

ADVICE TO A POTENTIAL LITIGANT: HOW TO CHALLENGE THE CONSTITUTIONALITY OF THE “CHOOSE LIFE” SPECIALTY LICENSE PLATE

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In 2000, the Florida Department of Motor Vehicles began issuing a “Choose Life” specialty license plate.¹ The plate displays the faces of two cartoon-drawn children with the words “Choose Life” inscribed at the bottom.² Shortly thereafter, Louisiana began sending the “Choose Life” message through its own, similar specialty license plate.³ The Louisiana plate replaced the children’s faces with an image of a brown pelican—the state bird—carrying a baby in a blanket.⁴ The same “Choose Life” message is displayed at the bottom.⁵ Other states, including Alabama, Mississippi, Oklahoma, and South Carolina, have enacted laws allowing the “Choose Life” plate, and similar laws are in the early stages of development in nearly thirty other states.⁶

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I would like to dedicate this Comment to my fiancé, Philippe Matthey, whose interest in license plates served as the basis for my writing, and whose love and encouragement, and support of and patience with my *Law Review* workload, has been a great comfort. I would like to thank my parents, Richard and Gina Stromberg, and my brother and sister-in-law, Sam and Jill Stromberg, for their love and direction, and for never missing an opportunity to tell me how proud they are. And finally, I am grateful to Professor Thomas C. Marks, Jr., for his advice and assistance throughout my writing process, and to the *Law Review* advisors, editors, and associates, particularly Andrea Johnson, Meredith Phipps, and Executive Secretary Beth Curnow, for their help in publishing this Comment.

1. Choose Life, Inc., *About Us: Choose Life Story*, <http://www.choose-life.org/story.html> (accessed Nov. 2, 2002).

2. Jay Krall, *Pro-Life License Plates Spark Controversy*, Wall St. J. B1 (June 12, 2002).

3. *Id.*

4. *Id.*

5. *Id.*

6. Foster’s/Citizen Online, *“Choose Life” License Plate Backers Not Worried about Ruling*, http://premium1fosters.com/2003/news/Jan_03/Jan_03/News/reg_nh0103g.asp (Jan. 3, 2003).

The campaign to create the Florida plate began with Marion County Commissioner Randy Harris in 1996.⁷ Harris formed Choose Life, Inc., a nonprofit organization created specifically to raise the funds and gather the signatures necessary to apply for a specialty license plate.⁸ Choose Life, Inc., successfully obtained both the funding and signatures required, and a legislative proposal to create the plate followed.⁹ The proposed bill passed in both the Florida House of Representatives and Senate.¹⁰ Initially, Florida Governor Lawton Chiles vetoed the plate.¹¹ He believed it “would put a political and divisive message out on Florida’s highways”¹² and explained in his veto message that the “Choose Life” “phrase is closely associated with the issue of reproductive rights, a controversial and difficult subject for many Floridians . . . [and] there are few issues that polarize people more than the issue of reproductive rights.”¹³ Chiles stated that “[s]imply because a particular political message is able to garner a majority of votes in the Florida Legislature does not mean that an official State of Florida license plate is the proper forum for debate on this—or any other—political issue.”¹⁴ Following Chiles’ death in office, Jeb Bush became Florida’s Governor in 1999 and approved the “Choose Life” plate.¹⁵ It has been available to Florida drivers since August 2000.¹⁶

Since the plate’s introduction to Florida highways, organizations and individuals have filed five cases requesting courts to declare the plate unconstitutional.¹⁷ In most of those cases, before

7. Russ Amerling, *Choose Life*, <http://www.atmag.com/v1n3/article5.asp> (accessed Mar. 7, 2003).

8. *Id.* At the time, an application for a specialty license plate in Florida required a \$30,000 application fee and 10,000 signatures. *Id.* As of 1999, the requirements have increased to 15,000 signatures and a \$60,000 application fee. Deborah Olszonowicz, *NCSL Transportation Reviews: Motor Vehicle Registration and License Plates*, http://www.ncsl.org/programs/esnr/tranrm_p.htm (Sept. 1999). “After departmental review, the Florida Legislature then must approve the proposed specialty plate.” *Id.*

9. Amerling, *supra* n. 7.

10. *Id.*

11. *Id.*

12. Diane Rado, *Chiles Vetoes “Choose Life” License Plate*, [http://pqasb.pqarchiver.com/sptimes;search “License Plate, Rado, Chiles”](http://pqasb.pqarchiver.com/sptimes;search%20License%20Plate,%20Rado,%20Chiles) (May 21, 1998).

13. *Id.*

14. *Id.*

15. Choose Life, Inc., *supra* n. 1.

16. *Id.*

17. *E.g. Hildreth v. Dickinson*, 1999 U.S. Dist. LEXIS 22503 (M.D. Fla. Dec. 22, 1999); *Women’s Emerg. Network v. Dickinson*, 214 F. Supp. 2d 1308 (S.D. Fla. 2002), *aff’d sub*

courts have ruled on the constitutionality of the plate, some courts have determined that the plaintiffs lacked standing and awarded summary judgment against them.¹⁸ As a result, only two plaintiffs have been able to challenge the constitutionality of the plate. In 2002, a South Carolina plaintiff successfully had standing and won on the merits of her arguments in *Planned Parenthood v. Rose*;¹⁹ however, plans to appeal to the United States Court of Appeals for the Fourth Circuit are underway.²⁰ Additionally, on July 8, 2003, an individual plaintiff in Louisiana won a standing argument, and the court declared the statute establishing the “Choose Life” plate unconstitutional in *Henderson v. Stalder*.²¹ As with *Planned Parenthood*, the defendants in *Henderson* are also planning an appeal.²²

Despite the inability of many plaintiffs to acquire standing and present their arguments against the “Choose Life” plate, more and more of these suits are likely, as additional states consider enacting “Choose Life” license-plate legislation.²³ As a result, “a ‘Choose Life’ tidal wave—and its litigation backlash—is poised to hit the nation.”²⁴

The first part of this Comment will address how the “Choose Life” plate is vastly different from the other specialty license plates offered, and why it is inappropriate for Florida highways. Part II will focus on the difficulties that past plaintiffs have faced in their attempts to challenge a “Choose Life” plate. This Part also will examine how a potential litigant might bypass summary judgment, so as to argue the constitutional issue. Finally, Part III will focus on the arguments the potential litigant should use to address the merits of this issue.

nom. Women’s Emerg. Network v. Bush, 323 F.3d 937 (11th Cir. 2003); *Henderson v. Stalder*, 265 F. Supp. 2d 699 (E.D. La. 2003); *Planned Parenthood v. Rose*, 236 F. Supp. 2d 564 (D.S.C. 2002); *Fla. Natl. Org. for Women, Inc. v. State*, 832 So. 2d 911 (Fla. 1st Dist. App. 2002).

18. *E.g. Hildreth*, 1999 U.S. Dist. LEXIS 22503 at **15–19; *Women’s Emerg. Network*, 214 F. Supp. 2d at 1315; *Henderson*, 265 F. Supp. 2d at 709–710.

19. *Planned Parenthood*, 236 F. Supp. 2d at 574.

20. Jeffrey Collins, *Federal Judge Rules “Choose Life” License Plates Unconstitutional*, <http://www.thestate.com/mld/thestate/4848495.htm> (Dec. 31, 2002).

21. *Henderson*, 265 F. Supp. 2d at 719.

22. Alan Sayre, *Judge Bans Specialty Plates in “Choose Life” Rehearing*, http://www.2theadvocate.com/stories/071003/new_plates001.shtml (July 10, 2003).

23. Dahlia Lithwick, *Poetic Licenses: Are “Choose Life” License Plates Free Speech or State-Sponsored Infomercials?* <http://slate.msn.com/id/2078247/> (Feb. 6, 2003).

24. *Id.*

I. WHY THE "CHOOSE LIFE" PLATE IS INAPPROPRIATE
FOR THE HIGHWAYS

Cars always have been a means for drivers to express themselves. "People clutter their bumpers all the time with everything from Jesus fish to Darwin fish (Jesus fish with legs) to the band Phish."²⁵ However, the State of Florida should not provide license plates that contain controversial political messages. Of the fifty-four specialty license plates that the Florida Department of Motor Vehicles issues,²⁶ the "Choose Life" plate is vastly different from traditional specialty license plates that support universities, professional sports teams, wildlife, and the arts.²⁷

At the core of this controversial "Choose Life" plate is the abortion issue, one of "the most divisive public issue[s] . . . today, producing the most passionate debate, the least compromise, the greatest lack of civility and even anger."²⁸ A State-provided license plate is an improper forum for such messages. The State of Florida should not act as fundraiser in "facilitating efforts of the public to generate revenues" for one side of a widely debated and divisive controversy.²⁹ Allowing "an official license plate with a clearly political message establishes a precedent that was not intended by the development of specialty plates bearing the name and sanction of the [S]tate of Florida."³⁰

Individuals who wish to express a pro-life message via their vehicles have many means to do so. Pro-life supporters can affix bumper stickers to their vehicles to support the message. They can also order a vanity plate³¹ with any original, clever combina-

25. Deanna Wrenn, *Striking Out at the Plate: Sensitive Issues Should Not Be Debated on West Virginia's Tags*, <http://www.da.wvu.edu/archives/011503/news/011503,04,01.html> (Mar. 15, 2001).

26. Fla. Dept. of Hwy. Safety & Motor Vehs., *Specialty License Plates Index*, <http://www.hsmv.state.fl.us/specialtytags/specialindex.html> (accessed Apr. 11, 2003).

27. ACLU Online Archives, *In the States*, <http://archive.aclu.org/community/florida/c051498a.html> (May 14, 1998).

28. *Id.*

29. Krall, *supra* n. 2 (quoting Randy Harris, creator of Choose Life, Inc.).

30. Rado, *supra* n. 12 (quoting former Governor of Florida Lawton Chiles).

31. A vanity plate is a license plate on which the driver personally selects an arrangement of numbers and/or letters to convey a personal message on the standard license plate. Fla. Dept. of Hwy. Safety & Motor Vehs., *Application for Personalized License Plate*, <http://www.hsmv.state.fl.us/forms/vanity.html> (accessed Jan. 6, 2004). By contrast, a specialty license plate is premarked with a message or picture and approved by the Florida Legislature. Fla. Dept. of Hwy. Safety & Motor Vehs., *Specialty, Personality & Military License Plates*, <http://www.hsmv.state.fl.us/specialtytags/faqplates.html> (accessed Jan. 6,

tion of letters and numbers to display their views on abortion.³² Additionally, there are "'Choose Life' license plate holders and promotional plates"³³ containing the same message and cartoon-like drawing as the "Choose Life" plate that Florida issues.³⁴ Such vanity plates, promotional plates, and bumper stickers expressing a pro-life message are acceptable and even appropriate, as they reflect clearly an individual driver's self-expression. Promotional plates and bumper stickers affixed to a vehicle are clearly forms of expression for the driver. Similarly, vanity plates are also forms of expressions for the driver, and though the State of Florida must approve the vanity plate, the State does not *create* the vanity plate.³⁵ However, the State of Florida has approved, manufactured, and distributed these controversial "Choose Life" plates. These actions indicate an inappropriate State sponsorship of only one side of a heated political controversy.³⁶

With the exception of *Planned Parenthood*³⁷ and *Henderson*,³⁸ two federal district cases for which appeals are already pending,³⁹ no attempts to challenge the "Choose Life" plate have been successful in any state.⁴⁰ However, it is possible, pending appellate review of *Planned Parenthood* and *Henderson*, to visualize the potential litigant who can satisfy the judicial requirements, and argue that the "Choose Life" plate is unconstitutional.

2004). A specialty license plate may also be a vanity plate. The "Choose Life" plate with the personally selected "SAVE UM" message is an example.

32. Examples of vanity plates with a "Choose Life" message may include, "IM4LIFE" or "PROLIF."

33. Alliance for Life Ministries, *Choose Life*, <http://www.alliance4lifemin.org/chooselife.html> (accessed Mar. 7, 2003). "[The] license plate holders will fit around your current license plate on the front or back of your vehicle." *Id.* The promotional plates—which are not government-issued or used for vehicle-registration purposes, but allow the driver to show support for a particular cause—"will attach to the bottom of and hang below your license plate on the front of your car. Both will send a beautiful pro-life message to everyone around you." *Id.*

34. *Id.*

35. "Requests with obscene or objectionable words will be rejected. If a [vanity] plate has been issued and later determined to be obscene or objectionable, the department may recall the license plate." *Application for Personalized License Plate*, *supra* n. 25.

36. Wrenn, *supra* n. 25.

37. 236 F. Supp. 2d 564.

38. 265 F. Supp. 2d 699.

39. Collins, *supra* n. 20.

40. *Infra* nn. 41–45 and accompanying text (discussing reasons why previous attempts to challenge the "Choose Life" plate have been unsuccessful).

II. THE DIFFICULTIES OF SATISFYING JUDICIAL REQUIREMENTS AND HOW TO OVERCOME THEM

Before a court will hear a case, the potential litigant must satisfy judicial requirements.⁴¹ Before being permitted to present any arguments, the potential litigant must demonstrate that he or she is the proper party to bring suit.⁴² So far, a number of organizations that have attempted to challenge the plate's constitutionality⁴³ have failed to meet this threshold requirement.⁴⁴ Accordingly, courts have silenced litigants hoping to have the merits of their arguments heard, and the issue of whether the plate is constitutional remains unresolved.⁴⁵

The potential litigant may face difficulties in court, depending on whether he or she files in federal or state court. However, in both courts, the potential litigant should be able to satisfy the judicial requirements and proceed to the merits. The next section will address the problems that plaintiffs have had in Florida state court and federal court in past lawsuits challenging the "Choose Life" plate, and more importantly, will advise the potential litigant on how to overcome those problems.

A. Filing in State Court

Although the Florida Constitution does not specifically require an actual case or controversy,⁴⁶ this principle generally is applied in Florida courts.⁴⁷ "Florida recognizes a general standing

41. For a plaintiff to be heard in court, that plaintiff must bypass the barriers of judicial review. See Thomas C. Marks, Jr., *Untying the Gordian Knot: An Orderly Approach to Federal Jurisdiction Issues in a Basic Course in United States Constitutional Law*, 12 Campbell L. Rev. 383, 385 (1990) (discussing how to overcome the barriers of judicial review). These barriers—or judicial requirements—include, among others, having standing and having a ripe and actual injury that is capable of redress by the courts. *Id.*

42. *Id.* at 400–407.

43. The Women's Emergency Network, Planned Parenthood of Louisiana, Florida National Organization for Women, and the National Council of Jewish Women have all attempted to challenge the "Choose Life" specialty license plate. *Henderson v. Stalder*, 287 F.3d 374 (5th Cir. 2002); *Hildreth*, 1999 U.S. Dist. LEXIS 22503; *Women's Emerg. Network*, 214 F. Supp. 2d 1308.

44. *Id.*

45. *Id.*

46. Although the Florida Constitution does not expressly include the case or controversy requirement, the United States Constitution specifically states that, when a litigant files suit in federal court, that litigant must bring an actual case or controversy before the court. U.S. Const. art. III, § 2.

47. *Dept. of Revenue v. Kuhnlein*, 646 So. 2d 717, 720 (Fla. 1994).

requirement in the sense that every case must involve a real controversy."⁴⁸ For the potential litigant to demonstrate that the matter presents an actual case or controversy, the litigant must have standing.⁴⁹ Under Florida law, the potential litigant will likely have standing by suing in his or her capacity as a taxpayer.⁵⁰

A taxpayer's right to sue depends on "the *peculiar injury* which may result to him from the expenditure of [tax] funds."⁵¹ Although taxpayer standing requires a showing of specific injury, Florida courts recognize an exception.⁵² "[W]here there is an attack upon *constitutional* grounds based directly upon the Legislature's *taxing and spending* power, there is standing to sue without the . . . requirement of special injury."⁵³ Thus, the potential litigant filing in Florida state court could have taxpayer standing to challenge the constitutionality of the "Choose Life" plate.⁵⁴

The purpose of the Florida statute that created the "Choose Life" plate is to raise revenue for the State to distribute funds among organizations assisting women who are "committed to placing their children for adoption."⁵⁵ Because the Florida Legislature created the statute to raise revenue,⁵⁶ the statute imposes a tax.⁵⁷ Therefore, the potential litigant could sue in his or her ca-

48. *Id.*

49. *Women's Emerg. Network*, 214 F. Supp. 2d at 1312.

50. In addition to standing, ripeness also may be a potential problem. See *Bryant v. Gray*, 70 So. 2d 581, 584 (Fla. 1954) (explaining that when a litigant's "question is hypothetical and is too remote as to time," there is no controversy). However, the litigant may fulfill the ripeness requirement in state court in the same way that the litigant may solve this problem in federal court. *Infra* pt. II(B) (explaining how a litigant may overcome this problem in federal court by alleging an actual injury capable of redress).

51. *Rickman v. Whitehurst*, 74 So. 205, 207 (Fla. 1917) (emphasis added). The Florida Supreme Court reasoned,

The principle on which the right [of standing to sue] rests is that the taxpayer is necessarily affected and his burdens of taxation increased by any unlawful act of the county commissioners which may increase the burden to be borne by the taxpayers The right of [a] complainant to maintain [a] suit therefore would seem to depend upon the peculiar injury which may result to him from the expenditure of the funds. . . . The taxpayer's injury specially induced by the unlawful act is the basis of his equity, and unless it is alleged and proved, there can be no equitable relief.

Id.

52. *Dept. of Administration v. Horne*, 269 So. 2d 659, 663 (Fla. 1972).

53. *Id.* (emphasis in original).

54. *Infra* nn. 55–59 and accompanying text (demonstrating how a plaintiff may claim taxpayer standing).

55. Fla. Stat. § 320.08058 (2003).

56. Money collected from sales of the "Choose Life" specialty license plate is partly retained by the State to defray the costs of issuing the plate. *Id.* at § 320.08056.

57. All individuals owning a motor vehicle must register the vehicle and affix a State-

capacity as a taxpayer by alleging that the plate is an unconstitutional use of the Florida Legislature's taxing-and-spending power.⁵⁸ Using these arguments, the litigant should satisfy the specific-injury requirement of standing in a Florida state court.⁵⁹

B. Filing in Federal Court

When the potential litigant sues in federal court, that litigant must bring an actual case or controversy before the court.⁶⁰ Without standing, there can be no case⁶¹ and, to satisfy the standing requirement, the matter must be ripe for adjudication.⁶² "[A] party must show (1) actual or threatened injury which is (2) fairly traceable to the challenged action and (3) a substantial likelihood the relief requested will redress or prevent the plaintiff's injury."⁶³ It may appear that the potential litigant may face problems with these ripeness requirements—demonstrating an actual injury that is capable of redress⁶⁴—however, the following sections will demonstrate that a litigant may overcome such problems.

1. Actual Injury

The United States Supreme Court has set forth two requirements for actual injury.⁶⁵ The injury must be "concrete and particularized" and "actual or imminent, not conjectural or hypothetical."⁶⁶ This requires that the actual injury be specific and ripe.

issued license plate to the vehicle. *Id.* at §§ 316.605, 320.02. Regardless of whether the license plate is the standard plate or a specialty plate, the State "levie[s] and impose[s] annual license taxes for the operation of motor vehicles." *Id.* at § 320.08 (emphasis added).

58. *Horne*, 269 So. 2d at 663.

59. *Supra* nn. 52–53 and accompanying text (discussing the *Horne* exception to the special-injury requirement).

60. U.S. Const. art. III, § 2, cl. 1.

61. *Planned Parenthood*, 236 F. Supp. 2d at 567. "If a plaintiff does not have standing, the matter before the court is not a 'case or controversy.'" *Id.*

62. *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 180–181 (2000) (explaining the requirements for standing).

63. *Adland v. Russ*, 307 F.3d 471, 477–478 (6th Cir. 2002), *cert. denied*, 2003 U.S. LEXIS 3264 (Apr. 28, 2003).

64. *Id.* at 478.

65. *Friends of the Earth, Inc.*, 528 U.S. at 180–181.

66. *Id.*

a. Specific Injury: The Captive-Audience Rule

Standing requires that the injury to the potential litigant must not be merely a general grievance to many people, but rather a specific injury that the plaintiff suffered.⁶⁷ An injury to many people does not constitute an actual injury because it is not unique to any one litigant.⁶⁸ Thus, the specific-injury requirement may be difficult for a litigant to meet in the "Choose Life" plate challenge because the plates are offensive to many people, and no single litigant can claim a specific injury.⁶⁹ However, if the litigant can show that he or she was a "captive audience," the litigant will have suffered a specific injury.⁷⁰

If the potential litigant can demonstrate that he or she was a "captive audience,"⁷¹ he or she will have standing.⁷² "The captive audience rule has been used where the listener cannot escape."⁷³ The key to having standing as a "captive audience" is the amount of exposure.⁷⁴ Short exposure to objectionable material allows one to choose whether to look away.⁷⁵ However, when exposure is longer and relatively unavoidable, the court would likely grant standing.⁷⁶

The United States Supreme Court has commented that, in certain situations when an offended party has the ability to look

67. See *U.S. v. Richardson*, 418 U.S. 166, 175 (1974) (declaring that a taxpayer lacked standing because he experienced no injury particular to himself). In *Richardson*, the taxpayer challenged the constitutionality of the Central Intelligence Agency (CIA) Act that stated that the CIA did not have to account for its expenditures unless certified by the Director. *Id.* at 169. However, the United States Supreme Court determined that, because portions of taxpayer money goes to funding the CIA, the injury was to all taxpayers, and therefore was not an injury to this particular taxpayer. *Id.* at 175; see *Schlesinger v. Reservists Comm. to Stop the War*, 418 U.S. 208, 217 (1974) (denying standing where the injury is abstract or a "generalized grievance"). Instead, the plaintiff must show a personal stake apart from any generalized injury suffered by all. *Id.*

68. *Id.* at 220.

69. *Infra* nn. 85–89 and accompanying text (illustrating how a plaintiff suffers a specific injury.)

70. See *Public Utilities Commn. v. Pollack*, 343 U.S. 451, 454, 456–457 (1952) (ruling on the validity of the Public Utilities Company (PUC) playing radio programs in its streetcars and buses).

71. *Public Utilities*, 343 U.S. at 468 (Douglas, J., dissenting).

72. *Supra* nn. 62–63 and accompanying text (discussing the standing requirement).

73. Marybeth Herald, *Licensed to Speak: The Case of Vanity Plates*, 72 U. Colo. L. Rev. 595, 643 (2001).

74. *Id.*

75. *Id.*

76. *Id.*

away from something he or she finds objectionable, he or she should look away.⁷⁷ However, that argument applies only when the objectionable thing “is not ‘so obtrusive as to make it impossible for an unwilling individual to avoid exposure to it.’”⁷⁸ This is not the case when the offended party is *unable* to look away, for example, when he or she is behind a car displaying a particular license plate.⁷⁹

When an individual is held captive to the ideas of another and unable to avoid exposure to those ideas, he or she will have the requisite standing.⁸⁰ In *Public Utilities Commission v. Pollak*,⁸¹ passengers on a bus had standing to sue the city bus system for playing particular radio programs over the speakers on the bus.⁸² Although the passengers did not succeed on the merits,⁸³ the case illustrates that an individual captive to another’s ideas can have standing based on an actual injury and a likelihood of redress.⁸⁴

“[T]here are [certainly several] circumstances in which license plates can hold an audience captive—for example, at stop signs, at red lights, and in traffic jams.”⁸⁵ Drivers cannot be expected to avert their eyes or avoid “things in their line of sight,” especially from cars in front of them, and still be capable of safely steering their vehicles.⁸⁶ Although drivers *pass* billboards on the *side* of the road, license plates do not remain stationary as cars pass. Rather, as one driver moves forward, so too does the driver

77. *Erznoznik v. City of Jacksonville*, 422 U.S. 205, 212 (1975) (finding a city ordinance unconstitutional because it prohibited a drive-in movie theater from showing films containing nudity on screens visible from public streets). In *Erznoznik*, the United States Supreme Court held that, if the viewer finds something objectionable, he or she should just look away because, “absent the narrow circumstances [of being a captive audience], the burden normally falls upon the viewer to ‘avoid further bombardment of [his] sensibilities simply by averting [his] eyes.’” *Id.* at 210–211 (quoting *Cohen v. Cal.*, 403 U.S. 15, 21 (1971)).

78. *Id.* at 212 (quoting *Redrup v. N.Y.*, 386 U.S. 767, 769 (1967)).

79. *Infra* nn. 85–88 and accompanying text (outlining examples of when a driver is a “captive audience”).

80. *Public Utilities*, 343 U.S. at 454, 456–457 (ruling on the validity of the PUC playing radio programs in its streetcars and buses).

81. 343 U.S. 451.

82. *Id.* at 454, 456–457.

83. *Id.* The plaintiffs lost because “There [was] no substantial claim that the programs [played on the radio in the bus had] been used for objectionable propaganda.” *Id.* at 463.

84. *Supra* n. 62–63 and accompanying text (discussing the standing requirement).

85. Herald, *supra* n. 73, at 646.

86. *Id.*

in front, along with the “mobile billboard”⁸⁷ affixed to the driver’s vehicle. When the driver in front displays an objectionable license plate, the rear driver has no alternative but to continue facing forward and be confronted with the message.⁸⁸ Individuals certainly have the right to express their views, but they “[have] no right to force [their] message upon an audience incapable of declining to receive it.”⁸⁹ As a result, the potential litigant can avoid the problems of the specific-injury requirement by arguing that he or she is a “captive audience” of the “Choose Life” plate.

b. Ripeness of Injury

Coinciding with the requirement that the injury be specific to the litigant is the requirement that the injury be ripe for adjudication and not merely speculative.⁹⁰ If the litigant sues under a claim that has not yet reached the point of actual injury, it will lack ripeness, and a court will not hear the claim.⁹¹ This ripeness

87. *Wooley v. Maynard*, 430 U.S. 705, 715 (1977) (holding that the State cannot criminally punish a person for covering the “Live Free or Die” phrase on the New Hampshire license plate, because that person found the phrase morally, politically, and religiously objectionable). In *Wooley*, the United States Supreme Court did not permit a statute that “in effect requires that appellees use their private property as a ‘mobile billboard’ for the [s]tate’s ideological message.” *Id.*

88. Some may argue that a driver has the option simply to change lanes when positioned behind a car with the “Choose Life” plate; however, the ability to get out of such a position is not always available to a driver—for example, in no-passing zones, on small roads, or at stop signs. *Supra* nn. 85–87 and accompanying text (discussing the difficulties drivers encounter in avoiding the “Choose Life” plate). Additionally, just as the ability of a bus passenger to get off the bus does not destroy that passenger’s captive-audience status, so too, the ability of a driver to pass a vehicle does not destroy the captive-audience status of that driver. See *Public Utilities*, 343 U.S. at 468 (Douglas, J., dissenting) (stating that bus passengers are a “captive audience”).

89. *Lehman v. City of Shaker Heights*, 418 U.S. 298, 307 (1974) (Douglas, J., concurring) (stating that commuters on the mass transit system have the right to be free from having ideas forced upon them, and the transit system has no constitutional right to spread messages before a “captive audience”).

90. *Intl. Longshoremen’s & Warehousemen’s Union, Local 37 v. Boyd*, 347 U.S. 222, 224 (1954). In *International Longshoremen’s*, the United States Supreme Court found that the case,

[was] not a lawsuit to enforce a right; [but was] an endeavor to obtain a court’s assurance that a statute does not govern hypothetical situations that may or may not make the challenged statute applicable. Determination of the scope and constitutionality of legislation in advance of its immediate adverse effect in the context of a concrete case involves too remote and abstract an inquiry for the proper exercise of the judicial function.

Id.

91. *Adland*, 307 F.3d at 477. Injury must be actual, not hypothetical. *Id.*

requirement has proven difficult for some organizations challenging the constitutionality of the “Choose Life” plate in the past.⁹² However, the potential litigant may overcome the difficulties of the ripeness requirement.⁹³

In past challenges to the “Choose Life” plate, plaintiffs have argued that, because the state endorses only one side of a controversial issue by promoting the “Choose Life” plate, it engages in viewpoint discrimination against a pro-choice message.⁹⁴ In such challenges, a court has stated that, if an organization does not go through the necessary steps required for the creation of a specialty license plate, then the organization’s claim is not yet ripe.⁹⁵ For example, in *Women’s Emergency Network v. Dickinson*,⁹⁶ the plaintiffs alleged, in part, that their injury was that they could not buy a license plate with a pro-choice message.⁹⁷ The court noted that the “Plaintiffs’ failure to even apply for the development of a pro[-]choice specialty plate renders their claim unripe for review.”⁹⁸

Similarly, in *Hildreth v. Dickinson*,⁹⁹ a case challenging the plate three years before *Women’s Emergency Network*, the court ruled that “The plaintiffs’ failure to request the development of a pro[-]choice license plate pursuant to the applicable statutory mechanism makes [the] [p]laintiffs’ federal claims unripe for judicial determination.”¹⁰⁰ In *Hildreth*, the plaintiffs claimed that, although they could satisfy the statutory requirements to create a plate, they were not guaranteed that the Florida Legislature

92. *Women’s Emerg. Network*, 214 F. Supp. 2d at 1315; *Hildreth*, 1999 U.S. Dist. LEXIS 22503 at *20.

93. *Infra* nn. 105–110 (discussing the ripeness requirement).

94. *Women’s Emerg. Network*, 214 F. Supp. 2d at 1311.

95. *Id.* at 1315.

96. *Id.* at 1308. The Women’s Emergency Network, a nonprofit organization in Miami, provides telephone abortion-referral services “to low-income pregnant women.” *Id.* at 1310. The organization applied for funds earned by the “Choose Life” plate and, after being turned down because of its involvement with abortion, sued under the claim that the statute creating the plate violated “free speech by forcing it to choose between speech about abortion and eligibility to receive funds under the [statute].” *Id.* The court found that the Women’s Emergency Network lacked standing. *Id.* at 1315.

97. *Id.* at 1314–1315.

98. *Id.* at 1315.

99. 1999 U.S. Dist. LEXIS 22503. Jacksonville residents challenged the constitutionality of the “Choose Life” plate, but lost on summary judgment because they lacked standing. *Id.* at **5, 8, 20.

100. *Id.* at *16.

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would approve it, and therefore, they should not be required to comply with the statute to achieve standing.¹⁰¹ However, the court held that if it heard the case, it would be “entertain[ing] a conjectural or hypothetical injury.”¹⁰² Further, there was no guarantee that the Florida Legislature would approve the plate if the plaintiffs won in court.¹⁰³ Consequently, a claim lacks ripeness if it is merely a hypothetical situation.¹⁰⁴

However, even without applying for a plate with the opposing viewpoint, it may be possible for the potential litigant to have standing. As stated before, *Planned Parenthood* is one of only two “Choose Life” plate challenges in which the litigant had standing and convinced the court that the plate was unconstitutional.¹⁰⁵ The court explained that, when the state has unbridled discretion in whether to permit expressive activity under a licensing statute, anyone subject to the law might challenge it without first applying for and being denied the license plate.¹⁰⁶

Henderson is the second successful challenge to the “Choose Life” plate. In *Henderson*, because Louisiana’s specialty license plates are created through legislative enactment and not through application and administrative process, no application for a pro-choice plate was necessary for injury to be present.¹⁰⁷ Rather, the plaintiff had standing because of an actual injury she suffered—

101. *Id.* at **16–17.

102. *Id.* at *17.

103. *Id.*

104. *Intl. Longshoremen’s*, 347 U.S. at 224.

105. *Planned Parenthood*, 236 F. Supp. 2d at 574. However, an appeal is already planned for the United States Court of Appeals for the Fourth Circuit. Collins, *supra* n. 20.

106. *Planned Parenthood*, 236 F. Supp. 2d at 570. The court held that,

[i]f a licensing statute allegedly vests unbridled discretion in a government official over whether to permit or deny expressive activity, one who is subject to the law may challenge it facially without the necessity of first applying for, and being denied, a license. A facial challenge lies whenever a licensing law gives to a government official or agency substantial power to discriminate based on the context or viewpoint of speech by suppressing disfavored speech or disliked speakers.

Id. at 568 (emphasis deleted) (quoting 15 Moore’s Federal Practice § 101.615b(ii) (3d ed. 2002)).

107. *Henderson*, 265 F. Supp. at 712. The Louisiana statute requires:

[E]ach prestige license plate issued in Louisiana is permitted only by statute rather than by any administrative process. Each demonstrates some form of expression: membership in a group or organization; support for an institution; or endorsement of a cause, slogan or belief. Thus, only through legislative enactment of a statute can an organization, group of individuals, or other entity participate in this form of expression by obtaining and using such a license plate.

Id.

namely, the inability to display a pro-choice license plate on her car.¹⁰⁸ Therefore, a potential litigant can avoid the problems of ripeness by arguing that the state has unbridled discretion and the litigant is unable to display a pro-choice plate.

2. Redressability of Injury

In addition to actual injury, the potential litigant may confront further problems based on the court's inability to furnish a remedy that is capable of redressing the injury to the plaintiff.¹⁰⁹ Part of the standing requirement is that the court must be able to furnish such a remedy and, if the injury is not one that is capable of redress, then the court may not hear the case.¹¹⁰ The appellate courts have not yet addressed this problem, but the federal district courts have granted injunctive relief, thus suggesting that this issue is not insurmountable.¹¹¹ The potential litigant should understand why redressability of injury should not be a problem in the event that a federal court addresses this issue.

Proponents of the "Choose Life" plate may argue that, if the litigant sues under the claim that the state has not approved a pro-choice plate, the litigant lacks standing based on an inability of the court to furnish a remedy that would redress the situation.¹¹² Because final approval of specialty license plates belongs to the state legislature, federal courts are unable to redress an injury based on the Political-Question Doctrine and the Separation-of-Powers Doctrine.¹¹³ The Separation-of-Powers Doctrine ensures that certain tasks will be the responsibility of specific branches of government and will not be shared between the branches.¹¹⁴ This Doctrine prevents the court from redressing the injury because the courts may not force the state legislature to

108. *Id.* at 710.

109. *Infra* nn. 119–125 and accompanying text (discussing the redressability-of-injury requirement).

110. *Friends of the Earth*, 528 U.S. at 181. "[T]he injury [must] be [capable of being] redressed by a favorable decision." *Id.*

111. *Supra* nn. 105–108 (discussing the remedies of *Planned Parenthood* and *Henderson*).

112. "To demonstrate standing a plaintiff must show an 'actual injury' caused by defendant's conduct which can be remedied by a court." *Washegesic v. Bloomingdale Pub. Schs.*, 33 F.3d 679, 682 (6th Cir. 1994).

113. Jeremy T. Berry, Student Author, *Licensing a Choice: "Choose Life" Specialty License Plates and Their Constitutional Implications*, 51 *Emory L.J.* 1605, 1620 (2002).

114. 16B *Am. Jur. 2d Constitutional Law* § 639 (1998).

approve any specialty license plate.¹¹⁵ The decision to approve such plates is a task reserved to the legislature; therefore, the courts may not address this type of political question.¹¹⁶

However, the potential litigant challenging the "Choose Life" plate need not worry about this hurdle, because such an injury is capable of redress by the courts.¹¹⁷ Although a court may not order the legislature to create a plate with an alternative viewpoint to "Choose Life," a court may give the legislature an *option* to do so.¹¹⁸ If the court fashions its opinion so that *either* the legislature must approve a plate with an alternative viewpoint, *or* the court will declare the "Choose Life" plate unconstitutional, then the court will avoid the potential problems with the Separation-of-Powers and Political-Question Doctrines.¹¹⁹

Another way to avoid problems with the redressability-of-injury requirement is to argue for the elimination of the "Choose Life" plate. Opponents may argue that eliminating the "Choose Life" plate does not cure the injury of not having a pro-choice plate, but this does not exclude the litigant from having standing if he or she is challenging an "underinclusive" statute.¹²⁰ An organization may not be stripped of its ability to challenge the con-

115. Berry, *supra* n. 113.

116. *Id.*

117. *Infra* nn. 118–119 and accompanying text (arguing that, when a court gives an option to the legislature instead of an order, the court does not violate the Separation-of-Powers and Political-Question Doctrines).

118. "[I]t is primarily the duty of the legislative body to provide the ways and means of enforcing such rights; however, in the absence of appropriate legislative action, it is the responsibility of the courts to do so." *Dade County Classroom Teachers Assn., Inc. v. Legis. of Fla.*, 269 So. 2d 684, 686 (Fla. 1972). In *Dade County*, teachers attempted to compel the Florida Legislature to enact certain standards of collective bargaining for public employees. *Id.* at 685. The court determined that it was appropriate for the court to offer the option to the Legislature to deal with the matter first:

[W]e have confidence that within a reasonable time [the legislature] will extend its time and study into this field. . . . If not, this Court will . . . have no choice but to fashion such guidelines by judicial decree in such manner as may seem to the Court best adapted to meet the requirements of the constitution.

Id. at 688. The Separation-of-Powers Doctrine is not violated when the judicial branch first gives the legislative branch the option to remedy a matter before a court will act. *Id.*

119. *Id.*

120. The United States Supreme Court has stated that denying standing to an organization not included under a statute "would effectively insulate underinclusive statutes from constitutional challenge." *Arkansas Writers' Project, Inc. v. Ragland*, 481 U.S. 221, 227 (1987) (providing that a magazine publisher had standing to challenge the constitutionality of a sales-tax exemption even though the statute was underinclusive as to the publisher).

stitutionality of a statute simply because the statute is underinclusive as to that organization.¹²¹ When a group is “excluded from benefits conveyed via an underinclusive statute,” that group “has standing to challenge the statute on constitutional grounds, even if the effect of striking down the statute is to *deny the benefit to the intended group and not extend it to the plaintiffs.*”¹²² In a license-plate challenge, even if striking down the statute creating the plate would eliminate the “Choose Life” plate and not create a pro-choice plate, a litigant would still have an injury that is capable of redress. Therefore, the litigant will have standing to challenge the plate.

III. ARGUING THE MERITS

If the potential litigant has demonstrated standing by showing that there is an actual injury before the court that is both ripe and capable of redress, the litigant must choose arguments to demonstrate that the “Choose Life” plate is unconstitutional. The best arguments are that the plate violates the Establishment Clause,¹²³ the lack of an alternative-viewpoint plate violates the viewpoint-neutrality requirement of the Free Speech Clause,¹²⁴ and the statute behind the “Choose Life” plate discriminates against pro-choice organizations on the basis of viewpoint.¹²⁵

A. Establishment Clause

One of the strongest arguments for challenging the “Choose Life” plate is that it violates the Establishment Clause,¹²⁶ which provides that “Congress shall make no law respecting an establishment of religion.”¹²⁷ In past attempts to challenge the “Choose

121. *Tex. Monthly, Inc. v. Bullock*, 489 U.S. 1, 2 (1989) (providing that an organization had standing to challenge the constitutionality of a sales-tax exemption even though the statute did not include the organization in its breadth). A party may have standing despite the fact that the statute does not apply to that party. *Id.*; *Planned Parenthood*, 236 F. Supp. 2d at 570.

122. *Id.* at 568 (emphasis added).

123. *Infra* pt. III(A) (discussing the Establishment Clause).

124. *Infra* pt. III(B) (discussing the viewpoint-neutrality requirement).

125. *Infra* pt. III(B) (discussing the Free Speech Clause).

126. The standing requirement may be less strict if the litigant argues that the plate violates the Establishment Clause. *Sec. of St. of Md. v. Munson Co.*, 467 U.S. 947 (1984); *Planned Parenthood*, 236 F. Supp. 2d 564; Berry, *supra* n. 115.

127. U.S. Const. amend. I. Along with the Establishment Clause found in the United States Constitution, the Florida Constitution also prohibits the creation of a law respecting

Life” plate, several litigants *would have* argued that the plates represent improper entanglement with religion, which violates the Establishment Clause.¹²⁸ Because the Establishment Clause prohibits laws establishing a religion, the first step is to demonstrate that the “Choose Life” message is religious.¹²⁹ The litigant may then argue that the statute permitting the “Choose Life” plate creates excessive entanglement between the state and religious organizations, which is a violation of the Establishment Clause.¹³⁰

1. Connecting “Choose Life” and Religion

To make an argument that the plate violates the Establishment Clause, the litigant must first demonstrate that the “Choose Life” plate’s message is religious.¹³¹ Even though the pro-life movement is not supported in its entirety by Christian organizations and individuals, it is a movement that is deeply connected to religion.¹³² An Internet search for “pro-life” yields links to several

an establishment of religion. Fla. Const. art. 1, § 3. In addition, “No revenue of the state or any political subdivision or agency thereof shall ever be taken from the public treasury directly or indirectly in aid of any church, sect, or religious denomination or in aid of any sectarian institution.” *Id.*; see *Holmes v. Bush*, 2002 WL 1809079 at *3 (Fla. 2d Cir. Ct. Aug. 5, 2002) (holding that a state scholarship program that gave money to certain students to attend sectarian schools was unconstitutional). In *Holmes*, even though the scholarship vouchers were given to the parents or guardians of the students who then gave the money to the sectarian schools, such a set-up was indirectly aiding sectarian institutions and was therefore against the plain meaning of Article One, Section Three of the Florida Constitution. *Id.*

128. *Henderson v. Stalder*, 112 F. Supp. 2d 589, 593 (E.D. La. 2000), *aff’d*, 2000 U.S. Dist. LEXIS 18805 (E.D. La. Dec. 21, 2000), *rev’d*, 265 F. Supp. 2d 699 (E.D. La. 2002), *cert. denied*, 537 U.S. 1048 (2002); *Fla. Natl. Org. for Women, Inc. v. State*, 832 So. 2d 911, 913 (Fla. 1st Dist. App. 2002).

129. *Infra* pt. III(A)(1) (discussing the connection between the “Choose Life” plate and religion).

130. *Infra* pt. III(A)(2) (discussing the excessive entanglement between the state and religious organizations).

131. “Congress shall make no law respecting an establishment of religion.” U.S. Const. amend. I. To successfully argue that the “Choose Life” plate violates the Establishment Clause, the “Choose Life” message must be religious.

132. For instance, Bishop William K. Weigand has stated the following:

As your bishop, I have to say clearly that anyone—politician or otherwise—who thinks it is acceptable for a Catholic to be pro-abortion is in very great error, puts his or her soul at risk, and is not in good standing with the Church. Such a person should have the integrity to acknowledge this and choose of his own volition to abstain from receiving Holy Communion until he has a change of heart.

Bishop William K. Weigand, *Annual Pro-life Mass*, <http://www.diocese-sacramento.org/bishops/bishop.prolife.homily.2003.htm> (Jan. 22, 2003).

Web sites with religious home pages.¹³³ For only four dollars, one can own a “U Can’t B Both Christian & Pro-Choice” or “Pray to End Abortion” bumper sticker.¹³⁴ In fact, the term “Choose Life” comes from the *Book of Deuteronomy*.¹³⁵ In the Index to Pro-Life Resources on the Web, a Web site listing over fifty available pro-life Web sites, almost one-third of the Web sites listed specify a religious affiliation in the link itself.¹³⁶ That same Web site includes a graphic design of dripping blood, after which appears the statement, “Pro-Death-WARNING: The following links *are not Christian sites* but are included here for the brave to explore the dark side of human nature.”¹³⁷ Following this *warning*, the Web site then lists pro-choice and abortion-information Web sites.¹³⁸

Additionally, the Web sites that contain petitions to sign in support of the “Choose Life” plate are religious.¹³⁹ In Alabama, for instance, where the idea for the plate is in its beginning stages, the Christian Coalition of Alabama’s home page contains a special link for the “Choose Life” plate information.¹⁴⁰ The Web site then asks that “you cover this project in *prayer*” and “fill out the email form now and email this link to your *church*.”¹⁴¹ There are too many connections between the “Choose Life” plate and religion for the “Choose Life” plate not to have a religious message and connection.

133. An Internet search for “pro-life” using the Yahoo! search engine (accessed Feb. 9, 2003) takes the viewer to several homepages including the Presbyterian Pro-Life (<http://www.ppl.org>), United States Catholic Bishops Pro-Life Activities (<http://www.usccb.org/prolife/>), and Priests for Life (<http://www.priestsforlife.org/>), among other Web sites that promote dealing with the “Choose Life” movement via biblical passages and prayer. Additionally, several of the other Web sites, contain both religious text and ideals in their Web sites or links to other religious Web sites (*e.g.* <http://www.catholicity.com>).

134. ChristEveryWear, <http://www.christeverywear.net> (accessed Feb. 5, 2003). The Web site also sells other religious, pro-life bumper stickers including “God is Pro-Life,” “If Mary was Pro-Choice there would be no Christmas,” and “U Can’t B Both Catholic and Pro-Choice.” *Id.*

135. “I call heaven and earth to record this day against you, that I have set before you life and death, blessing and cursing: therefore choose life, that both thou and thy seed may live.” *Deuteronomy* 30:19 (King James).

136. Jeremiah Project, *Index to Pro-Life Resources on the Web*, <http://members.tripod.com/~jproj/linklife.html> (last updated Feb. 5, 2003).

137. *Id.* (emphasis added).

138. *Id.*

139. Christian Coalition of Ala., *Choose Life Auto Tag*, <http://www.ccbama.org/newsite/chooselifeautotag.htm> (accessed Nov. 2, 2002).

140. *Id.*

141. *Id.* (emphasis added).

2. *Excessive Entanglement*

After demonstrating ties between the "Choose Life" plate and religion, the potential litigant may proceed with his or her argument for excessive entanglement between church and state, in violation of the Establishment Clause. The definitive case for determining whether a violation of the Establishment Clause exists is *Lemon v. Kurtzman*.¹⁴² The United States Supreme Court in *Lemon* outlined a three-part test for evaluating a statute's potential violation of the Establishment Clause:

First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion, . . . finally the statute must not foster "an excessive government entanglement with religion."¹⁴³

If a statute does not meet all three requirements, then it violates the Establishment Clause.¹⁴⁴ Therefore, attacking even one of these three requirements is enough to show it violates the Establishment Clause.¹⁴⁵ Although a statute creating the "Choose Life" plate may purport to have a secular purpose, namely supporting adoption,¹⁴⁶ the best argument for the litigant under the *Lemon* test is that there is excessive entanglement.

"[T]o assess entanglement, [courts] have looked to 'the character and purposes of the institutions that are benefited, the nature of the aid that the [s]tate provides, and the resulting relationship between the government and religious authority.'"¹⁴⁷ As a result of

142. 403 U.S. 602 (1971).

143. *Id.* at 612–613 (citing *Waltz v. Tax Commn.*, 397 U.S. 664, 674 (1970)).

144. *Lemon*, 403 U.S. at 613–614. The Court reasoned that there was no need to look to the second requirement of the test, where evidence demonstrated that the statute did not pass the third part. "Under *Lemon*, the Establishment Clause is violated if any of the [three requirements] are found." *Ind. Civ. Liberties Union v. O'Bannon*, 259 F.3d 766, 770 (7th Cir. 2001).

145. *Id.*

146. In Florida, "Anti-abortion activists insisted that the plate is about adoption, not abortion." Rado, *supra* n. 12. "Sponsors say it's an innocent attempt to raise money to help pregnant women find help in placing their babies for adoption rather than undergo an abortion." Isabelle de Pommereau, *A New Strategy in the Abortion Fight?* <http://www.csmonitor.com/durable/1998/05/08/p4s1.htm> (May 8, 1998).

147. *Agostini v. Felton*, 521 U.S. 203, 232 (1997) (quoting *Lemon*, 403 U.S. at 615). In *Agostini*, the United States Supreme Court held that there was no Establishment Clause violation when the government act did not advance religion. *Id.* at 234–235. The Court defined advancing religion as "result[ing] in governmental indoctrination; defin[ing] its recipients by reference to religion; or creat[ing] an excessive entanglement." *Id.* at 234.

this method of examining possible entanglement, the potential litigant should focus on the language of the statute and the way in which the state and religious organizations are inextricably intertwined in their distribution of funds generated by the plates.¹⁴⁸ A statutory scheme that permits excessive entanglement between the state and religious organizations violates the Establishment Clause.¹⁴⁹

An example of excessive entanglement is in the State of Louisiana where the State has a statute that permits the production of the “Choose Life” plate provided that a “Choose Life Advisory Council . . . shall be established to design and review grant applications for qualifying organizations, and shall make recommendations regarding the awarding of grants to the [S]tate treasurer.”¹⁵⁰ The statute then lists the three mandatory members of Choose Life Advisory Council (Council).¹⁵¹ These members include the presidents, or their designees, from the American Family Association, the Louisiana Family Forum, and the Concerned Women for America¹⁵²—all three of which are religious organizations.¹⁵³

The American Family Association Web site lists its number-one issue as “Church in America,” sells religious books and paraphernalia, solicits “prayer requests,” discusses “evangelical activities” and how to find churches in the area, and contains links to a directory of Christian businesses and “The E-commerce Website¹⁵⁴ for the Christian World.”¹⁵⁵ The second mandatory member of the Council must come from the Louisiana Family Forum (LFF), an organization formed by “a group of *pastors*, policymakers, and concerned citizens.”¹⁵⁶ The LFF’s mission statement is “To persuasively present biblical principles in the centers of influence on

148. *Lemon*, 403 U.S. at 612–613.

149. *Supra* n. 143 and accompanying text (outlining the three-part *Lemon* test for a statute to be free from violation of the Establishment Clause).

150. La. Rev. Stat. Ann. § 47:463:61 (2002). Mississippi also allows a “Choose Life Advisory Committee” to determine what organizations should receive profits from the plate sales. Miss. Code Ann. § 27-19-56.70 (2002).

151. La. Rev. Stat. Ann. § 47:463:61(E)(1).

152. *Id.*

153. *Infra*. nn. 154–164 and accompanying text (discussing the religious foundations of these three organizations selected to constitute the “Choose Life Advisory Council”).

154. KingdomBuy.com, *The E-commerce Web Site for the Christian World*, <http://www.kingdombuy.com> (accessed Feb. 7, 2003).

155. Am. Fam. Assn. Online, <http://www.afa.net> (accessed Feb. 7, 2003).

156. La. Fam. Forum, <http://www.lafamilyforum.org>; *select* About LFF (accessed Feb. 7, 2003) (emphasis added).

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issues affecting the family through research.”¹⁵⁷ Additionally, in several editions of “Forum Notes,” a newsletter published by the LFF, religious ideals are the predominant subject matter.¹⁵⁸ One issue explained that the concept of the separation of church and state is merely a *myth*.¹⁵⁹ It stated that,

[t]he Christian religion is the most important and one of [the] first things in which all children under a free government, ought to be instructed . . . [and] that the Christian religion must be the basis of any government intended to secure the rights and privileges of a free people.¹⁶⁰

The final mandatory member of the Council must come from Concerned Women for America, an organization “built on prayer and action” that prides itself on “helping [its] members across the country bring biblical principles into all levels of public policy.”¹⁶¹

Together, these three organizations comprise the Choose Life Advisory Council, which, under the Louisiana statute, is authorized to decide what organizations shall receive portions of the funds generated by the plates.¹⁶² The Council’s function is to interact with the State treasurer and identify the organizations that it believes should be given the profits.¹⁶³

The potential litigant should argue that such a statutory scheme in Louisiana violates the Establishment Clause because it permits excessive entanglement between the State of Louisiana and religious organizations. The statute specifically delineates that the leaders of three religious organizations will head the Council in charge of advising the State on how to disperse the money generated from the “Choose Life” plate.¹⁶⁴ There is excessive entanglement because religious organizations play a key role in government functions.¹⁶⁵ “It is well settled that the Establish-

157. *Id. select* Our Mission.

158. *Id. select* Forum Notes.

159. *Id. select* Forum Notes; *select* Church and State; *select* Separation Myth.

160. *Id.* (quoting Noah Webster, author of *Webster’s Dictionary*).

161. Concerned Women for Am., <http://www.cwfa.org>; *select* About CWA (accessed Feb.7, 2003).

162. La. Rev. Stat. Ann. § 47:463.61(E)(1), (G).

163. *Id.*

164. *Id.*; *supra* nn. 158–164 and accompanying text (discussing the religious foundations of the three organizations that constitute the “Choose Life Advisory Council” as delineated by the statute).

165. *Infra* nn. 167–169 and accompanying text (discussing excessive entanglement).

ment Clause is not violated every time money previously in the possession of a [s]tate is conveyed to a religious institution.”¹⁶⁶ However, the Louisiana statute does not involve merely conveying State money to religious organizations. Rather, the State and religious organizations are inextricably intertwined in the decisionmaking process of choosing the organizations that receive the money.¹⁶⁷

When a statute approving the plate requires a committee made up of heads of religious organizations to advise a state on how to disperse money earned by the plate, the potential litigant should argue that there is excessive entanglement between the state and religion. It is excessive entanglement for a state to manufacture and distribute these plates and then keep the money in the state treasury,¹⁶⁸ while a predominantly religious council advises the state on how to distribute the money.¹⁶⁹

B. Freedom of Speech

If a state has produced a “Choose Life” plate, but denied any sort of pro-choice plate, the potential litigant should argue that the state has engaged in viewpoint discrimination, which violates the freedom of speech.¹⁷⁰ “[O]nce the [s]tate creates a forum where viewpoints are expressed, it must be viewpoint neutral.”¹⁷¹ Regulation of speech by the state must be viewpoint neutral¹⁷² and may

166. *Witters v. Wash. Dept. of Servs. for the Blind*, 474 U.S. 481, 486 (1986) (dictum).

167. La. Rev. Stat. Ann. § 47:463.61(E)–(G).

168. *Id.* at § 47:463.61(A)–(D), (F)(1), (H).

169. *Id.* at § 47.463.61(E)(1), (F)(2), (G).

170. For example, in West Virginia a committee in the House of Delegates proposed a bill to create a “Pro-Life” plate. Wrenn, *supra* n. 25. The bill then passed the House Roads and Transportation Committee. *Id.* One member of that committee “proposed an amendment to the bill to offer [a] ‘pro-choice’ license [plate] as well,” but “The amendment was killed by a vote of 22 to 1.” *Id.*

171. *Henderson*, 112 F. Supp. 2d at 598 (ruling that plaintiffs lacked standing in the first place, thereby negating the arguments made by the plaintiffs and accepted by the lower courts). Later, the court allowed the plaintiff to amend the complaint under the Fifth Circuit’s mandate. *Id.* Subsequently, the court found that the entire license-plate scheme was unconstitutional under the First Amendment. *Henderson*, 265 F. Supp. 2d at 708, 719–720.

172. *Sons of Confederate Veterans, Inc. v. Glendening*, 954 F. Supp. 1099, 1102 (D. Md. 1997) (holding that the Motor Vehicle Administration of Maryland (MVA) was wrong in suspending approval of the Sons of Confederate Veteran’s (SCV) license plate, depicting the organization’s logo, a confederate battle flag, because in doing so the MVA was promoting the viewpoint of those offended by the confederate flag, over the viewpoint of those who wished to express their affiliation with the SCV).

not be an effort to suppress expression simply because some people oppose it.¹⁷³ When a state regulates speech, it "may not favor one speaker over another."¹⁷⁴ Therefore, if the state permitted the production of the "Choose Life" plate but denied permission to an opposing viewpoint, the state has engaged in viewpoint discrimination.¹⁷⁵

Also, the potential litigant could challenge the entire statutory scheme behind which the plate is created. In *Henderson*, a federal district judge held that the statute behind the creation of the specialty license plate was unconstitutional because there was "no neutrality in the scheme."¹⁷⁶ When "an organization may only obtain a specialty plate if the . . . legislature condones the message so as to adopt it," there is a presumption of unconstitutionality.¹⁷⁷ There is an inherent probability of viewpoint discrimination because the legislature chooses what specialty license plates to create.¹⁷⁸ "If the [s]tate built a convention hall for speech and then only allowed people to speak with whom they agreed with their message, the [s]tate's actions would be in contravention of the First Amendment."¹⁷⁹ Similarly, the state may not favor one message over another, for to do so is to fail to maintain viewpoint neutrality.¹⁸⁰

A separate but similar argument is that the state is engaging in viewpoint discrimination because the statute clearly discriminates against organizations that view abortion as a viable option. For example, the Florida "Choose Life" statute specifically states

173. *Perry Educ. Assn. v. Perry Loc. Educators' Assn.*, 460 U.S. 37, 46 (1983). Regulation of speech may not be "an effort to suppress expression merely because public officials oppose the speaker's view." *Id.*

174. *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 828 (1995) (citing *Members of City Council of L.A. v. Taxpayers for Vincent*, 466 U.S. 789, 804 (1984)).

175. *Members of City Council of L.A.*, 466 U.S. at 804. "[T]he First Amendment forbids the government to regulate speech in ways that favor some viewpoints or ideas at the expense of others." *Id.* Some may argue that the state could alleviate the controversy behind the plate by offering a pro-choice license plate. However, creating such a plate would not fix the problem, for the real problem lies in the creation of the "Choose Life" plate, a plate that displays only one side of a heated political and religious controversy. Such a message does not belong on a state-issued license plate, and creating a pro-choice plate would add fuel to the fire, but would not fix the problem.

176. *Henderson*, 265 F. Supp. 2d at 718.

177. *Id.*

178. *Id.*

179. *Id.*

180. *Id.*

that “[f]unds may not be distributed to any agency that is involved or associated with abortion activities, including counseling for or referrals to abortion clinics, providing medical abortion-related procedures, or proabortion advertising.”¹⁸¹ Any organization that views abortion as an option and counsels women with unplanned pregnancies by providing information on all available options—including abortion—is prohibited from receiving any of the funds generated by the plate.¹⁸² These organizations are denied funds based solely on their views on abortion. The “Choose Life” statute discriminates against organizations that counsel and meet the physical needs of pregnant women if the organizations view abortion as an option. This statutory scheme discriminates against pro-choice organizations. Therefore, the potential litigant should argue that the “Choose Life” plate violates the viewpoint-neutrality requirement and discriminates on the basis of viewpoint.

IV. CONCLUSION

A potential litigant seeking to challenge the constitutionality of the “Choose Life” plate will have several hurdles to overcome before the challenge may be heard in court, including demonstrating standing to bring the suit,¹⁸³ suffering an actual injury,¹⁸⁴ having a ripe claim,¹⁸⁵ and exhibiting an injury that is capable of redress by the court.¹⁸⁶ However, it is possible for the potential litigant to satisfy these judicial requirements.¹⁸⁷

The potential litigant may avoid problems with standing in state court if the litigant challenges the “Choose Life” plate in his or her capacity as a taxpayer.¹⁸⁸ In so doing, the litigant will satisfy the requirement of actual injury and will have standing. If the litigant challenges the plate in federal court, he or she may avoid the ripeness and redressability-of-injury problems that have

181. Fla. Stat. § 320.08058(30)(b).

182. Ctr. for Reproductive Rights, *Choose Life License Plates: An Infringement on First Amendment Rights*, http://www.crlp.org/pub_fac_licenseplates.html (Aug. 2002).

183. *Women's Emerg. Network*, 214 F. Supp. 2d 1308.

184. *Schlesinger*, 418 U.S. 208.

185. *Intl. Longshoremen's*, 347 U.S. 222.

186. Berry, *supra* n. 113, at 1619–1621.

187. *Supra* pt. II (outlining the ways a potential litigant may overcome the judicial requirements).

188. *Supra* pt. II(A) (discussing taxpayer standing).

plagued previous plaintiffs by demonstrating that the statute is underinclusive,¹⁸⁹ demonstrating that the litigant was a "captive audience,"¹⁹⁰ or demonstrating that a favorable decision for the plaintiff will not violate the Separation-of-Powers or Political-Question Doctrines.¹⁹¹ The litigant also may overcome the problem of redressability by alleging, not that the injury is the lack of a license plate with an opposing viewpoint, but rather that the "Choose Life" plate is unconstitutional.¹⁹² This argument will permit the litigant to bring suit despite the seeming inability of the court to furnish a remedy. If the litigant argues that the plate is unconstitutional, the injury is capable of redress because the court may enjoin the state from enforcing or implementing the statute creating the "Choose Life" plate.

Once past these judicial requirements, the litigant must choose how he or she will argue that the "Choose Life" plate is unconstitutional. The best arguments are that the "Choose Life" plate and the scheme for handling the funds it generates create excessive entanglement, which violates the Establishment Clause;¹⁹³ the absence of a pro-choice plate violates the viewpoint-neutrality requirement of the Free Speech Clause;¹⁹⁴ the statutory scheme under which the plates are created will inherently lead to a lack of viewpoint neutrality;¹⁹⁵ and the statute behind the "Choose Life" plate discriminates against pro-choice organizations.¹⁹⁶

Although lack of successful precedent that has been upheld on appeal¹⁹⁷ makes the challenge to the "Choose Life" plate seem difficult,¹⁹⁸ it is not an impossibility. In most cases, plaintiffs have lost their battles due to a lack of standing, and courts have not

189. *Tex. Monthly*, 489 U.S. 1; *Planned Parenthood*, 236 F. Supp. 2d 564.

190. *Public Utilities*, 343 U.S. at 468 (Douglas, J., dissenting).

191. *Supra* nn. 118–119 and accompanying text (discussing and dismissing the problems with the Separation-of-Powers and Political-Question Doctrines).

192. *Supra* pt. II(B)(2) (discussing the redressability-of-injury requirement).

193. *Supra* pt. III(A)(2) (discussing excessive entanglement).

194. *Supra* pt. III(B) (discussing Freedom of Speech).

195. *Supra* pt. III(B) (discussing viewpoint-neutrality requirement).

196. *Supra* pt. III(B) (discussing discrimination against a pro-choice plate).

197. One organization and one individual, in *Planned Parenthood* and *Henderson* respectively, had standing and successfully obtained an injunction against the creation of "Choose Life" plates. However, a potential litigant should be cautioned that both cases will be appealed. Collins, *supra* n. 20.

198. Challengers of the "Choose Life" plate lost on summary judgment in *Hildreth*, 1999 U.S. Dist. LEXIS 22503, and *Women's Emergency Network*, 214 F. Supp. 2d at 1308, 1315.

addressed the merits of their arguments regarding the constitutionality of the plate.¹⁹⁹ If a litigant is able to demonstrate standing, he or she could win a claim that the “Choose Life” plate is unconstitutional.

The “Choose Life” plate is merely three years old and already has been challenged five times.²⁰⁰ With the plate in existence in six states across the country and heading towards creation in nearly thirty more, the courtroom will likely become home to additional challenges to the plate’s constitutionality.²⁰¹

Although a debate over a license plate may seem quotidian in the spectrum of human events, state censorship of private speech is inimical to a viable and dynamic democracy. State control of private speech is an insidious incursion into the bedrock of freedom. It must not be permitted and is not permitted under our Constitution.²⁰²

199. *Supra* n. 43 (listing the plaintiffs that have failed to meet the judicial requirements).

200. *Hildreth*, 1999 U.S. Dist. LEXIS 22503; *Women’s Emerg. Network*, 214 F. Supp. 2d 1308; *Henderson*, 265 F. Supp. 2d 699; *Planned Parenthood*, 236 F. Supp. 2d 564; *Fla. Natl. Org. for Women*, 832 So. 2d 911.

201. Foster’s/Citizen Online, *supra* n. 6. Besides Florida and Louisiana, the “Choose Life” plate is available in Alabama, Mississippi, Oklahoma, and South Carolina. *Id.*

202. *Henderson*, 265 F. Supp. at 720.