



**National First Amendment
Moot Court Competition**

Vanderbilt University Law School

First Amendment Center

2008

**National First Amendment Moot Court
Competition Problem**

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**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY**

**MARIA STONE and UNITED FEDERATION FOR)
AMNESTY AND IMMIGRATION RIGHTS)**

Plaintiffs,)

v.)

Case No.: VU 3:83 – 4733

**STATE OF NEW JERSEY MOTOR VEHICLE)
COMMISSION,)**

Defendant.)

MEMORANDUM OPINION AND ORDER

October 16, 2006, Decided

PARKER, District Judge.

The present case deals with a constitutional challenge to a specialty license plate statute, N.J. Ann. Stat. § 39:3-27:140 (“the Act”), the text of which is reprinted in Appendix A.

Plaintiffs allege that the Act violates the First Amendment of the United States Constitution because it is an exercise of viewpoint discrimination in a forum created for private speech.

Defendant, however, argues that the Act is a form of government speech, exempt from First Amendment scrutiny.

Pending before the Court are the parties’ cross-motions for summary judgment. Having considered the parties’ memoranda, in light of the stipulated facts and the oral arguments of their counsel, the Court finds that there are no genuine issues of material fact and that Defendant is entitled to entry of summary judgment in its favor as a matter of law pursuant to *Fed. R. Civ. P.*

56. For reasons explained herein, Defendant’s Motion for Summary Judgment is GRANTED.

The Court finds that the Act is government speech which does not offend the First Amendment.

Plaintiffs’ Motion for Summary Judgment is DENIED.

I. FACTUAL BACKGROUND

The facts of this case are not in dispute. The parties have stipulated to the following:

New Jersey permits drivers to pay a premium for specialty license plates. These plates are available through the New Jersey Motor Vehicle Commission (“Commission”). There are two varieties of specialty plates: specialty organization plates and dedicated plates. There are notable differences between these two forms of specialty plates and the statutes authorizing them. Specialty organization plates permit members of nonprofit service, community, and alumni organizations to obtain a license plate to “commemorate [the] groups’ civic contributions and achievements.” See <http://www.state.nj.us/mvc/Vehicle/SpecialtyPlates.htm>. The statute provides:

A person who is a member in good standing of a nonprofit community, alumni or service organization in the State approved by the director pursuant to the provisions of this act may be issued special organization vehicle registration plates to be displayed on motor vehicle owned or leased by that person in place of standard registration plates.

N.J. Ann. Stat. § 39:3-27.35. The statute also establishes various conditions for issuance of the specialty organization plate. § 39:3-27.36. These conditions include appointing a representative, providing a copy of the organization’s charter indicating its lawful purpose and proof of nonprofit status, and placing an initial order for no less than 500 plates for members of the organization in good standing. *Id.* The fees for the plates are \$15 for service organizations, \$25 for community organizations, and \$50 for alumni organizations. A portion of the proceeds from these plates is dedicated to the sponsoring organization.

The law does not automatically entitle any organization to a specialty plate. Instead, “[t]he director shall have the authority to make the final decision as to whether or not an organization is approved for the issuance of special organization vehicle registration plates to its members.” § 39:3-27.37. Furthermore, “[t]he use and arrangement of the name, initials, or

logotype of the organization on the registration plates shall be in the sole discretion of the director.” § 39:3-27.36(d).

In contrast, dedicated plates are available to all licensed New Jersey drivers. These plates require a one-time fee of \$50 plus a \$10 yearly renewal fee. As with specialty organization plates, a portion of the price for dedicated plates is donated to a designated cause. Currently, New Jersey offers 18 dedicated plates with a variety of messages, including “Organ Donor” benefiting the Organ and Tissue Donor Awareness Education Fund, “Treasure Our Trees” benefiting Shade Tree and Community Forest Program, and “United We Stand” benefiting Rewards for Justice Program, which provides reward money for information that leads to the capture of terrorists and terrorist plots. Each of these plates is authorized by a separate statute.

Most recently, New Jersey passed the Act authorizing a dedicated plate depicting an American flag and the profile of a bald eagle. Imprinted on the plate is the phrase “America for Americans.” N.J. Ann. Stat. § 39:3-27:140. The Act provides that “[t]he wording, design, and color scheme of the plate shall be selected by the director.” *Id.* Proceeds from the sale of the plate go to the New Jersey Disaster Relief Coalition (the “Coalition”), an organization comprised of concerned citizens of the state of New Jersey who raise support for the victims of various disasters around the country. For instance, the Coalition contributed large financial support to the flood and storm victims of the Tropical Depression Ivan on the New Jersey coast in 2004. Similarly, it sent economic relief to Louisiana and Mississippi following Hurricane Katrina in 2005. Money from these special dedicated license plates, thus, is sent to various disaster relief efforts. Although the design and the slogan come from the Coalition’s website, the Act originated in and was unanimously approved by the New Jersey legislature.

Maria Stone is a resident and licensed driver in the state of New Jersey. She is a student of genealogy and a web programmer for The American Family Immigration History Center, located in the Ellis Island Immigration Museum. Ms. Stone's work with this foundation sparked her interest in current immigration issues, and she subsequently became a dedicated member of the New Jersey Chapter of the United Federation for Amnesty and Immigration Rights ("UnFAIR").

UnFAIR is a national, nonprofit, public-interest, membership organization seeking to promote and defend the rights of foreign-born individuals settling in the United States. UnFAIR's primary mission is to improve the quality of life of immigrants, both legal and illegal, once they are in the U.S. UnFAIR is known by its popular organizational motto: "Xenophobia is UnFAIR." The organization has approximately 10,000 registered members throughout the country and 1,700 in New Jersey. Its membership in this state nearly doubled after the legislature proposed an "English Only" bill, which, if passed, would prohibit state business from being conducted in any language other than English. Since the proposal of the bill, the divisiveness of the immigration issue has become evident throughout the state. Most recently, in response to pressure from union lobbyists, an Atlantic City hotel was shut down after the INS raided and arrested more than half of its maintenance staff. For several days following the hotel's reopening, demonstrators on both sides of the debate gathered outside in protest, and police had to be called in to restore peace after violent fights broke out amongst the demonstrators.

In March of 2006, Ms. Stone spotted the "America for Americans" license plate on a minivan in her neighborhood. Having just come from visiting with an acquaintance who faces deportation, Ms. Stone interpreted this message as an anti-immigration expression and was

enraged. Shortly thereafter, she attended an UnFAIR meeting, where she suggested the organization apply for its own specialty plate. At Ms. Stone's insistence, UnFAIR surveyed its members to gauge interest in the idea and determined that approximately half of its New Jersey members, including Ms. Stone, would purchase the specialty plate if it was offered.

On April 22, 2006, UnFAIR submitted an application for a specialty organization plate pursuant to N.J. Ann. Stat. § 39:3-27.35. The proposed specialty license plate depicted an image of the Statue of Liberty, and at the bottom were the words, "Xenophobia is UnFAIR." The Commission formally voted to deny UnFAIR's application because it presented a politically divisive message about immigration. The Commission informed UnFAIR that it did not approve contentious political slogans such as those dealing with immigration. UnFAIR responded with two arguments. First, it reasoned that the proposed message does not deal overtly with the immigration debate because xenophobia is defined as the fear of foreigners or strangers and is actually unrelated to immigration itself. In the alternative, UnFAIR argued that a pro-immigration message should be permitted because the Commission already approved an anti-immigration slogan in "America for Americans." The Commission again rejected the application.

On August 4, 2006, Ms. Stone and UnFAIR filed their complaint in this Court against the Commission alleging that § 39:3-27.140 is unconstitutional if the government refuses to allow the private expression of an opposing view.

II. LEGAL ANALYSIS AND DISCUSSION

In deciding the present case, the Court is faced with an overarching question of law: Does the government's dissemination of a message on specialty license plates create a public forum for speech, restrictions on which must be reasonable and viewpoint neutral? The answer is no

because the specialty license plate is a medium for the government to communicate its own speech to its citizens. Therefore, viewpoint neutrality is not required and the government may disseminate any statement it wishes, however controversial or ill-advised.

A. The Specialty License Plate is Government Speech.

The message on the specialty license plates, “America for Americans,” is purely government speech. “[W]hen the government determines an overarching message and retains power to approve every word disseminated at its behest, the message must be attributed to the government for First Amendment purposes.” *ACLU v. Bredesen*, 441 F. 3d 370, 375 (6th Cir. 2006) (quoting *Johanns v. Livestock Mktg. Ass’n*, 544 U.S. 550, 562 (2005)). Under this formulation, this Court must conclude that “America for Americans” is the speech of the Commission and, therefore, that of the government of the state of New Jersey.

In *Johanns*, the Supreme Court held that beef marketing programs, the content of which was proposed by a panel of industry leaders, constituted government speech. *Johanns*, 544 U.S. at 560-61. In making this determination, the Court focused on two key components. The first was that the content was “from beginning to end the message established by the Federal Government.” *Id.* at 560. The program was established by an act of Congress with clear legislative guidelines under the auspices of the Secretary of Agriculture. *Id.* at 561; *see* Beef Promotion and Research Act of 1985, 7 U.S.C. § 2901 (2000). The second component was that “the Secretary [of Agriculture] exercises final approval of authority over every word used in every promotional campaign.” *Johanns*, 544 U.S. at 561. No message was disseminated without the express approval of the federal government.

Applying the rule of *Johanns*, this Court finds specialty license plate messages to be government speech. There is no material difference between the situation presented by the Beef

Promotion and Research Act in *Johanns* and the Act in question here. The New Jersey legislature passed the Act and, in doing so, approved the specialty license plate's general design and scheme. The Act expressly delegates the approval of the exact wording and logotype to the director of the Commission. N.J. Ann. Stat. § 39:3-27.36. Like the Secretary of Agriculture in *Johanns*, the director of the Commission is accountable to the government. Thus, because the state of New Jersey has "final authority" over every word printed on its license plates, the speech on its license plates is purely government speech. *Johanns*, 544 U.S. at 561. The degree of governmental control in this situation obviates any claim that this is government dissemination of private speech via a government-sponsored forum. *Id.* Even if the final design of the plate originated from the Coalition, the level of involvement by the government and its statutorily authorized agent (the director) indicates that the speech must be attributed to New Jersey.

Further, *Johanns* instructs that even if the message is not directly attributed to the government, it still can be government speech. *Id.* at 565. In *Johanns*, despite the fact that beef promotional materials bore the ascription "Funded by America's Beef Producers," the Court nonetheless found the message to be government speech and not attributable to America's Beef Producers. *Id.* However, this problem is not present here because a reasonable person knows that license plates are issued by the government and therefore convey government messages. *See e.g., Bredesen*, 441 F. 3d at 377; *Perry v. McDonald*, 280 F.3d 159, 169 (2nd Cir. 2001) ("Automobile license plates are governmental property intended primarily to serve a governmental purpose, and inevitably they will be associated with the state that issues them."); *Ariz. Life Coalition v. Stanton*, 2005 U.S. Dist. LEXIS 21960, *18 (D. Ariz. 2005) (holding that license plates are not traditionally associated with anything other than government speech).

B. The License Plate is Government Speech under Alternative Formulations.

Plaintiffs argue that *Johanns* is not applicable here because it deals with compelled speech about agricultural products and is thus limited in its scope. In the alternative, Plaintiffs propose that this Court apply the four-part test used by the Fourth Circuit in *Planned Parenthood of S.C., Inc. v. Rose*, 361 F.3d 786 (4th Cir. 2004) and *Sons of Confederate Veterans, Inc. v. Comm'r of Va. Dep't of Motor Vehicles*, 288 F.3d 610 (4th Cir. 2002). While this Court finds the Supreme Court's holding in *Johanns* dispositive, the specialty plate is also government speech under this alternative test.

Applying this four-part analysis, courts must examine: “(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[.]” *Sons of Confederate Veterans*, 288 F.3d at 618 (internal quotation marks omitted). Applying each of these factors to the case at bar indicates that the license plate messages are government speech.

The specialty license plate program's primary purpose is to license and register vehicles for the state of New Jersey and thus provide a means of vehicle identification. The vehicle license plate program is a uniquely governmental function. “The display of license plates has been deemed the best method of government identification, both for the vehicle and for the owner/operator of the vehicle.” *Ariz. Life Coalition*, 2005 U.S. Dist. LEXIS at *3. Therefore, while the New Jersey specialty license plate program does allow for some degree of private input in designing the plates, the program's purpose is primarily a governmental one. Similarly, as discussed above, the total control exercised by the government over the content and design of

each specialty license plate indicates that the government ultimately controlled what was on each plate. Again, the plate was initiated by the state, and the legislature controlled its message. As the Fourth Circuit held, this indicates government speech. *Planned Parenthood*, 361 F.3d at 792.

Further, the government was the literal speaker because the issuance of each plate was an expression of the Commission's discretionary powers to speak freely to its citizens.

"[O]wnership of a means of communication is a valid consideration in determining" whether speech is private or government. *Sons of Confederate Veterans*, 288 F.3d at 621 (citing *Wells v. City and County of Denver*, 257 F.3d 1132 (10th Cir. 2001)). The State "is the owner of state-created, state-issued license plates. While one may transfer license plates to a new car or replace a standard license plate with a special plate, [the State's] ownership remains the same." *Ariz. Life Coalition*, 2005 U.S. Dist. LEXIS at *6. While it is true that the message was displayed on government property affixed to private vehicles, the government depended solely on volunteers to disseminate its message. Thus, the U.S. Supreme Court's decision in *Wooley v. Maynard*, 430 U.S. 705 (1977), which found that individuals cannot be compelled to support the "Live Free or Die" motto on standard state-issued license plates, is not applicable here. The present case does not involve compelled speech. Therefore, the Commission, in its authority to decide what goes on each license plate and how it will be distributed, bears the ultimate responsibility for the messages on the specialty plates.

C. Government Speech is Not Susceptible to First Amendment Challenge.

Because Plaintiffs challenge the statute on First Amendment grounds, their lawsuit must be dismissed because the only redress to combat government speech is the democratic process, not the First Amendment. *Johanns*, 544 U.S. at 560; *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819, 833 (1995) ("[W]hen the State is the speaker, it may make content-

based choices.”). It is immaterial that the message is primarily disseminated by private volunteers.

III CONCLUSION AND ORDER

If Plaintiffs wish to seek redress from New Jersey, their answer lies not in the First Amendment, as the speech of the government is not under its aegis. Plaintiffs should look to the ultimate check against the exercise of government speech (and power), the ballot box. Therefore, it is ordered that Plaintiffs’ motion be denied, and Defendant’s motion is granted.

APPENDIX A

N.J. Ann. Stat. § 39:3-27:140. America for Americans license plates

a. Authorized. The director shall, upon proper application therefore, issue America for Americans license plates, for any motor vehicle owned or leased and registered in the State. In addition to the registration number and other markings or identification otherwise prescribed by law, an America for Americans license plate shall display words or a slogan and a logo indicating support for, or an interest in, protecting and empowering United States citizens. The wording, design, and color scheme of the plate shall be selected by the director.

b. Application. Application for issuance of an America for Americans license plate shall be made to the director on forms and in a manner as may be prescribed by the director. In order to be deemed complete, an application shall be accompanied by a fee of \$50, payable to the Division of Motor Vehicles, which shall be in addition to the fee otherwise prescribed by law for the registration of motor vehicle. The annual renewal fee for the registration certificate of a motor vehicle for which an America for Americans license plate has been issued shall include, in each year subsequent to the year of issuance, an America for Americans license plate fee in the amount of \$10, which shall be in addition to the fee for the renewal of the registration certificate. Applicants for the America for Americans license plate shall be advised of the annual \$10 renewal fee at the time of initial application.

c. Fund. Moneys from the application and renewal fees collected by the Division of Motor Vehicles for America for Americans license plates shall be deposited in a fund to benefit the New Jersey Disaster Relief Coalition.

federal district court against the Commission seeking to invalidate the Act. The complaint asserts that the Act violates the First Amendment to the United States Constitution by discriminating against a particular viewpoint in a forum created for private speech. The District Court found that the Act was not unconstitutional because license plate messages are government speech, and thus traditional First Amendment analysis does not apply.

The matters of Appellants' standing and the Tax Injunction Act have been decided separately and are not at issue here. Therefore, the sole concern of this Court is whether the Act constitutes permissible government speech or unconstitutional viewpoint discrimination upon private speech.

I. BACKGROUND

The uncontested facts of this case as summarized by the District Court are adopted herein by reference. On October 16, 2006, the District Court found that the license plate slogan was government speech and thus immune from First Amendment challenge. The District Court dismissed the complaint, and Ms. Stone and UnFAIR appealed to this Court. Oral argument was heard by this Court on January 15, 2007.

II. LEGAL ANALYSIS

We address the appellants' contentions that, as applied in this case, N.J. Stat. Ann. § 39:3-27.140 violates the First Amendment. In order to do so, we must decide whether the specialty license plate program constitutes government speech, private speech, or a mixture of both.

A. Specialty License Plate Messages Constitute Private Speech

The Commission first asserts that specialty license plate messages are government speech and that as such, the denial of the plate raises no First Amendment problem. It is a settled principle that “when the government speaks, it may craft its message and cannot be forced to formulate or subsidize a message it does not choose.” *Sons of Confederate Veterans, Inc. v. Comm'r of the Va. Dept. of Motor Vehicles*, 288 F.3d 610, 616 (4th Cir. 2002) (“SCV”). When the government is speaking, it is entitled to say whatever it wishes even if the speech is disseminated by a private entity using public funds. See *Johanns v. Livestock Marketing Association*, 544 U.S. 550, 560 (2005); *Rust v. Sullivan*, 500 U.S. 173, 193 (1991). “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.” *ACLU v. Bredesen*, 441 F.3d 370, 372 (6th Cir. 2006). The District Court concluded that the license plates are government speech, and thus the Commission may choose to accept, reject, and modify messages as it pleases. However, we disagree with this conclusion.

Other federal circuits have applied different tests to determine whether speech on specialty license plates is private, government, or a mixture of the two. The test that we find most compelling is the four-part analysis used by the Fourth Circuit in *Planned Parenthood of S.C., Inc. v. Rose*, 361 F.3d 786 (4th Cir. 2004) (“*Rose*”) and *SCV*, 288 F.3d at 618. Under this analysis, courts apply the following four factors: (1) the central purpose of the program in which the speech occurs, (2) the degree of editorial control exercised by the government over the content of the speech, (3) identity of the literal speaker, and (4) who bears the ultimate

responsibility for the speech. We find an application of these factors indicates that the license plates are private speech.

The purpose of the specialty plate program is for individuals to express support for chosen causes and organizations. In contrast, the District Court found that the primary purpose is to identify vehicles. The identification of vehicles is the purpose for the standard license plate program, but in the present case, we are analyzing the specialty license plate program, in which drivers pay extra, not to identify their cars, but to make some statement – to express themselves. That, in fact, is the reason that states offer specialty license plates. Thus, the first factor points toward private speech. Likewise, the second factor indicates private speech. Although the Commission reserves the right to exercise discretion over the design of the plates, the record does not indicate it doing so before this instance. Nominal editorial control is not enough to satisfy the second prong of this test.

In this case, it is difficult to identify the literal speaker because the license plate itself is the entity proclaiming the message. However, the U.S. Supreme Court established that even messages on standard license plates are at least partially attributable to the private party who owns the vehicle. *Wooley v. Maynard*, 430 U.S. 705, 717 (1977). Thus, the argument is much stronger when the message is on a specialty plate, selected and paid for by the individual. Based on the Supreme Court's decision in *Wooley*, this speech must be attributable to the vehicle owner, not the government.

Likewise, ultimate control lies with the individual driver, who chooses to pay a premium to display the slogan on the back of his or her private vehicle. Essentially, a specialty license plate is no different than a bumper sticker. Private individuals have complete control to decide if they want standard-issue plates or more expressive specialty plates. Thus, according to the four

factors considered, the specialty plates are private speech rather than government. “A specialty license plate program is a government decision to create a private speech forum, not to promote speech by government agents.” Leslie Gielow Jacobs, “Free Speech and the Limits of Legislative Discretion: The Example of Specialty License Plates,” 53 Fla. L. Rev. 419, 454 (2001).

The Commission argues that we should follow the Sixth Circuit and apply the standard established by the recent U.S. Supreme Court decision in *Johanns* instead of the four-part analysis above. See *ACLU v. Bredesen*, 441 F.3d 370, 375 (6th Cir. 2006) (“*Johanns* stands for the proposition that when the government determines an overarching message and retains power to approve every word disseminated at its behest, the message must be attributed to the government for First Amendment purposes.”). However, the Commission misinterprets *Johanns*, which arose from the context of compelled speech involving agricultural products. Here, the government is not compelling individuals to speak, and thus the analysis from *Johanns* is inapplicable.

B. The Commission Exercised Unconstitutional Viewpoint Discrimination

The Commission next argues that even if the speech is private, there was no First Amendment violation because the rejection of UnFAIR’s requested specialty plate was not based on viewpoint, but instead reflected the government’s non-speech related concerns. Under the First Amendment, viewpoint discrimination on private speech must satisfy strict scrutiny. *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819 (1995). In *Rosenberger*, Justice Anthony Kennedy emphasized that “[v]iewpoint discrimination is...an egregious form of content discrimination.” *Id.* at 829.

When speech is private, viewpoint discrimination occurs when the government favors one speaker over another. *Id.* “Where the government voluntarily provides a forum for private

expression, the government may not discriminate against some speakers because of their viewpoint. If the government is not expressing its own policy, it presumptively violates the First Amendment when it picks and chooses access to the forum on the basis of views expressed by the private speakers.” *Choose Life Ill., Inc. v. White*, 2007 WL 178455, *22 (N.D. Ill. 2007) (citing *Ark. Educ. Tv Comm'n v. Forbes*, 523 U.S. 666 (1998)). Thus, “the government must abstain from regulating speech when the motivating ideology or the opinion or perspective of the speaker is the rationale for the restriction.” *Rosenberger*, 515 U.S. at 828. Otherwise, permitting viewpoint discrimination would threaten the First Amendment by allowing the government to distort public debate. “Put colloquially, the state does not need to lend out its microphone to let private actors espouse their own views on their own behalf, but once the state does, it cannot pick and choose among them.” *Golden v. Rossford Exempted Village School Dist.*, 445 F.Supp.2d 820, 824 (N.D. Ohio 2006).

A forum exists when the government establishes a program to facilitate private speech. *Legal Servs. Corp. v. Velazquez*, 531 U.S. 533, 542 (2001). However, it is important to note that the creation of the forum usually must be intentional. “The government does not create a public forum by inaction or by permitting limited discourse, but only by intentionally opening a nontraditional forum for public discourse.” *Cornelius v. NAACP Legal Def. & Educ. Fund, Inc.*, 473 U.S. 788, 802 (1985). Yet, viewpoint discrimination is presumed unconstitutional in any type of forum. *Rosenberger*, 515 U.S. at 829-30; *SCV*, 288 F.3d at 623. Thus, it is necessary only to determine whether the Commission rejected the application from Ms. Stone and UnFAIR based on viewpoint discrimination. In this case, the government created a forum by allowing drivers to obtain plates expressing anti-immigration messages. It then discriminated based on viewpoint when it refused to allow a pro-immigration plate.

Our esteemed colleague argues in dissent that the Commission has not discriminated based upon viewpoint because UnFAIR's plate proposal was not denied for its expression of a pro-immigration stance. Judge Zuleika argues that the "America for Americans" plate is not creating a forum for immigration discussion, but is instead simply expressing a purely patriotic message. She points to the fact that money generated from sales of these plates does not go toward an anti-immigration group or cause. Thus, Judge Zuleika and the Commission claim that UnFAIR's message was denied precisely because the government wanted to avoid opening the door to political topics such as this. However, we find this argument unpersuasive. The slogan "America for Americans" on its face expresses nativism and distaste for immigrants. This is clear from Ms. Stone's reaction. We have seen no evidence that others would respond differently. In fact, in light of the proposed "English Only" bill and other recent events in this state, immigration is on the forefront of the minds of many New Jersey citizens, who would likely interpret the slogan as an anti-immigration message. Further, we feel that Judge Zuleika is incorrect to inject into the analysis any information regarding the organization which receives money generated from the sale of the plate. This question involves First Amendment free-expression rights and the fundamental principle of viewpoint neutrality, not concerns over money distributed to third parties.

The Commission has also expressed concern that if the proposed license plate is allowed, it creates a slippery slope, and there is no end to what messages will be approved. It suggests that universally unwanted opinions must likewise be allowed. In fact, this is exactly what the First Amendment encourages. The First Amendment presupposes a vigorous, diverse marketplace of ideas in which "the ultimate good desired is better reached through free trade in ideas." *Abrams v. United States*, 250 U.S. 616, 630 (1919) (J. Holmes, dissenting). Although

we recognize that the government can limit the types of content on license plates, once the Commission opens up a forum, it may not discriminate based upon the expressed viewpoint. While New Jersey can express its preferences and policies, it cannot – consistent with the First Amendment – create a forum for private expression, and then selectively approve only particular viewpoints. “In the real world, specialty plates are widely understood to operate as a forum for private speech, not the state’s bully pulpit.” Andy G. Oltree, “Specialty License Plates: Look Who’s Talking in the Sixth Circuit,” 68 Ala. Law. 213, 215 (2007).

III. ORDER

For the foregoing reasons, the District Court’s order upholding the Act is REVERSED.

ZULEIKA, J, dissenting.

Although I agree with the majority decision that the speech at issue is private and is therefore subject to First Amendment protections, I respectfully dissent because I do not believe that the legislature is engaging in unconstitutional viewpoint discrimination, but rather permissible content discrimination.

Generally, First Amendment jurisprudence finds that content-based restrictions on speech are presumptively unconstitutional. *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819, 828 (1995); *R.A.V. v. City of St. Paul*, 505 U.S. 377, 382 (1992). However, the government has the general power to establish general guidelines on subject matter within certain fora. As the Supreme Court has stated, there is a “distinction between, on the one hand, content discrimination, which may be permissible if it preserves the purposes of that limited forum, and, on the other hand, viewpoint discrimination, which is presumed impermissible when

directed against speech otherwise within the forum's limitations." *Rosenberger*, 515 U.S. at 829-830. When the legislature passed the statute authorizing the "America for Americans" license plate, it "created by purposeful governmental action" a limited public forum for speech. *Ark. Educ. Tv Comm'n v. Forbes*, 523 U.S. 666, 677 (1998). Within that forum, the government is allowed to confine that forum "to the limited and legitimate purposes for which it was created." *Rosenberger*, 515 U.S. at 829. "[T]he prohibition on viewpoint discrimination serves that important purpose of the Free Speech Clause, which is to bar the government from skewing public debate." *Id.* at 894 (J. Souter, dissenting).

In the case at bar, the government was not "skewing public debate" or engaging in impermissible content discrimination. The Commission has simply chosen to exclude the controversial topic of immigration from a nonpublic or, at most, limited public forum. The government is constitutionally allowed to draw this line. It is entirely reasonable for the Commission to choose to altogether avoid such a divisive and politically charged issue, particularly in light of recent events that have taken place in this state as a result of the heated immigration debate. Thus, UnFAIR's plate was not denied because it expressed a pro-immigration sentiment, but because it expressed a stance on immigration at all. There is no evidence that the "America for Americans" plate creates a forum for debate on immigration. The plate is more appropriately read as a purely patriotic message akin to another New Jersey license plate which proclaims, "United We Stand." N.J. Ann. Stat. § 39:3-27.132. The fact that Ms. Stone may have misinterpreted the message as an anti-immigration expression is not enough to override the legislature's actual intent in approving the message.

Further evidence that this is a patriotic communication, and not one with anti-immigration sentiment, is found in the designation of the specialty plate funds, which go to a

politically neutral organization providing relief to the victims of natural disasters. This is not a case where the proceeds are funding a clearly anti-immigrant organization. That may well put a different spin on the issue. However, absent some legitimate showing that the government has opened a forum for debate on immigration topics, I see no reason to call the Commission's denial of the UnFAIR plate viewpoint discrimination, as opposed to legitimate subject matter control in a limited forum. I would therefore affirm the final judgment of the court below, though for different reasons.

SUPREME COURT OF THE UNITED STATES

**STATE OF NEW JERSEY MOTOR VEHICLE COMMISSION,
Petitioner,**

v.

**MARIA STONE, UNITED FEDERATION FOR
AMNESTY AND IMMIGRATION RIGHTS, Respondents.**

No. VU-SUP 2007
September 26, 2007

Case Below:

___ F.3d ___ (3rd Cir. 2007)
___ F. Supp. 2d ___ (D.N.J. 2006)

Petition for writ of certiorari to the United States Court of Appeals for the Third Circuit GRANTED.

The sole issue before the Court is:

Whether, under the First Amendment, the regulation of specialty license plates constitutes unconstitutional viewpoint discrimination of private speech.

Arguments will be heard on an expedited basis. The Petitioner State of New Jersey Motor Vehicle Commission shall present argument first.

LIST OF RELEVANT SOURCES

CASES

ACLU v. Bredesen, 354 F. Supp.2d 770 (M.D. Tenn. 2004)
ACLU v. Bredesen, 441 F.3d 370 (6th Cir. 2006)
Ariz. Life Coal. v. Stanton, 2005 WL 2412811 (D. Ariz. Sept. 26, 2005)
Ark. Educ. Television Comm'n v. Forbes, 523 U.S. 666 (1998)
Children First Found., Inc. v. Legreide, 2005 WL 3088334 (D.N.J. Nov. 17, 2005)
Children First Found., Inc. v. Martinez, 2006 WL 544502 (2d Cir. Mar. 6, 2006) (unpublished)
Choose Life Ill., Inc. v. White, 2007 WL 178455 (N.D. Ill. Jan. 19, 2007)
Cornelius v. NAACP Legal Def. & Educ. Fund, Inc., 473 U.S. 788 (1985)
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STATUTES

N.J. Ann. Stat. § 39:3-27.35
N.J. Ann. Stat. § 39:3-27.36
N.J. Ann. Stat. § 39:3-27.37
N.J. Ann. Stat. § 39:3-27.132
N.J. Ann. Stat. § 39:3-27.140*

* See Appendix A of Dist. Ct. opinion (*Stone v. State of N.J. Motor Vehicle Comm'n*, ___ F. Supp. 2d ___ (D.N.J. 2006)).