LICENSE TO DISCRIMINATE: "CHOOSE LIFE" LICENSE PLATES AND THE GOVERNMENT SPEECH DOCTRINE

*W. Alexander Evans**

I. INTRODUCTION

The line between expressing one's own view and discriminating against contrary views is a fine one. The distinction, however, is important in the context of government speech. While the government can express a view pertaining to a particular subject and refuse to express contrary views, it cannot discriminate against contrary views when access to a public forum is at issue, even if it has created the forum and controls subject matter within it.[1]

In *ACLU of Tennessee v. Bredesen*,[2] the United States Court of Appeals for the Sixth Circuit upheld a Tennessee statute[3] that authorized the sale of a license plate bearing the words "Choose Life," despite the fact that the State refused to authorize a similar license plate bearing a "Pro-Choice" message. The court held that the "Choose Life" message consisted of purely governmental speech distributed by private volunteers and that, as such, it failed to create a "forum" of speech that required viewpoint neutrality.[4]

The *Bredesen* court acknowledged that its holding conflicted with a Fourth Circuit decision that invalidated a "Choose Life" license plate under almost identical circumstances. In *Planned Parenthood of South Carolina Inc. v. Rose*,[5] the Fourth Circuit had concluded that the speech contained on a "Choose Life" license plate was neither that of the government nor that of the public volunteers who displayed the plates, but rather was a form of "mixed speech" that required viewpoint neutrality. The *Bredesen* court dismissed the reasoning employed by the *Rose* court,[6] declaring that "[w]ith no Supreme Court case requiring [it to invalidate such legislation, it would] decline to do

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1 *See infra* Part II.A.

2 ACLU of Tenn. v. Bredesen, 441 F.3d 370 (6th Cir. 2006).

3 TENN. CODE ANN. § 55-4-306 (2003).

4 *Bredesen*, 441 F.3d at 375-80.

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

6 The *Bredesen* court stated: "*Rose* relied . . . on a pre-*Johanns* [*v. Livestock Marketing Ass'n*, 544 U.S. 550 (2005)] four-factor test of the Fourth Circuit's own devising that led to an 'indeterminate result' on the crucial issue of whether 'Choose Life' specialty plates express a government message. The *Johanns* standard, by contrast, classifies the 'Choose Life' message as government speech." *Bredesen*, 441 F.3d at 380 (citation omitted). The court concluded that "the Fourth Circuit's lead in this case would invalidate wide swaths of previously accepted exercises of government speech." *Id.*

so."[7] The United States Supreme Court denied certiorari in both *Rose* and *Bredesen*.[8]

In an atmosphere where many already fear that the integrity of civil liberties under the Constitution is at risk,[9] the United States Supreme Court has recently issued several opinions effectively constricting the breadth of free speech and weakening traditional First Amendment protections.[10] Additionally, the Court has failed to address important cases such as *Bredesen*, where fundamental rights were at issue and where circuit courts were split. In fact, during the spring 2006 term, the Court decided the fewest number of cases in its history.[11] Some commentators have speculated that the Supreme Court's reluctance to hear such contentious cases stems from the dynamic of an evenly divided Court with Justice Kennedy acting as an unpredictable swing voter.[12] Whatever the reason, the Court's failure to address these questions has resulted in a legacy of continued confusion and uncertainty, of which the "Choose Life" license plate cases are quintessential examples.

The *Bredesen* and *Rose* opinions both state that the dispositive issue in determining the validity of a "Choose Life" license plate is whether the court classifies the plate's message as government speech, private speech, or mixed speech.[13] Such a determination, however, is not necessary where access to a forum rather than access to funds or the benefits of a program are at issue. Both courts likely erred by rigidly confining their analyses to contrived analogies to inapposite cases with dissimilar facts. Regardless of how courts characterize the "Choose Life" license plate, when access to a forum is at issue, the government cannot discriminate against disfavored viewpoints, even if it has created the forum and controls the subject matter.[14]

This Note will first examine the evolution of the government speech doctrine and ascertain how it relates to viewpoint discrimination and free speech

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[7] *Bredesen*, 441 F.3d at 380.

[8] ACLU of Tenn. v. Bredesen, 126 S. Ct. 2972 (2006); Rose v. Planned Parenthood of S.C., 543 U.S. 1119 (2005).

[9] *See* Erwin Chemerinsky, *Standing up to Injustice in a Crisis*, THE NEWS & OBSERVER, Oct. 20, 2006, at A15 (stating that "[i]t is not hyperbole to say that [the Military Commission Act] is among the worst ever adopted in its disregard for the Constitution"); Erwin Chemerinsky, *The War on Terrorism and the Loss of Freedom*, CR: THE NEW CENTENNIAL REV., Spring 2006, at 55, 55-67 (discussing that grave governmental errors leading to a loss of civil rights and precious freedoms often coincide with security threats).

[10] *See, e.g.*, Garcetti v. Ceballos, 547 U.S. 410 (2006) (denying First Amendment protection and insulation from employer discipline to speech of a public employee in matter of public concern); Rumsfeld v. Forum For Academic & Institutional Rights, Inc., 547 U.S. 47 (2006) (holding that the Solomon Amendment, requiring law schools to either host military recruiters or lose all federal funds, does not violate First Amendment).

[11] Erwin Chemerinsky, Lecture at the William S. Boyd School of Law (Oct. 5, 2006); *see also* Stephanie Francis Ward, *Hot Spring: The U.S. Supreme Court Loads up Its Docket for April Arguments, but Does That Signal a Real Change?*, ABA J. E-REP., Feb. 9, 2007, *available at* Westlaw, 6 No. 6 ABA J. E-Report 3.

[12] Erwin Chemerinsky, Lecture, *supra* note 11. *See generally Justice Kennedy Will Provide Key Votes in Upcoming Session*, DUKE U. NEWS & COMM., Sept. 26, 2006, http://www.dukenews.duke.edu/2006/09/supremecourt_tip.html.

[13] *See* ACLU of Tenn. v. Bredesen, 441 F.3d 370, 375-77 (6th Cir. 2006); Planned Parenthood of S.C. Inc. v. Rose, 361 F.3d 786, 792-94 (4th Cir. 2004).

[14] *See* Rosenberger v. Rector & Visitors of Univ. of Va., 515 U.S. 819, 829-30 (1995).

under the First Amendment. Next, this Note will consider the interaction between government speech and the "Choose Life" license plate. Finally, it will analyze the principal case and discuss whether the analysis of the Sixth Circuit Court of Appeals was well founded.

II. The Historical Development of the Government Speech Doctrine and Its Effect Upon Viewpoint Discrimination

A. Government Speech Doctrine

The government speech doctrine embodies the concept that, in certain situations, the government can "speak" in order to promote ideas and policies notwithstanding objections from those who disagree.[15] Generally, when a court determines that the government is speaking, viewpoint discrimination is permitted inasmuch as the government can express a particular viewpoint without being obligated to express other alternative points of view.[16]

However, the government speech doctrine is not applicable in every circumstance.[17] When a court determines that a private individual is speaking, the government has little authority to regulate and thus cannot discriminate against particular viewpoints.[18] Also, some circuit courts have recognized a third category of speech, known as "mixed speech," that contains aspects of both government and private speech, but requires the government to maintain a neutral viewpoint.[19]

Because the government speech doctrine is a relatively new legal construct, courts have not fully developed some complicated aspects of the doctrine, including how it interacts with the First Amendment rights of private citizens.[20] The right of the government to speak often comes into conflict with the protected rights of private citizens to speak and, in many instances, one interest must defer to the other.[21] Although courts may not have resolved every issue, they certainly have not remained silent.[22] Over the years, the Supreme

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[15] Johanns v. Livestock Mktg. Ass'n, 544 U.S. 550, 574 (2005).

[16] *See Johanns*, 544 U.S. 550; Rust v. Sullivan, 500 U.S. 173 (1991). In *Legal Services Corp. v. Velazquez*, the Court noted that the idea of government speech "flows in part from [the] observation that, '[w]hen the government speaks . . . it is, in the end, accountable to the electorate and the political process for its advocacy.'" 531 U.S. 533, 541 (2001) (second alteration in original) (quoting Bd. of Regents of the Univ. of Wis. Sys. v. Southworth, 529 U.S. 217, 235 (2000)). The government speech doctrine can be thought of as a sort of reverse compelled speech concept. Generally, the public cannot force the government (representing the majority by virtue of the political process) to support a policy that it does not agree with, just as the government cannot force private citizens to support and promote government speech if they do not agree.

[17] *Velazquez*, 531 U.S. at 542.

[18] *See Velazquez*, 531 U.S. 533; *Rosenberger*, 515 U.S. 819.

[19] *See* Planned Parenthood of S.C. Inc. v. Rose, 361 F.3d 786 (4th Cir. 2004). See also *infra* Part II.D for a more detailed explanation of the concept of "mixed speech."

[20] *Johanns*, 544 U.S. at 574.

[21] *See Johanns*, 544 U.S. 550; *Velazquez*, 531 U.S. 533; *Rosenberger*, 515 U.S. 819; *Rust*, 500 U.S. 173; Wooley v. Maynard, 430 U.S. 705 (1977); ACLU of Tenn. v. Bredesen, 441 F.3d 370 (6th Cir. 2006); *Rose*, 361 F.3d 786.

[22] *See* cases cited *supra* note 21.

Court has heard cases involving compelled speech,[23] government funded programs,[24] and compelled subsidies.[25] This Note will review each of these concepts and discuss how they relate to the Tennessee specialty license plate at issue in *Bredesen*.

B. Compelled Speech

While issues involving First Amendment privileges often involve the right to speak openly and freely, the Constitution also protects the right to refrain from speaking.[26] The concept of government speech intersected with the right to refrain from speaking in *Wooley v. Maynard*.[27] In that case, the State of New Hampshire adopted as its official state motto the phrase "Live Free or Die" and required all license plates on noncommercial vehicles to display the motto.[28] The State also made it a misdemeanor to knowingly obscure or deface any portion of the license plate.[29] The plaintiff, who objected to the State's message on moral, ethical, religious, and political grounds, began to cover the motto on his license plate with tape so that others could not see it.[30] After receiving several citations that resulted in fines and a jail sentence, the plaintiff brought an action seeking injunctive and declaratory relief from enforcement of the law.[31]

The United States Supreme Court held that it was unconstitutional to require private individuals to distribute the State's ideological message by compelling them to display it on their private property as if the car were a "mobile billboard" to be used at the government's convenience.[32] Although the State's motto qualified as government speech, and although the State had a right to express this message and adopt it as its own, it could not force others to appear as though they had also adopted the message by requiring them to display it on their private property.[33] To do so would be to infringe upon the First Amendment right to refrain from speaking or to refrain from being compelled to speak for others.[34]

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[23] *See Wooley*, 430 U.S. 705.

[24] *See Velazquez*, 531 U.S. 533; *Rosenberger*, 515 U.S. 819; *Rust*, 500 U.S. 173.

[25] *See Johanns*, 544 U.S. 550.

[26] *Wooley*, 430 U.S. at 714; *see also* W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624 (1943) (government cannot compel children to salute the flag).

[27] *Wooley*, 430 U.S. 705.

[28] *Id.* at 707.

[29] *Id.*

[30] *Id.* at 707-08 & n.4.

[31] *Id.* at 708-09.

[32] *Id.* at 713, 715.

[33] *Id.*

[34] However, when a private individual wishes to refrain from providing funds that will facilitate the government's right to speak, the analysis is quite different. *See* Johanns v. Livestock Mktg. Ass'n, 544 U.S. 550, 564-65 (2005); *see also infra* Part II.E (discussing government speech and viewpoint discrimination in the context of compelled subsidies).

C. Government Funded Programs

1. Government Speech: The Scope of the Program

One way that the government may "speak" or communicate a message is by lending support to programs that advance the ideas and policies that it is interested in promoting.[35] When the government chooses to fund a program for the purpose of advocating and defending the policies that it has adopted, it may ensure that the funds are spent for that purpose and may refuse to fund certain speech if such speech is outside of the scope of the program.[36] For example, in *Rust v. Sullivan*,[37] Congress established a program whereby the government subsidized doctors who provided patients with advice and services about a variety of family planning methods.[38] Funds reserved for purposes of the Act, however, were not to be distributed to any "programs where abortion [was] a method of family planning."[39] Plaintiffs challenged the Act, contending that it violated the First Amendment rights of the organizations, physicians, and patients that received program funds because it restricted their speech based on viewpoint.[40]

The United States Supreme Court held that Congress had not discriminated based on viewpoint, but had "merely chosen to fund one activity to the exclusion of [another]."[41] The government could, "without violating the Constitution, selectively fund a program to encourage certain activities it believe[d] to be in the public interest, without at the same time funding an alternative program which [sought] to deal with the problem another way."[42] The government did not infringe upon a fundamental right by simply choosing not to subsidize that right.[43]

In *Rust*, the Court observed that Congress's monetary support of a program that advanced a certain policy and a particular viewpoint was government speech.[44] Distinguishing "direct state interference with a protected activity" from "state encouragement of an alternative activity,"[45] it determined that in establishing the family planning program, Congress had neither suppressed any

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[35] *See Johanns*, 544 U.S. at 574.

[36] *See* Rust v. Sullivan, 500 U.S. 173, 193-95 (1991).

[37] *Id.*

[38] *Id.* at 178-79 (citing Title X of the Public Health Service Act, 42 U.S.C. §§ 300-300a-6 (1988)).

[39] *Id.* at 178 (quoting 42 U.S.C. § 300a-6).

[40] *Id.* at 192.

[41] *Id.* at 193.

[42] *Id.*

[43] *Id.* (citing Regan v. Taxation with Representation of Wash., 461 U.S. 540, 549 (1983)).

[44] *Id.* The Court in *Legal Services Corp. v. Velazquez* stated:

> The court in *Rust* did not place explicit reliance on the rationale that the counseling activities of the doctors under Title X amounted to governmental speech; when interpreting the holding in later cases, however, we have explained *Rust* on this understanding. We have said that viewpoint-based funding decisions can be sustained in instances in which the government is itself the speaker, or instances, like *Rust*, in which the government "used private speakers to transmit specific information pertaining to its own program."

531 U.S. 533, 541 (2001) (citing Bd. of Regents of the Univ. of Wis. Sys. v. Southworth, 529 U.S. 217, 229, 235 (2000), and quoting Rosenberger v. Rector & Visitors of Univ. of Va., 515 U.S. 819, 833 (1995)).

[45] *Rust*, 500 U.S. at 193 (quoting Maher v. Roe, 432 U.S. 464, 475 (1977)).

contrary viewpoints nor denied benefits to anyone for expressing them.[46] Instead, the government was "simply insisting that public funds be spent for the purposes for which they were authorized. . . . The [grantee could] continue to perform abortions, provide abortion-related services, and engage in abortion advocacy . . . ."[47] The government simply required that these activities be separate and independent from the government-funded program.[48]

2. *Facilitating Speech: Distinguishing* Rust v. Sullivan

The United States Supreme Court has recognized an important distinction between situations like that in *Rust* where the government uses private speakers (such as physicians) and appropriates public funds to private entities in order to carry out a project, and situations where the government is neither speaking nor subsidizing the transmission of a message through private speakers, but is rather "expend[ing] funds to encourage a diversity of views from private speakers."[49] In *Rosenberger v. Rector*,[50] a state university created a fund[51] to reimburse student organizations for their expenditures associated with paying independent entities to print various student publications.[52] While the purpose of the fund was to "support a broad range of extracurricular student activities . . . related to the educational purpose of the University," the University expressly refused to provide funds to support "religious activities, philanthropic contributions and activities, political activities, activities that would jeopardize the University's tax exempt status, those which involve payment of honoraria or similar fees, or social entertainment or related expenses."[53] Thereafter, a student organization, which published a magazine for the purpose of "foster[ing] an atmosphere of sensitivity to and tolerance of Christian viewpoints," brought an action when the University denied its request for reimbursement.[54]

In its analysis, the Court squarely addressed the concept of viewpoint discrimination.[55] It recognized the general rule that the government has no authority to regulate the substantive content or message of private speech, or to favor the viewpoint of one speaker over another.[56] The Court acknowledged that, in certain circumstances, content discrimination could be appropriate to preserve the purpose of a limited forum.[57] However, the Court emphasized that

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[46] *Velazquez*, 531 U.S. at 547; *Rust*, 500 U.S. at 196.
[47] *Rust*, 500 U.S. at 196.
[48] *Id.*
[49] *Rosenberger*, 515 U.S. at 834. In the second situation, the government is not saying "take this message and distribute it for us," but instead is saying "give us your message and we will facilitate you in your distribution of it." If the government qualifies the second statement with "provided that we agree with your message," then it has impermissibly discriminated on the basis of viewpoint. *See Rosenberger*, 515 U.S. 819.
[50] *Rosenberger*, 515 U.S. 819.
[51] The money for the fund came from mandatory student fees. *Id.* at 824.
[52] *Id.* at 822.
[53] *Id.* at 824-25 (internal quotation omitted).
[54] *Id.* at 825-26 (internal quotation omitted).
[55] *Id.* at 828-29.
[56] *Id.*
[57] *Id.* at 829; *see also* Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37 (1983).

this type of content discrimination is distinct from viewpoint discrimination.[58] "When the government targets *not subject matter*, but particular *views* taken by speakers *on a subject*, the violation of the First Amendment is all the more blatant. Viewpoint discrimination is thus an egregious form of content discrimination."[59]

Because the University did not exclude the subject of religion, but instead prohibited expression of a religious viewpoint pertaining to the subject of religion, the Court held that the regulation violated free speech rights guaranteed by the First Amendment.[60] Recognizing that the government could express its own message and restrict subject matter in a forum that it had created, the Court distinguished the facts and circumstances of the case from those of *Rust*.[61] The Court explained that in *Rust*, it had

> upheld the government's prohibition on abortion-related advice applicable to recipients of federal funds for family planning counseling. There, the government did not create a program to encourage private speech but instead used private speakers to transmit specific information pertaining to its own program. . . . It does not follow, however, . . . that viewpoint-based restrictions are proper when the University 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. 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.[62]

Thus, the Court distinguished between permissible content-based restrictions and impermissible viewpoint discrimination, and then explained how that distinction related to concepts of government-speech and private speech. When the government speaks for itself, it can say what it wants.[63] Within a forum, the Court noted, the government can sometimes regulate subject matter.[64] Once the government introduces a subject into the forum, however, it cannot exclude one viewpoint while allowing others, even though it may still promote and encourage the adoption of the viewpoint that it favors.[65] The fact that the government is the creator of the forum is irrelevant.[66]

3. Programs as Speech and Programs as Forums: Further Distinguishing Rust v. Sullivan

In *Legal Services Corp. v. Velazquez*,[67] the United States Supreme Court emphasized a different aspect of government speech, expanding on its analysis

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[58] *Rosenberger*, 515 U.S. at 829-30.
[59] *Id.* at 829 (emphasis added) (internal citation omitted).
[60] *Id.* at 831, 837.
[61] *Id.* at 833.
[62] *Id.* at 833-34.
[63] *Id.* at 833.
[64] *Id.* at 829, 833; *see also* Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37 (1983).
[65] *Rosenberger*, 515 U.S. at 829-30. In *Rust*, the government speech was the program and the forum was family planning services. The government was merely expressing and promoting its viewpoint within the forum. Therefore, the government was not restricting abortion speech within the forum, but rather within the confines of its own speech.
[66] *Id.* at 829.
[67] Legal Servs. Corp. v. Velazquez, 531 U.S. 533 (2001).

in *Rosenberger* and focusing on the governmental program's purpose.[68] The Court scrutinized the distinction between the situation in *Rust*, where private citizens distributed a government message through a government program, and the situation in *Velazquez*, where the government designed a program that either facilitated a private individual's access to a forum, or facilitated the expression of an individual's private speech or viewpoint within a forum.[69]

At issue in *Velazquez* was a government welfare program created "for the purpose of providing financial support for legal assistance in noncriminal proceedings or matters to persons financially unable to afford legal assistance."[70] The government prohibited the distribution of funds to any organization that "initiate[d] legal representation or participate[d] in any other way, in litigation, lobbying, or rulemaking, involving an effort to reform a Federal or State welfare system . . . [or] to amend or otherwise challenge existing law in effect on the date of the initiation of the representation."[71] Plaintiffs brought suit requesting the Court to invalidate the restriction as impermissible viewpoint discrimination in violation of the First Amendment.[72]

The Court found that the government's legal assistance program was similar to the student-publication program in *Rosenberger* in that both were "designed to facilitate private speech, not to promote a governmental message."[73] In other words, these government programs did not express any message in and of themselves.[74] In contrast, the government's act of establishing the family planning program in *Rust* was the government's message; thus the program itself was government speech.[75]

Although the government program in *Rust* expressed a message that private individuals distributed within the forum of family planning services,[76] the forum itself remained open to those individuals that chose to advocate contrary messages.[77] Therefore, the government was not discriminating against any viewpoint, but was instead expressing its own view.[78] Because the purpose of the program was to express a governmental message, the government could ensure that the recipients only spent the funds in furtherance of that message.[79]

In *Velazquez*, the government program did not express a message.[80] Instead, it facilitated a private individual's access to the forum of court by funding legal assistance.[81] Therefore, participation in the program consisted of an individual's expression of private speech undertaken in legal proceedings, not

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[68] *Id.* at 536.
[69] *Id.* at 540-44.
[70] *Id.* at 536 (quoting 42 U.S.C. § 2996b(a) (2000)).
[71] *Id.* at 538 (quoting Omnibus Consolidated Rescissions and Appropriations Act of 1996, Pub. L. No. 104-134, § 504(a)(16), 110 Stat. 1321, 1321-55 to 1321-56).
[72] *Id.* at 539.
[73] *Id.* at 542.
[74] *Id.* at 542-43, 548.
[75] *Id.* at 548. *See generally* Rust v. Sullivan, 500 U.S. 173 (1991).
[76] *See Rust*, 500 U.S. at 178-79.
[77] *Id.* at 196.
[78] *Id.* at 193, 196.
[79] *Id.*
[80] *Velazquez*, 531 U.S. at 542.
[81] *Id.*

distribution by private individuals of government speech.[82] Under these circumstances, the Court held that the government could not discriminate in its provision of funds based on the particular viewpoints that others might use those funds to promote.[83] It concluded that the restriction limiting receipt of the benefits under the legal assistance program to those not contesting welfare law was impermissible viewpoint discrimination.[84]

Velazquez expanded and slightly modified the holding in *Rosenberger* by not only prohibiting viewpoint discrimination when the government program encouraged private speech within a forum, but also prohibiting viewpoint discrimination when the program facilitated access to a specific forum.[85] The Court recognized that facilitating access to a forum in this instance was a method of encouraging private speech and it mattered not whether the purpose was to encourage a diversity of views.[86] Permissible viewpoint discrimination was thus limited to situations like *Rust* where the government was not in fact discriminating, but rather was expressing its own message to the exclusion of others within a particular forum.[87]

D. A Case Directly on Point

Against the backdrop of *Wooley*, *Rust*, *Rosenberger*, and *Velazquez*, the Fourth Circuit Court of Appeals confronted a license plate case with facts that were very similar to those of *Bredesen*. In *Planned Parenthood of South Carolina Inc. v. Rose*,[88] South Carolina established a specialty license plate program whereby nonprofit organizations could display an "emblem, . . . seal or other symbol" that the Department of Public Safety ("DPS") "consider[ed] appropriate."[89] The DPS reserved the right to "alter, modify, or refuse to produce" plates that "it deem[ed] offensive or [that] fail[ed] to meet community standards."[90]

Pursuant to the specialty license plate program, the South Carolina legislature enacted a statute authorizing a "Choose Life" license plate, but refused to authorize similar plates for those that preferred to express a pro-choice view.[91] The Department of Social Services was to distribute proceeds from the sales of the "Choose Life" license plate to private nonprofit organizations that promoted "crisis pregnancy services."[92] However, the statute specifically prohibited organizations that provided, promoted, or referred to abortion from receiving any of the "Choose Life" license plate funds.[93] Plaintiffs brought suit claiming that the South Carolina statute authorizing the "Choose Life" plate was invalid

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[82] *Id.* at 542-43.
[83] *Id.* at 537, 548-49.
[84] *Id.*
[85] *Id.* at 542-43.
[86] *Id.*
[87] *Id.* at 540-48. *See generally* Rust v. Sullivan, 500 U.S. 173 (1991).
[88] Planned Parenthood of S.C. Inc. v. Rose, 361 F.3d 786 (4th Cir. 2004).
[89] *Id.* at 788 (quoting S.C. CODE ANN. § 56-3-8000(A) (2001)).
[90] *Id.* (second alteration in original) (quoting S.C. CODE ANN. § 56-3-8000(H)).
[91] *Id.*
[92] *Id.* (quoting S.C. CODE ANN. § 56-3-8910(B)).
[93] *Id.*

and unconstitutional because it regulated "access to a speech forum on the basis of viewpoint."[94]

The court recognized that the result in viewpoint discrimination cases often turned on whether it could classify the speech at issue as government speech or private speech.[95] However, the court acknowledged that "[n]o clear standard ha[d] yet been enunciated in [its] circuit or by the Supreme Court for determining when the government [was] 'speaking' and thus able to draw viewpoint-based distinctions, and when it [was] regulating private speech and thus unable to do so."[96] In order to determine whether the speech at issue was government speech or private speech, the court employed a four-factor test that 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.[97]

Applying this test to the facts of the case, the court determined that the first two factors supported classifying the speech as government speech while the second two factors weighed in favor of classifying it as private speech.[98] The court, therefore, concluded that the "Choose Life" license plate was a mixture of both government and private speech and that as such, the statute violated the First Amendment.[99] The Constitution entitles "mixed speech"[100] to the same protections as private speech.[101] Because the government had favored itself within a limited forum and then shielded itself from accountability by obscuring its role in promoting the "Choose Life" message, the court held that upholding the statute "would require an unwarranted extension of the government speech doctrine."[102]

In *Bredesen*, the Sixth Circuit rejected the Fourth Circuit's analysis in part because it preceded the United States Supreme Court's decision in *Johanns v. Livestock Marketing Ass'n*,[103] which the *Bredesen* court found was controlling.[104] The *Bredesen* court maintained that in light of *Johanns*, it had properly characterized the "Choose Life" license plate as government speech, justifying its arrival at a conclusion that was not in accord with that of *Rose*.[105]

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[94] *Id.* at 789.
[95] *Id.* at 792.
[96] *Id.* (first alteration in original) (quoting Sons of Confederate Veterans, Inc. v. Comm'r of the Va. Dep't of Motor Vehicles, 288 F.3d 610, 618 (4th Cir. 2002)).
[97] *Id.* at 792-93 (quoting *Sons of Confederate Veterans, Inc.*, 288 F.3d at 618).
[98] *Id.* at 793-94.
[99] *Id.* at 793.
[100] The court acknowledged that the United States Supreme Court had never recognized "mixed speech" as a category, but relied on an analyses of *Rust*, *Roseberger*, and *Velazquez* to defend its conclusion as one in which the Supreme Court would approve. *Id.* at 795. However, the United State Supreme Court denied certiorari in *Rose*. Rose v. Planned Parenthood of S.C., 543 U.S. 1119 (2005).
[101] *Rose*, 361 F.3d at 795.
[102] *Id.* at 795-96.
[103] Johanns v. Livestock Mktg. Ass'n, 544 U.S. 550 (2005).
[104] ACLU of Tenn. v. Bredesen, 441 F.3d 370, 380 (6th Cir. 2006).
[105] *Id.*

E. Compelled Subsidies: A Case Directly on Point?

Sometimes, in order to promote a specific message, the government will seek the assistance of private individuals or organizations.[106] In *Johanns*, the United States Supreme Court addressed the issue of whether and to what extent private involvement in creating or distributing a "government" message affects the message's classification as government speech.[107] The Court also explored the distinction between cases that involved compelled speech and those that involved compelled subsidies or taxes.[108]

At issue in *Johanns* was a federal program whereby the government financed generic advertising campaigns that promoted certain agricultural products.[109] Using funds that were collected from a tax that it imposed on the sale or importation of cattle, the government began to promote the "marketing and consumption of 'beef and beef products'" through advertisements that bore the message: "Beef. It's What's for Dinner."[110] Private entities assisted the government in developing and distributing this message.[111]

A group of plaintiffs objected to the tax, contending that it forced them to subsidize private speech with which they did not agree.[112] Because the government cannot compel individuals to subsidize the speech of private entities,[113] but can compel subsidization in support of its own speech,[114] the outcome of the case turned on whether the message promoting the beef was government speech or private speech.[115] Plaintiffs argued that the speech was private because private entities created and distributed the message, and because the tax that the government imposed to support the campaign was not general, but instead targeted a specific group.[116]

The Court held that the beef advertising campaign was government speech despite the fact that non-governmental entities helped to design it because the federal government was in control of the message.[117] "When, as here, the government sets the overall message to be communicated and approves every word that is disseminated, it is not precluded from relying on the government-speech doctrine merely because it solicits assistance from nongovernmental sources in

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[106] *See* Rust v. Sullivan, 500 U.S. 173 (1991); Wooley v. Maynard, 430 U.S. 705 (1977).
[107] *See Johanns*, 544 U.S. at 560-62.
[108] *See id.* at 557-59.
[109] *Id.* at 553.
[110] *Id.* at 553-54.
[111] *Id.* at 560-62.
[112] *Id.* at 555.
[113] *See id.* at 559; *see also* Keller v. State Bar of Cal., 496 U.S. 1 (1990) (holding that mandatory state bar dues that fund political or ideological activities violate free speech under the First Amendment); Abood v. Detroit Bd. of Educ., 431 U.S. 209, 235-36 (1977) (holding that mandatory union dues that fund political or ideological activities do not violate the First Amendment, so long as they are "financed from charges, dues, or assessments paid by employees who do not object to advancing those ideas").
[114] *See Johanns*, 544 U.S. at 559; *see also* Bd. of Regents of the Univ. of Wis. Sys. v. Southworth, 529 U.S. 217, 229 (2000) (holding that mandatory student activity fee that funds political or ideological activities does not violate First Amendment, so long as university allocates funds without regard to viewpoint).
[115] *Johanns*, 554 U.S. at 563.
[116] *Id.* at 560.
[117] *Id.* at 562.

developing specific messages."[118] The Court also found that it was of no consequence that the government did not identify itself as the speaker in the advertisements[119] and that it was irrelevant whether the government derived the funds to support its speech from a general or targeted tax.[120] As the federal program failed to offend any First Amendment rights, plaintiffs "enjoy[ed] no right not to fund government speech."[121]

III. *ACLU OF TENNESSEE V. BREDESEN*

The dispute in *Bredesen*[122] involved a Tennessee law that authorized the sale of specialty license plates and directed some of the revenue derived from such sales to "departments, agencies, charities, programs and other activities impacting Tennessee."[123] The statute devoted and distributed half of the profits obtained from the sales of the license plates to specific groups that advanced the organization or cause that the license plate promoted.[124] In 2003, pursuant to this statutory scheme, the Tennessee legislature approved the issuance of a "Choose Life"[125] specialty license plate,[126] but declined to issue a "Pro-Choice" specialty license plate despite requests from lobbyists.[127]

Plaintiffs[128] brought an action in federal district court, contending that the statute authorizing the "Choose Life" specialty license plate was unconstitu-

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[118] *Id.*

[119] The court noted:

> If a viewer would identify the speech as [Plaintiffs'], however, the analysis would be different. . . . [T]here might be a valid objection if "those singled out to pay the tax are closely linked with the expression" in a way that makes them appear to endorse the government message. But this compelled-speech argument (like the *Wooley* and *Barnette* opinions on which it draws) differs substantively from the compelled-subsidy analysis. The latter invalidates an exaction not because being forced to pay for speech that is unattributed violates personal autonomy, but because being forced to fund someone else's private speech unconnected to any legitimate government purpose violates personal autonomy. Such a violation does not occur when the exaction funds government speech.

Id. at 564 n.7, 565 n.8 (quoting *Johanns*, 544 U.S. at 575-76 (Souter, J., dissenting)).

[120] *Id.* at 564.

[121] *Id.* at 564 n.7.

[122] ACLU of Tenn. v. Bredesen, 441 F.3d 370 (6th Cir. 2006).

[123] *Id.* at 372 (quoting TENN. CODE ANN. § 55-4-201(j) (2003)).

[124] *Id.* (citing TENN. CODE ANN. §§ 55-4-215 to -217). The government keeps the other half of the profits. *Id.*

[125] The slogan "Choose Life" not only promotes a pro-life viewpoint, but also comments on the pro-choice viewpoint through the use of parodic elements. The slogan takes the essence of one viewpoint—"choice"—and twists it to support its own view—"Choose Life."

[126] *Bredesen*, 441 F.3d at 372 (citing TENN. CODE ANN. § 55-4-306). Funds derived from the sales of the "Choose Life" license plate were to be "used exclusively for counseling and financial assistance, including food, clothing, and medical assistance for pregnant women in Tennessee." *Id.* (quoting TENN. CODE ANN. § 55-4-306(c)).

[127] *Id.*

[128] Plaintiffs included the American Civil Liberties Union of Tennessee, Planned Parenthood of Middle and East Tennessee, Inc., Sally Levine, Hilary Chiz, and Joe Sweat. Defendants included Philip Bredesen (Governor of Tennessee), Fred Phillips (Tennessee Commissioner of Safety), Friends of Great Smoky Mountains National Park, Inc. (a non-profit North Carolina corporation), and New Life Resources, Inc. (beneficiary under the

tional[129] because it impermissibly discriminated according to viewpoint.[130] Analyzing the distinction between "government speech" and "private speech," the district court determined that the "Choose Life" specialty license plate was purely neither.[131] The court followed Fourth Circuit precedent established in *Rose*[132] and held that, as a "mixture" of both government and private speech, the statute authorizing the "Choose Life" license plate was unconstitutional because it allowed the government to discriminate against and thus suppress unpopular viewpoints.[133] Accordingly, the district court granted summary judgment in favor of the plaintiffs and enjoined enforcement of the statute. Defendants appealed.[134]

Having determined that the district court properly exercised its authority with regard to subject matter jurisdiction,[135] the Sixth Circuit Court of Appeals addressed whether and to what extent private involvement in creating or distributing the "Choose Life" license plate affected the message's classification as government speech, private speech, or mixed speech.[136] Relying primarily upon the United States Supreme Court's decision in *Johanns*, the appellate court concluded that the "Choose Life" license plates bore a "government-crafted message."[137]

The appellate court found that private citizens had assisted the government in crafting and disseminating the specific "Choose Life" message.[138] However, as in *Johanns*, this fact did not preclude the court from characterizing the mes-

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statute and intervening defendant). ACLU of Tenn. v. Bredesen, 354 F. Supp. 2d 770, 771-72 (M.D. Tenn. 2004).

[129] *Id.* Plaintiffs alternatively contended that the entire "specialty license plate" program was unconstitutional. *Id.* However, the district court found it unnecessary to address that particular issue. *Id.* at 774.

[130] *Id.*

[131] *Id.* at 773.

[132] Planned Parenthood of S.C. Inc. v. Rose, 361 F.3d 786 (4th Cir. 2004).

[133] *Bredesen*, 354 F. Supp. 2d at 773-74.

[134] The State defendants did not appeal (although they filed a brief asking the court not to invalidate the entire specialty license plate legislation). Only the intervening defendant, New Life Resources, Inc. (beneficiary under the statute), appealed the district court's decision. ACLU of Tenn. v. Bredesen, 441 F.3d 370, 373 (6th Cir. 2006).

[135] *See id.* at 373-75. In reaching its conclusion, the Sixth Circuit determined that the fees the government received from specialty license plate sales did not qualify as a tax. *Id.* Instead, the court found that the fees resembled payments for purchases from the government acting as an ordinary market participant rather than in its usual capacity as a sovereign power. *Id.* at 373-74. In other words, the fee was akin to a simple "debt." *Id.* While a tax is an "in invitum" (meaning "[a]gainst an unwilling person"), *id.* at 373 n.2 (alteration in original) (quoting BLACKS LAW DICTIONARY 787 (7th ed. 1999)), "pecuniary burden laid upon individuals or property for the purpose of supporting the [g]overnment," a debt is an obligation "for the payment of money founded upon contract." *Id.* at 373 (internal quotation omitted). The purpose of a tax is to acquire funds to support either the government, or something that the government chooses to support. *Id.* at 373-74. In contrast to payment of debts, courts do not require consent from the taxpayer to obtain taxes. *Id.* at 374. As the specialty license plate fee was not a "tax," the Tax Injunction Act, 28 U.S.C. § 1341 (2000), was not applicable; thus the district court properly exercised its authority with regard to subject matter jurisdiction. *Id.* at 373-75.

[136] *See id.* at 375-77.

[137] *See id.* at 375-78, 380.

[138] *See id.* at 377.

sage as government speech so long as the government controlled and approved it.[139] The court reasoned that Tennessee prescribed the policy behind the program, as well as its specific "Choose Life" message and "approve[d] every word that [was] disseminated."[140] The court observed that participation by public organizations in crafting the message was of no consequence to the court's determination and that the "government-crafted message [was] government speech even if the government [did] not explicitly credit itself as the speaker."[141] Moreover, the court noted, the plaintiffs' position would have forced the government to provide specialty license plates to any organization, including institutions of disrepute.[142]

Having determined that the "Choose Life" message was government speech, the court framed the next issue for analysis as "whether a government-crafted message disseminated by private volunteers create[d] a 'forum' for speech that must be viewpoint neutral."[143] Failing to acknowledge that a forum might exist independently from a message, the court held that the "Choose Life" message did not create a "forum" that required the government to remain neutral with respect to viewpoint.[144] Therefore, the government could choose to promote a specific message even if those that disagreed could not express a contrary message through the same medium.[145]

To support this notion the court pointed to *Johanns* and *Rust*, noting that "[i]n general, the government does not create a 'forum' for expression when it seeks to have private entities disseminate its message."[146] In *Johanns*, the Court determined that government speech was impervious to challenges of viewpoint discrimination regardless of whether the government had paid non-governmental entities to design and disseminate its message.[147] Similarly, in *Rust*, the government paid private entities with public funds to communicate its message, and the Court determined that no viewpoint discrimination had occurred.[148] According to the *Bredesen* court, the result in *Johanns* or *Rust* would have been no different had the public entities in those cases disseminated the government's message for free or paid for the privilege.[149] Therefore, the court concluded that the government's receipt of payment was inconsequential and did not create a "forum" for speech that the First Amendment protects.[150]

The Sixth Circuit also dismissed the reasoning that the Fourth Circuit employed in *Rose* to find "mixed speech," stating a similar application of the four-part test would serve to either invalidate all prior forms of privately disseminated government speech, or force the court to construct a distinction

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139 *See id.* at 375-77.
140 *Id.* at 376 (quoting Johanns v. Livestock Mktg. Ass'n, 544 U.S. 550, 562 (2005)).
141 *Id.* at 377.
142 *Id.* at 376-77.
143 *Id.* at 375.
144 *Id.* at 377.
145 *Id.* at 378-79.
146 *Id.* at 378.
147 Johanns v. Livestock Mktg. Ass'n, 544 U.S. 550, 560-62 (2005); *see also Bredesen*, 441 F.3d at 378.
148 Rust v. Sullivan, 500 U.S. 173, 192-200 (1991).
149 *Bredesen*, 441 F.3d at 378.
150 *Id.*

between such prior forms and the "Choose Life" license plates.[151] Because applying the *Rose* test provided an indeterminate result regarding the issue of whether a court should characterize a "Choose Life" license plate as government or private speech, and because the court decided *Rose* prior to the ruling in *Johanns*, which provided a definite result, *Rose* was inapplicable.[152]

In light of *Johanns*, the appellate court concluded that the "Choose Life" license plate program was government speech and did not violate the First Amendment.[153] Although the court conceded "voluntary dissemination itself qualifies as expressive conduct," it found that such "reliance on private volunteers to express [government] policies [did] not create a 'forum' for speech requiring viewpoint neutrality."[154] Despite the fact that the appellate court found the "exercise of government one-sidedness with respect to a very contentious political issue [to] be ill-advised," the court upheld the Tennessee statute declaring that it did not offend any rights under the First Amendment.[155] The "[g]overnment can certainly speak out on public issues supported by a broad consensus, even though individuals have a First Amendment right not to express agreement."[156]

Circuit Judge Martin F. Boyce concurred in part and dissented in part. He agreed with the majority's holding that the specialty license plate fee was not a tax and that subject matter jurisdiction in the district court was proper.[157] Boyce did not agree, however, with the remainder of the majority's opinion.[158]

Judge Boyce observed that the purpose of the specialty license plate program was not to promote a government message, but rather to facilitate private speech.[159] He viewed the specialty license plate program as a forum that required viewpoint neutrality despite the fact that the program contained some undeniable aspects of government speech.[160] Therefore, regardless of whether the message was government-crafted, the government could not suppress disfavored messages from the forum based on viewpoint.[161] The majority had reached a contrary conclusion because it had failed to consider the "nature of the license plate forum."[162]

Boyce also contended that the majority's reliance on *Johanns* and the compelled subsidy doctrine was improper because participation in the specialty license plate program was entirely voluntary.[163] The First Amendment harm of which the plaintiffs in *Johanns* complained was government compulsion to

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151 *Id.* at 378-80.
152 *Id.* at 380.
153 *Id.* at 372, 375.
154 *Id.* at 377.
155 *Id.* at 372.
156 *Id.* at 379.
157 *Id.* at 380 (Boyce, J., concurring in part and dissenting in part).
158 *Id.* at 380-81.
159 *Id.* at 381-85.
160 *Id.*
161 *Id.*
162 *Id.* at 381 n.2.
163 *Id.* at 381, 385-87.

speak or to subsidize a disagreeable message.[164] The analysis applicable to harm associated with denial of "the opportunity to speak on the same terms as other private citizens within a government sponsored forum" was of a different nature.[165]

For these reasons, Boyce would have held that "[a]lthough the government may generally speak and control its own message, it may not suppress contrary messages because of their viewpoint in a forum designed to encourage a diversity of views from private speakers."[166]

IV. ANALYSIS OF THE SIXTH CIRCUIT'S OPINION IN *BREDESEN*

The *Bredesen* court concluded that the government had an unqualified right to express its "Choose Life" message in part because the purpose of the "Choose Life" specialty license plate program was to promote a government message.[167] The court determined that under *Johanns* and *Rust*,[168] it was proper to classify the "Choose Life" license plate as government speech.[169]

However, the validity of the "Choose Life" license plate was not dependent solely upon whether the court classified the message as government speech. Under the circumstances of *Bredesen*, the court should have declared the "Choose Life" license plate to be invalid because of the government's refusal to issue a "Pro-Choice" license plate within the broader specialty license plate program, where the Constitution prohibits viewpoint discrimination regardless of whether the "Choose Life" plate was government speech.

The root of the court's apparent confusion was that it failed to distinguish between the "Choose Life" license plate program and the broader specialty license plate program. In doing so, it applied the wrong analysis to the question of whether it could preclude the contrary message proposed by the plaintiffs. Because the plaintiffs challenged the validity of the "Choose Life" license plate program within the context of the broader specialty license plate program, the validity of the "Choose Life" license plate should have depended upon whether the subject of abortion was permissible within the broader specialty license plate program. Presumably, the government would have had no authority to issue a "Choose Life" license plate within the specialty license plate program unless abortion was a permissible subject. So long as the government allowed the subject of abortion, yet refused to issue a pro-choice license plate, the "Choose Life" license plate would be invalid regardless of its purpose and regardless of whether the court properly classified it as government speech.

As Judge Boyce noted in his dissenting opinion, the dispute in *Bredesen* revolved around the specialty license plate statute, not the "Choose Life"

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[164] Johanns v. Livestock Mktg. Ass'n, 544 U.S. 550, 564-65 (2005); *see supra* note 112 and accompanying text; *see also Bredesen*, 441 F.3d at 385-87 (Boyce, J., concurring in part and dissenting in part).

[165] *Bredesen*, 441 F.3d at 385-87 (Boyce, J., concurring in part and dissenting in part).

[166] *Id.* at 381.

[167] *See id.* at 375-80 (majority opinion).

[168] The majority did not consider *Rosenberger* or *Velazquez* in its analysis. *See Bredesen*, 441 F.3d 370.

[169] *See id.* at 375-80.

license plate statute.[170] The court was confused about which of these constituted the forum in part because of the way the plaintiffs framed their cause of action. The plaintiffs' contention was that the "Choose Life" license plate statute was unconstitutional, or alternatively that the specialty license plate statute was unconstitutional.[171] However, the plaintiffs should have argued instead that the legislature's decision to exclude other viewpoints on abortion from the broader specialty license plate forum was unconstitutional.

This Note will first examine the "Choose Life" license plate program in order to determine whether the court properly characterized it as government speech and whether viewpoint discrimination was permissible. Next, it will consider whether the broader specialty license plate forum consists of government speech and whether the First Amendment permits viewpoint discrimination in that context.

A. The "Choose Life" License Plate Program

In order to determine whether the "Choose Life" license plate program is government, private, or mixed speech, it is important to understand the extent to which *Johanns* controls and modifies the four-factor test that the Fourth Circuit applied in *Rose*. An analysis of *Rust* and *Rosenberger* also provides insight into the nature of the "Choose Life" license plate program and the question of whether its purpose is to promote government speech or facilitate private speech and access to a forum.

The *Bredesen* court was correct to rely on *Johanns* to determine whether the "Choose Life" specialty license plate "program" consisted of government, private, or mixed speech. In fact, it appears that *Johanns* invalidated the third, and possibly the fourth, factor of the test that the Fourth Circuit applied in *Rose*.[172] Coincidentally, these were also the two factors that were characteristic of private speech and eventually led the *Rose* court to its "mixed speech" classification.[173] If, under *Johanns*, it was not essential for the government to identify itself as the speaker, then the factors that the *Rose* court focused on regarding "the identity of the literal speaker" or "whether the government or the private entity [bore] the ultimate responsibility for the content of the speech" were irrelevant.[174] Instead, the crucial factors in determining whether the

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[170] *Id.* at 381 & n.2 (Boyce, J., concurring in part and dissenting in part).

[171] ACLU of Tenn. v. Bredesen, 354 F. Supp. 2d 770, 771-72 (M.D. Tenn. 2004).

[172] *See* Planned Parenthood of S.C. Inc. v. Rose, 361 F.3d 786, 792-93 (4th Cir. 2004); *see also supra* note 97 and accompanying text.

[173] *See Rose*, 361 F.3d at 792-94.

[174] *See generally id.* at 792-93 (quoting Sons of Confederate Veterans, Inc. v. Comm'r of the Va. Dep't of Motor Vehicles, 288 F.3d 610, 618 (4th Cir. 2002)). The *Johanns* Court noted that while the government need not identify itself as the speaker, if the speech would be attributed to someone who does not agree, the analysis would be different. Johanns v. Livestock Mktg. Ass'n, 544 U.S. 550, 564-65 (2005); *see Bredesen*, 441 F.3d at 385-87 (Boyce, J., concurring in part and dissenting in part); *supra* note 117 and accompanying text. That is not the case here because only those who agree display the "Choose Life" license plate.

speech was that of the government or of a private entity were the "central purpose of the program" and the government's "degree of editorial control."[175]

In *Johanns*, the government program promoting beef was very similar to the family planning program in *Rust* because it was fairly evident that the purpose of the advertising campaign was to promote a specific government message.[176] Accordingly, the court in *Johanns* did not even address the purpose of the program.[177] Instead, it considered whether the government's reliance on private assistance and its failure to disclose its identity as the speaker barred the speech from technically qualifying as government speech despite the fact that the purpose was to promote a government message.[178] The extent to which private citizens played a role in designing and distributing the government message did not affect the message's status as government speech because the government approved the message, thus expressing a high degree of editorial control.[179] The fact that the government may have obscured its identity as the message's promoter was of no consequence.[180] The government simply contributed to the debate just as any private speaker would have: by expressing support for beef, albeit anonymously.

Likewise, within the specialty license plate forum, the government may express a message and promote it by allowing private citizens that agree with the message to assist in designing and distributing it. The government's editorial control in *Bredesen* was achieved through supervision and approval of the "Choose Life" message. The issue of whether the government obscured its role by involving private entities should have been irrelevant.

Thus, in light of *Johanns*, it appears that the *Bredesen* court properly classified the "Choose Life" specialty license plate program as government speech and that the government had a right to express its message despite objections from dissenters. The government is not obligated to express views other than its own, and in this respect, the government may properly "discriminate" against other viewpoints. Because the government is ultimately accountable to the electorate for the messages that it chooses to promote, the political process acts as a check upon the content of the government's speech.[181] Thus, the *Bredesen* court was apparently correct to uphold the validity of the "Choose Life" license plate program as its analysis on that point was well founded.[182]

The "Choose Life" license plate program also appears to be valid in the context of a *Rust* and *Rosenberger* analysis because, similar to *Rust* (and *Johanns*), its purpose is to promote a governmental message, not to facilitate

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[175] *See generally Rose*, 361 F.3d at 792-93 (quoting *Sons of Confederate Veterans, Inc.*, 288 F.3d at 618).
[176] *See Johanns*, 544 U.S. 550.
[177] *See id.*
[178] *Id.* at 560.
[179] *Id.* at 560-62.
[180] *Id.* at 564.
[181] *Id.* at 575 (citing Bd. of Regents of the Univ. of Wis. Sys. v. Southworth, 529 U.S. 217, 235 (2000); Abood v. Detroit Bd. of Educ., 431 U.S. 209, 259 n.13 (1977)).
[182] *But see* Saumya Manohar, *Look Who's Talking Now: "Choose Life" License Plates and Deceptive Government Speech*, 25 YALE L. & POL'Y REV. 229 (2006) (arguing that the Fourth Circuit's four factor approach is proper because it prevents the government from monopolizing the marketplace of ideas).

private speech. Therefore, the government may define the scope of the program in order to ensure that its message is not distorted. The government defined the scope of the "Choose Life" license plate program by approving the message that the plate displayed and by ensuring that funds gathered from the sales of the plate supported activities that were consistent with its message.

However, the fact that the *Bredesen* court properly characterized the "Choose Life" license plate program as government speech does not necessarily mean that the government can restrict private speech that expresses a dissenting view within the larger specialty license plate program. The idiosyncrasy in the facts of *Bredesen* is that the case involved a program within a program. It is within the larger specialty license plate program that the *Rust* "scope of the program," and the *Rosenberger* and *Velazquez* "facilitating private speech" analyses really become relevant to the issue of viewpoint discrimination. The proper question thus becomes not whether the "Choose Life" license plate program is invalid, but whether the government's suppression of a pro-choice viewpoint within the larger specialty license plate program is invalid. This Note argues that it is.

B. The Specialty License Plate Program

In contrast to the "Choose Life" license plate program, the specialty license plate program does not qualify as a form of government speech. The specialty license plate program does not express or promote any governmental message, but instead facilitates private speech by creating an opportunity for private entities or organizations to express and promote their messages on a license plate. While the "Choose Life" license plate program does not create a forum, the specialty license plate program does. In that respect, the specialty license plate program is much more like the programs in *Rosenberger* and *Velazquez* than the programs in *Rust* and *Johanns*.

When the government creates a forum for private speech, it may express editorial control over the subject matter of the speech, but not over the viewpoints relating to otherwise permissible subjects.[183] Therefore, in the *Bredesen* case, the government clearly had the power to allow or disallow the subject of abortion. However, once it expressed its own view, or allowed a private entity to express a view on the subject of abortion, it could no longer deny others the same opportunity to express their views within the same forum.

When the government creates and controls a forum, it does not have limitless authority to control speech within it and cannot make access to the forum depend upon governmental approval of the private message.[184] Government-created forums are subject to the same conventional rules that apply to ordinary, limited public forums.[185] Hence, the government must base any forum restrictions upon some criteria that is permissible and not solely upon viewpoint. A contrary rule would allow the government to skew the debate on a

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[183] *See* Legal Servs. Corp. v. Velazquez, 531 U.S. 533 (2001); Rosenberger v. Rector & Visitors of Univ. of Va., 515 U.S. 819 (1995).

[184] *See Rosenberger*, 515 U.S. at 829.

[185] *See id.*; Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37 (1983).

subject by promoting its view while simultaneously suppressing others.[186] Without proper and balanced access to different views relating to a particular subject, the public cannot make informed and intelligent decisions about how to resolve contentious issues. The principles of free speech, therefore, should not allow the government to exclude different viewpoints, leaving the public to depend upon government propaganda. When the government is the only speaker, the consequence is a distorted perception of the real problem that facilitates only the outcome that the government finds most politically advantageous.

While *Johanns* was helpful in determining whether the "Choose Life" license plate program was government speech, it would have provided little guidance in analyzing whether the *Bredesen* specialty license plate program consisted of government speech. In *Johanns*, the context was one where the Court had already determined that the purpose of the program was to express a government message.[187] In such a case, the government's mere reliance on private assistance in designing and distributing that message, or a failure to disclose itself as the speaker of that message would not disqualify the speech from the category of government speech.[188] But, such considerations would have been irrelevant in *Bredesen* where there was no message.[189]

There seems to be little merit to the argument that the specialty license plate program expressed any broad governmental message in and of itself, or that it served the purpose of promoting some government policy other than facilitating private speech or providing a means for private organizations to acquire funds. In fact, the stated purpose of the specialty license plate program was to provide funds to "departments, agencies, charities, programs and other activities impacting Tennessee."[190] Only the specific individual license plates contained within the larger specialty license plate program expressed a message.

Furthermore, the State of Tennessee had approved several specialty license plates that did not relate to any legitimate government interest or express any message that the government was attempting to distribute through private citizens.[191] Among other things, the State had approved specialty license plates that promoted fraternities, the Sons of Confederate Veterans, football teams, and both in-state and out-of-state colleges.[192]

Thus, it appears that under the specialty license plate program, it is the private organizations that seek the help of the government in expressing their messages, not the government that seeks help from private organizations in

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[186] *See* Planned Parenthood of S.C. Inc. v. Rose, 361 F.3d 786, 799 (4th Cir. 2004); Geoffrey R. Stone, *Restriction of Speech Because of Its Content: The Peculiar Case of Subject-Matter Restrictions*, 46 U. CHI. L. REV. 81, 108 (1978).

[187] Johanns v. Livestock Mktg. Ass'n, 544 U.S. 550, 560 (2005).

[188] *Id.* at 564.

[189] *See Rosenberger*, 515 U.S. at 834; *see also* Legal Servs. Corp. v. Velazquez, 531 U.S. 533, 542 (2001).

[190] TENN. CODE ANN. § 55-4-201(j) (2003).

[191] *See* ACLU of Tenn. v. Bredesen, 441 F.3d 370, 382-85 (6th Cir. 2006) (Boyce, J., concurring in part and dissenting in part).

[192] *Id.* at 383 n.5.

expressing its message.[193] When the purpose of the program is to facilitate private speech in such a manner, the government may not discriminate merely because it disagrees. While the government is free to agree with a private organization and express support for an idea as a form of government speech, the First Amendment prohibits the government from denying others an opportunity to express support for competing ideas within the same forum.[194] The mere fact that the government is speaking within a particular forum does not mean that others must refrain from speaking within it.[195]

A *Johanns* analysis is also improper in the context of the specialty license plate program because in *Johanns*, the government was not restricting access to a forum, but rather, was compelling speech of dissenters, which is a different type of First Amendment harm.[196] To argue that the government's right to promote beef through the medium of television includes the right to prohibit non-governmental entities from also expressing anti-beef messages on television would be absurd. Likewise, the government cannot prohibit pro-choice speech within the medium of license plates simply because it chooses to express a pro-life message within that same medium.[197] The government properly chooses not to support a certain view by expressing a contrary view, not by prohibiting others from expressing their support for a particular view on an equal basis within the same forum.

V. Conclusion

Considering that the Fourth, Fifth, and Sixth Circuits "have spoken on the issue, reaching at least three different conclusions, via at least sixteen separate opinions,"[198] the United States Supreme Court might have been wise to address the issue of government speech and viewpoint discrimination in the context of the "Choose Life" license plate in *Bredesen*. However, the Supreme Court likely will have another opportunity to confront the issue when it inevitably arises in another circuit.

In fact, a federal district court within the Seventh Circuit recently concluded that a "Choose Life" license plate consisted of private speech and directly expressed doubt as to the validity of the *Bredesen* court's analysis and conclusion.[199] In *Choose Life Illinois, Inc. v. White*,[200] the plaintiffs sued the State of Illinois contending that its refusal to issue a "Choose Life" license

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[193] *See* Sons of Confederate Veterans, Inc. v. Comm'r of the Va. Dep't of Motor Vehicles, 305 F.3d 241, 246 (4th Cir. 2002).
[194] *See Rosenberger*, 515 U.S. at 829-30.
[195] *See Sons of Confederate Veterans, Inc.*, 305 F.3d at 246.
[196] *See Bredesen*, 441 F.3d at 385-86 (Boyce, J., concurring in part and dissenting in part).
[197] On the other hand, it appears that, per *Johanns* and *Rust*, if the government wanted to levy a tax upon all family planning service providers, it could choose to spend the funds to advance only pro-life organizations even if some family planning service providers dissented. Similarly, the government could require all license plates to display a "Choose Life" message but could not prohibit individuals that objected from concealing it per *Wooley*.
[198] *Bredesen*, 441 F.3d at 380 n.1 (Boyce, J., concurring in part and dissenting in part).
[199] Choose Life Ill., Inc. v. White, No. 04 C 4316, 2007 WL 178455, at *7 (N.D. Ill. Jan. 19, 2007).
[200] *Id.*

plate was impermissible viewpoint discrimination even though the State had not issued a license plate with a pro-choice view.[201] The court applied the Fourth Circuit's four-factor test and determined that, under the circumstances, the "Choose Life" license plate was private speech because private organizations had originated it. As such, the court held that the State could not restrict the plaintiffs' message or discriminate against their view merely because it was unpopular or addressed a contentious issue. The court ordered the State to issue a "Choose Life" license plate, concluding that "because we are dealing with viewpoint discrimination in private speech, the forum is inconsequential."[202]

While the United States Supreme Court has examined the interaction between government speech and viewpoint discrimination and provided a basic framework for analysis, circuit courts are apparently unable to apply the abstract analysis consistently to cases with dissimilar facts. Ambiguities in the analysis and its application to varying factual circumstances may leave too much room for courts to employ discretion and curb individual rights in favor of advancing government policies. The result, as evidenced by the split among the circuits, is an uneven distribution in the nature of fundamental rights that citizens in one part of the country enjoy compared to those in another. Additionally, the reluctance of the Supreme Court to resolve the inconsistent application of the law has enhanced the "inherent risk that the [g]overnment seeks not to advance a legitimate regulatory goal, but to suppress unpopular ideas or information or manipulate the public debate through coercion rather than persuasion."[203] Until the United States Supreme Court clarifies the nature of government speech and its relationship to viewpoint discrimination, courts will continue to produce inconsistent opinions affecting the fundamental right of private citizens to access a forum without regard to viewpoint.

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[201] *Id.* at *3.
[202] *Id.* at *9.
[203] Turner Broad. Sys., Inc. v. FCC, 512 U.S. 622, 641 (1994).