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Four-Factor Disaster: Courts Should Abandon the Circuit Test for Distinguishing Government Speech from Private Speech

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FOUR-FACTOR DISASTER: COURTS SHOULD ABANDON THE CIRCUIT TEST FOR DISTINGUISHING GOVERNMENT SPEECH FROM PRIVATE SPEECH

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Abstract: A recent addition to First Amendment jurisprudence, the government-speech doctrine was developed by the Supreme Court to insulate government speech from certain First Amendment challenges. Broadly, the doctrine rests on the notion that when the government speaks for itself, it may say what it wishes. Recently, government entities facing claims of viewpoint discrimination against speech have asserted a government-speech defense, claiming that their viewpoint-based actions were justifiable because they were not regulating private speech but speaking for themselves. Several federal courts deciding these cases have applied a circuit-developed, four-factor test to determine whether the speech at issue was private speech or government speech. This test looks at the following factors: (1) the central purpose of the program in which the speech occurs, (2) the degree of editorial control exercised over the speech by the government or by private parties, (3) the identity of the literal speaker, and (4) whether the government or private parties bear the ultimate responsibility for the speech.

This Comment argues, for two principal reasons, that courts should abandon the four-factor test for distinguishing government speech from private speech. First, in the face of the inherent malleability of the factors, courts applying the test have failed to produce a principled and consistent approach that guides future courts. Second, an application of the test to *Rust v. Sullivan*, 500 U.S. 173 (1991), the Supreme Court's original government-speech case, yields a result contrary to the Court's decision. This Comment does not propose an alternative to the four-factor test, but does suggest that courts, in fashioning a new approach, should adhere to the principles underlying two distinct lines of Supreme Court cases.

INTRODUCTION

What began as a system to facilitate the efficient identification of vehicles has in many states become a carnival of expression, as drivers maneuver the roads in vehicles bearing license plates with a myriad of messages and designs. "Specialty" license plates—those bearing background designs and messages different from those on standard-issue plates[1]—are now available in all states.[2] States' regulation of their

1. "Specialty" plates differ from "vanity" plates, which feature number-and-letter configurations chosen by drivers. An example of a specialty plate is Illinois' "America Remembers" plate, which features the text "America Remembers" and "September 11, 2001" against a background design of the American flag. CyberDriveIllinois, America Remembers, http://www.cyberdriveillinois.com/departments/vehicles/license_plate_guide/specialty_plates/america_remembers.html (last visited Oct. 24, 2008) ("America Remembers" specialty plate), *permanent copy available at*

specialty-plate programs has aroused controversy and litigation, as private parties argue that the states discriminated based on viewpoint in approving, denying, or modifying certain plates.[3] States respond by arguing that specialty plates constitute the states' own speech, not private speech.[4] These cases are quintessential examples of private parties and government laying claim to the same speech.

While the Supreme Court has explained some of the things government can do when it is speaking,[5] it has not clearly explained how to tell whether government is speaking in the first place.[6] Identifying the speaker is important because government's regulation of private speech is subject to First Amendment principles that do not apply when it speaks for itself.[7] Grappling with this lack of clarity, courts in several circuits have applied a four-factor test to analyze the provenance of speech.[8]

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http://www.law.washington.edu/wlr/notes/83washlrev569n1.pdf. An example of a vanity plate might be the text "USA-911" on a standard-issue background.

2. *See* ANNE TEIGAN & NICHOLAS FARBER, NAT'L CONFERENCE OF STATE LEGISLATURES, TRANSPORTATION REVIEW: MOTOR VEHICLE REGISTRATION AND LICENSE PLATES 22–25 (2007), *available at* http://www.ncsl.org/print/transportation/license-registration07.pdf, *permanent copy available at* http://www.law.washington.edu/wlr/notes/83washlrev569n2.pdf. The number of specialty-plate designs offered by states varies significantly, from as few as five to more than seven hundred. *See id*.

3. *See, e.g.*, Ariz. Life Coal., Inc. v. Stanton, 515 F.3d 956, 960 (9th Cir. 2008); Planned Parenthood of S.C., Inc. v. Rose, 361 F.3d 786, 787–88 (4th Cir. 2004); Sons of Confederate Veterans, Inc. *ex rel*. Griffin v. Comm'n of Va. Dep't of Motor Vehicles (*SCV*), 288 F.3d 610, 614 (4th Cir. 2002); Choose Life Ill., Inc. v. White, No. 1:04-CV-04316, 2007 WL 178455, at *3 (N.D. Ill. Jan. 19, 2007); Henderson v. Stalder, 265 F. Supp. 2d 699, 703–04 (E.D. La. 2003), *vacated on other grounds*, 407 F.3d 351 (5th Cir. 2005).

4. *See Rose*, 361 F.3d at 792; *White*, 2007 WL 178455, at *3; Ariz. Life Coal., Inc. v. Stanton, No. 2:03-CV-01691, 2005 WL 2412811, at *2 (D. Ariz. Sept. 26, 2005), *rev'd*, 515 F.3d 956 (9th Cir. 2008); *Henderson*, 265 F. Supp. 2d at 713.

5. *See infra* notes 40–41 and accompanying text.

6. *See SCV*, 288 F.3d at 618 ("No clear standard has yet been enunciated in our circuit or by the Supreme Court for determining when the government is 'speaking' and thus able to draw viewpoint-based distinctions, and when it is regulating private speech and thus unable to do so.").

7. *See infra* note 38; *see also* Page v. Lexington County Sch. Dist., 531 F.3d 275, 288 (4th Cir. 2008) ("[T]he School District engaged in government speech and . . . its speech did not implicate the First Amendment or [plaintiff's] First Amendment rights."); *SCV*, 288 F.3d at 618 ("[E]ven ordinarily impermissible viewpoint-based distinctions drawn by the government may be sustained where the government itself speaks or where it uses private speakers to transmit its message.").

8. *See Stanton*, 515 F.3d at 965–68 (applying four-factor test to decide that specialty license plate was private speech); *Rose*, 361 F.3d at 793–94 (Choose Life message on specialty plate constituted hybrid of government and private speech); *SCV*, 288 F.3d at 619–21 (logo restriction on specialty plate of Sons of Confederate Veterans regulated private speech); Summum v. City of Ogden, 297 F.3d 995, 1004–05 (10th Cir. 2002) (Ten Commandments monument on city property was private

This Comment argues that federal courts should abandon the test. Its factors are inherently malleable, and the emerging case law has not clarified their meanings. Courts cannot apply the test in a consistent and predictable manner to future cases. Moreover, it produces outcomes inconsistent with Supreme Court precedent.

Because cases in which government invokes the government-speech defense almost always implicate government property or instrumentalities, Part I provides a brief overview of public-forum principles. Part II summarizes the Supreme Court's government-speech cases, while Part III describes a different line of cases, those in which the Court has held that government may make content-based decisions about private speech that it will make available to the public. Part IV describes the origins of the four-factor test and how courts have applied it. Finally, Part V argues that courts should stop using the four-factor test for distinguishing government speech from private speech. While this Comment does not suggest an alternative approach, it argues that courts should adhere to the principles underlying two distinct lines of cases as they formulate a different approach.

I. GOVERNMENT MUST MAINTAIN VIEWPOINT NEUTRALITY IN FORUMS FOR PRIVATE SPEECH

People often express themselves on government property—they may, for example, distribute literature on public sidewalks[9] or produce plays in government-owned theaters.[10] And while this speech enjoys First Amendment protections, it "is not thereby accorded a guaranteed forum on all property owned by the State."[11] Government uses its property to accomplish many different purposes—some that are amenable to all speakers, some that can accommodate certain conversations but not

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speech); Wells v. City & County of Denver, 257 F.3d 1132, 1141–42 (10th Cir. 2001) (sign listing private sponsors of public holiday display constituted government speech); *White*, 2007 WL 178455, at *4–7 (message on specialty plates constituted private speech); *Stanton*, 2005 WL 2412811, at *3–6 (specialty plates were government speech); Chiras v. Miller, No. 3:03-CV-02651, 2004 WL 1660388, at *6–8 (N.D. Tex. July 23, 2004) (classroom use of textbook was not pure government speech), *aff'd on different grounds*, 432 F.3d 606 (5th Cir. 2005); *Henderson*, 265 F. Supp. 2d at 715–17 (specialty plates were private speech); Cimarron Alliance Found. v. City of Okla. City, 290 F. Supp. 2d 1252, 1257–59 (W.D. Okla. 2002) (city's banner program constituted government speech).

9. *See* United States v. Grace, 461 U.S. 171, 173 (1983).

10. *See* Se. Promotions, Ltd. v. Conrad, 420 U.S. 546, 547–548 (1975).

11. Capitol Square Review & Advisory Bd. v. Pinette, 515 U.S. 753, 761 (1995).

others, and some that are inconsistent with any right of speech access whatsoever. When government restricts speech that takes place on its property or through its instrumentalities, courts apply public-forum principles to determine whether those restrictions are constitutional.[12]

The Supreme Court has recognized three categories of forums for speech: traditional public forums, designated public forums (with its sub-category of limited public forums),[13] and nonpublic forums.[14] While speakers' protections differ depending on which type of forum is involved, government may not discriminate based on viewpoint in any forum.[15]

Traditional public forums are properties such as "streets and parks which . . . time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions."[16] Government may place reasonable time, place, and manner restrictions on speech in traditional public forums if they are viewpoint-neutral, narrowly tailored to serve a significant governmental interest, and leave open ample alternative channels for communication.[17] Content-based regulations of speech are permissible if they serve a compelling state interest and are narrowly drawn to achieve that end.[18]

Designated public forums consist of property not historically devoted to public expression, but which government has opened for that purpose.[19] For example, courts have described university meeting

12. Cornelius v. NAACP Legal Def. & Educ. Fund, Inc., 473 U.S. 788, 800 (1985) ("[T]he extent to which the Government can control access depends on the nature of the relevant forum."). For more extensive overviews of the public-forum doctrine, see 1 RODNEY A. SMOLLA, SMOLLA & NIMMER ON FREEDOM OF SPEECH §§ 8:1–52 (2007), and RUSSELL L. WEAVER & DONALD E. LIVELY, UNDERSTANDING THE FIRST AMENDMENT 116–24 (2d. ed. 2006).

13. Courts sometimes express confusion about the difference between limited public forums and nonpublic forums. *See, e.g.*, Gentala v. City of Tucson, 213 F.3d 1055, 1062 n.4 (9th Cir. 2000); People for the Ethical Treatment of Animals v. Giuliani, 105 F. Supp. 2d 294, 307 n.9 (S.D.N.Y. 2000). At least one court explained that general access indicates a designated public forum, while selective access indicates a non-public forum. Warren v. Fairfax County, 169 F.3d 190, 205 (4th Cir. 1999) (citing Ark. Educ. Television Comm'n v. Forbes, 523 U.S. 666, 679–80 (1998)).

14. *See* Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 46 (1983) (describing "[p]ublic property which is not by tradition or designation a forum for public communication").

15. Sons of Confederate Veterans, Inc. *ex rel*. Griffin v. Comm'n of Va. Dep't of Motor Vehicles (*SCV*), 288 F.3d 610, 616 n.4 (4th Cir. 2002) (citing Rosenberger v. Rector & Visitors of Univ. of Va., 515 U.S. 819, 829–30 (1995), for the proposition that viewpoint discrimination is presumptively impermissible in all forums for private speech).

16. *Perry*, 460 U.S. at 45 (internal quotation omitted).

17. Ward v. Rock Against Racism, 491 U.S. 781, 791 (1989).

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

19. *Id*.

facilities[20] and municipal theaters as designated public forums.[21] The same requirements that apply to traditional public forums govern designated public forums, but government retains the right to modify the designated public forum's use or close it altogether.[22]

Limited public forums, a type of designated public forum, are devoted to particular conversations—for use by certain groups or for the discussion of certain topics.[23] Limited public forums have been recognized in school facilities opened to after-school use by various social and civic groups in the community,[24] and in university funding for student publications.[25] In these forums, the government "has power to preserve the property under its control for the use to which it is lawfully dedicated."[26] But that power does not include the right to discriminate against disfavored viewpoints; while the government may exclude speakers who wish to address subjects not under discussion, it may not prohibit speakers from offering their opinions about an otherwise permitted subject.[27]

Nonpublic forums include all other government property,[28] with the caveat that some properties are not classified as forums at all.[29]

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20. Widmar v. Vincent, 454 U.S. 263, 267–68 (1981). The Court explained in a later case that *Widmar* involved a designated public forum. Ark. Educ. Television Comm'n v. Forbes, 523 U.S. 666, 679 (1998) ("[T]he government creates a designated public forum when it makes its property generally available to a certain class of speakers, as the university made its facilities generally available to student groups in *Widmar*.").

21. Se. Promotions, Ltd. v. Conrad, 420 U.S. 546, 555 (1975).

22. *See Perry*, 460 U.S. at 45–46 ("Although a state is not required to indefinitely retain the open character of the facility, as long as it does so it is bound by the same standards as apply in a traditional public forum.").

23. *See* Good News Club v. Milford Cent. Sch., 533 U.S. 98, 106 (2001).

24. *Id*.

25. Rosenberger v. Rector & Visitors of Univ. of Va., 515 U.S. 819, 829–30 (1995).

26. Greer v. Spock, 424 U.S. 828, 836 (1976) (quoting Adderley v. Florida, 385 U.S. 39, 47 (1966)).

27. Cornelius v. NAACP Legal Def. & Educ. Fund, Inc., 473 U.S. 788, 806 (1985).

28. *See* Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 46 (1983).

29. *See* Ark. Educ. Television Comm'n v. Forbes, 523 U.S. 666, 672–73 (1998) ("[T]he public forum doctrine should not be extended in a mechanical way to the very different context of public television broadcasting. . . . In the case of television broadcasting, . . . broad rights of access for outside speakers would be antithetical, as a general rule, to the discretion that stations and their editorial staff must exercise to fulfill their journalistic purpose and statutory obligations."); Nat'l Endowment for the Arts v. Finley, 524 U.S. 569, 585–88 (1998) (explaining that program awarding arts funding under competitive criteria differed from program in *Rosenberger*, where the government had created a limited public forum). For a discussion of *Forbes* and *Finley*, see *infra* Part III.

Examples of nonpublic forums are the Combined Federal Campaign (an annual fundraising drive allowing approved charitable groups to solicit donations)[30] and a school's internal mail system.[31] Restrictions on speech in nonpublic forums are subject to the same rules that apply to limited public forums:[32] they must be reasonable in light of the purpose served by the forum.[33] Furthermore, although government may restrict the subject matter of speech, it may not exclude speakers based on viewpoint.[34]

Public-forum principles are frequently implicated in cases where government invokes a government-speech defense against claims of viewpoint discrimination, because the disputed speech often takes place on government property or through government instrumentalities.[35] Typically, the plaintiff argues that the government has created a forum by making its property available to private speakers,[36] while the government claims the speech as its own, contending that it has not created a forum to which the plaintiff is entitled access.[37] While public-forum principles apply when private speech takes place on government property, they do not apply to the government's own speech.[38]

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30. *Cornelius*, 473 U.S. at 805.

31. *Perry*, 460 U.S. at 46.

32. *Id*. at 46 ("[T]he state may reserve the forum for its intended purposes, communicative or otherwise, as long as the regulation on speech is reasonable and not an effort to suppress expression merely because public officials oppose the speaker's view.").

33. *See* Rosenberger v. Rector & Visitors of Univ. of Va., 515 U.S. 819, 829 (1995).

34. *See id*.

35. *See, e.g.*, *Rosenberger*, 515 U.S. 819; Page v. Lexington County Sch. Dist., 531 F.3d 275 (4th Cir. 2008); Ariz. Life Coal., Inc. v. Stanton, 515 F.3d 956 (9th Cir. 2008); Am. Civil Liberties Union of Tenn. v. Bredesen, 441 F.3d 370 (6th Cir. 2006); People for the Ethical Treatment of Animals, Inc. v. Gittens, 414 F.3d 23 (D.C. Cir. 2005).

36. *See, e.g.*, Brief of Appellants at 15, *Stanton*, 515 F.3d 956 (No. 05-16971), 2006 WL 3032960 (arguing that state's license plates were a designated public forum); Appellants' Brief at 24, *Page*, 531 F.3d 275 (No. 07-1697), 2007 WL 2988073 (arguing school district created forum through web site linking to third-party sites).

37. *See, e.g.*, Appellees' Answering Brief at 12–31, *Stanton*, 515 F.3d 956 (No. 05-16971), 2006 WL 2983500 (arguing that Arizona's special organization plates were government speech and a nonpublic forum from which exclusion of Life Coalition was reasonable and viewpoint-neutral); Response Brief for Appellee Lexington County School District One at 26–31, *Page*, 531 F.3d 275 (No. 07-1697), 2007 WL 4114512 (arguing that school district did not create a forum and that web links to third-party sites constituted government speech).

38. *See* Bd. of Regents of Univ. of Wis. Sys. v. Southworth, 529 U.S. 217, 234–35 (2000) ("Our decision ought not to be taken to imply that in other instances the University, its agents or employees, or—of particular importance—its faculty, are subject to the First Amendment analysis which controls in this case. Where the University speaks, either in its own name through its regents or officers, or in myriad other ways through its diverse faculties, the analysis likely would be

II. GOVERNMENT CAN FAVOR ITS OWN VIEWPOINT OVER OTHERS WHEN IT SPEAKS FOR ITSELF

Government engages in speech activity to carry out its many functions.[39] When government speaks, its "power to choose and tailor its message includes the discretion to promote policies and values of its own choosing free from forum analysis or the viewpoint-neutrality requirement."[40] Under the government-speech doctrine, government may express a preferred viewpoint, fund certain programs without funding others, and take certain measures to control its own message.[41] That does not mean that all speech that is somehow supported by government is subject to the whims of the state. Government may not discriminate based on viewpoint when it facilitates private speech[42] or encourages a diversity of speech from private speakers.[43]

The origins of the government-speech doctrine lie in *Rust v. Sullivan*,[44] a case involving congressional funding of family-planning services under Title X.[45] Congress was willing to fund every family-planning technique but one—abortion.[46] A program restriction prevented a healthcare provider from answering a pregnant woman's questions about abortion—for instance, if she asked where to get one.[47] The

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altogether different. The Court has not held, or suggested, that when the government speaks the rules we have discussed come into play.") (citation omitted); Wells v. City & County of Denver, 257 F.3d 1132, 1139 (10th Cir. 2001) ("When the government speaks, either directly or through private intermediaries, it is constitutionally entitled to make 'content-based choices' and to engage in 'viewpoint-based funding decisions.'" (quoting *Rosenberger*, 515 U.S. at 833, and Legal Services Corp. v. Velazquez, 531 U.S. 533, 541 (2001), respectively)). *But see* W. Alexander Evans, Comment, *License to Discriminate: "Choose Life" License Plates and the Government Speech Doctrine*, 8 NEV. L.J. 765, 766 (2008) (suggesting that courts do not need to determine who is speaking when access to a forum is at issue); Alana C. Hake, Comment, *The States, a Plate, and the First Amendment: The "Choose Life" Specialty License Plate as Government Speech*, 85 WASH. U. L. REV. 409, 447 (2007) (proposing a "forum-accountability" principle by which courts should determine whether states' viewpoint-based actions are constitutional as "government speech").

39. *See Southworth*, 529 U.S. at 229; Sons of Confederate Veterans, Inc. *ex rel*. Griffin v. Comm'n of Va. Dep't of Motor Vehicles (*SCV*), 288 F.3d 610, 616–17 (4th Cir. 2002).

40. W. Va. Ass'n of Club Owners & Fraternal Servs., Inc. v. Musgrave, 512 F. Supp. 2d 424, 430 (S.D. W. Va. 2007) (internal citations omitted).

41. *See* Rust v. Sullivan, 500 U.S. 173, 193 (1991); *SCV*, 288 F.3d at 616–17.

42. *See Velazquez*, 531 U.S. at 542–49.

43. *See Rosenberger*, 515 U.S. at 834.

44. 500 U.S. 173 (1991).

45. *Id*. at 177–78.

46. *See id*. at 178.

47. *See id*. at 180.

provider was permitted to say that "the project does not consider abortion an appropriate method of family planning and therefore does not counsel or refer for abortion."[48] The Supreme Court upheld the regulations against the providers' challenge that the regulations abridged their free-speech rights.[49] The Court framed a Title X provider's discussion with a pregnant patient as part of a larger government program that Congress had the right to shape.[50] In effect, the provider's speech was the government's speech.[51] The Court also pointed out that "[t]o hold that the Government unconstitutionally discriminates on the basis of viewpoint when it chooses to fund a program dedicated to advance certain permissible goals, because the program in advancing those goals necessarily discourages alternative goals, would render numerous Government programs constitutionally suspect."[52] The Court illustrated the principle with an example: Congress, in establishing a program to encourage other countries to adopt democratic principles, did not also have to fund a program encouraging communism and fascism.[53]

In *Legal Services Corp. v. Velazquez*,[54] the Court was faced with facts similar to those in *Rust*, but reached a very different conclusion, finding that Congress had discriminated against private speakers.[55] Congress had allocated funds to the Legal Services Corporation (LSC), a federal nonprofit corporation, to provide legal assistance to indigent persons unable to afford representation.[56] A program restriction prohibited funding of legal representation that involved an effort to amend or otherwise challenge existing welfare law.[57] The Court found LSC's argument—that *Rust* squarely governed the case[58]—unavailing.[59] The

48. *Id*.

49. *Id*. at 192.

50. *See id*. at 193–94.

51. Although the *Rust* opinion did not include the explicit language "government speech," the Court later recognized that "the counseling activities of the doctors under Title X amounted to governmental speech . . . ." Legal Servs. Corp. v. Velazquez, 531 U.S. 533, 541 (2001).

52. Rust v. Sullivan, 500 U.S. 173, 194 (1991).

53. *Id*.

54. 531 U.S. 533 (2001).

55. *Id*. at 537.

56. *Id*. at 536.

57. *Id*. at 536–37.

58. Brief for Petitioner Legal Services Corp. at 24, Legal Servs. Corp. v. Velazquez, 531 U.S. 533 (2001) (Nos. 99-603, 99-960), 2000 WL 772605.

59. *Velazquez*, 531 U.S. at 542–43.

Court unequivocally concluded that "[t]he advice from the attorney to the client and the advocacy by the attorney to the courts cannot be classified as governmental speech even under a generous understanding of the concept."[60]

The Court distinguished the facts before it from those in *Rust*. Unlike a doctor who received Title X funds so he or she could communicate the government's message, the LSC-funded lawyer "[spoke] on the behalf of his or her private, indigent client."[61] Further, there was no "programmatic message" as there had been in *Rust*.[62] Whereas Congress had communicated in Title X that it found birth preferable to abortion,[63] the regulation at issue in *Velazquez* contained no message; it was "designed to insulate the Government's interpretation of the Constitution from judicial challenge."[64]

In *Rosenberger v. Rector & Visitors of University of Virginia*,[65] the Court considered whether the government-speech doctrine allows the State to discriminate based on viewpoint when it funds a diversity of speakers.[66] A University of Virginia student organization seeking to publish a newspaper had sought funding from the university under a program that subsidized the printing costs of student groups.[67] The University denied the funding request because the newspaper "promote[d] or manifest[ed] a particular belie[f] in or about a deity or an ultimate reality."[68] The Court rejected the government's argument that *Rust* was controlling.[69] It found that the university had created a "metaphysical" limited public forum by financing the fund,[70] and that denying funding to the student organization amounted to viewpoint discrimination.[71] The Court clarified that although the State may shape the contours of its own message,[72] "[i]t does not follow . . . that

60. *Id*.
61. *Id*. at 542.
62. *Id*. at 548.
63. *See* Rust v. Sullivan, 500 U.S. 173, 192–93 (1991).
64. *Velazquez*, 531 U.S. at 548.
65. 515 U.S. 819 (1995).
66. *See id.* at 832–34.
67. *Id.* at 822–27.
68. *Id.* at 827.
69. *See id.* at 833–34.
70. *Id.* at 830.
71. *See id.* at 845.
72. *Id.* at 833.

viewpoint-based restrictions are proper when the University does not itself speak or subsidize transmittal of a message it favors but instead expends funds to encourage a diversity of views from private speakers."[73]

The differences in these cases' outcomes, particularly between *Rust* and *Velazquez*, demonstrate how blurry the line is between government speech and private speech. Justice Scalia, in a sharp dissent in *Velazquez*, invoked stare decisis, writing that the LSC subsidy was "indistinguishable in all relevant respects from the subsidy upheld in *Rust v. Sullivan*"[74] and that there was "no legitimate basis for declaring [the regulation] facially unconstitutional."[75] On the distinction the majority drew between the permissible government speech in *Rust* and the impermissible restriction on private speech in *Velazquez*, he wrote:

> If the private doctors' confidential advice to their patients at issue in *Rust* constituted "government speech," it is hard to imagine what subsidized speech would *not* be government speech. Moreover, the majority's contention that the subsidized speech in these cases is not government speech because the lawyers have a professional obligation to represent the interests of their clients founders on the reality that the doctors in *Rust* had a professional obligation to serve the interests of their patients . . . which at the time of *Rust* we had held to be highly relevant to the permissible scope of federal regulation . . . . Even respondents agree that "the true speaker in *Rust* was not the government, but a doctor."[76]

These cases demonstrate the rough contours of the government-speech doctrine. Government, when it is speaking through its own officials or through paid agents,[77] can use public funds to promote its own policy and can regulate the content of its own speech.[78] But it may

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73. *Id.* at 834.

74. Legal Servs. Corp. v. Velazquez, 531 U.S. 533, 558–59 (2001) (Scalia, J., dissenting).

75. *Id.* at 559.

76. *Id.* at 554 (citations omitted).

77. *See id.* at 541 (recognizing the proposition in *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 833 (1995), that viewpoint-based funding decisions could be sustained in instances such as *Rust v. Sullivan*, 500 U.S. 173 (1991), where the government used private speakers to transmit specific information about *its own program*).

78. *See Rosenberger*, 515 U.S. at 833 (citing *Rust*, 500 U.S. at 194); Sons of Confederate Veterans, Inc. *ex rel*. Griffin v. Comm'n of Va. Dep't of Motor Vehicles (*SCV*), 288 F.3d 610, 616–17 (4th Cir. 2002).

not discriminate against viewpoint when it facilitates private speech[79] or encourages a diversity of views from private speakers.[80]

III. SOME PROGRAMS THAT REQUIRE GOVERNMENT TO SELECT AMONG PRIVATE SPEAKERS ARE NOT BOUND BY FORUM PRINCIPLES

Government administers some programs that require it to choose between private speakers. A public broadcaster must choose between the many different programs offered to it by private producers. A public library, by selecting certain books, chooses not to include others. These types of programs, although implicating government property or instrumentalities, are not subject to forum principles (that is, they are not considered "forums" within the Court's framework).

In *Arkansas Educational Television Commission v. Forbes*,[81] the Supreme Court said that public broadcasters were generally not subject to the public-forum principles of open access and viewpoint-neutrality because those principles are "antithetical, as a general rule, to the discretion that stations and their editorial staff must exercise to fulfill their journalistic purpose and statutory obligations."[82] The Court acknowledged that public stations favor some speakers over others but explained that such selection was unavoidable: "[A] broadcaster by its nature will facilitate the expression of some viewpoints instead of others."[83]

The Court's analysis in *National Endowment for the Arts v. Finley*[84] was similar. A group of artists brought a facial challenge to a provision[85] of the National Foundation on the Arts and the Humanities Act[86] that required the National Endowment for the Arts (NEA) to "tak[e] into consideration general standards of decency and respect for the diverse

79. *See Velazquez*, 531 U.S. at 542–49.

80. *See Rosenberger*, 515 U.S. at 834.

81. 523 U.S. 666 (1998). The Court held that although public broadcasting decisions were not generally subject to forum principles, candidate debates presented a narrow exception to that rule. The debate at issue was a nonpublic forum. Nonetheless, the Court held that the broadcaster's exclusion of a political candidate was a reasonable, viewpoint-neutral exercise of discretion.

82. *Id*. at 673.

83. *Id.* at 674.

84. 524 U.S. 569 (1998).

85. 20 U.S.C. § 954(d)(1) (2006).

86. 20 U.S.C. §§ 951–60.

beliefs and values of the American public."[87] The artists argued that the requirement discriminated against any viewpoint that "fails to 'respect' the American public's 'beliefs and values' or offends its 'standards of decency.'"[88]

The Court refused to apply forum analysis because the very nature of a highly selective grant program rendered "absolute neutrality . . . simply 'inconceivable.'"[89] It rejected the artists' argument that *Rosenberger* controlled the case.[90] The University of Virginia's funding program in *Rosenberger* was a "metaphysical" forum[91] because it "indiscriminately 'encourage[d] a diversity of views from private speakers.'"[92] The NEA's funding, on the other hand, was allocated according to a competitive process, meaning the NEA had to select among private speakers to fulfill its mandate "to make esthetic judgments."[93]

Finally, government can exercise discretion when it operates public libraries. In *United States v. American Library Ass'n*[94] (*ALA*), a plurality of the Court analyzed, under the principles of *Forbes* and *Finley*, libraries' exercise of judgment in deciding what materials to purchase for their patrons:[95]

> Just as forum analysis and heightened judicial scrutiny are incompatible with the role of public television stations and the role of the NEA, they are also incompatible with the discretion that public libraries must have to fulfill their traditional missions. Public library staffs necessarily consider content in making collection decisions and enjoy broad discretion in

87. Nat'l Endowment for the Arts v. Finley, 524 U.S. 569, 572 (1998) (quoting 20 U.S.C. § 954(d)(1)). Congress had passed § 954(d)(1), which amended the earlier version of the statute, after "[t]wo provocative works . . . prompted public controversy." *Id.* at 574. The University of Pennsylvania used NEA funding to host a retrospective of Robert Mapplethorpe's photography, which "included homoerotic photographs that several Members of Congress condemned as pornographic." *Id.* Artist Andres Serrano used his NEA grant to subsidize "Piss Christ," a photograph of a crucifix immersed in urine. *Id.*

88. Respondents' Brief at 21, *Finley*, 524 U.S. 569 (No. 97-371), 1998 WL 47281.

89. *Finley*, 524 U.S. at 585 (quoting Advocates for the Arts v. Thomson, 532 F.2d 792, 795–96 (1st Cir. 1976)).

90. *Id.* at 586.

91. Rosenberger v. Rector & Visitors of Univ. of Va., 515 U.S. 819, 830 (1995).

92. *Finley*, 524 U.S. at 586 (quoting *Rosenberger*, 515 U.S. at 834).

93. *Id.*

94. 539 U.S. 194 (2003) (holding that the Children's Internet Protection Act, which required public libraries to use internet filters as a condition of receiving federal funding, did not violate the Free Speech Clause of the First Amendment).

95. *Id.* at 204–05.

making them.[96]

Finley, *Forbes*, and *ALA* involved programs that, because they require government to limit access and select some speakers to the exclusion of others, are incompatible with public-forum principles. But the Court in *Finley* pointed out that while the arts-funding program was insulated from forum principles, a plaintiff might prevail in an as-applied challenge by showing that the NEA had denied funding because of "invidious viewpoint discrimination."[97]

IV. FEDERAL COURTS HAVE USED A FOUR-FACTOR TEST TO DISTINGUISH GOVERNMENT SPEECH FROM PRIVATE SPEECH

The Supreme Court has yet to announce a clear method to determine "when the government is 'speaking' and thus able to draw viewpoint-based distinctions, and when it is regulating private speech and thus unable to do so."[98] Without clear guidance, lower courts distinguishing government speech from private speech have used a four-factor test.[99] The four factors are: (1) the central purpose of the program in which the speech in question occurs, (2) the degree of editorial control exercised by government or private entities over the content of the speech, (3) the identity of the literal speaker, and (4) whether government or private entities ultimately bear responsibility for the content of the speech.[100]

A. The Four-Factor Test Emerged from an Eighth Circuit Case that Was Later Limited to the Broadcasting Context

The four-factor test was assembled from the analysis of a decision involving a claim of viewpoint-based exclusion of speech from a radio broadcasting program. In *Knights of the Ku Klux Klan v. Curators of the*

96. *Id.* at 205.

97. *Finley*, 524 U.S. at 587.

98. Sons of Confederate Veterans, Inc. *ex rel*. Griffin v. Comm'n of Va. Dep't of Motor Vehicles (*SCV*), 288 F.3d 610, 618 (4th Cir. 2002); *see also* Wells v. City & County of Denver, 257 F.3d 1132, 1140 (10th Cir. 2001) ("The Supreme Court has provided very little guidance as to what constitutes government speech. As noted, we are aware of only one case, *Rust v. Sullivan*, 500 U.S. 173 (1991), in which the Court actually applied the principles that underlie the government speech doctrine.") (parallel citation omitted).

99. *See* cases cited *supra* note 8.

100. *SCV*, 288 F.3d at 618.

University of Missouri[101] (*KKK*), the Klan wished to participate in an underwriting program of a publicly owned radio station, KWMU, which would have required the station to identify the group as a sponsor during programming.[102] The Klan had proposed that the acknowledgement announce, "The Knights of the Ku Klux Klan, a White Christian organization, standing up for rights and values of White Christian America since 1865. . . . Let your voice be heard!"[103] When the station denied the Klan's offer to underwrite programming, the group filed suit, claiming it was excluded from a speech forum because of its viewpoint.[104]

The *KKK* court applied the *Forbes* principle that forum rules do not generally apply to public broadcasters.[105] In reaching its decision, the court rejected the Klan's argument that the announcements of underwriters' identities constituted the private speech of the identified sponsors, and held that the announcements were the University's speech:

> First and foremost, KWMU's underwriting acknowledgments constitute governmental speech on the part of [University of Missouri, St. Louis]. Contrary to appellants' contentions, the central purpose of the enhanced underwriting program is not to promote the views of the donors, but to acknowledge "any money, service, or other valuable consideration . . . directly or indirectly paid, or promised to or charged or accepted by" the station with respect to the broadcast of any matter. In other words, KWMU's underwriting announcements are federally-mandated sponsorship identifications, in which UMSL "speaks" by airing its acknowledgments of funds received from certain parties to pay for specific KWMU broadcasts. Because KWMU *must* by law publicly advise its listeners as to the sources of funds "accepted" for its broadcasts, UMSL's decision to accept or reject the funds of underwriters is itself a governmental decision to speak or remain silent. As speaker, UMSL exercises control not only over the decision to accept or reject the donations, but also over the form and content of the announcements themselves. KWMU staff members compose, edit, and review acknowledgment scripts to insure compliance

101. 203 F.3d 1085 (8th Cir. 2000).

102. *Id.* at 1088–89.

103. *Id.* at 1089.

104. *See id.* at 1090–91.

105. *Id.* at 1093.

> with both FCC and internal guidelines. Moreover, the station does not broadcast "pre-produced" announcements submitted by underwriters; instead, KWMU employees themselves read the acknowledgments on air. Finally, as speaker and licensee, UMSL is ultimately responsible for all of its broadcast material, including the underwriting announcements, and is subject to sanctions for failure to comply with its legal obligations. As appellees point out, "[i]t would be anomalous to impose these penalties on a station for any speech other than its own."[106]

The Eighth Circuit later limited its government-speech analysis in *KKK* to the public-broadcasting context. *Robb v. Hungerbeeler*[107] involved the Klan's attempts to participate in Missouri's Adopt-A-Highway program.[108] The State denied the application.[109] It argued that the program involved only government speech because the State composed and placed the signs identifying the groups that adopted stretches of highway.[110] Further, it argued that the Adopt-A-Highway program was similar in relevant respects to the radio underwriting program in *KKK*.[111]

This time, however, the Eighth Circuit rejected Missouri's government-speech defense.[112] The court explained that the issues were fundamentally different from those in *KKK*, which "rest[ed] largely on the unique context of public broadcasting, in which editorial discretion to select programming and sponsors looms large."[113] The Eighth Circuit has not applied the four-factor *KKK* analysis in any other case.

B. Federal Courts Began Using the Four-Factor Test After It Was Assembled by the Tenth Circuit in Wells v. City & County of Denver

In *Wells v. City & County of Denver*,[114] the Tenth Circuit announced a four-factor test that it had assembled from *KKK*, and applied the test to

106. *Id.* at 1093–94 (internal citations omitted).

107. 370 F.3d 735 (8th Cir. 2004).

108. *Id.* at 737–38.

109. *Id.* at 738.

110. *Id.* at 744.

111. *Id.*

112. *Id.* at 744–45.

113. *Id.* at 744 (quoting Cuffley v. Mickes, 208 F.3d 702, 706 n.3 (8th Cir. 2000)).

114. 257 F.3d 1132 (10th Cir. 2001).

facts involving a Christmas display on the steps of the City and County Building.[115] The court held that a sign wishing visitors "Happy Holidays" and listing private sponsors of a public holiday display was government speech, meaning the Denver government could maintain the display without incurring a constitutional obligation to incorporate the messages of other parties.[116]

Federal courts in five circuits have since used the four-factor test in various cases to determine whether government or private parties were speaking.[117] In *Chiras v. Miller*,[118] a district court in the Fifth Circuit applied the test to a school's use of textbooks, holding that the speech was not pure government speech but speech that bore the imprimatur of the government.[119] In *Summum v. City of Ogden*,[120] the Tenth Circuit held that a Ten Commandments monument displayed on the lawn outside of the City's municipal building was private speech under the four-factor test.[121] Thus, the City could display the Ten Commandments monument only if it also displayed the monuments of other religious groups.[122] In *Cimarron Alliance Foundation v. City of Oklahoma City*,[123]

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115. *See id.* at 1139–42.

116. *Id.* at 1143.

117. *See* cases cited *supra* note 8. Even in circuits that have applied the four-factor test, courts have not consistently used it in all cases to distinguish government speech from private speech. In *PMG International Division L.L.C. v. Rumsfeld*, 303 F.3d 1163 (9th Cir. 2002), the Ninth Circuit held that the federal government's ban on the sale or rental of sexually explicit materials on Department of Defense property regulated private speech, not government speech exempt from public-forum analysis under *Arkansas Educational Television Commission v. Forbes*, 523 U.S. 666 (1998). *Id.* at 1169. The court reasoned that the facts were distinguishable from those in *Forbes*, where the property was exempt from public-forum analysis because of "policy considerations specifically associated with public broadcasting." *Id.* (internal quotation omitted). *See also* Chiras v. Miller, 432 F.3d 606, 618 (5th Cir. 2005) ("Because we conclude that the selection of curricular materials by the [School Board] is clearly government speech based on the principles applied by the Supreme Court in *Rust*, *Rosenberger*, *Forbes*, *Finley*, and *ALA*, we need not adopt this multi-factor test in order to resolve this dispute. However, we note that the application of the test in this case produces a result consistent with our conclusion."). The Fifth Circuit concluded that "[b]ecause the Board must necessarily exercise its editorial discretion in selecting which private entities will convey the message the state selects, forum analysis and the viewpoint neutrality requirement are inapposite in this case." *Id.* at 615.

118. No. 3:03-CV-02651, 2004 WL 1660388 (N.D. Tex. July 23, 2004), *aff'd on different grounds*, 432 F.3d 606 (5th Cir. 2005).

119. *Id.* at *6–8. Two out of four factors weighed in favor of the use of the textbooks to be pure government speech. *Id.* at *6–7. The court found that the School Board had nonetheless acted within its discretion in rejecting the plaintiff's textbook. *Id.* at *13.

120. 297 F.3d 995 (10th Cir. 2002).

121. *Id.* at 1004–06.

122. *Id.* at 1011.

a district court applied the four-factor test to the City's practice of allowing banners to be displayed on its utility poles.[124] That court held the banners were private speech.[125] The four-factor test has also been used by several federal courts analyzing specialty-plate cases, to decide whether states' viewpoint-based actions regarding specialty plates were permissible under the government-speech doctrine.[126]

V. COURTS SHOULD ABANDON THE FOUR-FACTOR TEST

Courts should abandon the four-factor test as a method of distinguishing government speech from private speech. The factors themselves are inherently nebulous and susceptible to manipulation, failing to direct judicial decision-making, and case law has failed to clarify their meanings. The inconsistent results produced by the four-factor test are especially apparent in specialty-plate cases, as courts have reached different conclusions in cases with strikingly similar facts. Moreover, the test leads to results inconsistent with Supreme Court precedent; a four-factor analysis of the speech involved in *Rust v. Sullivan*[127] yields a finding of private speech.

A. Courts Have Failed to Clarify How to Apply the Malleable Factors of the Test in a Uniform and Consistent Manner

The first factor—regarding the central purpose of the program in which the speech occurs[128]—raises a host of questions. What is the breadth of the "program" courts should consider? What if a program appears to contain manifold purposes that appear equally "central"—which one should govern? What if there does not appear to be any definable "program" in which the speech takes place? Once a central purpose is identified, what determines the result the factor should favor?

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123. 290 F. Supp. 2d 1252 (W.D. Okla. 2002).

124. *Id.* at 1257–59.

125. *Id.* at 1259.

126. *See* Ariz. Life Coal., Inc. v. Stanton, 515 F.3d 956, 965–68 (9th Cir. 2008); Planned Parenthood of S.C., Inc. v. Rose, 361 F.3d 786, 793–94 (4th Cir. 2004); Sons of Confederate Veterans, Inc. *ex rel*. Griffin v. Comm'n of Va. Dep't of Motor Vehicles (*SCV*), 288 F.3d 610, 619–21 (4th Cir. 2002); Choose Life Ill., Inc. v. White, No. 1:04-CV-04316, 2007 WL 178455, at *4–7 (N.D. Ill. Jan. 19, 2007); Ariz. Life Coal., Inc. v. Stanton, No. 2:03-CV-01691, 2005 WL 2412811, at *3–6 (D. Ariz. Sept. 26, 2005), *rev'd*, 515 F.3d 956 (9th Cir. 2008).

127. 500 U.S. 173 (1991).

128. *SCV*, 288 F.3d at 618.

Courts have failed to define how these issues should be resolved consistently. From the outset, courts approach the central-purpose factor in different ways. Some courts ask what the central purpose of a program is, irrespective of whether that purpose directly involves speech.[129] For example, one court found that the central purpose of a state's specialty-license-plate program was to produce revenue.[130] Other courts approach the factor by asking whether the central purpose of a program is to promote a governmental message or to promote private expression.[131] This approach assumes that the central purpose of a program is to promote some sort of expression, rather than to achieve some substantive goal via that expression.

Courts apply the central-purpose factor even where they acknowledge that it is unclear,[132] often considering facts more appropriately analyzed under the editorial-control factor. One court explained that the purpose of a city's banner program was not apparent,[133] but nonetheless engaged in an analysis by pointing out that the program allowed private donors to express their messages or goals.[134] Because the private donors exercised complete control over banners, the court found the central-purpose factor to weigh in favor of private speech.[135] In another case, the Tenth Circuit considered "the City's complete control over the sign's construction, message, and placement" when deciding the central-purpose factor.[136]

Second, courts have failed to shape a consistent approach to the editorial-control factor, which purports to examine whether the government or the private speaker fashioned the speech's message.[137] But what counts as "editorial control"? How *much* editorial discretion is necessary? At what stage in the process of "speaking" must that discretion be exercised?

Some courts focus on identifying the party with whom the idea for

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129. *See id.* (inquiring into "the central 'purpose' of the program in which the speech in question occurs"); Henderson v. Stalder, 265 F. Supp. 2d 699, 715 (E.D. La. 2003) (asking "what is the central 'purpose' of the program in which the speech in question occurs").

130. *SCV*, 288 F.3d at 619.

131. *See* Summum v. City of Ogden, 297 F.3d 995, 1004 (10th Cir. 2002); Cimarron Alliance Found. v. City of Okla. City, 290 F. Supp. 2d 1252, 1257 (W.D. Okla. 2002).

132. *SCV*, 288 F.3d at 619; *Cimarron*, 290 F. Supp. 2d at 1257.

133. *Cimarron*, 290 F. Supp. 2d at 1257.

134. *Id.*

135. *Id.* at 1257–58.

136. Wells v. City & County of Denver, 257 F.3d 1132, 1141 (10th Cir. 2001).

137. *See SCV*, 288 F.3d at 618.

speech originated, finding this factor to weigh in favor of that party.[138] Some courts require the government, in order for this factor to weigh in favor of government speech, to be actively involved in editing the substantive content of speech; it is not enough for the government to simply have approval authority over the speech submitted by private parties.[139] On the other hand, one court found that the government could claim speech as its own so long as it possessed the power to "to implicitly accept or explicitly reject various portions" of a message.[140]

Courts' applications of the literal-speaker factor are equally divergent and reveal the problems with turning the Eighth Circuit's *KKK* analysis into a test that applies to other factual contexts. *KKK* involved a radio station,[141] which *always* features a literal speaker. In other factual contexts, though, it is often impossible to identify a literal speaker. For instance, when the speech at issue is the design and message on a specialty license plate, is a license plate a literal speaker?[142] Is the owner of a car a literal speaker of the message on a license plate?[143] Is a city literally speaking by permitting the display of a monument on its property?[144] The answer to these questions, of course, is "no"—unless "literal" is used in a non-literal sense.

Struggling to answer these questions, some courts render this factor redundant or meaningless by looking at other considerations. One court looked at the *content* of the speech—a consideration not belonging under any of the factors: "In this case, the banners clearly displayed [the private organization's] logo on them, as well as that of a sponsor; there is nothing which portrays the name of Oklahoma City on them. For

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138. *See* Ariz. Life Coal., Inc. v. Stanton, 515 F.3d 956, 966 (9th Cir. 2008); Planned Parenthood of S.C., Inc. v. Rose, 361 F.3d 786, 793 (4th Cir. 2004).

139. *See Stanton*, 515 F.3d at 966; *SCV*, 288 F.3d at 620–21; Henderson v. Stalder, 265 F. Supp. 2d 699, 716 (E.D. La. 2003), *vacated on other grounds*, 407 F.3d 351 (5th Cir. 2005); Cimarron Alliance Found. v. City of Okla. City, 290 F. Supp. 2d 1252, 1258 (W.D. Okla. 2002); Fleming v. Jefferson County Sch. Dist., 170 F. Supp. 2d 1094, 1107 (D. Colo. 2001).

140. *See* Chiras v. Miller, No. 3:03-CV-02651, 2004 WL 1660388, at *7 (N.D. Tex. July 23, 2004), *aff'd on different grounds*, 432 F.3d 606 (5th Cir. 2005) However, the court expressed that its standard was analyzing the "the extent of control exercised over the internal content of adopted textbooks, not the extent of control over the actual decision to adopt a textbook." *Id*.

141. *See supra* text accompanying notes 101–106.

142. *See, e.g.*, *SCV*, 288 F.3d at 621; Ariz. Life Coal., Inc. v. Stanton, No. 2:03-CV-01691, 2005 WL 2412811, at *5 (D. Ariz. Sept. 26, 2005), *rev'd*, 515 F.3d 956 (9th Cir. 2008).

143. *See, e.g.*, Choose Life Ill., Inc. v. White, No. 1:04-CV-04316, 2007 WL 178455, at *6 (N.D. Ill. Jan. 19, 2007).

144. *See, e.g.*, Summum v. City of Ogden, 297 F.3d 995, 1004 (10th Cir. 2002).

instance, a different conclusion would be warranted if the banners stated somewhere 'Sponsored by the City of Oklahoma City.'"[145] The court then engaged in analysis that seems more suited to the editorial-control factor, finding that the City was not the literal speaker because the City could offer "no evidence that shows it exercises *discretion* as to the content of the banners."[146]

Courts have also failed to set guidelines on whether the literal speaker should be assessed when the speech is created, or when the speech is conveyed or displayed. The *Summum* court, admitting the identity of the literal speaker to be "less clear" in the context of a monument to the Ten Commandments,[147] ultimately focused on the moment of creation and found that this factor weighed in favor of private speech: "We so conclude based upon recognition of the fact that the Eagles, free from any City control, composed the speech contained on the Monument—a fact underlined by the Monument's explicit acknowledgment of the Eagles as the Monument's creators."[148] Other courts assessed the literal speaker at a point after the speech was created—when it was displayed. Courts in specialty-plate cases have identified the literal speaker as the private vehicle owners who display the plates on their cars, long after the plates have been designed, approved, and produced.[149]

Finally, the ultimate-responsibility factor also reveals the inherent problems with creating a test from the factors used to decide a public-broadcasting case. The *KKK* court pointed out that the radio station was "ultimately responsible for all of its broadcast material, including the underwriting announcements, and [was] subject to sanctions for failure to comply with its legal obligations."[150] Again, this made sense in the broadcasting context of *KKK*, where the radio station was strictly liable for the content of its broadcasting. But in cases where there are no such legal consequences, what does it mean to be "ultimately responsible" for

145. Cimarron Alliance Found. v. City of Okla. City, 290 F. Supp. 2d 1252, 1258 (W.D. Okla. 2002).

146. *Id.* (emphasis added).

147. *Summum*, 297 F.3d at 1004.

148. *Id.* at 1004–05.

149. *See* Planned Parenthood of S.C., Inc. v. Rose, 361 F.3d 786, 794 (4th Cir. 2004); Sons of Confederate Veterans, Inc. *ex rel*. Griffin v. Comm'n of Va. Dep't of Motor Vehicles (*SCV*), 288 F.3d 610, 621 (4th Cir. 2002); Choose Life Ill., Inc. v. White, No. 1:04-CV-04316, 2007 WL 178455, at *6 (N.D. Ill. Jan. 19, 2007); Henderson v. Stalder, 265 F. Supp. 2d 699, 717 (E.D. La. 2003), *vacated on other grounds*, 407 F.3d 351 (5th Cir. 2005).

150. Knights of the Ku Klux Klan v. Curators of the Univ. of Mo., 203 F.3d 1085, 1094 (8th Cir. 2000).

speech? And should ultimate responsibility be assessed before or after the speech takes place?

In trying to apply this factor, some courts look at who exercises dominion over speech after it has been created. In *Summum*, the court said that the fact that the City could have sold, given away, modified, or even destroyed the monument pointed to its being government speech under this factor.[151] It equated ultimate responsibility with powers of disposition over the speech act. In *Wells*, the court determined the ultimate-responsibility factor weighed in favor of government speech because the City had assumed "full responsibility for providing security for the display, including a fence to guard against theft and protect citizens from possible electrical hazards, video cameras, motion detectors, and a security guard."[152]

Part of the *Wells* court's analysis under the ultimate-responsibility factor appears tautological. It found that "this litigation is itself an indication that the City bears the ultimate responsibility for the content of the display."[153] But if that is true, this factor will *always* weigh in favor of government speech in these cases, where private parties asserting speech rights bring suit against the government. Such an analysis renders the factor pointless.

In sum, the factors of the four-factor test are inherently malleable, and no clear rules have emerged from the case law. Instead, courts have applied various, conflicting approaches under each factor. Some of the problems stem from applying a test that was fashioned from a public-broadcasting case to inapposite factual scenarios.

B. Courts Applying the Four-Factor Test Have Reached Opposite Outcomes in Cases with Similar Facts

Specialty-plate cases illustrate the unpredictable results worked by the four-factor test.[154] This Comment discusses cases that involve groups

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151. *Summum*, 297 F.3d at 1005.

152. Wells v. City & County of Denver, 257 F.3d 1132, 1142 (10th Cir. 2001) (internal citations omitted).

153. *Id.*

154. *See, e.g.*, Ariz. Life Coal., Inc. v. Stanton, 515 F.3d 956, 965–68 (9th Cir. 2008) (applying test to find specialty license plates were private speech); *Rose*, 361 F.3d at 793–94 (Choose Life plate constituted hybrid of government and private speech); *SCV*, 288 F.3d at 619–21 (logo restriction on specialty plate of Sons of Confederate Veterans regulated private speech); *White*, 2007 WL 178455, at *4–7 (message on Illinois's specialty plates was private speech); Ariz. Life Coal., Inc. v. Stanton, No. 2:03-CV-01691, 2005 WL 2412811, at *3–6 (D. Ariz. Sept. 26,

that unsuccessfully petitioned state governments for plates (either Choose Life or pro-choice plates) or opposed Choose Life plates when pro-choice plates were unavailable.[155] The states argued that the speech at issue was government speech. The courts' results under the test run the gamut: government, private and even "hybrid" speech—a category not recognized by the Supreme Court.[156]

States' specialty-plate programs are strikingly similar.[157] The states whose actions were assessed under the four-factor test include Arizona, Illinois, Louisiana, South Carolina, and Virginia. All five offer a diversity of plates featuring different organizations and causes—among

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2005) (specialty plates were government speech), *rev'd*, 515 F.3d 956 (9th Cir. 2008); *Henderson*, 265 F. Supp. 2d 699, 715–17 (E.D. La. 2003) (Louisiana's specialty plates were private speech), *vacated on other grounds*, 407 F.3d 351 (5th Cir. 2005).

One circuit court ruled that the government-speech issue was controlled by a Supreme Court decision, *Johanns v. Livestock Marketing Ass'n*, 544 U.S. 550 (2005). Am. Civil Liberties Union of Tenn. v. Bredesen, 441 F.3d 370, 375–77 (6th Cir. 2006). Courts and commentators have criticized the application of *Johanns* to specialty-plate cases. In a forceful dissent on the merits, Judge Martin argued that the majority erred in applying *Johanns*—a case about compelled subsidization of speech—to all First Amendment cases. *Bredesen*, 441 F.3d at 385 (Martin, J., concurring in part and dissenting in part). *See also* Ariz. Life Coal., Inc. v. Stanton, 515 F.3d 956, 964–65 (9th Cir. 2008) (explaining that *Johanns* was factually distinguishable, but useful in conjunction with four-factor test); Choose Life Ill., Inc. v. White, No. 1:04-CV-04316, 2007 WL 178455, at *7 (N.D. Ill. Jan. 19, 2007) (describing Sixth Circuit's application of *Johanns* as "forced"); Saumya Manohar, Comment, *Look Who's Talking Now: "Choose Life" License Plates and Deceptive Government Speech*, 25 YALE L. & POL'Y REV. 229, 230 (2006) (explaining that courts should not use *Johanns* to analyze whether government is speaking in Choose Life specialty-plate cases because that standard allows for deceptive government speech that distorts the marketplace of ideas and indoctrinates the public); Andy G. Olree, *Specialty License Plates: Look Who's Talking in the Sixth Circuit*, 68 ALA. LAW. 213, 214 (2007) (arguing that the Sixth Circuit ignored operative facts of *Johanns* in using it to analyze Choose Life plate).

155. *See supra* note 3.

156. *See supra* note 154.

157. In some minor respects, the specialty-plate programs analyzed under the four-factor test differed. Arizona had a statute, ARIZ. REV. STAT. ANN. § 28-2404 (2004), under which groups meeting specified requirements could apply for their own specialty plates, and a license plate commission was required to authorize the plates if the organizations met certain statutory requirements. *See Stanton*, 515 F.3d at 961. In practice, Illinois and Louisiana required approval of individual plates by their respective state legislatures. *See* Choose Life Ill., Inc. v. White, No. 1:04-CV-04316, 2007 WL 178455, at *1–2 (N.D. Ill. Jan. 19, 2007) (explaining that the Secretary of State, vested with authority to administer specialty-plate program, had a policy of requiring General Assembly to approve specialty plates); Henderson v. Stalder, 265 F. Supp. 2d 699, 712 (E.D. La. 2003), *vacated on other grounds*, 407 F.3d 351 (5th Cir. 2005) ("[E]ach prestige license plate issued in Louisiana is permitted only by statute rather than by any administrative process."). South Carolina had a statute, S.C. CODE ANN. § 56-3-8000 (2004), under which nonprofit organizations could apply for plates, but the South Carolina State Legislature also passed legislation approving plates on a case-by-case basis. *See Rose*, 361 F.3d at 788. In any event, in all states there was a *de facto* method by which nongovernmental groups could work to obtain their own specialty plates.

them, colleges and universities (and fraternities and sororities), sports teams, professions, and military and veterans groups.[158] Some plates support state causes, such as wildlife and public education.[159] All five states also offer plates featuring the slogans and emblems of nongovernmental groups, like the Wildlife Conservation Council in Arizona,[160] the Eagle Scouts in Illinois,[161] the Knights of Columbus in Louisiana,[162] the Sons of the Confederate Veterans in South Carolina,[163] and the Shriners in Virginia.[164] States generally earmark a portion of the specialty-plate fee for the cause or organization featured on the plate.[165]

The specialty-plate cases took place against the backdrop of *Wooley*

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158. *See* Ariz. Dep't of Transp., Motor Vehicle Div., http://www.azdot.gov/mvd/vehicle/mvdplate.asp (last visited Sept. 25, 2008) (Arizona specialty plates), *permanent copy available at* http://www.law.washington.edu/wlr/notes/83washlrev569n158a.pdf; CyberDriveIllinois, Specialty License Plates, http://www.cyberdriveillinois.com/departments/vehicles/license_plate_guide/specialty_plates/home.html (last visited Sept. 25, 2008) (Illinois specialty plates), *permanent copy available at* http://www.law.washington.edu/wlr/notes/83washlrev569n158b.pdf; La. Office of Motor Vehicles, Louisiana Special Plate Display, http://omv.dps.state.la.us/Special%20Plates/SpecialPlates_display.asp (last visited Sept. 25, 2008) (Louisiana specialty plates), *permanent copy available at* http://www.law.washington.edu/wlr/notes/83washlrev569n158c.pdf; S.C. Dep't of Motor Vehicles, SCDMV Online: Specialty Plates, http://www.scdmvonline.com/VehPlateSpecialty.aspx (last visited Sept. 25, 2008) (South Carolina specialty plates), *permanent copy available at* http://www.law.washington.edu/wlr/notes/83washlrev569n158d.pdf; Va. Dep't of Motor Vehicles, Commonwealth of Virginia Department of Motor Vehicles, http://www.dmv.state.va.us/webdoc/citizen/vehicles/plate_search.asp (last visited Sept. 25, 2008) (Virginia specialty plates), *permanent copy available at* http://www.law.washington.edu/wlr/notes/83washlrev569n158e.pdf.

159. *See id.*

160. Motor Vehicle Div., Ariz. Dep't of Transp., Motor Vehicle Div., http://www.azdot.gov/mvd/vehicle/mvdplate.asp#WC (last visited Sept. 25, 2008) (Wildlife Conservation specialty plate), *permanent copy available at* http://www.law.washington.edu/wlr/notes/83washlrev569n160.pdf.

161. CyberDriveIllinois, Eagle Scout, http://www.cyberdriveillinois.com/departments/vehicles/license_plate_guide/specialty_plates/eaglescout.html (last visited Sept. 25, 2008) (Eagle Scout specialty plate), *permanent copy available at* http://www.law.washington.edu/wlr/notes/83washlrev569n161.pdf.

162. La. Office of Motor Vehicles, *supra* note 158.

163. S.C. Dep't of Motor Vehicles, *supra* note 158.

164. Va. Dep't of Motor Vehicles, Commonwealth of Virginia Department of Motor Vehicles, http://www.dmv.state.va.us/exec/vehicle/splates/info.asp?idnm=SHR (last visited Sept. 25, 2008) (Shriner specialty plate), *permanent copy available at* http://www.law.washington.edu/wlr/notes/83washlrev569n164.pdf.

165. *See supra* note 158. For example, in Arizona, a portion of the White Mountain Apache Tribe plate goes to the Tribe for traffic control devices. http://www.azdot.gov/mvd/vehicle/mvdplate.asp#WhiteMountain (last visited Sept. 25, 2008, *permanent copy available at* http://www.law.washington.edu/wlr/notes/83washlrev569n165.pdf.). In Illinois, a portion of the Eagle Scout plate goes to the Boy Scout and Girl Scout Fund. CyberDriveIllinois, *supra* note 161.

v. Maynard,[166] a First Amendment case involving license plates. New Hampshire made it a misdemeanor to knowingly obscure "the figures or letters on any number plate,"[167] including the state motto—"Live Free or Die."[168] George Maynard, a Jehovah's Witness, found the motto repugnant to his beliefs, so he covered it.[169] After three convictions and fifteen days in jail, Maynard filed a civil-rights claim asking the federal courts to enjoin New Hampshire from prosecuting him.[170] The Court implicitly held that messages on license plates involve private-speech interests, describing the statute as "forc[ing] an individual . . . to be an instrument for fostering public adherence to an ideological point of view he finds unacceptable."[171]

Relying in part on *Wooley*, courts in specialty-plate cases have applied the four-factor test to reach three different conclusions. In *Arizona Life Coalition, Inc. v. Stanton*,[172] Life Coalition alleged that the State had denied its application for a plate because of the group's pro-life stance.[173] The Ninth Circuit found that all four factors weighed in favor of private speech.[174] The court agreed with Life Coalition that the program's central purpose was to offer drivers the opportunity "to identify themselves with individualized messages" and "to benefit worthy organizations financially."[175] The editorial-control factor weighed in favor of private speech because "the idea of a 'Choose Life' license plate originated with Life Coalition."[176] The literal-speaker factor was a closer call—the government owned the plates, but *Wooley* indicated that messages on the plates implicated private-speech

166. 430 U.S. 705 (1977).

167. *Id.* at 707 (quoting N.H. REV. STAT. ANN. § 262:27-c (1975)).

168. *Id.* (citing State v. Hoskin, 295 A.2d 454 (N.H. Sup. Ct. 1972)).

169. *Id.* at 707–08.

170. *Id.* at 708–09. Maynard could have avoided time in jail by paying fines totaling $75, but he refused to pay them as a matter of conscience. *Id*.

171. *Id.* at 715. The Court concluded that the State's claimed interests in facilitating the identification of passenger vehicles and promoting an appreciation of history, individualism, and state pride did not outweigh an individual's First Amendment right to refuse to be a courier for the State's message. *Id.* at 716–17.

172. 515 F.3d 956 (9th Cir. 2008).

173. Brief of Appellants at 31–38, Ariz. Life Coal., Inc. v. Stanton, 515 F.3d 956 (9th Cir. 2008) (No. 05-16971), 2006 WL 3032960.

174. *Stanton*, 515 F.3d at 965–68. The court supplemented the four-factor test with the Supreme Court's analysis in *Johanns v. Livestock Marketing Ass'n*, 544 U.S. 550 (2005). *See id.* at 965.

175. *Id.* (internal quotations omitted).

176. *Id.* at 966.

interests.[177] The factor ultimately weighed in favor of private speech because Life Coalition's logo, showing the faces of two young children, would be displayed on the license plate.[178] Finally, Life Coalition bore ultimate responsibility for the speech because it had taken "the affirmative step of submitting an application."[179]

The Ninth Circuit's finding of private speech reversed the district court, which found all four factors to weigh in favor of government speech.[180] The district court had reasoned that because the license plates existed primarily to identify vehicles and their drivers, and "Arizona determine[d] the efficacy of license plate messages," the program's primary purpose weighed in favor of government speech.[181] The State exercised editorial control by limiting participation to groups that met certain requirements.[182] The district court analyzed the literal-speaker and ultimate-responsibility factors together, finding they weighed in favor of government speech because Arizona "control[led] the type of organization allowed and the substance that the organization trie[d] to promote."[183]

Finally, in *Planned Parenthood of South Carolina, Inc. v. Rose*,[184] the Fourth Circuit considered a South Carolina statute that authorized pro-life plates but not pro-choice plates.[185] The court concluded that the plates constituted "hybrid speech"—a category not recognized by the Supreme Court.[186] Judge M. Blane Michael analyzed the speech using the four-factor test, finding the primary-purpose and editorial-control

177. *See id.* at 966–67.

178. *See id.* at 967.

179. *Id.* at 968.

180. Ariz. Life Coal., Inc. v. Stanton, No. 2:03-CV-01691, 2005 WL 2412811, at *3–6 (D. Ariz. Sept. 26, 2005).

181. *See id.* at *3–4.

182. *See id.* at *4–5.

183. *Id.* at *6.

184. 361 F.3d 786 (4th Cir. 2004).

185. *Id.* at 787–88.

186. Each judge of the three-judge panel, writing separately, found that the plates were hybrid speech, although for different reasons. *See id.* at 787–801. *See also* Women's Resource Network v. Gourley, 305 F. Supp. 2d 1145, 1161 (E.D. Cal. 2004) ("It is pellucid that the speech on the license plates authorized by these statutes 'is neither exclusively that of the private individuals nor exclusively that of the government, but, rather, hybrid speech of both.'" (quoting Sons of Confederate Veterans, Inc. v. Comm'r of Va. Dep't of Motor Vehicles, 305 F.3d 241, 245 (4th Cir. 2002) (Luttig, J., respecting denial of rehearing en banc))).

factors to weigh in favor of government speech,[187] while the literal-speaker and ultimate-responsibility factors fell on the private-speech side of the scale.[188] The central purpose of the program was "to promote the State's preference for the pro-life position."[189] The State exercised editorial control because the idea "originated with the State, and the legislature determined that the plate will bear the message 'Choose Life.'"[190] Judge Michael considered *Wooley* in analyzing the literal-speaker factor, and concluded that "the specialty plate gives private individuals the option to identify with, purchase, and display one of the authorized messages."[191] The driver exercised ultimate control over the speech because "the private individual chooses to spend additional money to obtain the plate and display its pro-life message on her vehicle."[192] While the court could not agree on a rationale, it unanimously held that the statute violated the First Amendment.[193]

C. The Four-Factor Test Applied to Rust v. Sullivan *Produces a Result Inconsistent with Supreme Court Precedent*

An assessment of the facts of *Rust v. Sullivan* under the four-factor test produces a result inconsistent with the Supreme Court's decision in that case, the "fountainhead" of the government-speech doctrine.[194] The Court has described *Rust* as relying upon a finding of government speech,[195] but the four-factor test points to a finding of private speech. The application of the four-factor test in the facts of *Rust* is not straightforward for all factors, but the test can be applied to produce such a finding.

At the outset, it is important to identify the precise speech at issue: counseling by recipient healthcare providers that touches upon

187. Planned Parenthood of S.C., Inc. v. Rose, 361 F.3d 786, 793 (4th Cir. 2004).

188. *Id.* at 793–94.

189. *Id.* at 793.

190. *Id.*

191. *Id.* at 794.

192. *Id.*

193. *See id*. at 799.

194. Note, *The Curious Relationship Between the Compelled Speech and Government Speech Doctrines*, 117 HARV. L. REV. 2411, 2411 (2004) (citing Legal Servs. Corp. v. Velazquez, 531 U.S. 533, 541 (2001) and Rosenberger v. Rector & Visitors of Univ. of Va., 515 U.S. 819, 833 (1995) as "cases that have subsequently identified *Rust* as the fountainhead of the government speech doctrine").

195. *See supra* note 51.

abortion.[196] The government gave providers broad discretion to counsel their patients on family-planning techniques but prohibited them from discussing abortion.[197] The providers argued that the specific regulations proscribing abortion-related counseling violated their First Amendment rights,[198] an argument the Court rejected.[199]

Three of the four factors weigh in favor of private speech. First, the program's central purpose weighs in favor of private speech. The legislation creating the program authorizes the Secretary of Health and Human Services "to assist in the establishment and operation of voluntary family planning projects which shall offer a broad range of acceptable and effective family planning methods and services (including natural family planning methods, infertility services, and services for adolescents)."[200] Though this does not clearly weigh in favor of government speech or private speech, the central purpose of Title X does not have to do with supporting a specific government message. One court, where the central purpose did not clearly weigh in either direction but it was apparent that the central purpose was not to promote the views of the government, held that the factor weighed against finding government speech.[201]

Second, the editorial-control factor weighs in favor of government speech. Although the government largely vests editorial control of family-planning techniques in the providers, the specific restriction on counseling regarding abortion constituted a strict control on the speech at issue.

The literal-speaker factor weighs heavily in favor of private speech, because the literal speakers (in this case, they *are* identifiable) are the providers who counsel their patients.

Finally, the ultimate-responsibility factor also weighs heavily in favor of private speech. Healthcare providers bear the ultimate responsibility for the counseling and care they give to their patients. They are bound to their patients by legal and ethical rules, and the federal government does

196. *See* Rust v. Sullivan, 500 U.S. 173, 192 (1991). *See also* discussion *supra* text accompanying notes 44–53.

197. *See id*. at 178–81.

198. Brief for Petitioners at 13, *Rust*, 500 U.S. 173 (1991) (Nos. 89-1391, 89-1392), 1990 WL 10012648.

199. *See Rust*, 500 U.S. at 192.

200. 42 U.S.C. § 300 (2005).

201. *See* Chiras v. Miller, No. 3:03-CV-02651, 2004 WL 1660388, at *6 (N.D. Tex. July 23, 2004).

not indemnify healthcare providers against suits arising under projects funded by Title X.[202]

On balance, the factors weigh in favor of private speech, a result directly at odds with Supreme Court precedent. That the four-factor test can be applied to produce this result demonstrates its unreliability as a test to distinguish government speech from private speech.

CONCLUSION

The government-speech doctrine exists because government must speak to function. The Supreme Court has explained what government can do when it is speaking, but not how to tell whether it is speaking. Confronted with this lack of guidance, several federal courts have used a four-factor test born from one court's analysis in a public-broadcasting case. Courts should abandon this test. Its factors are inherently malleable, and courts apply them inconsistently. It also produces a result contrary to Supreme Court precedent in one of the Court's few government-speech cases, *Rust v. Sullivan.*

This Comment does not propose an alternative means of assessing whether speech is government or private. But as courts work to craft a better approach, they must consider that distinct principles underlie two lines of cases. *Rust*, *Velazquez*, and *Rosenberger* articulate the rationale and some limits of the government-speech doctrine. *Rust* allows government to express its own viewpoint to the exclusion of others; *Velazquez* prohibits government from simultaneously facilitating and controlling private speech; and *Rosenberger* prohibits government from creating a forum for a diversity of private speakers and then excluding a speaker from that forum because of his or her viewpoint. *Finley*, *Forbes*, and *ALA* describe government programs not bound by forum principles—those programs that necessarily require government to choose between private speakers. Government officials administering those programs, however, are still subject to the First Amendment requirement of viewpoint-neutrality; they cannot discriminate against particular private speakers because of viewpoint.

The distinction between the two lines of cases is important. Whereas the *Rust* line expressly pertains to the boundaries of government speech, the *Finley* line describes government programs that implicate private

202. Letter from Evelyn M. Kappeler, Acting Director, Office of Population Affairs, U.S. Department of Health & Human Services, to author (Oct. 28, 2008), *available at* http://www.law.washington.edu/wlr/notes/83washlrev569n202.pdf.

speech. To illustrate, a finding that states' specialty-plate programs constitute government speech under *Rust* is in error, because states have created programs that encourage the expression of a variety of views. And because the specialty-plate programs do not *require* that states select some speakers to the exclusion of others, they do not fall under the *Finley* line of cases, meaning they are subject to public-forum principles.

The *Finley* line of cases does not permit the government to exercise viewpoint discrimination against speech, and it does not transform the relevant speech into "government speech" for First Amendment purposes. Any test for distinguishing government speech from private speech must adhere to these principles.