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American Civil Liberties Union of North Carolina v. Tata: Manipulation of the Government Speech Doctrine Through Specialty License Plates

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AMERICAN CIVIL LIBERTIES UNION OF NORTH CAROLINA v. TATA: MANIPULATION OF THE GOVERNMENT SPEECH DOCTRINE THROUGH SPECIALTY LICENSE PLATES

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In *American Civil Liberties Union ("ACLU") of North Carolina v. Tata*,[1] the United States Court of Appeals for the Fourth Circuit considered whether specialty license plates bearing the message, "Choose Life," which were authorized by the North Carolina General Assembly, constituted private or government speech.[2] The Fourth Circuit employed a four-factor test developed in an earlier case also concerning specialty license plates and informed by two later United States Supreme Court decisions on the government speech doctrine outside of the specialty license plate context.[3] Using this analysis, the Fourth Circuit found that the Choose Life license plate implicated private speech interests.[4] Therefore, North Carolina engaged in impermissible viewpoint discrimination in violation of the First Amendment by authorizing the Choose Life plate while rejecting a pro-choice specialty license plate.[5]

The Fourth Circuit in *Tata* correctly concluded that North Carolina attempted to manipulate the government speech doctrine to prevent the expression of a disfavored viewpoint by claiming private speech as its own.[6] However, the court incorrectly interpreted Supreme Court case law on the government speech doctrine, which resulted in it employing an improper analysis to address the government speech issue.[7] Instead, the Fourth Circuit should have simplified and reduced its four-factor balancing test into a dispositive two-element test: the actual and apparent accountability test.[8] Under this test, the contested speech is government speech if (1) the gov-

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1. 742 F.3d 563 (4th Cir. 2014).
2. *Id.* at 567.
3. *See infra* Part III.
4. *See infra* Part III.
5. *See infra* Part III.
6. *See infra* Part III.
7. *See infra* Part IV.
8. *See infra* Part IV.

ernment controls the content and dissemination of the message, and (2) the government appears, to a reasonable and fully informed observer, to be the literal speaker of the message.[9] The existence of these two elements ensures that the government can be held accountable for its speech through the political process and prevents the government from improperly relying on the government speech doctrine to suppress disfavored viewpoints in a speech forum.[10] Therefore, if either element of the actual and apparent accountability test is lacking, the contested speech is that of a private party and traditional First Amendment protections apply.[11]

I. THE CASE

In June 2011, the North Carolina General Assembly passed, and North Carolina Governor Beverly Perdue signed into law, House Bill 289.[12] The bill authorized approximately 70 new specialty license plates and brought the total number of authorized specialty plates in North Carolina to approximately 150.[13] Included among the newly authorized plates was one bearing the message, "Choose Life" ("Choose Life plate").[14] By the terms of the statute, the Choose Life plate would cost an individual $25 annually (in addition to yearly state registration fees), $15 of which would go to the Carolina Pregnancy Care Fellowship, a private organization that provides support for crisis pregnancy centers throughout North Carolina.[15] The statute authorizing the Choose Life plate expressly prohibits these funds "from 'be[ing] distributed to any agency, organization, business, or other entity that provides, promotes, counsels, or refers to abortion.'"[16] The Division of Motor Vehicles ("DMV") would be able to develop the plate once it received 300 applications for the Choose Life plate[17] through the Carolina

9. *See infra* Part IV.

10. *See infra* Part IV.A.

11. *See infra* Part IV.

12. ACLU of N.C. v. Conti (*Conti I*), 835 F. Supp. 2d 51, 54 (E.D.N.C. 2011) (citing Act effective June 30, 2011, Sess. Law 2011-392, 2011 N.C. Sess. Law 1594).

13. ACLU of N.C. v. Conti (*Conti II*), 912 F. Supp. 2d 363, 371 (E.D.N.C. 2012) (citing Sess. Law 2011-392 § (b)(1)), 2011 N.C. Sess. Law 1594), *aff'd subnom.* ACLU of N.C. v. Tata, 742 F.3d 563 (4th Cir. 2014).

14. *Conti I*, 835 F. Supp. 2d at 54 (citing Sess. Law 2011-392 § 1(b1)(39), 2011 N.C. Sess. Laws at 1595) .

15. *Id.* at 54–55 (citing Sess. Law 2011-392 §§ 4(a), 5, 7(b84), 2011 N.C. Sess. Laws at 1604–05, 1607, 1613).

16. *Id.* at 55 (alteration in original) (quoting Sess. Law 2011-392 § 7(b84), 2011 N.C. Sess. Laws at 1613).

17. *Id.* (citing N.C. Sess. Law 2011–392 § 7(b84)).

Pregnancy Care Fellowship.[18] Once the DMV issued the plate, it could be purchased by any vehicle owner in North Carolina.[19]

Only those specialty plates that have been specifically authorized by the General Assembly are available to North Carolina vehicle owners.[20] Unlike many other states, there is no general statute or administrative scheme through which individuals and organizations can request and obtain specialty license plates.[21] Thus, during the 2011 Legislative Session, various legislators made six attempts to amend House Bill 289 to include another specialty plate with one of the following messages: "Respect Choice" or "Trust Women. Respect Choice."[22] All of those attempts were rejected by the General Assembly.[23]

Thereafter, the ACLU of North Carolina, along with registered North Carolina vehicle owners who wished to purchase a specialty license plate displaying a message supporting reproductive choice (collectively, "Plaintiffs"), filed suit against the Secretary of the North Carolina Department of Transportation and the Commissioner of the North Carolina DMV (collectively, "the State" or "North Carolina").[24] The Plaintiffs sought a preliminary injunction to prohibit the issuance of the Choose Life plates.[25] They alleged that, by authorizing the Choose Life plate while rejecting a pro-choice plate, the State had impermissibly discriminated on the basis of viewpoint in violation of the First and Fourteenth Amendments.[26]

In December 2011, the United States District Court for the Eastern District of North Carolina granted the preliminary injunction.[27] The district court utilized the four-factor test adopted by the Fourth Circuit in *Sons of Confederate Veterans, Inc. v. Commissioner of Virginia Department of Motor Vehicles* ("*SCV*")[28] and relied on the factually similar case of *Planned*

18. *Conti II*, 912 F. Supp. 2d at 365–66. The Carolina Pregnancy Care Fellowship received the requisite 300 applications by September 22, 2011. *Id.* at 366.

19. *Conti I*, 835 F. Supp. 2d at 55.

20. *Id.* at 54.

21. *Id.*

22. *Id.* at 55.

23. *Id.*

24. *Id.* at 54–55. While the case was pending in district court, Eugene Conti held the position of Secretary of the North Carolina Department of Transportation and Michael Robertson held the position of Commissioner of the North Carolina Division of Motor Vehicles. *Id.* at 54.

25. *Id.* at 54–55.

26. *Id.* at 56.

27. *Id.* at 63.

28. 288 F.3d 610 (4th Cir. 2002). In *SCV*, the Fourth Circuit considered whether a proposed specialty license plate for the Sons of Confederate Veterans organization constituted private or government speech. *Id.* at 616. Noting that neither the Fourth Circuit nor the Supreme Court had established a definitive test for answering this question, the court adopted a four-factor test that had been utilized by other circuits in government speech cases outside of the specialty license plate context. *Id.* at 618. The four "instructive" factors are "(1) the central 'purpose' of the program in which the speech in question occurs; (2) the degree of 'editorial control' exercised by the

Parenthood of South Carolina, Inc. v. Rose[29] in its decision.[30] The court preliminarily concluded that the Choose Life plate did not constitute pure government speech,[31] and therefore had to comply with the Free Speech Clause of the First Amendment.[32] The court rejected the State's argument that the Supreme Court had announced a new test for identifying government speech in *Johanns v. Livestock Marketing Ass'n*[33] and that *SCV* and *Rose* were no longer good law.[34] Instead, the district court found that the Fourth Circuit had continued to utilize the *SCV* factors in opinions postdating *Johanns* and that *Johanns* was not "wholly applicable in the specialty license plate context" because *Johanns* is a compelled subsidy case.[35] The district court preliminarily agreed with the Plaintiffs' assertion that the State had engaged in impermissible viewpoint discrimination in violation of the First Amendment, and thus found that the Plaintiffs had met their burden of establishing a likelihood of success on the merits.[36]

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government or private entities over the content of the speech; (3) the identity of the 'literal speaker'; and (4) whether the government or the private entity bears the 'ultimate responsibility' for the content of the speech." *Id.*; *see infra* Part II.B.3.

29. 361 F.3d 786 (4th Cir. 2004). In *Rose*, the Fourth Circuit held that the Choose Life plate authorized by the South Carolina legislature constituted a mixture of private and government speech and, therefore, the State violated the First Amendment by refusing to authorize a corresponding pro-choice plate. *Id.* at 794, 799; *see infra* Part II.B.4.

30. *Conti I*, 835 F. Supp. 2d at 61.

31. The Fourth Circuit has recognized that the classification of speech as either "government" or "private" is an oversimplification, as some speech may have both government and private characteristics. W. Va. Ass'n of Club Owners & Fraternal Servs., Inc. v. Musgrave, 553 F.3d 292, 298 (4th Cir. 2009); *see also Rose*, 361 F.3d at 794 ("I conclude that *SCV*'s four-factor test indicates that both the State and the individual vehicle owner are speaking. . . . Therefore, the speech here appears to be neither purely government speech nor purely private speech, but a mixture of the two."); Sons of Confederate Veterans, Inc. v. Comm'r of Va. Dep't of Motor Vehicles, 305 F.3d 241, 244–45 (4th Cir. 2002) (Luttig, J., respecting the denial of rehearing en banc) ("[M]y colleagues have struggled with this case because they have assumed, in oversimplification, that all speech must be either that of a private individual or that of the government, and that a speech event cannot be *both* private and governmental at the same time."). Other circuits that have addressed the issue of government speech, as well as the Supreme Court, have yet to recognize the possibility of such "mixed" or "hybrid" speech. However, the Fourth Circuit has determined that "mixed" or "hybrid" speech is treated essentially the same as private speech for First Amendment purposes. *See Rose*, 361 F.3d at 799 ("South Carolina has engaged in viewpoint discrimination by allowing only the Choose Life plate . . . . This is prohibited by the First Amendment."). Since mixed speech is subject to the same constitutional protections as private speech, this Note will not distinguish between the two. Thus, any speech that is referred to as "private," "mixed," "hybrid," or "not purely government" speech will be treated as constitutionally equivalent, as distinguished from "pure government" or "government" speech.

32. *Conti I*, 835 F. Supp. 2d at 61.

33. 544 U.S. 550 (2005). In *Johanns*, the Supreme Court found that the federal government established the message of a national beef promotion campaign and effectively controlled the content and dissemination of that message. *Id.* at 560. Thus, the Court held that the beef campaign constituted government speech. *Id.* at 562; *see infra* Part II.C.1.

34. *Conti I*, 835 F. Supp. 2d at 58, 61.

35. *Id.* at 59.

36. *Id.* at 61.

In December 2012, the district court granted the Plaintiffs' motion for summary judgment and permanently enjoined North Carolina from issuing the Choose Life plate.[37] The State again argued that *Johanns* replaced the four *SCV* factors with a single-factor test—the control test—for determining what constitutes government speech, and further asserted "that the Supreme Court confirmed the use of this test in its decision in" a subsequent case.[38] The district court again rejected this argument, and interpreted *Johanns* and *Summum* "as evaluating factors the Supreme Court deemed relevant to the particular facts at issue in those cases," rather than announcing a new test.[39]

Additionally, North Carolina argued that *SCV* and *Rose* were no longer good law because the Fourth Circuit, in *Page v. Lexington County School District One*,[40] applied the two factors articulated in *Johanns* instead of the four *SCV* factors to determine whether the contested speech was that of the government.[41] Because the Fourth Circuit returned to application of the four *SCV* factors in subsequent cases,[42] the State argued that either these cases were inconsistent, or the Fourth Circuit uses the *SCV* factors differently in different contexts.[43] In either instance, the State argued, *Page* would control the outcome of the instant case.[44] The district court rejected this argument as well, finding that there was no "irreconcilable conflict" between *Page* and the later cases, and that *Page* was not so factually similar to the instant case so as to "dictate [that] this court apply the only two factors used by the *Page* court."[45]

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37. *Conti II*, 912 F. Supp. 2d 363, 375 (E.D.N.C. 2012), *aff'd subnom.* ACLU of N.C. v. Tata, 742 F.3d 563 (4th Cir. 2014).

38. *Id.* at 368. North Carolina cited *Pleasant Grove City, Utah v. Summum*, which held that privately donated monuments displayed in a city-owned park qualified as government speech, in part because the city exercised "'final approval authority' over their selection." 555 U.S. 460, 473 (2009) (quoting *Johanns*, 544 U.S. at 560–561); s*ee infra* Part II.D.1.

39. *Conti II*, 912 F. Supp. 2d at 372.

40. 531 F.3d 275 (4th Cir. 2008).

41. *Conti II*, 912 F. Supp. 2d at 373. In *Page*, the Fourth Circuit found that, in cases concerning the government's use of third-party messages, *Johanns* "distilled" the *SCV* factors into two inquiries: "(1) the government's *establishment* of the message, and (2) its *effective control* over the content and dissemination of the message." 531 F.3d at 281 (citing *Johanns*, 544 U.S. at 560–62); *see infra* Part II.C.4.

42. The State cited *Turner v. City Council of Fredericksburg, Virginia*, 534 F.3d 352 (4th Cir. 2008), and *Musgrave* as cases in which the Fourth Circuit returned to application of the *SCV* four-factor test after *Page*. *Conti II*, 912 F. Supp. 2d at 373; *see infra* Part II.C.4 (discussing these cases).

43. *Conti II*, 912 F. Supp. 2d at 373.

44. *Id.*

45. *Id.* In *Page*, the school district expressed its opposition to pending voucher legislation through its website and through e-mails and letters to parents and school employees. 531 F.3d at 278–79. A county resident sued the school district after it refused to allow him to express his support for the pending legislation using the district's website and other communication channels. *Id.* at 279; *see infra* Part II.C.4.

After applying the *SCV* factors, the district court concluded that the Choose Life plates were not pure government speech, but instead were "a government-sponsored avenue to encourage private speech."[46] The court held that offering the Choose Life plate while rejecting a pro-choice plate constituted viewpoint discrimination by the State in violation of the First Amendment.[47] North Carolina appealed the district court's decision to the United States Court of Appeals for the Fourth Circuit.[48]

II LEGAL BACKGROUND

The First Amendment to the United States Constitution provides that "Congress shall make no law . . . abridging the freedom of speech."[49] This guarantee creates a presumption of unconstitutionality when the government regulates or restricts individual expression based on content.[50] Unless the restricted speech falls within one of the established exceptions to freedom of speech, the restriction will be struck down as violative of the First Amendment.[51]

The Free Speech Clause also limits the government's ability to regulate speech that occurs on government property. Such regulations are reviewed according to the property's classification as a traditional public forum, designated public forum, or limited public forum.[52] In a traditional public forum or a designated public forum, government restrictions on private speech must satisfy strict scrutiny review, meaning "the restriction must be narrowly tailored to serve a compelling government interest."[53] In such fora, reasonable time, place, and manner restrictions are permissible, but restrictions based on viewpoint are prohibited.[54] In a limited public forum, the government may restrict private speech by subject matter, or limit

46. *Conti II*, 912 F. Supp. 2d at 375.

47. *Id.* (citing Planned Parenthood of S.C., Inc. v. Rose, 361 F.3d 786, 799 (4th Cir. 2004); *Rose*, 361 F.3d at 800 (Luttig, J., concurring in the judgment); *Rose*, 361 F.3d at 801 (Gregory, J., concurring in the judgment)).

48. ACLU of N.C. v. Tata, 742 F.3d 563, 567 (4th Cir. 2014.)

49. U.S. CONST. amend. I.

50. *See* Cohen v. California, 403 U.S. 15, 24 (1971) ("[M]ost situations where the State has a justifiable interest in regulating speech will fall within one or more of the various established exceptions . . . to the usual rule that governmental bodies may not prescribe the form or content of individual expression.").

51. *Id.* Examples of established exceptions to the prohibition of government regulation on speech include obscenity, "fighting words," and "true threats." *Id.* at 20 (discussing obscenity and fighting words); Virginia v. Black, 538 U.S. 343, 359–60 (2003) (discussing true threats).

52. *See* Pleasant Grove City, Utah v. Summum, 555 U.S. 460, 469–70 (2009) (noting the various standards of review and permissible restrictions on speech for each type of forum).

53. *Id.*

54. *Id.* at 469.

its use to certain groups.[55] However, such restrictions must be reasonable and viewpoint neutral.[56]

A. The Supreme Court Implicitly Employed a Government Speech Analysis for the First Time in Rust*, Then Developed the Doctrine in Subsequent Cases Interpreting* Rust

The government speech doctrine stands for the proposition that when the government speaks for itself, "it is entitled to say what it wishes."[57] Thus, before a court can evaluate the constitutionality of a regulation or restriction on speech, it first must determine which entity is speaking—the government or a private party. This doctrine has its origins in *Rust v. Sullivan*,[58] where the Supreme Court rejected a First Amendment challenge to federal funds conditioned upon certain restrictions on speech.[59] Although the *Rust* Court never used the term "government speech," subsequent First Amendment cases cited *Rust* as an example of the government speaking for itself to contrast cases in which the government funded private speech, thus establishing the government speech doctrine.[60]

1. Rust *Established That Traditional First Amendment Analysis Does Not Apply When the Government Promotes Its Own Message*

Rust concerned Title X of the Public Health Service Act,[61] which provides federal funding for family-planning services.[62] The Act expressly forbids any funds appropriated under Title X being "'used in programs where abortion is a method of family planning,'" and provides that all grants and contracts made under Title X must be in accordance with regulations promulgated by the Secretary of Health and Human Services ("Secretary").[63] "In 1988, the Secretary promulgated new regulations designed to provide . . . 'guidance to [Title X] grantees about how to preserve the distinction between Title X programs and abortion as a method of family planning.'"[64] The regulations attached three conditions on the grant of federal funds for Title X projects: (1) the prohibition of counseling or referrals for

55. *Id.* at 470.

56. *Id.*

57. Rosenberger v. Rector & Visitors of Univ. of Va., 515 U.S. 819, 833 (1995).

58. 500 U.S. 173 (1991).

59. *See id.* at 192 ("There is no question but that the statutory prohibition [on speech] contained in § 1008 is constitutional.").

60. *See infra* Part II.A.2.

61. 42 U.S.C. §§ 300 to 300a-6 (2012).

62. 500 U.S. at 178.

63. *Id.* (quoting 42 U.S.C. §§ 300a-4(a), 300a-6).

64. *Id.* at 179 (quoting 53 Fed. Reg. 2923–24 (1988)).

abortions; (2) the prohibition of encouraging, promoting, or advocating abortion; and (3) a requirement that the projects be "physically and financially separate" from abortion activities.[65]

Title X grantees and doctors who supervised the funds ("Petitioners") sued the Secretary on behalf of themselves and their patients, claiming that the regulations were facially invalid, in part because they violated the First Amendment rights of Title X clients and health providers.[66] Petitioners claimed that the regulations impermissibly discriminated based on viewpoint by compelling clinics to promote continuing a pregnancy to term while prohibiting any discussion of abortion as an option.[67] The Court rejected Petitioners' First Amendment argument and found that, rather than discriminating based on viewpoint, the government had "merely chosen to fund one activity to the exclusion of the other."[68] The Court found this permissible because "[t]he government can, without violating the Constitution, selectively fund a program to encourage certain activities it believes to be in the public interest, without at the same time funding an alternative program which seeks to deal with the problem in another way."[69] Thus, the Government can "make a value judgment favoring childbirth over abortion, and . . . implement that judgment by the allocation of public funds."[70]

2. Subsequent First Amendment Cases Cited Rust *as an Example of the Government Speaking on Its Own Behalf*

Although the *Rust* Court never used the term "government speech," subsequent cases involving First Amendment challenges interpreted *Rust* as establishing a distinct analysis when the government promotes its own message, as opposed to funding private speech.[71] First, in *Rosenberger*, the Court cited *Rust* as it distinguished the government's use of private speakers to convey its own message (such as in *Rust*) from government programs that encourage private speech (such as in *Rosenberger*).[72] The Court found that "[w]hen the government disburses public funds to private entities to convey a *governmental message*, it may take legitimate and appropriate

65. *Id.* at 179–80 (quoting 42 C.F.R. § 59.8–.10 (1989)) (internal quotation marks omitted).

66. *Id.* at 181.

67. *Id.* at 192 (quoting Brief for Petitioners at 11, *Rust*, 500 U.S. 173 (No. 89-1391)).

68. *Id.* at 193.

69. *Id.*

70. *Id.* at 192–93 (alteration in original) (quoting Maher v. Roe, 432 U.S. 464, 474 (1977)) (internal quotation marks omitted).

71. *See SCV*, 288 F.3d 610, 617 (4th Cir. 2002) ("[N]owhere in *Rust* did the Court rely explicitly on the government speech rationale. . . . In later cases, however, the Court consistently has interpreted *Rust* as indicating that the doctors' funded counseling activities were government speech, and that where the government is the speaker, it may choose and tailor its message." (footnote omitted) (citing Legal Servs. Corp. v. Velazquez, 531 U.S. 533, 541 (2001))).

72. Rosenberger v. Rector & Visitors of Univ. of Va., 515 U.S. 819, 833 (1995).

steps to ensure that its message is neither garbled nor distorted by the grantee."[73] However, the Court held that the same logic does not apply "when the [government] does not itself speak or subsidize transmittal of a message it favors but instead expends funds to encourage a diversity of views from private speakers."[74] In the latter instance, the government creates a public forum and viewpoint-based restrictions on speech are impermissible.[75]

The Court next cited *Rust* as an example of the government speaking for itself in *Board of Regents of the University of Wisconsin System v. Southworth*.[76] In this case, the Court noted that the First Amendment analysis it employed does not apply when the government speaks on its own behalf.[77] The *Southworth* Court also explained the rationale behind the government speech doctrine, clarifying why traditional First Amendment principles are inapplicable to instances where the government speaks for itself: "When the government speaks, for instance to promote its own policies or to advance a particular idea, it is, in the end, accountable to the electorate and the political process for its advocacy. If the citizenry objects, newly elected officials later could espouse some different or contrary position."[78]

Finally, in *Velazquez*, the Court cited *Rust* as the origin of the government speech doctrine and noted its interpretation as such in *Rosenberger* and *Southworth*.[79] The Court then explained that the government may discriminate based on viewpoint when "the government is itself the speaker" or when the government funds private speakers to transmit a governmental message.[80]

This line of cases establishes that traditional First Amendment principles, including the prohibition on viewpoint-based discrimination on speech, do not apply to government speech.[81] However, these preliminary government speech cases failed to provide a rule for determining what con-

73. *Id.* (emphasis added) (citing *Rust*, 500 U.S. at 196–200).

74. *Id.* at 834.

75. *Id.*

76. 529 U.S. 217 (2000).

77. *Id.* at 234–35 (citing *Rust*, 500 U.S. 173; Regan v. Taxation With Representation of Wash., 461 U.S. 540 (1983)).

78. *Id.* at 235.

79. *See* Legal Servs. Corp. v. Velazquez, 531 U.S. 533, 541 (2001) ("The Court in *Rust* did not place explicit reliance on the rationale that the counseling activities of the doctors under Title X amounted to governmental speech; when interpreting the holding in later cases, however, we have explained *Rust* on this understanding.").

80. *Id.* (quoting *Rosenberger*, 515 U.S. at 833) (citing *Southworth*, 529 U.S. at 229, 235).

81. *See* Pleasant Grove City, Utah v. Summum, 555 U.S. 460, 467 (2009) ("The Free Speech Clause restricts government regulation of private speech; it does not regulate government speech.").

stitutes government speech and left the lower courts with little guidance on how to analyze this issue.[82]

B. Specialty License Plates Contain Elements of both Government and Private Speech

The Supreme Court first addressed the private speech rights implicated by license plates in *Wooley v. Maynard*.[83] Although *Wooley* dealt with the private speech interests of standard-issue license plates, lower courts have since relied on *Wooley* to support their findings that specialty license plates also implicate private speech interests.[84] The Fourth Circuit was the first circuit court to address the First Amendment implications of specialty license plates in *SCV*, where it adopted a four-factor test to determine whether specialty license plates constitute government speech.[85]

1. Wooley *Laid the Foundation for Specialty License Plate Jurisprudence*

At issue in *Wooley* was a New Hampshire state law that required noncommercial vehicles to display license plates with the state motto, "Live Free or Die," and another state law that made it a misdemeanor to obscure the motto.[86] George Maynard and his wife covered the motto on their family vehicles, finding it repugnant to their moral, religious, and political beliefs.[87] Maynard was convicted in state court of violating the misdemeanor statute and sentenced to pay two fines of twenty-five and fifty dollars, respectively.[88] The Maynards then brought suit in federal district court under 42 U.S.C. Section 1983 against New Hampshire officials, seeking injunctive and declaratory relief against enforcement of the state statutes.[89]

The Supreme Court found that "the right of freedom of thought protected by the First Amendment against state action includes both the right to

82. *See SCV*, 288 F.3d 610, 618 (4th Cir. 2002) ("No clear standard has yet been enunciated in our circuit or by the Supreme Court for determining when the government is 'speaking' and thus able to draw viewpoint-based distinctions, and when it is regulating private speech and thus unable to do so.").

83. 430 U.S. 705 (1977).

84. *See, e.g.*, Ariz. Life Coal. Inc. v. Stanton, 515 F.3d 956, 967 (9th Cir. 2008) (noting the Supreme Court's indication "that messages conveyed through license plates 'implicate private speech interests'" (quoting *SCV*, 288 F.3d at 621) (citing *Wooley*, 430 U.S. at 717)); Planned Parenthood of S.C. Inc. v. Rose, 361 F.3d 786, 794 (4th Cir. 2004) ("[T]he Supreme Court has held that even messages on standard license plates are associated at least partly with the vehicle owners." (citing *Wooley*, 430 U.S. at 717)).

85. *See infra* Part II.B.3.

86. 430 U.S. at 707 (quoting N.H. REV. STAT. ANN. § 263:1 (Supp. 1975); N.H. REV. STAT. ANN. § 262:27-c (Supp. 1975)).

87. *Id.* at 707–08.

88. *Id.* at 708. Upon refusing to pay the fines, Maynard served fifteen days in jail. *Id.*

89. *Id.* at 709.

speak freely and the right to refrain from speaking at all."[90] Thus, the Court held that the Maynards' interests implicated First Amendment protections because the New Hampshire statutes forced them to use their vehicles as "an instrument for fostering public adherence to an ideological point of view [they found] unacceptable."[91] Furthermore, the Court found that the State's interests of proper identification of passenger vehicles and promoting appreciation of history, individualism, and state pride were not sufficiently compelling to justify requiring the Maynards to display the state motto on their license plates.[92] Therefore, the Court held that New Hampshire could not require the Maynards to display the state motto on their personal vehicles.[93]

2. Specialty License Plates Allow Individuals to Display a Particular Message or Image for an Additional Fee

Although *Wooley* dealt with the private speech interests of standard-issue license plates, lower courts have since cited *Wooley* for the proposition that messages on license plates are associated with the private vehicle owner's expression, and that association is only stronger in the case of specialty license plates.[94] Specialty license plates are produced by the government, usually at the request of a private individual or organization, to display a particular message or image.[95] Registered vehicle owners can obtain a specialty license plate by paying additional fees beyond those required for registration.[96]

The process of creating specialty license plates varies from state to state, but there are three models into which the methods of most states can be classified: the administrative model, the legislative model, and the hybrid model.[97] Under the administrative model, the state has a general specialty license plate statute that establishes the procedure by which organiza-

90. *Id.* at 714.

91. *Id.* at 715.

92. *Id.* at 716–17.

93. *Id.* at 717.

94. *See, e.g.*, Planned Parenthood of S.C. Inc. v. Rose, 361 F.3d 786, 794 (4th Cir. 2004) ("[T]he Supreme Court has held that even messages on standard license plates are associated at least partly with the vehicle owners. This association is much stronger when the vehicle owner displays a specialty license plate." (citing *Wooley*, 430 U.S. at 717; *SCV*, 288 F.3d 610, 621 (4th Cir. 2002))).

95. *See id.* ("Although a specialty license plate, like a standard plate, is state-owned and bears a state-authorized message, the specialty plate gives private individuals the option to identify with, purchase, and display one of the authorized messages.").

96. *See* Ariz. Life Coal. Inc. v. Stanton, 515 F.3d 956, 964 (9th Cir. 2008) ("In specialty license plate cases, private individuals choose to pay the price for obtaining a particular specialty license plate.").

97. Stephanie S. Bell, Note, *The First Amendment and Specialty License Plates: The "Choose Life" Controversy*, 73 MO. L. REV. 1279, 1281 (2008).

tions can request specialty plates and designates a state agency (such as the DMV) to review and process those requests.[98] Under the legislative model, state legislatures enact statutes that directly authorize the issuance of particular specialty plates, and describe the method by which each plate will be produced.[99] Finally, under the hybrid model, state legislatures can authorize the issuance of particular specialty plates by statute (as in the legislative model), or organizations can apply for a specialty plate through a designated state agency (as in the administrative model).[100]

3. The Fourth Circuit Adopted a Four-Factor Test to Determine Whether Specialty License Plates Constitute Government Speech

The Fourth Circuit was the first circuit court to address the First Amendment implications of specialty license plates. In *SCV*, the Virginia General Assembly enacted a statute authorizing the issuance of specialty license plates to members of the Sons of Confederate Veterans organization ("SCV").[101] However, unlike other Virginia statutes authorizing specialty plates for members of various organizations, this statute included a logo restriction that prohibited SCV from incorporating its logo, which features the Confederate flag, on its plates.[102] SCV sued the Commissioner of the Virginia DMV, seeking a declaration that the logo restriction was invalid under the First, Fifth, and Fourteenth Amendments and an injunction requiring the Commissioner to issue SCV's specialty license plates, logo included, to members who request them.[103]

The Fourth Circuit began by explaining the Supreme Court's government speech jurisprudence[104] and noted that the authority of the government to speak on its own behalf "necessarily carries with it the authority to select from among various viewpoints those that the government will express as its own."[105] The court also commented on the Supreme Court's explanation in *Southworth* of the rationale behind the government speech doctrine, noting that "where the government itself is responsible, and therefore accountable, for the message that its speech sends, the danger ordinarily involved in governmental viewpoint-based choices is not present."[106]

98. *Id.*
99. *Id.* at 1282.
100. *Id.* at 1283.
101. 288 F.3d 610, 613 (4th Cir. 2002).
102. *Id.*
103. *Id.* at 614.
104. *See supra* Part II.A.
105. *SCV*, 288 F.3d at 617.
106. *Id.* at 618; *see supra* text accompanying notes 76–78.

Next, the Fourth Circuit noted that neither it nor the Supreme Court had enunciated a "clear standard" for distinguishing government speech from private speech.[107] Thus, the court identified four factors examined by other circuits who had addressed the question in other contexts:

> (1) the central "purpose" of the program in which the speech in question occurs; (2) the degree of "editorial control" exercised by the government or private entities over the content of the speech; (3) the identity of the "literal speaker"; and (4) whether the government or the private entity bears the "ultimate responsibility" for the content of the speech.[108]

The court noted that these factors do not "constitute an exhaustive or always-applicable list," but found them "instructive" and sufficient to resolve the issue in this case.[109]

Applying these factors to SCV's specialty license plate, the court found, first, that the purpose of Virginia's specialty license plate program was primarily to produce revenue for the Commonwealth, while also allowing for the private expression of a variety of messages.[110] Therefore, the first factor weighed against a finding of government speech.[111] Second, the court concluded that Virginia exercised "little, if any, control" over the content of its specialty plates, finding instead that the sponsors of the specialty plates "make the substantive decisions regarding . . . content."[112] Third, the court found that the literal speaker and ultimate responsibility factors also weighed in favor of private speech because the plates, although owned by Virginia, are mounted on vehicles owned by private persons.[113] Citing *Wooley*, the court found that "license plates, even when owned by the government, implicate private speech interests because of the connection of any message on the plate to the driver or owner of the vehicle."[114] Therefore, the court concluded that the specialty license plate authorized by the statute

107. *SCV*, 288 F.3d at 618.

108. *Id.* (citing Wells v. City & Cnty. of Denver, 257 F.3d 1132, 1141 (10th Cir. 2001) (using the four factors to determine whether a sign naming the private sponsors of a public holiday display constituted government speech); Knights of the Ku Klux Klan v. Curators of the Univ. of Mo., 203 F.3d 1085 (8th Cir. 2000) (using the four factors to determine whether messages from private sponsors on a public radio station constituted government speech); Downs v. L.A. Unified Sch. Dist., 228 F.3d 1003, 1011 (9th Cir. 2000) (applying similar analysis to determine whether postings on school bulletin boards constitute government speech)).

109. *Id.* at 619.

110. *Id.*

111. *See id.* ("[T]he net financial impact of the program on the Commonwealth's fisc does indicate that the General Assembly here is not making the kind of selective *funding* decisions involved in cases like *Rust* . . . .").

112. *Id.* at 621.

113. *Id.*

114. *Id.* (citing Wooley v. Maynard, 430 U.S. 705, 717 (1977)).

was SCV's speech, not Virginia's, and thus First Amendment protections applied.[115]

4. The Fourth Circuit Applied Its Four-Factor Test to an Earlier Challenge to Choose Life License Plates

The Fourth Circuit subsequently applied the *SCV* four-factor test for distinguishing government speech to specialty license plates in *Rose*. The facts of *Rose* closely resemble those of *Conti*: The South Carolina legislature enacted a statute ("South Carolina Act") that authorized the issuance of a Choose Life plate that would be available to any interested vehicle owner in South Carolina.[116] Planned Parenthood of South Carolina ("PPSC") attempted to amend earlier versions of the South Carolina Act to include a provision for the issuance of a pro-choice plate, but those bills died in committee.[117]

PPSC sued South Carolina officials seeking declaratory and injunctive relief, alleging that the South Carolina Act violated the First Amendment by regulating access to the specialty license plate forum on the basis of viewpoint.[118] The Fourth Circuit found that the district court incorrectly interpreted *SCV*—by overlooking important factual differences between the two cases—as holding that specialty license plates necessarily constitute private rather than government speech.[119] In *SCV*, the Fourth Circuit noted, "Virginia acted as regulator of the existing specialty license plate forum"; in comparison, in this case South Carolina was acting "as a covert speaker" within that forum.[120]

Proper application of the *SCV* four-factor test led the court to conclude that the Choose Life plate contained elements of both private and government speech.[121] First, the court found that the purpose of the South Carolina Act was "to promote [South Carolina's] preference for the pro-life position," and thus this factor weighed in favor of finding government

115. *Id.* at 621–22. The court went on to find that Virginia's logo restriction was impermissible viewpoint discrimination, as the Commissioner failed to demonstrate that the restriction was the least restrictive means available to serve a compelling government interest. *Id.* at 626.

116. Planned Parenthood of S.C., Inc. v. Rose, 361 F.3d 786, 788 (4th Cir. 2004). According to the court, the South Carolina Act "came about because of the perseverance of two legislators who were acting on their own initiative"; it was not initiated by any pro-life organization. *Id.* at 789.

117. *Id.* at 788. South Carolina, operating under the hybrid model of specialty-license-plate creation, also has a general statute that authorizes the issuance of specialty license plates for nonprofit organizations. *Id.* However, organizational plates are only available to certified members of the organization and may only contain the organization's emblem. *Id.* (quoting S.C. CODE ANN. § 56-3-8000(A), (H) (2001)). PPSC did not apply for an organizational plate. *Id.*

118. *Id.* at 789.

119. *Id.* at 793.

120. *Id.*

121. *Id.* at 794.

speech.[122] Second, the court found that South Carolina "exercises complete editorial control over the content of the speech on the Choose Life plate," and thus this factor also weighed in favor of finding government speech.[123] Third, to determine the identity of the literal speaker and who bears the ultimate responsibility for the speech, the court, citing *Wooley*, "found that even messages on standard license plates are associated at least partly with the vehicle owners. This association is much stronger when the vehicle owner displays a specialty license plate."[124] Furthermore, the court found that those who viewed the Choose Life plate would assume that the vehicle owner "holds a pro-life viewpoint."[125] Therefore, the court concluded that the vehicle owner was the literal speaker of, and bore the ultimate responsibility for, the Choose Life plate, and thus these two factors weighed in favor of finding private speech.[126]

Since the four factors led to an "indeterminate result," with two factors weighing in favor of government speech and two weighing in favor of private speech, the court concluded that the Choose Life plate was mixed speech,[127] and thus the government speech doctrine did not apply.[128] Therefore, the South Carolina Act, by authorizing the Choose Life plate while rejecting a pro-choice plate, constituted impermissible viewpoint discrimination in violation of the First Amendment and thus was invalid.[129]

C. The Supreme Court Used a Different Analysis for Government Speech in Johanns*, Producing Disagreement Among the Circuits over the Proper Test*

After the Fourth Circuit had developed the *SCV* four-factor test for evaluating government speech, the Supreme Court addressed the issue using a different analysis in *Johanns*.[130] The *Johanns* decision produced disagreement among the circuits over the proper test for determining government speech.[131]

122. *Id.* at 793.
123. *Id.*
124. *Id.* at 794 (citing Wooley v. Maynard, 430 U.S. 705, 717 (1977); *SCV*, 288 F.3d 610, 621 (4th Cir. 2002)).
125. *Id.*
126. *Id.*
127. *Id.* at 793.
128. *See supra* note 31 (discussing mixed speech).
129. *Rose*, 361 F.3d at 799–800.
130. *See infra* Part II.C.1.
131. *See infra* Parts II.C.2–4.

1. The Supreme Court Evaluated the Government's Establishment and Control of the Contested Speech in Johanns

In *Johanns*, beef producers objected to the Department of Agriculture's requirement that they fund a beef promotion campaign because it undermined their efforts to promote their own specialty beef products, such as American beef, grain-fed beef, and certified Angus beef.[132] In determining that the beef ads at issue constituted government speech, the Court focused on the government's *establishment* and *control* of the content of the message, without explicitly stating that this was the test for government speech.[133]

Regarding *establishment*, the Court noted that "[t]he message set out in the beef promotions is from beginning to end the message established by the Federal Government," and that the government had "set out the overarching message and some of its elements."[134] Regarding *control*, the Court found that the federal government "effectively controlled" the message of the beef promotions and "the Secretary exercise[d] final approval authority over every word used in every promotional campaign."[135] Thus, the Court concluded that "[w]hen, as here, the government sets the overall message to be communicated and approves every word that is disseminated," the government speech doctrine applies.[136]

2. The Sixth Circuit Applied Johanns *to the Specialty License Plate Context*

The Sixth Circuit, in *ACLU of Tennessee v. Bredesen*,[137] held that *Johanns* created the establishment and control test for determining government speech, so that the government speech doctrine applies "when the government determines an overarching message and retains power to ap-

132. Johanns v. Livestock Mktg. Ass'n, 544 U.S. 550, 555–56 (2005).

133. *Id.* at 560–62.

134. *Id.* at 560–61.

135. *Id.*

136. *Id.* at 562. The *Johanns* Court declined to address the beef producers' argument that the beef ads could not be government speech because they are attributed to someone other than the government. *Id.* at 564. Many of the ads bore the attribution, "Funded by America's Beef Producers." *Id.* at 555. However, the Court found that this argument "relate[d] to compelled *speech* rather than compelled *subsidy*, and therefore was inapplicable to this compelled *subsidy* case. *Id.* at 564–65. Compelled subsidy refers to when a private party is required by the government to fund someone else's message; compelled speech refers to when a private party "is obliged personally to express a message he disagrees with, imposed by the government." *Id.* at 557. The Court found that the attribution argument might present a valid objection only if "'those singled out to pay the tax are closely linked with the expression' in a way that makes them appear to endorse the government message," which it did not find to be the case here. *Id.* at 565 n.8 (quoting *id.* at 575–76 (Souter, J., dissenting)).

137. 441 F.3d 370 (6th Cir. 2006).

prove every word disseminated at its behest."[138] In *Bredesen*, the ACLU of Tennessee challenged the constitutionality of a Tennessee statute authorizing the issuance of a Choose Life plate without a corresponding pro-choice plate.[139] Applying *Johanns*'s establishment and control test, the Sixth Circuit, contrary to the conclusion reached by the Fourth Circuit in *Rose*,[140] found that the Choose Life plate constituted government speech.[141]

The Sixth Circuit found that Tennessee established the message on the Choose Life plate by specifying in the authorizing statute that the plates would display the words "Choose Life."[142] Furthermore, the court found that Tennessee exercised "final approval authority" over the Choose Life plate by retaining a veto over its design and through its power to withdraw the authorization.[143] Therefore, the court concluded that, just like the federal government in *Johanns*, "[t]he Tennessee legislature chose the 'Choose Life' plate's overarching message and approved every word to be disseminated."[144] Thus, Tennessee did not violate the First Amendment by authorizing the Choose Life plate without a corresponding pro-choice plate.[145]

Judge Martin dissented in *Bredesen*, concluding that the majority erred by applying a compelled subsidy analysis "to a case where . . . *nothing* is compelled."[146] He explained that *Johanns* involved compelled subsidies to support the government's message, which is immune from First Amendment challenges, as opposed to compelled subsidies to support a private entity's message, which is unconstitutional.[147] He noted that the potential harm in a compelled subsidy challenge "is being forced to give the government money to pay for someone else's message."[148] However, this harm is alleviated when the message is that of the government because "the government must be able to tax and spend in order to function."[149] Therefore, courts must determine whether the contested speech in compelled subsidy cases is that of the government or a private party in order to decide whether the compulsion is constitutional.[150]

Judge Martin found that "[t]he First Amendment harm in this case . . . has nothing to do with being forced to speak or to subsidize a message. Ra-

138. *Id.* at 375.
139. *Id.* at 371–72.
140. *See supra* Part II.B.4.
141. *Bredesen*, 441 F.3d at 376.
142. *Id.*
143. *Id.*
144. *Id.*
145. *Id.* at 372.
146. *Id.* at 381 (Martin, J., dissenting).
147. *Id.* at 385.
148. *Id.*
149. *Id.* at 386.
150. *Id.* at 385.

ther, the harm is being denied the opportunity to speak on the same terms as other private citizens within a government sponsored forum."[151] Therefore, he concluded that the Tennessee statute authorizing the Choose Life plate without a corresponding pro-choice plate constituted impermissible viewpoint discrimination in violation of the First Amendment.[152]

3. The Seventh and Ninth Circuits Distinguished Johanns *from the Specialty License Plate Analysis*

The Seventh and Ninth Circuits, in two cases challenging the constitutionality of the respective state legislatures' *refusal* to issue a Choose Life plate, both distinguished *Johanns* and limited the establishment and control test to compelled subsidy cases. In *Stanton*, the Ninth Circuit applied the *SCV* four-factor test[153] and held that the Choose Life plates constituted private speech.[154] Thus, the Arizona License Plate Commission, by denying the Arizona Life Coalition's application for a specialty license plate, had engaged in impermissible viewpoint discrimination in violation of the First Amendment.[155]

The Seventh Circuit, facing very similar facts in *Choose Life Illinois, Inc. v. White*,[156] distilled the *SCV* four-factor test into a single inquiry: "Under all the circumstances, would a reasonable person consider the speaker to be the government or a private party?"[157] The court noted that "the degree to which the message originates with the government, the degree to which the government exercises editorial control over the message, and whether the government or a private party communicates the message" were among the factors to be considered in its analysis.[158] Applying this simplified version of the *SCV* test, the court found that the vehicle owners who display the specialty plates and the organizations whose logos or messages are depicted on them are the "most obvious speakers in the specialty-plate context" and that "the driver is the ultimate communicator of the message."[159] Therefore, the court concluded that the messages displayed on specialty license plates are not government speech.[160] However, unlike the Ninth Cir-

151. *Id.* at 386.

152. *Id.* at 390. Judge Martin further distinguished *Johanns* from "true compelled speech cases," where compulsion is unconstitutional regardless of whether the message is that of the government or a private party. *Id.* at 385 (quoting Johanns v. Livestock Mktg. Ass'n, 544 U.S. 550, 557 (2005)).

153. Ariz. Life Coal. Inc. v. Stanton, 515 F.3d 956, 965 (9th Cir. 2008).

154. *Id.* at 968.

155. *Id.* at 973.

156. 547 F.3d 853 (7th Cir. 2008).

157. *Id.* at 863.

158. *Id.*

159. *Id.* at 863–64.

160. *Id.* at 863.

cuit in *Stanton*, the court found that the Illinois General Assembly's rejection of a Choose Life plate was viewpoint neutral and thus permissible because the state had excluded the subject of abortion from the specialty license plate forum altogether.[161]

4. The Fourth Circuit Inconsistently Applied both Johanns *and the* SCV *Four-Factor Test in Government Speech Cases Outside of the Specialty License Plate Context*

After *Johanns*, the Fourth Circuit, in a number of government speech cases outside of the specialty-license-plate context, vacillated between application of *Johanns*'s establishment and control test and the *SCV* four-factor test. For example, in *Page*, a county resident brought a Section 1983 First Amendment action against a school district after being denied access to the school district's website and other communication channels (such as letters distributed to students and e-mails sent to school district employees) to express his support for pending state legislation, which the school district opposed.[162]

In determining whether the school district's opposition to the bill constituted government speech, the Fourth Circuit noted that *Johanns* distilled the *SCV* factors, "particularly in cases involving the government's use of third-party messages, [into] (1) the government's *establishment* of the message, and (2) its *effective control* over the content and dissemination of the message."[163] Applying these factors to the school district's opposition to the pending state legislation, the court found that the school district "*established* its message to oppose" the bill.[164] Furthermore, the school district "adopted and approved all speech, even that of third parties, as representative of its own position" and thus *controlled* the content of the message.[165] The school district also "controlled [the message's] dissemination to the public" by distributing it through its own website, e-mails sent to employees, and letters sent home to students.[166] Therefore, the court concluded that the school district's opposition to the bill constituted government speech, and thus the school district "did not create a limited public forum to which [the county resident] was entitled access."[167] As such, the school district did not violate the First Amendment by denying him access to its communication channels.[168]

161. *Id.* at 866.
162. 531 F.3d 275, 277–79 (4th Cir. 2008).
163. *Id.* at 281 (citing Johanns v. Livestock Mktg. Ass'n, 544 U.S. 550, 560–62 (2005)).
164. *Id.* at 282.
165. *Id.*
166. *Id.*
167. *Id.* at 285.
168. *Id.* at 288.

Just one month after its decision in *Page*, the Fourth Circuit addressed the government speech doctrine again in *Turner*, where the court returned to its application of the *SCV* four-factor test to determine that legislative prayers at a city council meeting constitute government speech.[169] Apparently contradicting the *Page* court's "distillation" of the *SCV* factors into the *Johanns* establishment and control factors, the court in *Turner* affirmatively stated, "The Fourth Circuit has adopted a four-factor test for determining when speech can be attributed to the government."[170] The court did not mention, much less attempt to distinguish, either *Johanns* or *Page*.

The Fourth Circuit continued its inconsistent treatment of the government speech doctrine in *Musgrave*, where the court found that retailers' advertisements for their video lottery machines constituted hybrid speech.[171] The court in *Musgrave* found that "the state [was] conveying a message for which it is politically accountable," and that these two factors (a government-conveyed message and political accountability) weighed in favor of government speech.[172] The court cited *Johanns* in finding that the message conveyed by the government was one of moderation, but did not mention either the establishment or control factors.[173] However, the court also noted that the speech was privately funded and that the retailers were the literal speakers of the advertisements.[174] Citing *SCV*, the court found that these two factors weighed in favor of private speech.[175] Thus, the court in *Musgrave* cited to both *Johanns* and *SCV*, but did not explicitly rely on either test in reaching its ultimate conclusion. Instead, the court apparently examined the factors it found most relevant to the specific facts of this case, without employing any particular test for determining government speech. Thus, the Fourth Circuit's varying analyses in *Page*, *Turner*, and *Musgrave* demonstrate its unprincipled approach to the government speech doctrine following *Johanns*.

D. The Supreme Court Employed a Literal Speaker Analysis in Summum*, but Failed to Guide Lower Courts on the Proper Test for Distinguishing Government Speech*

With the circuits in disagreement about the proper test for determining government speech and the applicability of *Johanns* outside of the compelled subsidy context, the Supreme Court addressed the government

169. 534 F.3d 352, 354 (4th Cir. 2008).

170. *Id.*

171. 553 F.3d 292, 298 (4th Cir. 2009).

172. *Id.* at 299.

173. *Id.* at 298 (citing Johanns v. Livestock Mktg. Ass'n, 544 U.S. 550, 561 n.5 (2005)).

174. *Id.* at 299.

175. *Id.* (citing Planned Parenthood of S.C. Inc. v. Rose, 361 F.3d 786, 792–93 (4th Cir. 2004); *SCV*, 288 F.3d 610, 618 (4th Cir. 2002)).

speech doctrine again in *Summum*.[176] After *Summum*, lower courts once again were left to decipher the relevant factors for determining government speech, the respective weight of each of those factors, and their applicability to various factual circumstances.[177]

1. The Supreme Court Revived the Literal Speaker Factor for Government Speech Analysis in Summum

Summum concerned a city-owned park in Pleasant Grove City, Utah ("City"), that displayed fifteen permanent monuments, eleven of which were donated by private parties.[178] One of the donated monuments displayed the Ten Commandments.[179] Summum, a religious organization, wished to donate a monument to the park that would display the Seven Aphorisms of Summum, but the City denied the organization's requests.[180] Summum sued the City, seeking an injunction directing the City to erect its monument in the park.[181] Summum contended that the City violated the Free Speech Clause of the First Amendment by accepting the Ten Commandments monument but refusing the Summum monument.[182]

The Court unanimously agreed that the monuments in the park, including those that were privately donated, were government speech and thus not subject to the Free Speech Clause of the First Amendment.[183] However, the Court declined the opportunity to resolve the confusion over the proper test for determining when the government speaks on its own behalf. While the Court did rely on *Johanns* in finding that "the City [had] 'effectively controlled' the messages sent by the monuments in the Park by exercising 'final approval authority' over their selection,"[184] the Court did not state that establishment and control were the dispositive factors in determining government speech. In fact, the Court deemphasized the importance of the government's establishment of the message, a crucial factor in *Johanns*, by acknowledging that "many of the monuments were not designed or built by the City and were donated in completed form by private entities."[185]

The Court also implicitly appealed to the literal speaker factor of the *SCV* test, without citing any cases that had previously analyzed this factor and without explicitly stating that this factor weighs into the government

176. *See infra* Part II.D.1.
177. *See infra* Part II.D.2.
178. 555 U.S. 460, 464–65 (2009).
179. *Id.* at 465.
180. *Id.*
181. *Id.* at 466.
182. *Id.*
183. *Id.* at 472, 481.
184. *Id.* at 473 (quoting Johanns v. Livestock Mktg. Ass'n, 544 U.S. 550, 560–61 (2005)).
185. *Id.* at 472.

speech analysis. The Court noted that property owners do not typically allow "the installation of permanent monuments [on their land] that convey a message with which they do not wish to be associated."[186] Thus, the Court found that "persons who observe donated monuments routinely—and reasonably—interpret them as conveying some message on the property owner's behalf."[187] Therefore, the Court concluded that in the case of the donated monuments in the city-owned park, "there is little chance that observers will fail to appreciate the *identity of the speaker*."[188]

2. The Eighth Circuit Also Employed a Literal Speaker Analysis, but Distinguished Summum

Before *Tata*, only one circuit court had addressed government speech in the context of specialty license plates since the *Summum* decision. In *Roach v. Stouffer*,[189] a pro-life organization challenged Missouri's denial of its application for a specialty license plate.[190] The Eighth Circuit, in a case of first impression in the circuit,[191] discussed the approaches of its sister circuits when addressing specialty license plates,[192] and ultimately adopted the simplified literal speaker test announced by the Seventh Circuit in *White*: "Our analysis boils down to one key question: whether, under all the circumstances, a reasonable and fully informed observer would consider the speaker to be the government or a private party."[193] Employing this analysis, the court concluded "that a reasonable and fully informed observer would consider the speaker to be the organization that sponsors and the vehicle owner who displays the specialty license plate."[194] Therefore, specialty license plates constitute private speech, and the state's denial of the Choose Life plate constituted impermissible viewpoint discrimination.[195]

The *Roach* decision, issued just one month after *Summum*, distinguished that case in a footnote, stating that *Summum* did not require a finding of government speech in the present case.[196] The court noted that *Summum* dealt with privately donated monuments in a city-owned park, whereas specialty license plates are displayed on privately owned vehicles

186. *Id.* at 471.
187. *Id.*
188. *Id.* (emphasis added).
189. 560 F.3d 860 (8th Cir. 2009).
190. *Id.* at 861.
191. *Id.* at 864.
192. *Id.* at 865–67.
193. *Id.* at 867.
194. *Id.*
195. *Id.* at 868, 870.
196. *Id.* at 868 n.3.

and "facilitate expressive conduct on the part of the organization and its supporters, not the government."[197]

III. THE COURT'S REASONING

On February 11, 2014, the Fourth Circuit affirmed the district court's decision in *Conti II*[198] and explicitly agreed with its conclusion that the Choose Life plate implicated private speech interests sufficient "to preclude a finding of purely government speech."[199] On appeal, North Carolina did not deny the Plaintiffs' contention that its approval of the Choose Life plate and concurrent rejection of a pro-choice plate constituted viewpoint discrimination.[200] Instead, the State argued "that it was free to discriminate based on viewpoint because the license plate speech at issue was solely its own"—in other words, because the specialty plate constituted pure government speech to which First Amendment restrictions do not apply.[201] The Fourth Circuit disagreed however, and concluded without hesitation that the Choose Life plate contained elements of private speech and therefore did not qualify as government speech.[202]

North Carolina argued, as it had below, that the Fourth Circuit had "abandoned the *SCV* factors" for identifying government speech with its decision in *Page*.[203] The court rejected this argument for three reasons: 1) because *Page* is not a Supreme Court or en banc decision, it could not overrule prior Fourth Circuit precedent;[204] 2) "*Page* does not suggest any attempt to overthrow the *SCV* factors in favor of a single-factor control test";[205] and 3) Fourth Circuit decisions after *Page* explicitly analyzed the *SCV* factors in determining government speech.[206] North Carolina also reiterated its argument that *Johanns* and *Summum* "implicitly overruled" the *SCV* test and asserted that those cases confirm the government's control

197. *Id.*

198. ACLU of N.C. v. Tata, 742 F.3d 563, 576 (4th Cir. 2014). By the time the case reached the Fourth Circuit, Anthony Tata had replaced Conti as Secretary of the North Carolina Department of Transportation, and James Forte had replaced Robertson as Commissioner of the North Carolina Department of Motor Vehicles. *See id.* at 563 (naming "Anthony J. Tata, in his official capacity as Secretary of the North Carolina Department of Transportation; [and] James L. Forte, in his official capacity as Commissioner of the North Carolina Division of Motor Vehicles" as defendants).

199. *Id.* at 574 (quoting *Conti II*, 912 F. Supp. 2d 363, 375 (E.D.N.C. 2012), *aff'd sub nom. Tata*, 742 F.3d 563)) (internal quotation marks omitted).

200. *Id.* at 567.

201. *Id.*

202. *Id.* at 575.

203. *Id.* at 569.

204. *Id.*

205. *Id.*

206. *Id.* (citing Turner v. City Council of Fredericksburg, Va., 534 F.3d 352, 354 (4th Cir. 2008)).

over the speech as the dispositive factor and eliminate any reliance on the literal speaker factor.[207] The Fourth Circuit disagreed and stated, "We cannot square the Supreme Court's multi-faceted, context-specific reasoning in *Summum* with North Carolina's blanket contention that all that matters is who controls the message."[208]

After concluding that the *SCV* factors "remain appropriate tools for evaluating whether speech is government, private, or both," the Fourth Circuit applied those factors to the Choose Life plate.[209] The court found that three factors—the central purpose of the program in which the speech in question occurs, the identity of the literal speaker, and which party bears the ultimate responsibility for the speech—weighed in favor of private speech.[210] The remaining factor—the degree of editorial control exercised by the government over the content—weighed in favor of government speech.[211]

First, the court determined "that the *purpose* of the specialty license plate program, including the 'Choose Life' plate, is to allow North Carolina drivers to express their affinity for various special interests, as well as to raise revenue for the state."[212] Furthermore, the court concluded that, with over 200 specialty plates to choose from covering a range of interests, "[i]t defies logic, and may in fact create other problems (such as Establishment Clause issues in the case of the Knights of Columbus [specialty plate offered by the State]) to suggest that all of these plates constitute North Carolina's—and only North Carolina's—message."[213]

Second, the court found, as both parties had agreed, that North Carolina exercised complete *editorial control* over the content of the message.[214] Third, the Fourth Circuit noted that "the Supreme Court [in *Wooley*] deemed license plates a sphere of private 'intellect and spirit' that 'implicat[es] First Amendment protections' from government control"[215] and concluded that the *literal speaker* of a message on a specialty license plate

207. *Id.* at 569–70.

208. *Id.* at 571. North Carolina cited to a third Supreme Court case "for the proposition that [u]nder the government speech doctrine, North Carolina can claim the fundamental rule of protection under the First Amendment, that a speaker has the autonomy to choose the content of his own message." *Id.* (alteration in original) (internal quotation marks omitted) (citing Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos., Inc., 515 U.S. 557, 573 (1995)). The Fourth Circuit found that this case had "absolutely no bearing" on the instant case because "*Hurley* had nothing to do with the government speech doctrine" and "[i]f anything, *Hurley* hurts North Carolina's cause." *Id.*

209. *Id.* at 571–72.

210. *Id.* at 573.

211. *Id.* at 572–75.

212. *Id.* at 572 (emphasis added).

213. *Id.* at 573.

214. *Id.*

215. *Id.* (second alteration in original) (citing Wooley v. Maynard, 430 U.S. 705, 715 (1977)).

that the vehicle owner selected must be the vehicle owner.[216] Fourth and finally, the Fourth Circuit held that the private party bears the *ultimate responsibility* for the speech's content because "'[w]hen a special license plate is purchased, it is really the private citizen who engages the government to publish *his* message,' not the other way around."[217] The specialty plate would not exist but for the private party establishing, applying for, and paying for it, while the government's role is limited to that of publisher of the private message.[218]

Because North Carolina did not challenge the district court's conclusion that, upon finding that the specialty license plates implicate private speech rights, offering a Choose Life plate while refusing to authorize a pro-choice plate constitutes impermissible viewpoint discrimination in violation of the First Amendment,[219] and because that conclusion was supported by *Rose*, the Fourth Circuit did not disturb that finding.[220] The State did contend, however, that its inability to filter out certain specialty plates would "force it to end its specialty plate program."[221] The court responded that its ruling "does not render [North] Carolina powerless to regulate its specialty license plate forum,"[222] as long as it does so "in a viewpoint-neutral fashion."[223] The court suggested as an alternative that North Carolina could "choose to avoid the reproductive choice debate altogether," and noted that the Seventh Circuit had upheld such a restriction as being viewpoint neutral and thus permissible.[224]

IV. ANALYSIS

Although the Fourth Circuit in *Tata* correctly concluded that the Choose Life plate constituted private, not government, speech, it incorrectly

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216. *Id.* at 574.

217. *Id.* (quoting Sons of Confederate Veterans, Inc. v. Comm'r of the Va. Dep't of Motor Vehicles, 305 F.3d 241, 246 (4th Cir. 2002) (Luttig, J., respecting the denial of rehearing en banc)).

218. *Id.* (citing *Sons of Confederate Veterans, Inc.*, 305 F.3d at 246 (Luttig, J., respecting the denial of rehearing en banc)).

219. *Id.* at 575 (quoting *Conti II*, 912 F. Supp. 2d 363, 375 (E.D.N.C. 2012), *aff'd sub nom. Tata*, 742 F.3d 563)).

220. *Id.* (citing Planned Parenthood of S.C. Inc. v. Rose, 361 F.3d 786, 799 (4th Cir. 2004)).

221. *Id.*

222. *Id.* (alteration in original) (quoting *Rose*, 361 F.3d at 799) (internal quotation marks omitted).

223. *Id.* The court pointed out that North Carolina already imposes a viewpoint-neutral regulation on its specialty-plate program by requiring 300 applications before issuing a new plate. *Id.*

224. *Id.* (citing Choose Life Ill., Inc. v. White, 547 F.3d 853, 865–66 (7th Cir. 2008)). In *White*, Illinois "excluded the entire subject of abortion from its specialty-plate program." 547 F.3d at 865. The Seventh Circuit found that the restriction was one on subject matter, not viewpoint, because the state did not favor any particular perspective over another. *Id.* at 866; *see supra* Part II.C.3.

interpreted the Supreme Court case law on the government speech doctrine, which resulted in it employing an improper analysis to reach this conclusion. The Fourth Circuit should have distinguished *Johanns* and limited its application to compelled subsidy cases.[225] Furthermore, the Fourth Circuit should have interpreted *Summum* as analyzing the two dispositive factors in government speech cases that do not involve compulsion.[226]

The Fourth Circuit should have simplified and reduced its four-factor balancing test into a dispositive two-element test: the actual and apparent accountability test. Under this test, the contested speech is that of the government if (1) the government controls the content and dissemination of the message, and (2) the government appears, to a reasonable and fully informed observer, to be the literal speaker of the message. The existence of these two elements ensures that the government can be held accountable for its speech through the political process and thus the contested speech can properly be characterized as government speech.[227] If either or both of these elements are lacking, then the contested speech is private speech and traditional First Amendment protections apply.

A. The Rationale Underlying the Government Speech Doctrine Supports the Actual and Apparent Accountability Test

The actual and apparent accountability test promotes the underlying rationale behind the government speech doctrine: political accountability. The Supreme Court explained in *Southworth* that government speech is exempt from traditional First Amendment protections because the government can be held accountable to the public through the political process: "If the citizenry objects, newly elected officials later could espouse some different or contrary position."[228] The Fourth Circuit elaborated on this position by stating that "where the government itself is responsible, and therefore accountable, for the message that its speech sends, the danger ordinarily involved in governmental viewpoint-based choices is not present."[229] This accountability also explains why, when the government speaks for itself, it can restrict speech on the basis of viewpoint "to ensure that its message is neither garbled nor distorted"[230]—because if the government is to be held accountable for its speech, it is imperative that the public is able to delineate

225. *See infra* Part IV.D.

226. *See infra* Part IV.B.

227. *See infra* Part IV.A.

228. Bd. of Regents of the Univ. of Wis. Sys. v. Southworth, 529 U.S. 217, 235 (2000); *see supra* text accompanying notes 76–78.

229. *SCV*, 288 F.3d 610, 618 (4th Cir. 2002).

230. Rosenberger v. Rector & Visitors of Univ. of Va., 515 U.S. 819, 833 (1995).

its message from that of other speakers. Thus, the linchpin of the government speech doctrine is governmental accountability.[231]

The government's actual ability to control the content and dissemination of its message, and its appearance to the public as the literal speaker, are both necessary to hold the government accountable for its speech through the political process. The first element establishes the government's actual accountability for its speech, while the second element establishes the government's apparent accountability to the public for its speech. As the Fourth, Seventh, Eighth, and Ninth Circuits have observed in their government speech cases, speech cannot be attributed to the government unless a reasonable observer would understand that it is the government that is speaking.[232] This is because the government cannot be held accountable for its speech through the political process if the citizenry does not recognize that it is the government doing the speaking.[233] Without such recognition, the public would not see the need to elect new officials who "espouse some different or contrary position" to the one with which they disagree.[234]

Just as important to the goal of government accountability is the government's ability to control the content and dissemination of its message. The importance of this element is made clear in the Supreme Court's decisions in *Johanns* and *Summum*, and the Sixth Circuit's decision in *Bredesen*, all of which heavily relied on the government's effective control over the message in finding that the contested speech in each case was that of the

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231. *See* Helen Norton, *The Measure of Government Speech: Identifying Expression's Source*, 88 B.U. L. REV. 587, 597 (2008) ("Government speech is thus most valuable and least dangerous when its governmental source is apparent, enabling the public to more accurately assess the message's credibility and to take accountability measures as appropriate."); *id.* at 599–600 ("If, however, political accountability is not available as a check on the government because the governmental source is obscured, then the safeguards of traditional First Amendment analysis should apply.").

232. *See* Roach v. Stouffer, 560 F.3d 860, 867 (8th Cir. 2009) ("Our analysis boils down to one key question: whether, under all the circumstances, a reasonable and fully informed observer would consider the speaker to be the government or a private party."); Choose Life Ill., Inc. v. White, 547 F.3d 853, 863 (7th Cir. 2008) ("Under all the circumstances, would a reasonable person consider the speaker to be the government or a private party?"). *See generally* Turner v. City Council of Fredericksburg, Va., 534 F.3d 352 (4th Cir. 2008) (finding government speech where the government was found to be the literal speaker); Ariz. Life Coal. Inc. v. Stanton, 515 F.3d 956 (9th Cir. 2008) (finding private speech where the private party was found to be the literal speaker); Planned Parenthood of S.C. Inc. v. Rose, 361 F.3d 786 (4th Cir. 2004) (same); *SCV*, 288 F.3d 610 (4th Cir. 2002) (same).

233. *See* W. Va. Ass'n of Club Owners & Fraternal Servs., Inc. v. Musgrave, 553 F.3d 292, 299 (4th Cir. 2009) ("The fact that the state is conveying a message for which it is politically accountable suggests that the speech at issue is government speech."); *Rose*, 361 F.3d at 799 ("As the citizen becomes less likely to associate specialty plate messages with the State, the State's accountability for any message is correspondingly diminished."); Norton, *supra* note 231, at 603 ("Absent an understanding of the message's governmental source, onlookers cannot fully evaluate the message's credibility, nor will they realize the possibility of holding the government accountable as the source of messages they find objectionable.").

234. Bd. of Regents of the Univ. of Wis. Sys. v. Southworth, 529 U.S. 217, 235 (2000).

government.[235] Just as the government cannot be held accountable for speech if the public does not know that the government is speaking, the government also cannot be held accountable for speech when it has no ability to control the content and dissemination of the message that is ultimately expressed to the public.[236] If such were the case, the newly elected officials, even if they espouse a different viewpoint from their predecessors, would be unable to alter the government's message in response to public concern. Therefore, the government must have the ability to control the content and dissemination of its message, and thus the ability to respond to the political process, in order to be held accountable for its speech.

B. Summum *Employed an Actual and Apparent Accountability Analysis to Distinguish Government Speech, Without Making the Test Explicit*

As the most recent Supreme Court decision to address government speech and the more factually similar case, the Fourth Circuit should have found the analysis in *Summum* to be controlling in *Tata*, and should have limited the analysis of *Johanns* to the compelled subsidy context. In *Summum*, the Court did not state any particular test or required factors for determining what constitutes government speech. However, the Court explicitly relied on the government's ability to control the content and dissemination of its message,[237] and referenced the government's appearance as the literal speaker,[238] in finding that the privately donated monuments on government-owned property constitute government speech.[239] The Court cited *Johanns* in finding that the City "effectively controlled" the message expressed through the monuments in that it exercised "final approval authority" over which monuments were selected.[240]

Interestingly, the Court in *Summum* did not mention the other element that was critical in *Johanns*—the government's establishment of the message. Indeed, this element weighed against a finding of government speech in *Summum* because the messages of the monuments were established by the private individuals and organizations who created and donated them, not

235. Pleasant Grove City, Utah v. Summum, 555 U.S. 460, 473 (2009); Johanns v. Livestock Mktg. Ass'n, 544 U.S. 550, 560–62 (2005); ACLU of Tenn. v. Bredesen, 441 F.3d 370, 376 (6th Cir. 2006).

236. *Cf.* Andy G. Olree, *Identifying Government Speech*, 42 CONN. L. REV. 365, 415 (2009) (advocating a finding of government speech where the message is "expressed in a medium or format effectively owned and controlled by government and clearly reserved for the purpose of expressing only those messages the government regards as its own").

237. *Summum*, 555 U.S. at 473 (quoting *Johanns*, 544 U.S. at 560–61).

238. *Id.* at 471.

239. *Id.* at 472.

240. *Id.* at 473 (quoting *Johanns*, 544 U.S. at 560–61).

by the government.[241] The Court's inattention to this element in *Summum* suggests its inapplicability to the government speech determination outside of the compelled subsidy context.

However, the Court did allude to the government's appearance to the public as the literal speaker of the messages displayed on the monuments.[242] Although the Court did not cite any of the circuit court decisions that had explicitly used this factor in the government speech analysis, nor did the Court state that this factor was necessary or even relevant to its determination, it apparently discussed the literal speaker factor to support its conclusion that privately donated monuments on government-owned property constitute government speech.[243] Specifically, the Court stated that a reasonable observer would ordinarily expect that a permanent monument on one's property reflects the property owner's viewpoint.[244] Therefore, the public is aware that it is the government, rather than the private donors, who is speaking through the monuments in the city park.

Thus, in *Tata*, the Fourth Circuit should have interpreted *Summum* as finding the government's control over the message and its appearance as the literal speaker to be the two critical factors in distinguishing government speech. The importance of the control factor is made clear in the *Summum* opinion in that it is the Court's primary focus in finding in favor of government speech.[245] However, it is doubtful that the Court would have reached the same conclusion if that finding was not also supported by the literal speaker factor. Furthermore, the Court's virtual silence on the establishment factor, and its acknowledgement that this factor actually weighed against a finding of government speech in that case, should have been interpreted by the Fourth Circuit as dispensing with this element in the government speech analysis, at least in cases not concerning compelled subsidies.

C. The Fourth Circuit Already Emphasizes the Government's Control and the Literal Speaker Factors in the SCV *Four-Factor Test*

When employing the *SCV* four-factor test to distinguish government speech, the Fourth Circuit already emphasizes the degree of governmental control and literal speaker factors more so than it does the other two factors. Although the court describes the four factors as "instructive" and notes that

241. *See id.* at 472 ("[M]any of the monuments were not designed or built by the City and were donated in completed form by private entities . . . .").

242. *Id.* at 471.

243. *See id.* at 470 ("Permanent monuments displayed on public property typically represent government speech.").

244. *Id.* at 471.

245. *See id.* at 473 ("[T]he City has 'effectively controlled' the messages sent by the monuments in the Park by exercising 'final approval authority' over their selection." (quoting *Johanns*, 544 U.S. at 560–61)).

no particular factor is dispositive,[246] the Seventh and Eighth Circuits both found that the *SCV* test could be simplified into a single factor—that of the literal speaker.[247] The Fourth Circuit itself consistently analyzes the literal speaker factor and the ultimate responsibility factor as if they are equivalent, rather than two separate factors.[248] Furthermore, the Fourth Circuit has consistently refused to attribute speech to the government when the literal speaker/ultimate responsibility factor weighs against it—even if both of the other factors weigh in its favor.[249] Therefore, the Fourth Circuit appears to place greater weight on the literal speaker/ultimate responsibility factor than on the other two factors combined.

However, the Fourth Circuit has not gone as far as the Seventh and Eighth Circuits in holding that the literal speaker factor is the sole, determinative factor.[250] By retaining its other factors—the purpose of the program in which the speech occurs and the government's degree of control over the speech—the Fourth Circuit has recognized the importance of actual government accountability to a finding of government speech. But these two factors also can be reduced to a single factor—the government's ability to control the content and dissemination of its message. The other *SCV* factor—the purpose of the program in which the speech occurs—does not add value to the analysis because it merely informs the other factors in a conclusory manner. For example, when the court finds that the purpose of the program is to promote individual expression, this necessarily implies that the literal speaker is the private party.[251] In contrast, when the court finds that the purpose of the program is to promulgate the state's message on a particular subject, this generally supports a finding that the government controls the content and dissemination of that message.[252] Thus, the pur-

246. *See* ACLU of N.C. v. Tata, 742 F.3d 563, 569 (4th Cir. 2014) (noting the court's "express acknowledgement in [*SCV*] that the four factors identified there are 'instructive' but neither 'exhaustive' nor always uniformly applicable" (quoting *SCV*, 288 F.3d 610, 619 (4th Cir. 2002))).

247. Roach v. Stouffer, 560 F.3d 860, 867 (8th Cir. 2009); Choose Life Ill., Inc. v. White, 547 F.3d 853, 863 (7th Cir. 2008).

248. *See* Planned Parenthood of S.C. Inc. v. Rose, 361 F.3d 786, 793–94 (4th Cir. 2004) ("Finally, I consider the third and fourth factors of the *SCV* test: the 'identity of the literal speaker' and 'whether the government or the private entity bears the ultimate responsibility' for the speech."); *id.* at 794 ("The same reasoning [applied to the literal speaker factor] leads me to conclude (under the fourth *SCV* factor) that the private individual bears the ultimate responsibility for the speech on the Choose Life plate."); *SCV*, 288 F.3d at 621 ("We next inquire into who is the 'literal speaker' and who bears the 'ultimate responsibility' for the speech in this case.").

249. *See* W. Va. Ass'n of Club Owners & Fraternal Servs., Inc. v. Musgrave, 553 F.3d 292 (4th Cir. 2009); *Rose*, 361 F.3d 786.

250. *See Tata*, 742 F.3d at 571–72 ("Having concluded that the 'instructive' factors we identified in *SCV* remain appropriate tools for evaluating whether speech is government, private, or both, we turn to applying those factors here.").

251. *See Tata*, 742 F.3d at 572, 574; *SCV*, 288 F.3d at 619, 621.

252. *See, e.g.*, *Rose*, 361 F.3d at 793 ("Here, the idea for a Choose Life plate originated with the State, and the legislature determined that the plate will bear the message 'Choose Life.' The

pose factor is merely an approximation for the control and literal speaker factors, and does not need to be analyzed separately.

Therefore, the Fourth Circuit's analysis in government speech cases is generally consistent with the actual and apparent accountability test in that it emphasizes the importance of the government's ability to control the speech as well as the public's recognition of the government as speaker. However, the Fourth Circuit could have made its analysis in *Tata* more clear and concise by consolidating the literal speaker and ultimate responsibility factors into a single factor—apparent accountability—and eliminating the conclusory purpose of the program factor.

D. Johanns*'s Establishment and Control Test Is Limited to Compelled Subsidy Cases*

The Fourth Circuit should have limited the establishment and control test utilized by the Supreme Court in *Johanns* to compelled subsidy cases, and thus should not have applied it to the specialty license plate context where neither speech nor financial support is compelled. Different interests are at stake when a private party is compelled by the government to either fund or personally endorse someone else's message, as opposed to when the government restricts a private party's ability to speak in a government-sponsored forum.[253] Therefore, it is inappropriate for courts to apply the same analysis to compelled subsidy cases as they do to government speech cases that do not involve compulsion.[254] As such, the Fourth Circuit in *Tata* should have limited the establishment and control test of *Johanns* to cases involving compulsion, and utilized the actual and apparent accountability test instead.

The potential harm in a compelled subsidy case is a private party being forced by the government to fund the expression of someone else's message with which the private party does not agree.[255] This is permissible when the message is that of the government because it must be able to tax and spend in order to function.[256] However, the government violates the First Amendment when it forces a private party to fund another private party's expression.[257] Therefore, the government's establishment of an overarching message, as was found in *Johanns*, is particularly important to the determination of constitutionality in compelled subsidy cases.

State thus exercises complete editorial control over the content of the speech on the Choose Life plate.").

253. ACLU of Tenn. v. Bredesen, 441 F.3d 370, 386 (6th Cir. 2006) (Martin, J., dissenting).

254. *Id.* at 381.

255. *Id.* at 385.

256. *Id.* at 386.

257. *Id.* at 385–86.

The same concern is not present, however, in cases where a private party is denied access to speak in a government-sponsored forum. In these cases, the potential "harm is being denied the opportunity to speak on the same terms as other private citizens within" the forum.[258] Therefore, the determination of which entity (public or private) established the message is less important than the determination of which entity is actually communicating the message. If private parties are speaking in a government-sponsored forum, then the government cannot restrict access to that forum based on viewpoint; if the government is merely using its own communication channels to express its own view, then it may restrict the expression of opposing viewpoints through those channels "to ensure that its message is neither garbled nor distorted."[259] The actual and apparent accountability test determines which entity is actually communicating the contested message by examining who has control over its content and dissemination and who appears to be the literal speaker.[260]

Therefore, the Fourth Circuit should have interpreted the *Johanns* establishment and control test as limited to compelled subsidies cases. *Tata* did not involve a compelled subsidy because the North Carolina vehicle owners were not being forced to pay for the Choose Life plate; rather, they were petitioning the government for the opportunity to pay for their own pro-choice plates.[261] Thus, the *Johanns* establishment and control test does not apply to *Tata*, or to specialty license plate cases in general. The Seventh and Ninth Circuits correctly interpreted *Johanns* as being limited to compelled subsidy (and possibly compelled speech) cases, and therefore distinguished it from specialty license plate cases.[262] The Fourth Circuit in *Tata* also correctly noted that *Johanns* and *Summum* taken together demonstrate that different factors are relevant in different circumstances when distinguishing government from private speech.[263] However, the court did not go far enough in differentiating the applicability of each of these two cases. Instead, the court continued to rely on *Johanns* to support its conclusion that specialty license plates constitute mixed speech.[264] It was an error for

258. *Id.* at 386.

259. Rosenberger v. Rector & Visitors of Univ. of Va., 515 U.S. 819, 833 (1995).

260. *See supra* Part IV.A.

261. *See Conti I*, 835 F. Supp. 2d 51, 55 (E.D.N.C. 2011) ("The Individual Plaintiffs are registered automobile owners in the State of North Carolina who desire to purchase a license plate bearing a message expressing support for a woman's right to reproductive choice . . . .").

262. *See* Choose Life Ill., Inc. v. White, 547 F.3d 853, 863 (7th Cir. 2008) (declining to apply the *Johanns* analysis to the specialty license plate context, instead finding "the approach of the Fourth and Ninth Circuits more persuasive"); Ariz. Life Coal. Inc. v. Stanton, 515 F.3d 956, 965 (9th Cir. 2008) (finding *Johanns* to be "factually distinguishable" from, yet "instructive" to, the specialty license plate context, and applying the four-factor test).

263. ACLU of N.C. v. Tata, 742 F.3d 563, 570–71 (4th Cir. 2014).

264. *Id.* at 570.

Johanns to influence the court's decision in *Tata* because it is wholly inapplicable to the specialty license plate context.[265]

V. CONCLUSION

In *Tata*, the Fourth Circuit determined that the Choose Life plate constituted private speech.[266] Therefore, North Carolina engaged in impermissible viewpoint discrimination by authorizing the issuance of the Choose Life plate while refusing to issue a pro-choice specialty license plate.[267] Although the court arrived at the correct conclusion in *Tata*, it did so by employing the inadequate *SCV* four-factor test for determining what constitutes government speech.[268] Furthermore, the Fourth Circuit incorrectly interpreted *Johanns* as being relevant outside of the compelled subsidy context,[269] and failed to recognize that *Summum* makes clear that the two most important factors in the government speech analysis are the government's control over the content and dissemination of the message and the government's appearance to a reasonable observer as the literal speaker.[270] Therefore, the Fourth Circuit should have taken the opportunity in *Tata* to remedy its inconsistent treatment of the government speech doctrine by employing the actual and apparent accountability test, which utilizes these two factors, to determine whether the Choose Life plate constituted government speech.[271] The existence of a simplified and clarified analysis governing the government speech doctrine would both ensure that the government can be held accountable for its speech through the political process, and prevent

265. Furthermore, an entirely different concern is present in true compelled speech cases. In those cases, the right being threatened is not "the right to speak freely [but] the right to refrain from speaking at all." Wooley v. Maynard, 430 U.S. 705, 714 (1977). The First Amendment prohibits the government from compelling an individual "personally to express a message he disagrees with," regardless of the source of the message. Johanns v. Livestock Mktg. Ass'n, 544 U.S. 550, 557 (2005). Therefore, the government speech doctrine is wholly inapplicable to such cases. The compulsion will be held unconstitutional whenever the private party is "'closely linked with the expression' in a way that makes [it] appear to endorse the . . . message." *Id.* at 565 n.8 (quoting *id.* at 575–76 (Souter, J., dissenting)). Accordingly, neither the *Johanns* establishment and control test nor the actual and apparent accountability test for determining government speech apply to true compelled speech cases. *See id.* at 564–65 (declining to address respondents' argument because it "relates to compelled *speech* rather than compelled *subsidy*"); *Tata*, 742 F.3d at 570 ("[T]he Supreme Court itself limited its holding [in *Johanns*] to compelled subsidies, expressly declining to address as not on point even compelled speech arguments." (citing *Johanns*, 544 U.S. at 564–65)).

266. *See supra* Part III.

267. *See supra* Part III.

268. *See supra* Part IV.

269. *See supra* Part IV.D.

270. *See supra* Part IV.B.

271. *See supra* Part IV.

the government from improperly relying on the doctrine to suppress disfavored viewpoints in a speech forum.[272]

272. *See supra* Part IV.A.