

IN THE UNITED STATES DISTRICT COURT  
FOR THE MIDDLE DISTRICT OF TENNESSEE  
NASHVILLE DIVISION

THE AMERICAN CIVIL LIBERTIES UNION )  
OF TENNESSEE, PLANNED PARENTHOOD )  
OF MIDDLE AND EAST TENNESSEE, INC., )  
SALLY LEVINE, HILARY CHIZ, )  
and JOE SWEAT, )

Plaintiffs, )

v. )

PHILIP BREDESEN, Governor of Tennessee, )  
and FRED PHILLIPS, Commissioner of Safety )  
of Tennessee, in their official capacities, )

Defendants, )

NEW LIFE RESOURCES, INC., and )  
FRIENDS OF GREAT SMOKY MOUNTAINS )  
NATIONAL PARK, INC., )

Defendant-Intervenors. )

Civil Action No. 3: 03-1046

Judge Campbell

Magistrate Judge Brown

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**MEMORANDUM IN SUPPORT OF PLAINTIFFS' MOTION  
FOR SUMMARY JUDGMENT**

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## INTRODUCTION

Under Chapter 372 of the Public Acts of 2003, T.C.A. § 55-4-306 (the Act),<sup>1</sup> Tennessee automobile owners may obtain “Choose Life” specialty license plates but may not obtain specialty license plates that espouse any opposing viewpoint on the subject of abortion. In decision after decision, courts have held unconstitutional specialty license plates that, like those authorized by the Act, give voice to only one side of a debate. See Planned Parenthood of South Carolina, Inc. v. Rose, 361 F.3d 786 (4th Cir. 2004) (PPSC); Sons of Confederate Veterans, Inc. v. Comm’r of Va. Dep’t of Motor Vehicles, 288 F.3d 610 (4th Cir. 2002) (SCV); Women’s Res. Network v. Gourley, 305 F. Supp. 2d 1145 (E.D. Cal. 2004); Henderson v. Stalder, 265 F. Supp. 2d 699 (E.D. La. 2003); Sons of Confederate Veterans, Inc. v. Glendening, 954 F. Supp. 1099 (D. Md. 1997). The Act too is unconstitutional in at least two respects.

First, the Act violates Plaintiffs’ First Amendment right of free speech because it impermissibly discriminates on the basis of viewpoint. The Tennessee legislature has authorized a “Choose Life” license plate but has twice rejected an amendment that would have provided for a pro-choice license plate. As the Fourth Circuit Court of Appeals explained when striking down a similar South Carolina statute, it is unconstitutional viewpoint discrimination to open specialty license plates to speech on the issue of abortion and permit automobile owners to express the “Choose Life” viewpoint, but refuse automobile owners the opportunity to express the opposing pro-choice viewpoint.

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<sup>1</sup> The Act became effective on July 1, 2003. A copy of the statute is attached as Exhibit A to the Complaint.

See PPSC, 361 F.3d at 798-99; see also Henderson, 265 F. Supp. 2d at 719 (enjoining Louisiana statutory scheme giving rise to similar statute).

Second, the Act violates Plaintiffs' First Amendment free speech rights because the Tennessee legislature exercised unfettered discretion in deciding to favor the "Choose Life" message on specialty license plates while disfavoring the pro-choice one. As the Sixth Circuit has held, it is a well established principle that "a statute or ordinance offends the First Amendment when it grants a public official 'unbridled discretion' such that the official's decision to limit speech is not constrained by objective criteria."

United Food & Commercial Workers Union, Local 1099 v. Southwest Ohio Reg'l Transit Auth., 163 F.3d 341, 359 (6th Cir. 1998); see also Women's Res. Network, 305 F. Supp. 2d at 1154 (holding California's specialty license plates scheme unconstitutional because no standards guided the legislature); Henderson, 265 F. Supp. 2d at 719 (enjoining Louisiana specialty license plate scheme because "whether or not a license plate is issued is subject to the uncontrolled discretion of the legislature").

Finally, Tennessee's specialty license plate scheme, codified at T.C.A. §§ 55-4-228, 55-4-230 through 55-4-240, and 55-4-242 through 55-4-308, suffers from the same two constitutional failings. First, it permits the expression of only those viewpoints condoned by the Tennessee legislature. Second, the legislature exercises unfettered discretion in deciding which plates become part of the scheme. For all these reasons, Plaintiffs are entitled to summary judgment.<sup>2</sup>

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<sup>2</sup> Supporting affidavits have been submitted with this motion for summary judgment.

## RELEVANT STATUTES

The Act provides for a “new specialty earmarked license plate” bearing the words “Choose Life.” The Act therefore permits Tennessee vehicle owners to collectively display and express views in opposition to abortion on their license plates. Vehicle owners must pay \$35 per year for the “Choose Life” license plate in addition to their regular vehicle registration fee. T.C.A. § 55-4-203(d). The Act requires that the “Choose Life” plates “be designed in consultation with a representative of New Life Resources.” T.C.A. § 55-4-306(b). The Commissioner is directed to issue these plates once a minimum order of at least one thousand plates has been made. T.C.A. § 55-4-201(h)(1). According to New Life Resources, it has met the minimum order requirement and placed an order for over one thousand of the “Choose Life” specialty plates. New Life Resources Mot. to Intervene ¶ 3. As of this filing, the “Choose Life” license plates are in the design stage and have not yet been issued. Defendants have represented that they will advise Plaintiffs before production of the plates becomes imminent.

The Act further requires that, once the plates are issued, fifty percent of all funds raised by the sale of the plates, after expenses, be allocated to New Life Resources. T.C.A. § 55-4-306(c). The remaining fifty percent of the funds shall be shared by the Tennessee Arts Commission and the Tennessee state highway fund (a provision common to other specialty plates). T.C.A. §§55-4-306(c), (d).

During legislative consideration of the Act, Senator Ford of Memphis offered an amendment that would have authorized a pro-choice specialty license plate. S.B. 618, Amend. 2, 102d Gen. Assem., Reg. Sess. (Tenn. 2003). Despite the lobbying efforts of Plaintiffs ACLU of Tennessee and Planned Parenthood of Middle and Eastern Tennessee,

however, that amendment was killed when the full Senate voted to table the amendment on third reading. Audio Tape: Proceedings of Tenn. Gen. Assem., State Senate (May 29, 2003) (on file with Tenn. state archives). When the Act reached the desk of Defendant Governor Bredesen, he returned it to the General Assembly without his signature, expressing reservations about its wisdom and constitutionality. Nevertheless, because Defendant Bredesen did not veto the Act, it became law pursuant to Article II, Section 18 and Article III, Section 18 of the Tennessee Constitution. An amendment authorizing “Pro-Choice” specialty license plates was subsequently proposed during the 2004 legislative session. S.B. 3323, Amend. 2, 103d Gen. Assem., Reg. Sess. (Tenn. 2004). The measure was again defeated. Id. (unenacted).

The “Choose Life” license plate is one of numerous specialty license plates that have been authorized by the Tennessee General Assembly. Such license plates are established only by statute. Thus, expression by means of such a plate is possible only if a statute is enacted in the Tennessee legislature. The legislature approves specialty license plates under several statutory rubrics, including “cultural” license plates, “specialty earmarked” license plates, “new specialty earmarked” license plates, and “memorial” license plates. T.C.A. § 55-4-202 (listing available plates by category). The statutes authorizing these specialty license plates are codified at T.C.A. §§ 55-4-228; 55-4-230 through 55-4-40; and 55-4-242 through 55-4-308.

The statutes creating specialty license plates differ in certain respects, such as the amount of the annual fee and how many applications are required before the plates may be distributed. Despite these differences, all the statutes authorize some kind of expression by residents of Tennessee. For example, some statutes have allowed

Tennessee residents to express membership in some group or association on their motor vehicles. See, e.g., T.C.A. § 55-4-234 (Harley Owners' Group). Other statutes have allowed Tennessee residents to express support for a particular institution on their motor vehicles. See, e.g., T.C.A. § 55-4-247 (Penn State University); § 55-4-248 (Memphis Zoo). Still others allow Tennessee residents to express a slogan or support a cause. See, e.g., T.C.A. § 55-4-281 (Fish and Wildlife Species).

### **ARGUMENT**

Summary judgment is appropriate where “the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.” Fed. R. Civ. P. 56(c). Based on the undisputed facts, the Act and Tennessee’s specialty license plate scheme violate the First Amendment; and Plaintiffs are entitled to summary judgment.

#### **I. The Act Violates Plaintiffs’ Free Speech Rights.**

##### **A. The Act Impermissibly Discriminates Against Plaintiffs on the Basis of Viewpoint in a Government Forum.**

It is unconstitutional for the government to favor or disallow private speakers in a forum because of their viewpoint. Yet that is precisely what the government has done in the license plate forum: the Act opens the license plate forum to automobile owners who wish to express their opposition to abortion on their license plates, but shuts out those owners who wish to express their view that the rights of women to choose abortion should be respected. The Act should be struck for this reason alone.

1. *The Act Constitutes Unlawful Viewpoint Discrimination.*

There are three categories of government fora: the traditional public forum,<sup>3</sup> the designated public forum,<sup>4</sup> and the nonpublic forum.<sup>5</sup> Cornelius v. NAACP Legal Def. & Educ. Fund, Inc., 473 U.S. 788, 802 (1985); Perry Educ. Ass’n v. Perry Local Educators’ Ass’n, 460 U.S. 37, 45-46 (1983). The extent to which government can lawfully regulate private speech occurring on government property depends on the forum in which the speech occurs. See Cornelius, 473 U.S. at 800. Regardless of the type of forum, however, the government may not discriminate based on viewpoint. See Rosenberger v. Rector & Visitors of the Univ. of Va., 515 U.S. 819, 829 (1995); Kincaid v. Gibson, 236 F.3d 342, 354 (6th Cir. 2001) (en banc).

Because government regulation of speech must be “viewpoint neutral,” Cornelius, 473 U.S. at 806; Rosenberger, 515 U.S. at 829; Putnam Pit, Inc. v. City of Cookeville, 221 F.3d 834, 845 (6th Cir. 2000), the government may not limit speech based on “the specific motivating ideology or the opinion or perspective of the speaker,” Rosenberger, 515 U.S. at 829; see also Kincaid, 236 F.3d at 354, 356 (same). Thus, the government cannot “suppress expression merely because public officials oppose the

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<sup>3</sup> Traditional public fora are places, such as public streets, that have been devoted “by long tradition or by government fiat . . . to assembly and debate.” Perry Educ. Ass’n v. Perry Local Educators’ Ass’n, 460 U.S. 37, 45 (1983); see also Kincaid v. Gibson, 236 F.3d 342, 348 (6th Cir. 2001) (en banc).

<sup>4</sup> Designated public fora are designated by government “for use by the public at large for assembly and speech, for use by certain speakers, or for the discussion of certain subjects.” Cornelius v. NAACP Legal Def. & Educ. Fund, Inc., 473 U.S. 788, 802 (1985); see also Kincaid, 236 F.3d at 348.

<sup>5</sup> Nonpublic fora are those that are “not by tradition or designation [fora] for public communication.” Perry, 460 U.S. at 46.

speaker’s view.” Perry, 460 U.S. at 46; Cornelius, 473 U.S. at 806. Nor may the government “favor one speaker over another.” Rosenberger, 515 U.S. at 828. Indeed, the Supreme Court has made clear that granting use of a forum to views the government finds acceptable while excluding other views unconstitutionally abridges “equality of status in the field of ideas.” Police Dep’t of Chicago v. Mosley, 408 U.S. 92, 96 (1972) (citation and quotation omitted).<sup>6</sup> In short, viewpoint-based restrictions are presumed unconstitutional. See Rosenberger, 515 U.S. at 828, 830; Cornelius, 473 U.S. at 806 (“[T]he government violates the First Amendment when it denies access to a speaker solely to suppress the point of view he espouses on an otherwise includable subject.”); Putnam Pit, 221 F.3d at 845 (same).

The Act violates the viewpoint-neutrality rule by opening up discourse on the subject of abortion on state specialty license plates, but then permitting only one side of that debate to speak. Automobile owners opposed to abortion can express their view via the special “Choose Life” license plate. Automobile owners who wish to express the view that women’s decisions regarding abortion should be respected, however, are not given that option. Indeed, the Tennessee legislature has twice rejected an amendment that would have provided a pro-choice license plate for such vehicle owners. Just as a statute allowing the Democratic party alone to post campaign materials on public buses is

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<sup>6</sup> Plaintiffs assert that by providing for a large number of specialty license plates, the Tennessee legislature has opened up a designated public forum on its license plates. See T.C.A. §§ 55-4-2, -3 (providing for over seventy “cultural,” “specialty earmarked” and “new specialty earmarked” license plates). Nevertheless, because the Act is viewpoint discriminatory, which is unconstitutional in any forum, this Court need not decide which type of forum the government has created. See, e.g., Sons of Confederate Veterans, Inc. v. Comm’r of Va. Dep’t of Motor Vehicles, 288 F.3d 610, 623 (4th Cir. 2002) (type of forum relevant only if the restriction is viewpoint neutral).

unconstitutional, so too is the Act. Because the Act impermissibly discriminates on the basis of viewpoint, it is unconstitutional and cannot stand.

This discrimination is precisely the reason that the Fourth Circuit enjoined a similar South Carolina statute authorizing “Choose Life” license plates. The Court first held that it is possible for a regulation to “discriminate based on viewpoint without affirmatively suppressing a certain viewpoint. Discrimination can occur if the regulation promotes one viewpoint above others.” Planned Parenthood of South Carolina, Inc. v. Rose, 361 F.3d 786, 795 (4th Cir. 2004) (PPSC). The Court then held that by authorizing expression of the pro-life viewpoint on license plates without authorizing expression of the pro-choice viewpoint, “South Carolina has provided pro-life supporters with an instrument for expressing their position and has distorted the specialty license plate forum in favor of one message, the pro-life message.” Id. This, the Fourth Circuit concluded, is discrimination based on viewpoint.<sup>7</sup> Similarly, in striking down Louisiana’s “Choose Life” license plate statute, the district court held that “[t]he State of Louisiana has created a forum – prestige license plates for privately owned vehicles – that is only open to those organizations the viewpoints of which the State approves. . . . Thus, regardless of the

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<sup>7</sup> The Fourth Circuit has also rejected an attempt by the Commonwealth of Virginia to discriminate on the basis of viewpoint in a specialty license plate program. There, the Sons of Confederate Veterans (SCV) challenged a Virginia law forbidding the display of the Confederate flag on the organization’s specialty plates, when all other specialty license plate provisions permitted the display of logos and emblems. The court struck the logo restriction, holding that it “works viewpoint discrimination against the SCV. Such discrimination, as we have noted, is ‘presumed to be unconstitutional.’” SCV, 288 F.3d at 626 (citation omitted), aff’g Sons of Confederate Veterans, Inc. v. Holcomb, 129 F. Supp. 2d 941, 946 (W.D. Va. 2001) (“[T]he Commonwealth seeks to bar the Sons from making their political statement while allowing various other groups to make their political statements. Such a restriction seems to be exactly the type at which First Amendment protections are designed to erase.”).

type of forum, [the scheme] is presumptively unconstitutional.” Henderson v. Stalder, 265 F. Supp. 2d 699, 718 (E.D. La. 2003); see also Sons of Confederate Veterans, Inc. v. Commissioner of Va. Dep’t of Motor Vehicles, 288 F.3d 610 (4th Cir. 2002) (SCV) (striking specialty license plates as viewpoint discrimination); Sons of Confederate Veterans, Inc. v. Glendening, 954 F. Supp. 1099 (D. Md. 1997) (same).

Thus, the Act – which discriminates on the basis of viewpoint by allowing individuals opposed to abortion to display “Choose Life” specialty plates on their automobiles, but refusing the same right to individuals supportive of a woman’s right to choose abortion – is unconstitutional.

2. *The Act Authorizes Private Speech, Not Government Speech.*

This Court should reject any assertion by Defendants that the “Choose Life” license plates represent pure government speech rather than the private speech of automobile owners. The Act enables private individuals to express their own views on the license plate of their own automobiles. But for private individuals, the “Choose Life” message would not be displayed: private individuals must apply for the plates, pay an additional fee for them, and place them on their privately owned vehicles. Because the “Choose Life” message is associated with the private owner of the vehicle, the license plates embody private, not government, speech.

Many courts have held that license plates chosen by individual automobile owners are private speech. Henderson, 265 F. Supp. 2d at 717 (holding “Choose Life” license plate constituted private speech); SCV, 288 F.3d at 621 (finding SCV’s specialty license plates constitute private speech); Perry v. McDonald, 280 F.3d 159, 166 (2d Cir. 2001) (analyzing restriction on vanity plates as a “government regulation[] . . . concerning

private individuals’ speech on government-owned property”) (emphasis added); Lewis v. Wilson, 253 F.3d 1077, 1079 (8th Cir. 2001) (analyzing a restriction on vanity plates as a restriction on private individuals’ speech); Sons of Confederate Veterans, 954 F. Supp. at 1101-02 (finding that specialty plates constitute private speech). A few courts have held that such plates constitute both private and government speech. See PPSC, 361 F.3d at 794; Women’s Res. Network v. Gourley, 305 F. Supp. 2d 1145, 1156 (E.D. Cal. 2004). However, no court that has addressed the constitutionality of such plates, including “Choose Life plates,” has concluded that they constitute pure government speech.

In rejecting the argument that the South Carolina “Choose Life” license plate constituted pure government speech, the Fourth Circuit analyzed several factors, including the central purpose of the program; the degree to which South Carolina exercised editorial control; who is the “literal speaker;” and who bears the ultimate responsibility for the speech. PPSC, 361 F.3d at 792-93; see also Henderson, 265 F. Supp. 2d at 715. The Fourth Circuit noted that even messages on standard license plates are associated with the private automobile owners. PPSC, 361 F.3d at 794; see Wooley v. Maynard, 430 U.S. 705, 717 n.15 (1977) (automobiles are “readily associated with [their] operator”). The association is even stronger when the automobile owner displays a specialty license plate. PPSC, 361 F.3d at 794. After all, although the specialty license plate is state-owned and bears a state-authorized message, without the actions of the private individuals who voluntarily buy and display these plates on their private vehicles, they would not even exist. See Sons of Confederate Veterans, Inc. v. Comm’r of Va. Dep’t of Motor Vehicles, 305 F.3d 241, 246 (4th Cir. 2002) (Luttig, J., respecting denial of rehearing en banc). “Indeed, no one who sees a specialty plate imprinted with the

phrase ‘Choose Life’ would doubt that the owner of that vehicle holds a pro-life viewpoint.” PPSC, 361 F.3d at 794; see also id. (literal speaker of “Choose Life” license plate is vehicle owner “just as the literal speaker of a bumper sticker message is the vehicle owner, not the producer of the bumper sticker”). The Fourth Circuit therefore concluded that the specialty license plates are not pure government speech. Id. at 794. For the same reason, the Act is not pure government speech. And opening up the license plates to private speech on the subject of abortion without giving access to automobile owners on both sides of the issue violates the First Amendment.<sup>8</sup>

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<sup>8</sup> Even assuming the “Choose Life” license plates were a mixture of private and government speech, the Act could not constitutionally discriminate on the basis of viewpoint. The government speech doctrine – which allows the government to promote a particular viewpoint when it speaks for itself and is accountable to the electorate for its advocacy – applies only to pure government speech. Thus, as the Fourth Circuit explained in holding unconstitutional a “Choose Life” plate that it deemed part private speech and part government speech:

Although the government may favor certain speech on the basis of viewpoint when it creates and manages its own programs, [South Carolina’s Choose Life license plate program] departs from this model in constitutionally significant ways. . . . [T]he State’s advocacy of the pro-life viewpoint may not be readily apparent to those who see the Choose Life license plate, and this insulates the State’s advocacy from electoral accountability. The government speech doctrine was not intended to authorize cloaked advocacy that allows the State to promote an idea without being accountable to the political process.

PPSC, 361 F.3d at 795-96; see also SCV, 305 F.3d at 245 (Luttig, J., respecting denial of rehearing en banc) (Supreme Court likely to recognize that the government cannot engage in viewpoint discrimination in license plate forum even if speech is both private and governmental).

B. The Act Violates the First Amendment Because the Legislature Exercised Unbridled Discretion In Authorizing the “Choose Life” Plate.

The Act also violates the First Amendment for the independent reason that the legislature exercised “uncontrolled discretion” in authorizing the “Choose Life” license plates while refusing to authorize a specialty license plate with an opposing viewpoint.

It is widely recognized that “a statute or ordinance offends the First Amendment when it grants a public official ‘unbridled discretion’ such that the official’s decision to limit speech is not constrained by objective criteria.” United Food & Commercial Workers Union, Local 1099 v. Southwest Ohio Reg’l Transit Auth., 163 F.3d 341, 359 (6th Cir. 1998); see also Stonewall Union v. City of Columbus, 931 F.2d 1130, 1134 (6th Cir. 1991) (stating that it is unconstitutional for an ordinance to grant an administrative body or government official unfettered discretion to regulate activities protected by the First Amendment); Planned Parenthood of South Carolina, Inc. v. Rose, 236 F. Supp. 2d 564, 572 (D.S.C. 2002) (“Fewer principles are better established in First Amendment law than the principle that exercise of the right of free speech may not be subjected to the unlimited discretion of public officials . . .”), aff’d on other grounds, 361 F.3d 786 (4th Cir. 2004).

Such unfettered discretion increases the risk that a government official may discriminate based on the content of the speech or the viewpoint of the speaker. Stonewall Union, 931 F.2d at 1134; see also Polaris Amphitheatre Concerts, Inc. v. City of Westerville, 267 F.3d 503 (6th Cir. 2001) (“[I]n the absence of narrowly drawn, reasonable, and definite standards for the officials to follow, the law invites opportunities

for the unconstitutional suppression of speech.”). As the district court noted about Louisiana’s license plate program:

The licensing scheme in Louisiana has no standards, parameters, guidelines, or other criteria . . . . As a result, the threat of discrimination based on viewpoint invariably must loom over any applicant. The reason for this is that whether or not a license plate is issued is subject to the uncontrolled discretion of the legislature.

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

The legislature’s actions in Tennessee demonstrate that this fear is well founded. The Tennessee General Assembly had unlimited discretion to determine which specialty license plates to allow. With no objective, neutral standards to guide its decisionmaking, the General Assembly authorized only one side of the abortion debate and excluded the opposing pro-choice side.

Other state specialty licensing plate schemes have fallen because the legislature exercised unbridled discretion. See Women’s Res. Network, 305 F. Supp. 2d at 1154 (enjoining California’s specialty license plate program because it gave California legislators “unconstitutional, unfettered discretion” in violation of the First Amendment); Henderson, 265 F. Supp. 2d at 719-20 (enjoining Louisiana’s specialty licensing plate scheme); see also Lewis, 253 F.3d at 1080-81 (striking down a license plate statute on the grounds that the statute gave the Department of Revenue “unfettered discretion in choosing what license plates should be rejected . . . . [The statute] thus creates an impermissible risk of suppression of ideas . . . .”) (citation and quotation omitted). Because the Act is a product of such standardless discretion, it too cannot stand.

## **II. Tennessee's Specialty License Plate Scheme Violates Plaintiffs' Free Speech Rights.**

Tennessee's specialty license plate scheme suffers from the same unconstitutional deficiencies as the Act. It permits the expression of only those viewpoints condoned by the Tennessee legislature. Moreover, the legislature acted with unfettered discretion in approving certain specialty plates, such as the "Choose Life" plate, while refusing to authorize license plates that convey a message disfavored by the legislature, such as a pro-choice plate. In both regards, the scheme violates the First Amendment. See supra Part I and authorities cited therein.

### **CONCLUSION**

For the reasons set forth above, Plaintiffs respectfully request that the Court grant their Motion for Summary Judgment and that the Act be declared unconstitutional and permanently enjoined. In the alternative, Plaintiffs request that the Court declare that T.C.A. §§ 55-4-228, 55-4-230 through 55-4-240, and 55-4-242 through 55-4-308 are unconstitutional and permanently enjoin their enforcement.

Dated: Nashville, Tennessee  
August 2, 2004

Respectfully submitted,

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\*Motion for admission *pro hac vice* pending

CERTIFICATE OF SERVICE

I hereby certify that on August 2, 2004, I caused to be served by Federal Express a true copy of Plaintiffs' Motion for Summary Judgment and accompanying Request for Oral Argument, Statement of Undisputed Facts, Memorandum in Support, and Affidavits of Sally Levine, Hilary Chiz, Joe Sweat, Hedy Weinberg and Jeffrey Teague, on the following counsel of record:

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