SPECIALTY LICENSE PLATES: THE FIRST AMENDMENT AND THE INTERSECTION OF GOVERNMENT SPEECH AND PUBLIC FORUM DOCTRINES

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Specialty license plates are commonly seen displayed on cars across the United States. Certain states permit motorists to purchase a specialty license plate for an extra fee in order to allow the driver to affiliate with a particular cause while simultaneously raising money for nonprofit organizations associated with the plates. The introduction of specialty license plates bearing messages either in favor of or opposed to abortion has generated much free speech litigation across the country. The core issue in what is now a circuit split among federal courts of appeal is how to resolve the tension between the First Amendment doctrines of government speech and public forums, because the state legislatures who authorized creation of the plates, nonprofit organizations, and drivers all claim the speech as their own. This Comment argues for the adoption of a four-factor test which will assist courts in determining whether the speech at issue is either government or private speech. It further explores the underlying principles justifying the government speech doctrine, and suggests factors to be considered should courts determine that speech is neither purely government nor purely private.

* Symposium Editor, UCLA Law Review, Volume 55. J.D., UCLA School of Law, 2008; B.S., Northwestern University, 2003. There are some teachers who leave indelible marks on our lives. They not only possess expertise, wisdom, and knowledge, but they are also blessed with the unique ability to impart it onto others. They open doors we never knew existed and inspire us to achieve, learn, and contribute. Professor Jonathan Varat is one such teacher. I would like to express my thanks to him for these things, for his guidance in writing this Comment, and for his ceaseless patience while I learned, albeit slowly at times. I would also like to express my undying gratitude to Rick Lucas. The things I have achieved of which I am most proud, I did because of your support and love. Thank you.

INTRODUCTION

License plates seem uncontroversial—they are received from the Department of Motor Vehicles (DMV), affixed to our cars, and then forgotten until the next year when vehicle registrations are renewed. In their purest form, they serve no purpose other than to enable the state to identify drivers. Today, license plates have evolved into an additional source of revenue for states and nonprofit organizations, as well as a means through which to communicate messages. Drivers can choose between a standard plate with a state-issued combination of letters and numbers, vanity plates,[1] or specialty plates.[2]

1. Vanity plates are standard state-issued plates, except that the combination of letters and numbers is chosen by the driver to spell or to convey a message intended by the driver to be seen by other motorists. Presumably, the message says something about the driver. *See* Marybeth Herald, *Licensed to Speak: The Cost of Vanity Plates*, 72 U. COLO. L. REV. 595, 596 (2001) ("State governments make money selling vanity license plates for cars, because many car owners are willing to pay extra to imprint their personality, thoughts, or viewpoints on their car's license plate." (footnote omitted)).

Specialty plates and vanity plates have been the topic of First Amendment litigation[3] since their introduction in the late 1980s.[4] Recently, some states have passed legislation authorizing the issuance of specialty plates bearing the message "Choose Life," while other states have denied applications proposing abortion-related messages.[5] Predictably, large amounts of litigation have ensued given the intensity of the abortion debate. Suits have been filed both by pro-choice and by pro-life groups that were denied their own specialty license plates bearing particular messages relating to abortion.[6]

These statutory schemes for specialty license plates are superficially similar in that they all require legislative action to be created and some private support to be produced. Some of these statutory schemes are substantively different, however, and courts have used various approaches to determine whether they violate the First Amendment.[7] The current circuit split[8] has

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2. Specialty plates are license plates with a special background replacing the standard state-issued background. While they still identify from what state the plate originates, they also include some sort of message from a group, whether a motto, logo, or other graphic. Drivers purchase the plates for an extra fee as a show of their support for the group or the cause. *See id.* Some jurisdictions refer to these plates as "special prestige license plates" or "specialty earmarked plates." *See* LA. REV. STAT. ANN. § 47:463.61 (2007); TENN. CODE ANN. § 55-4-215 (2004). For continuity, plates where the background is dedicated to a group or cause will be referred to in this Comment as specialty plates.

3. Vanity plate litigation generally involves the issue of whether the state's denial of a particular phrase was constitutional. *See* Perry v. McDonald, 280 F.3d 159 (2d Cir. 2001) (claiming a First Amendment rights violation when the state denied plaintiff's application for "SHTHPNS" plate); Byrne v. Terrill, No. 2:05-CV-15, 2005 WL 2043011, at *1 (D. Vt. Aug. 1, 2005) (denial of variations on John 3:16); Katz v. Dep't of Motor Vehicles, 108 Cal. Rptr. 424 (Ct. App. 1973) (denial of "EZ LAY"). Previously, specialty plate litigation centered on the state's ability to dictate what was to be actually displayed on a specialty plate once a group had been granted permission to create the plate. *See* Sons of Confederate Veterans, Inc. v. Comm'r of the Va. Dep't of Motor Vehicles, 288 F.3d 610 (4th Cir. 2002) (denial of the use of a Confederate flag on a specialty plate).

4. *See* Leslie Gielow Jacobs, *Free Speech and the Limits of Legislative Discretion: The Example of Specialty License Plates*, 53 FLA. L. REV. 419, 424 (2001) ("Although available in some states before the late 1980's, the trend towards adopting such programs surged after 1987, when Florida issued a plate commemorating the space shuttle Challenger.").

5. *Compare* LA. REV. STAT. ANN. § 47:463.61, S.C. CODE ANN. § 56-3-8910 (Supp. 2006), *and* TENN. CODE ANN. § 55-4-306(a) (authorizing "Choose Life" plates), *with* Ariz. Life Coal., Inc. v. Stanton, 515 F.3d 956 (9th Cir. 2008) (involving a dispute over the denial of pro-life plates).

6. *See* ACLU of Tenn. v. Bredesen, 441 F.3d 370 (6th Cir. 2006); Children First Found., Inc. v. Martinez, 169 F. A'ppx 637 (2d Cir. 2006); Henderson v. Stalder, 407 F.3d 351 (5th Cir. 2005); Planned Parenthood of S.C. Inc. v. Rose, 361 F.3d 786 (4th Cir. 2004); Women's Emergency Network v. Bush, 323 F.3d 937 (11th Cir. 2003); Ariz. Life Coal., Inc. v. Stanton, 515 F.3d 956.

7. *Compare Rose*, 361 F.3d at 798 (holding that the state created a limited public forum and discriminated based on viewpoint in violation of the First Amendment), *and Martinez*, 169 F. App'x at 639 (indicating that custom license plates involved at least some private expression and denying the state's motion to dismiss), *with Henderson*, 407 F.3d at 359 (holding the plaintiffs' claim as barred by the Tax Injunction Act), *and Bredesen*, 441 F.3d at 380 (holding that plates were government speech and that no forum was created).

created an opportunity for the U.S. Supreme Court to refine and to further define the government speech doctrine, its limitations, and its intersection with the public forum doctrine. This Comment argues that rather than rely on government speech tests articulated under different circumstances, the Court should adopt a modified four-part test from the Fourth Circuit to determine whether specialty license plates are government or private speech. If the Court concludes that the plates at issue bear characteristics of both government and private speech, it suggests rationales for the government speech doctrine that, if present, will aid in deciding whether to afford the plates the protection of government speech.

Part I of this Comment provides a brief overview of the public forum and government speech doctrines and discusses their applicability to specialty license plates. Part II addresses in detail the cases that comprise the most recent circuit split. Part III examines precedent relating to government speech, public forum, and specialty license plates that may resolve the current split. Part IV attempts to answer the central question that has been argued in these cases—whether the content of specialty license plates is government speech, private speech, or a mixture of the two. Part IV identifies and tailors a four-factor test that the Court should apply to the various specialty license plate statutory schemes that are the subject of litigation, concluding that most specialty plates are neither purely private nor purely government speech, but rather are a hybrid of the two. To address the dilemma of speech which is neither purely government nor purely private, this Comment further examines the rationales for government speech and whether they apply to specialty license plate programs that resulted in mixed speech. Part V examines whether the specialty license plate programs may also implicate nonprofit fundraising, a protected form of speech, and why neither the parties nor the courts have considered this approach. This Comment concludes that most specialty license plate programs do not exhibit the characteristics that justify categorizing plates as government speech, and thus they should be afforded the protection of private speech.

8. Currently the Second, Fourth, Fifth, Sixth, and Ninth Circuits are in disagreement about how to interpret and to address the issues. *See Martinez*, 196 F. App'x at 637 (denying the governments' motion to dismiss but declining to address the merits); *Rose*, 361 F.3d at 799 (holding that the Choose Life plate mix of government and private speech and state impermissibly discriminated on viewpoint); *Bredesen*, 441 F.3d at 370 (holding that the plates constituted government speech); *Henderson*, 407 F.3d at 351 (finding the suit barred by the Tax Injunction Act); *Stanton*, 515 F.3d at 956 (following Rose).

I. FIRST AMENDMENT SPEECH DOCTRINES

The central problem in divining an answer to the specialty license plate controversy lies in resolving the tension[9] between the government speech doctrine and the public forum doctrine. On one hand, drivers and nonprofit groups claim that states have provided an open forum for private expression but then subsequently denied applications for plates based on viewpoint. On the other hand, states argue that specialty license plates and programs constitute government speech, permitting viewpoint-based exclusions.

Currently, there is no Supreme Court jurisprudence that holds that speech can be both government speech and private speech in a public forum. As such, courts have struggled to classify specialty license plates and programs as one or the other. Before addressing the substantive merits of this, it is helpful to provide an overview of each doctrine.

A. Government Speech Doctrine

The government speech doctrine provides a means through which the government may communicate its policies and positions to the electorate. When speech is labeled that of the government, no duty exists to provide for opposing viewpoints.[10]

1. Why Is Government Speech Afforded Protection?

The concept of a democratic society necessitates that citizens be aware of the choices available to them so that they can decide who will govern them and how.[11] In contrast to an authoritarian society, where those in power make decisions and then unilaterally communicate them to the governed, a "democratic ideal embodies the notion that the voters or followers

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9. *See* Leslie Gielow Jacobs, *Who's Talking? Disentangling Government and Private Speech*, 36 U. MICH. J.L. REFORM 35, 36–37 (2002) ("This relationship between private and governmental speech, which depends upon different rules applying to each, makes it important to determine the boundary between them."); Steven Shiffrin, *Government Speech*, 27 UCLA L. REV. 565, 584 (1980) (referring to the "complicated relationship between [the] public forum doctrine and government interests").

10. *See* Rosenberger v. Rector & Visitors of the Univ. of Va., 515 U.S. 819, 833 (1995).

11. *See* MARK G. YUDOF, WHEN GOVERNMENT SPEAKS 20–37 (1983) (describing the "self-controlled citizen"); Randall P. Bezanson & William G. Buss, *The Many Faces of Government Speech*, 86 IOWA L. REV. 1377, 1380 (2000) ("Democratic governments must speak, for democracy is a two-way affair. This is particularly true in representative democracies, where governments' speech must consist not just of information but also of explanation, persuasion, and justification to a polity tethered to the policies and preferences acted upon by its representatives.").

take aim at the political leadership. Authority emanates from below; government depends on the consent of the governed."[12] In order to accomplish this ideal, those in power must make decisions and communicate them to the electorate. The electorate then decides if it agrees and may react via the electoral process until the government's actions reflect the values of the governed.[13]

Government's ability and freedom to communicate to the public is key to a democratic society because "[t]he ideology of democratic government posits the existence of autonomous citizens who make informed and intelligent judgments about government policies, free of a state preceptorship that substantially impedes individual choice and consent by selective transmission of information."[14] Therefore it is necessary, even desirable, that the government be empowered to freely and clearly communicate its policies, decisions, and rationales to the public.[15]

It is unrealistic to expect everyone in society to agree on how best to run a country.[16] However, democratic societies place great value on the ability of government to communicate its policies to facilitate the electoral process, and First Amendment jurisprudence recognizes the notion that when the government speaks, it need not provide a platform for competing viewpoints.[17] Were the government required to do so, its operations would slow to a crawl, and endless time would be spent evaluating choices rather than making decisions. Consequently, when the government is speaking for itself, the government

12. YUDOF, *supra* note 11, at 20.

13. *See id.* at 21 (citing KENNETH BOULDING, THE IMAGE 99–100 (1963)).

14. *Id.* at 32; *see also* 9 WRITINGS OF JAMES MADISON 103 (Gaillard Hunt ed., 1910) ("A popular Government, without popular information, or the means of acquiring it, is but a Prologue to a Farce or a Tragedy; or, perhaps both. Knowledge will forever govern ignorance: And a people who mean to be their own Governors, must arm themselves with the power which knowledge gives.").

15. Yudof warns against a model that fails to strike a balance between government communication to the public and public communication to the government. If there is too much emphasis on government communication there exists the risk of tyranny developing. If there is too much communication addressed to the government, then the ability for democratic government to function effectively breaks down. He advocates a "balance between communications from government and those addressed to it." YUDOF, *supra* note 11, at 22.

16. *See* Bd. of Regents of the Univ. of Wis. Sys. v. Southworth, 529 U.S. 217, 229 (2000) ("It is inevitable that government will adopt and pursue programs and policies within its constitutional powers but which nevertheless are contrary to the profound beliefs and sincere convictions of some of its citizens.").

17. *See* Rust v. Sullivan, 500 U.S. 173, 193 (1991) ("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."); Rosenberger v. Rector & Visitors of Univ. of Va., 515 U.S. 819, 833 (1995) ("[W]e have permitted the government to regulate the content of what is or is not expressed when it is the speaker or when it enlists private entities to convey its own message . . . . 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 by the grantee.").

speech doctrine affords it wider latitude in its ability to discriminate based on viewpoint than it ordinarily would receive under the First Amendment.[18]

2. Dangers of an Unlimited Government Speech Doctrine

In modern society, government speech is pervasive in everyday life.[19] Government now speaks in so many different ways, through so many mediums, and on so many topics[20] that it has become important to distinguish where government speech stops and where private speech begins. But these ever increasing ways in which government speaks have only recently been recognized by First Amendment doctrine and scholarship.[21]

A government that has the unlimited right to speak in implementing or promoting its own policies risks abusing this power and using it to suppress critical voices. In the marketplace of ideas, it is vital that all voices be heard and that the most powerful do not drown out the weak or unpopular, no matter how tempting it may be to do so.[22] A free marketplace of ideas is

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18. *See* Bezanson & Buss, *supra* note 11, at 1486 ("Since a democratic government (like all governments in this respect) must be able to make and implement policy, government speech must have some policy-implementing immunity that entitles it to different and more lenient treatment than other government action.").

19. Yudof sees this as a function of both the expanding role of government in the lives of its citizens as well as of the rise in technology, making it easier for the government to communicate with the governed. *See* YUDOF, *supra* note 11, at 6.

20. Indeed, it has been noted that

> [s]ometimes the government speaks as government; sometimes it subsidizes speech without purporting to claim the resulting message is its own. The term "government speech," therefore, includes all forms of state-supported communications: official government messages; statements of public officials at publicly subsidized press conferences; artistic, scientific, or political subsidies; even classroom communications of public school teachers.

Steven Shiffrin, *Government Speech*, *in* THE FIRST AMENDMENT 59, 59 (Leonard W. Levy et al. eds., 1990); *see also* Bezanson & Buss, *supra* note 11, at 1380 (detailing the government's numerous roles and the many different ways in which it speaks); Shiffrin, *supra* note 9, at 569 ("One need only notice the ready access of government officials to the mass media, the franking privilege, the constant stream of legislative and executive reports and publications, and the massive system of direct grants and indirect subsidies to the communications process (including federal financing of elections) to recognize that speech financed or controlled by government plays an enormous role in the marketplace of ideas." (footnotes omitted)).

21. *See* Johanns v. Livestock Mktg. Ass'n, 544 U.S. 550, 574 (2005) (Souter, J., dissenting) ("The government speech doctrine is relatively new, and correspondingly imprecise."); Bezanson & Buss, *supra* note 11, at 1388 ("Despite the unexceptional and inevitable participation of government in public discussion, the role of government as a speaker has appeared in recent years in a variety of new—or at least newly recognized—forms, and the significance of government speech has been receiving intense consideration by the courts and scholars.").

22. *See* Bezanson & Buss, *supra* note 11, at 1381 ("[T]he use of speech by government is expanding and taking new forms, which presents heightened risks that the government may displace or monopolize private speech by inserting its voice in the speech marketplace, employing devices to conceal hidden government messages in private speech, or distorting the gatekeeping functions of

critical to a democratic society because unfettered government speech runs the risk that citizens will make choices not because they are fully informed and rational, but because they only have been presented with the government's choice and do not know any better.[23] This proposition relates to the fundamentals of democratic government, and is also rooted in the notion that the democratic spirit must be actively fostered and patrolled for violations because it is not the natural state of human beings to recognize objectively all points of view or to form democracies.[24] For these reasons, government must permit members of the electorate to communicate their views to the government and to each other.[25] The dangers of unlimited government speech and the relative novelty of the doctrine underscore the importance of squaring it with public forum doctrine in the case of specialty license plates.

B. Public Forum Doctrine

For nearly seventy years, the Court has recognized that the First Amendment confers a right to private citizens to access certain public property for speech purposes.[26] Today, government property that has been traditionally open to public expression continues to be held in the public trust for speech purposes.[27] The Court applies strict scrutiny when ruling on

private speakers through leverage, inducement, or direct government ownership of channels of expression."); Thomas I. Emerson, *Freedom of Speech*, *in* THE FIRST AMENDMENT, *supra* note 20, at 19, 21 ("Toleration of the speech of others does not come easily to many people, especially those in positions of power."); Kenneth L. Karst, *Introduction* to THE FIRST AMENDMENT, *supra* note 20, at xvii, xix ("A measure of a nation's self-confidence and stability is its willingness to tolerate strong criticism of what a majority may see as the very foundations of government. The toleration of this kind of expression lies at the core of the First Amendment's guarantees of speech and press freedoms." (citing STEVEN H. SHIFFRIN, THE FIRST AMENDMENT, DEMOCRACY, AND ROMANCE (1990))).

23. *See* YUDOF, *supra* note 11, at 15 ("[G]overnment has an affirmative obligation to promote individual choice and autonomy by expanding the individual's knowledge, and yet, in a negative sense, it should be constrained from programming the citizen to make preconceived choices. Preconceived choices can be defined as choices *compelled* by indoctrinated value systems rather than the product of considered judgments arrived at by a process of evaluation of the efficacy of both the particular choice and the value systems which generate various decisions."); *see also* Cons. Edison Co. of N.Y. v. Pub. Serv. Comm., 447 U.S. 530, 538 (1980) ("To allow a government the choice of permissible subjects for public debate would be to allow that government control over the search for political truth.").

24. *See* YUDOF, *supra* note 11, at 39 n.5 ("Malinowski puts the matter this way: 'We shall see that human beings can either be trained to be free, or trained to be rulers, tyrants, or dictators, or else they can be trained to be slaves.'" (quoting BRONISLAW MALINOWSKI, FREEDOM AND CIVILIZATION 140 (1976))).

25. *See* Jacobs, *supra* note 9, at 37 (providing examples of how government interacts with private speakers).

26. *See* Bezanson & Buss, *supra* note 11, at 1402 (stating that the public forum doctrine is usually traced back to *Hague v. Comm. for Indus. Org.*, 307 U.S. 496 (1939)).

27. *See Hague*, 307 U.S. at 515–16; Frisby v. Schultz, 487 U.S. 474, 479–81 (1988).

government actions that impinge private rights to use these forums for speech, requiring that regulations be necessary and narrowly tailored to achieve a compelling state interest.[28] In all of the specialty license plate cases, the parties have agreed that the plates are not traditional public fora.

The second category of government-owned fora used for speech purposes is that of the designated, or limited, public forum. This second forum recognizes that while many types of government property have not been traditionally reserved for the exchange of ideas, the government may voluntarily open new fora for such exchanges at its discretion. Here, "whether of a limited or unlimited character—property that the State has opened for expressive activity by part or all of the public" is a designated public forum.[29] In contrast to a public forum, which is available to the public because of its very nature, "[t]he government does not create a [designated] public forum by inaction or by permitting a limited discourse, but only by intentionally opening a nontraditional forum for public discourse."[30]

In determining whether the government has created a designated public forum, the Court looks to "the policy and practice of the government to ascertain whether it intended to designate a place not traditionally open to assembly and debate as a public forum" as well as "the nature of the property and its compatibility with expressive activity . . . ."[31] Once the government has designated a forum, it is subject to the same limitations as if it were a traditional public forum.[32] However, the government is given slightly more leeway in controlling a designated public forum. The Court has recognized that

> in determining whether the State is acting to preserve the limits of the forum it has created so that the exclusion of a class of speech is legitimate, we have observed a distinction between, on the one hand, content discrimination, which may be permissible if it preserves the purposes of that limited forum, and, on the other hand, viewpoint discrimination, which is presumed impermissible when directed against speech otherwise within the forum's limitations.[33]

The Court acknowledges that the difference between content discrimination and viewpoint discrimination sometimes is a matter of semantics, but has

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28. *See* Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 45 (1983). This standard applies for content-based regulation. A different standard is used for time, place, and manner regulation, which is outside the scope of this Comment.

29. Int'l Soc'y for Krishna Consciousness, Inc. v. Lee, 505 U.S. 672, 678 (1992).

30. Cornelius v. NAACP Legal Def. & Educ. Fund, Inc., 473 U.S. 788, 802 (1985).

31. *Cornelius*, 473 U.S at 802.

32. *See Perry*, 460 U.S. at 46.

33. Rosenberger v. Rector & Visitors of the Univ. of Va., 515 U.S. 819, 829–30 (1995).

looked generally to whether the prohibition is on a particular perspective (viewpoint) or on a general subject matter (content).[34]

Finally, all remaining government property used for private speech that is neither a public forum nor a designated public forum is a nonpublic forum.[35] When a nonpublic forum is at issue, the scrutiny is less exacting; the government need only show that the "challenged regulation [is] reasonable, as long as the regulation is not an effort to suppress the speaker's activity due to disagreement with the speaker's view."[36]

While the distinctions between the different types of public and nonpublic fora are helpful to understand, they are relatively meaningless in the specialty plate context because each of the states involved in litigation based its actions on viewpoint discrimination, namely either an endorsement or rejection of pro-life sentiments.[37] Thus, regardless of whether specialty license plates are a limited public forum or a nonpublic forum, the denial of an application or a refusal to issue a plate based on the state government's disagreement with the proposed message is unconstitutional so long as the plaintiff can establish that a forum of some kind has been created for private speech. The relevant inquiry thus becomes: Is the government speaking and even if so, are private speech rights implicated? This inquiry will turn on whether the government is said to be speaking for itself when it issues specialty plates—making them government speech—or whether the government encouraged or facilitated expression of individual ideas, thus creating a forum and the attendant prohibitions on viewpoint discrimination.

II. THE CIRCUIT SPLIT

The current circuit split exists because courts have applied different tests to specialty license plate cases to determine whether the speech at issue is government or private. The Fourth Circuit applies a four-part test and holds that the license plate schemes at issue are a mix of private and government speech, and that a limited forum for private speech has been created. A district court in the Fifth Circuit similarly applies this four-part test, finding that the plates constitute private speech and that the government has discriminated based

34. *Id.* at 831.

35. *See* Int'l Soc'y for Krishna Consciousness, Inc. v. Lee, 505 U.S. 672, 678–79 (1992).

36. *Id.* at 679.

37. The Ninth Circuit addressed a case in which no plate had ever been issued. Nevertheless, the court determined that the government had engaged in viewpoint discrimination for denying a plate based not on the limits it set for the forum, but for the nature of the message. *See* Ariz. Life Coal., Inc. v. Stanton, 515 F.3d 956 (9th Cir. 2008).

on viewpoint.[38] The Sixth Circuit has abandoned the four-part test in favor of one that asks who controls the message and wording on the plates. Using this inquiry, the speech is found to be government speech because the state legislature chose the overarching message and approved the wording on the plate. The Second Circuit has thus far declined to apply any specific test, only stating that license plates involve at a minimum some private speech and that states are therefore prohibited from discriminating based on viewpoint when issuing specialty plates. Finally, the Ninth Circuit rejects the Sixth Circuit's approach and applies the Fourth Circuit's four-part test, concluding not that the speech was mixed, but that it was private. It also found that the state had created a limited public forum. The difficulty then is to determine which test is appropriate before applying it to the various specialty plate programs across the country.

A. The Fourth Circuit: *Planned Parenthood of South Carolina Inc. v. Rose*

In *Planned Parenthood of South Carolina Inc. v. Rose*,[39] the Fourth Circuit affirmed the district court's decision[40] to strike down a South Carolina statute establishing Choose Life license plates as violating the First Amendment. The statute[41] authorized the creation of Choose Life plates after the Department of Public Safety received either 400 prepaid applications for the plates or a donation of $4000 from an interested individual or organization.[42] The court noted that in the case of the Choose Life plates, "[i]t does not appear that any pro-life organization initiated the idea of a Choose Life plate. Rather, the statutory provision for the plate (the Act) came about because of the perseverance of two legislators who were acting on their own initiative."[43] A separate

38. The Fifth Circuit Court of Appeals later dismissed the case as barred by the Tax Injunction Act. *See* Henderson v. Stalder, 407 F.3d 351 (5th Cir. 2005).

39. 361 F.3d 786 (4th Cir. 2004).

40. Planned Parenthood v. Rose, 236 F. Supp. 2d 564 (D. S.C. 2002).

41. *See* S.C. CODE ANN. § 56-3-8910 (Supp. 2006), *invalidated by Rose*, 361 F.3d 786.

42. *Id.* § 56-3-8910(c).

43. *Rose*, 361 F.3d at 789. The court noted in its decision differences between the Choose Life statute and other South Carolina statutes authorizing specialty license plates. *See id.* at 788–89 (noting that the general specialty plate statute required issuees to be designated honorees or organization members, while anyone could purchase a Choose Life plate; that general specialty plates bear only a symbol or emblem while the new statute authorized a specific message; and that the original statute did not automatically entitle an organization to its own plate). It appears that the court accepted that the government had not previously entered the forum as a speaker based on the requirement that the recipient of a specialty plate be a designated honoree or member of an organization. *See id.* at 799 ("The state has opened a limited forum for expression, then entered that forum as a covert but dominant speaker, advocating for one viewpoint in the abortion debate without political accountability and without authorizing the expression of the opposing viewpoint.").

statute that addressed issuance of nonprofit organization license plates[44] allowed for any nonprofit organization within specific meanings of the tax code to be issued special plates provided that the DMV received either 400 prepaid orders or $4000 from the nonprofit and a plan for marketing the plates.[45] At the time of the decision, the Choose Life plates were available to any driver who owned a private passenger vehicle, whereas the nonprofit plates were available only to certified members of the nonprofit organization.[46]

The extra fees collected from drivers wishing to display the Choose Life specialty plate on their cars were to be placed in an account administered by the Department of Social Services.[47] The Department of Social Services, in turn, was authorized to grant money from the account to local, private nonprofit organizations that provided crisis pregnancy services, but it was not permitted to fund any entity that provided or promoted abortions.[48]

After addressing the issue of standing, the Fourth Circuit stated that the first step in deciding whether the state engaged in impermissible viewpoint discrimination was to determine whether the speech at issue was government or private.[49] The parties were operating under the assumption that all speech necessarily falls at one extreme or the other—either government speech or private speech.[50] However, the court applied a four-factor test previously used in *Sons of Confederate Veterans, Inc. v. Commissioner of the Virginia Department of Motor Vehicles*,[51] which examines

> (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.[52]

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44. *See* S.C. CODE ANN. § 56-3-8000.

45. *See id.* § 56-3-8000(A)–(B).

46. *See id.* § 56-3-8000(D); Planned Parenthood v. Rose, 236 F. Supp. 2d 564, 566 (D. S.C. 2002). The statute was subsequently amended in 2006 to allow anyone who owns a private passenger vehicle to display a nonprofit license plate on it regardless of membership in that organization. *See* S.C. CODE ANN. § 56-3-8000(A).

47. *Rose*, 361 F.3d at 788.

48. *Id.*

49. *Id.* at 792.

50. *Id.* ("This threshold inquiry is generally dispositive in viewpoint discrimination cases because of three common assumptions: first, that all speech is either government speech or private speech; second, that when the government speaks for itself and is not regulating the speech of others, it may discriminate based on viewpoint; and third, that the government may not discriminate based on viewpoint when it regulates private speech.").

51. 288 F.3d 610, 618–19 (4th Cir. 2002).

52. *See Rose*, 361 F.3d at 792–93 (quoting *Sons of Confederate Veterans, Inc.*, 288 F.3d at 618).

The court determined that the license plates were neither purely governmental nor purely private, but rather "a mixture of the two."[53] In so finding, the court emphasized that the central purpose of the plates was to promote the state's pro-life position; that the state had complete editorial control over the plates; that license plates were associated with private drivers; and that private individuals bore ultimate responsibility for the message.[54]

The court concluded that the state had created a limited forum for expression and had "distorted the specialty license plate forum in favor of one message . . . . [T]he act was adopted because of the State's agreement with the pro-life message."[55] The court also determined that although the Supreme Court had not yet recognized a mixed speech doctrine, the state's discrimination was impermissible because it had created a limited forum for private expression rather than a government program; because the state favored itself as speaker; and because the state's pro-life viewpoint may not have been readily apparent to those who viewed the license plates.[56] The court reasoned that if it were to hold that such discrimination was permissible, then it would be an unwarranted extension of the government speech doctrine and of the state's already powerful ability to ignore competing viewpoints when speaking for itself.[57] The court emphasized the danger in characterizing the plates as government speech because of a lack of transparency in the specialty license plate program, and thus a lack of government political accountability for creating them.[58] Further, by looking to *Rosenberger v. Rector & Visitors of the University of Virginia*[59] and *Legal Services Corp. v. Velazquez*,[60] the court concluded that in analyzing the statute it was necessary to "focus not only on the character of the speech, but also on the nature of the medium."[61] Thus, because the specialty plates were more similar to a limited forum created by the government than a traditional medium through which government speaks, the court deemed the state's viewpoint discrimination against pro-choice plates unconstitutional.

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53. *Id.* at 794.
54. *See id.*
55. *Id.* at 795 (citing Legal Servs., Corp. v. Velazquez, 531 U.S. 533, 543 (2001); Police Dep't v. Mosley, 408 U.S. 92, 95–97 (1972)).
56. *Id.*
57. *Id.*
58. *See id.* at 795–99.
59. 515 U.S. 819 (1995).
60. 531 U.S. 533 (2001).
61. *Rose*, 361 F.3d at 798.

B. The Fifth Circuit: *Henderson v. Stalder*

In 2005, the Fifth Circuit decided *Henderson v. Stalder*,[62] after ruling three years prior that the plaintiffs—an individual taxpayer and Planned Parenthood of Louisiana—lacked standing to challenge a Louisiana statute[63] establishing a Choose Life license plate.[64] The district court noted that the specialty plates were available only by statute rather than an administrative process through which an organization applied for a plate.[65] However, part of the statutory scheme in question implied that it was possible for an organization to request a special license plate.[66] Further, the statute set out conditions precedent before a specialty plate could be issued.[67]

On remand from its first appeal, the district court determined that the plaintiffs' amended complaint demonstrated their standing, that the specialty plate program was not government speech, and that the program violated the First Amendment because it discriminated based on viewpoint.[68] The court applied the same four-factor test[69] used in *Veterans* and *Rose* to conclude that the plates were private expression because the purpose of the plates was to raise revenue while allowing for private expression; the editorial control for the message was vested in the organization seeking the plate; the literal speaker was the driver on whose car the plate was mounted; and the driver bore ultimate responsibility for the message.[70]

Finally, although the district court noted the different fora that could be created for speech, it expressly declined to identify what type of forum the state of Louisiana had created.[71] Because the state discriminated based on viewpoint, and because viewpoint discrimination by the government is impermissible whether in a public forum, designated forum, or nonpublic forum, the court deemed irrelevant which type of forum had been created.[72] Further, the

62. 407 F.3d 351 (5th Cir. 2005).
63. *See* LA. REV. STAT. ANN. § 47:463.61 (2000).
64. *See* Henderson v. Stalder, 287 F.3d 374 (5th Cir. 2002).
65. *See* Henderson v. Stalder, 265 F. Supp. 2d 699, 712 (E.D. La. 2003).
66. *See* LA. REV. STAT. ANN. § 47:463(A)(3)(a).
67. *See id.* at § 47:463(A)(3)(b) (requiring a minimum of one thousand applications, prepayment of necessary fees, and a guarantee of one thousand orders).
68. *See Henderson*, 265 F. Supp. 2d at 699.
69. *See supra* text accompanying note 52.
70. *See Henderson*, 265 F. Supp. 2d at 715–17.
71. *Id.* at 718.
72. *See id.*

government had not demonstrated that the scheme presented "the least restrictive means available to serve a compelling governmental interest."[73]

On *Henderson*'s second appeal, the Fifth Circuit declined to decide the issue on the merits. Instead, the court characterized the extra fees paid by drivers to obtain a specialty plate as taxes and held that the suit was barred by the Tax Injunction Act.[74] Thus, the case was dismissed.[75]

C. The Sixth Circuit: *ACLU v. Bredesen*

In 2006, the Sixth Circuit weighed in, announcing in *ACLU v. Bredesen*[76] that a Tennessee statute[77] creating Choose Life plates did not violate the First Amendment. The Tennessee statute at issue authorized the plate's private sponsor, New Life Resources, Inc., to design the plate, which would be approved by the state before issuance.[78] Half of the profits collected from sales of the plate were to be distributed to New Life and specially listed groups authorized to share in the proceeds.[79] Further, it was undisputed that Planned Parenthood had lobbied for an amendment authorizing the creation of a pro-choice plate, but the measure was defeated in the legislature.[80] The statutory scheme creating the "new specialty earmark plates" specifically defined the plates as those authorized by statute "which statute earmarks the funds produced from the sale of such plate to be allocated to a specific nonprofit organization or state agency or fund to fulfill a specific purpose or to accomplish a specific goal."[81] The issuance procedure for new specialty earmarked plates was different than that for collegiate plates, which only required the fee, a minimum order of one hundred plates, and the submission of a design approved by the commissioner.[82] Additionally, the statute provided that "[t]he commissioner of safety shall not issue any license plate commemorating any practice which is contrary to the public policy of the State of Tennessee, nor shall the commissioner issue any license plate to any entity whose goals and objectives are contrary to the public policy of Tennessee."[83]

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73. *Id.* (quoting Sons of Confederate Veterans, Inc. v. Comm'r of the Va. Dep't of Motor Vehicles, 288 F.3d 610, 626 (4th Cir. 2002) (internal quotations omitted)).
74. Henderson v. Stalder, 407 F.3d 351, 359 (5th Cir. 2005).
75. *Id.* at 360.
76. 441 F.3d 370 (6th Cir. 2006).
77. *See* TENN. CODE ANN. § 55-4-306 (2004).
78. *See* ACLU of Tenn. v. Bredesen, 354 F. Supp. 2d 770, 772 (M.D. Tenn. 2004).
79. *See* TENN. CODE ANN. § 55-4-306(d).
80. *See* ACLU of Tenn. v. Bredesen, 441 F.3d 370, 372 (6th Cir. 2006).
81. *See* TENN. CODE ANN. § 55-4-209(4).
82. *See id.* §§ 55-4-210(b), 55-4-201(b)(3).
83. *Id.* § 55-4-210(d)(1).

The district court had granted summary judgment to plaintiffs by applying the *Rose* four-factor test and finding that the speech was mixed for the same reasons as the *Rose* court.[84] Again, the district court declined to state which type of forum had been created, instead relying on the proposition that the state was not permitted to discriminate based on viewpoint in any forum.[85]

The district court's decision was reversed on appeal to the Sixth Circuit. In coming to its conclusion, the court determined that the plates were a government-crafted message because the plates originated at the legislative level.[86] The Sixth Circuit held that *Johanns v. Livestock Marketing Ass'n*[87] was controlling, and thus applied a different test than that applied by previous courts to determine whether the government was speaking.[88] Enunciating the test for government speech as whether the government "'sets the overall message to be communicated and approves every word that is disseminated,'"[89] the court found that the Choose Life specialty plates statute constituted government speech because the legislature chose the plates' overarching message and approved every word.[90]

The court next rejected the proposition that the specialty plates could not be pure government speech simply because Tennessee had issued over 150 plates that benefited different groups, ideologies, and colleges. The court reasoned that it was not implausible for the state to use its license plate program to convey multiple messages, because government today is large, and so long as it does not blatantly contradict itself, there was no reason to think that a specialty plate's legislative approval was not synonymous with state policy.[91] The court seemed particularly troubled by the prospect that should

84. *See* ACLU of Tenn. v. Bredesen, 354 F. Supp. 2d 770, 773 (M.D. Tenn. 2004) ("The Court adopts the Fourth Circuit's four-factor test and finds: 'The State speaks by authorizing the Choose Life plate and creating the message, all to promote the pro-life point of view; the individual speaks by displaying the Choose Life plate on her vehicle. Therefore, the speech here appears to be neither purely government speech nor purely private speech, but a mixture of the two.'" (quoting Planned Parenthood v. Rose, 361 F.3d 786, 794 (4th Cir. 2004))).

85. *See id.* at 774.

86. *See* ACLU of Tenn. v. Bredesen, 441 F.3d 370, 376 (6th Cir. 2006) ("The Tennessee legislature chose the 'Choose Life' plate's overarching message and approved every word to be disseminated.").

87. 544 U.S. 550 (2005) (holding that the "Beef, It's What's For Dinner" advertising funded by a targeted assessment "checkoff" constituted government speech and, thus, was not susceptible to a compelled subsidy First Amendment challenge).

88. It should be noted that *Johanns* was decided after *Stalder* and *Rose*, so it is unknown whether the prior courts would determine that *Johanns* was controlling or not. The dissent in the Sixth Circuit *Bredesen* makes compelling arguments for why it should not control "allocation of speech opportunity" cases. *See supra* text accompanying notes 96–117.

89. *Bredesen*, 441 F.3d at 376 (quoting *Johanns*, 544 U.S. at 562).

90. *See id.*

91. *See id.*

the plates be deemed private or mixed speech, the state would be compelled to provide license plates for hate groups such as the Nazi party and the Ku Klux Klan.[92]

The court did not give credence to the fact that the Tennessee government was not immediately identifiable as the speaker, because "a government-crafted message is government speech even if the government does not explicitly credit itself as the speaker."[93] It further held that even where a government either uses or allows private individuals to disseminate its message, a First Amendment forum is not created.[94] A contrary decision "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."[95] Thus, the court characterized the program as government speech carried out by private volunteers, meaning no forum was created and that the statute was constitutional.

A scathing dissent was filed in which Judge Martin criticized the majority's characterization of the program, its application of forum doctrine, and its use of the compelled speech/subsidization doctrine. Judge Martin's opinion is important to understand the test this Comment later proposes and the errors in the majority's reasoning. First, Judge Martin pointed out that before deciding whether a "government crafted message . . . creates a 'forum,'"[96] one must first decide whether or not the government is actually speaking at all. If it is not, then there exists the possibility that the government has opened a forum. When the government is speaking, no forum is created by default, rendering the majority's threshold question a nullity.[97] The dissent argued that "the proper question is *not* whether when the government speaks must it always allow others to speak, but whether a forum exists in which speech is occurring, and if so, whether the government may suppress a disfavored message based on its viewpoint."[98]

In order to answer this question, the dissent urged the court to examine the "overall purpose" of the program and, when viewed as a whole, whether

92. *See id.* at 376–77.

93. *Id.* at 377 (citation omitted).

94. *See id.* at 378 (citing *Johanns*, 544 U.S. 550; Rosenberger v. Rector & Visitors of the Univ. of Va., 515 U.S. 819 (1995); Rust v. Sullivan, 500 U.S. 173 (1991)). The court acknowledged the distinction between this case and those cited for the proposition that drivers pay for the privilege of putting the plates on their cars, thus "express[ing] agreement with Tennessee." However, the court disregarded this fact and said "that fact does not mean that a First Amendment 'forum' for speech has been created." *Id.*

95. *Bredesen*, 441 F.3d at 378–79.

96. *Id.* at 381 (Martin, J., dissenting).

97. *See id.* at 381–82.

98. *Id.* at 382.

the specialty license plate program was designed to facilitate private speech.[99] In the dissent's opinion, the fact that 150 organizations had been permitted to receive specialty plates indicated that a forum for private speech had been opened.[100] The dissent pointed out that in *Rosenberger* "the fact that student newspapers expressed many different points of view was an important foundation for the Court's decision to invalidate viewpoint-based restrictions."[101] The dissent further questioned the practicalities of the specialty license plate program and the logic in deciding that the state of Tennessee had decided to "establish a program promoting Penn State Alumni Pride and seek out private volunteers to transmit this message to the public at large[.]"[102] In criticizing the majority for its oversight, the dissent scolded, "[i]t is a nice academic exercise to hypothesize that the license plate program is a governmental program to disseminate through private volunteers all of the state's various messages, but it seems to me to be a conclusion that only judges banished to our ivory towers and shut off from the real world could reach."[103]

The dissent examined the way that the government of Tennessee itself characterized the specialty license plate program in promoting it to the general public and found that the state's own communications implied that the state was facilitating private speech.[104] Thus, the overall purpose of the specialty license plate program was "designed to facilitate private speech, not to promote a governmental message."[105]

The dissent next criticized the majority's application of the compelled speech and the compelled subsidy doctrine in analyzing plaintiffs' First Amendment claim.[106] It claimed that the majority erred in applying *Johanns*[107] because the case at bar "has nothing to do with being forced to speak or to subsidize a message. Rather, the harm is being denied the opportunity to speak on the same terms as other private citizens within a government

99. *See id.*

100. *See id.* at 382–83 ("In my opinion, the fact that the state has permitted approximately 150 private organizations to create specialty license plates and the manner in which the state operates its license plate program demonstrates that the forum was created to facilitate private speech.").

101. *Id.* at 383 (quoting Legal Servs. Corp. v. Velazquez, 531 U.S. 533, 543 (2001)).

102. *Id.* at 382 n.4.

103. *Id.*

104. *See id.* at 384 ("First, the State's own application for a 'personalized,' 'specialty,' or 'special' license plate advertises, 'SHOW *YOUR* SCHOOL SPIRIT' and 'SUPPORT *YOUR* CAUSE AND COMMUNITY.' It does *not* say, 'SUPPORT THE GOVERNMENT'S MESSAGE.' Additionally, a June 22, 2005 press release from the Governor's office informs that the state 'currently issues nearly 150 different license plates to reflect *drivers'* special interests, such as schools, wildlife preservation, parks, the arts and children's hospitals.'").

105. *Id.* at 382 (citations omitted).

106. *See id.* at 385.

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

sponsored forum."[108] Thus, it was a mistake for the majority to extrapolate a test for government speech from a compelled subsidy context and then to apply it uniformly across all First Amendment cases. This application of the test would cause the outcomes of several prior First Amendment cases to be different.[109] The dissent further noted that it was irrelevant to inquire whether the speech was purely governmental because there were still 150 other private speakers in the forum, and the government's voice would merely be one of many.[110]

The dissent went on to criticize the majority for misinterpreting and misapplying *Rust v. Sullivan*;[111] the Supreme Court in *Rust* specifically warned that the decision should not suggest that "funding by the Government, even when coupled with the freedom of the fund recipients to speak outside the scope of the Government-funded project, is invariably sufficient to justify Government control over the content of expression."[112] The majority, therefore, erred in assuming that "any government involvement in speech turns that speech into government speech immune from First Amendment restrictions."[113] The dissent pointed out that it would be reasonable to conclude that the Choose Life plates were a government message if one were to look at the plates in a vacuum.[114] If that were the case, "each one [could] be reasonably characterized as a government message. But, in order to properly characterize the specialty license plate program for First Amendment purposes, we cannot view each license plate in isolation."[115]

Finally, the dissent addressed the majority's concern that Tennessee would be forced to allow groups such as the Ku Klux Klan and the Nazi Party

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108. *Bredesen*, 441 F.3d at 386.

109. *See id.* at 386–87 ("First, if the majority's analysis applied to *Barnette*, *Wooley*, *Keller*, and *Abood*, the outcomes of all of those cases certainly could have been different. The majority here found several facts relevant to its decision. First, the government 'crafted' the message. The same could be said in the earlier cases. The Pledge of Allegiance is the government's message. New Hampshire's government 'crafted' its own motto. Based on the majority's broad interpretation of government involvement in speech, the fact that the government compelled membership and dues payments in *Keller* and *Abood*, could be interpreted to fall within the majority's understanding of government speech. The government had ultimate control over all of these messages. In each of those cases, the facts the majority found relevant here would indicate that the message was the government's own. But, this was not the approach the Supreme Court took, and I would not take it here either, because it ignores the First Amendment interests at issue.").

110. *See id.* at 386 & n.10.

111. 500 U.S. 173 (1991). Rust v. Sullivan upheld a government prohibition on certain funds being used for abortions, abortion counseling, or advocation.

112. *See Bredesen*, 441 F.3d at 388 (quoting *Rust*, 500 U.S. at 199).

113. *Id.*

114. *See id.* at 389–90.

115. *Id.* at 390.

to have their own license plates by pointing out that providing access and voice to unpopular ideas is a key function of the First Amendment.[116] It also pointed out that Tennessee had already authorized the Confederate flag to be displayed on the Confederate Veterans' license plates, a symbol considered just as offensive to some as any of the other discussed topics.[117]

D. The Second Circuit: *Children First Foundation, Inc. v. Martinez*

A specialty license plate case in which the plaintiffs were not pro-choice reached the Second Circuit, albeit in an unpublished opinion. In *Children First Foundation, Inc. v. Martinez*,[118] a pro-life group brought suit against the Commissioner of the New York Department of Motor Vehicles claiming that its First Amendment rights had been violated when its application for a specialty plate was denied based on its stance on abortion.[119] The government defendants moved to dismiss for failure to state a claim and under the doctrine of qualified immunity.[120] In denying the defendant's motion to dismiss, the Second Circuit acknowledged that although the government was free to discriminate based on viewpoint when it was speaking for itself, "custom license plates involve, at minimum, some private speech" and "[t]herefore, it would not have been reasonable for defendants to conclude [that] this doctrine permitted viewpoint discrimination in this case."[121] The Second Circuit's holding prohibits the state from relying on qualified immunity as a defense and the case may now move forward. Additionally, it appears that the Second Circuit would prohibit viewpoint discrimination under the government speech defense when any amount of private speech is at issue, raising serious implications for states: The court's prohibition would preclude the government from relying on government speech to justify its actions if the speech was deemed by the court to be a combination of government and private speech.

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116. *See id.* ("The majority claims that viewpoint neutrality will require the state to issue Ku Klux Klan and American Nazi Party specialty license plates. The simple answer in response to this suggestion is: Well of course that's true if viewpoint neutrality means anything. That is the same reason that Tennessee cannot prevent the KKK or Nazi Party from getting parade licenses on the same terms as other groups and the same reason that Tennessee cannot prevent these groups from espousing their views in the town squares.").

117. *See id.* at 390–91.

118. 169 F. App'x 637 (2d Cir. 2006).

119. *See id.* at 639.

120. *See id.* at 638.

121. *See id.* at 639 (citing Wooley v. Maynard, 430 U.S. 705, 715, 717 (1977); Perry v. McDonald, 280 F.3d 159, 166–67 (2d Cir. 2001)).

E. The Ninth Circuit: *Arizona Life Coalition, Inc. v. Stanton*

In *Arizona Life Coalition, Inc. v. Stanton*,[122] the Ninth Circuit reversed the district court's grant of summary judgment to the Arizona License Plate Commission (Commission)[123] and held that the Commission's denial of a pro-life plate violated the First Amendment. The Arizona statute at issue[124] created the specialty license plate program, allowed certain organizations to apply for specialty license plates,[125] and stated that upon receiving a request:

> [T]he commission shall authorize a special organization plate if the organization meets the following requirements: (1) The primary activity or interest of the organization serves the community, contributes to the welfare of others and is not offensive or discriminatory in its purpose, nature, activity or name[;] (2) The name of the organization or any part of the organization's purpose does not promote any specific product or brand name that is provided for sale[;] (3) The purpose of the organization does not promote a specific religion, faith or antireligious belief.[126]

In 2002, the Arizona Life Coalition (Life Coalition) submitted an application for a specialty plate that would display their logo, a graphic of two children's faces, the motto "Choose Life," and its name on the plate.[127] After initially declining to take action, the Commission formally denied the application without providing a reason for its denial.[128] Life Coalition subsequently filed suit.

In reversing the district court's grant of summary judgment for the Commission, the Ninth Circuit first questioned whether the specialty license plate program constituted government or private speech. The court acknowledged that post-*Johanns* and *Bredesen*, there was confusion as to whether it should apply the test articulated in *Johanns* or in *Rose* to differentiate between government and private speech.[129] The court then cited extensively Judge Martin's dissenting opinion in *Bredesen*, and while the court agreed

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122. 515 F.3d 956 (9th Cir. 2008).

123. Ariz. Life Coalition, Inc. v. Stanton, No. CV031691PHXPGR, 2005 WL 2412811 (D. Ariz. Sept. 26, 2005), *rev'd*, 515 F.3d 956.

124. *See* ARIZ. REV. STAT. ANN. § 28-2404 (2004).

125. The statute defines a qualifying organization as an

> entity that is organized as a nonprofit corporation pursuant to title 10, chapters 24 through 40 and that either: (a) Certifies to the department that the organization has at least two hundred members. (b) If the organization has fewer than two hundred members, agrees to pay the production and program costs of the special organization plate as determined by the commission.

Id. § 28-2404(G).

126. *Id.* § 28-2404(B).

127. 515 F.3d at 961.

128. *Id.* at 962.

129. *Id.* at 963.

with Judge Martin that *Johanns* was factually distinguishable, the court stated that it believed that *Johanns* was instructive because "the Court relied on factors similar to those set forth in the four-factor test. It considered who controlled the speech, . . . the purpose of the program, . . . and the fact that the Secretary of Agriculture exercised final editorial control over the promotional campaign."[130] As such, the court rejected *Bredesen*'s articulation of the test for government speech and adopted the four-factor test used in *Rose*.[131]

Applying the four-factor test, the Ninth Circuit found that the speech at issue was private speech. The court held that the primary function of the specialty license plate program was to provide "a forum in which philanthropic organizations . . . can exercise their First Amendment rights in the hopes of raising money to support their cause."[132] Focusing on the revenue-producing aspects of the program, the court found that the first factor—the central purpose of the program—weighed in favor of private speech. For the second factor—editorial control—the court held that "[t]he Commission's de minimis editorial control over the plate design and color [did] not support a finding that the *messages* conveyed by the organization constitute government speech."[133] Although the government set the guidelines to determine who could gain access to specialty license plates, the Coalition chose the substantive message of the plate, supporting a finding of private speech.[134]

In determining the third factor—literal speaker—the court emphasized the following facts: the government owned the plates; the plates were displayed on drivers' cars at their behest; that other vanity plate cases had held that the messages were private; and the logo would depict the Coalition's logo and message.[135] As such, although the third factor had "characteristics of both private and government speech," the court found it favored private speech.[136]

The court acknowledged that the fourth factor—the question of who bears the ultimate responsibility for the license plate—is similar to who is the literal speaker.[137] Even though the government developed the program, the court focused on the facts that the Coalition submitted its motto and would be identified on the plates; that the Coalition controlled the message on the plates; and that individual drivers voluntarily choose to disperse the

130. *Id.* at 965.
131. *Id.*
132. *Id.* (citation omitted).
133. *Id.* at 966.
134. *Id.*
135. *Id.* at 966–67.
136. *Id.* at 967.
137. *Id.*

message.[138] The court further stated that there was no evidence that the government intended to adopt the message as it own and weighed the Coalition's and drivers' affirmative acts to develop and to display the plates as factors in favor of finding private speech.[139] The court then concluded that "the 'Choose Life' message displayed through a specialty license plate if issued" would be private speech.[140]

The Ninth Circuit went on the hold that the government of Arizona had created a limited public forum and it had discriminated based on viewpoint because its denial of the Coalition's application was "motivated by the nature of the message rather than the limitations of the forum . . . ."[141]

* * *

The circuit split is a result of the courts' confusion over which test is appropriate to use in the case of specialty license plates. The Supreme Court has yet to provide a definitive test for government speech when it could also be private speech. Therefore, the courts are torn between applying the *Johanns* and the *Rose* tests.

III. NOTABLE JUDICIAL PRECEDENT RELATING TO GOVERNMENT SPEECH, PUBLIC FORUM, AND SPECIALTY LICENSE PLATES

As previously discussed in Part I, when the government intends to clearly convey its messages and policies, the Court affords it broad discretion to do so. However, the discretion that the First Amendment affords the government has limits, and the line between permissible and impermissible government action is often unclear, especially when the government's actions affect the ability of other private speakers to use the medium. There are three relevant areas in which the government's ability to speak have been addressed by the courts: (1) when the government's message is involuntarily subsidized by a private speaker; (2) when the government prohibits private speakers from addressing certain topics but does not itself speak; and (3) when state governments allow drivers to select messages to be displayed on vanity license plates. These cases, described below, provide guidance in determining how the government speech and public forum doctrines should interact.

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138. *Id.* at 968.
139. *Id.*
140. *Id.*
141. *Id.* at 972 (quoting Sammartano v. First Judicial Dist. Court, 303 F.3d 959, 971 (9th Cir. 2002)).

A. Involuntary Subsidy of Government Messages—*Johanns v. Livestock Marketing Association*

Johanns v. Livestock Marketing Ass'n[142] is helpful because a part of it focused on attribution of a particular message, which is helpful in the current case of specialty license plates. In *Johanns*, the Court upheld a government program that created a forced check-off payment of one dollar per head of sold or imported cattle to fund a federal policy of promoting the marketing and consumption of beef. The policy was created by federal statute[143] and directed the Secretary of Agriculture to implement the program.[144] The Secretary was to appoint numerous committees, which then oversaw the creation and implementation of the "Beef. It's What's for Dinner." campaign.[145] Many of the promotional messages created by the check-off bore the message "Funded by America's Beef Producers."[146] Numerous beef producers sued the Department of Agriculture, facially challenging the statute on First Amendment grounds by arguing that the check-off impeded "their efforts to promote the superiority of, *inter alia*, American beef, grain-fed beef, or certified Angus or Hereford beef."[147] The Supreme Court, in a plurality opinion, held that the check-off program did not violate the First Amendment because the messages conveyed by the program were government speech and "[c]ompelled support of government—even those programs of government one does not approve—is of course perfectly constitutional, as every taxpayer must attest."[148]

The Court found that the message being conveyed was a "coordinated program of promotion,"[149] where the government set the overarching message and elements. Thus, the Court found that the messages created by the program were government speech because the "government sets the overall message to be communicated and approves every word that is disseminated . . . ."[150] In determining that the government would be held accountable for its message, the Court emphasized that it was expressly created by statute, the requirements were

142. 544 U.S. 550 (2005).
143. *See* 7 U.S.C. § 2901(b) (2000).
144. *See id.* § 2903.
145. *See Johanns*, 544 U.S. at 554.
146. *Id.*
147. *Id.* at 556.
148. *Id.* at 559 (internal quotation marks omitted).
149. *Id.* at 561 (internal quotation marks omitted).
150. *Id.* at 562.

imposed by the government, and a politically accountable figure oversaw the program and retained absolute veto power over the message.[151]

It is significant that the Court left open the possibility that the government speech created by the Department of Agriculture might be attributed to private speakers, and thus might be unconstitutional as applied to certain plaintiffs.[152] The plaintiffs had made an additional argument, challenging the program because it

> impermissibly use[d] not only their money but also their seeming endorsement to promote a message with which they [did] not agree. Communications cannot be "government speech," they argue[d], if they are attributed to someone other than the government; and the person to whom they are attributed, when he is, by compulsory funding, made the unwilling instrument of communication, may raise a First Amendment objection.[153]

In other words, plaintiffs argued that the public perceived the message to be the plaintiffs' rather than the government's message. Therefore, the government should be precluded from relying on government speech where the public attributes the message to someone other than the government. The Court declined to address this issue because it referred to compelled speech rather than compelled subsidy, and the record was devoid of evidence on compelled speech.[154] However, the Court did leave room for the plaintiffs' theory to form an as-applied challenge to the program if the individual advertisements were wrongly attributed to plaintiffs, although the evidentiary record before the Court did not allow it to make a ruling.[155]

In a concurring opinion, Justice Thomas stated that the plaintiffs may have had a valid as-applied challenge because "[t]he government may not, consistent with the First Amendment, associate individuals or organizations involuntarily with speech by attributing an unwanted message to them, whether or not those individuals fund the speech, and whether or not the message is under the government's control."[156] Justice Ginsburg, also concurring, would not have allowed the messages to be called government speech at all because the messages were not attributed to the government.[157]

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151. *See id.* at 563–64.
152. *See infra* text accompanying notes 163–166.
153. *Johanns*, 544 U.S. at 564.
154. *See id.* at 564–65.
155. *See id.* at 565.
156. *Id.* at 568 (Thomas, J., concurring).
157. *See id.* at 569 (Ginsburg, J., concurring).

The dissenters, however, went even further than the concurring opinions in addressing the government speech doctrine. They acknowledged that the government speech doctrine is "relatively new, and correspondingly imprecise."[158] The dissent first noted a need to "recognize the legitimacy of government's power to speak despite objections by dissenters whose taxes or other exactions necessarily go in some measure to putting the offensive message forward to be heard."[159] The second point was that government speech is permissible because "[d]emocracy . . . ensures that government is not untouchable when its speech rubs against the First Amendment interests of those who object to supporting it; if enough voters disagree with what government says, the next election will cancel the message."[160]

Additionally, the dissent pointed out "the commonsense notion that individuals feel a closer connection to speech that they are singled out to fund with targeted taxes than they do to expression paid for with general revenues."[161] In arguing that the beef program should have violated the First Amendment, the dissent focused on the fact that viewers of the advertisements would have no reason to suspect that the government was sending the message, and since they did not know who was the "man behind the curtain," the accountability justification for government speech had been destroyed.[162]

What *Johanns* brought to First Amendment doctrine is the possibility that the government may violate a private individual's First Amendment rights when it "compels speech, or the support of speech, falsely attributed to a private speaker. In such a case, not only would the public be misinformed, but the additional intrusion into speaker autonomy would implicate serious First Amendment concerns."[163] It is already established that the government may not compel a private individual to fund another private individual's speech because the speech would be wrongly attributed to him.[164] Nor may the government force a private speaker to speak a message that is not his own for similar reasons.[165] These notions seem to turn on attribution—more specifically, to whom the speech is being attributed. Indeed, the Court in

158. *Id.* at 574 (Souter, J., dissenting).
159. *Id.*
160. *Id.* at 575.
161. *Id.* at 576 n.4.
162. *See id.* at 577–78.
163. Jonathan D. Varat, *Deception and the First Amendment: A Central, Complex, and Somewhat Curious Relationship*, 53 UCLA L. REV. 1107, 1139 (2006).
164. *See* United States v. United Foods, Inc., 533 U.S. 405 (2001); Keller v. State Bar of Cal., 496 U.S. 1 (1990); Abood v. Detroit Bd. of Ed., 431 U.S. 209 (1977). *Keller* and *Abood* also stand for broader principles of invasion of conscience, which are beyond the scope of this Comment.
165. *See* Wooley v. Maynard, 430 U.S. 705 (1977).

Johanns spoke in terms of attribution and observed that the more monetary involvement a person has with speech, the closer the connection he or she feels to the message.[166]

This notion of attribution begs several questions that are relevant to determine the correct test governing specialty license plate cases. Is the inverse then true in the case of specialty license plates? If a message becomes one's own when it is attributed to him or her involuntarily through compelled payment or compelled speech, can it be even truer that a message becomes an individual message unavailable for claim as government speech it is voluntarily attributed to a private speaker, such as a driver through purchase and fixation on his or her car? Does it matter whether the private speaker spoke the message before the government claimed it as its own or if the private speaker only later adopted the government's message as his or her own? Does public perception of whose message it is affect this determination? Do perceptions of endorsements in general have anything to say about the matter? Even if the government can be held accountable for the program, can this be trumped by the fact that the speech is primarily attributed to the driver, rendering the speech private rather than government?

B. Government Regulation or Prohibition of Speech—*Legal Services Corporation v. Velazquez*

Another decision that provides guidance in resolving these questions is *Legal Services Corp. v. Velazquez*, which suggests the overall program should be assessed, rather than individual plates.[167] In *Velazquez*, plaintiffs challenged the federal government's formation of the Legal Services Corporation (LSC), a nonprofit corporation whose mission was to distribute governmental money "for the purpose of providing financial support for legal assistance in noncriminal proceedings or matters to persons financially unable to afford legal assistance."[168] A condition built into the grant program "prohibit[ed] legal representation funded by recipients of LSC moneys if the representation involve[d] an effort to amend or otherwise challenge existing welfare law."[169] The

166. *See Johanns*, 544 U.S. at 565 n.8 (plurality opinion) (referring to the notion that where one is singled out to pay a tax, he or she is closely linked with the expression "in a way that makes them appear to endorse the government message"); *id.* at 576 n.4 (Souter, J., concurring) (speaking of the "commonsense notion that individuals feel a closer connection to speech that they are singled out to fund with targeted taxes than they do to expression paid for with general revenues").

167. 531 U.S. 533 (2001).

168. *Id.* at 536 (citing 42 U.S.C. § 2996b(a) (2000)).

169. *Id.* at 536–37.

plaintiffs challenged the program, claiming that it restricted their First Amendment rights and those of their clients.

Before striking down the program as unconstitutional, the Court emphasized that "[w]hen 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 by the grantee."[170] However, the Court pointed out that neither the leeway afforded to government speech nor the rationale for doing so applies in every situation in which government subsidizes speech. The Court cautioned, "[i]t does not follow . . . that viewpoint-based restrictions are proper when the [government] does not itself speak or subsidize transmittal of a message it favors but instead expends funds to encourage a diversity of views from private speakers."[171]

In coming to its decision, the Court observed that the LSC program was "designed to facilitate private speech, not to promote a governmental message" or "to encourage a diversity of views."[172] The program was designed to facilitate lawyers to speak for their clients rather than to facilitate lawyers to speak for the government about welfare, making it impossible for the lawyers' speech to be that of the government.[173] Further, the Court was persuaded by that fact that the government was seeking "to use an existing medium of expression and to control it, in a class of cases, in ways which distort its usual functioning."[174]

Thus, *Velazquez* seems to limit the government's power to rely on government speech to justify regulating private speakers. The decision built on the framework laid down by *Rosenberger* by stating that where a program was designed merely to facilitate private speech (as opposed to actively encouraging a diversity of speakers), the government may not rely on government speech to regulate or to suppress private viewpoints. This statement is relevant to the specialty license plate dilemma since one of the points of contention during litigation has been whether to analyze each individual plate ad hoc or to examine the overall program. *Velazquez*,

170. *Id.* at 541 (quoting Rosenberger v. Rector & Visitors of the Univ. of Va., 515 U.S. 819, 833 (1995)).

171. *Id.* at 542 (quoting *Rosenberger*, 515 U.S. at 834).

172. *Id.*

173. *Id.* at 542.

174. *Id.* at 543. The Court pointed out that it had previously invalidated government efforts at suppressing speech in situations when the speech was inherent in the nature of the medium or where there were already many different points of views being expressed. *See id.* (citing FCC v. League of Women Voters of Cal., 468 U.S. 364, 396–97 (1984); *Rosenberger*, 515 U.S. at 836).

read literally, directs courts to examine the entire program and to determine whether it was designed to facilitate private speech.

Given this reading of *Velazquez*, the defendants in specialty plate cases would be correct to point out that specialty license plate programs are distinguishable from the LSC program in that the attorneys were carrying out their clients' message rather than the government's message. Because of the obvious private speech taking place when attorneys represent clients, *Velazquez* is a clear example both of a program designed to facilitate private speech and of the government distorting the usual function of a medium. However, to assume that drivers are carrying out the government's message merely because specialty license plate programs are distinguishable from the LSC program misses the point of inquiring into the nature of the program in the first place. Assessing the nature of the program will allow courts to determine whether private speech has been implicated, even though there are inevitably degrees of private speech involvement. At one end of the spectrum are cases like *Rust v. Sullivan*,[175] where the parameters of a government program are clearly identifiable and implicate government speech.[176] At the other end are cases like *Velazquez*, where the program's parameters more clearly implicate private speech. In the middle are cases like the specialty license plate programs that implicate neither government speech nor private speech. *Velazquez* dictates that in determining where a particular case falls, the entire program should be examined. Part IV proposes one such test.

C. Vanity Plates—The "Other" Cases

Vanity license plates—where a driver requests a certain combination of letters and numbers to convey a message that the driver presumably wishes other drivers to see—have also been the subject of extensive First Amendment litigation. Courts have generally agreed that in this context, the license plate functions as a nonpublic forum and any regulations imposed by a state or department of motor vehicles must be reasonable and viewpoint neutral.[177] Interestingly, in all of the cases in which a driver has challenged

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175. 500 U.S. 173 (1991).

176. *See* Legal Servs., 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."); *Rust*, 500 U.S. at 193.

177. *See* Perry v. McDonald, 280 F.3d 159, 169 (2d Cir. 2001) (holding vanity plates as a nonpublic forum); Higgins v. Driver & Motor Vehicle Servs. Branch, 72 P.3d 628, 634 (Or. 2003) (affirming an appellate court decision that a registration plate was a nonpublic forum and restrictions must be both reasonable and viewpoint neutral). *But see* Lewis v. Wilson, 253 F.3d 1077, 1079 (8th

the denial of a request for a vanity plate, the state has not raised the issue of government speech. Vanity plates have always been assumed to be a forum—whether designated or nonpublic—that implicate the drivers' own speech rather than the speech of the state.

These cases raise questions pertaining to how specialty plates are different from vanity plates: Why do specialty plates implicate government speech while vanity plates do not, even though they are the exact same medium owned by the same governments? Is the background of a license plate on a car, even though chosen by the driver, substantively different from a combination of letters and numbers also chosen by the driver? How does the state's procedure for allowing specialty plates versus vanity plates affect our analysis?[178]

IV. GOVERNMENT SPEECH OR PRIVATE SPEECH?

A. Application of Government Speech to Specialty License Plate Programs

When an employee or administrative office of the government speaks, it is generally not difficult for the audience to identify that it is the government's message.[179] However, sometimes government and private speech overlap. For instance, it is less clear that the government is speaking when a private actor conveys the message.[180] In these situations, there are generally three ways in which the government speaks through private speakers: (1) private speakers as government agents; (2) government as editors; and (3) government as quality arbiters.[181]

Cir. 2001) (expressing doubt as to whether vanity plates are nonpublic fora rather than designated public fora); Sons of Confederate Veterans, Inc. v. Holcomb, 129 F. Supp. 2d 941, 948 (W.D. Va. 2001) (holding vanity plates as designated public fora where the state allows slogans and designs on the plates).

178. Vanity plates are issued through an administrative process, whereas some specialty plates are statutorily created while others are administratively created.

179. *See* Bezanson & Buss, *supra* note 11, at 1384 (identifying government programs expressing a message as the "simplest and clearest example of government speech").

180. *See* Jacobs, *supra* note 9, at 47 ("A crucial aspect of a government/private speech interaction is that private speakers actually do the talking; the government's input comes from its selection of private speakers. When the government's selection process constitutes speech, it can discriminate among private speakers according to their viewpoints. There are several ways that the government can legitimately 'speak' through its selection of private speech.").

181. *See id.* at 47–55 (identifying and discussing each). Other scholars have broken the categories into more specific instances. *See, e.g.*, Bezanson & Buss, *supra* note 11, at 1384–87 (identifying seven government speech typologies: (1) government program expressing a specific message; (2) government program expressing a general or diffuse message; (3) government control of a communication medium; (4) government messages required to be spoken by a private speaker; (5) government preference for some messages over others; (6) government control of information it

In the first situation, when private speakers act as government agents, their speech is effectively the government's speech. The government designates private speakers "as its agents by funding or otherwise benefiting their speech and telling them what to say."[182] When agents are carrying out the government's message as part of an initiative to communicate it, the government is entitled to discriminate based on viewpoint in order to ensure that its message is delivered clearly.[183] However, the line between when a government is engaging agents to deliver its message and when the government is enabling private speakers to speak for themselves is a fine one, as *Velazquez* demonstrates. Whether the specialty license plate programs should be characterized as the former or the latter will likely dictate their constitutionality.

The government as editor argument will not be addressed at length in this Comment. The government is not sending one coherent message through the license plate program and therefore is not acting as an editor. When government acts as editor, it chooses and presents private speakers in a way that can be reasonably perceived as sending a coherent message which is the sum of the private speakers' message. In contrast, private agents specifically carry out the government's message.[184] Although the government may argue that it is acting as an editor in selecting messages to be given specialty license plates, it is more likely that there is no common theme underlying the specialty plate programs.[185] Even when the government could successfully argue that it is acting as editor, if the "circumstances of the particular presentation indicate that, rather than sending its own message, the government editor is creating a private speech forum," the government loses its discretion to discriminate on viewpoint.[186]

The government as quality arbiter argument also need not be addressed in this Comment because the government is not holding a contest or basing

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possesses; and (7) government speech though private messages attributed to it). Because Jacobs' typologies are appropriate for purposes of this Comment, and for the sake of brevity, all seven of Bezanson and Buss' typologies will not be discussed.

182. Jacobs, *supra* note 9, at 47.

183. *See id.* at 50; Rosenberger v. Rector & Visitors of the Univ. of Va., 515 U.S. 819, 833 (1995) ("When the University determines the content of the education it provides, it is the University speaking, and we have permitted the government to regulate the content of what is or is not expressed when it is the speaker or when it enlists private entities to convey its own message.").

184. *See* Jacobs, *supra* note 9, at 50.

185. *See* Jacobs, *supra* note 4, at 455–56 ("[L]egislators generally do not view themselves as 'editors' when they approve the particular 'mix' of specialty license plates available for purchase, and members of the public, while perhaps objecting to a particular plate's message, do not understand the compilation of plates approved to express an overall 'message' or 'theme.'" (various citations of legislator's comments omitted)).

186. Jacobs, *supra* note 9, at 52.

decisions of whether to award a specialty plate on the quality of the plate's design or cause. Moreover, the government itself put forward the defense that drivers are the agents of the government in disseminating its message.

In the second situation, when the government acts as editor, its role is to select and to compile private messages for presentation.[187] There, rather than sending one distinct programmatic message, the actual act of editing is a "speech act" to which the protections of government speech doctrine apply.[188] In those cases where a government entity exercises editorial control over a medium, the Court has held that the resulting editorial decisions are government speech.[189] The reason for this permissible viewpoint discrimination lies in the government's effort to craft its own message and the assumption that the government is contributing to the speech market.[190]

In the final situation, the government is permitted to discriminate based on viewpoint when it acts as a quality arbiter, "administer[ing] a competitive benefit program designed to reward high quality speech expression."[191] For example, government need not provide money to all points of view when it distributes grants to fund art it deems worthy.[192] Members of the Court have expressed doubt as to whether this ability to discriminate as an arbiter of quality is unlimited, or whether it is limited to discrimination based on content rather than viewpoint.[193]

1. Government Speech Carried out by Private Agents or Government Facilitating Private Speech?

As articulated above, the state governments' arguments for why specialty license plates are government speech is that the plates contain government messages carried out by private individuals, namely the drivers who purchase them and place them on their cars.[194] *ACLU v. Bredesen*[195] squarely held that drivers are the agents of the government in carrying out government

187. *See id.* at 50.
188. *Id.* at 51.
189. *See* Bezanson & Buss, *supra* note 11, at 1385.
190. *See* Jacobs, *supra* note 9, at 51.
191. *See id.* at 52–53.
192. *See* Nat'l Endowment for the Arts v. Finley, 524 U.S. 569 (1998).
193. *See id.* at 598 n.3 (Scalia, J., concurring); Bezanson & Buss, *supra* note 11, at 1462 ("These broad categorical distinctions based on subject matter would ordinarily be regarded as forms of *content* discrimination that were *not viewpoint* based.").
194. *See* ACLU of Tenn. v. Bredesen, 441 F.3d 370, 375 (6th Cir. 2006) (stating that the message was disseminated by private volunteers); Planned Parenthood of S.C. Inc. v. Rose, 361 F.3d 786, 798 (4th Cir. 2004); Henderson v. Stalder, 265 F. Supp. 2d 699, 713 (E.D. La. 2003).
195. 441 F.3d 370.

crafted messages. While *Bredesen* only applied to Tennessee's specialty license plate program, this Comment attempts to analyze specialty license plate programs across different states, which are all organized and administered differently. The differences in the schemes could possibly affect the constitutionality of each. Therefore, these differences and their constitutional relevance will be highlighted when discussing specialty license plate programs.

The *Bredesen* majority erred in applying the law to specialty license plate programs. *Bredesen* relied on *Johanns v. Livestock Marketing Ass'n*[196] in formulating a test for when speech should be characterized as government speech, stating that speech is the government's when "the government sets the overall message to be communicated and approves every word that is disseminated."[197] The *Bredesen* dissent was correct to point out that the test is inapplicable here because it examines whether a message being involuntarily subsidized by a private citizen is that of another private citizen or that of the government.[198] Instead, the test needs to address whether a message being voluntarily communicated by a private citizen is that of the citizen or that of the government. The proposed test does so by examining both subjective and objective perceptions of the message.

The *Johanns* decision turned on whether the speech at issue was that of the government. The Court primarily examined who controlled the speech without referencing to whom the speech might be attributed because the government is allowed to force citizens to subsidize governmental messages through taxes.[199] This was important in *Johanns* because the plaintiffs were being forced to pay money to fund a message with which they disagreed.

While the specialty license plate cases may deceptively seem to turn on a similar determination of whether the speech is government or private, control over the message is not the determinative factor in this context because we are interested in whether speech is government or private *and* whether a public forum is implicated. The specialty license plates do not involve an unwanted duty to pay money, and the attribution of the government's message to the private speaker was irrelevant to the facial challenge

196. 544 U.S. 550 (2005).

197. *Bredesen*, 441 F.3d at 376 (citing *Johanns*, 544 U.S. at 562).

198. *See id.* at 387 (Martin, J., dissenting) ("The government speech doctrine, as it is used in *Johanns*, is more appropriately utilized in the compelled subsidy context, where who is speaking is determinative, and if it is the government, consistent with its broad taxing authority, that speech is immune from First Amendment challenge . . . . Thus, if the plaintiffs here, who presumably disagree with the 'Choose Life' message, were *compelled* to subsidize the production and distribution of 'Choose Life' license plates, then *Johanns* would be on all fours with this case. We face an entirely different situation, however, and therefore *Johanns* is not determinative.").

199. *See Johanns*, 544 U.S. at 562; *Bredesen*, 441 F.3d at 387 (Martin, J., dissenting).

in *Johanns*.[200] However, attribution in this context is relevant, because it is fundamental to determining who is speaking in the first place. Thus the *Johanns* test, which does not address attribution, and which was only concerned with government speech for forced tax purposes, is inappropriate for specialty license plates cases. To offer the blanket statement that where the government speaks at all, and controls the message, it is entitled to discriminate based on viewpoint even if it means prohibiting other speakers from speaking in a medium would be too broad. Further, it is extremely difficult to find a case standing for the proposition that when government chooses to speak in a medium that appears to also facilitate private speech, the government may refuse to allow viewpoints opposed to its own be heard. To the contrary, the Court has warned that this sort of prohibition on speech is not a proper government action.[201]

Therefore, it is illogical to apply the *Johanns* test as used in *Bredesen*, which merely asks who controls the message to the current situation. In specialty license cases, the conflict is about who is actually perceived to speak the message and whether by virtue of its previous actions, the government has facilitated private speech. However, *Johanns* is not entirely irrelevant because it is helpful in determining how the Court examines message attribution and how much editorial control is exercised over a message.[202] *Johanns* should not dictate the test for government speech merely because it used the words "government speech" in its holding. *Johanns* dealt with a separate First Amendment problem and did not speak squarely to how the Court should address situations in which private speech and forums are implicated.

If the *Johanns* test is not the appropriate test to determine whether private drivers are carrying out the government's message or their own message, then what is the appropriate test? The answer lies in the test employed

200. *See Johanns*, 544 U.S. at 568 (Thomas, J., concurring).

201. *See* Legal Servs., Corp. v. Velazquez, 531 U.S. 533, 542 (2001) ("Neither the latitude for government speech nor its rationale applies to subsidies for private speech in every instance, however."); Rosenberger v. Rector & Visitors of the Univ. of Va., 515 U.S. 819, 834 (1995) ("A holding that the University may not discriminate based on the viewpoint of private persons whose speech it facilitates does not restrict the University's own speech, which is controlled by different principles."); Rust v. Sullivan, 500 U.S. 194, 199 (1991) ("This is not to suggest that funding by the Government, even when coupled with the freedom of the fund recipients to speak outside the scope of the Government-funded project, is invariably sufficient to justify Government control over the content of expression."); Bd. of Educ., Island Trees Union Free Sch. Dist. No. 26 v. Pico, 457 U.S. 853, 870–71 (1982) ("[The government] rightly possess[es] significant discretion to determine the content of their school libraries. But that discretion may not be exercised in a narrowly partisan or political manner . . . . Our Constitution does not permit the official suppression of ideas.").

202. The Ninth Circuit's holding in *Arizona Life Coalition, Inc. v. Stanton*, 515 F.3d 956 (9th Cir. 2008), supports this view. *See id.* at 965 (recognizing that *Johanns* was factually distinguishable yet instructive).

by *Rose* as it incorporates both the test for who is speaking *and* whether the government is facilitating private speech, providing a more comprehensive understanding of the facts so that the law may be applied. This test allows courts not only to determine whether the government is speaking, but also why it is speaking, whether it is speaking clearly, and whether individual speech is being conveyed.

The *Rose* test to determine whether speech is government or private examined:

> (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.[203]

a. Central Purpose of the Program

The court in *Rose* analyzed that first factor—the central purpose of the program—too narrowly. The *Rose* court considered "the purpose of the Act" which created the Choose Life plate, determining that it was to promote the State's preference for childbirth, rather than to consider the purpose of the specialty license plate program in general.[204] When analyzing government regulation of speech, courts should look to the overall purpose of the program and identify its predominant purpose rather than the purpose of the individual speech act itself. How broadly the Court casts its net will inevitably affect whose speech is implicated. If the Court were to examine the isolated act of creating the Choose Life plates, the government's speech would arguably be the only one ever implicated. Under such circumstances, the government would never be wrong and could always justify its actions by invoking "government speech" as a defense. If, however, the Court looks at the entire specialty license plate program in context, it could better determine whether private speech and the accompanying problems of government altering a marketplace of ideas are present. While the predominant purpose of a legislature enacting a Choose Life or a Pro-Choice specialty license plate is ostensibly for the legislature to express its approval of one side or the other in the

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203. Planned Parenthood of S.C. Inc. v. Rose, 361 F.3d 786, 792–93 (4th Cir. 2004).

204. *See id.* at 793. It is interesting to note that the *Rose* court did not delve into whether the entire scheme was to facilitate private speech, which was the test in *Velazquez*. Although the court quoted *Velazquez*, nowhere did it mention facilitating private speech. The question remains whether this was an intentional omission by the court in an effort to limit the holding to the Choose Life plates and in an effort not to jeopardize the entire specialty license plate scheme.

abortion debate,[205] the broader scheme of the specialty license plate programs implicate private fundraising and the encouragement of private speech.[206]

It is important to analyze the entire program because the government speech defense has powerful consequences, including shifting the balance of power to the government and allowing it to "trump" individual speech claims.[207] The purpose of government speech is utilitarian—it enables the government to inform voters of its policies in order for the democratic system to function properly.[208] In the marketplace of ideas that is valued by our system of governance and the First Amendment, the central theme is one of the cream rising to the top—that is, people will decide what the best ideas are and implement them. However, if the government is allowed to tinker with the marketplace of ideas by inserting its own points of view and simultaneously exclude others under the guise of government speech, the marketplace of ideas will not function properly and may become rigged.[209] Conceptions of the First Amendment traditionally cast government in the role of outsider—the one "whose actions the First Amendment was primarily intended to limit in the interest of individual freedom of political, personal, social, and economic will."[210] In order to maximize protection of the original purpose of government speech and to maintain loyalty to First Amendment values, examining the

205. This proposition assumes that legislatures who pass one type of plate but not the other are operating under either a liberal or conservative agenda. Of course, if a legislature passed both types, we would not be having this discussion.

206. *See Arizona Life Coal., Inc.*, 515 F.3d at 965 ("[W]e must address Arizona's specialty license plate program as a whole." (emphasis omitted)); ACLU of Tenn. v. Bredesen, 441 F.3d 370, 384 (6th Cir. 2006) (Martin, J., dissenting); Henderson v. Stalder, 265 F. Supp. 2d 699, 716 (E.D. La. 2003) ("[L]ooking at the purpose of the prestige license plate scheme in place in Louisiana, it is pellucid that its purpose is likewise to produce revenue while allowing, on special plates authorized for private organizations, for the private expression of various views."); Jacobs, *supra* note 9, at 100.

207. *See* Bezanson & Buss, *supra* note 11, at 1504–05 (describing the illusion that government speech reflects the opinion of the polity and thus should not be able to trump individual First Amendment claims).

208. *See id.* at 1505; YUDOF, *supra* note 11, at 20–37.

209. *See* Bezanson & Buss, *supra* note 11, at 1506 ("Part of getting an idea accepted in the market is gathering sufficient support for its distribution, a process that is dependent on a wide variety of private decision makers . . . . If the market's distribution mechanisms, as imperfect as they may be, are not private, then by definition the market of expression cannot be described as private or independent or governed by individual belief and choice. Because government expression is often accompanied by efforts to preempt private choice in the distribution system, government speech threatens to undermine the private nature of the marketplace of expression."); YUDOF, *supra* note 11, at 15 ("[G]overnment has an affirmative obligation to promote individual choice and autonomy by expanding the individual's knowledge, and yet, in a negative sense, it should be constrained from programming the citizen to make preconceived choices. Preconceived choices can be defined as choices *compelled* by indoctrinated value systems rather than the product of considered judgments arrived at by a process of evaluation of the efficacy of both the particular choice and the value systems which generate various decisions.").

210. *See* Bezanson & Buss, *supra* note 11, at 1508.

purpose of the program allows courts to determine whether the government is using government speech the way it was intended. That is, is the government relying on government speech to communicate effectively its policies to the electorate?[211] If so, then the speech should be more clearly government speech. However, if the predominant purpose of the program is less clear but there are many different opinions being espoused, then the risk increases that the state will use the government speech doctrine as a means to alter the marketplace of ideas to its own benefit by asserting control over private speech.

First, courts should look to how the states themselves characterize the programs. For example, in Tennessee, the government promotes its specialty license plate program by advertising the program as an opportunity to "show your school spirit" and "support your cause and community."[212] Where a state government advertises its specialty license plate program as a way for drivers to express their individual opinions, or as a way for nonprofit organizations to raise money, courts should weigh in favor of private speech.

Second, courts should look to how many and to the types of groups that have been previously granted specialty plates. In South Carolina, the state currently offers eighty-seven different specialty license plates, including plates dedicated to Dale Earnhardt Jr., Jeff Gordon, various colleges (both in-state and out-of-state), square dancers, and fishing, among others.[213] Similarly, Louisiana offers a multitude of plates, including one for street cruisers, ducks, autism, various fraternities and sororities, as well as the Choose Life plate.[214] It seems peculiar that a state would take an official position on NASCAR drivers,[215] fraternities and sororities, or street cruisers, as these topics seem to be more germane to the individuals driving the cars rather

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211. For instance, in *Rust v. Sullivan*, 500 U.S. 194 (1991), the purpose of the program was for the government to carry out its pro-childbirth policies through assisting mothers in choosing adoption over abortion, which gave the government leeway in dictating what doctors could say. Conversely, in *Velazquez*, the purpose of the legal assistance program was for lawyers to assist indigent clients, not for the government to announce its policies on welfare. Therefore, the government could not rely on government speech to dictate what the lawyers could say. *See* Legal Servs., Corp. v. Velazquez, 531 U.S. 533, 542 (2001).

212. *See* Application for Tennessee Personalized License Plate, http://www.state.tn.us/revenue/forms/titlereg/applpersonalizedplates.pdf (last visited Apr. 2, 2008).

213. *See* S.C. Dep't of Motor Vehicles, Complete Plate List, http://www.scdmvonline.com/DMVNew/PlateGallery.aspx (last visited Apr. 2, 2008) (displaying all of South Carolina's specialty plate options).

214. *See* Louisiana Special Plates, http://omv.dps.state.la.us/Special%20Plates/SpecialPlates_display.asp (last visited Apr. 2, 2008).

215. As any NASCAR fan knows, Jeff Gordon and Dale Earnhardt Jr. are rivals, making it even more preposterous for the state to endorse them both simultaneously. *See* Mark Zeske, *Bad Blood Boiling Over: Gordon, Earnhardt Jr. Stir Rivalry Into All-Out Feud*, SI.COM, Oct. 11, 2006, http://sportsillustrated.cnn.com/2006/writers/mark_zeske/10/11/gordon.earnhardt/index.html.

than to the state. While it is not impossible or even improbable for a state to have official positions on hundreds of topics,[216] it is problematic that the state may claim government speech where its messages are unclear and even conflicting.[217] When a state advertises its specialty license plate program to drivers as a way for them to express their opinions or as a way for nonprofits to raise money, and when the state has granted plates to many diverse entities, the first factor should clearly weigh in favor of individual speech.

Take, for example, the jurisdictions considered in this Comment: Tennessee advertises its program as a chance for drivers to express themselves, and it has authorized plates to many different groups.[218] Thus, the first factor weighs in favor of individual speech. Louisiana and South Carolina, in contrast, do not advertise its programs to drivers to promote any particular cause, but they have approved many different types of plates.[219] Therefore, Louisiana's and South Carolina's central purpose weighs only slightly toward individual speech, on the reasoning that the affirmative act of approving many diverse plates outweighs the passive lack of advertising. In addition, Arizona's program, prior to being overturned, provided a method for nonprofits to raise money and had granted many different plates,[220] and thus weighs in favor of private speech.

b. Degree of Editorial Control Exercised by Government or Private Entity

The second *Rose* factor—the degree of editorial control exercised by the government or private entity—is where the *Johanns* test can be applied appropriately, because this test asks whether the "government sets the overall message to be communicated and approves every word that is disseminated . . . ."[221] If the message on the plates is determined solely by the government, with little or no input from individuals or nonprofit organizations, it weighs towards

216. *See* ACLU of Tenn. v. Bredesen, 441 F.3d 370, 376 (6th Cir. 2006) ("[T]here is nothing implausible about the notion that Tennessee would use its license plate program to convey messages regarding over one hundred groups, ideologies, activities, and colleges. Government in this age is large and involved in practically every aspect of life.").

217. *See id.* at 383 (Martin, J., dissenting) ("It cannot be ignored that the license plates represent a wide-array of viewpoints, some arguably conflicting, and many not germane to any governmental interest.").

218. *See id.* at 384.

219. *See* LA. STAT. ANN. § 47:463.43–47:463.135 (2007); S.C. CODE ANN. § 56-3-8000 to 56-3-10010 (Supp. 2004).

220. *See* Ariz. Life Coal., Inc. v. Stanton, 515 F.3d 956, 969–70 (9th Cir. 2008) (listing organizations who had received plates).

221. Johanns v. Livestock Mktg. Ass'n, 544 U.S. 550, 562 (2005).

government speech because the government would be regulating only its own speech. However, if groups or applicants are given editorial control over the plates' message or design, as in the case of vanity plates, it weighs toward finding that the plates facilitate private speech.

In Tennessee, the statute provides that the group sets the message to be communicated, but this message must adhere to certain requirements and is subject to approval.[222] This rule points to both government and private speech, because the group is given discretion in designing the plate, but is subject to government approval. In Louisiana, the legislature controls the entire message on some plates, but allows some groups to design their own plates with no oversight, and directs the secretary of the Department of Public Safety and Corrections to design other groups' plates for them.[223] Thus, some plate messages favor government speech while others favor private speech. The South Carolina Statute provides that any nonprofit group is entitled to a plate and gives the groups nearly free reign in designing their plates, subject only to restriction if the design is "offensive or fails to meet community standards."[224] Likewise, the Arizona statute allows the group to submit its own design subject to certain standards.[225] These statutory schemes favor finding that these plates are private speech.

c. Identity of the Literal Speaker

The third factor—the identity of the literal speaker—examines the objective perception of who is the speaker of the message. When the objective observer perceives the speaker to be the driver, it should favor individual speech.[226] Conversely, when the objective observer perceives the state to be speaking, it should favor government speech. Here, it is helpful to

222. *See* TENN. CODE. ANN. § 55-4-220(a)(3) (2004) ("Such plates shall be designed in consultation with the commissioner and the department's taxpayer and vehicle services director, in addition to any other person or entity designated to be consulted relative to the design of such plate in the section authorizing an individual plate[.]").

223. *Compare* LA. REV. STAT. ANN. § 47:463.76(B) (dictating the color, design, and logo of the Jaycees' plate), *with id.* § 47:463.108(A) (providing that the breast cancer awareness plate be of the color and design selected by Susan G. Komen Affiliates), *and id.* § 47:463.40(A) (directing the secretary to design a child safety plate benefiting the Coalition for Maternal and Infant Health).

224. S.C. CODE ANN. § 56-3-8000(F) (Supp. 2004).

225. *See* ARIZ. REV. STAT. ANN. § 28-2404 (2006).

226. *See* Planned Parenthood of S.C. Inc. v. Rose, 361 F.3d 786, 794 (4th Cir. 2004). The court declined to state a definite test, and subsequent decisions indicate that it would be helpful to clarify this factor. As such, this Comment attempts to determine how the Court would (and should) analyze it.

look at previous Court cases to determine what the Court deems important in objectively ascertaining who is speaking.

The court's dicta in *Johanns* relating to the possibility of an as-applied challenge to the beef promotion as well as its discussion of monetary ties to messages are helpful. Both the *Johanns* plurality and dissent point out that when money is involved, the more money a person feels he has directly contributed to a cause through taxation or forced subsidy, the more closely connected he feels to that message.[227] Thus, when a person is forced to pay for a message, there is a greater chance that the message will be attributed to him. If this proposition holds true in terms of forced subsidies, then it logically follows that when a person voluntarily pays to display a message—for example, when a driver pays for a specialty license plate—he or she feels that the message is his or her own. When people who perceive a message know that the communicator has actually paid to communicate the message (and most people know that drivers have to pay extra for a specialty plate), they are more likely to understand that the person communicating the message feels that it is his message.

Another way the Court has determined when a message should be attributed to a speaker is when the message is actually attached to the personal property of the speaker.[228] In *Wooley v. Maynard*,[229] the Court held that when a message is attached to the personal property that is closely related to an individual, the message is attributed to that individual.[230] Although *Wooley* was a compelled speech case, the Court's consideration that messages on license plates are a reflection of the driver's point of view is relevant.

Because the Court has also looked to monetary ties and the location of the message in determining attribution, it is appropriate to incorporate these inquiries into an objective test for who speaks. When a speaker has paid to display a message and when the message is attached to personal property of the speaker, it is more likely that, objectively, the private person is perceived

227. *See* Johanns v. Livestock Mktg. Ass'n, 544 U.S. 550, 565 n.8 (2005) (referring to the notion that where one is singled out to pay a tax, he or she is closely linked with the expression "in a way that makes them appear to endorse the government message"); *see also id.* at 576 n.4 (Souter, J., concurring) (speaking of the "commonsense notion that individuals feel a closer connection to speech that they are singled out to fund with targeted taxes than they do to expression paid for with general revenues").

228. *See* Wooley v. Maynard, 430 U.S. 705, 715 (1977) ("New Hampshire's statute in effect requires that appellees use their private property as a 'mobile billboard' for the State's ideological message or suffer a penalty, as Maynard already has.").

229. 430 U.S. 705.

230. *See id.* (stating that a person's automobile was an instrument through which to express an ideological point of view); *see also* Children First Found., Inc. v. Martinez, 169 F. A'ppx 637, 639 (2d Cir. 2006) ("[C]ustom license plates involve, at minimum, some private speech . . . .").

to be the speaker. Both of these factors are present in specialty license plate cases, and thus weigh in favor of private speech.

d. Ultimate Responsibility for Speech

The fourth factor examines who claims ultimate responsibility for the speech and whether anyone may be held accountable for its creation.[231] If the procedure for creating a specialty plate is purely statutory with no driver or nonprofit group application process, then it would weigh towards government speech because voters could ostensibly voice their disapproval through the electoral process if the legislature enacted an inflammatory plate. However, if there is an application process that is carried out administratively, then it weighs toward finding that the plates facilitate private speech because no one other than the private group itself is responsible for creation of the plates.

While the Tennessee statute did not employ an administrative process and plates could only be created by statute, the Tennessee's Department of Revenue invites all groups to obtain their own specialty plate by asking their state senator or representative to sponsor it for approval.[232] Similarly, in Louisiana, where plates are created statutorily, a part of the statutory scheme in question implies that it is possible for an organization to request a special prestige license plate.[233] Further, this statute sets out conditions precedent before a prestige plate can be issued.[234] Although both states arguably encourage application to the programs, ultimately plates are created by the legislative process and not

231. The court in *Rose* did not articulate a specific test for the fourth factor, but by asking how the plates came into existence, courts will be able to determine better whether they are government or private speech. Further, this formulation of the fourth factor differentiates the third and fourth factors, which some courts have admitted are similar. *See* Ariz. Life Coal. v. Stanton, 515 F.3d 956, 967 (9th Cir. 2008) ("The question of who bears 'ultimate responsibility' for the 'Choose Life' license plate is very similar to the question of who is the literal speaker."). Further, the *Life Coalition* court applied the fourth factor by asking whether the message originated through legislation or from the nonprofit group, and without specifically articulating a test, followed this approach. *See id.* ("It is true that, like the Secretary in *Johanns*, Arizona developed the program that allows nonprofit organizations such as Life Coalition to obtain specialty license plates. However, in *Johanns* the beef producers had no choice but to support the beef ad. In comparison, there is nothing in the record to even suggest that Arizona intended to adopt the message of each special organization plate as its own state speech. Instead, *the burden is on the nonprofit organization*. If it wants to convey a certain message through the Arizona specialty plate program, it must take the affirmative step of submitting an application. This suggests that it is Life Coalition, rather than the State of Arizona, that bears ultimate responsibility for the content of the speech." (emphasis added)).

232. *See* Tennessee.gov, Introduce a New Specialty Plate, http://state.tn.us/revenue/vehicle/licenseplates/introducenewplate.htm (last visited Apr. 2, 2008).

233. *See* LA. REV. STAT. ANN. § 47:463(A)(3)(a) (2007).

234. *See id.* § 47:463(A)(3)(b).

administratively. Thus, the government has a strong argument that it is speaking for itself and this factor should weigh in favor of government speech.[235]

Conversely, in South Carolina, specialty plates can either be created statutorily or administratively,[236] but any group presumably can get its own plate if it is able to meet the order qualifications and is a nonprofit group. Similarly in Arizona, specialty plates are created administratively, and any qualifying group is entitled to one.[237] Thus, these states have created a program where private groups are entitled to a plate, and the only entity accountable for its creation is the private group. Thus, if the government is not ultimately accountable for the speech, then this factor should weigh towards private speech.

e. Totality of the Circumstances

After analyzing the factors to determine whether specialty plates are government or private speech, it becomes apparent that the Fourth Circuit in *Rose* was correct. Specialty plates have attributes of both government and private speech that are difficult to ignore. While the purpose of the legislature acting to pass the statute may have been to support its position on abortion, the purpose of all of the specialty license plate programs is (or was originally) to facilitate private speech of drivers when states advertise the programs as a way for drivers to express themselves and when many different entities are granted plates. When the government controls the messages by excluding private speakers from the creation of the message and design, as in South Carolina and Tennessee, it favors government speech. When groups design the plates, as in South Carolina and Arizona, it favors private speech. From an objective standpoint, all of the messages displayed on the plates are perceived to be the drivers' due to monetary involvement and attachment to the personal property of drivers. Tennessee and Louisiana's schemes are purely legislative, allowing for accountability, while South Carolina and Arizona's are administrative, weighing in favor of private speech. Arizona's and South Carolina's schemes appear most clearly to favor private speech due to the administrative nature of the program and the lack of governmental

235. The court in *Rose* countered this observation by pointing to the fact that drivers are the ones who ultimately choose to pay extra money to buy the plates, and as such, they bear the ultimate responsibility for the plates. *See* Planned Parenthood of S.C. Inc. v. Rose, 361 F.3d 786, 794 (4th Cir. 2004). This may be true, and it may weigh in the Court's analysis should it decide to resolve the current circuit split.

236. *See* S.C. CODE ANN. §§ 56-3-8000(A)–(B), 56-3-8910 (Supp. 2006).

237. *See* ARIZ. REV. STAT. ANN. § 28-2404 (West 2006).

input, while Tennessee and Louisiana's schemes may each have two factors favoring government and private speech. Thus, on balance, it is impossible to determine whether the Tennessee and Louisiana specialty license plate programs are pure government speech conveyed by private drivers or pure private speech, as they are a mixture of both.

2. Characteristics Justifying Government Speech That May Nevertheless Apply

This analysis does not end our inquiry: If a government creates a program that produces messages that are a combination of government and private speech, whose right to speak should prevail? Should the government be afforded the same protections as if it were enlisting agents to disseminate its speech? Should the rights of individuals to have access to the forum prevail?

If the rationales for why government speech is recognized are applicable here, then it follows that the Court should favor the speech as if it were the government's and permit the government to ensure that its message "is neither garbled nor distorted."[238] Commentators have warned that expansion of government speech risks an exception (government may sometimes discriminate when it is speaking for itself) swallowing the rule ("Congress shall make no law . . . abridging the freedom of speech . . . ."[239]), resulting in government distorting the marketplace of ideas to its advantage.[240] Therefore, if the reasons for allowing government to categorize its speech under the safe haven of government speech are absent, then we may treat the government as if it were "expend[ing] funds to encourage a diversity of views from private speakers,"[241] and engage in forum analysis, which prohibits discrimination based on viewpoint. However, as two commentators have pointed out, this decision may be a function of the Court's own view of whether the government deserves discretion in this particular area:

> In deciding between the poles, the Court purports to hold the government to its own decision. The Court determines either that the government was speaking its own message or that it opened an avenue for individual speech opportunities and, if the latter, whether it was opening the door wide or opening only a limited forum. It seems clear that in deciding what the government has undertaken to do, the Court will be influenced by its own broad view of First Amendment tradeoffs.

238. *See* Rosenberger v. Rector & Visitors of the Univ. of Va., 515 U.S. 819, 833 (1995).
239. U.S. CONST. amend. I.
240. *See* Bezanson & Buss, *supra* note 11, at 1505–07.
241. *See Rosenberger*, 515 U.S. at 834.

> That is, in selecting one category or another, the Court will be influenced by its own judgment about the discretion the government needs to communicate its message and the impact of the exercise of such discretion on the working of individual speech markets.[242]

a. Clear Message, Accountability, and Non-Suppressive

The characteristics of speech that justify classifying it as government speech are: (1) clarity that it is the government's message, (2) the public's ability to hold the government accountable,[243] and (3) whether the impact of the speech is suppressive of other private speech.[244] For the government's message to gain government speech protection, this list is not exhaustive nor has the Court articulated a specific test appropriate for when the government speaks in a medium that also implicates private speech.[245]

A clear message from the government inevitably affects accountability. When people can ascertain that it is the government speaking, they are better able to hold the government accountable for what it says through the political process.[246] In order for the government to be held accountable for its messages, it must make clear both what it intends to say and that it intends to speak through private speakers.[247] This requirement prevents the government from later claiming "that any action is expressive and subject to different criteria than those applied to instances of government regulation.

242. *See* Bezanson & Buss, *supra* note 11, at 1407.

243. *See* Johanns v. Livestock Mktg. Ass'n, 544 U.S. 550, 563 (2005) ("Some of our cases have justified compelled funding of government speech by pointing out that government speech is subject to democratic accountability."); Jacobs, *supra* note 9, at 56 (citing Bd. of Regents of the Univ. of Wis. Sys. v. Southworth, 529 U.S. 217, 235 (2000)).

244. *See* Jacobs, *supra* note 9, at 56 (citing Nat'l Endowment for the Arts v. Finley, 524 U.S. 559 (1998)).

245. *See id.* (stating that the Court's opinions provide clues as to what characteristics legitimize government speech rather than identifying them as elements or necessities).

246. *See Johanns*, 544 U.S. at 575 (Souter, J., dissenting) ("Democracy, in other words, ensures that government is not untouchable when its speech rubs against the First Amendment interests of those who object to supporting it; if enough voters disagree with what government says, the next election will cancel the message.").

247. *See* Jacobs, *supra* note 9, at 57; Bezanson & Buss, *supra* note 11, at 1510 ("[G]overnment should be able to act as a speaker only when it does so purposefully, with an identified message, which is reasonably understood by those receiving it to be the government's message . . . . Otherwise, the government might claim the status of speaker in defending its truly regulatory acts, basing the claim only on the artifact of meaning that others attribute, wrongly, to the government's action. Moreover, a requirement of purpose would assure that the message communicated is the government's own, and not the speech of a private party commandeered by government without expressive purpose. And a requirement of open purpose would also permit the government's speech claim to be judged in terms of the intended message's actual receipt by an audience, and the audience's understanding that the message is the government's own.").

Such a result would seriously undermine the existing constitutional doctrines governing regulation of private speech and management of the various forms of public and nonpublic forum."[248]

Political accountability can justify the government speaking when it is putting forth its policies. However, the government violates the First Amendment when it uses means to become another speaker in the market and then discriminates based on viewpoint by relying on government speech doctrine, which alters the marketplace of ideas. Traditionally, the populace rejects an unwise or unpopular idea by collective inaction—ignoring the speech. This concept is illustrated by the fact that the American Nazi party and the KKK are not the prevailing political or social groups in America. Their ideas have been rejected by the majority through collective inaction. If government were merely to add its voice into the marketplace, there would be no First Amendment problem. However, where the government seeks the ability to speak in the marketplace of ideas and to keep others out based on viewpoint, collective inaction does nothing but permit the government to continue speaking its views to the detriment of other private speakers.[249] A key difference between private speech and government speech is that government speech allows the government to exclude other speakers, whereas private speakers have to share access to the marketplace equally with their peers. Rather than collectively ignoring the government speech that excludes others as a solution, the populace would have to mobilize and affirmatively vote in a new government, which is contrary to how the First Amendment and the marketplace of ideas

248. Bezanson & Buss, *supra* note 11, at 1511.

249. *See* Shiffrin, *supra* note 9, at 600–01 ("The idea that government may add its voice to the many it must tolerate until it drowns out private communications is an unworkable test. It does, however, underscore one of the problems to be faced in assessing government speech: the concern that government speech could result in unacceptable domination of the marketplace and the need for measures to confine the danger.").

should work.[250] The First Amendment does not require collective voter action to assure that every speaker is heard.[251]

The government can be accountable for its actions by stating in validly enacted legislation the "boundaries of a program and the agents employed by it."[252] This accountability becomes obvious because the government is clearly identifying its policies and ends. If voters disagree, then they can collectively act in the next election and vote in someone with different policies. However, accountability is not present when the government does not clearly identify a program's purpose, or when it engages in a discriminatory practice and then makes ex post determinations that the speech at issue is government policy. In such cases, the government is not speaking to address its ends, but rather is using government speech as a means for distorting the marketplace.[253] Thus, courts should look to the government's policies and practices to decide whether a contested practice is in fact government speech

250. *See also* Bezanson & Buss, *supra* note 11, at 1507 ("A government speech 'right' would require that any limits placed on the government's expression in the marketplace be accomplished not by the supply and demand assumptions of a free market, but rather by positive democratic action (legislation, for example) requiring collective action by individuals and their representatives in the polity. This is a difficult if not impossible task, the need for which would set a higher barrier for response to competing ideas than is appropriate under the First Amendment. The First Amendment's competitive assumptions suppose that people can simply ignore or reject ideas, without more, and that, if enough people do so, collective action based on those ideas will simply not occur, because collective action is, and should be, difficult and time consuming. But with government speech, the collective action has already occurred by the government's very decision to speak, and thus rejection of collective action based on an unacceptable idea requires resort to collective political action.").

251. *See* Jacobs, *supra* note 4, at 464 ("Most fundamentally, the Constitution imposes the equal treatment standard of viewpoint neutrality on the government when it chooses among private speakers. This standard applies because, in the context of making individual speech selection decisions, the political process is an inadequate constitutional protection. In fact, not only is it inadequate, it is constitutionally perverse. The free speech guarantee protects minority speech, while the political process reflects majority will." (citing Bd. of Regents of the Univ. of Wis. Sys. v. Southworth, 529 U.S. 217, 235 (2000) ("The whole theory of viewpoint neutrality is that minority views are treated with the same respect as are majority views. Access to a public forum, for instance, does not depend upon majoritarian consent."))).

252. Jacobs, *supra* note 4, at 470–73; *see also* Johanns v. Livestock Mktg. Ass'n, 544 U.S. 550, 563–64 (2005) (finding that accountability existed when the program was created by statute, administered by an accountable official, and when the U.S. Congress retained oversight authority).

253. *See* Bezanson & Buss, *supra* note 11, at 1510 ("The topics of messages of government speech are not, in any event, what threatens individual liberty under the First Amendment. The abridgements of free speech are occasioned instead by the means used: the use of monopoly power or leverage to control the private mechanisms of distribution of speech, and thus to distort the operation of the private marketplace of ideas; the displacement of individual expression with the government's own speech; *the conversion of an individual's speech into a government message through subsidy or selection*; the deception occasioned by hidden and unacknowledged government messages; the use of attributed or unintended meaning as a justification for excluding private expression. It is in the means used that government speech claims can most affect private speech and the private speech marketplace." (emphasis added)).

or speech used as a means to abridge others' speech.[254] Government is assumed to be held politically accountable for its policies, but the Constitution puts inherent limits on the government's practices. Courts, not voters, have the duty to police this line.[255]

Some of the license plate programs discussed earlier illustrate such an accountability problem, while others do not. In states that carry out specialty license plate programs administratively, such as South Carolina and Arizona, the original programs were generally noncontroversial and created the public expectation that private entities could express themselves and their causes using the plates. Only when inundated with requests for a plate with which it disagreed (or when it got sued) did the government claim that its messages on all license plates were government speech, and the drivers displaying license plates bearing their veteran status or their alma maters were mere agents of the government rather than expressing any sort of individual message.

The problem with administratively run license plate programs is that voters are not told the purpose of the programs, other than that it is an opportunity for drivers to express their support for a cause and to raise money for that cause. Nor is it articulated to voters that specialty plates are to function as a medium through which the government will express its official policies. Thus, voters have no way of knowing before a controversial license plate is created that the license plate program is not, in fact, designed to display their messages, but rather only the government's messages. After a marketplace of ideas has already been formed, the government refuses to allow points of view contrary to its own into the market. Thus, the government is using government speech as means to control others' speech rather than as an end to convey its own clear policy messages.

In states such as Tennessee or Louisiana, however, with their strictly defined statutory rules for creating specialty license plates, the argument for a lack of accountability becomes more difficult to make. Here, the state legislatures consider and act upon each new proposed license plate that is introduced by a member of the legislature. Rather than merely tolerating speech that is proposed by private entities by approving each plate if it is not

254. *See* Jacobs, *supra* note 9, at 60 (citing Air Line Pilots Ass'n Int'l v. Dep't of Aviation, 45 F.3d 1144, 1153 (7th Cir. 1995) ("This factual inquiry into policy and practice is necessary . . . because it . . . guards against the dangers of post-hoc policy formation or the discretionary enforcement of an effectively inoperative policy.")).

255. *See* Marbury v. Madison, 5 U.S. 137, 177, 180 (1803) ("It is emphatically the province and duty of the judicial department to say what the law is . . . . Thus, the particular phraseology of the constitution of the United States confirms and strengthens the principle, supposed to be essential to all written constitutions, that a law repugnant to the constitution is void; and that *courts*, as well as other departments, are bound by that instrument.").

obscene or confusing (as in vanity plates), the government is actively embracing a cause as its own by passing a statute. Whether many of the voters in the state agree with the legislature is usually considered a matter best left to the political process. Instead, voters in states such as Tennessee and Louisiana are left with only a legislative record of which plates their state legislators approve or disapprove.

Even in states where voters are arguably able to hold the government politically accountable for its policies, the structure and previously accepted use of the specialty license plate programs both indicate that the government has stepped outside the parameters of the traditional use of the license plate programs in deciding to provide a plate to only one side of a debate, such as in the case of the abortion debate. The state governments, including those in which plates are created statutorily, have created a system that has not previously been subject to strict regulation in determining who could participate. Nor did the states make it clear to voters that license plates would be used to communicate official state policy. Had the state governments originally made clear that the specialty plates were reserved for state-sponsored causes or programs, the usual purpose of the programs would be different, and state regulation would be incidental to the programs. However, that has not been the case, as evidenced by the sheer number of plates available, the previously noncontroversial subjects of plates, the lack of clarity in obtaining one, and the government's nonselectiveness in granting plates. Thus, the act of denying plates based on abortion views is not necessary to the usual purposes of the specialty plate program and cannot justify the government restricting contrary speech to the benefit of favored speech.[256]

States have also made the argument that drivers are able to voice their opinions on other things than a license plate—for example, on a bumper sticker, and thus drivers do not need license plates to speak. However, this argument trivializes a person's right to speak equally with others who hold the opposite viewpoint. Arguably, in *Velazquez* the clients could seek assistance from Legal Aid or a pro bono lawyer, and in *Rosenberger*, the student group could have privately raised funds to publish its newspaper. However, simply because an alternative medium exists in which one could express one's

256. *See* Posting of Eugene Volokh to The Volokh Conspiracy, Free Speech and License Plate Designs, http://volokh.com/2002_04_28_volokh_archive.html#76006887 (Apr. 30, 2002 10:42 PST) ("[B]ecause this program was so nonselective, and so focused on raising funds rather than genuinely praising certain groups, . . . it became an essentially open forum for a wide variety of private speech, rather than an expression of the government's own message.").

opinion does not cure the wrong.[257] The entire point of the public forum doctrine is that if individual speech is taking place on the government's property, then the government may not discriminate based on the speakers' viewpoint when allocating time or use of the medium. Because most of the schemes at issue do not provide for clear government accountability, lack a clear government message, and have excluded contrary viewpoints, the policies favoring government speech are absent. As such, courts should find private speech and engage in forum analysis.

V. CREATING A FORUM THROUGH FUNDRAISING

A separate argument, which has not been addressed by the lower courts or the courts of appeals, may provide a different, but more satisfying answer to the problems presented by the specialty license plate programs. Even if courts accepted as true the states' assertions that the plates' purposes are not to enable private speech, they should also consider that another main purpose of the plates is to raise money. Revenue raised in all states through specialty license plate program goes both towards the causes listed on the plates as well as to the states themselves.[258] Nonprofit organizations, therefore, look to specialty license plate programs as a way to generate revenue from citizens. However, in order to do so they must be granted access to license plates by either an administrative process of approval (South Carolina) or a statutory act (Tennessee and Louisiana).

Given that a central purpose of the specialty license plate programs is to enable nonprofit groups to engage in fundraising, this may bring litigation of future cases within the ambit of *Cornelius v. NAACP Legal Defense and Education Fund Inc.*,[259] where the Court made it clear that when the government allows nonprofit groups to engage in fundraising activities by accessing government property, it may not discriminate based on viewpoint in granting access to the property.[260] In *Cornelius*, the Court was asked to determine

257. *Cf.* Rosenberger v. Rector & Visitors of the Univ. of Va., 515 U.S. 819, 835 (1995) ("The underlying premise that the University could discriminate based on viewpoint if demand for space exceeded its availability is wrong as well. The government cannot justify viewpoint discrimination among private speakers on the economic fact of scarcity.").

258. *See* LA. REV. STAT. ANN. §§ 47:463.61(F), 463.31(C), 463.40(D) (2007); S.C. CODE ANN. §§ 56-3-8910(B), 56-3-8000(A) (Supp. 2006); ACLU of Tenn. v. Bredesen, 441 F.3d 370, 372 (6th Cir. 2006) ("The statute authorizing issuance of these license plates earmarks half of their respective profits for named nonprofit groups committed to advancing the causes publicized on the plates. The State of Tennessee takes the other half of the profits." (internal citation omitted)).

259. 473 U.S. 788 (1985).

260. *See id.* at 812 ("[T]he purported concern to avoid controversy excited by particular groups [seeking to fundraise] may conceal a bias against the viewpoint advanced by the excluded speakers.").

whether the Federal Government violated the First Amendment when it prevented certain political advocacy groups from participating in the Combined Federal Campaign (CFC), an annual fundraising drive that allowed nonprofit groups to solicit donations from federal workers.[261] Specifically, the Federal Government had excluded "those agencies that seek to influence the outcomes of elections or the determination of public policy through political activity or advocacy, lobbying, or litigation on behalf of parties other than themselves."[262] The NAACP and other political advocacy groups sued, claiming that the government violated their First Amendment rights by preventing them from soliciting charitable contributions.[263]

In its decision, the Court stated that charitable donation solicitations are a recognized form of protected speech,[264] but acknowledged the possible difference between in-person solicitation and the thirty-word written statements at issue in the federal campaign program.[265] Nevertheless, the Court concluded that nondirect solicitation of donations by nonprofit groups deserved First Amendment protection both because the statements "directly advance the speaker's interest in informing readers about its existence and its goals" and because "an employee's contribution in response to a request for funds functions as a general expression of support for the recipient and its views."[266] The Court emphasized "the reality that solicitation is characteristically intertwined with informative and perhaps persuasive speech seeking support for particular causes or for particular views . . . and the reality that without solicitation the flow of such information and advocacy would likely cease."[267]

The Court noted that while "[g]overnment restrictions on the length and content of the request are relevant to ascertaining the Government's intent as to the nature of the forum created, they do not negate the finding that the request implicates interests protected by the First Amendment."[268] This declaration allows for the possibility that state governments—in creating specialty plate programs that are de facto fundraising tools for nonprofit organizations—have

261. *See id.* at 790.
262. *Id.* at 795 (internal quotation marks omitted).
263. *See id.* at 795.
264. *Id.* at 797 (citing Vill. of Schaumburg v. Citizens for a Better Env't, 444 U.S. 620 (1980)).
265. *See id.* at 798–99 ("In a face-to-face encounter there is a greater opportunity for the exchange of ideas and the propagation of views than is available in the CFC. The statements contained in the CFC literature are merely informative. Although prepared by participants, the statements must conform to federal standards which prohibit persuasive speech and the use of symbols 'or other distractions' aimed at competing for the potential donor's attention.").
266. *Id.* at 799.
267. *Id.* at 797–98 (quoting *Vill. of Schaumburg*, 444 U.S. at 632).
268. *Id.* at 799.

created a forum for protected speech to take place even though the government is able to regulate what is actually displayed on the plates.

The Court concluded that the CFC program and access to the federal workers constituted a nonpublic forum because the history of the CFC indicated that it was created to raise money while minimizing federal workplace disruptions and because the government limited access to the program.[269] As a nonpublic forum, restrictions on access were permissible so long as they were reasonable in light of the purpose served by the forum and viewpoint neutral.[270] The Court determined:

> Although a speaker may be excluded from a nonpublic forum if he wishes to address a topic not encompassed within the purpose of the forum, or if he is not a member of the class of speakers for whose special benefit the forum was created, the government violates the First Amendment when it denies access to a speaker solely to suppress the point of view he espouses on an otherwise includable subject.[271]

The Court did not state that the challenged policy violated the First Amendment as viewpoint discrimination; they declined to do so because the issue had not been decided below nor briefed before them.[272] Thus, the possibility has been left open that when the government creates a mechanism by which nonprofit organizations may fundraise using government property, the government may not deny access to the property by discriminating based on viewpoint. This possibility raises the question of whether specialty plates are different than the CFC. Until now, courts and litigants have assumed that specialty plates implicate either individual speech because they are the opinions of the drivers carrying them, the groups that sponsor them, or the legislature. They have not considered that specialty plates implicate individual speech because raising money is a form of speech in and of itself, implicating only the organizations' speech.

Regardless of whether state governments claim that specialty license plates are government speech, they may have recreated *Cornelius* and the accompanying First Amendment problems. Specialty license plates are a source of fundraising for nonprofit organizations. Certain organizations

269. *Id.* at 805–06.
270. *Id.* at 806.
271. *Id.* (citation omitted).
272. *See id.* at 812–13 ("Although there is no requirement that regulations limiting access to a nonpublic forum must be precisely tailored, the issue whether the Government excluded respondents because it disagreed with their viewpoints was neither decided below nor fully briefed before this Court. We decline to decide in the first instance whether the exclusion of respondents was impermissibly motivated by a desire to suppress a particular point of view. Respondents are free to pursue this contention on remand.").

financially benefit from access to the license plates, a nonpublic forum, and are thus better equipped financially to communicate their messages than organizations who do not have access to specialty plate fundraising. Drivers know that the extra money paid for a specialty plate supports the cause on the plate. Consequently, when a nonprofit group seeks a specialty license plate, it is seeking access to drivers in order to make a charitable request.

The governments have conceded that the decision to exclude certain abortion plates is based on viewpoint discrimination. Thus, under the dicta in *Cornelius*, the state governments have violated the First Amendment not because they denied drivers the right to voice their opinion by favoring their own policy, but because they denied organizations the right to fundraise on equal footing with other organizations based on that organization's point of view on abortion.

CONCLUSION

Specialty license plates created by states with politically divisive messages such as Choose Life or pro-choice slogans were bound to draw a reaction from people who seek to express the opposite sentiment. Whether specialty license plates implicate government or private speech is an important decision in determining whether the plates violate the First Amendment. The Supreme Court has not yet articulated an appropriate test that addresses situations in which government speech and public forum doctrines overlap. However, by tailoring and applying the Fourth Circuit's four-part test, it becomes clear that most of this speech is in fact a hybrid between government and private speech.

When states create an administrative procedure by which entities may apply for plates and develop an expectation to receive them, political accountability is lacking because voters have no one to hold responsible when an unpopular or controversial plate is approved or denied. In these cases, courts should treat specialty license plate programs as facilitating private speech and engage in forum analysis, even though which type of forum is irrelevant because the government is not permitted to discriminate based on viewpoint in any forum. Accordingly, the Court should declare those particular specialty license plate programs a violation of the First Amendment until states ensure that those who wish to mobilize enough private support to qualify for their own plate are able to do so or until they are willing to hold political representatives accountable for the content on each plate.

Even in states where legislatures are politically accountable for the plates by enacting legislation for each plate, when the previously accepted use

of the program was nonselective and when the state did not clearly communicate that the plates were reserved for state messages, government regulation of viewpoint is not a usual function and cannot justify restrictions on contrary viewpoints.

Finally, courts should look beyond the traditional specialty plate government speech versus public forum arguments and consider whether the programs may fall closer to *Cornielius*, implicating nonprofit organizations' rights to fundraise using government property. If the courts determine that permitting nonprofit organizations to receive funds from the sale of specialty license plates is the same as allowing nonprofit organizations to receive federal worker donations, then these cases are on point with *Cornelius* and the states must not discriminate based on viewpoint when deciding which specialty plates to approve.

Thus, examining the intersection of government speech and the public forum doctrine in the context of specialty license plates tells us that the government speech doctrine is not yet completely developed. The Court needs to address situations in which private speech rights overlap with government speech, and provide guidance for lower courts when they take up similar problems.