No. 05-16971

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ARIZONA LIFE COALITION, INC., et al.,

Plaintiffs-Appellants,

v.

STACY STANTON, in her personal capacity as Arizona License Plate Commission Chair, et al.,

Defendants-Appellees.

On Appeal from the District Court of Arizona, No. 03-01691

BRIEF OF AMICUS CURIAE WOMEN'S CHOICE PREGNANCY CLINIC IN SUPPORT OF PLAINTIFFS-APPELLANTS AND REVERSAL OF THE DISTRICT COURT OF ARIZONA

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February 3, 2006

CORPORATE DISCLOSURE STATEMENT

Women's Choice Pregnancy Clinic is a not-for-profit organization (501-(c)-3) that has no parent corporation, and no publicly held corporation owns any of its stock.

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STATEMENT OF INTEREST OF THE AMICUS CURIAE

Amicus Curiae Women's Choice Pregnancy Clinic has a substantial interest in the disposition of this case. Consisting of three pregnancy centers[1] and a maternity home,[2] *Amicus* is one of the many organizations providing adoption counseling that could benefit from the proceeds of the Arizona "Choose Life" license plates.[3] *Amicus* is a non-profit organization founded in 1997. Combined, its three pregnancy centers counsel almost 625 women per month. In addition, its Whiteriver location is the only pregnancy center located on a Native American reservation in Arizona.

Amicus provides both counseling and education to hurting women in crisis pregnancies. This education includes classes on adoption and, as of October 2005, *Amicus* has helped 17 mothers place their children in permanent homes through adoption. After adoption, *Amicus* continues to support the women, offering post-adoption counseling. The pregnancy centers also provide life trauma counseling, and, through that program, many cycles of neglect and abuse are stopped, allowing young women to face their futures free from the emotional encumbrances of the

[1] These centers are located in Show Low, Springerville, and Whiteriver, Arizona.

[2] Hope House Maternity Home is located outside of Show Low, Arizona.

[3] *Amicus* is not currently a member of Arizona Life Coalition, but it agrees with the Coalition's mission, goals, and activities and is interested in joining the Coalition in the future.

past. In addition to counseling and education, *Amicus* also provides housing to those women in need of a safe place to stay before and after delivering their babies. *Amicus* is committed to supporting and empowering the women it serves in practical, tangible ways throughout pregnancy, delivery, and after delivery.

As one of the crisis pregnancy organizations that could benefit from the proceeds of the Arizona "Choose Life" license plates, *Amicus* urges this Court to reverse the ruling of the District of Arizona.

According to Fed. R. App. P. 29, Counsel for *Amicus* has contacted the parties and has obtained consent to file this brief.

SUMMARY OF THE ARGUMENT

Several other Circuit Courts of Appeal and district courts have addressed the constitutionality of "Choose Life" license plates. However, due to the varying factual situations and allegations made in each of those cases, the courts resolved the cases on varying grounds. A few cases have been resolved on the merits: whether "Choose Life" plates constitute government or private speech and whether a legislative body involved in the approval of "Choose Life" license plates engaged in viewpoint discrimination forbidden under the First Amendment.[4] Other courts have cited the Tax Injunction Act as precluding federal jurisdiction over such

[4] *See* Part I.A., examining "Choose Life" decisions based upon the merits.

cases.[5] Moreover, one Circuit Court simply found that the plaintiffs did not have standing to challenge the legislatively-created "Choose Life" plates.[6] An examination of the "Choose Life" decisions of other courts reveals that, not only is the fact situation in the current litigation unique, but that the previous "Choose Life" decisions support reversal of the District Court of Arizona.

ARGUMENT

I. OTHER COURTS HAVE RESOLVED "CHOOSE LIFE" LITIGATION ON VARYING GROUNDS

A. Decisions Based Upon The Merits

Only one Circuit Court of Appeal—the Fourth Circuit—has considered the merits in "Choose Life" litigation. In 2001, the South Carolina legislature enacted a statute authorizing the issuance of specialty license plates bearing the message "Choose Life." *Planned Parenthood of S.C. v. Rose*, 361 F.3d 786, 788 (4th Cir. 2004). South Carolina also possessed a more general statute authorizing specialty plates. *Id*. The statute authorizing the "Choose Life" plates did not also authorize an abortion rights counterpart, and the plaintiff organization, Planned Parenthood of South Carolina, never applied for an organizational plate under the more general statute. *Id*.

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[5] *See* Part I.B., examining decisions issued under the Tax Injunction Act.

[6] *See* Part I.C., examining the decision based upon standing.

The Fourth Circuit first addressed the issue of standing, focusing on whether there was an actual or threatened injury that was caused by the allegedly illegal conduct of the defendant and likely to be redressed by a favorable ruling. *Id*. at 789-90. The court concluded that where "plaintiffs challenge a law on the ground that it promotes an opposing political viewpoint above their own, they suffer a cognizable injury that can be redressed by the invalidation of that law."[7] *Id*. at 790. The court added that the plaintiffs did not need to show an explicit prohibition of their speech in order to claim discriminatory treatment. *Id*. at 791.

After concluding that the plaintiffs had standing, the court next addressed whether South Carolina engaged in impermissible viewpoint discrimination, examining whether the license plate speech constituted government or private speech. The court began by stating three basic premises: 1) all speech is either government or private speech; 2) when the government speaks for itself and is not regulating the speech of others, it may discriminate based upon viewpoint; and 3) the government may not discriminate based upon viewpoint when it regulates private speech. *Id*. at 792.

[7] The court did also note that the plaintiff's inability to obtain an abortion rights license plate was not an injury, as the case was not about whether people can obtain license plates with messages of their choice, but about whether the State had impermissibly favored one viewpoint over another. *Rose*, 361 F.3d at 790-91.

The plaintiffs claimed that the "Choose Life" message constituted private speech, while the state claimed that the message constituted government speech. *Id*. In determining whether the message constituted private or government speech, the Circuit examined the following four factors: 1) the central *purpose* of the program in which the speech in question occurred; 2) the degree of *editorial control* exercised by the government or private entity over the content of the speech; 3) the identity of the *literal speaker*; and 4) whether the government or the private entity bore the *ultimate responsibility* for the content of the speech. *Id*. at 792-93 (citing *Sons of Confederate Veterans, Inc. v. Comm'r of the Va. Dep't of Motor Vehicles*, 288 F.3d 610, 618 (4th Cir. 2002)). Analyzing these factors, the Fourth Circuit determined that the "Choose Life" license plates constituted neither government nor private speech, but rather a hybrid of the two. *Id*. at 793, 794.

First, the court concluded that the purpose of the plates was not to produce revenue while allowing for private expression, but instead to advance a pro-life viewpoint. *Id*. at 793. Thus, the first factor weighed in favor of government speech. Second, because the "Choose Life" plate originated with the state and with the legislature determining the plate's message, the state exercised complete editorial control over the content of the speech—again weighing in favor of government speech. *Id*. Third, the court concluded that the literal speaker appeared to be the vehicle owner and not the government, because the owner

undoubtedly held and expressed a pro-life view, just as he would be the literal speaker of a bumper sticker message.[8] *Id*. at 794. Likewise, it was the private individual that bore the ultimate responsibility for the speech on the plates.[9] *Id*. Thus, the four-factor test indicated that both the government and the private vehicle owners were speaking, and the court concluded that the speech was mixed, or "hybrid," speech. *Id*.

Because the "Choose Life" plates were adopted as a result of South Carolina's agreement with the pro-life message, and because the state had "distorted the specialty license plate forum in favor of one message," the court concluded that the state had engaged in viewpoint discrimination. *Id*. at 795. The court went on to consider whether the state could engage in such viewpoint discrimination when the relevant speech was both government and private, concluding that the state had engaged in conduct prohibited by the First Amendment. *Id*.; *id*. at 798-99.

The court reasoned that the state had opened up a limited forum for expression—and not a government program where the government could limit the viewpoints expressed. *Id*. at 795, 798. In addition, the state had entered that forum

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[8] The U.S. Supreme Court has held that messages on standard license plates are associated, at least in part, with the vehicle owner. *Id.* at 794 (citing *Wooley v. Maynard*, 430 U.S. 705, 717 (1977); *SCV*, 288 F.3d at 621).

[9] The court made this conclusion despite the fact that it considered license plates "state-owned." *Id*.

as a favored speaker, giving its viewpoint privilege above others. *Id*. at 795, 798. Moreover, the state's advocacy of the message was not readily apparent, and, therefore, the state was insulated from electoral accountability. *Id*. at 795, 799. Following the adverse determinations of the Fourth Circuit, South Carolina petitioned for certiorari, but the U.S. Supreme Court denied that petition. *Rose v. Planned Parenthood*, 2005 U.S. LEXIS 788 (Jan. 24, 2005).

When the Fourth Circuit considered whether the plates in *Rose* constituted government or private speech, it mainly relied upon the four factors enunciated in *Sons of Confederate Veterans, Inc. v. Commissioner of the Virginia Department of Motor Vehicles* ("*SCV*"). A further look at the court's analysis in that case is instructive.

While not a case involving "Choose Life" license plates, *SCV* has greatly impacted subsequent "Choose Life" litigation. The case originated when a Virginia statute authorized the provision of specialty license plates to SCV members, but barred the use of its logo because it contained a Confederate flag. *SCV*, 288 F.3d at 613. The SCV sought an injunction requiring the Commissioner to issue special license plates bearing SCV's logo. *Id*. at 614.

In its analysis in *SCV*, the Fourth Circuit first discussed whether the speech on specialty license plates constituted government or private speech, as viewpoint distinctions drawn by the state are sustainable where the government itself speaks

or where it uses private speakers to transmit its own message. *Id*. at 616, 618. The rationale for these exceptions lay in the accountability the government faces in the political process. *Id*. at 618. The court recognized, as it did later in *Rose*, that there is no clear standard for determining whether speech is government or private. *Id*. The court examined the issue through the purpose of the program, the degree of editorial control exercised, the identity of the literal speaker, and what entity bore the ultimate responsibility for the content, recognizing that this list of factors is not exhaustive or always applicable. *Id*. at 618-19.

First, the court stated that the primary purpose of the license plate program was to produce revenue for the state while allowing for private expression of various viewpoints.[10] *Id*. at 619. Because the license plates were only available to members of SCV, those motorists who had the plates would be sending a personal message, as the license plates would identify them as members of the organization. *Id*. at 620. Second, the court concluded that neither the Commissioner nor the state legislature exercised editorial control over the content of the specialty plates. *Id*. at

[10] The license plate system required the guaranteed collection of a certain amount of money before specialty plates could be issued. The system ensured that only popular plates—and therefore plates which would raise a certain amount of revenue—would be authorized. *SCV*, 288 F.3d at 620. The court noted that if the license plates constituted government speech, it was "curious" that the government required money from private persons before its own speech would be triggered. *Id*.

621. No instruction as to the substantive content of license plates was given to organizations before they submitted their logos for the specialty plates. *Id*.

While the court indicated that the "literal speaker" may have been the license plate itself and that the entity bearing the "ultimate responsibility" was unclear, it noted the importance of the fact that the license plates were mounted on vehicles owned by private persons—and that the U.S. Supreme Court had instructed that license plates implicate private speech interests. *Id*. (citing *Wooley*, 430 U.S. at 717). The court concluded that the specialty plates constituted *private* speech. *Id*. In considering whether the state engaged in viewpoint discrimination, the court stated the following:

> [W]here an evaluation of a given restriction and the surrounding circumstances indicates that one or more speakers are favored over others, and further that the basis for the restriction is in fact the message the disfavored speaker seeks to convey, the restriction violates the First Amendment.

Id. at 624.

The restriction imposed by the statute did not prohibit the Confederate flag itself, but instead prohibited SCV's *use* of the Confederate flag. *Id*. at 624-25. In doing so, SCV's speech was prohibited on the basis of content—a prohibition that burdened the speech of only one speaker. *Id*. at 625. This suggested that it was SCV's viewpoint, rather than the Confederate flag as content, that was the subject of the restriction. *Id*.

After noting that no other logo restriction was imposed on plates of "*groups that have distinct viewpoints in political or social debate*," the court concluded that "[t]he nature of the restricted speech, the lack of a generally applicable content-based restriction, the breadth of the special plate program in Virginia, and the lack of any restrictions" in other license plate statutes demonstrated the state's viewpoint discrimination against SCV. *Id*. at 626 (emphasis added). The state did not establish that the discrimination was the least restrictive means available or in service of a compelling government interest, and thus the restriction did not survive strict scrutiny. *Id*.

Finally, two federal district courts have also considered the merits in "Choose Life" litigation. When a plaintiff was unsuccessful in its attempt to have the California legislature enact an enabling statute to issue a "Choose Life" license plate, the plaintiff filed suit in the Eastern District of California challenging 1) the specialty plates already issued under specific enabling statutes,[11] and 2) CAL. VEH. CODE § 5060 and the enabling statutes created under § 5060, the provision which opened a speech forum for nonprofit organizations to request the issuance of license plates with specific messages or designs. *WRN*, 305 F. Supp. 2d at 1147-48. The plaintiff argued that the statutes violated the First Amendment's viewpoint

[11] These plates were not enacted pursuant to § 5060. *Women's Res. Network ("WRN") v. Gourley*, 305 F. Supp. 2d 1145, 1150 (E.D. Ca. 2004).

neutrality principle. *Id*. at 1148. At issue was whether the legislature's denial of the "Choose Life" plates was a "legitimate exercise of its licensing authority or … resulted from an 'illegitimate abuse of censorial power.'" *Id*.

The district court first addressed the issue of standing.[12] *Id*. at 1149-53. The court found that the plaintiff did not have standing to challenge the specialty plates issued under enabling statutes that were not enacted under § 5060, as those enabling statutes constituted nonpublic fora, and the plaintiff did not demonstrate that the state acted unreasonably or in a viewpoint discriminatory manner by excluding the plaintiff under those enabling statutes. *Id*. at 1150-52. Moreover, none of those statutes created license plates targeting the subject of abortion, and thus the plaintiff was not excluded from those statutes because of its pro-life viewpoint. *Id*. at 1152.

The plaintiff did have standing, however, to challenge § 5060 and the license plates issued through the enabling statutes under § 5060. *Id*. at 1152-53. Section 5060 did not circumscribe the legislature's discretion in determining what speech was authorizable, and therefore the plaintiff suffered an injury, as "a facial *First Amendment* challenge lies whenever a licensing law 'vests unbridled discretion in [an office or agency] over whether to permit or deny expressive activity.'" *Id*. at

[12] The individual plaintiffs in the lawsuit were dismissed for lack of standing, as only nonprofit organizations could apply for specialty license plates. *Id*.

1152 (emphasis in the original) (quoting *City of Lakewood v. Plain Dealer Publ'g Co*., 486 U.S. 750, 755 (1988)). Because the defendant administered the statutes created under § 5060 and was responsible for issuing those plates, the plaintiff also fulfilled the causality and redressability requirements for standing. *Id*. at 1153.

After determining that the plaintiff had standing to challenge § 5060 and the enabling statutes created under § 5060, the court turned to the Tax Injunction Act ("TIA").[13] *Id*. The court determined that fees collected from vehicle owners wishing to benefit certain non-profit organizations through license plate proceeds did not constitute taxes. *Id*. at 1154. Such fees were voluntarily paid by vehicle owners wanting to support those causes and to display their support. *Id*. As such, the TIA did not apply. *Id*.

Finally, the court considered whether permanently enjoining the use of § 5060 as well as the enabling statutes for plates already issued under § 5060 was proper. *Id*. at 1154-61. The court held that § 5060 granted "unconstitutional, unfettered discretion to deny a private nonprofit organization's request for an enabling statute authorizing issuance of a plate" and that this aspect of the created forum was facially unconstitutional under the First Amendment, as there were no standards governing the decision as to what organizations may speak. *Id*. at 1154. Noting that the First Amendment precludes the government from using a

[13] *See* Part I.B. for further discussion of the Tax Injunction Act.

standardless forum to select private speakers based upon views the government finds acceptable, the court permanently enjoined the defendant from approving any new license plates under § 5060. *Id*. at 1154-55.

On the other hand, those license plates already issued through enabling statutes under § 5060 were not enjoined. Focusing on whether these license plates constituted government or private speech, and using the four factors laid out in *SCV*, the court particularly noted that the revenue generated by these plates was earmarked for distribution to certain government funds and programs. *Id*. at 1156-57. The court then found that the nature of the speech of each challenged license plate reflected a primary purpose or interest of the state. *Id*. at 1158-61.

While the court concluded that the speech on license plates was neither exclusively that of the government nor that of private individuals, it also held that the government component of the license plate speech evidenced that it was fundamentally government speech promoting the state's policies. *Id*. at 1161. Because the plaintiff did not show it had a First Amendment right to direct this government speech or that the existence of this government speech was likely to cause it irreparable injury, the permanent injunction as to the plates already issued was denied. *Id*.

In *ACLU of Tennessee v. Bredesen*, the plaintiffs filed suit in the Middle District of Tennessee challenging the state statute creating a "Choose Life" license

plate.[14] 354 F. Supp. 2d 770, 771 (M.D. Tenn. 2004). Citing *Rose* and *SCV* and adopting the Fourth Circuit's four factor test, the court concluded that both the government and private individuals speak through license plates. *Id*. at 773. Maintaining that viewpoint discrimination occurs if a regulation promotes one viewpoint above others, the court concluded that Tennessee allowed the "Choose Life" viewpoint to the exclusion of "pro-choice" and other views on abortion. *Id*. at 773-74. The court held that because the State created a forum for the abortion debate, it could not limit the viewpoints expressed in that forum. *Id*. at 774. Because the court did not consider "Choose Life" to be viewpoint neutral speech, it found that the state discriminated based upon viewpoint. *Id*.

B. Decisions Based Upon The Tax Injunction Act (TIA)

In *Henderson v. Stalder*, the plaintiffs filed suit claiming that Louisiana's "Choose Life" license plates facially discriminated against their abortion rights views in contravention of the First Amendment. 407 F.3d 351, 352 (5th Cir. 2005). The "Choose Life" license plates had been authorized by the state legislature, and the proceeds collected from the plates were to be distributed to organizations selected by the legislature. *Id*. at 352, 355. After initially vacating the district court opinion and ordering dismissal for lack of standing, the Fifth

[14] The General Assembly had rejected an abortion rights license plate. *Bredesen*, 354 F. Supp. 2d at 772.

Circuit amended its decision to allow the plaintiff to amend her complaint to challenge the "state's overall policy and practice of issuing specialty [or "prestige"] license plates," rather than simply challenging the lack of an abortion rights alternative. *Id*. at 353. In the subsequent appeal, the State argued that the Tax Injunction Act barred the entire lawsuit and that the prestige license plate program did not violate the First Amendment. *Id*. at 353-54

The Fifth Circuit explained that the TIA prohibits federal courts from "enjoining, suspending, or restraining the assessment, levy or collection of any tax under State law where a plain, speedy and efficient remedy may be had in the courts of such state." *Id*. at 354 (citing 28 U.S.C. § 1341). However, the TIA would not bar federal court jurisdiction if 1) the "fees" charged by the state for the specialty license plates were not "taxes" for purposes of the TIA, or 2) the case *Hibbs v. Winn*, 542 U.S. 88 (2004), could be read to encompass the lawsuit. *Henderson*, 407 F.3d at 354.

Thus, the Circuit first had to resolve whether the additional charges above the handling charges and ordinary vehicle registration taxes were taxes or fees. In discussing the difference between a tax and a fee, the Circuit quoted the following:

> The classic tax sustains the essential flow of revenue to the government, while the classic fee is linked to some regulatory scheme. The classic tax is imposed by a state or municipal legislature, while the classic fee is imposed by an agency upon those it regulates. The classic tax is designed to provide a benefit for the entire community,

> while the classic fee is designed to raise money to help defray an agency's regulatory expenses.

Id. at 356 (quoting *Home Builders Ass'n of Miss., Inc. v. City of Madison, Miss.*, 143 F.3d 1006, 1011 (5th Cir. 1998)). In another Fifth Circuit case, the Circuit characterized "fees" as charges imposed 1) by an agency, not the legislature; 2) upon those it regulates, not the community as a whole; and 3) for the purpose of defraying regulatory costs, not simply for general revenue-raising purposes. *Id*. at 357 (quoting *Neinast v. Texas*, 217 F.3d 275, 278 (5th Cir. 2000)).

Based upon these factors, the Fifth Circuit determined that the charges imposed for the specialty license plates constituted taxes and not fees. First, the Fifth Circuit noted that the fees for the specialty plates were set by the legislature, suggesting a tax. *Id*. The court held that the second factor was interrelated with the third factor: the purpose of the cost. *Id*. The court did not view any of the purposes for which the specialty license plate proceeds were used—such as park development and adoption support—as regulatory. *Id*. at 357-58. The court held that it was not the voluntariness of or the motivation behind the vehicle owner's payment of the fees that mattered, but the government's purpose in exacting the charge that distinguished taxes from fees. *Id*. at 358. The court did not view the charges as "regulating" anything—the dominate feature of the specialty plate program was to raise revenue. *Id*.

After determining that the charges constituted taxes and not fees, the Circuit's second step was evaluating the facts under *Hibbs v. Winn*. In *Hibbs*, the Supreme Court allowed federal jurisdiction where 1) a third party (not the taxpayer) filed suit, and 2) the suit's success would enrich and not deplete the government's resources. *Id*. at 359 (citing *Hibbs*, 542 U.S. at 105-07). While the plaintiffs in *Henderson* satisfied the first *Hibbs* prong, they failed on the second: enjoining the entire program's operation would *reduce* state tax revenue. *Id*. For these reasons, the Circuit determined that federal jurisdiction was barred under the TIA. *Id*. at 359-60.

Just months after the Fifth Circuit issued its decision in *Henderson*, the Northern District of Ohio also used the TIA to dismiss an action filed by NARAL Pro-Choice Ohio challenging the legislation providing for Ohio "Choose Life" license plates. *NARAL Pro-Choice Ohio v. Taft*, 2005 U.S. Dist. LEXIS 21394 (N.D. Ohio Sept. 27, 2005). In reviewing the factors laid out in *Henderson* and *Home Builders* for determining whether a charge is a fee or a tax, the district court noted that where a charge falls in the middle of the spectrum—between a classic tax and a classic fee—the controlling factor is the revenue's ultimate use. *Id*. at *14.

Evaluating these factors, the court considered the following and determined that the charges constituted taxes and not fees: the charges for the "Choose Life"

plates were set directly by the state legislature; the additional charge for the plates was in addition to motor vehicle registration fees, was not related to a regulatory function, and was a source of revenue for the government; and the purpose of the charges—funding adoption-related services—benefited the community. *Id*. at *20. The district court then went on to consider *Hibbs*. Because the relief sought by the plaintiffs would decrease state revenue, and because the state courts could provide a "plain, speedy and efficient remedy," the court concluded that the action was barred by the TIA. *Id*. at *23-25 (citing 28 U.S.C. § 1341).

C. Decision Based Upon Standing

The only other Circuit Court of Appeal to rule in a "Choose Life" case—the Eleventh Circuit—decided the case based upon the plaintiffs' standing. In Florida, the Department of Highway Safety and Motor Vehicles reviews requests for specialty license plates to ensure that such plates meet certain statutory criteria. *Women's Emergency Network ("WEN") v. Bush*, 323 F.3d 937, 941 (11th Cir. 2003). The Department then submits qualified plans to the state legislature, which can either enact or reject the proposed license plates. *Id*. In 1999, Choose Life, Inc., satisfied the statutory requirements and the proposal for a "Choose Life" license plate was submitted to the legislature. *Id*. The "Choose Life" legislation passed, while an amendment proposing a "Pro Choice" plate was rejected. *Id*.

Plaintiffs—two individuals and an organization—challenged the constitutionality of the legislation, claiming that it violated their First Amendment rights to freedom of speech by providing a forum for pro-life vehicle owners to voice their political opinions without also providing a similar forum for vehicle owners who supported abortion rights. *Id*. at 942. Plaintiffs also claimed that the distribution of proceeds collected from the plates discriminated against the viewpoint of certain agencies because funds were prohibited from agencies "involved with or associated with abortion activities." *Id*. The plaintiffs also raised claims under the Establishment Clause of the First Amendment and the Due Process Clause of the Fourteenth Amendment. *Id*.

The district court dismissed the case for lack of standing and the Eleventh Circuit affirmed. The Eleventh Circuit first considered whether the individual plaintiffs had taxpayer standing for their Establishment Clause claims. *Id*. at 943. Specifically, plaintiffs challenged the use of county funds to negotiate a contract with Catholic Charities, which would distribute the funds raised by the plates to qualified organizations. *Id*. To demonstrate taxpayer standing for Establishment Clause claims, the plaintiffs only had to show "a logical link between [their] taxpayer status and the challenged legislative enactment," along with a nexus between that taxpayer status and "the precise nature of the alleged constitutional infringement" or injury. *Id*. The court stated that the plaintiffs met this relaxed

criteria: plaintiffs were taxpayers who paid taxes to the county, and the county had expended municipal funds in negotiation of the contract with Catholic Charities. *Id*. at 943-44. However, there was nothing more than speculative injury because no contract was ever formed. *Id*. at 944-45. Further, there is nothing unconstitutional about expending public funds "to negotiate a contract that may or may not come to fruition." *Id*. at 945. Thus, the court ruled that the Establishment Clause claims failed for lack of taxpayer standing. *Id*. at 945.

In addressing the issue of whether the license plates constituted government or private speech, the court took note that the messages on the specialty plates did not "universally concern issues of the greatest importance to the State" and that the program was structured to benefit the organizations that apply for the plates and not the State itself. *Id*. at 945 n.9. As such, the court failed to see a "sufficient government attachment" to the message in the plates that would allow a determination that the plates constituted government speech. *Id*.

The Eleventh Circuit then addressed individual standing, rejecting plaintiffs' claimed injury-in-fact[15]: the government's promotion of one side of the debate and the lack of opportunity to present their opposing view. *Id*. at 945-46. While the court acknowledged that the state had authorized the speech of one side of the

[15] In order to establish individual standing, plaintiffs must demonstrate they suffered an injury-in-fact as a result of a defendant's conduct. *WEN*, 323 F.3d at 946.

debate, the state had not denied the other side the same opportunity to speak. *Id*. at 946. The court concluded:

> The *First Amendment* does not require states to authorize the speech of those who have expressed no interest in speaking; it only protects the rights of those who wish to speak."

Id. (emphasis in the original). Because the plaintiffs had not been denied the opportunity to speak, they had not sustained an injury-in-fact. *Id*. at 946-47. Until the plaintiffs applied for a license plate and had that application denied, there could be no injury-in-fact, and thus the plaintiffs lacked individual standing. *Id*. The court also held that "[t]he *First Amendment* protects the right to speak; it does *not* give [plaintiffs] the right to stop others with opposing viewpoints from speaking." *Id*. at 947 (emphasis in the original).

Furthermore, the plaintiffs' claims suffered from a problem of redressability. *Id*. The plaintiffs specifically challenged the "Choose Life" plates, but removing pro-life speech from the forum did not in any way advance their own opportunity to speak, and therefore any injury was not redressable by the court. *Id*.

Finally, the court addressed organizational standing. *Id*. at 947-49. The plaintiff organization claimed that the State violated its First Amendment rights by authorizing a distribution of the "Choose Life" proceeds that discriminated on the basis of viewpoint. *Id*. at 947-48. Funds were available only to those organizations that did not promote the use of abortion and, thus, the plaintiff did

not qualify. The plaintiff stated its injury was impermissible viewpoint discrimination and alleged that the injury was redressable by the "restoration of a level playing field, even if that means the elimination of the entire funding program." *Id*. at 948. The court held that the "level playing field" analysis was inconsistent with First Amendment law. *Id*. Instead, the proper remedy would have been to make funds available to the plaintiff organization—not to take funds from adoption agencies. *Id*. Enjoining the entire program would not provide any more funding to the plaintiff than it already had and, therefore, an injunction would not redress the plaintiff's alleged injury. *Id*.[16]

Because the plaintiffs lacked taxpayer standing, individual standing, and organizational standing, the Circuit Court affirmed that the case was properly dismissed. *Id*. at 950.[17]

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[16] The court also rejected the plaintiff's alternate remedy of severing the portion of the statute prohibiting organizations providing or promoting abortion from receiving funds, as that portion was not severable under Florida law. *Id*. at 948-49. Such a remedy would contradict the very legislative purpose of the statute: to promote adoption over abortion. *Id*. at 949. The legislature would not have enacted the statute if the proceeds from the "Choose Life" plates could be used for the funding of abortion. *Id*.

[17] The only other court to issue an opinion in a "Choose Life" license plate case was the Northern District of New York. However, that decision was entirely procedural. *See, e.g., Children First Found., Inc. v. Martinez*, 2005 U.S. Dist. LEXIS 3897 (N.D.N.Y. Mar. 14, 2005). An appeal is currently pending before the Second Circuit.

II. THE DECISIONS OF OTHER COURTS SUPPORT REVERSAL OF THE DISTRICT COURT OF ARIZONA

The decisions of other courts in "Choose Life" cases support reversal of the District Court of Arizona, particularly as those decisions regard specific issues decided by the District Court: whether the speech on license plates constitutes government or private speech; whether the License Plate Commission ("the Commission") engaged in impermissible viewpoint discrimination; and whether the Commission has been granted unbridled discretion in reviewing specialty license plate applications.[18]

First, the previous decisions support a conclusion that the "Choose Life" license plates in Arizona constitute private rather than government or "hybrid" speech. The most dominant difference between this case and the prior cases is that the Arizona legislature did not create the "Choose Life" license plates; in each of the other cases, it was the state government that initiated the plates. This gives the Arizona "Choose Life" plates a much more private bent than any of the other plates.

[18] The District Court determined that the license plates constituted government speech, that the Commission did not engage in viewpoint discrimination, and that the Commission did not possess unbridled discretion in reviewing license plate applications. *See generally, Ariz. Life Coalition, Inc. v. Stanton*, 2005 U.S. Dist. LEXIS 21960 (D. Ariz. Sept. 26, 2005). Yet, because the U.S. Supreme Court has already stated that the messages on standard license plates are at least, in part, associated with the vehicle owner, the District Court's determination of purely government speech is automatically invalid. *See Wooley*, 430 U.S. at 717.

The four factors laid out in *SCV* and utilized in *Rose*, *WRN*, and *Bredesen* reinforce this conclusion. First, as in *SCV*, the central purpose of the license plate program in Arizona is to allow for *private expression*. Vehicle owners who obtain the plates will be sending a personal message. This factor weighs in favor of private speech. Moreover, the organization applying for a license plate must have a certain number of members or guarantee to pay the program costs of the plate before an application can be granted. *See* ARIZ. REV. STAT. § 28-2404(G)(2). Just as the court pointed out in *SCV*, if the license plates constitute government speech, it is "curious" that such speech is triggered only when a plate is guaranteed to be popular or paid for by the organization itself.

Furthermore, unlike the situation in *Rose*, the Arizona "Choose Life" license plates were not enacted through the legislature in order to advance a pro-life viewpoint. Instead, a private organization sought action under the Arizona specialty license plate program. In addition, the revenue generated by these plates is not earmarked for government funds and programs as it was in *WRN*; instead, the proceeds are distributed to the organizations obtaining the specialty plates.

The second prong of the *SCV* test—the degree of editorial control—also weighs in favor of private speech. In *Rose*, the "Choose Life" license plates originated with the state and with the legislature determining the plate's message. Yet the Arizona "Choose Life" license plates were originated and the design

submitted by Arizona Life Coalition. This closely resembles the situation in *SCV*, where neither the commissioner nor the state legislature exercised editorial control over the content of specialty plates. No instruction as to substantive content was given.

Likewise, the Arizona License Plate Commission has not been granted any editorial control over the substantive content of the license plate designs. Instead, the Commission 1) reviews the primary activity or interest *of the organization*; 2) prohibits the issuance of plates where the name or purpose *of the organization* promotes a *product or brand name*; and 3) prohibits the issuance of plates where the purpose *of the organization* promotes a religion, faith, or antireligious belief. *See* ARIZ. REV. STAT. § 28-2404(b). The statute granting this authority does not give the Commission any editorial control over the content of the license plates themselves.

The third and fourth factors also weigh in favor of private speech. The Fourth Circuit in *Rose* concluded that the "literal speaker" of the message on license plates was the private vehicle owner and not the government. In addition, it was the private vehicle owner that bore the ultimate responsibility for the message on the license plates. Similarly, the court in *SCV* noted the importance of the fact that the license plates were mounted on the vehicles of private owners. Interestingly, the District Court of Arizona ignored these conclusions when it

analyzed the Arizona plates. The District Court also ignored the fact that *no court* has concluded that the "Choose Life" plates constitute purely government speech.

Thus, each of the four *SCV* factors—which the District Court purportedly relied upon—actually weigh in favor of private speech, and not government or hybrid speech. The Eleventh Circuit's failure to see a "sufficient government attachment" to the message in "Choose Life" plates also underscores this conclusion.[19]

The prior cases also suggest a conclusion of viewpoint discrimination by the Commission. As in *Rose*, the State, through its specialty license plate program, has opened up a limited forum for expression—and not a nonpublic forum as found by the District Court. It is not a government program where the government can control the content of the speech.[20] Moreover, the Commission's denial of the "Choose Life" plate violates the First Amendment. The Commission favors organizations with messages it deems more acceptable, thus favoring other

[19] This conclusion also negates the District Court's holding that the license plates constitute nonpublic fora. Furthermore, the Commission cannot discriminate based upon viewpoint when regulating private speech. *See Rose*, 361 F.3d at 792.

[20] The District Court clearly misunderstood the holding in *Rose*. South Carolina did not engage in viewpoint discrimination by merely allowing a "Choose Life" license plate; it engaged in viewpoint discrimination because it opened a forum in which an abortion rights plate was denied. It was that denial that demonstrated the State's viewpoint discrimination, just as the Commission's *denial* of the "Choose Life" plate demonstrates its viewpoint discrimination.

organizations over Arizona Life Coalition. *See SCV*, 288 F.3d at 624. A comparison to the situation in *SCV* demonstrates this point. In *SCV*, the state did not prohibit a plate by SCV or the use of the Confederate flag on license plates in general, but prohibited the message conveyed by the use of the flag by SCV. Likewise, the Commission has not denied a plate to Arizona Life Coalition as an organization, but denied the plate based upon the viewpoint and content of the message conveyed by Arizona Life Coalition.

It is also telling that the Commission has not denied specialty plates to other "groups that have distinct viewpoints in political or social debate." *See id*. at 626. For example, the Commission has granted plates pertaining to wildlife conversation, child abuse, hospice palliative care, and organ transplantation.[21] While the District Court and the Commission argue that, because no other *abortion*-related plates have been allowed, the government has not discriminated, *SCV* demonstrates that that is not the proper analysis. If the Commission has granted a license plate to any group with distinct political or social views, it cannot then deny another plate because of the political or social debate implicated by that message. Yet that is exactly what the Commission did.

[21] It cannot go unnoticed that the organ transplantation plate reads similarly to the "Choose Life" plates in its "Donate Life" message. In addition, the hospice palliative care plate plays directly into the assisted suicide debate that is rampant in a number of states.

Furthermore, the District Court erred in not holding that the Commission exercises unbridled discretion when reviewing specialty license plate applications. As in *WRN*, there are no standards governing the Commission in deciding which organizations may speak. While ARIZ. REV. STAT. § 28-2404(b) lays out basic criteria of what organizations may obtain specialty plates, there are no standards to guide the Commission in determining whether organizations fit these criteria and no standards for evaluating the messages of those organizations. As such, the Commission can veto the message on any plate it chooses, and for any reason. The Commission is not required to give its reasons for denying a license plate application. In *WRN*, the court held that the license plate forum was facially unconstitutional because of such a lack of criteria and standards.

For these reasons, the previous "Choose Life" decisions support reversal of the District Court of Arizona.[22]

CONCLUSION

The District Court of Arizona's judgment should be reversed.

Respectfully Submitted,

[22] While not directly applicable to the appeal at hand, the decisions addressing standing and the TIA also support the position of Arizona Life Coalition. According to those decisions, Arizona Life Coalition clearly has standing, and the TIA does not apply because the remedy the Coalition seeks would "enrich and not deplete the government's resources." *See Henderson*, 407 F.3d at 359.

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February 3, 2006

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