No.

In the Supreme Court of the United States

CHOOSE LIFE ILLINOIS, INC., ET AL.,
Petitioners,

v.

JESSE WHITE, SECRETARY OF STATE OF THE STATE OF ILLINOIS,
Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

PETITION FOR A WRIT OF CERTIORARI

THOMAS BREJCHA
JASON R. CRADDOCK
PETER BREEN
Thomas More Society
29 South LaSalle Street
Suite 440
Chicago, IL 60603
(312) 782-1680

ALAN UNTEREINER*
ROY T. ENGLERT, JR.
DAMON TAAFFE
JENNIFER WINDOM
Robbins, Russell, Englert, Orseck, Untereiner & Sauber LLP
1801 K Street, N.W.
Suite 411
Washington, D.C. 20006
(202) 775-4500

* *Counsel of Record*

Counsel for Petitioners

QUESTIONS PRESENTED

This case involves important and recurring issues concerning application of the First Amendment to politically controversial messages that owners of motor vehicles wish to communicate on specialty license plates affixed to their vehicles. Those questions are:

1. Whether the Seventh Circuit correctly held, in acknowledged conflict with the Ninth Circuit, that a state's selective refusal to approve a "Choose Life" specialty plate – after approving scores of other specialty plates, some involving controversial subjects – is content rather than viewpoint discrimination and does not violate the First Amendment rights of individuals who would like to express their views in support of adoption and against abortion by displaying the plates on their vehicles.

2. Whether the Seventh Circuit correctly held, in conflict with the Eighth Circuit and *Shuttlesworth* v. *City of Birmingham*, 394 U.S. 147 (1969), that a specialty license plate program that grants standard-less authority to approve or reject new messages on plates is not facially invalid under the First Amendment if it vests that licensing authority in a legislative body.

RULE 14.1(b) AND 29.6 STATEMENT

In addition to Choose Life Illinois, Inc., petitioners here (plaintiffs below) include the following 15 individuals, all of whom reside in Illinois: Richard Bergquist, Sue Bergquist, James Finnegan, Phyllis Finnegan, Daniel Gura, Sandra Gura, Becky MacDougall, Virginia McCaskey, Thomas Morrison, Bethany Morrison, Dan Proft, Richard Stanek, Jill Stanek, Joseph Walsh, and Carol Walsh.

Choose Life Illinois, Inc., is a non-profit corporation organized under the laws of the State of Illinois. It has no parent corporation and does not issue stock to the public.

TABLE OF CONTENTS

Page

TABLE OF CONTENTS—Continued

Page

TABLE OF CONTENTS—Continued

Page

TABLE OF AUTHORITIES

Page(s)

Cases:

TABLE OF AUTHORITIES—Continued

Page(s)

TABLE OF AUTHORITIES—Continued

Page(s)

TABLE OF AUTHORITIES—Continued

Page(s)

Statutes:

TABLE OF AUTHORITIES—Continued

Page(s)

Miscellaneous:

TABLE OF AUTHORITIES—Continued

Page(s)

TABLE OF AUTHORITIES—Continued

Page(s)

PETITION FOR A WRIT OF CERTIORARI

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-33a) is reported at 547 F.3d 853. The district court's opinion granting summary judgment (App., *infra*, 34a-55a) is unreported.

JURISDICTION

The court of appeals entered judgment on November 7, 2008, and denied rehearing and rehearing en banc on December 17, 2008. App., *infra*, 1a, 56a-57a. On March 4, 2009, Justice Stevens extended the time within which to file a petition for a writ of certiorari to and including April 16. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The First Amendment to the U.S. Constitution provides, in pertinent part, that "Congress shall make no law * * * abridging the freedom of speech." Relevant provisions of the Illinois Vehicle Code, 625 ILCS 5/3-101 *et seq*., are set forth at App., *infra*, 58a-61a.

STATEMENT

Although automobile license plates "are still used for their original purpose of tracking individuals," they have "over the years * * * become a way for Americans, who spend an average of 56 minutes a day in their cars, to express their identity." Marsh, *License To Shill*, LEGAL AFFAIRS, Jan./Feb. 2003, *50, *52. This case involves Illinois's selective refusal to approve petitioners' application for a specialty license plate bearing the words "Choose Life." The district court

held that the state's rejection of the plate, in light of its having approved "approximately 60 designs" bearing "a medley of various special-interest messages" (App., *infra*, 35a), was impermissible viewpoint discrimination. The Seventh Circuit reversed. Placing itself in conflict with the Eighth and Ninth Circuits – and with decisions of this Court – the court of appeals held that (a) Illinois's actions did not violate the First Amendment as applied to petitioners' application; and (b) the Illinois specialty plate program is not facially invalid even though it delegates unfettered discretion to the General Assembly to approve or squelch private expression. Further review is needed to resolve the deep divisions in the lower courts over how the First Amendment applies to specialty license plates.

A. The Illinois Specialty Plate Scheme

Almost every motor vehicle registered in Illinois must bear a license plate issued by the Secretary of State's Vehicle Services Department. App., *infra*, 35a. When vehicle owners request license plates from the Department, they may select a standard plate or a more expensive "vanity," "personalized," or "specialty" plate. *Id.* at 4a-5a, 35a.[1] Illinois offers a broad selection of specialty plates, including plates denoting that the vehicle owner "is an alumnus of a certain college or university," is "a member of a civic organization," pursues a hobby such as hunting, or supports a particular social cause. *Id.* at 4a, 35a-36a; see *id.* at 52a-55a (listing specialty plates available as of January 2007). Examples in this last category include plates declaring "I am Pet Friendly," "Be An Organ Donor," or

[1] Vanity and personalized plates use an existing plate design, but allow applicants to choose the combination of identifying letters and numbers that will appear on the plate. 625 ILCS 5/3-405.1.

"Support Our Troops," (Pet. C.A. Supp. Br. 1), and plates expressing opposition to violence or support for the environment. The proceeds from specialty plates typically benefit various non-profit groups that sponsor them, and to a lesser extent help defray the state's administrative processing costs. App., *infra*, 5a, 35a-36a.

Illinois law vests in the Secretary of State broad authority to administer and enforce the Illinois Vehicle Code, including the provisions relating to specialty license plates. See 625 ILCS 5/2-101, 5/2-104. Section 5/3-600 of the Vehicle Code imposes several requirements on specialty plates issued since 1990. See 625 ILCS 5/3-600(c). First, it provides that the Secretary "shall not issue a series of special plates unless applications * * * have been received for 10,000 plates of that series," but authorizes the Secretary to reduce that number if the lower number "is sufficient to pay for the total cost of designing, manufacturing and issuing the special license plate." 625 ILCS 5/3-600(a).[2] Second, as amended effective January 1, 2008, Section 5/3-600 provides that "[t]he Secretary of State shall issue only special plates that have been

[2] Secretary of State Jesse White (respondent here) has issued a "Fact Sheet" stating his policy of reducing the minimum number of plate applications to approximately 800-850. App., *infra*, 62a-63a (reproducing "Fact Sheet"); *id.* at 5a-6a, 37a-38a. The Fact Sheet also requires that, before any "new plate category" will be approved by the Secretary, "[l]egislation must be [1] introduced (by a legislator either in the Senate or the House), [2] passed by both chambers, and [3] signed into law by the Governor." *Id.* at 62a; see also *id.* at 5a-6a. These three requirements, the Fact Sheet explains, were necessary to avoid "arbitrarily * * * issuing a new plate category." *Id.* at 62a. In 2007, while this case was on appeal to the Seventh Circuit, Illinois codified the second of these requirements in a modified form – *i.e.*, "authoriz[ation]" (whether in the form of legislation or otherwise) by the General Assembly of new specialty plates. *Id.* at 8a.

authorized by the General Assembly." 625 ILCS 5/3-600(a).[3]

B. Petitioners' Unsuccessful Efforts To Win Approval For The "Choose Life" Plate

Petitioner Choose Life Illinois, Inc. ("CLI"), is an Illinois not-for-profit corporation dedicated to promoting the adoption of children and increasing public awareness and education about the importance of adoption. The 15 individual petitioners are Illinois residents who hold leadership positions in, or are members or supporters of, CLI. To further its goals, CLI sought approval in Illinois of a "Choose Life" specialty plate that would support adoption causes. CLI collected more than 25,000 signatures of Illinois citizens who wished to purchase the plates. Between 2001 and 2004, a period in which Illinois authorized specialty plates for various social causes, CLI and several individual petitioners tried repeatedly to persuade the General Assembly to approve the "Choose Life" plate. App., *infra*, 1a-2a, 6a, 34a-35a. In an unrebutted declaration submitted in the district court, petitioner Dan Proft detailed these efforts and the hostility with which they were met. *Id.* at 64a-67a (reproducing declaration).

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[3] Other provisions of the Vehicle Code regulate the content of specialty and other license plates. With certain exceptions, Illinois license plates must indicate the vehicle's registration number, the year for which the registration is issued, and the state's official motto ("Land of Lincoln") and name. 625 ILCS 5/3-412(b). The Secretary may not issue any vanity plates that substantially interfere with law enforcement, are "misleading," or would "create[] a connotation that is offensive to good taste and decency." 625 ILCS 5/3-405.2; see App., *infra*, 60a-61a.

C. The Proceedings In The District Court

1. Petitioners filed this lawsuit seeking declaratory and injunctive relief in the Northern District of Illinois. They allegied that Secretary White's refusal to issue the plate was "viewpoint discrimination" in violation of the First Amendment. In the alternative, they advanced a facial challenge contending that the specialty plate scheme impermissibly invited viewpoint discrimination by failing to impose *any* substantive standards on the state's decision to allow a new plate.

Respondent moved to dismiss, arguing among other things that messages on specialty license plates are government rather than private speech and that Illinois was justified in rejecting the "Choose Life" plate because of disagreement with its message. Defs.' Mem. of Law in Support of Mot. To Dismiss, at 12 (Sept. 22, 2004) ("the state has an interest in selecting *only* those messages on special plates *it chooses to associate with*, and avoiding messages *it does not endorse*") (emphases added). The motion to dismiss was denied.

2. On cross-motions for summary judgment, the district court held that the state's refusal to issue the "Choose Life" plate violated the First Amendment. App., *infra*, 34a-55a. The court first examined whether the "Choose Life" message constituted private speech, government speech, or hybrid speech. App., *infra*, 40a-48a. Based on its review of the Illinois program, this Court's decision in *Wooley* v. *Maynard*, 430 U.S. 705 (1977), and other decisions involving specialty plates, the district court ruled that "the privately-crafted and privately-funded message on specialty license plates constitutes private speech." *Id.* at 42a-48a.

Next, the district court ruled that the state's rejection of the "Choose Life" plate was based on viewpoint

discrimination. App., *infra*, 49a-51a.[4] "[T]he 'Choose Life' message," the court reasoned, "certainly represents a viewpoint – the pro-life viewpoint" – and the state's "reason for denying the speech is because that viewpoint is controversial." *Id.* at 50a. Accepting the explanation offered by the state in its motion to dismiss, the district court observed that "it appears that the state wishes to suppress what it considers a controversial idea, discriminating against a viewpoint with which it *does not agree or wish to associate*." *Ibid.* (emphasis added). Moreover, the court reasoned, there are "no general guidelines or rules" in Illinois "on restricting speech in a viewpoint neutral way that would account for denying 'Choose Life' on a specialty license plate." *Ibid.*[5] Accordingly, the court ordered respondent to issue the "Choose Life" plate, but stayed its order pending appeal.

D. The Court Of Appeals' Decision

The Seventh Circuit reversed. App., *infra*, 1a-33a. Like the district court, the appellate court first

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[4] In the summary judgment proceedings, the state failed to identify a *single other instance* of the General Assembly's rejecting a specialty license plate on substantive grounds.

[5] The district court's determination that Illinois law and the Secretary's "Fact Sheet" contained "no substantive criteria or guidelines for the approval of the specialty license plates by the General Assembly and the Governor" (App., *infra*, 37a) was based on the undisputed facts. Respondent admitted that no such standards existed and agreed that his agency was "*aware of no standards that the General Assembly itself has developed or follows* in making the approval decision" for new specialty plates. See Defs.' Response To Plfs.' Statement of Undisputed Facts, at 10 (Dec. 7, 2005) (emphasis added). Ultimately, the district court concluded that there was no need to decide petitioners' facial challenge (or, on the as-applied claim, the nature of the forum). App., *infra*, 37a n.2, 50a-51a.

reviewed the extensive (and conflicting) circuit decisions on the nature of speech on specialty license plates and concluded that the "Choose Life" message was "not government speech." *Id.* at 11a-22a. The Seventh Circuit disagreed, however, with the district court's determination that Illinois had engaged in viewpoint discrimination. Accepting at face value respondent's new assertion on appeal that there was an unwritten, undocumented, and previously unarticulated policy of excluding "the entire subject of abortion" from Illinois's "specialty-plate program" (compare note 5, *supra*), the court of appeals held that Illinois had engaged only in content-based discrimination. App., *infra*, 25a. The Seventh Circuit acknowledged that the Ninth Circuit, in *Arizona Life Coalition, Inc.* v. *Stanton*, 515 F.3d 956 (9th Cir.), cert. denied, 129 S. Ct. 56 (2008), a case "very much like our own," had reached "the opposite conclusion." App., *infra*, 19a-20a, 25a-26a.

Because content-based discrimination is subject to strict scrutiny in traditional and designated public fora but only to reasonableness review in nonpublic fora, the Seventh Circuit proceeded to examine the nature of the forum created by the Illinois program. App., *infra*, 22a-24a. "Specialty license plates," the court reasoned, "are an unusual species of forum – certainly not a traditional public forum, and we think not a designated public forum, either." *Id.* at 23a. Instead, it concluded, they qualify as a nonpublic forum because *license plates in general* are heavily regulated, have a "primary purpose" of "identify[ing] the vehicle," and "are not by nature compatible with anything more than an extremely limited amount of expressive activity." *Id.* at

23a-24a.[6] The court also held that Illinois's exclusion of any specialty-plate messages touching on "the entire subject of abortion" was reasonable. *Id.* at 25a, 27a-28a.

Finally, the Seventh Circuit rejected petitioners' facial challenge. App., *infra*, 10a n.4. The court said the absence of standards governing "the *state legislature's* discretion to authorize new plates" (*ibid.* (emphasis added)) did not render the licensing scheme facially invalid:

> It is axiomatic that one legislature cannot bind a future legislature. The General Assembly is entitled to authorize specialty plates one at a time. It is not required to – and cannot – adopt "standards" to control its legislative discretion.

Id. at 10a-11a n.4 (citations omitted).[7]

REASONS FOR GRANTING THE PETITION

For a decade, the federal courts have entertained a series of lawsuits involving First Amendment challenges to the decisions of states concerning specialty license plates. Many have involved "Choose Life" plates, which currently are available in 19 states

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[6] In contrast, the district court had identified the "central purpose[s] of the specialty plate program" as being "to raise revenue" for the state and "to allow for some private expression." App., *infra*, 35a-36a, 43a; see also *id.* at 43a ("private expression is an important purpose for specialty plates").

[7] The Seventh Circuit also reasoned that a statutory amendment made while the case was on appeal (see note 2, *supra*) "moot[ed]" the facial challenge to the extent that it targeted the lack of "articulated standards governing * * * the *Secretary's* discretion to authorize new plates," but not with respect to the *legislature's* participation in the scheme. App., *infra*, 10a n.4 (emphasis added).

(and have been approved, but are not yet available, in five additional states).[8] Some cases have been initiated by entities and individuals whose request for a "Choose Life" plate was denied. See, *e.g.*, *Arizona Life Coalition, Inc.* v. *Stanton*, 515 F.3d 956 (9th Cir.), cert. denied, 129 S. Ct. 56 (2008). (To date, Arizona, California, Illinois, Missouri, New York and New Jersey have each been sued in federal court based on such denials.) Other cases have been brought by groups challenging a state's selective decision to *approve* a "Choose Life" plate (while not simultaneously approving a "pro-choice" plate). See, *e.g.*, *Planned Parenthood of S.C., Inc.* v. *Rose,* 361 F.3d 786, reh'g denied, 373 F.3d 580 (4th Cir. 2004), cert. denied, 543 U.S. 1119 (2005); *ACLU of Tenn.* v. *Bredesen,* 441 F.3d 370 (6th Cir.), cert. denied, 548 U.S. 906 (2006). (To date, federal cases have challenged "Choose Life" plates approved by Florida, Louisiana, Ohio, Oklahoma, South Carolina, and Tennessee.) Many of the lawsuits in both categories have – like this case – included as-applied as well as facial challenges.

The result of this extensive litigation is a patch-work of conflicting decisions, as courts have struggled to determine how expression on specialty license plates should be analyzed under the First Amendment (without the benefit of any guidance from this Court

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[8] See Choose Life, Inc., http://www.choose-life.org/states.htm (last visited Apr. 15, 2009) (displaying map as well as approved plate designs). In addition, at least two states have "pro-choice" specialty plates: Hawai'i ("Respect Choice") and Montana ("Pro-Family, Pro-Choice"). *Ibid.* Virginia's governor recently expressed a willingness to approve a "pro-choice" plate. See Ertelt, *Virginia Governor Tim Kaine Signs Bill Creating Choose Life License Plates* (Mar. 30, 2009), http://www.lifenews.com/state4006.html. Petitioners have no objection to Illinois approving a "pro-choice" plate.

more recent than *Wooley* v. *Maynard*, 430 U.S. 705 (1977), a compelled-speech case involving an ordinary license plate and New Hampshire's state motto, "Live Free or Die"). In the decision below, the Seventh Circuit joined the Fourth, Eighth, and Ninth Circuits in holding that specialty plates contain private and not purely governmental speech; only the Sixth Circuit in *Bredesen* has taken a contrary view, which the Seventh Circuit expressly rejected. See App., *infra*, 2a & n.1; see also *Roach* v. *Stouffer*, 2009 WL 775581, *4-*8 & n.3 (8th Cir. March 26, 2009) (surveying cases, agreeing with majority view, and explaining that nothing in *Pleasant Grove City* v. *Summum*, 129 S. Ct. 1125 (2009), changes the analysis); cf. *Rose,* 361 F.3d at 794-95 ("Choose Life" plate that originated in legislature and was sponsored by state legislators was hybrid of government and private speech).[9]

Moreover, of the four circuits that have squarely held that specialty license plates contain private speech, two – the Fourth and Ninth – have upheld First Amendment challenges to a state's selective denial or approval of a "Choose Life" plate on the ground that the state's action constituted impermissible viewpoint discrimination. See *Stanton*, 515 F.3d at 968-72; *Rose,* 361 F.3d at 792-95; see also *Sons of Confederate Veterans, Inc.* v. *Comm'r of the Va. Dep't of Motor Vehicles*, 288 F.3d 610, 623-27, reh'g denied, 305 F.3d

[9] The Second and Eleventh Circuits have also suggested, in an unpublished decision and in dicta, respectively, that specialty plates includes some private speech. See *Children First Found., Inc.* v. *Martinez*, 2006 WL 544502, at *1 (2d Cir. Mar. 6, 2006) ("custom license plates involve, at minimum, some private speech") (unpublished), on remand, 2008 WL 4367338 (N.D.N.Y Aug. 3, 2008); *Women's Emergency Network* v. *Bush*, 323 F.3d 937, 945 n.9 (11th Cir. 2003).

241 (4th Cir. 2002) ("*SCV*"). Another of those circuits – the Eighth – recently held Missouri's specialty license plate scheme facially invalid without reaching the as-applied challenge. *Roach*, 2009 WL 775581, at *8-*11. The decision below conflicts with both of these lines of authority by (a) holding that Illinois's selective rejection of the "Choose Life" plate was *not* viewpoint discrimination, and (b) rejecting a facial challenge to Illinois's specialty plate scheme despite that scheme's delegation of standardless discretion to legislators to approve or deny new plates.

As result of these decisions, and in the absence of action by this Court, in the federal courts there are no Speech Clause restrictions on state officials' specialty license plate decisions in Michigan, Ohio, Kentucky, and Tennessee, since specialty plates are treated there as government speech. Selective decisions to deny or approve specialty plates violate the First Amendment in Alaska, Arizona, California, Guam, Hawai'i, Idaho, Maryland, Montana, Nevada, North Carolina, Northern Mariana Islands, Oregon, South Carolina, Virginia, Washington and West Virginia. And – because of the decision below – such selective decisions are constitutional in Illinois, Indiana, and Wisconsin. Moreover, specialty plate schemes that confer standardless licensing authority on legislative bodies (a common feature) violate the First Amendment in Arkansas, Iowa, Minnesota, Missouri, Nebraska, North Dakota, and South Dakota, and in California, see *The Women's Resource Network* v. *Gourley*, 305 F. Supp. 2d 1145 (E.D. Cal. 2004), but are permissible in Illinois, Indiana, and Wisconsin. The Court should bring uniformity to this vitally important area of federal law and provide much-needed guidance on new types of

license plates that have been developed since *Wooley* was decided and are ubiquitous around the Nation.

I. This Court Should Resolve The Circuit Conflict Over Whether A State's Selective Denial Of A "Choose Life" Specialty License Plate Violates The First Amendment

The decision below creates or exacerbates several conflicts in the circuits over whether the First Amendment permits a state to deny selectively a "Choose Life" specialty license plate on the ground that its message is politically controversial. This is an important and recurring constitutional question, and the Seventh Circuit decided it incorrectly.

A. There Are Multiple Circuit Conflicts

1. The Seventh Circuit placed itself in conflict with several circuits that have upheld as-applied First Amendment claims indistinguishable from the one in this case. Indeed, the Seventh Circuit acknowledged that "the Ninth Circuit came to the opposite conclusion" in *Stanton*, a case "very much like" this one. App., *infra*, 19a, 25a.

In *Stanton*, the Ninth Circuit reversed a grant of summary judgment for the Arizona License Plate Commission, concluding that the Commission had impermissibly denied an application for a "Choose Life" specialty plate based on the nature of the message expressed on the plate. 515 F.3d at 972. The state argued that it had denied the plate "not because of the viewpoint it expressed but because the state did not wish to entertain specialty plates on *any* aspect of the abortion debate." App., *infra*, 25a; 515 F.3d at 972. The Ninth Circuit rejected that argument and also concluded that "[p]reventing Life Coalition from

expressing its viewpoint out of a fear that other groups would express opposing views seems to be a *clear form* of viewpoint discrimination." 515 F.3d at 972 (emphasis added); App., *infra*, 25a-26a.

2. The sharp disagreement between the Seventh and Ninth Circuits over whether the selective denial of a "Choose Life" plate violates the First Amendment was based, in part, on conflicting interpretations of *Rosenberger* v. *Rector & Visitors of the Univ. of Va.,* 515 U.S. 819 (1995). The Ninth Circuit read *Rosenberger* to have "rejected" an argument that was "similar" to Arizona's claim that it had engaged only in content-based, but not in viewpoint, discrimination. 515 F.3d at 971.

In *Rosenberger*, the majority held that a public university violated the First Amendment when it withheld funding to a student publication because the magazine "primarily promote[d] or manifest[ed] a particular belie[f] in or about a deity or an ultimate reality." 515 U.S. at 823. In rejecting the dissent's argument that there was no viewpoint discrimination because the university had limited *all* religious speech, both theistic and atheistic, the majority explained:

> The dissent's assertion that no viewpoint discrimination occurs because the Guidelines discriminate against an entire class of viewpoints reflects an insupportable assumption that all debate is bipolar * * * . *If the topic of debate is, for example, racism, then exclusion of several views on that problem is just as offensive to the First Amendment as exclusion of only one.* It is as objectionable to exclude both a theistic and an atheistic perspective on the debate as it is to exclude one, the other, or yet another political, economic, or social viewpoint.

Id. at 831 (emphasis added). The Ninth Circuit directly relied on that passage in rejecting Arizona's argument that its licensing scheme did not constitute viewpoint discrimination. *Stanton*, 515 F.3d at 971.

The Seventh Circuit expressly disagreed with the Ninth Circuit's reading of *Rosenberger*. App., *infra*, 26a-27a. The Seventh Circuit held that the passage quoted above "actually undermines the Ninth Circuit's conclusion." *Id.* at 27a. "Excluding a faith-based publication from a speech forum because it is *faith based*," the Seventh Circuit reasoned, "is indeed viewpoint discrimination; where all other perspectives on the issues of the day are permitted, singling out *the religious perspective* for exclusion is discrimination based on viewpoint, not content." *Ibid.* (emphasis added). "In contrast, here (and in *Stanton*, too)," the Seventh Circuit reasoned, "the State has effectively imposed a restriction on access to the specialty-plate forum based on subject matter: no plates on the topic of abortion." *Ibid.* In this situation, the Seventh Circuit reasoned, the state "has not disfavored any particular perspective or favored one perspective over another on that subject; instead, the restriction is viewpoint neutral." *Ibid.*

The Seventh Circuit's analysis not only ignores the example of racism given in *Rosenberger* but also misapprehends the university's policy, which excluded both theistic *and atheistic* viewpoints and thus was hardly limited to speech that was "faith based" or reflective of a "religious perspective." In any event, this Court's review is necessary to resolve the disagreement over the meaning of *Rosenberger* and its implications for the dividing line between viewpoint and content-based discrimination.

3. Like the Ninth Circuit, the Fourth Circuit has held that a state's selective rejection (or approval) of a specialty license plate violates the First Amendment. See *SCV*, 288 F.3d at 623-27; *Rose,* 361 F.3d at 794-95. In *SCV*, Virginia had authorized a "Sons of Confederate Veterans" license plate but barred that plate from including a logo or emblem (the Confederate flag). In *Rose*, the South Carolina legislature had authorized a "Choose Life" plate (without, at the same time authorizing a "pro-choice" plate). The Seventh Circuit acknowledged that both *SCV* and *Rose* involved "fairly obvious instances of discrimination on account of viewpoint" (App., *infra*, 25a), but thought they were distinguishable:

> Virginia was not imposing a "no flags" rule; it was prohibiting the display of a specific symbol commonly understood to represent a particular viewpoint. South Carolina was favoring one viewpoint on the subject of abortion over any other.
>
> Here, in contrast, Illinois has excluded the entire subject of abortion from its specialty-plate program.

App., *infra*, 25a. But in *SCV* Virginia made an argument very similar to Illinois's in this case – that the logo proscription was viewpoint neutral because it reflects a ban on "*all* viewpoints about the Confederate flag (which the [state] identifies as a category of 'content' or subject matter) from the special plate forum." 288 F.3d at 623 (emphasis added). (Presumably, then, Virginia also would have barred the use of the Confederate flag with a circle around it and a line through it on a "No Racism" plate.) Unlike the panel

in this case, however, the Fourth Circuit rejected that assertion.[10]

4. The Fourth and Ninth Circuit's *analytical approach* to determining whether a state has engaged in viewpoint discrimination is also markedly different from the Seventh Circuit's approach in this case. The Fourth and Ninth Circuits both began by expressing concern that the state's action was motivated by the nature of the message as politically controversial, noting that such bans on controversial speech too easily lend themselves to impermissible viewpoint discrimination. See *Stanton*, 515 F.3d at 972; *SCV*, 288 F.3d at 624 (pointing to "inherent danger of viewpoint discrimination"); see also *Cornelius* v. *NAACP Legal Defense & Educ. Fund, Inc.*, 473 U.S. 788, 812 (1985) ("[T]he purported concern to avoid controversy * * * may conceal a bias against the viewpoint advanced by the excluded speakers").

Both appellate courts also looked beyond the justifications offered by the state for rejecting or selectively regulating the specialty plates. Both carefully examined the actual limits on expression in the specialty plate program as reflected in the governing statutes and regulations and the record evidence of the state's practices concerning approval of specialty plates. See *Stanton*, 515 F.3d at 972; *SCV*, 288 F.3d at 624-26. Using a similar approach, the district court in this case concluded that Illinois had engaged in viewpoint discrimination. See App., *infra*, 35a-36a, 40a, 44a, 49a-50a (state's "reason for denying the speech" is

[10] The Seventh Circuit's decision also conflicts with other decisions. See, *e.g*,. *Sons of Confederate Veterans, Inc.* v. *Glendening*, 954 F. Supp. 1099, 1103 (D. Md. 1997); *Pruitt* v. *Wilder*, 840 F. Supp. 414 (E.D. Va. 1994) (vanity plate case involving rejection of "GODZGUD" plate).

that the plate's message "is controversial"; there are "no general guidelines or rules" in Illinois "on restricting speech in a viewpoint neutral way that would account for" denying the plate; and record showed that approximately 60 plates "bear[ing] a medley of various special-interest messages" had been approved whereas state has presented "no evidence that the General Assembly" had ever "exercised its discretion in denying a specialty plate").

The Seventh Circuit's approach could hardly be more different. The panel expressed no concern that the state's justification for rejecting the "Choose Life" plate hinged on the politically controversial nature of the plate's message. It accepted uncritically the state's new assertion on appeal that denial of the "Choose Life" plate reflected an undocumented policy in the General Assembly of excluding "the entire subject of abortion" from the specialty plate program. But see App., *infra*, 30a (Manion, J., concurring) (expressing "reservations" about lead opinion's statement that "it is undisputed" that Illinois has excluded "the entire subject of abortion"; noting that "[t]his is nothing more than the Illinois legislature rejecting efforts to approve a single specialty license plate, 'Choose Life.'"). The panel also ignored the fact that the state's new assertions on appeal (1) contradicted the state's admission in the trial court that it was *aware of no standards employed by the General Assembly* (see note 5, *supra*); and (2) were inconsistent with the record evidence, which showed that the General Assembly had used a special ad hoc hearing procedure that would have been unnecessary if there had actually been a policy of excluding the "entire subject of abortion" from specialty plates. App., *infra*, 64a-67a. As if that were not enough, the panel also ignored respondent's history

in this litigation of offering conflicting justifications for the General Assembly's rejection of the plate.[11] Finally, the Seventh Circuit also failed to consider the evidence concerning the state's statutes, regulations, and permissive historical practice of approving plates – all of which severely undercut the supposed "exclusion" claimed by the state. See page 16 and notes 4-5, *supra*.

5. The Seventh Circuit's conclusion that specialty plates are a nonpublic forum and its determination that the exclusion of the "Choose Life" plate was reasonable also conflict with the decisions of other courts. Although most courts entertaining specialty-plate cases have (like the district court here) avoided deciding the nature of the forum because they have found viewpoint discrimination (or resolved the case on other grounds), several courts and commentators have concluded that specialty plates should be treated as a designated

[11] The state's explanations have shifted repeatedly. As previously noted, in the trial court respondent first took the position that the plate was rejected because the state disagreed with its message. See page 5, *supra*. After petitioners pointed out that this was tantamount to a confession of viewpoint discrimination, respondent shifted gears and argued that in fact "he had *no knowledge* concerning why the legislature approved, or did not approve, specific specialty plates." Defs.' Motion To Alter or Amend The Judgment, at 7 (Feb. 5, 2007) (emphasis added); see also note 5, *supra*. In the appellate court, respondent found the missing knowledge and argued that the "Choose Life" plate was rejected because it involved the "politically sensitive" topic of "abortion" and the General Assembly had in fact excluded the entire "subject of abortion." Resp. C.A. Op. Br. 31. In his reply brief and at oral argument, respondent's shape-shifting continued: he suggested that the zone of exclusion might not be "abortion" but instead "reproductive rights" (which, as Judge Manion correctly observed, is much broader). Compare Resp. C.A. Reply Br. 2 (the "topic" and "issue" of abortion) with *id*. at 3 ("the topic of reproductive rights"). See also Oral Arg. Audiotape, at 1:03-22, 14:56-15:37, *available at* http://www.ca7.uscourts.gov.

public forum. The *SCV* district court, for example, reached that conclusion based on a careful examination of the relevant factors set out in *Cornelius*, 473 U.S. at 802, including the government's policy and practice, the nature of the property, and the compatibility of the place with the expressive activity at issue. See *Sons of Confederate Veterans* v. *Holcomb*, 129 F. Supp. 2d 941, 947-49 (W.D. Va. 2001), aff'd on other grounds, 288 F.3d 610 (4th Cir. 2002). Thus, the *SCV* district court emphasized that Virginia's policy and practice had been to approve a "wide range of specialty plates" and there was a close nexus between "the expression sought and the forum created." 129 F. Supp. 2d at 948. Because creation of the specialty plate program represented Virginia's "intentional action to open up a non-traditional forum for public discourse," that program was "precisely the type of designated public forum contemplated by the Court in *Cornelius*." *Ibid.*[12]

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[12] See also Berry, *Licensing A Choice: "Choose Life" Specialty License Plates and Their Constitutional Implications*, 51 EMORY L.J. 1605, 1624-30 (2002) (specialty plates should be treated as designated public forum; "the 'Choose Life' plates involve an intentional effort by the states to open a nonpublic forum, the standard state license plate"); Guggenheim & Silversmith, *Confederate License Plates at the Constitutional Crossroads: Vanity Plates, Special Registration Organization Plates, Bumper Stickers, Viewpoints, Vulgarity, and the First Amendment*, 54 U. MIAMI L. REV. 563, 577-79 (2000) (specialty plates should be considered designated or limited public forum but vanity plates should be considered nonpublic forum). The Eighth Circuit has expressed "skepticism about characterizing a license plate as a nonpublic forum," explaining that "a [vanity] plate is not so very different from a bumper sticker that expresses a social or political message" and "[t]he evident purpose of such a 'forum[]' * * * is to give vent to the personality, and to reveal the character or views, of the plate's holder." *Lewis* v. *Wilson*, 253 F.3d 1077, 1079 (8th Cir. 2001) (dicta), cert. denied, 535 U.S. 986 (2002).

Similarly, the Ninth Circuit held in *Stanton* that Arizona had "open[ed] up its license plate forum" "to a certain class of organizations," thereby creating a "limited public forum," and had acted unreasonably in rejecting the "Choose Life" plate. 515 F.3d at 969-73. In concluding that Arizona's specialty plate program was "limited," the Ninth Circuit relied on certain access restrictions in the Arizona scheme that had been consistently applied and that have no analogue in Illinois. *Id.* at 970. Faced with a scheme such as Illinois's, the Ninth Circuit likely would have held the specialty plate program to be an ordinary "designated public forum." What is more, the Ninth Circuit in *Stanton* ruled that it was *unreasonable* for Arizona to deny the "Choose Life" plate because the state's reasons (identical to Illinois's reasons in this case) were "not statutorily based or related to the purpose of the limited public forum." *Id.* at 972-73. So, too, here. Yet the Seventh Circuit came to the opposite conclusion, concluding that Illinois's rejection of the "Choose Life" plate was reasonable. App., *infra*, 24a, 27a-28a.

6. Finally, if review is granted, respondents presumably will renew their principal argument in the lower courts: that specialty license plates represent *government* rather than private speech. Although the Seventh Circuit has joined the Fourth, Eighth, and Ninth Circuits in squarely rejecting that argument, the Sixth Circuit has taken a contrary view. See App., *infra*, at 11a-22a, 40a-48a; see also *Roach*, 2009 WL 775581, *3-*7; *Rose,* 373 F.3d at 582-89 (Shedd, J., joined by Williams, J., dissenting from denial of rehearing en banc) (arguing that specialty plates are government speech). Thus, further review is likely to provide an occasion for this Court to resolve this entrenched and important circuit conflict as well.

B. The Issues Raised By Petitioners' As-Applied Challenge Are Recurring And Important

As the many cases cited above demonstrate, the constitutionality of a state's selective treatment of a "Choose Life" specialty license plate is a recurring issue.[13] "Choose Life" plates have been approved in 24 states, and efforts are underway to gain approval in at least 14 more states. See Choose Life, Inc., http://www.choose-life.org/states.htm (last visited Apr. 15, 2009) (displaying map). Hawai'i and Montana have "pro-choice" plates, and there have been efforts to gain approval of "pro-choice" plates in at least six other states. *Ibid.*; see Daffer, *A License To Choose Or A Plate-ful of Controversy? Analysis of the "Choose Life" Plate Debate*, 75 UMKC L. REV. 869, 891-92 (2007). All of this activity and litigation has occurred since 1999, when Florida became the first state to approve a "Choose Life" plate. Daffer, 75 UMKC L. REV. at 871-72.

Moreover, similar issues have arisen in cases involving other potentially controversial specialty license plates. See, *e.g.*,, *SCV*, 288 F.3d at 613-29; *Glendening*, 954 F. Supp. at 1103; *Summers* v. *Adams*, 2008 WL 5401537 (D.S.C. Dec. 23, 2008) (First

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[13] Other cases not cited above involving "Choose Life" plates include *Hill* v. *Kemp*, 478 F.3d 1236 (10th Cir. 2007), on remand, 2008 WL 822070 (N.D. Okla. 2008); *Children First Found., Inc.* v. *Legreide*, 2005 WL 3088334 (D.N.J. Nov. 17, 2005), vacated, 259 Fed. App'x 444 (3d Cir. 2007); *NARAL Pro-Choice Ohio* v. *Taft*, 2005 U.S. Dist. LEXIS 21394 (N.D. Ohio Sept. 27, 2005), appeal dismissed, Order (6th Cir. Sept. 14, 2006) (No. 05-4338); *Henderson* v. *Stalder*, 112 F. Supp. 2d 589 (E.D. La. 2000), rev'd and remanded, 287 F.3d 374 (5th Cir. 2002), on remand, 265 F. Supp. 2d 699, stay denied, 281 F. Supp. 2d 866 (E.D. La. 2003), vacated, 407 F.3d 351 (5th Cir. 2005); and *Hildreth* v. *Dickinson*, 1999 WL 36603028 (M.D. Fla. Dec. 22, 1999).

Amendment challenge to "I Believe" specialty license plate). Specialty plate programs exist in all 50 states, the District of Columbia, Puerto Rico, and the U.S. Virgin Islands. See Teigan & Farber, *Nat'l Conference of State Legislatures, Transportation Review: Motor Vehicle Registration and License Plates*, at 22-25 (2007) *available at* http://www.ncsl.org/print/transportation/license-registration07.pdf; see also *Motor Vehicle Registration and License Plates: NCSL Transportation Review* App. B (2009), http://www.ncsl.org/programs/transportation/AppendB_licenseplate09.htm (listing jurisdictions and updated number of approved specialty plates). By last count, more than 4,325 specialty plates were available nationwide (*ibid.*), and that number continues to grow. Most if not all states also offer vanity or personalized plates, which regularly give rise to similar First Amendment challenges. Teigan & Farber, *supra*, at 8 (describing ACLU litigation against South Dakota for seeking to recall "MPEACHW" plate); see also notes 10, 12, *supra*.

Finally, the Seventh Circuit's decision exacerbates conflicts and confusion in the lower courts over three embedded doctrinal issues that have significance far beyond the extensive litigation over "Choose Life" plates: (1) the proper line between viewpoint and content-based discrimination; (2) the proper forum analysis of specialty license plates; and (3) the proper line between government and private speech. These issues are of surpassing importance to the public and to government officials across the Nation. See *SCV*, 305 F.3d 241, 247-48 (4th Cir. 2002) (Niemeyer, J., dissenting from denial of rehearing en banc by 6-5 vote) (arguing that case involves an "important First Amendment issue" on which the circuits have "taken different analytical courses"); *id.* at 253 (Gregory, J.,

dissenting from denial of rehearing en banc) (the "issues presented here are important").

C. The Decision Below Is Wrong

The Seventh Circuit was wrong in rejecting petitioners' as-applied First Amendment challenge. The panel also erred in each step of its analysis (except, of course, for its threshold determination that specialty license plates are not government speech).

1. Illinois's rejection of the "Choose Life" plate is viewpoint discrimination. As *Rosenberger* makes clear, the exclusion of several different viewpoints on the issue of abortion – no less than on the issue of racism – constitutes viewpoint and not merely content-based discrimination. The Seventh Circuit's efforts to distinguish *Rosenberger* were unavailing. See page 14, *supra*. Moreover, as explained above, the panel erred both in (a) accepting uncritically the state's assertion that it was following an unwritten policy of excluding the "entire subject of abortion" from the specialty plate program; and (b) failing to consider the substantial record evidence contradicting or undercutting the state's assertion. See pages 17-18 & notes 4-5, 11, *supra*.

2. Specialty license plates are properly treated as a designated public forum, as other courts (and several commentators) have concluded. See pages 17-19 & n.9, *supra*. Illinois, like most other states, has intentionally opened up its license plates – which are borne by privately owned vehicles and historically served only to facilitate vehicle identification – to create a forum for public discourse and private expresssion. As the Seventh Circuit acknowledged, specialty plates "serve as 'mobile billboards' for the organizations and like-minded vehicle owners to promote their causes."

App., *infra*, 21a; accord *Wooley*, 430 U.S. at 715 (comparing license plate to a "mobile billboard" and noting that driver communicates its message "as part of his daily life" and "indeed constantly while his automobile is in public view"). Thus, the "policy and practice of the government" in freely approving scores of specialty plate designs (see note 4, *supra*), "the nature of the property" (a mobile billboard selected by the vehicle owner), and specialty plates' "compatibility with expressive activity" all confirm that specialty plates are a designated public forum. App., i*nfra*, 23a; see also pages 5-7, *supra*.

The Seventh Circuit was able to reach a contrary decision only by redefining the relevant forum as *license plates generally* rather than specialty plates. App., i*nfra*, 24a. The Seventh Circuit erred by shifting its focus away from specialty plates. This also created internal inconsistencies in the court's opinion, since the Seventh Circuit's analysis of the government speech issue had instead focused on specialty plates. As the district court correctly recognized, the primary purpose of specialty plates includes permitting vehicle owners to engage in expression. See note 6, *supra*. Because specialty plates are designated public fora, content-based restrictions on them are subject to strict scrutiny. Tellingly, Illinois has never suggested that its rejection of the "Choose Life" plate could survive strict scrutiny.

Finally, even if specialty plates are a nonpublic forum, the Seventh Circuit erred in concluding that Illinois's rejection of the "Choose Life" plate was reasonable. Reasonableness must be evaluated not in the abstract but "*in the light of the purpose of the forum* and all the surrounding circumstances." *Cornelius*, 473 U.S. at 809 (emphasis added). Because the purposes of

specialty plates are to raise revenue for the state and sponsoring organizations and to permit private expression, the crucial question is whether excluding "the entire subject of abortion" serves those purposes. Plainly, it does not. The Seventh Circuit was therefore mistaken in concluding that, "[t]o the extent that messages on specialty license plates are regarded as approved by the State, it is reasonable for the State to maintain a position of neutrality on the subject of abortion." App., *infra*, 28a.[14] Indeed, the premise underlying that rationale – that specialty plates are "reasonably viewed as having the State's stamp of approval" (*id*. at 27a) – is highly dubious, as the Eighth Circuit recently noted.[15] It is especially dubious here, because Illinois has repeatedly refused to issue the "Choose Life" plate and has vigorously defended this litigation – a fact that would be apparent to any "fully informed observer."

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[14] There is further reason to be skeptical of respondent's claim that Illinois wishes to avoid abortion-related or reproductive-rights-related specialty plates because they involve subjects that are too politically divisive or controversial. Two months after rehearing was denied in this case, respondent announced the availability of "special event" license plates bearing the words, "Illinois Salutes President Barack Obama." Press Release, at 1 (Feb. 13, 2009), *available at* http://www.cyberdriveillinois.com/press/2009/february/090213d1.html.

[15] See *Roach*, 2009 WL 775581, at *7-*8 (concluding that "a reasonable and fully informed observer" would "understand that the vehicle owner took the initiative to purchase the specialty plate and is voluntarily communicating his or her own message, not the message of the state"); *id*. at *7 (noting with respect to the 'ARYAN-1' plate at issue in *Lewis* that "[n]o reasonable observer would believe that the State of Missouri is endorsing white supremacy").

II. This Court Should Resolve The Conflict Over Whether A Standardless Licensing Scheme Survives A Facial Challenge If It Delegates Licensing Authority To A Legislative Body

Petitioners' facial challenge targeted the complete absence in the Illinois Vehicle Code and in the Secretary's administrative policy (as stated in his "Fact Sheet") of *any* substantive criteria or guidelines that would govern the state's decision to approve or reject new specialty plates. App., *infra*, 10a-11a n.4, 37a n.2. This standardless discretion over the licensing of private expression, petitioners maintained, violated the First Amendment under a long line of this Court's decisions. See, *e.g.*, *R.A.V.* v. *City of St. Paul*, 505 U.S. 377, 393-94 (1992); *City of Lakewood* v. *Plain Dealer Publ'g Co.*, 486 U.S. 750, 757-58 (1988) (condemning as a prior restraint); *Nietmotko* v. *Maryland*, 340 U.S. 268, 273 (1951); *Thornhill* v. *Alabama*, 310 U.S. 88, 97 (1940).[16]

The district court had no occasion to reach the facial challenge, but it did observe (based on the undisputed facts) that there were "no substantive criteria or guidelines for the approval of the specialty license plates by the General Assembly" and that respondent "has not explained why delegating his authority to approve requests [to the General Assembly] protects him from constitutional review of his actions." App., *infra*, 37a n.2; note 5, *supra*. By the time the case reached the Seventh Circuit, the state had come up with an explanation, contending that,

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[16] While this case was pending on appeal, Illinois amended its Vehicle Code. See note 2, *supra*. But the amendment did nothing to provide any substantive standards or guidelines to channel the General Assembly's unfettered discretion to permit or stifle the messages on specialty license plates.

"[a]s the ultimate repository of legislative power in Illinois," the General Assembly "cannot be ordered to impose on itself prospectively binding standards" because any such "prescriptive standards" "cannot limit the exercise of that power by future sessions of the General Assembly." Resp. C.A. Op. Br. 42, 43.[17]

Crediting this new-found argument, the Seventh Circuit summarily rejected petitioners' facial challenge. App., *infra*, 10a n.4. It reasoned that the absence of standards governing "the *state legislature's* discretion to authorize new plates" (*ibid.* (emphasis added)) did not render the licensing scheme facially invalid because:

> It is axiomatic that one legislature cannot bind a future legislature. *Vill. of Rosemont* v. *Jaffe*, 482 F.3d 926, 937-38 (7th Cir. 2007) (citing *Reichelderfer* v. *Quinn*, 287 U.S. 315, 318 (1932)). The General Assembly is entitled to authorize specialty plates one at a time. It is not required to – and cannot – adopt "standards" to control its legislative discretion.

App., *infra*, 10a-11a n.4. This aspect of the Seventh Circuit's decision independently warrants review.

A. The Seventh Circuit's Holding Conflicts With Decisions Of This Court, The Eighth Circuit, And Other Lower Courts

The Seventh Circuit's rejection of the facial challenge is inconsistent with a subsequent decision of the Eighth Circuit, *Roach* v. *Stouffer*, 2009 WL 775581

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[17] Contrary to the state's suggestion, petitioners never requested that the lower court "order" the General Assembly to adopt standards. They simply sought to enjoin the operation of the standardless program already in existence. Pet. C.A. Br. 43-44.

(8th Cir. Mar. 26, 2009), which invalidated on its face a Missouri specialty license plate scheme that delegated approval authority to a joint legislative Committee on Transportation Oversight (consisting of seven state senators, seven state representatives, and three non-voting *ex officio* members). After the Committee denied an application for a "Choose Life" plate, the rejected applicant – Choose Life Missouri – and its president brought suit. Both the district court and the Eighth Circuit held that the licensing scheme was facially invalid because it "provide[d] no standards or guidelines whatsoever to limit the unbridled discretion of the Joint Committee." 2009 WL 775581, at *8. The Eighth Circuit rejected the state's argument that the result should be different because "the only voting members of the Joint Committee are *legislators*, not administrators or hired state employees," explaining that any immunity from suit for legislators would apply only to suits against officials sued in their individual capacities (not, as here, in their official capacities). *Id*. at *9; see also *Lewis*, 253 F.3d at 1078-83 (Eighth Circuit held that Missouri vanity plate scheme with vague approval standards is facially invalid).

The Seventh Circuit's creation of a novel "legislative body" exception to the long line of authority condemning standardless licensing schemes is equally incompatible with this Court's decisions. In *Shuttlesworth* v. *City of Birmingham*, 394 U.S. 147 (1969), this Court invalidated the conviction of civil rights protesters for violating an ordinance that required a permit from the City Commission to participate in a parade or public demonstration. The Commission was "the City's legislative body." *Shuttlesworth* v. *City of Birmingham*, 180 So. 2d 114,

126-27 (Ala. Ct. App. 1965); accord *Henderson* v. *Stalder*, 287 F.3d 374, 389 n.9 (5th Cir. 2002) (Davis, J., dissenting). Even though the permitting authority was a legislative body, this Court had no difficulty concluding that the city ordinance "conferr[ing] upon the City Commission virtually unbridled and absolute power" to prohibit parades or demonstrations "*fell squarely within the ambit* of the *many* decisions of this Court over the last 30 years, holding that [a standardless licensing scheme] is unconstitutional." 394 U.S. at 150-51 (emphasis added); see also *Nietmotko*, 340 U.S. at 273-74 (reaching same conclusion in case where permit applications were customarily made to Park Commissioner and, if he denied them, to City Council).

Finally, other lower federal and state courts have likewise rejected the "legislator" or "legislative body" exception embraced below. In *The Women's Resource Network* v. *Gourley*, 305 F. Supp. 2d 1145 (E.D. Cal. 2004), for example, the district court held that California's specialty plate scheme was facially unconstitutional because the state legislature had been given unbridled discretion to issue new plates. The court explained that "[l]eaving that authority directly in the hands of the legislature does not change the analysis." *Id.* at 1153 (internal quotation marks omitted). Similarly, the district court in *Rose* held that South Carolina's specialty license scheme was facially invalid because it granted "uncontrolled discretion" to "the legislature" to decide which plates to approve. *Planned Parenthood of S.C., Inc.* v. *Rose,* 236 F. Supp. 2d 564, 573 (D.S.C. 2002), aff'd on other grounds, 361 F.3d 786 (4th Cir. 2004); see also *Henderson* v. *Stalder*, 265 F. Supp. 2d 699, 719 (E.D. La. 2003) (Louisiana prestige plate licensing scheme facially

unconstitutional where legislature was decisionmaker, and there were "no standards, parameters, guidelines or other criteria by which a prestige plate c[ould] be issued"), rev'd on other grounds, 407 F.3d 351 (5th Cir. 2005); *Stalder*, 287 F.3d at 388-89 (Davis, J., dissenting) ("Leaving that [standardless] authority directly in the hands of the Louisiana legislature should not change the analysis"); *Shuttlesworth*, 180 So. 2d at 127 ("'[T]he rule is no different where the legislative body reserves for itself the administration of the licensing power.'") (quoting *ACLU* v. *Town of Cortlandt*, 109 N.Y.S.2d 165 (N.Y. Sup. 1951)).

B. The Issues Raised By Petitioners' Facial Challenge Are Recurring And Important

As the cases cited in the previous section show, the facial validity of standardless specialty license plate schemes is an issue that arises with considerable frequency. Indeed, many of the cases involving "Choose Life" license plates have raised both as-applied and facial challenges. The reported decisions understate the frequency with which the issue arises, because many cases have been resolved on alternative grounds. Because 24 states have approved the "Choose Life" plates and approval is being sought in another 14 jurisdictions, litigation over this question can be expected to continue – and be fueled by the Eighth Circuit's recent decision in *Roach*. And, of course, the issue can be expected to arise in litigation involving other types of specialty plates as well.

As noted above, all states have specialty license plate schemes. Many of these schemes grant standardless licensing authority to the legislature or to other government officials. See Daffer, *supra*, 75 UMKC L. REV. at 893 (28 states now require legislative

approval before specialty plates can be used, whereas 19 states have a purely administrative process; some states have both methods of approval). Similarly, state schemes authorizing *personal or vanity* plates often contain vague or indeterminate standards governing approval decisions. See, *e.g.*, *Lewis*, 253 F.3d at 1078-83. The issue thus has implications for a broad range of state programs. And the facial validity under the First Amendment of these licensing schemes is clearly an important question. Finally, if permitted to stand, the Seventh Circuit's rationale for upholding an admittedly standardless licensing scheme for private expression – *i.e.*, one legislature cannot bind a future legislature – could invite imitation in a wide range of other settings where standardless schemes chill expression.

C. The Seventh Circuit's Decision Is Wrong

The Seventh Circuit's terse departure from the foregoing precedents was evidently based on its view that, to implement licensing standards sufficient to survive a facial challenge, a legislative body must bind itself *permanently* to a particular set of substantive criteria for approving specialty plates. Such a requirement, the Seventh Circuit reasoned, might violate the so-called rule against legislative entrenchment, under which "the will of a particular Congress * * * does not impose itself upon those to follow in succeeding years." *Reichelderfer*, 287 U.S. at 317-18 (involving validity of statute purporting to "perpetually dedicate[]" Rock Creek Park to certain uses); see also *United States* v. *Winstar Corp.*, 518 U.S. 839, 872 (1996); Posner & Vermeule, *Legislative Entrenchment: A Reappraisal*, 111 YALE L.J. 1665 (2002) (arguing that the principle is invalid and should be abandoned). But the Seventh Circuit's reasoning is flawed for at least three reasons.

First, to create a constitutional licensing system complete with substantive standards to guide decisionmaking, a legislature need not entrench criteria against future repeal (such as by requiring that changes be made only by a supermajority of a future legislature). Instead, it need only enact neutral, non-entrenched standards and apply them in good faith until (if ever) it formally adopts different ones for reasons unrelated to a specific application. At bottom, the Seventh Circuit relied on a faulty syllogism, which posits that: (1) standards are meaningless *unless* they are entrenched; (2) legislative entrenchment is impermissible; thus (3) standards that meaningfully curb legislative discretion are impermissible and cannot be required. That reasoning gets off on the wrong foot.

Second, the rule against legislative entrenchment applies only to the "legislative authority" of future legislatures. *Winstar*, 518 U.S. at 872. It is far from clear that the discretionary authority to decide who may speak in the specialty plate forum, authority delegated to the "General Assembly" by Illinois statute, implicates the General Assembly's lawmaking powers. The same licensing authority, if conferred on the Secretary of State, clearly would *not* involve "legislative" authority. Why should the decision to delegate that authority to a legislative body alter that conclusion? See *District of Columbia Court of Appeals* v. *Feldman*, 460 U.S. 462, 477 (1983) ("[T]he nature of a proceeding depends not upon the character of the body but upon the character of the proceedings.") (internal quotation marks omitted).

Third, even entertaining the dubious assumption that federal law enshrines the rule against entrenchment as a protection of the prerogatives of

state legislatures, the rule could hardly trump the First Amendment (or the power of the federal courts to remedy a constitutional violation). See *Winstar*, 518 U.S. at 872-73 (unlike Parliament, where rule originated, "the power of American legislative bodies * * * is subject to the overriding dictates of the Constitution" with which the rule "has always lived in some tension"). The exact same threat to freedom of expression posed by standardless licensing schemes – and condemned by the First Amendment – exists when unfettered licensing authority is delegated to a legislative body.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

THOMAS BREJCHA
JASON R. CRADDOCK
PETER BREEN
Thomas More Society
29 South LaSalle Street
Suite 440
Chicago, IL 60603
(312) 782-1680

ALAN UNTEREINER*
ROY T. ENGLERT, JR.
DAMON TAAFFE
JENNIFER WINDOM
Robbins, Russell, Englert
Orseck, Untereiner &
Sauber LLP
1801 K Street, N.W.
Suite 411
Washington, D.C. 20006
(202) 775-4500

* *Counsel of Record*

APRIL 2009

Counsel for Petitioners

APPENDIX

APPENDIX A

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 Nov. 27, 2007
Decided Nov. 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 "Choose Life" license plate was thus

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[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).

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.

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

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[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.

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 amendatory Act of 1990, or to the Secretary of State's discretion as established in Section 3-611 [relating to specialty plates for specific categories of persons, typically elected officials].

Id. (amended effective 2008). Although the statute specifies a default minimum of 10,000 applications, the Secretary often required far less (approximately 800 applications) before issuing a new legislatively approved specialty plate. That lesser number was usually enough to make the program financially feasible from a manufacturing standpoint. Illinois currently has about 60 specialty license plates available for purchase.

B. CLI's Quest for a "Choose Life" Specialty License Plate

CLI is a not-for-profit agency that promotes adoption in the State of Illinois. In 2001 CLI embarked on an initiative to obtain approval for a specialty license plate bearing the words "Choose Life." To that end CLI collected more than 25,000 signatures from prospective purchasers and applied to the office of Illinois Secretary of State Jesse White for issuance of the plate. The Secretary informed CLI that he could not issue a new specialty plate that had not been approved by the General Assembly. For the next several years, CLI waged a legislative battle for approval of its "Choose Life" specialty license plate, lining up support among sympathetic legislators. Its efforts were thwarted, however – initially in the Illinois Senate and later in the House. (The proposal died in a House subcommittee.)

CLI and several individual plaintiffs then brought this suit against the Secretary for violating their free-speech rights. The parties filed cross-motions for summary judgment. CLI first argued that the Secretary had authority under section 5/3-600 to issue the

"Choose Life" plates without legislative approval, and his refusal to do so constituted viewpoint discrimination within a government-created forum for private speech. Alternatively, CLI claimed that if legislative approval was required, it had been subjected to impermissible viewpoint discrimination by the General Assembly. CLI also claimed the specialty-plate program was facially unconstitutional because the lack of any governing standards invited discrimination against disfavored messages. CLI asked the district court to order the Secretary to issue the "Choose Life" plate or shut down the entire specialty-plate program.

The Secretary argued that although section 5/3-600 was silent on whether an enabling statute was required for a new specialty-plate series, all specialty plates in Illinois (other than those grandfathered under section 5/3-600(c)) had in fact been authorized by specific statutory enactment. Accordingly, the Secretary argued, the messages on specialty license plates were government speech, and the free-speech rights of the plaintiffs as private speakers were not implicated. The Secretary maintained in the alternative that even if the specialty-plate program amounted to a forum for private speech, it was a nonpublic forum and the State's decision to exclude the entire subject of abortion from the forum was a reasonable viewpoint-neutral restriction on content and was therefore constitutionally permissible.

The district court granted summary judgment for CLI. The court interpreted section 5/3-600 as permitting the Secretary to issue new specialty license plates without specific enabling legislation. Applying the four-factor test from *Sons of Confederate Veterans,*

Inc. v. Commissioner of the Virginia Department of Motor Vehicles, 288 F.3d 610, 618 (4th Cir. 2002), a Fourth Circuit license-plate case, the court concluded that the Illinois specialty-plate program established a forum for private speech and that the exclusion of the "Choose Life" message from this forum was viewpoint discrimination and could not withstand strict scrutiny. The court ordered the Secretary to issue the "Choose Life" license plates, but stayed its order pending appeal.

In response to the district court's decision, and while this appeal was pending, the General Assembly amended section 5/3-600 to include an explicit requirement of legislative approval for any new specialty license plate. Effective January 1, 2008, the statute provides: "The Secretary of State shall issue only special plates that have been authorized by the General Assembly." Act of Aug. 23, 2007, Ill. Pub. Act No. 95-0359.

II. Analysis

Our standard of review is de novo. *Metro. Life Ins. Co. v. Johnson,* 297 F.3d 558, 561-62 (7th Cir. 2002). The material facts are undisputed. The question presented is whether the messages on specialty license plates are the government's own speech or private speech, and if the latter, whether the exclusion of CLI's proposed "Choose Life" plate from the "specialty-plate

forum" violates the Free Speech Clause of the First Amendment.[3]

A. The District Court's Interpretation of the Unamended Statute

A considerable amount of the parties' initial briefing concerned the proper interpretation of unamended 625 ILL. COMP. STAT. 5/3-600. The district court read the statute to permit the Secretary to issue new specialty

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[3] We note that some specialty-license-plate cases in other circuits have been dismissed on jurisdictional grounds, notably for lack of standing or by application of the Tax Injunction Act, 28 U.S.C. § 1341. See *Henderson v. Stalder,* 407 F.3d 351, 358 (5th Cir. 2005) (plaintiffs' challenge to Lousiana's [sic] "Choose Life" license plate barred by the Tax Injunction Act);*Women's Emergency Network v. Bush,* 323 F.3d 937, 946-47 (11th Cir. 2003) (holding that plaintiffs lacked standing to challenge Florida's "Choose Life" license plate under either the Establishment Clause or the Free Speech Clause of the First Amendment); *Henderson v. Stalder,* 287 F.3d 374, 382 (5th Cir. 2002) (plaintiffs lacked standing to challenge Louisiana's "Choose Life" license plate on free-speech grounds). On the other hand, plaintiffs in other circuits have successfully established standing and prevailed on the argument that the Tax Injunction Act does not apply. *See Stanton,* 515 F.3d at 963-64 (Tax Injunction Act does not apply to plaintiff advocacy group's claim that Arizona committed viewpoint discrimination in denying its application for a "Choose Life" license plate); *Bredesen,* 441 F.3d at 373-74 (Tax Injunction Act does not bar plaintiffs' claim that Tennessee's "Choose Life" license plate violates the First Amendment); *Rose,* 361 F.3d at 789-92 (plaintiffs have standing to challenge South Carolina's "Choose Life" license plate on viewpoint-discrimination grounds). We are satisfied CLI and the individual plaintiffs have standing; they have adequately alleged an injury by reason of the exclusion of their "Choose Life" message from Illinois' specialty-plate program. And we agree with the Ninth and Sixth Circuits that the Tax Injunction Act does not apply.

license plates without a specific authorizing statute upon presentation of the minimum required number of applications. There is reason to doubt this interpretation. The statute is phrased not as a positive grant of authority to *approve* a new plate series but as a limitation on the Secretary's authority to *commence issuing* plates in an approved series. *Id.* ("The Secretary ... shall not issue a series of special plates unless applications ... have been received for 10,000 plates of that series."). This begs the question of who has the approval authority; nothing in the Illinois Vehicle Code addresses the Secretary's power to *approve* new specialty license plates. In practice, the Secretary has never issued specialty plates in a new series without a specific statutory enactment creating the series.

We need not resolve this aspect of the appeal. The amendment to section 5/3-600(a) makes explicit what the Secretary had argued was implicit: that the authority to *approve* new specialty license plates resides with the General Assembly.[4] Act of Aug. 23,

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[4] In addition to specifically challenging the rejection of its "Choose Life" license plate, CLI also claims the Illinois specialty-plate program is facially unconstitutional because it lacks any articulated standards governing (1) the Secretary's discretion to authorize new plates (to the extent the Secretary had that authority), or (2) the state legislature's discretion to authorize new plates. The amendment to section 5/3-600 moots the first of these claims, and the second has no merit. It is axiomatic that one legislature cannot bind a future legislature. *Vill. of Rosemont v. Jaffe,* 482 F.3d 926, 937-38 (7th Cir. 2007) (citing *Reichelderfer v. Quinn,* 287 U.S. 315, 318 (1932)). The General Assembly is entitled to authorize specialty plates one at a time. It is not required to – and cannot – adopt "standards" to control its

2007, Pub. Act No. 95-0359 (amending 625 ILL. COMP. STAT. 5/3-600(a) to add the following: "The Secretary of State shall issue only special plates that have been authorized by the General Assembly."). We ordinarily apply the law in effect on appeal, and where (as here) a party requests only prospective relief, there is no impediment to doing so retroactively. *Landgraf v. USI Film Prods.,* 511 U.S. 244, 273 (1994) ("[A]pplication of new statutes passed after the events in suit is unquestionably proper in many situations. When the intervening statute authorizes or affects the propriety of prospective relief, application of the new provision is not [impermissibly] retroactive.").

B. Government Speech or Private Speech?

It is well established that when the government speaks, "it is entitled to say what it wishes[,] ... [and] it may take legitimate and appropriate steps to ensure that its message is neither garbled nor distorted." *Rosenberger v. Rector & Visitors of the Univ. of Va.,* 515 U.S. 819, 833 (1995) (citations omitted); *see also Johanns v. Livestock Mktg. Ass'n,* 544 U.S. 550, 559-62 (2005); *Bd. of Regents of Univ. of Wis. Sys. v. Southworth,* 529 U.S. 217, 229 (2000); *Keller v. State Bar of Cal.,* 496 U.S. 1, 12-13 (1990). "[U]nits of state and local government are entitled to speak for themselves," *Hosty v. Carter,* 412 F.3d 731, 736 (7th Cir. 2005), and "[w]hen the government speaks[,] ... it is, in the end, accountable to the electorate and the political process for its advocacy." *Southworth,* 529 U.S. at 235. "If the citizenry objects, newly elected

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legislative discretion.

officials later could espouse some different or contrary position." *Id.*

Accordingly, when the government is the speaker, it may choose what to say and what *not* to say; it need not be neutral. Subject to other constitutional limitations not at issue here (such as the Establishment Clause), the constraints on the government's choice of message are primarily electoral, not judicial. While it is true that the government may not compel a person to "express a message he disagrees with, imposed by the government" (the "compelled speech" doctrine) or compel a person to "subsidize a message he disagrees with, expressed by a private entity" (the "compelled subsidy" doctrine), *see Johanns,* 544 U.S. at 557, neither of these principles is implicated here. (We will have more to say about *Johanns* in a moment.) It follows, then, that if the messages on specialty license plates in Illinois are the State's own speech, no private-speech rights are involved and CLI's remedy for the defeat of its "Choose Life" license plate is at the ballot box.

If, on the other hand, the messages on specialty license plates are not government speech, then the denial of CLI's application for a "Choose Life" specialty plate is analyzed under the Supreme Court's "speech forum" doctrine. "The government violates the Free Speech Clause of the First Amendment when it excludes a speaker from a speech forum the speaker is entitled to enter." *Christian Legal Soc'y v. Walker,* 453 F.3d 853, 865 (7th Cir. 2006) (citing *Rosenberger,* 515 U.S. at 829-30; *Hosty,* 412 F.3d at 737). Judicial scrutiny in this context varies depending on the nature of the forum, and speech fora come in three basic

varieties: traditional public, designated public, and nonpublic.

We will return to forum analysis later; the predicate question is whether the messages on specialty license plates are government speech, private speech, or a combination of the two. Other circuits are divided on the question. The Fourth and Ninth Circuits have held that messages on specialty license plates are private or hybrid speech; the Sixth Circuit has held that messages on specialty license plates are government speech. *Compare Ariz. Life Coal., Inc. v. Stanton,* 515 F.3d 956, 968 (9th Cir. 2008) (messages on specialty license plates in Arizona are private speech), *Planned Parenthood of S.C., Inc. v. Rose,* 361 F.3d 786, 794 (4th Cir. 2004) ("Choose Life" message on South Carolina specialty license plate is a mixture of government and private speech), *and Sons of Confederate Veterans,* 288 F.3d at 621 (messages on Virginia specialty license plates are private speech), *with Am. Civil Liberties Union of Tenn. v. Bredesen,* 441 F.3d 370, 376 (6th Cir. 2006) ("Choose Life" message on Tennessee specialty license plate is government speech).

The Fourth Circuit was the first to weigh in. In *Sons of Confederate Veterans,* the court was confronted with a First Amendment challenge to a Virginia statute authorizing a specialty license plate for an organization of descendants of Confederate Army veterans. The statute differed from others authorizing specialty plates for private organizations because it specifically prohibited the group's logo – which included the Confederate flag – from being displayed on the plate. 288 F.3d at 613-14. The Sons of Confederate Veterans cried foul, alleging viewpoint discrimination in violation

of the First Amendment. Virginia argued in response that the specialty plate was government speech or, if it was not, that the restriction on the display of the Confederate flag was a reasonable content-based, not viewpoint-based, restriction.

The Fourth Circuit began its analysis by adapting an approach developed by the Tenth Circuit in a case involving a First Amendment challenge to a holiday display featuring joint public and private sponsorship. *Id.* at 618 (citing *Wells v. City & County of Denver,* 257 F.3d 1132, 1141 (10th Cir. 2001)). To determine whether the speech at issue was governmental or private, the court weighed the following factors:

> (1) the central "purpose" of the program in which the speech in question occurs; (2) the degree of "editorial control" exercised by the government or private entities over the content of the speech; (3) the identity of the "literal speaker"; and (4) whether the government or the private entity bears the "ultimate responsibility" for the content of the speech....

Id. (quoting *Wells,* 257 F.3d at 1141).

Applying this framework, the court noted that Virginia's specialty-plate program had dual purposes: the collection of revenue for the State and the facilitation of expression by private organizations and their members. *Id.* at 620-21. The court also observed that the State generally exercised minimal editorial control over the content of specialty license plates because it usually accepted the designs submitted by the sponsoring organizations. *Id.* at 621. Finally, the court noted that although specialty license plates (like

other license plates) were technically the property of the State, the owners of the vehicles on which they were mounted were the "literal speakers" and bore "ultimate responsibility" for the messages contained on the plates. *Id.* at 621-22. The court concluded that the messages on Virginia's specialty license plates were predominantly private rather than government speech. *Id.* The court went on to hold that the Virginia statute's logo restriction amounted to viewpoint discrimination within a forum for private speech. *Id.* at 626.

The Fourth Circuit returned to this subject just two years later in *Rose,* a case involving a challenge to South Carolina's "Choose Life" specialty license plate. The statute at issue provided that proceeds from the sale of the "Choose Life" plate were to be distributed to local private crisis pregnancy agencies – but not to those that performed or promoted abortion services. *Rose,* 361 F.3d at 788. Planned Parenthood of South Carolina challenged the statute shortly after it was adopted. The Fourth Circuit consulted the factors identified in *Sons of Confederate Veterans* but fine-tuned its analysis. Rejecting South Carolina's argument that its "Choose Life" specialty plate was government speech, the court determined that the plate "embodie[d] a mixture of private and government speech." *Id.* at 793.

The indicators of government speech were more strongly present in *Rose* than in *Sons of Confederate Veterans.* For example, South Carolina's "Choose Life" license plate had its origins in the state legislature rather than a private sponsoring organization; two lawmakers acting on their own had initiated the

legislative effort. Other factors, however – notably that individual vehicle owners became the "literal speakers" with "ultimate responsibility" for the speech when they purchased and displayed the "Choose Life" plate on their vehicles – led the court to conclude that the license-plate message was a form of hybrid speech, both governmental and private. *Id.* at 793-94. The private-speech attributes of the specialty plate were substantial enough to analyze the case under nonpublic forum doctrine, testing for viewpoint neutrality. *Id.* at 798. The "Choose Life" plate flunked. *See id.* at 799 ("South Carolina has impermissibly favored the pro-life viewpoint by authorizing the Choose Life plate.").

The following year the Supreme Court decided *Johanns,* elaborating on the government-speech doctrine in the context of an alleged "compelled subsidy." *Johanns* was a First Amendment challenge by a group of beef producers to a special federal assessment imposed on heads of cattle and used to fund a promotional campaign encouraging the consumption of beef. The advertising featured, among other things, the catchy "Beef. It's What's for Dinner" slogan. *Johanns,* 544 U.S. at 553-55. The complaining ranchers argued that the federal government could not constitutionally compel them to subsidize a private message.

The Supreme Court held that the assessment did not amount to a compelled subsidy of a private message because the promotional campaign was entirely the government's speech. *Id.* at 560-62. Congress had established the framework for the promotional program in the Beef Promotion and Research Act of 1985 and directed the Secretary of Agriculture to implement it

via a Cattlemen's Beef Promotion and Research Board, whose members were appointed by and answerable to the Secretary. *Id.* at 553-54. The Beef Board, in turn, convened an Operating Committee composed of Beef Board members and representatives appointed by a federation of state beef councils. *Id.* The ranchers argued that the advertising could not be considered government speech because it was actually developed by the Operating Committee, some of whose members were private beef-industry representatives. *Id.* at 560.

The Court disagreed, holding that "[t]he message set out in the beef promotions is from beginning to end the message established by the Federal Government." *Id.* The program was established by Congress, and the Secretary of Agriculture implemented and retained ultimate control over it. *Id.* at 561. "When, as here, the government sets the overall message to be communicated and approves every word that is disseminated, it is not precluded from relying on the government-speech doctrine merely because it solicits assistance from nongovernmental sources in developing specific messages." *Id.* at 562.

Relying almost entirely on *Johanns,* a divided panel of the Sixth Circuit broke with the Fourth Circuit and held in *Bredesen* that Tennessee's "Choose Life" specialty license plate was government speech, implicating no speech rights of private speakers whatsoever. 441 F.3d at 380. The *Bredesen* majority thought *Johanns* established a new test for government speech, applicable in all contexts, and on this basis declined to follow the Fourth Circuit's lead in *Rose.* "The *Johanns* standard," the court held, "classifies the

'Choose Life' message [on Tennessee's specialty plate] as government speech." *Id.*

The Court's conclusion in *Johanns* had been driven by the federal government's pervasive and complete control – "from beginning to end" – over the beef-promotion message. 544 U.S. at 560. The Sixth Circuit believed the same total governmental control was evident in *Bredesen.* The Tennessee legislature had consulted with New Life Resources, a private, nonprofit pregnancy-assistance organization, on the design of the "Choose Life" plate; the statute authorizing the plate also directed that New Life was to receive half the profits from its sale. *Bredesen,* 441 F.3d at 372. But because the Tennessee legislature "chose the 'Choose Life' plate's overarching message and approved every word to be disseminated," the court held that "*Johanns* supports classifying 'Choose Life' on specialty license plates as the State's own message." *Id.* at 376.

That specialty license plates involve additional private speakers–the individual vehicle owners who carry the messages on their cars–did not alter the Sixth Circuit's analysis. On this point, the court distinguished *Wooley v. Maynard,* 430 U.S. 705 (1977), a "compelled speech" case involving a New Hampshire vehicle owner who repeatedly obliterated the state's motto, "Live Free or Die," from his license plate. After multiple convictions and a jail term for violating the State's vehicle code, the vehicle owner sought and obtained a federal-court injunction against further enforcement of the State's license-plate statute. The Supreme Court affirmed, noting that the State's license-plate statute "in effect requires that [vehicle

owners] use their private property as a 'mobile billboard' for the State's ideological message or suffer a penalty." *Id.* at 715. This, the Court held in *Wooley,* was a form of coerced speech, impermissible under the First Amendment. *Id.* at 716-17.

Not so in *Bredesen,* said the Sixth Circuit; no vehicle owner is compelled to carry Tennessee's "Choose Life" message. 441 F.3d at 377-78. From this unremarkable observation the court extrapolated the following conclusion: Because display of a specialty license plate is voluntary, not compulsory, Tennessee had not created a forum for private speech. *Id.* at 378. This strikes us as a non sequitur. As Judge Martin noted in dissent, if messages on license plates implicated no private-speech interests *at all,* then *Wooley* (among other cases) would have come out differently. *See id.* at 386 (Martin, J., dissenting). Judge Martin also noted that the First Amendment harm in the "compelled speech" or "compelled subsidy" context is the *compulsion* – in the former, being compelled against one's conscience to utter the government's preferred message, and in the latter, being compelled to subsidize someone else's private message. *See id.* at 385-86. The First Amendment harm in the specialty-plate context, on the other hand, is "being denied the opportunity to speak on the same terms as other private citizens within a government sponsored forum." *Id.* at 386. We think Judge Martin has it exactly right.

The Ninth Circuit did, too, in *Arizona Life Coalition, Inc. v. Stanton,* a case very much like our own. The Arizona License Plate Commission denied the Arizona Life Coalition's application for a "Choose Life" specialty license plate, and the group sued, alleging a violation of

its members' free-speech rights and asking the court to order the Commission to issue the plate. The Ninth Circuit viewed the Sixth Circuit's decision in *Bredesen* as a mis-application of *Johanns* and declined to follow it. *Stanton,* 515 F.3d at 964-65.

The court found *Johanns* instructive, however, in that the Supreme Court had focused on some of the same factors the Fourth Circuit had identified as important in *Sons of Confederate Veterans.* Applying the Fourth Circuit's four-factor test, the court in *Stanton* concluded that messages on specialty license plates in Arizona were not government speech; instead, as in *Sons of Confederate Veterans* and *Rose,* messages on specialty license plates in Arizona should be treated as private speech and subjected to forum analysis. *See id.* at 968. The court held that the forum was a limited one (more precisely, a nonpublic forum), meaning that "any access restriction must be viewpoint neutral and reasonable in light of the purpose served by the forum." *Id.* at 971. Finally, the court concluded that the Commission's exclusion of the "Choose Life" message was viewpoint discriminatory and ordered the Commission to approve the plate. *Id.* at 971-73.

We will come back to this last point in a moment. For now, we pause to note that what emerges from this trip through license-plate caselaw is that the Sixth Circuit stands alone in holding that specialty license plates implicate *no* private-speech rights at all. We think this conclusion is flawed for the reasons we have noted and instead find the approach of the Fourth and Ninth Circuits more persuasive. Their multi-factor test can be distilled (and simplified) by focusing on the following inquiry: Under all the circumstances, would

a reasonable person consider the speaker to be the government or a private party? Factors bearing on this analysis include, but are not limited to, the degree to which the message originates with the government, the degree to which the government exercises editorial control over the message, and whether the government or a private party communicates the message.

Applying this approach here, we arrive at the same conclusion as in *Sons of Confederate Veterans, Rose,* and *Stanton:* Messages on specialty license plates cannot be characterized as the government's speech. Like many states, Illinois invites private civic and charitable organizations to place their messages on specialty license plates. The plates serve as "mobile billboards" for the organizations and like-minded vehicle owners to promote their causes and also are a lucrative source of funds. Editorial control over the message is shared between the sponsoring organization and the State; the organization typically develops the plate design, subject to the State's authority to modify it. The most obvious speakers in the specialty-plate context are the individual vehicle owners who choose to display the specialty plates and the sponsoring organizations whose logos or messages are depicted on the plates. The State can reasonably be viewed as having approved the message; it is commonly understood that specialty license plates require State authorization. Nonetheless, specialty-plate messages are most closely associated with drivers and the sponsoring organizations, and the driver is the ultimate communicator of the message. In short, we agree with the Fourth and Ninth Circuits that there are enough elements of private speech here to rule out the

government-speech doctrine; the messages on Illinois specialty license plates are not government speech. Because private-speech rights are implicated, we proceed to First Amendment forum analysis.

C. What Kind of Forum?

As we have already noted, the Supreme Court has identified three types of speech fora: traditional public, designated public, and nonpublic. "In an open or traditional public forum, state restrictions on speech get strict scrutiny." *Christian Legal Soc'y*, 453 F.3d at 865 (citing *Good News Club v. Milford Cent. Sch.,* 533 U.S. 98, 106 (2001); *Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist.,* 508 U.S. 384, 391 (1993); *Widmar v. Vincent,* 454 U.S. 263, 269-79 (1981); *Hosty,* 412 F.3d at 736-37). Speakers may be excluded from an open or traditional public forum only when "necessary to serve a compelling state interest" and when the exclusion is "narrowly drawn to achieve that interest." *Cornelius v. NAACP Legal Def. & Educ. Fund, Inc.,* 473 U.S. 788, 800 (1985); see also *Christian Legal Soc'y,* 453 F.3d at 865. A traditional public forum is public property that "by long tradition or by government fiat ... has been devoted to assembly and debate," such as a public street or square. *Perry Educ. Ass'n v. Perry Local Educators' Ass'n,* 460 U.S. 37, 45 (1983). Government creates a "designated public forum" when it "intentionally open[s] a nontraditional forum for public discourse." *Cornelius,* 473 U.S. at 802; *see also Christian Legal Soc'y,* 453 F.3d at 865. Strict scrutiny applies here as well. *Christian Legal Soc'y,* 453 F.3d at 865 (citing *Ark. Educ. Television Comm'n v. Forbes,* 523 U.S. 666, 667 (1998)).

All other government property is considered under the rubric of "nonpublic forum" – property that "is not by tradition or design a forum for public communication." *Perry Educ. Ass'n,* 460 U.S. at 46; *see also Good News Club,* 533 U.S. at 106. Restrictions on speech within a nonpublic forum must not discriminate on the basis of viewpoint and "must be reasonable in light of the forum's purpose." *Good News Club,* 533 U.S. at 106-07 (citing *Cornelius,* 473 U.S. at 806); *Forbes,* 523 U.S. at 682; *Rosenberger,* 515 U.S. at 829; *Lamb's Chapel,* 508 U.S. at 392-93.

Specialty license plates are an unusual species of forum – certainly not a traditional public forum, and we think not a designated public forum, either. Illinois hasn't opened this particular property for general public discourse and debate. "[T]he government need not permit all forms of speech on property that it owns and controls," *Int'l Soc'y for Krishna Consciousness, Inc. v. Lee,* 505 U.S. 672, 678 (1992), and it "does not create a public forum by inaction or by permitting limited discourse, but only by intentionally opening a nontraditional forum for public discourse," *Cornelius,* 473 U.S. at 802. Relevant factors in the analysis include "the policy and practice of the government" and "the nature of the property and its compatibility with expressive activity." *Id.*

These factors weigh against a conclusion that specialty license plates are a designated public forum. License plates in Illinois, as elsewhere, are heavily regulated by policy and practice. *See* 625 ILL. COMP. STAT. 5/3-100 *et seq.,* 5/3-400 *et seq.,* 5/3-600 *et seq.* Their primary purpose is to identify the vehicle, not to facilitate the free exchange of ideas. License plates are

not by nature compatible with anything more than an extremely limited amount of expressive activity. We conclude that specialty license plates are a forum of the nonpublic variety, which means that we review CLI's exclusion from that forum for viewpoint neutrality and reasonableness.

D. Viewpoint Neutrality and Reasonableness

Within a nonpublic forum, the Supreme Court has recognized "a distinction between, on the one hand, content discrimination, which may be permissible if it preserves the purposes of th[e] limited forum, and on the other hand, viewpoint discrimination, which is presumed impermissible when directed against speech otherwise within the forum's limitations." *Rosenberger,* 515 U.S. at 829-30. Distinguishing between a permissible content-based restriction and an impermissible viewpoint-based restriction is not always easy. *Id.* at 831 (acknowledging that the distinction between content and viewpoint discrimination "is not a precise one").

The difference between content and viewpoint discrimination was more readily apparent in *Sons of Confederate Veterans* and *Rose* than it is here. Excluding the Confederate flag from a specialty-plate design (*Sons of Confederate Veterans*) and authorizing a "Choose Life" specialty plate without permitting a plate for those who wish to espouse the pro-choice viewpoint (*Rose*) were fairly obvious instances of discrimination on account of viewpoint. Virginia was not imposing a "no flags" rule; it was prohibiting the display of a specific symbol commonly understood to represent a particular viewpoint. South Carolina was

favoring one viewpoint on the subject of abortion over any other.

Here, in contrast, Illinois has excluded the entire subject of abortion from its specialty-plate program. The Secretary argues this is a content-based but viewpoint-neutral restriction. We agree. Illinois has not favored one viewpoint over another on the subject of abortion (*Rose*) or prohibited the display of a viewpoint-specific symbol (*Sons of Confederate Veterans*). Instead, the State has restricted access to the specialty-plate forum on the basis of the *content* of the proposed plate – saying, in effect, "no abortion-related specialty plates, period." This is a permissible content-based restriction on access to the specialty-plate forum, not an impermissible act of discrimination based on viewpoint.

We noted earlier that the Ninth Circuit came to the opposite conclusion in *Stanton,* and our disagreement with this aspect of its analysis requires some explanation. Like the Secretary here, Arizona's License Plate Commission argued in *Stanton* that it had rejected the "Choose Life" specialty plate not because of the viewpoint it expressed but because the State did not wish to entertain specialty plates on *any* aspect of the abortion debate. Because the State had *no* specialty license plates expressing *any* view on the abortion issue, the Commission maintained that its rejection of the "Choose Life" plate was a viewpoint-neutral restriction on access to the specialty-plate forum. The Ninth Circuit rejected this argument: "Preventing Life Coalition from expressing its viewpoint out of a fear that other groups would express opposing views seems

to be a clear form of viewpoint discrimination." *Stanton,* 515 F.3d at 972.

The Ninth Circuit's conclusion on this point relied heavily on a passage from *Rosenberger* in which the justices in the majority were responding to an argument made by the dissent. At issue in *Rosenberger* was a public university's exclusion of a faith-based student newspaper from student activity funding in accordance with a university policy that prohibited the funding of organizations that "primarily promote[ ] or manifest[ ] a particular belie[f] in or about a diety [sic] or an ultimate reality." 515 U.S. at 823. The Supreme Court held this was impermissible viewpoint discrimination within a speech forum in violation of the First Amendment. The dissenting justices argued that the university's policy was not viewpoint discriminatory because it excluded *all* religious speech. *Id.* at 892-96 (Souter, J., dissenting). The Court responded as follows:

> The dissent's assertion that no viewpoint discrimination occurs because the Guidelines discriminate against an entire class of viewpoints reflects an insupportable assumption that all debate is bipolar and that antireligious speech is the only response to religious speech. Our understanding of the complex and multifaceted nature of public discourse has not embraced such a contrived description of the marketplace of ideas. If the topic of debate is, for example, racism, then exclusion of several views on that problem is just as offensive to the First Amendment as exclusion of only one. It is as objectionable to exclude both a theistic and an atheistic perspective on the debate as it is to

> exclude one, the other, or yet another political, economic, or social viewpoint.

Id. at 831.

This passage actually undermines the Ninth Circuit's conclusion. Excluding a faith-based publication from a speech forum *because* it is faith based is indeed viewpoint discrimination; where all other perspectives on the issues of the day are permitted, singling out the religious perspective for exclusion is discrimination based on viewpoint, not content. In contrast, here (and in *Stanton,* too), the State has effectively imposed a restriction on access to the specialty-plate forum based on subject matter: no plates on the topic of abortion. It has not disfavored any particular perspective or favored one perspective over another on that subject; instead, the restriction is viewpoint neutral.[5]

This leaves the question of reasonableness. We have no trouble accepting the Secretary's argument that the restriction is reasonable. Although the messages on specialty license plates are not government speech, they *are* reasonably viewed as having the State's stamp of approval. License plates are, after all, owned and issued by the State, and specialty license plates in particular cannot come into being without legislative

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[5] We note in addition that *Stanton's* conclusion is in tension with *Rose*. The Fourth Circuit said in *Rose* that it is viewpoint discrimination to *allow* a "Choose Life" specialty plate in the absence of a pro-choice plate. 361 F.3d at 795. The Ninth Circuit said in *Stanton* that it is viewpoint discrimination to *disallow* a "Choose Life" specialty plate even when there is no pro-choice plate. 515 F.3d at 972.

and gubernatorial authorization. To the extent that messages on specialty license plates are regarded as approved by the State, it is reasonable for the State to maintain a position of neutrality on the subject of abortion.

Our conclusion is consistent with a decision of the Second Circuit in the related context of vanity license plates. In *Perry v. McDonald,* 280 F.3d 159 (2d Cir. 2001), the court was confronted with a First Amendment challenge by a Vermont vehicle owner whose vanity license plate, "SHTHPNS," was rejected by the State Department of Motor Vehicles. The Vermont statute governing vanity license plates barred any arrangement of letters and numbers that produced an offensive message, and "SHTHPNS" was deemed offensive. The Second Circuit concluded that Vermont's vanity-license-plate program was a nonpublic forum and the State's rejection of this license plate was both viewpoint neutral and reasonable. *Id.* at 167-70. "Vermont's restriction on scatological terms – what the Vermont statute describes as 'offensive' – reasonably serves legitimate governmental interests." *Id.* at 169. Because license plates are governmental property and "inevitably ... will be associated with the state that issues them," the State has a legitimate interest in not communicating "offensive scatological terms." *Id.* Vermont did not prohibit the plate because it represented the view " 'Shit happens (so don't let life's problems drive you to drink),' " but because the vehicle owner used "a combination of letters that stands in part for the word 'shit.' " *Id.* at 170.

Because the General Assembly's rejection of the "Choose Life" specialty plate was viewpoint neutral and

reasonable, there was no First Amendment violation here, and the district court improperly entered judgment for CLI. We REVERSE the judgment of the district court, VACATE its order directing the Secretary to issue the "Choose Life" plate, and REMAND with instructions to enter judgment for the Secretary.

MANION, *Circuit Judge*, concurring. I agree with the court's conclusion that Illinois' specialty plate program, as set forth in amended 625 Ill. Comp. Stat. 5/3-600, does not constitute government speech.[6] I also agree with the court's conclusion that Illinois' specialty plate program is most aptly characterized as a non-public forum. As such, any restriction on speech must not discriminate on the basis of viewpoint and must be reasonable in light of the forum's purpose. *See* Opinion at 24. I write separately, however, to stress three points.

First, the court in its opinion concludes that it is undisputed that Illinois decided to exclude "the *entire subject* of abortion from its specialty-plate program." Opinion at 25 (emphases added). However, I have some reservations with this conclusion. This is nothing more than the Illinois legislature rejecting efforts to approve a single specialty license plate, "Choose Life." As the

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[6] I likewise agree that the amendment by the Illinois legislature effectively moots the district court's opinion by expressly requiring legislative approval of any license plate message before the Secretary of State may issue new specialty plates.

court noted, those efforts were thwarted initially in the Illinois Senate and later in the House (the proposal died in a House subcommittee). By rejecting a "Choose Life" plate, it is not clear to me that the legislature decided to exclude "the *entire subject* of abortion." Nevertheless, with that assumption I would then agree that the exclusion of the entire subject is a content-based restriction and not one based on viewpoint.

Second, I disagree with the district court's (and other courts') characterization of the "choose life" message as simply a pro-life statement. It is more than that. The message acknowledges both choice and life, so most people who claim to be pro-life and a large number of people who claim to be pro-choice but personally opposed to abortion should be comfortable with this message that is directed at pregnant women who are contemplating abortion. This petition expressly recognizes that it is the woman's choice. But at the same time it recognizes that the life of the developing baby is also at stake.

Although there are extremes on both sides of the abortion issue, the "choose life" message covers a much broader middle ground. Many, if not most (especially politicians, as this issue comes up every election season) who claim to be pro-choice also frequently and I presume sincerely claim to be personally opposed to abortion. Yet they recognize that for a woman faced with an unwanted pregnancy, whether or not to terminate will be an extremely difficult decision. For whatever reason they are personally opposed to abortion, they want the final decision to be with the woman. Still, it seems that these people want to at

least greatly reduce the number of abortions and even make them "rare." Additionally, many proclaim strong support for adoption. But before there is adoption, someone has to intervene and be an advocate for the unborn child in order to encourage the mother to carry her baby to term. Most people who claim to be pro-life recognize that the Supreme Court has created a right of privacy that engulfs the right to choose to have an abortion. With that in mind, most pro-life people would want to do whatever is possible to encourage the woman to choose life for her unborn baby. Thus it would seem to be a natural combination for people who are pro-choice but personally opposed to abortion, and those who are pro-life but recognize that ultimately it's the woman's decision, to join together and encourage women in that difficult position to choose life.

While Illinois has decided to exclude the choose-life subject from its specialty plate program, other states might recognize the combined forces of people who are pro-choice but personally opposed, and people who are pro-life but who acknowledge that legally it is the mother's choice. This combination of people would be willing to accept a "Choose Life" plate, as such a plate does not express any opinion on the legality of abortion. There are organizations that counsel pregnant women who are questioning whether or not to have an abortion. These counselors provide genuine compassion and concern for the woman with an unexpected or even unwanted pregnancy. Their hope is that, with expert counseling, state of the art ultrasounds, prenatal care, and many other services, the pregnant woman would make an informed final decision for her developing child. Support for the mother and baby after birth

could include baby cribs, parenting classes, and other follow-up services. All of this would be the hoped-for result for those who are pro-life, as well as those who are pro-choice but personally opposed to abortion.

The bottom line is that the "choose life" message can be placed on two sides of the same coin, which includes concern and compassion for the expectant mother and concern for the future life of her unborn baby. Illinois has chosen to exclude this subject from its specialty plate program. However, for states that choose to include the issue, the "choose life" combination is one that a solid legislative majority could comfortably approve.

Third and finally, it is important to stress that for those states which have approved a "Choose Life" plate, that, by itself, does not demonstrate viewpoint discrimination based on the absence of other specialty plates related to the topic of abortion. A "Choose Life" plate does not speak to whether abortion should be legal, but instead recognizes that under our legal system only pregnant women can choose whether or not to have an abortion. The message simply recommends that a woman contemplating abortion choose life for her unborn child. But rather than devolve into the contentious debate about viewpoints concerning the legality of abortion, a state could reasonably seek to promote a common middle ground – shared by both those who support and those who object to the Supreme Court's decision to legalize abortion. States which find the "Choose Life" plate provides a positive non-confrontational area of shared consensus act reasonably in that conclusion and do not engage in viewpoint discrimination. On the other hand, for now,

Illinois can reasonably conclude that it does not want its license plates to mention anything related to abortion.

For these reasons, I concur.

APPENDIX B

In the United States District Court
For the N.D. Illinois, Eastern Division

CHOOSE LIFE ILLINOIS, INC., et al.,	)	
Plaintiff,	)	No. 04 C 4316
v.	)	
	)	Honorable David
JESSE WHITE, Secretary of State, State of Illinois,	)	H. Coar
Defendant.	)	

MEMORANDUM OPINION AND ORDER

Before this Court is plaintiffs Choose Life Illinois, Inc. et al's ("Plaintiffs") motion for summary judgment against defendant Jesse White ("White" or "Defendant"), and defendant Jesse White's motion for summary judgment against Plaintiffs. For the reasons set forth below, Plaintiffs' motion is granted, and Defendant's motion is denied.

I. FACTS

Choose Life Illinois, Inc. is a not-for-profit corporation, whose purpose is to promote and increase adoption in the state of Illinois. The fifteen individual plaintiffs all reside in Illinois, and are members of Choose Life Illinois. Each individual has committed to purchase one or more sets of the "Choose Life" specialty plates if they were available. Many of the individual plaintiffs have been public advocates of adoption. Many

have adopted children of their own or were themselves adopted. Although the words used on the requested plate "Choose Life" are consistent with the goal of promoting adoption, it is not lost on this court that these words are also closely associated with the "Right to Life/Anti-Abortion" political point of view. Under the reasoning expressed in this opinion, this duality of purpose is not material. This court will assume that this broader purpose motivates the Plaintiff's request.

Defendant is the Secretary of State of the State of Illinois ("Secretary"). Among other duties, White has statutory responsibility for issuing vehicle license plates in Illinois and for administering the specialty license plate programs in Illinois.

With certain exceptions, every motor vehicle registered in Illinois must bear a license plate issued by the Secretary's Vehicle Services Department under the oversight and direction of the Defendant. When vehicle owners request license plates, they may choose a standard plate or a more expensive vanity, personalized, or "specialty" plate. Specialty plates, of which there are approximately 60 designs in existence, bear a medley of various special-interest messages. At least 27 of these plates are sponsored by private organizations. Some examples include, "Be an Organ Donor," "I am Pet Friendly," and "D.A.R.E."[1] The proceeds from specialty plates typically inure in large part to the benefit of various non-profit interest groups,

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[1] See *Appendix A: List of Illinois Specialty Plates as of October 2005* attached to this opinion.

as well as to the State of Illinois to cover or help defray administrative processing costs.

Illinois law vests in the Secretary the authority to observe, administer, and enforce the provisions of the motor vehicle code, including those governing specialty license plates. The Secretary may amend or rescind rules and regulations as may be necessary in the public interest to carry out the provisions of the code, and is authorized to refuse any application lawfully made to the Secretary if he is "not satisfied of the genuineness, regularity or legality thereof or the truth of any statement contained therein, or for any other reasons, when authorized by law." 625 ILSC 5/2-110; 625 ILSC 5/3-600(a).

In 1988, Illinois began offering specially designed license plates to recipients of the Purple Heart. In 1990, the General Assembly enacted P.A. 84-1207, § 1, currently codified at 625 ILCS 5/3-600, which sets forth certain requirements for the issuance of specialty license plates. By its terms, the statute does not require enabling legislation before a new category of specialty license plates may be issued. Under 625 ILCS 5/3-600, the Secretary is barred from issuing a series of specialty plates unless 10,000 applications for plates of that series have been received, except when the Secretary prescribes some other required number of applications. This provision also requires the Secretary to notify all law enforcement official [sic] of the design, color and other special features of the plates.

In other provisions of the motor vehicle code, the General Assembly has given specific guidelines as to the substantive content on the plate, including the

name of the State, the registration number of the vehicle, the year number for which it was issued, and the phrase "Land of Lincoln." 625 ILCS 5/3-412(b). Illinois law also requires the Secretary "to refuse any license plates bearing a combination of letters or numbers, or both, which creates a potential duplication or, in the opinion of the Secretary, (1) would substantially interfere with plate identification for law enforcement purposes, (2) is misleading, or (3) creates a connotation that is offensive to good taste and decency." 625 ILCS 5/3-405.2.

Defendant has issued a "Fact Sheet" explaining his own policies and practices with respect to the issuance of new categories or types of specialty license plates. Particularly, Defendant requires that the General Assembly must approve specialty plates. Defendant has required that legislation be introduced and approved by both chambers of the General Assembly, and signed into law by the Governor, in order to approve the specialty plates. These requirements for specialty plates are not included in the statute authorizing specialty plates, 625 ILCS 5/3-405.2, and there are no substantive criteria or guidelines for the approval of the specialty license plates by the General Assembly and the Governor.[2] Further, pursuant to 625

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[2] The Secretary has not explained why delegating his authority to approve requests for specialty plates protects him from constitutional review of his actions. The Plaintiffs have argued in the alternative that the procedure by which the Secretary delegates the decision to the legislature is "facially" unconstitutional. This court does not have to reach this issue and expresses no opinion thereon.

ILCS 5/3-600, the Secretary has reduced the requisite number of applications for a new plate from the statutory target of 10,000 to 850.

According to the Defendant's Fact Sheet, once the General Assembly has approved the specialty license plate and requests approach 850 (between 750 and 850), the Communications Department works with some representing the special interest group on a design of the plate. The sample plate is submitted to law enforcement for approval. Once 850 requests are actually received, an initial production order is placed. Notification and applications are sent to all those that submitted commitment forms requesting the plate, and plates are issued when the applications and money are received. It is noted on the Secretary's written policy that any promotional materials relating to a specialty license plate "are the sole responsibility of the sponsoring organization." Dannenberger Dep. 24.

During the 2001-2002 legislative session, the Illinois General Assembly enacted, and the Governor signed into law, legislation authorizing specialty license plates to raise money and awareness for social causes, such as education, pet overpopulation, and Pan-Hellenic charities. Choose Life Illinois, through Illinois State Senator Patrick O'Malley and Illinois State Representative Dan Brady, introduced several "Choose Life" specialty license plate bills during the 2001-2002 legislative session. The General Assembly took no action. During the 2003-2004 legislative session, Choose Life again introduced several "Choose Life" specialty license plate bills. The General Assembly again took no action, and the specialty plate was de facto denied.

On June 28, 2004, Plaintiffs filed suit in this court. Plaintiffs allege that, having the requisite number of requests, the state's denial of the "Choose Life" plate constituted viewpoint discrimination, in violation of the First and Fourteenth Amendments of the Constitution. Before this court are both Plaintiffs' motion for summary judgment and Defendant's motion for summary judgment.

II. LEGAL STANDARD

Summary judgment is appropriate when the pleadings, depositions, answers to interrogatories, and admissions on file, along with any affidavits, show there is no genuine issue of fact. Such a showing entitles the moving party to judgment as a matter of law. Fed. R. Civ. P. 56; *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242 (1986); *Lucas v. Chicago Transit Authority,* 367 F.3d 714, 720 (7th Cir. 2004). A genuine issue of material fact exists only when a reasonable factfinder could find for the nonmoving party, based on the record as a whole. The court does not weigh the evidence and it does not make credibility determinations. Instead, the court makes all reasonable inferences in favor of the nonmoving party. *Reeves v. Sanderson Plumbing Prod., Inc.,* 530 U.S. 133 (2000); *EEOC v. Sears, Roebuck & Co.,* 233 F.3d 432, 436 (7th Cir. 2000). If a party fails to present proof on an essential element of his or her case, then all other facts become necessarily immaterial. *Ribando v. United Airlines, Inc.,* 200 F.3d 507, 509 (7th Cir. 1999).

III. ANALYSIS

Both Plaintiffs and Defendant motion for summary judgment. At issue is whether denying a "Choose Life" message on specialty license plates constitute [sic] viewpoint discrimination in violation of the First Amendment. It is undisputed that the state, through the Defendant, did not approve the "Choose Life" specialty plate. It is undisputed that the reason for not approving the plate was because of the politically controversial nature of the message. There is no genuine issue of material fact, such that what remains is a matter of law. In order to succeed in a viewpoint discrimination claim, the message on the specialty license plates must constitute private speech. Plaintiffs motion for summary judgment as a matter of law, arguing that federal courts have found specialty license plate messages to be private speech, requiring strict scrutiny review for viewpoint discrimination. Defendant motions for summary judgment as a matter of law, arguing that federal courts have found specialty license plate messages to be governmental speech, and thus is not protected by the First Amendment.

The First Amendment requires strict scrutiny review for viewpoint restrictions on private speech. To pass this test, the restriction on private speech must be necessary to serve compelling governmental interest by the least restrictive means available. However, if the speech is governmental speech, traditional First Amendment inquiries do not apply. When the government speaks, it may craft its message as it chooses. *Board of Regents v. Southworth,* 529 U.S. 217 (U.S. 2000). The government may promote its policies and positions either through its own official or through

its agents. This authority to "speak" carries with it the authority to select from among various viewpoints those that the government will express as its own. *Rust v. Sullivan,* 500 U.S. 173 (U.S. 1991); *Rosenberger v. Rector & Visitors of the Univ. of Va.,* 515 U.S. 819, 833 (U.S. 1995); *Sons of Confederate Veterans v. Vehicles,* 288 F.3d 610, 617 (4th Cir. 2002). Thus, if the speech is governmental speech, the expression and restriction of a particular viewpoint is perfectly acceptable. However, if the speech is private speech, the restriction of a particular viewpoint would trigger First Amendment strict scrutiny review.

Although no clear standard has been enunciated in this Circuit or by the Supreme Court to be used in determining whether a slogan on a specialty license plate is private or governmental speech, other federal courts have considered four factors: (1) the central "purpose" of the program in which the speech occurs; (2) the degree of "editorial control" exercised by the government or private entities over the content of the speech; (3) the identity of the "literal speaker"; and (4) whether the government or the private entity bears the "ultimate responsibility" for the content of the speech. *Sons of Confederate Veterans v. Vehicles,* 288 F.3d 610, 618 (4th Cir. 2002); see also *Wells v. City & County of Denver,* 257 F.3d 1132, 1141 (10th Cir. 2001); *KKK v. Curators of the Univ. of Mo.,* 203 F.3d 1085 (8th Cir. 2000).

A. Central Purpose

The central purpose of the specialty plate program appears to be two-fold. Defendant argues that the purpose of the specialty plate program is to publicize messages both the State and private individuals will support and also to generate revenue for the state. Plaintiffs argue that the purpose is to allow for the private expression of a state-approved message. The Seventh Circuit has not ruled on this issue. However, other federal courts have addressed this issue, and, while this court is not bound by their decisions, it must give substantial weight to their reasoning.

The Fourth Circuit states that the purpose of the specialty plate program "primarily is to produce revenue while allowing, on special plates authorized for private organizations, for the private expression of various views." *Sons of Confederate Veterans v. Vehicles,* 288 F.3d 610, 619 (4th Cir. 2002). In that case, the Commissioner of the Virginia Department of Motor Vehicles denied the Sons of Confederate Veterans a specialty license plate displaying the confederate flag. The Fourth Circuit found that there was viewpoint discrimination in not allowing the confederate flag logo, as the message on the specialty plates was considered private speech.

In *Sons of Confederate Veterans,* as in the present case, the specialty plate was conditioned on the willingness of a threshold number of private persons to pay an extra fee for the plate with the special message. The Fourth Circuit acknowledged that this fee partially went to government revenue, a governmental purpose. The requirement that a minimum number of people

would purchase the plate suggests that "the very structure of the program ensures that only specialty plate messages popular enough among private individuals to produce a certain amount of revenue will be expressed." *Id.* However, "if the General Assembly intends to speak, it is curious that it requires the guaranteed collection of a designated amount of money from private persons before its 'speech' is triggered." *Id.* That is, the collection of private funds indicates that an important purpose of specialty plates is to allow for private expression, as well as to serve governmental revenue purposes.

In the present case, the Defendant requires each private individual to pay an additional fee in order to obtain a specialty license. The requirement of a minimum number of applications and the extra fee charged for the specialty plates leads this court to the same analysis as that employed by the Fourth Circuit. The central purpose of the specialty plate program is both to raise revenue for the state as well as to allow for some private expression. This factor supports the specialty plate program as a medium for both state and private expressions, and that private expression is an important purpose for specialty plates.

B. Editorial Control

Defendant argues that editorial control primarily lies with the state, as the Secretary retains discretion over approving or rejecting the plate, citing *Johanns v. Livestock Marketing Association* that when the state has final approval authority over "every word" in the promotional campaign it qualifies as government speech. 544 U.S. 550 (2005). Plaintiffs argue that

editorial control primarily lies with the private Illinois Choose Life organization, as the Secretary's discretion is exercised in the design and color of the plate, not the substantive content of the plate.

The Fourth Circuit addressed this issue in *Sons of Confederate Veterans v. Vehicles,* finding that although the state Commissioner was given discretion to approve or reject a given plate design, this discretion was only exercised on one other occasion, suggesting that "little, if any" editorial control was exercised by the Commonwealth over the content of special plates in Virginia. 288 F.3d 610, 621 (4th Cir. 2002). Further, there were no "guidelines regarding the substantive content of the plates or any indication of reasons, other than failure to comply with size and space restrictions, that a special plate design might be rejected." *Id.* Instead, the Commissioner's discretion was usually reserved for the design and layout of the plate, not the substantive content. *Id.* Similarly, in the present case, Secretary's discretion has been exercised over the design and color of the specialty plates, working with a graphic artist from the Communications Department and law enforcement officials to ensure the designs meet minimum standards of visibility. The Secretary has delegated the approval of the content of specialty plates to the General Assembly, but there are no standards, or indication of reasons, that would guide the decision. There is no evidence that the General Assembly has exercised its discretion in denying a specialty plate bill. Even granting that it has, there is a further point of consideration in *Planned Parenthood of S.C., Inc. v. Rose* that informs this analysis.

In *Planned Parenthood of S.C., Inc. v. Rose,* the Fourth Circuit found that the state exercised complete editorial control over the content of the speech on the Choose Life plate because the idea of a Choose Life plate originated with the State, and the legislature determined that the plate would bear the message "Choose Life." 361 F.3d 786, 793 (4th Cir. 2004). This is distinguishable from *Sons of Confederate Veterans,* where the plate was sought and presented by the plate's private sponsor. If the idea originated with the state, and the state crafted or created the message, then it [sic] more likely that the state has control over what is communicated, and how it is presented. However, if the content of the speech originated from a private organization, the private speaker holds much more editorial control in crafting and framing the final message. In the case at hand, the idea and message of the Choose Life plate originated with a private organization, Choose Life Illinois, not the legislature. Unlike *Planned Parenthood of S.C., Inc. v. Rose,* the present case involves a private organization petitioning to express its own message on a specialty plate. Because a private organization created and crafted the "Choose Life" message in this case, it holds more editorial control in accordance with *Planned Parenthood of S.C., Inc. v. Rose.*

Moreover, the Secretary has stated that "any promotional materials [on the specialty plates] are the sole responsibility of the sponsoring organization." That is, the Secretary has specified that some control and responsibility over the substantive content lies with the private organization. The evidence supports

the conclusion that the editorial control over the substantive content favors private speech.

C. Literal Speaker and Ultimate Responsibility

The third and fourth factors ask who is the "literal speaker" and who bears the "ultimate responsibility" for the speech on the specialty license plates. The Supreme Court has held that even messages on standard license plates implicate private speech, as it is at least partly associated with the vehicle owner. *Wooley v. Maynard*, 430 U.S. 705 (U.S. 1977). When the vehicle owner displays a specialty license plate, this association is much stronger:

> Although a specialty license plate, like a standard plate, is state-owned and bears a state-authorized message, the specialty plate gives private individuals the option to identify with, purchase, and display one of the authorized messages. Indeed, no one who sees a specialty license plate imprinted with the phrase "Choose Life" would doubt that the owner of that vehicle holds a pro-life viewpoint. The literal speaker of the Choose Life message on the specialty plate therefore appears to be the vehicle owner, not the State. *Planned Parenthood of S.C., Inc. v. Rose,* 361 F.3d 786, 793-94 (4th Cir. 2004).

This Court agrees with the Fourth Circuit that for a specialty plate, where private individuals have to pay an extra fee for a certain message to be expressed on her private vehicle, and where not all vehicles or license plates contain this message, the "literal speaker" who bears "ultimate responsibility" for the specialized message is the private individual. While the forum

may be public, the speech is private. Thus, the third and fourth inquiries favor a private speech designation.

Defendant argues that specialty license plates should be treated as government speech. In support of its position, Defendant cites *Rust v. Sullivan,* where the Supreme Court found that a doctor, working for a state-funded hospital, whose salary came from federal funds, was an individual messenger of government speech. 500 U.S. 173 (1991). When the government pays for the doctor's services, the doctor's speech is considered governmental, and can be controlled by the state regardless of viewpoint. *Rust* is inapposite to the case at hand. In the present case, the private individuals are paying a premium for the specialty plate message to be displayed. That is, the added content of the specialty plate is privately funded by the individual. It would be surprising indeed for the state to require a private individual to create, apply for and pay for what would be considered government speech. It is, in fact, the opposite of *Rust,* where the government determined the message and paid individuals to express it as government speech.

Defendant also cites to *ACLU of Tenn. v. Bredesen,* where the Sixth Circuit found that specialty license plates constituted government speech. 441 F.3d 370 (6th Cir. 2006). Contrary to the Fourth Circuit's holding, the Six Circuit held that "Choose Life" specialty license plates bears a government-crafted message disseminated by private volunteers, where viewpoint neutrality is not required. Key to the Six Circuit's analysis is *Johanns v. Livestock Mktg. Ass'n,* where the Supreme Court found that where "the government sets the overall message to be

communicated and approves every word that it disseminated," the message constitutes government speech. 125 S. Ct. 2055 (U.S. 2005). In *Johanns,* the government promoted marketing slogans such as "Beef. It's What's for Dinner.", subsidized by a government-run "checkoff" fee on all sales or importation of cattle and imported beef products, pursuant to The Beef Promotion and Research Act of 1985. *Id.* In that case, the government passed an act to promote its own interests, created its own marketing campaigns, and was subsidized by its own fund-raising efforts. *Id.* Under these circumstances, the pro-beef speech was considered government speech. *Id.* This is clearly not the case with the present case of specialty license plates. The message in fact was created by the private organization, not the state itself. Further, an extra charge was levied on individuals who would like the specialized message on their license plate. The Sixth Circuit reasoned that this extra charge indicates that there are private "volunteers" who are willing to "pay out of their own pockets for the privilege of putting the government-crafted message on their private property." *ACLU of Tenn. v. Bredesen,* 441 F.3d 370 (6th Cir. 2006). This reasoning is forced. A more compelling reason would be that individuals pay to give expression to their private causes and viewpoints through the specialty plate program. This court respectfully disagrees with the reasons of the Sixth Circuit, and is persuaded by the rationale of the Fourth Circuit. Weighing the four factors discussed above, this court concludes that the privately-crafted and privately-funded message on specialty license plates constitutes private speech.

D. Viewpoint Discrimination

Where the government voluntarily provides a forum for private expression, the government may not discriminate against some speakers because of their viewpoint. If the government is not expressing its own policy, it presumptively violates the First Amendment when it picks and chooses access to the forum on the basis of views expressed by the private speakers. *Ark. Educ. Tv Comm'n v. Forbes,* 523 U.S. 666 (U.S. 1998). Defendant's main argument is that the license plate message is state speech, and thus not subject to First Amendment protection. However, it has been determined that the added message of specialty license plates constitute private speech, and thus the First Amendment is implicated.

Viewpoint discrimination occurs when, in the realm of private speech, government regulation favors one speaker over another. *Rosenberger v. Rector & Visitors of the Univ. of Va.,* 515 U.S. 819, 828 (U.S. 1995). Further, "the government must abstain from regulating speech when the motivating ideology or the opinion or perspective of the speaker is the rationale for the restriction." *Id.* Where restrictions or regulations of speech discriminate on the basis of the content of speech, there is an "inherent risk that the Government seeks not to advance a legitimate regulatory goal, but to suppress unpopular ideas or information, or manipulate the public debate through coercion rather than persuasion." *Turner Broad. Sys. v. FCC,* 512 U.S. 622 (U.S. 1994). As such, these viewpoint restrictions require strict scrutiny. *Id.*

In analyzing the facts of the present case, the "Choose Life" message certainly represents a viewpoint – the pro-life viewpoint. The state's reason for denying the speech is because that viewpoint is controversial. However, because it is private speech, this reason will not survive strict scrutiny. There are no general guidelines or rules on restricting speech in a viewpoint neutral way that would account for denying "Choose Life" on a specialty license plate. Rather, it appears that the state wishes to suppress what it considers a controversial idea, discriminating against a viewpoint with which it does not agree or wish to associate. When a group, such as Choose Life Illinois, has met the numerical and financial requirements of the specialty plate program to deny authorization of the Choose Life plates is to discriminate against those who hold a pro-life viewpoint. This is impermissible.

Defendant argues that if the "Choose Life" message is permissible, than [sic] the state would also have to issue Ku Klux Klan or Nazi plates to avoid viewpoint discrimination. The issue of whether there may be any limits on the right to have messages displayed under the Illinois statute does not have to be decided in this case. The fact that speech or viewpoint is unpopular does not exempt it from First Amendment protection. Indeed, the First Amendment protects unpopular, even some hateful speech. The message conveyed by this proposed license plate is subject to First Amendment Protection.

Finally, Defendant attempts to distinguish between private and public fora in their argument for summary judgment. However, because we are dealing with viewpoint discrimination in private speech, the forum

is inconsequential. Viewpoint discrimination in private speech is presumptively unconstitutional in any forum. *Rosenberger v. Rector & Visitors of the Univ. of Va.,* 515 U.S. 819, 829-30 (U.S. 1995). Thus, this court concludes that denying Illinois Choose Life the specialty license plate based on its message constitutes viewpoint discrimination of private speech, and is prohibited by the First Amendment. With no genuine issue of material fact, Plaintiff is entitled to Judgment.

IV. CONCLUSION

For the foregoing reasons, Defendant's motion for summary is denied; Plaintiffs' motion for summary judgment is granted. Judgment will be entered for the Plaintiffs and against the Defendant. If the Plaintiffs meet the numerical and design requirements for issuance of a specialty plate, the Secretary of State is ordered to issue the "Choose Life" plate. Because this is a case of first impression in this Circuit, this order will be stayed 30 days.

Enter:

/s/ David H. Coar

David H. Coar
United States District Judge

Dated: January 19, 2007

APPENDIX A: Illinois Specialty Plates as of October 2005

(1) Korean War Veteran License Plates, 625 ILCS 5/3-626;

(2) Environmental License Plates, 625 ILCS 5/3-627;

(3) Collegiate License Plates, 625 ILCS 5/3-629;

(4) Prevent Violence License Plates, 625 ILCS 5/3-630;

(5) Sportsmen Series License Plates, 625 ILCS 5/3-631;

(6) Wildlife Prairie Park License Plates, 625 ILCS 5/3-632;

(7) Illinois Firefighters' License Plates, 625 ILCS 5/3-634;

(8) Master Mason Plates, 625 ILCS 5/3-635;

(9) Knights of Columbus Plates, 625 ILCS 5/3-636;

(10) D.A.R.E. License Plates, 625 ILCS 5/3-637;

(11) Illinois and Michigan Canal License Plates, 625 ILCS 5/3-640;

(12) Mammogram License Plates, 625 ILCS 5/3-643;

(13) Police Memorial Committee License Plates, 625 ILCS 5/3-644;

(14) Organ Donor Awareness License Plates, 625 ILCS 5/3-646;

(15) Education License Plates, 625 ILCS 5/3-648;

(16) Hospice License Plates, 625 ILCS 5/3-648;

(17) U.S. Marine Corps License Plates, 625 ILCS 5/3-651;

(18) Chicago and Northeastern Illinois District of Carpenters Plates, 625 ILCS 5/3-652;

(19) Pet Friendly License Plates, 625 ILCS 5/3-653;

(20) Lewis and Clark Bicentennial License Plates, 625 ILCS 5/3-653;

(21) September 11th "America Remembers" License Plates, 625 ILCS 5/3-653;

(22) Illinois Route 66 License Plates, 625 ILCS 5/3-653;

(23) Illinois Public Broadcasting System Stations License Plates, 625 ILCS 5/3-654;

(24) Pan Hellenic License Plates, 625 ILCS 5/3-654;

(25) Park District Youth Program License Plates, 625 ILCS 5/3-654;

(26) Professional Sports Teams License Plates, 625 ILCS 5/3-654;

(27) Stop Neuroblastoma License Plates, 625 ILCS 5/3-654;

(28) Members of the General Assembly, 625 ILCS 5/3-606;

(29) Retired Members of the General Assembly, 625 ILCS 5/3-606.1;

(30) Amateur Radio Operators, 625 ILCS 5/3-607;

(31) Disabled Veterans, 625 ILCS 5/3-609;

(32) Congressional Medal of Honor Recipients, 625 ILCS 5/3-609.1;

(33) Members of Congress, 625 ILCS 5/3-610;

(34) Retired Members of the Illinois Congressional Delegation, 625 ILCS 5/3-610.1;

(35) Repossessors, 625 ILCS 5/3-612;

(36) Special Inaugural License Plates, 625 ILCS 5/3-613;

(37) Honorary Consular License Plates, 625 ILCS 5/3-615;

(38) License Plates for Disabled Individuals, 625 ILCS 5/3-616;

(39) Drivers Education, 625 ILCS 5/3-617;

(40) Charitable Vehicle, 625 ILCS 5/3-618;

(41) Ex-Prisoners of War, 625 ILCS 5/3-620;

(42) Illinois National Guard, 625 ILCS 5/3-621;

(43) Members of Armed Forces Reserves, 625 ILCS 5/3-622;

(44) Purple Heart, 625 ILCS 5/3-623;

(45) Retired Armed Forces, 625 ILCS 5/3-624;

(46) Pearl Harbor Survivor, 625 ILCS 5/3-625;

(47) Bronze Star License Plates, 625 ILCS 5/3-628;

(48) Universal Charitable Organization License Plates, 625 ILCS 5/3-633;

(49) Universal U.S. Veteran License Plates, 625 ILCS 5/3-638;

(50) Special Registration Plates for a President of a Village or Incorporated Town or Mayor, 625 ILCS 5/3-639;

(51) Deceased Police Officer or Firefighter License Plates, 625 ILCS 5/3-641;

(52) Silver Star License Plates, 625 ILCS 5/3-642;

(53) Vietnam Veteran License Plates, 625 ILCS 5/3-645;

(54) World War II Veteran License Plates, 625 ILCS 5/3-647;

(55) West Point Bicentennial License Plates, 625 ILCS 5/3-649;

(56) Army Combat Veteran License Plates, 625 ILCS 5/3-650;

(57) Antique Vehicle Plates, 625 ILCS 5/3-804;

(58) Custom Vehicle Plates, 625 ILCS 5/3-804.1;

(59) Street Rod Plates, 625 ILCS 5/3-804.2;

(60) Gold Star Plates, 625 ILCS 5/3-806.4.

APPENDIX C

UNITED STATES COURT OF APPEALS

For the Seventh Circuit
Chicago, Illinois 60604

December 17, 2008

Before

DANIEL A. MANION, *Circuit Judge*
TERENCE T. EVANS, *Circuit Judge*
DIANE S. SYKES, *Circuit Judge*

No. 07-1349

CHOOSE LIFE ILLINOIS, INC., RICHARD BERGQUIST, SUE BERGQUIST, et al.,	Appeal from the United States District Court for The Northern District of Illinois, Eastern Division.
Plaintiffs-Appellees,	
v.	No. 04 C 4316
JESSE WHITE, Secretary of State of the State of Illinois,	David H. Coar, *Judge*.
Defendant-Appellant.	

ORDER

On consideration of the petition for rehearing and for rehearing en banc, no judge in active service has requested a vote on the petition for rehearing en banc and all of the judges on the original panel have voted to deny rehearing. It is therefore ordered that the petition for rehearing and for rehearing en banc is DENIED.

APPENDIX D

625 ILCS 5/3-600:

Requirements for issuance of special plates.

(a) The Secretary of State shall issue only special plates that have been authorized by the General Assembly. 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.

(b) The Secretary of State, upon issuing a new series of special license plates, shall notify all law enforcement officials of the design, color and other special features of the special license plate series.

(c) This Section shall not apply to special license plate categories in existence on the effective date of this amendatory Act of 1990, or to the Secretary of State's discretion as established in Section 3-611.

625 ILCS 5/3-405.1:

Application for vanity and personalized license plates.

(a) Vanity license plates mean any license plates, assigned to a passenger motor vehicle of the first division, [and] to [other qualifying vehicles] * * *, which display a registration number containing 1 to 7 letters and no numbers or 1, 2, or 3 numbers and no letters as requested by the owner of the vehicle and license plates

issued to retired members of Congress under Section 3-610.1 or to retired members of the General Assembly as provided in Section 3-606.1. Personalized license plates mean any license plates, assigned to a passenger motor vehicle of the first division, [and] to [other qualifying vehicles] * * * , which display a registration number containing one of the following combinations of letters and numbers, as requested by the owner of the vehicle:

Standard Passenger Plates

First Division Vehicles

1 letter plus 0-99

2 letters plus 0-99

3 letters plus 0-99

4 letters plus 0-99

5 letters plus 0-99

6 letters plus 0-9

* * *

(e) An applicant for the issuance of vanity or personalized license plates or subsequent renewal thereof shall file an application in such form and manner and by such date as the Secretary of State may, in his discretion, require.

No vanity nor personalized license plates shall be approved, manufactured, or distributed that contain any characters, symbols other than the international accessibility symbol for vehicles operated by or for

persons with disabilities, foreign words, or letters of punctuation.

* * *

625 ILCS 5/3-405.2:

Improper plates.

The Secretary of State shall refuse to issue any license plates bearing a combination of letters or numbers, or both, which creates a potential duplication or, in the opinion of the Secretary, (1) would substantially interfere with plate identification for law enforcement purposes, (2) is misleading, or (3) creates a connotation that is offensive to good taste and decency.

The Secretary may revoke any such plates issued previously. Any person who has his or her plates revoked under this Section may acquire at no charge new plates and any required stickers of the same category and for the same period of registration.

625 ILCS 5/3-412:

Registration plates and registration stickers to be furnished by the Secretary of State.

(a) The Secretary of State upon registering a vehicle subject to annual registration for the first time shall issue or shall cause to be issued to the owner one registration plate for a motorcycle, trailer, semitrailer, motorized pedalcycle or truck-tractor, 2 registration plates for other motor vehicles and, where applicable, current registration stickers for motor vehicles of the first division. The provisions of this Section may be made applicable to such vehicles of the second division,

as the Secretary of State may, from time to time, in his discretion designate. * * *

(b) Every registration plate shall have displayed upon it the registration number assigned to the vehicle for which it is issued, the name of this State, which may be abbreviated, the year number for which it was issued, which may be abbreviated, the phrase "Land of Lincoln" (except as otherwise provided in this Code), and such other letters or numbers as the Secretary may prescribe. * * *

APPENDIX E

OFFICE OF THE
SECRETARY
OF STATE

Vehicle Services Department

501 So. 2nd St., Room 312
Springfield, Illinois 62756

JESSE WHITE
SECRETARY OF STATE

New Plate Categories
(Fact Sheet)

1. Legislation must be introduced (by a legislator either in the Senate or the House), passed by both chambers, and signed into law by the Governor. The Secretary can not arbitrarily begin issuing a new plate category.

2. Once the plate is authorized, by law the Vehicle Services Department begins accepting commitment forms containing names & addresses of people who will be applying for the plate when and if it becomes available. No money or applications are accepted at this time, simply names, addresses, daytime telephone numbers and current license plate numbers. Please note: Any promotional materials are the sole responsibility of the sponsoring organization.

3. As the number of requests approaches the 850 level (somewhere between 750 & 850 depending on the

amount of time elapsed from the inception of the legislation to the current date) our Communications Department works with someone representing the special interest group on a design of the plate.

4. A sample plate, designed as agreed to by the group and the Secretary of State, with the approval of law enforcement, is produced and signed off by all the aforementioned parties.

5. If the 850 minimum is now a reality an initial production order is placed.

6. Notification and applications are sent to all those that had submitted commitment forms requesting the plate when it became available.

7. Plates are issued as the applications and money are received.

8. Additional fees are deposited in the special fund created by the legislation.

9. Once annually the funds, subject to appropriation by the legislature, are forwarded to the organization by the Comptroller.

APPENDIX F

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS EASTERN DIVISION

CHOOSE LIFE ILLINOIS, INC., et al.,	)	
Plaintiffs,	)	
	)	
vs.	)	**No. 04 C 4316**
	)	**Hon. David Coar,**
	)	
	)	**Presiding**
	)	**Judge**
JESSE WHITE, Secretary of State, State of Illinois,	)	
	)	
Defendant.	)	

DECLARATION OF DAN PROFT IN SUPPORT OF PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

Dan Proft, upon oath, deposes and states the following:

1. I am one of the individual plaintiffs in this action and a member of Choose Life Illinois, Inc., the corporate plaintiff. I am making this Declaration in support of the plaintiffs' motion for summary judgment.

2. I am the president of the Illinois Leader Media Company and publisher of the *Illinois Leader*. I have

a special, personal concern about the cause of adoption, because I was adopted. This is the cause that the plaintiffs' effort to secure a Choose Life specialty license plate in Illinois seeks to advance.

3. If in fact the Choose Life specialty license plate were approved, I would purchase one for my own automobile.

4. There are at least 26,000 petitions that Illinois citizens have signed, requesting approval of a Choose Life specialty license plate in Illinois. I have had personal custody of all these petitions (received up to that point) for the last six to eight months. Over that period, under my direct supervision on behalf of the plaintiff, Choose Life Illinois, Inc., a data entry operation has been carried on at my office by which the data contained on these petitions has been entered into a data base. Among the data which we have entered is the indication on each petition whether the signer would purchase a Choose Life license plate if the same became available in Illinois. So far, after entry of approximately 60% of all the petitions we've collected, at least one-third (or 33 1/3%) of the signers have indicated that they would purchase one or more Choose Life specialty license plates, if approved and if available in Illinois.

5. I have also taken a leading role in the failed efforts to secure legislative approval, for a Choose Life specialty license plate in Illinois. Over two years ago, I led a delegation to Springfield, together with plaintiffs Jill Stanek and Joseph Walsh. We were also accompanied by Scott and Janet Willis, a couple from suburban Chicago whose six children were tragically

killed when an illegally licensed Illinois truck driver (whose truck bore Illinois plates) caused a fiery accident on a Wisconsin right of way. The Willises were part of our delegation because they were convinced that the Illinois driver license system had been corrupted by a prior regime, and they wanted to play a role in helping Illinois license plates to stand for something good.

6. Our delegation met with Senator Emil Jones, the president of the Illinois Senate. Senator Jones, while courteous to us, asked us when we were meeting in his office why we weren't pressing for the slogan, "Choose Adoption," on the specialty license plates rather than "Choose Life." He remarked that he had a "pro-choice" position, that is to say, that he was in favor of legalized abortion. We explained that our cause was adoption, but that we were of the viewpoint that the best way to press that cause was by having widespread use of "Choose Life" specialty plates in Illinois. Senator Jones disagreed, and it was very clear that it was our viewpoint that led to his opposition to our getting the Choose Life specialty plate approved in the General Assembly.

7. Later, we were to appear and testify before the House State Government Committee, chaired by Rep. Jack Franks. But then we found out that a special 3-member subcommittee had been set up, and we were to appear before that subcommittee instead of before the State Government Committee. Together with the Willeses, we waited hours before we were called to testify. The subcommittee voted 2-1 against sending it to the full committee. No explanation whatsoever was ever given to us. As someone with experience in

Springfield, in my opinion this abrupt, unexplained rebuff of the specialty plate, despite our having so many signed petitions, clearly evinced an hostility to the viewpoint which the Choose Life specialty plate was communicating. Indeed, prior to this dozens of specialty plates had been routinely approved.

Further this Declarant sayeth not.

Subscribed and sworn to, under penalties of perjury, as prescribed by the laws of the United States of America, this 4th day of October, 2005.

/s/ Daniel K. Proft