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No. 12-1234

In The
Supreme Court of the United States

October Term 2011

**GREG WEBBER, GOVERNOR OF THE STATE OF
GILEAD,**

Petitioner,

v.

WINSTON SMITH,

Respondent

On Writ of Certiorari to the

United States Court of Appeals for the Fourteenth Circuit

BRIEF FOR THE RESPONDENT

Sarah Benavides
Counsel for Respondent

QUESTIONS PRESENTED

I. Whether the Gilead specialty license plate program is classified as private speech or government speech.

II. Whether or not the Governor engaged in viewpoint discrimination when he denied Smith's proposed specialty license plate design.

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JURISDICTION

The court of appeals entered judgment on February 1, 2012. (R. 32-33). Petitioner filed his petition for writ of certiorari on February 7. *Id.* at 34. This Court granted the petition on March 25. *Id.* at 36. This Court's jurisdiction rests on 28 U.S.C. Section 1254(1) (2000).

STANDARD OF REVIEW

A district court's fact findings and the reasonable inferences to be drawn from them are reviewed for clear error. Its legal conclusions are reviewed *de novo*.

STATEMENT OF THE CASE

Winston Smith owns and is licensed to operate a white Ford Escape, registered in the State of Gilead. (R. 3). Smith's vehicle currently bears a standard license plate issued by the State of Gilead. *Id.* Section 1661 of the Title 42 of the State of Gilead Statutes, which relates to the title and registration of motor vehicles, provides that Gilead residents interested in the creation of a new specialty license plate ("SLP") may apply for authorization of their plate with the Governor, who will then permit the production of the proposed plates. *Id.* at 6. On July 4, 2011, Smith filed an application with the Governor to create a specialty license plate. *Id.* at 3. Smith applied for a plate design commemorating Caucasian heritage in the State of Gilead with a logo reading "White Pride Statewide". *Id.* at 4. Smith's proposed plate meets Section 1661's requirements for license character space. *Id.* at 3-4. Further, his application included all fees and sufficient order forms to fulfill the minimum order size requirement provided in Section 1661. *Id.* at 4.

Smith received a letter dated August 1, 2011, from the Governor, stating that his proposed plate design was rejected. *Id.* at 13. The Governor claimed that license plates are at all times property to the State of Gilead and that messages sent by the proposed specialty plate would be attributed to Gilead. *Id.* Further, he argued that as state property, specialty plates are subject to a Gilead statute that prohibits funds or property of the State to advocate or promote "discrimination on the basis of race, color". 451 GIL. STAT. ANN. § 1984. The Governor rejected Smith's design because the logo's message of white supremacy violates Section 1984 of title 451 statutes by promoting Caucasians. (R. at 13).

Interestingly, Smith discovered that a specialty license plate bearing the logo for a pro-diversity group known as INGSOC was approved by the Gilead General Assembly. *Id.* at 3. This specialty plate displays the group’s message “Celebrate Gilead’s Diversity”. *Id.*

Frustrated with the rejection of his specialty plate design, Smith filed suit against the Governor in the United States District Court for the District of Gilead and submitted a motion for summary judgment alleging that by rejecting his specialty plates, the Governor violated Smith’s right to express himself. *Id.* at 14-15. Smith sued for the protection of his free speech under the First Amendment, which is applied to the states through the Fourteenth Amendment. U.S. CONST. amend. XIV. In response, the Governor filed a cross motion for summary judgment, rejecting Smith’s contention. (R at 20). The district court granted Smith’s motion for summary judgment. *Id.* at 29. Thereafter, the Governor appealed to the Fourteenth Circuit, who affirmed the district court’s judgment for Smith. *Id.* at 30, 32-33. The Governor then filed a Petition for Certiorari to the United States Supreme Court, who granted certiorari and certified two questions for argument. *Id.* at 34, 36. First, is the Gilead state special license plate program government speech? Second, does the program constitute viewpoint discrimination? *Id.*

SUMMARY OF THE ARGUMENTS

I

The Gilead specialty license plate program is designed to give individuals the opportunity to select, purchase, and place an order for a specialty license plate or create a specialty plate for themselves or their organization. Such an opportunity presents the

individual with an occasion to express their own views or to promote an organization of their interest on the exterior of their private vehicle. The characteristics of the program indicate that the method of speech created is private speech.

II

By creating the opportunity for private speech and expression, the Gilead specialty license plate program must be treated as a limited public forum. As such, the standard of review that applies to individual messages must not be discriminative based on viewpoint of the individual attempting to be active within the forum. By creating the availability of a pro-diversity plate, race-oriented content has been allowed within the forum. Discriminating based on *which* race-oriented message is permitted specifically constitutes viewpoint discrimination and cannot be tolerated.

ARGUMENT

I. THIS COURT SHOULD HOLD THAT THE GILEAD STATE SPECIALTY LICENSE PLATE PROGRAM CONSTITUTES PRIVATE SPEECH

A. *Categories of speech and required protection of private speech*

Protection of individual speech has been a priority of the United States since the signing of the Constitution and inclusion of the First Amendment in the Bill of Rights. U.S. CONST. amend. I. However, not all speech falls beneath the umbrella of individual protection established in the First Amendment. *See generally* *Johanns v. Livestock Marketing Assn.*, 554 U.S. 550 (2009). In the judicial system and traditions of our nation, two forms of speech known as private speech and government speech have emerged, each with their own respective characteristics and protections. *Id.* Typically, private speech preserves the standard of free speech, protecting interests of the individual speaker without discriminative intervention or suppression by the government.

Rosenberger v. Rector & Visitors of the Univ. of Va. 515 U.S. 819, 828 (1995). On the other hand, when speech is classified as government speech, the government has the authority to promote any view it desires, excluding messages that violate the Establishment Clause provided in the First Amendment. *Pleasant Grove City v. Summum*, 555 U.S. 460, 468 (2009). Not all speech is easy to classify as either government or private speech for the purpose of determining when protection is owed to the speaker. *Planned Parenthood of S.C., Inc. v. Rose*, 361 F.3d 786, 792 (4th Cir. 2004). One such method of speech which this Court has never specifically addressed is the type of speech created by state specialty license plate programs.

Individuals who opt to participate in the Gilead specialty license plate program may select or design a non-standard license plate to promote their organization of choice or express their views. 42 GIL. STAT. ANN. § 1661. Those individuals who have engaged in the program to express their views should be entitled to the protection of the First Amendment.

B. The Fourth Circuit test for determining category of speech

As this is an issue of first impression, it may be insightful to consider the approaches taken by the lower courts. While lower court decisions are not binding on this Court, a test should be adopted for future clarification. There is not great unanimity among the lower courts in regards to this issue. Compare *Planned Parenthood of S.C., Inc. v. Rose*, 361 F.3d 786, 794 (4th Cir. 2004) (holding that SLP programs fall into a third classification of “mixed” speech requiring first amendment protection), with *Am. Civil Liberties Union of Tenn. v. Bredesen*, 441 F.3d 370, 376 (6th Cir. 2006) (holding that SLP programs are classified as government speech). In *Rose*, the Fourth Circuit of

the United States Court of Appeals developed a well-rounded test that has been adopted by other courts, including the Ninth Circuit. *Arizona Life Coalition Inc. v. Stanton* 515 F.3d 956, 965 (9th Cir. 2008). This test considers four factors to classify the method of speech created by a specialty license plate program, and captures the layers of expression born by the program. *Rose*, 361 F.3d at 792-93. When applied, the court in *Rose* determined that the speech created by the program could not be classified as strictly government or private speech, rather that the speech created a new category of “mixed speech”. *Id.* However, the facts of Smith’s case are distinguishable to suggest the finding of purely private speech. The observance of the factors presented in *Rose* serve as a strong reminder that while government may wish to reserve the minimal right to review plate designs, the expression of individual views by private speech is evidenced and needs protection.

The Fourth Circuit test was developed in *Rose*, based on an earlier decision. *See generally Sons of Confederate Veterans, Inc. v. Comm’r of Va. Dep’t of Motor Vehicles*, 288 F.3d 610 (4th Cir. 2002). The test presents the following factors to be considered:

- (1) purpose of the program;
- (2) degree of editorial control expended by the state;
- (3) identity of the “literal speaker”; and
- (4) who is ultimately accountable for the message.

Rose, 361 F.3d at 792.

Applying these factors to the present case, each factor points to the finding that the speech created by the specialty license plate program is private speech.

i. Purpose of the program- individual expression

Firstly, the purpose of the specialty license program is to allow private expression. 42 GIL. STAT. ANN. § 1661. The ability of individuals to design their own

plate supports a finding of substantial programmatic purpose of private expression. *Id.* Individuals who opt into the program have chosen to do so in an effort to display their special interest or message rather than be assigned a standard-issue plate. This first factor considering the purpose of the program should be weighed heavily to determine what method of speech is created, and strongly suggests that the category of speech created is private speech.

The Governor may argue that the purpose of the specialty license plate program is to generate revenue, however, the rejection of Smith's proposed plate drives against this very argument. If the purpose of the program is to generate revenue for the state, the Governor should accept Smith's design and produce the plate. When many specialty plates are available to choose from, vehicle owners will have a greater chance of finding a plate that expresses their view and will be more likely to purchase a specialty plate, in turn furthering any revenue generating purpose of the program. Likewise, when submitting the required materials and design for the plate, Smith also submitted the required number of order forms. (R. at 11). This demonstrates that the plate is viable in Gilead, and again will further any revenue generating purpose of the program.

ii. Degree of editorial control expended by the state is minimal

Secondly, Gilead performs little editorial control over the designs of plates. 42 GIL. STAT. ANN. § 1661 (4). The plates are designed and submitted for approval by individuals and organizations, not the state. The state exercises minimal editorial control, holding only power to reject messages that break the law, otherwise allowing the expression of views submitted by individuals. *Id.* This is unlike the situation discussed in *Rose*, where the legislature reserved editorial control by creating a design themselves as

opposed to the individuals' ability to control the submitting of a design. *Rose*, 531 F.3d at 793.

The Governor will argue that Gilead holds a high level of editorial control over all specialty license plates. (R at 21). While it is true that the Governor must approve proposed plates, it is the individual or organization that designs the plate, determines the overarching message, and sometimes even includes an emblem or symbol. 42 GIL. STAT. ANN. § 1661. This is even evidenced by the creation of the INGSOC specialty plate. Although the formulation of the INGSOC plate was passed by the Gilead General Assembly, its design was in control of a representative of the organization. 451 GIL. STAT. ANN. § 2050. This shows that the state does not perform the creation, design, or decoration of specialty plates, nor do they determine the message expressed by the organization or individual. Altogether, this demonstrates that the editorial interest taken by Gilead is weaker than suggested by the Governor.

iii. The individual is the "literal speaker"

Thirdly, the literal speaker of a message or image displayed on a license plate is likely to be attributed to the driver or owner of the vehicle. *Wooley v. Maynard*, 430 U.S. 705, 717 (1977). Any view expressed is not chosen by the state, but selected, purchased and displayed by the person who orders the specialty plate and operates the vehicle. *Rose*, 531 F.3d at 794. The Court may want to consider further whether a reasonable person would truly attribute a special design plate displaying a personal message with the driver of the vehicle or the state. As discussed in *Rose*, it is not likely that a reasonable person who sees a "Pro-Life" plate will doubt that the owner of the vehicle holds a pro-life viewpoint. *Id.*

iv. The owner of the motor vehicle is ultimately accountable for the message

In regards to who bears the responsibility of the message, it is easily suggested that the owner of the motor vehicle holds the responsibility. *Rose*, 531 F.3d at 794. If a car owner wishes to display a non-standard license plate, they bear the responsibility of designing the plate, or going out of their way to select a specialty plate in existence that promotes their interest, then submitting the designated order form with appropriate funds to the state. (R. at 11). The owner, not the state, places an order for the specialty plate of their choice, and holds the responsibility of attaching the plate to their vehicle. *Id.* If they do not wish to display or hold responsibility of the message on a specialty plate, the vehicle owner may simply opt out of the specialty plate program, and attach a standard issue plate to their vehicle. The only information displayed on the plate for which the government holds responsibility is the plate number assigned for vehicle identification purposes. It follows that the design and message contained on the plate are the responsibility of the owner of the vehicle.

An evaluation of the above mentioned factors points to the conclusion that the speech created by the license plate program is private speech. Allowing subjective discrimination to promote views while suppressing others is counterintuitive to the purpose of the program. As such, this speech must be protected by the First Amendment, and one view must not be favored over another (namely, ING SOC versus Smith's proposed plate design).

C. Further considerations finding private speech in license plate programs

The Court may be pleased to consider one additional factor when classifying the speech created by SLP programs: who pays for the speech? This factor has been discussed in this Court before. In *Rust v. Sullivan* 500 U.S. 173 (1991), this Court held

that when the government designed and funded a specific message, government speech was created regardless of the fact that private mouths disseminated the message. Unlike *Rust*, the speech in question presented here is fully paid for and sponsored by the individual upon submitting the SLP order form, and the individual designs the specific message disseminated. In *Johanns v. Livestock Marketing Association*, 554 U.S. 550 (2005), this Court held that generic advertisements that were designed, supervised, and controlled by the government were not attributed to individual beef producers who were compelled to participate in the advertisements' funding, rather constituted government speech. This situation is unlike the one presented here. Here, individuals volunteer to engage in the SLP program. These individuals do not contribute to that is a fund controlled and supervised by the government. Finally, the messages are not designed by a government entity as in *Johanns*, rather are designed by individuals or groups. The consideration of who pays for the speech supports the finding of private, not government speech.

While not bound to it, the Court may also wish to look to the case of *Lewis v. Wilson*, 253 F.3d 1077 (8th Cir. 2001). In this case, the Eighth Circuit held that vanity plates are classified as private speech. Specialty plates are comparable to vanity plates, the primary purpose of which is to give the vehicle owner a chance to reveal their perspectives. *Id* at 1079.

D. The facts of this case are distinguishable from cases that suggest the presence of government speech

The Governor relies on three cases that suggest a finding of government speech, all of which are distinguishable from the present case.

In *Johanns v. Livestock Marketing Association*, 554 U.S. 550 (2005), the Court held that when individuals are compelled to subsidize a message that is organized and disseminated by a government agency, government speech is created, and is not subject to first amendment scrutiny. Compelled subsidies that finance an advertisement under the full supervision and control of the government do not exist in the case at hand. Rather, individuals must go out of their way to design and purchase the message whose display *they* will control. And unlike the situation in *Johanns*, individuals of Gilead have the ability to choose not to participate in the program if they so wish. Analogizing *Johanns* to the present case is inappropriate.

The facts of this case are distinguishable from those in *American Civil Liberties Union of Tennessee v. Bredesen*, 441 F.3d 370, 371 (6th Cir.), where the state legislature exercised great control of the SLP program. There, the court found that the specialty plate in question was created by the state legislature, the message of the plate was “crafted” by the legislature, and that the state legislature “strictly regulated” the activities funded by the SLP program revenue. *Bredesen*, 441 F.3d at 372. These findings imply a high degree of editorial control, which ultimately steered the court to the finding that the plate was the government’s message. *Id.* In the present case, Gilead does not determine the “overarching message” of every SLP that is made available, it is the individual who designs and selects the message. The Governor only has the power to modify those plates that are contrary to state law. 42 GIL. STAT. ANN. § 1661(4). Further, the court misapplied *Johanns*, distinguishing it themselves when noting that a driver’s only motive to engage in the purchase of a specialty plate is because of the attractiveness of the message, not because the state of Tennessee willed it. *Bredesen*, 441 F.3d at 374. The

misapplication of *Johanns* prevented the court from addressing the proper question of whether or not a forum was created by the SLP program. This case is not binding on this Court, and should not be used here.

Finally, in *Pleasant Grove City v. Summum* 555 U.S. 460 (2009), the Court held that private individuals or groups who donate a monument to a government park are not speakers for first amendment purposes, rather the government is the speaker, as the monuments are found within government owned property and attributed to the government. This situation is unlike the present case, where the individual owns the property upon which the message will be attached. While it is true that the state of Gilead owns the metal that the license plate is printed on, the individual owns the vehicle where the plate rests. Ultimately, the message will be attributed to the property where it is affixed-- the individual's vehicle. The finding of government speech as in *Summum* is not smoothly applied to Smith's case.

Altogether, the Governor proposes distinguishable cases. To consider the specialty license plate program strictly government speech would be a mistake and deny individuals the protection guaranteed under the First Amendment.

E. The Governor proposes weak arguments without merit

The Governor argued that by applying for approval of a specialty license plate, Smith "clearly finds" value because the message endorsed is attributed to the government and constitutes government speech. (R at 22). This is unconvincing. The only reason that Smith has submitted a specialty license plate design is so he may celebrate his heritage along with members of his interest group.

The Governor continued on by saying that Smith has alternative options to express his viewpoint, primarily that he should be content with displaying his message on a bumper sticker. *Id.* This reasoning is dangerous. If this were the view adopted by the Court, the government could freely limit any speech it finds unpopular or disagreeable. When rejecting an individual's right to express their viewpoint, the government could simply say "There are alternative methods you may use to express your views". This is offensive to the essence free speech and the Constitution, and cannot be adopted. The Governor's suggestion of an alternative method of expression may also be countered by a suggestion that if the state truly wished to adopt a message of it's own, they may do so through the adoption of a standard plate.

Further, the Governor claims that Gilead holds a strong interest in the message displayed. However, in allowing any group or individual to design and submit a plate, the state has made available 74 plates ranging in theme, organization, school spirit etcetera. (R. at 3). This shows that the government is not trying to send a message. The multitude of plate dilutes the claim that Gilead has a strong interest in what messages are sent. Altogether, the Governor has not supported the finding that the speech created is government speech.

II. THIS COURT SHOULD HOLD THAT THE REJECTION OF SMITH'S SPECIALTY LICENSE PLATE DESIGN CONSTITUTES VIEWPOINT DISCRIMINATION

A. A limited public forum is created by the specialty license plate program, requiring regulation that is viewpoint neutral

i. Forum examination and standards for state restriction

When two individuals are engaged in private speech, the government may not discriminate by favoring one speaker over another. *Rosenberger v. Rector & Visitors of*

the Univ. of Va. 515 U.S. 819, 828 (1995) (quoting *Members of City Council of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789, 804 (1984)). The protection of free speech for individuals of all viewpoints is necessary and essential for all Americans; the First Amendment would be eviscerated without such protection. By allowing individual expression in public forums, the government must follow rules to protect free speech as laid out in *Perry Education Ass'n v Perry Local Educators' Ass'n* 460 U.S. 37 (1983). In *Perry* this Court identified three forums, each with standards for when the government may or may not prohibit expressive activity.

A traditional public forum is created when public property becomes available to the public for the purpose of assembly, communication between citizens, or discussion of “public questions”. *Perry* 460 U.S. at 45. The communicative activity may be prohibited only in cases where the state exhibits that the prohibition is necessary to promote a compelling state interest. *Id.* The state must show that when regulation is needed, the restrictions placed on expressive activity are reasonable, “narrowly tailored”, and appropriate to achieve the compelling interest. *Id.* If there are restrictions in place, the state must leave alternative channels of communication open. *Id.*

A designated public forum is created when public property is made available by the state for public use as a locale for expressive activity. *Perry* 460 U.S. at 45. Even if a state was not required to open the forum, is not required to keep the forum open, or did not intend to open a forum in the first place, they are still held to a high standard when trying to restrict expressive activity. *Id.* The state must show that the regulations are reasonable for time, place and manner, and may restrict expressive content when narrowly done so to effectuate a compelling state interest. *Id.* at 46.

Public property may become a forum by tradition or designation or another means for public communication. *Perry* 460 U.S. at 46. Limited public forums exist when property is made available to certain groups, or created for presentation of special subject matter. *Id* at 49. A state may determine what content is permitted for expression within the forum, so long as the restriction is reasonable and viewpoint neutral in order to reserve the forum for its intended purposes. *Id* at 46. This requirement is to ensure that a state cannot prohibit or prevent speech with which it disagrees. *Id*.

ii. A limited public forum was created by Gilead's SLP program

In this case, a limited public forum was created when the SLP program invited the expression of individuals on their SLP. Gilead owns the actual metal that the license plate design is printed on, yet any individual or group is given the opportunity to express their views through the program. 42 GIL. STAT. ANN. § 1661. As such, the only restrictions that may be imposed must be reasonable and viewpoint neutral to reserve the forum for its intended purpose.

B. The Governor's rejection of Smith's proposed specialty plate constitutes viewpoint discrimination.

By rejecting Smith's specialty plate design, the Governor engaged in viewpoint discrimination. The specialty license plate program of Gilead is private speech, and creates a limited public forum under *Perry*. Therefore, the Governor may not control the message that Smith and his group wish to display on the proposed specialty plate because of a disagreement with the view expressed or because the view they desire to express may seem unpopular. *Perry* 460 U.S. at 46. By rejecting the plate design submitted by Smith on the sole basis that it promotes a Caucasian racial group who wishes to celebrate its heritage, the Governor impermissibly discriminated against Smith based on his

viewpoint. (R 13).

C. *While the Governor might claim to be viewpoint-neutral, he has prohibited “white” pride and promoted a diversity group.*

A state may prohibit expression of all viewpoints related by shared content, but may not allow only specific viewpoints of the content while discriminating against opposing viewpoints. *Rosenberger v. Rector & Visitors of the Univ. of Va.* 515 U.S. 819, 828 (1995). The Governor will claim that he has not discriminated against Smith based on viewpoint because he would prohibit *any* racial pride content specialty plate. That is, he and the state would reject any racially specific group or its message from being displayed on any specialty plate. However, the record does not support this argument. Gilead has permitted the message of the diversity group INGSOC to be expressed through a specialty license plate. (R. at 3). INGSOC was granted the opportunity to design its own group specialty plate while Smith’s group specialty plate was rejected. *Id.* It is not a reasonable expectation that the Governor would reject a specialty plate proposed by other racially organized groups such as the NAACP. By providing access to the limited forum to selective viewpoints while rejecting others, the forum is distorted. In conclusion, by prohibiting Smith’s specialty plate and allowing another racially specific group an opportunity to enjoy the forum created by the specialty plate program, the Governor has engaged in viewpoint discrimination.

D. *Evidence of viewpoint discrimination leads to the conclusion that Smith’s first amendment rights were violated.*

When an individual’s expression or speech is denied or prohibited on the basis of his viewpoint alone, his first amendment rights are violated. *Rosenberger v. Rector & Visitors of the Univ. of Va.* 515 U.S. 819, 828 (1995). Like the students in *Rosenberger*,

Smith has been subjected to viewpoint discrimination. The Governor rejected Smith's proposed specialty plate to unconstitutionally control the message expressed. This Court should hold that Smith's rights under the First Amendment have been violated and must be restored.

Ultimately, this Court should hold that the Governor has engaged in viewpoint discrimination by denying Smith's proposed specialty plate design, and should affirm the decisions of the lower courts.

CONCLUSION

In conclusion, the specialty license plate program of Gilead creates an avenue for individuals to engage in the expression of their views or promotion of their interests, suggesting that speech created by the program may be classified as private speech. After allowing race content to find its way into this limited public forum, no racial viewpoint may be discriminated against over another. The Court should hold that the speech is private, and viewpoint discrimination may not be tolerated. The Court should require Gilead to issue Smith's proposed plate, or discontinue the issuance of the specialty INGSOC plate.

PRAYER

For these reasons, Respondent prays this court will affirm the decision of the court below.