

Docket No. 09-0001

IN THE
SUPREME COURT OF THE UNITED STATES

MARCIA S. ADAMS, in her
Official capacity as the Director of the
South Carolina Department of Motor
Vehicles; JON OZMIT, in his official
Capacity as the Director of the Department
Of Corrections of South Carolina.

Petitioners

V.

REV. DR. THOMAS A. SUMMERS,
REV. DR. ROBERT M. KNIGHT,
RABBI SANFORD T. MARCUS, REV.
DR. NEAL JONES, HINDU
AMERICAN FOUNDATION, and
AMERICAN-ARAB
ANTI DISCRIMINATION COMMITTEE

Respondents

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

BRIEF FOR THE RESPONDENT

QUESTIONS PRESENTED FOR REVIEW

1. Under the Establishment Clause of the First Amendment, do the “I Believe” Act and its statutory scheme barrel through the wall that separates church and state when it places the purely Christian message of “I Believe” coupled with Christian symbols squarely and prominently on a governmentally created and distributed license plate?
2. Under the Free Speech clause of the First Amendment, are the “I Believe” Act and its statutory scheme viewpoint discriminatory when they enable the South Carolina legislature to wield unchecked discretion when advancing its own causes and simultaneously grounding all expression it determines does not fit its idea of “community standards?”

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STATEMENT OF THE CASE

Marcia S. Adams, Director of the South Carolina Department of Motor Vehicles, and John Ozmint, Director of the Department of Corrections of South Carolina, (“The Petitioners”) appeal from the correct reversal of the South Carolina District Court’s findings of a December 11, 2008 hearing. (Record, “R.” 1-11). On January 1, 2009, the United States Court of Appeals for the Fourth Circuit, correctly reversed the District Court by finding that Rev. Dr. Thomas A. Summers, Rev. Dr. Robert M. Knight, Rabbi Sanford T. Marcus, Rev. Dr. Neal Jones, the Hindu American Foundation and American-Arab Anti-Discrimination Committee (“The Respondents”) had standing. (R. 1-2). The Fourth Circuit further ruled that the “I Believe” Act did violate the Establishment Clause and the Free Speech Clause of the First Amendment. (R. 1-17). The Fourth Circuit properly reversed and remanded the case. (R. 1-17). The Petitioners appeal from this reversal.

STATEMENT OF FACTS

On April 24, 2008, two members of the South Carolina legislature stood before the General Assembly. (R. 1-3). They lobbied the General Assembly to approve the “I Believe” Act, which authorized the creation of a new specialty license plate. (R. 1-3). The new plate was to display the phrase “I Believe” and a cross superimposed on a stained glass window. (R. 1-3). The price for this specialty plate was set at \$24, the same price as South Carolina’s standard license plate. (R. 1-4).

On May 22, 2008, the General Assembly approved the Act. (R. 1-3). The legislation became law on June 5, 2008 without Governor Mark Sanford’s signature. (R. 1-3). The Governor

issued a non-signing statement scolding the legislature for “entering into the license plate creation business, and failing to designate an organization to be the recipient of any additional fees to be created by the Department of Motor Vehicles.” (R. 1-4, 1-5).

The South Carolina Code § 56-3-8100, states the requirements for the creation of specialty license plates. (R. 1-3). All license plates created after January 1, 2006 cannot be released until the DMV receives 400 prepaid applications or \$4000 from the organization seeking issuance of the plate. (R. 1-4).

The DMV must receive and approve a plan to market prospective plates. (R. 1-3). The record is devoid of any evidence suggesting a marketing plan for the “I Believe Act.”

If the individual or organization sponsoring the plate submits \$4000, the money is to be placed in a trust for the purpose of defraying the initial production of the plate. (R. 1-4). The section also states that the fee for all special license plates is to be the regular biennial registration fee plus additional fees requested by the sponsoring individual or organization. (R. 1-4). The “I Believe Act” contained no additional fee for an organization. (R. 1-4).

The Governor ordered the DMV to set the “I Believe” plate price at “an amount that will cover the entire cost of producing and administering the new plates.” (R. 1-5). The DMV set the price at \$5 above the standard fee. (R. 1-5). Most special license plates are priced above the standard fee due to a sponsoring organization’s fee. (R. 1-9).

South Carolina has two methods of creating specialty license plates, the legislative process and the DMV process. (R. 1-8).

The legislative process allows for the General Assembly to create and authorize a specialty plate by passing a statute. (R. 1-7). The only limitations are the requirements for a specialty plate codified in § 56-3-8100. (R. 1-7). The General Assembly may limit special plates to only qualifying individuals. (R. 1-7). There are no design limitations on statutorily created plates. (R. 1-7).

The DMV approval process is different. It is codified in DMV Policy RG-504. (R. 1-8).

Before a non-profit organization can apply for a plate, it must incorporate within South Carolina and maintain its non-profit status for five years. (R. 1-8). The organization must submit a detailed marketing plan. (R. 1-8). It also must submit license plate artwork for DMV approval. (R. 1-8).

All plate applications are reviewed by the “Special Plate Review Board,” whose members are chosen by the Director of the DMV. (R. 1-9). The Board ensures that the plate meets all of the DMV’s design standards. (R. 1-9). No text or motto can appear on the plate outside of an organization’s logo. (R. 1-9).

The Board must also ensure that the plate is “appropriate.” (R. 1-9). The DMV can reject any plate that is “controversial, subject to litigation in other states, partisan, or potentially offensive, controversial or inappropriate.” (R. 1-9, 1-10). Final approval rests with the General Assembly’s legislative review board (R. 1-10). It may overrule any DMV decision. (R. 1-10).

On June 19, 2008 the Respondents filed suit. (R. 1-5). The religious leaders and organizations based their claim on the “I Believe” Act’s violations of both the Establishment Clause and Free Speech Provision of the First Amendment. (R. 1-5). The “I Believe” Act

advances, endorses and promotes religion. (R. 1-5). It also created a forum that advances a religious viewpoint over another. (R. 1-5).

The “I Believe” plate was placed on the DMV’s website on October 30, 2008. (R. 1-5). On November 3, 2008, the DMV announced it had the necessary 400 prepaid applications, and that it would begin production of the plate. (R. 1-5).

The “I Believe” Act has violated our Constitution. It has smashed through the wall that separates church and state. It openly advocates for one religion while firmly grounding the opportunities of others to advance their own. The Fourth Circuit’s ruling should be affirmed and the injunction should be upheld.

SUMMARY OF THE ARGUMENT

Jesus Christ and George Washington are both considered saviors. However, for the sake of religion and our nation, it is imperative that these two never meet. Each is a representative of different worlds, and those worlds cannot collide.

The Respondents are here to ensure that this impending collision does not occur. However, before this Court can render justice, it must ensure itself that the Respondents have standing to pursue their claims under both the Establishment Clause and the Free Speech Clause of the First Amendment.

In order for one to have standing under Article III, he must allege (1) an injury in fact, (2) that is fairly traceable to the complained of action and (3) it must be likely to be redressed by a favorable court decision. The Respondents have met this requirement. The Respondents are

deeply religious men and their injury in fact slashes at the core of their beliefs. The “I Believe” Act is an abomination towards their spirituality, which this Court has recognized is a particularized injury in fact for Establishment Clause cases.

The imminent and bona fide threat the Respondents face in the impending release of the plates also constitutes an injury in fact. The undesired and unavoidable direct contact with the undeniably religious nature of the “I Believe” Act also constitutes an actual and imminent injury in fact.

Causation and redressibility are flip sides of the same coin: if an injury is caused by the complained of conduct, this Court will likely have the power to redress it. Both of these requirements are met in this case. The “I Believe” Act has caused the Respondents’ pain. But for this Act, they would not be exposed to the undesired direct contact with the religious plates. But for this Act, they would not suffer a crushing blow towards their spirituality. Causation is evident.

Once the coin is flipped, redressibility is equally as evident. This Court has the power to uphold the injunction placed on the “I Believe” Act by the Fourth Circuit. Upholding the injunction would effectively stop all injuries rendered upon the Respondents. All that is required is a likelihood of redressibility, fleeting and rare examples of when an injunction would not redress this injury are not of any concern in this case.

The Free Speech Clause is meant for the minority of one voice, not the synched voices of the majority. With this idea in mind, this Court has allowed standing to attack facially discriminatory statutes and schemes. The “I Believe” Act and the South Carolina specialty

license plate scheme are prime examples of discriminatory practices. Any overbroad, discretionary scheme or regulation spits in the face of Free Speech.

The specialty license plate scheme enables the South Carolina legislature to act as dictators, tempered only by terms such as “*community standards*” or “*potentially offensive*,” when it judges proposed specialty plates. Such wild grants of unchecked discretion cannot stand. The South Carolina legislature wields power by design, and by design limitations. The South Carolina legislature has ensured that its baby, the “I Believe” Act, will have no comparable specialty plates. One can feel the icy effects of this system’s chill on free speech no matter where he turns.

The Establishment Clause is meant to stop wars. It is meant to prevent the degradation of religion. These noble purposes cannot be pushed aside to allow the South Carolina legislature to endorse its own religion.

The tool this Court has used to judge Establishment Clause cases is the *Lemon* test. While other tests have come and gone, the *Lemon* test is an angel that keeps watch over the Establishment Clause. While other tests have been tailored specifically to its facts, found only to be useful in certain situations, or even blended in with other tests: the *Lemon* test is and will be the basic analytical framework for Establishment Clause cases.

In order to pass muster under the *Lemon* test, a government action must (1) have a secular purpose, (2) not have a primary effect of endorsing religion and (3) not promote excessive entanglement between government and religion. There is nothing secular about the South Carolina legislature’s purpose in this case. The legislature has gone out of its way to introduce, approve and place into effect an undeniably Christian license plate: *for the sole purpose of*

endorsing Christianity. Stating that the “I Believe” Act is nothing more than an attempt to give its citizens just another choice in a license plate is nothing more than a charade. It is a sham.

The primary effect of the “I Believe” Act’s license plate is that it radiates with Christian endorsement. Within a six by 12 inch plate, the words “I Believe” and “South Carolina,” would appear next to a cross superimposed on a stained glass window. These poignant images and phrases *cannot* co-exist on a license plate. The very idea that the South Carolina legislature produced this plate violates the Establishment Clause. Its effect is a ringing endorsement of the Christian faith.

The “I Believe” Act has also entangled religion and government. The South Carolina legislature is not in the business of producing religious memorabilia. A license plate’s nature and purpose have no room for religion: *a license plate is something one renews as needed; religion is something one grips for all eternity*.

A non-public forum allows for the government to discriminate, as long as it is viewpoint neutral. While a public forum is almost immune from government regulation outside of reasonable time, place and manner restrictions. Government speech allows the government to basically remain immune from First Amendment challenges. Private speech is the darling of the First Amendment.

The concepts of “government speech” vs. “private speech,” and “public forum vs. “non-public forum” produce a quagmire few wish to enter. However, in order to decide if the “I Believe” Act has violated the Free Speech Clause by committing viewpoint discrimination, this Court must pick the proper test. This Court is met with two choices: the *Rose* test, or the *Johanns* test.

The *Rose* test has its roots in specialty license plate jurisprudence. It offers a four-part test that takes into account all aspects of the specialty license plate forum. Its rationale has been embraced by the majority of the Circuits. It dictates that specialty license plates are either hybrid or private speech.

The *Johanns* test draws its roots from this Court's decision in a *compelled* subsidy case. It was applied by the Sixth Circuit in a case that is now more famous for its dissent. The majority somehow determined that voluntary, privately-purchased specialty plates constituted government speech, even after admitting that nothing in the case was compelled.

The *Johanns* test is inapplicable. The *Rose* test was designed for this case. The "I Believe" Act has violated the Free Speech clause.

ARGUMENT

I. THE RESPONDENTS HAVE STANDING BECAUSE THIS COURT CAN REMEDY THE POIGNANT RELIGIOUS INJURIES CAUSED BY THE DESIGN AND PRODUCTION OF THE "I BELIEVE" PLATES BY UPHOLDING THE INJUNCTION.

Hundreds of years ago, men risked their lives to start anew in this country. Their motivation: religious freedom. Now the South Carolina legislature is attempting to endorse its favored religion. There are no more new lands to settle. There is no escape from this endorsement. The imminent, bona fide threat of unwanted religious contact via the "I Believe" Act has worked a grave injury on the Respondents. This Court has the power to redress this injury. The Respondents have standing.

Article III of the United States Constitution limits the jurisdiction of the Federal Courts to actual “cases and controversies.” *Lujan v. Defenders of Wildlife*, 504 US 555, 560 (1992). The core consideration of the “cases and controversies” requirement is the doctrine of standing. *Id.* In order to establish standing for a Constitutional issue, the plaintiff must be able to show that he personally suffered an actual or threatened injury based on the illegal conduct of the defendant. *Heckler v. Mathews*, 465 U.S. 728, 738 (1984).

In *Lujan v. Defenders of Wildlife*, this Court listed the three Constitutional requirements for standing, (1) the plaintiff must have suffered an “*injury in fact*,” (2) the injury must be *fairly traceable* to the challenged action and (3) it must be likely to be *redressed* by a favorable court decision. *Id.* at 560-61.

This Court has also established the requirements that must be met for an organization to have standing: (1) the organization’s members would have standing in their own right, (2) the interest it seeks to protect is germane to the organization’s purpose, and (3) neither the claim asserted or the relief requested requires the participation of its members. *United Food and Commercial Workers v. Brown Group*, 517 U.S. 544, 553 (1996). The third requirement does not need to be met in suits for an injunction. *Warth v. Seldin*, 422 US 490, 511 (1975).

These requirements are the focus of the following sections and will show that the Respondents have standing under both the Establishment Clause and the Free Speech Clause.

A. Standing under the Establishment Clause is established because the “I Believe” Act is the cause of imminent unwanted contact with religious plates which can be redressed by an injunction.

Religion, and the ability to practice it freely, drives the Respondents. Religion is the focal point of their lives. No one can inflict a greater injury than exposure to unwanted religious

material and simultaneously stifling their ability to support their own. They have suffered an injury in fact. They have standing under the Establishment Clause.

In order to establish standing, the party must have suffered “an injury in fact”. *Lujan*, 504 U.S. at 560. The injury cannot be speculative or hypothetical. *Id.* The claimed injury must be “concrete and particularized” as well as “actual or imminent.” *Id.*

Non-economic or intangible injuries meet the standing requirements under the Establishment Clause. *Valley Forge Christian College v. Americans United for Separation of Church and State Inc.*, 454 U.S. 464, 486 (1982). Injuries impacting a person’s spirituality give rise to standing in First Amendment cases. *Ass’n of Data Processing Service Org., Inc. v. Camp*, 397 U.S. 150, 154 (1970).

All that is needed to establish the causation and redressibility components of standing is a showing that government action caused the injury, and that it is *likely* to be redressed by a favorable decision. *Heckler*, 465 U.S. at 738. An organization can meet these requirements through injuries to the organization itself or to its members. *Brown Group*, 517 U.S. at 557.

This Court found that unwanted exposure to the Ten Commandments, which were placed in a several county courthouses, met the injury requirement for standing in *McCreary County, Kentucky. v. ACLU of Kentucky*. 545 U.S. 844, 861 (2005). The Ten Commandments had been posted in the hallways of the courthouses and were “readily visible...to all county citizens who use the courthouse to conduct their civic business, to *obtain or renew their drivers’ licenses and permits*, to register cars, to pay local taxes and to register to vote.” *Id.* at 853. This Court found that the undeniable Christian character of the Ten Commandments would work an injury by sending a message to non-adherents that they were disfavored outsiders, while telling adherents

they were the favored members of society. *Id.* This Court found that the preliminary injunction issued by the district court was an appropriate remedial measure. *Id.* at 874.

This Court found that an organization lacked standing in *Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.* 454 U.S. 464, 479 (1982). The Court stated that psychological injury based on indirect contact with offensive material is not a sufficient injury. *Id.* at 485. The individual plaintiffs in the case were members of an organization incorporated in Washington D.C. *Id.* at 487. The plaintiffs resided in Virginia and Maryland, but complained of a transfer of government funds that occurred in Pennsylvania. *Id.* at 487.

Plaintiffs challenging a legislative directive to move a Ten Commandments monument to state capitol grounds had standing in *Adland v. Russ*, 307 F.3d 471, 478 (6th Cir. 2002). The plaintiffs were five religious leaders and the American Civil Liberties Union of Kentucky. *Id.* The Sixth Circuit found that the *imminent unwelcome contact* that plaintiffs *will* endure when they travel into the city satisfied the injury in fact requirement. *Id.* The Court found that the *ACLU* had standing via the fact it had numerous members that will be offended when driving into the city, and that the *ACLU*'s purpose of "defending the wall of separation between church and state" was germane to the suit. *Id.* The Sixth Circuit also found that since an injunction would redress the issue, participation of the *ACLU*'s members was not required. *Id.*

The Respondents have standing. All of the Respondents are either South Carolina citizens or have members that are South Carolina citizens. (R. 1-12). The Respondents are also registered South Carolina drivers. (R. 1-12). These people will be trapped by the "I Believe" Act. They *will*

come into direct contact with the undesirable “I Believe” plates, which is an intangible, but poignant injury. *Valley Forge*, 454 U.S. at 486.

The injury to the Respondents’ spirituality is immense. *Camp*, 397 U.S. at 154. Like the Ten Commandments display in *McCreary County*, the “I Believe” plates will be “readily visible” to all South Carolina citizens who drive a car, enter the DMV, or even visit the photo-gallery on the DMV website. (R. 1-12). Each sighting of the plate will echo the unconstitutional messages of either *your God and Government favor you*, or *your God and Government have shunned you, you are an outsider*.

Unlike *Valley Forge*, the organizations involved in this case are not basing their claim on tax payer standing and indirect injury. *Valley Forge*, 454 U.S. at 485. The Hindu American Foundation and the American-Arab Anti Discrimination Committee have members in South Carolina who have standing to sue. (R. 1-13). The organizations’ purposes of preventing discrimination and government favoritism are furthered by this action.

Like the legislative directive in *Adland*, this case will likely be redressed by an injunction. An injunction would prevent the dissemination of the plates into the public, and effectively remedy any unwanted direct contact. The fact that a “Choose Life” plate was later introduced to the public by the South Carolina DMV, after the Fourth Circuit found a similar one unconstitutional in *Rose v. Planned Parenthood*, has no impact on redressibility. (R. 1-13). All that is required to have standing is that the injury will *likely* be redressed by a favorable decision.

The wall that separates church and state must not come under siege. The Respondents have standing. They will now show the ability to fight “I Believe” Act’s unconstitutional viewpoint discrimination.

B. The Respondents have standing under the Free Speech Clause because the “I Believe” Act and its facially discriminatory statutory scheme rob them of their right of free speech.

The government cannot kill creativity. It cannot kill expression. A state where the government can control its citizens to this degree is doomed to fail. The “I Believe” Act and its statutory scheme have enabled the South Carolina legislature to be the puppet master: and rendered its citizens unknowing puppets. The Respondents have standing to revolt against this system under the Free Speech Clause.

A key function of the Free Speech Clause is to invite dispute: *it is at its highest purpose when it stirs controversy and drives people to anger. Cox v. State of Louisiana*, 379 U.S. 536, 551 (1965). Freedom of speech must be zealously guarded in order to protect against standardization by legislatures, courts and political groups. *Id.* at 552.

Viewpoint discrimination is an egregious form of content discrimination. *Rosenberger v. Rector and Visitors of Uni. of Virginia*, 515 U.S. 819, 829 (1995). It occurs when there is intent to advance one view and discourage another. *United States v. Kokinda*, 497 U.S. 720, 736 (1990). A state cannot engage in viewpoint discrimination even when a limited public forum is one of its own creation. *Rosenberger*, 515 U.S. at 829.

A facial challenge to a regulation lies whenever a government official or agency has the power to discriminate based on content or *viewpoint*. *City of Lakewood v. Plain Dealer Publishing Co.*, 486 U.S. 750, 759 (1988). One has standing to challenge a statute based on the allegation that it gives an administrative entity unhindered discretion in an area concerning freedom of expression. *Freedman v. State of Maryland*, 380 U.S. 51, 56 (1965). A plaintiff may

also challenge the entire statutory scheme. *Id.* The mere *existence* of excessive legislative discretion is an unconstitutional injury under the First Amendment. *Shuttlesworth v. City of Birmingham*, 394 U.S. 147, 150-51 (1969). Statutes governing access to speech must contain “narrow, objective and definite standards.” *Id.* One does not need to allege an abuse of discretion or apply for a license in order to raise a facial challenge to a statute or scheme. *Thornhill v. Alabama*, 310 U.S. 88, 97 (1940).

This Court has historically defended the Free Speech Clause from the unbridled whims of administrative entities. In *Forseyth County v. Nationalist Movement*, this Court found standing to challenge a regulation giving a mayor discretion on whether to grant, and how much to charge for, a parade permit. 505 U.S. 123, 129 (1992). This Court found standing despite the fact the organization was granted a permit. *Id.* Part of the regulation allowed the mayor to charge for “the cost of reasonable and necessary protection of persons participating or observing the activity.” *Id.* This Court reiterated that the success of a facial challenge does not rest on the facts of the case, but the *existence* of unbridled discretion invested in a government entity. *Id.*; *see also*, *Staub v. City of Baxley*, 355 U.S. 313, 319 (1958) (finding that appellant had standing to attack unduly discretionary statute *despite the fact she made no attempt to file for a license under it*).

The lower courts have followed this Court’s example. The Fifth Circuit found an organization had standing to launch an *anticipatory* suit against a discretionary regulation in *International Society for Krishna Consciousness of Atlanta v. Eaves*. 601 F.2d 809, 823 (1979). The Court found that a regulation allowing an airport administrator to disallow any expression that would “hamper or impede the conduct of any authorized business in the airport,” enabled the

administrator to act as a censor. *Id.* at 822, 833. The very existence of this censorial power, regardless to how it is ultimately used, is unacceptable. *Id.* at 823.

Free Speech is at its best when it stirs controversy. *Cox*, 379 U.S. at 551. The South Carolina legislature through both the DMV and Legislative processes, have ensured Free Speech will not flourish in South Carolina. Every potential specialty license plate is at the mercy of the legislative committee's uninhibited discretion. (R. 1-10).

A facial challenge to a statute lies whenever a government agency can discriminate based on content or viewpoint. *Lakewood v. Plain Dealer Pub. Co.*, 486 U.S. 750, 759 (1988). The South Carolina legislature is allowed to reject a plate it finds to be "*potentially* offensive." (R. 1-10). It may discontinue a plate if it determines it does not meet "*community standards*." (R. 1-10). The meaning of these terms is left totally to the whim of the legislature. The legislature is scrutinizing its people's messages and discriminating against them. No plate created through the DMV can match the expressive design and content of this plate. (R. 1-8). The very *existence* of this incredible censorship is the gravest of injuries under the First Amendment. *Shuttlesworth*, 394 U.S. at 150-51.

The roar of the "I Believe" Act is the final blow to the voices of South Carolina, whom were already stifled by the license plate scheme to no more than a whisper. They have standing under the Free Speech Clause.

II. THE "I BELIEVE" ACT VIOLATES THE ESTABLISHMENT CLAUSE BECAUSE ITS ONLY PURPOSE IS TO ENDORSE CHRISTIANITY, ITS PRIMARY EFFECT ENDORSES CHRISTIANITY AND IT ENTANGLES RELIGION WITH GOVERNMENT.

God and politics do not mix. This combination has led to the downfall of empires and ignited wars that are centuries old. The founding fathers recognized this fact and wrote the Establishment Clause to protect our nation. The “I Believe” Act violates the Establishment Clause.

“Congress shall make no law respecting an establishment of religion.” *U.S. Const. Amend. I.*

Countless questions and instances of litigation have sprung from these ten words. However, this Court has established some basic principles.

The Establishment Clause rests on the principle that a “union of government and religion tends to destroy government and degrade religion.” *Engel v. Vitale*, 370 U.S. 421, 431 (1962). The government cannot associate itself with any religious doctrine or organization. *County of Allegheny v. ACLU Greater Pittsburgh Chapter*, 492 U.S. 573, 590 (1989). The Establishment Clause only applies to government action, and is not meant to hinder the expression of purely private speech which may occur in a public forum. *Capitol Square Review & Advisory Board v. Pinette*, 515 U.S. 753, 767 (1995).

The clearest command of the Establishment Clause is that *one religious denomination cannot be favored over another*. *Larson v. Valente*, 456 U.S. 228, 244 (1982).

Establishment Clause cases are decided under the three prong test espoused in *Lemon v. Kurtzman*.¹ In order to be considered constitutional under the *Lemon* test, a government action

¹ This Court has also considered other tests when deciding Establishment Clause cases. In *Marsh v. Chambers*, this Court espoused the “Marsh Test,” which looks to the unique history of the religious activity in question. 463 U.S. 783, 790 (1983). This test has been limited to the facts of *Marsh*. *County of Allegheny v. ACLU Greater Pittsburgh Chapter*, 492 U.S. 573, 602-03 (1989).

must: (1) have a secular purpose, (2) its primary or principle effect must not advance or inhibit religion, and (3) must not foster an excessive entanglement with religion. *Lemon v. Kurtzman*, 403 U.S. 602, 612-13 (1971).

The “I Believe” Act violates the Establishment Clause. It fails all three prongs of the *Lemon* test, which will be discussed in the following sections.

A. The “I Believe” Act was advanced for no secular purpose and any advancement of a legitimate secular purpose would be nothing more than a sham.

The South Carolina government favors Christianity. The “I Believe” Act trumpets this message. That is its purpose. The “I Believe” Act has failed the first prong of the *Lemon* test. The Act is unconstitutional.

The appropriate question to ask under the secular purpose prong is: “whether the government’s actual purpose is to endorse or disapprove of religion.” *William v. Jaffee*, 472 U.S. 38, 56 (1985). A state action must have a clearly legitimate secular purpose. *Id* at 56. However, there is no need for the purpose of the legislation to have an entirely secular motive. *Id*. It is this Court’s duty to distinguish between a sham secular purpose and a sincere one. *Santa Fe Independent School District v. Doe*, 530 U.S. 290, 308 (2000).

This Court has not tolerated blatant infringements of the Establishment Clause. In *Stone v. Graham*, this Court held that a statute requiring the Ten Commandments to be posted on the walls of courthouses was had no secular purpose. 449 U.S. 39, 41 (1980). This Court found a

This Court has also created the “Coercion Test,” which evaluates whether the government is coercing someone to support or participate in religion. *Lee v. Wiesman*, 505 U.S. 557, 587 (1992). This test is used for school prayer cases. *Mellen v. Bunting*, 327 F.3d 355, 370 (4th Cir. 2003). A final test is the “Endorsement Test,” which evaluates whether a reasonable, informed observer would interpret government action as endorsing religion. *County of Allegany*, 492 U.S. at 592-94. The Fourth Circuit has already applied the Endorsement Test to this case as a part of its *Lemon* analysis. *Mellen*, 327 F.3d at 371.

lack of a secular purpose despite the facts they were purchased with private funds, and that there was a written proclamation of a secular purpose on the bottom of each display. *Id.* This Court held, “The Ten Commandments are undeniably a sacred text in the Jewish and Christian faiths and no legislative recitation of a supposed secular purpose can blind us to this fact.” *Id.*

Displays of the Ten Commandments have been a common source of litigation. In *Van Orden v. Perry*, this Court found that a passive Ten Commandment monument on Texas state capitol grounds did not violate the Establishment Clause. 545 U.S. 677, 688-89 (2005). The Court determined that there was a secular purpose based on the passive nature of the monument and our nation’s history. *Id.* at 686. The primary content of the monument was the Ten Commandments, an eagle grasping an American flag, and an eye inside of a pyramid. *Id.* at 681. There were also 17 other monuments on the grounds. *Id.*

On the very same day the Ten Commandments display in *Van Orden* was found to be constitutional, a Ten Commandments display in a courthouse was invalidated in *McCreary County, Kentucky, v. American Civil Liberties Union of Kentucky*. *McCreary*, 545 U.S. at 881. This Court stated the purpose prong of the *Lemon* test was an essential tool and found the display contained no legitimate secular purpose. *Id.* at 861, 869. The eyes that evaluate purpose belong to a reasonable, informed observer. *Id.* at 862. This Court found that the display was not incorporated into a secular scheme, and a reasonable observer would determine its purpose to be an endorsement of religion. *Id.* at 869.

The “I Believe” plate cannot pass the secular purpose analysis. The South Carolina legislature claims the purpose behind the plate is “to provide South Carolina motorists with another message that they can elect to convey when selecting from over one hundred available specialty plates.” (R. 1-14, 1-15).

The secular purpose behind an action cannot be a sham. *Santa Fe*, 530 U.S. at 608. The Petitioners' supposed purpose is pretext used to advance their endorsement of Christianity. The plate features the message "I Believe" as well as the undeniable Christian symbols of a cross and a stained glass window. (R. 1-3). No pretextual purpose can blind this Court from this irrefutable reality. *Stone*, 449 U.S. at 41.

The "I Believe" Act has failed to provide any legitimate secular purpose. In addition, the primary effect of its unconstitutionality cannot be denied.

B. The primary effect of the "I Believe" Act demonstrates a flagrant endorsement of Christianity by the South Carolina Legislature that cannot be ignored by a reasonable observer.

Perception speaks louder than words. What society perceives is reality. Despite the Petitioners' claimed pretextual secular purpose, they cannot deny the primary effect the "I Believe" Act induces. The "I Believe" Act has failed another prong of the *Lemon* Test.

Government action must not actually or symbolically endorse a religion. *Allegheny*, 492 U.S. at 590. Government action is unconstitutional if it has the effect of endorsing religion. *Id.* at 597. This determination rests on the context of the action. *Id.*

A crèche placed on the grand staircase of a county courthouse violated the Establishment Clause in *Allegheny*. 492 U.S. at 599-600. The crèche in question was surrounded by a wooden fence lined with poinsettias. *Id.* at 580. At each end of the display there were small evergreen trees. *Id.* A plaque on the fence stated it had been donated by the Holy Name Society. *Id.* This Court stressed that based on crèche's location, "no viewer could reasonably think it occupies this space without the support and approval of the government." *Id.* at 599-600.

The "I Believe" plate practically pulsates with the endorsement of Christianity. Like the crèche in *Allegheny*, the message and religious symbols are enclosed by borders. Also like

Allegheny, the license plate is located on one of the most prominent and constantly viewed part of a vehicle. However, the “I Believe” plate is even a greater endorsement than the crèche.

S.C. Code § 56-3-1230 provides specifications for all South Carolina license plates. This section states that all license plates must be at least six inches wide and not less than 12 inches in length. Another requirement is that all license plates contain in *bold* letters, the *abbreviation or the full name of South Carolina*. The state name or abbreviation will be placed inches away from the religious message of “I Believe.” It is placed inches away from a cross. The impact of this union cannot be understated. A more symbolic endorsement of Christianity cannot be found. No reasonable observer can disagree.

Unlike the “Choose Life” plate that was approved by the DMV in *Rose*, this is an *Establishment Clause* case. The legislature ultimately has the final say on whether to approve a plate whether it is passed via statute or DMV approved. (R. 1-8). The Establishment Clause *forbids* the legislature from endorsing this plate or any other similar plate that may arise through either process.

The primary effect of the “I Believe” plate is to endorse religion. Its production also entangles church and state.

C. The “I Believe” Act excessively entangles the concepts of Christianity and government because the nature and purpose of a license plate have no need for such intense religious symbols.

Entanglement leads to stagnation. Stagnation leads to atrophy. Atrophy leads to death. Society cannot afford for an entanglement of church and state. The “I Believe” Act constitutes the first step in this series: it has failed the final *Lemon* prong.

In order to determine whether government entanglement is excessive, the courts must examine the character and purposes of the institutions that are benefited, the nature of the aid that

the State provides, and the resulting relationship between the government and the religious authority. *Lemon*, 403 U.S. at 612. A government action cannot create the danger of political fragmentation and divisiveness along religious lines. *Id.* at 623.

This Court found a statute giving a Church the ability to prevent liquor licensing around its location violated the excessive entanglement prong of *Lemon*. *Larkin v. Grendel's Den*, 459 U.S. 116, 125 (1982). This Court reiterated that the Establishment Clause's objective is to prevent intrusion by the state into religion and vice versa. *Id.* at 126. *see also, Coles ex rel. Coles v. Cleveland Board of Education*, 171 F.3d 369, 885 (6th Cir. 1999) (holding that when a public school principle chose to have a school prayer, designed the content of the prayer and delivered it to an audience it created an excessive entanglement of with religion).

The legislature has created a system that entangles the concepts of god and government. The governor even recognized this fact. After the "I Believe" Act became law, he chastised the legislature for entering the license plate creation business. (R. 1-4). It has created a statute that favors one religion over another, which is forbidden by the Establishment Clause. The statutory scheme has effectively ensured that no other religious plates will make it through the ringer. Like *Coles*, the legislature chose to introduce this plate, designed its content, and to deliver it to the public. The government must also renew the plates as required by law. Religious symbols should not be renewed, they should be eternal. The nature and purpose of a license plate is to provide identification, it has no room for religion within this purpose. Nothing is more offensive to the Establishment Clause than intrusion by the state into the religious realm. *Larkin*, 459 U.S. at 126.

The "I Believe" Act has violated the Establishment Clause. It has also intruded into another hallowed First Amendment ground: the Free Speech Clause.

III. THE FOURTH CIRCUIT APPLIED THE CORRECT TEST WHEN FINDING THE “I BELIEVE” ACT IS VIEWPOINT DISCRIMINATORY BECAUSE EVERY DRIVER HAS SOME INTEREST OF PRIVACY WHEN CHOOSING THEIR LICENSE PLATE.

South Carolina citizens make private choices when they choose a specialty license plate. The government has nothing to say in this issue. The “I Believe” Act has violated the Free Speech Clause.

This Court has found, “it is axiomatic that the government may not regulate speech based on its substantive content or the message it conveys.” *Rosenberger*, 515 U.S. at 828. The prohibition on viewpoint discrimination extends to all forums. *Perry Education Association. v. Perry Local Education Association*, 460 U.S. 37, 45-46 (1983).

Private religious expression is protected by the first amendment. *Pinette*, 515 U.S. at 759. Every driver is partially responsible for the message on even standard license plates. *Wooley v. Maynard*, 430 U.S. 705, 717 (1977).

A consideration in viewpoint discrimination cases is the relevant forum of speech. The government cannot limit expressive activity in a traditional public forum, such as streets and parks, outside of reasonable time, place, and manner restrictions. *Perry*, 460 U.S. at 45. The same prohibition on limiting speech applies to areas the government designates as public forums, such as municipal theaters and school board meetings. *Id.* at 45-46. Any content restrictions on these forums are subject to strict scrutiny. *Id.* at 45-46. A non-public forum, such as a school’s internal mailing system, can be protected to ensure the purpose of the forum. *Id.* at 46. Government regulation must be viewpoint neutral. *Id.* at 46.

However, the key issue in this case is whether specialty license plates constitute government or private speech. When the government is disseminating its own speech, it may take appropriate measures to ensure its message is not distorted. *Rosenberger*, 515 U.S. at 833. However, if the speech is determined to be private speech, the government is forbidden to favor one side over another. *Id.* at 28. The Fourth Circuit has also determined there is hybrid speech, which is entitled to First Amendment protection. *Planned Parenthood of S.C. v. Rose*. 361 F.3d 786, 793 (4th Cir. 2004).

The classifications of speech are generally accepted. However, there is a Circuit split regarding how to test this concept.

In 2002, the Fourth Circuit announced a test specifically tailored to specialty license plates in *Sons of Confederate Veterans v. Commissioner of the Virginia Department of Motor Vehicles*. 288 F.3d 610, 618 (4th Cir. 2002). The Fourth Circuit examined the following factors: (1) The central purpose of the program in which the speech in question occurs, (2) the degree of editorial control exercised by the government or private entities over the content of the speech, (3) the identity of the literal speaker, and (4) whether the government or the private entity bears the ultimate responsibility for the content of the speech. *Id.*

The Fourth Circuit applied this test to the *exact* same situation as the current case in *Rose*. 361 F.3d at 792-93. The Fourth Circuit found that a legislatively created “Choose Life” plate constituted a hybrid of government and private speech. It also determined that the government had created a designated public forum. The Fourth Circuit found that the “Choose Life” Act constituted viewpoint discrimination and found it unconstitutional.

One year later, this Court announced its decision in *Johanns v. Livestock Marketing Association*, finding that the message “Beef, it’s what for dinner” constituted pure government

speech. 544 U.S. 550, 560 (2005). *Johanns* was a *compelled* subsidy case where beef farmers attempted to enjoin their endorsement of the message. *Id.* at 555. This Court found that the message was pure government speech by examining two factors: (1) the government’s establishment of the message and (2) its effective control over the content and dissemination of the message. *Id.* at 562.

The Sixth Circuit applied the *Johanns* test in *American Civil Liberties Union of Tennessee v. Bredesen*. 441 F.3d 370, 380 (6th Cir. 2006). The Sixth Circuit used the *Johanns* test to evaluate another legislatively created “Choose Life” plate. *Id.* at 376. The Sixth Circuit reached the conclusion that the plate constituted government speech: *despite the fact individual purchasers ultimately had the decision of whether to buy the plates.* *Id.* at 379. The Sixth Circuit compared the case to this Court’s finding in *Johanns* stating, “here automobile owners are not only not compelled, they have to pay extra to disseminate the message.” *Id.* at 378.

The *Bredesen* decision also included a biting dissent by Justice Martin, who scolded the majority for mischaracterizing the nature of the specialty license plate scheme. *Id.* at 381. He found the majority erred in finding it was a system meant to promote governmental speech, instead of one meant to facilitate private speech. *Id.* He also chastised the majority for applying the *Johanns* test, despite the majority’s own admission that *nothing* in the case was compelled. *Id.*

Since the *Johanns* and *Bredesen* decisions, no other Circuit has followed the Sixth Circuit’s lead in finding specialty license plates are governmental speech. In *Children First Foundation v. Martinez*, the Second Circuit found that “custom license plates involve at the very least some private speech.” 169 F. Appx. 637, 639 (2nd Cir. 2006). In *Arizona Life Coalition, Inc. v. Stanton*, the Ninth Circuit rejected the test from *Bredesen* and adopted the four factor test

from *Rose*. 515 F.3d 956, 965 (9th Cir. 2008). After its analysis, the Ninth Circuit found that specialty license plates constitute purely *private* speech. *Id.* at 967.

The Eighth and Eleventh Circuits have applied different tests from both *Rose* and *Bredesen*, but both Circuits determined license plates constitute private speech in *Lewis v. Wilson*, 253 F.3d 1077, 1082 (8th Cir. 2001); and *Women’s Emergency Network v. Bush*, 323 F.3d 937, 946 (11th Cir. 2003).

The Fourth Circuit has promulgated the correct test to judge this case. As in both *Rose* and *Bredesen*, the “I Believe” plate is legislatively created. However, only the *Rose* court delivered the correct decision. The *Johanns* test employed by the Sixth Circuit is not suitable to judge the voluntary and intensely personal nature of this specialty license plate scheme. There is no compulsion present in this case.

Once the *Rose* test is applied to this case, the finding will be one of either hybrid or private speech. The first factor, “the central purpose of the program,” weighs in favor of private speech. The South Carolina legislature has created this designated forum for public expression. South Carolina offers a wide variety of specialty license plates. It encourages its citizens to choose one that expresses their own ideas. The secular purpose claimed by the Petitioners was “to provide South Carolina motorists with another message that they can elect to convey when selecting from over hundred available specialty plates.” (R. 1-15).

The second factor will likely weigh in favor of government speech. However, the third factor, “identity of the literal speaker,” favors private speech. The fact that citizens can choose which plate they want sends the unquestionable message that they agree with its point of view. The fact a citizen is passionate enough to send extra money to purchase a special plate shows they wish to express their private beliefs to the world.

The final factor, “who bears the ultimate responsibility for the message,” also screams private speech. The private citizen must peruse over a hundred specialty license plates in order to select the one that best suits him. (R. 1-15). He then must purchase the plate and place it on his vehicle. The ultimate responsibility falls squarely on the shoulders of the private citizen.

The South Carolina government cannot discriminate based on viewpoint, but it has. The message of the specialty plate is a private or hybrid one, and the government cannot inject its own view into this designated forum.

This case represents a situation this Court recognized when government and religion reside too closely together. *Pinette*, 515 U.S. at 769. If the “I Believe” Act is purely the government’s message, it has violated the Establishment Clause. If the Court finds it is private speech, it has committed viewpoint discrimination, in violation of the Free Speech Clause.

CONCLUSION

The “I Believe” Act has skewered the First Amendment. It has pierced the hearts of both the Establishment Clause and the Free Speech Clause. This Court must act before it is too late to save them. For all of the foregoing reasons, the Respondents respectfully request that the Fourth Circuit be affirmed and the injunction upheld.

APPENDIX

First Amendment to the United States Constitution

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances

28 U.S.C. 1254

Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

- (1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree;
- (2) By certification at any time by a court of appeals of any question of law in any civil or criminal case as to which instructions are desired, and upon such certification the Supreme Court may give binding instructions or require the entire record to be sent up for decision of the entire matter in controversy.

S.C. Code § 56-3-8100.

Special license plates production and distribution guidelines.

(A) Before the Department of Motor Vehicles produces and distributes a special license plate created by the General Assembly after January 1, 2006, it must receive:

(1) four hundred prepaid applications for the special license plate or four thousand dollars from the individual or organization seeking issuance of the license plate;

(2) a plan to market the sale of the special license plate which must be approved by the department; and

(3) the emblem, a seal, or other symbol to be used for the plate and, if necessary, written authorization for the department to use a logo, trademark, or design that is copyrighted or registered. If the individual or organization seeking issuance of the plate submits four thousand dollars, the Comptroller General shall place that money into a restricted account to be used by the department to defray the initial cost of producing the special license plate.

(B) The fee for all special license plates created by the General Assembly after January 1, 2006, is the regular biennial registration fee set forth in Article 5, Chapter 3 of this title plus an additional fee to be requested by the individual or organization seeking issuance of the plate. The initial fee amount requested can only be changed every five years from the first year the plate is issued. Each special license plate must be of the same size and general design of regular motor vehicle license plates. Each special license plate must be issued or revalidated for a biennial period which expires twenty-four months from the month the special license plate is issued.

(C) Of the additional fee collected pursuant to this section, the Comptroller General shall place sufficient funds into a special restricted account to be used by the Department of Motor Vehicles to defray the expenses of producing and administering special license plates. Any of the remaining fee not placed in the restricted account must be distributed to an organization designated by the individual or organization seeking issuance of the license plate.

(D) If the department receives less than three hundred biennial applications and renewals for a particular special license plate, it shall not produce additional special license plates in that series. The department shall continue to issue special license plates of that series until the existing inventory is exhausted.

(E) If the department receives less than three hundred biennial applications and renewals for plates created pursuant to Article 12, Chapter 3, Title 56; Article 14, Chapter 3, Title 56; Article 31, Chapter 3, Title 56; Article 39, Chapter 3, Title 56; Article 40, Chapter 3, Title 56; Article 43, Chapter 3, Title 56; Article 45, Chapter 3, Title 56; Article 49, Chapter 3, Title 56; Article 50, Chapter 3, Title 56; Article 60, Chapter 3, Title 56; Article 70, Chapter 3, Title 56; Article 72, Chapter 3, Title 56; and Article 76, Chapter 3, Title 56, it shall not produce additional special license plates in that series. The department shall continue to issue special license plates of that series until the existing inventory is exhausted.

(F) The provisions contained in subsection (A)(1) and (2) do not apply to the production and distribution of the Korean War Veterans Special License Plates contained in Article 68, Chapter 3, Title 56.

S.C. Code § 56-3-1230.

Specifications of license plates; periodic issuance of new plates; treatment with reflective material; issuance of revalidation stickers.

(A) License plates must be at least six inches wide and not less than twelve inches in length and must show in bold characters the year of registration, the serial number, the full name or the abbreviation of the name of the State, and other distinctive markings the department may consider advisable to indicate the class of the weight of the vehicle for which the license plate was issued. The plate must be of a strength and quality to provide a minimum service of five years. A new license plate including personalized and special plates, but excluding license plates provided in Sections 56-3-660 and 56-3-670, must be provided by the department at intervals the department considers appropriate, but at least every six years. A new license plate for vehicles contained in Sections 56-3-660 and 53-6-670 must be provided by the department at intervals the department considers appropriate. Beginning with the vehicle registration and license fees required by this title which are collected after July 1, 2002, except for the fees collected pursuant to Sections 56-3-660 and 56-3-670, two dollars of each biennial fee and one dollar of each annual fee collected from the vehicle owner must be placed by the Comptroller General in a special restricted account to be used solely by the Department of Motor Vehicles for the costs associated with the production and issuance of new license plates. The department is not authorized to use this set aside money for any other purpose. License plates issued for vehicles in excess of twenty-six thousand pounds must be issued biennially, and no revalidation sticker may be issued for the plates. License plates issued as permanent may be revalidated and replaced at intervals determined by the department.

(B) The face of the license plate must be treated completely with a retroreflective material which increases the nighttime visibility and legibility of the plate. The department shall prepare the specifications for the retroreflective material. In those years in which a metal plate is not issued, a revalidation sticker with a distinctive serial number or other suitable means prescribed by the department must be issued and affixed in the space provided on the license plate assigned to the vehicle upon payment of the fee prescribed for registration and licensing, including fees for personalized or special license plates.