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File Name: 06a0099p.06

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

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

Plaintiffs-Appellees,

v.

PHILIP BREDESEN, Governor of Tennessee; FRED PHILLIPS, Commissioner of Safety of Tennessee,

Defendants-Appellees,

FRIENDS OF GREAT SMOKY MOUNTAINS NATIONAL PARK, INC., a non-profit North Carolina Corporation,

Defendant,

NEW LIFE RESOURCES, INC.,

Intervening Defendant-Appellant.

No. 04-6393

Appeal from the United States District Court
for the Middle District of Tennessee at Nashville.
No. 03-01046—Todd J. Campbell, District Judge.

Argued: November 2, 2005

Decided and Filed: March 17, 2006

Before: MARTIN, NELSON, and ROGERS, Circuit Judges.

COUNSEL

ARGUED: James Bopp, Jr., BOPP, COLESON & BOSTROM, Terre Haute, Indiana, for Appellant. Julie E. Sternberg, AMERICAN CIVIL LIBERTIES UNION FOUNDATION, New York, New York, Jimmy G. Creecy, OFFICE OF THE ATTORNEY GENERAL, Nashville, Tennessee, for Appellees. **ON BRIEF:** James Bopp, Jr., Thomas J. Marzen, Anita Y. Woudenberg, BOPP, COLESON & BOSTROM, Terre Haute, Indiana, for Appellant. Julie E. Sternberg, Carrie Y. Flaxman, Caroline M. Corbin, AMERICAN CIVIL LIBERTIES UNION FOUNDATION, New York, New York, Jimmy G. Creecy, OFFICE OF THE ATTORNEY GENERAL, Nashville, Tennessee, Melody L. Fowler-Green, ACLU FOUNDATION OF TENNESSEE, Nashville, Tennessee, Susan L. Kay, VANDERBILT SCHOOL OF LAW, Nashville, Tennessee, Roger K.

Evans, Donna Lee, PLANNED PARENTHOOD FEDERATION OF AMERICA, New York, New York, for Appellees. Mathew D. Staver, LIBERTY COUNSEL, Maitland, Florida, Mary E. McAlister, LIBERTY COUNSEL, Lynchburg, Virginia, for Amicus Curiae.

ROGERS, J., delivered the opinion of the court, in which NELSON, J., joined. MARTIN, J. (pp. 10-19), delivered a separate opinion concurring in part and dissenting in part.

OPINION

ROGERS, Circuit Judge. In this case we are required to decide the constitutionality of Tennessee's statute making available the purchase of automobile license plates with a "Choose Life" inscription, but not making available the purchase of automobile license plates with a "pro-choice" or pro-abortion rights message. *See* TENN. CODE ANN. § 55-4-306. Although this exercise of government one-sidedness with respect to a very contentious political issue may be ill-advised, we are unable to conclude that the Tennessee statute contravenes the First Amendment. Government can express public policy views by enlisting private volunteers to disseminate its message, and there is no principle under which the First Amendment can be read to prohibit government from doing so because the views are particularly controversial or politically divisive. We accordingly reverse the judgment of the district court invalidating the statute on First Amendment grounds.

I.

Tennessee statutory law authorizes the sale of premium-priced license plates bearing special logotypes to raise revenue for specific "departments, agencies, charities, programs and other activities impacting Tennessee." TENN. CODE ANN. § 55-4-201(j). The statute authorizing issuance of these license plates earmarks half of their respective profits for named non-profit groups committed to advancing the causes publicized on the plates. *Id.* § 55-4-215 to -217.

The State of Tennessee takes the other half of the profits. *See id.* § 55-4-215(a)(2)-(3). Forty percent (of the total profits) goes to the Tennessee arts commission, while the remaining 10 percent goes to the state's highway fund. *Id.* Tennessee will not issue a new specialty license plate until customers place at least one thousand advance orders. *See id.* § 55-4-201(h)(1).

The Tennessee legislature has determined the price of specialty plates by statute. In general, they cost the same as a non-specialty plate plus a $35.00 fee (if the government issues the plate on or after September 1, 2002, as in this case). *See id.* § 55-4-203(d).

In 2003, the Tennessee legislature passed a law (hereinafter "the Act") authorizing issuance of a specialty license plate with a "Choose Life" logotype "designed in consultation with a representative of New Life Resources." *See id.* § 55-4-306(b). Half of the profits go to New Life Resources, Inc. (New Life). *See id.* § 55-4-306(c)-(d). New Life's half "shall be used exclusively for counseling and financial assistance, including food, clothing, and medical assistance for pregnant women in Tennessee." *Id.* § 55-4-306(c). The Act strictly regulates the precise activities that these profits shall fund. *See id.* § 55-4-306(d). It also provides a comprehensive list of dozens of groups that must share in a portion of these profits. *See id.* It is undisputed that during legislative consideration of the Act, Planned Parenthood of Middle and East Tennessee "lobbied for an amendment authorizing a 'Pro-Choice' specialty license plate . . . , but the measure was defeated." JA 231.

The plaintiffs in this action, the American Civil Liberties Union of Tennessee and others, filed a civil action in federal district court challenging the Act as facially unconstitutional, naming the Governor of Tennessee as defendant. New Life intervened as a defendant. The district court granted summary judgment to the plaintiffs, enjoining enforcement of the Act. The district court held that the authorization of the "Choose Life" license plate was not purely government speech. Relying largely upon Fourth Circuit precedent, the district court held that "both the State and the individual vehicle owner are speaking"—a "mixture" of government and private speech. JA 33-34 (citing *Planned Parenthood of S.C., Inc. v. Rose*, 361 F.3d 786, 793-94 (4th Cir. 2004); *Sons of Confederate Veterans, Inc. v. Comm'r of the Va. Dep't of Motor Vehicles*, 288 F.3d 610, 615 (4th Cir. 2002)). Reasoning that providing for such "mixed" speech is not constitutional if doing so is discriminatory as to viewpoint, the district court found that the statute was clearly discriminatory as to viewpoint and enjoined enforcement of the Act. The district court expressly refrained, however, from reaching the question of whether the entire specialty license plate program was unconstitutional.

New Life appeals. Although the Tennessee state defendants have not appealed, they have filed a brief urging this court not to strike down Tennessee's specialty license plate scheme in its entirety.

II.

First, the district court was not deprived of subject matter jurisdiction in this case by the Tax Injunction Act (TIA), 28 U.S.C. § 1341, as argued by New Life. New Life claims that the extra cost for a "Choose Life" specialty license plate constitutes a tax that may not, under the TIA, be enjoined by a federal district court if a plain, speedy and efficient remedy may be had in Tennessee courts. Even making the somewhat artificial assumption that it is really the payments that are being challenged in this case,[1] the payments are most closely analogous to payments for simple purchases from the government. Ordinary purchase payments are not taxes under the TIA, and neither is the extra payment for a specialty license plate. It follows that the TIA did not deprive the district court of subject matter jurisdiction in this case.

This conclusion is supported by the longstanding distinction drawn in various legal contexts between taxes and ordinary debts. The Supreme Court for instance explained in *New Jersey v. Anderson*, 203 U.S. 483, 492 (1906):

> Generally speaking, a tax is a pecuniary burden laid upon individuals or property for the purpose of supporting the Government. We think this exaction is of that character. It is required to be paid by the corporation after organization in invitum.[2] The amount is fixed by the statute, to be paid on the outstanding capital stock of the corporation each year, and capable of being enforced by action against the will of the taxpayer. As was said by Mr. Justice Field, speaking for the court in *Meriwether v. Garrett*, 102 U.S. 472, 513:

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[1] *Compare Hibbs v. Winn*, 542 U.S. 88 (2004). In *Hibbs*, the Supreme Court held that the TIA did not bar an Establishment Clause challenge to a state income-tax credit for payments to certain organizations that give tuition grants to students attending religious schools. The Court explained that "in enacting the TIA, Congress trained its attention on taxpayers who sought to avoid paying their tax bill by pursuing a challenge route other than the one specified by the taxing authority." *Hibbs*, 542 U.S. at 104-05. The Court also noted that cases applying the TIA generally "involved plaintiffs who mounted federal litigation to avoid paying state taxes (or to gain a refund of such taxes)." *Id.* at 106. Plaintiffs in this case are of course not seeking to avoid paying for a "Choose Life" license plate, and it is therefore at least questionable whether the TIA would apply even if the payment for the license plates were a "tax." We need not reach the issue, however, because of our determination that no tax is involved here.

[2] "In invitum" means "[a]gainst an unwilling person." BLACK'S LAW DICTIONARY 787 (7th ed. 1999).

> "Taxes are not debts. . . . Debts are obligations for the payment of money founded upon contract, express or implied. Taxes are imposts levied for the support of the Government, or for some special purpose authorized by it. The consent of the taxpayer is not necessary to their enforcement. They operate in invitum. Nor is their nature affected by the fact that in some States—and we believe in Tennessee—an action of debt may be instituted for their recovery. The form of procedure cannot change their character."

See also Fla. Cent. & Peninsular R.R. Co. v. Reynolds, 183 U.S. 471, 475 (1902) ("tax" defined as "enforced" contribution and distinguished from ordinary contractual debt); *Patton v. Brady*, 184 U.S. 608, 619 (1902) (same); *Alaska Consol. Canneries v. Territory of Alaska*, 16 F.2d 256, 257 (9th Cir. 1926) (same).

The Fifth Circuit has relied upon the definition of tax in *Anderson* to hold that a challenge to the collection of lease rent payments was not subject to the Tax Injunction Act. The Fifth Circuit explained,

> The State contends that the leases are in fact taxes, and thus the federal courts are barred by the Tax Injunction Act, 28 U.S.C. § 1341, from entertaining a challenge to the State's actions to collect on the leases. This contention is without merit. The lease obligations are a creature of contract, not a mandatory obligation imposed by the state as taxes are.

Lipscomb v. Columbus Mun. Separate Sch. Dist., 269 F.3d 494, 500 n.13 (5th Cir. 2001). The analysis would apply a fortiori to ordinary purchases, like the purchase of government bonds, or the purchase of a souvenir at a state park gift store. Such purchase payments can hardly be termed "taxes" as opposed to ordinary payments on voluntary contracts. This conclusion follows, moreover, regardless of what the government does with the sales income.

In this case, Tennessee's sale of specialty plates creates contractual debts to pay but imposes no tax. Instead of using its sovereign power to coerce sales, Tennessee induces willing purchases as would any ordinary market participant. The government confers all the same driving privileges on people who forgo specialty plates to buy standard-issue plates. Drivers' only motive for buying such plates, therefore, must rest with the attractiveness of the "Choose Life" message as Tennessee has marketed it, not a desire to obey Tennessee's will. Under *Anderson* and *Lipscomb*, these sales constitute regular contractual payments, not taxes.

We recognize that there is some case law to the effect that cases like this one are precluded by the Tax Injunction Act. *See Henderson v. Stalder*, 407 F.3d 351, 354-60 (5th Cir. 2005); *NARAL Pro-Choice Ohio v. Taft*, No. 1:05 CV 1064, 2005 U.S. Dist. LEXIS 21394, at *16-*26 (N.D. Ohio Sept. 27, 2005). These cases proceed on the questionable assumption that the applicable test is the one for differentiating between a regulatory fee and a tax. *See generally Hedgepeth v. Tenn.*, 215 F.3d 608 (6th Cir. 2000). This test was created to answer a different question: whether a regulatory fee, often directed to a segregated fund for a special use related to the basis for imposing the fee, is or is not a tax for TIA purposes. *See generally San Juan Cellular Tel. Co. v. Pub. Serv. Comm'n of P.R.*, 967 F.2d 683 (1st Cir. 1992). The classic non-tax regulatory fee

> is imposed by an agency upon those subject to its regulation. It may serve regulatory purposes directly by, for example, deliberately discouraging particular conduct by making it more expensive. Or, it may serve such purposes indirectly by, for example, raising money placed in a special fund to help defray the agency's regulation-related expenses.

Id. at 685 (citations omitted) (Breyer, J.). In contrast, a purchase price cannot be said to be "imposed by an agency upon those subject to its regulation." Instead it is merely a contract price. The test for determining which compelled exactions are taxes and which are fees cannot logically be used to determine whether a payment is a compelled exaction in the first place. Under the Supreme Court's basic definition of a tax, logically applied in *Lipscomb*, the TIA does not preclude federal jurisdiction over the plaintiffs' claims in this case.

Eight judges of the Fifth Circuit accordingly dissented from the denial of rehearing en banc in *Henderson*. 434 F.3d 352 (5th Cir. 2005) (Davis, J. dissenting). In an opinion with which we are in substantial agreement, the dissent acknowledged the accepted test for distinguishing between a regulatory fee and a tax, but explained that "this does not mean that the extra charge for a specialty plate must be one or the other." *Id.* at 355. It does not follow, in other words, that if "the charge is not a regulatory fee . . . it must be a tax." *Id.* Relying in part on the Ninth Circuit's reasoning in *Bidart Brothers v. Calif. Apple Comm'n*, 73 F.3d 925 (9th Cir. 1996), the Fifth Circuit dissent reasoned that, "the relevant question is whether this charge is a tax and if the answer to this question is no, the TIA does not apply regardless of whether the charge is characterized as a regulatory fee, a charitable donation or something else." *Henderson*, 434 F.3d at 355. Thus even though the Fifth Circuit dissent found the charge for the Louisiana "Choose Life" plate not to be a regulatory fee, the charge was not a tax either, in part because "the charge is not 'imposed' by the legislature; because it is entirely optional and voluntary on the part of Louisiana citizens electing to pay the extra charge for a specialty plate." *Id.* at 356.

III.

On the merits we are faced with a purely legal issue: whether a government-crafted message disseminated by private volunteers creates a "forum" for speech that must be viewpoint neutral. No such requirement applies, at least with respect to state-produced specialty license plates like those at issue in this case.

A. The "Choose Life" Specialty License Plate Bears a Government-Crafted Message

"Choose Life," as it is to appear on the face of Tennessee specialty license plates, is a government-crafted message. *See Johanns v. Livestock Mktg. Ass'n*, 125 S. Ct. 2055 (2005). *Johanns* stands for the proposition that when the government determines an overarching message and retains power to approve every word disseminated at its behest, the message must be attributed to the government for First Amendment purposes. *See id.* at 2062-66. In this case, *Johanns* requires the court to conclude that "Choose Life" is Tennessee's message because the Act determines the overarching message and Tennessee approves every word on such plates.

In *Johanns*, the Supreme Court held that federal government promotional campaigns to encourage beef consumption constituted government speech because the "message of the promotional campaigns is effectively controlled by the Federal Government itself." *Id.* at 2062. In these campaigns, however, the federal government did not explicitly credit itself as the speaker. *See id.* at 2059 (messages bore the attribution, "Funded by America's Beef Producers").

More specifically, the "message set out in the beef promotions" counted as government speech because "from beginning to end [it is] the message established by the Federal Government." *Id.* at 2062. Congress "directed the implementation of a coordinated program of promotion" that includes paid advertising to advance the "image and desirability of beef and beef products." *Id.* at 2062-63 (internal quotation marks omitted). Congress and the U.S. Secretary of Agriculture enunciated "the overarching message and some of its elements," while leaving the "remaining details to an entity whose members are answerable to the Secretary." *Id.* at 2063. Also, the "Secretary exercises final approval authority over every word used in every promotional campaign."

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