No. 08-1283

IN THE

Supreme Court of the United States

CHOOSE LIFE ILLINOIS, INC., ET AL.,

Petitioners,

v.

JESSE WHITE, ILLINOIS SEC'Y OF STATE,

Respondent.

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

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BRIEF OF *AMICI CURIAE* CHOOSE LIFE, INC.; THE CHILDREN FIRST FOUNDATION, INC.; ARIZONA LIFE COALITION, INC.; CHOOSE LIFE OF MISSOURI, INC.; AND MASSACHUSETTS CHOOSE LIFE IN SUPPORT OF PETITIONERS

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INTERESTS OF *AMICI*[1]

Choose Life, Inc. is a non-profit organization that coordinates state-by-state efforts to authorize the "Choose Life" license plate. Beginning with Florida in 2000, the "Choose Life" specialty plate is now on the road in Alabama, Arizona, Arkansas, Connecticut, Florida, Georgia, Hawaii, Indiana, Kentucky, Louisiana, Maryland, Mississippi, Montana, Ohio, Oklahoma, Pennsylvania, South Carolina, South Dakota and Tennessee. "Choose Life" plates are approved and pending issuance in Delaware, Missouri, New Mexico, North Dakota and Virginia. Efforts to authorize the "Choose Life" plate are underway in at least eighteen other states.

The "Choose Life" specialty plate has met with significant political resistance in many states. For example, in spite of the fact that for many years Florida made specialty license plates available in support of a variety of interest groups including universities, sports teams, and environmental and social causes, the bill to authorize the first "Choose Life" plate in that state was challenged every step of the way by those who opposed the message. The legislation failed to pass the Senate Transportation Committee the first year. The application was

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[1] Counsel for the parties received timely notice of the filing of this brief pursuant to Rule 37.2(a) of the Rules of the Supreme Court. All parties have consented to the submission of this brief through letters filed with the Clerk of the Court. *Amici* state that no portion of this brief was authored by counsel for a party and that no person or entity other than *Amici* or their counsel made a monetary contribution to the preparation or submission of this brief.

resubmitted in the 1998 Legislative Session and passed both the House and the Senate with overwhelming majorities, but then-Governor Lawton Chiles vetoed the bill. Resubmitted the following year, the "Choose Life" plate bill passed the House with a wide bi-partisan margin, but met considerable opposition in the Senate, where it was passed in the last 15 minutes of the legislative session by a single vote. On June 10, 1999, Governor Jeb Bush signed the bill into law.

Before the plate could go on sale, however, the National Organization for Women and other individuals opposed to the "Choose Life" message filed multiple lawsuits against the State of Florida to prevent the plate from being issued. Nonetheless, the plate was ultimately issued and the lawsuits were dismissed. *Hildreth v. Dickinson*, No. 99-583-CIV-J-21-A, 1999 WL 33603028, *7 (M.D. Fla. Dec. 22, 1999) (plaintiffs failed to seek authorization for their own "pro-choice" plate); *Women's Emergency Network v. Dickinson*, 214 F. Supp. 2d 1308 (S. D. Fla. 2002), *aff'd*, 323 F.3d 937 (11th Cir. 2003).

In 2007, the "Choose Life" license plate was the eighth best-selling specialty plate of 104 such plates released in Florida. As of April 30, 2008 it was displayed on approximately 40,000 vehicles, with over 324,386 sales or renewals of the plate raising in excess of $6.4 million for adoption efforts. Every "Choose Life" plate sold raises $20 to help pro-women organizations, such as maternity homes, non-profit adoption agencies and pregnancy care centers.

Choose Life, Inc.'s experience in Florida was a harbinger of things to come elsewhere, as the efforts of Choose Life state affiliates have frequently been thwarted by politically powerful groups who dislike its message. Efforts to have the "Choose Life" plate authorized have been stymied by political forces in many states besides Illinois, including California, Minnesota, North Carolina, Utah, Washington and West Virginia. Approved plates in other states have been met with litigation by activists opposed to the "Choose Life" message. *See, e.g., ACLU of Tenn. v. Bredesen*, 441 F.3d 370 (6th Cir. 2006) (litigation opposing Tennessee's "Choose Life" plate); *Planned Parenthood of South Carolina, Inc. v. Rose*, 361 F.3d 786 (4th Cir. 2004) (litigation opposing South Carolina's "Choose Life" plate); *Henderson v. Stalder*, 407 F.3d 351 (5th Cir. 2005), *reh'g and reh'g en banc denied*, 434 F.3d 352, *cert. denied*, 126 S.Ct. 2967 (2006) (litigation by Planned Parenthood affiliate opposing Louisiana "Choose Life" plate). Choose Life, Inc. believes that if the Seventh Circuit's decision stands without review by this Court, these political opponents of the "Choose Life" message will assert that the "controversy" over the message – controversy that they themselves have helped create – is a sufficient and constitutionally defensible reason to exclude it from a public forum for expression.

The Children First Foundation, Inc. ("CFF") is a non-profit organization that serves as the official sponsor of the "Choose Life" specialty plate effort in Connecticut, New York and New Jersey. CFF is dedicated to providing pro-adoption funding and other adoption-related resources for charities that

encourage and facilitate adoption as a positive choice for women facing unplanned pregnancies. CFF's efforts in Connecticut made that state the ninth state in the nation - and the first in the Northeast - to have the "Choose Life" plate on the road in September 2003.

CFF's efforts to bring the "Choose Life" plate to New York began in late 2001. The New York Department of Motor Vehicles rejected the Foundation's design of a crayon drawing of a yellow sun behind the faces of two smiling children, claiming that a significant segment of the population would consider the design "patently offensive" because it also included the words "Choose Life." CFF revised its design by adding the organization's web site address, "fund-adoption.org," but the design was rejected again on the same grounds. In March 2004, the NY DMV Commissioner sent a final rejection letter to CFF, reiterating the same rationale and stating that control over the design, marketing and issuance of any specialty plate was "solely within [his] discretion." CFF filed suit against the New York DMV on August 4, 2004, asking for judicial intervention to allow its plate to be issued, and the case is ongoing. *The Children First Foundation v. Martinez*, No. 04-CV-927 (N. Dist. N.Y.).

In New Jersey, CFF sought authorization for the "Choose Life" plate from the New Jersey Motor Vehicle Commission in January 2003. As a qualified organization, CFF applied for a plate displaying The Children First Foundation's official corporate logo that includes a copyrighted childlike drawing of two

smiling children and the words "Choose life." CFF's organizational plate design used "FUND-ADOPTION.ORG," which was one of CFF's internet domain names, at the bottom of the plate as well as the vertical letters "AD" in its design to further promote adoption. After initial approval was extended, the commission reversed the decision. The reason given for the rejection was that the logo "Choose Life" was too "controversial" and "political." The commission's representative suggested that something "less controversial" be used, such as "Choose Adoption" or "Adopt a Baby." After CFF unsuccessfully sought to communicate with the commission about this decision for nearly five months, the commission sent CFF a letter stating that the governing statutes and regulations disallowed a "slogan" or "advocacy message" on an organizational plate, but failed to cite its authority.

Under protest, CFF proposed to amend its design by removing the words "Choose life" from CFF's corporate logo and substituting "NJCHOOSE-LIFE.ORG" at the bottom of its plate, which was another pre-existing, operational internet domain name and alternate legal name for CFF. The commission once again rejected the design, stating that it would allow "FUND-ADOPTION.ORG" to appear at the bottom of the plate, but not "NJCHOOSE-LIFE.ORG". CFF filed suit in May 2004, and the District Court ruled against it after lengthy proceedings in June 2008. *Children First Foundation, Inc. v. Legreide*, No. 04-2137 (Dist. N.J. Jun. 18, 2008). The case is on appeal before the Third Circuit Court of Appeals. *Children First*

Foundation, Inc. v. Legreide, Appeal No. 08-3131, U.S.C.A. 3 (Notice of Appeal filed July 17, 2008).

If the Seventh Circuit's decision stands without review, CFF believes that the states of New York and New Jersey will regard its reasoning as clear constitutional authority to prohibit use of the phrase "Choose Life" on its specialty plate as an unnecessarily "controversial" topic of political dialogue, rather than what it actually is intended to be – a pro-adoption viewpoint.

Arizona Life Coalition, Inc. is an Arizona nonprofit corporation that provides compassionate care to women who are going through unplanned pregnancies. In June 2002, Life Coalition submitted an application for a specialty plate that would display the organization's official logo, a small graphic of two children's faces and the motto, "Choose Life."

The Arizona License Plate 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 apply for plates. The Coalition filed a revised application, which proposed to include its name in the plate design. In spite of the fact that the Coalition had complied with all the administrative requirements for a specialty plate, the commission denied the group its plate and refused to state the reason for the denial. Life Coalition was forced to file suit in

the District of Arizona in order to secure access to the specialty plate forum. The District Court ruled against the Coalition, but the Ninth Circuit Court of Appeals reversed the decision and ordered the Commission to issue the "Choose Life" plate. *Arizona Life Coalition, Inc. v. Stanton*, 515 F.3d 956 (9th Cir. 2008), *cert. denied*, 129 S.Ct. 56 (2008). This Court denied review. *See id.* The state has now approved the "Choose Life" specialty plate pursuant to court order, and recently made the plate available to Arizona Life Coalition's membership, including approximately 40 organizations and 100,000 individuals. The Coalition is concerned, however, that if the Seventh Circuit's decision remains precedential, members of the state legislature will believe they have the constitutional authority to pass legislation directing the commission to once again deny the group and its members their right to display the "Choose Life" plate.

Choose Life of Missouri, Inc. is a nonprofit Missouri corporation organized to further the efforts of not-for-profit crisis pregnancy centers, maternity homes and adoption agencies.

Choose Life of Missouri applied to the Missouri Department of Revenue for a "Choose Life" specialty plate. Because the application fully complied with statutory requirements, the Department referred the application to the Joint Committee on Transportation Oversight, which possessed statutory authority to approve plate applications. Two members of the committee, state senators who described themselves as "pro-choice," submitted a letter to the committee chair opposing the "Choose

Life" plate. The committee accordingly denied the application pursuant to MO. REV. STAT. § 21.795(6). That provision states:

> The committee shall not approve any application if the committee receives a signed petition from five house members or two senators that they are opposed to the approval of the proposed license plate.

Id. Choose Life of Missouri brought suit in the District of Missouri. The District Court struck down the statute as unconstitutionally overbroad, and enjoined the Director of the Department of Revenue to issue the plate. *Choose Life of Missouri, et al. v. Vincent,* No. 4:06-cv-00443-SOW (Dist. Mo. Jan. 23, 2008). The Eighth Circuit Court of Appeals affirmed on March 26, 2009, holding that the law "failed to provide standards or guidelines to prevent viewpoint discrimination" by the committee. *Roach v. Stouffer*, 560 F.3d 860, 868 n.4. (8th Cir. 2009). Choose Life of Missouri remains concerned, however, that if the Seventh Circuit's decision goes unreviewed, politically opposed forces within the state will persuade the legislature that it is not bound by the discretionary decisions former legislatures have made for access to the specialty plate forum, leaving the "Choose Life" message vulnerable to majoritarian whims. *See Choose Life of Illinois v. White*, 547 F.3d 853, 858 n.4 (7th Cir. 2008). If, as the Seventh Circuit has it, "The [legislature] is entitled to authorize specialty plates one at a time," and "It is not required to - and cannot - adopt 'standards' to control its legislative discretion," *id.*, nothing seems to keep it from withdrawing

authorization for specialty plates when and if political winds shift.

Massachusetts Choose Life, Inc. is a non-profit organization that seeks to have a "Choose Life" plate issued by the State of Massachusetts. Funds generated by the "Choose Life" specialty plate will be distributed to qualified charities that assist women with the expenses of a full term pregnancy, such as medical bills, temporary housing, transportation, utility bills, food, maternity clothing, and similar expenses of infants. The state requires 3000 registrations to qualify for a specialty plate, and hundreds of "Choose Life" plates have been ordered to date. However, the precedent established by the Seventh Circuit's decision threatens to end these efforts, as organizations such as Planned Parenthood have already used the argument that a license plate is no place for a "political statement."

SUMMARY OF THE ARGUMENT

The history of First Amendment free speech jurisprudence is the story of a struggle by the federal courts to interpret the Constitution in a manner that protects the right to engage in controversial political speech. As the *Amici*'s Statement of Interests relates, despite the laudable profession of a "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open," *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964), the Court's *Amici* and many of their affiliated organizations have encountered politically-motivated obstacles in more than a dozen states to the public display of a simple

but powerful message, "Choose Life," from those who would censor that message as a threat to their own values. In this case, the Seventh Circuit Court of Appeals' determination that the State of Illinois committed no transgression of the First Amendment by refusing to authorize Petitioners' "Choose Life" plate because of the "controversial" nature of the speech was an astonishing departure from the well-recognized and longstanding purpose behind free speech protections related to speech fora – to ensure that the standards for eligibility to a public forum for expression are not gerrymandered by powerful forces to exclude those whose views are counter-majoritarian.

Moreover, the Court of Appeals' conclusion that no claim of unbridled discretion could be made against the state legislature because legislative assemblies cannot "bind" future assemblies to objective criteria extends an open invitation to the states to refer questions about forum access for "controversial" speakers and topics to legislative bodies, where an unaccountable majority will decide them – inevitably in favor of insulating the public from politically "divisive" minority views. The Seventh Circuit has essentially created a "legislative discretion exception" to a long-standing principle of First Amendment law. The Supreme Court should not permit the precious right of free speech on public ways[2] to become subject to the political whims of a

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[2] *Amici* note that the forum in question is comprised predominantly of First Amendment protected places and means of expression. A specialty license plate is a "mobile billboard" for the private views of the vehicle's owner; he places it on his own private property and displays it to hundreds of other

governing body, without any limitation on its discretion to guard against inevitable viewpoint discrimination.

REASONS FOR GRANTING THE WRIT

I. CERTIORARI SHOULD BE GRANTED TO CORRECT THE COURT OF APPEALS' UNPRECEDENTED DEPARTURE FROM ESTABLISHED FIRST AMENDMENT CASE LAW PROTECTING ACCESS BY OTHERWISE-QUALIFIED BUT "CONTROVERSIAL" SPEAKERS TO A FORUM FOR PUBLIC EXPRESSION.

"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." *Choose Life Illinois, Inc. v. White*, 547 F. 3d at 859, *citing Christian Legal Society v. Walker*, 453 F. 3d 853, 865 (7th Cir. 2006) (Sykes, J., writing for the court). Disregarding this well-established principle of First Amendment jurisprudence, the Seventh Circuit markedly departed from well-established forum doctrine to deny Choose Life the opportunity to seek the issuance of a "Choose Life" license plate, and in so doing has created a schism in Circuit law on the area of public forum speech that warrants review by this Court.

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private citizens on roadways that constitute traditional public fora, for the purpose of fostering public adherence to his own point of view. *Wooley v. Maynard*, 430 U.S. 705, 715 (1977). The only component of this complex delivery system for free speech that is proprietary to the government is the plate itself on which the organization's slogan or logo resides.

The Supreme Court has observed that "protected speech is not equally permissible in all places and at all times." *Cornelius v. NAACP Legal Defense and Educational Fund, Inc.*, 473 U.S. 788, 800 (1985). Courts must routinely engage in an analysis of the particular forum to determine "when the Government's interest in limiting the use of its property to its intended purpose outweighs the interest of those wishing to use the property for other purposes." *Id.*

The Court recently reaffirmed that it has established three types of speech fora - traditional, designated and nonpublic - and that each type involves a different standard for the evaluation of permissible government restrictions on speech. *Pleasant Grove City, Utah v. Summum*, ___ U.S. ___, 129 S. Ct. 1125, 1132 (2009).[3] It is beyond dispute,

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[3] Traditional public fora include "public streets and parks, which have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions." 129 S.Ct. at 1132 (citation omitted). Designated public fora are those places where government creates a forum on government property or through a government program which have not traditionally been regarded as a public forum but have been intentionally opened up for that purpose. *Id.* at 1132. Nonpublic fora are fora that are "limited to use by certain groups or dedicated solely to the discussion of certain subjects." *Id.* at 1132. In Petitioners' case, the Seventh Circuit held that the specialty license plate program in Illinois created a nonpublic forum. *Choose Life*, 547 F.3d at 865. The Court's *Amici* do not address the correctness of this determination, except to note that the question is at least debatable and may in fact offer an alternate basis for granting certiorari, since the application of that test by the Seventh Circuit has created a schism amongst the

however, that a constitutional standard common to each type of forum is that limitations on access relating to a prospective speaker's identity and its message must be neutral regarding their emotive impact on the public. *Forsyth County, Ga. v. Nationalist Movement*, 505 U.S. 123, 133 (1992) (traditional public forum); *Widmar v. Vincent*, 454 U.S. 263 (1981) (designated public forum); *Lamb's Chapel v. Center Moriches Union Free School Dist.*, 508 U.S. 384 (1993) (limited public forum); *National Endowment for the Arts v. Finley*, 524 U.S. 569 (1998) (nonpublic forum). The Seventh Circuit's failure to guide its decision by this North Star of forum jurisprudence has created conflict with at least the Ninth and Fourth Circuits, and arguably others as well.

The Seventh and Ninth Circuits have come to diametrically opposing conclusions concerning the validity of restricting speech related to "controversial" issues in specialty license plates fora. *Stanton*, 515 F.3d at 971; *Choose Life*, 547 F.3d at 865. In *Stanton*, the court concluded that the State Commissioner's ostensible banishment of the "abortion issue" from the specialty license plate program was improper viewpoint discrimination. *Stanton*, 515 F.3d at 972. The *Stanton* court

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Seventh, Fourth and Ninth Circuits. The Seventh Circuit admitted in its opinion that the Ninth Circuit reached the "opposite conclusion" in *Arizona Life Coalition* a case involving almost identical circumstances. *Choose Life*, 547 F.3d at 865. The Seventh Circuit's decision is also in opposition to the Fourth Circuit's analysis in *Sons of Confederate Veterans, Inc. v. Holcomb, Commissioner of the Virginia Department of Motor Vehicles*, 288 F.3d 610 (4th Cir. 2002) ("*SCV v. Holcomb*").

determined that "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." *Stanton*, 515 F.3d at 972; *see also Sammartano v. First Judicial District Court*, 303 F.3d 959, 971 (9th Cir. 2002).

Stanton followed the contours of forum doctrine laid out by this Court in *Perry* and later cases. As the Court explained in *Rosenberger*, it is only when the viewpoint expressed is beyond the forum's limited purpose that it may be excluded as ineligible for the forum. In that case, it is regarded as a proper form of "content" discrimination:

> Thus, in determining whether the State is acting to preserve the limits of the forum it has created so that the exclusion of a class of speech is legitimate, we have observed a distinction between, on the one hand, content discrimination, which may be permissible if it preserves the purposes of that limited forum, and, on the other hand, viewpoint discrimination, which is presumed impermissible when directed against speech otherwise within the forum's limitations.

Rosenberger v. Rector of the University of Va., 515 U.S. 819, 829-830 (1995), citing *Perry Ed. Assn. v. Perry Local Educators' Assn.*, 436 U.S. 37, 46

(1983).[4] The Seventh Circuit noted *Stanton*'s reliance on *Rosenberger*, but regarded it as erroneous because, in its own view, exclusion of the "Choose Life" plate was pursuant to a restriction on the subject matter of abortion – in spite of the fact that no such forum topic limitation was articulated by the legislature. 547 F.3d at 866. The Seventh Circuit's egregious misreading of *Rosenberger* has thus created an untenable conflict with the Ninth Circuit.

The Seventh Circuit's decision is also at odds with the Fourth Circuit's well-reasoned decision in *SCV v. Holcomb*, which presented similar circumstances involving an ostensibly content-based legislative ban on all speech related to the Confederate battle flag. *Holcomb*, 288 F.3d at 623. The Fourth Circuit saw through this erroneous application of the content-viewpoint distinction and

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[4] According to the Fourth Circuit, the Fourth and Ninth Circuits stand together in this view, apparently as against the Seventh:

> As the Ninth Circuit has noted, the "coherence of the distinction between 'content discrimination' and 'viewpoint discrimination'" may be seen as "tenuous." *Giebel v. Sylvester*, 244 F.3d 1182, 1188 n. 10 (9th Cir. 2001). "While the former describes the subject matter of the speech, and the latter the specific positions taken on the matter, the level at which 'subject matter' is defined can control whether discrimination is held to be on the basis of content or viewpoint." *Id.* Nevertheless, it is clear from the Supreme Court's decisions that, given a properly defined subject matter, the government is presumptively unable to discriminate among viewpoints about that subject matter.

SCV v. Holcomb, 288 F.3d at 623 n.11.

hewed instead to well-established Supreme Court authority:

> [W]here restrictions or regulations of speech discriminate on the basis of the content of speech, there is an "inherent risk that the Government seeks not to advance a legitimate regulatory goal, but to suppress unpopular ideas or information or manipulate the public debate through coercion rather than persuasion ..." - in other words, to exercise viewpoint discrimination.

288 F.3d at 624, quoting *Turner Broadcasting Sys., Inc. v. F.C.C.*, 512 U.S. 622, 642-43 (1994). Clearly, the Fourth Circuit understood the purpose behind the line of cases protecting against viewpoint discrimination; that purpose is to protect the people's right to express all viewpoints, especially those that are most controversial.

This Court should review the Seventh Circuit's decision to consider whether foregoing the right to express controversial views, a core basis of American free speech jurisprudence, may constitutionally be made a qualification for eligibility to speak in a forum for private expression. Because the Court of Appeals' decision countenances a total ban on "controversial speech" in a forum for citizen expression, a ban that other Circuits have soundly rejected, certiorari is warranted.

II. CERTIORARI SHOULD BE GRANTED TO CONSIDER THE IMPORTANT CONSTITUTIONAL QUESTION OF WHETHER A LEGISLATIVE

BODY MAY CREATE A FORUM FOR PUBLIC EXPRESSION WITHOUT PROVIDING CONTENT-NEUTRAL STANDARDS FOR SPEAKER ELIGIBILITY.

The Seventh Circuit's acquiescence to the lack of definitive, established standards for allowing individuals access to Illinois' legislatively created "specialty plate" public speech forum in is a radical departure from the law in other Circuits, as it has been informed by this Court. The Seventh Circuit simply glossed over the crucial importance of establishing explicit standards governing access to a legislatively created forum for public expression, despite this Court's clear direction to the Seventh Circuit in an earlier case:

> The whole theory of viewpoint neutrality is that minority views are treated with the same respect as are majority views. *Access to a public forum, for instance, does not depend upon majoritarian consent.*

Board of Regents of University of Wisconsin System v. Southworth, 529 U.S. 217, 235 (2000) (emphasis supplied); on remand, *Southworth v. Board of Regents of the University of Wisconsin System*, 307 F.3d 566, 578-579 (7th Cir. 2002) (the Supreme Court's rationale in unbridled discretion cases "compels the conclusion that the requirement of 'viewpoint neutrality' includes as a corollary a prohibition on unbridled discretion").

As the experiences of *Amici* and their affiliated organizations in numerous states amply

demonstrate (*see* Statement of Interests, *supra*, at 1-9), forum access is a particularly critical issue for "Choose Life" groups seeking specialty plate status in states that are politically unreceptive to their message:

> Most states also require that specialty plate applications that meet the minimum requirements be approved in their own pieces of legislation, meaning that both houses of the legislature must pass them and the governor must sign them into law. Thus, applications for specialty plates may also fail at one of the numerous stages in the legislative process.... *[T]here are rarely articulated standards to guide elected officials' judgments. To the extent that they offer explanations for approving or disapproving special plate applications, their explanations relate generally to their perceptions of the public interest and whether the proposed specialty plate would serve it.*

Leslie Gielow Jacobs, *Free Speech and the Limits of Legislative Discretion: The Example of Specialty License Plates*, 53 FLA. L. REV. 419, 426 (2001) (emphasis added). Numerous other legal scholars have noted the intensity of the First Amendment controversy over the standard for speaker access to state specialty plate approval regimes.[5]

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[5] *See, e.g.*, Jeremy T. Berry, *Licensing a Choice: "Choose Life" Specialty License Plates and Their Constitutional Implications*, 51 EMORY L.J. 1605, 1643 (2002); James C. Colling, *General Lee Speaking: Are License Plate Designs Out of the State's Control? A Critical Analysis of the Fourth*

By holding that "one legislature cannot bind a future legislature," and that a legislature "is entitled to authorize specialty plates one at a time" and "is not required to... adopt 'standards' to control its legislative discretion," *Choose Life*, 547 F. 3d at 858 n.4, the Seventh Circuit creates a rift in the long line of cases that have required laws regulating speech fora to include explicit standards for those persons charged with the duty to enforce them. *Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972); *City of Lakewood v. Plain Dealer Publishing Co.*, 486 U.S. 750, 758 (1988) (the absence of explicit standards for forum eligibility "makes it difficult for courts to determine in any particular case whether the licensor is permitting favorable, and suppressing unfavorable, expression"). Even in a nonpublic forum, the Court has cautioned that speaker eligibility criteria must be based on objective, discernible criteria, not on subjective perceptions. *See, e.g., Arkansas Educ. Tel. Com'n v. Forbes*, 523 U.S. 666 (1998).

Circuit's Decision in Sons of Confederate Veterans, Inc. v. Comm'r of the Va. Dept. of Motor Vehicles, 12 GEO. MASON L. REV. 441, 478 (2003); Stephanie S. Bell, *The First Amendment and Specialty License Plates: The "Choose Life" Controversy*, 73 MO. L. REV. 1279, 1302 (2008); Caroline Mala Corbin, *Mixed Speech: When Speech is Both Private and Governmental*, 83 N.Y.U. L. REV. 605, 692 (2008); Sarah E. Hurst, *One Way Street to Unconstitutionality: The "Choose Life" Specialty License Plate*, 64 OHIO ST. L.J. 957, 998 (2003); Amy Riley Lucas, *Specialty License Plates: The First Amendment and the Intersection of Government Speech and Public Forum Doctrines*, 55 UCLA L. REV. 1971, 2023 (2008); Alana C. Hake, *The States, a Plate, and the First Amendment: The "Choose Life" Specialty License Plate as Government Speech*, 85 WASH. U. L. REV. 409, 456 (2007).

> *"It is not merely the sporadic abuse of power by the censor but the pervasive threat inherent in its very existence that constitutes the danger to freedom of discussion."* Accordingly, the success of a facial challenge on the grounds that an ordinance delegates overly broad discretion to the decisionmaker rests not on whether the administrator has exercised his discretion in a content-based manner, but whether there is anything in the ordinance preventing him from doing so.

Forsyth County Georgia v. Nationalist Movement, 505 U.S. 123, 133 (1992), citing *Thornhill v. Alabama*, 310 U.S. 88, 97 (1940) (emphasis added; citations omitted).

The Eighth Circuit, in direct contrast, affirms the importance of succinct, definitive direction for forum eligibility to avoid giving government officials unbridled discretion. *Roach v. Stouffer*, 560 F.3d 860, 869 (8th Cir. 2009); *Lewis v. Wilson*, 253 F.3d 1077, 1079 (8th Cir. 2001). Likewise, the Ninth Circuit holds that a legislative body must include specific guidelines in establishing speaker eligibility in a legislatively created forum in order to avoid viewpoint discrimination. *Cogswell v. City of Seattle*, 347 F.3d 809, 816 (9th Cir. 2003); *Sammartano*, 303 F.3d at 965. Moreover, a plethora of Circuit case law stands for the constitutional principle that discretionary decisions regarding government regulation of speech in nonpublic fora require specific limitations and guidelines from legislative

bodies to inform government officials' discretion in determining speaker access.[6]

The Seventh Circuit's decision offers a judicial imprimatur to the many States that would prefer to ban unpopular speech by ceding "unbridled discretion" over access to speech fora to the governmental branch least insulated from majoritarian pressures – the legislative branch.[7]

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[6] *See, e.g, Gannett Satellite Information Network, Inc. v. Berger*, 894 F.2d 61, 65-66, 69 (3rd Cir. 1990); *Child Evangelism Fellowship of Maryland, Inc. v. Montgomery County Public Schools*, 457 F.3d 376, 386-389 (4th Cir. 2006); *Polaris Ampitheater Concerts, Inc. v. City of Westerville*, 267 F.3d 503, 509 (6th Cir. 2001); *Summum v. Callaghan*, 130 F.3d 906, 919 (10th Cir. 1997); *Atlanta Journal and Constitution v. City of Atlanta Department of Aviation*, 322 F.3d 1298, 1310 (11th Cir. 2003).

[7] The problem of majoritarianism is compounded by the fact that legislatures are ill-equipped even to *interpret* the content of private speech; Circuit Judge Manion recognized that the "Choose Life" slogan could appeal to sympathizers on *both* sides of the controversial abortion debate depending on one's point of view:

> [T]he message acknowledges both choice and life, so most people who claim to be pro-life and a large number of people who claim to be pro-choice but personally opposed to abortion should be comfortable with this message that is directed at pregnant women who are contemplating abortion. This petition expressly recognizes that it is the woman's choice.

Choose Life, 547 F.3d at 868 (Manion, J., concurring). On the other hand, the Fourth Circuit observed in *SCV v. Holcomb* that the Confederate battle flag was a symbol regarded with reverence by some and with calumny by others. *Compare* 288 F.3d at 624 ("As the Commissioner concedes, the logo would 'advance [the] view that the flag [is] a symbolic

Because the Seventh Circuit gave no credence whatsoever to the constitutional necessity of objective and specific guidelines in regulating public speech fora, contrary to the rule that has been established, with good reason, by this Court and other Circuits, certiorari is warranted in this case.

CONCLUSION

For the reasons stated above, the Court's *Amici* respectfully suggest that a writ of *certiorari* is appropriate to clarify the important constitutional question of whether state legislatures may create public fora for speech, but limit access to those fora by the exercise of "unbridled discretion" to determine whether a proposed speaker or the content of its speech is too "controversial" to permit.

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acknowledgment of pride in Southern heritage and ideals of independence'"); and *id.*, n.12 ("A competing viewpoint of the Confederate flag is that it is 'a symbol of racial separation and oppression.'"). But the problem of reinforcing majoritarian views exists regardless of whether the censored topic is the subject of an even split in public opinion or of an element of a received monolithic cultural worldview, or something in between. For this reason, the Court has cautioned that the First Amendment does not treat all debate as bipolar: "If the topic of debate is, for example, racism, then exclusion of several views on that problem is just as offensive to the First Amendment as exclusion of only one." *Rosenberger*, 515 U.S. at 831.

Respectfully submitted this 18th day of May, 2009.

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