

515 F.3d 956 (9<sup>th</sup> Cir. 2008)

ARIZONA LIFE COALITION, INC.

v.

STANTON

TALLMAN, Circuit Judge:

Arizona Life Coalition (“Life Coalition”) appeals a summary judgment in favor of Stacey Stanton and other members of the Arizona License Plate Commission (collectively the “Commission”). Life Coalition contends that the Commission violated its First Amendment right to free speech and Fourteenth Amendment right to equal protection by arbitrarily denying its application for a special Arizona organization license plate that would portray its message “Choose Life.” We agree that the Commission violated Life Coalition’s First Amendment right to free speech and therefore do not reach its equal protection argument.

...

The Commission first considered Life Coalition’s application in August 2002. Members of the Commission raised concerns over whether the general public would believe Arizona had endorsed the message of the “Choose Life” license plate, as well as concerns over whether groups with differing viewpoints would file applications. To obtain legal advice, the Commission tabled Life Coalition’s application without taking action.

To alleviate the Commission’s concerns, Life Coalition filed a revised application on September 27, 2002. In this application Life Coalition proposed including its name on the plate design. The Commission considered Life Coalition’s revised application in an August 2003 meeting. During the meeting, Gary Paisley, Chairman of Life Coalition, explained how Life Coalition served the community: (1) it organized a diaper drive, after which Life Coalition donated thousands of diapers to the Arizona Diaper Bank; (2) “Life Coalition’s purpose is to provide compassionate services to those people that

are considering or have been affected by abortion including pregnancy tests, pregnancy counseling, and relationship counseling”; and (3) Life Coalition “established a hotline for women who are pregnant.” Paisley also told the Commission that Life Coalition’s membership included approximately 40 organizations and 100,000 individuals. Paisley then confirmed that a person or organization must subscribe to Life Coalition’s statement of principles to become a member.

Initially, the Commission declined to take action on Life Coalition’s application. After Paisley implored the Commission to explain what statutory requirements Life Coalition failed to satisfy, a member of the Commission moved to formally deny the application, which passed by voice vote. Chairwoman Stanton replied to Paisley’s request for an explanation by stating that “the action of the Commission is final” and that she did not believe “now is an opportunity for[ ] further debate, or for further info that [Life Coalition] could put on additional applications.”

...

We must decide whether, by authorizing a specialty license plate sought by a nonprofit organization to display its message and the message of the organization’s members, the State of Arizona has adopted that speech as its own. It is undeniable that “when the government speaks for itself, it ‘may take legitimate and appropriate steps to ensure that its message is neither garbled nor distorted.’ ” *Planned Parenthood of S.C. Inc. v. Rose*, 361 F.3d 786, 792 (4th Cir.2004) (plurality) (quoting *Rosenberger v. Rector and Visitors of Univ. of Va.*, 515 U.S. 819, 833, 115 S.Ct. 2510, 132 L.Ed.2d 700 (1995)). However, when the government regulates private speech, we must conduct a traditional First Amendment analysis.

There is some question as to what standard we should apply in differentiating between private and government speech. In *Johanns v. Livestock Marketing Ass’n*, 544 U.S. 550 (2005), the Court addressed whether a federal program that requires beef producers to finance promotional messages to support the beef industry-“Beef. It’s What’s for Dinner”-violated the First Amendment. The Court

held that “[w]hen ... the government sets the overall message to be communicated and approves every word that is disseminated,” it is government speech. *Id.* at 561-62. And, because “[t]he message set out in the beef promotions is from beginning to end the message established by the Federal Government,” “Congress ... directed the implementation of a ‘coordinated program’ of promotion, ‘including paid advertising, to advance the image and desirability of beef and beef products,’ ” and the Secretary of Agriculture “exercise[d] final approval authority over every word used in every promotional campaign,” the beef promotional messages represented government speech. *Id.* at 560-61.

...

Prior to *Johanns*, the Fourth, Eighth, and Tenth circuits had adopted a nonexhaustive list of four factors to differentiate between the two types of speech. Those factors are:

- (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, in analyzing circumstances where both government and a private entity are claimed to be speaking.

*Sons of Confederate Veterans, Inc.*, 288 F.3d 610, 618 (4<sup>th</sup> Cir. 2002) (citing *Wells v. City and County of Denver*, 257 F.3d 1132, 1141 (10<sup>th</sup> Cir.2001); *Knights of the Ku Klux Klan v. Curators of the Univ. of Mo.*, 203 F.3d 1085, 1093-94 (8<sup>th</sup> Cir.2000)).<sup>FN5</sup>

FN5. Although we have not yet expressly adopted the four-factor test, we relied on similar factors in *Downs v. Los Angeles Unified School District*, 228 F.3d 1003 (9<sup>th</sup> Cir.2000)...

... *Johanns* is factually distinguishable from these specialty license plate cases. *Johanns* involved a government-compelled subsidy of government speech. Specialty license plate programs do not raise issues regarding “compelled-speech” or a

“compelled-subsidy.” In specialty license plate cases, private individuals choose to pay the price for obtaining a particular specialty license plate. The First Amendment harm “is being denied the opportunity to speak on the same terms as other private citizens within a government sponsored forum.” ...

[W]e believe, [however], that *Johanns* is instructive when determining whether the message constitutes government or private speech. In concluding that the beef program represented government speech, the Court relied on factors similar to those set forth in the four-factor test. It considered who controlled the speech, 544 U.S. at 560-61, the purpose of the program, *id.* at 561, and the fact that the Secretary of Agriculture exercised final editorial control over the promotional campaign, *id.* We therefore adopt the Fourth Circuit's four-factor test-supported by the Supreme Court's decision in *Johanns* -to determine whether messages conveyed through Arizona's special organization plate program constitute government or private speech.

The Commission argues that the “primary function of Arizona license plates-including special plates-is the State's need to identify a vehicle and its owner.” It cites *Kahn v. Department of Motor Vehicles*, 16 Cal.App.4th 159 (Cal.Ct.App.1993), where the California Court of Appeal stated:

A vehicle license plate is a state-imposed display of registered vehicle identification. That the state permits license holders, for an additional fee, to vary minimally their vehicle identification from the prescribed form by selecting letter and/or number combinations which may reflect an individual's personal or professional identity, or possibly express a thought or idea, is purely incidental to the primary function of vehicle identification.

*Id.* at 166. Life Coalition argues that the specialty license plates offer something more: “the opportunity to identify themselves with individualized messages via these specialized plates” as well as “the opportunity to benefit worthy organizations financially.”

We agree with Life Coalition. While the primary

purpose of any vehicle license plate is vehicle identification and registration, we are not concerned with the general validity of Arizona's licensing requirements. Rather, we must address Arizona's *speciality license plate* program as a whole. *See Sons of Confederate Veterans, Inc.*, 288 F.3d at 619.

By allowing organizations to obtain speciality (sic) license plates with their logo and motto, Arizona is providing a forum in which philanthropic organizations can exercise their First Amendment rights in the hopes of raising money to support their cause. *See* Ariz. Rev.Code § 28-2402(1) (setting the fee for specialty license plates at twenty-five dollars); *id.* § 28-2404(F) (stating that eight dollars of the fee is a specialty plate administration fee and seventeen dollars is an annual donation to the organization)...

The revenue raising purpose of the Arizona special organization plate program supports a finding of private speech.

The Commission's *de minimis* editorial control over the plate design and color does not support a finding that the *messages* conveyed by the organization constitute government speech. The Arizona legislature has chosen to limit the license plate forum to only those organizations that “serve[ ] the community, contribute[ ] to the welfare of others and [are] not offensive or discriminatory in [their] purpose, nature, activity or name.” Ariz.Rev.Stat. § 28-2404(B). In addition, the organizations cannot “promote a specific religion, faith or antireligious belief.” *Id.*

However, as Life Coalition notes in its brief, the statutory requirements address who may speak, not what they may say...

In this case, the idea of a “Choose Life” license plate originated with Life Coalition. While the Commission determined whether Life Coalition met the statutory guidelines for gaining access to the license plate forum, Life Coalition determined the substantive content of their message.

Therefore, this factor weighs in favor of private speech.

“[O]wnership of the means of communication [i]s a

valid consideration in determining whether [the license plate] contained government speech.” *Sons of Confederate Veterans, Inc.*, 288 F.3d 610, 621 (4<sup>th</sup> Cir. 2002); *Wells v. City and Country of Denver*, 257 F.3d 1132, 1142 (10<sup>th</sup> Cir. 2001). Therefore, the fact that Arizona owns the special organization plates supports a finding that the State is the literal speaker. However, in *Wooley v. Maynard*, 430 U.S. 705 (1977), the Supreme Court indicated that messages conveyed through license plates “implicate private speech interests because of the connection of any message on the plate to the driver or owner of the vehicle.” *Sons of Confederate Veterans, Inc.*, 288 F.3d at 621.

This factor has characteristics of both private and government speech. Nevertheless, in this situation, where Life Coalition's logo depicting the faces of two young children will also be displayed on the license plate supporting the message “Choose Life,” we conclude that it weighs in favor of finding this to be primarily private speech.

The question of who bears “ultimate responsibility” for the “Choose Life” license plate is very similar to the question of who is the literal speaker... Here, Life Coalition submitted its motto to be placed on a speciality license plate that would also identify the organization by name. Life Coalition controlled the message of its special organization plate, and the individual members who choose to purchase the plate voluntarily choose to disperse that message.

It is true that, like the Secretary in *Johanns*, Arizona developed the program that allows nonprofit organizations such as Life Coalition to obtain specialty license plates. However, in *Johanns* the beef producers had no choice but to support the beef ad. In comparison, there is nothing in the record to even suggest that Arizona intended to adopt the message of each special organization plate as its own state speech. Instead, the burden is on the nonprofit organization. If it wants to convey a certain message through the Arizona specialty plate program, it must take the affirmative step of submitting an application. This suggests that it is Life Coalition, rather than the State of Arizona, that bears ultimate responsibility for the content of the speech.

We therefore hold that the “Choose Life” message displayed through a speciality license plate if issued

by Arizona would constitute private speech.

Having determined that the “Choose Life” message would represent private speech, we must now determine whether the Commission has acted appropriately under the First Amendment. The first step in assessing a First Amendment claim relating to private speech on government property is to “identify the nature of the forum, because the extent to which the Government may limit access depends on whether the forum is public or nonpublic.” *Cornelius v. NAACP Legal Def. & Educ. Fund*, 473 U.S. 788, 797 (1985). In defining the forum, we must focus “on the access sought by the speaker. When speakers seek general access to public property, the forum encompasses that property. In cases in which limited access is sought, [the Supreme Court's] cases have taken a more tailored approach to ascertain[ ] the perimeters of a forum within the confines of the government property.” *Cornelius*, 473 U.S. at 801 (citation omitted). Here, the forum is Arizona license plates.

“[A] public forum may be created by government designation of a place or channel of communication for use by the public at large for assembly and speech, for use by certain speakers, or for the discussion of certain subjects.” *Cornelius*, 473 U.S. at 802. In a designated public forum, speakers cannot be excluded unless it is “necessary to serve a compelling state interest” and the exclusion is “narrowly drawn to achieve that interest. We have further refined the concept of “designated” public forum by carving out a subcategory we call a “limited” public forum. See *Hopper v. City of Pasco*, 241 F.3d 1067, 1074 (9th Cir.2001). The government may restrict speech in limited public fora so long as the restrictions are “viewpoint neutral and reasonable in light of the purpose served by the forum.” *Id.* at 1075.

... A limited public forum exists when the government intentionally opens a nonpublic forum to expressive activity by a certain class of speakers to address a particular class of topics.

We have no trouble concluding that Arizona's purpose was to open up its license plate forum to a certain class of organizations for expressive activity. As the Commission correctly notes in its brief, “[h]istorically, Arizona's license plates have served the purely governmental function of vehicle and

vehicle owner identification and have been a nonpublic forum.” However, Arizona took the affirmative step by passing its special license plate legislation of allowing limited access to license plates publicly displayed for expressive conduct as vehicles are driven throughout the state.

Arizona's speciality plate program encompasses a wide range of philanthropic organizations with community based programs/ideals. Section 28-2404(B) states that the Commission *shall* authorize a speciality license plate to all nonprofit organizations that (1) “serve[ ] the community, contribute[ ] to the welfare of others and [are] not offensive or discriminatory in [their] purpose, nature, activity or name”; (2) has an organizational name or purpose that “does not promote any specific product or brand name ... provided for sale”; and (3) the organizations do not “promote a specific religion, faith, or antireligious belief.”

Applying this statutory mandate, the Commission has authorized, and the Department has issued, the following special organization plates: (1) The University of Phoenix Alumni Network (bearing the University's identifier, “Univ. of Phoenix”); (2) Associated Fire Fighters of Arizona (bearing the Union's motto, “Professional Fire Fighters”); (3) Fraternal Order of Police (bearing the Order's identifier, “Fraternal Order of Police”); (4) Legion of Valor (bearing the Legion's identifier, “Legion of Valor”); and (5) Wildlife Conservation Council (bearing the Council's motto, “Conserving Wildlife”). In addition, the Commission has authorized six additional license plates, but at the time of briefing this appeal we were told the Department had yet to issue them because of factors unrelated to this appeal: (1) Civil Air Patrol; (2) Arizona Association of Future Farmers of America; (3) Rotary International; (4) Arizona Hospice Palliative Care Organizations; (5) Red Means Stop Coalition; and (6) Arizona Historical Society.

Nevertheless, “[a] policy with a broad purpose ... is not dispositive of an intent to create a public forum by designation.” We must therefore look closely at the Commission's policy and practice to determine whether Arizona intended the speciality plate forum to be “open for indiscriminate use.” *Id.* In other words, if Arizona intended only to open the forum to “certain groups or to certain topics,” it has created

only a limited public forum.

...Arizona by statute restricts its speciality license plate program to only nonprofit organizations with community driven purposes that do not promote a specific religion, faith or antireligious belief. Ariz.Rev.Stat. § 28-2404(B). To gain access, the nonprofit organization must have its application reviewed and approved by the Commission. These are not abstract policy statements, but are definite and unambiguous restrictions on gaining access to the forum.

From the record before us, it is also clear that the Commission has consistently applied the access restrictions when reviewing pending applications.

Finally, we note that the nature of the forum also supports a conclusion that Arizona intended only to create a limited public forum. [G]iven the general overarching purpose of aiding in vehicle identification, expression through vanity plates (and, in turn, special organization plates) is subject to numerous restrictions with the general public having only limited access. *Id.* We therefore conclude that Arizona's speciality license plate program is a limited public forum, and that any access restriction must be viewpoint neutral and reasonable in light of the purpose served by the forum.

... The Commission contends that it did not engage in viewpoint discrimination because it “did not grant a special organization plate to a group with a viewpoint in opposition to Life Coalition’s” and therefore, “[n]either side of the ‘Choose Life’ issue is represented by a special organization plate.” The Supreme Court rejected a similar argument in *Rosenberger*, where it found a First Amendment violation when a public university withheld funding to a student publication because its paper “primarily promote[d] or manifest[ed] a particular belie[f] in or about a deity or an ultimate reality.” 515 U.S. at 823.

Unlike the University system in *Rosenberger*, the Arizona statutes do not expressly prohibit abortion-related speech in the license plate forum. Rather, the State has opened this forum to all organizations that serve the community and contribute to the welfare of others in a nondiscriminatory way. Ariz.Rev.Stat. § 28-2404(B)(1). The Commission does not argue that Life Coalition failed to meet this statutory

requirement. Instead, the only justification the Commission can give for denying Life Coalition's application is that it chose not to enter the Choose Life/Pro-Choice debate. And “where the government is plainly motivated by the nature of the message rather than the limitations of the forum or a specific risk within that forum, it is regulating a viewpoint rather than a subject matter.”

Moreover, during the August 2002 hearing, the Commissioners expressed concerns that, if they granted Life Coalition's application, groups with opposing viewpoints would file applications for their own special organization plate. 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....

Admittedly, this is a difficult issue. “The line between an acceptable subject matter limitation and unconstitutional viewpoint discrimination is not a bright one.” ...

Arizona has created a limited public forum for nonprofit organizations. The only substantive restriction is that the license plate cannot promote a specific product for sale, or a specific religion, faith, or antireligious belief. Nowhere does the statute create objective criteria for limiting “controversial” material, and nowhere does the statute prohibit speech related to abortion. Consequently, because abortion-related speech falls within the boundaries of Arizona's limited public forum, and because the Commission clearly denied the application based on the nature of the message, we conclude the Commission's actions were viewpoint discriminatory.

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