UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
COLUMBIA DIVISION

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 *Plaintiffs*, v. 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. *Defendants*.	Case No. 3:08-2265-CMC

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION

Aaron J. Kozloski (D. S.C. Bar No. 9510)
CAPITOL COUNSEL
1201 Main Street Suite 1980
Box 11902 Capitol Station
Columbia, SC 29211
Tel: (803) 748-1320
Fax: (888) 513-6021

Ayesha N. Khan (appearing *pro hac vice*)
Alex J. Luchenister (appearing *pro hac vice*)
Elizabeth J. Stevens (appearing *pro hac vice*)
AMERICANS UNITED FOR SEPARATION OF CHURCH AND STATE
518 C Street, NE
Washington, DC 20002
Tel: (202) 466-3234
Fax: (202) 466-2587

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INTRODUCTION

This lawsuit seeks to enjoin the implementation of Act No. 253 (to be codified at S.C. Code Ann. § 56-3-10110 (2008)), which became law on June 5, 2008. The statute calls for the South Carolina Department of Motor Vehicles ("DMV") to make available to the State's drivers a license plate with "the words 'I Believe' and a cross superimposed on a stained glass window." DMV began taking orders for the "I Believe" plate via its website on October 30, 2008 — and on November 3, it announced that it had received 400 applications, a prerequisite to the plate's production. DMV has further announced that it anticipates having the plate in drivers' hands in early December 2008. Interim injunctive relief has thus become necessary to prevent the Plaintiffs from suffering constitutional injury.

Regardless of whether the plate is deemed government speech, government-endorsed private speech, purely private speech, or hybrid government-private speech — and irrespective of whether the Establishment Clause or the Free Speech Clause provides the framework of analysis — the result is the same: The Constitution speaks with one voice in precluding South Carolina from promoting the Christian message on the "I Believe" plate.

STATEMENT

A. South Carolina's License-Plate Scheme

South Carolina law requires that all motor vehicles be registered and licensed by DMV, *see* S.C. Code Ann. §§ 56-3-110, 56-3-190 (2007), and that vehicle owners pay a biennial registration fee — $24 for most vehicles, *see id.* § 56-3-620(B). A registrant who pays this fee normally receives the standard-issue plate, which is imprinted with the image of a dark-blue palmetto and crescent moon silhouetted against an orange sunrise and the words

"TRAVELS2SC.COM." *See id.* §§ 56-3-1210, 56-3-1230 (requiring DMV to issue license plates to all registrants and setting out basic specifications). The South Carolina legislature, however, has chosen to give vehicle owners additional license-plate options, having created by statute a wide array of license plates that honor respected individuals or organizations, or that advance particular issues or ideals. The legislature has also authorized DMV to issue plates at the request of certain kinds of institutions and organizations, without legislative involvement. *See id.* §§ 56-3-3710 (educational institutions), 56-3-7750 (fraternities and sororities), 56-3-8000 (nonprofit organizations).[1] Private citizens who do not wish to display the standard-issue plate can choose from among the legislatively created and DMV-issued options, usually for an additional charge. (*See* Ex. 1, Complete Plate List.)[2]

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[1] (*See* Ex. 1, Complete Plate List, http://www.scdmvonline.com/DMVNew/plategallery.aspx?q=All (this and all subsequent citations to DMV's website were accessed on November 6, 2008).) This online plate gallery depicts 108 plates. 62 of these were created by statute (*see* Ex. 2 (listing, and dividing into categories, the 62 plates created by statute)), and, with one exception, the remainder were issued by DMV alone. The exception is the motorcycle plate, which appears to lack any specific statutory authorization.

[2] The General Assembly has, in some instances, restricted vehicle owners' choices. Of the approximately 62 legislatively created plates in DMV's online gallery, 26 are available only to particular classes of vehicles or drivers. (*See* Ex. 1, Complete Plate List.) To obtain a Purple Heart plate, for instance, a vehicle owner must provide proof that he or she indeed received this military award. S.C. Code Ann. § 56-3-3310 (2007). Similarly, applicants for the Lions Club plate must be members of that organization. *Id.* § 56-3-8400. In contrast, some legislatively created plates bearing the names and/or logos of organizations — such as the South Carolina Elks Association and the Boy Scouts of America — are available to all registered vehicle owners, not just to these organizations' members. *See id.* §§ 56-3-4100 (Elks), 56-3-7330 (Boy Scouts).

As with those created by the legislature, not all DMV-approved plates are generally available. Ten of the approximately 47 such plates in DMV's online gallery are limited to certain categories of persons. (*See* Ex. 1.) All five fraternity and sorority plates, for example, are available only to these organizations' members. (*See id.*) Similarly, five nonprofit organizations

(continued...)

1. Legislatively Created License Plates

Legislatively created specialty plates vary widely in their content, cost, and beneficiaries. In terms of content, they generally fall into three categories.[3] The first group, which includes about 17 plates, consists of plates that honor military personnel or their families and members of certain respected professions or vocations. This category includes plates honoring Medal of Honor winners, members of the National Guard, Firefighters, and Emergency Medical Technicians.[4] The second group, which includes about 21 plates, consists of plates sought by and bearing a reference to a respected private organization. This category includes plates

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[2](...continued)
— the Ancient Free Masons, the South Carolina Ancient Free and Accepted Masons, the Secular Humanists of the Low Country, the South Carolina Chiropractic Association and West Point — have elected to offer their plates only to members. (*See id.*; Ex. 3, South Carolina DMV Policy RG-504, Specialized Plates for Organizations, at 12 (effective June 11, 2007), *available at* http://www.scdmvonline.com/dmvnew/forms/RG-504.pdf (permitting applicant nonprofit organization to check boxes indicating whether proposed plate can be purchased by the general public).)

[3] Not included within these categories are three legislatively created plates that simply serve an identifying function without otherwise conveying any substantive message: Farm Vehicle plates, S.C. Code. Ann. § 56-3-670 (2007), Antique motor vehicle plates, *id.* § 56-3-2220, and the Disabled plate, *id.* § 56-3-1910. Also omitted are personalized plates, *id.* § 56-3-2010, commonly known as "vanity plates," which are unique to the specific vehicle to which they are affixed. Vanity plates are governed by a set of special rules. They may bear up to seven characters — limited to letters, numbers, and the ampersand symbol, and including spaces — of the owner's choice. (Ex. 4, Application for Personalized License Plate, Form MV-96 (last revised Nov. 2007), *available at* http://www.scdmvonline.com/DMVNew/forms/MV-96.pdf.) They cannot, however, contain symbols, emblems, or images. (*See id.*) DMV may refuse to issue requested character combinations "which may carry connotations offensive to good taste and decency." S.C. Code Ann. § 56-3-2010(A) (2007). Further, a vehicle owner who seeks a vanity plate must pay an additional $30 beyond the basic registration fee. *Id.* § 56-3-2020.

[4] *See* S.C. Code. Ann. §§ 56-3-1610 (Emergency Medical Technician), 56-3-1810 (National Guard), 56-3-1850 (Medal of Honor), 56-3-4910 (Firefighter) (2007). For a complete list of the plates we have placed in this category, see Exhibit 2, Comprehensive Classification of Legislatively Created License Plates.

commemorating the Boy Scouts, the Fraternal Order of Police, the Lions Club, the Rotary International, the Shriners, and the South Carolina Elks Association.[5] The third and final category consists of plates that serve no identifying function and bear no reference to a private organization, but instead convey messages of importance to the State. There are approximately 20 plates in this category, including those featuring:

- An apple along with the phrase, "Public Education: A Great Investment";
- Several colorful animals and the phrase, "Protect Endangered Species";
- A golfer, poised mid-swing, and the words, "First in Golf";
- The outline of a house, silhouetted against the shape of South Carolina, and the phrase, "Homeownership: The American Dream";
- Fluttering U.S. and South Carolina flags, and the words, "In God We Trust";
- A puppy and kitten, and the phrase, "No More Homeless Pets";
- Fluttering U.S. and South Carolina flags, and the words, "United We Stand."[6]

Many of the plates in the second and third categories include expressive phrases or slogans along with vivid imagery. (*See* Ex. 1, Complete Plate List.)

The cost of legislatively created plates varies widely, particularly among those in the third

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[5] *See* S.C. Code. Ann. §§ 56-3-4100 (South Carolina Elks Association), 56-3-5400 (Fraternal Order of Police), 56-3-7100 (Shriners), 56-3-7330 (Boy Scouts of America), 56-3-7860 (Shriners), 56-3-8200 (Rotary International), 56-3-8400 (Lions Club) (2007). For a complete list of plates in this category, see Exhibit 2.

[6] (*See* Ex. 1, Complete Plate List (providing images of all plates)); *see also* S.C. Code. Ann. §§ 56-3-4510 (Endangered Species), 56-3-4600 (Homeownership), 56-3-5010 (Public Education), 56-3-5200 (First in Golf), 56-3-9200 (In God We Trust), 56-3-9300 (United We Stand), 56-3-9600 (No More Homeless Pets) (2007). For a complete list of plates in this category, see Exhibit 2.

category. For example, "United We Stand" plates are available for $25 beyond the basic registration price of $24, S.C. Code. Ann. § 56-3-9300 (2007); plates commemorating South Carolina's state dance, "the Shag," cost an additional $50, *id.* §56-3-3910; and plates trumpeting, "Homeownership: The American Dream," cost an additional $100, *id.* § 56-3-4600. Of the approximately 20 plates conveying messages of importance to the state, however, only one carries a premium lower than $25: the "In God We Trust" plate is available for no charge beyond the basic registration price. *See id.* § 56-3-9200; (*see also* Ex. 1, Complete Plate List.)

In some cases, the General Assembly has directed DMV to pay a portion of the premium it receives to a sponsoring organization or a particular fund. For instance, of the $54 fee for the "Public Education: A Great Investment" plate, DMV must place $20 in a state account to fund computers in the classroom and must distribute the remainder to a school or school district chosen by the license-plate purchaser. S.C. Code. Ann. § 56-3-5010 (2007). In other cases, however, fees for legislatively created plates benefit no particular organization or cause. For example, DMV need not set aside or distribute the excess fees it receives for "the Shag" license plates. *Id.* § 56-3-3910.

In one respect, however, all legislatively created plates are created equal: before DMV may produce and distribute a plate, it must receive either 400 prepaid applications or $4,000 from a sponsoring organization, a marketing plan for the plate, and any images that will appear on the plate. *See id.* § 56-3-8100(A).

2. DMV-Issued Plates

The South Carolina General Assembly has created a separate scheme for DMV to issue plates without legislative backing. That scheme authorizes DMV to issue plates for educational

institutions, *see id.* § 56-3-3710, fraternities and sororities, *see id.* § 56-3-7750, and nonprofit organizations, *see id.* § 56-3-8000. Of the 108 plates in DMV's online gallery, educational-institution plates account for approximately 29, fraternity and sorority plates for five, and nonprofit-organization plates for about 11. (*See* Ex. 1, Complete Plate List.)

But these plates cannot include the rich expressive content found on many legislatively created plates. Their content is limited to the requesting educational institution, fraternity, sorority, or nonprofit organization's "emblem, seal, or other symbol." S.C. Code. Ann. §§ 56-3-3710(A), 56-3-7750(A), 56-3-8000(A) (2007). Indeed, DMV policy makes explicit that nonprofit-organization plates may not include "slogans, names or other text" beyond any text that "appears within the sponsoring organization's emblem, seal, logo, or other representative symbol." (Ex. 3, South Carolina DMV Policy RG-504, at 7.)[7] DMV explains this limitation along the following lines: "Designs displayed on state license plates . . . are the sole responsibility of the State," and "the public must [] be protected from state action that might be construed as using taxpayer-generated funding to create messages or impressions that are not appropriate for a governmental entity." (*Id.* at 6).

Applicant organizations may specify a premium, beyond the standard $24 fee, that DMV will charge vehicle owners requesting their plates. S.C. Code. Ann. § 56-3-8000(A) (2007). DMV retains a portion of this additional fee "to defray the expenses of producing and administering" the new plate, but it must distribute the balance to an organization the applicant

[7] It appears that this prohibition was not imposed until February 5, 2007. (*See* Ex. 3, South Carolina DMV Policy RG-504, at 3.) For that reason, two plates issued before that date — those of the Chiropractic Association and the Secular Humanists — include both an expressive phrase and the organization's logo. (*See* Ex. 1, Complete Plate List.)

designates. *Id.*[8]

B. The "I Believe" License Plate

In May 2008, the South Carolina General Assembly unanimously approved legislation authorizing DMV to issue a license plate that "must contain the words 'I Believe' and a cross superimposed on a stained glass window." *See* Act No. 253 (June 5, 2008) (to be codified at S.C. Code. Ann. § 56-3-10110 (2008)). Beyond requiring that the plate include the words "I Believe," a cross, and a stained-glass window, however, the legislature had little to say. As it did with the "In God We Trust" plate, *see* S.C. Code. Ann. § 56-3-9200 (2007), the legislature declined to set a premium price, simply setting the biennial fee as "the same as the fee provided in Article 5, Chapter 3 of this title" — that is, the basic $24 registration price, *see* Act No. 253 (June 5, 2008) (to be codified at S.C. Code. Ann. § 56-3-10110 (2008)). The bill also invoked "the requirements contained in Section 56-3-8100," namely, that a certain number of applications or a lump-sum payment, a marketing plan, and the plate design must be received by DMV before it will begin producing the plate. *Id.*; S.C. Code. Ann. § 56-3-8100(A) (2007).

On June 5, 2008, Governor Mark Sanford allowed the "I Believe" license plate bill to become law without his signature. In his non-signing statement, he scolded the legislature for

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[8] Prior to 2006, applicants for organizational plates were not permitted to specify a premium or an organization to receive the excess fees. *See* Act of Sept. 7, 2006, 2006 S.C. Acts 3779, 3780-82 (amending section 56-3-8000 to add these features); *cf.* S.C. Code Ann. § 56-3-8000(A) (2005) (fee for DMV-approved organizational plates equal to fee for personalized license plates). Likewise, until 2006, DMV-approved organizational plates were available only to certified members of the applicant organization. *See* Act of Sept. 7, 2006, 2006 S.C. Acts 3779, 3782-83 (amending section 56-3-8000 to eliminate membership requirement); *cf.* S.C. Code Ann. § 56-3-8000(D) (2005) ("Only certified members of organizations, as set forth by the organization, may be issued a special license plate pursuant to this section."). As noted above, *see supra* note 2, nonprofit organizations may now choose to make their plates generally available. (*See* Ex. 3, South Carolina DMV Policy RG-504, at 12.)

failing to specify a premium for the plate, and encouraged DMV to charge a premium to cover the cost of plate production. (*See* Ex. 5, Letter from Governor Mark Sanford to President Pro Tempore Glenn McConnell (June 5, 2008).) DMV subsequently took the Governor's advice, charging a five-dollar premium to allay the costs of the plate's production. (*See* Ex. 6, I Believe License Plate, Frequently Asked Questions, http://www.scdmvonline.com/DMVNew/default.aspx?n=I_Believe_License_Plate.) Because no organization sponsored the plate or was designated as a recipient of a premium, however, it appears that the State must have supplied the marketing plan and plate design itself. And on November 3, 2008, four days after making the plate available on its website, DMV announced that it had received the necessary 400 applications, and would be furnishing the plate to registrants approximately one month hence. (*See id.* (explaining plates will be available approximately one month after application requirement is fulfilled); Ex. 7, DMV Website Homepage, http://www.scdmvonline.com/DMVNew/default.aspx (announcing requirement has been met).)

Both before and after its passage, the bill provoked extensive public comment from state officials. In an Associated Press account disseminated May 13, 2008, State Senator J. Yancey McGill, one of the bill's sponsors, declared that he "welcome[d] any religion tags." (Ex. 8, Jim Davenport, *SC lawmakers have religion on minds, in bills*, The Associated Press, May 13, 2008.) Yet when asked about Wicca, McGill retorted, "Well, that's not what I consider to be a religion." (*Id.*) When queried about Buddhism, McGill hedged: "I'd have to look at the individual situation. But I'm telling you, I firmly believe in this tag." (*Id.*) In his personal blog, State Senator Kevin L. Bryant expressed similar ambivalence: "I guess I'd have to admit I could

support a plate for the Jewish community, yet would be very uncomfortable with a plate for scientology." (Ex. 9, Kevin L. Bryant, *i believe we're going to court*, *in* Blog From the Backbench (June 20, 2008), http://kevinbryant.com/2008/06/.) During a June 24, 2008, interview with a local journalist, State Representative Bill Sandifer proved more blunt: he would "[a]bsolutely and positively no[t]" support a bill creating a license plate expressing belief in Islam. (Ex. 10, Andrew Moore, *Group Fighting Against Christian License Plate*, Upstate Today, June 24, 2008, http://www.upstatetoday.com/news/2008/jun/24/group-fighting-against-christian-license-plates/.) He continued: "I can't tell you what 169 of my colleagues would do. But I would not [support such a bill] because of my personal belief, and because I believe that wouldn't be the wish of the majority of the constituency in this house district." (*Id.*)

In an Associated Press interview on June 12, 2008, Lieutenant Governor R. André Bauer dismissed doubts about the plate's legality, opining that "[p]eople who support Judeo-Christian values are ever under fire now. . . . It's like they expect folks who are believers just to roll over because they're scared of the ACLU." (Ex. 11, Seanna Adcox, *SC first to get 'I Believe' license plates*, The Associated Press, June 12, 2008; *see also* Ex. 24, Official Website of Lieutenant Governor R. André Bauer, http://ltgov.sc.gov/ (last visited Nov. 11, 2008) (stating his "proud and unrelenting" support for the plate, making clear that the plate advances a Christian message, declaring that the plate "reflects core values" of the state, and poking fun at "freethinkers" with contrary beliefs).)

ARGUMENT

This case presents one central question: whether the First Amendment to the United

States Constitution permits a state to use its license-plate scheme to promote Christianity. Though it emerges from a complex legal landscape, the answer to that question is a simple, "no." This Court will reach that answer regardless of whether it concludes the "I Believe" license plate is government speech, government-endorsed speech, purely private speech, or hybrid government-private speech, or declines to consider this issue at all. For however the plate is classified, it contravenes well-established principles under both the Establishment and Free Speech Clauses of the First Amendment.

I. The Plaintiffs Have Standing to Challenge Issuance of the "I Believe" License Plate

"Article III standing is a fundamental, jurisdictional requirement that defines and limits a court's power to resolve cases or controversies. And 'the irreducible constitutional minimum of standing' consists of injury-in-fact, causation, and redressability." *In re Mutual Funds Inv. Litig.*, 529 F.3d 207, 216 (4th Cir. 2008) (citations omitted) (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992)). Although the Defendants claimed in their Answer that the Plaintiffs lack standing to pursue this lawsuit (Answer ¶ 51), the Plaintiffs easily satisfy all three elements of the test.

A. The Individual Plaintiffs Have Standing

The four individual Plaintiffs have shown (1) ongoing injury and a likelihood of imminent, further injury through unwelcome direct contact with a state-sponsored religious display and through discriminatory treatment, (2) directly caused by DMV's promotion and issuance of the "I Believe" license plate, that will be (3) fully redressed if this Court prohibits DMV from issuing the plate. They therefore have standing.

1. The Plaintiffs Will Suffer Injury In Fact

Plaintiff Reverend Dr. Thomas A. Summers, a retired United Methodist Church minister, has resided in Columbia, South Carolina, for the last 40 years. (Ex. 12, Summers Decl., ¶¶ 2-3.) Throughout his religious career, Dr. Summers has strived to promote diversity and interfaith harmony at the state, national, and international levels. (*Id.* ¶ 6.) Plaintiff Reverend Dr. Robert M. Knight has been the pastor at First Christian Church (Disciples of Christ) in Charleston, South Carolina, for 14 years. (Ex. 13, Knight Decl., ¶ 2.) Freedom of belief is a principal tenet of his faith. (*Id.* ¶ 4.) Dr. Summers and Dr. Knight object to, and are offended by, the legislature's approval of the "I Believe" plate, its display on DMV's website, its imminent production and issuance, and its imminent display on automobiles for several reasons: these activities improperly place a governmental imprimatur on the Christian beliefs the plate expresses, thereby co-opting for the state's benefit — and thus demeaning — the religious iconography and beliefs of their faith; by affording preferential treatment to a particular Christian viewpoint, while failing to allow in the same forum the expression of non-Christian viewpoints, these activities discriminate against non-Christians, thereby risking the very type of religious discord that Dr. Summers has devoted his life to healing, and that Dr. Knight's faith, with its emphasis on freedom of belief, aims to avoid; and the license plate's discriminatory and exclusive message contravenes their view of Christianity as a religion that teaches inclusiveness and acceptance of all people. (*Id.* ¶ 7; Ex. 12, ¶ 9.)

Plaintiff Sanford T. Marcus is Rabbi Emeritus at the Tree of Life Congregation in Columbia, South Carolina, where he served as Rabbi for 20 years, and he continues to serve as a guest rabbi for congregations across the state. (Ex. 14, Marcus Decl., ¶¶ 2-3.) Rabbi Marcus has

devoted his life to fostering respect and unity in the interfaith community. (*Id.* ¶ 4.) Plaintiff Reverend Dr. Neal Jones has served as a reverend at the Unitarian Universalist Fellowship of Columbia for three years. (Ex. 15, Jones Decl., ¶ 2.) Dr. Jones's beliefs do not encompass traditional Christian viewpoints, and do not include the belief that Jesus Christ was the son of God. (*Id.* ¶ 4.) Rabbi Marcus and Dr. Jones object to, and are offended by, the legislature's approval of the "I Believe" plate, its display on DMV's website, its imminent production and issuance, and its imminent display on automobiles because these activities advance a religious viewpoint to which they do not subscribe; these activities are designed to create the very type of religious discord that Rabbi Marcus has devoted his life as a rabbi to healing, and that Unitarian Universalism aims to prevent; these activities improperly place the state's imprimatur on the Christian beliefs expressed by the plate, sending the message to Rabbi Marcus, Dr. Jones, and all believers of non-Christian faiths that they are second-class citizens; and these activities discriminate against Jewish and Unitarian Universalist believers (and other non-Christians) by affording preferential treatment to an expressly Christian viewpoint, while failing to allow in the same forum the expression of an explicitly Jewish or Unitarian Universalist viewpoint. (*Id.* ¶ 8; Ex. 14, ¶ 8.)

Each of these individual Plaintiffs is a South Carolina citizen, a driver licensed by the South Carolina DMV, and an owner, co-owner, or lessee of DMV-registered vehicles, and each has already viewed images of the "I Believe" license plate in press reports or on DMV's website. (*See* Ex. 12, ¶¶ 7-8; Ex. 13, ¶¶ 5-6; Ex. 14, ¶¶ 6-7; Ex. 15, ¶¶ 5, 7; Ex. 7, DMV Website Homepage (displaying image of sample plate).) The license plates on the Plaintiffs' vehicles will all be due for renewal in the coming months and years. For example, Plaintiff Rabbi Marcus is

due to renew the registration for one of his vehicles in January 2009. (*See* Ex. 14, ¶ 6.) As in the past, he intends to renew at his local DMV office, where images of all of the available specialty license plates are displayed on the wall. (*See id.*) Further, once DMV issues the plate, all four individual Plaintiffs will undoubtedly view it on vehicles as they travel on public roads while pursuing their daily activities.

In Establishment Clause cases, "[s]uch personal contact with state-sponsored religious symbolism is precisely the injury that [i]s sufficient to confer standing." *Suhre v. Haywood County*, 131 F.3d 1083, 1086 (4th Cir. 1997) (citing *Sch. Dist. of Abington v. Schempp*, 374 U.S. 203 (1963)). In *Suhre*, where the plaintiff challenged a Ten Commandments display in a county courtroom in which he had attended hearings and public meetings, the Court of Appeals held that "[t]hese forms of contact [we]re the sort that courts have routinely recognized as sufficient to establish standing in Establishment Clause cases." *Id.* at 1090; *see also Lambeth v. Bd. of Comm'rs*, 321 F. Supp. 2d 688, 692-93 (M.D.N.C. 2004), *aff'd*, 407 F.3d 266 (4th Cir. 2005), *cert. denied*, 546 U.S. 1015 (2005) (licensed attorneys living and practicing in county had standing to challenge "In God We Trust" inscription on county building because inscription appeared "in a location where each has regular personal and professional contact with it"). As in *Suhre*, the individual Plaintiffs here have alleged "direct contact with unwelcome religious symbolism endorsed by the state." 131 F.3d at 1088. This "'surely suffice[s] to give [them] standing to complain'" of an Establishment Clause violation. *Id.* (quoting *Schempp*, 374 U.S. at 224 n.9) (first alteration in original).

As for the Plaintiffs' viewpoint-discrimination claim, the Fourth Circuit has held — on closely analogous facts — that "[d]iscriminatory treatment is a harm that is sufficiently particular

to qualify as an actual injury for standing purposes." *Planned Parenthood of S.C. Inc. v. Rose*, 361 F.3d 786, 790 (4th Cir. 2004), *reh'g en banc denied by*, 373 F.3d 580 (4th Cir. 2004) (pro-choice supporters had standing to challenge South Carolina's issuance of legislatively created "Choose Life" license plate as viewpoint discriminatory); *see also id.* at 791 (noting that in such cases, plaintiffs need not first seek comparable treatment for their own viewpoint to gain standing to challenge government action favoring another viewpoint).

2. The Plaintiffs' Injury is Caused by the Challenged Action, and the Requested Relief will Redress that Injury

The source of the viewpoint discrimination that the Plaintiffs challenge in their free-speech claim is none other than the "I Believe" plate itself, so it comes as no surprise that the discriminatory treatment will be redressed by a preliminary injunction preventing DMV from issuing the plate. That discontinuing the "I Believe" plate will not give rise to a plate advancing a competing viewpoint favored by the Plaintiffs is beside the point, because the injury on which the Plaintiffs' free-speech claim rests is discriminatory treatment, not their inability to obtain a competing license plate. As the Fourth Circuit has recognized, "plaintiffs in [viewpoint] discrimination cases may seek equal treatment in the form of a level playing field, regardless of whether this is achieved by extending benefits to the disfavored group or by denying benefits to the favored group." *Rose*, 361 F.3d at 790.

The personal offense that gives rise to the Plaintiffs' injury under their Establishment Clause claim is likewise caused by the "I Believe" plate, and will be redressed by an injunction

against the plate's issuance in the same way that an injunction requiring the removal of a government-sponsored religious display averts the injury caused by the display.[9]

B. The Organizational Plaintiffs Have Standing

According to the venerable formula, "an association has standing to bring suit on behalf of its members when: (a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization's purpose; and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit." *Hunt v. Wash. State Apple Adver. Comm'n*, 432 U.S. 333, 343 (1977). Largely for the same reasons that the individual Plaintiffs have standing, organizational Plaintiffs Hindu American Foundation ("the Foundation") and American-Arab Anti-Discrimination Committee ("ADC") meet this standard.

First, both ADC and the Foundation count South Carolina residents, licensed drivers, and registered vehicle owners among their members. (Ex. 16, Ayoub Decl., ¶¶ 6-7; Ex. 17, Shukla Decl., ¶¶ 5-6.) Like the four individual Plaintiffs, these organizational members will view images of the "I Believe" license plate when they visit DMV's website or one of its offices, and they will view the plate itself when they travel on public roads while pursuing their daily activities. Also like the individual Plaintiffs, the organizational members object to and are

[9] Indeed, in Establishment Clause challenges to religious displays, courts rarely even address causation and redressability because it merely states the obvious to add that a plaintiff's offense at such a display may be redressed by its removal. *See, e.g.*, *Schempp*, 374 U.S. at 225 n.9 (observing only that persons directly affected by the "practices against which their complaints are directed . . . surely . . . [have] standing to complain," without specifically considering second and third standing elements); *Suhre*, 131 F.3d at 1090-92 (discussing only whether plaintiff had alleged injury-in-fact before concluding he had standing); *Lambeth*, 321 F. Supp. 2d at 693 (concluding plaintiffs had standing because they had alleged cognizable injury-in-fact).

offended by the State's approval and offering of the "I Believe" plate, the plate's display on DMV's website, its imminent production and issuance, and its imminent display on vehicles.[10] Hence, like the individual Plaintiffs, these ADC and Foundation members would have standing in their own right to seek to enjoin the plate's issuance. *See Suhre*, 131 F.3d at 1088.

Second, both ADC and the Foundation have joined this lawsuit as Plaintiffs to protect interests central to their organizational missions.[11] *Cf. Hunt*, 432 U.S. at 344 (organization had

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[10] Specifically, they object to and are offended by these activities because they: (1) advance a religious viewpoint to which the Foundation and its members, as well as ADC and its non-Christian members, do not subscribe; (2) create religious discord, thereby undermining the Foundation's efforts to promote understanding, tolerance, and pluralism; (3) improperly place the state's imprimatur on the Christian beliefs expressed by the plate, sending the message to the Foundation and its members, as well as to ADC and its non-Christian members, that they, and all other believers of non-Christian faiths, are second-class citizens; (4) discriminate against Hindu believers, as well as ADC's non-Christian members (and persons of other non-Christian faiths), by affording preferential treatment to an expressly Christian viewpoint, while failing to allow in the same forum the expression of an explicitly Hindu or other minority-faith viewpoint; and (5) foster religious discord and inflame further bias and prejudice against believers of minority faiths, including Muslims, Jews, Hindus, Sikhs, and Buddhists, thereby undermining ADC's efforts to promote a pluralistic nation free from discrimination against Arab-Americans of all religions. (Ex. 16, ¶ 9; Ex. 17, ¶ 8.)

[11] ADC is a civil-rights organization committed to defending the rights of people of Arab descent and to promoting their rich cultural heritage. (Ex. 16, ¶¶ 1, 3.) Though ADC is non-sectarian and non-partisan — drawing members from a variety of religious backgrounds, including Muslims, Jews, Christians, Sikhs, Hindus, Buddhists, and Arabs of other faiths — ADC has a particular interest in combating anti-Muslim religious bias because it often leads to discrimination against Arab-Americans. (*Id.* ¶¶ 2-3.) Consistent with its educational mission, ADC issues reports and conducts research studies, seminars, and conferences to identify, document, and raise awareness of discrimination faced by Arab-Americans. (*Id.* ¶ 4.)

The Foundation is a national, non-profit, human-rights advocacy organization whose purpose is to provide a voice for over two million Hindu-Americans, including the approximately 3,100 Hindus who reside in South Carolina. (Ex. 17, ¶¶ 1, 5.) While tolerance and pluralism are valued by many religions, these concepts are the very essence of Hinduism and are expressed through the diversity of Hindu practice and its centuries of peaceful coexistence with other religious traditions and faiths. (*Id.* ¶ 2.) The Foundation aims to promote these ideals by

(continued...)

standing because attempt to "secure the [apple] industry's right to publicize its grading system [was] central to the Commission's purpose of protecting and enhancing the market for Washington apples"). South Carolina's issuance of the "I Believe" license plate, which ADC and the Foundation view as a governmental endorsement of Christianity that discriminates against other religious and non-religious viewpoints, would hinder ADC's efforts to combat discrimination and would create religious discord antithetical to the Hindu ideals the Foundation strives to advance. *See supra* notes 10-11. Indeed, given the close connection between their missions and the interests they seek to protect with this suit, each organization also has standing to complain of viewpoint discrimination on its own behalf. *See Rose*, 361 F.3d at 789-92 (pro-choice organization that lacked comparable expressive outlet for its viewpoint had standing to challenge "Choose Life" license-plate statute).

Third and finally, neither the Plaintiffs' First Amendment claims, nor their present request for preliminary injunctive relief, requires "individualized proof." *Cf. Hunt*, 432 U.S. at 344 (interstate-commerce claim and request for declaratory and injunctive relief did not require individualized proof and thus were "properly resolved in a group context").

Consequently, both the individual and organizational Plaintiffs have standing to raise their Free Speech and Establishment Clause claims.

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[11](...continued)
interacting with and educating leaders in public policy, academia, government, and media, as well as the public at large, about Hinduism and issues of concern to Hindus globally and locally. (*Id.* ¶ 4.)

II. The Plaintiffs Are Entitled to a Preliminary Injunction

In determining whether to issue a preliminary injunction, courts in the Fourth Circuit follow "the familiar analytical framework first established in *Blackwelder Furniture Co. v. Seilig Mfg. Co.*, 550 F.2d 189 (4th Cir. 1977), and more recently outlined in *Direx Israel, Ltd. v. Breakthrough Med. Corp.*, 952 F.2d 802 (4th Cir. 1991)." *Southtech Orthopedics, Inc. v. Dingus*, 428 F. Supp. 2d 410, 416 (E.D.N.C. 2006).

> First, the moving party must make a "clear showing" that it will suffer irreparable harm if the court denies its request. Second, if the moving party establishes irreparable harm, the next step is "to balance the likelihood of irreparable harm to the plaintiff from the failure to grant interim relief against the likelihood of harm to the defendant from the grant of such relief." Third, if the balance tips decidedly in favor of the moving party, "a preliminary injunction will be granted if the plaintiff has raised questions going to the merits so serious, substantial, difficult, and doubtful, as to make them fair ground for litigation and thus more deliberate investigation." However, "if the balance does not tip decidedly there must be a strong probability of success on the merits." Fourth, the court must evaluate whether the public interest favors granting preliminary injunctive relief.

Id. (citations omitted). The Plaintiffs easily satisfy this standard.

A. The Plaintiffs Will Suffer Irreparable Injury if the Court Does Not Grant an Injunction

In determining whether to grant a preliminary injunction, the Court must first examine whether the Plaintiffs have clearly shown they will otherwise suffer irreparable harm. *Id.* It is well-settled that "[t]he loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." *Elrod v. Burns*, 427 U.S. 347, 373 (1976); *accord Johnson v. Bergland*, 586 F.2d 993, 995 (4th Cir. 1978) ("Violations of first amendment rights constitute per se irreparable injury."). Thus, the irreparability of the Plaintiffs' injury in this case is inseparable from their claim that the "I Believe" license plate violates their First Amendment rights — a claim that they have sustained. *See infra* part II.C.

But there is an additional, practical reason why DMV's issuance of the "I Believe" license plate would irreparably injure the Plaintiffs. Once DMV begins issuing the plate, returning the proverbial cat to its bag will be a logistical nightmare. If this Court were to enjoin the "I Believe" plate after hundreds, if not thousands, of the plates have been issued and placed on vehicles, DMV would be obliged to order all vehicle owners who had received the plates to exchange them at DMV offices, thus imposing a cumbersome burden both on DMV and on private citizens with no direct connection to this lawsuit. Simply communicating this order to all affected vehicle owners — let alone enforcing their compliance with it — will prove highly onerous. And a lengthy time period may elapse before all of the plates are returned. Preserving the status quo, and keeping the plates off the road, avoids this quagmire and the injury it would impose on the Plaintiffs.

B. A Preliminary Injunction Will Not Substantially Injure Defendants

The Defendants will suffer no substantial injury from a preliminary injunction. DMV has commenced production of "I Believe" license plate, but the plates have not yet been provided to drivers. Indeed, as mentioned above, enjoining issuance of the plate now may actually *benefit* DMV, by avoiding the administrative costs of repossessing the plates should the Plaintiffs ultimately obtain a permanent injunction. To the extent "I Believe" plates have already been produced, license plates' all-weather nature and small size will allow for easy and inexpensive storage. Hence, a preliminary injunction will cause the Defendants little if any cognizable harm.

C. The Plaintiffs Have a Strong Probability of Success on the Merits

If any of the Plaintiffs' First Amendment claims has merit, they will certainly suffer irreparable harm absent an injunction. *See supra* part II.A. By comparison, an erroneously

issued preliminary injunction will cause only negligible harm to the Defendants. *See supra* part II.B. Where, as here, "the balance tips decidedly in favor of the moving party, 'a preliminary injunction [should] be granted if the plaintiff has raised questions going to the merits so serious, substantial, difficult, and doubtful, as to make them fair ground for litigation and thus more deliberate investigation.'" *Southtech Orthopedics*, 428 F. Supp. 2d at 416 (quoting *Direx*, 952 F.2d at 813). Here, the Plaintiffs' claims are not only serious and substantial; they easily meet even the more stringent standard of having a "strong probability of success on the merits." *Id.*

1. The Plaintiffs Are Likely to Prevail on Their Free Speech Claim

a. The Legal Landscape Surrounding Specialty License Plates

Although several Courts of Appeals have addressed specialty-license-plate challenges, with varying and sometimes conflicting results, the Fourth Circuit has spoken definitively in this area. Thus, we canvas the legal landscape simply to provide context for the analysis.

The Fourth Circuit has already decided a case virtually identical to this one: *Planned Parenthood of S.C. Inc. v. Rose*, 361 F.3d 786 (4th Cir. 2004), *reh'g en banc denied*, 373 F.3d 580 (4th Cir. 2004). At issue in *Rose* was a "Choose Life" license plate which, like the "I Believe" plate, was created by the South Carolina legislature on its own initiative. *See id.* at 789. The statute set a premium of $70 for the plate, with proceeds to be given to local nonprofit organizations that advanced a pro-life message. *See id.* at 788. The plaintiffs, a pro-choice organization and an individual automobile owner, claimed that the license-plate scheme violated the Free Speech Clause because it discriminated on the basis of viewpoint in a speech forum. *See id.* at 787-88. The government argued that the plate was the government's own speech, so viewpoint neutrality was not required. *Id.* at 792.

Writing for himself alone, but announcing the court's judgment, Judge Michael applied the four factors that the Fourth Circuit had previously adopted as the test for determining whether speech is private or governmental:

> (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. at 792-93 (internal quotation marks omitted). Judge Michael concluded that the first factor weighed in favor of a government-speech designation because the "Choose Life" plate "came about through legislative initiative," was generally available, and expressly excluded abortion service providers from receiving funds generated by the plate's sale; hence, the legislation's purpose was "to promote the State's preference for the pro-life position." *Id.* at 793. A governmental-speech designation was further supported by the second factor, in Michael's view, because the legislature had selected the "Choose Life" plate's message and had retained complete editorial control over the message. *Id.* But the literal speaker, and the ultimately responsible party, is "the private individual [who] chooses to spend additional money to obtain the plate and to display its pro-life message on her vehicle" — because "no one who sees a specialty license plate imprinted with the phrase 'Choose Life' would doubt that the owner of that vehicle holds a pro-life viewpoint." *Id.* at 794.[12] Hence, the last two factors indicated the plate was private speech. *Id.* Because this test produced an ambiguous result, Judge Michael concluded the plate comprised a hybrid of government and private speech. *Id.*

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[12] In recognizing the plate's private attributes, Judge Michael cited *Wooley v. Maynard*, 430 U.S. 705, 717 (1977), in which the Supreme Court held that vehicle owners could not be compelled to display on their license plates a message with which they disagreed.

Judge Michael further concluded that viewpoint discrimination is prohibited in this hybrid government-private speech context because: the scheme is more like a limited forum for expression than like a governmental enterprise; the State has favored itself as a speaker within the forum; and the State's role in skewing debate within the forum is obscured from the public because the "Choose Life" message is purveyed by private individuals and is one among many messages on the road. *Id.* at 798-99. Judge Michael also concluded that the license plate plainly discriminated on the basis of viewpoint because it promoted a single position in the abortion debate. *Id.* at 795.

The other two judges on the panel — Judges Luttig and Gregory — concurred in the judgment but issued their own opinions. *Id.* at 800-01. Neither concurring judge, however, took issue with Judge Michael's conclusion that the "Choose Life" license plate was hybrid government-private speech subject to the prohibition on viewpoint discrimination. *See id.* at 800-01. Rather, Judge Luttig used the opportunity to commend the other two judges for their recognition of the hybrid category, a course that Luttig had encouraged two years earlier in an opinion respecting a denial of rehearing *en banc*. *See id.* at 800 (discussing opinion in *Sons of Confederate Veterans v. Comm'r of Va. Dep't of Motor Vehicles*, 305 F.3d 241, 244-47 (4th Cir. 2002) (Luttig, J.) [hereinafter *SCV*]. Judge Gregory, in turn, pointed to his own opinion, a dissent, in the *SCV* denial of rehearing *en banc*. *Id.* at 801. There, he took issue with the panel's conclusion that an organizationally driven, but legislatively enacted, license plate was private speech, advocating instead the view that "'license plate programs . . . really have elements of both private *and* government speech.'" *Id.* (quoting *SCV*, 305 F.3d at 252 (Gregory, J.)). Gregory concluded his concurring opinion in *Rose* with the observation that Michael's decision

was a step in the right direction because it "begins to recognize the government speech interests that are implicated" in the specialty-license-plate context. *Id.* Accordingly, on this point, the *Rose* panelists were unanimous: a specialty license plate conceived and created by the South Carolina legislature is hybrid speech subject to the prohibition on viewpoint discrimination.

When, however, the plate is sought and created by, and bears the logo of, a private organization, a plate is likely to be deemed almost exclusively *private* speech — even if the plate is created by statute. At issue in *SCV* was a Virginia program through which specialty plates could be issued, by statute, to organizations and groups upon their request. *Sons of Confederate Veterans v. Comm'r of Va. Dep't of Motor Vehicles*, 288 F.3d 610, 614 (4th Cir. 2002). When the Sons of Confederate Veterans sought a plate under this program, the Virginia legislature authorized issuance of the plate but included a proviso prohibiting the inclusion of SCV's logo, a prohibition that the legislature had not imposed on other plates in the program. *Id.* at 613-14. SCV claimed, and a Fourth Circuit panel agreed, that this limitation worked a free-speech violation. Applying the same four-factor analysis employed in *Rose*, a unanimous panel concluded that: (1) the primary purpose of the specialty-plate scheme was to produce revenue through private expression; (2) the state exercised little, if any, editorial control over plate designs proposed by private groups; and (3) the literal speaker, and the party with ultimate responsibility for the message, was the vehicle owner. 288 F.3d at 619-21. Accordingly, the panel concluded, SCV's license plate was private speech subject to the viewpoint-neutrality requirement. *Id.* at 621-23. The court's subsequent conclusion that the prohibition on SCV's use

of its logo was not viewpoint-neutral, *see id.* at 623-26, allowed the court to sidestep the task of specifying the type of forum created by the specialty-plate program, *see id.* at 623.[13]

The Seventh Circuit recently considered a similar scheme in *Choose Life Ill., Inc. v. White*, No. 07-1349, 2008 WL 4821759 (7th Cir. Nov. 7, 2008). (*See* Ex. 18 (copy of opinion).) Under the scheme at issue in *White*, before the Secretary of State could issue a requested specialty plate, the applicant organization was required to satisfy certain prerequisites *and* to obtain express statutory authorization through the legislature. 2008 WL 4821759, at *1. A pro-adoption group which had otherwise met the eligibility requirements proposed legislation creating a specialty "Choose Life" license plate, but after the bill died in committee, the group sued, claiming viewpoint discrimination. *Id.*

In deciding whether the messages on specialty license plates are government speech, private speech, or a combination of the two, the Court of Appeals settled on the following test: "Under all the circumstances, would a reasonable person consider the speaker to be the government or a private party?" *Id.* at *9. "Factors bearing on this analysis include, but are not limited to, the degree to which the message originates with the government, the degree to which the government exercises editorial control over the message, and whether the government or a private party communicates the message." *Id.* In addressing this inquiry, the court first observed that the statute "invite[d] private civic and charitable organizations to place their messages on specialty license plates" and to thereby raise funds and recruit "like-minded vehicle owners to

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[13] Five of the eleven judges on the *en banc* Fourth Circuit voted to rehear the panel decision in *SCV*. *See* 305 F.3d at 242. Two of those five judges wrote separate opinions dissenting from the denial of rehearing. Judge Niemeyer opined that the license plates were government speech, *id.* at 247-51 (Niemeyer, J.), while Judge Gregory took the view that the plates presented hybrid private-government speech, *id.* at 251-53 (Gregory, J.).

promote their causes." *Id.* The court next noted that the sponsoring organization, which typically developed a plate's design, and the State, which retained the ability to modify the design, shared editorial control over specialty plates' messages. *Id.* Further, it reasoned that while the State could reasonably be viewed as having approved a specialty plate's message, "specialty-plate messages are most closely associated with drivers" who choose to display the plates on their vehicles, and with "the sponsoring organizations whose logos or messages are depicted on the plates." *Id.* Thus, "the driver is the ultimate communicator of the message." *Id.* In short, the court concluded, specialty plates involved "enough elements of private speech . . . to rule out the government-speech doctrine." *Id.* The court proceeded to classify the license-plate scheme as a nonpublic forum, in which only reasonable, viewpoint-neutral exclusions are permitted. *Id.* at *10.[14]

The Eleventh Circuit expressed a similar view, albeit in *dictum*, in *Women's Emergency Network v. Bush*, 323 F.3d 937 (11th Cir. 2003) [hereinafter *WEN*]. The specialty license-plate scheme at issue in *WEN* permitted private organizations to initiate the creation of new plates, but it left the final decision to the legislature, which had "unfettered discretion to enact a law authorizing the specialty plate, or to reject the plan *in toto*." *Id.* at 941. The Eleventh Circuit decided the case on standing grounds and thus did not reach the merits of the plaintiffs' claim. *Id.* at 950. But the court relied on two facts — that the plates did not "concern issues of the

[14] The court determined that in failing to enact a "Choose Life" plate, the State had merely imposed a *content-based* restriction on speech by "exclu[ding] the entire subject of abortion from its specialty-plate program." 2008 WL 4821759 at *11-12. The restriction was reasonable — and thus permissible — because "messages on specialty license plates are regarded as approved by the State," which could reasonably "maintain a position of neutrality on the subject of abortion." *Id.* at *12.

greatest importance to the State," and that the program was structured to benefit the initiating organizations rather than the State — to support a tentative conclusion that the license plates likely did not "represent government speech." *Id.* at 945 n.9.

The Circuits do not, however, uniformly classify statutorily created, but organizationally driven, specialty license plates as private speech. Some years after *Rose*, the Sixth Circuit concluded that Tennessee's specialty "Choose Life" license plate, created by statute but designed by and subsidizing a private organization, was entirely *government* speech. *ACLU of Tenn. v. Bredesen*, 441 F.3d 370, 375-77 (6th Cir. 2006).[15] In reaching that conclusion, the court principally relied on *Johanns v. Livestock Marketing Ass'n*, 544 U.S. 550 (2005), a post-*Rose* decision involving a compelled-speech challenge by private beef producers to a mandatory fee that the Department of Agriculture assessed to subsidize an advertising campaign. *See Bredesen*, 441 F.3d at 375 (citing *Johanns*, 544 U.S. at 555-56). The advertisements grew out of a federal statutory program enacted to promote beef consumption. 544 U.S. at 553. The copy was written by a committee, of which some, but not all, members were appointed by the Secretary of Agriculture, *id.* at 560, and many of the advertisements bore the attribution, "Funded by America's Beef Producers," *id.* at 555. The Court in *Johanns* concluded that the advertisements were the government's own speech and thus did not give rise to any private-speech rights. *Id.* at 561. In determining that the campaign was attributable to the government, the Court relied on the fact that federal officials had established the program, set the overall message to be

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[15] *See also Women's Resource Network v. Gourley*, 305 F. Supp. 2d 1145, 1161 (E.D. Cal. 2004) (enjoining as standardless statutory scheme under which organizations could seek specialty plates through legislation, but concluding that speech on license plates issued under that scheme was more governmental than private).

communicated, participated in crafting the message, reviewed all proposed promotional messages, rejected or rewrote some proposals, and exercised final approval authority over every word used. *Id.* at 560-561.

The *Bredesen* court viewed *Johanns* as compelling the conclusion that the "Choose Life" license plate was the government's own speech. 441 F.3d at 376-77. The court dismissed the state's delegation of "partial responsibility for the design of the plate" to a private, anti-abortion group, analogizing the scheme to the government's delegation of advertisement-drafting to the committee in *Johanns*. 441 F.3d at 376. In the *Bredesen* court's view, the dispositive factor was that the State retained veto power over the design. *Id.* The court likewise dismissed the fact that Tennessee produced over 100 plates in support of diverse groups and ideologies, noting that "[g]overnment in this age is large and involved in practically every aspect of life." *Id.* The court also gave short shrift to the fact that the plates are ultimately placed on private vehicles, analogizing the circumstance to private individuals' dissemination of government-printed pamphlets or pins urging people to "Register and Vote" or "Buy U.S. Bonds." *Id.* at 379. The *Bredesen* panel also expressed disagreement with the Fourth Circuit's decision in *Rose*, deeming it to be in tension with *Johanns*. *Id.* at 380.[16]

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[16] The Fourth Circuit has not revisited specialty license plates since *Rose*, but it has considered *Johanns*' impact on *Rose*'s four-factor analysis. In *Page v. Lexington County Sch. Dist. One*, 531 F.3d 275 (4th Cir. 2008), a school district used the internet, email, flyers, and other communication methods to issue statements opposing proposed legislation. *Id.* at 278-79. Some of the communications incorporated third-party materials, such as reprints of articles written by private citizens. *Id.* at 279. A resident sued to have the school board include among its communications materials expressing an opposing viewpoint. *See id.* at 297-80. In analyzing the plaintiff's claim, the court explained that *Johanns* had "distilled [*Rose*'s four factors], particularly in cases involving the government's use of third-party messages, focusing on (1) the government's *establishment* of the message, and (2) its *effective control* over the content and

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Finally, two courts have considered schemes in which license plates were issued at the request of organizations by the state's DMV, without legislative involvement — both of them concluding that the plates bore messages that were at least in part private. In *Arizona Life Coalition, Inc. v. Stanton*, 515 F.3d 956 (9th Cir. 2008), the statutory scheme entitled any organization meeting certain criteria to obtain from the state's License Plate Commission a license plate bearing the organization's logo. 515 F.3d at 961. When the Commission denied an eligible organization's application for a "Choose Life" plate, the organization filed suit. *See id.* at 960-62.

The *Stanton* court expressed disagreement with *Bredesen*'s broad applications of *Johanns* to specialty-license-plate schemes, *see id.* at 964-65, but observed that *Johanns* was still

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[16](...continued)
dissemination of the message." *Id.* at 281 (citing *Johanns*, 544 U.S. at 560-62). The court concluded that the School District had *established* the message, and that although the District "did not create the full content of every communication . . . it adopted and approved all speech, even that of third parties, as representative of its own position for inclusion in its messages opposing the bill. Thus it also *controlled* the message." *Id.* at 282. Hence, under *Johanns*, the communications were government speech. *See id.*

In a subsequent decision involving messages crafted without any third-party involvement, Justice O'Connor, sitting by designation, applied *Rose*'s four-factor analysis to prayers offered by city-council members to open public meetings — without mentioning either *Johanns* or *Page*. *See Turner v. City Council of the City of Fredericksburg*, 534 F.3d 352, 354-55 (4th Cir. 2008). In holding the prayers were government speech, she reasoned that as "an official part of every Council meeting," the prayers served a government purpose; that having banned sectarian prayer, the Council exercised substantial editorial control; that individual Council members were allowed to offer prayers only by virtue of their official roles; and that while Council members took "some personal responsibility for their" prayers, the prayers "focus[ed] . . . on government business at the opening of the Council's meetings." *Id.* at 354-55.

Here, of course, the government has not used third-party contributors in crafting its message; instead, it has crafted the message on its own, and then enlisted the help of private vehicle owners to purvey that message — a situation easily distinguishable from *Johanns*, but on all-fours with *Rose*.

"instructive" in determining whether Arizona's specialty license plates were governmental or private speech, *see id.* at 965. The court further observed that the factors addressed in *Johanns* were "similar" to the four factors examined in *Rose* and *SCV*. *Id.* The Ninth Circuit then proceeded to apply those factors. *See id.* at 965-68. First, because the program required applicants to pay for their specialty plates, it had a revenue-raising purpose that supported a finding of private speech. *Id.* at 965-66. Second, because the state's "statutory requirements address[ed] who may speak, not what they may say," it exercised only "*de minimis* editorial control," further suggesting the plates were private speech. *Id.* at 966. Third, though the government's "'ownership of the means of communication [i]s a valid consideration,'" *Wooley* indicated that drivers were also the literal speakers of license-plate messages, so this factor's effect was ambiguous. *Id.* at 966-67 (quoting *SCV*, 288 F.3d at 621). Fourth, the program required private organizations to "take the affirmative step of submitting an application" for a specialty plate, further supporting a private-speech classification. *Id.* at 967-68. Because three of four factors pointed to this result, the court concluded the plate was private speech, *id.* at 968 — and that in refusing to approve a "Choose Life" license plate, the Commission had impermissibly discriminated based on viewpoint in a limited public forum, *id.* at 971-72.

The Second Circuit has also expressed the view, albeit in the preliminary context of a qualified-immunity appeal, that license plates issued under a statutory scheme that authorizes the DMV to issue plates at the request of various organizations "involve, at minimum, some private speech." *Children First Found., Inc. v. Martinez*, 169 Fed. Appx. 637, 639 (2d Cir. 2006) (dismissing appeal) (attached as Ex. 19); *Children First Found., Inc. v. Martinez*, No. 1:04-CV-

0927 (NPM), 2007 WL 4618524, at *3 (N.D.N.Y. Dec. 27, 2007) (on remand, explaining statutory scheme) (attached as Ex. 20).

Bredesen thus "stands alone in holding that specialty license plates implicate *no* private-speech rights at all." *White*, 2008 WL 4821759, at *9. The Circuits that have considered license-plate schemes post-*Bredesen* have expressed disagreement with *Bredesen*'s holding and with its application of *Johanns*. *See White*, 2008 WL 4821759, at *8-9; *Stanton*, 515 F.3d at 964-65. With the exception of *Bredesen*, the Circuits have uniformly concluded that specialty-license-plate schemes involve at least some private elements and thus must be administered in a viewpoint-neutral fashion. The courts have reached this conclusion when license plates are issued by the state's DMV without legislative involvement, *see Stanton*, 515 F.3d at 968, 971; *Children First*, 169 Fed. Appx. at 639; when the plates are organizationally driven but legislatively enacted, *see SCV*, 288 F.3d at 621-22; *White*, 2008 WL 4821759, at *9-10; *WEN*, 323 F.3d at 945 n.9; and even when the license plates are created wholly by the legislature, without organizational involvement, *see Rose*, 361 F.3d at 794, 798.

b. Under *Rose*, Issuing the Plate Will Violate the Free Speech Clause

Because *Rose* is on all-fours with this case, it compels the conclusion that DMV's issuance of the "I Believe" plate will violate the Free Speech Clause.

Under the holding of *Rose*, the "I Believe" license plate constitutes hybrid government-private speech. As in *Rose*, the "I Believe" license plate came about through legislative initiative, without any overt involvement by a private organization. The plate itself makes no mention of the involvement of any such organization, and the statute creating the plate mentions no private organization to receive any excess funds generated by the plate's sale. It is as clear

here as it was in *Rose* that the central purpose of the plate's creation is not to propound a private message, but to promote the State's own views. Thus, the first factor of the *Rose* test, as in *Rose* itself, weighs in favor of a government-speech designation.

A government-speech designation is further supported by the second *Rose* factor because the legislature selected the "I Believe" plate's message and retained complete editorial control over that message. But, as in *Rose*, the literal speaker, and the ultimately responsible party, is "the private individual [who] chooses to spend additional money to obtain the plate and to display its . . . message on her vehicle" — because "no one who sees a specialty license plate imprinted with the phrase ['I Believe'] would doubt that the owner of that vehicle holds a pro-[God] viewpoint." *Rose*, 361 F.3d at 794. Hence, contrary to the first two, the last two factors indicate that the "I Believe" plate is private speech. Accordingly, *Rose* compels the conclusion that the "I Believe" plate is a hybrid of government and private speech.

Rose likewise compels the conclusion that viewpoint discrimination is prohibited in this context. *See* 361 F.3d at 795-99 (Michael, J.).[17] Finally, *Rose* compels the conclusion that the "I

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[17] Limiting expression within the license-plate forum to a single viewpoint poses particular dangers:

> When a certain viewpoint dominates a speech forum, it should be clear to the public whether that dominance reflects the prevailing view or whether it results from a government restriction. In this case, the pro-life position exclusively dominates the abortion debate in the license plate forum, but the reason for that dominance is not readily apparent to the ordinary citizen. Those who see the Choose Life plate displayed on vehicles, and fail to see a comparable pro-choice plate, are likely to assume that the presence of one plate and the absence of another are the result of popular choice.

Rose, 361 F.3d at 798 (Michael, J.). By restricting the expression of different or opposing viewpoints on a particular subject, "[t]he State can thereby mislead the public" to believe that the

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Believe" license-plate scheme reflects viewpoint discrimination because government "can discriminate based on viewpoint without affirmatively suppressing a certain viewpoint. Discrimination can occur if the [government action] promotes one viewpoint above others[.]" *Id.* at 795.[18]

The "I Believe" license plate reflects viewpoint discrimination of two distinct varieties. First the plate stands in opposition to a plate announcing "I Do Not Believe," in much the same way that the "Choose Life" license plate promoted a pro-life perspective, but not a pro-choice one. If the government engages in viewpoint discrimination when it allows a topic to be addressed from a secular perspective but not a religious one,[19] it engages in reverse viewpoint discrimination when it allows a topic to be addressed from a religious perspective but not a non-religious or even anti-religious one.

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[17](...continued)
lone expressed viewpoint actually dominates, subtly suppressing other viewpoints. *See id.*

[18] Because the "I Believe" license plate reflects viewpoint discrimination, and viewpoint discrimination is "prohibited in *all* forums," *Children's Evangelism Fellowship of S.C. v. Anderson Sch. Dist. Five*, 470 F.3d 1062, 1067 n.2 (4th Cir. 2006) (emphasis added) [hereinafter *CEF S.C.*], this Court need not classify the forum at issue in this case, *see SCV*, 288 F.3d at 623 (declining to specify nature of specialty-license-plate forum when viewpoint discrimination was present). But if the Court elects to engage in forum analysis, *Rose* appears to suggest that the forum is properly classified as a limited public forum. *See* 361 F.3d at 798 (referring to license-plate scheme as "creating a limited forum for expression"); *see also Stanton*, 515 F.3d at 971 (finding specialty-license-plate scheme to be limited public forum); *but see White*, 2008 WL 4821759, at *10 (concluding that specialty-license-plate scheme was nonpublic forum). In either case, however, viewpoint discrimination is prohibited. *See Good News Club v. Milford Cent. Sch.*, 533 U.S. 98, 106-07 (2001); *Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384, 392-93 (1993).

[19] "[G]overnment may not bar religious perspectives on otherwise permitted subjects, as it constitutes viewpoint discrimination to permit 'the presentation of all views . . . except those dealing with the subject matter from a religious standpoint.'" *CEF S.C.*, 470 F.3d at 1068 (quoting *Lamb's Chapel*, 508 U.S. at 393).

The second form of viewpoint discrimination that is worked by the "I Believe" plate results from the plate's iconography — a cross and a stained-glass window. That iconography casts the plate in opposition to plates propounding non-Christian beliefs because the iconography is quintessentially Christian. The General Assembly has not created a license plate expressing any other viewpoint concerning religious belief: no statute presently authorizes DMV to issue an "I Believe" plate imprinted with a Jewish Star of David, an Islamic crescent, or a Wiccan pentacle. Distinguishing between Christian and non-Christian speakers is such a blatant and shameless form of viewpoint discrimination that few examples exist in the case law.[20]

Absent legislative action, non-Christians may not obtain specialty license plates expressing their viewpoints about religion in a manner comparable to the "I Believe" plate. The

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[20] *See, e.g., Capitol Square Review & Advisory Bd. v. Pinette*, 515 U.S. 753, 766 (1995) (noting that "giving sectarian religious speech preferential access to a forum close to the seat of government (or anywhere else for that matter) would violate the Establishment Clause (as well as the Free Speech Clause, since it would involve content discrimination)") (plurality opinion); *Am. Jewish Cong. v. City of Beverly Hills*, 90 F.3d 379, 383 (9th Cir. 1996) (recognizing in case challenging exclusion of menorah from public park that government engages in impermissible content discrimination when it gives one sect preferential access over other sects); *Church on the Rock v. City of Albuquerque*, 84 F.3d 1273, 1279 (10th Cir. 1996) (holding that City had engaged in unconstitutional viewpoint discrimination where, having opened publicly operated senior centers to presentations on religion, it denied access to group wishing to show film about Jesus); *Kiesinger v. Mexico Academy & Cent. Sch.*, 427 F. Supp. 2d 182, 194-95 (N.D.N.Y. 2006) (holding that school had engaged in unconstitutional viewpoint discrimination where, on pretext of making brick walkway non-sectarian, it removed only bricks on which contributors had inscribed "Jesus" but allowed those on which contributors commemorated Methodist, Episcopal, and Catholic churches to remain); *Pruitt v. Wilder*, 840 F. Supp. 414, 418 (E.D. Va. 1994) (holding that DMV personalized-license-plate policy proscribing references to a deity was viewpoint discriminatory because some religions, such as Christianity, "center on a deity or deities," but others, such as Buddhism, do not); *cf. Lubavitch of Iowa, Inc. v. Walters*, 873 F.2d 1161, 1163 (8th Cir. 1989) (finding no free-speech violation in exclusion of private group's menorah from state capitol grounds because the "record does not disclose that the State has in any way discriminated against Lubavitch by allowing other religious organizations or other religious symbols to remain on state grounds overnight, while not allowing the menorah to stand during the time in question").

plates available through DMV without legislative involvement are simply incomparable to the "I Believe" plate. Vanity plates may bear only a phrase composed from a limited selection of characters and may not include symbols, logos, or other images. (Ex. 4, Application for Personalized License Plate.) And organizational plates may feature only the organization's "emblem, seal, or other symbol;" "slogans, names or other text" are not allowed. (Ex. 2, DMV Policy RG-504, Specialized Plates for Organizations; *see also* S.C. Code. Ann. § 56-3-8000(A) (2007).) Only the legislature may create license plates emulating the "I Believe" plate's rich expressive content — imagery juxtaposed with a declarative phrase. No existing mechanism affords a materially equivalent expressive outlet to those who wish to express non-Christian religious viewpoints. *See Rose*, 361 F.3d at 789 (discussing differences between legislatively created plate and plate issued by DMV under section 56-3-8000). And even if DMV could, on its own, issue Muslims or Jews a plate comparable to the "I Believe" plate, the DMV-issued plate would still lack legislative imprimatur.

Rose makes clear that to establish a First Amendment violation, the Plaintiffs need not prove that the General Assembly will never provide such an outlet for other viewpoints, nor demonstrate that they have unsuccessfully sought one. *See* 361 F.3d at 791. Nonetheless, bills creating license plates expressing non-Christian religious viewpoints will find little traction in the South Carolina legislature. When queried about a license plate expressing the Wiccan religious viewpoint, for example, State Senator J. Yancey McGill, one of the "I Believe" plate's sponsors, retorted, "Well, that's not what I consider to be a religion." (Ex. 8.) As for the Buddhist viewpoint, McGill will "have to look at the individual situation." (*Id.*) State Senator Kevin L. Bryant "would be very uncomfortable with a plate for scientology." (Ex. 9.) And State

Representative Bill Sandifer will "[a]bsolutely and positively no[t]" vote to create a plate expressing belief in Islam because "that wouldn't be the wish of the majority of the constituency in []his house district." (Ex. 10.) Though neither Sandifer, nor McGill, nor Bryant may speak for his colleagues, they have made clear that groups wishing to express non-Christian religious, or irreligious, views on specialty license plates will not receive the same unanimous support garnered by the "I Believe" plate. Moreover, their publicly expressed hostility to such petitions will almost certainly deter these groups from seeking a comparable expressive outlet through the legislature.

Representative Sandifer's comment alludes to the seminal First Amendment value at stake in this case. "The very purpose of the Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities . . . and to establish them as legal principles to be applied by the courts." *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 638 (1943). The requirement that government not leverage its power in the marketplace of ideas to disadvantage minority viewpoints — religious or otherwise — stands as an exemplar of that principle. This Court should act now to ensure that South Carolina does not offend this fundamental pillar of our constitutional order.

2. The Plaintiffs Are Likely to Prevail on Their Establishment Clause Claim

However the Court classifies the "I Believe" license plate — as government speech, private speech, or a hybrid of the two — DMV's issuance of the plate will violate the Establishment Clause's proscription of "law[s] respecting an establishment of religion." U.S. CONST. amends. I, XIV § 1; *see Everson v. Bd. of Educ.*, 330 U.S. 1, 15 (1947). The Clause "prohibits governmental establishment of a religion in the sense of 'sponsorship, financial

support, and active involvement of the sovereign in religious activity.'" *Brown v. Gilmore*, 258 F.3d 265, 274 (4th Cir. 2001) (quoting *Walz v. Tax Comm'n of N.Y.*, 397 U.S. 664, 668 (1970)). And it "means at least this: Neither a state nor the Federal Government can . . . pass laws which aid one religion . . . or prefer one religion over another." *Everson*, 330 U.S. at 15. By issuing a license plate that sponsors an explicitly sectarian Christian religious message, South Carolina transgresses this prohibition.

As a threshold matter, labeling the speech governmental or private is largely irrelevant under the Establishment Clause because the Clause governs not just government speech, but also private speech endorsed by the government. *See County of Allegheny v. ACLU Greater Pittsburgh Chapter*, 492 U.S. 573, 600 (1989) (noting that the Clause "also prohibits the government's support and promotion of religious communications by religious organizations"). Government may no more endorse a private speaker's religious message than it may voice religious messages of its own. *See id.* at 600-01 ("Indeed, the very concept of 'endorsement' conveys the sense of promoting someone else's message."). Accordingly, in *Allegheny County*, and also in *Santa Fe Independent School District v. Doe*, 530 U.S. 290 (2000), the Court found Establishment Clause violations in the government's provision of privileged access to a private, religious speaker. *See Allegheny County*, 492 U.S. at 599-600 (noting that "[n]o viewer could reasonably think that [a privately owned crèche] occupie[d] this [prominent] location without the support and approval of the government"); *Santa Fe*, 530 U.S. at 297-98, 304-05 (striking down policy that allowed a single student to present a message weighted towards prayer at high-school football games).

Classifying the forum (if one exists at all) is likewise unnecessary to the Establishment Clause analysis in this case because, consistent with the neutrality principle, government may not discriminate among religions in *any* forum for private religious expression. *See Allegheny County*, 492 U.S. at 590 (government "may not discriminate among persons on the basis of their religious beliefs and practices"); *Agostini v. Felton*, 521 U.S. 203, 231 (1997) (government must make benefits "available to both religious and secular beneficiaries on a nondiscriminatory basis"); *see also Allegheny County*, 492 U.S. at 600 n.50 (observing that forum analysis was inapplicable when site was not made broadly available to others).[21] Because equal access has plainly not been provided here, the nature of the forum is immaterial.

Rather than classifying the nature of the speech or the forum in which it arises, the task in an Establishment Clause claim is to apply the tripartite test of *Lemon v. Kurtzman*, 403 U.S. 602 (1971), which remains the common standard for adjudicating such claims in the Fourth Circuit. *See, e.g.*, *Lambeth v. Bd. of Comm'rs*, 407 F.3d 266, 268 (4th Cir. 2005); *Koenick v. Felton*, 190 F.3d 259, 265 (4th Cir. 1999). That test requires that government action "have a secular purpose," that its "primary effect . . . neither advance[] nor inhibit[] religion," and that it "not foster an excessive government entanglement with religion." *Mellen v. Bunting*, 327 F.3d 355, 372 (4th Cir. 2003). "To pass muster under the Establishment Clause, a challenged government action must satisfy each of the[se] . . . three criteria." *Lambeth*, 407 F.3d at 269. Here, for all of

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[21] Indeed, an Establishment Clause violation can arise even in the context of a public forum. *See Santa Fe*, 530 U.S. at 303 n.13 ("We have never held the mere creation of a public forum shields the government entity from scrutiny under the Establishment Clause."); *Pinette*, 515 U.S. at 772 (O'Connor, J., concurring in part and concurring in judgment) ("I see no necessity to carve out . . . an exception to the endorsement test for the public forum context."); *id.* at 777 ("At some point, for example, a private religious group may so dominate a public forum that a formal policy of equal access is transformed into a demonstration of approval.").

the reasons set forth below, DMV's issuance of the "I Believe" license plate fails to satisfy a single one of these criteria.

a. The "I Believe" License Plate Has a Primarily Religious Purpose

Only three years ago, in holding a Kentucky courthouse's Ten Commandments display unconstitutional, the U.S. Supreme Court affirmed the continued vitality of *Lemon*'s purpose prong. *McCreary County v. ACLU*, 545 U.S. 844, 859-66 (2005). The High Court reiterated that all government action must have a secular purpose that is "genuine, not a sham, and not merely secondary to a religious objective." *Id.* at 864; *see also Lynch v. Donnelly*, 465 U.S. 668, 691 (1984) (O'Connor, J., concurring) (*Lemon*'s purpose prong not satisfied by "mere existence of *some* secular purpose, however dominated by religious purposes") (emphasis added).

Further, the Court confirmed that "[t]he eyes that look to purpose belong to an objective observer, one who takes account of the traditional external signs that" accompany government action. *McCreary County*, 545 U.S. at 862 (internal quotation marks omitted). Thus, in holding the challenged Ten Commandments display unconstitutional, the *McCreary* Court examined not only the challenged display itself, but also its two predecessor displays and the legislative resolutions, unveiling ceremonies, and official government acts that accompanied them. *See id.* at 868-73.

The Court also recognized, however, that in some cases context may be superfluous. When "the government action itself besp[eaks] the [religious] purpose," a court need not scrutinize its legislative history to reach the "commonsense conclusion that a religious objective permeate[s] the government's action." *Id.* at 862-63. Thus, in *Abington Township v. Schempp*, 374 U.S. 203 (1963), "the object of required Bible study in public schools was patently

religious." *McCreary County*, 545 U.S. at 862 (citing *Schempp*, 374 U.S. at 223-24). And in *Stone v. Graham*, 449 U.S. 39 (1980),

> the Court held that the "[p]osting of religious texts on the wall serve[d] no . . . educational function," and found that if "the posted copies of the Ten Commandments [were] to have any effect at all, it [would] be to induce the schoolchildren to read, meditate upon, perhaps to venerate and obey, the Commandments."

McCreary County, 545 U.S. at 862-63 (quoting *Stone*, 449 U.S. at 42).

The Fourth Circuit has followed suit, holding that "[w]hen a state-sponsored activity has an overtly religious character, courts have consistently rejected efforts to assert a secular purpose for that activity." *Mellen*, 327 F.3d at 373; *see also Lambeth v. Bd. of Comm'rs*, 321 F. Supp. 2d 688, 697 (M.D.N.C. 2004) (noting that if a "stated secular purpose is eclipsed by religious characteristics intrinsic to the conduct at issue," that conduct "will not pass constitutional muster"), *aff'd*, 407 F.3d 266 (4th Cir. 2005). The Circuit has thus concluded that "recitation of a prayer 'is undeniably religious and has, by its nature, both a religious purpose and effect.'" *Mellen*, 327 F.3d at 373 (quoting *Hall v. Bradshaw*, 630 F.2d 1018, 1020 (4th Cir. 1980)). In *Hall v. Bradshaw*, a district court had accepted North Carolina's avowed purpose — promoting highway safety — for including a nonsectarian, monotheistic prayer on its official state road maps. 630 F.2d at 1019. The Court of Appeals recognized promoting motorist safety as a legitimate and laudable goal, but it warned that the state could "[]not escape the proscriptions of the Establishment Clause" by simply *stating* "a beneficial secular purpose." *Id.* at 1020. Instead, the Circuit concluded the prayer was, "by its very nature, religious. By printing a prayer on the official map, the state [was] placing its power and support behind a particular form of theological

belief[.]" *Id.* Such symbolic action was inconsistent with any *legitimate* secular purpose, and consequently, it failed the *Lemon* test's purpose prong. *See id.* at 1020-21.

The Fourth Circuit has characterized "demonstration of [] a legitimate secular purpose" as "'a fairly low hurdle.'" *Lambeth*, 407 F.3d at 270 (quoting *Brown v. Gilmore*, 258 F.3d 265, 276 (4th Cir. 2001)). But the "I Believe" license plate fails to clear it because — like required Bible study in *Schempp*, classroom Ten Commandments displays in *Stone*, and the prayers in *Mellen* and *Hall* — the "overtly religious character" of this mandated expressive content belies the existence of any legitimate secular purpose for the plate. *See Mellen*, 327 F.3d at 373. Per the General Assembly's stipulation, "the words 'I Believe' and a cross superimposed on a stained glass window" "must" appear on each plate. *See* Act No. 253 (June 5, 2008) (to be codified at S.C. Code. Ann. § 56-3-10110 (2008)). Although there may be instances in which a cross can be displayed without a religious purpose,[22] when superimposed on a stained-glass window, and joined by the words, "I Believe," the plate's content bespeaks an irrefutably religious purpose. *See, e.g.*, *Harris v. City of Zion*, 927 F.2d 1401, 1403-04, 1413-14 (7th Cir. 1991) (holding that city council's vote to retain historic city seal — designed by local church leader in 1902, and featuring Latin cross, dove carrying branch, sword and crown, city name, and the words "God Reigns" — evinced religious purpose because "something more than a perfunctory appeal to

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[22] *See, e.g.*, *Capitol Square Review & Advisory Bd. v. Pinette*, 515 U.S. 753, 770 (1995) (Thomas, J., concurring) (characterizing erection of cross by Ku Klux Klan as "a political act, not a Christian one"). For example, some courts have concluded that employing a cross as a memorial to the dead does not necessarily reflect a religious purpose. *See, e.g., Am. Atheists, Inc. v. Duncan*, 528 F. Supp. 2d 1245, 1256 (D. Utah 2007); *Eugene Sand & Gravel, Inc. v. City of Eugene*, 276 Ore. 1007, 558 P. 2d 338, 347 (1976) (attached as Exhibit 21). Other courts, however, have reached the opposite conclusion. *See, e.g, Gonzales v. N. Twp. of Lake County*, 4 F.3d 1412, 1421 (7th Cir. 1993) (holding that memorial crucifix in public park reflects primarily religious purpose).

history is required to legitimize the underlying purpose of this particular seal"); *ACLU of Georgia v. Rabun County Chamber of Commerce, Inc.*, 698 F.2d 1098, 1110-11 (11th Cir. 1983) (upholding district-court holding that government's maintenance of privately erected Latin cross in state park by private group was undertaken with a primarily religious purpose); *Am. Atheists, Inc. v. City of Starke*, No. 3:05-cv-977-J-16MMH, 2007 WL 842673, at *5-6 (M.D. Fla. Mar. 20, 2007) (attached as Exhibit 22) (holding that display of illuminated cross on water tower evinced religious purpose because cross was paired with the city's name in capital letters and with the local high-school football team's symbol, thus demonstrating that "City supports its high school football team and Christianity"). As in *Hall*, South Carolina plans to print an overtly (Christian) religious message on government-issued license plates that will, like the maps in *Hall*, be available to all South Carolina registered vehicle owners. As in *Hall*, the state's placement of "its power and support behind a particular form of theological belief" reflects a quintessentially religious purpose. *See id.* at 1020.

Neither the authorizing statute's text nor its legislative history hints at any contrary purpose. *See* Act No. 253 (June 5, 2008) (to be codified at S.C. Code. Ann. § 56-3-10110 (2008)); *see generally* Journal of the Senate, 117th Sess., at April 28-30, May 15, 22 (S.C. 2008); Journal of the House of Representatives, 117th Sess., at May 1, 21-22 (S.C. 2008). The statute sets no biennial fee for the "I Believe" plate beyond the basic vehicle-registration price. *See* Act No. 253 (June 5, 2008) (to be codified at S.C. Code. Ann. § 56-3-10110 (2008)). Thus, the General Assembly obviously did not create the "I Believe" plate to generate revenue for the state. *Cf. Sons of Confederate Veterans v. Comm'r of Va. Dep't of Motor Vehicles*, 288 F.3d 610, 619 (4th Cir. 2002) (finding purpose of statute permitting private organizations to pay for specialty

license plates was to "produce revenue while allowing . . . for the private expression of various views"); *Arizona Life Coalition, Inc. v. Stanton*, 515 F.3d 956, 965-66 (9th Cir. 2008) (finding that state's overall specialty-license-plate program had revenue-raising purpose).

Nor can it be argued that the General Assembly sought to facilitate private religious expression, because "[t]his argument obviously proves too much," *see County of Allegheny v. ACLU Greater Pittsburgh Chapter*, 492 U.S. 573, 601 (1989), as the General Assembly has elected to facilitate *only* private *Christian* religious expression. "Manifesting a purpose to favor one faith over another" in this manner "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*, 545 U.S. at 860 (quoting *Zelman v. Simmons-Harris*, 536 U.S. 639, 718 (2002)).[23]

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[23] Expanding the focus beyond the "I Believe" plate itself would simply confirm the legislature's religious purpose. *See McCreary County*, 545 U.S. at 868-73 (examining legislative resolutions accompanying predecessor displays in assessing purpose behind Ten Commandments display). Around the same time that it passed the "I Believe" license plate, the South Carolina General Assembly passed the Public Prayer and Invocation Act, which authorizes deliberative public bodies to open their sessions with sectarian prayer, *see* Act No. 241 (May 27, 2008) (to be codified at S.C. Code. Ann. § 10-1-168 (2008)), as well as a bill authorizing state and local government entities to post "Foundations of American Law and Government" displays — including the Lord's Prayer — in public buildings, *see* Act No. 340 (June 11, 2008) (to be codified at S.C. Code. Ann. § 10-1-168 (2008)).

And the General Assembly considered, but did not pass, at least four other bills directly or indirectly promoting religion during its 2007-2008 session. *See* S. 1386, 2007-08 Leg., 117th Sess. (S.C. 2008) (authorizing public-school teachers to "help[] [their] students understand, analyze, critique, and review the scientific strengths and weaknesses of biological and chemical evolution in an objective manner"); S. 1394, 2007-08 Leg., 117th Sess. (S.C. 2008) (requiring public schools to permit students to proselytize their peers during class and at school-sponsored events); H.R. 4090, 2007-08 Leg., 117th Sess. (S.C. 2007) (exempting vacation Bible schools from certain child-care regulations); H.R. 3229, 2007-08 Leg., 117th Sess. (S.C. 2007) (authorizing the Citadel, a public institution, "to have prayer at on-campus and off-campus events

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Promotion of a sectarian religious message does even greater violence to Establishment Clause principles than the promotion of religion in general, as the "clearest command of the Establishment Clause is that one religious denomination cannot be officially preferred over another." *Larson v. Valente*, 456 U.S. 228, 244 (1982). "Whatever else the Establishment Clause may mean . . . it certainly means at the very least that government may not demonstrate a preference for one particular sect or creed (*including a preference for Christianity over other religions*)." *Allegheny County*, 492 U.S. at 605 (emphasis added); *accord McCreary County v. ACLU*, 545 U.S. 844, 860 (2005) (noting that governmental neutrality *among* religions is a "central Establishment Clause value"); *Brown v. Gilmore*, 258 F.3d 265, 274 (4th Cir. 2001) (noting that the Establishment Clause "limits any governmental effort to promote particular religious views to the detriment of those who hold other religious beliefs").

There is but one "commonsense conclusion" about the purpose behind the "I Believe" plate: "a religious objective permeate[s] the government's action." *McCreary County*, 545 U.S. at 863.

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[23](...continued)
sponsored by the university").

And in previous years, the General Assembly has authorized public schools to teach elective "history and literature" courses using the Old and New Testaments as their primary texts, S.C. Code Ann. § 59-29-230 (2007); and permitted public schools to award elective credit to high-school students participating in off-site religious classes, *id.* § 59-39-112. It has also adopted resolutions to express "strong support for the right of prayer" at public schools and colleges, H.R. Res. 5056, 2005-06 Leg., 116th Sess. (S.C. 2006); to urge citizens to participate in a National Day of Prayer, H.R. Res. 4042, 2003-04 Leg., 115th Sess. (S.C. 2003); and to condemn the United States Supreme Court's decision in *Santa Fe Independent School District v. Doe*, 530 U.S. 290 (2000), S. Res. 1438, 1999-2000 Leg., 113th Sess. (S.C. 2000); H.R. Res. 5176, 1999-2000 Leg., 113th Sess. (S.C. 2000) (both claiming decision would "send shock waves throughout . . . our God-fearing society").

b. The "I Believe" License Plate's Primary Effect is to Promote and Endorse the Christian Religion

Lemon's second prong asks "whether, irrespective of government's actual purpose, the practice under review in fact conveys a message of endorsement or disapproval [of religion]." *Wallace v. Jaffree*, 472 U.S. 38, 56 n.42 (1985) (quoting *Lynch v. Donnelly*, 465 U.S. 668, 690 (1984) (O'Connor, J., concurring). In *Allegheny County*, the Supreme Court refined this inquiry, elaborating on the meaning of "endorsement." *See* 492 U.S. at 592-93; *see also Lambeth v. Bd. of Comm'rs*, 407 F.3d 266, 269 (4th Cir. 2005) (characterizing endorsement test as an "'enhancement of *Lemon*'s second prong'") (quoting *Mellen v. Bunting*, 327 F.3d 355, 370-71 (4th Cir. 2003)). The Court explained that "the prohibition against governmental endorsement of religion 'preclude[s] government from conveying or attempting to convey a message that religion or a particular religious belief is *favored* or *preferred*.'" *Allegheny County*, 492 U.S. at 593 (quoting *Wallace*, 472 U.S. at 70 (O'Connor, J., concurring in judgment)). In other words, "[t]he Establishment Clause . . . prohibits government from appearing to take a position on questions of religious belief or from 'making adherence to a religion relevant in any way to a person's standing in the political community.'" *Id.* at 593-94 (quoting *Lynch*, 465 U.S. at 687 (O'Connor, J., concurring)).[24] And, as with *Lemon*'s purpose prong, the touchstone of the endorsement inquiry is the reasonable, objective observer, *see Mellen*, 327 F.3d at 370, who is "deemed

[24] Because Justice O'Connor provided the crucial fifth vote in *Lynch*, her concurring opinion carries significant weight. There, she laid the foundation for the endorsement test adopted by the full Court in *Allegheny County*. She reasoned that "[e]ndorsement sends a message to nonadherents 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." *Lynch*, 465 U.S. at 688 (O'Connor, J., concurring). Her focus on the "message" communicated by a particular government action, is especially apt where, as here, the challenged government action involves a *literal* message: "I Believe."

aware' of the 'history and context' underlying a challenged program,'" *Zelman*, 536 U.S. at 655 (quoting *Good News Club v. Milford Cent. Sch.*, 533 U.S. 98, 119 (2001)).

Much like "recitation of a prayer," South Carolina's creation and issuance of a license plate bearing Christian religious iconography and an accompanying expression of religious faith "'is undeniably religious and has, by its nature, . . . a religious . . . effect.'" *Mellen*, 327 F.3d at 373 (quoting *Hall*, 630 F.2d at 1020). The Supreme Court's analysis of the holiday Nativity display in *Allegheny County* illustrates this principle. There, the county had permitted a Roman Catholic group to erect a traditional Nativity scene, including a crèche, surrounded by a poinsettia border, on the county courthouse's main staircase. 492 U.S. at 579-80 (plurality opinion). An angel suspended at the manger's apex bore a banner reading, "Gloria in Excelsis Deo," Latin for "Glory to God in the Highest." *Id.* at 580, 598. The Court held this display violated the Establishment Clause because the county had "chosen to celebrate Christmas in a way that ha[d] the effect of endorsing a patently Christian message: Glory to God for the birth of Jesus Christ." *Id.* at 601-02.

Several factors influenced the Court's conclusion. First, "the crèche . . . use[d] words, as well as the picture of the Nativity scene, to make its religious meaning unmistakably clear." *Id.* at 598. "This praise to God in Christian terms [was] indisputably religious — indeed, sectarian." *Id.* Second, "nothing in the context of the display detract[ed] from the crèche's religious message." *Id.* The crèche was the display's focal point, and "[t]he floral frame, like all good frames, serve[d] only to draw one's attention to the message inside . . . ." *Id.* at 598-99. Third, despite the presence of a sign disclosing the Roman Catholic group's ownership, due to the

crèche's prominent site within the courthouse, "[n]o viewer could reasonably think that it occupie[d] this location without the support and approval of the government." *Id.* at 599-600.[25]

These same factors compel an identical conclusion here. First, much like a crèche coupled with the phrase, "Glory to God in the Highest," a cross joined by a stained-glass window and the words "I Believe," conveys an "unmistakably clear" religious meaning. *See id.* at 598. Such an expression of Christian faith is "indisputably religious — indeed, sectarian." *See id.*; *accord Friedman v. Bd. of Comm'rs*, 781 F.2d 777, 779-81 (10th Cir. 1985) (objective observer would glean religious message from radiant cross paired with words "With this we conquer"); *Harris v. City of Zion*, 927 F.2d 1401, 1403, 1414 (7th Cir. 1991) ("There . . . can be no doubt that a Latin cross is the principal and unmistakable symbol of Christianity as practiced in this country today," and concluding that its placement on city seal alongside words, "God Reigns," violated *Lemon*'s effect prong); *see also ACLU v. City of St. Charles*, 794 F.2d 265, 271 (7th Cir. 1986) (it is "obvious" that the Latin cross is "the principal symbol of Christianity as practiced in this country today," and holding that Christmas-season placement of Latin cross atop firehouse "dramatically conveys a message of governmental support for Christianity").[26]

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[25] The lower federal courts have, likewise, regularly struck down government-sponsored, solitary crèche displays as having a primarily religious effect. *See, e.g., Am. Jewish Cong. v. City of Chicago*, 827 F.2d 120, 128 (7th Cir. 1987) ("The government-approved placement of [a privately donated, solitary] nativity scene in Chicago's City Hall unavoidably fostered the inappropriate identification of the City of Chicago with Christianity, and therefore violated [*Lemon*'s effect prong]."); *ACLU v. City of Birmingham*, 791 F.2d 1561, 1566-67 (6th Cir. 1986) (erection of solitary crèche in Birmingham's city hall violated effect prong of *Lemon* because it had the effect of endorsing Christianity).

[26] In some contexts, a cross has been deemed to convey a primarily secular message. In *Weinbaum v. City of Las Cruces*, 541 F.3d 1017 (10th Cir. 2008), for example, the Tenth Circuit held that three crosses on Las Cruces's city seal simply reflected the city's name, which was

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Second, the "I Believe" license plate's frame, "like all good frames," will only focus an objective observer's attention on the message within, and given their ubiquity, the plate's other, standard visual elements will not distract that observer from the religious content. *See Allegheny County*, 492 U.S. at 598-99.[27] Third and finally, because a reasonable observer will know that the "I Believe" plate is state owned and legislatively issued, no such observer could believe the plate lacks "the support and approval of the government." *See id.* at 599-600. Irrespective of whether "specialty license plates are . . . government speech, they *are* reasonably viewed as having the State's stamp of approval." *Choose Life Ill., Inc. v. White*, No. 07-1349, 2008 WL 4821759, at *12 (7th Cir. Nov. 7, 2008). As with the crèche in *Allegheny County*, the "I Believe" plate impermissibly endorses "a patently Christian message." *See* 492 U.S. at 601-02.[28]

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[26](...continued)
Spanish for "The Crosses" and stemmed from the city's founding near a makeshift cemetery. 541 F.3d at 1033-37. Similarly, some courts have concluded that a cross does not convey a primarily religious message when it functions as a memorial to the dead. *See, e.g., Eugene Sand & Gravel, Inc. v. City of Eugene,* 558 P. 2d 338, 347 (1976); *Am. Atheists, Inc. v. Duncan*, 528 F. Supp. 2d 1245, 1257 (D. Utah 2007). Other courts, however, have disagreed. *See, e.g., Separation of Church and State Comm. v. City of Eugene*, 93 F.3d 617, 620 (9th Cir. 1996); *Jewish War Veterans v. United States*, 695 F. Supp. 3, 14 (D.D.C. 1988). No such secular symbolic effect can be attributed to the "I Believe" license plate.

[27] The plate's image on DMV's website includes the standard uniquely identifying character combination and the state's name, and the Plaintiffs assume each individual plate will include a sticker indicating when the vehicle's registration expires. (*See* Ex. 15, DMV Website Homepage, http://www.scdmvonline.com/DMVNew/default.aspx.)

[28] Governmental recognition of religion will not always have a predominantly religious effect. *Allegheny County*, 492 U.S. at 601-03; *see also Koenick v. Felton*, 190 F.3d 259, 267 (4th Cir. 1999) ("The government may, through speech and actions, recognize religion or a religious holiday, but it may not overtly endorse a religion, or religion in general.") (internal citation omitted). In *Koenick*, for example, the Court of Appeals approved a statute providing a four-day public-school holiday around Easter because, *inter alia*: (1) by affording this time off to *all* students and teachers, the statute treated "all affected parties the same with respect to religion" (continued...)

Indeed, the religious effect of the "I Believe" plate is even more pronounced than the religious effect of the crèche at issue in *Allegheny County* because the license plates will be displayed by the hundreds and even thousands, and they are "a permanent statement that is viewed year-round, while the crèche is displayed only seasonally amidst the secular celebration of Christmas." *Harris*, 927 F.2d at 1412. Furthermore, the reasonable observer's views "would be shaped by . . . legislator[s'] public statements." *See Jewish War Veterans of the U.S.A., Inc. v. Gates*, 506 F. Supp. 2d 30, 46 (D.D.C. 2007) (on motion to quash subpoena *duces tecum* for legislators' public statements, noting statements' potential relevance to *Lemon*'s effect prong). Here, these statements include State Senator McGill's on-the-record dismissal of Wicca as "not what [he] consider[s] to be a religion," and his apparent doubts about Buddhism's status;[29] State Senator Bryant's professed discomfort with the notion of an "I Believe" license plate for scientologists;[30] State Representative Sandifer's definitive refusal to support a bill creating an "I

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[28](...continued)
and conferred an equal benefit on all; (2) under school-board policy, non-Christian students and teachers were granted excused absences to observe their own holy days; and (3) it was merely an "incidental benefit" that the holiday's timing facilitated Christians' observation of Good Friday. *See id.* at 267-68. By contrast, here, South Carolina has afforded a benefit — the ability to profess one's faith on a specialty license plate — *only* to Christians. While the "I Believe" license plate will be available to persons of all faiths, its message is not one that resonates with non-Christians. While all citizens are likely to enjoy a day off, non-Christians will find little value in the "I Believe" plate. And while non-Christians in *Koenick* were granted excused absences for religious observances, South Carolina provides non-Christian vehicle owners with *no* expressive outlet materially equivalent to the "I Believe" plate. Finally, the plate is not just incidentally, but deliberately, Christian.

[29] (Ex. 8, Jim Davenport, *SC lawmakers have religion on minds, in bills*, The Associated Press, May 13, 2008 (quoting McGill as stating, when asked about an "I Believe" license plate for Buddhists, "I'd have to look at the individual situation.").)

[30] (Ex. 9, Kevin L. Bryant, *i believe we're going to court*, *in* Blog From the Backbench (continued...)

Believe" plate for Muslims;[31] and Lieutenant Governor Bauer's description of the plate's Christian message as reflecting the "core values" of South Carolina.[32] These statements, made on the public record by public officials, would leave the reasonable observer with little doubt that the "I Believe" plate endorses religion in general, and Christianity in particular.[33]

In sum, the Supreme Court's reasoning in *Allegheny County* makes abundantly clear that the "I Believe" license plate has a religious effect. That conclusion is plain from the face of the plate, and it is confirmed by legislators' statements making clear that the "I Believe" license plate "convey[s] a message that religion or [the Christian] religious belief is favored or preferred." *See Allegheny County*, 492 U.S. at 593 (internal quotation marks omitted). That result arises

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[30](...continued)
(June 20, 2008), http://kevinbryant.com/2008/06/ ("I guess I'd have to admit I could support a plate for the Jewish community, yet would be very uncomfortable with a plate for scientology.").)

[31] (Ex. 10, Andrew Moore, *Group fighting against Christian license plates*, Upstate Today, June 24, 2008, http://www.upstatetoday.com/news/2008/jun/24/group-fighting-against-christian-license-plates/ (quoting Sandifer as stating he would "[a]bsolutely and positively no[t]" support a bill creating a license plate expressing belief in Islam).)

[32] (Ex. 24, Official Website of Lieutenant Governor R. André Bauer, http://ltgov.sc.gov/ (last visited Nov. 11, 2008) (stating that the "'I believe' plate reflects core values that are meaningful to our society"); *see also* Ex. 11, Seanna Adcox, *SC first to get 'I Believe' license plates*, The Associated Press, June 12, 2008 (quoting Bauer as stating, "People who support Judeo-Christian values are ever under fire now. . . . It's like they expect folks who are believers just to roll over because they're scared of the ACLU.").)

[33] The objective observer might also be aware of the historical and contemporaneous legislative measures discussed above. *See supra* note 23. In various manners and contexts, these measures all advanced the role of religion generally, or of Christianity in particular, in public life in South Carolina. *See, e.g.*, Act No. 340 (June 11, 2008) (to be codified at S.C. Code. Ann. § 10-1-168 (2008)) (authorizing display of the Lord's Prayer in public buildings); S.C. CODE ANN. § 59-29-230 (2007) (authorizing public schools to teach elective "history and literature" courses using the Old and New Testaments as their primary texts).

irrespective of whether the plate constitutes government or private speech. For if it is government speech, the Establishment Clause prohibits the government from advancing the plate's sectarian message. *See id.* If the plate is private or hybrid speech, the Clause "prohibits . . . the government's lending its support to the communication of a religious [faith's] religious message." *See id.* at 601. As in *Allegheny County*, South Carolina has lent its support to the "I Believe" message, offering an expressive opportunity solely to Christians. South Carolina's "I Believe" license plate thus fails *Lemon*'s effect prong.

c. The Plate Engenders Excessive Entanglement Between Religion and Government

In addition to its other constitutional flaws, the "I Believe" license plate evinces excessive entanglement between the State and religion. "Entanglement is a question of kind and degree." *Lynch v. Donnelly*, 465 U.S. 668, 684 (1984). "[T]o assess entanglement," courts must look "'to the character and purposes of the institutions that are benefitted, the nature of the aid that the State provides, and the resulting relationship between the government and religious authority.'" *Agostini v. Felton*, 521 U.S. 203, 232 (1997) (quoting *Lemon v. Kurtzman*, 403 U.S. 602, 615 (1971)). Thus, in *Lemon*, the Supreme Court found excessive entanglement where "careful governmental controls and surveillance by state authorities," including "state inspection and evaluation of the religious content of a religious organization," accompanied salary supplements for teachers of secular subjects in nonpublic schools. 403 U.S. at 616-20. Likewise, excessive entanglement is present when a statute delegates governmental functions to religious bodies, thus "enmesh[ing] churches in the exercise of substantial governmental powers." *Larkin v. Grendel's Den, Inc.*, 459 U.S. 116, 126 (1982).

Excessive entanglement also arises when the state itself undertakes a quintessentially religious enterprise, such as parsing religious doctrine.[34] Simply put, the Establishment Clause prohibits state officials from making "intrusive judgments regarding contested questions of religious belief or practice." *Colo. Christian Univ. v. Weaver*, 534 F.3d 1245, 1261 (10th Cir. 2008). In *Weaver*, the court examined a statutory exclusion of students attending "pervasively sectarian" schools from the state's higher-education scholarship program. *Id.* at 1250. To assess whether a school was pervasively sectarian, the state considered faculty and students' "religious persuasion" and the nature of required courses' religious content. *Id.* at 1251, 1264. But the First Amendment, the court concluded, did not permit the state "to wade into [such] issues of religious contention." *Id.* at 1264-65. Because the statute involved government officials in "the evaluation of contested religious questions and practices," it engendered excessive entanglement between government and religion in violation of the Establishment Clause. *See id.* at 1266; *see also Lemon*, 403 U.S. at 620 (finding excessive entanglement in "state inspection and evaluation of the religious content of a religious organization").

Nowhere are the dangers of such entanglement more evident than in the context of government-composed prayer. For in selecting a prayer's content, the state necessarily takes a position on questions of religious belief or practice. Noting that "establishing governmentally

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[34] *See Barghouti v. Bureau of Kosher Meat & Food Control*, 66 F.3d 1337, 1344 (4th Cir. 1995) (where ordinance imposed penalty for selling food falsely labeled as kosher, finding that even if city authorities did not rely on Orthodox Jewish religious officials to determine compliance, excessive entanglement would exist because "secular officials would be left to determine how Orthodox Judaism defines the rules of kashrut"); *see also Presbyterian Church v. Mary Elizabeth Blue Hull Mem'l Presbyterian Church*, 393 U.S. 440, 451 (1969) (noting that civil courts may not "engage in the forbidden process of interpreting and weighing church doctrine").

composed prayers for religious services was one of the reasons which caused many of our early colonists to leave England," the Supreme Court has read "the constitutional prohibition against laws respecting an establishment of religion [to] at least mean that in this country it is no part of the business of government to compose official prayers for any group of the American people to recite . . . ." *Engel v. Vitale*, 370 U.S. 421, 425 (1962); *cf. Lee v. Weisman*, 505 U.S. 577, 587-88 (1992) (citing *Engel*'s proscription that "it is no part of the business of government to compose official prayers" to find Establishment Clause violation in Rabbi's presentation of middle-school graduation prayer where school principal selected prayer-giver and instructed him on prayer's content).

Thus, the Fourth Circuit has twice found excessive entanglement when a government entity drafts a prayer. *See Mellen v. Bunting*, 327 F.3d 355, 375 (4th Cir. 2003); *Hall v. Bradshaw*, 630 F.2d 1018, 1021-22 (4th Cir. 1980). In *Mellen*, the court concluded that by "compos[ing], mandat[ing], and monitor[ing] a daily prayer for [the Virginia Military Institute's] cadets," the academy had "taken a position on what constitutes appropriate religious worship — an entanglement with religious activity that is forbidden by the Establishment Clause." 327 F.3d at 375. Likewise, in *Hall*, the Court of Appeals found that North Carolina's inclusion of a nonsectarian, monotheistic prayer on its official state road maps had "the potential for entangling the state in a politically divisive conflict." 630 F.2d at 1021. "By placing its imprimatur on the particular kind of belief embodied in [the] prayer," the state risked dividing society along religious lines — the very evil the Establishment Clause was enacted to avert. *Id.*

In selecting and designing the cross and the stained-glass window on the "I Believe" plate, South Carolina made the very sort of "intrusive judgments regarding contested questions of

religious belief or practice" which excessively entangle government and religion. *See Weaver*, 534 F.3d at 1261. DMV's selection of an unadorned cross with one horizontal arm, which transects a single vertical arm at roughly three-quarters of its height (*see* Ex. 7, DMV Website Homepage (displaying image of plate)) — commonly known as a Latin Cross, *see Weinbaum v. City of Las Cruces*, 541 F.3d 1017, 1022 (10th Cir. 2008) — was not the only option that DMV had. The Presbyterian cross, for example, consists of a Latin cross, the arms of which end in three-pointed buds, with a circle superimposed upon it and transecting each arm midway along its length; and Russian Orthodox Christians use a Latin cross with two additional horizontal arms of shorter length, crossing above and below the main horizontal arm, with the lowest arm placed at a diagonal.[35] Thus, in choosing a Latin cross for the "I Believe" license plate, the state has made an "intrusive judgment" on a question of religious iconography that divides Christian sects.

Second, and in this same vein, the Legislature's selection of a *stained*-glass window, *see* Act No. 253 (June 5, 2008) (to be codified at S.C. Code. Ann. § 56-3-10110 (2008)), and DMV's multi-colored interpretation of that edict (*see* Ex. 7), reflect yet another "intrusive judgment" on a divisive issue of religious symbolism. Many Christian sects adorn their houses of worship with colorful stained-glass windows.[36] Quakers, however, eschew colored-glass windows as a

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[35] *See* United States Department of Veterans Affairs, Available Emblems of Belief for Placement on Government Headstones and Markers, http://www.cem.va.gov/cem/hm/hmemb.asp (last visited November 9, 2008) (displaying all available religious symbols); VA Form 40-1330, Application for Standard Government Headstone or Marker, at 4 (last revised May 2008) (same).

[36] *See* Thomas Pak, *Free Exercise, Free Expression, and Landmarks Preservation*, 91 Colum. L. Rev. 1813, 1841 (1991) (citing Georges Duby, History of Medieval Art: 980-1440 II.26 (1986)) (describing stained glass as "[o]ne of the most spectacular and vivid symbolic devices used in Christian architecture . . . [,] designed to enlighten church interiors with an awe[-

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distraction from prayer.[37] Thus, in mandating that the window on the "I Believe" license plate must be *stained* glass, the Legislature has taken a position on a controversial religious question. The same may be said of DMV's decision to design that window in the shape of a Gothic arch, a stylistic question on which Christian sects diverge.[38]

Just as when the state selects particular religious content for a prayer, by making these design choices, the State has engaged in a quintessentially religious enterprise. Here, as in *Mellen*, South Carolina has favored particular elements imbued with sectarian meaning, and has thereby opined on what constitutes "appropriate" religious practice. *See* 327 F.3d at 375. As was true in *Mellen*, this engenders "an entanglement with religious activity that is forbidden by the Establishment Clause." *Id.*

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[36](...continued)
] inspiring brilliance as well as to perform the didactic function of religious edification").

[37] *See* Quaker Meetinghouse Architecture: Amawalk Friends Meeting House, http://www.sacredplaces.org/PSP-InfoClearingHouse/articles/Quaker%20Meetinghouse%20Architecture.htm (last visited November 10, 2008) (describing meetinghouses' traditionally simple architecture and explaining this austerity reflects the Quaker belief that worship involves "silent waiting for God without ritual").

[38] *Compare* Ian Serjeant, Historic Methodist Architecture and Its Protection, http://www.buildingconservation.com/articles/methodistarch/methodistarch.htm (2004) (last visited November 10, 2008) (noting Methodism's adoption of gothic architectural style in mid-nineteenth century), *and* The American Heritage College Dictionary 588 (3d ed. 1997) (defining "Gothic arch" as "[a] pointed arch, especially one with a jointed apex"), *with* Quaker Meetinghouse Architecture, *supra* note 37 (describing plainness and simplicity as fundamental principles of Quaker architecture and characterizing pointed-arch windows found on particular meetinghouse as "unusual").

D. The Public Interest Favors Preserving the Status Quo Until the Court Can Reach a Fully-Informed Decision on the Merits

As another court in this Circuit has recognized, averting constitutional violations "is of the highest public interest." *See Child Evangelism Fellowship of Va. v. Williamsburg-James City County Sch. Bd.*, No. 4:08cv4, 2008 WL 3348227, at *6 (E.D. Va. Aug. 8, 2008) (attached as Exhibit 23). The Plaintiffs have not merely raised "serious, substantial, difficult, and doubtful" constitutional questions about this license plate's constitutionality; they have demonstrated a strong probability that issuing the plate will violate the First Amendment. *See Direx Israel, Ltd. v. Breakthrough Med. Corp.*, 952 F.2d 802, 813 (4th Cir. 1991) (reiterating Fourth Circuit test for granting preliminary injunction).

The injunction sought by the Plaintiffs is not one that alters the status quo, but one that simply preserves it. *Cf. O Centro Espirita Beneficiente Uniao Do Vegetal v. Ashcroft*, 389 F.3d 973, 975 (10th Cir. 2004) ("preliminary injunctions that alter the status quo" are "disfavored"); *Stemple v. Bd. of Educ. of Prince George's County*, 623 F.2d 893, 898 (4th Cir. 1980) ("courts will ordinarily refrain from issuing preliminary injunctions which threaten to disturb the status quo"). The public interest here lies in "preserving the status quo ante litem until the merits of [this] serious controversy can be fully considered . . . ." *Md. Undercoating Co., Inc. v. Payne*, 603 F.2d 477, 481 (4th Cir. 1979).

CONCLUSION

For the reasons stated above, this Court should grant the Plaintiffs' motion for a preliminary injunction prohibiting the issuance of the "I Believe" plate. A proposed order accompanies this filing.

Respectfully submitted,

/s/ Aaron J. Kozloski
Ayesha N. Khan (appearing *pro hac vice)*
Alex J. Luchenitser (appearing *pro hac vice*)
Elizabeth J. Stevens (appearing *pro hac vice*)
AMERICANS UNITED FOR SEPARATION
OF CHURCH AND STATE
518 C Street, NE
Washington, DC 20002
Tel: (202) 466-3234
Fax: (202) 466-2587
khan@au.org /luchenitser@au.org
stevens@au.org

Aaron J. Kozloski (D. S.C. Bar No. 9510)
CAPITOL COUNSEL
1201 Main Street Suite 1980
Box 11902 Capitol Station
Columbia, SC 29211
Tel: (803) 748-1320
Fax: (888) 513-6021
aaron@capitolcounsel.us

Attorneys for Plaintiffs

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