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In the  
**SUPREME COURT OF THE UNITED STATES**

Spring Term, 2009

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No. 09-0001

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**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-Appellees,*

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-Appellants.*

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On Writ of Certiorari from  
the United States Court of Appeals  
for the Fourth Circuit

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**BRIEF FOR PETITIONERS**

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Charleston School of Law  
Moot Court Competition  
Attorneys for the Petitioners  
Team O

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## **QUESTIONS PRESENTED**

1. Whether the “I Believe” Act and relevant statutory scheme for manufacturing and distributing “I Believe” specialty license plates violate the Establishment Clause of the First Amendment.
2. Whether the “I Believe” Act and relevant statutory scheme for manufacturing and distributing “I Believe” specialty license plates violate the free speech provisions of the First Amendment.

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**OPINIONS BELOW**

The United States Court of Appeals for the Fourth Circuit opinion is unreported. The decision may be found in the record from pages 1-26.

## **STATEMENT OF JURISDICTION**

The decision of the United States Court of Appeals for the Fourth Circuit was issued on January 1, 2009. This Court has jurisdiction under 28 U.S.C. § 1254(1), as cases in the court of appeals may be reviewed by the Supreme Court by writ of certiorari granted upon the petition of any party in a civil case after rendition of judgment.

## **RELEVANT STATUTES AND CONSTITUTIONAL PROVISIONS**

The relevant provisions are set forth in the appendix.

## STATEMENT OF THE CASE

The State of South Carolina requires motor vehicles register and be licensed through the South Carolina Department of Motor Vehicles (hereafter “DMV”). (Opinion p. 6, (Op. at 6)) South Carolina vehicle owners must pay a biennial registration fee, typically \$24. (*Id.*) Owners paying the standard registration fee receive a state-issued plate which is currently displays “Travel2SC.com.” (*Id.*) The “Travel2SC.com” standard license plate depicts a dark blue palmetto tree and a crescent moon against an orange sunrise background with the motto, “Travel2SC.com” at the top. (*Id.*) Alternatively, South Carolina residents may obtain the “In God We Trust” specialty license plate authorized by the state legislature for the same \$24 standard registration fee. (*Id.* n.3 (citing S.C. Code Ann. § 56-3-9200).) Other specialty license plates are also available to motorists but require an additional fee. (*Id.*) However, no citizen is required to purchase or use a specialty license plate on his vehicle. (*Id.* at 21.) Currently, over one hundred specialty license plates are available from South Carolina DMV. *See* South Carolina Department of Motor Vehicles Website, *Plate Gallery, available at* <http://www.scdmvonline.com/DMVNew/plategallery.aspx>. (last viewed Jan. 23, 2008).

In South Carolina, there are two ways in which a specialty license plate is created: legislative authorization or DMV approval of a qualifying organization or institution. S.C. Code Ann. § 56-3-3710 (college or university specialty license plate), *id.* § 56-3-7750 (fraternity and sorority specialty license plate), *id.* §56-3-8000 (non-profit organization license plate). Legislative approval allows the South Carolina General Assembly to authorize special license plates by proposing the license plate by statute. The specialty license plate statute then follows the same approval process as other legislative statutes. (Op. at 7.) The DMV specialty license plate implementation requires either a sponsoring individual or organization to collect 400 pre-

paid applications for the specialty plate or \$4000, a marketing plan for the plate, and authorization to use the sponsoring organization's seals or emblems. (Op. at 8 (citing S.C. Code Ann. § 56-3-8100).) The DMV specialty license plate approval process then continues with an application, design review, approval or rejection appeal, and finally implementation. (Op. at 8-11.)

The case before this Court deals with the legislative approval process for specialty license plates and specifically Act No. 253 (codified at S.C. Code Ann. §56-3-10110). The Act (referred to as the "I Believe" Act) reads:

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 license plate is the same as the fee provided in Article 5, Chapter 5 of this title. The guidelines for the production of this special license plate must meet the requirements contained in Section 56-3-8100.

(Op. at 3.)

Section 56-3-8100 provides DMV guidelines following General Assembly approval of specialty license plates:

- (A) Before the Department of Motor Vehicles produces and distributes a special issue 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.

(Op. at 4.)

On April 24, 2008, two South Carolina legislators introduced the “I Believe” bill to authorize the “I Believe” specialty license plate. (Op. at 3.) The “I Believe” license plate’s design was to contain the phrase “I Believe” and an image of a cross superimposed over a stain glass window. (*Id.*) The General Assembly unanimously approved the “I Believe” legislation and on June 5, 2008, the bill became law without Governor Sanford’s signature. (*Id.*) In allowing the statute to become law without his signature, Governor Sanford did issue a statement regarding the legislation noting concern that South Carolina legislature was “enter[ing] into the license plate creation business” and for “failing to designate an organization to be the recipient of any additional fees to be created by the Department of Motor Vehicles.” (*Id.* at 4-5.) To address Governor Sanford’s concerns, the DMV set an additional \$5 fee above the standard license plate fee to defray the plate’s production costs. (*Id.* at 5.) No fees, besides the standard registration fee and the extra production fee, were collected from issuance of the “I Believe” license plates.

A DMV employee created the design for the “I Believe” license plate that incorporated a cross and stain glass window design. (*Id.*) By October 30, 2008, the DMV posted the “I Believe” license plate on its website and began taking orders for the tags from the public. (*Id.*) Within four days of posting the “I Believe” license plate (November 3, 2008), the DMV announced it had received 400 prepaid applications that would allow for the plate to enter production. (*Id.*) Respondents (religious leaders and non-profit religious-cultural organizations) filed their action challenging the constitutionality of the “I Believe” Act on June 19, 2008. (*Id.*) While the Fourth Circuit admitted the potential religious connotations of other South Carolina license plates (such as “Choose Life S.C.” or “In Reason We Trust”), the “I Believe” specialty license plate was the only one challenged by the Respondents. (*Id.* at 5, n.1.) Likewise, no evidence has been presented the State has refused to allow any religious group, including the

Respondents, a specialty plate. (*Id.* at 20.)

### SUMMARY OF ARGUMENT

The “I Believe” Act and the South Carolina scheme of manufacturing and distributing the “I Believe” specialty license plates provide a government framework that is consistent with well established precedent. The scheme authorized by Section 56-3-8100 and the subsequent creation of the “I Believe” Act do not violate the First Amendment under either the Establishment Clause or through the free speech provisions of viewpoint discrimination.

The United States District Court for the District of South Carolina correctly ruled that Respondent lacked standing for a constitutional challenge and that the statutory scheme permitting the “I Believe” license plate did not violate the Establishment Clause or the free speech provisions of the First Amendment. Unfortunately, the United States Court of Appeals for the Fourth Circuit determined that that the district court erred and that the “I Believe” Act and the statutory scheme for manufacturing and distributing the “I Believe” specialty license plate violated the First Amendment on both Establishment Clause and viewpoint discrimination grounds. This Court should reverse this decision in full.

Respondent contends that the “I Believe” Act and relevant statutory schemes violate the Establishment Clause of the First Amendment. However, Respondent and the Fourth Circuit incorrectly applied the *Lemon* Test to the First Amendment issue. This Court has found that an Establishment Clause challenge does not necessitate the use of the *Lemon* test. Since the inception of the test, numerous exemptions have been created for the test. Consequently, the *Lemon* test has become burdened by a myriad of loopholes and has become ineffective. Therefore, this Court should reject the test in favor of a more workable test to determine violations under the Establishment Clause.

However, if this Court finds the *Lemon* Test to be appropriate, then the “I Believe” Act and specialty plate survive the three prong test and are constitutional. Under the test, the “I Believe” specialty plate is secular because the specialty plate is legislatively created and there is no evidence of a non-secular purpose. The act and the specialty plate do not advance or inhibit religion because displaying the plate is part of a larger scheme of specialty plates that the objective observer would not recognize and endorsement. Furthermore, because the plate has a secular purpose of identifying motorists the primary effect and incidental benefit doctrine dictates that it does not advance a religion. The “I Believe” Act and plate do not create excessive government entanglement because after the plate is distributed to the driver the government no longer takes an active part in displaying the plate. In addition, there are strong historical and public policy justifications for allowing the “I Believe” specialty plate to be displayed on the vehicles of South Carolina’s citizens.

Respondent further contends that the “I Believe” Act and the specialty plate represent viewpoint discrimination in violation of the First Amendment. However, this Court has found that the government may speak for itself regardless of whether or not such speech is viewpoint-neutral. This Court has determined that government speech exists where the government maintains control over the expressed message. The “I Believe” Act falls within this exception because the government statutorily created both the message and design of the specialty plate. Unfortunately, the Fourth Circuit ignored this Court’s precedent and used a separate test to determine that the “I Believe” specialty plate was private speech.

However, if this Court chooses to accept the Fourth Circuit’s test, the “I Believe” Act and statutory scheme continue to qualify as government speech. The purpose of the program, the degree of editorial control exercised by the government, the government as the literal speaker of

the act, and the fact that the government bears the ultimate responsibility of the specialty plate all indicate that the “I Believe” message is government speech. Consequently, the “I Believe” Act falls outside the protection of the First Amendment.

Respondent argues that the “I Believe” Act is subject to a forum analysis because it is private or hybrid speech. Yet, the “I Believe” Act does not open a forum for debate among private citizens. Instead, the citizens that choose to display the plate are merely volunteers of the government designated message. Furthermore, Respondent’s contention that the South Carolina system is not viewpoint-neutral is unfounded and provides an unworkable constitutional standard that is against public policy.

## ARGUMENT

### **I. The Fourth Circuit erroneously applied the *Lemon* test when it determined the “I Believe” Act and relevant statutory scheme for manufacturing and distributing “I Believe” specialty license plates violated the Establishment Clause of the First Amendment.**

#### **A. The Fourth Circuit erred by applying the *Lemon* test to determine the “I Believe” Act violated the Establishment Clause of the First Amendment.**

The Establishment Clause of the First Amendment states “Congress shall make no law respecting an establishment of religion.” U.S. Const. amend. I. The Establishment Clause, however, does not call for an absolute wall to be created between church and state. *Lemon v. Kurtzman*, 403 U.S. 602, 614 (1971). This Court recognized that it would be impossible or unfavorable to create such a total separation. *Comm. for Pub. Educ. & Religious Liberty v. Nyquist*, 413 U.S. 756, 760 (1973). Instead the Constitution, “mandates accommodation, not merely tolerance, of all religions, and forbids hostility toward any.” *Lynch v. Donnelly*, 465 U.S. 668, 673 (1984) (citing *Zorach v. Clauson*, 343 U.S. 306, 314-15 (1952)). Despite a historical accommodation approach, the Court in *Lemon* developed a test (hereafter referred to as the

“*Lemon* test”) in an attempt to draw a line determining whether government action violates the Establishment Clause. 403 U.S. 602.

Since creating the *Lemon* test, this Court quickly developed exceptions and, in turn, created confusion among attorneys, academic scholars, and the Justices themselves as to when the Establishment Clause has been violated. Robert A. Sedler, *Understanding the Establishment Clause: The Perspective of Constitutional Litigation*, 43 Wayne L. Rev. 1317 (1997). A notable exception is the two-century old tradition of employing congressional Chaplains offering daily prayer to Congress. *Lynch*, 465 U.S. at 674. Cases carving out additional exceptions have called Justices like Justice O’Connor to conclude in *Wallace v. Jaffree*, the Establishment Clause should be re-examined. 472 U.S. 38, 68 (1985). Additionally in *Marsh v. Chambers*, the Establishment Clause was upheld without applying the *Lemon* test at all. 463 U.S. 783 (1983). Because of this confusion, the Establishment Clause should be rejected in favor of a more workable test to determine if government violates the Establishment Clause.

- B. Even if the Fourth Circuit may use the *Lemon* test determining whether the “I Believe Act” violates the Establishment Clause of the First Amendment, it incorrectly applied the test to the “I Believe” Act and specialty license plates**
  - 1. The “I Believe” Act does not violate the *Lemon* test’s “secular” purpose prong because the Act’s primary purpose is to identify, regulate, and distinguish motor vehicles registered within the State of South Carolina**

“I Believe” specialty license plates do not violate the *Lemon* test “secular purpose” prong because the plates are consistent with existing South Carolina code established for a secular purpose and not motivated by non-secular reasons. To determine whether government is acting for a “secular purpose,” this Court must determine “whether government’s actual purpose is to endorse or disapprove of religion.” *Lynch*, 465 U.S. 668 (O’Connor concurring). An affirmative answer to either question will find the law invalid. *Id.* This Court has found in other cases the

primary purpose in issuing license plates is to regulate, identify, and distinguish motor vehicles registered within a state. *See also Wooley v. Maynard*, 430 U.S. 705, 716 (1977) (state advances interests in license plates through identifying motor vehicles and promoting history, individualism, and state pride). Here, the “I Believe” Act incorporates S.C. Code Ann. § 56-3-8100 by reference which governs state-issued license plates. The Respondents have presented no evidence that South Carolina legislature was acting for a non-secular purpose when it created S.C. Code Ann. § 56-3-8100 or the “I Believe” Act. Clearly the issuance of license plates, whether standard state-issued or specialty, serves a secular purpose.

This Court should also determine the “I Believe” Act was introduced to the legislature solely for a secular purpose. In *Wallace*, 472 U.S. 38, the Court distinguishes between unconstitutional laws adopted for the purpose to create “moments of silence” to encourage school prayer while laws not adopted for that objective would be constitutional. *See Sedler, supra* at 1317, *See also Gary J. Simson, The Establishment Clause in the Supreme Court: Rethinking the Court’s Approach*, 72 *Corn. L. Rev.* 905, 909 (1987). The Respondents have failed to present any evidence in the legislative history indicating the “I Believe” Act was introduced for a purely religious purpose.

**2. Neither the “I Believe” Act nor the “I Believe” specialty license plate advance or inhibit religion under the *Lemon* test**

The “I Believe” Act and specialty license plates do not violate the “advance or inhibit religion” prong of the *Lemon* test. The Fourth Circuit erred in two ways. First, the court incorrectly applied the endorsement test to the facts in making its determination. Second, the court erred in solely analyzing the facts through the endorsement test. By correctly applying either the endorsement test or one of many other tests, this Court will find the “I Believe” Act and specialty license plates do not advance or inhibit religion.

**a. By issuing optional “I Believe” specialty license plates, the State is not advancing, endorsing, or promoting religion**

The South Carolina legislature does not require citizens to purchase “I Believe” license plates for their motor vehicles. (Op. at 3.) This Court has determined individuals are not required to disseminate religious ideologies contrary to their own beliefs. *Wooley*, 430 U.S. at 713 (holding a state may not constitutionally require an individual to display an ideological message on his personal property for the express purpose of being read by the public). “I Believe” specialty license plates are available on to individuals who wish to pay an additional \$5 to cover the plate’s production costs. (Op. at 5.) Standard state-issued “Travel2SC.com” and legislatively-authorized “In God We Trust” specialty license plates are still available at no additional cost to citizens. (Op. at 6, n.3.)

Under the endorsement test, government action violates the Establishment Clause when it is apparent to an objective observer the action constitutes government endorsement of religion or represents a symbolic union between the two. *Sedler, supra* at 1355. Under the endorsement test, a distinction must be drawn between an unadorned nativity scene on government property and a nativity scene as part of a larger holiday display. *Id., See Allegheny County v. ACLU*, 492 U.S. 573 (1989), *See Lynch*, 465 U.S. 668. This Court found in *Allegheny County* the government’s display of an unadorned crèche accompanied by the words “Glory to God for the Birth of Jesus Christ” violated the Establishment Clause. 492 U.S. 573. Justice Blackmun reasoned that this unadorned nativity scene partnered with the message was a “patently Christian message.” *Id.* at 574. Further, the display was not part of a comprehensive holiday display with other religious symbols that may detract from the message. *Id.* Compare the *Allegheny* case to the *Lynch* case, where the nativity was part of a larger display also including a Santa Clause house, a Christmas tree, carolers, and a banner reading “Seasons Greetings.” *Lynch*, 465 U.S. at

671. While the lower court in *Lynch* held that the display gave the “appearance of official sponsorship,” this Court ultimately held the crèche display was no more an advancement or endorsement of religion than government acknowledgement of Christmas’ origins or displaying religious paintings in a government museum. *Id.* at 683.

The “I Believe” specialty license plates are one of many fraternity, sorority, non-profit organization, college, and university specialty license plates available for purchase. (Op. at 6, n.3.) South Carolina motorists can even choose among “Choose Life S.C.” or The Council for Secular Humanism’s “In Reason We Trust.” (Op. at 5, n.1.) An objective observer would not recognize these specialty plates as government endorsement. This Court should find the plates, like the *Lynch* holiday crèche, are parts of a larger series of plates symbolizing South Carolina drivers’ ability to express personal taste rather than state endorsement of a specific religion.

In addition to the endorsement test, the “I Believe” Act and license plates would not advance religion under the “primary effect and incidental benefit” doctrine. Sedler, *supra*. at 1351-52. According to this doctrine, where a law advances a secular purpose, this Court has found the law does not also have the effect of “advancing religion.” Sedler, *supra* at 1351 (citing *McGowan v. Md.*, 366 U.S. 420 (1961) (upholding a state’s Sunday closing law as constitutional)). Here, South Carolina secular purpose is issuing license plates for motor vehicles. Under the rationale of the *McGowan* court, any benefit a religious group receives as a result of issuing “I Believe” license plates would be purely incidental. By advancing a non-religious purpose, the “I Believe” license plates do not violate the *Lemon* test’s second prong.

The “I Believe” Act and specialty license plates will not advance religion under one final principle: secular deism. Sedler, *supra* at 1353. Under the secular deism doctrine, certain references like, “In God We Trust” (the national motto) and “One Nation Under God” (words

within the Pledge of Allegiance) have been used so frequently in a secular context, they have ultimately lost their religious meaning. *Id.* (citing *School Dist. v. Schempp*, 374 U.S. 203 (1963) (Justice Brennan’s concurrence refers to these practices as being, “interwoven... so deeply into the fabric of our civil policy that [their] present use may well not present the type of involvement which the First Amendment prohibits.” at 203)). Since these practices and saying have become secularized and no longer primarily carry a religious significance, it can hardly be argued they advance religion. Sedler, *supra* at 1353-54. The same argument can be made with the “I Believe” license plates cross and stained glass window design. With crosses becoming more prevalent within modern culture in a variety of contexts, they have lost some of the religious symbolism once associated with them.

**b. By prohibiting “I Believe” specialty license plates but allowing other specialty plates, the Court is inhibiting religion**

Assuming for this part of the argument this Court does find the “I Believe” specialty license plates to be religious in nature, the Fourth Circuit’s actions, while not advancing religion, surely inhibited it. S.C. Code. Ann. § 56-3-8100 allows for the designation of specialty license plates specifically including specialty license plates available to colleges or universities (S.C. Code. Ann. § 56-3-3710), fraternities and sororities (S.C. Code. Ann. § 56-3-7750), and non-profit organizations (S.C. Code. Ann. § 56-3-8000). By allowing other specialty license plates but not permitting “I Believe” specialty license plates, the Fourth Circuit discriminates against religion. The Establishment Clause’s overriding principle is one of neutrality; it does not necessitate government be openly hostile to religion. Sedler, *supra* at 1357. In *Walz v. Tax Comm’n.*, this Court held that a property tax exemption for non-profits, including churches, did not violate the Establishment Clause. 397 U.S. 664 (1970). Prohibiting “I Believe” license plates on the basis of religion but authorizing all others (including “In God We Trust,” “In

Reason We Trust,” and “Choose Life S.C,” specialty license plate) permits the government to openly discriminate against religion. Religious groups should have equal access to the legislative process and specialty license plates like any other group.

**3. The “I Believe” Act and specialty license plates do not violate the Establishment Clause due to excessive entanglement**

Finally, the Fourth Circuit erred in determining the “I Believe” Act and specialty license plates failed the third excessive entanglement prong of the *Lemon* test. The Fourth Circuit mistakenly applied the entanglement prong to the present case. The test is not only whether entanglement exists, but that entanglement must be excessive. *Lemon*, 403 U.S. at 615. Even if the Fourth Circuit correctly determined the State’s actions were entangled with religion, it failed to determine whether that entanglement was excessive.

To determine whether the government’s action constituted excessive entanglement, this Court must examine the character and purpose of the benefitted institution, the form of the State-provided aid, and the resulting relationship between the State and the religious group. *Id.* The *Lemon* Court found the continued state surveillance violated the Establishment Clause because the continued oversight was excessive and continuing. *Id.* However, no continued regulation exists concerning the “I Believe” license plates. The DMV produced the specialty license plate pursuant to legislatively enacted “I Believe” Act. (Op. at 5.) S.C. Code Ann. § 56-3-8100 requires no additional administrative procedure regarding the specialty license plates. (Op. at 7.) Any oversight South Carolina maintains over the “I Believe” license plate is not unique to the plate itself. All South Carolina license plates would have similar oversight according to S.C. Code Ann. § 56-3-8100.

Judge Shealy’s broad speculation regarding South Carolina’s “I Believe” Act and potential future requests for religious tags conflicts with *Agostini v. Felton*. 521 U.S. 203 (1997).

In *Agostini*, the Court determined that “administrative collaboration” and “political divisiveness” were no longer solely sufficient to create an excessive entanglement claim. *Id.* at 233 (reversing *Aguilar v. Felton*, 473 U.S. 402 (1985)). The mere fact that a DMV employee created the design for the specialty plate would not violate the *Lemon* test’s excessive entanglement prong because DMV employees create all specialty license plates approved. (Op at 7-11.) Likewise, any legislative vote on future proposed license plates would also follow established statutory procedure and would likely have no more political divisiveness than any other legislation brought before the General Assembly. The Respondents have failed to show any evidence to the contrary.

As in *Lemon*, South Carolina has set forth precautions to avoid entanglement. Governor Sanford directed the DMV to charge a fee to cover any added production costs in creating the plate. (Op. at 5.) The DMV in turn set a plate production fee of \$5 above the standard plate fee to defray the plate’s costs. (*Id.*) The Act did not designate an organization to receive additional fees received by the DMV because no additional fees were charged. (*Id.*) By not setting an additional fee above the cost of production, the “I Believe” Act does not cause the State to co-mingle or pay money to a religious group. Financially, the State is not entangled with religion.

**C. Strong policy arguments favor allowing South Carolina to produce the “I Believe” Act and specialty license plates**

**1. Historically, this Court has allowed government to accommodate religious activities and viewpoints**

Historically, the Court has refused, “...to construe the Religion Clauses with a literalness that would undermine the ultimate constitutional objective *as illuminated by history.*” *Walz*, 397 U.S. at 671 (emphasis added), *See also Lynch*, 465 U.S. 668. The government has long recognized and this Court has accommodated, national holidays with religious undertones

such as Thanksgiving and Christmas, art exhibits at the National Gallery in Washington depicting religious messages like the Last Supper and the Birth of Christ, and Presidential declarations recognizing a National Day of Prayer or Jewish High Holy Days. *Lynch*, 465 U.S. at 676-77. Through this accommodation principle, Justice Douglas noted government has “follow[ed] the best of our traditions” and “respect[ed] the religious nature of our people.” *Lynch*, 465 U.S. at 678 (citing *Zorach*, 343 U.S. at 314). Likewise, South Carolina has for years allowed motorists to select from a variety of specialty license plates supporting a wide variety of causes. S.C. Code Ann. § 56-3-8100 (describing requirements applying to specialty license plates after Jan. 1, 2006). This Court should allow government to continue to accommodate motorists who choose to support causes through specialty license rather than see the specialty plates as government endorsement.

**2. The Fourth Circuit erroneously assumed the design and phrase used on the “I Believe” specialty license tag referred to Christianity alone**

The irony of the Establishment Clause is that when this Court rules a symbol violates the Establishment Clause, it is declaring the symbol is religious. *See* William P. Marshall, “*We Know It When We See It*” *The Supreme Court Establishment*, 59 S. Cal. L. Rev. 495, 512 (1986). While the symbol on the “I Believe” specialty license plate could be identified as a Christian symbol, it is a subjective determination. Accordingly, the more this Court seeks to define what is and is not religious, the more the Court is instituting its own denominational partiality. *Id.* The words “I Believe” alone do not espouse a religious meaning. If this Court determines the design and motto violate the Establishment Clause, it will wrongfully assume the cross and “I Believe” symbolize Christianity alone.

Alternatively, if this Court adopts the standard that all religious symbols must be removed for violating the Establishment Clause, this Court’s determination would impact not

just “I Believe” license plates. In addition to the “I Believe” specialty license plate, South Carolina’s state flag, and current standard state-issued license plate (“Travel2SC.com”) all identify South Carolina with a palmetto tree and crescent moon symbol. (Op. at 6.) The crescent moon is widely recognized as a Muslim symbol. This Court has addressed obscure references to religion in *Wooley* citing while the seal or motto may have ideological implications, the purpose of the seal or emblem is to authenticate the document. 430 U.S. at 715, n.11. By determining that the purpose of the specialty license plate is to identify and authenticate a motor vehicle, not endorse a religion, this Court can avoid the harsh repercussions of eliminating all symbols even potentially associated with a particular religion, including the crescent moon.

**II. The “I Believe” Act and relevant statutory scheme for manufacturing and distributing “I Believe” specialty license plates does not violate the free speech provisions of the First Amendment because it falls within the government speech exemption and is viewpoint-neutral**

**A. Specialty license plates created by state governments invoke government speech and do not violate the First Amendment**

**1. The Fourth Circuit erred in classifying the “I Believe” license plate as hybrid speech**

The First Amendment of the United States Constitution guarantees citizens the right to free speech without government interference. Under this doctrine, the government may not discriminate against the private speech of one citizen in favor of another. *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819, 829 (1995). However, this Court has explicitly stated that “the government may speak for itself.” *Bd. of Regents of Univ. of Wis. Sys. v. Southworth*, 529 U.S. 217, 229 (2000). The government may use this speech “to promote a particular policy of its own.” *Rosenberger*, 515 U.S. at 833 (1995). Consequently, there is a clear difference in treatment between government speech and private speech. The government must not regulate private speech, in particular forums, when “the specific motivating ideology or

opinion or perspective of the speaker is the rationale for the restriction.” *Id.* at 829. Therefore, viewpoint discrimination is “an egregious form of content discrimination.” *Id.* In contrast, viewpoint based discrimination is permissible where the government speaks for itself or it uses a private speaker to transmit its own message. *Sons of Confederate Veterans, Inc. v. Comm’r of Va. Dep’t of Motor Vehicles*, 288 F.3d 610, 617 (4<sup>th</sup> Cir. 2002).

The South Carolina statutory scheme for manufacturing and distributing the “I Believe” specialty license plate falls distinctly within this Court’s precedent defining government speech. The Fourth Circuit erred when interpreting the act as a form of hybrid speech. The court used an improper analysis for determining whether speech is considered government or private and ignored clear precedent of this Court’s current test for government speech. The authoritative test for government speech is found in *Johanns v. Livestock Mktg. Ass’n*, 125 S.Ct. 2055 (2005).

Government speech exists where a message is “from beginning to end a message established by the Federal Government.” *Id.* at 2063. In *Johanns*, a beef advertising campaign established by the government was funded through compelled subsidies. *Id.* at 2058. The petitioner argued that the compelled advertising violated the First Amendment. *Id.* at 2062. However, this Court ruled that the advertising campaign represented government speech. *Id.* As a result, the program was outside the protection of the First Amendment regardless of whether it was compelled speech. *Id.*

The key factor to determine whether speech is private or government relies on the amount of control the government maintains over the message in question. *Id.* at 2062-63. In *Johanns*, this Court emphasized that the federal government created the entire message of the advertising program because Congress implemented a statutory scheme of a “coordinated program,” specified the content of the promotional campaign, and determined what was not to be included

in the campaign. *Id.* at 2063. Furthermore, even though the campaign was managed by nongovernmental sources, the development of the program was overseen by government officials, who maintained final approval over every word of the promotional campaign. *Id.* Thus, when “the government sets the overall message to be communicated and approves every word that is disseminated, it is not precluded from relying on the government-speech doctrine merely because it solicits assistance from nongovernmental sources in developing specific messages.” *Id.*

The Fourth Circuit, in its opinion, used a test determining whether speech is government or private that is in direct conflict with this Court’s precedent. By relying on a four factor test previously established in their decision of *Planned Parenthood v. Rose*, 361 F.3d 786, 789 (4<sup>th</sup> Cir. 2004), the court ignored the test established in *Johanns*. The court stated that under the factor test the specialty license plates embodied hybrid, not government, speech. *Id.* at 794 (citing *Sons*, 288 F.3d at 618-19). Thus, the Fourth Circuit applied the wrong test to determine the essence of speech found in specialty license plates and consequently, erred in finding that the “I Believe” Act violated the First Amendment as viewpoint discrimination.

In contrast, the Sixth Circuit has properly applied the *Johanns* test in *ACLU of Tennessee v. Bredesen*, 441 F.3d 370 (6<sup>th</sup> Cir. 2006) cert. denied, 126 S.Ct. 2976 (2006). Here, the court ruled that a specialty plate was the state’s own message and should be classified as government speech. *Id.* at 375. The court emphasized, like in *Johanns*, that the Tennessee legislature chose the overarching message to be conveyed and approved every word that was to appear on the license plate. *Id.* Furthermore, the court held that the actual message of the plate, “Choose Life,” was “spelled out in the statute” to demonstrate that the state was completely in control of the message being espoused. *Id.* The court also noted that the fact that the details of the selected

speech were left to entities other than the government and that the fact that the government does not credit itself explicitly as the speaker does not shift the speech to a private nature. *Id.* at 377. The key factor in determining the type of speech that exists under *Johanns* is who maintains control over the message.

In the current case, under the rule laid out in *Johanns* and applied in *ACLU*, the government control evident in the creation and implementation of the “I Believe” Act satisfies the requirements for pure government speech and falls outside of the protection of the First Amendment. The “I Believe” Act, like the act in *ACLU*, created a specialty license plate through legislation, not through the established proposal system. (Op. at 3.) Within that legislation, the act required that the text on the plate be “I Believe.” (*Id.*) Furthermore, the image of a “cross superimposed on a stained glass window” was mandatory under the act. (*Id.*) The production of the plate and the other elements of design were designated to the DMV, a government entity. (Op. at 5.) As a result, from the inception of the “I Believe” Act statutory scheme to the actual production of the license plate, the government was the sole actor. In the facts of this case there is no reference to a nongovernment entity lobbying for the legislation to create the license plate, nor is there a nongovernment agency that helped produce or design the plate. Thus, the control by the government in this case is even stronger than in current precedent. In *ACLU*, design elements of the plate were delegated to a nongovernmental organization. *ACLU*, 441 F.3d at 376. Therefore, the “I Believe” license plate is pure government speech because the South Carolina government chose the overarching message of the plate, provided mandatory text and design elements, and designated a government entity to design and produce the plate.

The government’s interest in this case is also devoid of outside influence. Respondent will argue that outside influences demonstrate that the government was not fully in control of the

specialty plate creation. In both *Rose* and *ACLU* outside entities received funds from the profits of the plates which was argued to be evidence of viewpoint discrimination in the statutory scheme. In *Rose*, the profits of the specialty plate went to designated private nonprofit organizations. *Rose*, 361 F. 3d at 788. In *ACLU*, half of the plate's profits were distributed to one particular pro-life nonprofit organization. *ACLU*, 441 F.3d at 372. Yet, here, the South Carolina government designated no group to be the beneficiary of the plate's profits. On the contrary, the government first required that the plate have no additional fee. (Op. at 3.) Even when a premium fee was required by the governor, the extra five dollars per plate only went to defray production costs. (Op. at 4.) As a result, the lack of even underlying interests for outside private nonprofit organizations demonstrates that the government alone crafted and espoused the message contained on the plate.

**2. Under the *Rose* four factor test, the “I Believe” Act is government speech**

The Fourth Circuit relies on its previous decision in *Rose* to support the assertion that specialty license plates generally are a form of private speech and therefore subject to a forum analysis. While this test conflicts with this Court's precedent, the Fourth Circuit further failed to perform the required analysis of *Rose* test to accurately determine the type of speech created by the “I Believe’ Act.” Instead, the court relies on the analysis of previous precedent that is inapplicable to the current statutory scheme found in the “I Believe’ Act.” In fact, with the correct application of *Rose* requires that the test be applied individually to alleged viewpoint discrimination cases. *Rose*, 361 F. 3d at 788. When applying this test correctly the analysis indicates that the South Carolina statutory scheme for manufacturing and distributing the “I Believe” plate would be found to be government speech and constitutional.

In *Rose*, the court relied on a four-factor test to determine what type of speech was

invoked in a statutorily created specialty plate. *Sons*, 288 F.3d at 618. In *Sons*, the petitioner alleged that Virginia was guilty of viewpoint discrimination because they denied the creation of a plate with a logo that met the statutory requirements. *Id.* at 614. The court created a four factor test to determine whether the speech should be classified as government or private in a First Amendment context. *Id.* at 618. The factors that were examined are:

(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 court in *Sons* found that the factors indicated that the Virginia specialty plate program constituted private speech and was therefore subject to the restrictions of viewpoint discrimination. *Id.* at 619-22. However, in the current case the Fourth Circuit used the general holdings of *Rose* and *Sons* without providing an analysis of these factors. Furthermore, the holding in *Sons* applied to an entire DMV approval process. *Id.* at 614. In contrast, the “I Believe” specialty plate was created through the statutory process. The four factor test of *Sons* must be applied to the particular facts of this case in order to properly determine, under this theory, whether the “I Believe” specialty license plate constitutes private or government speech.

**a. The central “purpose” of the “I Believe” Act is to provide a government message**

In *Sons*, the court found that under the first factor, the primary purpose of a specialty plate “is to produce revenue, while allowing on special plates authorized for private organizations, for the private expression of various views.” *Id.* at 619. Furthermore, the court noted that the system where the government required a number of guaranteed sales of the license plates suggest that they are not espousing a message but, attempting to raise revenue. *Id.* at 620.

Nonetheless, in the current case, revenue is not the purpose of the “I Believe” Act. The legislature enacted the statute with a requirement that the plate not cost more than the state-required license plate. (Op. at 3.) Later, an extra premium was only instituted to defray the plate’s production cost. (Op. at 5.) Also, while South Carolina requires 400 prepaid applications for a specialty plate, the reasoning found in *Sons* does not apply. S.C. Code Ann. § 56-3-8100. Here, because no potential for revenue exists it is much more likely that prepaid applications were required to ensure that the state did not burden taxpayers while espousing the government message. As a result, the “‘I Believe’ Act’s” statutory scheme does not suggest the purpose of the program is to profit off of the views of a specific group. Therefore, the primary purpose of the message is to express a particular view of the government. This reasoning follows the decision in *Wells v. City and County of Denver*, 257 F.3d 1132, 1141 (10<sup>th</sup> Cir. 2001), *cert. denied*, 534 U.S. 997, 122 S.Ct. 469, 151 L.Ed.2d 384 (2001), where a sign thanking donors for sponsoring a government display was a government speech purpose because all benefits to sponsors and the government were incidental to the government’s message. *Id.* at 1141.

**b. “Editorial control” lies solely with the government**

The court in *Sons* determined that the government did not have sufficient control over the content of specialty plates within their DMV approval process. *Sons*, 288 F.3d at 620-21. However, in that case most of the creative control and logos could be submitted by organizations. *Id.* at 621. The opposite situation exists in the current case where the South Carolina legislature created legislation that designated the message on the plate as well as a design. (Op. at 3.) As a result, the degree of government editorial control is much higher than in the Fourth Circuit’s reliance on *Son*.

**c. Ownership of the means of communication determines the “literal speaker”**

The third factor of the test is meant to determine the party that is espousing the message. *Id.* at 621. In identifying the private individual the court in *Sons*, relied on *Wooley v. Maynard*, 430 U.S. 705 (1977), stating that the case asserted that “license plates, even when owned by the government, implicate private speech interests because of the connection of any message of the plate to the driver.” *Sons of Confederate Veterans, Inc.* 288 F.3d at 621. However, the only mention in *Wooley* that relates drivers to messages on their cars is that “an automobile... is readily associated with its operator.” 403 U.S. at 717. However, license plates are generally known to be the property of the government. In *Wells*, the court found that ownership of the means of communication indicates the identity of the speaker. *Sons of Confederate Veterans, Inc.*, 288 F.3d. at 621 (*citing Wells*, 257 F.3d. 1132). In this case, the government creates the “I Believe” plate through legislation and produces it through the DMV. The ownership of the plate never leaves the government. Furthermore, the license plate number serves the actual and obvious purpose of identification, as well as demonstrates that it is specifically for the use of the government.

**d. The government bears the “ultimate responsibility” for the content of the speech**

The court in *Sons* linked the third and fourth factors together and stated that the entity that bore the “ultimate responsibility” for the speech is unclear. *Id.* at 622. However, the party in litigation over the particular speech is evidence of who “bears the ultimate responsibility for the content of the display.” *Wells*. 257 F.3d at 1142. Also, since the government created, designed, distributed, and has used the license plates to identify car, the government’s close relationship to the specialty plate demonstrates the responsibility it bears for the message. In *Rose*, the court reasoned that the “private individual chooses to spend additional money to obtain the plate and to

display its pro-life message on her vehicle,” demonstrates that the private individual bears responsibility for the plate. *Rose*, 361 F.3d at 794. Yet, in this instance the private individual pays only a five dollar premium that is meant only to augment the cost of the plate as opposed to benefit a nonprofit group as in *Rose*. In addition, every South Carolina owner is required to pay a biennial registration fee to obtain a license plate for a car. (Op. at 6.) If they fail to pay this fee their right to use the license plate is invalidated. Thus, the private citizen is given the privilege of using the government’s property in order to validly drive a car within the state.

**e. Balancing the four factors**

The four factors of the *Sons* and *Rose* test, when applied to the current case, indicates that the “I Believe” Act statutory scheme is government speech. In particular, it is clear that a specialty plate that is created through statute, profits neither the state nor organizations, and is the property of the state weighs heavily towards government speech in this analysis. Therefore, the Fourth Circuit erred in both applying the correct test for determining government or private speech and failed to apply the test used to support the theory that the “I Believe” specialty plate represented a message of hybrid speech. Furthermore, in using this test in both *Rose* and this case, the court incorrectly created a form of speech that this Court has not recognized. (Op. p. 16.) The court failed to balance between the four factors and determine whether the speech as private or government. (*Id.*) As a result, the Fourth Circuit created a class of speech to hide its governmental nature in order to categorically subject speech government viewpoints to strict scrutiny.

**3. Forum analysis is not necessary under the government speech doctrine**

The “I Believe” Act’s is government speech under an analysis of either the *Johanns* and *Rose* tests. The South Carolina government is exercising its authority “to select from among

various viewpoints those that the government will express as its own.” *Sons*, 288 F.3d at 617.

The “I Believe” Act is an example of speech the government is entitled to promote to the exclusion of other possible messages. *Griffin v. Dep’t of Veterans Affairs*, 274 F.3d 818, 822 (4<sup>th</sup> Cir. 2001). Thus, “where the government itself is responsible, and therefore accountable, for the message that its speech sends, the danger ordinarily involved in governmental viewpoint-based choices is not present” and the government is not infringing on First Amendment rights through viewpoint discrimination. *Sons*, 288 F.3d at 618.

**B. Specialty license plate programs do not open a forum for the expression of private or hybrid speech**

In the alternative, if this Court finds that the statutory scheme of the “I Believe” Act is private or hybrid speech, it does not follow that any forum is opened to create viewpoint discrimination. This Court has identified three types of forums: traditional public forums, designated public forums, and nonpublic forums. *Cornelius v. NAACP Legal Defense & Ed. Fund, Inc.*, 473 U.S. 788, 802 (1985). Traditional public forums exist where there is an extensive history of government property being “devoted to assembly and debate.” *Perry Educ. Assoc. v. Perry Local Educators’ Assoc.*, 460 U.S. 37, 45 (1983). Designated public forums exist where “policy and practice of the government” are “intended to designate a place not traditionally open to assembly and debate as a public forum.” *Cornelius*, 473 U.S. at 802. If the government excludes a speaker from either a traditional public forum or a designated forum its actions are subject to strict scrutiny. *Id.* On the other hand, “property that is not a traditional public forum or a designated public forum is either a nonpublic forum or not a forum at all.” *Ark. Educ. Television Comm’n v. Forbes*, 523 U.S. 666, 667 (1998) (citations omitted). “Access to a nonpublic forum can be restricted if the restrictions are reasonable and are not an effort to suppress expression merely because public officials oppose the speaker’s views.” *Id.* (citations

omitted)

### **1. No forum exists for specialty license plate programs**

If this Court determines that the “I Believe” Act is private speech, then the act fails to fall within a forum. The “I Believe” Act authorizes no individual or group to express a particular viewpoint in a forum. Furthermore, no forum is reserved for the class of licensed drivers in South Carolina. Instead, the act provides a government designated tag with a message and design created by statute to be issued to those who voluntarily wish to distribute this message. If the individual chooses not participate in the “I Believe” specialty plate they are issued a license plate that contains another government designated message that promotes the “Travel2SC.com” website. Consequently, the choice is one of preference over a government message not a personal viewpoint. While the driver might be expressing agreement with the government, such agreement does not create a forum. *ACLU*, 441 F.3d at 378. The fact that these messages are disseminated by private drivers of South Carolina does not create a forum for expression. *Id.* Thus, the “I Believe” Act falls outside of the viewpoint discrimination forum analysis and does not offend the First Amendment.

### **2. The “I Believe” Act is viewpoint-neutral**

The Fourth Circuit has ruled that intentional viewpoint discrimination of private speech is impermissible whether it occurs within or outside a private speech forum. *Sons*, 288 F.3d at 622 (citing *Ark. Educ. Television Comm’n v. Forbes*, 523 U.S. 666, 677 (1998)). Therefore, the “I Believe” Act must be viewpoint-neutral and not actively hinder one viewpoint over another. *Page v. Lexington County Sch. Dist. One*, 531 F.3d 275, 280 (4<sup>th</sup> Cir. 2008). However, the “I Believe” Act makes no restriction on any viewpoint under South Carolina’s specialty plate program. The record indicates that an opposing viewpoint to the “I Believe” message faces no

restriction in either a proposal through the legislative process or the DMV approval process. Consequently, a specialty plate stating, “I Don’t Believe” faces the same challenges, legislature, and approval process as the “I Believe” license plate. If private speech exists in the specialty license plate program then the legislature has established a system that provides any viewpoint a venue to be expressed through an open system of approval devoid of government discrimination.

### **3. The Fourth Circuit’s precedent is contradictory**

Courts that have found viewpoint discrimination where one viewpoint is not explicitly expressed in a specialty license plate program have imposed an untenable line of precedent. The Seventh Circuit has noted that Circuit Court decisions concerning viewpoint discrimination have left states that create specialty license plates without a constitutional option. *Choose Life Illinois, Inc. v. White*, 547 F.3d 853, 866 (7<sup>th</sup> Cir. 2008). Here, the court stated that the Fourth Circuit has ruled that it is “viewpoint discrimination to *allow* a ‘Choose Life’ specialty plate in absence of a pro-choice plate. *Id* (citing *Rose*, 361 F.3d at 795) (emphasis in opinion). However, the Ninth Circuit determined that it is “viewpoint discrimination to *disallow* a ‘Choose Life’ specialty plate even when there is no pro-choice plate.” *Id.* (citing *Ariz. Life Coal., Inc. v. Stanton*, 515 F.3d 956, 972 (9<sup>th</sup> Cir. 2008)) (emphasis in opinion). Under this reasoning, a government can neither stop nor permit a specialty license plate that might invoke a message that has an opposing view without violating the First Amendment. Consequently, courts are only allowed to issue a specialty plate if all other viewpoints are equally covered. Yet, they cannot stop the approval of one specialty plate which has an unrepresented opposing viewpoint. But, once that plate is created constitutionally it is immediately unconstitutional. As a result, the Circuit Courts have created an unfeasible framework for analyzing specialty license plates under viewpoint discrimination.

#### **4. Overriding policy concerns invalidate the Fourth Circuit's Opinion**

There is also a legitimate concern that the Fourth Circuit's opinion in this case is inconsistent with promoting efficient government communications and operations. The Sixth Circuit found that if statutorily created specialty license plates were subject to viewpoint discrimination limitations in a public forum then the consequence of the decision would be to make a large amount of "desirable and legitimate" government actions unconstitutional. *ACLU*, 441 F.3d at 378-79. The court notes that every time the government would express a viewpoint on an issue, such as distributing pins to private individuals that state "Register to Vote" or "Spay or Neuter your Pets," the opposite viewpoint would also have to be expressed through opposing pins by the government in order to not favor one viewpoint over another. *Id.* at 379. In addition, federal stamps, which are purchased and displayed by private individuals with various designs and messages, would be required to be viewpoint neutral or afford the opposing viewpoints' their own stamp as well. *Id.* Accordingly, the Fourth Circuit's holding is not only inconsistent with this Court's precedent it is also impractical in today's society.

#### **CONCLUSION**

For the aforementioned reasons, this Court should overturn the lower court's holding that the "I Believe" Act and the relevant statutory scheme for manufacturing and distributing "I Believe" specialty license plates violate the Establishment Clause and free speech provisions of the First Amendment.

## **APPENDIX**

U.S. Const. amend. I

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 redress of grievances.