547 F. 3d 853 (7th Cir. 2008)

CHOOSE LIFE ILLINOIS, INC. et al.
v.
WHITE

Before MANION, EVANS, and SYKES, Circuit Judges.

SYKES, Circuit Judge. . . .

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. . . .

With insignificant historical exceptions, each specialty license plate in Illinois has its own authorizing statute describing the plate and establishing the required additional fee. These statutes typically allocate a portion of the proceeds from the sale of the plates to the specific state or local program that corresponds to the message or to the not-for-profit or charitable organization that sponsored the plate. . . . 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.
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> ....
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> (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. . . . [T]he 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

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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 (*2005*).* "[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." *Bd. of Regents v. Southworth,* 529 U.S. 217, 235 (2000). "If he citizenry objects, newly elected 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. . . . 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. . . . 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. 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 Seventh Circuit reviewed the other license plate cases in detail]. [W]hat 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 . . . 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). 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. 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; *Rosenberger,* 515 U.S. at 829.

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 (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. . . .

. . . 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 or prohibited the display of a viewpoint-specific symbol. 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.

. . . [T]he 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 deity 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

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.

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 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. . . .

MANION, Circuit Judge, concurring. . . .

[T]he 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 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. . . .