

No. 07-1349

IN THE UNITED STATES COURT OF APPEALS  
FOR THE SEVENTH CIRCUIT

_____	)	
CHOOSE LIFE ILLINOIS, INC.,	)	Appeal from the United States
et al.,	)	District Court for the
	)	Northern District of Illinois,
Plaintiffs-Appellees	)	Eastern Division
	)	
v.	)	No. 04 c 4316
	)	
JESSE WHITE, Secretary of State,	)	The Hon. David H. Coar,
State of Illinois,	)	Judge Presiding
	)	
Defendant-Appellant.	)	
_____	)	

SUPPLEMENTAL BRIEF OF PLAINTIFFS-APPELLEES

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## ARGUMENT

By Order dated November 14, 2007, the Court has requested supplemental briefing addressing the applicability to this case of two recently enacted Illinois laws. The first, Public Act 95-0534, creates a “Support Our Troops” specialty plate. See Plaintiffs’-Appellees’ Rule 28(j) letter, Ex. A (Oct. 1, 2007). The second, Public Act 95-0539, amends section 5/3-600 of the Illinois Vehicle Code to provide that “[t]he Secretary of State shall issue only special plates that have been authorized by the General Assembly.” *Id.* at Ex. B. Another copy of our Rule 28(j) letter, together with exhibits, is attached to this Supplemental Brief.

Public Act 95-0534, creating the “Support Our Troops” specialty plate, has already taken effect. But Public Act 95-0539, modifying section 5/3-600, *has not yet taken effect* – and will take effect *only on January 1, 2008*, five weeks after the scheduled oral argument in this case.

Because we have requested only injunctive relief – that is, issuance of a “Choose Life” specialty plate or, in the alternative, an injunction barring the operation of Illinois’s standardless specialty plate scheme – this Court ordinarily would apply the law as it exists at the time it issues its judgment. But in *Landgraf v. USI Film Products*, 511 U.S. 244 (1994), the Supreme Court made clear that “[w]hen a case implicates a federal statute enacted after the events in suit, the court’s first task is to determine whether Congress has expressly prescribed the statute’s proper reach. If Congress has done so, \* \* \* there is no need to resort to judicial default rules” with respect to its retroactive application. *Id.* at 280. In other words, legislative intent is paramount when it comes to determining the retroactive effect of legislation.

In *Commonwealth Edison v. Will County Collector*, 196 Ill. 2d 27, 39, 749 N.E.2d 964 (2001), the Supreme Court of Illinois explicitly adopted the *Landgraf* analysis when considering the retroactivity of new state laws. And in *Caveney v. Bower*, 207 Ill.2d 82, 797 N.E.2d 596 (2003),

that court further explained that “application of the *Landgraf* approach in Illinois should prove uneventful” because “the legislature has clearly indicated the ‘temporal reach’ of *every* amended statute.” *Id.* at 91-92, 797 N.E.2d at 601 (emphasis in original). The *Caveney* court pointed to “section 4 of the Statute on Statutes (5 ILCS 70/4 (West 2000)),” which provides that “[n]o new law shall be construed to repeal a former law, whether such former law is expressly repealed or not, as to \* \* \* any right accrued, or claim arising under the former law, or in any way whatever to affect \* \* \* any right accrued, or claim arising before the new law takes effect, save only that proceedings thereafter shall conform, so far as practicable, to the laws in force at the time of such proceeding.” 207 Ill. 2d at 92, 797 N.E.2d at 601-02. This provision, the court explained, “represents a clear legislative indication that retroactive application of substantive statutory changes is forbidden.” *Id.* at 95, 797 N.E.2d at 603.

Under this line of authority, it would appear that Public Act 95-0539 – requiring prior authorization of new specialty plates by the General Assembly – cannot be applied retroactively to Plaintiffs-Appellees’ as-applied challenge seeking the issuance of a new plate if to do so would “in any way whatever \* \* \* affect” Plaintiffs-Appellees’ “claim[s] arising before the new law takes effect” or their “claim[s] arising under the former law.” Plaintiffs-Appellees’ as-applied First Amendment claim, of course, clearly arose from the Secretary’s refusal to issue the specialty plate prior to entry of the district court’s judgment. In any event, since Public Act 95-0539 does not take effect until January 1, 2008, this Court could avoid dealing with the issue of the amendment’s applicability by issuing its judgment (perhaps with an opinion to follow) before that date. If the Court were to do so, and were at the same time to vacate the stay of the district court’s injunction and direct the Secretary to issue the “Choose Life” plate forthwith, there would be no need to

address the applicability of Public Act 95-0539.

Finally, we note that the effects of these new laws were fully anticipated in Plaintiffs-Appellees' Brief – and, in our view, there is no difference in result on the First Amendment issues raised in this appeal whether or not the new laws are applied here. The “Support Our Troops” plate is but another example of a controversial, or potentially controversial, specialty plate authorized by the Illinois General Assembly. It therefore further undermines the State’s claim to have applied a consistent policy of excluding controversial speech – a type of limitation that would be suspect in any event. See Plaintiffs-Appellees’ Br. 1. And, as we explained at length (*id.* at 12-45), the State unconstitutionally infringed Plaintiffs-Appellees’ First Amendment rights whether or not the Secretary has authority to issue plates without express legislative approval. To be sure, our brief argued that, under the expiring version of 5/3-600, the Secretary *did* have such independent authority (*id.* at 27-32), but we also made clear that the absence of that power should not affect the outcome of the case (*id.* at 32-33). That is equally true for our facial and as-applied challenges. Nor did the “Analysis” section of the District Court’s opinion rely on the Secretary’s independent authority under the expiring version of section 5/3-600. See Doc. 50 at 6-16. Because the decision below should be affirmed whether or not the new law is applied, there ultimately is no need for this Court to resolve the question of Public Act 95-0539’s applicability.

Respectfully submitted,

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November 21, 2007

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**CERTIFICATE OF COMPLIANCE**

I certify that this brief complies with the page limitation set forth in this Court's November 14, 2007 Order.

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An Attorney for Plaintiffs-Appellees

**CERTIFICATE OF SERVICE**

I hereby certify that, on this 21st day of November, 2007, I sent copies of Plaintiffs-Appellees' Supplemental Brief by Overnight Mail to:

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Dated: November 21, 2007

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