

In the
United States Court of Appeals
For the Seventh Circuit

No. 07-1349

CHOOSE LIFE ILLINOIS, INCORPORATED,
RICHARD BERGQUIST, SUE BERGQUIST, et al.,

Plaintiffs-Appellees,

v.

JESSE WHITE, Secretary of State
of the State of Illinois,

Defendant-Appellant.

Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division.

No. 04 C 4316—**David H. Coar**, *Judge*.

ARGUED NOVEMBER 27, 2007—DECIDED NOVEMBER 7, 2008

Before MANION, EVANS, and SYKES, *Circuit Judges*.

SYKES, *Circuit Judge*. Choose Life Illinois, Inc. (“CLI”), collected more than 25,000 signatures from Illinois residents interested in purchasing a “Choose Life” specialty license plate and applied to the Secretary of State for issuance of the plate under 625 ILL. COMP. STAT. 5/3-600(a) (amended effective 2008). That statute prohibits the

Secretary from issuing a new line of specialty plates unless he has a minimum number of applications on file, and CLI's 25,000 signatures far exceeded the minimum. Since 1948, however, when Illinois authorized its first specialty license plate, almost no specialty plate had been issued without prior legislative approval. The Secretary referred CLI to the General Assembly for enabling legislation.

CLI hit a roadblock in the General Assembly. Despite the strong showing of support, the proposal for a "Choose Life" license plate died in subcommittee. CLI turned to federal court for relief, claiming that the Secretary was authorized to issue the plates without legislative approval once CLI met the statutory requirements and that his failure to do so constituted impermissible viewpoint discrimination in violation of the First Amendment. If legislative approval was required, CLI claimed the General Assembly's refusal to adopt the "Choose Life" license plate was viewpoint discrimination. The district court accepted the first of these arguments and ordered the Secretary to issue the "Choose Life" plate, but stayed its judgment pending appeal.

In the meantime, the General Assembly resolved CLI's first claim by amending 625 ILL. COMP. STAT. 5/3-600 to require *express* prior legislative approval before the Secretary may issue new specialty plates. As to the second claim, the Secretary now argues that the amendment reinforces his position that the messages on specialty license plates are the government's own speech—not private or a mixture of government and private speech—and therefore no First Amendment

rights are implicated. We disagree, though we acknowledge the question has divided other circuits.¹

Specialty license plates implicate the speech rights of private speakers, not the government-speech doctrine. This triggers First Amendment “forum” analysis, and we conclude specialty plates are a nonpublic forum. Illinois may not discriminate on the basis of viewpoint, but it may control access to the forum based on the content of a proposed message—provided that any content-based restrictions are reasonable. The distinction between content and viewpoint discrimination makes a difference here.

It is undisputed that Illinois has excluded the *entire subject* of abortion from its specialty-plate program; it has authorized neither a pro-life plate nor a pro-choice plate. It has done so on the reasonable rationale that messages on specialty license plates give the appearance of having the government’s endorsement, and Illinois does not wish to be perceived as endorsing *any* position on the subject of abortion. The State’s rejection of a

¹ Compare *Ariz. Life Coal., Inc. v. Stanton*, 515 F.3d 956, 965-68 (9th Cir. 2008) (private speech), *Planned Parenthood of S.C., Inc. v. Rose*, 361 F.3d 786, 793-95, *reh’g en banc denied*, 373 F.3d 580 (4th Cir. 2004) (mix of government and private speech), and *Sons of Confederate Veterans, Inc. v. Comm’r of the Va. Dep’t of Motor Vehicles*, 288 F.3d 610, 617-21, *reh’g en banc denied*, 305 F.3d 241 (4th Cir. 2002) (private speech), with *Am. Civil Liberties Union of Tenn. v. Bredesen*, 441 F.3d 370, 378-79 (6th Cir. 2006) (government speech).

“Choose Life” license plate was thus content based but viewpoint neutral, and because it was also reasonable, there is no First Amendment violation. We reverse the judgment of the district court.

I. Background

A. Specialty License Plates in Illinois

For an extra fee, Illinois will permit a vehicle owner to have a specialized license plate that, in addition to the generic or personalized numbers and characters required for license identification, also bears a specific message or symbol. *See* 625 ILL. COMP. STAT. 5/3-600 *et seq.* Like most other states, Illinois offers a broad selection of specialty plates. Some denote that the vehicle owner is an alumnus of a certain college or university (schools in Illinois and contiguous states qualify) or a member of a civic organization (e.g., the Knights of Columbus or the Masons). *Id.* 5/3-629, 635. Others signify support for a particular cause, such as a love of pets (“I am pet friendly”); opposition to violence (the dove of peace symbol); mammogram or organ-donor awareness (“Mammograms Save Lives,” “Be An Organ Donor”); or prevention of childhood cancer (“Stop Neuroblastoma”).² *See id.* 5/3-653, 630, 643, 646, 654.

² Some specialty plates are issued at no extra charge to persons who have achieved some noteworthy distinction, such as being awarded the Silver Star, having served in World War II, or holding a public office. 635 ILL. COMP. STAT. 5/3-642, 647, 639.

With insignificant historical exceptions, each specialty license plate in Illinois has its own authorizing statute describing the plate and establishing the required additional fee. These statutes typically allocate a portion of the proceeds from the sale of the plates to the specific state or local program that corresponds to the message or to the not-for-profit or charitable organization that sponsored the plate. (For example, proceeds from the “Park District Youth” plate benefit local park and recreational districts; the “Police Memorial” plate benefits the Police Memorial Committee Fund. *See id.* 5/3-654, 644.) Beyond their obvious utility as a means of promoting a message or cause, specialty license plates thus also serve a fundraising purpose for units of state and local government and for private organizations.

The basic requirements for issuance of a new specialty-plate series are set forth in 625 ILL. COMP. STAT. 5/3-600, enacted in 1990. Until recently, that statute provided as follows:

(a) The Secretary of State shall not issue a series of special plates unless applications, as prescribed by the Secretary, have been received for 10,000 plates of that series; except that the Secretary of State may prescribe some other required number of applications if that number is sufficient to pay for the total cost of designing, manufacturing and issuing the special license plate.

....

(c) This Section shall not apply to special license plate categories in existence on the effective date of this

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