

IN THE UNITED STATES COURT OF APPEALS  
FOR THE EIGHTH CIRCUIT

Docket No. 08-1429

KEVIN ROACH, *et al.*,

Plaintiffs below,  
Appellees,

v.

OMAR DAVIS, in his official capacity as  
Director of the Missouri Department of  
Revenue, *et al.*

Defendants below,  
Appellants.

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: An appeal from the United  
: States District Court for  
: the Western District of  
: Missouri, Western Division  
: Hon. Scott Wright, U.S.D.J.  
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**BRIEF FOR AMICI CURIAE EAGLE FORUM EDUCATION & LEGAL  
DEFENSE FUND, LAW STUDENTS PRO-LIFE AT WASHINGTON  
UNIVERSITY IN ST. LOUIS SCHOOL OF LAW, AND STUDENTS FOR  
LIFE AT SAINT LOUIS UNIVERSITY FILED IN SUPPORT OF  
PLAINTIFFS-APPELLEES FOR  
AFFIRMANCE OF THE JUDGMENT BELOW**

Andrew Schlafly  
939 Old Chester Rd.  
Far Hills, NJ 07931  
Telephone: 908-719-8608  
Fax: 908-934-9207  
Attorney for *Amici Curiae*  
Eagle Forum Education & Legal  
Defense Fund, *et al.*

## CORPORATE DISCLOSURE STATEMENT

*Kevin Roach, et al. v. Davis, et al.*, No. 08-1429

Pursuant to Federal Rule of Appellate Procedure 26.1, *Amici Curiae* Eagle Forum Education & Legal Defense Fund, Law Students Pro-Life at Washington University in St. Louis School of Law, and Students for Life at Saint Louis University make the following disclosure:

1) For non-governmental corporate parties please list all parent corporations:

None.

2) For non-governmental corporate parties please list all publicly held companies that hold 10% or more of the party's stock:

None.

3) If there is a publicly held corporation which is not a party to the proceeding before this Court but which has as a financial interest in the outcome of the proceeding, please identify all such parties and specify the nature of the financial interest or interests:

None.

4) In all bankruptcy appeals counsel for the debtor or trustee of the bankruptcy estate must list: 1) the debtor, if not identified in the case caption; 2) the members of the creditors' committee or the top 20 unsecured creditors; and, 3) any entity not named in the caption which is active participant in the bankruptcy proceeding. If the debtor or trustee is not participating in the appeal, this information must be provided by appellant.

Not applicable.

/s/ Andrew L. Schlafly  
Andrew L. Schlafly  
Attorney for *Amici Curiae* Eagle Forum Education & Legal Defense Fund, *et al.*

Dated: July 16, 2008

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## **STATEMENT OF IDENTITY, INTEREST AND SOURCE OF AUTHORITY TO FILE**

Eagle Forum Education & Legal Defense Fund (“Eagle Forum ELDF”), a nonprofit organization founded in 1981, is a pro-family group that has long advocated fidelity to the text of the U.S. Constitution. As part of its mission to “support the sanctity of human life” consistent with the Declaration of Independence,<sup>1</sup> and to promote the welfare and defend the interests of the traditional family and all of its members, Eagle Forum ELDF has long advocated ensuring adherence by state governments to the rights of free speech of pro-life advocates. Eagle Forum ELDF has a direct and vital interest in application of the First Amendment protections of free speech to advocates of “Choose Life” license plates, which is the issue presented before this Court.

Eagle Forum ELDF has been cited and quoted by a Court of Appeals in the past. *See C. N. v. Ridgewood Bd. of Educ.*, 430 F.3d 159, 169 n.11 (3<sup>rd</sup> Cir. 2005).

Law Students Pro-Life at Washington University in St. Louis School of Law (“LSPL”) is an unincorporated, nonprofit student organization at Washington University in St. Louis. Its purpose is to bring students together in order to facilitate respectful discussion and debate of pro-life issues (especially their legal aspects), to assist in disseminating information relating to the pro-life cause, and to

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<sup>1</sup> <http://www.eagleforum.org/misc/descript.html> (Eagle Forum Mission statement).

engage in service projects to improve and benefit the school and community. LSPL's mission includes advocating for the protection of community members' right to express their pro-life views. Accordingly, LSPL has a direct interest in the application of First Amendment protection to the "Choose Life" license plate message, which is the issue presented before this Court.

Students for Life at Saint Louis University ("SFL at SLU") is an unincorporated, non-profit collegiate organization committed to upholding the fundamental right to life. Its mission calls members to "active means of building a culture of life that rejects the institution of abortion." In keeping with this purpose, SFL at SLU opposes the selective censorship of speech that is reflective of that culture of life. Therefore, SFL at SLU has a clear and imperative interest in the protection of the right for the "Choose Life" message to appear on specialty license plates in the State of Missouri, which is the issue presented before this Court.

The parties to this appeal have consented to the filing of an *amici curiae* brief by Eagle Forum ELDF and the student groups in this action.

## BACKGROUND

In more than one-third of the United States, drivers have the opportunity to purchase “Choose life” specialty license plates. Montana, South Dakota, Oklahoma, Arkansas, Louisiana, Mississippi, Alabama, Florida, Georgia, Tennessee, Kentucky, Indiana, Ohio, Pennsylvania, Maryland, Connecticut, and Hawaii all offer “Choose life” plates to their citizens. *See* <http://www.choose-life.org/states.htm>. Missouri became the 18<sup>th</sup> state to offer these license plates by virtue of this lawsuit and the decision below. Specialty license plates are obviously popular with the public and successful in application.

In 1996, Florida County Commissioner Randy Harris came up with the idea of “Choose life” license plates as a way to raise money for needy causes. Jay Krall, “Abortion Debate Goes to the Plate; ‘Choose Life’ License Plates Are Provoking Pro-Choice Lawsuits,” *Pittsburgh Post-Gazette* A16 (June 16, 2002). Mr. Harris proposed that a special pro-life license plate be offered to citizens alongside many other specialty plates already available. Mr. Harris envisioned sales of this license plate raising money for women in crisis pregnancies, just as numerous other specialty plates raised funds for other causes. Marc Caputo, “Choose Life plates most popular in Palm Beach,” *Chattanooga Times Free Press*

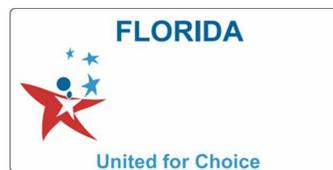
(Tennessee) A4 (July 1, 2001). Funds from these plates have also been used to support adoption and other pregnancy-related services for struggling families. *Id.*

An example of a “Choose life” license plate used elsewhere is the following plate, which is currently and successfully used on cars in Alabama:<sup>2</sup>



**Pro-life license plate**

In addition several states, including Montana and Hawaii, have allowed specialty license plates that promote the views of drivers who favor abortion rights, such as this proposed “pro-choice” license plate for the State of Florida:<sup>3</sup>



**Pro-choice license plate**

Kevin Roach founded “Choose Life” of Missouri, Inc., and continues to serve as president and chairman of the organization. *Choose Life of Mo., Inc. v. Vincent*, 2008 U.S. Dist. LEXIS 6524, \*3 (W.D. Mo. Jan. 23, 2008) (JA 575). To further the mission of the organization, Mr. Roach sought approval for a “Choose life” license plate in Missouri. Missouri currently allows specialty plates for a

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<sup>2</sup> <http://www.marshallco.org/probate/tags/images/ChseLf.jpg>

<sup>3</sup> [http://www.votervoices.net/Files/FLFPC/Images/New%20Picture%20\(1\)\(1\).jpg](http://www.votervoices.net/Files/FLFPC/Images/New%20Picture%20(1)(1).jpg)

wide spectrum of organizations and causes ranging from the religious Knights of Columbus to the Masons to the National Association for the Advancement of Colored People (NAACP). Missouri also allows specialty plates for many fraternities and sororities. In fact, about 70 specialty plates have been approved by legislative enactment in Missouri, and many more have additionally been approved through the application process used by Mr. Roach. *Id.* at \*4-7.

Mr. Roach fully complied with the applicable procedure for obtaining a specialty plate, which consisted of obtaining a legislator to sponsor the plate, listing at least 200 people who intended to purchase the plate, describing the plate in an application to the Missouri Department of Revenue, and paying an application fee of \$5,000. *Id.* at \*6 (JA 577). The Missouri Department of Revenue, as required by law, forwarded this application to the Joint Committee on Transportation Oversight for consideration. The Joint Committee is comprised of seven Missouri senators, seven Missouri representatives, and three non-voting members holding state positions.

State law permits rejection of the application if only two Missouri senators object, and abortion rights supporters Joan Bray and Rita Heard Days submitted a letter to the Chair of the Joint Committee in opposition to the application. *Id.* at

\*6-7 (JA 577-78). There is no dispute that the application complied with all of the procedural requirements, and their objection was plainly based on viewpoint.

The Joint Committee approved four other applications on the day of the hearing, February 21, 2006, but rejected the “Choose life” application. The Joint Committee approved applications by the following private organizations: Ethan and Friends for Autism (with the slogan “Understand Autism”), Missouri Cattlemen Foundation (having the slogan “Show Me Beef”), Missouri Caves and Karst Conservancy (carrying the slogan “The Cave State”), and Missouri Support our Troops, Inc. (featuring the slogan “Support Our Troops”). The Joint Committee rejected an appeal on May 9, 2006, because “the same two senators submitted a letter opposing Choose Life’s application.” *Id.* at \*7 (JA 578).

Missouri Statute 21.795(6) authorizes a veto by any member of the Joint Committee of an application for any reason whatsoever, which can (as here) be based on viewpoint. As explained further by the decision below:

Both parties agree that there are no objective standards, guidelines or written criteria to govern the Joint Committee’s decision regarding whether an eligible, private organization’s plate design is approved. Any application can be rejected by a single vote of a Joint Committee member and no reason or explanation is required by those in opposition. Both Senators Bray and Days testified in their depositions that they are opposed to the abortion debate on license plates. Neither party disputes that Senator Bray sponsored a bill in the Senate in 2005 to create a pro-choice license plate.

*Id.* at \*7-8 (JA 578).

Mr. Roach and his organization sued, asserting a violation of their First Amendment rights. Judge Scott Wright, writing for the court below, agreed and ordered Missouri to approve Choose Life’s specialty license plate. *Id.* at \*26 (JA 589-90). Judge Wright invalidated Missouri Statute 21.795(6) as unconstitutional and entered an injunction requiring Missouri to issue the “Choose Life” specialty license plate.

Missouri, acting through its Democratic-controlled Attorney General’s office, has appealed the decision to this Court. Missouri also sought to block Judge Wright’s order during this appeal, but by Order dated March 25, 2008, this Court rejected that request.

## **ARGUMENT**

The court below properly invalidated Missouri Statute 21.795(6) as unconstitutional, and its injunction requiring Missouri to issue the “Choose Life” specialty license plate should be upheld. *Choose Life of Mo.*, 2008 U.S. Dist. LEXIS at \*25 (JA 589). The State’s denial of Mr. Roach’s application for a pro-life license plate constituted an infringement on the First Amendment right of free speech of plaintiffs, and indeed of all Missouri citizens.

The State of Missouri created a public forum in the form of specialty license plates, whereby owners of vehicles could express support for a viewpoint by paying extra for a particular type of plate. The specialty license plate is a public forum opened by the government. Once opened, it is well-established that government may impose only viewpoint-neutral restrictions that are reasonable. Government may not, as Missouri did here, discriminate based on viewpoint or the content of the speech.

Yet Missouri did unconstitutionally discriminate against speech based on viewpoint by censoring the “Choose Life” license plates. Missouri approved every other proposal for a new specialty plate presented at the same time as the “Choose Life” plates, and has approved other slogans for plates that are potentially controversial. But Missouri singled out the “Choose Life” plates and rejected them, despite their success in 17 other states. This content-based discrimination against the “Choose life” slogan violated the First Amendment.

## **I. Specialty License Plates Are Private Speech, Not Government Speech.**

Specialty license plates enable some private expression in the public forum of the license plate, while also raising some revenue for the State.

Choose Life of Missouri, Inc., argued correctly below that “when a private organization obtains a specialty license plate, the message on the plate is private speech, not government speech.” *Choose Life of Mo.*, 2008 U.S. Dist. LEXIS at \*10-11 (JA 580). It pointed out that “the private organization creates the message when it submits its application to the Missouri Department of Revenue and the State of Missouri does not create or vote on the message to be contained on the specialty license plate. Therefore, ... even if the Joint Committee had approved Choose Life’s application for a specialty license plate, the message chosen by Choose Life could not be inferred as being the speech or message of the State of Missouri.” *Id.* at \*11 (JA 580).

Indeed, it is clear from the other specialty license plates approved by Missouri that they could not possibly qualify as government speech. As the court below observed, the notion that specialty license plates constitute government speech “is significantly contradicted by the nature of messages that are already on license plates within the State of Missouri. For example, in order to obtain a Knights of Columbus specialty license plate, one must be a ‘practicing Catholic’ and give a donation to this organization.” *Choose Life of Mo.*, 2008 U.S. Dist.

LEXIS at \*13 (JA 582). The State of Missouri does not engage in Catholic speech. The “Choose Life” message could not possibly be considered “government speech” any more than the approved Catholic message could be.

Other specialty license plates approved by the State of Missouri include the Grand Lodge specialty license plate, which requires that one be a member of that society and have a “belief in God” in order to obtain such a plate. A “belief in the existence of a Supreme Being” is a necessary prerequisite before a Missouri car owner can obtain the approved specialty license plate from the Order of the Eastern Star. A ruling that license plates constitute “government speech” would trigger litigation to exclude these plates under the Establishment Clause. In fact, none of these plates is government speech, and neither is the “Choose Life” plate at issue here.

The Ninth Circuit, in ordering Arizona to allow a “Choose Life” specialty license plate, observed that it was “not concerned with the general validity of Arizona’s licensing requirements,” but rather focused on the nature of “Arizona’s [*specialty*] license plate program as a whole.” *Ariz. Life Coalition, Inc. v. Stanton*, 515 F.3d 956, 965 (9th Cir. 2008) (citing *Sons of Confederate Veterans v. Comm’r of Va. Dep’t of Motor Vehicles*, 288 F.3d 610, 619 (4th Cir. 2002), emphasis in original). The Court concluded that “[b]y allowing organizations to obtain [*specialty*] license plates with their logo and motto, Arizona is providing a forum

in which philanthropic organizations, *see* Ariz. Rev. Code § 28-2404(B), can exercise their First Amendment rights in the hopes of raising money to support their cause.” *Ariz. Life Coalition* 515 F.3d at 965.

The Arizona statute, like the Missouri statute at issue here, required evidence that at least 200 persons would purchase the new specialty plate. The Ninth Circuit held that this requirement, combined with a licensing fee for the specialty plates, reflected the State’s goal of generating revenue through the program. The Court concluded that “[t]he revenue raising purpose of the Arizona special organization plate program supports a finding of private speech.” *Ariz. Life Coalition* 515 F.3d at 966; *see also Sons of Confederate Veterans*, 288 F.3d at 620 (“The very structure of the program [, which required 350 prepaid applicants,] ensures that only special plate messages popular enough among private individuals to produce a certain amount of revenue will be expressed.”).

The “Choose Life” message does not amount to government speech merely because Missouri must approve its use. As in the Ninth Circuit decision that resulted in a ruling ordering Arizona to issue the specialty plates with the requested message, “there is nothing in the record to even suggest that” the State “intended to adopt the message of each special organization plate as its own state speech.” *Ariz. Life Coalition*, 515 F.3d at 968. In the Arizona case, as here, “the burden is on the nonprofit organization. If it wants to convey a certain message through the

Arizona specialty plate program, it must take the affirmative step of submitting an application.” *Id.* at 968. The organization applying for the plates, not the State, “bears ultimate responsibility for the content of the speech.” *Id.* See also *Planned Parenthood of S.C., Inc. v. Rose*, 361 F.3d 786, 794 (4th Cir. 2004) (holding that the car owners had the ultimate responsibility for the “Choose Life” license plate, even though authorized by the State legislature). The “literal speaker” is the owner of the car who purchases the plates, not the State, and thus the speech is private to the owner and is not government speech. *Arizona Life Coalition*, 515 F.3d at 967.

This is in sharp contrast with actual government speech, such as that found in *Johanns v. Livestock Mktg. Ass’n*, 544 U.S. 550 (2005). In *Johanns*, Congress directed implementation of the program, and Congress and the Secretary of Agriculture determined which speech an advertising campaign should contain. There the companies (beef producers) were required to support particular advertisements (promoting beef), and government officials actually “attend[ed] and participat[ed] in the open meetings at which proposals [we]re developed.” *Id.* at 561. Here, in contrast, no one is required to adopt or be associated with any message, and “the idea and message of the Choose Life plate originated with a private organization” and “not the legislature.” *Choose Life Ill., Inc v. White*, 2007 U.S. Dist. LEXIS 21863, \*17 (N.D. Ill. Jan. 19, 2007). See also *Sons of Confederate Veterans*, 288 F.3d at 621 (noting that Virginia’s criteria for specialty

plates “do[] not contain guidelines regarding the substantive content of the plates or any indication of reasons, other than failure to comply with size and space restrictions”).

Over 40 years ago, the United States Supreme Court addressed the analogous issue of whether a state motto on license plates (“Live Free or Die”) constituted a form of compulsion of private speech of the owner of the vehicle. The Court held that it was compelled (private) speech, and that the First Amendment protected the rights of drivers not to be so compelled. The State may not “invad[e] the sphere of intellect and spirit which it is the purpose of the First Amendment of our Constitution to reserve from all official control.” *Wooley v. Maynard*, 430 U.S. 705, 715 (1977) (quoting *West Virginia Bd. of Ed. v. Barnette*, 319 U.S. 624, 642 (1943)). More recently, the Supreme Court confirmed this reading of *Wooley*; the Court observed that “requiring a New Hampshire couple to bear the State’s motto, ‘Live Free or Die,’ on their cars’ license plates was an impermissible compulsion of expression.” *Johanns*, 544 U.S. at 557.

In applying this line of Supreme Court precedents, most courts have held that specialty or vanity license plates constitute private speech and not government speech. *See Sons of Confederate Veterans*, 288 F.3d at 621 & n.9; *see also Rose*, 361 F.3d at 794 (“The literal speaker of the Choose Life message on the specialty plate therefore appears to be the vehicle owner, not the State, just as the literal

speaker of the bumper sticker message is the vehicle owner, not the producer of the bumper sticker.”); *Perry v. McDonald*, 280 F.3d 159, 166 (2d Cir. 2001) (holding that restricting speech on vanity plates “concern[ed] private individuals’ speech on government-owned property”); *Lewis v. Wilson*, 253 F.3d 1077, 1079 (8th Cir. 2001) (holding that speech on vanity plates is private speech, and thus a restriction on a particular vanity plate is a restriction on private speech), *cert. denied sub nom Fischer v. Lewis*, 535 U.S. 986 (2002); *Choose Life Ill., Inc v. White*, 2007 U.S. Dist. LEXIS 21863 (N.D. Ill. Jan. 19, 2007) (concluding that since a private individual pays an extra fee to express a certain message with a specialty license plate, he or she is the literal speaker of that message).

## **II. Missouri’s Statute and Procedures Lack Adequate Protections against Viewpoint Discrimination.**

The State of Missouri created a public forum for private expression, as demonstrated above, and the First Amendment prohibits viewpoint-based discrimination of such expression of speech. Missouri Statute 21.795(6), as applied to the application for a “Choose Life” license plate, violated the First Amendment by authorizing censorship of speech based on the viewpoints of two individual Missouri senators. This statute, in effect, authorized Missouri legislators supporting abortion to act as censors of the “Choose Life” viewpoint in an unconstitutional manner.

Since Missouri has implicitly designated the license plates as a public forum, it cannot exclude speech based on content unless it “served a compelling state interest” and the exclusion is “narrowly drawn to serve that interest.” *Burnham v. Ianni*, 119 F.3d 668, 675 n.12 (8<sup>th</sup> Cir. 1997) (citing *Widmar v. Vincent*, 454 U.S. 263, 270 (1981)). The application of Missouri Statute 21.795(6) here utterly fails to satisfy that standard. No “compelling state interest” exists to censor a “Choose Life” license plate, and none has credibly been proposed. The successful use of this type of plate in over one-third of the United States demonstrates that no compelling state interest exists to ban it.

The constitutional safeguard against viewpoint-based censorship likewise applies in a “limited” rather than full public forum. *See Burnham*, 119 F.3d at 676 (holding that a viewpoint-based discrimination was unconstitutional as “the photographs were removed because a handful of individuals apparently objected to the plaintiffs’ views” and “[f]reedom of expression, even in a nonpublic forum, may be regulated only for a constitutionally valid reason”). The Missouri statute runs afoul of this constitutional principle by purporting to authorize viewpoint-based discrimination in order to restrict the expression of views with which a few members of the Legislature disagreed.

The viewpoint basis of the denial of the “Choose Life” application is self-evident. But even if it were not, the court below correctly held that plaintiffs need not prove that viewpoint discrimination caused the denial:

Under the law, plaintiff Choose Life is not required to show that it was denied the Choose Life license plate because of their viewpoint ... Choose Life need only show that there was nothing in the statutory language to prevent the Department of Revenue, specifically the Joint Committee, from denying the application for a specialty license plate because of its pro-life viewpoint.

*Choose Life of Mo.*, 2008 U.S. Dist. LEXIS at \*22-23 (JA 587-88); *accord Lewis*, 253 F.3d at 1079-80.

Appellants argue here that the allowance of a “Choose Life” license plate would result in more controversial proposals by opposing viewpoints, but that is no justification for censoring the “Choose Life” message. “Missouri attempted to avoid the abortion arena,” Appellants insist, as though that somehow justifies discrimination based on a viewpoint about abortion. Appellants Br. at 37. But as the Ninth Circuit decision on this issue explained, preventing a “Choose Life” group “from expressing its viewpoint out of a fear that other groups would express opposing views seems to be a clear form of viewpoint discrimination.” *Arizona Life Coalition*, 515 F.3d at 972; *cf. Lewis*, 253 F.3d at 1081 (“the mere possibility of a violent reaction to Ms. Lewis's speech is simply not a constitutional basis on which to restrict her right to speak”). That Court continued, “[a] ban on ‘controversial [speech]’ may all too easily lend itself to viewpoint discrimination”

and “[r]estrictions based on community standards of decency must be based on objective criteria set out in advance.” *Arizona Life Coalition*, 515 F.3d at 972 (quotations omitted).<sup>4</sup>

It is no obstacle to approval of a “Choose Life” plate that women who support abortion rights would not receive funds from it. Atheists cannot typically receive funds from the religious specialty plates already approved by Missouri. The one-sided distribution of revenue from the voluntary program is not a justification for suppressing speech and discriminating based on viewpoint. The Ninth Circuit decision on this issue addressed, and rejected, the notion that the marketplace of ideas is somehow advanced or protected by discriminating against a viewpoint:

The dissent’s assertion that no viewpoint discrimination occurs because the Guidelines discriminate against an entire class of viewpoints reflects an insupportable assumption that all debate is bipolar and that antireligious speech is the only response to religious speech. Our understanding of the complex and multifaceted nature of public discourse has not embraced such a contrived description of the marketplace of ideas. If the topic of debate is, for example, racism, then exclusion of several views on that problem is just as offensive to the First Amendment as exclusion of only one. It is as objectionable to exclude both a theistic and an atheistic perspective on the

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<sup>4</sup> Because the plaintiffs establish an ongoing violation of the First Amendment and seek only declaratory and injunctive relief, the Appellants’ claims of legislative immunity (Appellants Br. at 34) border on the frivolous. *Ex parte Young*, 209 U.S. 123 (1908). Because this Court can redress the injury with relief directed only at the executive officers of the Missouri Department of Revenue, the Court need not address the need for relief against individual legislators. *See Franklin v. Massachusetts*, 505 U.S. 788, 803 (1992).

debate as it is to exclude one, the other, or yet another political, economic or social viewpoint.

*Arizona Life Coalition*, 515 F.3d at 971 (quoting *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819, 831 (1995)).

It is disruptive to the marketplace of ideas to censor one side of the abortion debate, as Missouri has done here, and the First Amendment compels invalidating Missouri Statute 21.795(6) for purporting to authorize that censorship.

## CONCLUSION

The decision below should be affirmed.

Respectfully submitted,

/s/ Andrew L. Schlafly  
Andrew L. Schlafly  
*Counsel for Amici Curiae*  
939 Old Chester Rd.  
Far Hills, NJ 07931  
Telephone: 908-719-8608  
Fax: 908-934-9207

Dated: July 16, 2008

UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT  
*Kevin Roach, et al. v. Davis, et al.*, No. 08-1429

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Dated: July 16, 2008

/s/ Andrew L. Schlafly  
Andrew L. Schlafly  
*Counsel for Amici Curiae*

## CERTIFICATE OF SERVICE

I, Andrew L. Schlafly, counsel for *amici curiae* Eagle Forum Education & Legal Defense Fund, *et al.*, does hereby certify that on July 16, 2008, I served two true copies of the attached brief with an electronic, virus-scanned “pdf” version on a CD-ROM, via first-class, postage-prepaid U.S. mail, or have dispatched it to a third-party commercial carrier for delivery within 3 calendar days, to:

Counsel for Appellants:

Joel Anderson  
Assistant Attorney General  
Attorney General’s Office  
207 W. High Street  
P.O. Box 899  
Jefferson City, MO 65102

Counsel for Appellees:

Joel Lee Oster  
Kevin Theriot  
David C. LaPlante  
Alliance Defense Fund  
15192 Rosewood  
Leawood, KS 66224

/s/ Andrew L. Schlafly  
Andrew L. Schlafly  
*Counsel for Amici Curiae*