

NOTES

The First Amendment and Specialty License Plates: The “Choose Life” Controversy

I. INTRODUCTION

Specialty license plate programs, specifically the “Choose Life” specialty license plate, have been and continue to be the subject of much controversy. For those in the pro-life community, the stakes are high. In Florida, as of February 29, 2008, the “Choose Life” specialty license plate has raised over five and a half million dollars for organizations that help women who are committed to adoption.¹ For those on both sides of the debate, the “Choose Life” controversy is shaping the way the judicial system defines government and private speech. Therefore, this controversy has serious implications for First Amendment rights.

The government speech doctrine, concerning speech by the government that is not required to be viewpoint neutral, is a fairly recent concept.² As cooperation between government and private parties continues to increase, the distinction between government and private speech becomes even more important. When demarcation between government and private speech is unclear, the government argues that a certain message is government speech

1. Choose Life, Inc., About Us, <http://www.choose-life.org/story.html> (last visited Oct. 22, 2008). Proceeds for Illinois state parks from an environmental specialty license plate total over seven million dollars, and Massachusetts environmental plates generate about one million dollars annually for environmental nonprofit groups. Deborah Olszonowicz, Nat’l Conference of State Legislatures, NCSL Transportation Reviews: Motor Vehicle Registration and License Plates (Sept. 1999), http://www.ncsl.org/programs/transportation/tranrm_p.htm#specialty. Proceeds from Centennial Commemorative plates totaled approximately one million dollars for a variety of centennial celebrations in Las Vegas in 2005. Anne Teigan & Nicholas Farber, Nat’l Conference of State Legislatures, NCSL Transportation Review: Motor Vehicle Registration and License Plates (July 2007), <http://www.ncsl.org/print/transportation/license-registration07.pdf>.

2. The concept only gained prominence after the decision in *Rust v. Sullivan*, 500 U.S. 173 (1991). In *Rust*, plaintiffs challenged a regulation barring doctors, who were subsidized by family planning funds under the Public Health Service Act, from discussing abortion with patients. *Id.* at 178-81. The Supreme Court upheld the regulation, holding that when the government itself is the speaker viewpoint-based funding decisions are allowed. *Id.* at 194.

because the message is literally printed on government property (e.g., specialty license plates) or part of a specific government program (e.g., family planning under Title X of the Public Health Service Act at issue in *Rust*).³ But to some extent, the property itself is simply a vehicle for individuals to express private speech (such as “Choose Life” supporters wanting to put their message on specialty license plates), and the program might involve administration by private parties (such as the doctors subsidized by family planning funds in *Rust*).⁴ If a specialty license plate is considered government speech, then viewpoint neutrality is not required. Further, expanding the government speech doctrine may chill private citizens’ free speech rights. Alternatively, if a specialty license plate is deemed private speech, it may gloss over any compelling state interest the government has in crafting its own message.

This summary will examine the models of specialty license plate creation, the history of “Choose Life” specialty license plates, the litigation surrounding the controversy, and the two differing standards courts have used to distinguish government and private speech: the Fourth Circuit’s four-factor test and the *Johanns* test.

In its “four-factor” test, the Fourth Circuit looks to the following factors to distinguish between government and private speech: (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.⁵ The Sixth Circuit has declined to apply the four-factor test and instead has applied the test from *Johanns* – whether “the government sets the overall message to be communicated and approves every word that is disseminated”⁶ – to distinguish government from private speech.⁷

Recently, the Ninth Circuit⁸ and several federal district courts⁹ have adopted the four-factor test of the Fourth Circuit instead of the Sixth Circuit’s *Johanns* test. However, the Sixth Circuit’s decision to use the *Johanns* test over the four-factor test is evidence that there is a split among the circuits

3. See 500 U.S. 173.

4. *Id.*

5. *Sons of Confederate Veterans, Inc. v. Comm’r of Va. Dep’t of Motor Vehicles*, 288 F.3d 610, 618 (4th Cir. 2002).

6. *Johanns v. Livestock Mktg. Ass’n*, 544 U.S. 550, 562 (2005).

7. *ACLU of Tenn. v. Bredesen*, 441 F.3d 370, 376 (6th Cir. 2006) (quoting *Johanns v. Livestock Mktg. Ass’n*, 544 U.S. 550, 562 (2005)).

8. *Ariz. Life Coal. Inc. v. Stanton*, 515 F.3d 956, 965 (9th Cir. 2008), *cert. denied*, 129 S. Ct. 56 (2008).

9. *Choose Life of Mo., Inc. v. Vincent*, No. 06-0443-CV-W-SOW, 2008 U.S. Dist. LEXIS 6524, at *12 (W.D. Mo. Jan. 23, 2008); *Children First Found., Inc. v. Martinez*, No. 1:04-CV-0927, 2007 WL 4618524, at *7 (N.D.N.Y. Dec. 27, 2007); *Byrne v. Lunderville*, No. 1:05-CV-15, 2007 WL 2892620, at *4 (D. Vt. Sept. 28, 2007); *Choose Life Ill., Inc. v. White*, No. 04-C-4316, 2007 WL 178455, at *4 (N.D. Ill. Jan. 19, 2007).

regarding which test is most appropriate when applied to the controversy surrounding specialty license plates.

Currently, there is pending litigation in three states,¹⁰ while in fifteen other states pro-life groups are working toward obtaining a “Choose Life” specialty license plate.¹¹ Moreover, debate continues to surround the issue of specialty license plates outside of the “Choose Life” controversy.¹² Since there is currently a split of authority between the circuits, and because the United States Supreme Court has denied certiorari on the issue five times,¹³ the specialty license plate controversy will only escalate over the coming years.

II. LEGAL BACKGROUND

A. Models of Specialty License Plate Creation

There are three models of specialty license plate creation in which individuals or organizations are able to receive and display their own specialty license plates.¹⁴ The three models of specialty license plate creation are the administrative model, the legislative model, and a hybrid model.

1. Administrative Model

In the administrative model of specialty license plate creation, a state legislature enacts a specialty license plate statute which defines the process by which organizations may apply for specialty plates and designates an agency to review such applications. Montana, for example, has a purely

10. Choose Life, Inc., Other States, <http://www.choose-life.org/states.htm> (last visited Oct. 23, 2008).

11. *Id.*

12. See Jessica Gresko, *Florida Lawmakers Debate Offering a Christian License Plate*, BREITBART.COM, Apr. 24, 2008, <http://www.breitbart.com/article.php?id=D9083RK80>; Bill Estep, *Anti-porn Group Seeks License Plate*, <http://www.protect-x.com/news/707/Anti-porn-group-seeks-license-plate.html> (last visited Oct. 23, 2008).

13. See *Ariz. Life Coal. Inc. v. Stanton*, 515 F.3d 956 (9th Cir. 2008), *cert. denied*, 129 S. Ct. 56 (2008); *Hill v. Kemp*, 478 F.3d 1236 (10th Cir. 2007), *cert. denied*, 128 S. Ct. 884 (2008); *ACLU of Tenn. v. Bredesen*, 441 F.3d 370 (6th Cir. 2006), *cert. denied*, 548 U.S. 906 (2006); *Henderson v. Stalder*, 407 F.3d 351 (5th Cir. 2005), *cert. denied sub nom. Keeler v. Stalder*, 548 U.S. 904 (2006); *Planned Parenthood of S.C., Inc. v. Rose*, 361 F.3d 786 (4th Cir. 2004), *cert. denied*, 543 U.S. 1119 (2005).

14. See Leslie Gielow Jacobs, *Free Speech and the Limits of Legislative Discretion: The Example of Specialty License Plates*, 53 FLA. L. REV. 419, 424-27 (2001); Alana C. Hake, Note, *The States, a Plate, and the First Amendment: The “Choose Life” Specialty License Plate as Government Speech*, 85 WASH. U. L. REV. 409, 414-16 (2007).

administrative model of specialty license plate creation. Under the Montana Generic Specialty License Plate Act,¹⁵ the Department of Motor Vehicles is charged with designing the background and general format of the specialty license plate, determining the most efficient and versatile manufacturing method of specialty license plates, and plate numbering.¹⁶ The Department must also adopt rules specifying the minimum and maximum number of characters a specialty license plate may contain, the general placement of a sponsor's name, message, and graphic, and any other limitations on the choice of color or detail of the graphic.¹⁷ Additionally, the sponsor name, message, and graphic must be approved by the Department.¹⁸ A governmental body¹⁹ or organization²⁰ may qualify as a sponsor under the Act if the entity meets certain requirements.²¹ Once the specialty plate is created, the Department of Motor Vehicles must issue a set of generic specialty license plates to an individual who applies and pays both an administrative fee²² and "the donation fee established by the plate sponsor."²³

2. Legislative Model

In contrast to the administrative model, the legislative model of specialty license plate creation involves legislatures enacting statutory provisions that create individual specialty license plates.²⁴ A senator or representative sponsors a bill detailing who may apply, the design, additional fees, and any limitations (i.e. on transferability).²⁵ For example, in 2007 in Tennessee, two legislators introduced a bill to create a specialty license plate benefiting the Tennessee Equality Project Foundation, an organization that promotes education and dialogue on issues related to equality for gay, lesbian, bisexual, and transgender persons in Tennessee.²⁶ Although several

15. MONT. CODE ANN. §§ 61-3-472 to -481.

16. MONT. CODE ANN. § 61-3-474(1)(a)-(c).

17. MONT. CODE ANN. § 61-3-474(1)(d).

18. MONT. CODE ANN. § 61-3-474(2).

19. MONT. CODE ANN. § 61-3-476.

20. MONT. CODE ANN. § 61-3-475.

21. Requirements include, but are not limited to: submitting an application, proof of good standing, designation of one organizational member as specialty plate liaison, and a proposed donation fee scheme. *Id.*

22. MONT. CODE ANN. § 61-3-480.

23. MONT. CODE ANN. § 61-3-479.

24. Hake, *supra* note 14, at 414.

25. *See, e.g.*, S.B. 856, 94th Gen. Assem., 2d Reg. Sess. (Mo. 2008), available at <http://www.senate.mo.gov/08info/pdf-bill/perf/SB856.pdf> (creating an Armed Forces Expeditionary Medal license plate in Missouri).

26. "Legislators introduce license plate bill for Tennessee Equality Project Foundation." Tennessee Equality Project, Legislators Introduce License Plate Bill for Tennessee Equality Project Foundation (Feb. 15, 2007), <http://www.tnep.org/html/021507Bill.html>.

specialty license plates can be created through the enactment of a single piece of legislation, Tennessee's statutes make clear that no specialty license plate may be created without specific legislative authorization.²⁷ Tennessee has a purely legislative model of specialty license plate creation.²⁸ Currently, in Tennessee the legislature has enacted over sixty-five statutory subsections to allow the issuance of individual specialty license plates.²⁹

3. Hybrid Model

Finally, some states have instituted a hybrid administrative and legislative model for specialty license plate creation – such is the case with Missouri.³⁰ Missouri has two distinct procedures for obtaining a specialty license plate.³¹ First, similar to the legislative model of specialty license plate creation, the Missouri legislature can pass a bill that creates a specialty license plate.³² The Missouri legislature has created approximately seventy license plates through this model, including: “Knights of Columbus,” “Harmony – Grand Eastern Star,” “Prince Hall – Missouri & Jurisdiction – Free & Accepted Masons,” “Shriners Help Kids” and “NAACP” plates.³³ The second procedure reflects the administrative model for specialty plate creation. Private organizations can apply to the Missouri Department of Revenue, and the department then submits the application to the Joint Committee on Transportation for approval.³⁴ After committee approval, the proposed art design is submitted, and the plate must be issued within one year.³⁵

In Missouri, the two models of specialty plate creation serve as two separate tracks for an organization to obtain a specialty plate. Nothing limits an

27. See TENN. CODE ANN. § 55-4-209 (defining “specialty...plate[s]” as those plates “authorized by statute”).

28. See TENN. CODE ANN. § 55-4-201 to -202, -209.

29. See, e.g., TENN. CODE ANN. § 55-4-232 (“Let’s Go Camping”); TENN. CODE ANN. § 55-4-233 (“Alpha Omicron Pi”); TENN. CODE ANN. § 55-4-234 (“Driving to a Cure”); TENN. CODE ANN. § 55-4-235 (“Former Prisoners of War”).

30. At the outset, it is important to note that Missouri has been operating under a hybrid model since the statutory scheme for the administrative process was enacted in 2004. MO. REV. STAT. § 301.3150 (Supp. 2007). However, recent litigation has left the existence of the administrative track uncertain. See *Choose Life of Mo., Inc. v. Vincent*, No. 06-0443-CV-W-SOW, 2008 U.S. Dist. LEXIS 6524 (W.D. Mo. Jan. 23, 2008). With an appeal pending in the Eighth Circuit, the future of the administrative track of specialty plate creation in Missouri remains uncertain. *Roach v. Davis*, *appeal docketed*, No. 08-1429 (8th Cir. Feb. 25, 2008).

31. *Choose Life of Mo., Inc. v. Vincent*, No. 06-0443-CV-W-SOW, 2008 U.S. Dist. LEXIS 6524, at *3-5 (W.D. Mo. Jan. 23, 2008).

32. See, e.g., Mo. S.B. 856 (creating an Armed Forces Expeditionary Medal license plate in Missouri).

33. *Choose Life of Mo.*, 2008 U.S. Dist. LEXIS 6524, at *4.

34. MO. REV. STAT. § 301.3150.

35. *Id.*

organization from pursuing both tracks simultaneously or choosing to pursue only one. With a legislative model, an organization would have to find a member of the General Assembly to sponsor the legislation, seek support from a majority of the members of the General Assembly, and ensure that the piece of legislation reaches the decision agenda. An applicant wishing to seek a specialty plate in Missouri under the administrative model would have to submit a petition including a list of two hundred potential purchasers and an application fee to the Department of Revenue, and then seek approval from the Joint Committee on Transportation Oversight.³⁶ An organization might find one of these tracks more feasible than another and therefore may choose to only pursue one for the purpose of specialty license plate creation.

Florida is another example of a state that has neither a purely legislative nor purely administrative model of specialty plate creation.³⁷ Rather than having two separate tracks, where organizations can choose either an administrative track or a legislative track, the model is both administrative and legislative.³⁸ Under Florida's original specialty license plate creation statute, an applicant must submit a petition with signatures of potential purposes, an application fee, and a marketing strategy plan on forms provided by the department.³⁹ This information is submitted to the legislature for their approval.⁴⁰ If approved, the applicant then must submit a proposed design for the specialty license plate to the department.⁴¹ If the legislature does not approve the application, the application fee is refunded to the organization.⁴²

B. History of "Choose Life" Specialty License Plates

The "Choose Life" license plate was first made available in Florida, in 1996, when Marion County Commissioner Randy Harris began a grassroots campaign to obtain the required application fee.⁴³ The "Choose Life" license plate would raise funds and awareness to support women who would commit to making an adoption plan for their unplanned pregnancies.⁴⁴ The Commis-

36. *Id.*

37. Illinois is another example. After a district court interpreted the specialty license plate statute in Illinois to allow the Secretary of State to issue specialty license plates without specific enabling legislation, the legislature (while an appeal of the district court's interpretation of the statute was pending) amended the statute to *require* legislative approval for any new specialty license plate. *See Choose Life Ill., Inc. v. White*, 547 F.3d 853 (7th Cir. 2008). As in Florida, the statute in Illinois requires an organization collect signatures and submit an application to the Secretary of State and then seek legislative approval. *See* 625 ILL. COMP. STAT. 5/3-600(a).

38. FLA. STAT. § 320.08056.

39. *Id.*

40. *Id.*

41. *Id.*

42. *Id.*

43. *Id.*; Choose Life, Inc., *supra* note 1.

44. Choose Life, Inc., *supra* note 1.

sioner and other pro-life citizens formed Choose Life, Inc., a pro-life, non-profit group to help raise funds for the application fee (to defray the cost to the Department of Motor Vehicles)⁴⁵ and gather signatures of potential purchasers.⁴⁶ In 1998, the Florida General Assembly passed legislation creating a “Choose Life” plate but the legislation was vetoed by then-Governor Lawton Chiles.⁴⁷ In 1999, the legislation was resubmitted, passed the Florida General Assembly, and was signed into law by then-Governor Jeb Bush.⁴⁸

After its success in Florida, Choose Life, Inc., created similar pro-life specialty plate campaigns in forty-six states.⁴⁹ Currently, the “Choose Life” specialty license plate is available in nineteen states.⁵⁰ State law varies as to whether and how the proceeds generated by the plates might be used, typically a plan for the proceeds is submitted by the applicant (in an administrative model) or as part of the legislative act (in a legislative model). Seven states with “Choose Life” specialty license plates donate a portion of proceeds to specific pro-life organizations.⁵¹ Thirteen states donate a portion of the proceeds to organizations that provide adoption assistance and counseling.⁵² Eight states prohibit the allocation of such funds to be used by agencies or organizations that provide abortion services, counseling or referral.⁵³ The instigation of pro-life specialty plate initiatives in additional states has fueled the “Choose Life” controversy.

45. FLA. STAT. § 320.08053(1)(c) (“An organization that seeks authorization to establish a new specialty license plate for which an annual use fee is to be charged must submit to the department . . . [a]n application fee, not to exceed \$70,000, to defray the department’s cost for reviewing the application and developing the specialty license plate . . .”).

46. *Id.* Under the first version of Florida’s specialty license creation statutory scheme, organizations were required to show proof of potential purchasers. *See* 1995 Fla. Laws chs. 95-282, § 1 (“An organization that seeks the authorization to establish a new specialty license plate for which an annual use fee is to be charged must submit to the department . . . [a]n petition, on a form approved by the department, signed by 10,000 or more residents who state their intent to purchase the requested specialty license plate.”).

47. *Id.*

48. *Id.*; Olszonowicz, *supra* note 1.

49. Choose Life, Inc., *supra* note 1.

50. Alabama, Arkansas, Connecticut, Florida, Georgia, Hawaii, Indiana, Kentucky, Louisiana, Maryland, Mississippi, Missouri, Montana, Ohio, Oklahoma, Pennsylvania, South Carolina, South Dakota, and Tennessee. *See* Choose Life, Inc., *supra* note 10.

51. GUTTMACHER INST., STATE POLICIES IN BRIEF: ‘CHOOSE LIFE’ LICENSE PLATES 1 (Oct. 1, 2008), http://www.guttmacher.org/statecenter/spibs/spib_CLLP.pdf.

52. *Id.*

53. *Id.*

C. Supreme Court Decisions

The United States Supreme Court has not yet addressed the specific issue of whether specialty license plates constitute government speech or private speech. However, several United States Supreme Court cases offer guidance to lower courts, as the Court has addressed a number of issues which are pertinent to the discussion of specialty license plates.

Rust v. Sullivan was the first case that established the government speech doctrine, although it did not use the term “government speech.”⁵⁴ At issue in this case were regulations promulgated under Title X of the Public Health Service Act,⁵⁵ which provided federal funds for family planning services. The regulations were challenged by doctors and grantees of such funds as (1) unauthorized by Title X, (2) violative of the First Amendment rights of Title X clients and providers, and (3) violative of the Fifth Amendment rights of Title X clients.⁵⁶ The specific regulations⁵⁷ at issue narrowed the definition of “family planning” to include “preventive family planning services,” effectively excluding counseling related to abortion.⁵⁸ The Court reasoned that, “[t]he Government can, without violating the Constitution, selectively fund a program to encourage certain activities it believes to be in the public interest, without at the same time funding an alternative program which seeks to deal with the problem in another way.”⁵⁹ The Court noted that it “[was] not the case [here] of a general law singling out a disfavored group on the basis of speech content, but a case of the Government refusing to fund activities, *including speech*, which are specifically excluded from the scope of the project funded.”⁶⁰ In effect, the Court in *Rust* held that the doctor’s actions were government speech.⁶¹

Four years later, in *Rosenberger v. Rector & Visitors of the University of Virginia*,⁶² the United States Supreme Court again addressed the issue of free speech as it related to government-funded public institutions. In this case, a Christian student magazine organization and several of the magazine’s editors

54. 500 U.S. 173 (1991).

55. 42 U.S.C. §§ 300-300a-6 (2000).

56. *Rust*, 500 U.S. at 181.

57. Statutory Prohibition on Use of Appropriated Funds in Programs Where Abortion Is a Method of Family Planning; Standard of Compliance for Family Planning Services Project, 53 Fed. Reg. 2922, 2925 (Feb. 2, 1988) (to be codified at 42 C.F.R. pt. 59).

58. *Rust*, 500 U.S. at 179.

59. *Id.* at 193.

60. *Id.* at 194-95 (emphasis added).

61. Although the court in *Rust* never mentioned the term “government speech,” the “Court has consistently interpreted *Rust* on th[e] basis [that the doctors’ actions were government speech].” See *Pittsburg League of Young Voters Educ. Fund v. Port Auth. of Allegheny County*, No. 2:06-cv-1064, 2008 U.S. Dist. LEXIS 63370, at *22 (W.D. Pa. Aug. 14, 2008).

62. 515 U.S. 819 (1995).

challenged the school's refusal to authorize printing costs on the basis of religious viewpoint.⁶³ The magazine and editors claimed such action violated their First Amendment rights.⁶⁴ The Court concluded that by "withholding... assistance that the University provides generally to all other student publications, the University has discriminated on the basis of the magazine's religious viewpoint in violation of the Free Speech Clause."⁶⁵

While the United States Supreme Court frequently addresses free speech issues, the Court has looked at the controversy surrounding license plates only once, in *Wooley v. Maynard*,⁶⁶ albeit before the "government speech" doctrine truly came into being. Also, although the Court only examined the tangential issue of compelled speech, the Court's analysis sheds light on the relationship between the First Amendment and specialty license plates. In *Wooley*, the Court addressed the issue of "whether the State of New Hampshire [could] constitutionally enforce criminal sanctions against persons who cover the motto 'Live Free or Die' on passenger vehicle license plates because that motto is repugnant to their moral and religious beliefs."⁶⁷ The Court found that the statute criminalizing obstruction of the state motto, "Live Free or Die" on license plates implicated the First Amendment rights of the private individuals involved and that the state's espoused interests⁶⁸ were not sufficiently compelling to require the private individuals to display the state motto on their license plates.⁶⁹ The Court ultimately concluded that "the State may [not] constitutionally require an individual to participate in the dissemination of an ideological message by displaying it on his private property in a manner and for the express purpose that it be observed and read by the public."⁷⁰

In his dissent, Justice Rehnquist never reached the question of compelling state interest, as he concluded that the First Amendment rights of the individuals were not implicated because the display of license plates did not amount to an "affirmation of belief."⁷¹ Relying on a rationale of the New Hampshire Supreme Court, Justice Rehnquist pointed out that the private individuals' "membership in a class of persons required to display plates bearing the State motto carries no implication and is subject to no require-

63. *Id.* at 827.

64. *Id.*

65. *Id.* at 852.

66. 430 U.S. 705 (1977).

67. *Id.* at 706-07.

68. The state suggested it had two interests in requiring individuals to display the motto, first that it "facilitat[ed] the identification of passenger vehicles" and second, that it "promote[d] appreciation of history, individualism, and state pride." *Id.* at 715-16.

69. *Id.* at 716-17.

70. *Id.* at 713.

71. *Id.* at 722 (Rehnquist, J., dissenting).

ment that they endorse that motto or profess to adopt it as matter of belief.”⁷² Based on the reasoning that the state had not forced the private individuals to actually “say” anything, Justice Rehnquist would have reversed the decision of the lower court, allowing the state to prosecute the private individuals for obscuring the state motto on their license plates.⁷³

In *National Endowment for the Arts v. Finley*,⁷⁴ the Supreme Court reversed the Ninth Circuit’s determination that an amendment to the National Foundation on the Arts and Humanities Act of 1965 discriminated on the basis of viewpoint and was therefore impermissible under the First Amendment.⁷⁵ In this case, four individual performance artists applied for grants before the amendment was enacted.⁷⁶ Initially, an advisory panel had recommended approval of their grant applications, but ultimately the artists’ applications were denied by the National Council on the Arts, and the NEA Chairperson.⁷⁷ The challenged amendment “directs the [NEA] Chairperson, in establishing procedures to judge the artistic merit of grant applications, to ‘tak[e] into consideration general standards of decency and respect for the diverse beliefs and values of the American public.’”⁷⁸ In their complaint, the individuals claimed violation of their First Amendment rights, failure to follow statutory procedure, and violation of the Privacy Act of 1974.⁷⁹ The four artist plaintiffs were later joined by the National Association of Artists’ Organizations and additionally challenged the amendment as void for vagueness and viewpoint-based discrimination under the First Amendment.⁸⁰ The Supreme Court relied heavily on *Rust*⁸¹ in holding that the amendment simply “adds some imprecise considerations to an already subjective selection process . . . [and] does not . . . impermissibly infringe on First . . . Amendment rights.”⁸²

In the Supreme Court’s most recent decision addressing the issue of government subsidies and private speakers, *United States v. American Library Ass’n*,⁸³ the Court again upheld conditions placed on public funds. In this case, a group of libraries, library associations, patrons and web site publishers challenged the constitutionality of the filtering provision under the Children’s Internet Protection Act (CIPA).⁸⁴ After learning that adults were

72. *Id.* at 721-22 (quoting *State v. Hoskin*, 295 A.2d 454, 457 (N.H. 1972)).

73. *Id.* at 720, 722.

74. 524 U.S. 569 (1998).

75. *Id.* at 572-73.

76. *Id.* at 577.

77. *Id.*

78. *Id.* at 576 (quoting 20 U.S.C. § 954(d)(1)).

79. *Id.*

80. *Id.* at 577-78.

81. *Id.* at 588.

82. *Id.* at 590.

83. 539 U.S. 194 (2003).

84. *Id.* at 201-02.

using public library computers (which were provided with the use of federal funds) to access pornography that ultimately resulted in exposure of pornographic images to other library patrons, including children, Congress took action by passing the CIPA.⁸⁵ Under this new law, the receipt of federal funds was conditioned on a library's policy of internet safety for minors.⁸⁶ The Court relied, in part, on *Finley*, holding that "[j]ust as forum analysis and heightened judicial scrutiny are incompatible with . . . the role of the NEA, they are also incompatible with the discretion that public libraries must have to fulfill their traditional missions."⁸⁷ The Supreme Court held, under the standard first articulated in *Rust*, that Congress could reasonably impose this limitation on its internet assistance programs and such limitation was not in violation of the First Amendment.⁸⁸

While the Supreme Court continues to shed light on the scope and application of the government speech doctrine, the doctrine is still in "the formative stages."⁸⁹ The Supreme Court has denied certiorari five times on the issue of specialty license plates; without a clear standard in the specialty license plate arena, a circuit split has developed in federal circuits as to the appropriate test for distinguishing government and private speech.

D. Lower Court Approaches to Specialty License Plates

1. The Fourth Circuit's Four-Factor Test

The Fourth Circuit was the first circuit to apply a four-factor test to specialty license plates. In *Sons of Confederate Veterans, Inc. v. Commissioner of Virginia Department of Motor Vehicles* (hereinafter "*SCV*"), the Sons of Confederate Veterans appealed to the Fourth Circuit after denial of their application for a specialty plate displaying their logo (incorporating the confederate flag).⁹⁰ The Sons of Confederate Veterans challenged Virginia's statutory scheme for specialty license plate creation on the grounds that it violated the First Amendment. The Fourth Circuit noted that "[n]o clear standard has yet been enunciated in [this] 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."⁹¹

85. *Id.* at 199-201.

86. *Id.* at 201.

87. *Id.* at 205.

88. *Id.* at 212, 214.

89. See *Pittsburg League of Young Voters Educ. Fund v. Port Auth. of Allegheny County*, No. 2:06-cv-1064, 2008 U.S. Dist. LEXIS 63370, at *22 (W.D. Pa. Aug. 14, 2008).

90. *Sons of Confederate Veterans, Inc. v. Comm'r of Va. Dep't of Motor Vehicles*, 288 F.3d 610, 613-14 (4th Cir. 2002).

91. *Id.* at 618.

Without a clear standard to follow in specialty license plate cases, the Fourth Circuit employed a four-factor test utilized by other circuits⁹² in other contexts to distinguish between government and private speech.⁹³ Although the court noted that the four factors are neither “exhaustive [n]or always-applicable,”⁹⁴ it concluded the following four-factor test resolved the government speech issue:

(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.⁹⁵

In applying these factors to the Sons of Confederate Veterans specialty plate case, the court found that all four factors weighed in favor of private speech.⁹⁶ Because government must be viewpoint neutral when regulating private speech, the court found that the logo restriction could not survive strict scrutiny and therefore affirmed the district court’s determination that the restriction was unconstitutional.⁹⁷

In *Planned Parenthood of South Carolina, Inc. v. Rose*,⁹⁸ the Fourth Circuit faced a challenge similar to *SCV*. In *Rose*, a pro-choice group argued that the South Carolina statute authorizing a pro-life license plate amounted to viewpoint discrimination.⁹⁹ In reaching its decision, the court relied heavily on *SCV* and employed its four-factor test.¹⁰⁰

Unlike in *SCV*,¹⁰¹ the court in *Rose* found that the purpose of the statute was to “promote the State’s preference for the pro-life position” and therefore weighed in favor of a finding of government speech.¹⁰² Likewise, the *Rose* court found that the second factor also weighed in favor of government speech because the idea for the plate originated with the government, and the legislature determined the message.¹⁰³ However, as in *SCV*, the court found

92. *Id.* at 618-19 (citing *Wells v. City and County of Denver*, 257 F.3d 1132, 1141 (10th Cir. 2001); *Downs v. Los Angeles Unified Sch. Dist.*, 228 F.3d 1003, 1011 (9th Cir. 2000); *Knights of the Ku Klux Klan v. Curators of the Univ. of Mo.*, 203 F.3d 1085 (8th Cir. 2000)).

93. *Id.*

94. *Id.* at 619.

95. *Id.* at 618-19.

96. *Id.*

97. *Id.* at 619-22, 626, 629.

98. 361 F.3d 786 (4th Cir. 2004).

99. *Id.* at 787-88.

100. *Id.* at 792-93.

101. The court in *SCV* found that the purpose of the challenged provision was to “produce revenue” while at the same time allowing for “private expression.” *Id.* at 793 (citing *SCV*, 288 F.3d at 619).

102. *Id.*

103. *Id.*

that the last two factors, literal speaker and ultimate responsibility, cut in favor of private speech.¹⁰⁴ In *Rose*, the four-factor test was indeterminate.¹⁰⁵ Without any clear answer from the four-factor test, the court concluded that the speech was a mixture of private and government speech¹⁰⁶ and that the state engaged in viewpoint discrimination by authorizing the pro-life license plate.

2. The Sixth Circuit and the *Johanns* Test

In *American Civil Liberties Union of Tennessee v. Bredesen*,¹⁰⁷ the Sixth Circuit declined to apply the Fourth Circuit's four-factor test, announcing that *Johanns v. Livestock Marketing Ass'n*¹⁰⁸ established a new test for determining whether speech was government speech. In *Bredesen*, the Sixth Circuit, relying on *Johanns*, upheld the state's decision to issue "Choose Life" license plates.¹⁰⁹ In *Johanns*, the United States Supreme Court was presented with a challenge to the Beef Promotion and Research Act of 1985. Under the act, more than a billion dollars was collected through an assessment on sales or importation of cattle and beef products and spent on the "Beef. It's What's for Dinner" promotional campaign.¹¹⁰ The Court held that "[w]hen . . . 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."¹¹¹

In *American Civil Liberties Union of Tennessee v. Bredesen*, the ACLU challenged an act authorizing the issuance of a "Choose Life" specialty license plate in a state with the purely legislative model of specialty license plate creation. In denying the ACLU's claim, the Sixth Circuit found there was no requirement for viewpoint neutrality when a government-crafted message is disseminated by private volunteers, as is the case with state-produced specialty license plates.¹¹² The court reasoned that "*Johanns* require[d] the court to conclude that 'Choose Life' is Tennessee's message because the Act determines the overarching message and Tennessee approves every word on

104. *Id.* at 793-94.

105. *Id.* at 794.

106. *Id.*

107. 441 F.3d 370 (6th Cir. 2006).

108. 544 U.S. 550 (2005).

109. Two other courts have also "upheld" the state's decision to issue plates by dismissing challenges for procedural reasons. *Women's Emergency Network v. Bush*, 323 F.3d 937 (11th Cir. 2003); *Henderson v. Stalder*, 287 F.3d 374 (5th Cir. 2002).

110. *Johanns*, 544 U.S. at 553-54.

111. *Id.* at 562.

112. *Bredesen*, 441 F.3d at 375.

such plates.”¹¹³ The Sixth Circuit noted that even though the private organization has partial responsibility for the design of the plate, the speech is government speech under *Johanns* because the state can veto the license plate design.¹¹⁴ The participation of the private organization in license plate design “has little or no relevance to whether a plate expresses a government message.”¹¹⁵ Unlike when a court applies the Fourth Circuit’s four-factor test, the court in *Bredesen* gave no weight to the fact that Tennessee produces more than one hundred plates supporting a variety of organizations or to the fact that the government does not credit itself as the literal speaker.¹¹⁶

In *Bredesen*, using a negative inference from the Supreme Court’s decision in *Wooley* to support its position that no forum for specialty license plates had been created, the Sixth Circuit stated: “The evil in *Wooley* was that the automobile owners were compelled to disseminate the message; here automobile owners are not only not compelled, they have to pay extra to disseminate the message.”¹¹⁷ The *Bredesen* court found the Fourth Circuit’s four-factor test to be inapplicable in the instant case for two reasons.¹¹⁸ First, the four-factor test was applied pre-*Johanns* and has led to indeterminate results; by contrast, *Johanns* establishes an “authoritative test” that classifies specialty license plates as a form of government speech.¹¹⁹ Second, the Fourth Circuit has not addressed how the four-factor test would weigh on government-provided, privately disseminated speech (e.g. the government distributing “Register and Vote” pins, “Win the War” postage stamps, and “Spay or Neuter your Pets” license plates).¹²⁰ For these reasons, the Sixth Circuit declined to adopt the Fourth Circuit’s four-factor test.¹²¹

Although the government speech doctrine is still in “the formative stages,”¹²² federal circuit courts and lower district courts have increasingly been called upon to make the determination between government and private speech.¹²³ In making this determination, these courts are forced to choose between two separate analytical methods – the Fourth Circuit’s four-factor test and the Sixth Circuit’s application of *Johanns*.

113. *Id.*

114. *Id.*

115. *Id.* at 377.

116. *Id.* at 376.

117. *Id.* at 378.

118. *Id.* at 380.

119. *Id.*

120. *Id.* at 379-80.

121. *Id.* at 380.

122. See *Pittsburg League of Young Voters Educ. Fund v. Port Auth. of Allegheny County*, No. 2:06-cv-1064, 2008 U.S. Dist. LEXIS 63370, at *22 (W.D. Pa. Aug. 14, 2008).

123. See *Roach v. Davis*, *appeal docketed*, No. 08-1429 (8th Cir. Feb. 22, 2008); *Choose Life Ill., Inc. v. White*, 547 F.3d 853 (7th Cir. 2008); *Pittsburg League of Young Voters Educ. Fund*, 2008 U.S. Dist. LEXIS 63370; *WV Ass’n of Club Owners & Fraternal Servs., Inc. v. Musgrave*, 512 F. Supp. 2d 424, 433 (S.D. W. Va. 2007).

III. RECENT DEVELOPMENTS

Since *Bredesen* came down from the Sixth Circuit in 2006, the Seventh,¹²⁴ Ninth¹²⁵ and Tenth¹²⁶ Circuits have addressed the “Choose Life” controversy, as have several district courts.¹²⁷

A. Developments in 2007: The Tenth Circuit and New York

In 2007, the Tenth Circuit did not address the issue of “Choose Life” specialty plates on a First Amendment challenge but rather on a jurisdictional challenge relating to the Tax Injunction Act (“TIA”).¹²⁸ The court held that Oklahoma’s specialty license plate charges are “taxes under State law” for the purpose of the TIA and, therefore, affirmed the district court’s dismissal on jurisdictional grounds, and remanded for consideration of other claims.¹²⁹

In *Children First Foundation, Inc. v. Martinez*, the Northern District of New York denied the defendant’s motion to amend her answer to include the defense of government speech, among other defenses.¹³⁰ Although the court declined to decide the question of whether the specialty license plate program at issue “involve[d] purely government or private speech,” the court found that the defendant’s government speech defense was not without merit.¹³¹

124. *Choose Life of Ill. Inc.*, 547 F.3d 853.

125. *Ariz. Life Coal. Inc. v. Stanton*, 515 F.3d 956 (9th Cir. 2008), *cert. denied*, 129 S. Ct. 56 (2008).

126. *Hill v. Kemp*, 478 F.3d 1236 (10th Cir. 2007). The Third Circuit has also preliminarily examined the issue, remanding the case back to the District Court for a decision on Motion to Dismiss of Defendant (New Jersey Motor Vehicle Commission, et al.). *Children First Found., Inc. v. Legreide*, 259 F. App’x 444 (3d Cir. 2007).

127. *Choose Life of Mo., Inc. v. Vincent*, No. 06-0443-CV-W-SOW, 2008 U.S. Dist. LEXIS 6524, at *12 (W.D. Mo. Jan. 23, 2008); *Children First Found., Inc. v. Martinez*, No. 1:04-CV-0927, 2007 WL 4618524, at *7 (N.D.N.Y. Dec. 27, 2007); *Byrne v. Lunderville*, No. 1:05-CV-15, 2007 WL 2892620, at *4 (D. Vt. Sept. 28, 2007); *Choose Life Ill., Inc. v. White*, No. 04-C-4316, 2007 WL 178455, at *4 (N.D. Ill. Jan. 19, 2007).

128. *Hill*, 478 F.3d at 1243-44. The Tax Injunction Act limits the jurisdiction of federal district courts, barring them from “enjoin[ing], suspend[ing] or restrain[ing] the assessment, levy or collection of any tax under State law where a plain, speedy and efficient remedy may be had in the courts of such State.” 28 U.S.C. § 1341 (2000). For a more detailed discussion of the Tax Injunction Act in relation to specialty license plates, see 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, 884-85 (2007).

129. *Hill*, 478 F.3d at 1262.

130. No. 1:04-CV-0927, 2007 WL 4618524, at *1 (N.D.N.Y. Dec. 27, 2007).

131. *Id.* at *8.

Thus, the court allowed the defendant to amend her answer with a government speech doctrine affirmative defense.¹³²

B. Developments in 2008: The Ninth Circuit, the Seventh Circuit, and Missouri

Three specialty license plate cases were decided on the merits in 2008.¹³³ In *Arizona Life Coalition Inc. v. Stanton*, the Ninth Circuit reversed the district court's grant of summary judgment in favor of the Arizona License Plate Commission.¹³⁴ The plaintiff alleged the Commission violated its First Amendment right to free speech by arbitrarily denying its application for a "Choose Life" plate.¹³⁵ While noting the circuit split in the test between private and government speech, the Ninth Circuit found the *Bredesen* dissent persuasive, noting that *Johanns* is factually distinct from the case before them but also finding it "instructive when determining whether the message constitutes government or private speech."¹³⁶ Thus, the Ninth Circuit adopted the Fourth Circuit's four-factor test.¹³⁷

The Ninth Circuit held that the first factor, the "central purpose" factor, weighed toward private speech, finding that the central purpose of the specialty license plate program was "revenue raising."¹³⁸ The court also found that the second factor weighed in favor of private speech because it determined the Commission only had "de minimis editorial control over the plate design and color."¹³⁹ Relying heavily on the Supreme Court's decision in *Wooley*, the court concluded that, although the identity of the literal speaker has characteristics of both private and government speech, "where Life Coalition's logo . . . will also be displayed on the license plate supporting the message 'Choose Life,'" it is primarily private speech.¹⁴⁰ With respect to the fourth factor, the court found that Life Coalition bears the ultimate responsibility for the speech, because an organization that wants "to convey a certain message . . . must take the affirmative step of submitting an application."¹⁴¹ After finding that all four factors weighed in favor of private speech, the court concluded that Arizona had created a "limited public

132. *Id.* at *12.

133. *Choose Life Ill., Inc. v. White*, 547 F.3d 853 (7th Cir. 2008); *Ariz. Life Coal. Inc. v. Stanton*, 515 F.3d 956 (9th Cir. 2008), *cert. denied*, 129 S. Ct. 56 (2008); *Choose Life of Mo., Inc. v. Vincent*, No. 06-0443-CV-W-SOW, 2008 U.S. Dist. LEXIS 6524 (W.D. Mo. Jan. 23, 2008).

134. 515 F.3d at 960.

135. *Id.*

136. *Id.* at 964-65.

137. *Id.* at 965.

138. *Id.* at 966.

139. *Id.*

140. *Id.* at 967.

141. *Id.* at 968.

forum.”¹⁴² Because the Commission denied Coalition’s application on the basis of the viewpoint of the proposed message, the Ninth Circuit held that the Commission violated the First Amendment.¹⁴³

In Illinois, after several bills were introduced to create a “Choose Life” plate and the General Assembly took no action, a pro-life group brought a suit alleging that the state’s denial of a “Choose Life” license plate amounted to viewpoint discrimination in violation of the First Amendment.¹⁴⁴ The Northern District of Illinois employed the Fourth Circuit’s four-factor test¹⁴⁵ and ultimately granted the pro-life group’s motion for summary judgment.¹⁴⁶ On appeal to the Seventh Circuit, the Secretary of State argued that specialty license plate speech is government speech.¹⁴⁷ While the Seventh Circuit “acknowledge[d] the question [of whether specialty license plates are private or government speech] has divided other circuits,” the court rejected the Secretary of State’s argument.¹⁴⁸

At the time when the pro-life group first sought their specialty license plate, Illinois seemed to have a purely legislative model. After the district court determined that the Secretary of State could issue specialty license plates without specific enabling legislation (suggesting that Illinois had a hybrid form of specialty plate creation), the Illinois legislature (while the appeal to the Seventh Circuit was pending) amended the statute to *require* legislative approval for new specialty license plates.

In *White*, the Seventh Circuit examined the application of the four-factor test by the Fourth and Ninth Circuits, and the application of *Johanns* by the Sixth Circuit.¹⁴⁹ The Seventh Circuit noted that the “Sixth Circuit [is] alone in holding that specialty license plates implicate no private-speech rights at all” and found the Fourth and Ninth Circuits’ analytical approaches more persuasive.¹⁵⁰ The Seventh Circuit stated that the Fourth Circuit’s four-factor test could be “distilled” by focusing on a single inquiry: “Under all the circumstances, would a reasonable person consider the speaker to be the government or a private party?”¹⁵¹ The court concluded that specialty license plates were not government speech and were instead, “‘mobile billboards’ for the organizations and like-minded vehicle owners to promote their causes.”¹⁵²

142. *Id.* at 971.

143. *Id.* at 973. A petition for certiorari was denied by the Supreme Court on October 6, 2008. *Stanton v. Ariz. Life Coal.*, 129 S. Ct. 56 (2008).

144. *Choose Life Ill., Inc. v. White*, No. 04-C-4316, 2007 WL 178455, at *1-3 (N.D. Ill. Jan. 19, 2007).

145. *Id.* at *4.

146. *Id.* at *9.

147. *Choose Life Ill., Inc. v. White*, 547 F.3d 853, 857 (7th Cir. 2008).

148. *Id.* at 855.

149. *Id.* at 859-64.

150. *Id.* at 863 (emphasis omitted).

151. *Id.*

152. *Id.*

Despite this conclusion, the court conceded that “[t]he State can reasonably be viewed as having approved the message; it is commonly understood that specialty license plates require State authorization.”¹⁵³ In concluding that the speech on specialty license plates implicated private, first-amendment, speech rights, the Seventh Circuit proceeded with forum analysis. Finding that specialty license plates were a nonpublic forum, and that rejection of the “Choose Life” specialty license plate was both viewpoint neutral and reasonable, the Seventh Circuit held that there was no First Amendment violation. Therefore, no “Choose Life” plate is currently available to individuals in Illinois.

Unlike in Illinois, the future of “Choose Life” license plates in Missouri is still uncertain. Although “Choose Life” plates are currently available, the decision of the Federal District Court for the Western District of Missouri has been appealed to the Eighth Circuit, and, therefore, whether Missouri citizens will be able to display the “Choose Life” plates indefinitely is uncertain.¹⁵⁴ Missouri offers nearly two hundred different license plate designs in the categories of organizational, collegiate, and military.¹⁵⁵ Some specialty license plates, including organization names and logos, require payment of an additional fee to the sponsoring organization.¹⁵⁶ An application for a “Choose Life” specialty license plate was submitted to the Department of Revenue on June 30, 2005 and was subsequently denied on February 21, 2006.¹⁵⁷ An appeal was also denied,¹⁵⁸ and litigation ensued.¹⁵⁹

In *Choose Life of Missouri, Inc. v. Vincent*, plaintiffs Choose Life of Missouri challenged the denial of their application for a “Choose Life” plate through the administrative model of specialty plate creation in Missouri.¹⁶⁰ In reviewing their motion for summary judgment, the Federal District Court for the Western District of Missouri first turned to the issue of whether specialty license plates constitute government or private speech.¹⁶¹ The court noted that “no clear standard [has been] enunciated in [the Eighth] circuit or by the Supreme Court for determining when the government is ‘speaking for

153. *Id.* at 864.

154. *Roach v. Davis*, *appeal docketed*, No. 08-1429 (8th Cir. Feb. 22, 2008).

155. Mo. Dep’t of Revenue, Personalized and Specialty License Plates, <http://dor.mo.gov/mvdl/motorv/plates/> (last visited Oct. 24, 2008).

156. *Id.*

157. Choose Life of Mo. Homepage, <http://www.chooselifemissouri.org/401.html> (last visited Oct. 24, 2008).

158. *Id.*

159. *Choose Life of Mo., Inc. v. Vincent*, No. 06-0443-CV-W-SOW, 2008 U.S. Dist. LEXIS 6524 (W.D. Mo. Jan. 23, 2008).

160. *Id.* at *3-8; *see also* *Women’s Res. Network v. Gourley*, 305 F. Supp. 2d 1145, 1152 (E.D. Cal. 2004) (striking down a specialty license plate provision because it “‘vest[ed] unbridled discretion in [an official or agency] over whether to permit or deny expressive activity’” (quoting *City of Lakewood v. Plain Dealer Publ’g Co.*, 486 U.S. 750, 755 (1988))).

161. *Choose Life of Mo.*, 2008 U.S. Dist. LEXIS 6524, at *9.

itself" ... and when the government is regulating private speech."¹⁶² In relying on *SCV*, the court adopted the Fourth Circuit's four-factor test, without offering an explanation why *Johanns* (or *Bredesen*) was not the appropriate standard.¹⁶³

In applying the four-factor test, the Federal District Court for the Western District of Missouri found that the specialty license plate program serves dual purposes – government identification and facilitating requests of private organizations to by-pass the legislature.¹⁶⁴ Therefore, the court found that the first factor weighed in favor of both government and private speech.¹⁶⁵ Because the court found that neither the Department of Revenue nor the Joint Committee on Transportation exercised editorial control over the content of the specialty license plates, the second factor weighed in favor of a finding of private speech.¹⁶⁶ The United States District Court for the Western District of Missouri analyzed the third and fourth factors together, finding they weighed in favor of private speech.¹⁶⁷ The court found that the private citizen is the literal speaker, relying on the reasoning of the Fourth Circuit 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.”¹⁶⁸ The court found that the private organization and private individual bear the ultimate responsibility for the content of the speech because the organization crafts the message and the individual chooses to purchase the specialty license plate.¹⁶⁹

On February 7, 2008, Representative Neal St. Onge introduced a bill in the Missouri House of Representatives that would repeal the statutory sections struck down in *Choose Life of Missouri, Inc.* and require organizations to instead seek approval of their specialty plates from the General Assembly.¹⁷⁰ This legislative effort proved unsuccessful in the 2008 legislative session, but similar efforts may arise in the future. If similar legislation is enacted, Missouri would remain a hybrid model of specialty plate creation, as it would maintain the purely legislative model and a form of the

162. *Id.* at *11.

163. *Id.* at *11-12, 14.

164. *Id.* at *14.

165. *Id.* at *14-15.

166. *Id.* at *15-16.

167. *Id.* at *16.

168. *Id.* at *16-17 (quoting *Planned Parenthood of S.C. Inc. v. Rose*, 361 F.3d 786, 794 (4th Cir. 2004)).

169. *Id.* at *17.

170. H.B. 2037, 94th Gen. Assem. 2d Reg. Sess. (Mo. 2008), available at <http://www.house.mo.gov/billtracking/bills081/bills/HB2037.htm> (last visited Oct. 24, 2008); KSPR News, *Mo. Lawmakers Seek More Power over Issuing License Plates*, KSPR (ABC) NEWS, Feb. 20, 2008, <http://www.kspr.com/news/local/15795532.html>.

administrative model.¹⁷¹ The proposed legislation would not affect the legislative model of specialty plate creation in Missouri. The legislation would also create an “administrative model” where those seeking administrative approval would have to first seek approval of the entire General Assembly and then submit an application and fee to the Department of Revenue.¹⁷² Regardless of the possibility of future legislative changes to Missouri’s specialty license plate statutory scheme, the continued availability of the “Choose Life” license plate to individuals in Missouri is in the hands of the Eighth Circuit.¹⁷³

IV. DISCUSSION

The fact that federal circuits have disagreed on which test is most appropriate to distinguish government and private speech is not surprising; the application of either test raises concerns. Specifically, when applied to different models of specialty plate creation, each test reaches different results in determining whether speech is private or governmental. This is especially troublesome for states that have hybrid systems of specialty plate creation; because under either of these tests, the specialty plate that went through the administrative model of specialty plate creation is likely to be private speech while the specialty plate that went through the legislative model of specialty plate creation is likely to be government speech. This leads to the bizarre result of specialty plates within the same state being two different kinds of speech, which are afforded two different types of protection. Government speech is not required to be viewpoint neutral. Private speech is analyzed under forum analysis, while the court’s level of scrutiny is based on the type of forum. Generally, the regulation of private speech must be viewpoint neutral. Courts, particularly those in states with hybrid models of specialty plate creation, should reconsider the Sixth and Fourth Circuits’ tests.

A. Reconsidering the Johanns Test

In applying the *Johanns* test in *Bresden*, the Sixth Circuit concluded that the speech at issue was government speech. The only factor considered in the *Johanns* test is that of editorial control. In *Bredesen*, because the specialty plate went through the Tennessee legislature, and the legislature had control

171. Mo. H.B. 2037.

172. *Id.* (“1. Notwithstanding any provision of law to the contrary, no organization shall seek authorization from the department of revenue to establish a new specialty license plate until the license plate proposal has been approved by the general assembly during its regular legislative session. 2. After receiving approval of the general assembly as required under subsection 1 of this section, the organization seeking authorization to establish a new specialty license plate shall submit to the department of revenue the [required applications and fees] . . .”).

173. *Roach v. Davis*, appeal docketed, No. 08-1429 (8th Cir. Feb. 22, 2008).

over the message, the *Johanns* test classified it as government speech. It is quite clear, however, that if the *Johanns* test were to be applied in a case with a purely administrative model (e.g. Montana) the outcome would be exactly the opposite. In Montana, a private organization controls the content of the message, and the administrative agency only ensures that the organization meets specific requirements. Because the government does not have complete editorial control over the message, under *Johanns*, a “Choose Life” plate would be private speech.

This makes clear that one major concern with the *Johanns* test is that it fails to address the problem of attribution, a concern in many compelled speech cases.¹⁷⁴ Several courts have reasoned that specialty license plates are private speech on the ground that the public attributes the message displayed to the private individual owner of the car. The *Johanns* test not only fails to address the issue of attribution but also fails to explain why the factor should not weigh on the distinction between private and government speech.

B. Reconsidering the Fourth Circuit’s Test

The outcomes in *SCV* and *Rose* demonstrate the weakness of the Fourth Circuit’s four-factor test. In *SCV*, the license plate at issue went through an administrative model of specialty plate creation, and the court found all of the factors weighed in favor of private speech. In *Rose*, where the plate went through a legislative specialty plate creation model, the court found the four factors to be indeterminate – the first two weighing in favor of government speech,¹⁷⁵ and the last two weighing in favor of private speech.

In *Rose*, the court used the fact that third parties who see a specialty license plate come to the conclusion that the owner of that vehicle has a “pro-life” view point to determine that the private individual is the literal speaker and bears ultimate responsibility for the message.¹⁷⁶ Using third-party perception as a factor in determining private or government speech further complicates the analysis, especially in states with hybrid models of specialty license plate creation. How is an ordinary citizen supposed to distinguish between specialty plates adopted through the legislative model (as were the “NAACP”¹⁷⁷ and “Friends of Kids with Cancer”¹⁷⁸ plates in Missouri) that are government speech and the specialty license plates adopted through the

174. See *supra* Part II.C; see also Caroline Mala Corbin, *Mixed Speech: When Speech is Both Private and Governmental*, 83 N.Y.U. L. REV. 605 (2008).

175. See the preceding discussion of the *Johanns* test that makes clear that the second factor of the Fourth Circuit’s test “editorial control” weighs differently under different models of specialty plate creation.

176. *Planned Parenthood of S.C., Inc. v. Rose*, 361 F.3d 786, 794 (4th Cir. 2004).

177. *Choose Life of Mo., Inc. v. Vincent*, No. 06-0443-CV-W-SOW, 2008 U.S. Dist. LEXIS 6524, at *4 (W.D. Mo. Jan. 23, 2008).

178. S.B. 1233, 92d Gen. Assem., 2d Reg. Sess. (Mo. 2004), available at <http://www.senate.mo.gov/04INFO/bills/SB1233.htm> (last visited Mar. 1, 2008).

administrative model (as were the “Understand Autism”¹⁷⁹ and the “Show Me Beef”¹⁸⁰ plates in Missouri) that are private speech? In light of the fact that Missouri has approximately two hundred specialty plates, it would be extremely difficult for private citizens to determine which plates speak for the government and which plates simply express the views of the owner of the vehicle. For this reason, the tests should be reconsidered, so that it is clearer to all citizens when the government is speaking and when it is not.

C. *Toward a New Test*

In addressing the controversy surrounding the creation of specialty plates, several solutions have been proffered, including: intervention by the Supreme Court, creating pro-choice license plates, amending states’ specialty license plate creation processes, and discontinuation of specialty license plate programs altogether.¹⁸¹ While creating pro-choice license plates and amending states’ special license plate creation processes may offer relief to individuals and organizations seeking (or seeking to block) the issuance of specialty plates, these solutions will not address the question of which test is appropriate, or how an existing test should be clarified, to better determine whether something is government or private speech. The test distinguishing government speech from private speech has significant constitutional law implications beyond the arena of specialty license plate creation.¹⁸²

Some commentators have suggested that the *Cornelius* test is more appropriate in the context of specialty license plates.¹⁸³ The *Cornelius* test focuses on governmental intent in forum creation through three factors: “the government’s policy regarding the property, its practice with respect to the property, and the compatibility of the property’s objective nature with expressive activity.”¹⁸⁴ Because the first factor weighs in different directions when applied to different models of specialty plate creation, the *Cornelius* test creates the same bizarre results as the tests of the Fourth and Sixth Circuits. In a legislative model, the factor weighs against a finding of forum creation in that “[a] state demonstrates [an] intent to structure the specialty

179. *Choose Life of Mo.*, 2008 U.S. Dist. LEXIS 6524, at *7.

180. *Id.*

181. Daffer, *supra* note 128, at 889-95.

182. See *Pittsburg League of Young Voters Educ. Fund v. Port Auth. of Allegheny County*, No. 2:06-cv-1064, 2008 U.S. Dist. LEXIS 63370 (W.D. Pa. Aug. 14, 2008) (applying the Fourth Circuit’s four-factor test to determine whether the advertising space maintained by a port authority (a state government agency) was government or private speech); *WV Ass’n of Club Owners & Fraternal Servs., Inc. v. Mugsgrave*, 512 F. Supp. 2d 424, 433 (S.D. W. Va. 2007) (applying the Fourth Circuit’s four-factor test to determine whether limited video lottery advertising, as authorized by the Limited Video Lottery Act, is government speech or private speech).

183. Hake, *supra* note 14, at 439-40.

184. *Id.* at 448.

plate scheme to financially support organizations viewed as beneficial to the community.”¹⁸⁵ In an administrative model, the *Cornelius* factor weighs in favor of a finding of forum creation, as the state “declares its purpose to allow members of the public to use specialty plates to promote their own causes. . . . [It] is an invitation for public expression.”¹⁸⁶ As is the case with the Fourth and Sixth Circuits’ tests, the factors cut differently when applied to different models of specialty plate creation.¹⁸⁷ Thus, application of the *Cornelius* factors proves no more useful than the tests already set out by the Fourth and the Sixth Circuits.

In addition, some have argued for an extension of the government speech doctrine.¹⁸⁸ The argument, in effect, is that “[w]here an affiliation resembles a partnership, so that the public will perceive government approval of a sponsor’s message [as is the case with specialty license plates], government should retain control over selection and the government speech analysis should apply.”¹⁸⁹ While many would argue that extending the government speech doctrine naturally takes away from First Amendment rights, its supporters argue exactly the opposite: allowing the government more control over messages in public-private partnerships will “enhance First Amendment values by increasing opportunities for speech activity.”¹⁹⁰ Although plausible, an expansion of the government speech doctrine does not seem very likely because the government speech doctrine is fairly new and the Supreme Court has already denied certiorari five times on the issue of specialty license plates. Therefore, this argument fails to address the issue of specialty license plates in the short term.

Various other factors have been offered up as possibilities to add or replace factors in the current tests, including: who funds the speech, what is the program’s speech goal, and to whom would a reasonable audience attribute the speech.¹⁹¹ If the test for distinguishing between private and governmental speech focused on attribution rather than on “editorial control,” there would no longer be an issue of different outcomes when applied to different models of specialty plate creation. If the court were to determine that a reasonable audience attributes the message on a specialty license plate to the individual owner of the car (regardless of whether it came to being under a legislative model or administrative model) then deeming the message “private speech” becomes much easier, and the concern that the government would be forced to enter unwanted debates dissipates. A test which includes

185. *Id.* at 450-51.

186. *Id.* at 451.

187. *Id.* at 450-55.

188. Mary Jean Dolan, *The Special Public Purpose Forum and Endorsement Relationships: New Extensions of Government Speech*, 31 HASTINGS CONST. L.Q. 71 (2004).

189. *Id.* at 74-75.

190. *Id.* at 138-39.

191. *See* Corbin, *supra* note 174.

the attribution factor and weighs it more heavily would be a step in the right direction in the controversy surrounding specialty license plates.

V. CONCLUSION

Recent decisions have continued to adopt either the Fourth Circuit's four-factor test or the *Johanns* analysis, with most courts applying the four-factor test. While the government has an interest in protecting messages printed on its own property and with its own funds, this interest must be balanced against one of the most fundamental First Amendment rights – a private individual's right to freedom of speech. Both the four-factor test and the *Johanns* test are alarming in that they reach different results under different models of specialty license plate creation. A clear cut test would certainly mean more efficiency, particularly in light of all the recent litigation; however, a simpler test might also fail to account for the complexity of the issue and inadequately balance governmental interests with the right to free speech.

The results of labeling all specialty license plates government speech might lead to more viewpoint discrimination, but labeling all specialty license plates private speech would force the government to enter public debates (which it might prefer to avoid) and disallow the government control over messages which may be attributed to it. As a result of recent litigation, some states considered banning specialty license plates all together. Even this option, however, is unfortunate as many specialty license plates have been particularly useful in funding causes which serve a public interest. It is certain that the existing tests to determine whether speech on specialty license plates is private or governmental speech are not adequate in addressing the controversy surrounding specialty license plates. Until the Supreme Court grants certiorari, or a new test is established, the controversy will continue.

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