No. 08-1429

IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

KEVIN M. ROACH, *et al.*,
Plaintiffs-Appellees,

v.

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

On Appeal from the United States District Court
For the Western District of Missouri

BRIEF *AMICUS CURIAE* OF
THE NATIONAL LEGAL FOUNDATION,
in support of Plaintiff–Appellee
Urging Affirmance

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FRAP RULE 26.1 DISCLOSURE STATEMENT

Amicus Curiae The National Legal Foundation has not issued shares to the public, and it has no parent company, subsidiary, or affiliate that has issued shares to the public. Thus, no publicly held company can own more than 10% of stock.

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INTEREST OF THE *AMICUS CURIAE*

The National Legal Foundation (NLF) is a public interest law firm dedicated to the defense of First Amendment liberties and to the restoration of the moral and religious foundation on which America was built. The NLF and its donors and supporters, including those in Missouri, are vitally concerned with the outcome of this case because of the effect it will have on the rights of individual speakers to express their consciences on the abortion controversy.

The NLF submits this Brief pursuant to consent from Counsel for all Parties.

SUMMARY OF THE ARGUMENT

This Brief makes one argument not made by the Appellees (hereinafter collectively referred to as "Choose Life") and expands upon one argument made by Choose Life. Your *Amicus* argues that Appellants (hereinafter collectively referred to as the "Joint Committee") wrongly seek to shield their actions by qualified or common law legislative immunity, similar to that protected in the Speech or Debate Clause of the United States Constitution and in Article III § 19 of the Missouri Constitution. *Amicus* further argues that the Joint Committee disingenuously takes a baseless litigation posture that it knew or should have known was false concerning the nature of the abortion controversy in Missouri.

The Brief explains that neither qualified nor legislative (*i.e.* "speech or debate" type) immunity is proper when the suit is not one for damages against

government officials individually. Rather, because Choose Life sued the Joint Committee by naming its members in their official capacities, no immunity is available. The Brief also explains why the Joint Committee's denial of Chose Life's specialty license plate was not an act within the legitimate sphere of legislative activities.

Further, because Missouri has a decades-long history of vibrant debate over abortion, opening a forum for private citizens to voice an opinion in the matter is entirely consistent with Missouri's governmental history.

ARGUMENT

I. NO DOCTRINE OF IMMUNITY APPLIES BECAUSE THE MEMBERS OF THE JOINT COMMITTEE WERE SUED IN THEIR OFFICIAL CAPACITIES AND BECAUSE THE DENIAL OF CHOOSE LIFE'S APPLICATION FOR SPECIALTY LICENSE PLATE WAS THE PERFORMANCE OF AN ADMINISTRATIVE, AND NOT LEGISLATIVE, FUNCTION.

The Joint Committee has argued that it is immune from suit because its members are "legislators, not administrators or hired state employees." (Appellant's Br. 34.) The Joint Committee further argues that "legislative bodies . . . are given immunity for statements and actions taken while performing legislative acts." (Appellant's Br. 34.) Although not plainly set forth in its brief, the legislative immunity—also sometimes called "speech or debate" immunity—the Joint Committee appears to seek is ordinarily absolute but only available for legislators when conducting legislative acts and "defeats a damage suit at the

pleading stage, once it appears the actions complained of were within the immunity's scope." *Gorman Towers, Inc. v. Bogoslavsky*, 626 F.2d 607, 611-12 (8th Cir. 1980).

Notably, the Joint Committee has *not* argued for qualified immunity, a doctrine by which a more general category of governmental officials is shielded from liability, provided, among other things set out more fully below, the "evidence shows that those actions were taken in good faith." *Id.* at 611. Presumably, the Joint Committee did not even attempt to claim it was eligible for qualified immunity because it knew that was a losing argument.

Thus, Choose Life correctly argues in its brief that immunity from suit is not available to the Joint Committee in that they are not being sued as legislators and that their actions were not legislative. (Appellee's Br. 24 & n.1.) Your *Amicus* expands upon Choose Life's arguments to demonstrate further that whether the Joint Committee seeks shelter from a speech or debate style immunity or from qualified immunity, neither is available to it for its unilateral closing of the specialty license plate forum that the Missouri legislature has opened.

A. Qualified immunity is not available to the Joint Committee because its members were sued in their official capacities and no damages were sought against the individual defendants.

Qualified immunity is available to "government officials performing discretionary functions . . . [provided] their conduct does not violate clearly

established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). The protection, provided, however, is only against "civil damages," *id.*, and only when the defendants have been sued in their individual capacities. *Moore v. City of Wynnewood*, 57 F.3d 924, 929 n.4 (10th Cir. 1995); *Kentucky v. Graham*, 473 U.S. 159, 166 (1985). This narrow application of qualified immunity exists because once defendants are sued in their official capacities, the suit is against the entity the official represents and is not a suit against the official personally—the caveat being that the government entity "receive[] notice and opportunity to respond." *Id.*

Thus, in the instant matter, the Joint Committee is afforded no protection under a theory of qualified immunity. First, Choose Life is not seeking "civil damages" against the individual members of the Joint Committee. *See Harlow*, 457 U.S. at 818. Second, as the case heading plainly sets out, the members of the Joint Committee were sued in their official capacities, making the instant case not against the individuals *per se*, but rather against the state of Missouri. *See Graham*, 473 U.S. at 166. As such, qualified immunity does not apply.

B. Legislative, or "speech or debate" type, immunity is similarly unavailable to the Joint Committee because no damages are sought against the individual members of the Joint Committee, and they were acting outside their role where legislators traditionally have the power to act.

As set out briefly above, the Joint Committee seeks immunity from suit based upon a somewhat cryptic reference to the fact that the members of the Joint Committee are legislators. (Appellant's Br. 34.) Although Missouri's legislators are afforded absolute immunity from damage suits brought against them for actions taken within traditional legislative roles, the instant case is not a damage suit, nor were the members of the Joint Committee acting within traditional legislative roles when they denied Choose Life's application for a specialty license plate. Therefore, legislative immunity does not apply.

1. Legislative immunity is inapplicable in the instant matter because Choose Life has not sued for damages against individual legislators.

Absolute legislative immunity for state legislators derives from the common law, having crossed the ocean from England and achieving official recognition in the Speech or Debate Clause of the United States Constitution, providing federal legislators immunity within the four corners of the document. *Hartley v. Fine*, 595 F. Supp. 83, 84-85 (W.D. Mo. 1984). *See, also, Tenney v. Brandhove*, 341 U.S. 367, 372-73 (1951). Missouri has also codified speech or debate style immunity for its legislators within its own constitution. Mo. Const. art. III § 19 ("Senators

and representatives . . . shall not be questioned for any speech or debate in either house in any other place.")

Legislative immunity seeks to ensure that legislators are unimpeded by any fear of personal prosecution for legislative action they may take while representing their constituents. *Lake County Estates, Inc. v. Tahoe Reg'l Planning Agency*, 440 U.S. 391, 404-06 (1979). However, and especially important to the instant case, protection from suit under a theory of legislative immunity generally only applies to *damage suits* against public officials in their individual capacities. *Tenney*, 341 U.S. at 371; *Gorman Towers*, 626 F.2d at 611; and *Hartley*, 595 F. Supp. at 85. Therefore—subject only to a narrow exception discussed below which is inapplicable in the instant case—a suit for injunctive relief naming a legislator in his official capacity is outside the bounds of any reasonable application of legislative immunity.

Here, Choose Life has filed suit against the Joint Committee, challenging the facial validity of two sections of Missouri's specialty plate laws and seeking injunctive relief as a remedy. None of the Joint Committee was named personally in the suit, and all the named defendants, whether having voted for or against Choose Life's specialty plate application, are represented by a single attorney under a unified defense theory. (*See, e.g.*, Appellant's Br. Cover Sheet (counsel of record for all Joint Committee are from the state's attorney general's office).)

Furthermore, the Order of the court below in no way suggests liability to the individuals on Joint Committee and even goes so far as to refer to a singular "defendant" throughout the Order.[1] *See Choose Life of Mo., Inc. v. Vincent*, No. 06-0443, 2008 U.S. Dist. LEXIS 6524 at *25-26 (W.D. Mo. Jan. 23, 2008).

Although a court has, in rare instances, granted legislative immunity in cases seeking injunctive relief, the circumstances surrounding such a situation are quite different from the instant case. For instance, in *Colon Berrios v. Hernandez Agosto*, 716 F.2d 85, 86 (1st Cir. 1983), the court applied legislative immunity to a Puerto Rican senatorial committee being sought to be enjoined from conducting hearings in a high-profile civil rights case. The court held that the committee could not prospectively be prevented from ordering the hearings and other evidence gathering activities because such activities were legitimate legislative activity. *Id.* at 90. The senatorial committee was not found to be immune from depriving others

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[1] The full text of the Order reads as follows:

> Accordingly, it is hereby
> ORDERED that plaintiffs' Motion for Summary Judgment (Doc. #32) is granted. It is further
> ORDERED that defendant's [sic] Motion for Summary Judgment (Doc. #34) is denied. It is further
> ORDERED that the Clerk of the Court shall enter judgment in favor of the plaintiffs. It is further
> ORDERED that Missouri Statute 21.795(6) is hereby deemed unconstitutional and an injunction shall be entered requiring the defendant [sic] to issue the Choose Life specialty license plate.

Choose Life, 2008 U.S. Dist. LEXIS at *25-26.

of constitutional rights; rather, it was simply permitted to go about an essential component of the legislative process. *Id.*

Unlike in *Colon* where the injunction applied to a future event, in the instant case, the Joint Committee has already denied the application making the action ripe for challenge. It is much like in criminal law when a person cannot be preemptively arrested for a crime they seem likely to commit. Further, in *Colon*, the suit sought to exclude the committee from exercising a right that it had as a governing body—the right to conduct hearings and gather evidence. *See id.* Here, the injunction is sought to make sure that Missouri's laws are confined *within* constitutional boundaries. Thus, *Colon* is inapposite to the instant matter.

It is clear that absent exceptional circumstances not present here, legislative immunity should not be applied to a situation where the relief is not damages from the individual legislators, but injunctive relief from an unconstitutional government action. Therefore, the Joint Committee's claim for immunity falls flat on its face. Because the instant matter is not a "damage suit" against individual legislators, legislative immunity is unavailing to the Joint Committee.

2. Because the Joint Committee was not engaged in legislative activity, its actions in denying Choose Life's application for a specialty license plate are not immune from constitutional scrutiny.

In addition to the legislative immunity defense failing because the Joint Committee members were sued in their official capacities, its actions were also not

legislative and therefore not immune from suit. As set out more fully above, legislative immunity only provides absolute immunity to governmental officials and is only absolute "within its scope," namely to protect them from liability for *legislative* actions done in their official legislative capacity. *Hartley,* 595 F. Supp. at 85; *Tenney*, 341 U.S. at 377-78. The doctrine of legislative immunity seeks to ensure that legislators are unimpeded by any fear of personal prosecution for legislative action they may take while representing their constituents. *Lake County Estates*, 440 U.S. at 404-06.

Activities that are merely administrative, however, even if conducted by legislators, are not legislative, and therefore not immune. *Fortner v. City of Archie*, 70 F. Supp. 2d 1028, 1030 (W.D. Mo. 1999). Even "voting does not, in and of itself, establish an act as legislative." *Id.* Rather, a legislative act is a "formulation of policy governing future conduct for all or a class of the citizenry." *O'Brien v. City of Greers Ferry*, 873 F.2d 1115, 1119 (8th Cir. 1989). When the facts used to make the decision "'relate to particular individuals or situations' and the decision impacts specific individuals or 'singles out specifiable individuals,' the decision is administrative." *Fortner*, 70 F. Supp. 2d at 1030 (citations omitted).

O'Brien is especially helpful in evaluating Joint Committee's actions in the instant matter. There, local government officials conducted a special meeting for

the sole purpose of determining whether to appropriate money to defend a party to the suit. *O'Brien*, 873 F.2d at 1119. The vote on the appropriation was the only business conducted at the special meeting. *Id.* This Court held that such an act was executive and not legislative and therefore not subject to legislative immunity. *Id.* at 1119-20.

Furthermore, in *Fortner*, a local governing body approved raises for two particular individuals, but denied a raise to the plaintiff only, based upon her "status as a married woman." *Fortner*, 70 F. Supp. 2d at1030. Because the denial to the plaintiff clearly "single[d] out specifiable individuals," the court found it not to be a legislative act and determined that legislative immunity was not appropriate. *Id.*

As in *Fortner* and *O'Brien*, the Joint Committee simply singled out Choose Life in its denial of the specialty license plate application. They were not "formulat[ing] . . . policy governing future conduct for all or a class of the citizenry." *See O'Brien*, 873 F.2d at 1119. Rather, they saw an application that a few members of the Joint Committee did not like, and it exercised its unbridled discretion. In light of the fact that *all* the other specialty plate applications were approved by the Joint Committee on the same day that Choose Life's application was denied, the Joint Committee was "singl[ing] out specifiable individuals," which prevents their immunity defense. *See Fortner*, 70 F. Supp. 2d at 1030.

Because the Joint Committee was not "acting in a field where legislators traditionally have power to act," legislative immunity is not available to shield the Joint Committee's actions from constitutional scrutiny. *See Tenney*, 341 U.S. at 379.

II. PERMITTING PRIVATE CITIZENS TO CARRY THE ABORTION DEBATE TO SPECIALTY LICENSE PLATES IS CONSISTENT WITH THE ACTIONS OF MISSOURI'S GOVERNMENT BECAUSE IT HAS REPEATEDLY PROPOSED, AND OFTEN PASSED, LEGISLATION ADDRESSING ABORTION.

The Joint Committee asserts in its brief that by rejecting the Choose Life specialty plates, the Missouri legislature is "attempt[ing] to avoid entering the abortion arena." (Appellant's Br. 37.) Additionally, the Joint Committee notes that approving the Choose Life specialty plate may possibly convey an "appearance of political favoritism," as well as expose Missouri to the "politically sensitive arena of abortion politics." (Appellant's Br. 36-37.) Your *Amicus* will first show why history proves that Missouri has not tried to avoid the abortion debate, but instead have enthusiastically engaged in it.[2] Second, your *Amicus* will show that because Missouri has a long history of engaging in the abortion debate the Joint Committee's litigation posture is baseless as to that issue and should be ignored by this Court.

[2] Not too squeamish about promoting at least one side of the abortion debate, Senator Bray, a member of the Joint Committee denying Choose Life's application for a specialty license plate and named defendant in the instant case, sponsored a bill in 2005 to create a pro-choice specialty plate. (Appellant's Br. 14.)

A. <u>Since the late 1980s, all three branches of Missouri's government have participated in the abortion controversy, demonstrating the state's willingness to tolerate vigorous and open debate on the matter.</u>

There has been decades-long vibrant and vigorous debate waged within Missouri's government over the abortion question. Such regular and persistent activity serves as first-hand evidence that the Missouri government has not only *not* ignored the abortion controversy—it has met it head-on.

By way of example, in 1989 the Missouri legislature passed § 1.205 of the Missouri Revised Statutes, a law commonly known as the "life begins at conception" statute. This statute goes to the heart of the abortion debate stating in the preamble that "life begins at conception" and that "unborn children have protectable interests in life, health, and well-being." Mo. Rev. Stat. §§ 1.205.1(1), (2) (LEXIS through 2007 Sess.). When state-employed health professionals sought to overturn the statute on grounds that it was unconstitutional, Missouri successfully defended its law before the United States Supreme Court. *Webster v. Reprod. Health Servs.*, 492 U.S. 490, 501 (1989).

The Missouri legislature further demonstrated its willingness to have its voice heard in the abortion debate in 1999 when it passed the Infant Protection Act, a measure intended to eliminate a procedure colloquially known as "partial birth abortion." Mo. Rev. Stat. § 565.300 (LEXIS through 2007 Sess.). Both houses of the legislature passed the bill, but it was subsequently vetoed by former Governor

Mel Carnahan. Not content to have the people's voice silenced, however, Missouri's house and senate promptly overrode the governor's veto. For original and veto override votes, see http://www.house.mo.gov/content.aspx?info=/bills99/action99/aHB427.htm (last visited July 23, 2008). This ping-pong action between the legislative and executive branches attests to the fact that Missouri is not shy about voicing opinions about this hotly-debated topic.

Finally, in 2005, the legislature passed a law imposing civil penalties against anyone intentionally assisting a minor in getting an abortion without gaining the proper "consents," particularly from the girl's parents. Mo. Rev. Stat. § 188.250.1 (LEXIS through 2007 Sess.). Missouri again successfully defended its law against constitutional challenge in 2007, when the Supreme Court of Missouri upheld the law. *Planned Parenthood of Kan. & Mid-Mo., Inc. v. Nixon*, 220 S.W.3d 732 (Mo. 2007) (*per curiam*).[3]

As is evident from the above examples, not only has every branch of the Missouri government influenced abortion laws in Missouri, but the debate has often been highly publicized, perhaps even contentious. Yet the government has

[3] One named defendant in *Planned Parenthood, supra*, was Jeremiah W. (Jay) Nixon, Attorney General of Missouri and counsel of record in the instant matter. Although the Attorney General has a duty to defend the state against suit, his office's vigorous and successful defense of several abortion laws rings inconsistent with his argument that "[r]ejection of Choose Life specialty plates keeps the state of Missouri out of the politically sensitive arena of abortion politics." (Appellant's Br. 36.)

not shied away from addressing and making policy decisions about abortion. Permitting another governmentally created forum to continue the debate, albeit with the voices of private citizens this time, is entirely consistent with what Missouri has already been doing for decades.

B. The Joint Committee has engaged in baseless "litigation posturing" by claiming that Missouri wants to ignore and evade the abortion debate when it is evident that the state intends to prominently engage in the abortion debate.

As alluded to above, all advocates are expected to argue strongly on behalf of their clients. Although it would be wrong to punish advocacy that pursued an "aggressive litigation posture," it is quite another situation to assert a baseless posture that the party knows will only amount to wasted time and resources in the end. *Lipsig. v. Nat'l Student Mktg. Corp.*, 663 F.2d 178, 180-81 (D.C. Cir. 1980).

Although promulgated in varied cases and contexts, courts have regularly voiced their disapproval of governmental entities tacking one direction pre-litigation, only to disingenuously reverse course when it appeared to benefit them in the midst of litigation. The term "litigation position" is perhaps most commonly encountered in litigation arising under the Equal Access to Justice Act (EAJA) in cases deciding whether attorneys' fees and expenses should be awarded. The Act, on its face, requires an analysis of the reasonableness of the government's "position." In 1984, the Ninth Circuit noted a then-current circuit split on whether to follow a theory of "litigation position" or of "underlying action," the former

evaluating a governmental agency's stated position on a matter at the time of the litigation, the latter evaluating the agency's litigation posture in light of the totality of its actions, including its pre-litigation actions. *Rawlings v. Heckler*, 725 F.2d 1192, 1195-96 (9th Cir. 1984).

This Court, citing the Ninth Circuit, came down on the side of "the underlying action" theory, holding that it would look at the "totality of the circumstances," including both pre-litigation and litigation positions. *Iowa Express Distribution, Inc. v. NLRB*, 739 F.2d 1305, 1308-10 (8th Cir. 1984). This Court noted that "[i]f [it] were to limit [its] consideration of the government's position to merely the stance taken in litigation, no matter how outrageous the underlying governmental action, the government would be absolved from liability if Justice Department litigators acted reasonably." *Id.* at 1309. Congress agreed with this and other Courts when it amended the EAJA in 1985 to explicitly state that the government's position "means, in addition to the position taken by the agency in the adversary adjudication, the action or failure to act by the agency upon which the adversary adjudication is based . . . ." Equal Access to Justice Act, Pub. L. No. 99-80, 5 U.S.C. § 504 (amended 1985).

However, EAJA cases are not the only cases in which courts have analyzed a party's litigation position or litigation posture. Mere positioning or posturing is frequently rightly ignored. For example, in a *Chevron* deference case, the United

States Supreme Court refused to give deference to the Secretary of Health and Human Services' interpretation of a law different from an interpretation previously advocated. *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 212-13 (1988). The Court chided the Secretary for advocating "what appear[ed] to be nothing more than an agency's convenient litigating position." *Id.*

Similarly, passing on whether the General Accounting Office (GAO) had provided evidence of a consistent interpretation or practice, the United States Supreme Court noted with disapproval the contrast between the GAO's litigation posture at the hearings and its previous expressions of opinions. *Bowsher v. Merck & Co.*, 460 U.S. 824, 839 (1983).Perhaps one of the strongest Supreme Court denunciations of litigation posturing came from Justice Marshall, writing in dissent in *Jean v. Nelson*, 472 U.S. 846, 865-66 & nn.5-6 (1985) (Marshall, J., dissenting). Justice Marshall noted that the Solicitor General's assertions before the Supreme Court differed from those made by the government at trial which differed from the actual governmental policy. Marshall noted that such "*post hoc* rationalization[s should be] entitled *no weight*." *Id.* at 866 n.5 (emphasis added). The majority disagreed that the government engaged in *post hoc* rationalizations, but presumably would have similarly given them no weight if convinced that that is what they were. *See, id.* at 856 & n.3.

As noted above, this Court has taken a strong stance against mere litigation posturing in the EAJA context. It has not hesitated to do the same thing in other contexts. For example, in an age discrimination case against a corporation, this Court noted that an executive's statements were relevant to the case, and that for the corporation defendant to downplay them as merely off-handed and non-consequential was "false positioning" for the litigation. *Morse v. S. Union Co.*, 174 F.3d 917, 922 (8th Cir. 1999).

Another common context in which courts often ignore litigation positions is in Establishment Clause cases. There, courts reject governments' proffered purposes under the *Lemon* test's purpose prong when they conclude that the proffered purpose is a sham. *See, e.g.*, *McCreary County v. ACLU*, 545 U.S. 844, 859-61 (2005) (citing *Lemon v. Kurtzman,* 403 U.S. 602, 612 (1971)). Some courts explicitly put this in terms of rejecting litigation positions. *See, e.g.*, *Paulson v. Abdelnour*, 145 Cal. App. 4th 400, 425 (Ct. App. 2006) (discussing both the case before it and *McCreary County* in terms of whether the respective government's proffered purposes were mere litigation posturing). Sometimes even governmental *actions* are seen as mere litigation posturing if they were taken for the sole reason of impacting the outcome of litigation. *See, e.g.*, *ACLU of Ky. v. Rowan Co.*, 513 F. Supp. 2d 889, 904 (N.D. Ky. 2007) (noting "a question as to whether the county's stated purpose is a mere litigation position . . . ."); *ACLU of Ky. v.*

Garrard Co., 517 F. Supp. 2d 925 (E.D. Ky. 2007) ("this stated purpose does not appear to be anything other than a mere litigation position . . . .").

Just as courts have criticized and ignored arguments (and actions) made by governmental parties when the positions were contrary to previously stated positions and were simply advanced for the purpose of a new round of litigation, so should this Court see behind the current stated position of the Joint Committee—namely that it denied Choose Life's application because it was trying to "avoid entering the abortion arena" (Appellant's Br. 36-37). There exists substantial evidence that the state of Missouri is, and has been, engaged in a lengthy abortion policy debate. The defendants here, in addition to being members of the Joint Committee, are all either legislators or employees of the executive branch. They knew or should have known of Missouri's long-standing history of addressing head-on the abortion controversy, yet the Joint Committee would have this Court believe that the state of Missouri is just not interested in the topic.

What seems just as likely is that several members of the Joint Committee, who happen to favor abortion rights, are dissatisfied that the legislature, through several laws, and now the people, through a specialty license plate, have been succeeding in advancing a decidedly more pro-life platform. Whatever the reason,

the Joint Committee's legal strategy is not simply advocacy—it is *baseless* litigation posturing and plainly untrue.[4]

Considering that the Joint Committee's attempt to paint Missouri as apprehensive or reluctant to participate in the abortion issue when she clearly is not, this Court should ignore Joint Committee's arguments to that end, recognizing that a specialty plate permitting private speakers to weigh-in on the abortion debate is consistent with Missouri's high tolerance for engaging in the matter.

CONCLUSION

For the foregoing reasons, this Court should affirm the District Court's judgment.

Respectfully submitted
This 23rd day of July 2008

____
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[4] It also further highlights the strength of one of Choose Life's main points that the Joint Committee simply placed a content-based restriction on Choose Life's speech and had not even an important governmental interest in doing so.

CERTIFICATE OF SERVICE

I hereby certify that I have duly served the attached Brief *Amicus Curiae* of The National Legal Foundation in the case of *Roach, et al. v. Davis, et al.*, No. 08-1429, on all required parties by depositing two paper copies and an electronic copy on compact disc in the United States mail, first class postage, prepaid on July 23, 2008, addressed as follows:

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1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 4,137 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

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Dated this 23rd day of July, 2008

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