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GOVERNMENT ADVERTISING SPACE: LESSONS FOR THE “CHOOSE LIFE” SPECIALTY LICENSE PLATE CONTROVERSY

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Abstract: As license plates emblazoned with the message “Choose Life” have proliferated across America, so too have lawsuits challenging such specialty license plates. The holdings of such cases have run the gamut, resulting in a current three-way circuit split between the Fourth, Fifth, and Sixth Circuits. None of the analysis of the controversy up to this point, however, has considered an illuminating analogy: advertising space owned and operated by the government. Examining the parallels between advertising space and specialty license plates informs and develops doctrinal analysis of the dispute, establishing that the “Choose Life” license plate programs as they currently exist violate the First Amendment.

INTRODUCTION

In recent years, the message “Choose Life” has appeared on license plates across the country. Printed directly on the license plate, the anti-abortion message has been challenged as representing a violation of constitutional principles in several jurisdictions, with diverging results in three different circuits.

One challenge to a plate scheme was dismissed by the Fifth Circuit for lack of standing.\(^1\) The Fourth and Sixth Circuits addressed the substantive freedom of speech question, analyzing what type of forum a license plate is and what type of speech—government or private—the “Choose Life” message is. The two cases, Planned Parenthood of South Carolina v. Rose\(^2\) and ACLU of Tennessee v. Bredesen,\(^3\) resulted in precisely opposite holdings. The Sixth Circuit held that “Choose Life” was government speech, and thus it did not violate the First Amendment that a “Choose Choice” or similar pro-choice message was not approved as a specialty license plate.\(^4\) The Fourth Circuit, in contrast, held that the speech was a mixture of government and private speech and that the State had unconstitutionally discriminated on the basis of viewpoint by not approving a pro-choice specialty license plate.\(^5\)

\(^1\) Henderson v. Stadler, 287 F.3d 374 (5th Cir. 2002).
\(^3\) ACLU of Tenn. v. Bredesen, 441 F.3d 370 (6th Cir. 2006).
\(^4\) Id. at 375 (“In this case, Johanns requires the court to conclude that ‘Choose Life’ is Tennessee’s message . . . .”).
\(^5\) Planned Parenthood, 361 F.3d at 799 (“In sum, South Carolina has engaged in viewpoint discrimination by allowing only the Choose Life plate . . . .”). The Second Circuit also addressed the issue, but in a
None of the existing discussion, however, has examined an illuminating analogy to a context in which the government administers a program allowing the speech of outside groups on government-owned property: advertising. The analogy to advertising helps to solve two problems. First, the comparison helps to demonstrate why the “Choose Life” license plate should not be understood as government speech. Second, the standard of forbidding arbitrary administration of advertising programs supplements the doctrinal forum analysis that is otherwise an imperfect analytical tool in the case of specialty license plates.

In Part I of this Article, I examine the factual circumstances of both cases and the split circuit decisions themselves, specifically the crucial disagreement on whether “Choose Life” constitutes government speech. In Part II, I briefly outline the First Amendment doctrinal issues in play, the concepts of forum and government speech; and explain why the existing forum analysis fails to usefully elucidate the question of specialty license plates. In Part III, I develop the analogy between government-owned advertising space and government-administered specialty license plates, then explain why the analogy is more apt than the claim that “Choose Life” is government speech. In Part IV, I apply the advertising decisions discussed in Part II to the question of “Choose Life” specialty license plates. This new source of context will demonstrate that a state legislature may not individually establish specialty license plates through statute. Instead, the legislature may only choose acceptable subjects to appear on license plates, and must leave individual applications under the care of a neutral administrator.

I. THE CIRCUIT SPLIT

In both Tennessee and South Carolina, the state legislatures passed statutes establishing general programs through which a group within certain categories—generally charities, nonprofit groups, and college affinity organizations—may apply for its own specialty plate. Both programs have relatively formulaic procedural requirements, mandating discrete categories of allowable specialty license plates and the steps through which a group may apply for a specialty plate. Yet in both South Carolina and Tennessee, the state legislatures passed specific statutes, separate from the general program, authorizing the “Choose Life” license plates. The statutes specific to the “Choose Life” license plate thus exempt the sponsoring organizations and citizens

limited and non-precedential manner. The Children First Foundation applied for a “Choose Life” specialty license plate in New York, but its application was denied, upon which point the foundation sued the New York DMV and other state officials. Children First Found. v. Martinez, 2005 WL 600283 (N.D.N.Y. 2005). The Second Circuit heard an appeal only on to the district court’s refusal to dismiss the suit based on qualified immunity—a refusal the Second Circuit affirmed—but noted in passing that “custom license plates involve, at minimum, some private speech. Therefore, it would not have been reasonable for defendants to conclude [the government speech doctrine] permitted viewpoint discrimination in this case.” (citations omitted) Children First Found. v. Martinez, 169 Fed. Appx. 637, 639 (2nd Cir. 2006) (unpublished).

In Tennessee, plates identifying both “cultural” and “collegiate” specialties are provided for by statute, subject to 1,000 advance orders. TENN. CODE ANN. § 55-4-201 (2006). South Carolina allows nonprofit organizations to apply by sending proof of nonprofit status, a marketing plan for the license plate, a proposed design for the specialty plate including written authorization for any trademarked or copyrighted symbols, and either 400 prepaid applications or a $4,000 deposit. S.C. CODE ANN. § 56-3-8000 (2005).

interested in purchasing such plates from the procedural steps specified in the separate statutes. The allowable message is also different: South Carolina’s general specialty license plate statute allows only “symbols” or “emblems” to appear on the license plates, rather than a message of support. “Choose Human Rights,” for example, would not appear on a license plate for Amnesty International. Rather, for all organizations but the pro-life cause, only logos, not messages, are allowed. Additionally, it is unclear in both states whether a “Choose Choice” or comparable message would be approved for a specialty license plate, as political advocacy organizations would not necessarily qualify as a nonprofit organization in South Carolina, nor as a cultural or collegiate group in Tennessee.\(^8\) The “Choose Life” statutes further reduce the requirements placed upon individuals purchasing the specialty license plates—notably, in South Carolina a person wishing to purchase a specialty license plate for a nonprofit group must be a “certified member” of the nonprofit organization, while any person may purchase a “Choose Life” plate.\(^9\)

A. Government Speech

The two circuit courts to address the issue of “Choose Life” license plates differed on one key issue: whether the “Choose Life” message was government speech. In Planned Parenthood v. Rose, the opinion of the Fourth Circuit noted that South Carolina’s “primary argument is that the license plate message, ‘Choose Life,’ is State speech.”\(^{10}\) South Carolina continued to advance this position in its unsuccessful petition to the United States Supreme Court for writ of certiorari, arguing that the “Choose Life” message was “the most recent and apparently most visible expression in a long line of statements asserting the state’s clear and oft-repeated preference for childbirth over abortion.”\(^{11}\) In ACLU v. Tennessee, the Sixth Circuit agreed with the state’s argument that “‘Choose Life’ is Tennessee’s public message, just as ‘Live Free or Die’ communicated New Hampshire’s individualist values and state pride.”\(^{12}\) The state persevered with that argument in its opposition to the ACLU’s petition for writ of certiorari to the Supreme Court, asserting that “the Sixth Circuit correctly concluded that a reasonable person knows that the medium for the message in this case, a ‘government-issued license plate,’ is government-issued and ‘a fortiori conveys a government message.’”\(^{13}\)

\(^8\) Furthermore, First Amendment jurisprudence is clear that a group challenging a licensing scheme need not apply and be denied such a license before challenging the scheme in court. See, e.g., Broadrick v. Oklahoma, 413 U.S. 601, 612 (1973) (“Litigants . . . are permitted to challenge a [policy] not because their own rights of free expression are violated, but because of a judicial prediction or assumption that the policy’s very existence may cause others not before the court to refrain from constitutionally protected speech or expression.”); Freedman v. Maryland, 380 U.S. 51, 56 (1965) (“In the area of freedom of expression it is well established that one has standing to challenge a statute on the ground that it delegates overly broad licensing discretion to an administrative office, whether or not his conduct could be proscribed by a properly drawn statute, and whether or not he applied for a license.”).


\(^10\) Planned Parenthood, 361 F.3d at 794.


\(^12\) ACLU of Tenn. v. Bredesen, 441 F.3d 370, 378 (6th Cir. 2006).

The argument that the “Choose Life” message on the license plate is attributable to the government takes two distinct forms, both of which understand the government’s administration of the specialty license plate program as government authorship and creation of the speech. First, there is the argument that the message itself is expressing a government position. The Sixth Circuit took *Johans v. Livestock Marketing Association* to be controlling. In that case, the Supreme Court held that it did not violate the First Amendment rights of beef producers to use targeted assessments in part to fund a governmentally-led marketing campaign promoting consumption of beef. The organizations challenging the marketing campaign alleged that a nongovernmental organization wrote the content of the marketing campaign, so it could not be considered government speech. The Supreme Court rejected this argument, finding that “[t]he message of the promotional campaigns is effectively controlled by the Federal Government itself.” The Sixth Circuit cited the case to find that Tennessee set the overall message and the specific message when it spelled out in the statute [authorizing the license plates] that these plates would bear the words “Choose Life.” . . . As in *Johans*, here Tennessee “sets the overall message to be communicated and approves every word that is disseminated” on the “Choose Life” plate. It is Tennessee’s own message.

The second strand of the argument is that “Choose Life” is not simply a message of the state government, but an implementation of a government program. This argument relies upon *Rust v. Sullivan*, in which the Supreme Court upheld restrictions prohibiting doctors working at clinics receiving funding from the government through Title X from providing any information on abortion to their patients. The dissent from the Fourth Circuit’s denial of rehearing en banc contends that “[t]he ‘Choose Life” statute is analogous to the federal regulations at issue in *Rust*” because the license plate program “earmarks revenues generated from sales of this specialty plate for a government grant program established to fund crisis pregnancy services that specifically do not counsel abortion.” South Carolina continued to advance this argument in its brief to the Supreme Court, stating that “the speech is uttered as part of a program to provide additional funding to crisis pregnancy centers that do not ‘provide, promote, or refer for abortion.’” The Sixth Circuit focused on the control that Tennessee maintained by specifying the “Choose Life” message, stating that *Rust* established that when “the government disburses public funds to private entities to convey a governmental message, it may take legitimate and appropriate steps to ensure that its message is neither garbled nor distorted.”

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15 Id. at 560.
16 *ACLU of Tenn.*, 441 F.3d at 376.
20 *ACLU of Tenn.*, 441 F.3d at 378 (citing Rosenberger v. Rector & Visitors of the Univ. of Va., 515 U.S. 819, 833 (1995)).
B. Forum

The circuits also split on the question of what type of forum the license plates, as used in the specialty license plate programs, are. The Fourth Circuit found that South Carolina “created a limited (license plate) forum for expression.” In contrast, the Sixth Circuit found that the “view that volunteer dissemination of a government-crafted message creates a ‘forum’ . . . would force the government to produce messages that fight against its policies, or render unconstitutional a large swath of government actions that nearly everyone would consider desirable and legitimate.” The Sixth Circuit therefore attributed the “Choose Life” message entirely to the government, and held that no forum had been created or existed.

II. FIRST AMENDMENT DOCTRINE

A. Forum

Under First Amendment doctrine, the threshold question to ask in a case of alleged violation of free speech is in what type of forum the restriction takes place: a traditional public forum, nonpublic forum, or designated public forum. A traditional public forum is an area “which by long tradition or by government fiat [has] been devoted to assembly and debate,” such as public parks or streets. In a public forum, the right to unrestricted speech is at its zenith: government may only constitutionally regulate the time, place, and manner of speech so long as the regulation is content-neutral, is narrowly tailored to further a significant state interest, and “ample alternative channels of communication” are still available. A designated public forum is government property that the government has voluntarily made available as a place of open and free discussion by the public, and is subject to the same limitations on government regulation of speech as a traditional public forum. A nonpublic forum is government property which has not been opened to public discourse, and restrictions of speech are constitutional as long as the restrictions are reasonable and viewpoint-neutral.

It is clear that license plates are not a traditional public forum. Much of the extant scholarship discussing the “Choose Life” license plates discusses the remaining possibilities: whether license plates in states that have established a general procedure for making specialty license plates have become a designated public forum or remain a nonpublic forum.

A designated public forum is not a place in which the government has allowed some speech. The Supreme Court has held that a designated public forum is not created

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22 ACLU of Tenn., 441 F.3d at 378-79.
24 Id.
25 Id. at 45-46.
by “permitting limited discourse,” but only “by intentionally opening a nontraditional public forum for public discourse.” In a later case, the Court further explained the distinction as between opening a forum for “general access,” when the forum is made “generally available to a certain class of speakers,” and “selective access,” when “it does no more than reserve eligibility for access to the forum to a particular class of speakers, whose members must then, as individuals, ‘obtain permission.’”

In the case of the specialty license plate programs, it seems clear that the statutes allowing certain types of groups or people, such as fans or alumni of a particular college, indicate the existence of a nonpublic forum. Some private speech is invited, as private citizens may express their membership in certain groups or support of certain causes or schools if they apply to do so. General access, however, is not permitted, as the statutes authorizing the specialty license plate programs do not invite anyone to print any message they would like on the license plates. Rather, the specific procedures and requirements by which specialty plates are obtained fit neatly into the description of reserving eligibility to a class of speakers who must individually then obtain permission.

It is crucial to the issue of “Choose Life” license plates that in no type of forum—neither designated public forum nor nonpublic forum—may the government “suppress expression merely because public officials oppose the speaker’s view.” The government, while it may limit access to a nonpublic forum, may not limit that access through viewpoint discrimination. In this case, the government is not seeking to suppress the pro-choice point of view outright, but by passing a separate statute privileging the pro-life point of view, it is “accord[ing] preferential treatment to the expression of views on one particular subject;” a form of viewpoint discrimination. Because the government is engaging in viewpoint discrimination, therefore, the question of forum is moot: if there is any kind of forum, the States’ actions are unconstitutional. The only argument that can save the States is if they are able to claim that they, as South Carolina or Tennessee, are speaking.

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30 A similar issue has arisen with regard to vanity license plates, or applications that allow any citizen to request a certain combination of letters and numbers as the actual license plate itself, rather than a symbol added to a blank portion of the plate, as here. A number of citizens who were denied their requested license plate have sued on First Amendment grounds, with mixed results. For example, after a citizen challenged the denied renewal of her license plate reading “ARYAN-1,” the Eighth Circuit discussed whether the license plate should be understood as a nonpublic or designated public forum and indicated they were inclined towards designated public, before finding that the forum designation was irrelevant because the statute prohibiting license plate numbers “contrary to public policy” left an unconstitutional amount of discretion to the official enforcing the regulation. Lewis v. Wilson, 253 F.3d 1077, 1079 (8th Cir. 2001) (“We express some initial skepticism about characterizing a license plate as a nonpublic forum, because it occurs to us that a personalized plate is not so very different from a bumper sticker that expresses a social or political message. The evident purpose of such a "forum," moreover, if it is one, is to give vent to the personality, and to reveal the character or views, of the plate's holder.”).
B. Government speech

1. Doctrine

The only context in which the government may explicitly privilege one viewpoint or message over another is when the viewpoint is that of the government itself; when the government itself is speaking. In that context, the government has no obligation to fund or allow, if in a government-owned forum, the opposite point of view. The government cannot force private citizens to carry the government’s message against their will—a case decided in the specific context of license plates—but neither must the government produce or fund speech in the same manner with an opposing message.

The governmental speech doctrine is, as the Supreme Court itself has acknowledged, “relatively new, and correspondingly imprecise.” Commentators have specifically noted that the concepts of designated and nonpublic forums and government speech “are on a collision course.” The reason for the confusion is that, as Leslie Gielow Jacobs points out, the government does not always “act[] separately and distinctly.” Rather, the government often “interacts with private speakers” by giving them “access to property, media access, financial assistance, or acknowledgement of their assistance in a government program. . . . The dilemma for purposes of constitutional analysis is that it becomes difficult to determine who’s talking.”

Because of the lack of doctrinal clarity, it is difficult to outline the field of government speech in the abstract. Where clear tests have been established in other areas of speech, such as inciting illegal conduct, an unambiguous framework of the government speech doctrine has yet to clearly emerge from iterations of case-by-case analysis. For the sake of organizational clarity, therefore, this Part will be ordered by the arguments as made by South Carolina and Tennessee.

2. Arguments as Presented by Tennessee and South Carolina

Both South Carolina and Tennessee argue that the “Choose Life” message on specialty license plates is in fact speech of the state itself, primarily using two Supreme Court cases as precedent.

i. Johanns

As noted in Section I.A., supra, the Sixth Circuit’s opinion held that Johanns v. Livestock Marketing Association determined the outcome of the case. The Sixth Circuit found that because Tennessee had final approval over the message on the “Choose Life” license plate, it was the author of that message.

35 Mary Jean Dolan, The Special Public Purpose Forum and Endorsement Relationships: New Extensions of Government Speech, 31 HASTINGS CONST. L.Q. 71, 73 (2004). Dolan’s Article proposes creation of the “special purpose forum . . . where government has a subjective expressive purpose that includes particular values and is carried out through selection of private speakers.”
37 Id.
The problem with the Sixth Circuit’s use of *Johanns*, however, is that the issue in *Johanns* was not simply whether the message supporting beef consumption was government speech. In fact, the question of whether the message itself was government speech was the weakest challenge, and not one that any of the Justices writing opinions spent much time on. It was virtually accepted as a given that the message itself was government speech: the two issues that caused controversy were whether the assessment on the beef producers funding the advertisements was appropriate (a compelled speech question), and whether it was fair for the government to not identify its message clearly as sponsored by the government. For example, Justice Souter’s dissent argued

In these cases, the requirement of effective public accountability means the ranchers ought to prevail, it being clear that the Beef Act does not establish an advertising scheme subject to effective democratic checks. The reason for this is simple: the ads are not required to show any sign of being speech by the Government, and experience under the Act demonstrates how effectively the Government has masked its role in producing the ads.39

There was no question that Congress “directed the implementation of a ‘coordinated program’ of promotion” of beef consumption.40 The questions, rather, were of the subsidies and the fear of misattribution.

There is no question of subsidies or compelled speech in the case of “Choose Life” specialty license plates, precisely because of the private involvement necessary for the message to be carried. The problem of accountability is still an issue for the “Choose Life” plates, as identified by both the courts41 and commentators.42 But there are two main differences between *Johanns* and the “Choose Life” license plates that make the use of *Johanns* unhelpful.

First, the main question of the “Choose Life” license plates is not whether an advertising campaign supervised and paid for by the government constitutes government speech. There are a few similarities between the creation of “Choose Life” and “Beef. It’s What’s for Dinner” as messages: in both cases, a private organization came up with

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39 *Johanns*, 544 U.S. at 577 (Souter, J., dissenting).
40 *Id.* at 561.
41 For example, the Fourth Circuit argued:

Of course, South Carolina could abolish the Choose Life license plate Act that results in mixed speech and adopt "Choose Life" as its state motto. Then the State's identity as speaker would be readily apparent, and the State would be accountable to the public for its support of a particular position. Residents displeased with the State's position could register their displeasure through the electoral process. However, precisely because this is a case of mixed speech, and the identity of the speaker of the Choose Life message is likely to be unclear to viewers of the license plate, government accountability is diminished. South Carolina has placed itself in a position to advocate for a political position while disguising its advocacy as that of private vehicle owners. Planned Parenthood v. Rose, 361 F.3d 786, 799 (4th Cir. 2004).

the actual slogan which was at some point approved by a government agent. But in the case of the beef campaign, there was no question that the government was funding the message—through a tax on beef producers, but funding it nonetheless. There was no involvement by private citizens paying their own money for the specific purpose of carrying that message. The example of Johanns thus fails entirely to speak to the question of the mixture of alleged government speech and private involvement and speech that is the crux of the “Choose Life” cases. Johanns establishes only that a message paid for and approved by the government is government speech—not that messages paid for and sought out by private citizens are also government speech.

Second, Johanns fails to address the questions of forum that are at issue in the context of “Choose Life” license plates. Accountability was so important in Johanns precisely because the advertisements for beef did not appear in restricted forums: the advertisements ran on television and in newspapers, where there was no allegation of the government unfairly limiting discourse. The question in Johanns was whether the government was trying to influence debate without being properly accountable through the democratic process. The question in the “Choose Life” cases is whether the government is trying to unfairly structure and restrict the entire debate because it controls the forum. Precedent set in one, therefore, should not and does not apply in the other.

\[\text{ii. Rust}\]

Another case cited as relevant to the “Choose Life” specialty license plates was Rust v. Sullivan. In Rust, the government action at issue was again related to funding. Title X of the Public Health Service Act provided grants from the federal government to groups providing family-planning counseling and assistance throughout the world. In 1988, the Department of Health and Human Services announced that it would not provide any grant money to projects that involved counseling of abortion services. This included referrals upon request: if a pregnant woman went to a clinic funded by Title X, said she had already made her mind up to seek an abortion, and asked for a list of safe clinics or doctors who provided abortions, if the clinic provided her with such a list it would lose its Title X funding. Furthermore, any Title X activities had to be organized “physically and financially” separated from any activities that did counsel abortion. Mere separation of funds was not sufficient: a list of factors the Department would take into account in deciding whether the Title X projects were sufficiently separate included existence of separate personnel and physical separation of facilities. The new regulations were challenged as viewpoint discrimination, as they prohibited any expression that abortion was a legal, acceptable, or even possible option for women. The Supreme Court held that this was not viewpoint discrimination:

\[\text{It is an important distinction, however, that the beef campaign was created by a marketing company paid by the government as part of an extant campaign, whereas “Choose Life” is a message created by a private organization running campaigns in numerous states to put the private message on specialty license plates. In the case of beef, the government approached a public relations company to come up with a slogan. In the case of “Choose Life,” an anti-abortion group approached the government.}\]

\[\text{Rust v. Sullivan.}^{44}\]

\[\text{Id. at 180 (“The Title X project is expressly prohibited from referring a pregnant woman to an abortion provider, even upon specific request.”).}\]

\[\text{Id.}\]
The 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. In so doing, the Government has not discriminated on the basis of viewpoint; it has merely chosen to fund one activity to the exclusion of the other.47

The Supreme Court thus accepted the government’s argument that the Department of Health and Human Services was not restricting the speech of doctors funded with Title X money, but rather choosing to fund private speech that furthered the government’s own message and philosophy, that all pregnancies should be carried to term.48

It is essentially this same argument that South Carolina and Tennessee made in the context of “Choose Life” license plates: that the State was merely supporting the message that all pregnancies should be carried to term rather than the diversity of other possible views that might be expressed on a license plate. For example, after losing in the Fourth Circuit, South Carolina continued to advance a Rust-based argument in its brief to the Supreme Court, stating that “the speech is uttered as part of a program to provide additional funding to crisis pregnancy centers that do not ‘provide, promote, or refer for abortion.’”49 Similarly, the Sixth Circuit extrapolated from Rust to find that the fact that the license plate carriers were not paid as part of a program was irrelevant:

If in this case Tennessee drivers were paid by the government to display "Choose Life" plates, the Act would unquestionably be constitutional. . . . The doctors in Rust disagreed with the government's anti-abortion policy. But if they had been true believers in the policy and had volunteered to work in the program free of charge, the speech restrictions in Rust would still have expressed the government's anti-abortion viewpoint-and therefore qualified for government speech treatment. . . . No constitutionally significant distinction exists between volunteer disseminators and paid disseminators.50

The Rust argument thus claims that the “Choose Life” license plates are merely one facet of a larger government program supporting carrying every pregnancy to term.

The greatest weakness, obviously, in this comparison is that neither Tennessee nor South Carolina was funding an identifiable larger program such as Title X in Rust, so

47 Id. at 193.
48 See Legal Services Corp. v. Velazquez, 531 U.S. 533, 541 (2001):
   The Court in Rust did not place explicit reliance on the rationale that the counseling activities of the doctors under Title X amounted to governmental speech; when interpreting the holding in later cases, however, we have explained Rust on this understanding. We have said that viewpoint-based funding decisions can be sustained in instances in which the government is itself the speaker, or instances, like Rust, in which the government "used private speakers to transmit information pertaining to its own program. (citations omitted)
50 ACLU of Tenn. v. Bredesen, 441 F.3d 370, 378 (6th Cir. 2006).
the basic analogy cannot hold. Furthermore, the Sixth Circuit’s argument that the “Choose Life” purchasers are volunteer disseminators who should be treated the same as paid disseminators is also inaccurate. As will be discussed in more detail below, the private purchasers of “Choose Life” plates are not simply volunteering to carry a message—they are paying the entire cost of the specialty plates. The fees that each individual wishing to purchase a specialty license plate must pay compensate the state for all additional costs of manufacture and handling, and even results in a considerable surplus, which is generally donated both to anti-abortion crisis pregnancy centers and, in many cases, state funds. 51 It is simply untenable to argue that a private citizen independently choosing and paying for the cost of carrying a message is not engaging in private speech. Justice Martin of the Sixth Circuit expressed this understanding in his dissent, asserting that

It proves too much to suggest, as the majority does, that any government involvement in speech turns that speech into government speech immune from First Amendment restrictions. Thus, Tennessee’s license plate program falls not within the broader holding of Rust, but within the Court’s caveat that the government, despite some involvement and despite providing a subsidy of sorts (here, providing the license plates for the messages), may not restrict speech in areas it has designed to facilitate private speech.52

Furthermore, later explanations of Rust further underscore that the holding of Rust is simply inapplicable to the “Choose Life” cases. In a later case, the Supreme Court clarified Rust, stating that “Title X did not single out a particular idea for suppression because it was dangerous or disfavored; rather, Congress prohibited Title X doctors from counseling that was outside the scope of the project.”53 Framed in this manner, the comparison to Rust is more clearly incorrect. It would be plainly impossible to assert that the State could constitutionally prohibit a message that volunteers sought out as outside the scope of a project in which the government paid no money and organized no carriers. Such a “program” would be tantamount to saying that the government was free to privilege the private speech with which it agreed—precisely the viewpoint discrimination that the First Amendment is designed to prevent. The government may speak for itself—but it may not privilege private speakers with whom it agrees. The specific funding program set up in Rust is one way of determining where that line is drawn, and it is because of the importance of having the distinction between government and private speech that the Rust holding cannot be universalized into any message which the government has not actually chosen to fund, but merely likes better than the opposing viewpoint.

51 For example, a full fifty percent of the profits on “Choose Life” license plates in Tennessee go to Tennessee, via the Tennessee Arts Commission and Tennessee Highway Fund. TENN. CODE ANN. § 55-4-215(a) (2006) (specifying the funding allocations). See also infra Section III.B.
52 ACLU of Tenn., 441 F.3d at 388 (Martin, J., dissenting).
3. Further Examples of Government Speech

There are a few other examples of cases in which a government speech argument has proven successful that are useful to briefly outline.

i. Government Funding the Arts and Advocacy

One such decision is National Endowment of the Arts v. Finley, in which a group of artists challenged the basis upon which decisions about which artworks to subsidize were made as discrimination on the basis of viewpoint.\(^\text{54}\) The reason for this allegation was a statute passed by Congress specifying that decisions regarding which artworks to subsidize should “take[e] into consideration general standards of decency and respect for the diverse beliefs and values of the American public.”\(^\text{55}\) The artists, who produced controversial works that they acknowledged offended many people, asserted that the statutory directive targeted their works because of the viewpoint or message that was hostile or critical of American society: the law “rejects any artistic speech that either fails to respect mainstream values or offends standards of decency.”\(^\text{56}\) The Supreme Court held, however, that the purpose of the National Endowment’s program was to “make aesthetic judgments,” thus the “inherently content-based ‘excellence’” standard was “the nature of arts funding.”\(^\text{57}\) Leslie Gielow Jacobs describes such a situation as a “Government Quality Arbiter,” in which the government is directed to fund expression based on some judgment of aesthetic quality.\(^\text{58}\) Given that there is no question of such an artistic competition in the case of the “Choose Life” license plates, no precedent is applicable. Similarly, Gielow Jacobs has also identified the “government as editor,” when the government “compil[e] numerous private messages into a unique presentation.”\(^\text{59}\) In this case as well, no “unique presentation” of compiled private messages exists: each individual buying a license plate carries that license plate on their own individual car. Gielow Jacobs also urges caution in the context of “government as editor” cases, as such a circumstance can still constitute private speech “when the circumstances of the particular presentation indicate that, rather than sending its own message, the government editor is creating a private speech forum.”\(^\text{60}\)

One key element of cases in which the government has unsuccessfully claimed governmental speech is when the government seeks to manipulate an existing forum, even when the government itself created that forum. For example, in Legal Services Corporation v. Velázquez, Congress had established a program funding the Legal Services Corporation providing legal assistance for persons unable to afford their own attorney.\(^\text{61}\) The funding was contingent, however, on funds allocated through the Legal Services Corporation not paying for lawsuits challenging welfare laws.\(^\text{62}\) At first glance this might seem akin to Rust—but the Court found that the restriction upon private speech and forum was determinative. The LSC itself had begun under statute in 1974, and it was


\(^{55}\) Id. at 576.

\(^{56}\) Id. at 580.

\(^{57}\) Id. at 585, 586.


\(^{59}\) Id. at 50.

\(^{60}\) Id. at 52.


\(^{62}\) Id. at 536-37.
not until 1996 that the regulations restricting lawsuits challenging welfare laws themselves were adopted.\textsuperscript{63} Furthermore, the Court addressed the greater involvement of private speech directly, noting that “the salient point is that . . . the LSC program was designed to facilitate private speech, not to promote a governmental message.”\textsuperscript{64} The Court also identified the use of “the legal profession and the established Judiciary” as indicating that the Government seeks to use an existing medium of expression and to control it, in a class of cases, in ways which distort its usual functioning.\textsuperscript{65}

Just as in \textit{Legal Services Corporation}, the States in the “Choose Life” cases seek to use an existing medium. One can define the medium broadly, taking the forum to be the car itself, in which there is no question that the medium exists for private expression. But even license plates themselves are open to all sorts of other private expression, both the other broad categories of specialty license plates approved and invited in both states, and vanity plates, in which any citizen can request a particular license plate number to spell out words or messages of his or her choosing. The government cannot take a medium open to private expression—even one that it helped to create—and distort its functioning by merely claiming some of the private speech being communicated in that medium as its own.

\textit{ii. Other License Plate Cases}

A brief mention of a few of the relevant previous cases regarding license plates is also informative. There have been a number of cases in which persons denied a vanity plate challenge the grounds upon which their request was denied. Although cases in different jurisdictions have resulted in verdicts both striking down and affirming the State’s denial of individual vanity plates, for the most part restrictions on offensive, objectionable, or obscene vanity license plates have been upheld, while restrictions based upon narrower or content-specific grounds have been struck down.\textsuperscript{66} For example, in \textit{Pruitt v. Wilder}, a Virginia District Court found that a policy prohibiting vanity license plates with references to deities, challenged by a man seeking a plate reading “GODZGUD,” was unconstitutional discrimination on the basis of viewpoint.\textsuperscript{67}

The Fourth Circuit, notably, is one of the few courts in the country to have dealt with a challenge to a specialty license plate scheme that did not involve “Choose Life” license plates. In 2002, the court heard \textit{Sons of Confederate Veterans v. Commissioner of the Virginia DMV},\textsuperscript{68} in which the Sons of Confederate Veterans challenged Virginia’s authorization of a specialty license plate for the SCV that specifically prohibited logos or emblems on the license plate. Other organizations were allowed to place logos on specialty license plates, and the restriction was widely understood to be because the SCV logo included the Confederate flag, a symbol offensive to many Americans.

The Fourth Circuit created a four-part test to analyze whether specialty plates were government or private speech,\textsuperscript{69} which it later applied to the “Choose Life” license plate scheme, finding in both cases that the specialty license plate programs had enough

\begin{itemize}
\item \textsuperscript{63} \textit{Id.} at 538.
\item \textsuperscript{64} \textit{Id.} at 542.
\item \textsuperscript{65} \textit{Id.} at 542-43.
\item \textsuperscript{66} See Guggenheim & Silversmith, \textit{supra} note 27, at 567-68.
\item \textsuperscript{68} 288 F.3d 610 (4\textsuperscript{th} Cir. 2002).
\item \textsuperscript{69} \textit{Id.} at 618.
\end{itemize}
an element of private speech that it could not be treated as government speech. Furthermore, in the denial of rehearing en banc, Judge Luttig wrote

No one, upon careful consideration, would contend that, simply because the government owns and controls the forum, all speech that takes place in that forum is necessarily and exclusively government speech. Such would mean that even speech by private individuals in traditional public forums is government speech, which is obviously not the case.\(^7\)

Previous analyses of cases dealing with license plates, therefore, indicates a fairly broad consensus that expression on license plates does not constitute government speech.

4. Additional Analysis of the License Plate Program Itself

As a conclusion, therefore, it is clear that specialty license plates cannot be understood to be government speech. One easy way of assessing the claims to government speech is a process of elimination: as the Fourth Circuit held, “[t]he medium here - the specialty license plate scheme - is more like a limited forum for expression than it is like a school, museum, or clinic,” contrasting the specialty license plate programs to the limited circumstances in which government speech has been upheld.\(^7\)

Similarly, another easy line to draw is how money is spent in the specialty license plate programs. In the examples of government speech upheld by the Supreme Court, the government targeted money to specific programs and campaigns. In contrast, the specialty license plates are entirely paid for by the individuals purchasing the plates. As the Fourth Circuit noted in *Sons of Confederate Veterans*,

The supposed “honor” bestowed on a group for whom a special license plate is authorized, in other words, is conditioned on the willingness of 350 private persons to pay extra to obtain the plate expressing the “honor.” If the General Assembly intends to speak, it is curious that it requires the guaranteed collection of a designated amount of money from private persons before its “speech” is triggered. It is not the case, in other words, that the special plate program only incidentally produces revenue for the Commonwealth. The very structure of the program ensures that only special plate messages popular enough among private individuals to produce a certain amount of revenue will be expressed.\(^7\)

The only defense left is that the government wishes to select some of the private speech taking place in a nonpublic forum that has been opened to broad categories of persons as part of an unfunded, but tacitly supported, government program. In other words, the dual statutes passed for specialty license plates—one for general applications,

\(^{70}\) *Sons of Confederate Veterans v. Comm’r of the Va. DMV*, 305 F.3d 241, 246 (4th Cir. 2002) (Luttig, J., respecting the denial of rehearing en banc).


\(^{72}\) *Sons of Confederate Veterans v. Commissioner of the Virginia DMV*, 288 F.3d 610, 620 (2002).
one for license plates reading “Choose Life”—become evidence that the government has claimed the “Choose Life” message as its own. As has been demonstrated above, such selective claims to government speech are unconstitutional, but are in a slightly less trenchant context as other allegations of viewpoint discrimination. The comparison to advertising, as discussed in the next Part, is especially helpful in this context: the question of “Choose Life” license plates does not arise in the same situation as *Johanns*, in which the government wishes to interject its speech in an already public and free debate. The license plates are a nonpublic forum, opened slightly by the government, in which the government wishes to selectively claim some speech. In the next Part, I discuss the comparison to advertising and why it is illuminating in this case.

III. THE ANALOGY TO ADVERTISING

A. Government Owned and Operated Advertising Space

There are a number of appellate cases in which a potential advertiser’s chosen message was denied access to a given advertising venue owned by the government. These cases, one of which is from the very Sixth Circuit that upheld the selective provision of “Choose Life” license plates, demonstrate that in situations in which the government allows private citizens to pay for use of governmental resources to publicize their message, viewpoint discriminations are unacceptable.

In *Lehman v. City of Shaker Heights*, the Supreme Court upheld the city’s restriction prohibiting a political candidate from running campaign advertisements on public transportation.\(^{73}\) Just as opponents to the “Choose Life” plates claim today, the candidate argued that the advertising space was a public forum, and thus refusing any person willing to pay the required fee for the space violated the First Amendment. The Court rejected this argument, focusing on the alternative purposes of the city transit system. Because the City was “engaged in commerce,” and “must provide . . . service to the commuters of Shaker Heights,” the transit cars could not be a purely public forum. Instead, the city government acted as administrator and was merely promulgating regulations that were “reasonable legislative objectives advanced by the city in a proprietary capacity.”\(^{74}\) Because the proprietor was the government, however, the Court noted that “the policies and practices governing access to the transit system’s advertising space must not be arbitrary, capricious, or invidious.”\(^{75}\)

Clarification of what practices are “arbitrary, capricious, or invidious” is found in the lower appellate decisions. The cases establish the right of a governmental agent to restrict the content of advertising by viewpoint-neutral categories, but not to discriminate on the basis of viewpoint or ideology once a milieu was opened to a particular topic. For example, in *Planned Parenthood of Southern Nevada v. Clark County School District*, the Ninth Circuit held that “controlling the content of school-sponsored publications so as to maintain the appearance of neutrality on a controversial issue” was an appropriate restriction, as the school district’s decision not to publish advertisements for Planned

\(^{73}\) 418 U.S. 298 (1974).

\(^{74}\) Id. at 304. The Court also held that “[n]o First Amendment forum is here to be found,” but the decision predates most of the Supreme Court decisions laying out the current understanding of public versus nonpublic forums, so that portion of the opinion is no longer necessarily determinative today given the developed jurisprudence.

\(^{75}\) Id. at 303.
Parenthood in school publications was “viewpoint neutral.” The court further noted that the school district wished to “maintain a position of neutrality on the sensitive and controversial issue of family planning” and did not want publications such as high school yearbooks to be “forced to open up their publications for advertisements on both sides of the ‘pro-life’ – ‘pro-choice’ debate.”

The Second Circuit similarly argued, in more direct form, that an advertising space may only be restricted on the grounds of content rather than viewpoint in New York Magazine v. Metropolitan Transportation Authority. In an opinion holding that the advertising standards being applied had no restriction on the basis of political speech and thus an advertisement criticizing the Mayor of New York could not be barred from New York buses, the Second Circuit held that “[d]isallowing political speech, and allowing commercial speech only, indicates that making money is the main goal. Allowing political speech, conversely, evidences a general intent to open a space for discourse, and a deliberate acceptance of the possibility of clashes of opinion and controversy.”

Most importantly, the Sixth Circuit itself has held that arbitrary restrictions on the specific messages allowed in a given space are unconstitutional. In United Food & Commer. Workers Union, Local 1099 v. Southwest Ohio Regional Transit Authority, the Sixth Circuit upheld an injunction requiring the Ohio Transit Authority to accept an advertisement for the union to appear on buses. In its opinion, the court held that “in accepting a wide array of political and public-issue speech,” the transit authority “demonstrated its intent to designate its advertising space a public forum. Acceptance of a wide array of advertisements, including political and public-issue advertisements, is indicative of the government’s intent to create an open forum.” This was held “even when speakers must obtain permission to use the forum.”

The very precedent of the Sixth Circuit, among others, thus demonstrates an important point in the designation of forums owned by the government. Even if the government owns a given resource, if it is opened up to speech by outside organizations which pay for the access to the resource, that “pay-to-display” speech may not be selected on the basis of viewpoint or ideology.

B. Specialty License Plates as Advertising Rather than Government Speech

The threshold question in the context of “Choose Life” license plates thus becomes whether a license plate may be understood as akin to government advertising space rather than government speech. There are important differences between an explicit advertising space owned by the government, such as advertising cards on city transit (common in cities across America) and license plates. But careful examination of the circumstances demonstrates that the analogy holds.

One foundational distinction between advertising and government speech is essentially where the money goes. In explicit advertising space, it is clear that it is a

76 941 F.2d 817, 829 (9th Cir. 1999).
77 Id.
78 136 F.3d 123 (2nd Cir. 1998).
79 Id. at 130. The Second Circuit further held that allowing political advertising meant that “the advertising space on the outside of MTA buses is a designated forum.” Id.
80 163 F.3d 341 (6th Cir. 1998).
81 Id. at 355.
82 Id. at 352.
commercial venture dedicated to generating revenue for the government. In contrast, the argument that specialty license plates are, like in *Rust v. Sullivan*, implementing a government program implies that, as in *Rust*, the government is choosing to allocate its own money to further a program it supports.

The specialty license plate programs do not easily fit into either of those categories. The specialty license plate schemes are not explicitly commercial enterprises, in the sense that they are not devoted wholly to raising revenue for the government. But neither does the government pay for any aspect of the specialty license plate production. Examining the funding of the license plates more closely, it becomes clear at least that the programs, while not entirely devoted to generating revenue, do raise money for the government, and are thus a closer analog to advertising than to a government-funded program. For example, the Sixth Circuit noted that Tennessee actually profits from the license plates—half of the profits from the sales are donated to New Life Resources, an anti-abortion nonprofit organization, forty percent is donated to the Tennessee arts commission, and ten percent to the Tennessee highway fund.\(^8\) South Carolina’s statute similarly specifies that fees paid for the license plates are deposited into a fund administered by the Department of Social Services and distributed to local crisis pregnancy centers only “after the costs to produce and administer the distribution” of the license plates are paid from the proceeds.\(^8\) In both cases at hand, the government raises revenue then, via statute, makes a judgment on how that money is allocated. In both examples at issue, the government decided to share the revenues produced with groups linked to the message displayed. But in neither case does the government simply donate space to outside groups—the government remains the administrator of the programs, and in both South Carolina and Tennessee first pays all costs associated with the program from the revenue generated. It is true that a substantial portion of the profits generated finds its way to private organizations—but only after the government receives the money, takes parts of it, and chooses to distribute the money.\(^8\)

Second, advertising on government property is characterized by a physical object upon which messages are displayed in exchange for money paid to the government, generally through a third administering party.\(^8\) Another distinction between a straightforward advertising space and a license plate, therefore, is that license plates are not objects whose sole purpose is for displaying advertisements. A closer definition of the license plate within the analogy, however, eliminates this difference. In the example of *Lehman*, the space under issue was not specifically the advertising cards alone—it was the city transit vehicles which carried advertising cards. License plates, therefore, should

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\(^8\) TENN. CODE ANN. § 55-4-306(c) (2006) (“The funds produced from the sale of Choose Life new specialty earmarked license plates shall be allocated to New Life Resources . . . .”); TENN. CODE ANN. § 55-4-215(a) (2006) (specifying the funding allocations); ACLU of Tenn. v. Bredesen, 441 F.3d 370, 371 (6th Cir. 2006).

\(^8\) S.C. CODE ANN. § 56-3-8910(c) (2005).

\(^8\) It seems clear that had the City of Shaker Heights decided to donate the profits from advertising space on its transit vehicles to charity, it would make the scheme itself no less an advertising venture. Even if the City had chosen to donate profits from the advertisements back to the very industries or groups which had purchased the space, that donation would not have made the entire scheme a charity donation rather than an (irrationally-run) advertising program.

\(^8\) For example, in *Lehman*, the advertising space was actually sold by Metromedia, Inc., which held a contract with the city specifying regulations such as that prohibiting political advertising. *Lehman v. City of Shaker Heights*, 418 U.S. 298, 299-300 (1974).
be understood as a government object which is now open to displaying advertising on a portion of the plate. The Supreme Court has previously acknowledged the expression that can take place on a license plate, noting in *Wooley v. Maynard* that requiring New Hampshire residents to display the motto “Live Free or Die” on their license plates “require[d]” them to “use their private property as a ‘mobile billboard’ for the State’s ideological message.”

The next challenge to the advertising analogy, then, is why citizens should not be allowed to freely choose to use their private property as a mobile billboard. After all, citizens can freely adorn their vehicles with bumper stickers espousing whatever views they wish—no citizens are here compelled to display the “Choose Life” message on their license plate, so why shouldn’t they be allowed to display the message?

It is in answering this question that the analogy to government-owned advertising space is most illuminating. A car itself is not subject to First Amendment forum analysis, as it is private, rather than government-owned, property. There is no question, therefore, that a car owner can express nearly anything he or she likes on the car itself. The license plate, however, is a controlled message which the government requires each car to carry in an unobscured, easily visible manner.

It would seem at first glance, then, that because the government mandates the structure of the license plate itself, that the government also controls all messages on the license plate and may fairly claim them as its own speech. The “Choose Life” message, however, was not a message crafted by the government. In contrast, the “Choose Life” license plates were created on the impetus of private citizens. The idea of the program was first generated by Marion County Commissioner Randy Harris in 1996, and Harris’s nonprofit organization “Choose Life, Inc.” reports “communicating with groups and individuals in over 46 states” in order to “[h]elp[[] them with their Choose Life license plate process.”

In each state, furthermore, “Choose Life” license plates are displayed only when private citizens choose to pay extra for the specialty plates. As Judge Martin noted in his dissent from *ACLU v. Bredesen*, “[i]t is also curious that the government, if it wished to speak and promote a message, would first require at least 1,000 individuals to pay the government before it agreed to disseminate the message.”

The message on the license plate, then, is a message crafted by an outside group, paid for by individual citizens. While an individual walking down the street may not think of himself as a walking billboard, if he has chosen to buy a sweatshirt that says

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88 *See, e.g.*, id. at 707.
91 *ACLU of Tenn. v. Bredesen*, 441 F.3d 370, 384 (6th Cir. 2006). The same point was raised in *Sons of Confederate Veterans v. Comm’r of the Va. DMV*, 288 F.3d 610 (2002), in which the Fourth Circuit held that refusing to print the symbol of the Sons of Confederate Veterans, which included the Confederate flag, on the organization’s specialty license plates was unconstitutional viewpoint discrimination. The court noted, in response to a similar contention by Virginia that such specialty plates constituted government speech that “[i]f the General Assembly intends to speak, it is curious that it requires the guaranteed collection of a designated amount of money from private persons before its ‘speech’ is triggered.” *Id.* at 620.
“Nike” he has (perhaps perversely) chosen to pay for the privilege of advertising the Nike brand. If an individual car owner buys a sticker that says “Choose Life” and affixes it to their bumper, it is her own independent personal expression. But when she has to submit an application and fee for a specialty license plate manufactured by the government, the government has become the administrator of what is essentially an advertising campaign for the “Choose Life” foundation. In Lehman, a campaign wished to pay for its own advertising to be carried on a bus. The campaign’s funding was presumably aggregated from the donations of individual supporters of Mr. Lehman’s candidacy—but even if a group of Lehman’s supporters had bypassed the campaign and tried to purchase a campaign advertisement themselves as an independent expenditure, the city still would have declined the advertisement as a political message. In the case of “Choose Life” license plates, the individual supporters of the “Choose Life” message have aggregated themselves only to the extent that they meet the requirement of preorders for the specialty plates. Despite their not forming one unitary order for 1,000 license plates placed by the Choose Life Foundation itself, they still create the same type of program under which the government sells space on its property to private groups. And as Lehman illustrates, when the government administers such a program, there are requirements of fairness and neutrality that bind how the program may be run—requirements that the “Choose Life” schemes violate. In the next Part, I explain how the “Choose Life” programs violate the requirements of Lehman.

IV. THE APPLICATION OF ADVERTISING PRECEDENTS

The application of the Supreme Court’s mandate that advertising programs not be administered in an “arbitrary, capricious, or invidious” manner is not as simple a process as it might appear. The most arbitrary, capricious or invidious administration would obviously be one in which a pro-choice organization made an application for a specialty license plate under a general program and the application was denied, while a pro-life license plate’s application was approved. That is not what has happened in Tennessee and South Carolina. Rather, in each state there is a dual-track system for license plate approval.

It is the separate individual statutes authorizing “Choose Life” license plates specifically that make the two-track system arbitrary, capricious, and invidious. Had specialty license plates been limited to nonprofit organizations, sports teams, and the other groups specified in the general statutes, the states would have “indicate[d] that making money is the main goal,” and thus not created a designated public forum for political discourse.92 Having allowed political messages in, however, Tennessee and South Carolina “demonstrated [their] intent to designate its advertising space a public forum.”93

Having opened license plates to political discourse, having statutes privileging one message over all others is an arbitrary and capricious distinction. In Lehman, the Supreme Court specifically stated that one justification for that the “policies and practices governing access” to the advertising space at issue was “in order to minimize . . . the

appearance of favoritism.”94 It is hard to imagine a clearer demonstration of favoritism on the part of the state legislature than privileging the pro-life point of view by passing a separate statute allowing persons wishing to purchase a “Choose Life” license plate to bypass the procedures every other organization must go through in order to receive specialty license plates.

In addition, this analysis of favoritism helps to demonstrate why the standing analysis applied by the Fifth Circuit dismissing a challenge to a similar program in Louisiana is flawed.95 The Fifth Circuit noted that none of the plaintiffs had applied for a “Choose Choice” or similar license plate and been rejected, and thus concluded that none of the plaintiffs had alleged an injury in fact.96 In South Carolina and Tennessee, no plaintiffs alleged their applications under the general statute for a “Choose Choice” license plate had been arbitrarily denied.97 Yet understanding favoritism as arbitrary administration of an advertising venue changes the question of injury. The injury is not, as the Fifth Circuit found, a total inability to even apply for a pro-choice specialty license plate. Rather it is a lack of a “level playing field.”98

In order to craft a neutral administration scheme for specialty license plates, the individual statutes providing for “Choose Life” license plates must be struck down. If the state legislatures wish to allow “Choose Life” license plates, the statutes providing for the general administration of specialty plates must be amended to provide for political messages in addition to charity organizations, colleges, and other groups currently allowed to apply for specialty license plates. Finally, the statute must make clear that the regulations are neutral and purely administrative in nature—no judgment other than whether a group meets the requirements of the statute is allowable. The statute may restrict messages in subject matter, but not in viewpoint. Any further criteria, such as a specific allowance for a pro-life but not pro-choice message, is arbitrary and capricious.

**CONCLUSION**

Application of the freedom of speech principles derived from the advertising cases reveals that a dual-track method by which a specialty license plate may be created is unconstitutional. If a space is opened up to advertising of a certain subject, the application process for advertising space must be neutral and should not be administered by the legislature via special statutes granting access to favored groups. The proper manner by which the state legislature may approve or deny use of government-controlled advertising space is by determining which general subjects may appear on specialty license plates—for example, a choice of whether or not to include political or campaign messages on plates. Once that determination has been made, the specific control over applications to print license plates with “Vote Democrat” or “Vote Republican” must be applied in a viewpoint-neutral manner by an independent administrator rather than the political vote of the legislature.

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95 Henderson v. Stadler, 287 F.3d 374 (5th Cir. 2002).
96 Id. at 379.
97 Although importantly, the general statutes in both states only allowed nonprofit organizations or cultural and collegiate groups to apply for license plates, indicating that an application for a “Choose Choice” or other general political message license plate would have been denied as ineligible under the statute.
98 Planned Parenthood v. Rose, 361 F.3d 786, 790 (4th Cir. 2004).