CONSTITUTIONAL LAW—THE "CHOOSE-LIFE" SPECIALTY PLATE CASES: STANDING TO SUE WHEN THE GOVERNMENT MANIPULATES PUBLIC DEBATE

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INTRODUCTION

In the Fall 1998 edition of the Radcliffe Quarterly, journalist and attorney Wendy Kaminer announced that “[f]ree speech has been the latest casualty of the abortion wars, suffering attacks from left and right.”¹ She described situations where activist groups pushed for laws or pursued claims that would effectively squash the speech activities of their opponents.² In her view, these actions set a dangerous precedent because they infringe upon “our right to conduct public debates about abortion (and other controversial matters), to engage in political advocacy, and to organize against whatever we regard as immoral or unjust.”³ What Ms. Kaminer did not address, and possibly was not aware of, is that one of the biggest challenges to the First Amendment rights of abortion activists was just around the corner.

In the same year that Ms. Kaminer wrote about the abortion war’s encroachment on free speech rights, the Florida legislature passed its “choose-life” specialty license plate bill.⁴ The bill provided for the manufacture, sale, and distribution of specialty license plate tags featuring the “choose-life” motto. It also set out a plan for the proceeds of the tags to be distributed to organizations that provide adoption services. Florida did not allow those funds to go to agencies “involved or associated with abortion activities” that offer abortion or abortion as a choice.⁵ Subsequently, pro-life organizations began to campaign for the implementation of “choose-life”

². Id.
³. Id.
⁴. See FLA. STAT. ch. 320.08058, § 30 (2002). The “choose-life” specialty license plate bill was the creation of Randy Harris, the County Commissioner of Marion, Florida. The idea was to create a specialty license plate in which the proceeds would go toward the funding and education of women “in crisis pregnancies who would commit to having their babies and placing them for adoption rather than opting for abortion.” Choose Life, Inc., About Us, at www.choose-life.org/story.html (last visited Mar. 1, 2004).
⁵. See FLA. STAT. ch. 320.08058, § 30.
specialty plate programs around the United States. Responding to this legislative activity, both pro-choice organizations and individual pro-choice citizens brought various First Amendment challenges to these statutes. In these cases, the primary dilemma for the courts is the lack of consensus on whether these complaints should even be allowed through the courthouse gate; that is, whether the plaintiffs have standing to sue. This Note analyzes these "choose-life" specialty plate cases and focuses on one of the core legal issues regarding a party's standing to sue: whether individual citizens have standing to challenge the constitutionality of a legislature's issuance of a specialty plate which expresses the legislature's view on a hotly contested issue, the abortion rights debate, on the grounds that it constitutes viewpoint discrimination in violation of the First Amendment of the United States Constitution. 


8. Id.

9. The courts entertaining "choose-life" specialty plate lawsuits hold that plain-
To accomplish its purpose, this Note discusses the Supreme Court's present articulation of the constitutional requirement of standing and its application to the "choose-life" standing cases. Thus, Part I of this Note provides a general commentary on the Supreme Court's current articulation of the standing doctrine and describes the constitutional requirements of standing as well as prudential considerations. Additionally, Part I gives a general background of the overbreadth and prior restraint doctrines of First Amendment cases. Part II of the Note discusses the "choose-life" specialty plate statutes and the three cases of the "choose-life" license plate saga, Henderson v. Stalder (hereinafter Henderson I), Women's Emergency Network v. Bush (hereinafter Bush), and South Carolina Planned Parenthood Network v. Rose (hereinafter Rose). Part III builds on the foundation laid in the previous parts of the Note, paying particular attention to the two main theories expressed in the opinions that lend themselves to polar opposite holdings on the standing issue. Part IV provides an analysis of both these main theories. I assert that both analyses incorrectly characterize the injury that individual pro-choice plaintiffs claim they suffer as a result of "choose-life" specialty plate legislation and, thus, the theories constitute faulty standing analysis. Furthermore, I maintain that when standing is argued to exist in these cases, the plaintiffs lacked organizational and taxpayer standing based on additional Establishment Clause, Free Speech, and Fourteenth Amendment claims; however, these claims and decisions are not the focus of this Note. See Dickenson, 214 F. Supp. 2d at 1313-14 (discussing taxpayer and organizational standing); Henderson, 287 F.3d at 379-82 (for a discussion on taxpayer and organizational standing in the case); Rose, 236 F. Supp. 2d at 566 (recognizing that plaintiffs launched individual as well as organizational challenges based on both the Fourteenth and First Amendments). See generally Jeremy T. Berry, Note, Licensing a Choice: "Choose Life" Specialty License Plates and their Constitutional Implications, 51 Emory L.J. 1605 (2002) (providing a brief commentary on those issues); Sarah E. Hurst, Note, A One Way Street to Unconstitutionality: The "Choose-Life" Specialty License Plate, 64 Ohio St. L.J. 957 (2003) (for a discussion on the viability of the Establishment Clause claims in the "choose-life" specialty plate cases).

10. Henderson, 287 F.3d at 374. In the July 2003 remand the plaintiff applied for, and was denied, a "choose-choice" specialty plate as directed by the Fifth Circuit in January 2003. Henderson v. Stalder, 265 F. Supp. 2d 699 (E.D. La. Jul. 8, 2003). She filed a new complaint, this time challenging the entire specialty plate program, not just the "choose-life" specialty plate statute that was the issue of the Fifth Circuit's original holding. Id. Standing was granted and the entire specialty plate program was declared unconstitutional on these grounds. Id. This Note involves discussion of the original Fifth Circuit decision from 2002. See Henderson, 287 F.3d at 374. See also infra text accompanying notes 73-85 (providing an in-depth discussion of the Henderson chronology).


12. Rose, 236 F. Supp. 2d at 564
“pro-standing” position inappropriately fashions standing by analogizing these novel cases to cases that concern prior restraint injuries or injuries that result from punitive government actions. Finally, Part V goes on to demonstrate that the facts of these cases fit squarely within the requirements of what the Second Circuit has termed “Competitive Advocate Standing” in equal protection cases. Therefore, I urge federal courts to expand this model of standing to encompass free speech claims, such as the claims presented in the “choose-life” specialty plate cases, where a narrowly defined law works to create a free speech benefit for a political group that injures the ability of its political adversary to compete within a specific arena.

I. THE STANDING DOCTRINE IN FREE SPEECH CASES

At their most basic level, the “choose-life” specialty plate cases ask whether an individual plaintiff has made a claim worthy of being heard in a federal court. Not only is this question important because the answer provides finality about whether litigation will occur for the parties involved, but the answer also either narrows or broadens the range of cases that federal courts will entertain. Because the implications of the “choose-life” specialty plate cases are far-reaching, it is important to lay out the foundation of standing jurisprudence in the free speech context in order to appreciate fully the issues addressed in the cases.

A. The Standing Doctrine Generally

Article III of the United States Constitution circumscribes the authority of the federal judiciary by confining its power to include only the determination of actual “cases” and “controversies.” Federal courts have developed various doctrines under this Article

13. See, e.g., Ctr. for Reprod. Law and Policy v. Bush, 304 F.3d 183, 197 (2nd Cir. 2002) (holding that pro-choice plaintiffs have standing to challenge Standard Clause that prohibits “[foreign NGOs] from collaborating with Plaintiffs, [thereby] den[y]ing Plaintiffs the opportunity to compete on an equal footing with opponents of abortion law reform.”); In Re Catholic Conference, 885 F.2d 1020, 1028-29 (2nd Cir. 1989) (“competitive advocate standing” is a kind of an injury “involve[ing] a determination that . . . as a competitor a plaintiff . . . personally competes in the same arena with the party to whom the government has bestowed the assertedly illegal benefit.”); New Alliance Party v. Federal Bureau of Investigation, 858 F. Supp. 425 (S.D.N.Y. 1994) (criteria for competitive advocate standing not met by plaintiff).

14. See supra note 7 (listing the various cases involving challenges to “choose-life” statutes).

III power, such as mootness, standing, ripeness, and political question,\(^\text{16}\) to answer whether a "case or controversy" exists that entitles a plaintiff to federal court jurisdiction.\(^\text{17}\) The doctrine of standing is inferred from Article III\(^\text{18}\) to ensure that the federal judiciary does not render decisions that violate separation of powers principles\(^\text{19}\) and to ensure the "exercise of [ ] power by a federal court" is not simply "gratuitous."\(^\text{20}\) The standing doctrine achieves these goals by enveloping both a constitutional requirement and prudential limits on the exercise of federal jurisdiction.\(^\text{21}\) Once raised, however, it becomes clear that standing is an "amorphous doctrine"\(^\text{22}\) and the existing case law provides little direction for any new standing inquiry.\(^\text{23}\)

The Supreme Court currently utilizes the three-pronged test articulated in \textit{Lujan v. Defenders of Wildlife}\(^\text{24}\) to determine whether


\(^{18}\) See, e.g., Lujan v. Defenders of Wildlife, 504 U.S. 555, 559-60 (1992) (discussing that although Article III simply requires a plaintiff's complaint to be a "case" or "controversy," certain elements must form a determination of "case" or "controversy").

\(^{19}\) \textit{Allen}, 468 U.S. at 752.

\(^{20}\) Simon v. E. Ky. Welfare Rights Org., 426 U.S. 26, 38 (1976) (stating that absent a showing that plaintiff has suffered an individualized injury "likely to be redressed by a favorable decision," standing "would be gratuitous" as opposed to consistent with Article III).

\(^{21}\) \textit{See Allen}, 468 U.S. at 750.


\(^{24}\) \textit{Lujan} v. \textit{Defenders of Wildlife}, 504 U.S. 555, 560-61 (1992). In the seminal case in which the Supreme Court articulated the current standing requirement, environ-
the constitutional requirement of standing has been met. This test asserts that at "its irreducible constitutional minimum" a party seeking jurisdiction in a federal court has the burden of showing: 1) some actual or threatened injury; 2) that can be traced to the challenged action of the defendant, and 3) that is likely to be redressed by a favorable decision. Thus, this test includes the three elements of injury-in-fact, causation, and redressability, each of which has its own independent criteria. Furthermore, Lujan makes clear that standing is "an indispensable part of the plaintiff's case" and that at each stage of litigation the elements of standing must be supported the same way that the elements of any other matter in litigation would need to be supported.

The first requirement of standing, injury-in-fact, demands that a plaintiff must suffer "an invasion of a legally protected interest which is (a) concrete and particularized, (b) and actual or imminent, not 'conjectural' or 'hypothetical.'" This means that although an individual's claimed injury might be merely an "identifiable trifle," a party seeking review must still be adversely affected or aggrieved by a defendant's actions. Moreover, so long
as the injury is particular to that individual the court cannot deny standing "simply because many people suffer the same injury."  

Causation, the second requirement of standing, necessitates that the alleged injury is "fairly traceable" to the challenged action of the defendant and not the result of independent action of some third party not before the court. Scientific certainty that the defendant's actions caused the precise harm suffered by the plaintiff is not needed to meet the causation element. Rather, the plaintiff must only establish that there exists a "substantial likelihood" that the defendant's conduct caused the plaintiff's harm.

The final constitutional requirement of standing is redressability. Redressability requires that it "is likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision." However, the case law is not clear as to what constitutes "likely" as opposed to "speculative" redress.

Furthermore, *Lujan* makes clear that when the suit is a constit-
stitutional challenge to the legality of government action or inaction “the nature and extent of facts that must be averred . . . or proved . . . in order to establish standing depends considerably upon whether the plaintiff is himself an object of the action or forgone action at issue.”40 If the plaintiff is the object of the action, courts are usually quick to hold that the action or inaction has caused the plaintiff’s alleged injury and “that a judgment preventing or requiring the action will redress it.”41 Conversely, although the plaintiff’s claim is not precluded when he or she is not the object of the government action or inaction challenged, standing in these cases is “substantially more difficult to establish.”42

In addition to the constitutional requirements of standing addressed above, federal courts also consider prudential interests.43 Prudential considerations federal courts take into account when making standing determinations include the general prohibition against one litigant raising another person’s legal rights,44 the rule barring adjudication of generalized grievances more appropriately addressed in the representative branches,45 and the requirement

40. Lujan, 504 U.S. at 561.
41. Id. at 561-62.
42. Id. at 562. Lujan articulated that when a plaintiff’s asserted injury arises from the government’s allegedly unlawful regulation or lack of regulation of someone else (such as an agency), causation and redressability usually turn on the response of the regulated or regulable third party to the government action or inaction. Id. It becomes the burden of the plaintiff to adduce facts showing that those choices have been or will be made in such manner as to produce causation and permit redressability of injury. Id. However, Lujan did not address what causation and redressability would turn on in a case where the plaintiff’s asserted injury arose from the government’s grant of a benefit to someone else – the situation confronted in the “choose-life” specialty plate cases.

43. John C. Reitz, Standing to Raise Constitutional Issues, 50 AM. J. COMP. L. 437, 439-43 (2002) (discussing the sources of the standing rules, including prudential considerations). Reitz’s article discusses the sources of the standing doctrine, including the history of prudential considerations. He states, “for most of its history, the Court has emphasized primarily ‘prudential’ bases for standing – that is, the Court has claimed that the standing limitations result chiefly from the Court’s own voluntary policy of self-restraint for various reasons. Only in the last three decades has the separation of powers argument emerged as the chief foundation of the standing rules.” Id. at 442 (citation omitted).

44. Valley Forge Christian Coll. v. Am. United for the Separation of Church and State, 453 U.S. 464, 474-75 (1982). See also Singleton v. Wulff, 428 U.S. 106, 113-14 (1976) (stating that the reason for the prohibition on third party standing includes the fact that courts should not adjudicate third party rights unnecessarily or “it may be that in fact that the holders of those rights either do not wish to assert them, or will be able to enjoy them regardless of whether the in-court litigant is successful or not”).

45. Valley Forge Christian Coll., 453 U.S. at 474. See also Ryan Guilds, A Jurisprudence of Doubt: Generalized Grievances as a Limitation to Federal Court Access, 74 N.C. L. REV. 1863, 1888 (1986). Although Guilds points out that courts are uncertain whether to treat the standing prohibition against generalized grievances as a constitu-
that a plaintiff's complaint fall within the "zone of interests" protected by the law invoked.\textsuperscript{46} However, because prudential considerations are not a required part of standing, federal courts have much more flexibility in their application.\textsuperscript{47} Thus, in the interest of justice, courts will often relax these requirements.\textsuperscript{48}

B. The Role of Overbreadth and Prior Restraint in Standing Cases

In free speech cases, the doctrine of overbreadth was developed to aid litigants in establishing standing in instances when an overly broad law threatens to deny the litigant free speech protections secured by the First Amendment.\textsuperscript{49} However, considerable debate exists over when exactly the doctrine of overbreadth applies in a particular case. Some federal courts treat it as a relaxation of the ordinary standing elements.\textsuperscript{50} Other federal courts treat overbreadth as a relaxation of only the injury-in-fact element of stand-

\begin{itemize}
  \item \textit{Id.} (footnote omitted).
  \item 46. \textit{Valley Forge Christian Coll.}, 453 U.S. at 475.
  \item 47. \textit{Id.} at 471-72. \textit{See also} Reitz, \textit{supra} note 43, at 442.
  \item All U.S.-American doctrines of justiciability are permeated by a strong sense that the courts must exercise self-restraint in exercising their powers of judicial review in order to temper inevitable conflicts with the other branches of government. No doubt this attitude springs at least in major part from the fact that the U.S. Constitution does not explicitly provide for judicial review and the courts have therefore thought it important to defend their claim of that power by trying to avoid overplaying their hand. Because the prudential tests for standing are not required by the Constitution, they have not been applied with much rigor. They are often not mentioned in the Court's opinions on standing. Moreover, they overlap to some extent with the constitutional requirements. For example, strict application of the personal injury test should rule out most generalized grievances, but as the Court has been willing to recognize intangible harms, some of which are widely shared, it has had to abandon the policy against general grievances in many cases. In order to facilitate judicial review at the behest of private litigants, the Court has recognized many third-party claims in violation of the prudential policy against them. \textit{Id.}
  \item 50. \textit{Vincent}, 466 U.S. at 796-98. \textit{See also} Harris v. Evans, 20 F.3d 1118, 1122 n.5
\end{itemize}
ing.51 Still other courts treat overbreadth as an additional prudential concern that a federal court may choose to apply.52 Despite this debate, what is clear is that overbreadth is "a judicially created doctrine designed to prevent the chilling of protected expression."53 In other words, the doctrine of overbreadth reasons that an unconstitutional restriction on expression might stop parties not before the court from engaging in protected speech and, therefore, those parties would be effectively denied judicial review.54

Constitutional scholar Richard H. Fallon has distilled the situations in which the Supreme Court allows facial challenges on the grounds of overbreadth.55 First, courts allow overbreadth challenges when the government has placed an obstacle or "roadblock" in the way of expressive activity or speech in order to control what it believes is a compelling interest.56 Second, it applies when a state regulates speech or expressive activity based on the belief that the category is not constitutionally protected.57 Third, overbreadth applies when the statute's true goal is to promote state interests unrelated to the content of speech or expressive activity, but the statute incidentally affects speech rights.58 Finally, it applies where a stat-
Another rule that applies to free speech standing issues is the doctrine of prior restraint established in *Near v. Minnesota*.\(^{60}\) Principally, prior restraints are "administrative and judicial orders forbidding certain communications when issued in advance of such time as communications are to occur."\(^{61}\) The prior restraint doctrine is a prohibition that places a high presumption of invalidity on those things that constitute a prior restraint.\(^{62}\) It is derived from the First Amendment\(^{63}\) which states that "Congress shall make no law . . . abridging the freedom of speech."\(^{64}\)

A prior restraint violation is not a trivial mistake. In *Nebraska Press Association v. Stuart*,\(^ {65}\) Justice Burger wrote, "prior restraints on speech and publication are the most serious and the least tolerable infringement on First Amendment rights. Prior restraint . . . has an immediate and irreversible sanction."\(^ {66}\) The federal courts have recognized two different forms of prior restraints: 1) judicial injunctions prohibiting speech,\(^ {67}\) and 2) burdens placed on communication before the communication is made.\(^ {68}\) In the case of judicial injunctions that prohibit protected speech, the court has held "[s]ubsequent civil or criminal proceedings, rather than prior re-

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10 (1946) (determining unconstitutional Alabama statute aiming to protect property rights of owners by making it a crime to enter or remain on premises after being told not to because free speech interests have preferred statutes).

59. Fallon, *supra* note 55, at 866. See, e.g., City of Lakewood v. Plain Dealers Publ'g Co., 486 U.S. 750, 757-69 (1988) (holding unconstitutional ordinance granting mayor the authority to grant or deny permit to place news rack on private property because it has danger of "chilling" constitutionally protected speech).


63. Additionally, the Court has held that the First Amendment applies to the states as well as the federal government through the Due Process clause of the Fourteenth Amendment. E.g., *Thornhill v. Alabama*, 310 U.S. 88, 95 (1940).

64. *U.S. Const.* amend. I.


66. *Id.*


68. Generally, this will mean that a permit system or licensing requirement is valid only if the discretion of the licensing official is limited to questions of times, place, and manner, i.e. the discretion is content-neutral. See, e.g., *Cox v. New Hampshire*, 312 U.S. 569, 574-76 (1941). *See also* Kevin Francis O'Neill, *A First Amendment Compass: Navigating the Speech Clause with a Five-Step Analytical Framework*, 29 Sw. U. L. Rev. 223, 270-78 (2000) (for a general discussion on the two forms of prior restraint).
straints [i.e. the injunction or gag order], ordinarily are the appropriate sanction for . . . misdeeds in the First Amendment context.69

The doctrines of overbreadth and prior restraint are often used together when determining standing in the free speech context.70 Specifically, courts consider overly broad laws that grant "unfettered discretion" in a licensing official to grant or deny licenses to be prior restraints on speech because they "chill" the ability of a particular speaker to speak before speech is to occur.71 One could say that in the First Amendment context the injury of the overly broad statute or law is the prior restraint on speech.

II. THE "CHOOSE-LIFE" SPECIALTY PLATE STATUTES AND CASES

The "choose-life" specialty plate legislation enacted throughout the United States is strikingly similar. The basic premise behind "choose-life" specialty plates legislation is threefold: 1) the statutes allow those individual car owners desiring to disseminate the "choose-life" message the ability to do so via the purchase and display of a "choose-life" specialty plate, 2) the statutes guarantee that the revenue generated from the sale of the specialty plates will go solely toward the funding of adoption services for women in "crisis pregnancies," and 3) the statutes specifically prohibit any generated revenue from going to agencies that offer counseling on abortion as a choice or abortion services.72 Before launching into an analysis of the positions on standing contained in the "choose-life" specialty plate cases, this part focuses attention on the underlying statutes at issue and the substance of the opinions in the cases that concern them. Thus, this section lays out the context necessary to apply the aforementioned standing principles to the "choose-life" specialty plate cases.

70. Broadrick v. Oklahoma, 413 U.S. 601, 611-12 (1973) (discussing that overbreadth challenges are entertained when there is a prior restraint violation).
72. See, e.g., FLA. STAT. ch. 320.08058, § 30 (2002); LA. REV. STAT. ANN. § 47:463.61 (West 1999); S.C. CODE ANN. § 56-3-8910 (Law. Co-op. 2002). Hawaii is an example of a state that has issued "choose-life" specialty plates through legislation that is not specifically aimed at creating a "choose-life" plate. Under the Hawaii scheme, any non-profit organization can apply for a specialty plate if they meet certain criteria. The directors of finance for the counties in Hawaii approve or deny specialty plates in accord with that statute. Therefore, although the scheme in Hawaii and states with similar provisions might raise speech issues, it does not raise the standing issues that are the subject of this note. HAW. REV. STAT. § 249-9.3 (2003).
A. The Louisiana Scheme

Before the Fifth Circuit declared the entire specialty plate scheme of Louisiana unconstitutional in the summer of 2003,\(^{73}\) Louisiana had a practice that the issuance of any specialty license plate needed to be secured by an act of the legislature.\(^{74}\) One specialty plate statute under this scheme was the Louisiana "choose-life" specialty plate statute that required all revenue generated from the sale of the "choose-life" specialty plates go to a fund authorized to distribute grants to organizations meeting the statute's criteria.\(^{75}\) The statute also created a "Choose-Life Advisory Council" to design the license plates and make decisions about what organizations will receive grants.\(^{76}\) The statute required the council's membership be composed of members from known pro-life organizations, including the American Family Association, the Louisiana Family Forum, and Concerned Women for America.\(^{77}\)

Plaintiffs, including individual Louisiana taxpayers and Planned Parenthood, brought a suit in August of 2000 challenging the constitutionality of the Louisiana statute.\(^{78}\) This case was the first of the three "choose-life" specialty plate cases, and although the case was ultimately vacated with instructions that the plaintiffs amend their complaint in order to have the substantive claim decided by the Eastern District of Louisiana,\(^{79}\) the reasoning of the Fifth Circuit's original standing decision articulates the positions for and against individual standing when a plaintiff alleges he or she is injured by a particular speech benefit granted to another group.\(^{80}\) The plaintiffs alleged that the statute "abrogate[d] their right to free speech, constitute[d] an impermissible establishment of relig-


\(^{79}\) Henderson, 265 F. Supp. 2d at 699 (E.D. La. 2003). See supra note 7 and accompanying text.

\(^{80}\) Henderson, 287 F.3d at 374.
ion, and deny[d] them their right to due process in violation of the First and Fourteenth Amendments of the United States Constitution. 81 The plaintiffs sought a declaratory judgment that the statute is unconstitutional and an injunction against its enforcement. 82 In its original decision on appeal, the Fifth Circuit rejected all the plaintiffs' arguments, finding that the plaintiffs lacked standing on all grounds averred to challenge the "choose-life" specialty plates. 83 In particular, the majority held that the individual plaintiff, Keeler, lacked standing to challenge the statute based on grounds that the statute constituted impermissible viewpoint discrimination on the part of the legislature, because even if the court declared the statute unconstitutional there would be no redress for her injury. 84 In contrast, the dissent argued that plaintiff Keeler had standing to challenge the specialty plate statute because redress would come in the form of "creat[ing] a level playing field for all affected by the statute." 85

B. The Florida Scheme

In Florida, the legislature enacted the "choose-life" specialty plate legislation pursuant to a Florida law that allows organizations desiring a specialty license plate to request a plate after meeting certain preliminary criteria. 86 The legislature can either grant or deny the request. 87 Although the goals of the Florida "choose-life" specialty plate statute are almost identical to the Louisiana goals, 88 the Florida statute has a different scheme for the distribution of the funds, though the intended beneficiaries are still non-profit pro-life adoption organizations. 89 Under Florida's scheme, fees generated from the sale of the specialty license plates are distributed to each county "in the ration that the annual use fees collected by each county bears to the total fees collected for the plates within the state." 90 To date, it has been reported that because of this program

81. Id. at 377. See also Henderson, 112 F. Supp. 2d at 591.
82. Henderson, 112 F. Supp. 2d at 592.
83. Henderson, 287 F.3d at 379-81 (stating that both the individual and the state plaintiffs lacked standing).
84. Id. at 387.
85. Id. at 392 (Davis, J., dissenting).
86. FLA. STAT. ch. 320.08053 (2002).
87. Id.
88. See supra text accompanying notes 74-77.
89. FLA. STAT. ch. 320.08058 (2002).
90. Id. Although not central to this Note's discussion of standing, Florida's scheme attempts a more democratic distribution than other "choose-life" specialty plate
over two million dollars has been generated for Florida pro-life, non-profit crisis-pregnancy organizations. 

In *Bush*, the Eleventh Circuit rejected the argument presented by individual plaintiffs Becker and Jackson that the State of Florida violated their First Amendment rights "by providing a public forum for pro-life car owners to express their political views but not providing a similar forum for pro-choice car owners." In keeping with the *Henderson* decision, the Eleventh Circuit rejected the plaintiffs' complaint on redressability grounds. The *Bush* court also rejected the individual plaintiffs' arguments for lack of a cognizable injury-in-fact. In the Eleventh Circuit's view, the plaintiffs did not claim an injury, and an injunction against the enforcement of the Florida "choose-life" specialty plate statute would not "in any way advance Appellant's opportunity to speak."

C. *The South Carolina Scheme*

In South Carolina, the "choose-life" specialty plate act requires the South Carolina Department of Public Safety to issue the specialty plate to any person requesting the plate. As in Louisiana and Florida, proceeds from the funds are to be distributed to local pro-life, non-profit agencies that provide "crisis pregnancy" pro-

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91. Choose Life, Inc. Website, at http://www.choose-life.org/story.html (last visited Mar. 1, 2004). Choose Life, Inc. describes the funds raised in Florida as follows: "As of September 2003, over $2,000,000.00 has been raised and the tags continue to sell, raising over $70,000.00 per month." Id.


93. *Bush*, 323 F.3d at 942.

94. Id. at 947.

95. Id. at 946-47. In rejecting the notion that the plaintiff articulated an injury in fact, the Eleventh Circuit held that "the state of Florida has not denied Appellants' access to the specialty license plate forum . . . [nor] rejected Appellants' application for a specialty license plate." Id.

96. Id.

grams. However, unlike the Florida and Louisiana statutes, the South Carolina "choose-life" specialty plate statute is separate from the statute authorizing other specialty plates. Under South Carolina's pre-existing general specialty license plate statute, non-profit organizations apply for license plates promoting their group and the group's license plates are only available to members of the "certified" organization. The South Carolina "choose-life" specialty plate program, however, was created and approved by an act of the legislature, thereby avoiding the earlier system designed to allow non-profit organizations to obtain permission for access to the license plate forum through a legislatively authorized process.

In Rose, the district court was asked to determine whether the South Carolina legislature violated the Constitution when it enacted South Carolina's "choose-life" specialty plate statute. On cross motion for summary judgment, the Rose court rejected the arguments posited by the defendant that the plaintiffs lacked standing to bring the free speech claim against them. More specifically, the Rose court affirmatively adopted Judge Davis' argument for standing presented in Henderson I, holding that in a case where the legislative process "uncontrolled by any standards . . . allegedly selects one viewpoint over all others on a particular topic" that the plaintiff may bring a facial challenge to the offensive statute without meeting the traditional standing requirements.

III. THE TWO CENTRAL POSITIONS ON THE STANDING ISSUE

The three cases introduced above articulate the current theories of standing where an individual citizen claims viewpoint discrimination by the government when it grants access to a speech

98. Id.
100. S.C. CODE ANN. § 56-3-8000(D) (Law. Co-op. 2002).
102. Rose, 236 F. Supp. 2d at 574 (declaring South Carolina "choose-life" plate act impermissible viewpoint discrimination and therefore unconstitutional).
103. Id. at 565.
105. Henderson, 287 F.3d at 387 (Davis, J., dissenting).
forum to individuals whose speech the plaintiff does not like or agree with. This part distills the two central arguments.

A. *The Pro-Standing Side of the Debate*

In his dissenting opinion in *Henderson I*, Judge Davis articulated a pro-standing position regarding individual First Amendment standing in the “choose-life” specialty cases that was later utilized, in part, by the *Rose* court. According to Judge Davis’ rationale, the injury that plaintiff Keeler complained of in *Henderson I* is that the “choose-life” specialty plate statute passed by the legislature “allows for expression of the choose life message on state prestige license plates, without allowing for the expression of the opposing pro-choice viewpoint in the same forum.” Judge Davis articulates that it is evident from the facts of *Henderson I* that the Louisiana legislature will not pass a statute authorizing a specialty plate with the pro-choice view. He opines that the Equal Protection Clause and the First Amendment afford individuals the security that the government may not grant the use of a forum to people whose views it finds acceptable, but deny use to those wishing to express less favorable or more controversial views. He emphasizes, “[t]here is ‘equality in the field of ideas,’ and government must afford all points of view an equal opportunity to be heard.”

According to Judge Davis, individual plaintiff Keeler’s claim in *Henderson I* is one that involves a free speech issue and, therefore, the court should apply an “expanded notion of standing.” Relying on *City of Lakewood v. Plain Dealer Publishing Co.*, Judge

107. *Id.* at 568; *Henderson*, 287 F.3d at 387 (Davis, J., dissenting).
108. *Henderson*, 287 F.3d at 387 (5th Cir. 2002) (Davis, J., dissenting).
109. *Id.* at 387 n.1 (Davis, J., dissenting).
110. *Id.* at 387 (Davis, J., dissenting) (citing as authority *Police Dep’t v. Mosley*, 408 U.S. 92, 96 (1972)).
111. *Id.* (Davis, J., dissenting) (quoting *Police Dep’t v. Mosley*, 408 U.S. at 96.
112. *Id.* at 388 (Davis, J., dissenting). *See also Rose*, 236 F. Supp. 2d at 568-70 (discussing how it agrees that an expanded notion of standing applies in this type of case and also viewing the cases cited by Judge Davis as dispositive).
113. *City of Lakewood v. Plain Dealer Publ’g Co.*, 486 U.S. 750 (1988). Plain Dealer Publishing challenged a Lakewood city ordinance that authorized the mayor to grant or deny the applications of publishers who sought permission to place newspaper racks on public property. *Id.* The ordinance required Lakewood’s mayor to give an explanation if he denied a permit, but, by the terms of the ordinance he could operate within whatever “terms and conditions” he “deemed necessary and reasonable.” *Id.* at 754. The Supreme Court held that the Lakewood ordinance was facially invalid because the mayor had “unfettered” discretion to discriminate in granting permits based on the content of a publisher’s publications or the viewpoints of those publications. *Id.* at 764. Moreover, the Court held that this kind of discretion encouraged publishers to
Davis reasons that a facial challenge to a licensing law should be brought whenever a party is subject to a law that “vests unbridled discretion” in a governmental official or agency to permit or deny a license based on content or viewpoint and “the law has a close nexus to expression.”\textsuperscript{114} He states that although in most instances the discretionary power to grant or deny a license is given to a government actor under the statute, he sees “no reason why the principle should not be applied [to the facts of Henderson I].”\textsuperscript{115} The fact that the legislature makes the decision to grant or deny a license is not distinguishable from the current case law that allows facial challenges where the discretionary agent is one that was granted its power from the legislature.\textsuperscript{116}

Furthermore, Judge Davis reasons that it is irrelevant whether a specific statute creates Louisiana’s specialty license plate program.\textsuperscript{117} He cites Neimotko v. Maryland\textsuperscript{118} in support of his argument that an unfair policy and practice can emerge where “unfettered discretion” is the standard for granting a license in violation of the Constitution.\textsuperscript{119}

Judge Davis further argues that under traditional analysis Keeler would have standing because the majority was mistaken in its framing of her injury and in its conclusion that her claim does not request a redressable remedy.\textsuperscript{120} Comparing Orr v. Orr\textsuperscript{121} and censor their publications or to “play nice” with the mayor in order to obtain approval of their licensing requests. \textit{Id.} The Court opined that cities can require licensing of news racks on public property and reasonable restrictions on that license. \textit{Id.} However, it made clear that cities cannot make obtaining a license subject to the unchecked discretion of one public official. \textit{Id.}

\begin{itemize}
\item 114. \textit{Henderson}, 287 F.3d at 388 (Davis, J., dissenting) (citing \textit{Lakewood}, 486 U.S. at 755-56).
\item 115. \textit{Id.} (Davis, J., dissenting).
\item 116. \textit{Id.} at 389 (Davis, J., dissenting) (citing \textit{Shuttlesworth} v. \textit{Birmingham}, 394 U.S. 147 (1969)).
\item 117. \textit{Id.} at 389 (Davis, J., dissenting).
\item 118. \textit{Neimotko} v. \textit{Maryland}, 340 U.S. 268 (1951). A group’s application to a city council for permits to use a city park for Bible talks was denied, for no apparent reason except the city council’s disdain or disagreement with the group’s opinions. \textit{Id.} at 272. Subsequently, the group members were convicted on charges of disorderly conduct for having public speeches and meetings without a permit. \textit{Id.} at 270. There was no evidence of disorder, violence, threat of violence or riot. \textit{Id.} at 271. Also, there was no official ordinance that regulated the park’s use, just a practice that developed whereby permits had to be obtained by the park commissioner and city council. \textit{Id.} at 269. The Supreme Court allowed the facial challenge to go forward. \textit{Id.} at 273.
\item 119. \textit{Henderson}, 287 F.3d at 389 (Davis, J., dissenting).
\item 120. \textit{Id.} at 390 (Davis, J., dissenting). Although the \textit{Rose} court clearly agrees with Judge Davis’ dissent that an expanded notion of standing allows for a facial challenge to the “choose-life” plate statute, the district court in \textit{Rose} also favorably cited
\end{itemize}
Arkansas Writers' Project, Inc. v. Ragland\(^{122}\) to the facts in Henderson I, Judge Davis concludes that when a law grants a privilege related to speech to a select group it is really just "manipulating the playing field for speech" and placing "a burden on the free speech rights of [the plaintiff]."\(^{123}\) When this happens, removal of the discriminatory program redresses the injury because it simply "creates a level playing field."\(^{124}\) This is consistent with Orr and Ragland, he maintains, because in those cases redress came in the form of removing the unconstitutional benefit from the beneficiary rather than granting the unconstitutionally denied benefit to the plaintiff.\(^{125}\)

Moreover, Judge Davis states that the "choose-life" statute is like the sales tax exemption in Ragland that grants a speech privilege to a select group of individuals.\(^{126}\) He claims that in Henderson

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121. Orr v. Orr, 440 U.S. 268-272 (1979). In Orr, an Alabama statute granted a benefit to wives or recently divorced women by excluding them from having to pay alimony to their husbands or ex-husbands. Id. at 270. One ex-husband challenged the statute on equal protection grounds. Id. at 271. The Supreme Court declared the statute unconstitutional reasoning that the statute was not substantially related to the goal of helping needy spouses or reducing the historical disparity between women and men that is caused by discrimination against women. Id. at 282-283.

122. 481 U.S. 221 (1987). Arkansas imposed a tax on receipts from the sale of tangible personal property, but exempted, among other things, newspapers and "religious, professional, trade, and sports journals and/or publications printed and published within this State." Id. at 224. A publisher of a general interest magazine that included articles on subjects, including religion and sports, brought suit arguing that the tax exemption violated the First and Fourteenth Amendments. Id. at 225. The publishers sought a refund of the sales taxes it had paid since 1982. Id. The major force of the publisher's argument was that subjecting its magazine to the sales tax, while sales of newspapers and other magazines were exempt, imposed a free speech penalty on the publisher. Id. at 226. The Supreme Court held that the publisher had standing to challenge the Arkansas sales tax scheme. Id. Moreover, the Court rejected the argument that the publisher did not assert a redressable injury because the publisher did not publish a newspaper or a religious, professional, trade, or sports journal. Id. at 227. In the Court's view, underinclusive statutes would be isolated from constitutional challenge if the plaintiff's challenge were denied. Id. at 233. See also Henderson, 287 F.3d at 391 (Davis, J., dissenting). According to Judge Davis, the state in Ragland argued that declaring the statute invalid would afford the appellant no relief because it would deny the exemption to those the statute was designed to benefit; it would not remove the offensive tax on the appellant. Id. The Supreme Court, he points out, rejected that reasoning in Ragland because "such a proposition would effectively insulate under inclusive statutes from constitutional challenge." Id.

123. Henderson, 287 F.3d at 391 (Davis, J., dissenting).

124. Id. at 392.

125. Id. at 391.

126. Id.
I, as in Orr and Ragland, it is "immaterial" whether the individual plaintiff would derive a benefit if her claim were successful because "this constitutional attack holds the only promise of escape from the burden on her free speech rights that derive from the challenged statute."\(^{127}\)

B. **The No-Standing Side of the Debate**

The no-standing position in the debate was first articulated in *Henderson I* and later solidified in the *Bush* decision.\(^{128}\) There are two basic theories to this contention that are addressed in turn. The first position is that individual plaintiffs lack standing to sue because the injury complained of—the inability to express one's pro-choice view within a state created license plate forum—could not be redressed by a remedy that sought to declare the statute unconstitutional.\(^{129}\) According to this view, declaring the statute unconstitutional cannot redress the injury because it does not grant access to the speech forum and only prohibits the speech of others.\(^{130}\) The other position involves the injury-in-fact prong of standing.\(^{131}\) According to this theory, the plaintiffs have not alleged an injury-in-fact because they have not applied for and subsequently been denied a specialty plate.\(^{132}\) Because of this, the position holds, the state cannot be alleged to have denied plaintiffs a speech benefit.\(^{133}\)

In her concurring opinion in *Henderson I*, Judge Jones manages to provide the most exhaustive articulation of the "no-standing" position on redressibility. In that opinion, she reiterates the Supreme Court's current enunciation of the elements used to determine standing: that at its "irreducible minimum" standing requires a plaintiff to show that he or she has "suffered an injury in fact," that "the injury is fairly traceable to the defendant's actions," and the injury "will likely be redressed by a favorable decision."\(^{134}\) In response to the plaintiff's challenge in *Henderson I* that sought a preliminary injunction, she states in language later adopted by the Eleventh Circuit that "even if the Choose-Life statute is declared

127. *Id.* at 392.
129. *Henderson*, 287 F.3d at 381; *Bush*, 323 F.3d at 947.
130. *Bush*, 323 F.3d at 947.
131. *Id.* at 946-47.
132. *Id.* at 947.
133. *Id.*
unconstitutional, [the plaintiff's] complained of injury would not be redressed as that remedy will not provide [plaintiff] a forum in which to express her pro-choice view."¹³⁵ In other words, Judge Jones claims that free speech jurisprudence traditionally holds the remedy for a speaker's unjust exclusion from a forum is to admit the speaker.¹³⁶ She opines that an injunction that would require the removal of pro-life speakers runs contrary to the law of free speech because it censors those speakers and does nothing to provide a forum for the plaintiff who has complained of an injury-in-fact in the form of viewpoint discrimination by government officials.¹³⁷

Judge Jones' concurring opinion, however, does more than state her position's rationale for why standing does not exist in the "choose-life" specialty plate context. She uses her platform to scrutinize directly Judge Davis' dissent in Henderson I, and, by implication, the position later articulated in Rose.¹³⁸ For example, she questions the use of Orr v. Orr¹³⁹ and Arkansas Writers' Project, Inc. v. Ragland¹⁴⁰ as precedent for the pro-standing position. She maintains that although these two cases involve parties that claimed injuries resulting from the grant of a statutory benefit to others, they are distinguishable because declaring the statute unconstitutional in both these cases only presented the "possibility" that the plaintiff's injuries might not be redressed.¹⁴¹ However, she argues that the relief requested by the plaintiff would have "no possibility whatsoever" of redressing the complained of injury because the speech forum would be nixed.¹⁴²

Furthermore, she argues that the plaintiff's claim does not

¹³⁵. Id. at 381. See also Bush, 323 F.3d 937 at 947 (holding that "[r]emoving pro-life speech from the forum does not in any way advance Appellants' opportunity to speak."). ¹³⁶. Henderson, 287 F.3d at 387 (Jones, J., concurring). ¹³⁷. Id. See also Bush, 323 F.3d at 947. Although the Eleventh Circuit does not maintain that the alleged injury-in-fact is cognizable, it clearly adopted the same rationale as Judge Jones on the redressibility issue when it held that redress is not possible because the requested injunction would only remove pro-life speech and do nothing to advance the allegedly injured speech, and that redress is problematic because the First Amendment does not require the state to provide a speech forum for speakers who have not requested an opportunity to speak. Id. ¹³⁸. Planned Parenthood v. Rose, 236 F. Supp. 2d 564 (D.S.C. 2002). ¹³⁹. Orr v. Orr, 440 U.S. 268, 272-73 (1979). See also supra note 121. ¹⁴⁰. Ark. Writers' Project, Inc. v. Ragland, 481 U.S. 221, 227 (1987). See also supra note 122. ¹⁴¹. Henderson, 287 F.3d at 386 (Jones, J., concurring). For example, if in Orr the state decided to impose the alimony requirement regardless of gender or, if in Ragland if the state decided to tax all publishers. ¹⁴². Id.
“hold the only promise of escape from the burden that derives from the challenged statutes.”¹⁴³ According to Judge Jones, the plaintiff could only be in “the same position as the appellant in Orr” if she challenged the total statutory scheme rather than this one statute.¹⁴⁴ Thus, “[f]avorable redress could then result either in the state’s allowing her to place the pro-choice sentiments on specialty license plates or in the state’s shutting down the alleged First Amendment forum by banning, or ceasing to sponsor, all specialty plates.”¹⁴⁵

Judge Jones also responds to the claim of an expanded notion of standing. She effectively declares that the claim that an expanded notion of standing exists is simply wrong. In her view, a First Amendment facial challenge to a statute is not a challenge where “[the standing] requirements of injury-in-fact, causation, and redressability need not be met ... these requirements are not optional.”¹⁴⁶ The relaxation principle is a “prudential standing principle”¹⁴⁷ and really just a “species of third party standing (jus tertii), which we have recognized as a prudential doctrine.”¹⁴⁸ In her view, Keeler does not meet the redressability prong of standing, so the question of whether the doctrine of overbreadth applies is immaterial.¹⁴⁹

Additionally, she argues that in the Henderson I dissent Judge Davis incorrectly applied case law to support his contention that a relaxed standing principle should apply and override the traditional standing requirement.¹⁵⁰ In her view, the plaintiffs’ injuries involved criminal convictions under laws that unconstitutionally violated free speech in all but one of the cases cited by the dissent.¹⁵¹

¹⁴³. Id. (quoting Orr 440 U.S. 268 at 273).
¹⁴⁴. Id. See also Women’s Emergency Network v. Bush, 323 F.3d 937, 947 (11th Cir. 2003) (holding “we will not instruct the State to close the entire specialty license plate forum because Appellants have not challenged the entire forum.”)
¹⁴⁵. Henderson, 287 F.3d at 386 (Jones, J., concurring).
¹⁴⁶. Id. at 384.
¹⁴⁷. Id. at 385 n.4.
¹⁴⁸. Id. (Jones, J., concurring).
¹⁴⁹. Id. at 384-85 (Jones, J., concurring).
¹⁵⁰. Id. at 385 (Jones, J., concurring).
¹⁵¹. Id. (Jones, J., concurring). See generally Shuttlesworth v. Birmingham, 394 U.S. 147 (1969) (reversing conviction for violating Birmingham ordinance that made it an offense to participate in parade, precession, or public demonstration without a permit); Freedman v. Maryland, 380 U.S. 51 (1965) (reversing conviction for failure to submit a film to Baltimore board of censors); Niemotko v. Maryland, 340 U.S. 268 (1951) (reversing convictions for disorderly conduct for having bible discussion in a public park); Thornhill v. Alabama, 310 U.S. 88 (1940) (reversing conviction for loitering under Alabama Act); Lovell v. City of Griffin, 303 U.S. 444 (1938) (reversing con-
Jones distinguishes *Lakewood*, the one case that did not involve criminal sanction of a plaintiff, from *Henderson I* on the ground that the "statute obstructed the publisher's First Amendment rights" by requiring the plaintiff to pay taxes and incur an additional burden that other magazines did not incur. In her view, plaintiff Keeler does not complain of an injury analogous to the one in *Lakewood* because Louisiana's "choose-life" specialty plate statute does not require Keeler to take an affirmative action that burdens her free speech.

In *Bush* the Eleventh Circuit denied the plaintiffs standing to sue on the ground that they failed to allege a cognizable injury. In a lengthy discussion, the Eleventh Circuit illustrates what it believes was the tension in the plaintiff's articulation of the injury. Describing how it believed the Fifth Circuit had difficulty defining the precise injury in *Henderson I*, the Eleventh Circuit held that framing the injury as "the government's promotion of one side of the debate on the abortion rights issue in a speech forum, coupled with the lack of opportunity to present their opposing view" is an articulation that "presumes the state has done more than it actually has done." In their view, although the state has granted a speech forum to persons who desire a "choose-life" plate, it has not denied the forum to those with contrary views. The Eleventh Circuit rejected the plaintiffs' argument that they were denied access to the forum when the legislature rejected an amendment to the act that would have implemented a choose-choice specialty plate because there was "no clear evidence that the legislature intended to exclude pro-choice groups from the specialty license plate forum by rejecting the amendment." The court viewed that evidence as indicating only that the legislature chose not to prefer the plaintiff's speech by allowing them to circumvent the requirements of the licensing scheme by getting an amendment rather than having to file pursuant to Florida law. Thus, under the holding of *Bush*, until a plaintiff has applied for and been denied a plate, the plaintiff lacks standing because he or she has not suffered the requisite injury in violation under city ordinance for distributing religious pamphlet and magazine without a permit.

152. *Henderson*, 287 F.3d at 385 n.5 (Jones, J., concurring).
153. See id. at 385 (Jones, J., concurring).
155. Id. at 946.
156. Id.
157. Id.
158. Id.
IV. HOW THE "CHOOSE-LIFE" SPECIALTY LICENSE PLATE CASES INCORRECTLY FRAMED THE ISSUE

A. Critique of the No-Standing Position

On the no-standing side of the debate, the underlying analysis argues that even if there is an injury, a favorable decision is not likely to redress the injury of which the individual pro-choice plaintiff complains. However, it is precisely because of the way they frame the issue that the advocates of the no-standing theory reach this outcome. In other words, if the only injury complained of is the inability to obtain a pro-choice plate, and all the "choose-life" specialty plate statutes do is grant access to a plate forum to another individual, then it is difficult to see how a favorable decision would redress the plaintiff's grievance. Conceptualizing an individual plaintiff's injury in this way makes declaring a choose-life specialty plate statute unconstitutional seem more like a penalty on the pro-life speaker than a remedy for the plaintiff. In fact, it was framing the injury this way that led the Eleventh Circuit to declare that not only was the injury irredeemable, but that there was no cognizable injury at all. A plaintiff simply cannot be injured if he or she has not even sought access to a forum to which someone else has been granted access.

However, the problem with this conceptualization of the injury is that it ignores the pro-choice plaintiffs' claim of viewpoint discrimination on the part of the state legislature. Viewpoint dis-
crimination by the government is a free speech violation. Once the injury is framed as one where the legislature has participated in viewpoint discrimination, the door to a constitutional challenge should open because it is the injury of the viewpoint discrimination itself which is impermissible absent a compelling justification.

B. Critique of the Pro-Standing Position

Unlike the no-standing side of the debate, the pro-standing side conceptualizes the plaintiff’s injury as two-fold. The injury both denies the plaintiff a forum and the government promotes only one side of the abortion debate. In doing so, these pro-standing advocates attempt to arrive at standing utilizing both a relaxed notion of standing and traditional standing analysis. How-

government denies them a speech benefit, because the government did not deny plaintiffs access to the forum by rejecting an application for a plate or discriminating in the application process. *Bush*, 323 F.3d at 946-47. However, this is simply a circular argument. The Eleventh Circuit has artfully argued that the answer to the claim that the plaintiffs have been denied a forum is to say they have not been denied access to a forum. *Id.* This argument makes a mockery of the requirement of *Lujan* that federal courts must look at standing questions in light of the stage of litigation in which defendants find themselves. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992) (stating that specific facts must be set forth to show standing at the summary judgment phase). In a motion for summary judgment, as in *Bush*, where the specific facts are ones that can be inferred to deny plaintiffs a forum, a genuine issue of material fact exists that must be resolved in favor of the non-moving party. See *Women’s Emergency Network v. Dickinson*, 214 F. Supp. 2d 1308, 1312 (S.D. Fla. 2002) (laying out the standard for summary judgment), *aff’d*, 323 F.3d 937 (11th Cir. 2003).

165. See *Good News Club v. Milford Cent. School*, 533 U.S. 98, 120 (2001) (finding school’s exclusion of a religious club from use of school building after school constituted unconstitutional viewpoint discrimination); *Nat'l Endowment for the Arts v. Finley*, 524 U.S. 569, 600 (1998) (Souter, J., dissenting) (stating that it is a “fundamental rule of the First Amendment that viewpoint discrimination in the exercise of public authority over expressive activity is unconstitutional.”); *Sons of Confederate Veterans, Inc. v. Glendening*, 954 F. Supp. 1099, 1102 (D. Md. 1997) (stating that it is not permissible for the government to target the particular views of a speaker on a particular subject in order to encourage one viewpoint and prohibit or discourage another viewpoint).

166. See generally *Perry Educ. Ass’n v. Perry Local Educators’ Ass’n*, 460 U.S. 37 (1983). In this case a union and its members challenged the provision of a collective bargaining agreement that granted the bargaining representative exclusive access to teacher mailboxes and the interschool mail system to the exclusion of a rival union. *Id.* at 38-39. The claimed injury was that this access policy favored a particular viewpoint on labor relations in the Perry schools such that teachers would receive information from one union but be denied the perspective offered by the plaintiff union. *Id.* at 48-49. The dissent stipulated that absent a compelling justification, viewpoint discrimination was not permissible. *Id.* at 65-66 (Brennan, J., dissenting).

167. *Henderson*, 287 F.3d at 387; *Planned Parenthood v. Rose*, 236 F. Supp. 2d 564, 570 (D.S.C. 2002) (citing Justice Davis affirmatively, “the plaintiffs are injured by the government’s promotion of one side of the debate on the abortion rights issue in a speech forum, coupled with the lack of opportunity to present their opposing view.”).
ever, their reasoning is flawed under present free speech jurisprudence.

To begin with, the pro-standing argument's reliance on Lakewood for a facial challenge is misplaced.\textsuperscript{168} Lakewood is an application of overbreadth in a prior restraint context.\textsuperscript{169} In Lakewood, the Supreme Court granted standing because in that case the statute allowed the Mayor of Lakewood to grant or deny permits in order to access newspaper racks on an "unfettered," "discretionary" basis.\textsuperscript{170} The "choose-life" specialty plate cases are distinguishable because the "choose-life" statutes do not work affirmatively to "chill" or "freeze" protected speech based on viewpoint before the speech happens.\textsuperscript{171} In Lakewood there was concern that publishers would or did censor their publications in order to get a permit to access news racks.\textsuperscript{172} As the Eleventh Circuit adeptly points out in Bush, the "choose-life" specialty plate statutes only explicitly apply to individuals desiring to purchase a "choose-life" specialty plate.\textsuperscript{173} In other words, the statute only creates a forum for pro-life speech that did not exist prior to the statute's passage. The "choose-life" specialty plate statutes may effectively create a speech forum for one group and not another, but they do not potentially remove an individual plaintiff's access to a forum that he or she previously had access. In short, the statutes do not "chill" speech in the way we have come traditionally to expect in free speech cases.\textsuperscript{174}

Second, the attempt to find redressability under traditional standing analysis fails because the particular conceptualization of the injury by the pro-standing side of the debate is not one found in any free speech cases to date.\textsuperscript{175} The injuries recognized in free

\textsuperscript{168} See discussion supra Part III.A.
\textsuperscript{169} City of Lakewood v. Plain Dealer Publ'g Co., 486 U.S. 750 (1988).
\textsuperscript{170} Id. at 757.
\textsuperscript{171} See discussion supra Part I.B. (discussing link between prior restraints and the doctrine of overbreadth).
\textsuperscript{172} City of Lakewood, 486 U.S. at 757.
\textsuperscript{173} Women's Emergency Network v. Bush, 323 F.3d 937, 947 (11th Cir. 2003) (distinguishing Bush from the authority plaintiffs cite).
\textsuperscript{174} See, e.g., Bartnicki v. Vopper, 532 U.S. 514, 533, 554 (2001) (noting fear of public disclosure of a private conversation might have a "chilling effect" on free speech); Reno v. Am. Civil Liberties Union, 521 U.S. 844, 871-72 (1997) (stating that the vagueness of a content-based regulation often raises First Amendment concerns because it can "chill" a speaker's permissible speech); Rosenberger v. Rector and Visitors of Univ., 515 U.S. 819, 896 (1995) (funding restrictions might "chill" free speech).
\textsuperscript{175} The closest articulation of an injury paralleling those of individual plaintiffs in the "choose-life" specialty cases is in Perry Education Association v. Perry Local
speech cases are either prior restraints on speech or injuries caused by a penalty that result from the allegedly unconstitutional statute. Redress happens in those types of First Amendment cases because it removes either the impermissible prior restraint on speech or the penalty imposed as a result of speech. In other words, the case law on which the pro-standing side of the debate relies would fit if the individual plaintiffs in the "choose-life" specialty plate cases complained that they were penalized under particular provisions of the statutes, or if their speech was prevented from ever happening. In other words, traditionally, when a statute is declared unconstitutional the Free Speech right and the Equal Protection right that have been denied are restored to the plaintiffs.

V. "COMPETITIVE ADVOCATE STANDING": THE KEY TO THE COURTHOUSE GATE

The difficulty of the pro-standing positions is that they are attempts to find standing by utilizing cases that involve legislation directed at the plaintiff as opposed to directed at a third party. The "choose-life" specialty plate statutes, however, are directed solely

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176. See discussion supra Part I.B. See also Doug Rendleman, Book Review, Irreparability Irreparably Damaged: The Death of the Irreparable Injury Rule, 90 MICH. L. REV. 1642, 1664 (1992) (discussing that there is no important significance in a prior restraint's ability to prevent speech before it happens and a known criminal penalty's ability to chill expression before it happens because both make it clear that the speaker is not supposed to speak).

177. For example, inArkansas Writers' Project, the newspapers were penalized by being taxed and redress came in the form of possibly not being taxed. Ark. Writers' Project v. Ragland, 481 U.S. 221 (1987). In Orr the remedy claimed was the possibility of not having to pay alimony. Orr v. Orr, 440 U.S. 268 (1979).

178. For example, in Lakewood redress comes in the form of a publisher no longer having to censor protected speech to get a permit. Lakewood, 486 U.S. at 750.


180. CompareArk. CODE ANN. §§ 27-15-3901-3908 (2003), andFla. STAT. ch. 320.08058 (2002), andMiss. CODE ANN. § 27-19-56.70 (2003), andOkla. STAT. tit. 47, § 1136 (2003) (providing only for the creation of a "choose-life" license plate tag), withArk. Writers' Project, 481 U.S. at 221 (city ordinance required all but exempt publishers to pay a sales tax), and Orr, 440 U.S. at 270 n.1 (stating thatAla. CODE § 30 (1975)
to benefit a particular group. There is no direct monetary or criminal penalty, nor does the statute impose a heightened obligation directly on the plaintiffs. The pro-standing side of the issue simply ignores that the "choose-life" specialty plate legislation involves a novel question for free speech jurisprudence. The no-standing side of the debate appears to understand that this is a novel issue at some level; however, they incorrectly treat as settled the issue of whether a third party could suffer an injury based on legislation enacted to benefit another. They are also incorrect in their resounding denial that redress for an injury suffered by a third party could come in the form of removing the legislatively granted benefit from the party being benefited.

On closer examination, the pro-standing side of the debate appears to be grappling with an articulation of standing that is close to what the Second Circuit calls "competitive advocate standing" in Equal Protection cases. In those cases, the plaintiff is judged to have standing to bring an Equal Protection claim when the government's allocation of a particular benefit "creates an uneven playing field" for organizations or individuals advocating views in a public arena and the "plaintiff competes in that arena with a party to whom the government has bestowed a benefit." In other words, "competitive advocate standing" exists where the plaintiff alleges "discriminatory enforcement of a statute grants an unfair advantage to a political competitor which thereby diminishes the plaintiffs' ability to compete effectively in the political arena."

Similarly, plaintiffs in "choose-life" specialty plate cases should frame the injury in the following context: the legislature has allo-

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182. Although the no-standing position does not explicitly talk about the novelty of these cases, it adequately distinguishes existing case law. See discussion supra Part III.B.
183. E.g., Ctr. for Reprod. Law and Policy v. Bush, 304 F.3d 183, 186 (2nd Cir. 2002); Fulani v. Bentsen, 35 F.3d 49, 54 (2nd Cir. 1994); In Re Catholic Conference, 885 F.2d 1020, 1024 (2nd Cir. 1989).
184. Ctr. for Reprod. Law and Policy, 304 F.3d at 197. Compare id. with Henderson, 287 F.3d at 390 (Davis, J., dissenting) (discussing redress in the form of a "level playing field for all effected by the statute").
185. Ctr. for Reprod. Law and Policy, 304 F.3d at 197; In Re Catholic Conference, 885 F.2d at 1029.
icated a free speech benefit to pro-life individuals in the form of a new forum for speech and, as a result, the law "creates an uneven playing field" whereby pro-life proponents are bestowed a competitive advantage. Thus, the injury is that by enacting the statute the government denies the pro-choice plaintiff the level playing field for viewpoint that neutrality requires in a government-sponsored public forum. The pro-choice plaintiff would meet the requirement that he or she competes in the same arena in which the government bestowed a benefit to pro-life perspectives because her view is a view on the abortion debate.\textsuperscript{187}

The virtues of framing the claim in this way are numerous. First, "competitive advocate standing" allows the plaintiff to articulate an injury that is not derived from the "chilling" nature of an overly broad statute or the potentially punitive vague statute. Rather, the injury under "competitive advocate standing" comes from precisely the kind of statutes we are dealing with here, narrowly constructed statutes\textsuperscript{188} that benefit one group of favored speakers with the intended effect of discriminating against another group of speakers.\textsuperscript{189} That is, the claimed injury is that the government denies the pro-choice plaintiff access to a forum because of his or her political views. Thus, a lack of viewpoint neutrality is really the injury-in-fact under this analysis. Causation is met because the injury is "fairly traceable" to a state legislature's enactment of a "choose-life" specialty plate tag. Redress is likely to follow from a favorable decision because declaring these types of statutes unconstitutional would "equalize the playing field of

\textsuperscript{187} See Ctr. for Reprod. Law and Policy, 304 F.3d at 189.

\textsuperscript{188} FLA. STAT. ch. 320.08058, § 30 (2002). "The department shall develop a Choose Life license plate as provided in this section. The word 'Florida' must appear at the bottom of the plate, and the words 'Choose Life' must appear at the top of the plate." \textit{Id.}

\textsuperscript{189} A similar theory to "competitive advocate standing" has emerged in the D.C. Circuit. This theory allows plaintiffs to establish standing where tax exemptions created a benefit for competitors. See, e.g., Normon Leon, \textit{The Second Circuit's Application of Standing in In Re United States Catholic Conference}, 57 BROOK. L. REV. 429, 464 n.204 (1991). Additionally, [Arkansas Writers' Project], Ark. Writers' Project v. Ragland, 481 U.S. 221 (1987), might be of help here because if we define the distinguishing quality of that case to be the "competitive" nature between those publishers granted an exemption and those denied an exemption, we have a similar situation to the tax cases out of the D.C. Circuit. See also Henderson v. Stalder, 287 F.3d 374, 385 n.5 (5th Cir. 2002) (Jones, J., concurring), cert. denied, 537 U.S. 1048 (2002), vacated and superceded by No. 00-31171, 2003 WL 151183 (5th Cir. 2003), on remand by 265 F. Supp. 2d 699 (E.D. La. 2003) (Judge Jones argued that \textit{Lakewood} would be on point if newspapers were rivals).
Therefore, declaring the statutes unconstitutional would not be a speculative form of redress because there is no doubt it would stop the constitutional violation.

Additionally, framing the injury by utilizing the “competitive advocate standing model” makes it permissible to challenge the narrow “choose-life” specialty plate statute as opposed to the entire statutory scheme. This is because the injury, which is the demotion of one side of the abortion debate because of the government’s lack of viewpoint neutrality, is caused by the enactment of the “choose-life” specialty plate legislation. The injury is not the government’s “unfettered discretion to grant or deny a specialty plate.” More narrowly, under this model the injury is the government’s alleged lack of viewpoint neutrality on the abortion issue. Attacking a statute authorizing a specialty plate for something other than an opinion on the abortion issue would not make sense

190. Some might criticize that framing this debate in terms of “competitive advocate standing” is problematic because it binds courts to use rational basis scrutiny because rational basis was applied to all the claims that said standing existed under the “competitive advocate standing” method. See, e.g., Ctr. for Reprod. Law and Policy, 304 F.3d at 186; Faluni v. Bentsen, 35 F.3d 49, 54 (2nd Cir. 1994); In Re Catholic Conference, 885 F.2d 1020, 1024 (2nd Cir. 1989). However, the difference between this case and other cases that have employed the “competitive advocate standing” framework is twofold. First, if treated as an Equal Protection claim, the claimed injury would be the denial of a speech forum based on certain “fundamentally protected” speech of a person. It is likely that when discussing access to a forum for speech that strict scrutiny would apply. This topic concerns more than a tax break for favored speakers. See, e.g., Regan v. Taxation with Representation, 461 U.S. 540, 547 (1983). Second, there is no reason why this articulation of standing could not directly apply to First Amendment claims. Free speech holds a special status, and therefore courts have loosened the standing requirement in various contexts. See discussion supra Part I.B. See also Police Dep’t v. Mosley, 408 U.S. 92, 96 (1972) (determining that “government may not grant the use of a forum to people whose views it finds acceptable, but deny use to those wishing to express less favored or more controversial views.”).

191. The redressability prong of standing provides two options when a statute is declared unconstitutional. First, the unconstitutional statute or law can be struck down. Alternatively, the statute can be reformed in order to make the unconstitutional law or statute constitutional. In the “choose-life” specialty plate cases, for example, the judges only spoke of redress in the form of striking down the unconstitutional provision. However, the plaintiffs’ briefs in the Henderson line of cases clearly addressed this option as a form of redress. Brief for Appellant-Plaintiffs at 3-7, Henderson v. Stalder, 287 F.3d 374, (5th Cir. 2002) (No. 02-13981-J), available at 2002 WL 32174297.

192. This is the course the Fifth Circuit took when it vacated Henderson and decided that it would entertain the case if plaintiff Keeler challenged the entire statutory scheme. Henderson v. Stalder, No. 00-31171, 2003 WL 151183 (5th Cir. Jan. 9, 2003). Additionally, the Eleventh Circuit reasoned that this would be the only way to challenge the statute in an attempt to get standing. Women’s Emergency Network v. Bush, 323 F.3d 937, 947 (11th Cir. 2003).

under this model because there is no link between those statutes and the speech forum the plaintiff claims that the government has granted to a political adversary.

Furthermore, "competitive advocate standing" is consistent with the judiciary's role as a protector of the minority against the encroachment of the legislative majority. For example, it is no secret that many state legislatures have a pro-life majority of members. By granting a forum to pro-life speakers via a "choose-life" specialty plate without providing a pro-choice plate, pro-life legislatures provide a competitive speech advantage to the pro-life side of the debate that has immeasurable consequences on the ability of pro-choice groups to compete on equal footing in those states. As Carolene Products taught, one of the functions of the judiciary is to protect the civil rights of the minority from the majoritarian legislative process. It is troubling that when a court denies standing in cases where the claim is that the government has granted a speech benefit to one side of a political debate and not the other side of that debate, as in the "choose-life" specialty plate cases, the legislature may effectively be able to "prescribe what is orthodox in politics." This is because without standing no re-

194. See United States v. Carolene Prod., 304 U.S. 144, 152 n.4 (1944) (stating that for the scope of the decision there was no need to determine if "prejudice against 'discrete and insular minorities' prohibits the protection of minorities to the point where there should be a 'more searching judicial inquiry.'").

195. Henderson, 287 F.3d at 388 n.1 (announcing that Louisiana has declared itself a pro-life state). See also Nat'l Abortion Rts. League, Positions of Governors and State Legislatures on Choice, at www.naral.org/publications/loader.cfm?url=/Commonspot/security/getfile.cfm&PageID=2193 (last visited Mar. 1, 2004). The methodology is not scientific, but it is clear that many states have legislatures in which the majority leans heavily pro-life or pro-choice. Id.

196. See, e.g., Int'l Ass'n of Machinists & Aerospace Workers v. Fed. Election Comm'n, 678 F.2d 1092, 1098 (1982) (noting union members' allegations of the "relative diminution of their political voices-their influence in federal elections-as a direct result of the discriminatory imbalance Congress is alleged to have ordered"). Similarly, providing pro-life speakers an extra forum would reduce the voices of the pro-choice side in public debate, therefore reducing their voice in elections, etc. See also Berry, supra note 9 (discussing Henderson and the underlying merits of the substantive claim of viewpoint discrimination).

197. Carolene Prod., 304 U.S. at 152 n.4.

198. Id.

199. W. V. State Bd. of Educ. v. Barnette, 319 U.S. 624, 642 (1943) (noting that government should not determine citizens' opinions in "politics, nationalism, religion, or other matters of opinion," nor "force [them] to confess by word or act their faith therein."). It is important to reiterate here that standing is a threshold question. The claim is that the state has not had a neutral viewpoint as is required when it opens up a forum for political speech. A claim based on competitive advocate standing does not foreclose the option of the state to argue that there is no limited public forum opened at
course is available to the political minority via the judicial process to repair the injury suffered by the plaintiff.

The above point is especially important because opponents of this conceptualization of the injury might claim that it is an attempt to find standing in an area in which the legislature, as opposed to the judiciary, should have the final say. Lujan made clear that the separation of powers principle is inherent in the constitutional requirement of standing. However, when a court correctly frames the injury-in-fact utilizing the “competitive advocate standing” model it becomes clear that the “choose-life” specialty plate cases involve claims that are not in violation of the separation of powers principle, but rather are about the federal courts’ legitimate power to determine whether a legislature has stepped outside of the bounds of its power to legislate certain matters. What this option provides is a loosening of the prudential concerns against generalized grievances and an accurate application of the redressability prong of standing. In these cases, and in future cases posing similar problems, the government should not be allowed to invoke the lack of standing as a shield just because it stabbed someone in the back instead of the heart.

CONCLUSION

The “choose-life” specialty plate legislation being enacted throughout the country runs the risk of drowning out the voices of pro-choice advocates because it grants pro-life advocates a megaphone. If courts do not accurately account for the type of injury alleged in cases involving legislation similar to the “choose-life” specialty plate legislation, and if courts continue to deny standing, it

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200. See, e.g., Flast, 392 U.S. at 106 (noting courts lack “confidence in [hearing] cases . . . where a taxpayer seeks to employ a federal court . . . to air his generalized grievances about the conduct of government or the allocation of power in the Federal System”).


202. Marbury v. Madison, 5 U.S. 137 (1803) (establishing judicial review as the mechanism for determining when the legislature has stepped outside of its designated role and acted unconstitutionally).

will become possible for legislatures to drown out the voices of any politically undesirable minority simply by granting benefits to those individuals whose speech they like. Courts have recognized a form of standing that allows plaintiffs to challenge statutes they believe attempt to manipulate public debate by granting benefits to their adversaries. It is time for the federal judiciary to adopt this standing principle universally in order to keep those legislatures hostile to the free speech rights of some individuals in the role of policy makers and out of the role of civil rights breakers.

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*I thank my husband Stephen who brewed countless cups of coffee, washed tons of laundry, made almost every dinner for a year, worked full time, performed comedy on occasion, and was available to maintain his role as the primary caregiver of our daughter during my second year of law school and the writing of this note. By doing the same work as invisible wives everywhere, he made it possible for me to publish. "I love you!"*