

No. 08-1429

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UNITED STATES COURT OF APPEALS  
FOR THE EIGHTH CIRCUIT

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KEVIN M. ROACH, et al.,

*Plaintiffs-Appellees,*

v.

TRISH VINCENT, in her official capacity as  
Director of the Missouri Department of Revenue, et al.,

*Defendants-Appellants.*

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On Appeal from the Western District of Missouri, No. 06-00443

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**BRIEF OF *AMICI CURIAE* LIFE CHOICE CENTER FOR WOMEN,  
LIFECHOICES MEDICAL CLINIC AND RESOURCE CENTER,  
LIFELINE PREGNANCY RESOURCE CENTER, OPEN ARMS  
PREGNANCY RESOURCE CENTER, OPTIONS PREGNANCY CLINIC,  
PREGNANCY CARE CENTER, PREGNANCY CARE CENTERS,  
PREGNANCY SUPPORT CENTER, AND THRIVE ST. LOUIS  
IN SUPPORT OF PLAINTIFFS-APPELLEES AND  
AFFIRMANCE OF THE WESTERN DISTRICT OF MISSOURI**

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## CORPORATE DISCLOSURE STATEMENT

*Amici Curiae* **Life Choice Center for Women** (Harrisonville), **LifeChoices Medical Clinic and Resource Center** (Joplin), **Lifeline Pregnancy Resource Center** (Kirksville), **Open Arms Pregnancy Resource Center** (Columbia, Fulton, Jefferson City, Mexico, and Moberly), **Options Pregnancy Clinic** (Ava), **Pregnancy Care Center** (Jefferson County), **Pregnancy Care Centers** (Springfield and Aurora), **Pregnancy Support Center** (Lebanon), and **ThriVe St. Louis** (Saint Louis City, Saint Charles County, North County, and South County) are not-for-profit organizations (501(c)3) that have no parent corporation, and no publicly held corporation owns any stock in these non-profit entities.

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## STATEMENT OF INTEREST OF *AMICI CURIAE*<sup>1</sup>

*Amici Curiae* are non-profit entities which stand to benefit from the funds generated by Choose Life license plates in Missouri. As stated in the Amended Complaint, the money generated from Choose Life plates in Missouri will support pro-life pregnancy resources centers such as *Amici*. See Amended Complaint, ¶ 42 (filed Aug. 21, 2006).

*Amici* **Life Choice Center for Women** (Harrisonville), **LifeChoices Medical Clinic and Resource Center** (Joplin), **Lifeline Pregnancy Resource Center** (Kirksville), **Open Arms Pregnancy Resource Center** (Columbia, Fulton, Jefferson City, Mexico, and Moberly), **Options Pregnancy Clinic** (Ava), **Pregnancy Care Center** (Jefferson County), **Pregnancy Care Centers** (Springfield and Aurora), **Pregnancy Support Center** (Lebanon), and **ThriVe St. Louis** (Saint Louis City, Saint Charles County, North County, and South County) are “pregnancy resource 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 pregnancy

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<sup>1</sup> According to Fed. R. App. P. 29, Counsel for *Amici* has contacted the parties and has obtained consent to file this brief.

resource centers 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 Western District of Missouri.

## **ARGUMENT**

Numerous “Choose Life” license plate cases have been decided or are currently pending in federal courts. To date, only the Fourth Circuit, Sixth Circuit, Ninth Circuit, and Northern District of Illinois have fully addressed the private/government speech dilemma at issue here. Though the decisions appear conflicting—with some courts citing private speech, and another court citing government speech—when the cases are examined, a trend becomes obvious. Where specialty plates are created by organizational or individual petition, license plates more likely constitute private speech. Where specialty plates are created by



legislative action, license plates more likely constitute government speech. Cases from both sides of this coin point toward one result in Missouri: private speech.<sup>2</sup>

More specifically, two different tests have been utilized by the Circuit Courts. The Fourth Circuit used a four-part test in *Planned Parenthood of South Carolina v. Rose*, while the Sixth Circuit utilized a two-part test in *ACLU of Tennessee v. Bredesen*, which is taken from the Supreme Court's evaluation of government speech in *Johanns v. Livestock Marketing Association*. See *Johanns*, 544 U.S. 550 (2005); *Rose*, 361 F.3d 786 (4th Cir. 2004); *Bredesen*, 441 F.3d 370 (6th Cir. 2006). When these cases are examined, it is clear that the Fourth Circuit's four-part test is more appropriate in the license plate setting. However,

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<sup>2</sup> Other courts, while considering similar license plates, ruled based upon technical issues not at issue in Missouri. For example, 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 Tax Injunction Act (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), cert. denied, 128 S. Ct. 873 (2008). 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.

Similarly, the case *Children First Foundation, Inc., v. Legreide* will not be discussed, as it concerns a purely procedural issue. 2007 U.S. App. LEXIS 29562 (3rd Cir. Dec. 20, 2007) (remanding to district court).

an examination of the Choose Life plates in Missouri under both tests demonstrates that the specialty plates constitute private speech.

Because the license plate speech at issue is private and because the Defendants, vested in unbridled power,<sup>3</sup> have engaged in improper viewpoint discrimination, the judgment of the district court should be affirmed.

**I. THE VARYING FACTUAL AND LEGAL GROUNDS IN CHOOSE LIFE CASES HAVE WARRANTED DIFFERENT ANALYSES**

**A. Setting The Stage For Private And Government Speech: The Fourth Circuit**

In 2001, the South Carolina legislature enacted a statute authorizing the issuance of specialty license plates bearing the message “Choose Life.” *Rose*, 361 F.3d at 788. 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.*

After concluding that the plaintiffs had standing to sue, the court examined whether the license plate speech constituted government or private speech. The

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<sup>3</sup> It is undisputed that there are no objective standards, guidelines, or written criteria to guide the decisions of the Joint Committee on Transportation (“Joint Committee”). *See Choose Life of Mo., Inc. v. Vincent*, 2008 U.S. Dist. LEXIS 6524, \*\*7-8 (W.D. Mo. Jan. 23, 2008).

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.

In determining whether the Choose Life message constituted private or government speech, the Circuit examined the following four factors<sup>4</sup> 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)) (emphasis added). Because the Fourth Circuit relied heavily on *SCV*, it bears further analysis.

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<sup>4</sup> This four-factor test has been adopted by the Fourth, Ninth, and Tenth Circuits, as well as this Circuit. See *Arizona Life Coalition, Inc. v. Stanton*, 515 F.3d 956, 964 (9th Cir. 2008) (citing, among other cases, *Knights of the Ku Klux Klan v. Curators of the Univ. of Mo.*, 203 F.3d 1085, 1093-94 (8th Cir. 2000)). In the “Choose Life” context, the Sixth Circuit is the only Circuit that has opted not to utilize this test. See *infra* Part I.B.

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)).<sup>5</sup> The court concluded that the specialty plates constituted *private* speech. *Id.*

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

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<sup>5</sup> 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).

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.<sup>6</sup> *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.*

But *Rose* was not the last word on Choose Life speech. The Sixth Circuit faced a different scenario in Tennessee—including provisions requiring hands-on direction from the government—and thus took a different route in upholding the Choose Life plates in Tennessee.

**B. License Plates Directly Controlled And Promoted By The State Constitute Government Speech: The Sixth Circuit**

Tennessee state law authorizes the sale of specialty license plates to raise revenue of departments, agencies, charities, programs, and other activities impacting the state. *Bredesen*, 441 F.3d at 372. The state of Tennessee takes half of the profits, with forty percent going to the Tennessee arts commission, and ten

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<sup>6</sup> The court made this conclusion despite the fact that it considered license plates “state-owned.” *Id.*

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 also directly participates in the specialty plate program. 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*,<sup>7</sup>

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<sup>7</sup> *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.

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).

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

1. *if* the government sets the overall message to be communicated, *and*
2. *if* the government approves every word that is disseminated,

*then* 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.*

Thus, in a state where the government directs every aspect of specialty license plate dissemination—from drafting the message to promoting the plate to controlling the proceeds—the Choose Life plate constitutes government speech.



Both the Sixth Circuit in *Bredesen* and the Fourth Circuit in *Rose* faced different factual situations than that in Missouri, where a private organization created and petitioned for the Choose Life plate. However, the Ninth Circuit and the Northern District of Illinois have tackled situations nearly identical to that in Missouri, with both courts concluding that license plate speech is purely private in nature.

**C. License Plates Initiated By Private Groups Constitute Private Speech: The Ninth Circuit And The Northern District of Illinois**

With the Fourth and Sixth Circuit decisions at hand, the Ninth Circuit examined a factual situation nearly identical to the situation in Missouri—and explicitly concluded that “[m]essages conveyed through special organization plates—although possessing some characteristics of government speech—represent primarily private speech.” *Arizona Life Coalition*, 515 F.3d at 960.

In Arizona, a private organization can apply to for a specialty plate with the Arizona Department of Transportation (“Department”). *Id.* at 960-61. 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.* at 961. 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.*

Plaintiff Arizona Life Coalition complied with the statutory requirements, and the Department submitted a plate request to the Commission. After initially failing to take any action on the plate, the Commission then formally denied the plate application and informed Plaintiff that the Commission's decision was final. *Id.* at 962.

After first discussing the TIA,<sup>8</sup> the Ninth Circuit went on to examine the private/government speech issue. Because it had both the Fourth and Sixth Circuit decisions at hand, the Ninth Circuit had the opportunity to fully evaluate the tests utilized in each Circuit. The Ninth Circuit began by distinguishing the fact situation in *Johanns* from the fact situations in license plate cases. *Id.* at 964. For example, *Johanns* involved a government-compelled subsidy of government speech, while specialty license plate programs do not raise issues regarding “compelled speech” or a “compelled subsidy.” *Id.* The Circuit saw the harm examined in *Johanns* as “being forced to give the government money to pay for someone else’s message,” while in specialty license plate programs individuals choose to pay the price for obtaining particular plates. *Id.* The Circuit also noted

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<sup>8</sup> The Ninth Circuit concluded that the additional charges for a specialty plate did not constitute a tax, and therefore the TIA did not apply. *Arizona Life Coalition*, 515 F.3d at 962-63.

that “specialty plate programs are not part of a larger governmental scheme to encourage some private activity, like beef consumption.” *Id.*

However, the factual differences did not lead the Ninth Circuit to completely exclude *Johanns* from its analysis. Instead, it viewed *Johanns* as overlapping with the four-factor test utilized by the Fourth Circuit: the Supreme Court in *Johanns* considered who controlled the speech, the purpose of the program, and who exercised editorial control. *Id.* at 965. The Circuit then adopted the Fourth Circuit’s four-factor test as a test supported by the Supreme Court’s *Johanns* decision. *Id.*

As to the first factor, the primary function of the Choose Life plate, the Ninth Circuit concluded that the specialty plate program developed a forum where organizations could exercise their First Amendment rights in the hope of raising money to support their causes. *Id.* The Circuit also noted that the fee structure, including the requirement that an organization have a certain number of members or agree to foot the bill, suggested the specialty plate’s revenue-producing aim. *Id.* at 966. Thus, the first factor weighed in favor of private speech. *Id.*

In examining the second factor, who exercises editorial control, the Circuit noted that the Choose Life plate originated with the Arizona Life Coalition. *Id.* That Coalition determined the substantive content of the message. The Circuit specifically differentiated the fact situation in the Fourth Circuit, where the Choose

Life plate language had originated in the state legislature. *Id.* Thus, the second factor also weighed in favor of private speech. *Id.*

The Circuit then examined the third factor: the literal speaker. The Circuit first acknowledged that the State's ownership of the plates points to government speech. *Id.* at 966-67. However, citing *Wooley v. Maynard* for the proposition that license plates implicate private speech interests, the Circuit stated that “*most courts* that have addressed vanity plates have concluded the messages are private speech.” *Id.* at 967 (emphasis added). The presence of the Plaintiff's logo on the plate tipped the scale even farther. *Id.* Thus, the third factor also implicated private speech. *Id.*

Finally, the Circuit considered the fourth factor, the question of who bears the ultimate responsibility for the plates. The Circuit noted that Arizona Life Coalition submitted its motto and controlled the message of the plate, and that individual citizens choose to purchase the plate voluntarily to disperse that message. *Id.* at 967-68. The Circuit contrasted this situation to that in *Johanns*, where the beef producers had no choice but to support the government's speech. *Id.* at 968. In the specialty plate situation, however, the non-profit organization bears the burden by taking affirmative steps to convey its message through the plate program. *Id.*

Thus, the Circuit concluded that an examination of all four factors revealed that the specialty plate program, and specifically the Choose Life plates, constituted private speech. *Id.* The Circuit then went on to conclude that the State had engaged in improper viewpoint discrimination of a private message. *See, e.g., id.* at 972 (“Preventing Life Coalition from expressing its viewpoint out of a fear that other groups would express opposing views seems to be a clear form of viewpoint discrimination.”).

The Northern District of Illinois reached a similar conclusion in *Choose Life Illinois, Inc. v. White*, 2007 U.S. Dist. LEXIS 21863 (N.D. Ill. Jan. 19, 2007).<sup>9</sup> In a fact scenario similar to that in Arizona and Missouri, Illinois allows the distribution of specialty license plates with very little statutory guidance in the crafting of the message. *See id.* at \*\*5-6. The only requirements, other than stipulations that the plate not be confusing, misleading, or offensive, is that the plate contain the name of the State, the registration number, the year number, and the phrase “Land of Lincoln.” *Id.* However, the Secretary of State unilaterally required that the General Assembly approve the plate—a stipulation not found in the statute authorizing specialty plates. *Id.* at \*6.

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<sup>9</sup> The appeal in *Choose Life Illinois* remains pending in the Seventh Circuit, No. 07-1349.

Choose Life Illinois completed all of the statutory requirements, but the Secretary of State refused to allow the license plate without action by the General Assembly. *Id.* at \*\*7-8. In its decision holding that the state had committed viewpoint discrimination in denying the Choose Life plates, the Northern District of Illinois concluded that license plate speech constitutes private speech under the Fourth Circuit’s four-part test. *Id.* at \*\*11-22. In examining the central purpose of the plate, the court focused on the fact that the specialty plate was conditioned on the willingness of a threshold number of private persons to pay an extra fee. *Id.* at \*13. The court found that the collection of private funds indicates that an important purpose of specialty plates is to allow for private expression. *Id.* at \*\*13-14. The court noted that if the General Assembly intended to speak, it was “curious” that the Assembly would require a designated amount of money be collected before its speech was “triggered.” *Id.* (citing *SCV*, 288 F.3d at 619).

In discussing the editorial control factor, the court held that because a private organization created and crafted the “Choose Life” message, that private organization has more editorial control than the state. *Id.* at \* 17. The court focused on the fact that, in *Rose*, the idea had originated with the state, with the state crafting the message. *Id.* at \*16. However, when the content of the speech originates from a private organization, then the private speaker holds much more editorial control than the state. *Id.* at \*17.

The court also concluded that the literal speaker and ultimate responsibility factors weighed in favor of private speech. *Id.* at \*\*18-20. Citing *Wooley* for the proposition that even messages on standard plates implicate private speech, the court stated that when vehicle owners display specialty plates, that association is much stronger. *Id.* at \*18 (citing *Wooley*, 430 U.S. 705). The court held that where private individuals have to pay an extra fee for plates, and where not all vehicles or license plates contain the message, the “literal speaker” who “bears the ultimate responsibility” is the private individual. *Id.* at \*\*18-19. The court noted that “[i]t would be surprising indeed for the state to require a private individual to create, apply for and pay for what would be considered government speech.” *Id.* at \*\*19-20.

The Northern District of Illinois also distinguished the *Johanns* case. The court stated that in *Johanns*, the government passed an act to promote its own interests, created its own marketing campaigns, and was subsidized by its own fund-raising efforts. *Id.* at \*\*20-21. The court stated that “[t]his is clearly not the case” with specialty plates, where the message is created by a private organization and an extra charge is levied on private individuals. *Id.* at \*21.

**D. Other Circuit Courts Also Indicate That License Plates Constitute Private Speech: The Eleventh and Second Circuits**

Although not decided entirely on the merits, other Choose Life decisions also support the position that the plate in Missouri constitutes private speech, and that the lower court should be affirmed.

For example, 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-abortion plate was rejected. *Id.* Pro-abortion 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 Circuit 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 Second Circuit also leans toward private speech. 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. *Martinez*, 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.*

In light of each of the case discussed above, this Court must affirm the decision of the lower court.

## **II. THE VARIOUS CHOOSE LIFE DECISIONS DEMONSTRATE THAT LICENSE PLATE SPEECH IN MISSOURI IS PRIVATE**

As this Court is well aware, an application for a specialty plate in Missouri must 1) generally describe the proposed plate; 2) have at least one legislative

sponsor; 3) list at least 200 people who intend to purchase the plate; *and* 4) include an application fee of 5,000 dollars. MO. REV. STAT. § 301.3150. Plaintiffs fulfilled these requirements, and the Department of Revenue properly submitted the application to the Joint Committee. However, the Joint Committee failed to then approve the plate for distribution. The district court ruled that the Joint Committee acted inappropriately in denying the expression of the Plaintiffs' private speech. *See generally Choose Life of Missouri*, 2008 U.S. Dist LEXIS 6524.

Each of the aforementioned cases in Part I, *supra*, supports affirmance of the Western District of Missouri. Under the four-part test utilized by the Fourth and Ninth Circuits in *Rose* and *Arizona Life Coalition*, the license plate speech clearly constitutes private speech. And while the facts in *Johanns* are clearly distinguishable from the license plate cases and indicate that the four-part test is more appropriate, even under the Sixth Circuit's use of the *Johanns* factors in *Bredesen*, the license plate speech constitutes private speech.

Significant here is that the plates analyzed by the Fourth and Sixth Circuits in *Rose* and *Bredesen* were initiated by the state legislatures. The Missouri Choose Life plates were initiated by a private organization. This fact gives the plates a much more private bent than the plates in *Rose* and *Bredesen*. This fact is bolstered by the decisions of the Ninth Circuit and Northern District of Illinois in

*Arizona Life Coalition* and *Choose Life Illinois*, where privately-initiated plates were found to constitute private speech.

**A. The Choose Life License Plate In Missouri Constitutes Private Speech Under The Four-Part Test Utilized In The Fourth And Ninth Circuits**

As already discussed, the four-factor test adopted by the Fourth, Eighth, Ninth, and Tenth Circuits evaluates 1) the central purpose; 2) the degree of editorial control; 3) the literal speaker; and 4) the ultimate responsibility. Each of these factors weighs in favor of a finding of private speech in the Missouri specialty license plate program.

***i. Central Purpose***

As the court enunciated in *SCV*, the central purpose of the specialty plate program in Missouri is to produce revenue while allowing for private expression of various viewpoints. Directly applicable here is the Fourth and Ninth Circuits' focus on the fact that those state statutes required a certain number of purchasers or that a monetary minimum be paid by the organization. Missouri's requirements go even further—requiring *both* that a certain number of persons agree to purchase the plate, *and* that an organization pay 5,000 dollars for plate production.

Thus, the statute ensures that only popular plates—and therefore plates raising a certain amount of revenue—be authorized. It would indeed be “curious” for a state government to require a certain amount of revenue in order for government speech to be triggered. *See SCV*, 288 F.3d at 620; *see also Choose*

*Life Illinois*, 2007 U.S. Dist. LEXIS 21863, at \*\*13-14. Thus, as in *SCV, Arizona Life Coalition*, and *Choose Life Illinois*, the fee structure indicates a revenue-producing aim. The collection of private funds indicates that an important purpose of the specialty plate program is to allow for private expression. See *Arizona Life Coalition*, 515 F.3d at 965; *Choose Life Illinois*, 2007 U.S. Dist. LEXIS 21863, at \*\*13-14.

This situation contrasts sharply to that in *Rose* and *Bredesen*, where the state legislatures initiated the creation and subject matter of the plate. Here, a private organization sought action under the Missouri specialty license plate statute. In addition, the revenue generated by the plates is not earmarked for government funds and programs as in *Bredesen*, nor does the state spell out exactly which private entities will receive the proceeds; instead, the proceeds are distributed to non-profit organizations with a direct tie to the message of the plates. 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. Thus, this factor is easily resolved in favor of private speech.

***ii. Degree Of Editorial Control***

As in *SCV, Arizona Life Coalition*, and *Choose Life Illinois*, the license plate design and message in Missouri was crafted solely by a private organization. No

instruction on the substantive content is given to organizations applying for specialty plates in Missouri. Again, this is contrasted to the situations in *Rose* and *Bredesen*, where it was the state legislatures that crafted the plates' messages. Here, the legislature has simply set general parameters around license plate speech, leaving private organizations to design and craft the messages. As stated in *Choose Life Illinois*, when the content of the speech originates from a private organization, the private speaker holds much more editorial control than the state. *Choose Life Illinois*, 2007 U.S. Dist. LEXIS 21863, at \*17. Thus, this second factor also weighs heavily in favor of private speech.

***iii. Literal Speaker***

It is unarguable that the literal speaker in the license plate setting is the private person purchasing the specialty plate. As held by the Fourth Circuit in *Rose*, the speaker is the vehicle owner, who “undoubtedly” holds a pro-life view—just as he or she would be the literal speaker of a bumper sticker. *Rose*, 361 F.3d at 794.

Further, as mentioned in *SVC*, license plates in Missouri are mounted on vehicles by *private persons*, and the U.S. Supreme Court has instructed that license plates implicate private speech interests. *See SCV*, 288 F.3d at 620 (citing *Wooley*, 430 U.S. at 717). Both the Ninth Circuit and the Northern District of Illinois also pointed to *Wooley* in evaluating the Choose Life plates, concluding that the

presence of the organization's logo on a plate makes the association even stronger. *See Arizona Life Coalition*, 515 F.3d at 966-67; *Choose Life Illinois*, 2007 U.S. Dist. LEXIS 21863, at \*18.

Thus, every court to evaluate Choose Life plates under the Fourth Circuit's four-factor test has concluded that the "literal speaker" in the license plate setting is the private individual. This is no different in Missouri. The presence of the "Choose Life" motto—an indicator of both the organization's control of the plate, as well as the private individual's viewpoint—points toward a finding of private speech.

***iv. Ultimate Responsibility***

With this factor tied closely to the third factor, each court evaluating Choose Life license plates—including the Fourth Circuit in *Rose* and the Ninth Circuit in *Arizona Life Coalition*—has also concluded that the entity bearing the ultimate responsibility is the private individual. The Ninth Circuit took special note of the fact that, just as in Missouri, the private organization submitted its motto and controlled the message, and the individual citizens choose to purchase the plate to voluntarily disperse the message. *See Arizona Life Coalition*, 515 F.3d at 967-68. It is the private organization and private individual that bear the burden of taking affirmative steps to convey the message.

Just as in Arizona and Illinois, where private individuals have to pay an extra fee for plates, and where not all vehicles or license plates contain the Choose Life message, the literal speaker who bears the ultimate responsibility is the private individual. As the court for the Northern District of Illinois concluded, it would be “surprising” for Missouri to require private individuals to create, apply for, and pay for government speech. *See Choose Life Illinois*, 2007 U.S. Dist. LEXIS 21863, at \*\*19-20. Therefore, the fourth factor also implicates private speech.

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Each of the four factors points toward a conclusion of private 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 minimum, some private speech.

**B. *Johanns* Is Factually Distinguishable From Choose Life Cases; Yet Even If This Circuit Adopts *Johanns*, A Finding Of Private Speech Is Still Appropriate**

As evidenced by the treatment of *Johanns* by the Ninth Circuit and the Northern District of Illinois, *Johanns* is factually distinguishable from specialty

plate cases, making its two-part test less applicable than the four-part test utilized by the Fourth and Ninth Circuits.

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. 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 inapplicable. This means the Fourth and Ninth Circuits’ analyses in *Rose* and *Arizona Life Coalition* are more on point, and, as shown in Part II.A., *supra*, under that four-factor test the district court decision must be affirmed.

Second, it is important to note that *Johanns* examined not license plates but *full-fledged government campaigns*.<sup>10</sup> *Johanns* also does not take into consideration the Supreme Court’s conclusion that standard license plates

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<sup>10</sup> Because Tennessee requires state-run promotional campaigns, *Johanns* was more applicable in *Bredesen* than in the case at hand.



constitute private speech to some degree, and thus the use of *Johanns* suffers from the same flaw mentioned above.

The Fourth and Ninth Circuits, 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 or promote the speech. To then thrust a non-license plate case into the analysis simply muddles the analysis.

And as pointed out by the Ninth Circuit, *Johanns* involved government-compelled speech, which is inapposite to the voluntary nature of the specialty plate setting. The Ninth Circuit saw the government program in *Johanns* as forcing individuals to give money to the government to pay for someone else's message. This is clearly not the case with Choose Life license plates. The plates are simply not a part of a larger governmental scheme to encourage some private activity. *See Arizona Life Coalition*, 515 F.3d at 964. The state of Missouri has not created the Choose Life plates to promote its own interests; has not created its own marketing campaigns; and is not subsidized by its own fund-raising efforts. *See Choose Life Illinois*, 2007 U.S. Dist. LEXIS 21863, at \*21.

For these reasons, the Fourth and Ninth Circuits' use of the four-factor test is more applicable to license plate issues in Missouri than is the Sixth Circuit's analysis in *Bredesen*. And, as discussed in detail in Part II.A., *supra*, the four-factor analysis yields a conclusion affirming the district court.

However, even if this Circuit were to adopt the rationale of the Sixth Circuit, the *Johanns* two-part test also points to a finding of private speech. As the Ninth Circuit noted, the two-factor *Johanns* test is simply a portion of the four-factor test utilized in *Rose* and *SCV*.

***i. The Government Did Not Set The Overall Message***

The government in Missouri has not set the overall message to be communicated in the Choose Life license plates. That language was chosen and submitted by the Plaintiffs, and the Missouri statutes demonstrate that the message is determined by private applicants. Unlike the state of Tennessee in *Bredesen*, the legislature in Missouri 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.

***ii. The Government Did Not Approve Every Word***

There is no state-run promotional campaign in Missouri; Missouri does not specify exactly who gets the funds; and the state does not approve every word that would be disseminated in the plate. In fact, the government does not approve *any*

word. Thus, the factual differences in Missouri and Tennessee underscore the different outcomes when the two-prong test is utilized. Even under the Sixth Circuit's use of *Johanns*, the Missouri Choose Life plate constitutes private speech.

### **CONCLUSION**

The decision of the Western District of Missouri should be affirmed.

Respectfully submitted,

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## PROOF OF SERVICE

I hereby certify that on \_\_\_\_\_, 2008, 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. A digital copy was also served via email.

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