



**I'm a  
vegetarian!**

**I'm a hunter!**

**Pro-Choice**

**Choose  
Life**

**Roll  
Tide!**

**War Eagle!**



BY ANDY G. OLREE

Today, license plates often do more than display a vehicle's unique registration number. They have become a means of expressing oneself. Vanity tags have long allowed motorists to express themselves by choosing the particular alphanumeric combination that will serve as their vehicle's registration number. But the most recent project for enhancing the expressiveness of license plates is the concept of specialty plates. For a separate fee, motorists are allowed to choose from among a state-approved menu of license plate designs containing preprinted slogans or symbols to be displayed alongside the vehicle's unique registration number.

Typically, specialty plates cost the state nothing; before producing a certain plate and offering it to motorists for the first time, the state will require a certain number of pre-orders or other commitments from interested motorists. If a plate goes into production, a portion of each motorist's specialty plate fee reimburses the state for the costs of the program, with the remainder allocated to a group affiliated with the cause the particular plate endorses.

## Sweet charity?

Since the late 1980s, a majority of states have adopted specialty plate programs, with the available menu ranging from 20 or 30 different choices in some states to over 500 in others. Alabama offers over 100 different specialty plates, with the most popular being the Auburn University plate, the University of Alabama plate and the "Helping Schools" plate.<sup>1</sup> According to a spokesperson for the University of Alabama, Auburn and Alabama alone have raised a combined total of over \$27 million through the specialty plate program in the state of Alabama.<sup>2</sup>

Doubtless, many view specialty plate programs as a win-win proposition—benefiting charitable organizations through voluntary private donations, at no net cost to the taxpayer—but they don't seem so benevolent to organizations who have applied for a specialty plate only to be told by the state that their particular cause is unworthy. The First Amendment of the U.S. Constitution protects freedom of

expression by forbidding laws “abridging the freedom of speech, or of the press . . .” Predictably, state denials of applications for specialty plates have spawned First Amendment litigation, notably in the case of groups that take a stand on abortion laws. Although many states offer “Choose Life” license plates, few states offer any kind of pro-choice tag, and as a result, a number of challenges to “Choose Life” plates recently have been litigated.<sup>3</sup> And in a strange twist, at least two cases have involved a challenge by a complaining pro-life group, whose applications for “Choose Life” plates were rejected in their respective states on the ground that the plates represented a viewpoint that was too politically divisive.<sup>4</sup>

## The *Bredesen* case

The Sixth Circuit became the latest circuit court to address the issue as it decided a “Choose Life” case in March 2006. In *ACLU of Tennessee v. Bredesen*,<sup>5</sup> the Tennessee legislature authorized “Choose Life” tags but defeated a proposal to authorize a “Pro-Choice” tag. Rejecting the approaches of other circuits that had confronted specialty plates, the Sixth Circuit asserted that a recent U.S. Supreme Court opinion, *Johanns v. Livestock Mktg. Ass’n*,<sup>6</sup> announced a new rule for determining whether any particular speech is government speech, and that *Johanns* controlled the case. According to the Sixth Circuit, *Johanns* set forth a universal test for all speech: “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.”<sup>7</sup>

Applying the *Johanns* test to specialty plates, the court determined that specialty plates are neither purely private speech nor some blend of public and private speech (as the Fourth Circuit had concluded),<sup>8</sup> but pure government speech, because the government claimed authority to “approve every word” on each specialty plate. On that basis, the specialty plate program was upheld, viewpoint discrimination and all. After all, said the court, the state of Tennessee can choose to send a pro-life message if it wishes, without being forced to send a pro-choice message as well.

## A problematic interpretation

Of course, the government is not required to be neutral when expressing itself, which is why *Johanns* came out the way it did. The Court has long held that the right of freedom of speech does not preclude the government from expressing its own viewpoint, nor does it require the government to fund or support viewpoints at odds with its own. On the other hand, the Supreme Court has been equally clear that if the government is not itself speaking, but is instead regulating the speech of a number of private parties speaking on its property or in its “forum,” the government may not exclude particular speakers or messages based on viewpoint.

The Sixth Circuit interpreted *Johanns* to mean that *any* speech becomes pure government speech whenever “the government determines an overarching message and retains power to approve every word disseminated at its behest.” That is a broad holding indeed, and it presents a big problem: If this is true, and if it shows that specialty plates are government speech, then, similarly, no private party is really speaking when the government tells people what viewpoints they can express in its town square, city sidewalks or public parks. The government can engage in all the viewpoint discrimination it wants because in these scenarios as much as in specialty plate programs, “the government determines an overarching message and retains power to approve every word disseminated at its behest,” and that converts the private speech into government speech. Of course, such a conclusion flies in the face of a long line of Supreme Court precedents holding that the state must maintain strict viewpoint neutrality in its forums.<sup>9</sup>

The Sixth Circuit arrived at its problematic interpretation of *Johanns* by ignoring the operative facts of that case. In *Johanns*, the federal government had established a program to encourage beef consumption and, as part of that program, had taxed sales and imports of cattle to fund a beef advertisement. Some beef producers who had to pay the tax did not like the ad and claimed that the tax constituted compelled speech in violation of the First Amendment. The Supreme Court rejected that claim and upheld the tax because the ad was government speech, not private

speech, and the government did not force anyone actually to convey the message, only to pay for it. In that context, the Court was able to determine that the ad in question was government speech because the government approved the final wording. The take-home message was that government is always allowed to tax in order to fund its own communications.

In *Johanns*, although no one was forced to convey a message personally, the government readily admitted that it was trying to encourage certain activities by transmitting a particular message, the costs of which were borne by unwilling taxpayers. Specialty license plate programs are fundamentally different. No one is being forced to pay for anything; the entire cost of specialty plates is borne voluntarily by those who agree with the message. And specialty plate programs are not part of a larger governmental scheme to encourage some private activity, like beef consumption.

The difference matters. If the government creates a program to promote some particular activity and then forces people to fund a message encouraging that activity, as in *Johanns*, the government is already deeply involved, and perhaps we can attribute the message to the government merely upon discovering, in addition, that the government has authority to approve or veto the message’s final wording.<sup>10</sup> On the other hand, if the expression does not occur in the context of a larger governmental program intended to encourage some particular activity, and no one is forced to pay any tax or convey any message, then the governmental involvement is minimal, limited only to opening its property or forum to some private speakers. Under these circumstances, surely we will want to know more than whether the government exercises power to veto the final message, before we characterize the message as government speech rather than private speech. If absolutely any speech becomes government speech just because the government gives itself the power to veto the final wording in advance, then the government can safely begin reviewing in advance the “final wording” of absolutely any speech, silencing any prospective public speaker with whom it disagrees. Are we prepared to sanitize such an arrangement, calling it a program of governmental expression? We used to call that “prior restraint,” and it was bad.

# Living in the real world

As various federal circuits remain at odds over the question of specialty plates and the U.S. Supreme Court continues to deny certiorari, one can only hope that the *Bredesen* decision will have little impact on circuits that have yet to confront this issue. Silent as to its implications for the law of public forums, the Sixth Circuit's analysis, which does little more than cite *Johanns*, evinces a disturbing disconnection from the real world. When a motorist in Alabama displays an Auburn University specialty tag on his car, no reasonable person interprets that to mean that the state government supports Auburn University above all other schools. Nor does anyone think for a moment that the message is "Auburn, and the University of Alabama, and a bunch of other schools and causes are all equally terrific." Rather, as we all know, the message is "Go Auburn!" (And perhaps "Beat Bama!") We understand that the Auburn plate is intended to show the loyalties, not of the state of Alabama, but of the person behind the wheel. (Indeed, University of Alabama alumni would likely be shocked to discover that an Auburn University specialty tag is actually intended to proclaim that the Alabama government is loyal to Auburn University!) The state did not wake up one day and decide people needed to support Auburn; rather, Auburn supporters petitioned the state for permission to fundraise and express themselves on state property, for a fee—which makes it extremely unnatural, and unrealistic, to view the tag as a state-crafted message to all of us.

In the real world, specialty plates are widely understood to operate as a forum for private speech, not the state's bully pulpit. And, as in any government forum for private speech, state censorship of disfavored viewpoints is a constitutional violation, the same violation that is committed when the government tells speakers in advance which viewpoints are acceptable for expressing on public sidewalks and in city parks.

This does not mean specialty plate programs are completely impermissible. If the state wants to approve in advance the messages allowed on its limited number of specialty plates, it could easily design rules for doing so in a viewpoint-neutral way—say, allowing only 100 distinct plate designs, to be allocated by random drawing among all organizations that apply by a certain date and present a certain number of signatures in support of their applications. Or, of course, it could do without a specialty plate program altogether, as states have done throughout most of the history of the automobile. What the state cannot do is to open a forum for private speakers, widely inviting any interested organization to apply for access, and then selectively deny access to disfavored groups and messages. Intentionally setting up a one-sided, private-party debate on public property violates the First Amendment, even if the state says a specialty tag is really the state's way of talking to us, and has nothing to do with allowing motorists to express themselves. The Sixth Circuit may believe this, but we all know better. ■

## Endnotes

1. Jay Wilson, "HOT Plates: Alabama Offers More Than 100 Specialty Tags," *The Decatur Daily*, Aug. 22, 2005, available at [www.decaturdaily.com/decaturdaily/livingtoday/050822/plate.shtml](http://www.decaturdaily.com/decaturdaily/livingtoday/050822/plate.shtml).

2. Pat Whetstone, "UA Car Tags Raise Almost \$2 Million for Scholarships," *The University of Alabama News*, Jan. 23, 2006, available at <http://uanews.ua.edu/uanews2006/jan06/cartags012306.htm>.
3. See, e.g., *Women's Emergency Network v. Bush*, 323 F.3d 937 (11th Cir. 2003); *Planned Parenthood of South Carolina, Inc. v. Rose*, 361 F.3d 786 (4th Cir. 2004), cert. denied, 543 U.S. 1119 (2005); *Henderson v. Stalder*, 407 F.3d 351 (5th Cir. 2005), cert. denied, 126 S. Ct. 2967 (2006); *ACLU of Tennessee v. Bredesen*, 441 F.3d 370 (6th Cir. 2006), cert. denied, 126 S. Ct. 2972 (2006).
4. See *Arizona Life Coalition, Inc. v. Stanton*, No. CV031691PHXPGR, 2005 WL 2412811 (D. Ariz. Sept. 26, 2005); *Choose Life Illinois, Inc. v. White*, No. 04-C-4316, 2007 WL 178455, slip op. (N.D. Ill. Jan. 19, 2007).
5. 441 F.3d 370 (6th Cir. 2006), cert. denied, 126 S. Ct. 2972 (2006).
6. 544 U.S. 550 (2005).
7. *Bredesen*, 441 F.3d at 375.
8. *Rose*, 361 F.3d at 794, 800–01.
9. See, e.g., *Rosenberger v. Rector and Visitors of the University of Virginia*, 515 U.S. 819, 833–34 (1995); *Cornelius v. NAACP Legal Defense and Educational Fund, Inc.*, 473 U.S. 788, 800 (1985); *International Society for Krishna Consciousness, Inc. v. Lee*, 505 U.S. 672, 678–79 (1992); *Perry Education Assn. v. Perry Local Educators' Assn.*, 460 U.S. 37, 45–46 (1983).
10. See also *Rust v. Sullivan*, 500 U.S. 173 (1991). *Rust* involved a federal grant program that made federal funds available to certain family planning clinics as long as their viewpoint on abortion was acceptable to the federal government. The Court upheld the program and its restrictions on the ground that the program was funding government speech, not private speech.



### Andy G. Olree

Andy G. Olree is an associate professor of law at Faulkner University's Thomas Goode Jones School of Law. A former associate professor of political science at Harding University, he has also practiced with Seyfarth, Shaw, Fairweather & Geraldson in Chicago.

## PLAN THE GREAT ESCAPE...TO A LOG HOME

### THE LOG HOME ADVANTAGE:

- Faster & Potentially less expensive construction (Maintenance costs are also usually lower.);
- Durability: Many log homes withstood Hurricane Katrina in areas where other homes were lost.
- Beauty: My family has been in the timber business for over 100 years and I believe that good wood, whether in the home or still growing in the open, is a form of art.
- Energy Efficiency: 8" logs insulate far better than bricks, dry vit, or siding.



To plan your own great escape, contact Hense R. Ellis, II • Authorized Dealer, Lincoln Logs Int'l, LLC  
1.888.LOG.2007 • [www.loghome.bravehost.com](http://www.loghome.bravehost.com) • [rellis@elmore.rr.com](mailto:rellis@elmore.rr.com) • [www.lincolnlogsinternational.com](http://www.lincolnlogsinternational.com)