Team Number – N

IN THE
SUPREME COURT OF THE UNITED STATES

No.: 09-0001

MARCIA S. ADAMS, in her official capacity as the Director of the South Carolina Department of Motor Vehicles; Jon Ozmint, in his official capacity as the Director of the Department of Corrections of South Carolina

Petitioners,

\- against -

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 Fourteenth Circuit

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BRIEF FOR RESPONDENTS

ISSUES PRESENTED FOR REVIEW

I. The Establishment Clause of the First Amendment requires that all government action must be neutral toward religion. The South Carolina General Assembly has passed the "I Believe" Act which created a specialty license plate with a cross superimposed on stained glass with the message "I Believe." This plate is the only religious plate available to South Carolina motorists and is a clear endorsement of Christianity as the religion supported by the South Carolina Government. As such, Should this Court affirm the Fourth Circuit Court's decision that the "I Believe" Act passed by the South Carolina General Assembly is a violation of the First Amendment's Establishment Clause?

II. The Free Speech Clause of the First Amendment requires that government action not favor one person's speech over another. The South Carolina General Assembly has passed the "I Believe" Act which created a specialty license plate with a cross superimposed on stained glass with the message "I Believe." Those who adhere to different views and want to state a similar message will have to go threw a much more difficult process of approval. As such, Should this Court affirm the Fourth Circuit's decision that the "I Believe" Act passed by South Carolina General Assembly is a violation of the First Amendment's Free Speech Clause?

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STATEMENT OF THE CASE

This case involves the passing of the "I Believe" Act ("the Act") by the South Carolina General Assembly to create a specialty license plate. A motorist has several specialty license plates available to them in South Carolina, from a "Sons of the Confederate Flag" plate to a "Clemson University" plate. (Record at 21.) There exist two distinct processes in which a specialty license plate in South Carolina; the General Assembly may create a statute which creates a specialty license plate or a non-profit organization may apply for approval of a specialty license plate through the Department of Motor Vehicles ("DMV"). (R. at 6-7.) On May 22, 2008, the General Assembly passed the Act which created the Christianity themed specialty plate and it became law without the Governor's signature on June 5, 2008. (R. at 3.) The Act states as follows:

> The Department of Motor Vehicles may issue "I Believe" special motor vehicle license plates to owners of private motor vehicles registered in their names. The plate must contain the words "I Believe" and a cross superimposed on a stained glass window. The biennial fee for this special plate is the same as the fee provided in Article 5, Chapter 3 of this title. The guidelines for the production of this special license plate must meet the requirements contained in Section 56-3-8100.

S.C. Code Ann. § 56-3-10510 (2008).

The legislative process through which the General Assembly is able to create a specialty license plate by statute is fairly simple. The General Assembly first must pass legislation by its normal means through the State House and Senate. (R. at 7.) There does not exist any statutes which limit the design of the plate, thus the General Assembly may create a license plate with any motto or statement with images and symbols with any size or placement restrictions. (R. at 7.) The statute may place limitations on who may acquire the plate, like military plates which require the citizen to have received a Purple Heart or Medal of Honor award in order to obtain a

plate with either image. S.C. Code. Ann. § 56-3-3310 (1987). The General Assembly however is free to make specialty plates which are available to all citizens such as the Act in question. The DMV has set guidelines to follow once the General Assembly has created a specialty license plate set forth in S.C. Code § 56-3-8100 (1999)[1] in order to produce the plate. (R. at 4.) S.C. Code Ann. § 56-3-8100 requires the DMV receive 400 prepaid applications for the plate or $4000 from a sponsoring individual or organization; an approved marketing plan; any emblem or symbol to be placed on the plate must come from the sponsor; and every specialty license plate have an additional fee added to the normal plate issuance price. (R. at 7-8.) Implementation of a plate through the DMV is a far more arduous process.

In order to get a specialty plate approved through the DMV process requires passage through several steps and procedures as provided in DMV Policy RG-504. An organization may apply for a specialty plate but first it must have been incorporated with a state and have applied for and obtained tax-exempt status with the Internal Revenue Service at least five years prior to applying for the plate. (R. at 8.) The application must include a request for the specialty plate on the organization's letterhead; a completed DMV Form RG-504(a) and 504(d); written authorization for use of any copyrighted or registered logo trademark, or design; license plate artwork on a CD and one color hard copy of the design; a detailed marketing plan; a designation of the requested fee for the special license plate; and documentation of its tax-exempt status and copies of its tax returns for the previous five years. (R. at 8-9.) Once the application is received it must go through a DMV review and approval process. (R. at 9.)

The DMV review process has three steps which can each determine that an organization's application fails. The first step is the application is sent to the DMV "Special Plate Review Panel," made up of members appointed by the Director of the DMV. (R. at 9.)

[1] See Appendix

The Panel is charged with the responsibility of examining the proposed designs to determine that the design meets all DMV specifications; the design is appropriate; not "offensive" and meets "community standards of propriety." Policy RG-504. The Panel may reject a special plate if is considered "controversial,…or [subject to] litigation in other states," "partisan," or "potentially offensive, controversial, or inappropriate to the public." *Id.*. The Panel may approve, conditionally approve, or reject the design which triggers the next step in the process. (R. at 10.)

The second step in the DMV process hinges on the Review Panel's decision of the proposed design. If the design is approved, two samples are made and sent to the Highway Patrol for approval. (R. at 10.) Once approved by the Highway Patrol, the DMV's Chief of Staff and Director review the plated and must approve the design. (R. at 10.) If the design is conditionally approved with suggested modifications, the Chief of Staff and Director then review and approve the design with modifications. (R. at 10.) The organization is then given an opportunity to review the modifications and resubmit its design. (R. at 10.) If the design is rejected by the Panel and the rejection is agreed upon by the Chief of Staff and the Director, the organization is notified and may resubmit a new design. (R. at 10.) The organization is not without recourse however and may appeal.

The third and final step is the appeals process available to the organization upon a rejection by the DMV of its application. (R. at 10.) The organization's appeal is reviewed by the legislative review committee, which has the power to overrule any decision by the DMV. (R. at 10.) S.C. Code Ann. § 56-3-8000 gives the legislative review committee the power to review existing plates and order the DMV to cease production and sale of any plates it "deems offensive or that fails to meet community standards." The result of this provision is that ultimately all plates are subject to legislative review. (R. at 10.) Once approved, the DMV goes through the

same implementation process as the legislature which requires 400 prepaid. orders or $4000 from the sponsor. S.C. Code Ann. § 56-3-8000.

The Act passed with the fee set for this special plate only at the basic fee of $24 and dId. not include the required additional specialty plated fee. (R. at 4.) The Governor of South Carolina, Mark Sanford, permitted the statute to become law without his signature, but issued a non-signing statement which criticized the legislature. (R. at 4.) He criticized the legislature for "enter[ing] 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. at 4-5.) Further, he ordered that a premium of $5 above the standard fee be added to the price of the specialty plate to cover the amount of production. (R. at 5.) The design of a cross superimposed on a stained glass window was created after the Governor's approval by a DMV employee and it received the necessary prepaid applications for purchase. (R. at 5.)

The Respondents brought suit against the Petitioners alleging that the Act which led to the production and sale of the Christianity themed license plates and the statutory scheme which allowed it were violations of both the Establishment Clause and the free speech guarantees of the First Amendment. (R. at 11.) The District Court ruled that the Respondents dId. not have standing to bring the action. (R. at ll.) The District Court went on to rule in the alternative that the Act and the statutory scheme did not violate the Establishment Clause and the free speech guarantees of the First Amendment. (R. at 11.) The Fourth Circuit Court of Appeals granted the Respondents appeal and reversed the District Court on both issues. (R. at 11.)

SUMMARY OF THE ARGUMENT

I. The "I Believe" Act is unconstitutional as it violates the principles set forth in the Establishment Clause of the First Amendment.

The Establishment Clause required that government is neutral towards all phases of religion. To measure the neutrality of a specific government action it must be measure against the *Lemon Test*, which requires a statute to have a secular purpose, that its primary effect be one that neither inhibits nor advances religion and it cannot create an excessive entanglement between church and state. The "I Believe" Act violates each prong as it is a non-secular policy that advances religion through government endorsement, which will ultimately result in the type of political divisiveness that impermissibly entangles religion in to the affairs of the state.

The *Lemon Test* is the proper test that Courts should employ in evaluating constitutional challenges brought under the Establishment Clause. It presents a clear and definite tool for Courts interpreting the cloudy subject of church and state. The test creates continuity in the Establishment Clause interpretation while maintaining the very principle of neutrality. Abandonment of the *Lemon Test*, will only lead to confusion and more importantly decisions which do not honor the Framers' true intent behind the Establishment Clause.

II. The First Amendment prohibits viewpoint discrimination when a forum for expression exists. When government is speaking, no forum exists and thus, the government may discriminate in the messages it conveys. The moment where private individuals can express their viewpoints, though a government program, a forum for dialogue is produced. At this point, the government may restrict the content of the speech but may not prohibit private individuals from expressing their viewpoint on the relevant message. Respondent's position is that South Carolina's "I Believe" statute constitutes a mixture of government and private speech or hybrid. speech. By making it more difficult for individuals, who hold different viewpoints, to express their message, South Carolina has impermissibly exercised viewpoint discrimination because the statute in question facilities a forum for expression.

ARGUMENT AND AUTHORITIES

I. THE SOUTH CAROLINA "I BELIEVE ACT" VIOLATES THE ESTABLISHMENT CLAUSE OF THE FIRST AMENDMENT BECAUSE IT IS A NON-SECULAR POLICY WHICH FAILS TO MEET ANY OF THE THREE PRONGS OF THE LEMON TEST

The "I Believe Act" ("the Act") passed by the South Carolina Legislatures violates the Establishment Clause of the First Amendment which provides, "Congress shall make no law respecting an establishment of religion." U.S. Const. Amend. I. The principle of the Establishment Clause which is the touchstone of this analysis is that the "First Amendment mandates government neutrality between religion and religion, and between religion and nonreligion." *Epperson* v. *Arkansas*, 393 U.S. 97, 104 (1968). "Manifesting a purpose to favor one faith over another or adherence to religion generally clashes with the 'understanding, reached … after decades of religious war, that liberty and social stability demand a religious tolerance that respects the religious views of all citizens." *McCreary County, Ky. v. American Civil Liberties Union of Ky.*, 545 U.S. 844, 860 (2005) (quoting *Zelman v. Simmons-Harris*, 536 U.S. 639, 718 (2002) (Breyer, J. dissenting). The government must avoid. sending the message to nonadherents, by showing favor to religion, "that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members of the political community." *Santa Fe Independent School Dist. v. Doe*, 530 U.S. 290, 309-310 (2000) (quoting *Lynch v. Donnelly*, 465 U.S. 668, 688 (1984) (O'Connor, J., concurring)). The Act violates the Constitution, as it endorses Christianity over other religions, but also religion over nonreligion, thus this Court should affirm the decision below.

A. The "I Believe Act" Fails All Three Prongs of the Lemon Test Created by this Court to Evaluate Neutrality of Government Policy and Acts.

In *Lemon*, this Court organized its past Establishment Clause jurisprudence into a three prong test to determine if government action or conduct resulted in a violation of the principles of the Establishment Clause. The decision acknowledged that the Establishment Clause is fairly "opaque," which has led to interpretation and line drawing by the courts. *Lemon*, 403 U.S. at 612. The *Lemon* Court stated that in order to determine that a government act does not violate the Establishment clause;

> First, the statute must have a secular legislative purpose; second, its principle or primary effect must be one that neither advances nor inhibits religion; finally, the statute must no foster 'an excessive government entanglement with religion.'

Id. at 612-613. The ultimate purpose of this test is to prevent "the three main evils which the Establishment Clause was intended to afford protection: 'sponsorship, financial support, and active involvement of the sovereign in religious activity." *Id.* The Act passed by the South Carolina Legislature violates each prong of the *Lemon Test* and the very principles it was created to protect.

1. The Act has a non-secular purpose of placing state favor and approval of the Christian Faith over other religions and the nonreligious.

The *Lemon* Court did not specifically address how to determine whether or not a statute has a secular purpose, but it was the specific reason for the invalidation of Kentucky state action in *McCreary County, Ky. v. American Civil Liberties Union of Ky*. In *McCreary*, the counties of McCreary and Pulaski put up the Ten Commandments and a citation to the Book of Exodus on the walls of each Counties Courthouses. *McCreary*, 545 U.S. at 851. The displays were the results of official orders from the local legislative bodies. *Id.* The American Civil Liberties Union of Kentucky successfully obtained an injunction against each county which required the displays be taken down. *Id.* at 852. After the injunction, each County's legislative body ordered the displays be put back up, but with resolutions which stated that the Ten Commandments were

the foundation of Kentucky criminal and civil law. *Id.* at 853. However, when the Counties changed lawyers, each changed the display to put along with the Ten Commandments, the copies of other important documents such as the Declaration of Independence and the Preamble to the Kentucky Constitution among others. *Id.* at 854. The District Court entered another preliminary injunction against the displays and the Circuit Court affirmed, which lead to the case being appealed to the Supreme Court. *Id.*

McCreary set out clear measuring tools used to determine what a legislature's purpose in enacting a law is, without attempting to find out the subjective truth in the drafters' minds. The Court reaffirmed the principle that examination of the purpose behind a statute is not only a "staple" in appellate review, but is a "key element" in constitutional doctrine. *Id.* at 861. The court stated that the question is not the actual intent of the drafters of a statute, but what the intent appears to be to an objective observer. *Id.* at 862. In order to achieve an objective analysis the Court stated that the analysis of a statute must take into account "the traditional external signs that show up in the 'text, legislative history, and implementation of the statute,' or comparable act." *Id.* (quoting *Santa Fe*, *supra*, at 308). *McCreary* admitted that the legislature is owed some deference in the statement of the purpose of a statute, but it is the duty of courts to determine whether the purpose is genuine and not a sham or merely secondary to a religious objective. *Id.* at 864. *McCreary* applied these principles to the displays put up by the Kentucky Counties and determined their actions had a non-secular legislative purpose and thus violated the Establishment Clause. *Id.* at 874.

The Court found that despite the Counties' stated secular purpose, the true purpose was non-secular, due to the traditional significance of the Ten Commandments combined with the circumstances surrounding their display. *Id.* The Court first discussed how the Ten

Commandments are a "central point of reference" in both the Jewish and Christian faiths with references to one god and regulations of religious obligations. *Id.* at 868. Thus, the first display of the Commandments needed to be mixed with a secular disclaimer or other symbols to detract from its clear religious meaning. *Id.* at 869. The second display contained the Ten Commandments accompanied by the Counties' resolution which stated that "Christ's Ethics" were a foundation for modern criminal and civil law. *Id.* at 870. Again, the Court concluded that an objective observer would see the religious intent behind the display. *Id.* The Counties' final display, which included the Commandments, other secular materials and the resolution, was combined with an attempt by the county to argue that it did have a secular purpose in educating citizens on the foundations of civil and criminal law. *Id.* at 871-872. The Court found, despite its secular purpose, an objective observer would denote the religious intent. *Id.* Additionally, the secular purpose was only created in litigation and not the reason behind the creation of the displays. *Id.* at 872. The case at hand demonstrates a similar analysis, in that the manner in which religious symbols appear would demonstrate a clear religious intent to the objective religious observer.

The Act's non-secular purpose is demonstrated by the words of the Act and the design of the specialty license plate. The General Assembly expressly stated in the Act that the license plate was to have the message "I Believe" with an image of a cross superimposed on stained glass. S.C. Code Ann. § 56-3-10510. The design by the DMV did exactly as was proscribed by the Act and created a license plate that included the "I Believe" message and cross on stained glass. (R. at 4.) A cross alone is a distinct religious symbol. *Lynch*, *supra* at 695 (Brennan, J., dissenting). It could hardly be argued that a cross in combination with stained glass is not a religious symbol, as it is common for Christian churches to have some form of stained glass.

This undeniable religious symbol combined with the message "I Believe," would lead the objective observer to the "commonsense conclusion that a religious objective permeated the government's actions." *McCreary*, 545 U.S. at 863. These facts considered with how a specialty license plate is created in South Carolina, lends further support that the General Assembly acted with not only a religious, but a Christian purpose.

The processes are clear for a specialty plate to be made in South Carolina, but the General Assembly ignored these procedures in order to get its religious message on a license plate. S.C. Code § 56-3-8100 clearly mandates that in order for the DMV to implement a specialty plate created by the General Assembly, the DMV must be provided with a marketing plan, the symbol to be placed on the plate, and a additional specialty plate fee. The General Assembly, however, simply stated that it wanted the "I Believe" message with the Christian symbol on the plate and left it up to the DMV to create the symbol. Further, the General Assembly set no fee for the plate as is required to be generally available for the particular Department upon sale, leaving the Governor to chastise the Legislature and mandate a fee. The commonsense conclusion to be drawn from these facts and circumstances is that a general objective observer could see that the government's actions were motivated by its ambition to create a religious, specifically Christian, plate without any semblance of a non-secular purpose.

2. <u>The Act is a clear endorsement of Christianity which results in the impermissible advancement of Christianity over other religions and nonreligious by the South Carolina Legislature.</u>

The second prong of the *Lemon Test* is commonly known as the "Endorsement Test" and has been addressed many times by this Court, but was best discussed in *County of Allegheny v. American Civil Liberties Union Greater Pittsburg Chapter*, 492 U.S. 573 (1989). The purpose of this prong is to enforce the Establishment Clause principles that "preclude[s] government

from conveying or attempting to convey a message that religion or a particular religious belief is favored or preferred." *Id.* at 593, (quoting *Wallace v. Jaffree*, 472 U.S. 38, 70 (1985) (O'Connor, J., concurring in judgment)). The Court restated the rule which is,

> The government's use of religious symbolism is unconstitutional if it has the effect of endorsing religious beliefs, and the effect of the government's use of religious symbolism depends upon its context.

Id. at 597. The task then of the Court is to determine whether the "particular physical settings" of the license plate has the effect of endorsing religion or religious beliefs. *Id.* The Court used these principles to determine if religious holiday displays had the effect of endorsing religion.

In *Allegheny*, the Court was presented with, *inter alia*, a crèche, displayed in the main staircase of the county courthouse, along with an angel holding a sign the proclaimed "to God in the Highest" in Latin. *Id.* at 580. The Court compared the setting of the crèche to an appropriate secular setting as was found in its decision in *Lynch*. In *Lynch*, the crèche was set among secular symbols like Santa Claus, Santa's, and reindeer which detracted from its religious message. *Id.* at 598. The crèche in *Allegheny* was substantially different as it stood alone in the busiest staircase of the county courthouse with the Latin phrase proclaiming "to God in the Highest." The Court found that the crèche was a "single element," and neither the surrounding floral decorations nor the fact it was the site for High School Christmas Choir concerts could detract from its clear religious symbolism. *Id.* at 599. Its placement in the Courthouse would not lead a "reasonable" viewer to any other opinion than that it was placed there with the "support and approval of the government." *Id.* at 599-600. The Court concluded that the County sent the unmistakable message "that it supports and promotes the Christian praise to God that is the crèche's religious message." *Id.* at 600. The "I Believe" license plate also can not be considered

to relay any other message than the State of South Carolina's endorsement and support of the Christian faith.

The "I Believe" plate is an endorsement of the Christian faith by the General Assembly, and no detracting elements exist to suggest otherwise. S.C. Code Ann. § 56-3-110 (1962) requires that; "Every motor vehicle … driven, operated or moved upon a highway in this State shall be registered and licensed in accordance with the provisions of this chapter." The fact that a license plate is required of all motorists demonstrates the importance placed on by the government. South Carolina has a basic plate along with many specialty plates and the ability to create a vanity plate available to its motorists.[2] However, among the many different specialty plates offered, the "I Believe" plate is the only religious plate which carries the distinct symbols of a particular religion available. Further, the "I Believe" plate was produced by the sole action of the General Assembly and not an organization or group. The result is that in South Carolina the government only offers one religious plate to be placed on motor vehicles on the roads of the state.

The Act did. not provide for other religious plates, nor are there any that already exist bearing symbols of other religions. The objective observer can make only one commonsense deduction; the South Carolina General Assembly supports, and approves of, the Christian religion. Without the existence of any detracting elements, such as other religious plates or the fact that a wholly separate organization is responsible for the "I Believe" plate, its religious message is loud and clear. The General Assembly has taken by its own ambition and accord, government action which is a clear endorsement of the Christian faith, and further, of the religious over the non-religious.

[2] See, http://www.scdmvonline.com/DMVNew/plategallery.aspx

3. <u>The Legislature has engaged in the excessive entanglement between the state and religion that is specifically prohibited by the Establishment Clause.</u>

Lemon states that the excessive entanglement prong protects the Establishment Clause principle to prevent the intrusion of church and state in the precincts of the other as much as possible. *Lemon*, *supra* at 614. Entanglement can occur in two ways; first, a statute or program involves the state impermissibly monitoring or overseeing religious affairs, or second, potential political divineness arises out of conflict which is a threat to the normal political process. *Marsh v. Chambers*, 463 U.S. 783, 798-799 (1983) (Brennan, J. dissenting) (citing *Lemon*, 403 U.S. at 614-622). At present the government is not attempting to monitor religious affairs, but the "I Believe" license plate clearly threatens the normal political process as it will lead to lines being drawn based on religious belief.

In *Lemon*, the Court was presented with the issue of whether programs in Rhode Island and Pennsylvania, which provided state funding to parochial schools, were a violation of the Establishment Clause. *Id.* at 607-612. The statutes were designed to aid parochial schools to make the education provided on par with public schools. *Id.*. The Court Identified that while political debate and division is normal and healthy within the American democratic system of government, political division based on religion is "evil" which the Establishment Clause was intended to prevent. *Id.* at 622. The potential for divisiveness is a threat to the normal political process, which tends to confuse and obscure other issues of great urgency. *Id.* at 622-623. The Court found that because the two statutes provided funds based on the continuing needs of parochial schools which would continue to grow larger over time, the potential for political divisiveness based on religious lines would be intense. *Id.* at 623-624. The potential for entanglement led the Court to determine that each statute violated the Establishment Clause. *Id.*

at 625. The statutory scheme which allows for specialty plates, combined with the Act, passed presents the same potential threat that was present in *Lemon*.

The South Carolina Legislature's power of oversight and review of specialty plate designs combined with its enactment of the "I Believe" plate, presents the potential for political divisiveness. The General Assembly not only has the ability to pass its own specialty plate statutes, but has final review over the DMV process which makes it the ultimate judge and jury regarding the permissibility of specialty plates. (R. at 8., footnote 6) The legislature having such power, no doubt has the potential to create political divide if and when it deems a religious specialty plate inappropriate for production. Combine the power given to the legislature with the "I Believe" plate endorsing Christianity and the "evil" the Establishment Clause was created to prevent it present, as the government has now favored one religion over all others and the nonreligious. Political decisions will become blurred when the debate is intensified with religion present in the background. The injection of religion into the political realm, while currently only a potential, is a clear entanglement of church into the precinct of state beyond an acceptable level. The Act violates the final prong of the *Lemon Test* as it will lead to political divide based solely on the lines drawn by differing religious belief.

B. The <u>Lemon Test</u> Best Advances the Principles of the Establishment Clause Which Requires the Government Remain Neutral in All Respects towards Religion.

The principle most common in this Court's Establishment Clause jurisprudence is that the "First Amendment mandates governmental neutrality between religion and religion, and between religion and nonreligion." *McCreary*, *supra* at 860, (Citing *Epperson*, *supra* at 104; *Everson v. Board of Ed. of Ewing,* 330 U.S. 1, 15-16 (1947); *Wallace, supra,* at 53). The *Lemon Test* is a compilation of the various rules this Court had created over many years in Establishment Clause analysis. *Lemon*, 403 U.S. at 612-613. This test best accomplishes the protections of the

Establishment Clause while navigating the muddy waters that are often attached with such Constitutional challenges. It provides clarity and clear lines of interpretation, while preventing against the intrusion of church into the realm of state and state into the realm of church.

This Court addressed the need for neutrality in *McCreary* and this analysis best amplifies the need for the *Lemon Test*. The prohibition by the Establishment Clause is not clearly defined in the text of the First Amendment and does not only stop the designation of a national religion. *McCreary*, 545 U.S. at 875. Neutrality is the best guide Courts possess to interpret the prohibitions of the Establishment Clause. *Id.* at 874. *McCreary* recognizes that,

> The prohibition on establishment covers a variety of issues from prayer in widely varying government settings, to financial aid for religious individuals and institutions, to comment on religious questions. In these varied settings, issues of interpreting inexact Establishment Clause language, like difficult interpretative issues generally, arise from the tension of competing values, each constitutionally respectable, but none open to realization to the logical limit.

Id. at 875. The Framers intended not only to protect an individual in his or her choice of religious beliefs, but also to protect from the civic divisiveness that occurs when the government begins to engage in the religious debate. *Id.* at 876. "A sense of the past thus points to governmental neutrality as an objective of the Establishment Clause, and a sensible standard for applying it." *Id.* at 876. The *Lemon Test* is a standard by which neutrality may be measured in those cases where the line between what is a permissible and impermissible action becomes cloudy.

Lemon set out three prongs which a statute must pass when challenged; it must have a secular purpose, its effect must not be one that either inhibits or advances religion, and it may not lead to the excessive entanglement between religion and state. Each prong ensures that a statute is neutral and thus permissible under the Establishment Clause. The first prong examines the motivation of a government in order to prevent a statute which is intended to have a religious

purpose. The second prong moves past a government's motivation to examine the effect once the statute is applied, so that while a statute has a valid secular purpose, it still may place some unanticipated benefit or disadvantage based on religion. The third prong works to prevent the government from using its power to impress it religious desires upon the citizens, and protects against unequal access to the government based on religions, religious or nonreligious. Each prong works towards neutrality by protecting the very ideals the Framer's intended the Establishment Clause to safeguard.

The Petitioners may point to some of the various cases in which this Court has chosen not to employ the *Lemon Test*, but those cases can be rationalized when considered in light of the three prongs of the test. The dissent in the Circuit Court opinion pointed towards this Court's decision in *Lee v. Weisman*, 505 U.S. 577 (1992), where the issue of prayer at a public school commencement ceremony was addressed. The school district in *Weisman* had a tradition of a having an invocation and a benediction given by an invited clergy, who was given a pamphlet, "Guidelines for Civic Occasions." *Id.* at 581. The Court found such practice to be a violation of the Establishment Clause, but stated it did not need to use the *Lemon Test* due to the coercive nature of the issue. *Id.* at 587. The Court held that this commencement practice forced its public school students to engage in a religious exercise, which is a form of coercion and clearly a violation of the Establishment Clause. *Id.* at 597-600. Weisman should not be read as an invalidation of the *Lemon Test*, but merely a situation where going through each prong was unnecessary due to the past jurisprudence regarding prayer and the coercive government action.

However, had the *Lemon Test* been employed the school prayer would undoubtedly been found as a violation. There was no secular purpose stated by the school more than tradition, which would lead an objective observer to see the religious purpose behind the prayer. Its

primary effect could only be the advancement of religion through the support and approval of prayer by the school. The *Weisman* Court recognized the potential for divisiveness which under *Lemon* leads to improper and excessive entanglement. *Id.* at 588-589. Thus, while the dissent relies on Weisman as a curious abandonment of the *Lemon Test*, it is actually quite consistent with the test and only stands for the proposition that where coercion into religious practice is present, the *Lemon Test* is unnecessary.

The Petitioners may point to *Van Orden v. Perry*, 545 U.S. 677 (2005) as another case where the *Lemon Test* was not employed, but again the case is consistent with the test. The Court was presented with the issue of whether the display of the Ten Commandments among 21 historical markers and 17 monuments surrounding the Texas State Capitol violated the Establishment Clause. *Id.* at 681. The Court again didn't apply the *Lemon Test*. Instead, it relied on past jurisprudence on point regarding passive displays to determine that the while the display clearly religious it was also had historical meaning in the foundation of the Texas government. *Id.* at 697-698. Though the Court made its decision based on an analysis of history and tradition, the *Lemon Test* would have deemed the display to be a neutral government act as well. The state could have justifiably stated that the monument was just a part of its history, which it displayed with another 21 historical markers and 17 monuments that had no religious meaning. This would lead an objective observer to discern that the monument's placement was supported by a secular purpose. The monument does not rise to an endorsement of religion as the other historical displays detract from its religious meaning and strengthen that it is just a necessary part of a historical secular display. The monument also would not lead to divisiveness in the political process as it is only one true piece of history and not the State's support or approval of religion. Therefore, while this Court has chosen not to apply the *Lemon Test* in this

case, it has not abandoned the test or rendered it any less viable a constitutional tool of interpretation.

The Petitioners believe that the jurisprudence should lead to an abandonment of the *Lemon Test* and the use of the many other tests cited in various dissenting and concurring opinions by a few Honorable Justices of this Court. Even if this Court disregarded the *Lemon Test*, the Act passed by the General Assembly violates the Establishment Clause. While there is no consensus among the critics of the *Lemon Test*, Justice Kennedy's opinion (concurring in judgment in part and dissenting in part) in *Alleghany* may present the best statement of the critics' position. He states that this Court's cases stand for the two limiting principles that,

> Government may not coerce anyone to support or participate in any religion or its exercise; and it may not, in the guise of avoiding hostility or callous indifference, give direct benefits to religion in such a degree that it in fact 'establishes a [state] religion or religious faith, or tends to do so.

Alleghany, *supra* at 660, (Kennedy, J., concurring in judgment in part and dissenting in part). While this current case does not represent a case of coercive action by the government forcing citizens into religious practice, the "I Believe" license plate tends to establish a state religion.

The South Carolina General Assembly voted unanimously in favor of the Act which resulted in the "I Believe" specialty plate. (R. at 3.) The Act was specific in requiring that the specialty plate include the undeniable religious symbols of a cross superimposed on stained glass. (R. at 3.) Not only has the legislature chosen to pass a single religious specialty plate, but it is a clear endorsement of the Christian faith. The cross is a central element in the Christian faith and stained glass is a common theme among Christian churches. Any reasonable observer can look at these circumstances and come to the same conclusion; the State of South Carolina openly supports, approves, and advocates the Christian faith. Without its support for other religious plates or the legislation being pushed by a religious organization seeking funds, this is

the only conclusion. If Petitioners convince this Court to abandon the *Lemon Test*, this Court should still find that the "I Believe" Act violates the very principles of the Establishment Clause.

II. SOUTH CAROLINA'S "I BELIEVE" SPECIALTY LICENSE PLATE STATUTE OFFENDS THE PRINCIPLES OF THE FIRST AMENDMENT.

A. South Carolina has created a forum for expression and has restricted the rights of some to speak in the forum.

The First Amendment of the Constitution states that, "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech." U.S. Const. Amend. I. This phrase has been divided into two parts; the first referring to the establishment clause, the second referring to the Free Speech Clause. Caroline Mala Corbin, Note, *Mixed Speech: When Speech Is Both Private And Governmental*, 83 NYU L. Rev. 605, (2008). The Establishment Clause only applies to the government, and the Free Speech Clause only applies to private individuals. *Id.* at 607. Our founding fathers placed this provision in the Constitution because they understood how essential it was for a democratic society to be aware of the choices availed to them. Randall P. Bezanson & William G. Buss, Note, *The Many Faces of Government Speech*, 86 Iowa L. Rev. 1377, 1380 (2000). Generally the government may not discriminate against the viewpoint of a private speaker by permitting some to speak while censoring others. *Police Dept. of Chicago v. Mosley,* 408 U.S. 92, 96, (1972). The central Idea of the Free Speech Clause is that democracy is best served when there is a free flowing marketplace of Ideas. *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting). This Idea is instrumental because self-governance requires a well-informed citizenry that participates and makes its own decisions after hearing all the evidence. *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 270, (1964). The Free Speech Clause also serves as a check on the possibility that governments may abuse their power. Amy Riley Lucas, Note, *Specialty License Plates: The First Amendment*

And The Intersection, 55 UCLA L. REV. 1971, 1977, (2008). All of these goals are impeded when the government attempts to suppress speech because of a person's perspective. *Id.*

While the Free Speech Clause protects private speakers, it does not apply when the government is speaking. This means the government may favor one side of a controversial topic over another, or discriminate within its own speech. *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819, 833 (1995). However, the ability of the government to say what it wants is not absolute. In modern society, the government speaks though so many different mediums that it has become important to distinguish where government speech stops and where private speech begins. *See* Lucas, *supra* note, at 1977.

We have alleged that South Carolina has impermissibly exercised viewpoint discrimination through one of its specialty license plate acts. The first step in determining whether a state has committed such an offence is to classify the relevant message as either government or private speech. *Legal Servs. Corp. v. Velazquez*, 531 U.S. 533 (2001). When the government speaks for itself, the message is considered government speech, therefore the government may discriminate based on their viewpoints. *Rosenberger* at_833. However, in the realm of private speech, the government may not favor one speaker over another. *Members of City Council of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789, 804 (1984). The Supreme Court has never established a standard for determining whether speech is government or private. However, our jurisprudence does provide guidance to answer this question.

In *Rust v. Sullivan*, 500 U.S. 173 (1991), Congress created program clinics that provided subsidies to doctors to allow them to advise their patients on different family planning topics. *Rust* at 178-79, 181. The law forbade doctors employed by the program from discussing abortion with their patients. *Id.* at 179-180. The challengers to the law argued that this violated their First

Amendment Right, because it discriminated against their pro-choice viewpoint. *Id.* at 192. The Court upheld the law, stating that Congress had merely chosen to fund one activity over another. *Id*. at 193. The statute in question did not single out a particular idea for suppression because it was disfavored, rather Congress prohibited government employed doctors from practicing activities outside the scope of the program. *Id.*. at 194. The government's ability to discriminate when speaking for itself is justified because in order to govern, they will have to eventually choose sides to make decisions. *Johanns v. Livestock Mktg. Ass'n*, 544 U.S. 550, 574 (2005) (Souter, J., dissenting). Government discretion in these instances is also acceptable because of democratic accountability. *Id.* at 563. If the people object to the statements their officials have made, they may elect new representatives. *Id*. at 575, also *see*, *Bd. of Regents v. Southworth*, 529 U.S. 217, 235 (2000). Therefore the government may discriminate within its own speech.

However, government's participation with speech does not always justify government control over the content of expression. *Rust* at 1776, (citing, *United States v. Kokinda,* 497 U.S. 720, 726 (1990)). In *Rosenberger*, the Petitioner, a religious student organization, was denied reimbursement of their publication cost by the public university, even though other secular organizations had received similar reimbursements through the Student Activities Fund (SAF). *Id.*. at 822-23.While the Court acknowledged the State's power to discriminate based on its own speech, once a forum for expression is created, the State may not "discriminate against speech on the basis of its viewpoint,". *Id.*. at 829, (citing, *Lamp's Chapel v. Center Moriches Union Free School Dist.*, 508 U.S. 384, 393, (1993)). In determining whether government has created a forum, the Court looks to "the policy and practices of the government to ascertain whether it intended to designate a place not traditionally open to assembly and debate as a public forum" as well as "the nature of the property and its compatibility with expressive activity…" *Cornelius v.*

NAACP Legal Def. & Educ. Fund, Inc., 473 U.S. 788, 802 (1985). If the Court believes that the speech constitutes the government defining its own program, a forum is not created. However, where government activities encourage or facilitate expression of individual ideas, a forum exists. *Rosenberger* at 833.

The Court ruled that by establishing the SAF, the State did not define the terms of its own program, rather, they created a forum. *Id.* at 830. The Court distinguished the government regulation of a forum for speech from the typical instance when the State may permissibly promote its viewpoint, such as defining its own educational criteria, or as in *Rust*, the use of private speakers to transmit specific information pertaining to its own programs. *Id.* at 833. Unlike these examples, in *Rosenberger*, the students did not speak for the school, and the university was not responsible for the student's message. *Velazquez* at 543. The fact that the SAF reimbursed publication, which held many different viewpoints, supported the notion that the SAF was intended to facilitate a forum for expression. *Id.* at 835. Having established a forum, the Court determined that the State had impermissibly suppressed speech based on its viewpoint. *Id.*

When a forum for expression exists, the First Amendment protects speech from viewpoint discrimination. In *Legal Servs. Corp. v. Velazquez*, the statute in question invalidated funding restriction under the Legal Services Corporation (LSC) Act. *Id.*. at 539. The funding condition required LSC lawyer to withdraw from representing a client if it turned out that the representation would involve challenging a welfare law. *Id.*. at 539. The Court stated that, "[t]he lawyer is not the government's speaker and when the government regulates a particular medium-lawyer advocacy in that case-the 'accepted usage [of the medium must be considered] in determining whether a particular restriction is necessary.'" *Id.* at 542, 543. In regulating the advocacy of LSC lawyers, the government had impermissibly attempted to "use an existing

medium of expression and to control it, in a class of cases, in ways which distort its usual functioning." *Id.* at 543. *Rosenberger* and *Velazquez* stand for the notion that this Court must focus not only on the character of the speech, but also on the nature of the medium in determining whether restriction of speech is constitutional.

Respondent's position is that South Carolina's "I Believe" statute constitutes a mixture of government and private speech or hybrid speech. Having affected private individuals First Amendment right, South Carolina has impermissibly exercised viewpoint discrimination because the statute in question facilities a forum for expression.

B. Appellate Courts across the country refuse to label specialty license plates as purely government speech.

In *Sons of Confederate Veterans, Inc. v Comm'r of Va. Dep't of Motor Vehicles*, 288 F.3d 610, 614, (2002), (SCV) the SCV applied under Virginia statute for a specialty license plate to be issued to its members that read, "Sons of Confederate Veterans" next to a confederate flag. The state authorized the message but prohibited the flag. *Id.*. After taking into account many other circuit court decisions, the Court considered four factors, none of which are exhaustive, to determine whether the speech constituted government or private speech. *Id.*. at 619. First, the court questioned the central purpose of the program. *Id.*. at 618. Second, the court weighed in on the degree of editorial control that either the government or the private party had. *Id.*. Third, the court sought the Identity of the literary speaker. Finally, the court questioned who bore the ultimate responsibility for the license plate. *Id.*. When viewed in conjunction with Supreme Court precedent, the SCV decision helps resolve the issue before this Court.

The Court in SCV held that all four factors weighed in favor of private speech. *Id.* at 612. The purpose of the specialty plate was to raise revenue while allowing for private expression. *Id.*. at 619. The original Idea and design came from a private organization, thus the private

individuals had control over the editorial process. *Id.* at 620-621. The Court noted that while specialty plates were manufactured, advertised, and issued by the State, the private individuals purchased, displayed and chose to affix the plate on their vehicle. *Id.* at 612. The personal decision of choosing one message over many others makes the private individual the literary speaker who holds the ultimate responsibility for the message. *Id.* (citing, *Perry v. McDonald,* 280 F.3d 159, 166 (2d Cir.2001)). The Court cited *Wooley v. Maynard,* 430 U.S. 705, 717, (1977), as its authority which stated that even the State motto on a standard plates had some element of private speech. After considering the four factors, the court held that the speech was private, and therefore that the restriction was discriminatory because it was aimed to suppress SCV's viewpoint. *SCV* at 623-26. The Court also stated that it was an oversimplification to assume that all speech must either be private or government speech. *Id.* at 244-245.

After SCV, many states issued license plates which read "Choose Life" and at the same time restricted the issuance of pro-choice specialty license plates. In *Planned Parenthood v Rose*, 361 F.3d 786, (S.C.), 2004, South Carolina defended its specialty license plates stating the legislation constituted government speech, thus it was constitutional for the legislature to discriminate based on viewpoint. *Id.* at 792. The Fourth Circuit rejected this argument, stating that the plates were not purely governmental, nor was it purely private. *Id.* at 793. Looking at the SCV factors, the Court concluded that the purpose of the law was to promote its pro-life policy, which was different from SCV's purpose of raising revenue and allowing personal expression. *Id.*. Additionally, the Court concluded that because the idea and design had originated with the government, rather than private individuals, the government exercised editorial control over the license plate scheme. *Id.* Thus the first two factors, the Court concluded were in favor of government speech.

The Court found the final two factors in favor of private speech. Much like SCV, it was the individual who chose the plate out of many others, and affixed the plate to their vehicle. Therefore, the individual was the literary speakers. *Id.* at 793-94. The private person bears the responsibility of the "Choose Life" plate, because there can be no doubt that the private person expressed the viewpoint on the license plate. *Id.* Therefore, South Carolina's specialty license plate program had elements of both private and government speech. *Id.* at 792. Having determined the speech was hybrid, the Court concluded that the State could not discriminate based on viewpoint because South Carolina had opened a forum for expression under *Rosenberger* and *Velazquez*, and must abide by the First Amendment restrictions. *Id.* at 795-99.

1. <u>Applying the SCV factors to the present case, South Carolina's "I Believe" license plate constitutes Hybrid speech.</u>

The statute in question is similar to the South Carolina statute that was invalidated in *Rose*. The purpose of the law in the present case was to spread the State's position on religion. In addition the message originated and was designed by the legislature. (R. at 5.) Therefore, the first two factors weigh in favor of considering the "I Believe" plate as government speech.

The final two factors weigh in favor of private speech. The Supreme Court has stated that even the message on a standard plate, one which private individuals are forced to bear, has some element of private speech. *Wooley* at 717. This notion is only strengthened when the private person has a choice between what message they decide to display on their personal vehicle, or when that person pays extra to affix that message on their private vehicles. *Rose* at 794.

Petitioners will argue that the specialty plate is government speech because the government not only owned and manufactured the plate, but more importantly they signed the speech by emblazoning the State's name across the license plate. *SCV* at 621. Petitioners will also claim that because there is no disclaimer on the license plate, the plate should be considered

government speech. *Capitol Square Review and Advisory Bd. V. Pinette*, 515 U.S.753 at 776, (1995) (O'Connor, J., concurring). However, a reasonable person is unlikely to attribute the message displayed on specialty plates to the government. *Rose* at 794. No one who sees a specialty plate imprinted with the phrase "I Believe" with a cross on stained glass window in the background would doubt that the owner of that vehicle holds that viewpoint. *Id.* Also, it is unreasonable to assume every message on South Carolina's plates constitute state policy. Many of the specialty plates support a private group or a local school. (R. at 21). Moreover, disclaimers are not always effective and due to the limited space on license plates, they are impossible in the present case. *See*, Bezanson & Buss, *supra* note, at 1484. Therefore the message on the plate, when read by others, will be attributed to the private individual. The final two factors weigh in favor of private speech, thus the statute in question constitutes hybrid speech.

2. <u>The Johanns test is inapplicable to the present case Because the current case has nothing to do with compelling speech.</u>

In a contrasting view, the Sixth Circuit in *ACLU of Tenn v. Bredesen*, 441 F.3d 370, (6th Cir. 2005), declined to use the four factor test and instead adopted a test the Supreme Court articulated in *Johanns v. Livestock Marketing Ass'n* 544 U.S. 550, 562 (2005). The test asked, "whether the government sets the overall message to be communicated and approves every word that is disseminated." *Id.*. at 375, (citing *Johanns* at 562). The Sixth Circuit found that Tennessee's "Choose Life" specialty plate statute constituted government speech because the legislature chose the plates overarching message and approved every word. *Bredesen* at 367.

The Sixth Circuit's legal authority came from *Johanns*, where the Supreme Court upheld a government program that created a forced check-off payment of one dollar per head of sold or imported cattle to fund a federal policy of promoting the marketing and consumption of beef. *Johanns* at 554. The program created the "Beef. It's What's for Dinner." campaign. *Id.*. Many

beef produces sued the Department of Agriculture, on the grounds that the check-off impeded their efforts to promote the superiority of other kinds of beef. *Id.*. at 556. The Court held, in a plurality opinion, that the check-off program did not violate the First Amendment because the message conveyed by the program was government speech. "[C]ompelled support of government—even those programs of government one does not approve—is of course perfectly constitutional, as every taxpayer must attest." *Id.* at 559. The Court concluded that the message was government speech because government set the overall message to be communicated and approved every word that it disseminated. *Id.* at 561.

The *Johanns* test is inapplicable to the current case because the present case has nothing to do with being forced to speak or subsidize a message. Rather, the harm present in this case is being denied the opportunity to speak on the same terms as other private citizens within a government sponsored forum. The *Johanns* decision turned on whether the speech at issue was that of the government. *Bredesen* at 386 (Martin, J., dissenting). The Court primarily examined who controlled the speech, without referencing to whom the speech might be attributed, because the government is allowed to force citizens to subsidize governmental messages though taxes. *Johanns* at 562. This was significant in *Johanns* because the plaintiffs were being forced to pay money to fund a message they disagreed with. *Bredesen*, 441 F.3d at 387 (Martin, J., dissenting). Applying *Johanns* to the present case would also run contrary to our jurisprudence in *Wooley*, where this Court held that an element of private speech exists even where the vehicle owner had no choice as to the message displayed on their government issued license plate. *Id.*. at 386. Additionally, the cases are distinguished because the attribution of the government's message to the private speaker was irrelevant to the facial challenge in *Johanns*. *Bredesen* at 586 (Thomas, J., concurring). Attribution in this context is relevant because it is fundamental to determining

who the speaker is in the first place. *See*, Lucas, *supra* note, at 2004. It's important to note several other circuits have used the *SCV* factors even after the *Johanns* decision. *Henderson v. Stalder*, 407 F.3d 351 (5th Cir. 2005), *Children First Foundation, Inc. v. Martinez*, 169 F. App'x 637 (2d Cir. 2006), *Arizona Life Coalition, Inc. v. Stanton*, 515 F.3d 956 (9th Cir. 2008). Thus the *Johanns* test, which does not address attribution, and which was only concerned with government speech for forced tax purposes, is inappropriate for specialty license plate cases. *Id.*.

3. The SCV test is the best test to apply to preserve the fundamental concepts of the First Amendment.

The main reason this Court allowed government speech to discriminate, was democratic accountability. *Johanns* at 563. However, accountability is only effective when a reasonable person knows who is speaking. *Rose* at 798. It means nothing that the government controls the message if that fact is never disclosed to the listeners. "The government speech doctrine was not intended to authorize cloaked advocacy that allows states to promote an idea without being accountable to the political process." *Rose* at 795-96. Yet, that is the result when the viewer underestimates the government's role in spreading the message. *Id.* at 798-99.

The consequences of labeling specialty license plate as purely government speech would allow government to control the content while avoiding any actual endorsement of a message. *See*, Corbin, *supra* note, at 654. The check upon government's abuse of power will vanish and be replaced with messages the government will judicially claim without being held democratically accountable. *Id.* at 654-62. Also, a private person could not express a contrary view in the same manner. A democratic society works at its best when the society is well informed. *Sullivan* at 270. Labeling the "I Believe" specialty license plate as government speech would impede these goals, and thus the First Amendment shield should ensure that all individuals have the same opportunity to speak.

C. By creating a specialty license plate program to express different viewpoints, the state has opened a forum for dialogue just as it did in Rosenberger and Velazquez.

Vehicle owners do not speak for the government. The nature of specialty license plates, and their ability to express different messages that the private person goes out of their way to communicate, indicates the program's purpose was to encourage expressive activity. The sheer number of plates available to the public supports the notion that the program was intended to facilitate expression of individual Ideas. *See*, Corbin, *supra* note, at 665. Labeling the specialty license plates as government speech, would allow the State to use an existing medium of expression in ways which distort its usual function. *Id.*

Opposing counsel will argue that the specialty license plate program is a government program similar to that described in *Rust*, and thus should be regarded as government speech. Although the State created the plates, it does not enlist vehicle owners to bear the message in the way Doctors are prohibited from discussing abortion with their patients. *Rust* at 179-180. Instead, vehicle owners pay extra to choose which message they want to express on their private vehicle. Therefore, unlike *Rust* where the State only intended one message to be conveyed, here the state has established a license plate forum where different ideas are intended to be shared, making discrimination among different ideas unconstitutional.

The Court of Appeals' dissent was concerned that if the speech was considered anything but purely government speech, then the government would have to provide other hate groups with the same opportunity and be compelled to spread a message it did not agree with. (R. at 21-23). However, the purpose of the First Amendment is to protect all Ideas, not just popular ones. *Bredesen* at 390 (Martin, J., dissenting). Moreover, South Carolina already has license plates made for controversial groups, such as the Sons of Confederate Flags. *SCV* at 612. The concern that government would be spreading messages it did not agree with has no constitutional ground

because the First Amendment only applies to private individuals, not the government. *See*, Corbin, *supra* note, at 607. Therefore, the "I Believe" license plate statute has opened a forum for expression, and not requiring South Carolina to fairly provide everyone with the same opportunity to speak would offend the constitution.

1. The legislative process provided to those who agree with the views advanced by the Believe" plate is distinctly easier and allows for options not available through the DMV process.

Those who would like to express a contrary view on a license plate need to prove their non profit and tax exempt status at least five years before their message can be expressed. (R. at 8-9). The group must also overcome many other obstacles of approval that do not exist for those who happen to agree with the legislature's message. (R. at 9-10) Even if the legislature later approves other religious plates of those groups which requests them, those applicants would be disadvantaged by the delay. Thus, any group forced to seek approval of a religious or non religious philosophy plate through the DMV is disadvantaged in expressing its viewpoint relative to the viewpoint advanced by the "I Believe" plate. By issuing license plates that read, "I Believe", the South Carolina has violated the First Amendment by favored a religious viewpoint over non religious viewpoint, as well as Christianity over other religions.

CONCLUSION

For these reasons, this Honorable Court should (1) hold that the "I Believe" Act passed by the General Assembly is unconstitutional as it violates the First Amendment's Establishment Clause and (2) hold that the Individuals with Disabilities Education Act limits tuition reimbursement only to children who have received public special education and related services through attendance at a public school.

Respectfully submitted,
ATTORNEYS FOR RESPONDENTS

APPENDIX

§ 56-3-8100. Special license plates production and distribution guId.elines.

(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 indivId.ual 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 indivId.ual 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 indivId.ual 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 revalId.ated 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 indivId.ual 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.

(G) For each new classification of special vehicle license plate, including, but not limited to, motorcycle license plates, created pursuant to this section, must meet the requirements of Articles 81 and 82, Chapter 3, Title 56 as appropriate.