11-5199-cv

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

CHILDREN FIRST FOUNDATION, INC., *Plaintiff-Appellee*,

ELIZABETH REX, *Plaintiff*,

v.

BARBARA J. FIALA, *Defendant-Appellant*,

RAYMOND P. MARTINEZ, Jr., individually, JILL A. DUNN, individually, DAVID A. PATTERSON, in his official capacity as governor of the State of New York, GEORGE E. PATAKI, individually, NEAL SCHOEN, in his official capacity as Deputy Commissioner and Counsel for the New York State Department of Motor Vehicles, *Defendants*.

On Appeal from the United States District Court for the Northern District of New York

---

AMICUS CURIAE BRIEF OF NEW YORK STATE PREGNANCY CARE CENTERS AND NATIONAL PREGNANCY CARE ORGANIZATIONS IN SUPPORT OF PLAINTIFF-APPELLEE AND AFFIRMANCE OF THE LOWER COURT

Mailee R. Smith
Counsel of Record for Amici
Americans United for Life

655 15th St. NW, Suite 410
Washington, D.C. 20005
Telephone: 202-289-1478
Facsimile: 202-289-1473

CORPORATE DISCLOSURE STATEMENT

Amici Alight Center, Inc. (Hudson), Care Net Pregnancy Center of the Hudson Valley (Poughkeepsie), Boro Pregnancy Counseling Center (Queens), Buffalo Pregnancy Care Center (Buffalo), Life Center of Long Island (Deer Park, Hempstead, Massapequa), Pregnancy Care Center of Cayuga County (Auburn), Pregnancy Resource Center of the Valleys, Inc. (Bath), Care Net, Heartbeat International, and National Institute of Family and Life Advocates are non-profit corporations. They have no parent corporation, and there is no publicly held corporation that owns 10 percent or more of their stock.

s/ Mailee R. Smith
Mailee R. Smith
Counsel of Record for Amici
Americans United for Life
655 15th St. NW, Suite 410
Washington, D.C. 20005
Telephone: 202-289-1478
Facsimile: 202-289-1473

Dated July 10, 2012

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

REGULATORY AUTHORITY

STATEMENT OF INTEREST OF *AMICI CURIAE*[1]

Amici curiae Alight Center, Inc. (Hudson), Care Net Pregnancy Center of the Hudson Valley (Poughkeepsie), Boro Pregnancy Counseling Center (Queens), Buffalo Pregnancy Care Center (Buffalo), Life Center of Long Island (Deer Park, Hempstead, Massapequa), Pregnancy Care Center of Cayuga County (Auburn), and Pregnancy Resource Center of the Valleys, Inc. (Bath) ("New York PCCs") are pregnancy care centers ("PCCs") which stand to benefit from the funds generated by Choose Life Foundation ("CFF") through the sale of "Choose Life" license plates in New York. Specifically, *Amici* New York PCCs are non-profit organizations that receive no government funding, provide services to pregnant women, and do not perform or refer for abortion. *See Children First Foundation, Inc. v. Martinez*, 2011 U.S. Dist. LEXIS 129047, *5 (N.D.N.Y. Nov. 8, 2011).

Amici New York PCCs provide a variety of pregnancy and post-pregnancy services, including adoption education and counseling. *Amici* offer a broad range of educational information on pregnancy, fetal development, nutrition, and pregnancy options. Services may also include free pregnancy testing, maternity

[1] *Amici* have authority to file this brief under Fed. R. App. P. 29 because all parties have consented to its filing. A party's counsel has not authored the brief in whole or in part. Neither a party nor a party's counsel has contributed money that was intended to fund the preparation or submission of the brief. No person outside of *Amici* or their Counsel has contributed money intended to fund preparation of the brief.

clothing, prenatal vitamins, and ultrasound services. *Amici* are committed to the well-being of the women they serve, as is demonstrated by their educational resources and counseling on adoption, life skills, and other post-pregnancy resources.

The proceeds generated by the sale of "Choose Life" license plates would assist *Amici* in their goals of protecting the well-being of the women they serve as well as ensuring that women make informed choices about their pregnancies. As such, *Amici* have a genuine and significant interest in the outcome of this case and urge this Court to affirm the judgment of the Northern District of New York.

Similarly, *Amici* Care Net, Heartbeat International, and National Institute of Family and Life Advocates are national organizations ("*Amici* National Organizations") that network individual PCCs across the nation. Specifically, *Amici* National Organizations have many affiliates in the state of New York and have an interest in ensuring that those affiliate PCCs have the maximum resources available to carry on their mission of assisting pregnant women and mothers.

ARGUMENT

Numerous "Choose Life" license plate cases have been decided in federal courts. Though the decisions at times appear conflicting, when the cases are examined, trends become obvious. For example, when a legislature authorizes "Choose Life" plates, courts are more likely to find the message to constitute at

least some degree of government speech. When the process is initiated by the application of a private organization, courts are more likely to find that the "Choose Life" message constitutes private speech.

While the parties in this action have agreed that the "Choose Life" message constitutes private speech, there is much to be gained from examining the varying factual and legal situations presented in previous "Choose Life" cases. A starting point is acknowledging that state specialty license plate programs fall into one of three categories: 1) programs where the process is initiated by the legislature (South Carolina and Tennessee); 2) programs where the process is initiated by a hybrid of private application and legislative action (Illinois and Florida); and 3) programs where the process is initiated solely by private application (Arizona and Missouri). In Part I, this brief examines the fact situations and legal conclusions presented in cases arising under each of the three types of specialty plate programs.

It is undisputed by the parties that the law in New York enables the Commissioner of the Department of Motor Vehicles (DMV) to issue specialty (or "custom") license plates for an additional fee and to promulgate regulations in relation thereto. *Children First Foundation, Inc. v. Martinez*, 2011 U.S. Dist. LEXIS 129047, *5 (N.D.N.Y. Nov. 8, 2011). There are several categories and sub-categories of specialty plates. *Id*. at *6. While some plates are authorized after legislative action, there is also an application procedure for the issuance of a

specialty plate within the discretion of the Commissioner of the DMV. It is that private application procedure under which Plaintiff Children First Foundation ("CFF") applied for a "Choose Life" plate.

Thus, the process at issue in this case falls squarely in line with the third category of state programs in which specialty plates are approved after private application (Arizona and Missouri). In those states, courts have ruled that failing to authorize the "Choose Life" message when a private entity has fulfilled all statutory requirements constitutes impermissible viewpoint discrimination, especially in light of the unbridled discretion allowed under the applicable statutes. Part II demonstrates that the lower court here should be affirmed under this line of cases.

I. THE VARYING FACTUAL AND LEGAL CIRCUMSTANCES IN OTHER "CHOOSE LIFE" CASES FALL INTO THREE CATEGORIES

The starting point when examining a case under the construct of other "Choose Life" decisions is to determine how a state allows for authorization of specialty plates—*i.e*., how the specialty license plate process works. This initial determination offers significant guidance in resolving the case on the merits.[2]

[2] A number of courts, while considering similar license plates, ruled based upon technical issues not at issue in this case. For example, cases challenging authorization of "Choose Life" plates have been dismissed in the Fifth Circuit and the Northern District of Ohio for lack of jurisdiction under the Tax Injunction Act (TIA). *See Henderson v. Stalder*, 407 F.3d 351 (5th Cir. 2005), *cert. denied sub*

A. Specialty plates initiated through legislative action alone: South Carolina (*Rose*) and Tennessee (*Bredesen*)

There have been two Circuit cases decided on the merits that involved "Choose Life" license plates approved through legislative enactment: *Planned Parenthood of South Carolina v. Rose* out of South Carolina, and *A.C.L.U. of Tennessee v. Bredesen* out of Tennessee.

In 2001, the South Carolina legislature enacted a statute authorizing the issuance of specialty license plates bearing the message "Choose Life." *Planned Parenthood of South Carolina 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. *Id*. The pro-abortion plaintiff organization never applied for an organizational plate under the more general statute. *Id*.

In determining whether the "Choose Life" message constituted government or private speech, the Fourth Circuit Court of Appeals utilized four factors

---

nom. *Keeler v. Stalder*, 548 U.S. 904 (2006); *NARAL Pro-Choice Ohio v. Taft*, 2005 U.S. Dist. LEXIS 21394 (N.D. Ohio Sept. 27, 2005). Because the TIA is not at issue here, these cases will not be discussed. Likewise, in *Hill v. Kemp*, the first four counts involving viewpoint discrimination were dismissed under the TIA. 478 F.3d 1236 (10th Cir. 2007), *cert. denied*, 552 U.S. 1096 (2008). After the district court denied summary judgment to plaintiffs challenging the plates, the case was not appealed and the issues were resolved. *See Hill v. Kemp*, 645 F.Supp.2d 992 (N.D. Okla. 2009) (focusing on the funding implications of the license plate program).

delineated in *Sons of Confederate Veterans, Inc. v. Commissioner of the Virginia Department of Motor Vehicles,* 288 F.3d 610 (4th Cir. 2002), and concluded that the plates constituted a hybrid of government and private speech.[3]

In assessing whether the state engaged in unconstitutional viewpoint discrimination in legislatively approving the "Choose Life" plate, the court concluded that the state was promoting the expression of one viewpoint while preventing the expression of another viewpoint. Rose, F.3d at 795. The court noted that the state had created a limited public forum for expression and favored itself as a speaker, giving its own viewpoint privilege above others. *Id*. Because the state had established a license plate forum for the abortion debate, it could not then limit the viewpoints expressed in the forum. *Id*. at 798. Because the legislature (and not a commission or other state actor acting under state statutory authority) had approved the plates, unbridled discretion was not discussed.[4]

---

[3] Those four factors are 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. *Sons of Confederate Veterans,* 288 F.3d at 618.

[4] A similar case is now pending before a district court in North Carolina, after the North Carolina General Assembly enacted another "Choose Life" plate in 2011. *See A.C.L.U. of North Carolina v. Conti*, 2011 U.S. Dist. LEXIS 141146 (E.D. N.C. Dec. 8, 2011).

In 2006, the Sixth Circuit Court of Appeals examined a similar situation in the case *A.C.L.U. of Tennessee v. Bredesen*, 441 F.3d 370 (6th Cir. 2006). In 2003, the Tennessee legislature passed an act authorizing a "Choose Life" specialty plate, which was "designed in consultation with a representative of New Life Resources," the non-profit managing the funds generated. *Id.* at 372. The act strictly regulated the precise activities funded by the proceeds and designated a "comprehensive list" of dozens of groups that must share in the profits. *Id*. The plaintiffs filed suit after legislation authorizing a "Pro-Choice" plate was defeated. *Id*.

In examining whether the "Choose Life" message constituted government or private speech, the court relied on *Johanns v. Livestock Marketing Association*[5] and summarized its holding as follows: when "the government sets the overall message to be communicated and approves every word that is disseminated," it is government speech. *Id*. at 376 (quoting *Johanns*, 544 U.S. at 562).

In utilizing this test, the court relied upon the fact that the Tennessee legislature spelled out in a statute that the plates were to bear the message "Choose Life." *Id*. This fact alone led the court to conclude that Tennessee "set the overall

[5] *Johanns* concerned "The Beef Promotion and Research Act of 1985," which established a federal policy of promoting and marketing beef and beef products. *See generally Johanns*, 544 U.S. 550 (2005). It did not in any way involve license plate speech.

message and the specific message" of the plates. *Id*. In addition, Tennessee retained veto power over the design of the plate, and the commissioner determined the design configuration. *Id*.

Because the state retained power to withdraw authorization for any specialty license plate, the court concluded that the state had "final approval authority over every word used" on the plates. *Id*. The court also concluded that the state set the overall message to be communicated and approved every word disseminated on the plates. *Id*. The court therefore did not address whether the state engaged in viewpoint discrimination; the state was merely asserting its own viewpoint.

While *Rose* and *Bredesen* involved similar fact scenarios, the courts obviously reached very different conclusions. However, those conclusions do not need to be reconciled here, where the facts necessitate a different legal analysis, as demonstrated below.

B. Specialty plates initiated through a hybrid process of private application and legislative action: Illinois (*Choose Life Illinois*) and Florida (*Women's Emergency Network*)

The second line of cases to be examined involves hybrid specialty plate programs involving both private application and legislative action. The Seventh Circuit is the only federal appellate court to have examined such a situation on the merits. *See Choose Life Illinois, Inc. v. White*, 547 F.3d 853 (7th Cir. 2008). However, a district court opinion out of Florida also involved a hybrid

application/legislative process. *See Women's Emergency Network v. Bush*, 323 F.3d 937 (11th Cir. 2003).

The facts in *Choose Life Illinois, Inc. v. White* are intricate and bear careful examination. The statute initially at issue simply prohibited the Secretary of State from issuing a new line of specialty plates unless a minimum of 10,000 applications for a plate had been received. *Choose Life Illinois*, 547 F.3d at 856. The Secretary had the discretion to "prescribe some other required number of applications" if that number was "sufficient to pay for the total cost of designing, manufacturing and issuing the special license plate." *Id*.

Choose Life Illinois ("CLI") collected more than 25,000 signatures and applied to the Secretary for issuance of a "Choose Life" plate. *Id*. at 855. Based upon an unwritten practice of that office, the Secretary then referred the request to the General Assembly for enabling legislation. *Id*. Although there was strong support for the "Choose Life" plate, the request died in subcommittee. *Id*. CLI then filed suit in federal court. *Id*. The district court agreed with CLI that, under the applicable statute, the Secretary was authorized to issue the plates without legislative approval, and that his failure to do so after CLI met the statutory requirements constituted impermissible viewpoint discrimination. *Id*.

While the district court's opinion was on appeal, the General Assembly amended the applicable statute to require express prior legislative approval before

the Secretary could issue new specialty plates. *Id*. The Seventh Circuit's opinion was based upon the new process, which is a hybrid of both private application and legislative action.

After determining that specialty plates constitute private speech, the Seventh Circuit concluded that the license plates are a nonpublic forum—the only Circuit to issue such a holding in a "Choose Life" case. *Id*. at 865. In concluding that the state had not engaged in impermissible viewpoint discrimination, the court incorrectly claimed that the state had excluded the entire subject of abortion from its specialty plate program (and not just the pro-life viewpoint) and had said, "no abortion-related specialty plates, period." *Id*.

However, the legislature had not issued any sort of decree regarding abortion-related plates. There was nothing stopping the legislature from issuing both a pro-life and a pro-abortion plate in future sessions. Basing the court's determination on a factual scenario that could change after the next election is an improper basis for First Amendment analysis. As one concurring opinion pointed out, "This [was] nothing more than the Illinois legislature rejecting the efforts to approve a single license plate." *Id*. at 867 (Manion, J., concurring). "By rejecting

a 'Choose Life' plate, it is not clear … that the legislature decided to exclude 'the *entire subject* of abortion.'" *Id*. (emphasis in original).[6]

In essence, the Seventh Circuit based its decision regarding viewpoint discrimination on the faulty presumption that the state had blocked the entire subject of abortion from the specialty license plate program—which it had not. The state had rejected *one side* of the abortion debate.

Moreover, the situation in Illinois presents a much different set of facts than that in New York. More closely akin to the facts at issue here are the facts as they were before the district court in Illinois—before the Illinois statute was amended to clearly require legislative involvement. Prior to that amendment, it appeared that the decision was simply left to the discretion of the Secretary of State, whose only statutory guidance was that he could not issue plates if a minimum number of applications were not received. As noted by the Seventh Circuit, the issue of whether the Secretary had impermissible unbridled discretion under the original statute was mooted by the amendment. *Id*. at 858 n.4.

We do not know whether the Seventh Circuit would have decided that the former statutory language granted unbridled discretion in the Secretary of State; we

[6] As such, it was error for the Seventh Circuit to claim "[i]t is undisputed that Illinois has excluded the *entire subject* of abortion from its specialty-plate program." *Choose Life Illinois*, 547 F.3d at 865 (emphasis in original). It was, in fact, disputed by a judge on that very panel.

do know, however, that the Seventh Circuit stated that because the language was phrased as a limitation (*i.e.* limiting when the Secretary could act) as opposed to a granting of authority to approve plates, it "beg[ged] the question of who [had] the approval authority." *Id*. at 858. This implies at least a hint of vagueness in the former statutory language most analogous here.

Turning to Florida, we see another case involving the hybrid application/legislative approval process. While *Women's Emergency Network* was not a decision on the merits, statements made by the court should be considered. Like Illinois, the authorization of specialty plates in Florida also utilizes a hybrid private application/legislative approval process. Under the applicable statute, an interested organization must submit to the Department of Highway Safety and Motor Vehicles 1) a request for the specialty plate (including a general description); 2) a scientific survey indicating that at least 15,000 Floridians intend to purchase the plate; 3) an application fee; and 4) a marketing strategy. *Women's Emergency Network*, 323 F.3d at 941. If an organization satisfies these requirements, the Department submits the plan to the Florida legislature to either enact a law authorizing the plate or to reject the plan. *Id*.

In *Women's Emergency Network v. Bush*, the plaintiffs were challenging the legislative authorization of the "Choose Life" plate.[7] *Id*. at 940. After the applicant organization had satisfied all of the statutory requirements, the "Choose Life" plate was submitted to the legislature. *Id*. at 941. A senator offered an amendment that would have created a second specialty plate with the message "Pro Choice," despite the fact that such a plate had not fulfilled the statutory requirements. *Id*. The amendment was defeated, and the "Choose Life" plate legislation passed. *Id*.

While the case was ultimately dismissed because the plaintiffs lacked standing, the Eleventh Circuit noted that if the message on a license plate is private speech, the First Amendment "significantly constrains the State's ability to regulate the speech." *Id*. at 945 n.9. The court also noted that "[t]he First Amendment is intended to protect speech, not censor it." *Id*. at 948.

Again, the courts examining these hybrid processes appear to have come to very different conclusions based upon different legal technicalities. Yet as demonstrated below, these fact situations do not need to be reconciled in order for this Court to affirm the lower court, as these cases are dissimilar to the facts at issue here.

[7] The plaintiffs were also challenging the disbursal of funds generated by the plates to organizations that provide adoption services. *Women's Emergency Network*, 323 F.3d at 940.

C. Specialty plates initiated through private application alone: Arizona (*Arizona Life Coalition*) and Missouri (*Roach*)

Finally, two federal appellate courts have considered on the merits an application process like the one at issue in New York; namely, a specialty plate program based entirely on private application. In both *Arizona Life Coalition Inc. v. Stanton*, 515 F.3d 956 (9th Cir. 2007), and *Roach v. Stouffer*, 560 F.3d 860 (8th Cir. 2012), the federal appellate courts ruled that failure to approve "Choose Life" license plates after the applicant organizations fulfilled all statutory requirements constituted impermissible viewpoint discrimination.

In Arizona, a private organization can apply for a specialty plate with the Arizona Department of Transportation ("Department"). *Arizona Life Coalition*, 515 F.3d at 961 n.2. Once the Department determines that the organization has at least 200 members or agrees to pay the production costs of the plates, the Department submits a request to the License Plate Commission ("Commission"). *Id*.; *id*. at 961 n.3. The Commission is to authorize the plate if: 1) the primary activity of the organization serves the community and is not offensive or discriminatory; 2) the plate does not promote any specific product or brand; and 3) the purpose of the organization is not to promote a religion or belief. *Id*. at 961.

Arizona Life Coalition ("Life Coalition") complied with the statutory requirements, and the Department submitted the plate request to the Commission. Members of the Commission raised concerns over whether the general public

would believe that the state had endorsed the message, as well as concerns over whether groups with differing viewpoints would file applications. *Id*. The Commission then tabled the application. *Id*.

In response, Life Coalition filed a revised application and proposed including its name on the plate design. *Id*. After the Commission declined to take action, the Chairman of Life Coalition asked the Commission to explain what statutory requirements Life Coalition had failed to satisfy. A member of the Coalition then moved to formally deny the application, which passed by voice vote. *Id*. at 962. When an explanation was requested, the Chairperson of the Commission stated that "the action of the Commission is final" and that it was not "an opportunity for[] further debate." *Id*. Life Coalition subsequently filed suit.

In determining that the license plate constituted private speech, the Ninth Circuit contrasted the situation in Arizona from that in South Carolina (*Rose*) by pointing out that the idea of the Arizona "Choose Life" license plate originated with Life Coalition—inherently highlighting the fact that the origin of the "Choose Life" plates plays a significant role in a court's analysis. *Id*. at 966. The Ninth Circuit determined that the state's specialty license plate program was a limited public forum and that any access restriction must be viewpoint neutral and reasonable in light of the purpose served by the forum. *Id*. at 971.

The court noted that the applicable statutes did not expressly prohibit abortion-related speech, but that the state had opened the forum to all organizations that served the community and contributed to the welfare of others in a nondiscriminatory way. *Id*. at 971-72. The Commission did not argue that Life Coalition did not meet this statutory requirement; instead, the "only justification" the Commission gave for denying the "Choose Life" plate was that it chose not to enter the Choose Life/Pro-Choice debate. *Id*. at 972. The court determined that preventing Life Coalition from expressing its viewpoint out of fear that other groups would express opposing views "seems to be a clear form of viewpoint discrimination," noting that a "ban on 'controversial [speech]' may all too easily lend itself to viewpoint discrimination." *Id*. (citation omitted). "[O]nce the government has chosen to permit discussion of certain subject matters, it may not then silence speakers who address those subject matters from a particular perspective." *Id*. (citation omitted).

Significantly, the Ninth Circuit noted the following:

> The only substantive restriction is that the license plate cannot promote a specific product for sale, or a specific religion, faith, or antireligious belief. Nowhere does the statute create objective criteria for limiting "controversial" material, and nowhere does the statute prohibit speech related to abortion.

Id. Because abortion-related speech fell within the boundaries of the state's limited public forum and because the Commission denied the application based on

the nature of the message, the court concluded that the Commission's actions were "viewpoint discriminatory." *Id.*

Turning to the second prong—reasonableness—the court concluded that the Commission acted unreasonably in denying the application for reasons not statutorily based or related to the purpose of the limited public forum. *Id*. The Commission did not dispute that Life Coalition had met the outlined statutory requirements and that when an organization meets the statutory requirements, the statute provides that "[t]he [C]omission *shall* authorize a special organization plate." *Id*. at 973 (emphasis in original).

Mindful of "potential constitutional problems when government officials are given unbridled discretion in regulating speech," the court concluded that Arizona had defined the outer limits of its specialty license plate program and that Life Coalition fit within those statutory boundaries. *Id*. Because the Commission denied the application for a reason "not expressly related to the forum's purpose by discriminating on the basis of the viewpoint" of the "Choose Life" message, the court concluded that the Commission acted in violation of the First Amendment. *Id*.

The Eighth Circuit reached similar conclusions in *Roach v. Stouffer*. Like New York, Missouri law provides for two methods to create a specialty plate. *Roach*, 560 F.3d at 862. First, the Missouri legislature can pass legislation creating

a specialty plate. *Id.* In the alternative, private organizations can apply to the Department of Revenue for a specialty plate. *Id.* Unlike the situation in *Choose Life Illinois*, these options represent two distinct routes of approval and are not a private application/legislative-action hybrid. Thus, at issue in *Roach*, as in the case at hand, was the third category of specialty plate program: application by a private organization.

Under the process of private application in Missouri, an organization must initially petition the Department of Revenue by submitting 1) an application, sponsored by at least one member of the General Assembly, describing the potential plate; 2) a list of at least 200 potential applicants; and 3) an application fee. *Id.* Then, the Department "shall" submit for approval all applications to the joint committee on transportation oversight ("joint committee"). *Id.* If the joint committee receives a signed petition from five house members or 2 senators that they are opposed to a particular plate, the joint committee shall not approve the application. *Id.*

Choose Life of Missouri, Inc., submitted an application to the Department of Revenue for a "Choose Life" plate and "fully complied" with the statutory requirements. *Id.* at 863. However, two state senators submitted a letter to the joint committee opposing the plates, and the joint committee denied the application. *Id.* Choose Life of Missouri requested a review of the decision, and

the joint committee again rejected the application. *Id*. Choose Life of Missouri then filed suit. *Id*. The district court, subsequently affirmed by the Eighth Circuit, held that the statutory scheme "lacked adequate guidelines to prevent viewpoint discrimination by the state because 'there is unbridled discretion given to the government official(s) in deciding to approve or deny a specialty plate.'" *Id*.

On appeal, the Eighth Circuit first concluded that the specialty plates constitute private speech. *Id*. at 868. The court then turned to the issue of whether the specialty plate program is unconstitutional because it allows the state to engage in viewpoint discrimination. *Id*. at 869. Because the court found that the statute unconstitutionally failed to provide standards or guidelines to prevent viewpoint discrimination, the court did not need to conduct a forum analysis. *Id*. at 868 n.4.

The Eighth Circuit then explained that the issue of unbridled discretion is intricately tied to the viewpoint discrimination analysis; they are not two separate issues, but instead unbridled discretion is indicative of viewpoint discrimination. The conclusion "rests not on whether the [state actor] has exercised his discretion in a content-based manner, but whether there is anything in the ordinance to prevent him from doing so." *Id*. at 869 (citation omitted). The danger of viewpoint discrimination is "at its zenith when the determination of who may speak and who may not is left to the unbridled discretion of a government official." *Id*. (citation omitted).

With that constitutional framework in mind, the Eighth Circuit concluded that Missouri's statute was so broad that there was nothing to prevent the Department of Revenue from denying the plate because of viewpoint. *Id*. The statute provided "no standards or guidelines whatsoever to limit the unbridled discretion" of the joint committee. *Id*. Because the statute simply *allowed* the joint committee unbridled discretion to determine who may speak based on the viewpoint of the speaker, the court found that the statute allowed for viewpoint discrimination and was, therefore, unconstitutional. *Id*. at 870.

As demonstrated below, the fact situation in the case at hand most closely resembles the situations in Arizona and Missouri.[8]

[8] *See also Children First Foundation, Inc. v. Legreide*, 373 Fed. Appx. 156 (3rd Cir. 2010). In reversing a lower court decision granting qualified immunity to government defendants who had denied a private application for a "Choose Life" license plate, the Third Circuit noted that the plaintiff made plausible a claim of viewpoint discrimination. *Id*. at 160. Like New York, Arizona, and Missouri, New Jersey authorized the issuance of a specialty organization vehicle registration (specialty plate) as long as the organization applying complied with certain statutory requirements. *Id*. at 158. The Chief Administrator of the Motor Vehicle Commission had final authority to approve an organization's application and had refused to approve the plaintiffs' "Choose Life" design because it was "controversial." *Id*. After the Third Circuit's decision, the parties entered a stipulation of dismissal, and the plates are now available in New Jersey.

II. AS IN THE ARIZONA AND MISSOURI CASES, DEFENDANTS HAVE ENGAGED IN IMPERMISSIBLE VIEWPOINT DISCRIMINATION AND THEIR UNBRIDLED DISCRETION NECESSITATES A FINDING OF UNCONSTITUTIONALITY

As demonstrated above, the Ninth and Eighth Circuits have reviewed situations where a private organization applies for a "Choose Life" plate and one person or a commission (as opposed to an elected legislature) maintains total discretion and responsibility for approving or disapproving the license plate application. In both of these cases, the courts concluded that the failure of the person or commission to approve the application resulted in impermissible viewpoint discrimination because of the person or commission's unbridled discretion. Both the regulation and the actions of Defendants here parallel those in these cases.

The relevant facts in this case are not in dispute. New York maintains a private application procedure (*i.e.*, the third category discussed above) for the issuance of specialty license plates. *Children First Foundation,* 2011 U.S. Dist. LEXIS 129047, at *6. There are certain prerequisites in applying for such a plate:

1) An organization must be not-for-profit and registered with the New York State Department of State;
2) It must have a sponsoring agency or organization as the main point of contact; and
3) It must pay a $5,000 deposit and sign a memorandum of understanding with the DMV that the deposit is refunded when 200 sets of the plate are sold within a three-year period.

Id. It is undisputed that CFF complied with requirements for entry into the program: it is a nonprofit organization incorporated in New York State and it submitted its application for a "Choose Life" custom plate, including all of the requested information and documentation in accordance with the DMV's requirements. *Id*. at *41.

The only applicable regulation governing the issuance of the plates provides that no plate shall be issued that "is, in the discretion of the commissioner, obscene, lewd, lascivious, derogatory to a particular ethnic or other group, or patently offensive." N.Y. COMP. CODES R. & REGS. tit. 15, § 16.5(e). Otherwise, as the district court noted, approval of a specialty plate in New York is purely within the discretion of the Commissioner and is not governed by statute or regulation. *Children First Foundation*, 2011 U.S. Dist. LEXIS 129047, at *44.

In February 2002, Commissioner Martinez denied CFF's application citing "the State of New York's policy[9] not to promote or display politically sensitive messages" because of the potential for "road rage." *Id*. at *8. After CFF's legal counsel contacted the Commissioner by letter, Deputy Commissioner Dunn replied that the application was rejected "on the grounds that the requested custom plate series is inconsistent with [the DMV's] regulations in that the message is patently offensive and could provoke outrage from members of the public." *Id*. at **8-9.

[9] This alleged "policy" is not in the applicable regulation.

Dunn concluded that the DMV intended to "preserve viewpoint neutrality by insuring that the plates issued by the State do not present or support either side of this issue, or any other political, religious or social issue that has proven to be so contentious and divisive." *Id*. at **9-10.

CFF thereafter submitted a revised application, changing the line "Choose Life" to "FUND-ADOPTION.ORG," but Commissioner Martinez rejected that plate as well (citing Dunn's previous letter). *Id*. at *10. CFF subsequently submitted an additional plate design, but Dunn notified CFF that Commissioner Martinez had suspended the specialty plate program. *Id*. at *11.

These undisputed facts place the situation in New York directly in line with those situations in Arizona and Missouri, where federal appellate courts ruled that the states' actions constituted impermissible viewpoint discrimination resulting from unbridled discretion in approving or disapproving applications. As in Arizona, CFF has complied with all application requirements. The Commissioner (and Deputy Commissioner) raised concerns over whether the general public would believe that the state had endorsed the message. *See id*. at * 9 (quoting Dunn as stating that "[t]he [DMV's] issuance of a 'Choose Life' custom plate series would readily be perceived as governmental support for one side of a controversy…."). In response, CFF (like Life Coalition in Arizona) filed a revised application that was also rejected. And, as in Arizona, the applicable regulation

does not expressly prohibit abortion-related speech. Instead, the state has opened the forum to all organizations that meet the application requirements.

As concluded by the Ninth Circuit in *Arizona Life Coalition*, exclusion of the entire subject of abortion from the forum is not permissible, but is discrimination based on viewpoint. As noted above, Dunn concluded that the state intended to "preserve viewpoint neutrality by insuring that the plates issued by the State do not present or support either side of this issue, or any other political, religious or social issue that has proven to be so contentious and divisive." The state was excluding certain issues that are "so contentious and divisive." Not only does this amount to viewpoint discrimination, but who decides when issues arise to the point of being "so contentious and divisive" that a specialty plate cannot be allowed? Does this mean that a contentious and divisive religious issue will be approved for a specialty plate message as long as it has not reached some unwritten level of contentiousness or divisiveness? The statements of the Defendants demonstrate impermissible viewpoint discretion and unconstitutional, unbridled discretion.

As the Ninth Circuit noted, the only substantive restriction here is that the plate is not, in the Commissioner's view, "obscene, lewd, lascivious, derogatory to a particular ethnic or other group, or patently offensive." "Nowhere does the [applicable regulation] create objective criteria for limiting 'controversial'

material, and nowhere does the [applicable regulation] prohibit speech related to abortion." *Arizona Life Coalition*, 515 F.3d at 972. As in *Arizona Life Coalition*, abortion-related speech falls within the boundaries of the forum and, because the Commissioner denied the plates based on the nature of the message, the Defendants have engaged in viewpoint discrimination. *See id*. Likewise, the Defendants acted unreasonably in denying the application for reasons not statutorily based or related to the purpose of the forum. *Id*.

The similarities to the facts in Missouri also weigh in favor of affirming the lower court. Again, like the plaintiffs in Missouri, CFF fully complied with the applicable requirements. But as the district court noted in *Roach*, New York's process "lack[s] adequate guidelines to prevent viewpoint discrimination by the state because 'there is unbridled discretion given to the government official(s) in deciding to approve or deny a specialty plate.'" *Roach*, 560 F.3d at 863. As the Eighth Circuit held, the New York scheme unconstitutionally fails to provide standards or guidelines to prevent viewpoint discrimination. The unbridled discretion vested in the Commissioner is indicative of viewpoint discrimination.

And as in Missouri, this framework is so broad that there is nothing preventing the Commissioner from denying a plate because of the viewpoint expressed. The applicable regulation provides "no standards or guidelines whatsoever to limit the unbridled discretion" of the Commissioner. *Id*. at 869.

Because the regulation allows the Commissioner unbridled discretion to determine who may speak based on the viewpoint of the speaker, the regulation allows for viewpoint discrimination and is, therefore, unconstitutional.

As held by the Eighth Circuit and the lower court here, viewpoint discretion is "at its zenith when the determination of who may speak and who may not is left to the unbridled discretion of a government official." *Id*. at 869; *Children First Foundation*, 2011 U.S. Dist. LEXIS 129047, at *42. There is no question here that the determination of who may speak and who may not is left to the unbridled discretion of the Commissioner. As such, the lower court must be affirmed.

CONCLUSION

The judgment of the Northern District of New York should be affirmed.

Respectfully submitted,

s/ Mailee R. Smith
Counsel of Record for Amici Curiae
Americans United for Life
655 15th St. NW, Suite 410
Washington, D.C. 20005
Telephone: 202-289-1478
Facsimile: 202-289-1473

Dated July 10, 2012

CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because:

   _X_ this brief contains **6,035** words excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because:

   _X_ this brief has been prepared in a proportionally spaced typeface using Microsoft Office Word 2007 in Times New Roman font, size 14.

s/ Mailee R. Smith
Counsel of Record for *Amici Curiae*
Dated July 10, 2012

CERTIFICATE OF SERVICE

I hereby certify that on July 10, 2012, a true and correct copy of the foregoing Brief was electronically filed with the Clerk of Court through the CM/ECF system. An electronic copy will be served on all counsel of record through the CM/ECF system. I will also send six (6) copies of this brief to the Clerk's office via Federal Express, pursuant to Local Rule 31.1.

Dated: July 10, 2012

s/ Mailee R. Smith
Counsel of Record for *Amici Curiae*