NO. _____

In the
Supreme Court of the United States

PHIL BERGER, President Pro Tempore of the North Carolina Senate, AND THOM TILLIS, Speaker of the North Carolina House of Representatives,
Petitioners,

v.

AMERICAN CIVIL LIBERTIES UNION OF NORTH CAROLINA, et al.,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

The government speech doctrine recognizes that the government "has the right to 'speak for itself' … and to select the views that it wants to express." *Pleasant Grove City v. Summum*, 555 U.S. 460, 467-68 (2009). Under *Planned Parenthood of Southeastern Pa. v. Casey*, the government also has the right "[t]o promote the State's profound interest in potential life." 505 U.S. 833, 878 (1992).

Exercising its authority under *Summum* and *Casey*, the State of North Carolina passed legislation authorizing a "Choose Life" specialty license plate, relying on "assistance from private sources for the purpose of delivering [its] government-controlled message." *Summum*, 555 U.S. at 468.

Applying a four-factor test for a novel category of "mixed speech" that this Court has never considered, the Fourth Circuit precluded North Carolina from promulgating its desired "Choose Life" message. In so holding, the Fourth Circuit expressly rejected a contrary decision in the Sixth Circuit and applied a test that is inconsistent with (i) the government speech doctrine set forth in *Summum* and *Johanns v. Livestock Mktg. Ass'n*, 544 U.S. 550 (2004), and (ii) the reasoning employed in the Fifth, Seventh, Eighth, and Eleventh Circuits.

The question presented is:

Whether the government speech doctrine permits the State of North Carolina to promote its "Choose Life" message through a specialty license plate program over which it exercises complete and

effective control without also offering a pro-choice specialty plate.

PARTIES TO THE PROCEEDING

Petitioners are Phil Berger, President Pro Tempore of the Senate of the North Carolina General Assembly, and Thom Tillis, Speaker of the House of the North Carolina General Assembly.

Respondents are the American Civil Liberties Union of North Carolina, Dean Debnam, Christopher Heaney, Susan Holliday, and Maria Magher.

CORPORATE DISCLOSURE STATEMENT

Petitioners Phil Berger and Thom Tillis are individual persons.

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INTRODUCTION

Petitioners, the President Pro Tempore of the North Carolina Senate and the Speaker of the North Carolina House of Representatives, intervened in this case to protect North Carolina's "right to 'speak for itself' … and to select the views that it wants to express." *Summum*, 555 U.S. at 467. In particular, drawing on the government speech doctrine, Petitioners sought to safeguard North Carolina's ability to promulgate a message—"Choose Life"—through its specialty license plate program without having to adopt a "Respect Choice" message. *See Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston*, 515 U.S. 577 at 573 (1995) ("one important manifestation of the principle of free speech is that one who chooses to speak may also decide 'what not to say.'").

Applying a four-factor test of its own making, the Fourth Circuit denied that the government speech doctrine applied and concluded that North Carolina's specialty license plates implicate private speech in a government-created forum. As a result, the panel concluded that North Carolina's authorizing a "Choose Life" plate without a pro-choice analogue "constitutes blatant viewpoint discrimination squarely at odds with the First Amendment." Pet. App. A4.

The decision below confirms a five-way circuit split among the seven circuits that have considered whether specialty license plates are government speech or private speech. The four-factor test used in the Fourth and Ninth Circuits directly conflicts with the Sixth Circuit's analysis, which takes

Johanns to articulate a new control test for government speech that supplants the Fourth and Ninth Circuits' pre-*Johanns* standard. It also is at odds with the single-factor "reasonable observer" test for government speech applied in the Seventh and Eighth Circuits. Furthermore, all of these circuit court decisions are inconsistent with how the Fifth and Eleventh Circuits resolved challenges to "Choose Life" plates, holding that such challenges were barred by the Tax Injunction Act and a lack of standing, respectively. Given that standing is "an essential limit on [this Court's] power," *Hollingsworth v. Perry*, 133 S.Ct. 2652, 2659 (2013), determining what constitutes a redressable injury in the government speech context is critically important and bears directly on the government's ability to avoid a heckler's veto.

Review also is warranted because the Fourth Circuit's opinion is predicated on a novel and unworkable standard for mixed speech that this Court has never considered, let alone discussed. Moreover, the tests for government speech used in the Fourth, Seventh, Eighth, and Ninth Circuits contravene this Court's decisions in, *Johanns*, *Summum*, *Wooley v. Maynard*[1], and *Hurley*.

Because "it is not easy to imagine how government could function if it lacked this freedom" to say what it wants, *Summum*, 555 U.S. at 468, determining the proper standard for government speech presents an important question of federal law that should be resolved by the Court. Additionally, only this Court can resolve the five-way circuit split

[1] *Wooley v. Maynard*, 430 U.S. 705 (1977).

regarding "Choose Life" specialty plates and to decide whether the Fourth Circuit's mixed speech standard is consistent with the government speech doctrine developed in *Summum* and *Johanns* as well as this Court's other First Amendment speech precedents.

DECISIONS BELOW

The opinion of the Court of Appeals is reported at 742 F.3d 563, No. 13-1030 (February 11, 2014) and reprinted in Pet. App. A1-A26. The opinion of the district court granting a permanent injunction is reported at 912 F. Supp. 2d 363 (E.D.N.C. 2012) and reprinted in Pet. App. B1-B27. The district court's entry of a preliminary injunction is reported at 835 F. Supp. 2d 51 (E.D.N.C. 2011) and reprinted in Pet. App. C1-C2.

STATEMENT OF JURISDICTION

The Court of Appeals issued its opinion on February 11, 2014. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

PERTINENT CONSTITUTIONAL PROVISIONS AND STATUTES

The First Amendment to the United States Constitution provides in pertinent part:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech ….

U.S. CONST. AMEND. I.

N.C.G.S. § 20-79.4(b)(41) provides:

> "[t]he Division shall issue the following types of special registration plates: (41) Choose Life—Issuable to a registered owner of a motor vehicle in accordance with G.S. 20-81.12. The plate shall bear the phrase 'Choose Life.'"

Pursuant to N.C.G.S. § 20-81.12(b84):

> "[t]he Division must receive 300 or more applications for a 'Choose Life' plate before the plate may be developed. The Division shall transfer quarterly the money in the Collegiate and Cultural Attraction Plate Account derived from the sale of 'Choose Life' plates to the Carolina Pregnancy Care Fellowship, which shall distribute the money annually to nongovernmental, not-for-profit agencies that provide pregnancy services that are limited to counseling and/or meeting the physical needs of pregnant women. Funds received pursuant to this section shall not be distributed to any agency, organization, business, or other entity that provides, promotes, counsels, or refers for abortion and shall not be distributed to any entity that charges women for services received."

STATEMENT OF THE CASE

I. Factual Background

The facts of this case are undisputed. On June 18, 2011, the North Carolina General Assembly passed legislation, entitled "An Act to Authorize the Division of Motor Vehicles to Issue Various Special Registration Plates" (the "Act"), authorizing several new specialty license plates, including a plate bearing the message "Choose Life." *See* N.C.G.S. § 20-63(b1)(39). Governor Perdue signed the bill into law on June 30, 2011. This statutory authorization was necessary because North Carolina, unlike several other States, does not have an administrative procedure through which individuals or organizations can propose or obtain specialty license plates. Rather, with the single exception of specialty plates for national civic organizations and colleges and universities, the North Carolina General Assembly must pass legislation specifically authorizing each specialty license plate in North Carolina. *See* N.C.G.S. §§ 20-79.4(b)(41) and 20-81.12.

During the 2011 Legislative Session, several legislators proposed failed amendments to the Act that would have provided for a "Respect Choice" or "Trust Women, Respect Choice" specialty plate. Although the record indicates that each of these amendments failed, it does not reveal the reasons why the General Assembly denied these amendments. The record also does not reflect that any legislator proposed these amendments as stand-alone bills.

Pursuant to the Act, in addition to the regular yearly registration fees, a vehicle owner who wished to affix North Carolina's "Choose Life" specialty plate on her vehicle would pay an extra $25.00 annually. N.C.G.S. § 20-79.7(a1). For each "Choose Life" plate selected, $15.00 would go to the Carolina Pregnancy Care Fellowship, a private organization that funds and supports crisis pregnancy centers in North Carolina. N.C.G.S. §§ 20-79.7(a1), 20-81.12(b84). Under the Act, the funds collected from North Carolina's "Choose Life" plate could not "be distributed to any agency, organization, business, or other entity that provides, promotes, counsels, or refers to abortion." *Id*. By directing moneys to an agency that promoted childbirth but not abortion, North Carolina further expressed its desire to promote childbirth over abortion.

Consistent with North Carolina's general procedure for specialty plates, the Division of Motor Vehicles could not begin developing the "Choose Life" plate until it received 300 applications from North Carolina motorists who wanted to display North Carolina's "Choose Life" plate on their vehicles. *Id*. The Division of Motor Vehicles received the required 300 applications by the fall of 2011. Once issued, North Carolina's "Choose Life" plate would have been available to any interested vehicle owner in the State.

II. Procedural Background

The Respondents filed suit in the United States District Court for the Eastern District of North Carolina, challenging the Act under the First and Fourteenth Amendments to the United States

Constitution and seeking injunctive relief. Specifically, the Respondents moved for a temporary restraining order and a preliminary injunction to prevent North Carolina from developing or issuing a "Choose Life" license plate. Pet. App. B4. Respondents did not challenge North Carolina's specialty plate program as a whole or ask the district court to require North Carolina to issue a pro-choice license plate.

The district court granted Respondents' motion for a preliminary injunction. Applying the Fourth Circuit's four-factor test for mixed speech, the district court concluded that specialty license plates implicated sufficient private speech rights under *Wooley* to preclude North Carolina's "authorizing the 'Choose Life' plate without also offering a pro-choice alternative." Pet. App. B8. The court also concluded that *Johanns* and *Summum* did not alter the Fourth Circuit's test such that the identity of the literal speaker still was relevant when deciding whether the government was speaking. The district court subsequently entered a permanent injunction, precluding North Carolina "from implementing, enforcing or otherwise carrying out" the sections of the Act relating to "Choose Life" license plates "or issuing the 'Choose Life' plate." Pet. App. C2.

The State timely appealed. On appeal, the Fourth Circuit affirmed, holding that specialty license plates were mixed speech under the four-factor test developed before *Johanns* and *Summum* were decided. The panel acknowledged that "the Supreme Court has not yet recognized that speech may be not purely government or private but instead implicate both," Pet. App A8, and that its conclusion

was directly at odds with the Sixth Circuit, which found that specialty plates were government speech under *Johanns*. The panel also cited to several circuits that decided specialty plates are private speech but did not consider or discuss the important differences in reasoning between and among these circuits.

The Fourth Circuit entered judgment on February 11, 2014, causing any petition for a writ of certiorari to be due on or before May 12, 2014. After the close of business on April 30, 2014, the Attorney General of North Carolina, who up to that point had defended the constitutionality of the Act through his representation of the Defendants in this action, informed the Petitioners that he would not petition for certiorari on behalf of the Defendants.

Because the Fourth Circuit's decision nullified an act of the General Assembly and prevented North Carolina from promulgating its "Choose Life" message, Petitioners promptly exercised their right to intervene in the Fourth Circuit. *See* N.C.G.S. § 1-72.2 (stating that the Speaker of the House and President Pro Tempore of the Senate "shall jointly have standing to intervene on behalf of the General Assembly as a party in any judicial proceeding challenging a North Carolina statute or provision of the North Carolina Constitution."). Given the imminent deadline for filing a petition for certiorari, Petitioners also filed in this Court a motion to intervene and a motion for an extension of time to file a writ of certiorari. The Fourth Circuit granted Petitioners' motion to intervene on May 12, 2014, and the Petitioners immediately filed with this Court an application for an extension of time to file a

writ of certiorari on or before July 11, 2014. The Court, through Chief Justice Roberts, granted the petition on May 19, 2014, and this petition timely followed.

REASONS FOR GRANTING THE WRIT

In *Summum*, this Court noted that "[t]here may be situations in which it is difficult to tell whether a government entity is speaking on its own behalf or is providing a forum for private speech." *Summum*, 555 U.S. at 470. Specialty license plates have proven to be one of those situations. To date, seven circuits have reached at least five different conclusions regarding First Amendment challenges to "Choose Life" specialty plates. Two of these circuits—the Fourth and the Eighth—considered such challenges after this Court unanimously affirmed the government speech doctrine in *Summum*. Yet even these circuits did not agree on the proper standard for government speech.

The decision below interpreted *Summum* as proffering a "multi-faceted, context-specific" analysis that is consistent with the Fourth Circuit's four-factor test for mixed speech. In a short footnote, the Eighth Circuit limited *Summum* to the monument context and applied a single-factor, reasonable observer test because specialty plates, unlike monuments, "facilitate expressive conduct on the part of the organization and its supporters, not the government." *Roach v. Stouffer*, 560 F.3d at 868 n.3 (2009).

Besides being inconsistent with each other, these decisions also conflict with (i) the Sixth Circuit's

conclusion that Tennessee's "Choose Life" plate is government speech under *Johanns*, (ii) decisions from the Fifth and Eleventh Circuits dismissing challenges to "Choose Life" plates on jurisdictional grounds, and (iii) several of this Court's First Amendment speech decisions, including *Johanns*, *Summum*, *Wooley*, and *Hurley*.

Because the Fourth Circuit's multi-factor test undermines North Carolina's right under *Casey* and *Summum* to say what it wants with respect to promoting childbirth over abortion, the decision below presents an important question of First Amendment law that has not been, but should be, decided by this Court. Moreover, given the variety of conclusions reached by the circuit courts, only this Court can resolve the conflict by articulating the proper standard for government speech in the wake of *Johanns* and *Summum*.

I. Certiorari Should Be Granted Because the Circuits Are in Conflict over the Proper Standard for Determining Whether Specialty License Plates Constitute Government Speech or Private Speech in a Government-Created Forum.

In holding that North Carolina cannot adopt a "Choose Life" specialty plate unless it also offers a "Respect Choice" plate, the Fourth Circuit expressly rejected a contrary decision of the Sixth Circuit, which concluded that "Choose Life" plates are government speech under the test articulated in *Johanns*. Pet. App. A24. And while the Fourth Circuit emphasized that the Seventh, Eighth, and Ninth Circuits reached similar conclusions—that

specialty plates create a forum for private speech—it did not consider the important differences between and among these opinions. *Id*. A closer look reveals that these other circuits reached their conclusion based on either a different legal standard (Seventh and Eighth Circuits) or a significantly different level of governmental control over the message (Ninth Circuit). Furthermore, the Fifth and Eleventh Circuits determined that courts should not even reach the merits of such First Amendment challenges. Because the Fourth Circuit's decision conflicts with six other circuits, further review by this Court is warranted.

A. The Fourth Circuit's Analysis Openly Conflicts with the Sixth Circuit and Is Inconsistent with Decisions of the Fifth and Eleventh Circuits.

Although recognizing that "'complete editorial control' rests with North Carolina" regarding its specialty license plates, the Fourth Circuit concluded that the State's "issuing a 'Choose Life' specialty license plate while refusing to issue a pro-choice specialty plate constitutes blatant viewpoint discrimination squarely at odds with the First Amendment." Pet. App. A4. In so holding, the panel expressly disagreed with an allegedly "flawed" Sixth Circuit opinion, which held that "Choose Life" specialty plates are government speech. Pet. App. A24. Although not mentioned in its decision, the Fourth Circuit's opinion also is inconsistent with decisions by the Fifth and Eleventh Circuits.

1. Conflict with the Sixth Circuit.

The Sixth Circuit's analysis in *American Civil Liberties Union of Tenn. v. Bredesen*, 441 F.3d 370 (6th Cir. 2005), is irreconcilable with the decision below. In *Bredesen*, the Tennessee legislature passed a statute authorizing a "Choose Life" license plate. The American Civil Liberties Union and others argued that the statute violated the speech rights of those advocating alternative viewpoints related to abortion. The district court enjoined the statute, applying a four-factor test that the Fourth Circuit developed in *Planned Parenthood of South Carolina, Inc. v. Rose*, 361 F.3d 786 (4th Cir. 2004) and *Sons of Confederate Veterans, Inc. v. Commissioner of the Virginia Department of Motor Vehicles* ("*SCV*"), 288 F.3d 610 (4th Cir. 2002). Pet. App. B25-26.

On appeal, the Sixth Circuit identified the central issue as "whether a government-crafted message disseminated by private volunteers creates a 'forum' for speech that must be viewpoint neutral." *Bredesen*, 441 F.3d at 375. Instead of using the Fourth Circuit's four-factor test, though, the Sixth Circuit relied on this Court's intervening decision in *Johanns*, which the panel majority viewed as "set[ting] forth an authoritative test for determining when speech may be attributed to the government for First Amendment purposes." *Id.* at 380. According to the Sixth Circuit, under *Johanns* the government must be viewed as the speaker if it "determines the overarching message and retains power to approve every word disseminated at its behest." *Id.* at 375.

Applying the *Johanns* standard, the majority concluded that Tennessee had the same type of

control over its "Choose Life" license plate that the federal government had over the beef advertising campaign in *Johanns*. Under Tennessee's specialty license plate program, the legislature established "the overall message to be communicated," "wield[ed] 'final approval authority over every word used,'" and "retain[ed] a veto over its design." *Id*. at 376. As in *Johanns*, the fact that the State did not "credit itself as the speaker" was irrelevant given the level of control that Tennessee exercised over the content and design of the specialty plates. Accordingly, the "Choose Life" plate was government speech, promulgating "Tennessee's own message." *Id.*

In reaching this conclusion, the Sixth Circuit rejected the plaintiffs' claim that Tennessee's specialty plates are a type of "mixed" speech given the large number of specialty plates Tennessee offered and the fact that the message on a license plate frequently is attributed to the vehicle owner. To hold otherwise—that Tennessee created a specialty plate forum by offering numerous organization plates—would force the State to offer specialty plates for hate groups such as the Ku Klux Klan or the American Nazi party. According to the majority, "[s]uch an argument falls of its own weight." *Id*. at 377.

In addition, the Sixth Circuit rebuffed the Fourth Circuit's suggestion in *SCV* and *Rose* that using third party volunteers to disseminate the State's message created a forum for private speech. That vehicle owners who display a specialty plate may agree with the State's message did not convert government speech into private speech. If it did, the Sixth Circuit worried that the government could be

forced to proffer messages that would contradict its chosen policies and undermine its ability to promote its own views in a variety of other contexts. Having distributed pins saying "Register and Vote" or stamps saying "Win the War" during World War II, the government could be required to give out "Don't Vote" pins or "Stop the War" stamps.

Because the prior Fourth Circuit decisions provided no basis for distinguishing such common and unexceptional examples from specialty license plates and because this Court decided *Johanns* based on the level of governmental control over the message, the Sixth Circuit refused to apply the four-factor test and ultimately concluded that specialty plates were government speech.

2. Conflict with the Fifth and Eleventh Circuits.

The Fifth and Eleventh Circuits also are at odds with the Fourth Circuit's decision below. Both of these circuits dismissed challenges to "Choose Life" license plates, albeit for different reasons. The Fifth Circuit dismissed the challenge to Louisiana's "Choose Life" license plate under the Tax Injunction Act ("TIA"). According to the Fifth Circuit, the relevant test differentiated between a regulatory fee and a tax. *Henderson v. Stadler*, 407 F.3d 351, 354 (5th Cir. 2005). Because the charge for a "Choose Life" specialty plate was not a regulatory fee, the panel determined that the additional cost for specialty plates constituted a "tax" that, pursuant to the TIA, could not be enjoined by a federal court where there was a plain, speedy, and efficient remedy available in the Louisiana courts. The Fifth

Circuit, therefore, remanded and ordered the district court to dismiss the case under the TIA.

The panel's decision in *Henderson* was not universally accepted even among members of the Fifth Circuit. Eight Fifth Circuit judges dissented from the denial of rehearing en banc, arguing that the panel had relied on a false dichotomy—that the payments had to be either a regulatory fee or a tax. *Henderson v. Stadler*, 434 F.3d 352, 354 (5th Cir. 2005) (Davis, J. dissenting). While agreeing with the panel that the cost of the plate was not a regulatory fee, the dissenters denied that it was a tax. As a result, according to the dissenters, the TIA did not apply, and the court should have reached the merits. In *Bredesen*, the Sixth Circuit substantially agreed with the Fifth Circuit dissenters, creating a circuit split as to whether the TIA governs in the context of specialty license plates.

The decision of the panel below also is inconsistent with the Eleventh Circuit's decision in *Women's Emergency Network v. Bush*, 323 F.3d 937 (11th Cir. 2003), which the Fourth Circuit cites to support its claim that specialty license plates are private speech. Pet. App. A24. The panel's reliance on *Women's Emergency Network* is misplaced because the Eleventh Circuit never reached the merits of the challenge to Florida's "Choose Life" plate, denying that the parties had standing on facts that are virtually identical to those in the present action. In *Women's Emergency Network*, the plaintiffs, an organization and several individuals, claimed that the Florida legislature's "Choose Life" plate violated their right to free speech by "providing a forum for pro-life car owners to express their

political views" but not providing a similar forum for pro-choice owners.

The Eleventh Circuit dismissed the plaintiffs' claim on standing grounds. In particular, the court held that the plaintiffs had not suffered an injury-in-fact because they had not personally applied for a pro-choice plate. Although the Florida legislature had "reject[ed] a proposed amendment … that would have created a pro-choice license plate," there was no evidence as to the reasons why the legislature declined to approve the amendment or that Florida had applied its specialty plate requirements in a discriminatory way. 323 F.3d at 946 n.12. Consequently, the plaintiffs failed to establish the requisite injury.

Furthermore, the Eleventh Circuit concluded that the alleged injury was not redressable. The plaintiffs' requested relief—an injunction precluding enforcement of the "Choose Life" specialty plate statute—did not redress the inability to express their pro-choice viewpoint. As the court noted, "[r]emoving pro-life speech from the forum does not in any way advance Appellants' opportunity to speak." *Id*. at 947. According to the Eleventh Circuit, to remedy the alleged injury, the court would "either have to instruct the State to create a pro-choice license plate, or instruct the State to close the specialty license plate forum altogether." *Id*. Because the plaintiffs had not asked the court to do either, the Eleventh Circuit held that the plaintiffs' alleged injury was not redressable. *Id*. (holding that the plaintiffs could not stifle the speech of others because "[t]he First Amendment protects the right to

speak; it does *not* give Appellants the right to stop others with opposing viewpoints from speaking.").

Although the decision below does not address standing, the similarities between this case and the Eleventh Circuit case are striking. As in *Women's Emergency Network*, the North Carolina legislature rejected proposed amendments to the Act that would have created a "Respect Choice" plate. Pet. App. B5. The panel below cited to the Joint Appendix to emphasize this point, but the record cites do not give any indication as to why the proposed amendments were rejected. Nor does the record show that the plaintiffs (or anyone else) independently sought to introduce legislation for a pro-choice plate. In fact, there is no evidence indicating that the plaintiffs took any action to secure a pro-choice specialty plate or had received commitments from 300 people to purchase such a plate as required by N.C.G.S. § 20-81.12.

Instead, throughout this litigation, the plaintiffs have sought only an injunction to stop the production and distribution of a "Choose Life" plate; they have neither asked the courts to order North Carolina to issue a "Respect Choice" plate nor challenged the entire specialty plate program.[2]

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[2] Most challenges to State specialty plate programs have sought to stifle one particular form of speech that plaintiffs dislike—the "Choose Life" message—rather than to promote the free flow of ideas. This is evident from plaintiffs' moving to enjoin the issuance of "Choose Life" plates instead of seeking an order requiring States to issue a pro-choice plate. *See, e.g.*, Complaint, *Women's Emergency Network v. Bush*, 191 F. Supp. 2d 1356 (S.D. Fla. 2002) (No. 02-20172 Civ.) (seeking only negative injunctive relief to prevent implementation of

Thus, because, as the Eleventh Circuit acknowledged, "[t]he First Amendment is intended to protect speech, not censor it," *Id.* at 948, this Court should determine whether a party has a redressable injury when it seeks only to prevent the State from speaking instead of the opportunity to express its own views.

B. The Fourth Circuit's Four-Factor Test Is Inconsistent with the Single-Factor Test Employed in the Seventh and Eighth Circuits.

Although the Seventh and Eighth Circuits have concluded that specialty plate programs create a forum for private speech, they have employed a single factor test to reach that conclusion: whether

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Florida's "Choose Life" license plate program and a declaration that the statute was unconstitutional); Memorandum in Support of Plaintiff's Motion for Summary Judgment at 14, *Planned Parenthood of S.C., Inc. v. Rose*, 236 F. Supp. 2d 564 (D.S.C. 2002) (No. 2-01-3571-23) (seeking only declarative and injunctive relief to prohibit implementation of South Carolina's "Choose Life" license plate program); *Am. Civil Liberties Union of Tenn. v. Bredesen*, 354 F. Supp.2d 770 (M.D. Tenn. 2004) (declaring Tennessee's issuance of a "Choose Life" license plate to be unconstitutional, rendering a decision regarding the requested injunction unnecessary), *rev'd*, 441 F.3d 370 (6th Cir. 2006); Complaint, *American Civil Liberties Union of N.C. v. Conti*, 912 F. Supp. 2d 363 (E.D.N.C. 2012) (No. 5:11-cv00470) (seeking only declarative and injunctive relief to prohibit implementation of North Carolina's "Choose Life" license plate program); *Women's Res. Network v. Gourley*, 305 F. Supp. 2d 1145 (E.D. Cal. 2004) (enjoining the execution of California's specialty license plate statute for private non-profits). Such challenges contradict the very purpose of the First Amendment, which is to protect, not limit, speech activity.

under all the circumstances a reasonable observer would view the government or a private individual as the literal speaker. This reasonable observer test is inconsistent with the Fourth Circuit's multi-factor test as well as with this Court's decisions in *Johanns* and *Summum*.

In *Choose Life of Illinois, Inc. v. White*, 547 F.3d 853 (7th Cir. 2008), a pro-life group asked the Illinois legislature to approve a "Choose Life" plate. After the legislature rejected its request, the group filed suit, claiming that Illinois had violated the group's free speech rights by denying it access to the state-created specialty plate forum. The district court held that the State had engaged in impermissible viewpoint discrimination, but the Seventh Circuit reversed.

Although the Seventh Circuit found the Fourth Circuit's analytical framework instructive, the court determined that the four-factor test "can be distilled (and simplified) by focusing on the following inquiry: Under all the circumstances, would a reasonable person consider the speaker to be the government or a private party." *Id.* at 863. Applying this reasonable observer test, the Seventh Circuit concluded that Illinois had created a forum for private speech through its specialty plate program but that the Illinois legislature had not engaged in viewpoint discrimination by rejecting the "Choose Life" plate. Although recognizing that the distinction between content and viewpoint discrimination "is not a precise one," *Rosenberger v. Rector and Visitors of Univ. of Va.*, 515 U.S. 819, 831 (1995), the Seventh Circuit surmised that Illinois had decided to exclude the entire subject of abortion,

not just a particular viewpoint on that subject. The court determined that Illinois's exclusion of abortion-related plates was reasonable because "messages on specialty license plates give the appearance of having the government's endorsement, and Illinois does not wish to be perceived as endorsing *any* position on the subject of abortion." *White*, 547 F.3d at 855.[3] As a result, the Seventh Circuit denied Choose Life of Illinois's First Amendment claim.

Similarly, in *Roach v. Stouffer*, the Eighth Circuit was called on to decide whether Missouri's "Choose Life" plate was government speech or private speech. After reviewing the case law from other circuits, the Eighth Circuit adopted *White*'s single-factor, reasonable observer test: "Our analysis boils down to one key question: whether, under all the circumstances, a reasonable and fully informed observer would consider the speaker to be the government or a private party." 560 F.3d at 867.

Under this standard, the Eighth Circuit determined "that a reasonable and fully informed observer would consider the speaker to be the organization that sponsors and the vehicle owner

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[3] The difficulty the lower courts have had in determining whether specialty plates are government or private speech is apparent from the Seventh Circuit's decision. The court concludes that specialty plates are private speech because their "messages are most closely associated with drivers and the sponsoring organizations, and the driver is the ultimate communicator of the message." *White*, 547 F.3d at 864. Yet, if that is correct, it is not clear how the government *reasonably* can believe that a third party will view the State as endorsing a message about abortion when the reasonable observer considers the driver, not the government, to be the speaker.

who displays the specialty license plate." *Id.* In reaching this conclusion, the Eighth Circuit sought to distinguish *Summum*. Whereas *Summum* dealt with "privately donated monuments in a city park," specialty plates implicated "a much different issue: whether specialty license plates on privately-owned vehicles communicate government speech." *Id.* at 868 n.3. Because specialty plates, unlike monuments, permit expressive conduct by organizations and their supporters, *Summum* did not alter the Eighth Circuit's view that specialty plates are private, not government, speech.

The Seventh and Eighth Circuit's reliance on the reasonable observer test, though, directly conflicts with the Fourth Circuit's four-factor test as well as its interpretation of *Summum*. Whereas the Fourth Circuit takes *Summum* to adopt a "multi-faceted, context-specific reasoning," Pet. App. A15, that is consistent with its four-factor test, the Eighth Circuit denies that *Summum* applies at all in the specialty plate context. Moreover, the use of a reasonable observer test—whether as only one factor or as the only factor—directly conflicts with *Johanns*, in which the "Beef, It's What's for Dinner" advertising campaign was government speech even though a reasonable observer would not know that the government was speaking, and *Summum*, in which Justice Souter expressly proffered a reasonable observer test in a concurrence that no other Justice joined.

II. The Fourth Circuit's Novel Mixed Speech Standard is Unworkable and Misapplies Established Supreme Court Case Law.

The Fourth Circuit expressly acknowledges that its decision is predicated on a category of speech—mixed speech—that this Court has never adopted: "the Supreme Court has not yet recognized that speech may be not purely government or private but instead implicate both." Pet. App. A8. Lacking guidance from this Court regarding a standard for "mixed speech," the panel below applied a four-factor test that the Fourth Circuit created before *Johanns* and *Summum* were decided.

That the Fourth Circuit's four-factor test is an improper lens through which to view specialty plates is evident from the fact that the test effectively ignores the level of governmental control over a specialty plate program and conflicts with several of this Court's First Amendment precedents.

A. The Fourth Circuit's Mixed Speech Test Improperly Treats All Specialty Plate Programs as Private Speech Regardless of the Level of Governmental Control over Such Programs.

The Fourth and Ninth Circuits apply the four-factor *SCV* test when determining whether specialty license plates are government or private speech. This test, however, precludes States from speaking through their specialty plate programs regardless of the level of control that they have over the programs. Under the *SCV* test, if a State issues a specialty plate through an administrative or legislative

process, it must either allow specialty plates expressing any viewpoint on that subject matter or terminate the program.

In *Arizona Life Coalition, Inc. v. Stanton*, the Ninth Circuit applied the Fourth Circuit's four-factor test to Arizona's specialty plate program, which (unlike the programs in *SCV* and *Rose*) established an administrative procedure for obtaining specialty plates. 515 F.3d 956 (9th Cir. 2008). Instead of having to get legislation passed authorizing each specialty plate, non-profit organizations in Arizona could submit an application directly to the Arizona Department of Transportation. Once the Arizona DOT certified the organization as a non-profit, the DOT submitted the plate request to the Arizona License Plate Commission, which was required to issue the plate if the organization was not discriminatory in purpose or name and either served the community or contributed to the welfare of others.

Arizona Life Coalition applied for a "Choose Life" plate, but its application was denied despite meeting all of Arizona's statutory requirements. The plaintiffs filed suit, arguing that specialty plates were government speech under *Johanns*. The Ninth Circuit disagreed and limited *Johanns* to the compelled subsidy context. But the court nevertheless viewed *Johanns* as consistent with the *SCV* test. Because the Arizona License Plate Commission had only "de minimis editorial control over the plate design and color," there was no basis for "finding that the *messages* conveyed by the organization constitute government speech." 515 F.3d at 966. As a result, the Ninth Circuit concluded

that the Commission engaged in viewpoint-based discrimination and remanded the case with orders to require the Commission to issue the "Choose Life" plate.

In contrast, the panel below held that North Carolina exercised "complete editorial control" over its specialty plates. Pet. App. A20. Despite this different level of control, the panel reached the same conclusion as the Ninth Circuit—that that North Carolina could not discriminate based on viewpoint. Relying on the other three *SCV* factors—the purpose of the program, the identity of the literal speaker, and the ultimate responsibility for the speech's content—the Fourth Circuit determined that specialty plates "implicate[] private speech rights." Pet. App. A24. Under the Fourth Circuit's reasoning, though, the result would have been the same even if North Carolina had adopted an administrative procedure similar to Arizona's. Under such an administrative procedure, North Carolina would relinquish effective control over the content and design of specialty plates, causing all of the *SCV* factors to implicate private speech.

Under the Fourth Circuit's novel standard, then, the level of governmental control over specialty plates is irrelevant to the government speech analysis. Once a State begins issuing specialty plates, it must allow all viewpoints related to those plates even if it has complete and effective control over the content and design of each plate. This holding not only prohibits States from speaking through their specialty plates, but also contradicts *Johanns* and *Summum*, which expressly predicate government speech on the government's control over

the message.[4] *Johanns*, 544 U.S. at 562 (finding government speech "[w]hen, as here, the government sets the overall message to be communicated and approves every word that is disseminated"); *Summum*, 555 U.S. at 473 (concluding that the monuments were government speech because "the City has 'effectively controlled' the messages sent by the monuments in the Park by exercising 'final approval authority' over their selection.") (quoting *Johanns*, 544 U.S. at 560-61).

Because the four-factor *SCV* test (i) is based on a new category of mixed speech and (ii) does not distinguish between specialty plate programs over which the government exercises complete control (North Carolina) as opposed to de minimis control (Arizona), there is a critical need for guidance from this Court regarding whether mixed speech is a separate category under the First Amendment, what the standard is for such speech, and how that standard applies in the context of specialty license

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[4] Under *Summum*, States can create a monument forum by relinquishing control over the selection process: "To be sure, there are limited circumstances in which the forum doctrine might properly be applied to a permanent monument—for example, if a town created a monument on which all of its residents (or all of those meeting some other criterion) could place the name of a person to be honored or some other private message." *Id.* at 480. As evidenced by *Stanton*, States can do the same thing for specialty plates by creating an administrative procedure that grants specialty plates to any group meeting certain general criteria. The Fourth Circuit's decision precludes States from deciding whether to keep (legislative process) or cede (administrative process) control over the specialty plate programs because it views both programs as creating a forum for private speech.

plates. Accordingly, the decision below raises novel and important questions of First Amendment law that should be resolved by this Court.

B. The Fourth, Seventh, and Eighth Circuits' Reliance on a Reasonable Observer Directly Conflicts with the Government Speech Doctrine Set Out in *Johanns* and *Summum*.

In determining whether specialty plates are government speech, the Seventh and Eighth Circuits focus solely on whom a reasonable observer would identify as the literal speaker: "Our analysis boils down to one key question: whether, under all the circumstances, a reasonable and fully informed observer would consider the speaker to be the government or a private party." *Roach*, 560 F.3d at 867. The Fourth Circuit also relies heavily on this factor, concluding that specialty plates represent private speech because "to any reasonable observer, the literal speaker of a message on a specialty plate that the observer knows the vehicle owner selected is surely the vehicle owner." Pet. App. A22.

The reasonable observer test, however, is inconsistent with *Johanns* and *Summum* for at least two reasons. First, *Johanns* expressly rejected the reasonable observer test, concluding that the "Beef, It's What's for Dinner" advertising campaign was government speech "*whether or not the reasonable viewer would identify the speech as the government's*." 544 U.S. at 564 n.7 (emphasis added). Even though many observers reasonably did not know the government produced the campaign, the speech was that of the government because "the

government sets the overall message to be communicated and approves every word that is disseminated." *Id.* at 562.

Justice Souter's *Johanns* dissent confirms that the majority relied on the government's having complete and effective control over the message. Although Justice Souter argued that the government could avail itself of the protection of the government speech doctrine only if a reasonable observer would attribute the message to the government, *Id.* at 578, he acknowledged that the majority instead focused on the level of governmental control over the message: "The Court takes the view that because Congress authorized this scheme and the Government controls (or at least has a veto on) the content of the beef ads, the need for democratic accountability has been satisfied." *Id.* Moreover, in determining that monuments were government speech, *Summum* applied *Johanns*'s control test: "the City has 'effectively controlled' the messages sent by the monuments in the Park by exercising 'final approval authority' over their selection." *Summum*, 555 U.S. at 473 (quoting *Johanns*, 544 U.S. at 560-61).

Second, the Fourth Circuit's mixed speech test disregards a central teaching in *Summum*—that government speech can convey more than one message. The panel below improperly contends that a specialty plate can be government speech only if it sends one message—that of the government. *See* Pet. App. A19 ("North Carolina has never communicated to the public that the specialty plate program is government-only speech or that it seeks volunteers to help disseminate a government–only

message."). Because the reasonable observer allegedly attributes the message on a specialty plate to the vehicle owner, the Fourth Circuit concludes that the message cannot be government speech.

Yet *Summum* rejects the Fourth Circuit's assumption that a specialty plate can send only one message on behalf of one person. As this Court instructed in *Summum*, the government may accept a monument or piece of art for its own expressive purposes without adopting the message that the artist sought to convey: "The thoughts or sentiments expressed by a government entity that accepts and displays such an object may be quite different from those of either its creator or donor." *Summum*, 555 U.S. at 476. In fact, the government might intend the monument or art to be interpreted in different ways: "Even when a monument features the written word, the monument may be intended to be interpreted, and may in fact be interpreted by different observers, in a variety of ways." *Id*. at 474.

The same holds true for specialty license plates. As *Johanns* emphasizes, the government does not lose the protection of "the government-speech doctrine merely because it solicits assistance from nongovernmental sources in developing specific messages." *Johanns*, 544 U.S. at 562. Although a third party may propose a specialty plate, North Carolina engages in its own speech activity by adopting the plate legislatively. The Fourth Circuit decision fails to appreciate the fact that vehicle owners may agree to convey the State's message and at the same time engage in their own expressive activity. *See Summum*, 555 U.S. at 468 (confirming that the government retains "this same freedom to

express its views when it receives assistance from private sources for the purpose of delivering a government-controlled message.").

For example, a State may offer a variety of college specialty plates without advocating one school over another, even though individuals choosing a specific college plate might do so. A driver might have a University of North Carolina license plate on her vehicle, while another has a Duke University plate on his. Both proudly express their affinity for their respective school. But North Carolina also engages in expressive activity—celebrating its well-educated citizenry and championing the various educational opportunities it offers its citizens—and therefore can claim the protection of the government speech doctrine.

C. Applying This Court's Forum Principles to North Carolina's Legislatively Controlled Specialty Plate Program Would Lead to the Closing of the Forum.

In *Summum*, this Court recognized that the forum doctrine does not apply when it would "defeat[] the essential function of the land or the program." *Id.* at 478. In the present case, North Carolina's specialty plate program is at issue, not land. Thus, determining the essential function of this program is critical.

The panel below concludes that the purpose of the specialty plate program "is to allow North Carolina drivers to express their affinity for various special interests, as well as to raise revenue for the

state." Pet. App. A17. In addition, the panel suggests that "the large number and wide array of specialty plates also weigh in favor of private speech." Pet. App A19.

The problem is that the Fourth Circuit's analysis is once again inconsistent with *Summum*. As discussed above, *Summum* acknowledges that the government can enlist third parties to deliver a government-controlled message even if those individuals seek to further their own expressive purposes. *Summum*, 555 U.S. at 468. Thus, North Carolina can encourage its citizens to "[m]ake a statement with a specialized … license plate" and to "find the plate that fits you," Pet. App. A18, and still engage in government speech.

Moreover, that North Carolina raises revenue for the program does not covert government speech into private speech. Under *Rust v. Sullivan*, 500 U.S. 173 (1991), a State's specialty plate program would be constitutional if it paid vehicle owners to carry a "Choose Life" plate. Under *Summum*, the constitutional analysis is the same where those same vehicle owners volunteer—or agree to pay more—to carry the State's message. The additional charge for a specialty plate does two things. It ensures that the costs of production and distribution are covered: "By accepting monuments that are privately funded or donated, government entities save tax dollars and are able to acquire monuments that they could not have afforded to fund on their own." *Id.* at 471. In addition, it enables North Carolina to raise funds to support groups with activities that are consistent with the State's chosen messages, furthering its expressive activity.

Furthermore, a large number of specialty plates does not automatically evince an intent to create a forum. Under *Hurley*, a speaker retains the right to control the content of its speech even though it does not convey a specific, narrowly defined message. In *Hurley*, this Court unanimously held that the First Amendment protected the organizers' right to exclude a group that would "impart[] a message the organizers do not wish to convey." 515 U.S. at 572-73. Given that parades are expressive activities, the organizers had the right to "choose the content of [their] own message," *Id.* at 573, even though they did not convey a particularized message: "A speaker does not forfeit constitutional protection simply by combining multifarious voices, or by failing to edit their themes to isolate an exact message as the exclusive subject matter of the speech." *Id.* at 569-70.

Like the parade organizers in *Hurley*, North Carolina selects those specialty plates that taken together convey a message about the State that the North Carolina General Assembly wants to promote: "Rather like a composer, the Council selects the expressive units of the parade from potential participants, and though the score may not produce a particularized message, each contingent's expression in the Council's eyes comports with what merits celebration on that day." *Id.* at 574; *see also Summum*, 555 U.S. at 473 ("The City has selected those monuments that it wants to display for the purpose of presenting the image of the City that it wishes to project to all who frequent the Park"). And "since every participating unit affects the message conveyed," individuals or groups whose messages are

not approved cannot "requir[e States] to alter the expressive content of their [program]." *Hurley*, 515 U.S. at 572-73. North Carolina, like any other speaker, has the "choice … not to propound a particular point of view," *Id*. at 575, and can exclude viewpoints that conflict with its vision of "what merits celebration" about the State. *Id*. at 573-74.

Once the proper function of the specialty plate program is identified, it becomes apparent that applying this Court's forum doctrine to legislatively controlled specialty plates undermines North Carolina's ability to convey its desired message. Having offered "Choose Life," "Save the Sea Turtles," "Kids First," and "Support Our Troops" specialty plates, North Carolina now "must either 'brace [itself] for an influx of clutter' or face the pressure to remove longstanding and cherished [plates]." *Summum*, 555 U.S. at 479 (citation omitted). Under the Fourth Circuit's analysis, North Carolina now must offer plates advocating views with which North Carolina disagrees—"Respect Choice," "Kill the Sea Turtles," "Kids Last," and "Undermine Our Troops"—or stop issuing such specialty plates altogether.[5]

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[5] The threat of conflicting messages is made worse by the fact that there could be a number of viewpoints, and therefore a number of proposed specialty plates, on any given topic. For example, "Choose Life" and "Respect Choice" are not the only viewpoints on abortion. Under the decision below, North Carolina must approve specialty plates that express a variety of other viewpoints on abortion—Pro-life, Pro-abortion; Anti-life, Anti-abortion; Fetuses Are Persons, Fetuses Are Not Persons; Every Child a Wanted Child, Every Child Is a Child; and the list could go on and on—or shut down the alleged

Like the "respondent and some of its *amici*" in *Summum*, the Fourth Circuit panel "deride[s] the fears expressed about the consequences of the Court of Appeals holding in this case." *Id.* at 479; *see* Pet. App. A25 ("North Carolina then sounds the death knell for specialty plates, predicting a 'flood' of 'Kill the Sea Turtles' and 'Children Last' plates that will force it to end its specialty plate program."). In *Summum*, though, this Court concluded that "those concerns are well founded" and even provided an illustration that mirrored the license plate examples that the Fourth Circuit disparaged:

> On this view, when France presented the Statue of Liberty to the United States in 1884, this country had the option of either (a) declining France's offer or (b) accepting the gift, but providing a comparable location in the harbor of New York for other statutes of a similar size and nature (*e.g.*, a Statue of Autocracy, if one had been offered by, say, the German Empire or Imperial Russia).

555 U.S. at 479. As this Court emphasized, the government is not required to accept such monuments if they would conflict with the government's desired message: "Every jurisdiction that has accepted a donated war memorial may be asked to provide equal treatment for a donated monument questioning the cause for which the veterans fought." *Id.* at 480.

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forum to avoid sending messages that contradict its desired speech.

Thus, this Court should grant certiorari to determine whether a State forfeits its role as a speaker simply by offering a variety of specialty plates and, in the process, to resolve the circuit split regarding whether North Carolina can "select[] those [specialty plates] that it wants to display for the purpose of presenting the image of the [State] that it wishes to project to all who" see its specialty plates. *Id*. at 473.

D. The Fourth Circuit's Decision Contravenes *Wooley* and *Hurley* by Forcing North Carolina either to Speak When It Does Not Want to or to Stop Promulgating Its Desired Choose Life Message.

The Fourth Circuit's opinion evinces a fundamental misunderstanding of this Court's decisions in *Wooley* and *Hurley*. According to the panel, if *Johanns* establishes that "control of the message is all that matters, both *Wooley* and *Barnette* would have been wrongly decided." Pet. App. A14. In addition, the panel claims that *Wooley* "deemed license plates a sphere of private 'intellect and spirit' that 'implicat[es] First Amendment protections' from government control" and that *Hurley* "has absolutely no bearing on this [case]." Pet. App. A15.

The Fourth Circuit is wrong on all counts. Contrary to the panel's suggestion, *Wooley* is predicated on the "Live Free or Die" plate being government speech. In *Wooley*, the constitutional violation arose only because the State sought to force the Maynards to "use their private property as a

'mobile billboard' for the *State*'s ideological message…." *Wooley*, 430 U.S. at 715 (emphasis added). That a reasonable observer might attribute the message to the Maynards did not convert the speech into private speech. Rather, the government violated the First Amendment because New Hampshire controlled the entire license plate process (from owning the license plate to selecting the message) and forced citizens to carry *its* message.

In fact, the Court never suggested that New Hampshire's plate involved private speech so as to discriminate against opposing viewpoints and, therefore, did not require New Hampshire to stop using (or even to modify) its "Live Free or Die" plate. Instead, the Court repeatedly stated that the government could not force its "ideological point of view" on third parties.

Under the government speech doctrine, private citizens cannot compel the government to carry their desired message any more than the government can force motorists (such as the Maynards) to carry its preferred message through a standard-issue plate. This is because "the First Amendment … includes both the right to speak freely and the right to refrain from speaking at all." *Id.* at 714. Just as private speakers enjoy "the fundamental rule of protection under the First Amendment, that a speaker has the autonomy to choose the content of his own message," *Hurley*, 515 U.S. at 573, when speaking the government can claim the same fundamental rule of protection—"the right to 'speak for itself' … and to select the views that it wants to express." *Summum*, 555 U.S. at 467-68. But given that the government "is entitled to say what it wishes," *Rosenberger,*, 515

U.S. at 833), it also is permitted to refrain from speaking: "one important manifestation of the principle of free speech is that one who chooses to speak may also decide 'what not to say.'" *Hurley*, 515 U.S. at 573.

The Fourth Circuit's opinion violates these fundamental First Amendment principles by forcing North Carolina either (i) to speak on a topic, "Respect Choice," that it does not want to discuss (thereby precluding its ability to refrain from speaking) or (ii) to stop promoting childbirth through its "Choose Life" specialty plate (thereby undermining its rights to speak freely and to "promote the State's profound interest in potential life." *Casey*, 505 U.S. at 878). Pet. App. A26 ("North Carolina's authorizing a 'Choose Life' plate while refusing to authorize a pro-choice plate constitutes viewpoint discrimination in violation of the First Amendment.").

Wooley, *Hurley*, and *Summum* protect the government's ability to speak for itself even though third parties may use the government-controlled message for their own speech activity. Where, as in *Wooley*, the government requires others to profess the government's message, the First Amendment protects against such compelled speech. But *Wooley* never questioned that New Hampshire could speak through its standard-issue license plate whenever a vehicle owner leaves the State motto uncovered. Even though "most individuals [may] agree with the thrust of New Hampshire's motto," *Id.*, and willingly display it for their own expressive purposes, the message still is New Hampshire's. And the same applies to specialty license plates where vehicle

owners consent to be "the courier for [the government's] message." *Wooley*, 430 U.S. at 717; *Summum*, 555 U.S. at 468 ("A government entity may exercise this same freedom to express its views when it receives assistance from private sources for the purpose of delivering a government-controlled message.").

CONCLUSION

In holding that North Carolina cannot offer a "Choose Life" specialty license plate without also offering a "Respect Choice" plate, the Fourth Circuit precluded North Carolina's ability "[t]o promote the State's profound interest in potential life" through its specialty license plate program. *Casey*, 505 U.S. at 878. Under the Fourth Circuit's analysis, as soon as the North Carolina legislature approves a particular specialty license plate, it also must permit specialty plates expressing all viewpoints relating to the subject matter of that plate—even if those viewpoints contradict its desired message. This requirement, therefore, prevents States from speaking for themselves and saying what they want through their specialty license plate programs in direct conflict with the tenets of the government speech doctrine that this Court expounded in *Johanns*, *Summum*, and *Rust*. *See*, *e.g.*, *Rust*, 500 U.S. at 194 ("To hold that the Government unconstitutionally discriminates on the basis of viewpoint when it chooses to fund a program dedicated to advance certain permissible goals, because the program in advancing those goals necessarily discourages alternative goals, would

render numerous Government programs constitutionally suspect.").

Moreover, the Fourth Circuit's restriction on government speech applies regardless of the level of control that the State exercises over the content and design of specialty plates. The Fourth Circuit's opinion does not distinguish between a specialty plate program over which a State exercises complete and effective control (*e.g.*, North Carolina's program that requires the legislature to pass legislation approving the design, format, and message of each plate) and a program over which the State exercises only de minimis control (*e.g.*, Arizona's program that creates an administrative procedure allowing non-profits to submit designs that are automatically approved if they meet a few general conditions).

Given the critical need for States to be able to speak for themselves and the confusion among circuits as to the proper test for government speech, this Court should review the Fourth Circuit's decision to clarify the proper constitutional standard for government speech and to explain how that standard applies in the context of "Choose Life" specialty plates.

Respectfully submitted,

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July 11, 2014

APPENDIX TABLE OF CONTENTS

PUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 13–1030

AMERICAN CIVIL LIBERTIES UNION OF NORTH CAROLINA LEGAL FOUNDATION, INCORPORATED; DEAN DEBNAM; CHRISTOPHER HEANEY; SUSAN HOLLIDAY, CNM, MSN; MARIA MAGHER,

Plaintiffs–Appellees,

v.

ANTHONY J. TATA, in his official capacity as Secretary of the North Carolina Department of Transportation; James L. Forte, in his official capacity as Commissioner of the North Carolina Division of Motor Vehicles,

Defendants–Appellants,

and

MICHAEL GILCHRIST, in his official capacity as Colonel of the North Carolina State Highway Patrol,

Defendant.

NATIONAL LEGAL FOUNDATION,

Amicus Supporting Appellants.

Appeal from the United States District Court for the Eastern District of North Carolina, at Raleigh. James C. Fox, Senior District Judge. (5:11-cv-00470-F)

Argued: Oct. 30, 2013 Decided: Feb. 11, 2014

Before TRAXLER, Chief Judge, WYNN, Circuit Judge, and GEORGE L. RUSSELL, III, United States District Judge for the District of Maryland, sitting by designation.

Affirmed by published opinion. Judge WYNN wrote the opinion, in which Chief Judge TRAXLER and Judge RUSSELL joined.

ARGUED: Kathryne Elizabeth Hathcock, North Carolina Department of Justice, Raleigh, North Carolina, for Appellants. Christopher Anderson Brook, American Civil Liberties Union of North Carolina Legal Foundation, Raleigh, North Carolina, for Appellees. **ON BRIEF:** Roy Cooper, North Carolina Attorney General, Neil Dalton, Special

Deputy Attorney General, North Carolina Department of Justice, Raleigh, North Carolina, for Appellants. Steven W. Fitschen, The National Legal Foundation, Virginia Beach, Virginia, for Amicus Supporting Appellants.

Opinion

WYNN, Circuit Judge:

The First Amendment prohibits the making of any law "abridging the freedom of speech...." U.S. Const. amend. I. "Premised on mistrust of governmental power, the First Amendment stands against attempts to disfavor certain subjects or viewpoints." *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 340 (2010). Chief amongst the evils the First Amendment prohibits are government "restrictions distinguishing among different speakers, allowing speech by some but not others." *Id.*

In this case, North Carolina seeks to do just that: privilege speech on one side of a hotly debated issue—reproductive choice—while silencing opposing voices. Specifically, though North Carolina invites citizens to "[m]ake a statement,"[1] and "promote themselves and/or their causes"[2] with specialty

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[1] http://www.ncdot.gov/dmv/vehicle/plates/

[2] http://www.ncdot.gov/dmv/online/.

license plates, it limits this invitation to only those citizens who agree with North Carolina's "Choose Life" stance. North Carolina contends that it may so discriminate because specialty plate messages constitute pure government speech free from First Amendment viewpoint-neutrality constraints. With this, we cannot agree.

The Supreme Court and this Court have recognized individual speech interests in license plate messages. And in this case, too, the specialty plate speech at issue implicates private speech rights, and thus First Amendment protections apply. Because issuing a "Choose Life" specialty license plate while refusing to issue a pro-choice specialty plate constitutes blatant viewpoint discrimination squarely at odds with the First Amendment, we affirm the district court's grant of summary judgment and a permanent injunction in Plaintiffs' favor.

I.

In June 2011, the North Carolina General Assembly passed, and the North Carolina Governor signed into law, House Bill 289 ("HB 289"). The resulting law, "An Act to Authorize the Division of Motor Vehicles to Issue Various Special Registration Plates," authorizes the North Carolina Division of Motor Vehicles ("NC DMV") to issue, among other specialty license plates, a "Choose Life" plate. 2011 N.C. Sess. Laws 392.

By contrast, this law authorizes no pro-choice specialty license plate. *Id.* In fact, plates bearing slogans such as "Respect Choice" were suggested but repeatedly rejected by the North Carolina General Assembly. J.A. 61–62.

A "Choose Life" plate, like many other specialty license plates, costs a vehicle owner an additional $25 per year. N.C.G.S. § 20–79.7(a1). Of the $25, $15 go to the Carolina Pregnancy Care Fellowship, a private organization that supports crisis pregnancy centers in North Carolina.[3] N.C.G.S. §§ 20–79.7(b), 20–81.12(b84). The remaining $10 go to the North Carolina Highway Fund, as is the case with other specialty plates. N.C.G.S. § 20–79.7(b). Further, the funds collected from "Choose Life" plates are expressly prohibited from "be[ing] distributed to any agency, organization, business, or other entity that provides, promotes, counsels, or refers for abortion...." N.C.G.S. § 20–81.12(b84).

To develop a specialty license plate, NC DMV must receive three hundred applications from individuals interested in that plate. *Id.* Once the NC DMV issues the plate, any interested vehicle owner registered in North Carolina may purchase it. Over two hundred specialty plates are available, and North Carolina invites vehicle owners to "find the plate that fits you" and "[m]ake a statement with a specialized or personalized license plate." http://

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[3] The Carolina Pregnancy Care Fellowship also serves as the official state contact for Choose Life, Inc., a national organization devoted to getting "Choose Life" license plates on the road in all fifty states.

www.ncdot.gov/dmv/vehicle/plates/. According to North Carolina, its specialty plate program "allows citizens with common interests to promote themselves and/or their causes." http://www.ncdot.gov/dmv/online/.

Because North Carolina refused to allow a specialized plate to promote their cause, North Carolina vehicle owners who wanted a pro-choice specialty plate, along with the ACLU, brought this lawsuit in the United States District Court for the Eastern District of North Carolina. They sued the North Carolina Department of Transportation ("NC DOT") and the NC DMV (collectively called "North Carolina") for First and Fourteenth Amendment violations.

In December 2011, the district court granted a preliminary injunction blocking North Carolina from issuing the "Choose Life" plate. *Am. Civil Liberties Union of N.C. v. Conti*, 835 F.Supp.2d 51 (E.D.N.C.2011). One year later, in December 2012, the district court granted summary judgment and permanently enjoined the "Choose Life" plate. *Am. Civil Liberties Union of N.C. v. Conti*, 912 F.Supp.2d 363 (E.D.N.C.2012). The district court held, among other things, that "sufficient private speech interests are implicated by the specialty license plates to preclude a finding of purely government speech [,]" and that "the State's offering of a Choose Life license plate in the absence of a pro-choice plate constitutes viewpoint discrimination in violation of the First Amendment." *Id.* at 375. North Carolina appealed,

and our review is de novo. *Planned Parenthood of S.C. Inc. v. Rose,* 361 F.3d 786, 789 (4th Cir.2004).

II.

At the outset, we note that North Carolina does not deny that it engaged in viewpoint discrimination by approving the "Choose Life" plate while refusing to allow a pro-choice plate. Instead, North Carolina contends that it was free to discriminate based on viewpoint because the license plate speech at issue was solely its own. And under the government speech doctrine, when the government speaks for itself, it can say what it wishes. Plaintiffs disagree, arguing that the license plate speech at issue implicates private speech and all its attendant First Amendment protections, including the prohibition on viewpoint discrimination. Determining whether the "Choose Life" specialty plate embodies pure government speech or something else is therefore at the heart of this case.

A.

"Premised on mistrust of governmental power," *Citizens United,* 558 U.S. at 340, the First Amendment bars the government from abridging freedom of private speech. U.S. Const. amend. I; *see also, Gitlow v. New York*, 268 U.S. 652 (1925) (incorporating the freedom of speech against the states). "It is axiomatic that the government may not regulate speech based on its substantive content or the message it conveys. Other principles follow from this precept. In the realm of private speech or

expression, government regulation may not favor one speaker over another. Discrimination against speech because of its message is presumed to be unconstitutional." *Rosenberger v. Rector & Visitors of Univ. of Va.,* 515 U.S. 819, 828 (1995) (citations omitted).

"[T]he violation of the First Amendment is all the more blatant" when the government targets not simply subject matter, but particular viewpoints speakers take on a subject. *Id.* at 829. Indeed, the Supreme Court has called viewpoint discrimination "an egregious form of content discrimination" and has held that "[t]he government must abstain from regulating speech when the specific motivating ideology or the opinion or perspective of the speaker is the rationale for the restriction." *Id.* at 829.

By contrast, if the government engages in its own expressive conduct, then the Free Speech Clause and its viewpoint neutrality requirements have "no application." *Pleasant Grove City, Utah v. Summum*, 555 U.S. 460, 467 (2009). Indeed, under the "relatively new, and correspondingly imprecise" government speech doctrine, *Johanns v. Livestock Mktg. Ass'n,* 544 U.S. 550, 574 (2005) (Souter, J., dissenting), "[a] government entity has the right to speak for itself. It is entitled to say what it wishes, and to select the views that it wants to express." (quotation marks, citations, and alterations omitted).

Although the Supreme Court has not yet recognized that speech may be not purely government or private but instead implicate both,

this Court has. In *Sons of Confederate Veterans, Inc. ex rel. Griffin v. Commissioner of the Virginia Department of Motor Vehicles* ("*SCV I*"), this Court held that Virginia's barring the Sons of Confederate Veterans from obtaining a specialty license plate with a confederate flag logo constituted unconstitutional viewpoint discrimination. 288 F.3d 610 (4th Cir. 2002). While the panel opinion deemed the speech at issue private only, Judge Luttig, in a separate opinion regarding the denial of rehearing en banc, presciently recognized that "speech in fact can be, at once, that of a private individual and the government." *Sons of Confederate Veterans, Inc. v. Comm'r of Va. Dep't of Motor Vehicles* ("*SCV II*"), 305 F.3d 241, 245 (4th Cir.2002) (Luttig, J.). He noted that specialty plates were perhaps the "quintessential example of speech that is both private and governmental because the forum and the message are essentially inseparable, the consequence being that it is difficult if not impossible to separate sufficiently what is indisputably the speech act by the private speaker from what is equally indisputably the speech act by the government." *Id.*

Two years later, in *Rose,* this Court embraced the notion of mixed speech. 361 F.3d at 794.[4] In

[4] While each member of the *Rose* panel wrote a separate concurring opinion, Judge Michael authored the only opinion laying out the Court's analytical framework, and the other panel members, Judge Luttig and Judge Gregory, essentially embraced it. *See, e.g.*, *Rose,* 361 F.3d at 800 (Luttig, J.) ("Needless to say, I am pleased that the court adopts today the view that speech can indeed be hybrid in character."); *Rose,* 361 F.3d at 801 (Gregory, J.) ("[B]ecause I believe the judgment

Rose, a case strikingly similar to this one, South Carolina had authorized the issuance of a "Choose Life" specialty license plate but no plate bearing a pro-choice message. *Id.* at 787–88. The plaintiffs in *Rose,* as here, alleged that in doing so, the state engaged in unconstitutional viewpoint discrimination. *Id.* Deeming the specialty plate speech at issue mixed speech implicating private speech rights, we agreed. *Id.* We held that the speech at issue there "appears to be neither purely government speech nor purely private speech, but a mixture of the two." *Id.* at 794. We applied a forum analysis, which the Supreme Court has instructed courts to use when private speech occurs on government property, noted that the government may not viewpoint-discriminate in any forum, and held that South Carolina's allowing a pro-life plate but no pro-choice plate constituted viewpoint discrimination in violation of the First Amendment. *Id.* at 795–99.

B.

To determine whether speech is that of the government, private parties, or both, this Court looks to "instructive" factors laid out in *SCV I:*

(1) "the central purpose of the program in which the speech in question occurs;"

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reached today applies the factors set forth in *Sons of Confederate Veterans* in a manner that begins to recognize the government speech interests in the vanity license plate forum, I concur in the judgment.").

(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[.]"

288 F.3d at 618 (quotation marks omitted).

North Carolina argues that this Court abandoned the *SCV* factors with *Page v. Lexington County School District One,* 531 F.3d 275 (4th Cir. 2008). According to North Carolina, in *Page* we lopped off several of the *SCV* factors in favor of an exclusive focus on control of the message in question to determine whose message it is. We disagree.

First, we note that "a panel of this court cannot overrule, explicitly or implicitly, the precedent set by a prior panel of this court. Only the Supreme Court or this court sitting en banc can do that." *United States v. Brooks,* 524 F.3d 549, 559 n. 17 (4th Cir. 2008) (quotation marks omitted). *Page,* which is neither a Supreme Court nor an en banc decision, thus did not supplant *SCV I.*

Second, *Page* does not suggest any attempt to overthrow the *SCV* factors in favor of a single-factor control test. Instead, in *Page,* a case about a school district's speech, we cited to, and considered, several factors-specifically, who disseminates the speech, as

well as who "establishes" and "controls" the speech. *Page,* 531 F.3d at 281. Our flexible approach in *Page* is not surprising, given our express acknowledgment in *SCV I* itself that the four factors identified there are "instructive" but neither "exhaustive" nor always uniformly applicable. *SCV I*, 288 F.3d at 619. Therefore even *Page* does not support our having embraced a single-factor approach to determining who is speaking.

Further, in opinions postdating *Page,* we explicitly employed the *SCV* factors to identify the pertinent speaker. *See, e.g.*, *Turner v. City Council of City of Fredericksburg, Va.*, 534 F.3d 352, 354 (4th Cir. 2008) (noting that the "Fourth Circuit has adopted a four-factor test for determining when speech can be attributed to the government," listing the *SCV* factors, and "[a]pplying these factors, . . . [to] conclude that the legislative prayer at issue ... is governmental speech"). Clearly, then, this Circuit has not recognized *Page* as having displaced *SCV I.*

North Carolina nonetheless presses that the Supreme Court implicitly overruled our *SCV* test with *Johanns,* 544 U.S. 550, and *Summum,* 555 U.S. 460. Specifically, North Carolina contends that those cases instruct us to consider only "the level of control the government exercises over the speech, not on who a reasonable observer views as the literal speaker." Appellants' Br. at 7. Again, we disagree with North Carolina's argument and thus decline its invitation to "follow the 'control' test for government speech set forth in *Johanns* and affirmed in *Summum.* " *Id.* at 14.

Looking first at *Johanns,* we agree with the Ninth Circuit that the case is factually distinguishable from specialty license plate cases. "*Johanns* involved a government-compelled subsidy of government speech.... In *Johanns,* the individual harm was being forced to give the government money to pay for someone else's message." *Ariz. Life Coal. Inc. v. Stanton*, 515 F.3d 956, 964 (9th Cir.2008) (quotation marks omitted). In specialty license plate cases, by contrast, "private individuals choose to pay the price for obtaining a particular specialty license plate. The First Amendment harm is being denied the opportunity to speak on the same terms as other private citizens within a government sponsored forum." *Id.* (quotation marks omitted).

Further, the Supreme Court itself limited its holding to compelled subsidies, expressly declining to address as not on point even compelled speech arguments. *Johanns*, 544 U.S. at 564–65.[5] While doing so, the Supreme Court recognized the continued validity of *Wooley v. Maynard,* in which

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[5] We recognize that, upon closer consideration, government subsidies may look more like government regulation than courts have generally been willing to admit. *See, e.g.*, Joseph Blocher, *Viewpoint Neutrality and Government Speech,* 52 B.C. L.Rev. 695, 721 (2011) (noting, among other things, that funding one group effectively singles out disfavored, unsubsidized groups and thus looks like viewpoint-based regulation). We do not resolve that quandary here. We simply conclude that *Johanns* did not overrule the four-factor framework this Court established in *SCV I* and has applied repeatedly since to determine who is speaking in cases like this one.

the Court held that vehicle owners had a First Amendment right to cover the "Live Free or Die" state motto on their New Hampshire license plates. *Johanns*, 544 U.S. at 565 n. 8 (citing and distinguishing *Wooley*, 430 U.S. 705 (1977)). The Supreme Court also recognized the continued validity of *West Virginia State Board of Education v. Barnette*, in which the Court held a law requiring all schoolchildren to recite the Pledge of Allegiance and salute the American flag unconstitutional under the First Amendment. *Johanns,* 544 U.S. at 565 n. 8, (citing and distinguishing *Barnette,* 319 U.S. 624 (1943)). Yet if North Carolina were correct in its assertion that government control of the message is all that matters, both *Wooley* and *Barnette* would have been wrongly decided—and they surely would not have been cited in *Johanns* as good compelled speech law.

Indeed, *Summum* underscores that the Supreme Court did not espouse a myopic "control test" in *Johanns*. Specifically, in *Summum*, the Supreme Court held that placement of permanent monuments, including those designed and donated by private entities, in a city park constitutes government speech. 555 U.S. at 481. As in *Johanns*, the Supreme Court considered the "control" factor, observing that the city "'effectively controlled' the messages sent by the monuments in the [p]ark by exercising 'final approval authority' over their selection." *Summum*, 555 U.S. at 473 (quoting *Johanns*, 544 U.S. at 560–61).

Importantly, however, the Supreme Court also focused on the perceived identity of the speaker. The Court noted that monuments installed on property are "routinely—and reasonably—interpret[ed] as conveying some message on the property owner's behalf." *Id.* at 471. Accordingly, the Court concluded that "there is little chance that observers will fail to appreciate the identity of the speaker" as the property owner. *Id.*

Additionally, context mattered in *Summum*. The Supreme Court focused on the fact that "public parks can accommodate only a limited number of permanent monuments." *Id.* at 478,. As the Court noted, "[s]peakers, no matter how long-winded, eventually come to the end of their remarks[,]" while "monuments ... endure." *Id.* at 479. We cannot square the Supreme Court's multi-faceted, context-specific reasoning in *Summum* with North Carolina's blanket contention that all that matters is who controls the message.[6]

The third Supreme Court case upon which North Carolina seeks to rely—*Hurley v. Irish–American Gay, Lesbian & Bisexual Group of Boston*—has absolutely no bearing on this one. 515 U.S. 557 (1995). North Carolina cites to *Hurley* for the proposition that "[u]nder the government speech doctrine, North Carolina can claim the 'fundamental

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[6] The Supreme Court also noted "the legitimate concern that the government speech doctrine not be used as a subterfuge for favoring certain private speakers over others based on viewpoint." *Summum,* 555 U.S. at 473, 129 S.Ct. 1125. We do not take this concern lightly.

rule of protection under the First Amendment, that a speaker has the autonomy to choose the content of his own message.'" Appellants' Br. at 4 (quoting *Hurley*, 515 U.S. at 573). But *Hurley* had nothing to do with the government speech doctrine—which, by its very nature, does not implicate the First Amendment. *See, e.g.*, *Summum*, 555 U.S. at 467–68 (noting that if the government engages in its "own expressive conduct, then the Free Speech Clause has no application" because "it does not regulate government speech"). Instead, that case centered on private parties' free speech rights, holding that requiring private parade organizers to include amongst their marchers a group whose message they opposed violated the organizers' First Amendment rights. *Hurley*, 515 U.S. at 559. If anything, *Hurley* hurts North Carolina's cause, not least due to its recognition that government regulation may not "interfere with speech for no better reason than promoting an approved message or discouraging a disfavored one, however enlightened either purpose may strike the government." *Id.* at 579.

In sum, for over a decade, this Circuit has found the *SCV* factors instructive in determining whether speech is that of the government, private parties, or both. Sometimes considering those factors has led us to conclude that speech implicated both government and private expression. *See, e.g.*, *WV Ass'n of Club Owners & Fraternal Servs., Inc. v. Musgrave*, 553 F.3d 292, 299–300 (4th Cir.2009); *Rose*, 361 F.3d at 794. In other cases, considering the *SCV* factors led to the conclusion that the speech at issue was purely government (*see, e.g.*, *Turner*, 534 F.3d at 354) or

purely private (*see SCV I*, 288 F.3d at 621). But regardless of our conclusion in any particular case, we have repeatedly looked to the *SCV* factors to help us identify the pertinent speaker. And neither an en banc decision from this Court, nor one from the Supreme Court, has implicitly, much less explicitly, suggested that to do so was to err.

C.

Having concluded that the "instructive" factors we identified in *SCV* remain appropriate tools for evaluating whether speech is government, private, or both, we turn to applying those factors here.

1. The Central Purpose Of The Program In Which The Speech In Question Occurs

The first *SCV* factor, the central purpose of the program in which the speech in question occurs, may—or may not—be readily apparent. *SCV I*, 288 F.3d at 619. To divine the central purpose, this Court has considered, e.g., revenue generation and allocation and legislative intent. *See, e.g.*, *id.*; *Rose*, 361 F.3d at 793.

Here, we must conclude that the purpose of the specialty license plate program, including the "Choose Life" plate, is to allow North Carolina drivers to express their affinity for various special interests, as well as to raise revenue for the state.[7]

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[7] In his *Rose* opinion, Judge Michael focused exclusively on the "Choose Life" specialty plate and its authorizing legislation, rather than on South Carolina's specialty plate program more

First, the legislative history of HB 289 indicates that the specialty license plate program was intended to be a forum for private expression of interests. *See, e.g.*, Remark of Representative Tim Moore to the North Carolina House Fin. Comm. (June 2, 2011), J.A. 19 ¶ 33 (stating that specialty license plates constitute "voluntary speech that people are making by purchasing the license plate"). Fittingly, then, North Carolina expressly invites its vehicle owners to "[m]ake a statement with a specialized or personalized license plate" and to "find the plate that fits you." http:// www.ncdot.gov/dmv/vehicle/plates/. It describes its specialty plate program as "allow[ing] citizens with common interests to promote

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broadly. That narrow focus does not square with *SCV I*'s instruction to look to the central purpose "of the *program* in which the speech in question occurs." *SCV I,* 288 F.3d at 618 (emphasis added). *See also Am. Civil Liberties Union of Tenn. v. Bredesen*, 441 F.3d 370, 389–90 (6th Cir.2006) (Martin, J., dissenting) ("If we think of each individual license plate in a vacuum, each one can 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. I suggest that when opening one's eyes to the license plate program as a whole, it is evident that the government has created a program to encourage a diversity of views and messages from private speakers."). Even were we to focus on the authorizing legislation alone, as did Judge Michael, the North Carolina law at issue here authorized a wide array of specialty plates, on topics ranging from wild turkeys to stock car racing. We therefore could not conclude here that the purpose of the authorizing law "is specifically to promote the expression of a pro-life viewpoint[,]" as opposed to legislation "allowing ... for the private expression of various views[.]" *Rose*, 361 F.3d at 793 (quotation marks and citation omitted).

themselves and/or their causes." http://www.ncdot.gov/dmv/online/. By contrast, nothing before us suggests that North Carolina has ever communicated to the public that the specialty plate program is government-only speech or that it seeks volunteers to help disseminate a government-only message.

The specialty license plate program also has a significant revenue-raising component. The NC DMV is authorized to develop a specialty license plate only after it has received three hundred applications from North Carolina drivers interested in the plate. N.C.G.S. § 20–81.12(b84). The specialty plate costs a vehicle owner an additional $25 per year. N.C.G.S. § 20–79.7. And $10 of that annual fee go to the North Carolina Highway Fund. *Id.* As we noted in *SCV I*:

> If the General Assembly intends to speak, it is curious that it requires the guaranteed collection of a designated amount of money from private persons before its 'speech' is triggered. It is not the case, in other words, that the special plate program only incidentally produces revenue for the [government]. The very structure of the program ensures that only special plate messages popular enough among private individuals to produce a certain amount of revenue will be expressed.

SCV I, 288 F.3d at 620 (footnote omitted).

Finally, the large number and wide array of specialty plates also weigh in favor of private speech. North Carolina drivers may choose from over two hundred specialty plates. And the subjects of those

plates range from the controversial (Sons of Confederate Veterans, whose confederate flag logo many "view to be a symbol of racism and slavery," *Rose,* 361 F.3d at 801 (Gregory, J., concurring)), to the religious (Knights of Columbus, a civic organization "which requires members to be practicing Catholics," *Roach v. Stouffer*, 560 F.3d 860, 868 (8th Cir.2009)), to the seemingly irrelevant to any conceivable North Carolina government interest (e.g., out-of-state universities). It defies logic, and may in fact create other problems (such as Establishment Clause issues in the case of the Knights of Columbus) to suggest that all of these plates constitute North Carolina's—and only North Carolina's-message.

In sum, the first *SCV* factor, the central purpose of the program in which the speech in question occurs, weighs in favor of finding the speech at issue here private.

2. The Degree Of Editorial Control Exercised By The Government Or Private Party Over The Content

The second factor, "the degree of editorial control exercised by the government or private entities over the content of the speech," weighs in favor of the government. The legislature determined, and the governor approved, the "Choose Life" message. 2011 N.C. Sess. Laws 392 ("The plate shall bear the phrase 'Choose Life.' "). And the parties themselves agree that "complete editorial control" rests with North Carolina. Appellees' Br. at 12.

3. The Identity Of The Literal Speaker

The third *SCV* factor, the identity of the literal speaker, weighs in favor of private speech. In coming to that conclusion, we first consider *Wooley*, in which the Supreme Court held that New Hampshire residents had a First Amendment right to cover the "Live Free Or Die" state motto on the standard state license plate. 430 U.S. 705. Significantly, the Supreme Court there declared that New Hampshire's citizens found themselves "faced with a state measure" that "invades the sphere of intellect and spirit which it is the purpose of the First Amendment to our Constitution to reserve from all official control." *Id.* at 715 (quotation marks omitted). In other words, the Supreme Court deemed license plates a sphere of private "intellect and spirit" that "implicat[es] First Amendment protections" from government control. *Id.*[8]

Moreover, any argument that the state alone is the literal speaker is substantially weaker here than it was in *Wooley*. In *Wooley*, the slogan at issue was the state motto, and it appeared on all non-commercial New Hampshire plates, "a fact

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[8] North Carolina suggests that *Wooley*—which predates the Supreme Court's recognition of the government speech doctrine and the "control test" North Carolina contends flows from *Johanns* and *Summum*—is no longer good law. Yet that contention flies in the face of *Johanns* itself, in which the Supreme Court majority recognized the continued validity of, and distinguished, *Wooley*. *Johanns,* 544 U.S. at 565 n. 8, 125 S.Ct. 2055. Clearly, the Supreme Court did not view *Wooley* as passé. Neither do we.

presumably apparent to anyone driving in New Hampshire." *SCV II*, 305 F.3d at 244 (Williams, J.). "*A fortiori* must it be the case that speech placed on a license plate by the government for a fee at the request of a private organization or individual is at a minimum *partly* the private speech of that organization or individual." *Id.* at 246 (Luttig, J.).

Indeed, to any reasonable observer, the literal speaker of a message on a specialty plate that the observer knows the vehicle owner selected is surely the vehicle owner. Messages on some specialty license plates, such as the dance plate "*I'd* Rather Be Shaggin," N.C.G.S. 20–79.4(b)(203) (emphasis added), or the plate depicting a dog and cat and stating "*I* care," N.C.G.S. 20–79.4(b)(12) (emphasis added), make the connection explicit.

We do not deny that specialty license plates are state property. Nor do we deny that even specialty plates, which must be authorized by state law, to some extent bear North Carolina's imprimatur. Nevertheless, the copious specialty license plates, including "Choose Life," available to North Carolina drivers constitute "voluntary speech that people are making...." Remark of Representative Tim Moore to the North Carolina House Fin. Comm. (June 2, 2011), J.A. 19 ¶ 33. Specialty plates are closely associated with the drivers who select and pay for them. And the driver, on whose car the special message constantly appears for all those who share the road to see, is the ultimate communicator. The third factor, the identity of the literal speaker, thus weighs in favor of private speech.

4. Whether The Government Or The Private Party Bears Ultimate Responsibility For The Speech's Content

Finally, we must conclude that the fourth factor, the ultimate responsibility for the speech, weighs in favor of private speech. "When a special license plate is purchased, it is really the private citizen who engages the government to publish *his* message," not the other way around. *SCV II*, 305 F.3d at 246 (Luttig, J.). Indeed "'but for'" the private individual's action, the specialty license plate would never exist. *Id.* North Carolina drivers must apply for the specialty plate, which is issued only after at least three hundred seek the plate. Further, those private individuals must pay for the specialty plate "over and above the cost exacted for a standard license plate." *Id.*

In sum, applying *SCV*'s instructive factors to the facts at hand, we conclude that three of the four factors indicate that the specialty plate speech at issue is private, while one suggests that the specialty plate speech is government. In other words, we agree with the district court "that sufficient private speech interests are implicated by the specialty license plates to preclude a finding of purely government speech." *Conti*, 912 F.Supp.2d at 375.

Our conclusion is in line with those reached by our Sister Circuits in similar cases. With only one exception, all Circuits to have addressed the issue have held that specialty license plates implicate private speech rights and cannot properly be characterized as solely government speech. *Roach*,

560 F.3d 860; *Stanton*, 515 F.3d 956; *Choose Life Ill., Inc. v. White*, 547 F.3d 853 (7th Cir.2008); *Women's Emergency Network v. Bush*, 323 F.3d 937 (11th Cir.2003); *cf. Perry v. McDonald*, 280 F.3d 159 (2d Cir.2001). The sole outlier, the Sixth Circuit, held in *Bredesen* that Tennessee's "Choose Life" specialty plate constituted pure government speech. 441 F.3d 370. For the many reasons discussed above, we must agree with the Seventh Circuit that "this conclusion is flawed...." *White*, 547 F.3d at 863. We have no hesitation in holding that the "Choose Life" plate at issue here implicates private speech rights and cannot correctly be characterized as pure government speech.

D.

On appeal, North Carolina argues only that because its specialty plates are government speech, North Carolina can viewpoint-discriminate free from First Amendment constraints. North Carolina did not argue, for example, that even if we were to deem specialty plates mixed speech, North Carolina still wins. North Carolina did not challenge in any way the district court's conclusion that, upon finding private speech rights implicated, "the State's offering of a Choose Life license plate in the absence of a pro-choice plate constitutes viewpoint discrimination in violation of the First Amendment." *Conti*, 912 F.Supp.2d at 375. That conclusion, which is supported by *Rose*, therefore stands. *See Rose*, 361 F.3d at 799 ("By limiting access to a specialty license plate to those who agree with its pro-life position,

the State has distorted the forum in favor of its own viewpoint. This it may not do.").

North Carolina nevertheless laments that if it has created a forum, it "must allow all viewpoints to be heard via specialty plates." Appellants' Br. at 30. This complaint seems at odds with North Carolina's contention that its vast array of specialty plates "celebrat[es]" the "diversity of its citizen's interests...." *Id.* at 18, 41. Apparently, North Carolina wishes to celebrate only some interests of some of its citizens—namely those with which it agrees. This, it may not do.

North Carolina then sounds the death knell for specialty plates, predicting a "flood" of "Kill The Sea Turtles" and "Children Last" plates that will force it to end its specialty plate program. Appellants' Br. at 27–29. Melodrama aside, our ruling today "does not render [North] Carolina powerless to regulate its specialty license plate forum." *Rose*, 361 F.3d at 799. But it must do so in a viewpoint-neutral fashion—which it already does, to some extent, by requiring three hundred applicants before issuing a new specialty plate. Surely such a requirement can filter out "frivolous license plate proposals" and prevent the roads from being inundated with "license plates advocating reckless pet breeding." *Bredesen*, 441 F.3d at 391 (Martin, J., dissenting).

Another alternative: North Carolina can choose to avoid the reproductive choice debate altogether. Illinois, for example, "excluded the entire subject of abortion from its specialty-plate program." *White*, 547 F.3d at 865. The Seventh Circuit upheld that viewpoint-neutral restriction, noting that "the State

has effectively imposed a restriction on access to the specialty-plate forum based on subject matter: no plates on the topic of abortion. It has not disfavored any particular perspective or favored one perspective over another on that subject; instead, the restriction is viewpoint neutral." *Id.* at 866. *But see Stanton*, 515 F.3d 956. After all, "[i]t is one thing for states to use license plates to celebrate birds and butterflies.... It is quite another for the state to privilege private speech on one side-and one side only-of a fundamental moral, religious, or political controversy." *Planned Parenthood Of S.C. Inc. v. Rose*, 373 F.3d 580, 581 (4th Cir.2004) (Wilkinson, J., voting to deny rehearing en banc).

III.

In sum, North Carolina invites its vehicle owners to "[m]ake a statement" and "promote themselves"—but only if they are on the government's side of a highly divisive political issue. This, North Carolina may not do. Because the specialty plate speech at issue implicates private speech rights and is not pure government speech, North Carolina's authorizing a "Choose Life" plate while refusing to authorize a pro-choice plate constitutes viewpoint discrimination in violation of the First Amendment.

AFFIRMED.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NORTH
CAROLINA WESTERN DIVISION

No. 5:11-CV-470-F

AMERICAN CIVIL LIBERTIES UNION OF NORTH CAROLINA, DEAN DEBNAM, CHRISTOPHER HEANEY, SUSAN HOLLIDAY, CNM, MSN, and MARIA MAGHER,

Plaintiffs,

v.

EUGENE A. CONTI, JR., in his official capacity as Secretary of North Carolina Department of Transportation, MICHAEL ROBERTSON, in his official capacity as Commissioner of the North Carolina Division of Motor Vehicles, and MICHAEL GILCHRIST, in his official capacity as Colonel of the North Carolina State Highway Patrol,

Defendants.

ORDER

This matter is before the court on the Motion for Summary Judgment [DE-47] filed by Plaintiffs American Civil Liberties Union of North Carolina ("the ACLU-NC"), Dean Debnam, Christopher Heaney, Susan Holliday, CNM, MSN and Maria Magher (collectively, "Plaintiffs"). Defendants Eugene A. Conti and Michael Robertson, sued in their official capacities as Secretary of the North Carolina Department of Transportation and Commissioner of the North Carolina Division of Motor Vehicles, respectively, (collectively, "the State" or "Defendants")[1] timely filed their Response [DE-51]. Plaintiffs have not filed a Reply, and the time for doing so has passed, so the motion is therefore now ripe for ruling.

IV. PROCEDURAL AND FACTUAL HISTORY

On June 18, 2011, the North Carolina General Assembly passed House Bill 289, entitled "AN ACT TO AUTHORIZE THE DIVISION OF MOTOR VEHICLES TO ISSUE VARIOUS SPECIAL REGISTRATION PLATES" (hereinafter, "the Act"). Governor Beverly Perdue signed the bill into law on June 30, 2011. *See* N.C. Sess. Law 2011-392. The Act authorizes many new specialty license plates, including a plate bearing the message "Choose Life." *See* N.C. Sess. Law 2011-392 §l(b1)(39). The Act brings the total number of specialty license plates

[1] Plaintiffs also named Michael Gilchrist, in his official capacity as Colonel of the North Carolina Highway Patrol, as a defendant in the Verified Complaint [DE-l]. Plaintiffs later filed a Notice of Voluntary Dismissal [DE-33] as to Defendant Gilchrist.

authorized by the North Carolina legislature to approximately 150. N.C. Sess. Law 2011-392 §(b)(l); N.C.G.S.§ 20-79.4(b).[2]

Unlike many other States, North Carolina does not have a general statutory or administrative mechanism through which organizations or individuals can propose or obtain specialty plates.[3] Rather, the only specialty plates available are those specifically authorized by the North Carolina General Assembly. *See* N.C. G.S. § 20-79 *et seq*.

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[2] The specialty plates authorized by the North Carolina General Assembly convey a broad range of messages, from support of the Buddy Pelletier Surfing Foundation and shag dancing to litter prevention and awareness of sharing the roads with bicyclists and pedestrians. *See* N.C.G.S. § 20-79.4(b)(23), (121), (122); N.C.G.S.§ 20-81.12(b15).

[3] The exceptions to this general rule include specialty plates for certain civic organizations and for plates bearing collegiate insignia. *See* N.C.G.S.§ 20-79(b)(27) (providing for specialty plates "[i]ssuable to a member of a nationally recognized civic organization whose member clubs in the State are exempt from State corporate income tax," provided that the Division of Motor Vehicles receives 300 applications for a specific civic club plate); N.C.G.S. § 20-81.12 (allowing specialty plates bearing collegiate insignia provided that the Division of Motor Vehicles receives at least 300 applications for a particular college or university's plate). The latter provision has resulted in North Carolina plates bearing the insignia of out-of-state colleges and universities, including some which could be considered academic or athletic rivals of North Carolina colleges and universities. *See* NORTH CAROLINA DIVISION OF MOTOR VEHICLES, *Collegiate Plates,* https:/ /edmv-sp.dot.state.nc.us/sp/SpecialPlatesList;jsessionid=7c303 39e5e5ac66ab70 1592b7fl3 cc732a43?category=collegiate (last visited December 5, 2012)(offering license plates bearing the insignia of Clemson University, Perdue University, Virginia Tech, and University of Florida, among others).

The "Choose Life" license plate at issue in this suit would cost $25.00 annually in addition to the regular yearly registration fees. *See* N.C. Sess. Law 2011-392 § 4(a). From this price, $15.00 of every plate sold would go to the Carolina Pregnancy Care Fellowship, a private organization which funds and supports crisis pregnancy centers in North Carolina. N.C. Sess. Law 2011-392 §§ 5, 7(b84). According to Plaintiffs, and admitted by Defendants, the Carolina Pregnancy Care Fellowship is the official state contact for Choose Life, Inc., the national organization devoted to getting the Choose Life license plates on the road in all fifty states. Verified Compl. [DE-l] ¶ 23 n.1; Answer [DE-25] ¶ 23. The funds to be collected from the "Choose Life" plate are expressly prohibited from "be[ing] distributed to any agency, organization, business, or other entity that provides, promotes, counsels, or refers to abortion." N.C. Sess. Law 2011-392 § 7(b84).

Under the provisions of the Act, if the Division of Motor Vehicles has received 300 applications for plates bearing the "Choose Life" message, it may develop the plate. N.C. Sess. Law 2011-392 § 7(b84). In practice, applications are received through the Carolina Pregnancy Care Fellowship, the sole recipient of a portion of the funds from the sale of the "Choose Life" plate. Verified Compl. [DE-l] ¶ 25; Answer [DE-25] ¶ 25. Carolina Pregnancy Care Fellowship has received the requisite 300 applications for the plate. *See* Pls.' Mem. in Supp. of Mot. For Summ. J., Ex. A [DE-49-1], at p. 19 (September 22, 2011, email from Bobbie Meyer to Angela Hatcher). Once the Division of Motor

Vehicles issues the "Choose Life" plate, it would be available to any interested vehicle owner in the State of North Carolina.

During the 2011 Legislative Session, various legislators proposed amendments to House Bill 289 to include another specialty plate stating: "Respect Choice" or "Trust Women. Respect Choice." Verified Compl. ¶¶ 28-31. In all, legislators made six attempts to amend the Act, accompanied by rancorous debate. Verified Compl. ¶ 32; Ex. C (recordings of various committee meetings wherein House Bill 289 and the amendments were discussed). All six of those attempts were rejected by the General Assembly. Plaintiffs thereafter initiated this action by filing a Verified Complaint, Motion for Temporary Restraining Order, and Motion for Preliminary Injunction. The Individual Plaintiffs are registered automobile owners in the State of North Carolina who desire to purchase a license plate bearing a message expressing support for a woman's right to reproductive choice, such as "Respect Choice" or "Trust Women. Respect Choice." Verified Compl. ¶¶ 9-12. The ACLUNC is a nonprofit membership organization with the mission of defending individual freedoms embodied in the United States and North Carolina Constitutions. Verified Compl. ¶ 8. The Plaintiffs contend that by authorizing the "Choose Life" plate while rejecting a pro-choice license plate, the State has opened a state-created forum for private speech to one viewpoint alone in the public debate over abortion, in violation of Plaintiffs' rights under the First and

Fourteenth Amendments to the United States Constitution. Verified Compl. ¶ 3.

The matter came before the undersigned for a hearing on the Motion for Preliminary Injunction [DE-8] on November 28, 2011, where Plaintiffs were represented by Katherine Lewis Parker, and Defendants were represented by Special Deputy Attorney General Neil Dalton. The hearing concluded with the undersigned allowing Plaintiffs' Motion for Preliminary Injunction. On December 8, 2011, the court issued a written order [DE-36] memorializing and clarifying the ruling, and specifically preliminarily enjoined Defendants from implementing, enforcing, or otherwise carrying out the program of administration provided by Session Law 2011-392 Sec. l(bl)(39), Sec. 4(a), Sec. 5(b), Sec. 7(b84)(House bill289) or issuing the "Choose Life" plate.

As the court explained in its December 8, 2011, Order, the parties agreed that the dispositive issue in determining whether Plaintiffs had shown a likelihood of success on the merits was whether the "Choose Life" license plate constitutes government speech. December 8,

2011, Order [DE-8] p. 6. Government speech is not subject to scrutiny under the Free Speech Clause of the First Amendment. *Pleasant Grove City, Utah v. Summum,* 555 U.S. 460,467-68 (2009) (explaining that "[t]he Free Speech Clause restricts government regulation of private speech; it does not regulate government speech" and therefore "[a] government

entity has the right to speak for itself' and "is entitled to say what it wishes and to select the views that it wants to express" (internal quotation marks and citations omitted)). Government regulation of *private* speech, however, is subject to the Free Speech Clause of the First Amendment. *See id.* at 469-70 (explaining that government restrictions of private speech in a traditional public forum, a designated public forum, or a limited public forum must be viewpoint neutral). Moreover, government restriction of hybrid speech-speech that is both private and governmental at the same time-also must be viewpoint neutral. *See Rose,* 361 F.3d at 795-99 (Michael, C. J., writing separately and concurring in judgment); *id* at 800 (Luttig, C. J., writing separately and concurring in judgment). Accordingly, if the "Choose Life" plate at issue is government speech, Plaintiffs have no claim under the First Amendment.

After weighing the parties' arguments, the court concluded that the "Choose Life" license plates at issue do not constitute government speech. December 8, 2011, Order [DE-8] p. 15. In reaching this conclusion, the court agreed with Plaintiffs that the Fourth Circuit Court of Appeals' previous decisions in *Sons of Confederate Veterans, Inc. v. Comm'r of Virginia Dep't of Motor Vehicles,* 288 F.3d 610 (4th Cir.) *reh'g en banc denied,* 305 F.3d 241 (4th Cir. 2002), *cert. denied* 543 U.S. 1119 (2005)("SCV") and *Planned Parenthood of South Carolina, Inc.* v. *Rose,* 361 F.3d 786, 789-92 (4th Cir.), *reh'g en banc denied,* 373 F.3d 580 (2004), *cert. denied* 543 U.S. 1119 (2005) remained good law. *Id* In those

decisions, the Fourth Circuit used a test which examines four non-exhaustive factors to determine whether speech is private or that of the government:

> (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.

Rose, 361 F.3d at 793-94 (Michael, J.); *see also SCV,* 288 F.3d at 618. Weighing those factors, the court preliminarily concluded that for the reasons stated in Judge Michael's opinion in *Rose*, the "Choose Life" specialty license plate implicates sufficient private speech rights so as not to constitute pure government speech. December 8, 2011 Order [DE-8] at p. 15 (citing *Rose*, 361 F.3d at 794 (Michael, J.)). The court also preliminarily concluded that by authorizing the "Choose Life" plate without also offering a pro-choice alternative, the State has engaged in impermissible viewpoint discrimination in violation of the First Amendment. *Id.*

In so ruling, the court rejected Defendants' argument that the Supreme Court's decision in *Johanns v. Livestock Marketing Association,* 544 U.S. 550 (2005), effectively announced a new test for identifying government speech: the control test. *Id.* at p. 10. The court reasoned that (1) the Fourth

Circuit continued to use and cite to the four factors stated in *Rose* and *SCV* after the *Johanns* decision; (2) the fact that *Johanns* was a compelled subsidy case prevented it from being wholly applicable in the specialty license plate context, and (3) the Supreme Court's decision in *Wooley v. Maynard,* 403 U.S. 705 (1977), indicated that drivers had private speech rights in license plates. December 8, 2011 Order [DE-8] at pp. 10-13. Additionally, the court viewed the Supreme Court's latest decision on government speech in *Summum*-a case neither side addressed in their briefs nor had little to say about at the hearing-as supporting the idea that the identity of the speaker continues to remain relevant. December 8, 2011, Order [DE-8] at pp. 13-14.

Plaintiffs now move for summary judgment [DE-47], seeking an order permanently enjoining Defendants from issuing the "Choose Life" plate.

V. STANDARD OF REVIEW

Summary judgment is appropriate when no genuine issues of material fact exist and the moving party is entitled to judgment as a matter of law. *See Anderson v. Liberty Lobby,* 4 77 U.S. 242, 247 (1986). The party seeking summary judgment bears the burden initially of coming forward and demonstrating the absence of a genuine issue of material fact. *See Celotex Corp. v. Catrett,* 477 U.S. 317, 323 (1986). When making the summary judgment determination, the facts and all reasonable inferences must be viewed in the light most favorable to the non-movant. *Liberty Lobby,* 477 U.S.

at 255. Once the moving party has met its burden, the non-moving party then must come forward and demonstrate that such a fact issue does indeed exist. *See Matsushita Elec. Indus. Co. v. Zenith Radio Corp.,* 475 U.S. 574, 587 (1986). Summary judgment is appropriate against a party who fails to make a showing sufficient to establish any one of the essential elements of the party's claim on which he will bear the burden of proof at trial. *See Celotex,* 477 U.S. at 322-23.

VI. ANALYSIS

In their Memorandum in Support of the Motion for Summary Judgment [DE-49], Plaintiffs urge the court to follow *SCV* and *Rose* and find that the "Choose Life" specialty license plates constitute private or hybrid speech. In opposition, Defendants again assert that *Johanns* provides a new test for determining what constitutes government speech-the control test-and further argue that the Supreme Court confirmed the use of this test in its decision in *Summum.* According to Defendants, the application of the control test dictates a finding that the "Choose Life" license plates are speech of the State. Additionally, Defendants set forth in their Response to Plaintiff's Motion for Summary Judgment [DE-51] new reasons why *SCV* and *Rose* are no longer good law. After thoroughly considering the parties' arguments, the court again concludes that the "Choose Life" license plates at issue in this case do not constitute government speech.

A. The origin and development of the government speech doctrine

To explain how this court reaches this conclusion, a brief explanation of the origin and development of the "government speech" doctrine is necessary. "According to accepted wisdom, the government speech doctrine, as articulated by the U.S. Supreme Court, had its genesis in *Rust v. Sullivan[,* 500 U.S. 173 (1991)]." Andy G. Olree, *Identifying Government Speech,* 42 CONN. L. REV. 365, 374 (2009). In *Rust,* Congress authorized, pursuant to Title X of the Public Health Service Act, 42 U .S.C. § 300a *et seq.,* subsidies to be provided to doctors and clinics in order to advise patients on family planning topics. 500 U.S. at 179. Abortion, however, was not within the scope of Congress' approved family planning topics, and the Act specifically prohibited subsidies being provided to programs or doctors that provided abortion counseling or referrals. *Id* at 179-80. Recipients of the federal funds under Title X challenged this restriction, arguing that the regulations passed pursuant to the Act constituted impermissible viewpoint discrimination favoring an antiabortion position over a proabortion position in the realm of family planning services. *Id* at 192. The Supreme Court rejected the challenge, stating that "the Government had not discriminated on the basis of viewpoint; it has merely chosen to fund one activity to the exclusion of the other" and that the restrictions were merely "designed to ensure that the limits of the federal program are observed." *Id* at 193. Rather than suppression of a viewpoint, the

challenged provisions were "a prohibition on a project grantee or its employees from engaging in activities outside the program's scope." *Id* at 194. The Supreme Court later explained the effect of its ruling in *Rust* as follows:

> 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 that 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 in instances, like *Rust,* in which the government "used private speakers to transmit specific information pertaining to its own programs." *Rosenberger v. Rector and Visitors of Univ. Of Va.,* 515 U.S. 819, 833 (1995).

Legal Servs. Corp. v. Velazquez, 531 U.S. 533,541 (2001) (some internal citations omitted).

> Thus, the "accepted wisdom" of courts and commentators is that the government prevailed in *Rust* because the funded speech at issue, although conveyed by private parties, was government speech rather than private speech. The funding rules were part of a larger government program to encourage or discourage some private activity-in *Rust,* a program to discourage abortion and to

> encourage family planning using alternative methods. The funds were allocated so as to ensure that private speakers would "transmit specific information"-the government's message-in support of the governmental program. The "family planning without abortion" message was the government's own message, crafted in advance by the government, and the funds at issue were part of a program designed to promote that kind of family planning rather than speech in general; therefore, the government was not required to fund messages by private speakers expressing other viewpoints, conveying other information, or offering other services. The viewpoint restriction could stand.

Olree, *supra* at 375 (footnotes and citations omitted). Working from this understanding of *Rust,* the Supreme Court has stated in subsequent cases that funds raised by taxes or other measures may "be spent for speech and expression to advocate and defend its own policies." *Bd of Regents of Univ. of Wisconsin Sys. v. Southworth,* 529 U.S. 217, 229 (2000) (explaining that the Court need not reach the issue of whether the government was the speaker because the University disclaimed the speech as its own). The Court, however, has also distinguished *Rust* in subsequent cases where the government could not be viewed as speaking itself, but rather must be viewed as creating a program to encourage or facilitate private speech. *See Rosenberger,* 515 U.S. at 833-35 (striking down university's student

activity fund program where the criteria for distributing the funds were not viewpoint neutral and distinguishing *Rust* because "[t]here, 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"); *Velazquez,* 531 U.S. at 542-44 (invalidating a congressional funding restriction that prohibited Legal Services Corporation ("LSC") attorneys from participating in cases attempting to reform or challenge a state or federal welfare system on the basis of viewpoint discrimination and reasoning that "the LSC program was designed to facilitate private speech, not to promote a governmental message").

Against this partial backdrop, the Supreme Court considered in *Johanns* a challenge by a group of beef producers on First Amendment grounds to a special federal assessment imposed on heads of cattle and used to fund a promotional campaign encouraging the consumption of generic beef (featuring the slogan "Beef. It's What's for Dinner."). 544 U.S. at 555-56. The promotional program was established by Congress pursuant to the Beef Promotion and Research Act of 1985 ("Beef Act"), which directs the Secretary of Agriculture to implement a policy promoting the marketing and consumption of beef. Specifically, the Secretary must appoint beef producers and importers to a "Beef Board" who, in turn, convenes an Operating Committee which designs and runs the promotional campaign, often attributed to "America's Beef Producers." 544 U.S. at 554-55. The beef producers

argued the federal government could not compel them to subsidize a private message, noting that the campaign was designed by private parties in the beef industry-the members of the Beef Board's Operating Committee.

The Supreme Court rejected the producers' challenge, stating there is no First Amendment violation where there is compelled funding of government speech. *Id* at 560. The Court concluded the promotional campaign constituted government speech, observing that "[t]he message set out in the beef promotions is from beginning to end the message established by the Federal Government." 544 U.S. at 560-61. The Court noted that the program to promote beef was established by Congress, and the Secretary of Agriculture implemented the program and retained ultimate authority over it. *Id* at 561. Accordingly, the Court concluded: "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 developing specific messages." *Id* at 562.

Subsequently, in its latest opinion concerning government speech, the Supreme Court in *Summum* held that the placement of a permanent monument, designed and donated by a private entity, in a city park does not create a forum for private expression but is instead a form of government speech. 555 U.S. at 481. The Court specifically remarked that

although "[t]here may be situations in which it is difficult to tell whether a government entity is speaking on its own behalf or is providing a forum for private speech" the facts in *Summum* did not present such difficulty because "[p]ermanent monuments displayed on public property typically represent government speech." *Id* at 470. In so concluding, the Court first took pains to note that "Governments have long used monuments to speak to the public." *Id.* Starting with the "obvious proposition that a monument that is commissioned and financed by a government body for placement on public land constitutes government speech," the Court went on to observe that monuments which are privately financed and donated to governments to be displayed on public property also constitute government speech. *Id* at 470-71. Specifically, the Court noted that property owners rarely open up their property for installation of a monument to convey a message with which they do not agree, and for that reason, monuments installed on property are "routinely-and reasonably-interpret[ed] as conveying some message on the property owner's behalf." *Id.* at 471. Accordingly, "there is little chance that observers will fail to appreciate the identity of the speaker" as the property owner. *Id.*

The Court also observed that governments have historically exercised selectivity in deciding which donated monuments to accept; because public places like parks are often closely associated with the government unit that owns the land, governments take care to "select the monuments that portray what they view as appropriate for the place in

question, taking into account such content-based factors as esthetics, history and local culture." *Id* at 472. Therefore, accepted monuments "are meant to convey and have the effect of conveying a government message, and they thus constitute government speech." *Id.* Turning to the city park and monuments at issue in *Summum,* the Court noted that government did not open up the park for just any monument which may be offered by a private donor. Instead, the city "'effectively controlled' the messages sent by the monuments in the [p]ark by exercising 'final approval authority' over their selection." 555 U.S. at 473 (quoting *Johanns,* 544 U.S. at 560-61).

B. **No one-factor test post-*Johanns* and *Summum***

Against this backdrop, Defendants argue after *Johanns* and *Summum,* the degree of ultimate government control over a message is *the* test for determining what is government speech, and the non-exclusive four factor test announced in *SCV* and applied in *Rose* is no longer good law. The court, again, disagrees. In the court's opinion, to extrapolate that control is the only factor in determining government speech is to read *Johann* and *Summum* in a vacuum, without regard to their factual underpinnings.

The speech at issue in *Johanns* was developed and disseminated pursuant to a statutorily prescribed program to promote the marketing and consumption of beef products. In other words, like

many other government programs, it "involve[d], or entirely consist[ed] of, advocating a position." *Johanns,* 544 U.S. at 559 (explaining that compelled support of a government program, even one consisting entirely of promoting a specific viewpoint, is constitutional). The fact that private individuals-many of whom were appointed by the Secretary of Agriculture and all of whom must answer to the Secretary-helped design campaigns to carry out the Government's objectives did not preclude the application of the government speech doctrine. *Id.* at 561-62. This differs considerably from the specialty license plate program at issue in this case.

The North Carolina General Assembly allowed for the "Choose Life" license plates in a bill which authorized approximately 70 new specialty license plates, bringing the total number of specialty license plates allowed by the General Assembly to 150. N.C. Sess. Law 2011-392 §(b)(1); N.C.G.S. § 20-79.4{b). This is not a program like *Rust* or *Johanns* with an overarching message to advocate or a policy to enforce. It is a further stretch to compare the involvement of private individuals in *Johanns* in helping design and implement a statutorily authorized government policy with the specialty license plate program at issue here; a program that specifically advertises itself as an opportunity for North Carolina drivers to "[s]how off your Special Interest." *See* NORTH CAROLINA DIVISION OF MOTOR VEHICLES, *Special interest Viewer,* https://edmv-sp.dot.state.nc.us/sp/demo/special_viewer_specialinterest.htm (last visited on December 5, 2012). *Cf Rosenberger,* 515 U.S. at 833-

35 (striking down university's student activity fund program where the criteria for distributing the funds were not viewpoint neutral and distinguishing *Rust* because "[t]here, 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"); *Velazquez,* 531 U.S. at 542-44 (invalidating a congressional funding restriction that prohibited Legal Services Corporation ("LSC") attorneys from participating in cases attempting to reform or challenge a state or federal welfare system on the basis of viewpoint discrimination and reasoning that "the LSC program was designed to facilitate private speech, not to promote a governmental message").

Moreover, although there was no overarching general message or program at issue in *Summum,* the Supreme Court, considering history and the application of common sense, concluded that when a government accepts a privately donated permanent monument and displays the monument on its land, that government-like any other property owner who were to erect a permanent monument on his property-is saying something and not creating a forum to encourage private speech. 555 U.S. at 470-73. Thus, the acceptance of monument-exercising control and final approval authority over it-was enough to establish government speech in *Summum* where the park was never opened up for the general display of monuments by private donors. *Id.* Again, the city park at issue in *Summum* was not used generally as a forum to encourage or foster private

speech-unlike the specialty license plate program at issue in this case.[4]

In sum, the court does not view *Johanns* and *Summum* as announcing a new one-factor test. Rather, the court views those cases as evaluating factors the Supreme Court deemed relevant to the particular facts at issue in those cases, and specifically repudiating the idea that *any* involvement by private speakers prevents the application of the government speech doctrine.

C. Analysis to be applied in this case

Having concluded that *Summum* and *Johanns* do not announce a new, one-size fits all single factor test leads to another issue raised by Defendants: whether the four factors set forth in *SCV* should still be applied and whether the Fourth Circuit's conclusion in *Rose* remains good law.

This court previously noted that the Fourth Circuit has continued to utilize the *SCV* factors to determine whether communication is government

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[4] For similar reasons, the court disagrees with Defendants' assertion that *Summum* means the forum doctrine is inapplicable. *See Summum,* 555 U.S. at 478-79 (explaining that "[t]he forum doctrine has been applied in situations in which government-owned property or a government program was capable of accommodating a large number of private speakers without defeating the essential function of the land or program"). The specialty license plate program-which already has demonstrated its ability to accommodate a large variety of special interest messages-is wholly different from a public park which can only accommodate a limited number of monuments.

speech. *See* December 8, 2011, Order [DE-36] at pp. 10-11 (citing *Turner* v. *City Council of the City of Fredericksburg,* 534 F .3d 3 52 (4th Cir. 2008) and *West Virginia Ass 'n of Club Owners & Fraternal Servs., Inc. v. Musgrave,* 553 F.3d 292 (4th Cir. 2009)). Defendants now note, however, in the Fourth Circuit's first case concerning government speech after *Johanns,* a unanimous panel stated that, "particularly in cases involving the government's use of third-party messages," *Johanns* "distilled" the *SCV* factors to focus on two inquiries: "(1) the government's *establishment* of the message, and (2) its *effective control* over the content and dissemination of the message." *Page v. Lexington Cnty. School District One,* 531 F .3d 275, 281 (4th Cir. 2008) (citing *Johanns,* 544 U.S. at 560-62) (emphasis in original). The *Page* court then applied those two factors, and did not discuss the remaining *SCV* factors in its analysis. Defendants argue that because the Fourth Circuit later used the *SCV* factors in *Turner* and *Musgrave* without purporting to overturn any other precedent, this court must view the cases either (1) inconsistent in using different factors, in which the earlier precedent-Page-controls, or (2) as treating the *SCV* factors differently in different contexts, in which case the most factually similar case governs.

The court does not agree with Defendants' first argument. It is true that the Fourth Circuit has held that "when there is an irreconcilable conflict between opinions issued by three-judge panels of this court, the first case to decide the issue is the one that must be followed, unless and until it is

overruled by this court sitting *en banc* or by the Supreme Court." *McMellon v. United States,* 387 F.3d 329, 334 (4th Cir. 2004). The court does not view, however, the Fourth Circuit's statement in *Page* and later application of other factors in *Turner* and *Musgrave* to be an "irreconcilable conflict." Rather, it reflects what this court already has addressed above: different factors will be relevant in different cases.

Nor does the court agree with Defendants' second argument: that the factual similarities between *Page* and the instant controversy dictate this court apply the only two factors used by the *Page* court. As Defendants themselves note, the *Page* court said that, *"particularly in cases involving the government's use of third-party messages," Johanns* "distilled" the *SCV* factors to focus on two inquiries: government establishment of the message and its control over the content and dissemination of the message. 531 F.3d at 281 (emphasis added). In *Page,* a school board passed a resolution opposing pending voucher legislation. *Id.* at 278. The school district then communicated its views on its web site, and via emails and letters to parents and school employees, and included on its web page to links to other organizations that shared the district's opposition to the voucher legislation. *Id.* at 278-79. A citizen sued the school district after it would not let him communicate, via the school district's website and other communication channels, his support of the pending voucher legislation. *Id.* The Fourth Circuit, relying on *Johanns,* determined that although the school district's websites displayed links to other

websites, the school district nonetheless had not created a "forum" but instead was engaging in dissemination of a message it had established. *Id*. at 285.

Here, of course, there is not just the adopting of a third-party's message-that of the Choose Life, Inc., the national organization dedicated to obtaining the availability of "Choose Life" license plates in all 50 states. Rather, the "Choose Life" plates at issue are part of a larger program encouraging the private speech of North Carolina drivers. Again, the factual underpinnings of *Page* are quite distinguishable from the instant controversy, and the court therefore finds that *Page* does not prohibit the consideration of other relevant factors.

Moreover, even if the court accepts Defendants' arguments that portions of the *SCV* factors-namely, the focus on whom an observer may deem to be the "literal speaker"-is incompatible with the Supreme Court's refusal in *Johanns* to require that the government be expressly identifiable as the speaker, that does not mean the court cannot consider the remainder of the *SCV* factors. Nor does it require the court to reject the idea announced in *Rose* that specialty license plates can be hybrid speech. *See* 361 F.3d at 794 (Michael, J.) (finding South Carolina's "Choose Life" license plates to be "mixed speech"); *Id* at 800 (Luttig, J.) ("Needless to say, I am pleased that the court adopts today the view that speech can indeed be hybrid in character."); *Id.* at 801 (Gregory, J.) (remarking that license plate programs have elements of private and government speech).

Applying the remaining *SCV* factors to the instant case, while keeping in mind the Supreme Court's invocation or rejection of the government speech doctrine in various cases, compels this court to conclude that the "Choose Life" license plates are not purely government speech. First, with regard to the "purpose" of the relevant law at issue, common sense dictates that it is to allow North Carolina drivers to express their affinity for various special interests. As this court already has observed, the passage of the bill authorized the issuance of approximately 70 different plates, bringing the total number of specialty plates to approximately 150. *See* N.C. Sess. Law 20 11-3 92 §(b)(l); N.C.G.S.§ 20-79.4(b). The State also advertises its specialty plates as an opportunity for drivers to express their special interest. *See* NORTH CAROLINA DIVISION OF MOTOR VEHICLES, *Special Interest Viewer,* https://edmv-sp.dot.state.nc.us/sp/demo/special_ viewer_ specialinterest.htm, (last visited on December 5, 2012). To state that the purpose of the relevant statute was to express the State's message of supporting the idea of choosing life over abortion is to ignore the larger governmental specialty license plate program as a whole.[5] This factor weighs in favor of finding the Choose Life license plates constitute private speech.

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[5] The court recognizes that Judge Michael, writing separately in *Rose,* did not reach this conclusion with regard to the South Carolina "Choose Life" license plate statute. 361 F .3d at 793 (finding that the purpose of the South Carolina Choose Life Act was specifically to promote the expression of a pro-life viewpoint). The court respectfully disagrees with Judge Michael as to that conclusion.

With regard to editorial control, it is undisputed that the State exercises complete editorial control over the Choose Life plates, even if the idea for the plate may have originated with the national Choose Life organization. *See Rose,* 361 F .3d at 793 (finding that South Carolina exercised complete editorial control over the content of the speech on the Choose Life plate because the legislature determined that the plate would bear the "Choose Life" message).

Finally, the last factor the court will consider-who bears ultimate responsibility for the speech-weighs in favor of finding private speech. As Judge Michael observed in the context of the South Carolina Choose Life plates, "[a]lthough the Choose Life plate was made available through state initiative, the private individual chooses to spend additional money to obtain the plate and to display its pro-life message on her vehicle." *Id.* at 794. This conclusion is buttressed by the fact that individual drivers specifically encouraged to show off their own special interest by purchasing a "special interest" license plate, as opposed to joining the State in spreading the State's "message."

Having weighed these factors, the court concludes, as the Fourth Circuit did in *Rose,* that sufficient private speech interests are implicated by the specialty license plates to preclude a finding of purely government speech. The court finds that this conclusion is in keeping with the commonsense notion that the North Carolina specialty license plate program as a whole, and the Choose Life plates in particular, are, at bottom, a government-

sponsored avenue to encourage private speech. This court also concludes, as did each of the judges in *Rose,* that the State's offering of a Choose Life license plate in the absence of a pro-choice plate constitutes viewpoint discrimination in violation of the First Amendment. *Rose,* 361 F.3d at 799 (Michael, J.) (finding that South Carolina has engaged in viewpoint discrimination by allowing only the Choose Life plate in contravention of the First Amendment); *Id.* at 800 (Luttig, J.) (concurring in the judgment that the statute authorizing the Choose Life plate violated the First Amendment and summarizing his view that "at least where the private speech component is substantial and the government speech component less than compelling, viewpoint discrimination by the state is prohibited); *Id.* at 801 (Gregory, J.) (concurring in the judgment).

VI. CONCLUSION

For the foregoing reasons, Plaintiffs' Motion for Summary Judgment [DE-47] is ALLOWED. It is hereby ORDERED that Defendants Eugene A. Conti, Michael Robertson, and their officers, agents, and employees are permanently ENJOINED from implementing, enforcing or otherwise carrying out the program of administration provided by Session Law 2011-392 Sec. 1 (b1)(39), Sec. 4(a), Sec. S(b), Sec. 7(b84) (House bill 289), or issuing the "Choose Life" plate. The Clerk of Court is DIRECTED to close this case.

SO ORDERED.

This the 7th day of December, 2012.

/s/ James C. Fox
James C. Fox
Senior United States District Judge

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NORTH CAROLINA
WESTERN DIVISION

AMERICAN CIVIL LIBERTIES UNION OF NORTH CAROLINA, DEAN DEBNAM, CHRISTOPHER HEANEY, SUSAN HOLLIDAY, CNM, MSN, and MARIA MAGHER, Plaintiffs, v. EUGENE A. CONTI, JR., in his official capacity as Secretary of the North Carolina Department of Transportation, MICHAEL ROBERTSON, in his official capacity as Commissioner of the North Carolina Division of Motor Vehicles, and MICHAEL GILCHRIST, in his official capacity as Colonel of the North Carolina State Highway Patrol, Defendants.	**JUDGMENT IN A CIVIL CASE** **CASE NO. 5:11-CV-470-F**

Decision by Court.

This action came before the Honorable James C. Fox, Senior United States District Judge, for ruling as follows.

IT IS ORDERED, ADJUDGED AND DECREED that the Plaintiff's Motion for Summary Judgment is ALLOWED. It is hereby ordered that Defendants Eugene A. Conti, Michael Robertson and their officers, agents, and employees are permanently ENJOINED from implementing, enforcing or otherwise carrying out the program of administration provided by Session Law 2011-392 Sec. 1(b1)(39), Sec. 4(a), Sec. 5(b), Sec. 7(b84)(House bill 289), or issuing the "Choose Life" plate. The Clerk of Court is DIRECTED to close this case.

This Judgment Filed and Entered on December 7, 2012, and Copies To:

Christopher Anderson Brook (via CM/ECF Notice of Electronic Filing) Katherine Lewis Parker (via CM/ECF Notice of Electronic Filing) Neil Clark Dalton (via CM/ECF Notice of Electronic Filing.

DATE

December 7, 2012

JULIE A. RICHARDS, CLERK

/s/ Susan K. Edwards

(By) Susan K. Edwards, Deputy Clerk