No. 13-1030

IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

AMERICAN CIVIL LIBERTIES UNION OF NORTH CAROLINA LEGAL FOUNDATION, INCORPORATED; DEAN DEBNAM; CHRISTOPHER HEANEY; SUSAN HOLLIDAY, CNM, MSN; MARIA MAGHER,
Plaintiffs-Appellees,

v.

ANTHONY J. TATA., in his official capacity as Secretary of the North Carolina Department of Transportation; JAMES L. FORTE, in his official capacity as Commissioner of the North Carolina Division of Motor Vehicles,
Defendants-Appellants,

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NORTH CAROLINA
WESTERN DIVISION

BRIEF *AMICUS CURIAE* OF THE NATIONAL LEGAL FOUNDATION
supporting the Appellants and urging reversal

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These disclosures were also made and served on the Appellees on February 26, 2013, as part of this Brief.

/s/ Steven W. Fitschen
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INTEREST OF *AMICUS CURIAE*

The National Legal Foundation (NLF) is a public interest law firm dedicated to the defense of First Amendment liberties and the restoration of the moral and religious foundation on which America was built. The NLF and its donors and supporters, including those in North Carolina—pursuant to one of the NLF's core missions—desire to see all human life cherished and respected. For this reason, the NLF and its donors and supporters applaud North Carolina's decision to speak the message "Choose Life" and desire to help demonstrate that this government speech does not violate the Constitution.

This Brief is filed with the consent of all Parties.

STATEMENT OF COMPLIANCE WITH RULE 29(c)(5)

This Brief is submitted pursuant to Rule 29(a) of the Federal Rules of Appellate Procedure with the consent of all parties. No party's counsel authored this Brief in whole or in part; no party or party's counsel contributed money that was intended to fund preparing or submitting the Brief; and no person other *Amicus Curiae*, The National Legal Foundation, its members, or its counsel contributed money that was intended to fund preparing or submitting the Brief.

SUMMARY OF THE ARGUMENT

This Brief points out that the cases primarily relied upon by the district court below have been rejected by the Sixth Circuit as not controlling the analysis of

specialty license plates. The Brief explains why this view is superior to the view of the Eighth Circuit, which employed the same test as the district court. Specifically, the Eighth Circuit thought it was free to ignore the teachings of the United States Supreme Court in *Pleasant Grove City, v. Summum,* 555 U.S. 460 (2009). This it was not free to do.

However, should this Court disagree and believe that the specialty plate context does require a test different from that employed in *Summum,* that test must be the one articulated by this Court in *Page v. Lexington County School District One*, 531 F.3d 275 (4th Cir. 2008).

This Brief then adds two reasons to those advanced by the Defendants as to why they prevail under either test. First, the legislative history of the bill authorizing the Chose Life plate demonstrates that the message is government speech. Second, the fact that North Carolina advertises its specialty plate program as a chance for drivers to show off their interests is a perfectly valid way for the state to recruit third parties to help it disseminate *its* message.

ARGUMENT

The Defendants (hereinafter "Tata") have explained correctly why the dispositive question is whether the "Choose Life" license plate constitutes government speech. (Appellants' Br. 3.) Tata has also explained correctly that the proper test is whether the government controls the message. (*Id.* 6-19.)

Furthermore, Tata also argues persuasively—in the alternative—why, should this Court reject the governmental control test, it should follow *Page v. Lexington County School District One*, 531 F.3d 275, 281 (4th Cir. 2008), which adds a second factor: the governmental establishment *vel non* of the message. (Appellants' Br. 33-41.) Your *Amicus* writes to supplement the reasons why Tata should prevail under either of these tests.

I. THIS CASE IS CONTROLLED BY THE TEST FROM *PLEASANT GROVE CITY V. SUMMUM*, NOT THE TEST FROM *PLANNED PARENTHOOD OF SOUTH CAROLINA, INC. V. ROSE*.

Your *Amicus* begins by noting that the reliance upon several of the cases used by the district court below has been rejected by one of this Court's sister circuits. The Sixth Circuit has explained why this Court's opinions in *Planned Parenthood of South Carolina, Inc. v. Rose*, 361 F.3d 786 (4th Cir. 2004) (plurality), and the test employed there (derived from *Sons of Confederate Veterans, Inc. v. Commissioner of Virginia Department of Motor Vehicles*, 288 F.3d 610 (4th Cir.)) do not control the instant case. In *ACLU of Tennessee v. Bredesen*, 441 F.3d 370, 380 (2006), the Sixth Circuit explained that *Rose* is no longer good law in light of the Supreme Court's opinion in *Johanns v. Livestock Marketing Association*, 544 U.S. 550 (2005). The Sixth Circuit explained the difference between the *Johanns* test and this Court's pre-*Johanns* test:

> *Johanns* sets forth an authoritative test for determining when speech may be attributed to the government for First Amendment purposes.

> *Rose* relied instead on a pre-*Johanns* four-factor test of the Fourth Circuit's own devising that led to an "indeterminate result" on the crucial issue of whether "Choose Life" specialty plates express a government message. The *Johanns* standard, by contrast, classifies the "Choose Life" message as government speech.

Id. (quoting *Rose*, 361 F.3d at 793 (Michael, J., separate opinion).

Of course, Tata has made this very point in his Brief (Appellants' Br. 6-19.) While your *Amicus* believes that Tata's argument on this point is sound in every way, it is worth pointing out that it is one thing for a litigant to make this argument and it is another thing for this Court's sister circuit to come to this conclusion.

Significantly, the Sixth Circuit correctly understood *Johanns's* import even prior to the Supreme Court's 2009 decision in *Pleasant Grove City v. Summum*, 555 U.S. 460 (2009). While the Seventh Circuit in *Choose Life Illinois, Inc. v. White*, 547 F.3d 853 (7th Cir. 2008), and the Ninth Circuit in *Arizona Life Coalition Inc. v. Stanton*, 515 F.3d 956 (9th 2008), disagreed with the *Bredesen* court, they did so prior to *Summum* being decided.

The Eighth Circuit decided a specialty plate case a month after the Supreme Court issued its opinion in *Summum*. Yet, inexplicably, the Eighth Circuit dispatched *Summum* with a footnote, thereby allowing it to use the four-factor test. The Eighth Circuit opined that *Summum* would not cause it to change its decision to employ the four-factor test because the monuments at issue in *Summum* are a "different issue" from license plates. *Roach v. Stouffer*, 560 F.3d 860, 868, n.3

(8th Cir. 2009). The implication, of course, is that had the Eighth Circuit employed *Summum's* teachings, it would have had to reject the four-factor test in favor of the governmental control test.

Your *Amicus* believes that the Eighth Circuit was mistaken to beg the question by merely asserting *Summum* is inapplicable because the facts are too different. The Eighth Circuit offered no internal evidence from *Summum* itself that the opinion was designed to be limited to only certain classes of cases nor did it offer external evidence; it merely asserted that *Summum's* teachings did not apply.

If your *Amicus* is correct that the Eighth Circuit erred in this question begging, then—as Tata has argued—the *Johanns/Summum* governmental control test should be employed in the instant case. If, however, this Court agrees with the Eighth Circuit that the type of speech being analyzed can warrant employing differing tests, then—as Tata has argued—the test that must be employed is the one from *Page v. Lexington County Sch. Dist. One*, 531 F.3d 275 (4th Cir. 2008).

Tata has ably argued that, under either test, the "Choose Life" license plate is government speech. Your *Amicus* will not repeat those arguments. Rather, your *Amicus* will add two brief additional reasons why Tata is correct.

II. UNDER ANY TEST, THE "CHOOSE LIFE" PLATES ARE GOVERNMENT SPEECH AS DEMONSTRATED BY THE LEGISLATIVE HISTORY AND NORTH CAROLINA'S SOLICITATION OF THIRD PARTY PARTNERS.

First, under either the *Johanns*/*Summum* test or the *Page* test—or for that

matter, even under the four-factor test—it is important to note that the legislative history demonstrates that North Carolina established and controls the "Choose Life" message. Furthermore, the fully informed observer of the four-factor test would know this legislative history.

As the district court correctly noted, "[u]nlike many other States, North Carolina does not have a general statutory or administrative mechanism through which organizations or individuals can propose or obtain specialty plates. Rather, the only specialty plates available are those specifically authorized by the North Carolina General Assembly." *ACLU of N.C. v. Conti*, No. 5:11-cv-470, 2012 WL 6094168, at *1 (E.D.N.C. Dec. 7, 2012) (footnote omitted). Thus, every time the legislature approves or disapproves a new specialty plate, it speaks. The legislature chose to speak the message "Choose Life." However, the legislature also chose six times *not* to speak the message "Respect Choice" or "Trust Women. Respect Choice." *Id.* at *2. Thus, the legislature established its message, both positively and negatively, and it continues to control the dissemination of that message—and, again, the fully informed observer knows this.

Second, the district court considered it significant that the specialty license plate program "advertises itself as an opportunity for North Carolina drivers to '[s]how off your Special Interest.'" *Id.* at *7 (citation omitted). The district court thought that this fact pointed towards the speech being private. However, this

conclusion does not follow. Given that governments may speak via third parties, *Page*, 531 F.3d at 281-83, the advertisement is actually evidence of how North Carolina solicits third parties to voluntarily help disseminate the state's message.

In sum, the view of the Sixth Circuit is correct: "Government can express public policy views by enlisting private volunteers to disseminate its message, and there is no principle under which the First Amendment can be read to prohibit government from doing so because the views are particularly controversial or politically divisive." *Bredesen*, 441 F.3d at 371.

CONCLUSION

For the foregoing reasons and for other reasons stated in Tata's Brief, this Court should reverse the District Court's judgment, dissolve the permanent injunction, and hold that North Carolina's "Choose Life" specialty license plate does not violate the First Amendment.

Respectfully submitted,
this 26th day of February 2013

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CERTIFICATE OF COMPLIANCE

I hereby certify that, pursuant to Fed. R. App. P. 32(a)(7)(C), the attached Brief *Amicus Curiae* has been produced using 14 point Times New Roman font which is proportionately spaced. This brief contains 1,622 words as calculated by Microsoft Word 2007.

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CERTIFICATE OF SERVICE

I hereby certify that on February 26, 2013, I electronically filed the foregoing Brief *Amicus Curiae* of The National Legal Foundation in the case of *ACLU of North Carolina, et al. v. Tata, et al.*, No. 13-1030, with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

All participants in the case are registered CM/ECF users and will be served by the appellate CM/ECF system.

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