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No. 08-1283

In The
Supreme Court of the United States

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

v.

JESSE WHITE, SECRETARY OF STATE
OF THE STATE OF ILLINOIS,
Respondent.

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

BRIEF *AMICI CURIAE* OF CONSISTENT LIFE, FEMINISTS CHOOSING LIFE OF NEW YORK, CARE-NET, EXPECTANT MOTHER CARE, GOOD COUNSEL, HEARTBEAT INTERNATIONAL, LUMINA, and THE WOMENS' CENTERS OF GREATER CHICAGOLAND, IN SUPPORT OF PETITIONERS

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QUESTIONS PRESENTED

1. Whether – after having approved several specialty license plates involving controversial subjects – a State administrator may deny the application of parties who seek to use the specialty license plate program to affirm publicly their support for counselling of women in crisis pregnancies and for adoption as a life-preserving alternative to abortion, without engaging in impermissible viewpoint discrimination in violation of the freedom to speak on a controversial issue of public concern on an evenhanded basis with other speakers on controversial issues.

2. Whether – after having approved several specialty license plates involving controversial subjects – a State legislature may deny an application for inclusion in a specialty license plate program without stating any basis for its apparent discrimination against those who submit an application for a license plate with the words "Choose Life" that conforms to every aspect of the legislative program.

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INTERESTS OF AMICI CURIAE

Amici[1] are not-for-profit organizations that engage in advocacy in support of respect for life at all stages. *Amici* also engage in public communication of their convictions with the general society, and in programmatic action to embody the values to which they committed.

We urge this Court to seize this opportunity to address an important and recurring difficulty. Those who seek to surround life with legal protection are frequently denied access to institutions of government on the same footing as others of differing views. For example, applications for inclusion in administrative programs such as the one at issue in this case are rebuffed without an explanation based upon evenhanded application of standards that should normally inform, guide, and control the discretion of administrators.

In this case the court of appeals denied constitutional protection to two words – "Choose Life" – which petitioners voluntarily sought to express publicly when they filed an application with the State of Illinois for participation in the state's specialty license program. The reason offered by the State is that it wishes to *avoid controversy*. As we argue below,

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[1] Pursuant to Rule 37.6 of the Rules of this Court, *amici* state that no counsel for a party has authored this brief in whole or part, and that no person or entity, other than one of the *amici*, its members, or its counsel, has made a monetary contribution to the preparation or submission of this brief. Counsel of record for all parties received timely notice of *amici curiae*'s intention to file this brief, which is filed with consent of the parties.

neither this rationale nor its indefensible acceptance by the court of appeals passes constitutional muster. Hence, we urge this Court to grant the petition because the constitutional analysis adopted by the court of appeals is severely out of joint with the obligation of governmental nondiscrimination when it comes to deciding who may or may not express a controversial idea. To avoid repetitious briefing, we rely upon legal history to show that protection of controversial speech on matters of public importance lies at very core of First Amendment's purposes.

Consistent Life (CL) is a coalition of activists who support the consistent ethic of reverence for life. *Feminists Choosing Life of New York* (FCLNY) is a nonpartisan, nonsectarian organization that seeks to return to the grassroots of pro-life feminism. Their interests are more fully elaborated in Appendix A. These two lead *amici* have appeared before this Court as *amici* when pro-life activists were threatened with severe penalties under the federal Racketeer-Influenced and Corrupt Organizations Act, 18 U.S.C. §§ 1961–1968. See *Scheidler et al. v. National Organization of Women* (*Scheidler II*), 537 U.S. 393 (2003), and *Scheidler et al. v. National Organization of Women* (*Scheidler III*), 547 U.S. 9 (2006).

These two *amici* now return in this case to urge the Court to clarify that viewpoint discrimination is never permissible – even when a State attempts to justify it by *banning all communication on a hot topic by both sides to an issue that the State decides is too controversial to be expressed in a forum that the State has already opened to many controversial views.*

In the *Scheidler* case, *CL* and *FCLNY* took the opportunity to locate that particular controversy – one that lasted for two decades – within the historical framework of the "central meaning of the First Amendment" expressed recurrently throughout the Nation's history: that speech in America, especially on divisive issues, must remain "uninhibited, robust, and wide-open." *New York Times v. Sullivan* 376 U.S. 254, 270 (1964).

In this case *CL* and *FCLNY* are joined by numerous organizations and networks that offer therapeutic support to women before, during, and after a pregnancy: *Care-Net, Expectant Mother Care, Good Counsel, Heartbeat International, Lumina,* and *Womens' Centers of Greater Chicagoland*. These *amici* offer care to pregnant young women who experience a range of conflicting and often painful emotions as they struggle to reach a decision about what to do about a crisis pregnancy. These organizations also offer a realistic possibility – adoption – that many women prefer to the reality of abortion that is frequently the only "way out" of the crisis they experience as they go through their pregnancies. More particular descriptions of the mission and purpose of the *amici curiae* are found in Appendix A.

REASONS FOR GRANTING THE PETITION

I. In Acknowledged Conflict with Other Circuits, the Court of Appeals Has Eroded the Historical Commitment to Governmental Nondiscrimination with Respect to Religious and Political Convictions by Allowing a State that Had already Permitted Expression of Viewpoints on Many Controversial Issues to Deny any Expression on the Subject of Abortion on the Ground that the Subject Matter itself – Whether a Speaker is "Pro-choice" or "Pro-life" – Is Too "Controversial."

A. Introduction: The Duty of Nondiscrimination

This case offers this Court an opportunity to clarify that, precisely because Americans profoundly disagree with one another over many aspects of abortion,[2] the government may not discriminate against the expression of one side or another in any public forum.

Petitioner "Choose Life Illinois" (CLI) is a not-for-profit corporation dedicated to promoting the adoption of children and increasing public awareness about adoption as an alternative to abortion. Over 26,000 citizens of Illinois have petitioned the State for a specialty automobile license with two words on the

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[2] A Gallup survey released on May 15, 2009, found that 51 percent of those questioned call themselves "pro-life" on the issue of abortion and 42 percent "pro-choice." Although moral questions are not settled by opinion polls, this Court did not – as the *New York Times* prematurely announced on January 24, 1973 – "settle abortion issue" in deciding *Roe v. Wade*, 410 U.S. 113 (1973).

plate: "Choose Life." Pet.App.65a. Respondent Secretary of State denied the application, and this litigation ensued.

In its motion to dismiss, the State suggested that it could legitimately deny the CLI application because the *viewpoint* that CLI sought to express on the auto license *"is controversial."* Pet.App.50a (emphasis added). The district court correctly rejected the State's blunt statement of the source of its assumed power to abridge the free expression of the CLI perspective on abortion simply because its "viewpoint is controversial," or because "the state wishes to suppress what it considers a controversial idea, discriminating against a viewpoint with which it does not agree or wish to associate." *Id.*

On appeal, the State proposed a different rationale for the denial of the CLI application: that the denial was based on a policy of excluding "the entire subject of abortion" from the specialty-plate program. Accepting at face value[3] this rationale for the state's rejection of the CLI application, the court of appeals reversed, finding that the State had engaged in permissible content-based discrimination. Pet.App.25a. In so doing, the Seventh Circuit acknowledged that its decision was in clear conflict with the "opposite conclusion" of the Ninth Circuit in *Arizona Life Coalition, Inc. v. Stanton*, 515 F.3d 956

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[3] Petitioners note that this rationale was unwritten, previously unarticulated, and unsupported by any evidence in the record. Pet. 7.

(9th Cir.), *cert. denied*, 129 S. Ct. 56 (2008). Pet.App.19a-20a.

The lower court also misread this Court's clear teaching on nondiscrimination in *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819 (1995). Pet.App.24a,26a-27a. Granting the petition would enable the Court to clarify that it is equally unconstitutional when a State opens up a forum such as the specialty license plate program involved here to a medley of 60 categories (some of which are undeniably "controversial"), but then specifically (and only in this instance in the entire history of the Illinois specialty license program) excludes expression of any viewpoint – whether for abortion or seeking to foster an alternative to abortion – in this forum because the government purportedly decides to exclude "the entire subject of abortion" Pet.App.25a,27a-28a. *See also Cornelius v. NAACP Legal Defense & Educ. Fund, Inc.* 473 U.S. 788, 812 (1985) ("purported concern to avoid controversy ... may conceal a bias against the viewpoint advanced by the excluded speakers")

B. Consensus and Conflicts in American History

In the spirit of the common law tradition, our courts – including this one – announce general rules that are bound up with the facts of particular cases. *See, e.g.* JOHN T. NOONAN, JR., PERSONS AND MASKS OF THE LAW (1976). In this sense legal method, including constitutional analysis, is deeply engaged in historical method. Henry P. Monaghan, *Foreword: Constitutional Common Law*, 89 HARV. L. REV. 1 (1975). It situates judicial interpretation within the matrix of changing fact patterns at differing moments in time. Hence, in

this brief *amici* offer reflections on legal history that we think support granting the petition in this case.

At the heart of historical reflection on the American Constitution are two very different approaches. The first emphasizes the achievement of a powerful *consensus* and agreement over the fundamentals of our nation. This view celebrates the historical achievement of a written constitution that has for centuries served as a unifying force in our pluralist society. This approach is warm without being fuzzy. It locates the historical context of the central doctrines of constitutional law. For example, in this perspective *separation of powers* is recognized as a bulwark against the abuse of concentrated power in totalitarian regimes. *Due process of law* is seen as a set of procedural safeguards adopted in part because our ancestors sought to preserve English liberties more carefully than the imperial rulers in London – King George III and the Parliament – who failed to give a fair or full hearing to the "humble petitions" for redress of grievances sent to them by our colonial ancestors at the time of the Stamp Act. *Equal protection of the laws* is the basis for rejection of many forms of irrational discrimination, primarily on the basis of race or gender, that had been allowed in our constitutional order at the outset. *First amendment values* have secured both freedom of religion and freedom of expression by raising the bar for human interaction beyond mere toleration to a deeper sense of respect for genuine differences. In short, the consensus view of American history urges that this constellation of constitutional values has made our country a safe place for peoples of many diverse backgrounds and convictions.

Without denying any of the basic themes of the consensus approach, the second approach notes that the achievement of harmony over fundamental ideas that now unify us was not present at the dawn of the Republic, and occurred only because of many painful and costly *conflicts*. This approach emphasizes that enormous struggles preceded the shift from original sins of inequality vis-à-vis the African slaves and their descendants. Thus, a recurrently bitter struggle over slavery lasted for than ninety years after the Declaration of Independence – with its acknowledgement of the self-evident truth that "all men are created equal," 1 Stat. 1 (1776) – until the textual amendments of the Constitution in the Thirteenth, Fourteenth, and Fifteenth Amendments in 1865, 1868, and 1870.

Similarly, the original Constitution was deficient in that it refused to include American women within the full role of citizens entitled to vote, hold public office, and serve on juries as representatives of the community. Although women were deeply engaged in the early nineteenth-century struggle to abolish slavery, they also needed to launch a major nationwide movement for their own full inclusion in constitutional protections, grounded in the equally self-evident truth that "all men *and women* are created equal." *Declaration of Sentiments of the Seneca Falls Convention* (1848). Like the founding Fathers in Philadelphia in 1787, the political establishment that controlled the process of drafting, proposing, and ratifying the Fourteenth Amendment was all-male, and refused to heed the sentiments expressed at Seneca Falls two decades earlier. Because the cause of women was betrayed once again, suffragists had to undertake yet another mass movement to redress their

grievances. The struggle to achieve equal political and civil rights for women was postponed for at least seventy years until the adoption of the Nineteenth Amendment in 1920.

These momentous textual changes in the Constitution, moreover, did not suffice to overcome invidious discrimination on the basis of race and gender after 1920. Decades later, the civil rights movement and the subsequent movement for gender equality continued as powerful struggles to achieve through statutes and litigation a fuller sense of equal dignity for the descendants of slaves and for women in our society. Thurgood Marshall, *Reflections on the Bicentennial of the United States Constitution*, 101 HARV. L. REV. 1 (1987).

Neither approach to constitutional interpretation is sufficiently descriptive of the American experience. Neither approach by itself accounts for the fundamental values we now espouse. The very fact that our current consensus has been achieved at the very high cost of bloody conflicts is itself a reminder that we must cherish a deep commitment to freedom of expression of conflicting views as a powerful nonviolent alternative for seeking constitutional consensus on issues that continue to divide the American people deeply.

C. The Duty of Government is Not to Police or Eliminate Conflict, But to Let it Thrive by a Policy of Nondiscrimination

The conclusion of the court of appeals in this case is also in glaring conflict with this Court's teaching on the duty of nondiscrimination in matters affecting both

religious beliefs and political decisions. *See Agostini v. Felton*, 521 U.S. 203, 230-31 (1997); *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819 (1995).

Convictions of religion and conscience, of the heart and the mind, are normally beyond the competence and ken of the government to decide, influence, or control. Our history repeatedly teaches that the government's job is *neither to police controversies nor to eliminate them* from our society. On the contrary, the *consensus* that emerges from our historical experience is that the government should let nonviolent *conflict* thrive, and should allow arguments to be assessed and rebutted by counterclaims and more persuasive arguments. The duty of governmental nondiscrimination is especially germane to issues as controversial as abortion.

D. Examples of Free and Open Conflict on Controversial Themes in American Constitutional History

As noted above, the baseline for the fundamental norm of freedom of expression is not that consensus is easily manufactured by the government, but that conflict over different approaches is itself normative when it comes to deciding how best to "establish justice, insure domestic tranquility, provide for the common defense, promote the general welfare, and secure the blessings of liberty to ourselves and our posterity." U.S. Const., Preamble.

For example, at the very dawn of the Republic some colonists – notably John Adams, Benjamin Franklin, Patrick Henry, James Madison, Thomas Jefferson, and

George Washington – favored "independency." Many others sought to remain loyal to the Crown. In this instance, the disagreement was open, but hardly "free." Tories or Loyalists were often dispossessed, tarred and feathered, and exiled to Canada or England. *See* GORDON S. WOOD, THE RADICALISM OF THE AMERICAN REVOLUTION (1993).

After the Constitutional Convention of 1787, James Madison, Alexander Hamilton, and John Jay wrote under the pen name of "Publius" to encourage the ratification of the proposed Constitution in the convention of the State of New York. THE FEDERALIST PAPERS, as these pamphlets or lengthy op-eds came to be known, are revered by some as a masterful commentary on the Constitution. But in another important body of pamphlets Anti-Federalists strongly and openly opposed ratification of the Constitution, in part because of its lack of a Bill of Rights cabining the authority of the federal government, which had been given many powers it hitherto lacked under the Articles of Confederation. *See, e.g.*, THE COMPLETE ANTI-FEDERALIST (HERBERT STORING and MURRAY DRY EDS., 7 vols., 1963-1981). The very fact that debate on this crucial matter was "uninhibited, robust, and wide-open" led Madison himself to change his mind about the need for a Bill of Rights, which he championed in the First Congress. The *consensus* for ratification was thus born out of *conflict*.

In the very first administration President Washington sought the views of the Secretary of State and of the Secretary of the Treasury over the constitutionality of a proposal to establish the Bank of the United States. Basing his view on a strict construction of the federal powers enumerated in

Article I, § 8 of the Constitution, Thomas Jefferson urged that the proposal was unconstitutional. Alexander Hamilton – employing a theory of implied rights – argued that the creation of a national bank was constitutional. This famous split of opinion in the first Cabinet sowed the seeds for the emergence of competing political parties. This Court eventually adopted Hamilton's approach, *McCulloch v. Maryland,* 17 U.S. (4 Wheaton) 316 (1819), but once again *consensus* was born out of *conflict*.

As the country lurched from one compromise over slavery to another, abolitionists and upholders of slavery vociferously advocated opposing views on this burning issue. *See, e.g.*, HENRY MAYER, ALL ON FIRE: WILLIAM LLOYD GARRISON AND THE ABOLITION OF SLAVERY (2008); PHILLIP S. PALUDAN, A COVENANT WITH DEATH (1975). For example, Senator Stephen Douglas and former Congressman Abraham Lincoln debated one another often about the politics and morality of slavery. These encounters throughout Illinois provide another example of "uninhibited, robust, and wide-open" debate. The State of Illinois did not then imagine that it could open a forum only to Douglas or Lincoln, and it did not – as in the present case – ban both Douglas and Lincoln because the subject matter of slavery and its abolition was too "controversial."

Shortly before the Lincoln-Douglas debates, this Court attempted its own form of compromise on slavery in its 5-4 decision in *Dred Scott v. Sandford*, 60 U.S. (19 Howard) 393 (1857). Nearly every newspaper in the country ran accounts of the decision on their front pages and discussed the opinion in heated editorials. No matter what the views expressed on the

Court's opinions, nearly all realized that the time for compromise had passed. *See*, e.g., DON E. FEHRENBACHER, THE DRED SCOTT CASE: ITS SIGNIFICANCE IN AMERICAN LAW AND POLITICS (1978). The house divided did not stand. Because there was no *consensus* on racial equality, horrific *conflict* ensued. As Lincoln said in his Second Inaugural, "And the war came."

The eminent abolitionist Frederick Douglas wrote of the Emancipation Proclamation: "The first of January, 1863, was a memorable day in the progress of American liberty and civilization. It was the turning-point in the conflict between freedom and slavery. A deathblow was then given to the slaveholding rebellion." Within days, the Illinois legislature passed a resolution condemning the proclamation as "unwarrantable in military as in civil law; a gigantic usurpation ..., a revolution in the social organization of the Southern States ... [that] invites servile insurrection ... a means of warfare, the inhumanity and diabolism of which are without example in civilized warfare, ... which the civilized world will denounce as an uneffaceable disgrace to the American people." *Illinois State Register* (Springfield, Jan. 7, 1863) at 1. No one in Rochester gagged Douglass. No one in Springfield stopped the Legislature from criticizing the President on a controversial matter.

E. Examples of Overt Abridgment of Speech on Viewpoints Contrary to Those Held by Public Officials

1. *Sedition Laws.* Sometimes the political branches sought to suppress unpopular viewpoints by overtly

targeting political opposition to the government as "seditious." Perhaps the most notorious example of this sort of abridgement of free speech was the Sedition Act of 1798, 1 Stat. 596. By its terms, it was self-interested partisan legislation, not an Act designed to avoiding sedition. The Federalists carefully inserted a "sunset clause" allowing the Act to expire in 1801, so that if Jefferson won the election of 1800, the Act could not be used against Federalists for opposing the Jefferson administration. JOHN CHESTER MILLER, CRISIS IN FREEDOM: THE ALIEN AND SEDITION ACTS (1952). Although this Court never ruled on the constitutionality of the Sedition Act, the Virginia Resolutions (drafted by Madison) clearly repudiated the Act as unconstitutional and the federal government subsequently enacted and carried out a program of reimbursement of fines levied under the Act. *New York Times v. Sullivan* 376 U.S. 254, 274-76 (1964).

During World War I Congress enacted a sedition law that rendered illegal the use of "disloyal, profane, scurrilous, or abusive language" about the United States, or saying or publishing anything "tending to bring the government into disrepute." The war was over by the time the first case on this legislation reached this Court, which unanimously sustained the conviction of the general secretary of the Socialist Party for distribution of antiwar pamphlets to potential draftees. *Schenck v. United States*, 249 U.S. 47 (1919). The Court also sustained the conviction of Eugene Debs, a prominent labor leader and candidate for the presidency, for a campaign speech he delivered against American involvement in World War I. *Debs v. United States*, 249 U.S. 211 (1919). And the Court sustained the conviction of an anarchist for

distributing leaflets denouncing President Wilson's short-lived invasion of the Soviet Union and calling for a general strike in New York. *Abrams v. United States.* 250 U.S. 616 (1919).

Thousands served long jail terms during both world wars, solely because of their conscientious objection to these wars. *See, e.g.*, THESE STRANGE CRIMINALS: AN ANTHOLOGY OF PRISON MEMOIRS BY CONSCIENTIOUS OBJECTORS FROM THE GREAT WAR TO THE COLD WAR (PETER BROCK ED. 2004). Few, if any, of these convictions would now be affirmed under the approach to protection of free speech that this Court adopted during the Vietnam War. *See Brandenburg v. Ohio*, 395 U.S. 444 (1969), reversing *Whitney v. California*, 274 U.S. 357 (1927).

No matter what one thinks of the tendency to diminish the protection of civil liberties during wartime, *see, e.g.*, WILLIAM H. REHNQUIST, ALL THE LAWS BUT ONE: CIVIL LIBERTIES DURING WARTIME (1998), the consensus that has now emerged in this Court on freedom of speech surely means that no governmental agency could have banned discussion of waterboarding by *both* Senators McCain and Obama during the past presidential campaign on the view that this form of torture is "controversial." *See, e.g., Hudson v. McMillian*, 503 U.S. 1, 26 (1992) (Thomas, J., dissenting) ("water torture" violates Eighth Amendment prohibition against cruel and unusual punishment).

2. *Gagging discussion of abolition.* From 1836 to 1844 the House of Representatives regularly adopted a rule prohibiting presentations of petitions urging the abolition of slavery in the District of Columbia. In 1836

the Senate rejected a gag rule, while adopting a procedure that had the same effect. John Quincy Adams, the only former President to serve in the House of Representatives, constantly urged that the gag rule adopted by the House notoriously ignored the limits on its power set by the provision in the First Amendment commanding Congress to "make no law ... abridging the right of the people ... to petition the government for a redress of grievances." Adams eventually prevailed when the gag was rescinded in 1844. *See, e.g.*, WILLIAM LEE MILLER, ARGUING ABOUT SLAVERY: JOHN QUINCY ADAMS AND THE GREAT BATTLE IN THE UNITED STATES CONGRESS (1995).

During the height of abolitionist fervor, Northerners frequently sought to influence the national debate by writing or sending books about the "peculiar institution" to Southerners. In reaction to this pressure of "outside agitators," slave-state legislatures attempted to suppress this communication as "seditious." Section 26 of the Virginia Sedition Law (enacted in 1831-1832, 1835-1836, 1847-1848) imposed criminal sanctions on any free person who "by speaking or writing, maintain[s] that owners have not right of property in their slaves." THE CODE OF VIRGINIA 809 (1860). Section 28 of this *state* law even purported to fine or imprison *federal* postmasters who failed to burn books that "aid the purposes of abolitionists" by "inculcating resistance to the right of property of masters in their slaves." *Id.* And President Andrew Jackson's Postmaster General informally sought to ban delivery of abolitionist literature by the U.S. Post Office in the South. SLAVERY ATTACKED 41,52 (JOHN L. THOMAS ED. 1965).

F. Silencing All Viewpoints on Controversial Matters Violates the Governmental Duty of Nondiscrimination in Political Speech

After the enactment of the Thirteenth Amendment, it is easy to see that the Sedition Act of Virginia is unconstitutional. But even before the Thirteenth Amendment, legislation of this sort violated the First Amendment. This is not an anachronistic judgment made with twenty-twenty hindsight. It is the view of a leading abolitionist, William Ellery Channing, who wrote at the time of the reenactment of the Virginia law:

> Of all powers, the last to be entrusted to the multitude of men, is that of determining what questions shall be discussed. The greatest truths are often the most unpopular and exasperating: and were they to be denied discussion, till the many should be ready to accept them, they would never establish themselves in the general mind. The progress of society depends upon nothing more, than on the exposure of time-honored abuses, which cannot be touched without offending multitudes, than on the promulgation of principles, which are in advance of public sentiment, and practice, and which are constantly at war with the habits, prejudices, and immediate interests of large classes of the community. Of consequence, the multitude, if once allowed to dictate or proscribe subjects of discussion, would strike society with spiritual blindness, and death. The world is to be carried forward by truth, which at first offends, which wins its way by degrees, which the many hate and would rejoice to crush. The

> right of free discussion is therefore to be guarded by the most sacred, and the most endangered of all our rights. William E. Channing, *Letter to James G. Birney* (Nov. 1, 1836).

The great abolitionist and early feminist Susan B. Anthony noted "It was we, the people; not we, the white male citizens; nor yet we, the male citizens; but we, the whole people, who formed the Union." As noted above, in 1848 she and Elizabeth Cady Stanton and the other participants at the Seneca Falls Convention added two critical words – "*and women*" – to the self-evident truth about those who are "created equal." The women of Seneca Falls aptly described the injustice of exclusion of women from participation in the republic as full citizens in the language of a public grievance, redolent of the long lists of grievances set forth against concentrated, monarchical power in the Declaration of Independence:

> The history of mankind is a history of repeated injuries and usurpations on the part of man toward woman, having in direct object the establishment of an absolute tyranny over her. To prove this, let facts be submitted to a candid world. He has never permitted her to exercise her inalienable right to the elective franchise. He has compelled her to submit to laws, in the formation of which she had no voice. He has withheld from her rights which are given to the most ignorant and degraded men--both natives and foreigners. Having deprived her of this first right of a citizen, the elective franchise, thereby leaving her without representation in the halls of legislation, he has oppressed her on all sides.

1 THE HISTORY OF WOMAN SUFFRAGE 70 (ELIZABETH CADY STANTON, SUSAN B. ANTHONY, AND MATILDA JOSLYN GAGE, EDS, 1881).

In both instances – abolitionism and inclusion of women in the prerogatives and duties of full citizenship – public officials attempted to stifle or prohibit the discussion of controversial ideas. Neither of these examples of muzzling and gagging is a curious relic of the past. Both experiences are illustrative counter-examples of the current doctrine of this Court. For example, in *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819 (1995), this Court ruled that where a public university had allowed the use of student fees for a Jewish student organization and a Muslim group, it violated the First Amendment guarantee of Free Speech when it withheld funding to a student publication that "primarily promote[d] or manifest[ed] a particular belie[f] in or about a deity or an ultimate reality." 515 U.S. at 823. The dissent argued that there was no viewpoint discrimination because the university had limited *all* religious speech, both theistic and atheistic.

This is precisely the argument of Respondent in this case: that the state may exclude from its specialty plate program not only a message such as the one that petitioners seek to express ("Choose Life"), but also a message such as that approved for specialty plates in Montana ("Pro-Family, Pro-Choice)."[4] This is precisely the sort of *blanket exclusion of a controversial theme*

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[4] See http://www.choose-life.org/states.htm (last visited May 15, 2009). Petitioners have no objection to Illinois approving a "pro-choice" plate. Pet. 10, note 8.

from a public forum that *Rosenberger* rejected: "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."[5] 515 U.S. at 831. Hence, this Court's review is now necessary to resolve the disagreement over the meaning of *Rosenberger* and its implications for the dividing line between viewpoint and content-based discrimination.

II. In Acknowledged Conflict with Other Circuits, the Court of Appeals Eroded the Understandings that Standardless Regal Power is "Absolute Tyranny" and that Standardless Administrative Authority is Arbitrary

A. Introduction: The Absence of Meaningful Standards in the Illinois Specialty License Plate Scheme

Respondent acknowledges that he may not "*arbitrarily* begin issuing a new plate category." Pet.App.62a, 10a-11a. Neither the state not the court of appeals takes this point seriously enough. Respondent states an obvious truth that no parliament can bind a subsequent one, Pet.App.27a, but never explains why a legislative body that takes over various administrative functions is not thereby responsible for

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[5] In rejecting Arizona's argument that its licensing scheme did not constitute viewpoint discrimination, the Ninth Circuit directly relied on this passage in *Rosenberger*. *Arizona Life Coalition, Inc. v. Stanton*, 515 F.3d 956, 971 (9th Cir.). The Seventh Circuit expressly disagreed with the Ninth Circuit's reading of *Rosenberger*. Pet.App. 26a-27a.

the same articulation of standards meant to inform, guide, and control administrative agencies and thus comply with the nondiscrimination principle discussed in this brief in Part I above. *See, e.g., Shuttlesworth v. City of Birmingham*, 394 U.S. 147 (1969).

The court of appeals repeated the point that a legislature cannot bind a future one, Pet.App.11a. But it did not explain how any state legislature escapes the command of the Fourteenth Amendment: "No State shall...." It ignored the teaching of this Court that lack of standards generates arbitrariness. *R.A.V. v. City of St. Paul*, 505 U.S. 377, 393-94 (1992); *City of Lakewood v. Plain Dealer Publ'g Co.*, 486 U.S. 750, 757-58 (1988); *Niemotko v. Maryland*, 340 U.S. 268, 273 (1951); *Thornhill v. Alabama*, 310 U.S. 88,97 (1940). And it provoked a circuit conflict by acknowledging important differences with other circuits on this very issue. Pet.27a-30a.

B. From the Revolutionary Rejection of Despotic and Tyrannical Power to the Insistence on Administrative Procedures to Inform, Guide and Control Governmental Discretion, Written Standards Have Been a Hallmark of American Constitutionalism

To help situate the decision on whether to grant certiorari in this case, *amici* offer some historical notes on the connection between the complete absence of any meaningful standards in the Illinois statutory and administrative regime dealing with specialty license plates and the arbitrary denial of the application sought by over 26,000 citizens of Illinois to express

their viewpoint on adoption as an alternative to abortion.

The connection between written standards and the rejection of arbitrary power has been a central theme in American constitutional history. From the dawn of the Republic to the burgeoning of multiple administrative agencies in the mid-twentieth century, America has insisted upon written constitutional norms and standards to guard against the recurrence of standardless, arbitrary power.

When the British imperial forces surrendered in 1781 at Yorktown to the improbable republican victors under the command of General Washington, the military band played "The World Turned Upside Down." European power was regal, and therefore concentrated. In most instances, regal power was also imperial, governing indigenous peoples and colonial settlers from the capital of the empire, minimizing the capacity of these people to govern themselves. In "the new order of the ages," it is not a monarch, but the People who are sovereign and who ordain and establish a written constitution granting some powers (e.g., Art.I,§8; Amend. XIII, §2) and refusing others (e.g., Art.I,§§9-10; Amend. I-VIII) to their elected representatives.

The Declaration of Independence states several "self-evident" truths as central principles of the American Revolution:

> That all men are ... endowed by their Creator with certain unalienable rights; that among these are life, liberty, and the pursuit of happiness; that, to secure these rights,

> governments are instituted among men, deriving their just powers from the consent of the governed. 1 Stat. 1 (1776).

The British Constitution set limits – then and now – upon royal power, but the very fact that this form of constitutionalism is *unwritten* led in the American experience to the conclusion that concentrated power of an imperial monarch was "absolute despotism" and "absolute tyranny":

> a long train of abuses and usurpations, pursuing invariably the same object, evinces a design to reduce them under absolute despotism .... The history of the present King of Great Britain is a history of repeated injuries and usurpations, all having in direct object the establishment of an absolute tyranny over these states. *Id.*

The bulk of the Declaration is a long statement of unredressed grievances that the colonists had addressed to the Crown in "humble petitions," all of which went unheeded and unanswered. The failure to grant a full and fair hearing to these grievances made "due process of law" a rallying cry of the American Revolution: "whenever any form of government becomes destructive of these ends, it is the right of the people to alter or to abolish it, and to institute new government, laying its foundation on such principles, and organizing its powers in such form, as to them shall seem most likely to effect their safety and happiness." *Id.*

Having declared their right and duty to throw off tyrannical and despotic government, the

revolutionaries immediately set about the task of providing "new guards for their future security" by establishing *written constitutions* in the independent states, each of which separated powers and secured religious and civil liberties and fair procedures to serve as safeguards against the *arbitrary, standardless,* concentrated, and unresponsive power of an imperial monarchy against which the revolutionaries rebelled. *See* GORDON S. WOOD, THE CREATION OF THE AMERICAN REPUBLIC, 1776-1789 (1969).

In Part I above, we noted examples of abridgement of freedom of speech directly targeting those seeking to end slavery and exclusion of women from full participation in civic life. We note now that when state or local officials have refused to issue a permit to assemble peaceably, to march in protest against perceived injustices, or to distribute literature from door to door (sometimes in very public spaces such as a sidewalk, an airport, or a state fair ground), the underlying cause of the problem has often been that decision-makers (whether in the legislative or executive branches of state and local governments) who determine access to a forum have operated without any standards to inform, guide, or control their discretion. *See generally*, KENNETH CULP DAVIS, DISCRETIONARY JUSTICE (1977).

Amici note, moreover, that those who have been deterred in engaging in expressive activity have often been members of racial or religious minorities. *See, e.g.*, *Shuttlesworth v. City of Birmingham*, 394 U.S. 147 (1969), *Murdock v. Pennsylvania*, 319 U.S. 105 (1943); *Niemotko v. Maryland*, 340 U.S. 268 (1951), *Heffron v. International Society for Krishna Consciousness,* 452 U.S. 640 (1981).

Thus, the fact of *standardlessness*, at the heart of the second question presented by petitioners, has in American history been frequently been linked closely to the violation of the duty of *governmental nondiscrimination*, at the heart of the first question presented by petitioners. The Court should grant the petition and resolve both of these recurring and important questions.

CONCLUSION

For the reasons stated above, *amici curiae* urge the Court to grant the petition.

Respectfully submitted,

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