No. 08-1283

In the
Supreme Court of the United States

CHOOSE LIFE ILLINOIS, INC., *et al.*,
PETITIONERS,

v.

JESSE WHITE, ILLINOIS SECRETARY OF STATE,
RESPONDENT.

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

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Through the passage of successive laws, the Illinois legislature has created various specialty license plates for motor vehicles (*e.g.*, plates honoring members of the military and elected officials, and plates supporting environmental protection), but has not enacted any law creating a specialty plate expressing a view—pro-life, pro-choice, or otherwise—on the subject of abortion.

The question presented is:

Where the Illinois legislature creates every new specialty plate by passing a separate law specifically authorizing that plate, did the court of appeals correctly hold that the absence of any law creating a plate on the subject of abortion is not discrimination against a particular viewpoint, and that there is no merit to petitioners' facial challenge to Illinois's method of creating specialty plates, where that challenge was inadequately developed below, petitioners lack standing to advance it, and no Supreme Court or appellate court authority supports it?

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BRIEF IN OPPOSITION

The petition for certiorari should be denied. A change in the Illinois statute governing speciality license plates, enacted while this case was on appeal, has forced petitioners to concede that this was not the case they thought it was when they filed suit. Petitioners now admit, contrary to their legal position before the district court and the Seventh Circuit, that respondent does not decide what new specialty plates are created in Illinois. Only the General Assembly may authorize new plates, which it does by enacting a new law for every plate. Accordingly, this is not the case of an administrative body refusing to issue a plate satisfying a State's preset, statutory criteria. Rather, it is the case of a legislature declining to pass a new law authorizing a plate on a controversial topic never before made the subject of Illinois plates.

This distinction was not only dispositive of the analysis and ultimate judgment below, but it means that this case implicates none of the claimed "splits" in authority that petitioners allege. They contend that the decision below is in conflict with the Ninth Circuit's recent decision in *Arizona Life Coalition, Inc. v. Stanton*, 515 F.3d 956 (9th Cir.), cert. denied, 129 S. Ct. 56 (2008). But in sharp contrast to Illinois's reliance on case-by-case, legislative lawmaking to authorize new plates, *Stanton* involved an administrative body's content-based refusal to issue a plate that it was

statutorily obligated to provide because the sponsor met all applicable eligibility criteria. Of course the court found viewpoint discrimination under such circumstances, just as this Court did on analogous facts in *Rosenberger v. Rector & Visitors of the University of Virginia*, 515 U.S. 819 (1995). But nothing in the decision below is to the contrary.

The alleged split between that decision and a single other circuit court opinion purportedly implicated by petitioners' facial challenge is just as illusory. The Eighth Circuit decision on which petitioners rely, *Roach v. Stouffer*, 560 F.3d 860 (8th Cir. 2009), says nothing about the situation here, where again it is dispositive that the General Assembly authorizes each new plate without delegating any of that authority. And there are numerous obstacles to further review of petitioners' facial challenge, including the inapplicability of overbreadth analysis, petitioners' lack of standing to press a facial claim, and their failure to brief this issue adequately below.

Finally, petitioners seek to bolster their petition by anticipating that respondent will advance, as an independent ground to sustain the judgment below, that specialty plates are government speech to which First Amendment protections do not apply. But that argument would implicate no meaningful split in authority. And in any event this Court clarified the government-speech doctrine last Term in *Pleasant Grove City v. Summum*, 129 S. Ct. 1125 (2009)

("*Summum*"), and it is far too early to claim irreconcilable confusion in the lower courts over the impact of that decision on the States' varied specialty-plate programs.

Ultimately, petitioners do not (and cannot) produce a single circuit court decision sustaining a First Amendment challenge to a specialty-plate process, like Illinois's, that requires the state legislature to enact a law authorizing each new plate, without a clear departure from past practices or other competent evidence of viewpoint discrimination. The Illinois legislature has not created any plate with an abortion-related message, and petitioners' proposed law is just one among dozens the General Assembly has declined to enact. The Seventh Circuit therefore rightly found nothing in the record to suggest viewpoint discrimination in the legislature's non-action here. In the end, when the dust settles on petitioners' several alleged conflicts and splits, they are asking this Court merely to review that factual record and rectify what they see (wrongly) as the appellate court's failure to consider evidence allegedly suggestive of the legislators' true motives in declining to pass a Choose Life plate bill. But even if well-founded (and it is not), such a request for error correction is not grounds for certiorari review.

STATEMENT

1. In Illinois, unlike most States, the legislature must pass a statute to authorize any new specialty license plate. Pet. App. 10a. By contrast, the majority of States delegate some or all of this authority to an official or other administrative entity.[1]

Illinois statutes authorizing new speciality plates are collected in Chapter 3, Article VI of the Illinois Motor Vehicle Code, 625 Ill. Comp. Stat. 5/3–600 *et seq.* (2008) ("Code"), including laws creating plates for war veterans and public officials, and others endorsing environmental protection, organ donation, and the prevention of violence and drug abuse. None of the specialty plates created by the Illinois legislature contains any message on the subject of abortion—pro-life, pro-choice, or otherwise. Pet. App. 3a, 25a.

2. Petitioners tried to garner legislative support for a Choose Life plate, but that plate, like dozens of others (including plates recognizing the Cancer Society, Community Colleges, Correctional Employee Memorial, Corvettes, Diabetes, Fallen Veterans, Illinois Coal Mining, Iraqi Freedom, K-12 Education, Lions Club,

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[1] Besides Illinois, the following States presently create specialty plates exclusively by specific legislative enactment: Alaska, Colorado, Florida, Kansas, Louisiana, Maine, Minnesota, Mississippi, Nebraska, New Hampshire, New Mexico, Ohio, Rhode Island, South Dakota, Tennessee, Virginia, West Virginia, and Wyoming.

NASCAR, Relay for Life, Road Worker Safety, Submarine Veterans, and Sudden Infant Death Syndrome) never inspired a new law authorizing its production. Pet. App. 1a-2a; see also Feb. 5, 2007 Motion, Ex. A; Nov. 30, 2007 Fed. R. App. P. 28(j) Letter 1-4.[2]

Petitioners then brought suit against respondent, Illinois Secretary of State Jesse White, who is responsible for administering the Code. Petitioners framed their case as one involving the unlawful delegation and exercise of power by respondent. The complaint thus began with the premise that the Code authorized him—not the General Assembly—to create new specialty plates, and that he had arbitrarily delegated this authority back to the General Assembly. Am. Comp. ¶¶ 3-4, 20-21, 23, 35, 43. Petitioners alleged that the failure to issue the Choose Life plate was the product of unlawful viewpoint discrimination, and they sought an injunction requiring respondent to issue their plate. Pet. App. 6a-7a. Their theory that Illinois law authorized respondent to issue speciality plates also took the form of a facial challenge, in which they claimed that the Code lacked sufficient standards cabining respondent's exercise of that authority. *Id.* at 7a; see also Oct. 4, 2005 Pet. Mem. 14-15. As relief on that claim, petitioners sought to enjoin Illinois's specialty-plate program in its entirety unless the State

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[2] Record materials outside the Petitioners' Appendix are identified by the filing date in the court's docket.

adopted viewpoint- and content-neutral criteria to govern respondent's actions. Pet. App. 7a.

The parties filed cross-motions for summary judgment. Respondent argued that if petitioners' claims did not fail at the threshold because specialty plates represent government speech rather than private expression, then they failed on the alternative ground that "the State does not engage in viewpoint discrimination by not approving the 'Choose Life' plate" but instead "simply remains neutral, taking no position on a politically-charged topic." Dec. 7, 2005 Resp. Mem. 2. Elaborating on the latter point, and contrary to misstatements in the petition (at pp. 7, 17-18 & n.11), respondent argued specifically that it is "legitimate" for the State "to avoid having its license plates be the place for the controversial competition of 'pro-life' and 'pro-choice' messages." Oct. 4, 2005 Resp. Mem. 10. Critically, respondent also made clear that he had no independent authority to permit new speciality plates—that he performed certain ministerial tasks, but only the General Assembly could authorize a new plate by statute. Dec. 7, 2005 Resp. Mem. 3-4.

The district court denied respondent's motion, granted petitioners', and ordered respondent to issue a Choose Life plate if petitioners met the Code's "numerical and design requirements for issuance of a specialty plate." Pet. App. 51a. The court adopted petitioners' view that the Code authorized respondent to issue a new specialty plate without a statute

specifically creating that plate, and concluded that the State had rejected the Choose Life plate proposal based on a desire to "suppress" petitioners' pro-life viewpoint. *Id.* at 36a, 50a.

3. Respondent appealed, and while the case was pending before the Seventh Circuit, the General Assembly amended the Code to clarify that—contrary to the district court's interpretation of Illinois law—new speciality plates are available *only* by specific legislative act. Pet. App. 10a-11a (citing Ill. Public Act 95-0359). In supplemental briefing, petitioners urged the Seventh Circuit to decide the appeal under pre-amendment Illinois law, Supp. Br. of Appellees 1-3, consistent with the manner in which they framed the case in their complaint.

4. The Seventh Circuit reversed. Without the benefit of this Court's later decision in *Summum*, the court applied the four-factor test for distinguishing between government and private speech used by the Fourth Circuit in *Sons of Confederate Veterans, Inc. v. Commissioner of the Virginia Department of Motor Vehicles*, 288 F.3d 610 (4th Cir. 2002) ("*SCV*"), and concluded that there were "enough elements of private speech" in Illinois's specialty-plate program to trigger First Amendment protections. Pet. App. 21a-22a. The nature of those protections turns on the type of "forum" that speciality plates represent, however, and on this score the court determined (in line with other courts of appeals) that the plates are a nonpublic forum, meaning

they are reviewed "for viewpoint neutrality and reasonableness." Pet. App. 24a. As the court explained, the "primary purpose" of license plates is "to identify the vehicle, not to facilitate the free exchange of ideas," and "Illinois hasn't opened this particular property for general public discourse and debate." *Id.* at 23a.

The court upheld the legislative decision not to pass a law authorizing the Choose Life plate as viewpoint-neutral and reasonable. It was viewpoint-neutral because it was "undisputed" that Illinois "has authorized neither a pro-life plate nor a pro-choice plate" and thus "has excluded the *entire subject* of abortion from its specialty-plate program." *Id.* at 3a (emphasis in original). The court contrasted this case with *SCV* and *Planned Parenthood of South Carolina, Inc. v. Rose,* 361 F.3d 786 (4th Cir. 2004) ("*Rose*"), where States manifested viewpoint discrimination by singling out the Confederate Flag alone for exclusion from speciality plates, and by authorizing a Choose Life specialty plate while simultaneously rejecting a "pro-choice" plate, Pet. App. 25a.

Moreover, the court had "no trouble" concluding that the General Assembly's exclusion of all speech on the subject of abortion was reasonable. *Id.* at 27a. "License plates are * * * owned and issued by the State, and, as respondent had argued consistently, "specialty license plates in particular cannot come into being without legislative and gubernatorial authorization." *Id.* at 27a-28a. Thus, "[a]lthough the messages on

specialty license plates are not government speech, they *are* reasonably viewed as having the State's stamp of approval," and therefore "it is reasonable for the State to maintain a position of neutrality on the subject of abortion." *Id.* at 27a, 28a (emphasis in original).

Also, in a footnote, the Seventh Circuit rejected petitioners' facial challenge. The court held that the amendment clarifying that express legislative authorization is required for issuance of any specialty plate is controlling, and it rejected petitioners' fallback argument that their facial challenge was sound even if the General Assembly, not respondent, has exclusive responsibility for creating new specialty plates. *Id.* at 10a-11a n.4. As the court explained, "[i]t is axiomatic that one legislature cannot bind a future legislature," and, accordingly, petitioners' view that "the Illinois specialty-plate program is facially unconstitutional because it lacks any articulated standards governing * * * the state legislature's discretion to authorize new plates" has "no merit." *Ibid.* Thus, "[t]he General Assembly is entitled to authorize specialty plates one at a time," and "[i]t is not required to—and cannot—adopt 'standards' to control its legislative discretion." *Ibid.*

REASONS FOR DENYING THE PETITION

Petitioners' suggested reasons for granting the petition fail. First, petitioners rely chiefly on an alleged 1:1 split between the decision below and *Stanton*, but this shallow split is manufactured, for *Stanton* is perfectly compatible with the Seventh Circuit's holding that there was no viewpoint discrimination on these facts. Second, petitioners advance a claim—belatedly raised and summarily rejected in a footnote below—that Illinois's practice of creating specialty plates via individual statutes is facially invalid, and petitioners again allege a 1:1 split, this time with the Eighth Circuit's decision in *Roach*. But once again, petitioner's purported split is wholly illusory, as *Roach* does not even address, much less reject, the settled constitutional rule on which the Seventh Circuit relied. Finally, petitioners must establish that the messages on Illinois specialty plates are private rather than government speech, and this threshold requirement does not present an issue worthy of certiorari review. Accordingly, the petition should be denied.

I. There Is No Circuit Split Over What It Means For A Law To Be "Viewpoint Neutral."

The Seventh Circuit properly rejected petitioners' as-applied challenge, and that decision implicates no split in appellate authority. Petitioners repeatedly characterize their failure to obtain a law authorizing a Choose Life plate as a "selective" denial, Pet. i, 1, 11, 12, 13, 15, but what they call "selective" in this case has no

analogue in any of the purportedly conflicting authority on which they rely. The Seventh Circuit readily distinguished these cases of patent viewpoint discrimination on their facts, the only exception being an alternative holding in a single Ninth Circuit decision, and even that is easily reconciled with the opinion below. Far from evidencing a split over legal doctrine, courts merely are applying the same principles to very different facts. In each of petitioners' cases, courts inferred viewpoint discrimination from obvious differences in treatment or from the fact that a requested plate was denied after satisfying preset criteria for its issuance. Neither basis for finding viewpoint discrimination exists here.

1. Petitioners rest their petition largely on a manufactured split between the decision below and the Ninth Circuit's decision in *Stanton* over whether not issuing a Choose Life plate betrays viewpoint discrimination. Pet. 12-18, 20. To be sure, the opinion below suggests some "disagreement" between it and *Stanton*, Pet. App. 25a, a reference on which the petition relies heavily, Pet. 12-14. But petitioners overstate this alleged "conflict" dramatically.

First, the passage from *Stanton* with which the Seventh Circuit purported to "disagree[]" was unnecessary to the Ninth Circuit's decision. To survive a First Amendment challenge, the decision denying the plate in *Stanton* had to be both viewpoint-neutral and reasonable, and the court separately held that

defendants "acted unreasonably" in denying the plate where plaintiffs admittedly met Arizona's preset, substantive requirements for speciality plates. 515 F.3d at 972-973.

Second, and more critically, the instant case and *Stanton* are worlds apart factually, in a manner that bears directly on the presence vel non of viewpoint discrimination. The key difference between these two cases is the distinction between declining to open a forum to certain subjects and failing to respect the forum's boundaries after they are established. Thus, the decision below and *Stanton* are both faithful to the Court's teaching that "[o]nce it has opened a limited forum, * * * the State must respect the lawful boundaries it has itself set." *Rosenberger*, 515 U.S. at 829; see also *Davenport v. Wash. Educ. Ass'n*, 551 U.S. 177, 189 (2007); *Good News Club v. Milford Cent. Sch.*, 533 U.S. 98, 107-112 (2001).[3] Both recognize that if the speech of a party seeking access to a nonpublic forum is on a topic the government has included in the forum, denying access to that speech based on its message necessarily constitutes viewpoint discrimination.

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[3] Courts have sometimes used the term "limited public forum" to describe what *Davenport*, 551 U.S. at 189, *Arkansas Educational Television Commission v. Forbes*, 523 U.S. 666, 677 (1998), and *Cornelius v. NAACP Legal Defense & Educational Fund, Inc.*, 473 U.S. 788, 802 (1985), referred to as a "nonpublic forum." See *Rosenberger*, 515 U.S. at 829. Respondent adopts the latter expression.

This principle compelled a finding of viewpoint discrimination in *Rosenberger*. After offering funding to various student groups for education-related speech, and thereby opening a nonpublic forum for student journalistic endeavors, the University of Virginia could not lawfully exclude a student magazine addressing topics included in that forum from a religious viewpoint. See 515 U.S. at 824, 828-837. Because "the subjects discussed were otherwise within the approved category of publications," it was clear that "[t]he prohibited perspective, not the general subject matter, resulted in the refusal to [provide funding]" and established unlawful viewpoint discrimination. *Id.* at 831. That is exactly what occurred in *Stanton*, and it bears no resemblance to the Illinois General Assembly's decision here not to enact a new law authorizing plates on a topic never before made the subject of an Illinois plate. That distinction, and not any conflict over applicable law, explains the different outcomes in the two cases.

Stanton addressed a challenge to the refusal by the Arizona License Plate Commission to issue a Choose Life specialty plate sought by Arizona Life Coalition. The governing Arizona statute required the Commission to issue such plates at the request of a not-for-profit organization if it satisfied three criteria, including that "'[t]he primary activity or interest of the organization serves the community [or] contributes to the welfare of others,'" and that "'[t]he purpose of the organization does not promote a specific religion, faith, or antireligious belief.'" 515 F.3d at 961 (quoting statute).

"The Commission [did] not dispute that Life Coalition * * * met each of the statutory requirements," *id.* at 973, but nonetheless it refused to issue the plate, *id.* at 962. Although the Commission gave no formal reason for its refusal, *ibid.*, during the application process members indicated that it was related to the message on Life Coalition's plate. Members "raised concerns over whether the general public would believe Arizona had endorsed the message of the 'Choose Life' license plate, [and] whether groups with differing viewpoints would file applications." *Id.* at 961.

The Ninth Circuit held that the Commission's refusal to issue the specialty plate not only "ignored its statutory mandate," but also constituted impermissible viewpoint discrimination because "Arizona has defined the outer limits of its speciality license plate program, and Life Coalition fits within those statutory boundaries." *Id.* at 973. Addressing the Commission's contention that it had not issued a specialty plate "to a group with a viewpoint in opposition to Life Coalition's and[,] therefore, neither side of the 'Choose Life' issue is represented by a special organization plate," *id.* at 971 (internal quotation marks and brackets omitted), the Ninth Circuit correctly determined that *Rosenberger* had "rejected a similar argument" when it held that denying access to "'an entire class of viewpoints'" that are within a forum's scope "'is just as offensive to the First Amendment as exclusion of only one,'" *ibid.* (quoting *Rosenberger*, 515 U.S. at 831).

But unlike in *Rosenberger* and *Stanton*, Illinois did not pass a statute making specialty plates available to a broadly defined category of speakers and messages, only to bar access to a speaker who indisputably fell within that category. This material distinction disposes of petitioners' alleged split. Unlike the Commission in *Stanton* or the university administrators in *Rosenberger*, who dispensed plates or funds according to preset substantive standards defining the respective speech forum, Illinois is creating its specialty-plate program through a series of individual statutes (to which no one is entitled, any more than parties are entitled to passage of any law), encompassing a limited number of subjects, not including the subject —abortion—on which petitioners wish to speak. The General Assembly's nonpassage of a bill authorizing a Choose Life specialty plate therefore cannot be equated with the Arizona Commission's refusal to issue a Choose Life plate under the Arizona program, or the university's refusal to fund plaintiffs' publication in *Rosenberger*.

As petitioners note, Pet. 12-14, the Seventh Circuit did reference the similarity between the Arizona Commission's belatedly expressed desire to avoid any speech on the subject of abortion, and respondent's argument that the General Assembly reasonably could have decided not to include any abortion-related messages in Illinois's specialty-plate program, Pet. App. 25a-27a. But given the two States' fundamentally different mechanisms for authorizing specialty plates,

that similarity is at best skin deep. It does not, as the Seventh Circuit mistakenly suggested, reflect a true disagreement over the meaning of *Rosenberger*. Having affirmatively opened its specialty-plate program by statute to speech on the topic of abortion, Arizona could not, consistent with *Rosenberger*, exclude one (or several) viewpoints on that topic. In short, both *Stanton* and the decision below are entirely consistent with one another and with *Rosenberger*.

2. Nor is there any conflict between the Seventh Circuit's finding of no viewpoint discrimination and two decisions of the Fourth Circuit, both of which the opinion below readily distinguished. In *Rose*, the South Carolina legislature authorized a Choose Life plate, rejecting arguments that the law should also authorize a plate allowing vehicle owners "to express the pro-choice view." 361 F.3d at 788-789 (internal quotation marks and brackets omitted). The Fourth Circuit's determination that this was impermissible viewpoint discrimination, see *id.* at 799 ("South Carolina has engaged in viewpoint discrimination by allowing only the Choose Life plate"), fully accords with the Seventh Circuit's conclusion that Illinois did not favor one abortion-related viewpoint over another, but instead excluded "the entire subject of abortion" from Illinois specialty plates, Pet. App. 25a.

The Fourth Circuit's earlier decision in *SCV*, which the Seventh Circuit likewise distinguished, also is perfectly consistent with the decision below. In that

case, the Virginia legislature had passed bills authorizing more than 100 specialty plates. See 288 F.3d at 614. Pursuant to state-issued guidelines, successful plate applicants were informed they could "'use [their] organization's logo or create a logo to be placed on the plate,'" and a letter from the Department of Motor Vehicles therefore asked these applicants to submit "'electronic media art of the logo and legend for the plate.'" *Ibid.* (quoting State's guidelines and letter, respectively). The lone exception to this memorialized practice was the law challenged in *SCV*, which authorized a specialty plate for the Sons of Confederate Veterans but affirmatively prohibited their plate alone from bearing any "logo or emblem," and thereby prevented members from obtaining "special plates bearing the symbol of their organization, which includes the Confederate flag." *Id.* at 613.

Finding this unique, logo-prohibiting law to constitute viewpoint discrimination, the Fourth Circuit emphasized "[t]he nature of the restricted speech, the lack of a generally applicable content-based restriction, the breadth of the special plate program in Virginia, and the lack of any restrictions in statutes authorizing special plates other than the SCV's." *Id.* at 626 (footnote omitted). That holding is consistent with the Seventh Circuit's decision here. As the court below observed, "Virginia was not imposing a 'no flags' rule"; rather, it singled out "a specific symbol commonly understood to represent a particular viewpoint." Pet. App. 24a.

3. Without a circuit split, petitioners challenge the decision below for its treatment of the factual record, including, in particular, claimed "evidence" that the Seventh Circuit did not see fit to mention. Specifically, they claim that the Seventh Circuit overlooked respondent's supposedly inconsistent justifications for the absence of a Choose Life plate from Illinois's program, Pet. 5, 6 & nn.4-5, 7, 17, 18 & n.11, 23, and purported evidence of actual viewpoint discrimination by the Illinois General Assembly, including an affidavit submitted by petitioner Dan Proft, *id.* at 4. But even if accurate, this amounts to a request for mere error correction, and these contentions are unfounded in any event. Respondent consistently maintained that the General Assembly's desire to stay neutral by avoiding the controversial subject of abortion, not hostility to petitioners' specific viewpoint, was a legitimate reason not to authorize the Choose Life plates. See *supra* p. 6. And critically, petitioners are simply wrong to suggest that the Illinois legislature has passed every other bill proposing a new specialty plate. Pet. 6 n.4, 16-17; see *supra* pp. 4-5.[4] As for the Proft "opinion" about certain

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[4] Even though respondent bore no burden to disprove viewpoint discrimination, and thus to show that other specialty-plate bills also died in the legislature, the record before the district court disclosed a number of bills (including bills that would have created specialty plates for K-12 Education, Submarine Veterans, Road Worker Safety, Relay for Life, NASCAR, and the Cancer Society) that recently had met that fate. Feb. 5, 2007 Motion, Ex. A. Then, when petitioners' counsel represented at oral argument on appeal that the

legislators' subjective motives for not passing a Choose Life plate bill, for multiple reasons the Seventh Circuit and the district court were on solid ground in disregarding it.[5] At bottom, then, the alleged factual basis for petitioners' viewpoint discrimination claim rests on a false choice between official endorsement and suppression of private speech, with no room for neutrality that avoids all speech on a subject.

4. Petitioners suggest in passing that Illinois's specialty-plate program is properly characterized as a "designated public forum," subjecting even content-based regulation to strict scrutiny. Pet. 18, 19 & n.12, 20. But no circuit court has ever held that a specialty-plate program is a designated public forum—even when the program, unlike Illinois's, is expressly open by

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General Assembly "approved all of th[e] specialty plates" requested except Choose Life, respondent clarified, based on judicially noticeable facts, that the General Assembly also failed to pass many other specialty-plate bills introduced (including ones pertaining to Iraqi Freedom, Community Colleges, Fallen Veterans, Corvettes, Sudden Infant Death Syndrome, and Diabetes). Nov. 30, 2007 Fed. R. App. P. 28(j) Letter 1-4.

[5] Among other things, Proft's "opinion" purporting to reveal the subjective, internal motivations of a few individual legislators and extrapolating that to the entire General Assembly was inadmissible under F.R.E. 702. And petitioners were further foreclosed from relying on it due to their failure to disclose it in accordance with Fed. R. Civ. P. 26(a)(2) and to identify it in their local Rule 56.1(a) Statement, see *Bordelon v. Chicago Sch. Reform Bd. of Trs.*, 233 F.3d 524, 529 (7th Cir. 2000).

statute to a broad category of defined subjects. See *Roach*, 560 F.3d at 868 n.4; *Stanton*, 515 F.3d at 968-971; *Rose*, 361 F.3d at 796-798; *SCV*, 288 F.3d at 623. And petitioners' speculation about how the Ninth Circuit "likely would" characterize Illinois's specialty-plate program, which they rightly concede is different from the Arizona scheme in *Stanton*, Pet. 20, is no basis for this Court's review.

5. Finally, petitioners claim that even if Illinois's specialty-plate program were a nonpublic forum, it is unreasonable, as a matter of law, for Illinois to exclude "controversial" or politically sensitive topics from the forum. Pet. 24-25. Again, no circuit court has adopted petitioners' view, and the Seventh Circuit's ruling is consistent with numerous holdings by this and other courts. See *Cornelius v. NAACP Legal Defense & Educ. Fund*, 473 U.S. 788, 809 (1985); see also *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 272 (1988); *Children of the Rosary v. City of Phoenix*, 154 F.3d 972, 979 (9th Cir. 1998) (White, *J.*).[6] If, as *Cornelius* holds, see 473

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[6] In the same vein, petitioners invoke the issuance of a "special event" plate to commemorate the inauguration of President Obama as a "reason to be skeptical" of the position that Illinois wishes to avoid abortion-related specialty plates because they are "too politically divisive or controversial." Pet. 25 n.14. But under Illinois law *special event* plates—which respondent has discretion to issue for qualifying occasions and may be displayed for 60 days, with the owner's regular license plates also on the vehicle, see Dec. 7, 2005 Resp. Mem. 5-6; 625 Ill. Comp. Stat. 5/3-808(f) (2008)—are very different from *specialty plates*, which are the exclusive focus of the claims here.

U.S. at 809, the controversial nature of a subject makes it reasonable to exclude that subject entirely from a nonpublic forum, then that same controversial nature cannot also make it *un*reasonable to exclude from that forum all viewpoints on that subject.

Petitioners base their argument chiefly on the false premise that Illinois specialty plates convey no state approval or endorsement of the messages on them and, therefore, that "[b]ecause the purposes of specialty plates are to raise revenue for the state and sponsoring organizations and * * * permit private expression," Illinois's decision to exclude the subject of abortion from its specialty plates cannot serve the forum's purposes. Pet. 24-25. Thus, in petitioners' view, once a State establishes a specialty-plate program, it may not decline to issue a requested plate, no matter the message, so long as it will produce revenue. This approach is nonsensical and, if adopted, would encourage States to do away with specialty plates entirely.

Moreover, contrary to petitioners' suggestion, Pet. 25 & n.15, the Eighth Circuit has not decided otherwise. *Roach* held merely that the messages communicated on Missouri specialty plates are sufficiently private to preclude their characterization as government speech. See 560 F.3d at 867-868. And to the extent that *Roach* held that Missouri's process for creating new plates did not establish official state approval for every plate's message, that conclusion is inapplicable to Illinois's fundamentally different mechanism of approving each

plate through individual legislative enactment. As for *Lewis v. Wilson*, 253 F.3d 1077 (8th Cir. 2001), the court there merely concluded that Missouri's program for vanity plates, whose individualized messages are crafted entirely by vehicle owners, did not provide its government administrators with sufficiently precise standards to refuse messages that are "obscene or profane." *Id.* at 1078-1081. Thus, neither decision conflicts with the Seventh Circuit's uncontroversial conclusion that, even if the messages on specialty plates include at least some elements of private speech, such messages may be "viewed as having the State's stamp of approval," making it reasonable for Illinois to exclude politically-charged subjects from these plates. Pet. App. 27a.

II. Petitioners' Facial Challenge Implicates No Circuit Split And Is Not A Ground For Further Review.

The Seventh Circuit's passing rejection of petitioners' facial challenge provides no basis for further review. Below, petitioners insisted that it was respondent, and not the General Assembly, who authorized specialty plates. Br. of Appellees 2-4, 13, 27-32, 34, 42-43. On appeal, petitioners argued for the first time, and then only briefly, that the Illinois system was facially invalid even if (as respondent correctly maintained) speciality plates require individual authorization from the legislature. *Id.* at 42-44. Indeed, even in their supplemental brief, filed with the Seventh Circuit after the General Assembly amended Illinois law

to make clear that only it can authorize new plates, petitioners devoted the bulk of their argument to the position they now abandon—that the court should decide this case under Illinois law as it stood before the amendment, which in their view empowered respondent to issue speciality plates. Supp. Br. of Appellees 1-2. They devoted only a paragraph to the claim that Illinois's process was invalid after the amendment. *Id.* at 3. And neither of petitioners' briefs below even cited *Shuttlesworth v. City of Birmingham*, 394 U.S. 147 (1969), the decision they now claim is dispositive. Nor did petitioners contest the principle that, in this context, the Illinois General Assembly cannot bind itself to standards controlling its future decisions on creating specialty plates. Br. of Appellees 44.[7] Without sufficient development below, including the failure even to cite the case petitioners now criticize the Seventh Circuit for ignoring, petitioners' facial challenge to current Illinois law is not properly before this Court. See *Roberts v. Galen of Va., Inc.*, 525 U.S. 249, 253-254 (1999) (*per curiam*) (declining to consider claims not "sufficiently developed below"); *Wisconsin v. Mitchell*, 508 U.S. 476, 481 n.2 (1993) (same).

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[7] The petition also advances two other arguments that petitioners never made below and thus forfeited: a claim that the General Assembly's decisions to create new specialty plates are not an exercise in "legislative authority," Pet. 32, and the contention that even if federal law recognizes a state legislature's inability to limit its own power, that could not "trump the First Amendment (or the power of the federal courts to remedy a constitutional violation)," *id.* at 32-33.

Even if it were, it is not an issue worthy of further review. Contrary to petitioners' claim, Pet. 27-30, the basis for the Seventh Circuit's ruling—that "one legislature cannot bind a future legislature," Pet. App. 10a n.4—is perfectly consistent with both *Roach* and *Shuttlesworth*. And petitioners gloss over threshold issues that are independently fatal to their facial challenge and therefore preclude review of the *Roach/Shuttlesworth* issue they now raise—namely whether First Amendment overbreadth analysis even applies in these circumstances and, if so, whether petitioners have standing to raise it.

1. As the Seventh Circuit recognized, the Constitution prohibits one legislature from limiting a future legislature's power. See, *e.g.*, *Reichelderfer v. Quinn*, 287 U.S. 315, 318 (1932) (federal law); *Fletcher v. Peck*, 6 Cranch 87, 135 (1810) (Marshall, *C.J.*) (same); see also *Mix v. Ill. Cent. R.R. Co.*, 6 N.E. 42, 44 (Ill. 1886) (Illinois law). That reality is alone fatal to petitioners' facial challenge, for the First Amendment does not authorize enjoining Illinois's specialty-plate program on the ground that the legislature has not enacted a law it has no power to enact—here, a law that would place substantive limits on future specialty-plate approvals.[8]

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[8] Petitioners deny that their theory requires the General Assembly to pass a law that is "binding" on itself. Pet. 32. But if that were correct, it would negate the key premise of their facial claim, which depends on the availability and necessity of standards controlling future speech-regulating decisions.

Petitioners seek to depict this as the subject of another circuit spit, but no such conflict exists. Their quarrel with the footnote in the decision below—which they characterize as embracing a "'legislative body'" exception to First Amendment overbreadth analysis, Pet. 28, but is more properly viewed as rejecting a First Amendment overbreadth exception to the constitutional principle that a legislature cannot limit its future lawmaking authority—is not supported by any decision of this Court or any federal court of appeals. The two cases on which petitioners rely, *Shuttlesworth* and *Roach*, are in no way inconsistent with the opinion below.

a. *Shuttlesworth* voided convictions under an ordinance imposing a prior restraint on expression in a traditional public forum without "narrow, objective, and definite standards" to govern licensing decisions. 394 U.S. at 150-153. The ordinance granted authority to issue parade licenses to the Birmingham City Commission, and petitioners cite a phrase in the Alabama Appellate Court's decision (not the decision reviewed by this Court) referring to that Commission as "'the City's legislative body.'" Pet. 28-29. But it is well settled that this Court's precedent resides in the questions it actually decides, not in "inferences from

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Indeed, petitioners' facial claim, if accepted, would turn the nondelegation doctrine on its head by requiring a legislature always to delegate its authority to decide what speech will be allowed in a nonpublic forum.

opinions which did not address the question." *Texas v. Cobb*, 532 U.S. 162, 169 (2001). And in any event this Court did not characterize the Commission as petitioners suggest; instead, it framed the question before it as one involving "discretion" in the hands of "administrative" or "licensing officials." 394 U.S. at 153 (internal quotation marks omitted).[9] It comes as no surprise, therefore, that this Court has described *Shuttlesworth* as applying where expressive conduct "has required official approval under laws that delegated standardless discretionary power to local functionaries, resulting in virtually unreviewable prior restraints on First Amendment rights." *Young v. Am. Mini Theatres, Inc.*, 427 U.S. 50, 59 n.17 (1976) (citing *Shuttlesworth*, 395 U.S. 147). That rule does not conflict with the Seventh Circuit's decision here, where the recent amendment makes clear that the General

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[9] The Court was correct to depict the Commission as acting in a non-legislative capacity in this context. The Commission likely undertook both legislative and administrative duties, and issuing licenses (without any suggestion that such issuance required new legislation, as it does in Illinois) would be an administrative function. See *City of Mobile v. Bolden*, 446 U.S. 55, 59 (1980) ("City Commission" of Mobile, Alabama, "exercise[s] all legislative, executive and administrative power in the municipality"). Consistent with that understanding, an offer of proof in a case arising out of the same events showed "that the [Birmingham] City Commission had never passed on permit applications in the past, but had delegated the task to inferior officials." *Shuttlesworth*, 394 U.S. at 163 n.5 (Harlan, *J.*, concurring).

Assembly has not delegated its authority to respondent or any other official.

b. For the same reason, there is no conflict between the decision below and *Roach*. The statute in that case required the Missouri Department of Revenue to grant all specialty-plate applications by private organizations meeting certain content-neutral criteria, provided that applications received "unanimous" approval from the Joint Committee on Transportation Oversight, whose voting members were state legislators. 560 F.3d at 862, 870. Two committee members, who described themselves as "pro-choice," opposed plaintiffs' application for a Choose Life plate; the Department of Revenue denied it; and plaintiffs challenged the denial, arguing that the "statutory scheme was unconstitutional because it gave Missouri officials unbridled discretion to restrict private speech." *Id.* at 863. Sustaining this claim, the Eighth Circuit held that the statute vesting the Committee with veto power over specialty-plate applications was facially unconstitutional because it contained no standards preventing the Committee from denying applications based on viewpoint. See *id.* at 869-870.

To manufacture a split between this case and *Roach*, petitioners mischaracterize the latter as a decision about standardless discretion in the hands of a "'legislative body.'" Pet. 28. *Roach* involved no such thing. The Committee whose discretion plaintiffs challenged in that case was not "legislative"; it was

administrative, notwithstanding that it was made up of legislators. Indeed, Missouri law is clear that the state legislature's role begins and ends with passing statutes, and that any entity with control over implementation of a statute—even one that happens to be composed of legislators—is an administrative agency that must be housed in the executive branch of government. See *Mo. Coal. for Env't v. Joint Comm. on Admin. Rules*, 948 S.W.2d 125, 133-134 (Mo. 1997); *State Auditor v. Joint Comm. on Legislative Research*, 956 S.W.2d 228, 231, 233 (Mo. Ct. App. 1997).

The Eighth Circuit recognized this distinction at the outset, when it differentiated between the two methods for seeking a specialty plate in Missouri: the legislative route, requiring the state legislature to "pass a bill that creates a specialty plate," and the administrative process that plaintiffs challenged. 560 F.3d at 862. Plaintiffs carefully observed this distinction as well. They acknowledged that the joint committee members, when exercising veto power over specialty plates meeting the statutory eligibility criteria, "were not acting in their legislative capacities" and that "[t]heir actions were only administrative." Pl. Mem. 9 n.9, *Choose Life v. Vincent*, No. 06-0443-CV-W-SOW (W.D. Mo. Nov. 5, 2007). And on appeal they repeatedly emphasized the constitutional significance of the fact that they were *not* challenging the legislature's own approval process. See Br. of Appellees, *Roach v. Davis*, No. 08-1429 (8th Cir. July 15, 2008), 2008 WL 2861766, at *12, 14 (noting that, under challenged provision,

"[t]he messages never go before the legislature for [a] vote," "[t]he Missouri legislature never votes to *approve* the message after a private organization submits its application," and "[t]he private message never goes before the Missouri governor for signature") (emphasis in original).

Petitioners' error is to mistake *Roach*'s rejection of defendants' legislative immunity defense for a conclusion that the committee was somehow "legislative" in character. Defendant committee members had claimed they were "immune from suit" because they were "legislators, not administrators or hired state employees." 560 F.3d at 870. The court rejected this theory on the ground that "immunity * * * is a *personal* defense that is available only when officials are sued in their individual capacities," and thus legislative immunity was unavailable because plaintiffs "filed suit against the members of the Joint Committee in their official capacities." *Ibid.* (citations and internal quotation marks omitted) (emphasis in original). Accordingly, the Eighth Circuit simply held that prospective equitable relief of the type permitted under *Ex parte Young*, 209 U.S. 123 (1908), is available to prevent an administrative body's exercise of veto authority over access to a nonpublic forum to which the governing statute otherwise grants a right of access.

2. In any event, petitioners' facial challenge fails on an alternative ground, making this case a singularly poor vehicle to address the issues raised in the petition,

even if they otherwise were grounds for this Court's review. Specifically, as respondent argued below, see Br. of Appellant 44-45, First Amendment overbreadth analysis does not automatically apply to every speech-regulating action affecting a nonpublic forum. Overbreadth is "strong medicine" that is used "sparingly," *Broadrick v. Oklahoma*, 413 U.S. 601, 613 (1973), and petitioners, who rely on this Court's precedents involving prior restraints on speech in traditional public fora, do not provide any appellate authority for their critical assumption that overbreadth principles necessarily apply to all restrictions in a nonpublic forum, much less to a specialty-plate program, like Illinois's, where the legislature has not delegated any authority over the creation of new plates, but instead exercises that authority on its own by passing an individual law for every plate.[10]

Petitioners cannot prevail without overcoming this obstacle, yet there is no circuit split or other basis for addressing it on certiorari review. Indeed, respondent knows of only one instance in which this Court transplanted the First Amendment overbreadth doctrine to a challenge involving a nonpublic forum, but that decision is readily distinguished. *Board of Airport Commissioners of City of Los Angeles v. Jews for Jesus,*

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[10] *Roach* did not present that issue because, as explained above (at pp. 27-28), Missouri's specialty-plate program delegated to an administrative body unlimited discretion to veto any specialty-plate application meeting all of the enabling statute's eligibility criteria.

Inc., 482 U.S. 569 (1987), held that an absolute ban on *all* "'First Amendment activities'" in the Los Angeles airport's central terminal area, including "even talking and reading, or the wearing of campaign buttons or symbolic clothing," was facially unconstitutional because "even if [the airport] were a nonpublic forum * * * no conceivable governmental interest would justify such an absolute prohibition of speech." *Id.* at 575. That limited holding by no means supports applying overbreadth analysis here.

3. Finally, petitioners lack standing to advance their facial challenge, a second insurmountable obstacle to review by this Court. Even if Illinois had standards to prevent discrimination against viewpoints on the topics encompassed by its specialty-plate program, those topics do not include abortion. The presence of such standards therefore could not benefit petitioners. Unlike parties who might want Illinois to create a specialty plate with a message on a subject that is included in the State's program, petitioners cannot satisfy the "redressability" component of standing for their claim that the General Assembly must adopt such standards. See *Advantage Media, LLC v. City of Eden Prairie*, 456 F.3d 793, 801 (8th Cir. 2006) (finding lack of standing to bring facial challenge to local sign code because "a favorable decision [still] would not allow [plaintiff] to build its proposed signs"); see also *Midwest Media Prop., LLC v. Symmes Twp., Ohio*, 503 F.3d 456, 461-464 (6th Cir. 2007); see generally *Davis v. Fed. Election Comm'n*, 128 S. Ct. 2759, 2768-2769 (2008)

(Article III's core standing requirements, including a concrete injury fairly traceable to defendant's challenged behavior that is likely to be redressed by a favorable ruling, must be demonstrated "for each form of relief that is sought") (citations and internal quotation marks omitted).

III. Respondent's Alternate Theory That Illinois Specialty Plates Are Government Speech Provides An Additional Reason To Deny The Petition.

Respondent has consistently maintained that the messages on specialty plates are government rather than private speech and thus are exempt from scrutiny under the Free Speech Clause. Pet. App. 7a. Even petitioners acknowledge that this argument provides an independent ground for affirming the judgment below. Pet. 20. Petitioners are wrong to suggest, however, that the government-speech issue somehow provides an additional reason for review. *Ibid.* The "conflict" petitioners describe is largely (if not entirely) the product of material factual differences in the procedures States use in authorizing new specialty plates. And this case is an especially poor vehicle for addressing the government-speech issue because Illinois is among the minority of States that approve plates exclusively by legislative act. Finally, this Court revisited the definition of government speech last Term in *Summum*, and more time is needed before proclaiming that lower courts are in hopeless disarray over its effect in this context.

1. Even without taking account of *Summum*'s impact, petitioners grossly exaggerate the extent of any pre-*Summum* disagreement over government-speech analysis in the context of specialty-plate programs, and thus any arguable justification for the Court to consider the government-speech issue in this case. Petitioners are wrong to say that the circuits are divided into two doctrinal camps, with the Fourth, Seventh, Eighth, and Ninth Circuits supposedly holding that specialty plates are never government speech, and the Sixth Circuit ruling that specialty plates are always government speech. Pet. 10-11, 20. This mischaracterization of the relevant decisions ignores the legal significance of different States' varied methods for creating specialty plates.

Central to petitioners' alleged split is the Sixth Circuit's decision in *ACLU of Tenn. v. Bredesen*, 548 U.S. 906 (2006) ("*Bredesen*"), the first specialty-plate decision after *Johanns v. Livestock Marketing Association*, 544 U.S. 550 (2005), which held that the Tennessee legislature's action creating a Choose Life specialty plate was government speech. See 441 F.3d at 380. Petitioners contrast *Bredesen* with the Ninth Circuit's decision in *Stanton* and the Eighth Circuit's in *Roach*, which held that Choose Life plates were private speech. But *Bredesen* involved a specialty-plate program that, like Illinois's, created new plates by the passage of individual laws, while *Roach* and *Stanton* addressed programs that were statutorily opened on an indiscriminate basis to broad categories of private

speech. The cases thus are materially distinguishable—the outcomes are different because the facts are different, not because the decisions announce different legal rules.

In *Bredesen*, the Choose Life message on specialty plates conveyed government speech because the legislature had created the plate through an individual law in which it "chose * * * and approved every word to be disseminated." 441 F.3d at 376. As the court explained, the plate's message was "government-crafted" by the Tennessee legislature itself, which had "spelled out in the statute that these plates would bear the words 'Choose Life.'" *Id.* at 375-376. Thus, as support for its conclusion that the speech was the State's own, the Sixth Circuit emphasized that the legislature was the source of the message.

The district court in *Roach* understood the important distinction between legislative and non-legislative approval schemes, distinguishing the administrative process challenged in that case from one in which "specific messages are created through legislative enactment." D. Ct. Order 11 n.9., *Choose Life v. Vincent*, No. 06-0443-CV-W-SOW (W.D. Mo. Jan. 23, 2008). Likewise, the *Roach* plaintiffs recognized this difference and emphasized throughout their appellate brief that they were challenging an administrative approval process in which plates lacked any legislative imprimatur. See Br. of Appellees, 2008 WL 2861766, at *12. The Eighth Circuit correspondingly recognized

that "the more control the government has over the content of the speech, the more likely it is to be government speech," *Roach*, 560 F.3d at 864, and it stressed facts specific to that case: that the Joint Committee's administrative authority to approve or deny a plate was "based solely on a general description of the plate provided by the sponsoring organization," and that, once approved, plates are "produce[d] * * * without further input from the Joint Committee or any other state actor," *id.* at 867. Under this approach, the sponsoring organization, and not the state legislature, "bear[s] the ultimate responsibility for the message." *Id.* at 868.

Similarly, *Stanton* emphasized that the administrative body exercised only "de minimis editorial control over the plate design and color," and that while it was charged with determining whether the sponsoring organization met the statutory requirements, those requirements "address[ed] who may speak, not what they may say." 515 F.3d at 966. Thus, again, the organization, not the legislature, "determined the substantive content of th[e] message." *Ibid.*

Nor does *Bredesen* present a current conflict with the Fourth Circuit's decisions in *SCV* and *Rose*. To be sure, those decisions involved challenges to legislatively created plates, but in holding that the plates were private speech the *SCV* court expressly found that the legislature did not "ordinarily assert 'editorial control'

over the content of the[ ] plates." 288 F.3d at 621; see also *Rose*, 361 F.3d at 793 (plate at issue in *SCV* "was sought and designed by the plate's private sponsor"). In addition, unlike *Bredesen*, both *SCV* and *Rose* were decided without the benefit of the Court's government-speech ruling in *Johanns*. Moreover, both relied on the four-factor test that neither *Johanns* nor *Summum* embraced, and that even *Rose* admitted produces an "indeterminate," 361 F.3d at 793—and therefore easily manipulable—result. Thus, they lack enduring vitality for purposes of ascertaining current doctrine, or contributing to a meaningful conflict, in this area.

2. The variety of ways in which different States create specialty plates also means that a decision on the government speech issue in this case would be relevant only in that minority of States where the legislature alone decides what specialty plates to create. See *supra* at 4 n.1. Thus, any decision by this Court on whether Illinois specialty plates are government speech would be of limited effect.

3. Finally, *Summum* dramatically affects the government-speech analysis for First Amendment claims involving a government-created forum. In holding that privately donated monuments in public parks were government speech, *Summum* made no mention of the four-factor test that petitioners vigorously advocated below, see Br. of Appellees 15, 18, 20, and that the Fourth, Seventh, Eighth, and Ninth Circuits approved, Pet. App. 14a-21a. Thus, until the

lower courts have had an opportunity to assess *Summum*'s effects on specialty-plate programs, it is premature for the Court to address any claim that depends, as petitioners' does, on a determination that the messages in a particular program are private rather than government speech.

Indeed, *Summum* likely will have a significant impact on the potentially dispositive government-speech question in many specialty-plate cases.[11] The Court held that monuments could convey government speech even if "donated in completed form by private entities," because the government had "exercis[ed] 'final approval authority'" over the monuments' selection and thereby "'effectively controlled' the messages" they sent. 129 S. Ct. at 1134 (quoting *Johanns*, 544 U.S. at 560-561). Moreover, because cities and other jurisdictions, in deciding whether to accept donated monuments, consider various "content-based factors," "[t]he

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[11] Petitioners inaccurately suggest that *Roach* negates this conclusion. Pet. 10. As noted above (at p. 27), however, the Missouri specialty-plate program in *Roach* was statutorily open to virtually all private organizations. That approach therefore embodied the polar opposite of the "selective receptivity" emphasized in *Summum*, 129 S. Ct. at 1133, and, likewise, of the method chosen by the General Assembly to authorize specialty plates in Illinois. Thus *Roach*—which was decided only a month after *Summum*, without supplemental briefing or argument, and, after a cursory discussion, simply concluded that *Summum* did not "require[] a different *outcome*" in that case, 560 F.3d at 868 n.3 (emphasis added)—does not minimize *Summum*'s impact on government-speech analysis in cases like this one.

monuments that are accepted * * * are meant to convey and have the effect of conveying a government message." *Ibid.* This analysis bears critically on the government-speech question in cases like this one, where the legislature not only retains "final approval authority" over specialty plates, but itself crafts, by individual legislation, the specific message on every state-issued plate.

This Court has long recognized the many advantages in permitting the lower courts to weigh in on new legal issues before addressing them (if necessary) on certiorari review. See, *e.g.*, *McCray v. New York*, 461 U.S. 961, 963 (1983) (Stevens, *J.*, respecting denial of petitions for writs of certiorari) ("[I]t is a sound exercise of discretion for the Court to allow the various States to serve as laboratories in which the issue receives further study before it is addressed by this Court."). Such an exercise of restraint is especially appropriate in the present circumstances. As several of the Court's members have noted, the "category of government speech" is "relatively new." *Summum*, 129 S. Ct. at 1142 (Souter, *J.*, concurring in the judgment); accord *id.* at 1139 (Stevens, *J.*, joined by Ginsburg, *J.*, concurring) (describing government speech doctrine as "recently minted"). As a result, "it would do well for [the Court] to go slow in setting its bounds, which will affect existing doctrine in ways not yet explored." *Id.* at 1141 (Souter, *J.*, concurring in the judgment). The latter observation is particularly apt here, for *Summum* will inevitably have significant

implications for challenges to government decisions regarding specialty plates, yet the lower courts have had almost no opportunity to consider them.

In short, even if this Court were inclined to review the questions petitioners present, this case is an unsuitable vehicle for doing so because lower courts have not yet had an adequate opportunity to address the effect of *Summum* on the government-speech issue in the context of specialty-plate programs, and petitioners would have to prevail on that issue before the Court could address the issues on which they do seek review.

CONCLUSION

For the foregoing reasons, the petition should be denied.

Respectfully submitted.

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