Specialty license plate messages: government speech, private speech, or mixed speech?

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ABSTRACT

In this paper, we discuss specialty license plates that drivers can purchase to signal their support of a particular organization (e.g. The Elvis Presley Memorial Trauma Center). Our main focus is discussing the legal issues associated with a state's decision to deny organizations the right to participate in such loyalty programs. Specifically, we discuss Choose Life organizations and their requests to establish specialty license plates bearing the message "Choose Life."

Keywords: Specialty License Plates, Choose Life Organization, Government Speech, Private Speech, Free Speech, Marketing

INTRODUCTION

Almost every U.S. state offers drivers an opportunity to purchase license plates that display the logo of an organization which a driver supports. Such sponsoring organizations include: fraternities, sororities, charitable organizations, branches of the state government, public and private universities, and more. As an example, in the state of Tennessee, registered drivers can purchase a license plate which signals their support of the LeBonheur Children's Medical Center. However, in some instances, a state refuses to allow a sponsoring organization to participate in such a program.

The Texas Alliance for Life (TAL) has been exhausting its efforts to establish a law in Texas allowing motorists to purchase a "Choose Life" specialty plate. Although the Texas Senate and House approved the "Choose Life" specialty plate bill, the bill did not pass during the 2009 81st Regular Session or during the subsequent special session in July due to conflicts over unrelated issues (www.txchoose-life.org 2009). Despite this setback, TAL continues in its quest for a "Choose Life" plate in Texas, hoping to see a "Choose Life" plate bill passed in the 82nd Regular Session, which begins in January of 2011 (www.txchoose-life.org 2009).

If the Texas legislature ultimately refuses to pass the bill and the issue comes before a court, whether the court will order Texas to issue the "Choose Life" specialty plate depends on which circuit's jurisprudence the court finds most persuasive. Some circuits have ordered the issuance of such plates (Ariz. Life Coal v. Stanton 2008), whereas others have prohibited the issuance of such plates (Choose Life Ill., Inc. v. White 2008). One of the reasons for the inconsistent circuit decisions is that the circuits are divided on the issue of whether messages on specialty license plates constitute government speech, private speech, or a combination of both for First Amendment purposes.

Given the inconsistency underlying the current state of the law, members of the public face uncertainty regarding First Amendment protections of free speech and, ultimately, may lose faith in the judiciary (Moragne v. States Marine Lines, Inc. 1970). To restore the public's faith, the United States Supreme Court should establish a clear standard for determining whether speech is government, private, or a mixture of both (Daffer 2007). Until the Supreme Court does so, reconciling the circuit decisions in this paper will help provide some clarity in this area of the law.

This paper describes the historical development of the law relating to the government-speech doctrine and private-speech forum analysis, discusses the circuit decisions, reconciles the division in the circuits, and argues that the Supreme Court should develop a clear standard for determining whether speech is private, government, or a combination of both. The objectives of this paper are threefold. First, we describe examples of these personalized plates and discuss the benefits of these plates to both the customer and the organization. Second, we examine the historical development of the law relating to the government-speech doctrine and private-speech forum analysis. As a part of this objective we discuss the division in the circuits regarding whether messages on specialty license plates are government speech, private speech, or hybrid speech. Third, we attempt to reconcile the circuit decisions, arguing that the Fourth Circuit correctly determined that messages on specialty license plates are a mixture of government speech and private speech, and that the Sixth Circuit's holding—that messages on specialty license plates are purely government speech—is flawed because the court misapplied Supreme Court precedent. In this section, we also assert that the inconsistency underlying the current state

of the law reveals the need for the Supreme Court to establish a clear standard for determining whether speech is private, government, or a mixture of both. In the following section, we provide a brief description of the benefits associated with specialty license plates.

BACKGROUND

Consider the State of Tennessee. This state offers more than 90 versions of personalized license plates to its drivers and prices range from $56.50 to $91.50 per year. See Figure 1 for some examples of a few of these different plates. See Figure 1 in the Appendix.

Specialty license plates offer potential benefits to consumers, organizations, and the state government. For instance, the state derives additional revenue from the sale of these plates. In the remainder of this section, we briefly describe organizational and consumer benefits. Organizations, such as the "fund-raising causes" depicted in Figure 1, receive a portion of the additional fee collected by the state. Consumers purchase these plates not only to help fund these organizations, but to show their support by displaying this license plate on their vehicle. These plates allow consumers to signal their beliefs to others and, in the process, create a kind of "roving community."

In some instances, consumers are denied the right to express themselves in this form. In Denver, the state of Colorado did not allow Kelly Coffman to use the letters "ILVTOFU" on a personalized plate to express her vegan lifestyle (i.e., "I love tofu"). The Department of Revenue declared that the letters could be misinterpreted as being profane (www.msnbc.msn.com 2009). In this example, an individual driver is being denied the right to display a specific personalized plate. In some instances, entire organizations are denied, based on their message. The remainder of this paper examines legal issues associated with this matter.

HISTORICAL DEVELOPMENT OF THE LAW

A. The Government-Speech Doctrine

In addressing First Amendment claims, courts first classify the relevant speech as private speech or government speech (Planned Parenthood of S.C., Inc. v. Rose 2004). However, courts struggle with classifying speech because the Supreme Court has not yet established a clear standard for determining whether the government is speaking or whether the government is regulating private speech (Daffer 2007).

When the government is conveying its own message, "it is entitled to say what it wishes" (Rosenberger v. Rector & Visitors of the Univ. of Va. 1995) because ultimately the government is "accountable to the electorate and the political process for its advocacy" (Bd. of Regents of Univ. of Wis. Sys. v. Southworth 2000). If individuals object to the speech of state or local government, their remedy is at the ballot box (Choose Life Ill., Inc. v. White 2008), and "newly elected officials later could espouse some different or contrary position" (Bd. of Regents of Univ. of Wis. Sys. v. Southworth 2000). Given the government's "accountability inherent in the political process,"(Sons of Confederate Veterans v. Comm'r of the Va. Dep't of Motor Vehicles 2002) the Supreme Court has recognized that the government may draw viewpoint-based distinctions when the government speaks for itself (Legal Servs. Corp. v. Velazquez 2001) or when the government uses private speakers to disseminate its messages (Rust v. Sullivan 1991).

B. Private-Speech Forum Analysis

"In the realm of private speech or expression, government regulation may not favor one speaker over another" (Daffer 2007). When the government restricts private speech, courts apply private-speech forum analysis "to determine whether those restrictions are constitutional" (Choose Life Ill., Inc. v. White 2008). "The government violates the Free Speech Clause of the First Amendment when it excludes a speaker from a speech forum the speaker is entitled to enter" (Christian Legal Soc'y v. Walker 2006).

There are three varieties of speech fora: traditional public forum, designated public forum, and nonpublic forum (Choose Life Ill., Inc. v. White 2008). Although First Amendment protections vary depending on the relevant forum, viewpoint discrimination is impermissible in all private-speech for a (Rosenberger v. Rector & Visitors of the Univ. of Va. 1995).

A traditional public forum is government property that "by long tradition or by government fiat . . . has been devoted to assembly and debate," such as parks, squares, streets, and sidewalks (Perry Educ. Ass'n v. Perry Local Educators' Ass'n 1983). Government restrictions on speech in a traditional public forum must be viewpoint-neutral (Ward v. Rock Against Racism 1989), "necessary to serve a compelling state interest," and "narrowly drawn to achieve that interest" (Cornelius v. NAACP Legal Def. & Educ. Fund, Inc. 1985).

These limitations on the government's ability to regulate speech in a traditional public forum also apply to a designated public forum (Ark. Educ. Television Comm'n v. Forbes 1998). The government establishes a designated public forum when it "intentionally open[s] a nontraditional forum for public discourse" (Ariz. Life Coal., Inc. v. Stanton 2008). Examples of a designated public forum include a municipal theater and a university meeting facility.

All other government property that "is not by tradition or design a forum for public communication" is considered a nonpublic forum, such as a school's internal mail system (Perry Educ. Ass'n v. Perry Local Educators' Ass'n 1983). While the government may regulate the subject matter of speech within a nonpublic forum, it may not restrict speech based on viewpoint (Good News Club v. Milford Cent. Sch. 2001). Also, restrictions on speech in a nonpublic forum "must be reasonable in light of the forum's purpose" (Rosenberger v. Rector & Visitors of the Univ. of Va 1995).

Furthermore, the Supreme Court has recognized that viewpoint discrimination is impermissible when the government encourages private speech within a forum and when the government facilitates a private individual's access to a speech forum (Evans 2008). Similarly, the Supreme Court has held that "[o]nce the government introduces a subject into the forum . . . it cannot exclude one viewpoint while allowing others, even though it may still promote and encourage the adoption of the viewpoint that it favors" (Evans 2008).

C. The Circuit Split

The circuit split regarding whether messages on specialty license plates are government speech, private speech, or a combination of both is a perfect example of how courts struggle with classifying speech. The Fourth, Seventh, and Ninth Circuits have held that messages on specialty plates are private speech or mixed speech (Choose Life Ill., Inc. v. White 2008). In contrast, the Sixth Circuit has held that messages on specialty license plates are government speech (Am. Civil Liberties Union of Tenn. v. Bredesen 2006).

1. The Fourth, Ninth, and Seventh Circuits Held that Messages on Specialty License Plates Are Private Speech or Hybrid Speech

The Fourth Circuit was the first to address this issue in *Sons of Confederate Veterans v. Commissioner of the Virginia Department of Motor Vehicles* (2002). In this case, a Virginia statute authorized a specialty license plate for an organization of descendants of Confederate Army veterans but prohibited the plate from displaying the organization's logo, a Confederate flag. In determining whether the speech at issue was private or government, the court evaluated four factors:

> 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.

Analyzing the first factor, the court observed that the purpose of the specialty plate program was not only to raise money for the state but also to facilitate expression by the organization and its members. Looking to the second factor, the court concluded that the state exercised minimal editorial control over the message because the state accepted the organization's design for the specialty plate. Turning to the last two factors, the court observed that while the specialty plates were state property, individual vehicle owners were the "literal speakers" with "ultimate responsibility" for the speech because they displayed the specialty plates on their vehicles. Although the court recognized that some aspects of the factors weighed in favor of government speech, the court concluded that the message on the specialty plate was predominately private speech.

Having determined that private-speech interests were implicated, the court next tested the statute's logo restriction for viewpoint neutrality. The court observed that the restriction was "aimed at prohibiting the display of the Confederate flag" and that there were no other logo restraints in any other Virginia statutes authorizing specialty plates. Accordingly, the court concluded that the restriction impermissibly discriminated based on viewpoint.

In determining that messages on specialty plates are a combination of government speech and private speech, the Fourth Circuit in *Planned Parenthood of South Carolina, Inc. v. Rose* (2004) deviated from its holding in *Sons of Confederate Veterans* (2002). In *Rose* (2004), a state statute authorized a specialty license plate with the message "Choose Life." Applying the four-factor test set out in *Sons of Confederate Veterans* (2002), the court determined that the first factor weighed in favor of government speech. Because two legislators initiated the legislation, as opposed to a private sponsoring organization like in *Sons of Confederate Veterans* (2002), the court concluded that the sole purpose of the statute was to advance the state's preference for the pro-life viewpoint. Likewise, the court determined that the second factor weighed in favor of government speech. The court explained that the state exercised complete editorial control over the content of the plate because members of the legislature designed the "Choose Life" plate.

Turning to the final two factors, the court concluded that these factors weighed in favor of private speech. Although the state owned and authorized the specialty license plate, the court determined that vehicle owners were the "literal speakers" who bore "ultimate responsibility" for the message because they purchased the plates and displayed them on their vehicles. Because

indicators of both government speech and private speech were strongly present, the court concluded that the "Choose Life" message on the specialty plate was a mixture of government speech and private speech.

After deciding that the private speech attributes were substantial enough to evaluate the state's regulation of speech under the designated public forum doctrine, the court tested for viewpoint neutrality. In making this determination, the court stated that "the principle inquiry" is "whether the government has adopted a regulation of speech because of [agreement or] disagreement with the message it conveys." The court concluded that the state adopted the statute because it agreed with the pro-life message and, thus, discriminated based on viewpoint in violation of the First Amendment. The court reasoned that the state was impermissibly promoting the expression of only one position in the abortion debate by allowing a "Choose Life" specialty plate in the absence of a pro-choice plate.

In determining that messages on specialty license plates are private speech, the Ninth Circuit in *Arizona Life Coalition, Inc. v. Stanton* (2008) relied on the Fourth Circuit's four-factor test. In *Stanton* (2008), the Arizona License Plate Commission denied a private organization's application for a specialty license plate with the message "Choose Life." Applying the four-factor test, the court determined that the first factor weighed in favor of private speech because the statute's purpose was to raise money for the private organization. Similarly, the court concluded that the second factor weighed in favor of private speech because the private organization initiated the "Choose Life" specialty plate and determined the substantive content of the message.

Looking to the third factor, the court observed that the specialty plates were state-owned but that the private organization's logo and motto were displayed on the plate. Although the court noted that this factor had both government-speech and private-speech characteristics, the court concluded that this factor weighed primarily in favor of private speech. Turning to the final factor, the court observed that this factor weighed in favor of private speech because the private organization controlled the message on the specialty plates and because individual drivers dispersed the message by displaying the "Choose Life" plates on their vehicles. In light of these considerations, the court held that the "Choose Life" message on the specialty plate was private speech.

Having determined that the "Choose Life" message represented private speech, the court next considered the type of speech forum involved. The court concluded that the specialty license plate was a designated public forum because the state "open[ed] up its license plate forum to a certain class of organizations for expressive activity" and because the primary purpose of the license plate was to identify the vehicle.

The court then evaluated whether excluding the private organization from the designated public forum constituted viewpoint discrimination. The court determined that rejecting the "Choose Life" message "out of fear that other groups would express opposing views [on the subject of abortion]" was viewpoint discrimination. Accordingly, the court ordered the Commission to authorize the specialty license plate.

Agreeing with the decisions in *Stanton* (2008) and *Sons of Confederate Veterans* (2002), the Seventh Circuit in *Choose Life Illinois, Inc. v. White* (2008) concluded that messages on specialty license plates are private speech. Similar to the Arizona License Plate Commission in *Stanton* (2008), the Illinois Secretary of State and the Illinois legislature in *White* (2008) refused to approve a private organization's application for a "Choose Life" specialty license plate.

Applying a similar version of the four-factor test, the Seventh Circuit first observed that the specialty plates raised funds for the state and "serve[d] as 'mobile billboards' for the [private] organizations and like-minded vehicle owners to promote their causes." The court next determined that the sponsoring organization and the state shared editorial control over the message, reasoning that the organization developed the plate design and the state retained authority to modify it. The court further observed that even though the state authorized the message, the most obvious speakers were the vehicle owners who displayed the plates and "the sponsoring organizations whose logos or messages [were] depicted on the plates." Accordingly, the court concluded that individual drivers were the "ultimate communicator[s]" of the message on the specialty plate. In light of these considerations, the court held that the "Choose Life" message on the specialty plate was private speech.

Having determined that the "Choose Life" message represented private speech, the court considered the type of speech forum involved. The court concluded that the specialty license plate was a nonpublic forum because the state did "not open[] this particular property for general public discourse and debate" and because the primary purpose of the license plate was "to identify the vehicle, not to facilitate the free exchange of ideas."

The court then evaluated whether excluding the private organization from the nonpublic forum constituted viewpoint discrimination. The court disagreed with the Ninth Circuit's holding and reasoning in *Stanton* (2008) regarding viewpoint discrimination. The court observed that in both *Stanton* (2008) and the instant case the state refused to allow *any* messages concerning abortion on specialty license plates. As such, the court argued, the state "restrict[ed] . . . access to the specialty-plate forum based on subject matter: no plates on the topic of abortion." Accordingly, the court explained, the state "has not disfavored any particular perspective or favored one perspective over another on that subject." Based on these considerations, the court held that excluding the entire subject of abortion from the specialty license plate program was permissible content-based discrimination.

2. The Sixth Circuit Held that Messages on Specialty License Plates Are Government Speech

Although the cases involved similar facts, the Sixth Circuit in *American Civil Liberties Union of Tennessee v. Bredesen* (2006) rejected the Fourth Circuit's analysis and decision in *Rose* (2004) and relied instead on the recent Supreme Court decision in *Johanns v. Livestock Marketing Ass'n* (2005). In *Johanns* (2005), the federal government established a committee, some of whose members were private representatives, to develop a beef-promotion campaign. The Court concluded that the promotional message developed by the committee was entirely government speech because the federal government "set[] the overall message" and "approve[d] every word that [was] disseminated." The Court further reasoned that the government was "not precluded from relying on the government-speech doctrine merely because it solicit[ed] assistance from nongovernmental sources in developing specific messages."

The Sixth Circuit in *Bredesen* (2006) believed that the government exercised the same total control as in *Johanns* (2005) (Am. Civil Liberties Union of Tenn. v. Bredesen 2006). Similar to the government in *Johanns* (2005), the Tennessee legislature in *Bredesen* (2006) consulted with a private organization on the design of a "Choose Life" specialty plate. The court held that the "Choose Life" message on the specialty plate was government speech. Relying on the *Johanns* (2005) standard, the court explained that the private organization's participation in

developing the design of the plate did not preclude a finding of government speech because the Tennessee legislature "chose the 'Choose Life' plate's overarching message and approved every word to be disseminated."

The court further decided that Tennessee had not created a forum for private speech because drivers voluntarily communicated the government's message by displaying the specialty plates on their vehicles. Accordingly, the court concluded that viewpoint neutrality was not required, and the court upheld the statute authorizing the "Choose Life" specialty plate.

ANALYSIS

The conflicting decisions in the circuits regarding whether specialty license plates are government speech, private speech, or hybrid speech reveal the need for the Supreme Court to create a clear standard for determining whether speech is government, private, or a mixture of both. Until the Supreme Court does so, reconciling the circuit decisions in this paper will help provide some clarity in this area of the law.

First, we argue that the Fourth Circuit in *Rose* (2004) correctly determined that messages on specialty license plates are a mixture of government speech and private speech because the Fourth, Sixth, Seventh, and Ninth Circuits have all recognized that such messages implicate both government-speech and private-speech interests. Then, we assert that the Sixth Circuit in *Bredesen* (2006) incorrectly concluded that messages on specialty license plates are purely government speech because the court misapplied Supreme Court precedent.

A. The Fourth Circuit in *Rose* Accurately Concluded that Messages on Specialty License Plates are Hybrid Speech

The Fourth Circuit in *Rose* (2004) astutely determined that messages on specialty plates are a combination of government speech and private speech (Planned Parenthood of S.C., Inc. v. Rose 2004). Although the Sixth, Seventh, and Ninth Circuits disagree with this conclusion (Choose Life Ill., Inc. v. White 2008), they have all recognized that messages on specialty license plates have *both* government-speech and private-speech attributes.

For example, the Sixth Circuit in *Bredesen* (2006) observed that the "Choose Life" specialty plate implicated private-speech interests because a private organization helped design the plate and because one of the purposes of the specialty-plate statute was to raise funds for the private organization. On the other hand, the court noted that the state legislature "chose the 'Choose Life' plate's overarching message and approved every word to be disseminated," thus implicating government-speech interests.

Similarly, the Seventh Circuit in *White* (2008) observed that the "Choose Life" specialty plate implicated private-speech interests because a private organization developed the plate design; because individual vehicle owners communicated the message by displaying the plate on their vehicles; and because the specialty plate served as a "mobile billboard" for the private organization to communicate its message and promote its cause. In addition, the court recognized that the message on the "Choose Life" plate had government-speech characteristics because the state authorized and approved the message on the specialty plate; because the state retained authority to modify the plate design developed by the private organization; and because the specialty plates raised funds for the state.

Likewise, the Ninth Circuit in *Stanton* (2008) observed that the "Choose Life" specialty plate implicated private-speech interests because one of the purposes of the specialty-plate program was to raise money for a private organization; because the private organization determined that its logo and motto would be displayed on the plate; and because individual drivers displayed the "Choose Life" plates on their vehicles (Ariz. Life Coal., Inc. v. Stanton 2008). Further, the court recognized that the message on the "Choose Life" plate had government-speech attributes because the specialty plate was state-owned and because one of the purposes of the specialty-plate program was to raise money for the state.

After recognizing that messages on specialty license plates have both government-speech and private-speech attributes, the Seventh and Ninth Circuits discounted the government-speech attributes and the Sixth Circuit discounted the private-speech attributes so that the messages would fit squarely within a single speech category (Choose Life Ill., Inc. v. White 2008). However, it is an "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" (Sons of Confederate Veterans v. Comm'r of the Va. Dep't of Motor Vehicles 2002). The analysis in these circuit decisions reveals that messages on specialty license plates are neither purely government speech nor purely private speech because they implicate both government-speech and private-speech interests.

Moreover, this conclusion is consistent with the Supreme Court's decision in *Wooley v. Maynard* (1977). In *Wooley* (1977), the Court held that the state could not require private individuals to display the state's motto, "Live Free or Die," on their license plates. This case indicates that messages conveyed through license plates "implicate private-speech interests because of the connection of any message on the plate to the driver or owner of the vehicle" (Sons of Confederate Veterans v. Comm'r of the Va. Dep't of Motor Vehicles 2002). Nevertheless, this case does not stand for the principle that messages on license plates constitute purely private speech or implicate *only* private-speech interests. Accordingly, the Court's decision in *Wooley* (1977) does not undermine the conclusion that messages on specialty license plates are a mixture of government speech and private speech. Given that messages on specialty plates are hybrid speech, the Supreme Court should recognize that speech can be a combination of government and private speech (Planned Parenthood of S.C., Inc. v. Rose 2004).

In summary, because messages on specialty license plates implicate both government-speech and private-speech interests, the Fourth Circuit in *Rose* astutely determined that messages on specialty plates are a mixture of government speech and private speech. Although the Supreme Court has not explicitly addressed the issue of hybrid speech (Daffer 2007), courts commonly assume that all speech is either purely private speech or purely government speech (Planned Parenthood of S.C., Inc. v. Rose 2004). However, messages on specialty license plates, with their dual government-speech and private-speech characteristics, show that the Supreme Court should recognize hybrid speech and create a clear standard for determining whether speech is private, government, or hybrid (Daffer 2007). This would also require the Supreme Court to develop a test for determining whether the government-speech doctrine or private-speech forum analysis applies to hybrid speech. Creating such a test is "crucial[] because government speech is subject to far less First Amendment scrutiny, and under the government[-]speech doctrine, the government has the ability to engage in viewpoint discrimination when it is disseminating its own message."

B. The Sixth Circuit's Holding in *Bredesen* Is Flawed Because the Court Misapplied Supreme Court Precedent

In determining that the "Choose Life" message on specialty plates is government speech, the Sixth Circuit in *Bredesen* (2006) misapplied Supreme Court precedent. Specifically, the Sixth Circuit's first error was assuming that the Supreme Court in *Johanns* (2005) created a new, rigid test for government speech that applies in all contexts (Choose Life Ill., Inc. v. White 2008). The Sixth Circuit's second error was concluding that messages on specialty license plates do not implicate any private-speech interests (Am. Civil Liberties Union of Tenn. v. Bredesen 2006). This conclusion is inconsistent with Supreme Court precedent and ignores the possible First Amendment harms inherent in specialty-plate cases.

In evaluating the speech implications of messages on specialty license plates, the Sixth Circuit in *Bredesen* (2006) abandoned the four-factor test in favor of the principle from *Johanns* (2005) that "when . . . 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 merely because it solicits assistance from nongovernmental sources in developing specific messages" (Johanns v. Livestock Marketing Ass'n 2005). In *Bredesen* (2006), the state legislature consulted with a private organization on the design of a "Choose Life" specialty plate. Relying on the *Johanns* (2005) standard, the court explained that the private organization's participation in developing the design of the plate did not preclude a finding of government speech because the state legislature "chose the 'Choose Life' plate's overarching message and approved every word to be disseminated."

Nonetheless, the Sixth Circuit relied on the standard in *Johanns* (2005) without considering whether *Johanns* (2005) is applicable to specialty-plate cases. The court assumed that *Johanns* (2005) "established a new test for government speech, applicable in all contexts." However, instead of replacing the Fourth Circuit's four-factor test with a new standard, the Supreme Court in *Johanns* (2005) reinforced the applicability of the four-factor (Ariz. Life Coal., Inc. v. Stanton 2008) test because "the Court relied on factors similar to those set forth in the four-factor test," such as the degree of editorial control exercised over the advertisement and the program's purpose. But, the four-factor test is more applicable in the specialty-plate context because it requires courts to consider additional factors, such as "the identity of the 'literal speakers" (Sons of Confederate Veterans v. Comm'r of the Va. Dep't of Motor Vehicles 2002). This additional factor is essential in specialty-plate cases because the First Amendment danger is that the literal speaker may be "denied the opportunity to speak on the same terms as other private citizens within a government sponsored forum" (Am. Civil Liberties Union of Tenn. v. Bredesen 2006). Conversely, the harm in *Johanns* (2005) is "being forced to give the government money to pay for someone else's message." Accordingly, to ensure that literal speakers receive full First Amendment protection, courts should apply the four-factor test, not the *Johanns* standard, in specialty-plate cases. Therefore, the Sixth Circuit's analysis in *Bredesen* is flawed because the court did not evaluate the case under the four-factor test.

The Sixth Circuit's second error was concluding that messages on specialty license plates implicate no private-speech interests (Civil Liberties Union of Tenn. v. Bredesen 2006). This conclusion is illogical for two reasons. First, it contravenes the Supreme Court's proposition in *Wooley v. Maynard* (1977) that messages on license plates "implicate private-speech interests because of the connection of any message on the plate to the driver or owner of the vehicle" (Sons of Confederate Veterans v. Comm'r of the Va. Dep't of Motor Vehicles 2002). Individual

vehicle owners choose to display specialty plates on their vehicles because they agree with and embrace as their own the message on the plate (Choose Life Ill., Inc. v. White 2008). Further, most courts addressing the similar subject of vanity plates have relied on *Wooley* (1977) to conclude that messages on vanity plates constitute private speech (Perry v. McDonald 2001). Moreover, as noted above, the constitutional danger in the specialty-plate context is "being denied the opportunity to speak on the same terms as other private citizens within a government sponsored forum" (Liberties Union of Tenn. v. Bredesen 2006). In light of these considerations, the Sixth Circuit incorrectly determined that messages on specialty license plates implicate no private-speech interests (Choose Life Ill., Inc. v. White 2008; Ariz. Life Coal., Inc. v. Stanton 2008).

In summary, the Sixth Circuit's analysis in *Bredesen* (2006) is flawed because the court relied on the standard in *Johanns* (2005) instead of applying the four-factor test. To ensure that literal speakers receive full First Amendment protection, courts should apply the Fourth Circuit's four-factor test, not the *Johanns* (2005) standard, in specialty-plate cases. The Sixth Circuit's second error was concluding that messages on specialty license plates implicate no private-speech interests (Life Coal., Inc. v. Stanton 2008). This conclusion is inconsistent with Supreme Court precedent and ignores the possible First Amendment harms inherent in specialty-plate cases.

CONCLUSION

In this paper, we have discussed the benefits of personalized licenses plates to both the customer and the organization, and we have examined the historical development of the law relating to the government-speech doctrine and private-speech forum analysis to try to determine whether messages on specialty license plates are government speech, private speech, or hybrid speech. We have argued that the Fourth Circuit correctly determined that messages on specialty license plates are a mixture of government speech and private speech, that the Sixth Circuit's holding—that messages on specialty license plates are purely government speech—is flawed because the court misapplied Supreme Court precedent, and that the Supreme Court must establish a clear standard for determining whether speech is private, government, or a mixture of both. We will now examine the marketing ethics implications of allowing or denying consumers the right to publically express their beliefs through these plates.

Marketers may consider applying the four-factor test themselves when determining whether or not their messages on these plates would be considered private or government speech or a combination of both. By simply examining: 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, marketers may craft their messages in such a way that encourages approval from the states.

By preparing themselves with a solid understanding of the law, marketers can set themselves up for a successful specialty plate campaign that will not only raise funds for their organization, but also continue to heighten awareness within the community.

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Choose Life Ill., Inc. v. White, 547 F.3d 853, 862 (7th Cir. 2008) (describing the court's conclusion in *Bredesen* as a "non sequitur").

Choose Life Ill., Inc. v. White, 547 F.3d 853, 862 (7th Cir. 2008) (stating that the court in *Bredesen* "thought *Johanns* established a new test for government speech, applicable in all contexts").

Choose Life Ill., Inc. v. White, 547 F.3d 853, 863 (stating that specialty license plates "serve as 'mobile billboards' for the [private] organizations and like-minded vehicle owners to promote their causes").

Choose Life Ill., Inc. v. White, 547 F.3d 853, 864 (7th Cir. 2008) (holding that messages on specialty license plates are private speech).

Choose Life Ill., Inc. v. White, 547 F.3d 853, 865 (7th Cir. 2008) (prohibiting the issuance of "Choose Life" specialty plates).

Christian Legal Soc'y v. Walker, 453 F.3d 853, 865 (7th Cir. 2006) (citing *Rosenberger*, 515 U.S. at 829–30).

Cornelius v. NAACP Legal Def. & Educ. Fund, Inc., 473 U.S. 788, 800 (1985).

Daffer, Traci, *A License to Choose or a Plate-ful of Controversy? Analysis of the "Choose Life" Plate Debate*, 75 UMKC L. REV. 869, 890 (2007) (stating that the Supreme Court has not created a clear rule for determining whether speech is private, government, or both).

Evans, W. Alexander, *License to Discriminate: "Choose Life" License Plates and the Government Speech Doctrine*, 8 NEV. L.J. 765, 772 (2008) (citing Legal Servs. Corp. v. Velazquez, 531 U.S. 533, 542–43 (2001)).
Good News Club v. Milford Cent. Sch., 533 U.S. 98, 106–07 (2001).
Johanns v. Livestock Marketing Ass'n, 544 U.S. 550 (2005).
Johanns v. Livestock Marketing Ass'n, 544 U.S. 550, 557 (2005) ("[W]e held [in *Wooley*] that requiring a New Hampshire couple to bear the [s]tate's motto, 'Live Free or Die,' on their cars' license plates was an impermissible compulsion of expression.").
Johanns v. Livestock Marketing Ass'n, 544 U.S. 550, 562 (2005).
Legal Servs. Corp. v. Velazquez, 531 U.S. 533, 541 (2001) (permitting viewpoint-based distinctions when the government itself speaks).
Moragne v. States Marine Lines, Inc., 398 U.S. 375, 402 (1970) (explaining that it is important for the public to have faith in the judiciary).
Perry v. McDonald, 280 F.3d at 159, 166 (2d Cir. 2001) (explaining that a restriction on vanity plates "concern[ed] private individuals' speech on government-owned property").
Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 45 (1983).
Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 46 (1983).
Planned Parenthood of S.C., Inc. v. Rose, 361 F.3d 786, 792 (4th Cir. 2004) (explaining that there is a "common assumption" that "all speech is either government speech or private speech").
Planned Parenthood of S.C., Inc. v. Rose, 361 F.3d 786, 793 (4th Cir. 2004) (holding that the "Choose Life" message on a specialty license plate is a mixture of private and government speech).
Planned Parenthood of S.C., Inc. v. Rose, 361 F.3d 786, 794 (4th Cir. 2004) (holding that the "Choose Life" message on a specialty license plate is a combination of private speech and government speech).
Planned Parenthood of S.C., Inc. v. Rose, 361 F.3d 786, 795 (4th Cir. 2004) ("[T]he Supreme Court has not yet recognized that speech can be governmental and private at the same time.").
Planned Parenthood of S.C., Inc. v. Rose, 361 F.3d 786, 799 (4th Cir. 2004) (prohibiting the state from issuing "Choose Life" plates).
Rosenberger v. Rector & Visitors of the Univ. of Va., 515 U.S. 819, 829 (1995).
Rosenberger v. Rector & Visitors of the Univ. of Va., 515 U.S. 819, 833 (1995).
Rust v. Sullivan, 500 U.S. 173, 193 (1991) (permitting viewpoint-based distinctions when the government uses private speakers to disseminate information regarding a government program).
Sons of Confederate Veterans v. Comm'r of the Va. Dep't of Motor Vehicles, 288 F.3d 610, 618 (4th Cir. 2002).
Sons of Confederate Veterans v. Comm'r of the Va. Dep't of Motor Vehicles, 288 F.3d 610, 618–19 (4th Cir. 2002).
Sons of Confederate Veterans v. Comm'r of the Va. Dep't of Motor Vehicles, 288 F.3d 610, 621 (4th Cir. 2002) (holding that messages on specialty license plates are private speech).

Sons of Confederate Veterans v. Comm'r of the Va. Dep't of Motor Vehicles, 288 F.3d 610, 621 (4th Cir. 2002).
Sons of Confederate Veterans v. Comm'r of the Va. Dep't of Motor Vehicles, 288 F.3d 610, 621 (4th Cir. 2002) (discussing the Supreme Court's decision in *Wooley*).
Sons of Confederate Veterans v. Comm'r of the Va. Dep't of Motor Vehicles, 288 F.3d 610, 626 (4th Cir. 2002) (ordering the issuance of specialty license plates bearing a private organization's motto, the Confederate flag).
Ward v.Rock Against Racism, 491 U.S. 781, 791 (1989).
Wooley v. Maynard, 430 U.S. 705 (1977).
www.msnbc.msn.com, "DMV Denies Vegan's Tofu License Plate Request," Associated Press, April 8, 2009.
www.txchoose-life.org, "Making a *Choose Life* License Plate a Reality in Texas," 2009.

FIGURE 1:

Fund Raising for Specific Causes:

Agriculture	**Animal Friendly**	**Choose Life**
		
Notes: $30.75 of the $35.00 additional fee is appropriated to the Department of Agriculture to be used for funding education and awareness of agriculture in Tennessee.	**Notes:** $15.38 of the $35.00 additional fee is allocated to the Animal Population Control Endowment Fund.	**Notes:** $15.38 of the $35.00 additional fee will be allocated to New Life Resources and shall be used exclusively for counseling and financial assistance including food, clothing, and medical assistance for pregnant women in Tennessee and will also be used to coordinate statewide awareness campaigns, a toll-free helpline and to reimburse social service providers who prepare adoptions throughout the state for services and programs targeting at-risk women and families.

University Examples:

Out-of-State License Plates (SEC Rivals):			***Private Universities:***	
University of Alabama	**University of Florida**		**Vanderbilt University**	**University of the South**