No. 04-6393

IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

AMERICAN CIVIL LIBERTIES UNION OF TENNESSEE; PLANNED PARENTHOOD OF MIDDLE AND EAST TENNESSEE, INC.; SALLY LEVINE; HILARY CHIZ; JOE SWEAT,
Plaintiffs-Appellees,

v.

PHILIP BREDESEN, GOVERNOR OF TENNESSEE; FRED PHILLIPS, COMMISSIONER OF SAFETY OF TENNESSEE,
Defendants-Appellees;

FRIENDS OF GREAT SMOKY MOUNTAINS NATIONAL PARK, INC., a NON-PROFIT NORTH CAROLINA CORPORATION,
Intervening Defendant;

NEW LIFE RESOURCES, INC.,
Intervening Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF TENNESSEE, NASHVILLE DIVISION

MOTION OF PLAINTIFFS-APPELLEES FOR STAY OF MANDATE PENDING FILING OF PETITION FOR CERTIORARI

Roger Evans
Planned Parenthood Federation of America
434 W. 33rd Street
New York, New York 10001
(212) 541-7800

Melody L. Fowler-Green
ACLU Foundation of Tennessee
P.O. Box 120160
Nashville, Tennessee 37212
(615) 320-7142

Susan L. Kay
Chairperson, Legal Committee
ACLU of Tennessee
131 21st Avenue South
Nashville, Tennessee 37203
(615) 322-4964

Julie Sternberg
Carrie Y. Flaxman
ACLU Reproductive Freedom Project
125 Broad Street
New York, New York 10004
(212) 549-2636

Pursuant to Federal Rule of Appellate Procedure 41(d)(2) and Sixth Circuit Rule 41, Plaintiffs respectfully move for a stay of the issuance of the mandate in the above-captioned case pending application to the Supreme Court for a writ of certiorari. This Court entered judgment on March 17, 2006. The mandate is thus scheduled to issue on April 7, 2006. 6th Cir. I.O.P. 41(a) (mandate issues twenty-one days after issuance of judgment). Plaintiffs intend to file a petition for writ of certiorari with the Supreme Court within the ninety days permitted. See Sup. Ct. R. 13(1). Plaintiffs request a stay that does not exceed the date on which their petition for a writ of certiorari must be filed (June 15, 2006), with a continuance of the stay to follow official notification that the petition has been filed. Fed. R. App. P. 41(d)(2)(A); 6th Cir. R. 41(c). As set forth more fully below, Plaintiffs' motion should be granted because their petition for a writ of certiorari will "present a substantial question and . . . there is good cause for a stay." Fed. R. App. P. 41(d)(2)(A); 6th Cir. R. 41(a).

PROCEDURAL BACKGROUND

Plaintiffs have challenged the constitutionality of Tennessee's "Choose Life" license plate law, Tenn. Code Ann. § 55-4-306 ("Act"), and, alternatively, Tennessee's policy and practice of issuing specialty license plates, Tenn. Code Ann. §§ 55-4-228 through 55-4-323 ("scheme"). Under the Act, Tennessee automobile owners who oppose abortion rights may purchase "Choose Life"

specialty license plates and display them on their cars. By contrast, Tennessee car owners who wish to display an opposing viewpoint, such as "Pro Choice," may not.

The United States District Court for the Middle District of Tennessee (Hon. Todd J. Campbell) ruled that the Act constitutes impermissible viewpoint discrimination under the First Amendment of the United States Constitution. ACLU v. Bredesen, 354 F. Supp. 2d 770, 774 (M.D. Tenn. 2004). The district court relied on several cases that have invalidated license plate schemes as unlawful viewpoint discrimination, including the ruling of the United States Court of Appeals for the Fourth Circuit striking down a parallel South Carolina "Choose Life" license plate statute. Planned Parenthood of S.C., Inc. v. Rose, 361 F.3d 786, 799 (4th Cir. 2004), cert. denied, 543 U.S. 1119 (2005) [hereinafter "PPSC"].

Defendants in the instant case, the Governor and the Commissioner of Safety of Tennessee, did not appeal the district court's decision.[1] Intervening Defendant New Life Resources, Inc., a private organization, is the sole Appellant. On appeal, in addition to contending that the "Choose Life" plates are pure government speech, New Life Resources argued for the first time that the Tax Injunction Act deprived the federal courts of jurisdiction over this matter.

---

[1] Instead, Defendants proceeded, like Plaintiffs, as Appellees; they argued only that this Court need not address the constitutionality of the specialty license plate scheme.

This Court rejected New Life Resources' Tax Injunction Act argument. In addition, over the dissent of Judge Martin, this Court reversed the ruling of the district court, reasoning that the Act's viewpoint discrimination is permissible, as the "Choose Life" plates constitute government speech.

FACTUAL BACKGROUND

The Act provides for a "new specialty earmarked license plate" bearing the words "Choose Life." Tenn. Code Ann. § 55-4-306(a). The Act therefore permits Tennessee vehicle owners to display and express views in opposition to abortion on their license plates. Vehicle owners must pay $35 per year for the "Choose Life" license plate in addition to their regular vehicle registration fee. Tenn. Code Ann. § 55-4-203(d). The Commissioner of Safety may issue these plates only after an order of at least 1000 plates has been made. Tenn. Code Ann. § 55-4-201(h)(1).

Amendments that would have authorized a pro-choice specialty license plate have been rejected more than once in the Tennessee legislature. (R. 97 Plaintiffs' Statement of Undisputed Facts ¶¶ 23-26, Apx. pgs. 225-26; R. 112 Intervening Defendant New Life Resources, Inc.'s Response to Plaintiffs' Statement of Undisputed Facts ¶¶ 23-26, Apx. pgs. 246-47; R. 105 Defendant's Response to Statement of Undisputed Facts ¶¶ 23-26, Apx. pg. 236.)

The "Choose Life" license plate is one of more than 100 specialty license plates that have been authorized by the Tennessee General Assembly. See Tenn. Code Ann. §§ 55-4-228; 55-4-230 through 55-4-240; 55-4-242 through 55-4-308. Tennessee residents may choose to purchase for display on their automobiles specialty license plates expressing membership in or support for some group or association, including, for example, Sons of Confederate Veterans. See Tenn. Code Ann. § 55-4-257; see also, e.g., § 55-4-261 (sororities and fraternities); id. § 55-4-265 (Ducks Unlimited); id. § 55-4-301 (Prince Hall Masons). A number of these plates are available only to individuals who prove membership in a given group. See, e.g., id. § 55-4-265 (Ducks Unlimited); § 55-4-261 (sororities and fraternities). Tennessee residents may also choose to purchase plates expressing support for a particular institution, including, for example, out-of-state rival University of Florida. See Tenn. Code Ann. § 55-4-250; see also, e.g., id. § 55-4-302 (Le Bonheur Children's Medical Center); id. § 55-4-247 (Penn State University). And they may elect to purchase plates expressing a slogan or support for a cause. See, e.g., Tenn. Code Ann. § 55-4-290 (Animal Friendly).

LEGAL ARGUMENT

A stay of the issuance of the mandate pending application for a writ of certiorari is appropriate when "the certiorari petition would present a substantial question and . . . there is good cause for a stay." Fed. R. App. P. 41(d)(2)(A); see

also 6th Cir. R. 41(a). Plaintiffs meet both prongs of this test. The factors considered by the Supreme Court when it reviews a certiorari petition establish that Plaintiffs' petition will present a substantial question. And both a consideration of irreparable harm and a balance of the equities establish that there is good cause for a stay. Plaintiffs thus respectfully request that this Court grant their motion.

I. Plaintiffs' Certiorari Petition Will Present a Substantial Question.

That Plaintiffs' petition will present a substantial question is established by the factors considered by the Supreme Court when it reviews a petition for a writ of certiorari. The Supreme Court assesses whether the decision being appealed "is in conflict with the decision of another United States Court of Appeals on the same important matter." Sup. Ct. R. 10(a). It also examines whether the decision on appeal addresses "an important question of federal law that has not been, but should be, settled by this Court, or has decided an important federal question in a way that conflicts with relevant decisions of this Court." Sup. Ct. R. 10(c). Each of those considerations is present here.

A. This Court's Decision Conflicts with Other Circuit Court Decisions on the Same Important Matter.

This Court's decision is in conflict with other circuit court decisions on the same important matter. This Court has now held that viewpoint discrimination is permissible in the specialty license plate context because specialty license plates constitute pure government speech. See ACLU of Tenn. v. Bredesen, No. 04-

6393, 2006 WL 664372 (6th Cir. Mar. 17, 2006). Other circuit courts have concluded otherwise. First, in a virtually identical case, the United States Court of Appeals for the Fourth Circuit held that South Carolina's "Choose Life" plates violate the First Amendment. See PPSC, 361 F.3d at 799. In so doing, the Fourth Circuit expressly rejected the conclusion (now adopted by this Court) that specialty license plates constitute pure government speech. See id. at 792-93 (Michael, J.); id. at 800 (Luttig, J., concurring); see also Sons of Confederate Veterans, Inc. v. Griffin, 288 F.3d 610, 616-21, 626 (4th Cir. 2002) (same) (invalidating viewpoint discrimination in specialty license plate context).[2]

This Court's decision is also in conflict with the decision of the United States Court of Appeals for the Second Circuit on essentially the same question. See Children First Found., Inc. v. Martinez, Nos. 05-0567-CV, 05-1979-CV, 2006 WL 544502 (2d Cir. March 6, 2006) (unpublished). In the Second Circuit case, New York state officials denied an entity's application for a "Choose Life" plate. The group sued, alleging that the officials had thereby engaged in unconstitutional viewpoint discrimination. Moving to dismiss on qualified immunity grounds, the

---

[2] The Eleventh Circuit, addressing a challenge to Florida's "Choose Life" plates, likewise rejected the argument that the plates constitute pure government speech. See Women's Emergency Network v. Bush, 323 F.3d 937, 945 n.9 (11th Cir. 2003). Although the Court held that the plaintiffs in that case lacked standing to challenge the plates, it concluded: "We fail to divine sufficient government attachment to the messages on Florida specialty license plates to permit a determination that the messages represent government speech." Id.

defendants in that case argued that the plates constitute pure government speech. Affirming the district court's denial of that motion, the Second Circuit held that "custom license plates involve, at a minimum, some private speech," and that "it would not have been reasonable for defendants to conclude [the government speech doctrine] permitted viewpoint discrimination in this case." Children First Found., 2006 WL 544502, at *1.[3]

B. Plaintiffs' Petition Will Raise an Important Question of Federal Law That Has Not Been, But Should Be, Squarely Decided by the Supreme Court.

The Supreme Court has not squarely decided the question whether the government may discriminate on the basis of viewpoint in the specialty license plate context. The sheer number of challenges to the issuance or rejection of

[3] This Court's decision divides the circuit courts on another important question as well. The United States Court of Appeals for the Fifth Circuit has held that the Tax Injunction Act deprives the federal court of subject matter jurisdiction over challenges to the constitutionality of Louisiana's "Choose Life" plate and specialty license plate scheme. See Henderson v. Stalder, 407 F.3d 351, 354-60 (5th Cir. 2005), petition for cert. filed, Keeler v. Stalder, No. 05-1222 (Mar. 21, 2006). This Court has rejected that conclusion. ACLU of Tenn., 2006 WL 664372, at *3-4. Plaintiffs agree with this Court's ruling on that question and will not appeal from it. However, the Supreme Court may consider the question, as it is jurisdictional. See, e.g., Steel Co. v. Citizens for a Better Env't, 523 U.S. 83, 93 (1998) (Supreme Court is obligated to raise questions of jurisdiction sua sponte). The existence of a division among the circuit courts on both the constitutional challenge at the heart of the case and the question of the federal courts' jurisdiction to hear it increases the probability that the Supreme Court will grant the petition for a writ of certiorari.

"Choose Life" plates across the country confirms the importance of this question. In addition to the challenges to the South Carolina "Choose Life" plate, see PPSC, 361 F.3d 786; the Louisiana "Choose Life" plate and specialty license plate scheme, see Henderson, 407 F.3d 351; and the New York rejection of a "Choose Life" plate, see Children First Foundation, 2006 WL 544502, courts are currently considering challenges to Oklahoma's "Choose Life" plate, see Hill v. Kemp, No. 04-CV-0028-CVE-PJC (N.D. Okla. Aug. 16, 2005), appeal docketed, No. 05-5160 (10th Cir. Sept. 15, 2005); Arizona's refusal to issue a "Choose Life" plate, see Arizona Life Coalition, Inc. v. Stanton, No. CV-03-1691-PHX-PGR, 2005 WL 2412811 (D. Ariz. Sept. 26, 2005), appeal docketed, No. 05-16971 (9th Cir. Oct. 18, 2005); Ohio's "Choose Life" plate, see NARAL Pro-Choice Ohio v. Taft, No. 1:05 CV 1064, 2005 U.S. Dist. LEXIS 21394 (N.D. Ohio Sept. 27, 2005), appeal docketed, No. 05-4338 (6th Cir. Oct. 28, 2005); New Jersey's refusal to issue a "Choose Life" plate, see Children First Foundation, Inc. v. Legreide, No. Civ. A. 04-2137(MLC), 2005 WL 3088334 (D.N.J. Nov. 17, 2005) (denying motion to abstain and to certify case for interlocutory appeal); and Illinois's refusal to issue a "Choose Life" plate, see Choose Life Illinois, Inc. v. White, No. 1:04-cv-04316 (N.D. Ill. filed June 28, 2004) (cross-motions for summary judgment pending). This issue thus calls for a unifying response from the Supreme Court.

The division of the circuit courts on the government speech question further reflects a need for a ruling from Supreme Court. See, e.g., PPSC, 361 F.3d at 792 ("[N]o clear standard has yet been enunciated . . . 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.") (internal quotation marks and citations omitted); see also Johanns v. Livestock Mktg. Ass'n, 125 S. Ct. 2055, 2070 (2005) (Souter, J., dissenting) ("The government-speech doctrine is relatively new, and correspondingly imprecise.").

C. This Court's Decision Is at Odds with Relevant Decisions of the Supreme Court.

Although the Supreme Court has not squarely decided the question in this case, this Court's decision is at odds with relevant Supreme Court precedent that should have governed its outcome. First, this Court's decision conflicts with Wooley v. Maynard, 430 U.S. 705 (1977). In Wooley, the Supreme Court held that the State of New Hampshire could not require private individuals to display the state motto "Live Free or Die" on their license plates. Id. at 717. The Wooley Court recognized that even standard-issue license plates, which are in no way hand-selected by individuals, implicate private speech rights. Id. at 717 n.15; see also Sons of Confederate Veterans, Inc. v. Comm'r of the Va. Dep't of Motor Vehicles, 305 F.3d 241, 244 (4th Cir. 2002) (Williams, J., concurring in denial of rehearing en banc) (if license plates were pure government speech, "then the First

Amendment claim in Wooley ought to have foundered for failure to implicate individual speech rights").

If standard state-issued plates implicate private speech, the association between the vehicle owner and the license plate is all the stronger in the case of specialty license plates, because private individuals affirmatively select and pay extra for these plates. See PPSC, 361 F.3d at 794. There is no speech at issue until private individuals select the message, pay an additional fee for it, and display it on their privately owned cars. Indeed, the "Choose Life" message does not even come into being unless at least 1000 individuals agree to pay for the plates and display them on their cars. (R. 125 Memorandum, pg. 5, Apx. pg. 33.)

Supreme Court precedent is likewise clear that once private speech rights are implicated, no matter what the forum, the government may not discriminate based on viewpoint. See, e.g., Rosenberger v. Rector & Visitors of the Univ. of Va., 515 U.S. 819, 829 (1995); Cornelius v. NAACP Legal Def. & Educ. Fund, Inc, 473 U.S. 788, 806 (1985); Police Dep't of Chicago v. Mosley, 408 U.S. 92, 96 (1972). This Court's decision contravenes that precedent as well.

Finally, this Court's decision misconstrues Johanns, 125 S. Ct. 2055. First, Johanns stands for the proposition that a government-compelled subsidy can be used to support a government message. Id. at 2062. That principle is not at issue here. The "Choose Life" license plates are funded not by mandatory government

assessments, but rather by the voluntary payments of car owners who select the "Choose Life" message and display it on their cars. Moreover, in Johanns, the connection between the message at issue and private individuals was too attenuated for viewers to identify the speech as that of the relevant individuals; the Supreme Court was quite clear that "[i]f a viewer would identify the speech as [plaintiffs'], . . . the analysis would be different." Id. at 2064 n. 7. Here, by contrast, specialty license plates are readily associated with vehicle owners, who select, pay extra for, and display specialty license plates – carrying messages, such as "University of Florida," "Sons of Confederate Veterans," and "Penn State," that are attributable to the individual rather than the State of Tennessee – on their private vehicles.

II. There is Good Cause for a Stay.

In addition, there is good cause for a stay. Production of the plates has not yet begun. If this Court is correct that the "Choose Life" message is pure government speech, then the government is not unduly harmed by continuing to postpone the dissemination of its message while the Supreme Court considers Plaintiffs' petition. The government, after all, did not appeal the district court's ruling prohibiting production of the "Choose Life" plates, signaling that it would have been content not to produce the plates at all. A temporary stay pending application for a writ of certiorari, then, cannot be an undue hardship.

By contrast, if Plaintiffs are correct that the "Choose Life" message in fact implicates private speech rights, irreparable harm will result from the violation of First Amendment rights caused by the viewpoint discrimination inherent in issuing "Choose Life" plates when pro-choice plates have been rejected. It is well established that "'[t]he loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury.'" Dayton Area Visually Impaired Persons, Inc. v. Fisher, 70 F.3d 1474, 1489-90 (6th Cir. 1995) (quoting Elrod v. Burns, 427 U.S. 347, 373 (1976) (plurality opinion)).

CONCLUSION

For all of these reasons, Plaintiffs respectfully request that this Court grant their motion for a stay of the mandate pending their filing of a petition for a writ of certiorari.

Dated April 6, 2006

Respectfully submitted,

Julie Sternberg
Carrie Y. Flaxman
ACLU Reproductive Freedom Project
125 Broad Street
New York, New York 10004
(212) 549-2636

Melody L. Fowler-Green
ACLU Foundation of Tennessee
P.O. Box 120160

Nashville, Tennessee 37212
(615) 320-7142

Roger Evans
Planned Parenthood Federation of America
434 West 33rd Street
New York, New York 10001
(212) 541-7800

Susan L. Kay
Chairperson, Legal Committee
ACLU of Tennessee
131 21st Avenue South
Nashville, Tennessee 37203
(615) 322-4964

CERTIFICATE OF SERVICE

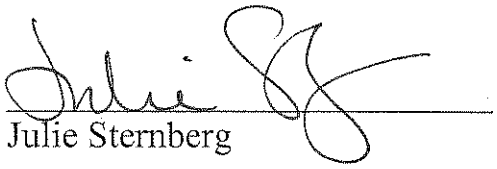
I hereby certify that on April 6, 2006, I caused to be served by Federal Express on the following counsel of record two true and correct copies of the Plaintiffs-Appellees' Motion For Stay of the Mandate Pending Filing of Petition for Certiorari:

Steven A. Hart
William Helou
Office of the Attorney General
P.O. Box 20207
425 Fifth Avenue North
Nashville, Tennessee 37202-0207
Counsel for Philip Bredesen, Governor of Tennessee, and Fred Phillips, Commissioner of Safety of Tennessee

James Bopp, Jr.
Thomas J. Marzen
Anita Y. Wouldenberg
Bopp, Coleson & Bostrom
1 South 6th Street
Terre Haute, Indiana 47807-3510
Counsel for Intervening Defendant-Appellant New Life Resources, Inc.

Mathew D. Staver
Liberty Counsel
1055 Maitland Center Commons, 2nd Floor
Maitland, FL 32751-7214
Co-counsel for Amicus Curiae Liberty Counsel

Mary E. McAlister
Liberty Counsel
100 Mountain View Road, Suite 2775
Lynchburg, VA 24502-2272
Co-counsel for Amicus Curiae
Liberty Counsel



Julie Sternberg