HENRY MCMASTER
ATTORNEY GENERAL

August 16, 2010

Marcia S. Adams, Director
Department of Motor Vehicles
Post Office Box 1498
Blythewood, South Carolina 29016

Dear Ms. Adams:

You seek an opinion as to whether, consistent with the Establishment Clause of the United States Constitution, the South Carolina Department of Motor Vehicles may, pursuant to § 56-3-8000, issue a specialty license plate to a private nonprofit organization known as "www.IBELIEVEsc.net," formerly known as Silver Ring South Carolina.

By way of background and quoting your letter virtually in full, you state the following:

> As you know, the U.S. District Court recently struck down Code Section 56-3-10510, the legislation authorizing the "I Believe" license plate, as unconstitutional in *Summer v. Adams*, 669 F.Supp.2d 637 (D.S.C. 2009).
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> In her opinion, Judge Currie ruled that the Department of Motor Vehicles' limited implementation of Section 56-3-10510 violated a clearly established standard:
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> > Thus focusing on the "I Believe" Act itself, the court concludes that it was clearly established that this Act was unconstitutional on or prior to October 30, 2008, during which period Adams authorized her employees to design and post images of the proposed plate on the DMV's website and to make the images available through the media.
>
> *Summers*, 669 F. Supp.2d at 670. The Court also granted me qualified immunity from personal liability from the Plaintiffs' claims for damages against me in an individual capacity, as follows:
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> > In reaching this conclusion, the court has considered that, despite the predictability of the outcome of this action, there was no controlling precedent specifically addressing application of the Establishment Clause to a religious message on a legislatively approved plate. More critically, there was, to the court's knowledge, no precedent holding

> that actions preliminary to distribution of such a plate (such as the actions taken by Adams), without more, are violative of the Establishment Clause.

Id. at 672. In a footnote, Judge Currie noted that:

> In reaching this conclusion, the court has given no weight to Adams' consultation with her General Counsel or claimed reliance on the Attorney General's defense of the constitutionality of the Act in his filings in this action.

Id. at 672, n. 57.

Following the issuance of Judge Currie's opinion, the SC DMV received from a private organization the attached request for a speciality plate to be known as the "www.IBELIEVEsc.net" license plate. This request was made pursuant to Section 56-3-8000, the non-profit license plate statute. The request has been made by www.IBELIEVEsc.net, an organization formerly known as Silver Ring, South Carolina. Under SC DMV Policy RG-504 (enclosed) non-profit plates are restricted to having the organization name at the top of the plate and the organization logo, symbol, or emblem in an area on the left side. Given Judge Currie's ruling in striking down the "I BELIEVE" license plate, and out of an abundance of caution, I respectfully request your opinion and advice under Section 1-7-110 concerning the constitutionality of the request for the "www.IBELIEVEsc.net" specialty license plate and that you address any other legal issues relevant to the request. Specifically, I ask first whether it is legal for SC DMV to issue such a plate in light of Judge Currie's decision. Second, and conversely, I ask whether it is legal for SC DMV to deny issuance of such a plate pursuant to Judge Currie's decision and/or pursuant to Subsection 56-3-8000(H).

Law / Analysis

Summers v. Adams

In *Summers v. Adams, supra*, the District Court concluded that the "I Believe" license plate Act, which authorized DMV to issue a license plate which contained the words "'I Believe' and a cross superimposed on a stained glass window," S.C. Code Ann. § 56-3-10510, violated the Establishment Clause of the First Amendment. Applying the three prong test established by the Supreme Court in *Lemon v. Kurtzman*, 403 U.S. 602 (1971), the District Court found that the Act

"violates the Establishment Clause" and that plaintiffs "are entitled to a permanent injunction against implementation of the act." 669 F.Supp.2d at 657. In the words of the District Court,

> [s]uch a law amounts to state endorsement not only of religion in general but a specific sect in particular. As Justice Blackmun, speaking for the majority in [County of] *Allegheny* [*v. ACLU Greater Pittsburgh Chapter*, 492 U.S. 573 (1989)]:
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> > Whatever else the Establishment Clause may mean (and we have held it to mean no official preference even for religion over nonreligion), ... 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). The clearest command of the Establishment Clause is that one religious denomination cannot be officially preferred over another.
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> 492 U.S. at 605 ... .
>
> Contrary to the arguments of Defendants Maria S. Adams ("Adams") and Attorney General Henry McMaster ("Attorney Gen. McMaster"), who appears as *amicus curiae*, the "I Believe" Act cannot be seen by any reasonable observer either as facilitating expression of a broad diversity of view points (Adams' argument) or as a permissible accommodation to Christians (Attorney Gen. McMaster's argument). Both positions are belied by the facts that the "I Believe" Act (1) authorizes a single plate with a uniquely Christian message, (2) was sponsored and approved solely as the result of governmental action, and (3) presents its message in a manner that is not available except through the legislative approval process (necessary to allow the inclusion of both motto and symbol). The first of these facts precludes a finding of any "context" that would save it from unconstitutionality. See *Allegheny*, 492 U.S. at 613-21 ... (Blackmun, J.); 632-37 ... (O'Connor, J.); see also id. at 651, 109 S.Ct. 3086 ("[D]isplays of this kind inevitably have a greater tendency to emphasize sincere and deeply felt differences among individuals than to achieve an ecumenical goal. *The Establishment Clause does not allow public bodies to foment such disagreement.*") (Stevens, J., dissenting in part) (emphasis added). The latter two facts preclude a finding that the plate is a mere accommodation because they distinguish the "I Believe" plate from any plate approved or available to private organizations through the non-legislative process.

669 F.Supp.2d at 639-640.

While the District Court struck down the legislation authorizing the "I Believe" plate, it is important to note that the Court left open the question raised here – whether a DMV approved plate which had been requested by a private nonprofit organization such as "IBELIEVEsc.net" – would violate the Establishment Clause. In its Order, the District Court noted that the "differences" between the procedure by which the "I Believe" plate had been approved – legislative act dictating the appearance of the plate – and that of "a plate obtained through the DMV process," established by § 56-3-8000, had been discussed in its *Amended Opinion on Plaintiff's Motion for Preliminary Injunction.* (hereafter "Amended Opinion"). *See*, 669 F.Supp.2d at 659, n. 38, referencing *Amended Opinion*, pp. 4-10 (found at 2008 WL 5401537). There, Judge Currie, after describing the procedure for approving a plate applied for through the DMV process by a nonprofit organization noted that, even these plates were "subject to *review* under the Establishment Clause." (emphasis in original). However, the Court contrasted a specific *legislatively approved* plate with one sought by and granted to a nonprofit corporation, among a wide variety of other speciality plates. The Court thus left for another day the question of whether the latter procedure would be upheld under the Establishment Clause:

> [w]hether a plate sponsored by a non-profit religious organization and approved by the DMV would survive such a challenge is beyond the scope of this action. It is, however, fair to predict that such a challenge might raise constitutional questions, particularly given that the policies for issuance of such plates may be said to favor established "majority" religions. See *supra* p. 6-7 ("Step 1 - Application Process"). Third, a legislatively-sponsored and authorized religious plate is clearly *more* offensive to the Establishment Clause than a plate sponsored by a governmental non-profit organization. This is because legislative authorization signals the state's affirmation, promotion, advancement and endorsement of the referenced religion (Christianity). This is particularly true in the present case given the General Assembly's initiation and unanimous authorization of overtly Christian license plate.
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> Furthermore, as of September, 2006, even DMV special license plates are subject to legislative veto and, therefore, are essentially legislative ....

Thus, it is clear that, while Judge Currie commented upon the issue raised by you here – approval of a plate by DMV applied for by a nonprofit religious organization – such issue was expressly left undecided. Moreover, the District Court clearly thought the DMV process to be less "offensive" to the Establishment Clause than the "I Believe" Act which is struck down.

Our April 24, 2008 Opinion

In an opinion dated April 24, 2008, we addressed the question of whether a nonprofit organization "South Carolina Citizens for Life, aka Choose Life S.C.," which met all the

requirements of S.C. Code Ann. § 56-3-8000 for issuance of a license plate in its name, must be issued such plate, notwithstanding the Fourth Circuit decision, *Planned Parenthood of South Carolina, Incorporated v. Rose, et al.*, 361 F.3d 786 (4th Cir. 2004). In *Planned Parenthood*, the Court concluded that a statute authorizing a "Choose Life" license plate violated the First Amendment as representing discrimination based upon message content. While the majority of the Fourth Circuit panel wrote separate opinions, the basic conclusion of the *Planned Parenthood* Court, in striking down the Act authorizing the "Choose Life" plate (§ 56-3-8910), was expressed in the opinion authored by Judge Michael. There, Judge Michael distinguished the *Planned Parenthood* situation from the previous Fourth Circuit decision in *Sons of Confederate Veterans, Inc. v. Commr. of Va. Dept. of Motor Vehicles (SCV),* 288 F.3d 610 (4th Cir. 2002) (which had required a plate with a Confederate Flag emblem to be approved because denial thereof constituted content discrimination in violation of the First Amendment). Judge Michael explained his reasoning in this regard as follows:

> [i]n *SCV* the Commonwealth of Virginia acted as a regulator of the existing specialty license plate forum.
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> In response to a private organization's request for its own plate, the Commonwealth authorized, but modified the plate to prevent the display of the Confederate flag. In this case, on the other hand, the State acts as a covert speaker within the speciality license plate forum, creating a license plate that promotes one view point in the abortion debate at the expense of another ....
>
> In addition to creating a limited forum for expression, the State has entered that forum as a privileged speaker. South Carolina does not merely approve or deny applications by private organizations for a specialty plate; it has favored its own position by authorizing one plate for those who share its view and by failing to authorize a comparable plate for those who oppose its view. The State thus acts as a privileged speaker within a forum that it creates and controls. The Supreme Court has never suggested that the government speech rationale allows a state to dominate a forum in this way, even one of its own creation.

361 F.3d at 794, 798.

Our 2008 Opinion recognized the distinctions in *Planned Parenthood* between a "private organization's request for its own plate," on one hand, and the State acting "as a covert speaker within the specialty license plate forum," on the other. We also reviewed the body of First Amendment law prohibiting discrimination based upon the content of speech once the State has created a limited public forum. Based thereupon, we advised that DMV was required by the First Amendment to

> ... issue the license plates to South Carolina Citizens for Life aka Choose Life S.C. [assuming the criteria established by statute and regulation for a private nonprofit organization to obtain speciality plates had been met]. Although the issue is complex, and it is difficult to predict how a court might rule, the situation appears much closer to that of the Fourth Circuit's *SCV* decision and the Ninth Circuit's ... ruling [in *Arizona Life Coalition, Inc. v. Stanton*, 515 F.3d 956 (9th Cir. 2008)] than it is to the Fourth Circuit's *Planned Parenthood* case. This is not a case like Planned Parenthood where a "comparable plate with a pro-choice message is not available." Indeed, within the confines of the State's program, we assume any nonprofit organization meeting the requirements of § 56-3-8000 and DMV Policy RG-504 may air its message through the speciality plate program. You state in your letter that Choose Life S.C. meets the requirements of § 56-3-8000 and DMV Policy RG-504 for the issuance of specialty license plates. Inasmuch as we deem § 56-3-8000 as a limited public forum along the same lines as the *Stanton* case, any access restrictions by the State must be viewpoint neutral and reasonable in light of the purpose served by the forum. See *SCV*, 288 F.3d at 623 [where the restriction is not viewpoint-neutral, it is "presumptively unconstitutional in any forum."].
>
> Accordingly, if DMV has determined that the organization, South Carolina Citizens for Life, has met the requirements for issuance of a specialty license plate imposed by Section 56-3-8000, the agency may not, consistent with the First Amendment, deny issuance of the specialty plates. In other words, denial may not be based upon the nonprofit organization's viewpoint, or for a reasons unrelated to the criteria set forth in § 56-3-8000 and Policy RG-504. As the Fourth Circuit concluded in *SCV*, where restriction of the speech by the State is not "borne out by the statute at issue, the record before us or any rules or restrictions generally applicable to [the] ... special plate program," than it is likely to be deemed to be viewpoint discriminatory. Thus, if these statutory and implementing policy requirements are met, the First Amendment likely requires issuance of the plates to South Carolina Citizens for Life.

Under ordinary circumstances, the Opinion of April 24, 2008 would resolve your request here. However, we must additionally address the question of whether the Establishment Clause dictates a different result in this instance. As Judge Currie noted in her Amended Opinion in *Summers*, "a plate sponsored by a non-governmental non-profit organization" stands upon a different constitutional footing than a "legislatively sponsored and authorized religious plate." The latter "signals the state's affirmation, promotion, advancement, and endorsement of the referenced religion (Christianity)." Thus, the question here is whether, assuming the proposed plate of the nonprofit organization "www.IBELIEVEsc.net" meets the criteria of § 56-3-8000 and DMV Regulation RG-504, such plate should be, nevertheless, denied because of the Establishment Clause would be

violated, if approved. Conversely, there is the question of whether the First Amendment's Free Speech Clause would require DMV to issue the plate, as was the case in our 2008 Opinion.

Case Law Concerning Establishment and Free Speech Clauses

The United States Supreme Court has issued a number of decisions which conclude that where government has created a limited public forum for the exercise of private expression, it may not discriminate against the content of expression simply because such expression involves religion. A number of Supreme Court decisions have reached this conclusion. For example, in *Widmar v. Vincent*, 454 U.S. 263 (1981), the Court held that, a public university, the University of Missouri Kansas City, having created a forum generally open for use by student groups, an exclusionary policy based upon the content of religious speech, violated the First Amendment. The Court rejected the argument that the University could not offer its facilities to religious groups and speakers without violating the Establishment Clause. Applying the three pronged test of *Lemon v. Kurtzman, supra*, the Court explained that

> [t]he University's argument misconceives the nature of this case. The question is not whether the creation of a religious forum would violate the Establishment Clause. The University has opened its facilities for use by student groups, and the question is whether it can now exclude groups because of the content of their speech. See *Healy v. James*, 408 U.S. 169, 92 S.Ct. 2338, 33 L.Ed.2d 266 (1972) .... In this context, we are unpersuaded that the primary effect of the public forum, open to all forms of discourse, would be to advance religion.
>
> We are not oblivious to the range of an open forum's likely effects. It is possible – perhaps even foreseeable – that religious groups will benefit from access to University facilities. But this Court has explained that a religious organization's enjoyment of merely "incidental" benefits does not violate the prohibition against the "primary advancement" of religion [citations omitted] ....
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> We are satisfied that any religious benefits of an open forum at UMKC would be "incidental" within the meaning of our cases. Two factors are especially relevant.
>
> First, an open forum in a public university does not confer any imprimatur of state approval on religious sects or practices. As the Court of Appeals quite aptly stated, such a policy "would no more commit the University ... to religious goals" than it is "now committed to the goals of the Students for a Democratic Society, the Young Socialist Alliance," or any other group eligible to use its facilities. 635 F.2d., at 1317....

> Second, the forum is available to a broad class of nonreligious as well as religious speakers; there are over 100 recognized student groups at UMKC. The provision of benefits to so broad a spectrum of groups is an important index of secular effect. See, *e. g., Wolman v. Walter*, 433 U.S. 229, 240-241, 97 S.Ct. 2593, 2601, 53 L.Ed.2d 714 (1977); *Committee for Public Education v. Nyquist, supra*, [413 U.S.] at 781-782, and n.38, 93 S.Ct., at 2969-2970, and n. 38. If the Establishment Clause barred the extension of general benefits to religious groups, "a church could not be protected by the police and fire departments, or have its public sidewalk kept in repair." *Roemer v. Maryland Public Works Bd., supra*, at 747, 96 S.Ct., at 2345, 49 L.Ed.2d, at 2345 (plurality opinion); quoted in *Committee for Public Education v. Regan*, 444 U.S., at 658, n.6, 100 S.Ct., at 849, n. 6. At least in the absence of empirical evidence that religious groups will dominate UMKC's open forum, we agree with the Court of Appeals that the advancement of religion would not be the forum's "primary effect."

454 U.S. at 273-275.

And, in *Lamb's Chapel v. Canter Moriches School District*, 508 U.S. 384 (1993), the Court, relying upon *Widmar*, held that a school district violated the Free Speech Clause of the First Amendment when it denied church access to school premises solely because the film it would show dealt with the subject of family values and child-rearing from a religious point of view. In the majority's view, allowing the church access to the school premises would not have violated the Establishment Clause; the school board had opened the school property for numerous purposes of communication, and thus had created a forum for First Amendment purposes, the Court concluded. Indeed, the school would have allowed access to school premises after hours to those who discussed family values and child-rearing from a non-religious point of view. Accordingly, the Court concluded that the school district had engaged in viewpoint discrimination against the church based upon its religious views. Responding to the school district's argument that the church's access to the school property would violate the Establishment Clause, the Court found that because "the District property had repeatedly been used by a wide variety of private organizations, ... [u]nder these circumstances, ... there would have been no realistic danger that the community would think that the District was endorsing religion or any particular creed ..." 508 U.S. at 395.

The decision in *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 115 S.Ct. 2510, 132 L.Ed.2d 700 (1995) is also particularly instructive. *Rosenberger* involved the collection of a mandatory fee from all full-time students at the University of Virginia for the Student Activities Fund. The Fund was used to support various student organizations, activities and publications. To receive such funds, a student group must have been declared a CIO ("Contracted Independent Organization"). The CIO agreement disclaimed any University endorsement of a particular CIO, stating that benefits provided "should not be misinterpreted as meaning that those organizations are

part of or controlled by the University, that the University is responsible for the organizations or other acts or omissions, or that the university approves of the organizations' goals or activities."

One organization, Wide Awake Productions, had as its goal, "publishing a magazine of philosophical and religious expression," "facilitating discussion which fosters an atmosphere of sensitivity to and tolerance of Christian viewpoints" and "providing a unifying focus for Christians of multicultural backgrounds." Wide Awake was approved as a CIO and, like other organizations, was granted access to University facilities and equipment. However, when Wide Awake sought funding for its expenses incurred, it was denied by the approval committee because the "request could not be funded as it is a religious activity."

Wide Awake challenged its denial as a violation of the Free Speech and Free Exercises Clauses of the First Amendment. The Fourth Circuit disagreed with the District Court and found that the University of Virginia's guidelines discriminated against Free Speech based upon content of expression. Ultimately, however, the Fourth Circuit upheld the District Court's ruling in favor of the University because a "compelling interest in maintaining strict separation of church and state" required denial of funding.

The United States Supreme Court granted *certiorari* as to whether the Establishment Clause compelled the University "to exclude an otherwise eligible student publication from participation in the student activities fund, where such exclusion would violate the Speech and Press Clauses if the publication were non-religious." Discrimination against Wide Awake was not justified on the basis of the content of its speech, the Court concluded. *Lamb's Chapel* provided the impetus for the Court's holding. Rejecting the University's argument trying "to escape the consequences" of the Court's holding in *Lamb's Chapel* "by urging that this case involves the provision of funds rather than access to its facilities ...", the Court found that

> [i]t does not follow ... that viewpoint-based restrictions are proper when the University does not speak or subsidize transmittal of a message it favors but instead expends funds to encourage a diversity of views from private speakers.

Id., at 834. Where the discrimination was speech-based, rather than group-based, the First Amendment was adversely implicated. In the Court's view, "[h] aving offered to pay the third-party contractors on behalf of private speakers who convey their own messages, the University may not silence the expression of selected viewpoints." Id. at 835.

With respect to the Establishment Clause, the Court emphasized that government neutrality was the "central lesson" of the Clause's jurisprudence. The majority summarized the Court's teachings in this area as follows:

> [w]e have held that the guarantee of neutrality is respected, not offended, when the government, following neutral criteria and evenhanded policies, extends benefits to recipients whose ideologies and viewpoints, including religious ones, are broad and diverse. See *Board of Ed. of Kirgas Joel Village School Dist. v. Grumet*, 512 U.S. 687, 704, 114 S.Ct. 2481, 2491, 129 L.Ed.2d 546 (1994) (Souter, J.) ("[T]he principle is well grounded in our case law [and] we have frequently relied explicitly on the general availability of any benefit provided religious groups or individuals in turning aside Establishment Clause challenges"); *Witters v. Washington Dept, of Services for Blind*, 474 U.S. 481, 487-488, 106 S.Ct. 748, 751, 88 L.Ed.2d 846 (1986); Mueller v. Allen, 463 U.S. 388, 398-399, 103 S.Ct. 3062, 3069, 77 L.Ed.2d 721 (1983); *Widmar*, 454 U.S., at 274-275, 102 S.Ct., at 277. More than once have we rejected the position that the Establishment Clause even justifies, much less requires, a refusal to extend free speech rights to religious speakers who participate in broad-reaching government programs neutral in design. See *Lamb's Chapel*, 508 U.S., at 393-394, 113 S.Ct., at 2147-2148; [*Board of Ed. of Westside Community Schools (Dist. 66) v.] Mergens*, [496 U.S. 226, 110 S.Ct. 2356, 110 L.Ed.2d 191 (1990)] ... at 248, 252, 110 S.Ct., at 2370-2371, 2373; *Widmar, supra*, at 274-275, 102 S.Ct., at 277.

Viewing the University's program as "neutral toward religion", the Court's reasoning was as follows:

> [t]here is no suggestion that the University created it to advance religion or adopted some ingenious device with the purpose of aiding a religious cause. The object of the SAF is to open a forum for speech and to support various student enterprises, including the publication of newspapers in recognition of the diversity and creativity of student life. The University's SAF Guidelines have a separate classification for, and do not make third-party payments on behalf of "religious organizations," which are those "whose purpose is to practice a devotion to an acknowledged ultimate reality or deity." ... The category of support here is for "student news, information, opinion, entertainment, or academic communications media groups," of which Wide Awake was 1 of 15 in the 1990 school year. WAP did not seek a subsidy because of its Christian editorial viewpoint, it sought funding as a student journal, which it was ....
>
> Government neutrality is apparent in the State's overall scheme in a further meaningful respect. The program respects the critical difference "between government speech endorsing religion, which the Establishment Clause forbids, and private speech endorsing religion, which the Free Speech and Free Exercise Clauses protect." *Mergens, supra*, at 250, 110 S.Ct., at 2372 (opinion of O'CONNOR, J.). In

> this case, "the government has not willfully fostered or encouraged" any mistaken impression that the student newspapers speak for the University. *Capitol Square Review and Advisory Bd. v. Pinette*, 515 U.S. 753, 766, 115 S.Ct. 2440, 2448, 132 L.Ed.2d 650 .... The University has taken pains to disassociate itself from the private speech involved in this case. The Court of Appeals' apparent concern that Wide Awake's religious orientation would be attributed to the University is not a plausible fear, and there is no real likelihood that the speech in question is being either endorsed or coerced by the State, see *Lee v. Weisman*, 505 U.S. 577, 587, 112 S.Ct. 2649, 2655, 120 L.Ed.2d 467 (1992); *Witters, supra*, at 489, 106 S.Ct., at 752-753 (citing *Lynch v. Donnelly*, 465 U.S. 668, 688, 104 S.Ct. 1355, 1367, 79 L.Ed.2d 604 (1984) (O'CONNOR, J., concurring)); see also *Witters, supra*, at 493, 106 S.Ct., at 754-755 (O'CONNOR, J., concurring in part and concurring in judgment) (citing *Lynch, supra*, at 690, 104 S.Ct., at 1368 (O'CONNOR, J., concurring)).

515 U.S. at 840-842. It was clear in the Court's view that access to government facilities by religious groups when done on a religion-neutral basis did not violate the Establishment Clause:

> [t]he error made by the Court of Appeals, as well as by the dissent, lies in focusing on the money that is undoubtedly expended by the government, rather than on the nature of the benefit received by the recipient. If the expenditure of governmental funds is prohibited whenever those funds pay for a service that is, pursuant to a religion-neutral program, used by a group for sectarian purposes, then *Widmar*, *Mergens*, and *Lamb's Chapel* would have to be overruled. Given our holdings in these cases, it follows that a public university may maintain its own computer facility and give student groups access to that facility, including the use of the printers, on a religion neutral, say first-come-first-served, basis. If a religious student organization obtained access on that religion-neutral basis and used a computer to compose or a printer or copy machine to print speech with a religious content or viewpoint, the State's action in providing the group with access would no more violate the Establishment Clause than would giving those groups access to an assembly hall. See *Lamb's Chapel v. Center Moriches School Dist.*, 508 U.S. 384, 113 S.Ct. 2141, 124 L.Ed.2d 352 (1993); *Widmar, supra*; *Mergens, supra*. There is no difference in logic or principle, and no difference of constitutional significance, between a school using its funds to operate a facility to which students have access, and a school paying a third-party contractor to operate the facility on its behalf. The latter occurs here. The University provides printing services to a broad spectrum of student newspapers qualified as CIOs by reason of their officers and membership. Any benefit to religion is incidental to the government's provision of secular services for secular purposes on a religion-neutral basis. Printing is a routine, secular, and recurring attribute of student life.

Id. at 843-844.

Also, emphasized was that a major difference existed between the State *aiding* religion directly and providing the same resources equally, the result being that such resources would be for religious purposes. Referencing earlier cases, the Court wrote:

> [i]n *Witters v. Washington Dept. of Services for Blind*, 474 U.S. 481, 106 S.Ct. 748, 88 L.Ed.2d 846 (1986), for example, we unanimously held that the State may, through a generally applicable financial aid program, pay a blind student's tuition at a sectarian theological institution. The Court so held, however, only after emphasizing that "vocational assistance provided under the Washington program is paid directly to the student, who transmits it to the educational institution of his or her choice." *Id.*, at 487, 106 S.Ct., at 751. The benefit to religion under the program, therefore, is akin to a public servant contributing her government paycheck to the church. *Ibid.* We thus resolved the conflict between the neutrality principle and the funding prohibition, not by permitting one to trump the other, but by relying on the elements of choice peculiar to the facts of that case: "The aid to religion at issue here is the result of petitioner's private choice. No reasonable observer is likely to draw from the facts before us an inference that the State itself is endorsing a religious practice or belief." *Id.*, at 493, 106 S.Ct., at 755 (O'CONNOR, J., concurring in part and concurring in judgment). See also *Zobrest v. Catalina Foothills School Dist.*, 509 U.S. 1, 10-11, 113 S.Ct. 2462, 2467-2468, 125 L.Ed.2d 1 (1993).

Id. at 848.

Another important case for consideration is *Capitol Square Review and Advisory Bd. v. Pinette*, 515 U.S. 753, 115 S.Ct. 2440, 132 L.Ed.2d 650 (1995). In *Capitol Square*, the State of Ohio opened its capitol grounds "for use by the public for free discussion of public questions or for activities of a broad public purpose." Use of the Square was authorized though an applicant's filling out a simple application designed to insure the meeting of criteria which concerned safety, sanitation and non-interference with other uses of the square. Such criteria were neutral as to speech content.

The Capitol Square Review and Advisory Board, given responsibility for regulating access to the grounds, received an application from the Ohio Ku Klux Klan to place a cross on the capitol grounds for a portion of the Christmas season, 1993. That application was denied.

Granting *certiorari* on the issue of whether the Establishment Clause required denial of the application, the United States Supreme Court concluded that it did not.

The plurality opinion, written by Justice Scalia, noted that the religious display was "private expression." Moreover, said the Court, "[t]here is no doubt that compliance with the Establishment Clause is a state interest sufficiently compelling to justify content-based restrictions on speech." Id. at 761-762. Once again, *Lamb's Chapel* provided considerable guidance for the Court. The key to the Court's analysis was, as in *Lamb's Chapel* and *Widmar*, that "[t]he State did not sponsor respondent's expression, the expression was made on government property that had been opened to the public for speech, and permission was requested through the same application process and on the same terms required of other private groups." *Id.* at 763.

In the view of the plurality, *Allegheny County v. American Civil Liberties Union, Greater Pittsburgh Chapter, supra*, was "easily distinguished." *Allegheny* was different because, there, the Court

> ... held that the display of a privately-sponsored creche on the "Grand Staircase" of the Allegheny County Courthouse violated the Establishment Clause. That staircase was not, however, open to all on an equal basis, so the County was favoring sectarian religious expression. 492 U.S., at 599-600, and n. 50, 109 S.Ct. at 3104-3105, and n. 50 ("[t]he Grand Staircase does not appear to be the kind of location in which all were free to place their displays.") We expressly distinguished that site from the kind of public forum at issue here, and made clear that if the staircase were available to all on the same terms, "the presence of the creche in that location for over six weeks would then not serve to associate the government with the creche."

Id. at 765.

With respect to the argument that *Lamb's Chapel* was distinguishable on the basis that, there, no realistic possibility existed that the community would think that the school district was endorsing religion, whereas in the case of *Capitol Square*, such was not necessarily true, the Court responded that in *Lamb's Chapel*

> ... we in effect said, given an open forum and private sponsorship, erroneous conclusions do not count. ... Once we determined that the benefit to religious groups from the public forum was incidental and shared by other groups, we categorically rejected the State's Establishment Clause defense. 454 U.S., at 274, 102 S.Ct., at 276.

Id. at 765. Thus, the critical difference was "between government speech and private speech." While "giving sectarian religious speech preferential access to a forum ... would violate the Establishment Clause (as well as the Free Speech Clause, since it would involve content discrimination) ...," on the other hand "[p]rivate religious speech cannot be subject to veto by those who see favoritism where there is none." *Id.* at 766.

Justice Thomas, in concurrence, interestingly, viewed the cross in the particular context of its display by the Ku Klux Klan as primarily political rather than religious. In other words, while the cross in other contexts would most certainly be deemed a religious symbol, here its use was secular. In Justice Thomas' view, "[t]he Klan simply has appropriated one of the most sacred of religious symbols as a symbol of hate."

Justices Souter, O'Connor and Breyer also separately concurred, emphasizing the need to continue application of the "endorsement" test. Justice Souter noted that "[w]hen an individual speaks in a public forum, it is reasonable for an observer to attribute the speech, first and foremost, to the speaker, while an unattended display (and any message it conveys) can naturally be viewed as belonging to the owner of the land on which it stands." *Id.*, at 786. He disagreed with the plurality that the "endorsement" test did not apply where the government was not itself speaking or discriminating in favor of private religious expression. Souter was of the view that "[i]f a reasonable observer would perceive a religious display in a government forum as government speech endorsing religion, then the display has made 'religion relevant, in public perception, to status in the political community.'" (quoting *Lynch v. Donnelly*, 465 U.S. 668, 692 (O'CONNOR, J. concurring).

Justice Souter's solution was thus to make it clear to the public that the Board was not endorsing the Klan's speech or the religious symbol included as part thereof. He reasoned that

> [b]ased on these and other factors, the Board was understandably concerned about a possible Establishment Clause violation if it had granted the permit. But a flat denial of the Klan's application was not the Board's only option to protect against an appearance of endorsement, and the Board was required to find its most "narrowly drawn" alternative. *Perry Ed. Assn. v. Perry Local Educators' Assn.*, 460 U.S. 37, 45, 103 S.Ct. 948, 955, 74 L.Ed.2d 794 (1983), *see also ante*, at 2459. Either of two possibilities would have been better suited to this situation. In support of the Klan's application, its representative stated in a letter to the Board that the cross would be accompanied by a disclaimer, legible "from a distance," explaining that the cross was erected by private individuals without government support." ... The letter said that "the contents of the sign" were "open to negotiation." ... The Board, then, could have granted the application subject to the condition that the Klan attach a disclaimer sufficiently large and clear to preclude any reasonable inference that the cross was there to "demonstrat[e] the government's allegiance to, or endorsement of, Christian faith." *Allegheny County*, 492 U.S., at 612, 109 S.Ct. at 3111. ... In the alternative, the Board could have instituted a policy of restricting all private, unattended displays to one area of the square, with a permanent sign marking the area as a forum for private speech carrying no endorsement from the State.

Id. at 794.

And, in *Good News Club v. Milford Central School*, 533 U.S. 98 (2001), a case involving elementary school children, the Court in held that the exclusion of a Christian club for children from use of an elementary school's facilities after hours violated the First Amendment. Relying upon *Widmar, Lamb's Chapel* and *Rosenberger,* the Court concluded that the exclusion of the Good News Club constituted viewpoint discrimination in the use of the limited public forum and thus infringed upon the member's Free Speech rights. Rejecting the school's defense that exclusion was necessary to avoid violating the Establishment Clause, the Court wrote:

> Milford attempts to distinguish *Lamb's Chapel* and *Widmar* by emphasizing that Milford's policy involves elementary school children. According to Milford, children will perceive the school is endorsing the Club and will receive coercive pressure to participate because the Club's activities and take place on school grounds, even though they occur during nonschool hours .... This argument is unpersuasive. ... The Good News Club seeks nothing more than to be treated neutrally and given access to speak about the same topics as other groups. [i.e. instruction in any branch of education, learning of the arts, social, civic and recreational meetings and entertainment events, and other uses pertaining to the welfare of the community]. Because allowing the Club to speak on school grounds and would ensure neutrality, not threaten it, Milford faces an uphill battle in arguing that the Establishment Clause compels it to exclude the Good News Club.
>
> Second, to the extent we consider whether the community would feel coercive pressure to engage in the Club's activities, cf. *Lee v. Weisman*, 505 U.S. 577, 592-593, 112 S.Ct. 2649, 120 L.Ed.2d 467 (1992), the relevant community would be the parents, not the elementary school children. It is the parents who choose whether their children will attend the Good News Club meetings. Because the children cannot attend without their parents' permission, they cannot be coerced into engaging in the Good News Club's religious activities. Milford does not suggest that the parents of elementary school children would be confused about whether the school was endorsing religion. Nor do we believe that such an argument could be reasonably advanced.
>
> Third, whatever significance we may have assigned in the Establishment Clause context to the suggestion that elementary school children are more impressionable than adults, cf., *e.g., id.*, at 592, 112 S.Ct. 2649; *School Dist. of Grand Rapids v. Ball*, 473 U.S. 373, 390, 105 S.Ct. 3216, 87 L.Ed.2d 267 (1985) (stating that "symbolism of a union between church and state is most likely to influence children of tender years, whose experience is limited and whose beliefs consequently are the function of environment as much as of free and voluntary choice"), we have never extended our Establishment Clause jurisprudence to foreclose private religious conduct during

> nonschool hours merely because it takes place on school premises where elementary school children may be present.

Moreover, the Court found unpersuasive the argument that religion was a prohibited subject matter under the Milford Policy. Noting that while in *Rosenberger*, there was no "prohibition on religion as to subject matter," such distinction was not pivotal, concluded the Court. In the Court's view, "we cannot say that the Club's activities are any more 'religious' or deserve any less First Amendment protection than did the publication of Wide Awake in *Rosenberger.*" 533 U.S. at 110. Compare, *Christian Legal Soc. Chap. of Univ, of Cal., Hastings v. Martinez*, ___ U.S. ___, 2010 WL 2555187 (2010) [limited public forum test was appropriate, but law school's policy of requiring student groups to comply with school's "all comers" nondiscrimination policy was viewpoint neutral]; see also, *id.* (Alito, Roberts, C.J., Scalia and Thomas, dissenting) [disagrees that Hastings' policy was viewpoint neutral; "... religious groups were not permitted to express a religious viewpoint by limiting membership to students who shared their religious viewpoints. Under established precedent, this was viewpoint discrimination."].

Lower courts have also applied the limited public forum analysis to private religious speech on public property, including the application of such speech to speciality license plates.

For example, in *Demmon v. Loudon Co. Public Schools*, 342 F.Supp.2d 474 (E.D.Va. 2004), the Court held that a school fundraising project, known as the "walkway of fame," through which people could contribute by purchasing bricks, was a limited public forum allowing for private speech and that the District engaged in viewpoint discrimination in disallowing the placement of a Latin cross on a particular brick purchased. The Court found that a limited public forum had been created by the school because "the school intended that symbols [placed upon the bricks] would personify the student" and "express something of importance to the honoree." 342 F.Supp.2d at 484-485. Citing *Lamb's Chapel, supra, Rosenberger, supra* and *Good News Club, supra*, the Court concluded:

> [t]hese cases stand for the unmistakable proposition that a school may not deny benefits to a group solely on account of their religious viewpoint. Whether that benefit is access to school facilities open to the public or paying for the cost of printing a journal, school policy must be neutral. Put another way, the school must choose who speaks based on criteria that do not involve religion. The school need not open its facilities to private speech, but once it does allow for expressive activity, it may not discriminate against those speakers who express a religious viewpoint on an otherwise permissible topic.
>
> In the instant case, the Defendants have engaged in viewpoint discrimination: those who honor a star athlete may adorn their bricks with a symbol but those who honor a pious student may not. Defendants argue that their decision to remove the

> bricks was viewpoint neutral, because no religious, philosophical, evolutionary, or political symbols were allowed in the walk of fame. This alone, however, would still constitute viewpoint discrimination. Preventing speakers to discuss otherwise permitted subjects, like their achievements in high school, except from a religious, philosophical, evolutionary or political viewpoint is exactly what the Supreme Court emphatically found unconstitutional in *Good News Club*. The purpose of the expression on the bricks was to express something of importance to the honoree. Brick purchasers were allowed to express themselves by choosing phrases or symbols that best expressed the honoree's interests. The school, however, censored those individuals who believed that the Latin cross was important to their honoree. Those students who believed that their high school career was marked by their faith were not permitted to celebrate their accomplishments, while the school allowed those who engaged in any number of athletic endeavors to inscribe their achievements on the "walk of fame."

342 F.Supp.2d at 487.

Next, applying the three part *Lemon* test, the Court concluded that the presence of the Latin Cross, had the school not removed it, would not violate the Establishment Clause. In the view of the District Court, the purpose of the "walk of fame" was secular, and the presence of the cross as a possible symbol for the bricks was not motivated by religious purposes on the part of school officials. Further, the effect of the possible presence of the Cross would not be interpreted by a reasonable observer "as an 'unmistakable endorsement' of the Christian faith" any more so than the various other messages contained on other bricks. *Id.* at 493. Finally, the school would not, in the Court's opinion, become "excessively entangled" in religion by allowing the cross to appear. In the Court's view, "[t]he school would not be taking a position 'on what constitutes appropriate religious worship' but rather allow members of different religions to select symbols for the bricks." *Id.* at 494.

In *Pruitt v. Wilder*, 840 F.Supp. 414 (E.D.Va. 1994), the District Court engaged in similar analysis with respect to a personalized license plate, possessing the message "GODZGUD." Plaintiff's plate was denied by DMV pursuant to its policy that licenses are not to be issued with any reference to drug culture, lewd and obscene words, *deities* or combinations which might otherwise be considered offensive. Emphasizing that the *Lamb's Chapel* decision served as its guide, the Court concluded that DMV's denial of the plaintiff's application violated the Free Speech Clause of the First Amendment:

> [i]n the present case, it is clear that the DMV CommuniPlate policy allows references to religion in general. The policy says "no deities," not "no religious references." In practice, DMV has granted applications for plates which refer to religion in general, plates such as "BIBLE," "ICOR14" and "PSALM96." See Pl.'s Complaint ¶ 27,

> Defs.' Answer ¶ 15. Yet, Pruitt's request for "GODZGUD" was rejected. The fact that the DMV policy purports to treat all references to deities the same does not mean that the policy is viewpoint neutral. To the contrary, by allowing one sub-set of religious speech-that not directly referring to a deity-to be placed on CommuniPlates, while denying another sub-set of religious speech-that referring to deities-the DMV policy discriminates on the basis of the speaker's viewpoint. This is particularly evident when it is considered that some religions, such as Buddhism, do not make reference to a deity, whereas others, like Christianity, center on a deity or deities.
>
> Defendants assert that the "no deity" policy is necessary because it avoids having the DMV "seen as endorsing ... deities or denigrating them and, accordingly, helps to satisfy [DMV's] constitutional obligation" not to violate the Establishment Clause. While a defense based on the Establishment Clause can potentially preserve the validity of a regulation or policy which is not viewpoint neutral, *see Lamb's Chapel*, 508 U.S. at ----, 113 S.Ct. at 2148, the argument in this case is meritless. Without analyzing whether the public views license plates as statements made by the Commonwealth of Virginia or by DMV, it is sufficient to note that if there were indeed an Establishment Clause problem, DMV would have to expand its policy to ban all religious references. The "no deity" policy, because it does not cover all references to religion, simply does not avoid entanglement with religion.

See also Children's First Foundation, Inc. v. Legreide, 2010 WL 1408323 (3d Cir. 2010) [denial of private organization's application for "Choose Life" speciality plate constituted viewpoint discrimination under First Amendment]; *Roach v. Stouffer*, 560 F.3d 860 (8th Cir. 2009 [same]; *Arizona Life Coalition, Inc. v. Stanton, supra* [same]; but see *Bryne v. Lunderville*, 2007 WL 2892620 (D. Vermont 2007) [denial of specialty license plate "JN36TN" ("John 3:16") denial of "Bryne's proposed plate was a neutral application of the DMV's policy because his plate referenced a Bible passage, a prohibited subject area under § 304(d)(4)." Thus, the denial was not based upon Bryne's viewpoint, Christianity or the Bible; "but rather, because it was a reference to religion."].

Our opinion of April 24, 2008 concluded that § 56-3-8000 and DMV Policy RG-504 created a limited public forum along the same lines as that created by Virginia in the *SCV* case and Arizona in the *Stanton* decision. We determined that the speech expressed by virtue of the specialty plates authorized by § 56-3-8000 is "primarily private speech." Section 56-3-8000 allows the nonprofit organization to have "imprinted on the plate the emblem, a seal or other symbol the Department considers appropriate of [the] organization ...." The purpose, therefore, is to allow the organization to characterize itself by emblem, seal or other symbol. The principal limitation placed upon the plates issued pursuant to § 56-3-8000 is that DMV not deem them "offensive" or that the plate

"fail[ ] to meet community standards." Likewise, DMV's implementing policy, RG-504, sets forth the purpose of the speciality plate program established by § 56-3-8000 as follows:

> [i]t is the intent of the Department to ensure that all designs submitted for consideration are not offensive and meet community standards of propriety. Designs displayed on state license plates are approved by the state for display to all audiences on the public highways and are the sole responsibility of the state. While the Department can be flexible in considering a range of specialty license plates, the public must also 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.
>
> This policy is also intended to protect the Department, as a public entity acting on behalf of all citizens, from allegations that it improperly sponsored partisan messages, divisive positions, or inappropriate language or designs. To that end the Department will employ criteria published in this policy during its design review process.

Neither § 56-3-8000 nor the DMV Policy expressly singles out religious messages for exclusion although it can fairly be implied that some reference is made to such messages in the DMV Policy by allusion to "divisive" positions. Nevertheless, we glean from your letter that the proposed plate conforms to the DMV guidelines.

Thus, we turn to the question of whether the Establishment Clause would be violated by approval of the referenced plate. The three-part test for violation of the Establishment Clause by particular government activity, articulated in *Lemon v. Kurtzman*, has often been criticized by various members of the Court and disregarded completely in some instances. *See, Van Orden v. Perry*, 545 U.S. 677 (2005); *McCreary County, Ky. v. American Civil Liberties Union of Ky.*, 545 U.S. 844, 890 (2005) (Scalia, Chief Justice Rehnquist and Thomas, dissenting) ["... a majority of the Justices on the current Court (including at least one member of today's majority have, in separate opinions, repudiated the brain-spun 'Lemon test.'"]. Nevertheless, until *Lemon* is overruled, the *Lemon* test is likely the one a lower federal court will apply. It is the test applied in *Demmon* and *Wilder*, referenced herein. Accordingly, we consider the validity of the plate, employing that test.

In *Demmon*, the District Court noted that "*Lemon* remains binding law in this Circuit" (4th) and thus quoted *Lemon* as follows:

> "[f]irst the [targeted] statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion; finally, the statute must not foster an excessive entanglement with religion."

342 F.Supp.2d at 490. As discussed above, *Demmon* found a secular purpose in the walk of fame and the inscription of the Latin cross. Likewise, here, the nonprofit organization program established by § 56-3-8000 has a secular purpose, that of allowing the organization to display a tasteful, nonoffensive symbol or logo characterizing the organization on the plate.

Likewise, the Court in *Demmon* found that display of the Latin cross did not have the appearance of endorsing religion or the Christian faith on the part of the school district. *Demmon* attributed this conclusion to the appearance of the walkway as a whole, as "[a]lmost every brick bore the name of a student or faculty member." In the Court's view, because of the numerous bricks contained in the walk and the wide variety of messages thereupon, "[t]he Latin cross would be connected to the student and not to the school."

We recognize that factually the speciality plate program here is different somewhat from the walk of fame in that a particular specialty plate is seen by the observer in isolation from other speciality plates. However, we find the Eighth Circuit's reasoning in *Roach v. Stouffer supra*, to be persuasive regarding the point that the proposed plate would not be seen by the reasonable observer as government's endorsement of a particular message (in that instance "Choose Life"):

> [w]ith more than 200 speciality plates available to Missouri vehicle owners, a reasonable observer could not think that the State of Missouri communicates all of those messages. For example, Missouri offers specialty plates for the Knights of Columbus, which requires members to be practicing Catholics, for the Grand Lodge, which requires members to have a "belief in God," and for the Order of the Eastern Star, which requires members to have a "belief in the existence of a Supreme Being." Yet a reasonable observer would not think that the State of Missouri has established the Catholic faith or that it has taken a position on the existence of God or a Supreme Being. Similarly, in *Lewis* we ordered the DOR to issue an "ARYAN-1" vanity plate. No reasonable observer would believe that the State of Missouri is endorsing white supremacy. Thus, the wide variety of available specialty plates further suggests that the messages on specialty plates communicate private speech.
>
> Moreover, we note that the messages communicated through specialty plates are voluntary, not compulsory. While Missouri requires a vehicle to display a license plate, the State does not compel anyone to purchase a specialty plate. "Private individuals choose to spend additional money to obtain the plate and to display its pro-life messages on their vehicle." *Stanton*, 515 F.3d at 967 (quotation and alterations omitted). The sponsoring organization must apply for the specialty plate, and the vehicle owner must choose to purchase it. Because the "Choose Life" plate is different from the standard Missouri license plate, a reasonable observer would understand that the vehicle owner took the initiative to purchase the specialty plate

> and is voluntarily communicating his or her own message, not the message of the state.
>
> Because the specialty plates bear sufficient indicia of private speech, we believe that under all the circumstances a reasonable and fully informed observer would recognize the message on the "Choose Life" specialty plate as the message of a private party, not the state. Therefore, we conclude that the messages communicated on specialty plates are private speech, not government speech. *See also Robb v. Hungerbeeler*, 370 F.3d 735, 745 (8th Cir.2004) (upholding the right of the Ku Klux Klan to participate in Missouri's Adopt-A-Highway program and explaining that the program's roadside signs communicate private speech because "[h]ighway adopters ... participate in the program in large part so that they can express a particular message: their solidarity with the community and their wish to become known as promoters of clean highways. Although the signs are state owned, an adopter speaks through the signs by choosing to undertake the program's obligations in exchange for the signs' announcement to the community that it is a highway adopter."). ...

560 F.3d at 868.

Moreover, as in *Demmon*, we conclude that there is no "excessive entanglement" with religious activity. *Demmon* noted that in considering "the question of entanglement, a court must examine the character and purposes of the institution benefitted, the nature of the assistance provided by the State, and the resulting relationship between the government and the religious entity." 342 F.Supp.2d at 493. The *Demmon* Court concluded that there was no excessive entanglement in that the school

> did not design the Latin cross symbol; the brick manufacturer provided the school with stock clip-art images .... The school would not be taking a position "on what constitutes appropriate religious worship" but rather allow members of different religions to select symbols for the bricks.

Id. at 494.

Likewise, according to RG-504, DMV does not design the speciality plate, but requires that "[d]esigns [by the applicant] must follow guidelines submitted within this policy." As noted above, the message must not be "offensive and [must] meet community standard of propriety." RG-504 contains a lengthy list of reasons why it might reject a particular plate including the following:

a. Does not promote positive image for the state
b. Low projected sales, lack of statewide appeal

c. Controversial, low sales, or litigation in other states
d. Production considered not to be cost beneficial to the state
e. Partisan or misrepresentative of the sponsoring organization or another organization
f. Potentially offensive, controversial or inappropriate to the public
g. Similar plate/design already exists
h. Proliferation of specialty plates, workloads and costs to the state
i. Advertises commercial logos or symbols
j. Use of proceeds from plate sales considered controversial or in violation of statute/constitution
k. Sexual or vulgar connotation
l. Derogatory reference to an individual or group
m. Implication extolling alcohol, drugs or other illegal activities or substances
n. Misrepresentation of organization as law enforcement or other governmental entity
o. Use of copyrighted emblem, seal, symbol, logo or registered trademark without written authorization from the owner
p. Design interferes with legibility or readability of plate number

Nowhere does the Policy comment expressly on religious messages or close the forum to organizations wishing to express religious messages. Rather, the Policy is principally aimed at eliminating those symbols or messages which are offensive, inappropriate, or unproductive in terms of sales or demand. Thus, in our view, there is no excessive entanglement of religion with the speciality plate program.

Accordingly, applying the *Lemon* test, we believe a court would likely conclude that the proposed plate does not violate the Establishment Clause. That being the case, if DMV concludes that the proposed plate meets the criteria as articulated in RG-504 and as specified in § 56-3-8000, we are of the opinion that the First Amendment requires approval of the plate. Our reasoning in the Opinion of April 24, 2008 would apply here as well. See, *SCV, supra*; *Arizona Life Coaltion, Inc. v. Stanton, supra*; *Roach v. Stouffer, supra*; *Demmon v. Loudon Co. Public Schools, supra*; *Pruitt v. Wilder, supra.*

While it is our opinion that the proposed plate is constitutionally valid and required, we note that Judge Currie, in dicta, was not necessarily convinced that such a plate would pass constitutional muster. In her Amended Opinion, she wrote:

> DMV's Policy RG-504 [for] Specialized Plates for Organizations also includes numerous other criteria. Designs may, for example, be rejected for a variety of reasons including that they are "controversial ... or [are subject to] litigation in other states." These concerns might lead the DMV to deny an application for a

> privately-sponsored "I Believe" plate if, for instance, other Christian groups opposed use of the phrase "I Believe" or their sacred symbols in such a manner or based on the risk of an Establishment Clause legal challenge.
>
> Second, as the DMV's published policy on special plates recognizes, even privately sponsored plates involve state action.
>
> *Designs displayed on state license plates are approved by the State ... and are the sole responsibility of the State.* While the Department can be flexible in considering a range of potential specialty license plates, *the public must also 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.*
>
> DMV Policy RG-504 (emphasis added). All state-issued plates are, therefore, subject to review under the Establishment Clause. Whether a plate sponsored by a non-profit religious organization and approved by the DMV would survive such a challenge is beyond the scope of this action. It is, however, fair to predict that such a challenge might raise constitutional questions, particularly given that the policies for issuance of such plates may be said to favor established "majority" religions. *See supra* p. 6-7 ("Step 1-Application Process").

One reason Judge Currie felt the DMV process might "favor established 'majority' religions is found in the *Amended Memorandum Opinion* as follows:

> [f]irst, as described earlier, only specified tax exempt groups may seek a special plate through the DMV ... . Among other requirements, these groups must have maintained that status for at least five years, prior to the date of application. This limits the groups which might seek approval of a similar plate.

Therefore, in Judge Currie's view, there is some doubt whether the proposed plate would meet the requirements of the Establishment Clause. Her Amended Opinion left open the possibility that the DMV approval process would not treat various religions equally.

However, in our opinion, the DMV process is neutral on its face. Any religious organization, whether a "majority" or "minority" religion, presumably could meet the requirements in order to qualify for a speciality plate. Thus, in our opinion, the issuance of the plate in question would not violate the Establishment Clause.

Conclusion

1. First Amendment issues are always particularly complex and difficult. Only a court and not an opinion of this Office may thus determine the requirements and limitations of the First Amendment. This is particularly so with respect to whether government activity violates the Establishment Clause.

2. We adhere to our earlier opinion dated April 24, 2008 which concluded that the specialty license plate program authorized by § 56-3-8000 and DMV Policy RG-504 established a limited public forum for First Amendment purposes. Thus, "any access restrictions by the State must be viewpoint neutral in light of the purpose served by the forum." In our view, as recognized in the earlier opinion, the speech expressed by virtue of the speciality plate program is "primarily private speech." The purpose of § 56-3-8000, which allows a nonprofit organization to have imprinted on the speciality plate the emblem, seal or logo of the organization, is to allow the organization to characterize itself by emblem, seal or other symbol. This purpose is similar to that recognized by the Court in *Roach v. Stouffer, supra*, that of allowing "private organizations to promote their messages and raise money and to allow private individuals to support those organizations and their messages." 560 F.3d at 867. We note that the DMV Policy does not expressly attempt to remove religious messages, nor could it, in our view, given the purpose of the limited forum, to allow private nonprofit organizations, including religious organizations, to promote their message in a tasteful, non-offensive manner. Accordingly, as we concluded in the earlier Opinion, if DMV determines that the organization in question has met the requirements for issuance of a specialty license plate, "the agency may not, consistent with the First Amendment, deny issuance of the specialty plates."

3. However, Judge Currie in her Amended Opinion in *Summers v. Adams* correctly recognized that "[a]ll state-issued plates are ... subject to *review* under the Establishment Clause." (emphasis in original). Thus, a court would still have to determine if approval of the "www.IBELIEVEsc.net" plate is violative of Establishment Clause. If so, approval would have to be denied.

4. Even though the *Lemon v. Kurtzman* three prong test for whether governmental action violates the Establishment Clause has been roundly criticized by members of the Supreme Court, the case has not been overruled and a court is likely to employ that test in some form. *See Mitchell v. Helms*, 530 U.S. 793 (2000) [modifying *Lemon* to determine whether statute has secular purpose and the effect of advancing religion results in governmental indoctrination; defines recipients by reference to religion; creates an excessive entanglement]. Our analysis herein is that the specialty license program has a secular purpose – allowing all nonprofit organizations to identify themselves by a logo or symbol.

Moreover, we do not see how the specialty program has the effect of advancing religion. As the Court in *Roach v. Stouffer, supra,* found in the context of the message at issue there, a reasonable observer would not deem that allowance of the plate, among many others, with a wide variety of messages, constituted an endorsement of a particular message. We deem this same analysis to apply here. Further, we cannot conceive that this specialty plate program involves an excessive entanglement in religion. Thus, based upon the information before us; it is our opinion that the Establishment Clause would not be violated by approval of this plate. Indeed, it is our opinion that denial would infringe upon the Free Speech Clause of the First Amendment.

5. We recognize that Judge Currie commented with respect to the Establishment Clause question, even though the specialty plate issue was not before her in *Summers v. Adams*. Her view expressed in dicta, was that the DMV approval process favored majority religions, presumably because of the criteria that a nonprofit group "must have maintained that status for at least five years prior to the date of the application." However, we believe these criteria are neutral on their face, and a court, with a full factual record before it, would determine with finality that the Establishment Clause is not violated by approval of the proposed plate. Again, in our opinion, the First Amendment requires the granting of the application, if DMV determines that all its criteria have been met.

Yours very truly,

Henry McMaster

HM/an