is obvious that the government could prevent offensive words from being printed because the government prevents the entire subject of offensive language on plates. This type subject matter discrimination is permissible. See, e.g., *Davenport v. Washinton Educ. Ass’n*, 127 S.Ct. 2372, 2381 (2007) (stating that “speech that is obscene or defamatory can be constitutionally proscribed because the social interest in order and morality outweighs the negligible contribution of those categories of speech to the marketplace of ideas.”).

¹⁴¹ *Cornelius*, 473 U.S. at 806.

Although a government may favor certain speech in its own programs, and may speak with a partisan tone when speaking for itself, the "Choose Life" scheme in South Carolina, Tennessee and all other issuing states departs from the constitutional model. Since access to "Choose Life" plates is a limited forum and the abortion debate has been allowed as a permissible topic of discussion, the government must allow all viewpoints on the issue to be reflected. The Sixth Circuit failed to correctly decide the threshold issue—that "Choose Life" plates involve some aspects of private speech. Thus, the court's determination that the plates are not a public forum and are not protected by the First Amendment is misguided.

V. CONCLUSION

It is inevitable that the Supreme Court will grant certiorari on this important issue. There is too much room for abuse if free speech continues to be hit around like a ping pong ball, back and forth between the lower courts. Car bumpers have emerged as a modern method of expressing individual beliefs and preferences. The government opened this forum by allowing individuals and organizations to express their views through a medium that was otherwise closed to the public. Although license plates are historically closed, inaccessible private property of the government, state governments have opened this property to allow access by individuals and have thus created a public forum.

As the Supreme Court has noted, "a speaker must seek access to public property or to private property dedicated to public use to evoke First Amendment concerns."¹⁴² In South Carolina, Planned Parenthood lobbied the state legislature to add a license plate for owners wishing to express a pro-choice view; they were denied.¹⁴³ In Tennessee, another pro-choice group asked the state government to create a plate expressing their point of view; they too were denied.¹⁴⁴ States that deny the issuance of a specialty license plate expressing the pro-choice view, while allowing a plate with an anti-abortion view, are engaging in the most fundamental form of illegal censorship. The government violates the principles of the First Amendment when it permits one perspective on an issue while disallowing all other perspectives on that same issue. This is true even if the government agrees with the opinion it is permitting, and disagrees with the one it is excluding. The remedy must be to eliminate

¹⁴² *Id.* at 801.

¹⁴³ *Planned Parenthood of S. Carolina, Inc.*, 361 F.3d at 788.

¹⁴⁴ *ACLU*, 441 F.3d at 372.

all plates expressing an opinion on the abortion issue, or to allow both the pro-life and the pro-choice viewpoints concurrently.

Certiorari on the “Choose Life” plate issue should be granted because it is necessary for the Supreme Court to create a test to determine when speech constitutes government speech versus when it constitutes private speech. Furthermore, it is urged that the Supreme Court recognize that government and private speech may be and often are mixed, and when this is the case, viewpoint discrimination is unacceptable and will not be tolerated under the United States Constitution. The Sixth Circuit failed to recognize the obvious and numerous distinctions between the “Choose Life” plate scheme and the government beef promotion project in *Johanns*.¹⁴⁵ This failure caused the Sixth Circuit to be misled into believing that the “Choose Life” scheme is subject to too much government control to constitute a public forum. This critical, threshold error has unconstitutionally suppressed the opportunity for equal expression by the pro-choice supporters. These supporters are prevented from disseminating and displaying their viewpoint through specialty license plates.

¹⁴⁵ *Johanns*, 544 U.S. 550 (2005).