No. 07-1349

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

CHOOSE LIFE ILLINOIS, INC., et al.,

Plaintiffs-Appellees,

v.

JESSE WHITE, Secretary of State of the State of Illinois,

Defendant-Appellant.

On Appeal from the Northern District of Illinois, No. 04-4316

BRIEF OF *AMICI CURIAE* SUNNY RIDGE FAMILY CENTER, CHRYSALIS SHEPHERDING HOME, AID FOR WOMEN, INC., ARMS OF LOVE CRISIS PREGNANCY CENTER, CRISIS PREGNANCY CARE CENTER, FAMILY LIFE PREGNANCY CENTER, FREEPORT PREGNANCY CENTER, HOPE LIFE CENTER, NEW BEGINNINGS PREGNANCY CARE CENTERS, NEW HOPE PREGNANCY CENTER, NEW LIFE PREGNANCY CENTER, PREGNANCY RESOURCE CENTER, QUINCY CRISIS PREGNANCY CENTER, SHAWNEE CRISIS PREGNANCY CENTER, SOUTH CENTRAL PREGNANCY CARE CENTER, TRI-STATE FAMILY SERVICES, WATERLOO CRISIS PREGNANCY CENTER, AND WOMEN'S PREGNANCY CENTER IN SUPPORT OF PLAINTIFFS-APPELLEES AND AFFIRMANCE OF THE DISTRICT COURT

Mailee R. Smith
Counsel of Record
Clarke D. Forsythe
Denise M. Burke
Americans United for Life
310 S. Peoria St., Suite 500
Chicago, Illinois 60607
Telephone: 312-492-7234

Counsel for Amici Curiae
August 3, 2007

CORPORATE DISCLOSURE STATEMENT

Amici Sunny Ridge Family Center, Chrysalis Shepherding Home, Aid for Women, Inc., Arms of Love Crisis Pregnancy Center, Crisis Pregnancy Care Center, Family Life Pregnancy Center, Freeport Pregnancy Center, Hope Life Center, New Beginnings Pregnancy Care Centers, New Hope Pregnancy Center, New Life Pregnancy Center, Pregnancy Resource Center, Quincy Crisis Pregnancy Center, Shawnee Crisis Pregnancy Center, South Central Pregnancy Care Center, Tri-State Family Services, Waterloo Crisis Pregnancy Center, and Women's Pregnancy Center are not-for-profit organizations that have no parent corporation, and no publicly held corporation owns any stock in *Amici*.

The following attorneys at the following organization appear for *Amici* in this cause. *Amici* were not involved in this case at the District Court level.

Mailee R. Smith
Counsel of Record
Clarke D. Forsythe
Denise M. Burke
Americans United for Life
310 S. Peoria St., Suite 500
Chicago, Illinois 60607
Telephone: 312-492-7234

_____
Mailee R. Smith
Counsel for Amici

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STATEMENT OF INTEREST OF *AMICI CURIAE*[1]

Amici Curiae are non-profit entities which stand to benefit from the funds generated by Choose Life license plates in Illinois. The stated purposes of Choose Life Illinois are to "promote within the State of Illinois the adoption of children, to increase public awareness about the importance of adoption, [and] to educate the public concerning the adoption of children." Complaint at 3. Along that line, the purpose of the Choose Life license plates is to promote and raise revenue for the cause of adoption in Illinois. *Id*. at 4, 6.[2]

According to Choose Life Illinois, the funds generated by the sales of Choose Life license plates would be allocated to the following:

> [n]on-governmental, not-for-profit agencies not involved in abortion services in any way who offer free counseling and services to women who are committed to making an adoption plan for their child, including ***homes for unwed mothers***, ***pregnancy help centers***, ***adoption agencies***, and organizations that provide help for foster and special needs children.

See Illinois Choose Life, *Frequently Asked Questions* (emphasis added).[3] Thus, the following *Amici* clearly stand to benefit from the funds generated from the license plates and thus have a significant interest in the outcome of this case:

Amicus Sunny Ridge Family Center is an "adoption agency" located in Bolingbrook.[4] In the last year, Sunny Ridge has worked with almost 100 women who

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[1] According to Fed. R. App. P. 29, Counsel for *Amici* has simultaneously submitted a Motion for Leave to File this brief. Plaintiffs-Appellees have consented to the filing of this brief; Defendant-Appellant does not oppose the filing of this brief.

[2] *See also Choose Life Ill., Inc. v. White*, 2007 U.S. Dist. LEXIS 21863, *3 (N.D. Ill. Jan. 19, 2007) ("The proceeds from specialty plates typically inure in large part to the benefit of various non-profit interest groups….").

[3] *Available at* http://www.ilchoose-life.org/FrequentlyAsked.htm (last visited July 9, 2007).

were seriously contemplating adoption. Thirty of those women did make an adoption plan for their children, and Sunny Ridge provided assistance with living expenses for at least 20 of these women. The goal of Sunny Ridge is to present adoption as an option without pressure, in a way that values the life of the child and honors and supports a woman making a decision on behalf of her child. Sunny Ridge also instructs "pregnancy help centers" on how to present the option of adoption without pressure.

Amicus Chrysalis Shepherding Home qualifies as a "home for unwed mothers"[5] and is located in rural Hancock County. Chrysalis is open to women 18 years of age or older who have recognized a need to change from past unhealthy lifestyles and have made a personal commitment to work with the staff to effect that change. Residents receive spiritual help, career counseling, training in practical aspects of living, and the opportunity to learn new skills.

Amici Aid for Women, Inc. (Chicago), Arms of Love Crisis Pregnancy Center (Godfrey), Crisis Pregnancy Care Center (Highland), Family Life Pregnancy Center (Effingham), Freeport Pregnancy Center (Freeport), Hope Life Center (Dixon and Sterling), New Beginnings Pregnancy Care Centers (Edwardsville, Fairview Heights, and Granite City), New Hope Pregnancy Center (Streator), New Life Pregnancy Center (Decatur), Pregnancy Resource Center (Rushville), Quincy Crisis Pregnancy Center (Quincy), Shawnee Crisis Pregnancy Center (Anna, Carbondale, and Marion), South Central Pregnancy Care Center (Centralia and Salem), Tri-State Family Services

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[4] Individual Plaintiff Becky MacDougall appeared in the original Complaint in this action. *See* Complaint at 4. Ms. MacDougall is the Director of Adoption/Birth Parent Services at Sunny Ridge. However, Ms. MacDougall appeared as an individual and adoptive mother. Sunny Ridge is not a Plaintiff in this case.

[5] Chrysalis also provides housing to women who are not pregnant.

(Carthage), Waterloo Crisis Pregnancy Center (Waterloo), and Women's Pregnancy Center (Galesburg) are "pregnancy help centers" that 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 clothing, prenatal vitamins, and ultrasound services. Various *Amici* also offer birth coaches to women continuing pregnancy as well as referrals for financial and medical assistance and information on medical care. *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 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 Illinois.

SUMMARY OF ARGUMENT

A minimum of ten "Choose Life" cases have been decided or are currently pending in federal courts. While the legal analyses appear different in each of the cases, in actuality the factual differences *require* different analyses. When the factual and legal situations of each of these cases are examined, it becomes clear that the Choose Life plates in Illinois constitute private speech, and the Defendant has engaged in viewpoint discrimination.

Both the Fourth Circuit's analysis in *Planned Parenthood of South Carolina v. Rose* and the Sixth Circuit's analysis in *ACLU of Tennessee v. Bredesen* reveal that the Choose Life plates in Illinois constitute private speech. This conclusion is bolstered by the Supreme Court's treatment of license plate speech in *Wooley v. Maynard* and by other "Choose Life" decisions. Because the speech is private and the Defendant has engaged in unconstitutional viewpoint discrimination, the judgment of the district court should be affirmed.

Yet even if this court were to conclude that the analysis utilized in *Bredesen* yields a determination of government speech, the judgment of the district court should be upheld because the Fourth Circuit's decision in *Rose* is more applicable to the case at hand than the Sixth Circuit's determination in *Bredesen*.

ARGUMENT

The area of "Choose Life" litigation is a complicated mess of jurisprudence to the outside eye. Some courts have resolved cases on the merits, others have dismissed cases for lack of federal jurisdiction under the Tax Injunction Act (TIA), and other cases

suffered from procedural pitfalls. In addition, even among those courts that have decided cases on the merits, the legal analyses differ.

Much of the confusion stems from the factual differences between these cases. For example, some cases have been brought by organizations that requested that a state agency issue a Choose Life plate and were denied. Other cases were brought by pro-abortion groups desiring to halt Choose Life plates after authorization by a state legislature. ***Thus, the different legal challenges presented warranted different legal analyses.***

An understanding of the intricacies of these cases is important to the resolution of the case at hand. An examination of the factual and legal analyses of the "Choose Life" cases reveals that, despite the factual and legal differences, these cases support affirmance of the decision of the Northern District of Illinois.

I. THE VARYING FACTUAL AND LEGAL GROUNDS IN "CHOOSE LIFE" CASES WARRANT DIFFERENT ANALYSES

A minimum of ten "Choose Life" lawsuits have been decided or are currently pending in federal courts.[6] However, only the Fourth and Sixth Circuits have fully

[6] Cases challenging the authorization of Choose Life plates have been dismissed in the Fifth Circuit and the Northern District of Ohio for lack of jurisdiction under the TIA. *See Henderson v. Stalder*, 407 F.3d 351 (5th Cir. 2005), *cert. denied sub nom. Keeler v. Stalder*, 126 S. Ct. 2967 (2006); *NARAL Pro-Choice Ohio v. Taft*, 2005 U.S. Dist. LEXIS 21394 (N.D. Ohio Sept. 27, 2005). Because the TIA has not been raised and 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). The last two counts, challenging the distribution of the license plate proceeds, were originally dismissed by the district court as precluded by the Eleventh Amendment. *Id*. Those counts have been remanded and remain pending. As such, *Hill* will also not be discussed in detail.

Similarly, the case *Children First Foundation, Inc., v. Legreide* will not be discussed, as it concerns a purely procedural issue. 2005 U.S. Dist. LEXIS 28703 (D. N.J. Nov. 17, 2005) (currently pending in the Third Circuit, No. 06-4324).

examined the merits of these cases. While at first blush these Circuit decisions may seem contradictory or irreconcilable, the facts and circumstances in the case at hand actually demonstrate that the same result would be had if either Circuit were followed: that the license plates in this case constitute private speech, and the Defendant has engaged in unconstitutional viewpoint discrimination. Other "Choose Life" decisions further bolster this conclusion.

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

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. *Id*. The plaintiff organization never applied for an organizational plate under the more general statute. *Id*.

After concluding that the plaintiffs had standing to sue, the court examined 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.

Finally, the case *Arizona Life Coalition, Inc. v. Stanton* poses issues similar to the issues in the case at hand. 2005 U.S. Dist. LEXIS 21960 (D. Ariz. Sept. 26, 2005) (striking down claims by Arizona Life Coalition). However, that case is currently pending before the Ninth Circuit, and for reasons similar to those in this brief, *Amici* believe that the District of Arizona will be reversed. *See* Brief of *Amicus Curiae* Women's Choice Pregnancy Clinic in Support of Plaintiffs-Appellants and Reversal of the District Court of Arizona, *Ariz. Life Coalition, Inc. v. Stanton* (9th Cir. 05-16971) (filed Feb. 3, 2006).

In determining whether the Choose Life message constituted private or government speech, the Circuit examined the following four factors from the case *Sons of Confederate Veterans, Inc.* (*SCV*) *v. Commissioner of the Virginia Department of Motor Vehicles*: 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 *SCV*, 288 F.3d 610, 618 (4th Cir. 2002)). Because the Fourth Circuit relied heavily on *SCV*, it bears further analysis.

In *SCV*, the Fourth Circuit recognized, as it did later in *Rose*, that there is no clear standard for determining whether license plate speech is government or private. *SCV*, 288 F.3d at 618. 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 in *SCV* stated that the primary purpose of the license plate program at issue was to produce revenue for the state while allowing for private expression of various viewpoints. *Id*. at 619. 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. *Id*. 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*.

In addition, 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*.

Second, the court concluded that neither the Commissioner nor the state legislature exercised editorial control over the content of the specialty plates. *Id*. at 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 v. Maynard*, 430 U.S. 705, 717 (1977)).[7] 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.

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

[7] The U.S. Supreme Court has held that messages on standard license plates are associated, at least in part, with the vehicle owner. *Rose*, 361 F.3d at 794 (citing *Wooley*, 430 U.S. at 717; *SCV*, 288 F.3d at 621).

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).

Analyzing the factors from *SCV*, the Fourth Circuit in *Rose* determined that the Choose Life license plates constituted neither government nor private speech, but rather a hybrid of the two. *Rose*, 361 F.3d 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. *Id*. at 794. Likewise, it was the private individual that bore the ultimate responsibility for the speech on the plates.[8] *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

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

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, ultimately concluding that the state had engaged in conduct prohibited by the First Amendment. *Id*.; *id*. at 798-99.

B. The Sixth Circuit In *ACLU of Tennessee v. Bredesen*

Tennessee state law authorizes the sale of specialty license plates to raise revenue of departments, agencies, charities, programs, and other activities impacting the state. *ACLU of Tenn. v. Bredesen*, 441 F.3d 370, 372 (6th Cir. 2006). The state of Tennessee takes half of the profits, with forty percent going to the Tennessee arts commission, and ten percent going to the highway fund. *Id*. The remaining profits are earmarked for named non-profit groups advancing the causes publicized on the plates. *Id*. The state determines the price of each specialty plate by statute, and no plate will issue until customers place at least 1,000 advanced orders. *Id*. In addition, Tennessee law provides that the department of motor vehicles must conduct a promotional campaign for new specialty plates. *See* TENN. CODE ANN. § 55-4-213.

In 2003, the state 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. *Bredesen*, 441 F.3d 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 in the action filed suit after a pro-choice plate was defeated. *Id*.

After rejecting an argument that the TIA barred jurisdiction, the court went on to discuss whether the Choose Life plate constituted government speech. *Id*. at 375. The

court relied on the case *Johanns v. Livestock Marketing Association*, 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. 550, 562 (2005)).

Thus, *Bredesen* relied upon a two-prong test:

1) if the government sets the overall message to be communicated, and

2) if the government approves every word that is disseminated,

it is government speech. *Id*.

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 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*. Due to the state's power to withdraw authorization for any license plate, the court concluded that the state had "final approval authority over every word used" on the plates. *Id*. The court concluded that the state 1) set the overall message to be communicated, and 2) approved every word disseminated on the plates. *Id*.

In rejecting the plaintiffs' argument that the plates at least constituted "mixed" private and government speech, the court re-emphasized that because Tennessee sets the overall message and approves the details, the license plate language must be attributed to Tennessee. *Id*. at 377. The court did not, however, take into consideration that the Supreme Court stated in *Wooley v. Maynard*—which, unlike *Johanns*, specifically dealt with license plate language—that even messages on standard license plates, which are

arguably entirely government-crafted, are associated, at least in part, with the private vehicle owner.[9]

C. Other Relevant "Choose Life" Decisions

Although not decided entirely on the merits, other "Choose Life" decisions also support the position that the license plates in Illinois constitute private speech, and that the lower court should be affirmed.

Eleventh Circuit

In 2003, the Eleventh Circuit ruled in favor of Choose Life license plates in the case *Women's Emergency Network (WEN) v. Bush*. 323 F.3d 937 (11th Cir. 2003). In Florida, a state agency reviews requests for specialty license plates to ensure that such plates meet certain statutory criteria. *Id*. at 941. The agency 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 then sued.

The crux of the Eleventh Circuit's decision involved the lack of standing of the plaintiffs. However, in addressing the issue of whether the license plates constitute 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

[9] The court went on to conclude that the dissemination of a government-crafted message by private volunteers does not create a forum requiring viewpoint neutrality. *Bredesen,* 441 F.3d at 377.

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*.

In addition, the court rejected the plaintiffs' claimed injury-in-fact: 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 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).

Tenth Circuit

While the Tenth Circuit Court of Appeals has not ruled on the merits of "Choose Life" litigation pending in Oklahoma, its decision in *Hill v. Kemp* sheds some light on the Tenth Circuit's treatment of Choose Life plates. 478 F.3d 1236. The court noted that the entire community would benefit from the generated funds, as the funds in Oklahoma are spread among a wide array of State initiatives, as well as to municipalities and schools that have no relationship with the message on the plates. *Id*. at 1245. While this observance arises in the context of a TIA discussion, the same facts are applicable to a determination of whether the plates constitute government or private speech. *See* Part II.A., *infra*. Furthermore, the Tenth Circuit is somewhat critical of the Sixth Circuit's analysis in *Bredesen*, particularly the analysis of the voluntariness of motorists to pay an

extra charge and that Circuit's conclusion that the state acts as an ordinary market participant. *Id*. at 1251-53.

Second Circuit

In *Children First Foundation v. Martinez*, the plaintiff organization sued state agencies and individuals after its application for a Choose Life license plate was denied. When the district court rejected defendants' qualified immunity arguments, the defendants appealed to the Second Circuit. 2006 U.S. App. LEXIS 5830 (2nd Cir. Mar. 6, 2006). While affirming the district court's decision that qualified immunity did not apply, the Circuit concluded that "***custom license plates involve, at minimum, some private speech***." *Id*. at 5830 *4 (emphasis added) (citing *Wooley*, 430 U.S. at 715; *Perry v. McDonald*, 280 F.3d 159, 166-67 (2nd Cir. 2001) (describing personalized license plates as private speech on government property)). Thus, the Circuit ruled that it would be unreasonable for defendants to conclude that their actions were permissible under the government speech doctrine. *Id*.

Eastern District of California

Finally, a decision from the Eastern District of California is also instructive. 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 challenging 1) the specialty plates already issued under specific enabling statutes, 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 specialty plates. *Women's Res. Network v. Gourley*, 305 F. Supp. 2d 1145, 1147-48 (E.D. Ca. 2004).

At issue in *WRN* 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*. at 1148. After determining that the plaintiff had standing to challenge § 5060 and the enabling statutes created under § 5060 and concluding that the TIA did not apply, 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 standard-less forum to select private speakers based upon views the government finds acceptable, the court permanently enjoined the state 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.

II. THE VARIOUS "CHOOSE LIFE" DECISIONS SUPPORT AFFIRMANCE OF THE NORTHERN DISTRICT OF ILLINOIS

The aforementioned decisions support affirmance of the Northern District of Illinois in regard to the private nature of the license plate speech and the viewpoint discrimination of the Defendant.

A. The Choose Life License Plates In Illinois Constitute Private Speech Under Both *Rose* and *Bredesen*

Both *Rose* and *Bredesen* support the conclusion that the plates in Illinois constitute private rather than government or "mixed" speech. The most dominant difference between this case and those two cases is that the Illinois General Assembly did not create the license plates; in each of the other cases, it was the state legislatures that initiated the plates. This gives the Illinois Choose Life plates a much more private bent than the plates in South Carolina or Tennessee.[10]

Moreover, both of the tests used in *Rose* and *Bredesen* reinforce this point. First, the four factor test utilized in *Rose* points to private speech. As far as the first prong is concerned, as in *SCV*, the central purpose of the license plate program in Illinois is to

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[10] The Defendant argues at length in his Brief of Defendant-Appellant that he lacks authority to grant specialty plates and that the Illinois General Assembly has retained all authority to do so. In order to avoid redundancy, *Amici* simply affirm the conclusion of the District Court and Choose Life Illinois that the state has granted authority for issuance of these plates to the Defendant. *See Choose Life Ill.*, 2007 U.S. Dist. LEXIS 21863 at *6; Plaintiff-Appellee's Response Brief. *Amici* do note four observations of the Defendant's arguments:

First, the Defendant's interpretation could change with a new administration. If there was a different Secretary, new guidelines could issue for these specialty plates; a new administration could interpret the applicable statutes differently. The Defendant's guidelines are his own and are not set in stone. This potential fluency in guidelines thus discredits the Defendant's claims.

Second, the Defendant argues that it is significant that every specialty plate in existence in Illinois was first passed by the General Assembly, and that his guidelines represent what he has practiced and therefore his actions in denying a Choose Life plate were constitutional. However, practicing what has been done in the past does not make that practice any more constitutional.

Third, the Defendant argues that because Section 3-600 *prohibits* him from issuing plates unless 10,000 applications are received, that does not mean he is *authorized* to issue plates. *See* Brief of Defendant-Appellant at 20. Yet this argument ignores simple statutory construction. If the Defendant did not have authority to issue plates, the statute would not need to provide that he could not issue plates unless there were 10,000 applications, because he could not issue plates regardless of the number of applications. Thus, Defendant's interpretation renders 3-600 purposeless and unnecessary.

Fourth, the Defendant is simply trying to pass his own unconstitutional actions off on the General Assembly. Yet only the Defendant's actions are at issue here.

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, a specific number of applications must be received before a plate series can issue. *See* 625 ILL. COMP. STAT. 5/3-600. 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 and payment is certain.

Furthermore, unlike the situations in *Rose* and *Bredesen*, the Illinois Choose Life plates were not enacted through the legislature in order to advance a pro-life viewpoint. Instead, a private organization sought action under the Illinois specialty license plate statutes. In addition, the revenue generated by these plates is not earmarked for government funds and programs as in *Bredesen*, *Hill*, and *WRN*; instead, the proceeds are distributed to non-profit organizations with a direct tie to the message of the plates through the non-profit Choose Life Illinois. This more closely resembles the situation in Florida, where the Eleventh Circuit failed to see a government attachment to a license plate program that was structured to benefit private organizations and not the state itself.

The second prong of the Fourth Circuit test—the degree of editorial control—also weighs in favor of private speech. In *Rose* and *Bredesen*, the Choose Life plates originated with the state and with the legislature determining the plate's message. Yet the Illinois plates were originated and designed by Choose Life Illinois. Unlike in *Bredesen*, Illinois does not strictly regulate who gets the funds or require a state-run promotional campaign for the plates. Instead, the situation in Illinois 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, neither the Secretary nor the General Assembly has been granted any editorial control over the substantive content of the license plate design. Unlike in *Bredesen*, neither exercises any editorial control over the content of the license plates themselves. The state simply requires that the name of the state, the vehicle registration number, the year, and the state motto be present. *See id.* at 5/3-412(b). In addition, a plate cannot be duplicative, unclear, misleading, or offensive. *Id*. at 5/3-405.2. These requirements are a far cry from editorial control of the content of the message itself.

The third and fourth factors also weigh in favor of private speech. The Fourth Circuit 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, *SCV* noted the importance of the fact that the license plates were mounted on the vehicles of private owners. The Supreme Court's decision in *Wooley* emphasizes this point.

Thus, each of the Fourth Circuit's factors weigh in favor of private speech.

Furthermore, the Sixth Circuit's two-prong test in *Bredesen* also weighs in favor of private speech. First, the government in Illinois has not set the overall message to be communicated in the Choose Life license plates. That language was chosen and submitted by Choose Life Illinois, and the Illinois statutes demonstrate that the message is determined by private applicants. Unlike the state of Tennessee in *Bredesen*, the Illinois General Assembly did not have any part in the message or design of the plate—

the sole factor which led the Sixth Circuit to conclude that Tennessee set the license plate message. In addition, there is no state-run promotional campaign in Illinois; Illinois does not specify exactly who gets the funds; and the state does not determine the design. Likewise, the government in Illinois does not approve every word that would be disseminated in the plate. In fact, the government does not approve *any* word.[11] Thus, the factual differences in *Choose Life Illinois* and *Bredesen* underscore the different outcomes when the two-prong test is utilized. Even under *Bredesen*, the Illinois Choose Life plate cannot constitute government speech.

Such a finding would also conform to the Supreme Court's decision in *Wooley*, which found that even messages chosen by the government on standard license plates are associated at least in part with private speech. A finding of private speech also conforms to the Eleventh Circuit's failure to see a "sufficient government attachment" to the message in Choose Life plates and the Second Circuit's statement that custom plates involve, at a minimum, some private speech.

B. The Defendant Has Engaged In Unconstitutional Viewpoint Discrimination

Because the license plates constitute private speech, the government may not discriminate based upon viewpoint. Yet that is exactly what the Defendant did in Illinois. As in *Rose*, the state of Illinois has opened a limited forum for expression. It is not a government program where the government can control the content of speech. It should be noted that South Carolina did not engage in viewpoint discrimination by allowing a Choose Life license plate; it engaged in viewpoint discrimination because it opened a

[11] As the district court so aptly discussed, these facts can be easily differentiated from the facts in *Bredesen* and *Johanns*. *See Choose Life Ill.*, 2007 U.S. Dist. LEXIS 21863 at **20-21.

forum in which an abortion rights plate *was denied*. As here, it was that denial that demonstrated the State's viewpoint discrimination.

The Defendant's denial of the Choose Life plate violates the First Amendment. The Defendant plainly favors organizations with messages it deems more acceptable and less "controversial," thus favoring other organizations over Choose Life Illinois. It is telling that the Defendant has not denied other license plates to groups that also have distinct viewpoints in political or social debate. For example, the Illinois Hospice palliative care plate plays directly into the assisted suicide debate that is rampant in a number of states.

While the Defendant argues that the government has not discriminated because no other *abortion*-related plates have been allowed,[12] this rationale is flawed for two reasons. First, the State offers a Mammogram License Plate that provides funds to an organization which in turn provides funds and assistance to Planned Parenthood—the number one abortion provider in the nation.[13]

Second, *SCV* demonstrates that this is not the proper analysis. If the State 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 this is exactly what the Defendant has done.

[12] *See* Brief of Defendant-Appellant at 12.

[13] A simple Google search of the terms "Komen Foundation" and "Planned Parenthood" yields a multitude of articles confirming the link between the organizations. Komen has not denied the link.

III. IN THE ALTERNATIVE, *ROSE* IS MORE APPLICABLE TO THIS CASE THAN *BREDESEN*

Even if the factual differences between this case and *Bredesen* were not dissimilar enough to render different outcomes under the two-prong analysis,[14] the judgment of the district court should still be affirmed because the Fourth Circuit's analysis in *Rose* is more applicable to the case at hand.

First, the Sixth Circuit in *Bredesen* did not take into consideration the Supreme Court's finding in *Wooley* that even the language on standard license plates constitutes some degree of private speech.[15] As this Court is well aware, the decision in *Wooley* addressed New Hampshire's use of the state motto—Live Free or Die—on its standard license plates. *See generally Wooley*, 430 U.S. 705. This distinction is important, because standard license plates are arguably a step closer to government speech than the class of specialty plates in each state. In addition, the case involved the state motto—obviously taking the plate yet another step closer to government speech. Yet the Supreme Court held that even state mottos on standard plates are associated at least in part with the vehicle owner. Thus, any decision finding purely government speech—as the Sixth Circuit did in *Bredesen*—is questionable. This means the Fourth Circuit's decision in *Rose* finding mixed speech is closer to the mark, and, as shown in Part II, *supra*, under that analysis the district court decision must be affirmed.

Second, it is important to note that the Sixth Circuit utilized *Johanns* in its analysis—a case that discussed not license plates but *full-fledged government*

[14] *Amici* do not represent that this is the case, but merely argue in the alternative.

[15] The Defendant also fails to take *Wooley* into proper consideration.

campaigns.[16] *Johanns* also does not take into consideration the Supreme Court's conclusion that standard license plates constitute private speech to some degree, and thus suffers from the same flaw mentioned above.

The Fourth Circuit, on the other hand, undertook a detailed examination of license plate jurisprudence. To the contrary, the Sixth Circuit used a speech case that has never been used in the license plate setting. Obviously, the intricacies of speech on license plates are different than the intricacies of speech in government campaigns—especially where, as here, the government does not originate the speech. To then thrust a non-license plate case into the analysis simply muddles the analysis.

For these reasons, the Fourth Circuit's decision in *Rose* is more applicable to license plate issues in Illinois than the Sixth Circuit's decision in *Bredesen*. And, as discussed in detail in Part II, *supra*, the Fourth Circuit's analysis yields a conclusion affirming the district court.

[16] Because Tennessee requires state-run promotional campaigns, *Johanns* was more applicable in *Bredesen* than in the case at hand.

CONCLUSION

The decision of the Northern District of Illinois should be affirmed.

Respectfully submitted,

Mailee R. Smith
Counsel of Record
Clarke D. Forsythe
Denise M. Burke
Americans United for Life
310 S. Peoria St., Suite 500
Chicago, Illinois 60607
Telephone: 312-492-7234

Counsel for Amici Curiae

August 3, 2007

CERTIFICATE OF COMPLIANCE

Counsel for *Amici Curiae* hereby certifies that the foregoing Brief of *Amici Curiae* complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains _____ words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii). This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and Cir. R. 32(b) and the type style requirement of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally-spaced typeface using Microsoft Word 2003 in 12-point font, Times New Roman font style.

_____
Mailee R. Smith
Counsel for Amici Curiae

PROOF OF SERVICE

I hereby certify that on August 3, 2007, I served two paper copies of the foregoing Brief of *Amici Curiae* to counsel listed below by depositing said copies in U.S.P.S. first-class mail, postage paid.

Lisa Madigan
Gary Feinerman
Richard S. Huszagh
Paul Berks
100 West Randolph Street
12th Floor
Chicago, Illinois 60601

Thomas Brejcha
Thomas More Society
29 S. LaSalle St., Suite 440
Chicago, Illinois 60603

Alan Untereiner
Damon Taafe
Robbins, Russell, Englert, Orseck & Untereiner
1801 K Street NW, Suite 411
Washington, D.C. 20006

_____
Mailee R. Smith
Counsel for Amici Curiae