13-1234

IN THE

SUPREME COURT OF THE UNITED STATES

Greg Weber,
Governor of the
State of Gilead,
Petitioner,

v.

Winston Smith,
Respondent.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURTS
FOR THE FOURTEENTH CIRCUIT

BRIEF FOR PETITIONER

Exam # 2231
Counsel for Petitioner
Office of the Attorney
General for the State of
Gilead
4 Ocean Bay Road
Ocean Bay, Gilead 99901

MARCH 8, 2013

QUESTIONS PRESENTED

I. Is the Gilead state special license plate program government speech?

II. Does the program constitute viewpoint discrimination?

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OPINIONS BELOW

The opinion of the United States District Court for the District of Gilead (granting summary judgment for the respondent) is omitted, but may be found on page 25 of the appellate record. (R. at 25-29). The opinion of the United States Court of Appeals for the Fourteenth Circuit (affirming the judgment of the district court) is also omitted, but may be found on page 32 of the appellate record. (R. at 32-33).

STATEMENT OF JURISDICTION

The Court of Appeals entered judgment on February 1, 2012. (R. at 32-33). Petitioner filed his Petition for Writ of Certiorari on February 7, 2012. (R. at 34). This Court granted the petition on March 25, 2012. (R. at 36). This Court's jurisdiction rests on 28 U.S.C. § 1254(1) (2006).

STATEMENT OF REVIEW

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

CONSTITUTIONAL PROVISIONS

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.

U.S. Const. amend. I.

STATEMENT OF THE CASE

The State of Gilead oversees a program in which its citizens may choose to affix non-standard, "specialty" license plates to their vehicles. (R. at 3). Citizens and organizations wishing to create a specialty license plate must either apply for authorization of a new plate from the Governor of Gilead or petition the Gilead General Assembly. (R. at 3). Not all applications for specialty license plates are approved. (R. at 6 & 13).

On July 4, 2011, Respondent Winston Smith ("Smith") submitted a design proposal for a specialty license plate to Petitioner Governor Greg Webber ("Gov. Webber") for approval. (R. at 3 & 12). Smith's design included the message: "WHITE PRIDE STATEWIDE," "Gilead, USA" and it displays a logo - a clenched fist within a pentagon - that is commonly associated with a white supremacist organization. (R. at 12 & 25). Gov. Webber identified Smith's proposal as one that "advocates or promotes discrimination" and contrary to Gilead Statute Title 451 § 1984. (R. at 13.) The Governor of Gilead may alter, modify or refuse to authorize any special license plate that is contrary to the laws of this State. (R. at 7 & 13). Smith's proposal was denied on August 1, 2011. (R. at 13). Subsequently, Smith brought a civil action against Gov. Webber alleging a violation of his First Amendment right to freedom of speech. (R. at 2).

In March of 2005, the General Assembly of Gilead approved a specialty license plate for a pro-diversity group, INGSOC, which bears the message: "Celebrate Gilead's Diversity." (R. at 3). Smith claimed that the rejection of his specialty plate design constitutes a violation of his First Amendment rights, and that his white supremacist design may not be denied so long as a license plate is issued that promotes diversity. (R. at 4). Thus, Smith has requested an order to compel Gov. Webber to authorize his design that promotes discrimination. (R. at 4 & 13).

Gov. Webber maintains that Gilead's specialty plate program is government speech, and that the program is not a public forum subject to the requirement of viewpoint neutrality. (R. at

22 - 23). The Sixth Circuit has determined that specialty plates are government speech. (R. at 21). Contrarily, Smith has relied upon holdings from the Fourth Circuit that qualify such programs as private speech amenable to First Amendment protections. (R. at 17-18). The present inconsistency is made manifest by a District Court's accession that a specialty license plate involves "neither purely government speech, nor purely private speech." (R. at 27).

On November 14, 2011, The United States District Court for the District of Gilead granted Plaintiff's motion for summary judgment, informing the parties that the State of Gilead had an obligation to issue Smith's white supremacist specialty plate. (R. at 25 & 29). Gov. Webber appealed the following day, and the United States Court of Appeals for the Fourteenth Circuit granted the appeal on December 7, 2011. (R. at 30 & 31). The Court of Appeals affirmed the judgment of the District Court, finding that Gilead may not regulate speakers "solely because it disagrees with their message." (R. at 33). Gov. Webber appealed to the Supreme Court of the United States, praying for the reversal of the lower courts' rulings. (R. at 34). On March 25, 2012, this Court granted Governor Webber's Petition for Writ of Certiorari. (R. at 36).

SUMMARY OF THE ARGUMENT

I.

Governor Webber's decision to reject the Respondent's racist specialty license plate proposal does not constitute a violation of the Respondent's First Amendment right to freedom of speech. The Governor's action was a constitutional exercise of discretion, which is reinforced by the doctrine of government speech. Under the government speech doctrine, The State of Gilead may express a preferred viewpoint, fund certain programs without funding others, and take certain measures to control its own message.

After the establishment of the government speech doctrine in *Rust*, courts have frequently relied upon a formulaic four-factors test to differentiate between government speech and private

speech. In effect, the four-factors test has rendered erratic results reflective of the prevailing prejudices of a particular time period or locality. Because the test is defenseless against subtle manipulation, it is dysfunctional and it does not provide an adequate framework for resolving the present controversy. Moreover, the test has been passed over by the Supreme Court in its most recent evaluation of the dichotomy between government speech and private speech.

Where speech takes place is critical in assessing whether it is protected by the First Amendment, and the Governor's decision to reject the Respondent's proposal is further validated by an examination of the forum in which the speech is revealed. The specialty license plate at issue is government property, and the State has the right to protect and regulate its own property in the same way as a private entity. Because this program does not provide an appropriate forum for the unbridled expression of private speech, the decision to reject the Respondent's proposal of a license plate advocating white supremacy is not a violation of his First Amendment right to freedom of speech.

II.

The controversy surrounding the specialty license plate program in the State of Gilead is that both the State and the Respondent have claimed exclusive dominion over the same forum for the expression of their incompatible speech. Even if Gilead's specialty license plate program is found to involve a combination of government speech and private speech, the Respondent may be rejected nonetheless. Gilead's decision to reject the Respondent's specialty license plate proposal extends beyond matters dealing only with a particular racist viewpoint.

In a forum of mixed speech, the State of Gilead may simultaneously approve a specialty license plate to "Celebrate Gilead's Diversity" and reject an application for a specialty license plate endorsing "WHITE PRIDE STATEWIDE" in order to protect legitimate and compelling

public policy concerns. In addition to the State's obligation to abide by Civil Rights legislation, the manner in which Gilead disburses revenues from the sale of specialty plates is without prejudice, which serves as a testament to the nondiscriminatory character of the program. Furthermore, as an aside from any particular viewpoint, Supreme Court precedent confirms that the Respondent's proposal may be rejected on the basis of content. The white supremacist logo on the proposed specialty plate represents content that is distinguishable, yet inseparable, from the Respondent's message.

ARGUMENT

I. THE STATE OF GILEAD'S SPECIALTY LICENSE PLATE PROGRAM IS GOVERNMENT SPEECH AND, ACCORDINGLY, THE GOVERNOR OF GILEAD MAY REJECT CERTAIN SPECIALTY LICENSE PLATE PROPOSALS WITHOUT VIOLATING APPLICANTS' FIRST AMENDMENT RIGHTS.

The First Amendment of the Constitution prohibits Congress from making laws that abridge the right to freedom of speech. U.S. Const. amend. I. The First Amendment is a treasure of American democracy, and when the government regulates private speech the courts must conduct a deep First Amendment analysis. *See Ariz. Life Coalition, Inc. v. Stanton*, 515 F.3d 956, 963 (9th Cir. 2011). At the same time, government speech exists, and a legislature's decision not to subsidize the exercise of private speech is not a violation of that right. *See Rust v. Sullivan*, 500 U.S. 173, 193 (1991). It is well established that the First Amendment does not protect all types of speech in unlimited circumstances. *See United States v. Kokinda*, 497 U.S. 720 (1990); *Perry v. McDonald*, 280 F.3d 159 (2nd Cir. 2001).

In the present controversy, the specialty license plate program of Gilead represents a forum that is not acceptable for private speech. (R. at 13 & 20-24). Although the exact boundaries of speech protections in various forums remain nebulous, there are limits nonetheless. *See Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 44 (1983). The court in

Rose, even in making a determination for private speech, acknowledged that a State may confine a forum to the limited and legitimate purposes for which it was created. *See Planned Parenthood of S.C., Inc. v. Rose*, 361 F.3d 786, 797 (4th Cir. 2004) (citing *Rosenberger v. Rector & Visitors of Univ. of Virginia*, 515 U.S. 819, 829-830 (1995)).

A. The Predominate Test Supporting The Case For Private Speech is Dysfunctional And Should Not Be Applied To The Present Controversy.

District Courts are challenged by the question of whether state specialty license plate programs are beholders of government speech or private speech. (R. at 24-29). The Sixth Circuit has determined that such programs are government speech. *See ACLU of Tennessee v. Bredesen*, 441 F.3d 370 (6th Cir. 2006), *cert. denied*, 126 S. Ct. 2972 (2006). Gilead is permitted to express a public policy view by offering a "diversity" license plate, and there is no principle under which the First Amendment can prohibit the government from doing so. *See id*. at 372. With regard to the First Amendment, when the government sets the overall message to be communicated and approves every word of that message, it is government speech. *See id.* at 376 (referring to *Johanns v. Livestock Mktg. Ass'n*, 544 U.S. 550, 561-562 (2005)).

Oppositely, the Fourth Circuit has determined that specialty license plate programs are not government speech, and therefore amenable to First Amendment private speech protections. *See Rose*, 361 F3d. at 799. Interpretations from the Fourth Circuit have popularized a four-factors test that characterize such programs as private speech. *See id*. at 792 (referring to *Sons of Confederate Veterans, Inc. ex rel. Griffin v. Comm'n of Virginia Dept. of Motor Vehicles*, 288 F.3d 610, 618 (4th Cir. 2002)). To discern private speech from government speech, the four-factors test seeks to examine: 1) The central purpose of the program in which the speech in question occurs; 2) The degree of editorial control exercised by the government or private entities over the content of the speech; 3) The identity of the literal speaker; and 4) Whether the

government or the private entity bears the ultimate responsibility for the content of the speech. *See id*. at 792-793. Courts have relied upon the test, in whole or in part, to make distinctions between government speech and private speech, yet the decisions resulting from this test do little to clarify the subject.

The four-factors test has been applied to a variety of controversies. The Tenth Circuit applied the test to find that a City's monument bearing the Ten Commandments, the Star of David and Phoenician letters was a manifestation of private speech and could not exclude the "Seven Aphorisms" of the Plaintiff SUMMUM, a sectarian group. *See Summum v. City of Ogden*, 297 F.3d 995, 1288 (10th Cir. 2002). Interestingly, this decision came just one year after the court's application of the same four-factors test to support a holding for government speech. *See Wells v. City & County of Denver*, 257 F.3d 1132, 1136 (10th Cir. 2001) (holding that the rejection of the plaintiff's exhibit from the city's holiday display area was a constitutional regulation of government speech). SUMMUM filed similar suits against several municipalities in Utah until the Supreme Court decided to hear a complaint in 2009, in which the Court unanimously ruled against SUMMUM, the sectarian group, and for the City's protection of its government speech. *See Pleasant Grove City, Utah v. Summum*, 555 U.S. 460, 464 (2009).

The four-factors test does not enable uniform decision-making when applied to specialty license plate programs. In some cases, the speech manifested in specialty plates has been attributed to the State Government. *See Summers v. Adams*, 669 F. Supp. 2d 637 (2009) (holding that a specialty license plate bearing a sectarian cross and the words "I Believe" was unconstitutional for violation of the Establishment clause). In *Conti*, the Court found that sufficient private speech was implicated in a specialty license plate program to preclude a finding for government speech. *See ACLU of N.C. v. Conti*, 835 F. Supp 2d 51 (2011) (holding

unconstitutional the state's "Choose Life" specialty plate to the exclusion of a Pro-Choice specialty plate). Not only does this test proliferate confusion, it also allows for rulings that contradict Supreme Court precedent. *See Rust*, 500 U.S. at 194-195.

The problem with the four-factors test is not necessarily that it can render a decision for either government or private speech; the problem with the test is that it is vulnerable to subtle manipulation. It is worth noting that, in a prominent application of the test, the *Rose* court conceded that the test may lead to an "indeterminate result." *See Bredesen*, 441 F.3d at 380 (Circuit Judge Rogers referring to *Rose*, 361 F.3d at 793). The court in *Conti* recognized that the factors of the test are "non-exhaustive." *See Conti*, 835 F. Supp 2d at 57. Moreover, the Supreme Court passed over the four-factors test in its most recent finding of government speech. *See Johanns v. Livestock Mktg. Ass'n*, 544 U.S. 550 (2005).

In theory, the four-factors test promotes a utilitarian framework for the courts to distinguish between government speech and private speech. *See Rose*, 361 F.3d at 792. In practice, the test is suspect because it fails to reconcile fact patterns of similar and recurring controversies. *Compare Rose*, 361 F.3d 786 *with Summers*, 669 F. Supp. 2d 637. Any test that is engineered to render inconsistent results is bunk. *See id*. Both *Rose* and *Bredesen* required analyses of specialty license plate programs comparable to the program at issue, but arrived at polar conclusions. The four-factors test is insufficient at best and defective at worst, and it cannot be faithfully relied upon to determine the present case.

B. The Specialty License Plate Program At Issue Is A Forum For Government Speech.

Parsing government speech from private speech requires a close examination of the forum in which such speech is expressed. *See generally Perry Educ.*, 460 U.S. 37. The Respondent has presumed that the purpose of Gilead's specialty license plate program is to

provide for the expression of private speech. (R. at 16). However, this is a gross speculation that presupposes what the Respondent seeks to establish. The Government's ownership of property does not automatically open that property to the public as a public forum. *See Kokinda*, 497 U.S. at 725. Despite the Respondent's fervor, mere personal desire is not sufficient to transform Gilead's program into something that it is not. *See Perry*, 280 F.3d at 170 (rejecting the plaintiff's proposal for desired specialty license plate "SHTHPNS" did not violate the First Amendment right to freedom of speech).

The Supreme Court has recognized certain nonpublic forums in which the First Amendment does not protect all types of speech. *See Perry Educ*., 460 U.S. at 44. Gilead's program should not qualify as a "limited public forum" established to support a certain class of speakers or to address a particular set of issues. *See Ariz. Life Coalition, Inc.*, 515 F.3d at 969 (*reh'g denied*). Ascribing such a purpose to Gilead's specialty plate program creates an artificial function for which the program was not established. (R. at 6-8). To be sure, the specialty license plate program of Gilead was not created for the purpose of debating ethnic superiority. 42 Gil. Stat. Ann. § 1661.

Contrary to the Respondent's conjecture, Gilead did not establish a "traditional public forum" subject to First Amendment private speech protections. *See Perry Educ*., 460 U.S. at 44. The specialty license plate program of Gilead is not a publicly open forum, and it never has been. (R. at 3). The State of Gilead has always functioned as the operator and regulator of the program. *See Perry Educ*., 460 U.S. at 44. After Gilead approves of, and manufactures a specialty license plate, citizens may choose to show them off on their vehicles. (R. at 3). However, the government does not create a forum for private expression when it seeks to have private entities disseminate its message. *See Bredesen*, 441 F.3d at 378. Nor do the specialty license plates

represent a "metaphysical" forum that facilitates private speech. *See Rosenberger*, 515 U.S. at 830. The specialty license plates occupy a tangible, visible space. (R. at 3 & 12).

Although the Court has not concretely defined or classified all types of forums, it is evident that specialty license plates do not provide a forum that is amenable to First Amendment private speech protections. *See Perry*, 280 F.3d at 166 (referring to *Cornelius v. NAACP Legal Def. & Educ. Fund*, 473 U.S. 788 (1985)). It is not disputed that the specialty license plates are government property. (R. at 22). The State, just like a private owner of property, has the power to preserve its property under its control for the use to which it is lawfully dedicated. *See Perry Educ.*, 460 U.S. at 46 (citing *United States Postal Serv. v. Council of Greenburgh Civic Ass'ns*, 453 U.S. 114, 121 (1981)). Despite the fact that Gilead allows for the independent proposal of license plate designs subject to governmental approval, "selective access" does not transform government property into a public forum. *See id*. at 47.

With respect to State property, Justice O'Connor instructed that the Constitution does not require the government to grant access to all who wish to exercise their First Amendment rights on every type of Government property without regard to the "nature of the property" or to the "disruption that might be caused." *See Cornelius*, 473 U.S. 788 at 800. The Respondent's proposal includes "Gilead, USA" beneath a white supremacy logo. (R. at 12). Indeed, for any speech on any license plate issued in Gilead, the government is implicitly a speaker. *See id*. Surely, the State of Gilead has the right to "say what it wishes" and to select the views that it wants to express. *See Pleasant Grove City*, 555 U.S. 460 at 467 (referring to *Rosenberger*, 515 U.S. at 833). It should follow that Gilead is permitted to refrain from speaking.

By design, Gilead's specialty license plate program is closed to the general public. (R. at 6-8). The program is closed to non-driving citizens of Gilead and those who do not own cars;

individuals who represent a significant demographic but are still immediately barred from access. (R. at 9). The government speech doctrine is readily applicable to the specialty license plate program of Gilead. *See Rust*, 500 U.S. 173. Gilead's program is a forum that is perfectly tailored for government speech, not to the detriment of private speakers, but for the State's legitimate and compelling interests. *See Perry Educ.*, 460 U.S. 37 at 66 (citing *Consol. Edison Co. v. Public Serv. Comm'n*, 47 U.S. 530, 540 (1980)).

II. EVEN IF THE SPECIALTY LICENSE PLATE PROGRAM AT ISSUE IS DETERMINED TO BE A FORUM THAT INVOLVES MIXED SPEECH, THE STATE OF GILEAD MAY REJECT THE RESPONDENT'S PROPOSAL WITHOUT DISCRIMINATING ON THE BASIS OF VIEWPOINT.

To the extent that any specialty license plate program is a mixture of government speech and private speech, it does not follow that government speech authority is extinguished. *See Rose*, 361 F.3d at 794 (concluding that South Carolina's program was a "mixture of government speech and private speech") (citing 36 *U. Mich. J.L Ref*. 35, 97 (2002)). The allegation of unlawful viewpoint discrimination against the State of Gilead must be measured against the disconcerting prospect of an unfiltered and unregulated process for creating license plates, whereby the State's right to effectively regulate its own property and enforce its laws would be greatly compromised. *See Lewis v. Wilson*, 253 F.3d 1077, 1078 (8th Cir. 2001) (ordering the State to issue a specialty license plate that was contrary to state law). The message proposed by the Respondent is racist, and it serves no purpose but for his own desire to provoke the sensitivities of the general public and discriminate against other people, specifically ethnic minorities. (R. at 12).

When the Government speaks, either directly or through private intermediaries, it is constitutionally entitled to make "content-based choices." *See Rosenberger*, 515 U.S. at 833 (citing *Rust*, 500 U.S. 173). Also, government programs can make "aesthetic judgments" and

consider "general standards of decency" with respect to the diverse values of the public. *See National Endowment for the Arts v. Finley*, 524 U.S. 569, 572 (1998). The Respondent's proposal not only attempts to deliver a racist message; it is emblazoned with an image – a white supremacist logo – that provides further justification for the Governor's decision to reject the design. *See id*.

A. The Respondent's Proposal Affronts Legitimate and Compelling Public Policy Interests That The State of Gilead Is Required To Protect.

The specialty license plate program of Gilead is a nonpublic forum, and relevant State legislation serves as a constitutional prior restraint to the Respondent's proposal. *See Perry*, 280 F.3d at 172. Legislation enacted on March 4, 2005 to prohibit discriminatory speech on government property serves as a prior restraint against the Respondent's proposal in August of 2011 to advance racist hate speech on government property. *See id*. at 171. The Respondent's allegations may well harass State law, but they are not sufficient to create First Amendment rights where such rights cannot exist. *See id*. at 173.

Restrictions on private speech that are based on community standards of decency are acceptable if such restrictions are based on objective criteria set forth in advance. *See Ariz. Life Coalition*, 515 F.3d at 972. This is exactly the intention of Gilead's Civil Rights legislation. (R. at 9). To the extent that Gilead's specialty license plate program may result in the combination of government speech and private speech, it does not follow that the State should be compelled to participate in the hate speech proposed by the Respondent, and as a consequence, violate its own laws. The government may speak for itself. *See Johanns*, 544 U.S. at 571.

Without a doubt, the Respondent's racist viewpoint is distinctly private. (R. at 4). Problematically, the lower courts have ruled that the State of Gilead must issue the "WHITE PRIDE STATEWIDE" specialty plate, thus compelling the State to abet the realization of, and

effectively endorse, a blatantly racist license plate. (R. at 29 & 33). This result would flagrantly transgress Gilead Civil Rights legislation, whereby no officer, department or program, while acting under color of state authority, shall advocate or promote discrimination on the basis of race, color or ethnicity. 451 Gil. Stat. Ann. §§ 1984(1)(2). Also, no funds or other property of Gilead may be used in any way that advocates or promotes discrimination. 451 § 1984(3). To approve the Respondent's proposal violates the former statute, and to manufacture the plate violates the latter. (R. at 9 & 10).

When a state government cannot protect its own speech, the consequences are absurd. *See Lewis*, 253 F.3d at 1078. The Eighth Circuit upheld an injunction that required the State of Missouri to issue the plaintiff's license plate "ARYAN-1" because the state had "overly broad discretion" to reject a license plate that was "contrary to public policy." *See id*. at 1080. This confounding decision deals a blow to the State's ability to effectively regulate its property and comply with its laws, and it fails to heed the wisdom of the Supreme Court. *See Perry Educ*., 460 U.S. at 45 (holding that the government may regulate expression in nonpublic forums).

Also, the *Lewis* holding fails to appreciate the purpose of the citizen-representative relationship. *Rose*, 361 F.3d at 795 (discussing the importance of a legislature's "electoral accountability" to its citizens). Surely Gilead's representatives are not given the task of legislating only to make subsequent decisions in direct contradiction of such laws. *Contra Lewis*, 253 F.3d at 1080. Most definitely, the citizens of Gilead do not elect representatives to shrink from the responsibility of exercising discretion, for it is their primary job. (R. at 3 & 13).

Contrary to the suggestions of the *Lewis* court, the Supreme Court has held that it is the very task of Government to "favor and disfavor points of view" on a host of subjects, for it is the main reason citizens elect representatives. *See Finley*, 524 U.S. at 598 (Scalia, J., concurring).

Governor Webber's decision to reject the Respondent's proposal is the natural democratic extension of the citizens' will. (R. at 13). While the State of Gilead has elected not provide Smith's design with the necessary means to become a reality, the Court in *Finley* did not perceive a realistic danger that this sort of discretionary decision-making compromised First Amendment protections. *See Finley*, 524 U.S. at 538.

B. An Examination Of The Program At Issue Reveals Its Nondiscriminatory Character.

A specialty license plate program was found to host viewpoint discrimination when the program involved legislation that enabled a biased distribution of public funds. *See Rose*, 361 F.3d at 797 (finding a biased distribution of revenues from specialty license plates to the detriment of Planned Parenthood). This is an incidental, yet important analysis, because it can potentially expose a State's ulterior discriminatory motive. *See id*. This is not the case in Gilead, for the program at issue does not allocate revenues raised from the sale of specialty license plates with any favoritism. (R. at 7). This is verified by an examination of The Revenue Sharing Fund, whereby the State returns monies to the organization or program for which the specialty plate was issued, and not according to any preferential State interest. Gil. Stat. Ann 42 § 1661(5)(d). Through this fund, monies are returned equally to the groups that provide the State of Gilead or its citizens with a public service. *See id*. Thus far, the Respondent has not established a recognizable organization to which he belongs, let alone the sort of public service it provides to the State or to his fellow citizens. (R. at 4).

"Diversity," if a single viewpoint at all, would naturally allow for the inclusion of other viewpoints. (R. at 3). However, the Respondent's crusade to pit "Celebrate Gilead's Diversity" in direct opposition to "WHITE PRIDE STATEWIDE" reveals the shameless intention of the proposal: to loudly promote discrimination. (R. at 12 & 13). If his message is in fact racist, then

the Respondent has misrepresented that his proposal "commemorates Caucasian heritage." (R. at 3). In doing so, the Respondent has not been forthcoming with the Record. *See id*. It stands to reason the Respondent's viewpoint cannot be discriminated against if it cannot be honestly presented to the Court, for the State is allowed to ensure that its own message is "neither garbled nor distorted." *See Rosenberger*, 515, U.S. at 833. The State of Gilead must safeguard its program against the Respondent's subversive efforts, and it is entitled to ensure that its own message, "diversity," is not disingenuously maligned as an oppressive viewpoint. *See id*.

The State of Gilead does not cling to one particular viewpoint that it wishes to promote above any other; the General Assembly has approved 74 variations of specialty license plates. (R. at 3). At the same time, the State is obligated defend against any improper attempts to undermine its ability to regulate its property and abide by its own laws. Undoubtedly, the State of Gilead may reject the Respondent's proposal, but it may do so for reasons far greater than solely on the basis of viewpoint alone. *See Rust v. Sullivan*, 500 U.S. at 178.

C. The State of Gilead May Reject The Respondent's Proposal For Its Content.

The Governor's decision to reject the Respondent's proposal is valid because the state is entitled to make "content-based choices." *See Rosenberger*, 515 U.S. at 833 (referring to *Rust*, 500 U.S. 173). The Respondent's proposed design gives prominence to a symbol that is readily associated with white supremacy. (R. at 12-13). In conjunction with the message, this logo confirms the raison d'être of the proposal (R. at 12).

The Supreme Court has directly addressed the issue of content rejection. *See Finley*, 524 U.S. 569 (1998). In *Finley*, the Court upheld a provision that permitted the National Endowment for the Arts to consider general standards of decency and respect for diverse public values before electing to fund various art projects. *See id*., (citing 20 U.S.C. § 954 (d)(1). The decision came

after artists had used their grants for works depicting "homoerotic photographs" and another, "Piss Christ," depicting a photograph of a crucifix immersed in urine. *See id*. at 594. Clearly, not all content must be tolerated in forums that are nonpublic. *See id*.; *Perry*, 280 F.3d at 168.

To the extent that artists relied upon government funding to carry out their projects, the experience of the National Endowment for the Arts is familiar to the position of Governor Webber. (R. at 13). Governor Webber, acting as an elected leader of the State, has a duty consider the sensitivities of its citizens, the laws of the State, and the values of the general public before granting, or rejecting, a design for a specialty license plate. *See generally*, *Perry*, 280 F.3d 159. The Respondent's proposal is not categorized within the boundaries of decency or respectable public values, and the Governor's exercise of discretion is hugely justified. (R. at 13).

CONCLUSION

This case does not concern an unconstitutional advance against the First Amendment right to freedom of speech; it is about the protection and the preservation of government speech. As established by the doctrine of government speech, the State of Gilead, via Governor Webber, is entitled to reject "WHITE PRIDE STATEWIDE" without violating the Respondent's First Amendment right to freedom of speech. The Governor's ability to exercise this right has thus far been thwarted by the lower courts' legal error. Such holdings have undermined both the State's ability to regulate its own property and its duty to make decisions in harmony with it own Civil Rights legislation, all the while giving undue credence to the Respondent's misguided speculations as to the actual purposes of Gilead's specialty license plate program.

The First Amendment right to freedom of speech does not protect an unlimited range of expression in nonpublic forums. A functional society requires the establishment of prudent boundaries, and the Supreme Court has acknowledged this necessity time and time again.

Governor Webber has attempted to set such boundaries by his decision to reject the Respondent's proposal.

A judgment for the Respondent would not be a victory for the First Amendment. The message proposed by the Respondent is racist, and it serves no purpose but for a personal desire to provoke State law and discriminate against others. A judgment for the Governor would stand for the reinforcement of Civil Rights legislation, and the democratic process by which such legislation comes to exist.

A finding of viewpoint discrimination within Gilead's specialty license plate program must be measured against the irony of punishing the state for its decision to reject racism, an inherently discriminatory viewpoint. Given the obvious limitations of the specialty license plate forum, viewpoint neutrality requirements beyond those that already exist as a core element of the program are not applicable. The state did not create a forum for the purpose of debate, much less to address the subject of ethnic superiority. Such a determination would insult the competence of the State's General Assembly, and it would breathe purposes and requirements into Gilead's specialty license plate program that simply do not exist.

PRAYER

For these reasons, Petitioner prays this Court reverse the decisions of the courts below and remand for further proceedings.

Respectfully submitted this 8th day of March 2013.

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Exam # 2231
Counsel for Petitioner
Office of the Attorney
General for the State of
Gilead
4 Ocean Bay Road
Ocean Bay, Gilead 99901