

## Look Who's Talking Now: "Choose Life" License Plates and Deceptive Government Speech

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In March 2006, the Sixth Circuit upheld a Tennessee statute<sup>1</sup> allowing drivers to purchase specialty license plates bearing a "Choose Life" slogan but not making available plates with an alternative pro-choice message.<sup>2</sup> Two years earlier, the Fourth Circuit struck down a nearly identical South Carolina statute,<sup>3</sup> claiming it violated the First Amendment by discriminating based on viewpoint.<sup>4</sup> Despite uncertain constitutionality, legislation allowing "Choose Life" plates has passed in thirteen states.<sup>5</sup> None of these states offer pro-choice tags.

The First Amendment issue boils down to whether specialty license plates are government or private speech. When the government speaks, it "may take legitimate and appropriate steps to ensure that its message is neither garbled nor distorted," and therefore need not accommodate competing or conflicting viewpoints.<sup>6</sup> But "[i]n the realm of private speech or expression, government regulation may not favor one speaker over another."<sup>7</sup> "Choose Life" plates are constitutional if government speech, unconstitutional if private speech.

The Fourth and Sixth Circuits decided the issue differently because they used different tests to determine which messages qualify as government speech. The Sixth Circuit found that the "Choose Life" message is government speech because the Tennessee legislature "determines the overarching message [of the specialty plate] and Tennessee approves every word on such plates."<sup>8</sup> The court applied the definition of government speech used in *Johanns v. Livestock Marketing Ass'n*,<sup>9</sup> in which the Supreme Court held that the federal

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1. TENN. CODE ANN. § 55-4-306 (2004).
2. *ACLU of Tenn. v. Bredesen*, 441 F.3d 370 (6th Cir. 2006).
3. S.C. CODE ANN. § 56-3-8910 (2006).
4. *Planned Parenthood of S.C. v. Rose*, 361 F.3d 786 (4th Cir. 2004).
5. *Guttmacher Inst., State Policies in Brief: 'Choose Life' License Plates* (Oct. 1, 2006), [http://www.guttmacher.org/statecenter/spibs/spib\\_CLLP.pdf](http://www.guttmacher.org/statecenter/spibs/spib_CLLP.pdf).
6. *Rosenberger v. Rectors & Visitors of Univ. of Va.*, 515 U.S. 819, 833 (1995).
7. *Id.* at 828.
8. *ACLU of Tenn. v. Bredesen*, 441 F.3d 370, 375 (6th Cir. 2006).
9. 544 U.S. 550 (2005).

government's "Beef. It's What's for Dinner." promotional campaign constituted government speech because the message was "effectively controlled by the Federal Government."<sup>10</sup>

In contrast, the Fourth Circuit determined that Choose Life plates are a hybrid of government and private speech using a four-factor test it borrowed from other circuits:

- (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 . . . ; (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.<sup>11</sup>

The court found that the first two factors weighed in favor of government speech, the last two against. In his opinion, Judge Michael found that the balance tipped in favor of private speech because specialty plates more closely resemble a forum for private expression than a vehicle for government speech.<sup>12</sup> Therefore, the Fourth Circuit ruled that South Carolina could not discriminate based on viewpoint when regulating specialty plates and accordingly found the "Choose Life" tags unconstitutional.<sup>13</sup>

The Fourth Circuit made the right decision. While the Sixth Circuit only considered whether the author of the "Choose Life" message is *actually* the government, the Fourth Circuit also considered whether the government *appears* to be speaking. Appearances matter. By disguising its speech as private expression, the government can manipulate the "marketplace of ideas" and the public's beliefs without being held democratically accountable. This concern is not merely hypothetical. Since 1988, the federal government has prohibited doctors in clinics that receive Title X funding from discussing abortion with their patients. These patients are not told that the government censors their doctor's advice.<sup>14</sup> From 1998 to 2003, the White House Office of National Drug Control gave major television networks millions of dollars in public service broadcasting credit in exchange for airing prime-time programming with anti-drug messages.<sup>15</sup> Between 2003 and 2005, at least twenty federal agencies spent \$1.6 billion making and distributing prepackaged news segments to local television stations.<sup>16</sup> The ninety-second clips praised

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10. *Id.* at 560. The campaign was attributed to "America's Beef Producers." *Id.* at 555. Had the Court taken appearances into account, it would have likely struck down the promotional program.

11. *Planned Parenthood of S.C. v. Rose*, 361 F.3d 786, 792-93 (4th Cir. 2004) (Michael, J.) (citation omitted).

12. *Id.* at 798 (observing that "[t]he medium here—the specialty license plate scheme—is more like a limited forum for expression than it is like a school, museum, or clinic," three environments in which the Supreme Court has found government speech).

13. *Id.* at 799.

14. *Rust v. Sullivan*, 500 U.S. 173, 178-81 (1991).

15. See Don Van Natta Jr., *Drug Office Will End Scrutiny of TV Scripts*, N.Y. TIMES, Jan. 20, 2000, at A15.

16. See Christopher Lee, *Update: Pre-Packaged News*, WASH. POST, Feb. 14, 2006, at A13.

## Look Who's Talking Now

various administration policies ranging from the war in Iraq to fighting computer viruses.<sup>17</sup> Using the Sixth Circuit's test for government speech, which asks only if a given message has been crafted by the government, these deceptive uses of government speech would be immune from constitutional challenge.

"Choose Life" plates present a more subtle example of nontransparent government speech. Unlike pre-packaged news broadcasts or censored prime-time television, specialty plates are obviously produced by the government. But it is not obvious that specialty plates are government speech. "Given the array of specialty license plates available"—approximately 150 in Tennessee,<sup>18</sup> 180 in Virginia,<sup>19</sup> and 740 in Maryland<sup>20</sup>—"a citizen is less likely to associate the plate messages with the State."<sup>21</sup> A reasonable person, seeing a South Carolina license plate for the National Wild Turkey Federation,<sup>22</sup> saltwater fishing,<sup>23</sup> or NASCAR racing,<sup>24</sup> would believe that the driver, not the government, was expressing support for these groups or activities. Given that it seems as though any group can get their own license plate, provided that there is enough demand, the ordinary person might think that there are no pro-choice plates because there is no support for that view.

In order to discourage deceptive government speech, courts should apply the Fourth Circuit's test and take appearances into account when deciding whether a challenged message constitutes government speech. In Part I of this Comment, I discuss the difficulty of distinguishing between government speech and private speech in a limited public forum. In Part II, I demonstrate that social science data supports the claims by many legal scholars that government speech, especially nontransparent government speech, can be dangerous. In Part III, I argue that nontransparent government speech is contrary to the spirit, if not the letter, of the First Amendment because it threatens the marketplace of ideas and democratic accountability.

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17. See David Barstow & Robin Stein, *Under Bush, A New Age of Prepackaged News*, N.Y. TIMES, March 13, 2005, at A1. For a further discussion of these and other examples of deceptive government speech, see Gia B. Lee, *Persuasion, Transparency, and Government Speech*, 56 HASTINGS L.J. 983, 983-88 (2005).

18. *ACLU of Tenn. v. Bredesen*, 441 F.3d 370, 382 (6th Cir. 2006).

19. Va. Dep't of Motor Vehicles, Search/View Specialized License Plates, [http://www.dmv.state.va.us/webdoc/citizen/vehicles/plate\\_search.asp](http://www.dmv.state.va.us/webdoc/citizen/vehicles/plate_search.asp) (last visited Dec. 15, 2006).

20. Md. Motor Vehicle Admin., Specialty Plates, <http://www.marylandmva.com/VehicleServ/SpecialtyPlates/product.asp> (last visited Dec. 15, 2006).

21. *Planned Parenthood of S.C. Inc. v. Rose*, 361 F.3d 786, 798 (4th Cir. 2004) (Michael, J.).

22. S.C. CODE ANN. § 56-3-3410 (2006).

23. *Id.* § 56-3-7300.

24. *Id.* § 56-3-8710.

## I. DIFFICULTY IN DISTINGUISHING BETWEEN GOVERNMENT SPEECH AND PRIVATE SPEECH IN A LIMITED PUBLIC FORUM

When the government speaks for itself, it may discriminate based on viewpoint.<sup>25</sup> The government can announce the dangers of second-hand smoke,<sup>26</sup> urge Americans to be vigilant and prepare for a possible terrorist attack,<sup>27</sup> or demand that citizens pay their taxes,<sup>28</sup> without being constitutionally required to express contradictory or competing viewpoints. The political process, not the Constitution, is the primary check on government speech.<sup>29</sup>

When a government program is “designed to facilitate private speech, not to promote a government message,” that program creates a public forum in which the government may not discriminate based on viewpoint.<sup>30</sup> The Supreme Court has divided all government property into three categories: traditional public forums, designated or limited public forums, and non-public forums.<sup>31</sup> Traditional public forums include town squares,<sup>32</sup> parks, and sidewalks,<sup>33</sup> places that “have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions.”<sup>34</sup> Designated or limited public forums are public property that the state has opened up to private parties for expressive use.<sup>35</sup> For example, the Supreme Court has categorized a public university’s student activity fund<sup>36</sup> and an

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25. See *Legal Servs. Corp. v. Velazquez*, 531 U.S. 533, 541 (2001) (“[V]iewpoint-based funding decisions can be sustained in instances in which the government is itself the speaker . . .”).

26. U.S. DEP’T OF HEALTH & HUMAN SERVS., *THE HEALTH CONSEQUENCES OF INVOLUNTARY EXPOSURE TO TOBACCO SMOKE: A REPORT OF THE SURGEON GENERAL* (2006), available at <http://www.surgeongeneral.gov/library/secondhandsmoke/report/>.

27. Dep’t of Homeland Sec., Homeland Security Advisory System, [http://www.dhs.gov/xinfo/share/programs/Copy\\_of\\_press\\_release\\_0046.shtm](http://www.dhs.gov/xinfo/share/programs/Copy_of_press_release_0046.shtm) (last visited Dec. 15, 2006).

28. Internal Revenue Serv., CP 504—Frequently Asked Questions (FAQs), <http://www.irs.gov/individuals/article/0,,id=136855,00.html> (last visited Dec. 15, 2006).

29. See *Bd. of Regents of the Univ. of Wis. Sys. v. Southworth*, 529 U.S. 217, 235 (2000) (“When the government speaks, for instance to promote its own policies or to advance a particular idea, it is, in the end, accountable to the electorate and the political process for its advocacy.”).

30. *Velazquez*, 531 U.S. at 542.

31. *Perry Educ. Ass’n v. Perry Local Educators’ Ass’n*, 460 U.S. 37, 45-46 (1983). This formalistic division of property has many critics. See, e.g., C. Thomas Dienes, *The Trashing of the Public Forum: Problems in First Amendment Analysis*, 55 GEO. WASH. L. REV. 109, 110 (1986) (describing the approach as “an inadequate jurisprudence of labels”); Robert Post, *Between Governance and Management: The History and Theory of the Public Forum*, 34 UCLA L. REV. 1713, 1714-15 (1987) (describing it as “an elaborate, even byzantine scheme of constitutional rules,” which are “virtually impermeable to common sense”).

32. See *Texas v. Johnson*, 491 U.S. 397, 412 (1989).

33. *Perry*, 460 U.S. at 45.

34. *Id.* (quoting *Hague v. Committee for Indus. Org.*, 307 U.S. 496, 515 (1939) (Roberts, J., concurring)).

35. See *id.*

36. *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819 (1995).

## Look Who's Talking Now

elementary school's classrooms<sup>37</sup> as limited public forums because the government property in each case had been "opened for use by the public as a place for expressive activity."<sup>38</sup> The government may place content-based restrictions on limited public forums, provided that these restrictions are viewpoint-neutral.<sup>39</sup> All other government property falls into the default category of non-public forum, where government may freely regulate speech so long as it does not discriminate based on viewpoint.<sup>40</sup>

The line between government speech and private speech in a limited public forum is hard to draw. Compare, for example, the holdings in *Legal Services Corp. v. Velazquez*<sup>41</sup> and *Rust v. Sullivan*.<sup>42</sup> In *Legal Services*, the Court held that a federal program providing funding to attorneys who represented indigent welfare clients was analogous to a limited public forum.<sup>43</sup> Therefore, the government could not prohibit these attorneys from arguing that welfare laws were unconstitutional.<sup>44</sup> In *Rust*, the Court upheld a restriction barring doctors employed by federally funded family planning clinics from discussing abortion with their patients because the restriction was government speech.<sup>45</sup> It is hard to understand why a restriction on the speech of professionals paid by the federal government was government speech in *Rust* but not in *Legal Services*.

Compare also *Rosenberger v. Rector & Visitors of the University of Virginia*<sup>46</sup> with *National Endowment for the Arts v. Finley*.<sup>47</sup> In *Rosenberger*, the Court held that the University's Student Activities Fund, which awarded funds to student groups, was a limited public forum. Therefore the University could not deny funding to publications with religious editorial viewpoints.<sup>48</sup> In *Finley*, the Court essentially argued that the NEA, by awarding financial grants to artists, had created a forum for *government* speech in which it could discriminate based on viewpoint.<sup>49</sup> It is hard to understand why a limited pool of public funds, distributed on a competitive basis, was a public forum in *Rosenberger* but not in *Finley*.

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37. *Good News Club v. Milford Cent. Sch.*, 533 U.S. 98 (2001).

38. *Perry*, 460 U.S. at 45 (emphasis added).

39. *See id.* at 46.

40. *See id.*

41. 531 U.S. 533 (2001).

42. 500 U.S. 173 (1991).

43. *Velazquez*, 531 U.S. at 544.

44. *Id.* at 548.

45. *Rust*, 500 U.S. at 192-93. Although the phrase "government speech" never appears in *Rust*, it has been widely viewed as the foundational case for the government speech doctrine. *The Supreme Court, 2004 Term—Leading Cases: Government Speech Doctrine—Compelled Support for Agricultural Advertising*, 119 HARV. L. REV. 277, 278 (2005).

46. 515 U.S. 819 (1995).

47. 524 U.S. 569 (1998).

48. *Rosenberger*, 515 U.S. at 837.

49. Randall P. Bezanson, *The Government Speech Forum: Forbes and Finley and Government Speech Selection Judgments*, 83 IOWA L. REV. 953, 971 (1998).

The difficulty in distinguishing government speech from private speech in a limited public forum is not unique to the specialty license plate dispute. This problem is endemic to the doctrines of government speech and limited public forum.<sup>50</sup> Because the problem is recurring, the Sixth Circuit's decision to uphold the "Choose Life" plates may set an important and harmful precedent.

## II. DANGERS OF DECEPTIVE GOVERNMENT SPEECH

The concerns of legal scholars regarding government speech generally fall into two categories. First, commentators have warned that the government, with its nearly unlimited resources, may use its speech to monopolize or distort the marketplace of ideas. The government monopolizes a market when it "drive[s] other speech out of the marketplace or 'drown[s] out' rival communications."<sup>51</sup> Distortion, a lesser evil, occurs when "the government's participation in the marketplace of ideas has distorted th[e] market by causing other views than the government's not to be heard or by causing a skewing of the ideas that reach an interested audience."<sup>52</sup>

Second, the government may use its speech to indoctrinate and to dull the individual's ability to think critically. Mark Yudof, for example, cautions that the government may "dominate[] the minds of individuals, suppressing their ability to think critically about government leaders and policies."<sup>53</sup> Along the same lines, Robert Post warns that, when the state subsidizes "speech, it establishes a relationship between itself and private speakers that can sometimes compromise the independence of the latter."<sup>54</sup> The dangers of monopolization and indoctrination are related; the greater the market dominance of government speech, the less private speech can counter its indoctrinating effect. Similarly, David Cole worries about "the indoctrinating effect of a monopolized marketplace of ideas."<sup>55</sup>

The dangers presented by government speech are magnified when that speech is disguised as private expression. The only check on government speech, the Supreme Court tells us, is the political process.<sup>56</sup> But if the public cannot tell who is speaking, it cannot know whom to hold accountable. The

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50. See Mary Jean Dolan, *The Special Public Purpose Forum and Endorsement Relationships: New Extensions of Government Speech*, 31 HASTINGS CONST. L.Q. 71, 72 (2004) ("The limited public forum test and the government speech approaches are on a collision course.").

51. Randall P. Bezanson & William G. Buss, *The Many Faces of Government Speech*, 86 IOWA L. REV. 1377, 1488 (2001).

52. *Id.* at 1491.

53. MARK G. YUDOF, *WHEN GOVERNMENT SPEAKS: POLITICS, LAW, AND GOVERNMENT EXPRESSION IN AMERICA* 166 (1983).

54. Robert C. Post, *Subsidized Speech*, 106 YALE L.J. 151, 154 (1996).

55. David Cole, *Beyond Unconstitutional Conditions: Charting Spheres of Neutrality in Government Funded Speech*, 67 N.Y.U. L. REV. 675, 680 (1992).

56. See *supra* note 29.

## Look Who's Talking Now

political process cannot protect the public from the dangers of nontransparent government speech.

Regarding the first danger, there is little doubt that the government can, like any other wealthy speaker, monopolize or distort the marketplace of ideas using either transparent or nontransparent speech. Whether such is the case with "Choose Life" specialty plates depends on how the market is defined. If the market includes all specialty plate messages, then Tennessee and South Carolina clearly are monopolists and have used their market power to silence pro-choice messages. But if the market includes all messages regarding abortion, then the impact of "Choose Life" tags on the market is unclear. Because pro-choice drivers can respond to the government's pro-life message in many other ways—for example, with bumper stickers or billboards—the government's "Choose Life" message likely does not skew public discourse on abortion.

Regarding the second danger, evidence from the social sciences suggests that nontransparent government speech may be used to indoctrinate, where indoctrination is broadly defined as the uncritical acceptance of an idea. Social psychologists have developed two main models of persuasion or attitude change: the Elaboration Likelihood Model and the Heuristic/Systemic Model.<sup>57</sup> According to both, individuals process messages via one of two routes. The central route is taken when people are motivated and able to critically evaluate the merits of the message. Attitude change through the central route is characterized by careful and conscious scrutiny of the communication. Argument strength is the main determinant of whether an individual is persuaded by the message.<sup>58</sup>

Attitude change can also occur by a second, peripheral route. When people are unmotivated or unable to critically evaluate a message, they may rely on certain cues or heuristics in the persuasion environment to decide whether to accept a message's conclusion. For example, a person is more likely to be persuaded by a message when he or she is in a neutral rather than good mood, when the message is expressed by someone who has a pleasant voice or a babyish face, and when the speaker is a member of the person's ingroup.<sup>59</sup> Attitude change solely in response to cues such as these occurs with little scrutiny of the message or its supporting arguments.<sup>60</sup>

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57. See Sara M. Baker & Richard E. Petty, *Majority & Minority Influence: Source-Position Imbalance as a Determinant of Message Scrutiny*, 67 J. PERSONALITY & SOC. PSYCHOL. 5, 7 (1994).

58. See Shelly Chaiken & Durairaj Maheswaran, *Heuristic Processing Can Bias Systematic Processing: Effects of Source Credibility, Argument Ambiguity, and Task Importance on Attitude Judgment*, 66 J. PERSONALITY & SOC. PSYCHOL. 460, 460 (1994); Richard E. Petty & John T. Cacioppo, *The Effects of Involvement on Responses to Argument Quantity and Quality: Central and Peripheral Routes to Persuasion*, 46 J. PERSONALITY & SOC. PSYCHOL. 69, 71 (1984).

59. James M. Olson, *Attitudes and Attitude Change*, 44 ANN. REV. PSYCHOL. 117, 138 (1993).

60. See Baker & Petty, *supra* note 57, at 7.

By disguising its speech as private expression, the government can take advantage of at least three cues that tend to increase the persuasiveness of a message. The first of these is perceived credibility. While people tend to trust government officials or programs they have personally dealt with, they tend to distrust the government and its employees in the abstract.<sup>61</sup> By channeling its message through a more credible source—perhaps doctors<sup>62</sup> or journalists<sup>63</sup>—the government can enhance the persuasiveness of its speech. The second of these is broadcast by multiple sources. The greater the number of independent sources that endorse a message, the more likely an individual will be persuaded by that message.<sup>64</sup> The government can increase the persuasiveness of its speech by enlisting multiple, ostensibly independent agents—for example, different television networks<sup>65</sup>—to send its message. The final cue is popularity. It is a “social psychological truism that individuals tend to yield to a majority position even when that position is clearly incorrect.”<sup>66</sup> If the government uses private speakers to make its message seem more popular than it actually is—by, for instance, making pro-life specialty plates but not pro-choice plates—it can increase the persuasiveness of that message.

Nontransparent government speech allows the government to “indoctrinate” its audience by manipulating certain cues that often prompt individuals to accept a message without critical evaluation. If this was Tennessee and South Carolina’s strategy in creating “Choose Life” specialty plates, they will likely be unsuccessful. Generally, systematic processing is high and cues exert little persuasive impact when individuals consider important issues like abortion.<sup>67</sup> But in other situations, all too easy to imagine, such a strategy could prove very successful.

### III. DECEPTIVE GOVERNMENT SPEECH VIOLATES THE SPIRIT OF THE FIRST AMENDMENT

Admittedly, deceptive government speech does not violate the letter of the First Amendment. But the Supreme Court has “long eschewed any ‘narrow, literal conception’ of the Amendment’s terms, for the Framers were concerned

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61. H. George Frederickson & David G. Frederickson, *Public Perceptions of Ethics in Government*, 537 ANNALS AM. ACAD. POL. & SOC. SCI. 163, 165-67 (1995).

62. See *supra* text accompanying note 14.

63. See *supra* text accompanying notes 15-17.

64. See RICHARD PETTY & JOHN CACIOPPO, COMMUNICATION & PERSUASION: CENTRAL AND PERIPHERAL ROUTES TO ATTITUDE CHANGE 96-101 (1986); Stephen G. Harkins & Richard E. Petty, *Social Context Effects in Persuasion: The Effects of Multiple Sources and Multiple Targets*, in BASIC GROUP PROCESSES 149, 163-70 (Paul B. Paulus ed., 1983); D. Wilder, *Perception of Groups, Size of Opposition, and Social Influence*, 13 J. EXPERIMENTAL SOC. PSYCHOL. 253, 254 (1977).

65. See *supra* text accompanying note 12.

66. Anne Maass & Russell D. Clark, III, *Internalization Versus Compliance: Differential Processes Underlying Minority Influence and Conformity*, 13 EUR. J. SOC. PSYCHOL. 197, 197 (1983).

67. Chaiken & Maheswaran, *supra* note 58, at 460.



## Look Who's Talking Now

with broad principles, and wrote against a background of shared values and practices.”<sup>68</sup> Therefore, courts should evaluate government speech in light of “the ends and purposes of the First Amendment.”<sup>69</sup>

Nontransparent government speech undermines at least two functions of the First Amendment. From a liberal perspective, the purpose of the First Amendment is “to preserve an uninhibited marketplace of ideas in which truth will ultimately prevail, rather than to countenance monopolization of that market, whether it be by the Government itself or a private licensee.”<sup>70</sup> As mentioned previously, deceptive government speech is unconstrained by the democratic political process, making it easy for the government to distort or monopolize the market. From a republican perspective, “‘a major purpose of that Amendment was to protect the free discussion of governmental affairs.’ . . . By offering such protection, the First Amendment serves to ensure that the individual citizen can effectively participate in and contribute to our republican system of self-government.”<sup>71</sup> Deceptive speech allows the government to manipulate the “free discussion” essential to deliberative democracy.

## CONCLUSION

The Sixth Circuit’s test<sup>72</sup> for government speech is at odds with the First Amendment. It allows deceptive government speech to pass constitutional muster by asking only whether the government is *actually* the author of a given message. But under the Fourth Circuit’s four-factor test,<sup>73</sup> which also considers whether the government *appears* to be speaking, nontransparent government speech is properly found unconstitutional.

Deceptive government speech is dangerous because it can be used to distort the marketplace of ideas and to indoctrinate the public. “Choose Life” plates are innocent on both counts. As mentioned previously, the plates likely have little impact on the public discourse surrounding abortion and cues should not make their pro-choice message significantly more persuasive. Nonetheless, the Sixth Circuit’s decision is important because it sets a dangerous precedent, opening the door for more harmful uses of deceptive government speech. Courts that are called upon to distinguish private from government speech in the future should follow the Fourth Circuit’s wiser approach.

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68. *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 604 (1982) (quoting *NAACP v. Button*, 371 U.S. 415, 430 (1963)).

69. *Red Lion Broad. Co. v. FCC*, 395 U.S. 367, 390 (1969).

70. *Id.*

71. *Globe Newspaper Co.*, 457 U.S. at 604 (quoting *Mills v. Alabama*, 384 U.S. 214, 218 (1966)).

72. *ACLU of Tenn. v. Bredesen*, 441 F.3d 370, 375 (6th Cir. 2006) (“[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.”).

73. *Planned Parenthood of S.C. v. Rose*, 361 F.3d 786, 792-93 (4th Cir. 2004) (Michael, J.).

