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Scott W. Gaylord

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LICENSING FACIALLY RELIGIOUS GOVERNMENT SPEECH: *SUMMUM*'S IMPACT ON THE FREE SPEECH AND ESTABLISHMENT CLAUSES

SCOTT W. GAYLORD*

ABSTRACT

It is the rare case that is decided solely on Free Speech grounds yet directly impacts the Supreme Court's Establishment Clause jurisprudence. *Pleasant Grove City v. Summum* is such a case. Although all nine Justices concurred in the judgment—that a privately donated monument in a public park is a form of “government speech” that is not subject to scrutiny under the Free Speech Clause—the case spawned five different opinions as the Justices attempted to explain the effect of the Court's decision on the Free Speech and Establishment Clauses. This Article analyzes the interaction between *Summum*'s “recently minted” government speech doctrine and the Establishment Clause. In particular, with respect to the Free Speech Clause, I argue that *Summum* resolves an ongoing circuit split regarding a common medium of expression—specialty license plates. Recently, six circuits have reached at least three different conclusions with respect to the status of specialty license plates, and two other circuits have addressed the First Amendment issue in passing. In addition, a petition for writ of certiorari has been submitted seeking Supreme Court review of a 2008 Seventh Circuit case dealing with this very issue. I maintain that *Summum*'s new test for government speech is

* Scott Gaylord is an Associate Professor of Law at the Elon University School of Law. He received his B.A., *summa cum laude* and Phi Beta Kappa, from Colgate University, earned an M.A. and a Ph.D. in Philosophy from the University of North Carolina at Chapel Hill, and graduated *summa cum laude* from Notre Dame Law School.

inconsistent with the test that the majority of circuits has applied to specialty plates. Whereas the majority considers whether a reasonable observer would identify the government as the speaker, *Summum* focuses on the level of control that the government has over the specialty plate program. Under *Summum*'s "control" test, many (and possibly all) specialty plate programs—as well as many other forms of speech that are subject to government control—government speech and, therefore, exempt from First Amendment scrutiny.

Moreover, I contend that *Summum*'s control test necessarily alters the Court's analysis of facially religious government speech under the Establishment Clause. Although the Establishment Clause still applies to government speech, the endorsement test does not. To understand why, this Article explores the effect of the government speech doctrine on an issue of first impression—a specialty license plate containing the phrase "I Believe" and a picture of a cross superimposed on a stained glass window. Although the lower court concluded that the plate violated the endorsement test, *Summum* changes the analysis. Under *Summum*, the government has the right to say what it wants even though the government's intended message may differ significantly from the message that observers ascribe to the government. As a result, when dealing with government speech, Justice O'Connor's "reasonable observer" test focuses on the wrong party—the reasonable observer instead of the government speaker. That is, when determining whether facially religious government speech violates the Establishment Clause post-*Summum*, the Court must determine whether the government actually has an improper religious motive, not whether a reasonable person interprets the message as impermissibly religious. I conclude that a majority of the current Court is apt to apply the control test and hold that the "I Believe" specialty plate is constitutional.

INTRODUCTION

In February 2009, the United States Supreme Court decided *Pleasant Grove City v. Summum*,¹ which marks an important development in the Court's First Amendment jurisprudence. Although all nine Justices concurred in the judgment—that a privately donated monument in a public park is a form of “government speech” that is not subject to scrutiny under the Free Speech Clause—the case spawned five different opinions as various Justices attempted to explain the proper scope of the Court's decision on the Free Speech and Establishment Clauses. With respect to the Free Speech Clause, for the first time, the Court unanimously adopted and applied the government speech doctrine, building on the framework set out in its prior decision in *Johanns v. Livestock Marketing Ass'n*.² While several members of the Court claimed that *Summum*'s effect would be limited, the majority opinion carved out a potentially broad category of government speech, immunizing from Free Speech review any message over which the government has effective control. But, as several concurring Justices acknowledge, *Summum*'s reach is not limited to the Free Speech Clause. Given that the government could reject a facially religious monument donated by the Summum religion while continuing to display a monument inscribed with the Ten Commandments, *Summum* also directly implicates the relationship

1. 129 S. Ct. 1125 (2009).

2. 544 U.S. 550 (2005). In *Johanns*, the Court considered a First Amendment challenge to a government-compelled subsidy that was used to fund government speech regarding beef and beef products. *Id.* at 556-57. Specifically, pursuant to the Beef Promotion and Research Act of 1985, a one dollar per head assessment on cattle was used to fund, among other things, promotional campaigns—such as “Beef. It's What's for Dinner”—that were designed by an Operating Committee and approved by the Secretary of Agriculture. *Id.* at 553-54. Although compelled speech generally is prohibited, see *W. Va. Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943); *Wooley v. Maynard*, 430 U.S. 705 (1977), “[c]ompelled support of government’—even those programs of government one does not approve—is of course perfectly constitutional, as every taxpayer must attest.” *Johanns*, 544 U.S. at 559.

between “the recently minted government speech doctrine”³ and the Establishment Clause.

Summum, therefore, is significant for at least three reasons. First, it provides the Court’s latest and most detailed explanation of the government speech doctrine. Federal and state governments are expansive and provide numerous services to their constituents. As the federal and state governments continue to expand their reach (consider the federal government’s recent involvement in the financial sector, automobile industry, and healthcare), the opportunities for government speech continue to increase. Thus, given that government speech is widespread and is a protected category under *Summum*, it is critical to understand the proper scope of the government speech doctrine.

Second, *Summum* applies directly to an ongoing circuit split regarding a common medium of expression—specialty license plates. Given that *Wooley v. Maynard*⁴ is a staple in Constitutional Law classes across the United States, it is not surprising to hear that automobile license plates implicate the First Amendment. In *Wooley*, the United States Supreme Court held that New Hampshire could not punish a vehicle owner for covering up the state motto on its standard, state-issued license plate. But, as indicated by the considerable attention that specialty license plates have received in recent years,⁵ specialty plates vary in significant

3. *Summum*, 129 S. Ct. at 1139 (Stevens, J., concurring).

4. 430 U.S. 705 (1977) (challenging a New Hampshire law which made obscuring the “Live Free or Die” motto on license plates illegal).

5. See, e.g., Jeremy T. Berry, Comment, *Licensing A Choice: “Choose Life” Specialty License Plates and Their Constitutional Implications*, 51 EMORY L.J. 1605, 1624-30 (2002) (assessing the forum analysis for specialty plates); Caroline Mala Corbin, *Mixed Speech: When Speech Is Both Private and Governmental*, 83 N.Y.U. L. REV. 605, 619-623 (2008) (surveying specialty plate cases and suggesting a better analysis for mixed speech); Traci Daffer, *A License to Choose Or A Plate-ful of Controversy? Analysis of the “Choose Life” Plate Debate*, 75 UMKC L. REV. 869, 870 (2007) (analyzing cases that deal with license plates supporting pro-life organizations and viewpoints); Jack Guggenheim & Jed Silversmith, *Confederate License Plates at the Constitutional Crossroads: Vanity Plates, Special Registration Organization Plates, Bumper Stickers, Viewpoints, Vulgarly, and the First Amendment*, 54 U. MIAMI L. REV. 563, 577-79 (2000) (arguing that specialty plates should be considered a limited public forum while vanity plates should be a nonpublic

ways from the compelled speech in *Wooley*. All states offer a large and ever-increasing selection of specialty plates. For example, state-issued license plates relate to specific organizations, groups, or causes.⁶ Under most specialty license plate programs, the state creates the specialty license plate program through legislation and then retains some level of control over the design and wording of specialty plates.⁷ Individuals who so desire may choose a specific specialty plate and display it on their vehicles. Thus, unlike the standard license plate in *Wooley*, motorists may select from a variety of specialty plates (usually paying more for the opportunity to do so) that carry a message with which they (presumably) agree and which they wish to convey to the rest of the world.

But who is speaking through, and therefore responsible for, this expressive activity—the government or the individual who chooses to display the message? Recently, six circuits have reached at least three different answers to this question,⁸ and two other

forum); Helen Norton, *The Measure of Government Speech: Identifying Expression's Source*, 88 B.U. L. REV. 587, 618-622 (2008) (applying a recommended framework for distinguishing between private and government speech in the specialty license plate context).

6. Each of the fifty states, as well as the District of Columbia, Puerto Rico, and the U.S. Virgin Islands, has specialty license plate programs. See ANNE TEIGAN & NICHOLAS FARBER, NAT'L CONFERENCE OF STATE LEGISLATURES, TRANSPORTATION REVIEW: MOTOR VEHICLE REGISTRATION AND LICENSE PLATES, 22-25 (2007), <http://www.ncsl.org/print/transportation/license-registration07.pdf>. Although the number of specialty plates offered varies by jurisdiction, currently there are more than 4,300 specialty plates available across the country, and the number appears likely to continue to increase. License Plate Information, National Conference of State Legislatures, Sept. 2009, <http://www.ncsl.org/default.aspx?tabid=18456> (last visited Feb. 20, 2010) (listing jurisdictions and number of approved specialty plates for each).

7. See Guggenheim & Silversmith, *supra* note 5, at 564-67 (discussing creation of specialty plates in various states).

8. *Roach v. Stouffer*, 560 F.3d 860 (8th Cir. 2009) (holding specialty plates were private speech, not government speech); *Ariz. Life Coal., Inc. v. Stanton*, 515 F.3d 956 (9th Cir. 2008) (holding that while specialty plates have some government speech quality, they are primarily private speech); *Choose Life Ill., Inc. v. White*, 547 F.3d 853 (7th Cir. 2008) (holding that specialty plates implicated private rights and were not government speech); *ACLU of Tenn. v. Bredesen*, 441 F.3d 370 (6th Cir. 2006) (holding that under *Johanns*,

circuits have addressed the First Amendment issue in passing.⁹ Moreover, a petition for writ of certiorari was submitted to the Court in a 2008 Seventh Circuit case asking the Court to consider this very issue.¹⁰ And *Summum* speaks directly to this conflict. In particular, *Summum* provides an analytical framework that is inconsistent with how the majority of circuits has resolved the status of specialty plates. Whereas the majority view determines whether specialty license plates are private or government speech by considering whether a reasonable observer would identify the government as the speaker, an approach consistent with *Summum* would focus on the level of control that the government has over the specialty plate program. Thus, *Summum* is significant because its new “control” test governs public monuments, specialty plates, and presumably all other forms of government speech.

Third, although *Summum* is expressly limited to the speech claims raised by the Summum religion, the Court’s decision is likely to alter the Court’s already complex Establishment Clause

Tennessee’s “Choose Life” specialty plate is government speech); *Henderson v. Stalder*, 407 F.3d 351 (5th Cir. 2005) (finding the court lacked jurisdiction to hear the case because of the Tax Injunction Act); *Planned Parenthood of S.C., Inc. v. Rose*, 361 F.3d 786 (4th Cir. 2004) (holding “Choose Life” specialty plate is a mixture of private and government speech).

9. *Children First Found., Inc. v. Martinez*, 169 F. App’x 639 (2d Cir. 2006) (declining application of the government speech doctrine because “custom license plates involve, at minimum, some private speech”); *Women’s Emergency Network v. Bush*, 323 F.3d 937, 945 n.9 (11th Cir. 2003) (“We fail to divine sufficient government attachment to the messages on Florida specialty license plates to permit a determination that the messages represent government speech.”).

10. See *Petition for Writ of Certiorari, Choose Life Ill., Inc. v. White*, No. 08-1283, 2009 WL 1030528, at *1-8, *cert. denied*, 130 S. Ct. 59 (2009) (discussing development of “Choose Life” controversy and collecting cases regarding that Circuit’s decision upholding Illinois’s denial of a “Choose Life” specialty plate). Florida was the first state to approve a “Choose Life” specialty plate. See Daffer, *supra* note 5, at 871-72. Since that time, twenty-four states have approved “Choose Life” plates, while fourteen other states are considering proposals for such plates. See *Choose Life, Inc.*, <http://www.choose-life.org/states.htm> (last visited Feb. 20, 2010). Two states—Hawaii and Montana—have approved “pro-choice” specialty plates, and six other states are considering proposals for similar “pro-choice” plates. See Daffer, *supra* note 5, at 891-92.

jurisprudence.¹¹ As Justice Souter noted in his concurrence, “[t]he interaction between the ‘government speech doctrine’ and Establishment Clause principles has not, however, begun to be worked out.”¹² But *Summum* requires courts to confront this interaction head on when considering facially religious government speech. If, as the Court states in *Summum*, the government “is entitled to say what it wishes,” may it engage in religious speech?¹³ For example, consider the impact of *Summum* on an issue of first impression—a specialty license plate with the phrase “I Believe” on the plate along with a picture of a cross superimposed on a stained glass window.¹⁴ In December 2008, a district court enjoined production of the “I Believe” specialty plate on Establishment Clause grounds, noting that neither of the parties had “directed the court to any case addressing the constitutionality of legislatively-authorized (or administratively-approved) religious license plates.”¹⁵ But the district court entered the injunction before *Summum* was decided. As a result, *Summers v. Adams* provides a unique opportunity to begin “working out” the intersection of the Free Speech and Establishment Clause strands of the First Amendment in light of the Court’s holding in *Summum*—with an eye toward determining whether and to what extent the government speech doctrine affects the Court’s Establishment Clause jurisprudence.

The purposes of this Article, therefore, are threefold: (i) to evaluate the scope of *Summum*’s government speech doctrine, (ii) to consider how the government speech doctrine affects a circuit split regarding the status of specialty license plates, and (iii) to

11. See, e.g., *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819, 861 (1995) (Thomas, J., concurring) (noting that “our Establishment Clause jurisprudence is in hopeless disarray”); *Edwards v. Aguillard*, 482 U.S. 578, 639-40 (1987) (Scalia, J., dissenting) (“In the past we have attempted to justify our embarrassing Establishment Clause jurisprudence on the ground that it ‘sacrifices clarity and predictability for flexibility.’”).

12. *Pleasant Grove City v. Summum*, 129 S. Ct. 1125, 1141 (2009) (Souter, J., concurring).

13. *Id.* at 1131 (majority opinion) (quoting *Rosenberger*, 515 U.S. at 833).

14. *Summers v. Adams*, No. 3:08-2265-CMC, 2008 WL 5401537, at *1 (D.S.C. Dec. 23, 2008).

15. *Id.* at *12.

consider whether *Summum* alters the Court's Establishment Clause analysis when the government engages in facially religious speech, such as the "I Believe" specialty plate in South Carolina.

Toward these ends, the next section provides an overview of the *Summum* decision, setting out the history behind the case as well as the Court's analysis of the government speech doctrine. Having defined the contours of the government speech doctrine under *Summum*, the third section considers the impact of *Summum* on the circuit split over the status of specialty license plates. In particular, this section explains the reasons for the circuit split and focuses specifically on the recent case from South Carolina in which the district court enjoined the production and distribution of the "I Believe" license plate. This section concludes with an analysis of why specialty license plates in South Carolina and the majority of jurisdictions are a form of government speech under *Summum* and, therefore, are not subject to scrutiny under the Free Speech Clause. The fourth section then turns to consider how *Summum*'s control test alters the Court's Establishment Clause analysis of facially religious government speech, using the "I Believe" specialty plate as a case study. Specifically, I argue that the government speech doctrine precludes the application of the endorsement test to facially religious government speech. That is, because government speech is characterized by the government's complete control over the message conveyed, which may differ from the message that observers ascribe to the government, Justice O'Connor's "reasonable observer" test¹⁶ focuses on the wrong party—the reasonable observer instead of the government speaker. Although the Establishment Clause still applies, the endorsement test does not. Thus, I contend (i) that after *Summum* and *Johanns*, the central Establishment Clause inquiry with respect to facially religious government speech is whether the government has a primarily religious purpose and (ii) that there is good reason to suppose that the "I Believe" plate is constitutional under both the Free Speech and Establishment Clauses of the First Amendment.

16. *County of Allegheny v. ACLU*, 492 U.S. 573, 630-36 (1989) (O'Connor, J., concurring).

I. *SUMMUM* — A MONUMENT TO THE PERMANENCE OF THE
GOVERNMENT SPEECH DOCTRINE

A. *Background.*

In 1971, the Fraternal Order of Eagles donated a Ten Commandments monument to Pleasant Grove City (“the City”). The City displayed the Ten Commandments monument in Pioneer Park, a 2.5-acre public park located in the City’s historic district.¹⁷ By 2003, Pioneer Park contained fifteen permanent displays, most of which came from private donors.¹⁸ Unlike *Stone v. Graham*, *McCreary County v. ACLU*, and *Van Orden v. Perry*, though, *Summum* does not involve an Establishment Clause challenge to the display of the Ten Commandments in a public setting.¹⁹ Rather, *Summum* involves a claim that the City violated the Free Speech Clause by refusing to accept and display another monument, one donated by members of the Summum religion. In 2003, Summum’s president wrote two letters to the City asking for permission to build a monument in Pioneer Park containing the Seven Aphorisms of Summum,²⁰ which would be similar in size and design to the Ten

17. *Summum*, 129 S. Ct. at 1129.

18. *Id.*

19. See *McCreary County v. ACLU*, 545 U.S. 844 (2005) (holding that the display of the Ten Commandments in a Kentucky courthouse, even though accompanied by other displays, was unconstitutional because the government had an improper religious purpose); *Van Orden v. Perry*, 545 U.S. 677 (2005) (a plurality of the Court and Justice Breyer held that a Ten Commandments monument on the Texas Capitol grounds did not violate the Establishment Clause); *Stone v. Graham*, 449 U.S. 39 (1980) (holding that the display of the Ten Commandments in a public school violated the Establishment Clause).

20. According to the brief that Summum filed with the Court, the Seven Aphorisms “were inscribed on the original tablets handed down by God to Moses on Mount Sinai. . . . Because Moses believed that the Israelites were not ready to receive the Aphorisms, he shared them only with a select group of people. In the Summum Exodus account, Moses then destroyed the original tablets, traveled back to Mount Sinai, and returned with a second set of tablets containing the Ten Commandments.” *Summum*, 129 S. Ct. at 1129-30 n.1 (quoting Brief for Respondent 1-2).

Commandments monument. The City refused both requests, stating that its practice was “to limit monuments in the Park to those that ‘either (1) directly relate to the history of Pleasant Grove, or (2) were donated by groups with longstanding ties to the Pleasant Grove community.’”²¹ Pursuant to this policy, Pioneer Park’s displays included, among other things, an historic granary, a wishing well, the fire station, a September 11 monument, and the aforementioned Ten Commandments monument.²²

In 2005, after the Pleasant Grove City Council rejected another request to erect a Seven Aphorisms monument in Pioneer Park, Summum filed its action. Summum alleged that the City and other local officials violated the Free Speech Clause of the First Amendment by permitting one religiously themed monument (Ten Commandments) to be displayed in the Park while denying another (Seven Aphorisms).²³ Although the district court denied Summum’s request for a preliminary injunction, the Tenth Circuit reversed.²⁴ Specifically, the panel held that Pioneer Park was a public forum and that, as a result, the City could refuse to display the Seven Aphorisms monument only if the City had a compelling reason that was narrowly tailored.²⁵ Because the City was unlikely to survive this strict scrutiny review, the panel directed the City to permit Summum to construct its Seven Aphorisms monument in Pioneer Park. After the Tenth Circuit denied the petition for rehearing en banc, the Supreme Court granted certiorari.²⁶

B. Summum’s control test for government speech.

Although Justice Stevens expressed concern about the “doubtful merit” of the few cases applying this “recently minted government speech doctrine,”²⁷ the majority did not have any such

21. *Summum*, 129 S. Ct. at 1130 (citation omitted).

22. *Id.* at 1129.

23. *Id.* at 1130.

24. *Summum v. Pleasant Grove City*, 483 F.3d 1044 (10th Cir. 2007).

25. *Id.* at 1054.

26. *Pleasant Grove City v. Summum*, 128 S. Ct. 1737 (2008).

27. *Summum*, 129 S. Ct. at 1139 (Stevens, J., concurring); *see also* *Johanns v. Livestock Mktg. Ass’n*, 544 U.S. 550, 574 (2005) (Souter, J.,

reservations. Tracing the doctrine back to at least Justice Stewart's concurrence in *Columbia Broadcasting System, Inc. v. Democratic National Committee*,²⁸ the *Summum* majority reaffirmed the general principles that the government "has the right 'to speak for itself'" and that when speaking, the government "'is entitled to say what it wishes'" and "to select the views that it wants to express."²⁹ As a result, "the government's own speech . . . is exempt from First Amendment scrutiny."³⁰ According to the Court, this exemption flows from at least three sources: (i) the text of the First Amendment, (ii) the role of the sovereign in governing, and (iii) the importance of having an informed electorate who can use the political process to remove officials who advocate unpopular policies.³¹ With respect to the text, the First Amendment states only that "Congress shall make no law . . . abridging the freedom of speech."³² The express language of the First Amendment precludes the government from limiting speech rights generally, but it does not impose any restrictions on what the government can or cannot say. That is, the text of the First Amendment is silent on the scope of government speech. Thus, as the Court acknowledges in *Summum*, "[t]he Free Speech clause restricts government regulation of private speech; it does not regulate government speech."³³

dissenting) (quoting *Bd. of Regents of Univ. of Wis. Sys. v. Southworth*, 529 U.S. 217, 229 (2000)) ("The government-speech doctrine is relatively new, and correspondingly imprecise. In fact, the few cases in which we have addressed the doctrine have for the most part not gone much beyond such broad observations as ' . . . it seems inevitable that funds raised by the government will be spent for speech and other expression to advocate and defend its own policies.'").

28. 412 U.S. 94, 139 n.7 (1973) (Stewart, J., concurring) ("Government is not restrained by the First Amendment from controlling its own expression.").

29. *Summum*, 129 S. Ct. at 1131 (quoting *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819, 833 (1995)).

30. *Id.* (quoting *Johanns v. Livestock Mktg. Ass'n*, 544 U.S. 550, 553 (2005)).

31. *Id.* at 1131-32.

32. U.S. CONST. amend. I.

33. *Summum*, 129 S. Ct. at 1131.

The role of the sovereign provides a more pragmatic justification of the government speech doctrine—the need for the government to secure a voice in the marketplace of ideas to promote and defend its own policies:

If every citizen were to have a right to insist that no one paid by public funds express a view with which he disagreed, debate over issues of great concern to the public would be limited to those in the private sector, and the process of government as we know it radically transformed.³⁴

Without the ability to speak, the government could not govern.³⁵ Accordingly, the Court has recognized consistently that the government must be allowed to speak:

The government, as a general rule, may support valid programs and policies by taxes or other exactions binding on protesting parties. Within this broader principle it seems inevitable that funds raised by the government will be spent for speech and other expression to advocate and defend its own policies.³⁶

Moreover, the government's ability to speak freely and openly is important for another reason: it ensures that the electorate can provide an informed check on the government. If the government is not able to advocate its policies and decisions free from the constraints imposed by the Free Speech Clause, voters would not know about the government's policies and, as a result, would be unable to elect new officials who better reflect their goals and policy concerns. For that reason, Justice Souter and several circuit courts take political accountability to limit the

34. *Keller v. State Bar of Cal.*, 496 U.S. 1, 12-13 (1990).

35. *See, e.g., Johanns v. Livestock Mktg. Ass'n*, 544 U.S. 550, 574 (2005) (Souter, J., dissenting) ("To govern, government has to say something, and a First Amendment heckler's veto of any forced contribution to raising the government's voice in the 'marketplace of ideas' would be out of the question.").

36. *Bd. of Regents of Univ. of Wis. Sys. v. Southworth*, 529 U.S. 217, 229 (2000).

government speech doctrine to only that speech that is identifiable as the government's. Under their view, if the reasonable observer cannot identify the government as the speaker, then the government cannot avail itself of the protection that the government speech doctrine affords.³⁷ Although the Court has never conditioned the protection of the government speech doctrine on such an identification, a majority of the Court still views political accountability as an important check on government speech, one that ultimately makes the government answerable to the public: "And of course, a government entity is ultimately 'accountable to the electorate and the political process for its advocacy If the citizenry objects, newly elected officials later could espouse some different or contrary position.'"³⁸

1. Locating government speech on the Court's forum continuum.

Given that government speech is exempt from scrutiny under the Free Speech Clause, the Court must be able to determine when the government is speaking in its own voice, as opposed to creating a forum for private speech. But, as *Sumnum* recognizes, the line is not always clear: "There may be situations in which it is difficult to tell whether a government entity is speaking on its own behalf or is providing a forum for private speech."³⁹ The task is

37. See, e.g., *Roach v. Stouffer*, 560 F.3d 860, 868 (8th Cir. 2009) ("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."); *Johanns*, 544 U.S. at 578 (Souter, J., dissenting) ("It means nothing that Government officials control the message if that fact is never required to be made apparent to those who get the message, let alone if it is affirmatively concealed from them."); *Planned Parenthood of S.C., Inc. v. Rose*, 361 F.3d 786, 798 (4th Cir. 2004) (Michael, C.J., writing separately) (holding that South Carolina's "Choose Life" plate was not government speech because, "[g]iven the array of specialty license plates available in South Carolina, a citizen is less likely to associate the plate messages with the State.").

38. *Sumnum*, 129 S. Ct. at 1132 (quoting *Southworth*, 529 U.S. at 235).

39. *Id.*

made all the more difficult because, although the Court previously recognized government speech as a special category of speech, it did not have occasion to explore the contours of the government speech doctrine.⁴⁰ In *Johanns* and *Summum*, the Court set out its “control” test for the first time. Under this test, the key feature distinguishing government speech from private speech in a traditional, designated, or nonpublic forum is the level of governmental control over the message conveyed: “In this case, it is clear that the monuments in Pleasant Grove’s Pioneer Park represent government speech . . . [because] the City has ‘effectively controlled’ the messages sent by the monuments in the Park by exercising ‘final approval authority’ over their selection.”⁴¹

But the government speech doctrine is not a radical departure from the Court’s traditional forum analysis. Rather, it simply represents one end on the continuum of limitations that the Free Speech Clause imposes on the government’s regulation of various fora. The different categories on the continuum—traditional open, designated open, designated limited, nonpublic, and government speech—are marked by the level of control that the government exercises over who may speak and what they may say. On one end are “traditional public fora,” in which the government’s authority to control private speech is strictly limited.⁴² Traditional public fora are those public places “which ‘have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly,

40. In *Southworth*, the Court did not need to consider the contours of the government speech doctrine because the University had denied that the speech at issue—consisting of speech funded by mandatory student activity fees—was its own: “If the challenged speech here were financed by tuition dollars and the University and its officials were responsible for its content, the case might be evaluated on the premise that the government itself is the speaker. That is not the case before us.” *Southworth*, 529 U.S. at 229. See also *Rust v. Sullivan*, 500 U.S. 173, 194 (1991) (“Within far broader limits than petitioners are willing to concede, when the Government appropriates public funds to establish a program it is entitled to define the limits of that program.”).

41. *Summum*, 129 S. Ct. at 1134 (quoting *Johanns*, 544 U.S. at 560-61).

42. *Cornelius v. NAACP Legal Def. & Educ. Fund, Inc.*, 473 U.S. 788, 800 (1985).

communicating thoughts between citizens, and discussing public questions.”⁴³ Although reasonable time, place, and manner restrictions are permitted,⁴⁴ the government may make content-based restrictions on speech in a traditional public forum, such as a public park or street, only if such restrictions pass strict scrutiny, i.e., are narrowly tailored to serve a compelling interest.⁴⁵ Moreover, viewpoint restrictions are prohibited.⁴⁶ Thus, under the Court’s traditional forum analysis, the government has very little control over the message of a private speaker who is properly using the forum.⁴⁷

In addition to traditional public fora, the Court has recognized two other types of fora that may be opened up to private speakers for public discourse: designated open and designated limited public fora. “To create such a forum, the government must make an affirmative choice to open up its property for use as a public forum. ‘The government does not create a public forum by inaction or by permitting limited discourse, but only by intentionally opening a non-traditional forum for public discourse.’”⁴⁸ By opening non-traditional fora to private

43. *Summum*, 129 S. Ct. at 1132 (quoting *Perry Educ. Ass’n v. Perry Local Educators’ Ass’n*, 460 U.S. 37, 45 (1983)).

44. *See, e.g., Perry*, 460 U.S. at 45 (“The State may also enforce regulations of the time, place, and manner of expression which are content-neutral, are narrowly tailored to serve a significant government interest, and leave open ample alternative channels of communication.”).

45. *Hill v. Colorado*, 530 U.S. 703, 748 (2000) (Scalia, J., dissenting) (“In sum, it blinks reality to regard this statute, in its application to oral communications, as anything other than a content-based restriction upon speech in the public forum. As such, it must survive that stringent mode of constitutional analysis our cases refer to as ‘strict scrutiny,’ which requires that the restriction be narrowly tailored to serve a compelling state interest.”).

46. *See Carey v. Brown*, 447 U.S. 455, 463 (1980).

47. *Summum*, 129 S. Ct. at 1132 (holding that “government entities are strictly limited in their ability to regulate private speech in such ‘traditional public fora.’”); *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819, 828 (1995) (“In the realm of private speech or expression, government regulation may not favor one speaker over another.”).

48. *United States v. Am. Library Ass’n, Inc.*, 539 U.S. 194, 206 (2003) (quoting *Cornelius v. NAACP Legal Def. & Educ. Fund., Inc.*, 473 U.S. 788, 802 (1985)).

speech, the government relinquishes significant control over the speech activity conducted on the property. In a designated open forum, the government takes property that traditionally has not been used for public assembly or discussion and opens it up generally for public purposes. In so doing, the government creates the equivalent of a traditional public forum. Therefore, any government regulation of private speech in a designated open forum is subject to the same standards that apply to traditional public fora—viewpoint-based distinctions are prohibited and content-based restrictions are subject to strict scrutiny.

But the government may open its property to some private speech without automatically creating the equivalent of a traditional public forum. If the government opens a forum for use by only certain groups or for the discussion of only certain topics, it creates a designated limited public forum. In this type of forum, the government cedes some of its authority over who may speak and on what topics: “When the State establishes a limited public forum, the State is not required to and does not allow persons to engage in every type of speech. The State may be justified ‘in reserving [its forum] for certain groups or for the discussion of certain topics.’”⁴⁹ Because the government has not opened the forum to any and all speech activities, “a government entity may impose restrictions on speech that are reasonable and viewpoint-neutral.”⁵⁰ Although content-based restrictions are permitted, viewpoint-based ones are not: “The State’s power to restrict speech, however, is not without limits. The restriction must not discriminate against speech on the basis of viewpoint, and the restriction must be ‘reasonable in light of the purpose served by the forum.’”⁵¹

Yet the government may create a forum for some forms of private speech even though it does not open its property to the public. The government may create a nonpublic forum by

49. *Good News Club v. Milford Cent. Sch.*, 533 U.S. 98, 106-07 (2001) (quoting *Rosenberger*, 515 U.S. at 829).

50. *Summum*, 129 S. Ct. at 1132.

51. *Good News Club*, 533 U.S. at 106-07 (quoting *Cornelius*, 473 U.S. at 806); *Rosenberger*, 515 U.S. at 829 (“These principles provide the framework forbidding the State from exercising viewpoint discrimination, even when the limited public forum is one of its own creation.”).

permitting non-governmental use of its property for activities that are related to the general purpose of the property.⁵² For example, in *Perry Educational Ass'n v. Perry Local Educators' Ass'n*, the Court held that the school could limit "a nonpublic forum to activities compatible with the intended purpose of the property."⁵³ That is, the school could grant one teachers union access to the school mailbox system while denying access to another union that lost the election. Because the school retained greater control over access to its property than it would in a designated forum, the school had more leeway in regulating who spoke on the property and the topics about which they spoke: "Public property which is not by tradition or designation a forum for public communication is governed by different standards In addition to time, place, and manner regulations, the State may reserve the forum for its intended purposes, communicative or otherwise, as long as the regulation on speech is reasonable and not an effort to suppress expression merely because public officials oppose the speaker's view."⁵⁴ According to the Court, the school excluded the union that lost not because of its intended message but because of its status—a union that did not have direct ties to the school. Thus, although the designated limited forum and the nonpublic forum impose the same restrictions—reasonableness and viewpoint neutrality—the two are conceptually distinct.⁵⁵ In a designated limited forum, the government intentionally opens the property to certain members of the public for certain uses, but having opened the forum for one group to use the property, the government cannot discriminate

52. *Good News Club*, 533 U.S. at 130-31 (Stevens, J., dissenting) (quoting *Greer v. Spock*, 424 U.S. 828, 836 (1976)) ("[W]hile a public entity may not censor speech about an authorized topic based on the point of view expressed by the speaker, it has broad discretion to 'preserve the property under its control for the use to which it is lawfully dedicated.'").

53. *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 49 (1983).

54. *Id.* at 46.

55. In *International Society For Krishna Consciousness, Inc. v. Lee*, Justice O'Connor suggested that "reasonableness" with respect to nonpublic fora may be more demanding than the reasonableness required under the rational basis test, but a majority of the Court has not expounded on this distinction. 505 U.S. 672, 687-88 (1992) (O'Connor, J., concurring).

against similar groups.⁵⁶ In a nonpublic forum, the government permits only certain groups to use its property based on the nature of the property and the status of the group, i.e., the nature of the property imposes its own limiting condition on who can use the property and for what purposes.⁵⁷

Government speech, however, is not subject to the Court's forum analysis. As the Court concluded with respect to the monuments in *Summum*, "public forum principles . . . are out of place in the context of this case."⁵⁸ The respondents had argued that the display of permanent monuments in a public park was analogous to the "delivery of speeches and the holding of marches and demonstrations" such that the traditional public forum analysis should govern.⁵⁹ The Court distinguished traditional public fora from government speech in two ways. First, and most importantly, the Court stated that government speech is marked by the high level of control that the government has over the message conveyed. The City never opened a "monument forum" to private expressive conduct. Rather, the City "effectively controlled" the message" by "exercising 'final approval authority'" over which monuments to display.⁶⁰ Thus, because the City did not create a forum, the Court's forum analysis did not apply.

Second, the Court distinguished the different uses to which public parks may be put. Although public parks "have

56. For example, in *Perry*, if the school had opened its mailbox to the public for school related correspondence, then it would have been much more difficult to deny that the union lost access to the mailbox forum. By opening the forum to the public, the school would limit its ability to make "status" distinctions based on the nature of the property.

57. The government has even greater authority to restrict speech activity on prison grounds and on a military base. See, e.g., *Thornburgh v. Abbott*, 490 U.S. 401 (1989) (analyzing restrictions on publications sent to prisoners in light of government's interest in maintaining prison security); *Brown v. Glines*, 444 U.S. 348 (1980) (finding requirements of military discipline could justify otherwise impermissible restrictions on speech).

58. *Pleasant Grove City v. Summum*, 129 S. Ct. 1125, 1137 (2009) (quoting *United States v. Am. Library Ass'n, Inc.*, 539 U.S. 194, 205 (2003)).

59. *Id.*

60. *Id.* at 1134 (quoting *Johanns v. Livestock Mktg. Ass'n*, 544 U.S. 550, 560-61 (2005)).

immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions,”⁶¹ there is no similar tradition with respect to permanent monuments in public parks. Put differently, public parks are traditional public fora for some purposes but not for all. And, as the Court makes clear, this distinction makes good practical sense. Whereas public parks may “accommodat[e] a large number of public speakers without defeating the essential function of the land or the program,” they cannot hold an unlimited number of permanent monuments.⁶² If public parks are public fora with respect to monuments (such that at a minimum viewpoint neutrality is required), then local, state, and federal governments “must either ‘brace themselves for an influx of clutter’ or face the pressure to remove longstanding and cherished monuments.”⁶³ In the end, if monuments are not government speech but merely private speech in an open forum, “most parks would have little choice but to refuse all such donations.”⁶⁴ As the Court notes, the fact that applying forum analysis to monuments in a public park would lead to the closing of that forum makes it “obvious that forum analysis is out of place.”⁶⁵

61. *Id.* at 1132 (quoting *Perry Educ. Ass’n v. Perry Local Educators’ Ass’n*, 460 U.S. 37, 45 (1983)).

62. *Summum*, 129 S.Ct. at 1137.

63. *Id.* at 1138 (citation omitted).

64. *Id.*

65. *Id.*

Hence, the restrictions that the Free Speech Clause imposes on the government may be summarized as follows:

Least control — — — — — Most control

Traditional Public Forum	Designated Open Forum	Designated Limited Forum	Nonpublic Forum	Government Speech
While reasonable time, place, and manner restrictions are allowed, strict scrutiny applies to content-based distinctions and viewpoint discrimination is prohibited.	Same as traditional public forum.	Government may open forum up to only certain groups and subject matters, but any speech restrictions must be reasonable and viewpoint neutral.	Government may limit speakers based on the nature of the property, the status of the speaker, and the subject matter, but any speech restrictions must be reasonable and viewpoint neutral.	Outside the Free Speech Clause, so both content-based and viewpoint-based restrictions are permitted.

As is apparent from this continuum, where government speech is at issue, the traditional restrictions on government’s regulating a forum fall away. As the government’s control over the message increases, the number and type of restrictions on the government decrease. In a traditional open or designated forum, the government has no right to regulate each and every message or to decide unilaterally which messages to allow. Rather, the type of forum created dictates the level of control that the government relinquishes over the messages of private speakers in the forum. As a result, any government regulation of speech in a forum — whether traditional, designated, or nonpublic—must conform to the applicable First Amendment requirements. But given that the

government has complete control over the message conveyed when speaking, it is not subject to the content and viewpoint neutrality requirements of traditional, designated, and nonpublic fora. That is, as a speaker, the government may make viewpoint-based distinctions without having to pass strict (or any other form of) scrutiny.⁶⁶

The distinguishing feature between government fora and government speech is the government's control over the messages conveyed.⁶⁷ In fact, references to the government's control over the message conveyed by monuments permeate the Court's *Summum* opinion:

Governments have long used monuments to speak to the public. . . . When a government entity arranges for the construction of a monument, it does so because it wishes to convey some thought or instill some feeling in those who see the structure.⁶⁸

Across the country, "municipalities generally exercise editorial control over donated monuments through prior submission requirements, design input, requested

66. *Id.* at 1131. See also *Nat'l Endowment for the Arts v. Finley*, 524 U.S. 569, 598 (1998) (Scalia, J., concurring in judgment) (stating that "[i]t is the very business of government to favor and disfavor points of view").

67. In *Johanns v. Livestock Marketing Ass'n*, the Court held that advertising carried out under the Beef Promotion and Research Act of 1985 was government speech because "[t]he message set out in the beef promotions [wa]s from beginning to end the message established by the Federal Government." 544 U.S. 550, 560 (2005). Similarly, in *Board of Regents of the University of Wisconsin v. Southworth*, although the Court did not apply the government speech doctrine, the Court acknowledged that if "the University and its officials were responsible for its content, the case might be evaluated on the premise that the government itself is the speaker." 529 U.S. 217, 229 (2000). See also *Roach v. Stouffer*, 560 F.3d 860, 864 (8th Cir. 2008) ("Thus, under *Johanns*, the more control the government has over the content of the speech, the more likely it is to be government speech.").

68. *Summum*, 129 S. Ct. at 1132-33.

modifications, written criteria, and legislative approvals of specific content proposals.”⁶⁹

Government decisionmakers select the monuments that portray what they view as appropriate for the place in question, taking into account such content-based factors as esthetics, history, and local culture.⁷⁰

[T]he City has “effectively controlled” the messages sent by the monuments in the Park by exercising “final approval authority” over their selection.⁷¹

The City has selected those monuments that it wants to display for the purpose of presenting the image of the City that it wishes to project to all who frequent the Park.⁷²

The City’s actions provided a more dramatic form of adoption than the sort of formal endorsement that respondent would demand, unmistakably signifying to all Park visitors that the City intends the monument to speak on its behalf.⁷³

Where the government has authority over the message, the government may “say what it wishes.”⁷⁴ That is, once the

69. *Id.* at 1133 (quoting Brief for International Municipal Lawyers Association as Amicus Curiae Supporting Respondents, *Pleasant Grove City v. Summum*, 129 S. Ct. 1125 at 21).

70. *Id.* at 1134.

71. *Id.* (quoting *Johanns*, 544 U.S. at 560-61).

72. *Id.*

73. *Id.*

74. *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819, 833 (1995) (stating that if the government is speaking and exercises the

government takes on the role of speaker, the government may claim the fundamental right protected by the Speech Clause—the right to choose the content of its message: “[T]he fundamental rule of protection under the First Amendment [is] that a speaker has the autonomy to choose the content of his own message.”⁷⁵

Moreover, the government’s ability to determine what it says without worrying about discriminating based on viewpoint is rooted in the Court’s precedent. The Court previously suggested that government speech is not bound by the same content and viewpoint neutrality requirements that attend the government’s regulation of public fora.⁷⁶ For example, in *Rosenberger*, the Court contrasted government speech with private speech, noting that viewpoint-based distinctions may be proper in the former even though they are prohibited in the latter:

It does not follow, however, and we did not suggest in *Widmar*, that viewpoint-based restrictions are proper when the University does not itself speak or subsidize transmittal of a message it favors but instead expends funds to encourage a diversity of views from private speakers. A holding that the University may not discriminate based on the viewpoint of private persons whose speech it facilitates does not restrict the University’s own speech, which is controlled by different principles.⁷⁷

Similarly, in *Southworth*, the Court noted that its prior decisions did not require the State to preserve viewpoint neutrality when it was

requisite level of control over the message, “it may make content-based choices”).

75. *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston, Inc.*, 515 U.S. 557, 573 (1995).

76. *See, e.g., Planned Parenthood of S.C., Inc. v. Rose*, 361 F.3d 786, 792 (4th Cir. 2004) (“[W]hen the government speaks for itself and is not regulating the speech of others, it may discriminate based on viewpoint . . .”).

77. *Rosenberger*, 515 U.S. at 834. *See also* *Perry Educ. Ass’n v. Perry Local Educators’ Ass’n*, 460 U.S. 37, 49 (1983) (holding that distinctions based on subject matter and speaker identity “are inherent and inescapable in the process of limiting a nonpublic forum to activities compatible with the intended purpose of the property”).

the speaker: "The Court has not held, or suggested, that when the government speaks the rules we have discussed [relating to viewpoint neutrality in a designated limited forum] come into play."⁷⁸

In addition, *Summum*'s holding that the government speech doctrine permits viewpoint discrimination finds support in *Rust v. Sullivan*. In *Rust*, the Court upheld a government decision to fund an anti-abortion program under Title X because the government had the right to promote its own policies: "when the Government appropriates public funds to establish a program it is entitled to define the limits of that program."⁷⁹ Having created a program to advance its own goals, the government could ensure that its message was not distorted. Thus, allowing the government to discriminate based on viewpoint was necessary to prevent others from undermining the government's message. Otherwise, the government, having chosen a specific message, would have to create a program for its desired message as well as programs for each competing viewpoint. But the Court expressly denied any such requirement: "Government can, without violating the Constitution, selectively fund a program to encourage certain activities it believes to be in the public interest, without at the same time funding an alternative program which seeks to deal with the problem in another way."⁸⁰ Just as the State may not interfere directly with a third party's right to engage in protected activity (such as speech advocating a particular position in a traditional or designated forum), a third party cannot shut down a government program by claiming viewpoint discrimination:

To hold that the Government unconstitutionally discriminates on the basis of viewpoint when it chooses to fund a program dedicated to advance certain permissible goals, because the program in advancing those goals

78. Bd. of Regents of Univ. of Wis. Sys. v. Southworth, 529 U.S. 217, 235 (2000); see also *id.* ("Where the University speaks, either in its own name through its regents or officers, or in myriad other ways through its diverse faculties, the analysis likely would be altogether different.").

79. *Rust v. Sullivan*, 500 U.S. 173, 194 (1991).

80. *Id.* at 193.

necessarily discourages alternative goals, would render numerous Government programs constitutionally suspect.⁸¹

Under the Court's precedent, the government has the right to convey its desired message (e.g., promoting childbirth over abortion) by creating a program and appropriating public funds to support it without having to provide for the viewpoints of others. But if the government has the authority to discriminate against viewpoints when funding others to convey its message, the government, *a fortiori*, may convey that message directly through its speech without having to be viewpoint neutral.

Put differently, under the government speech doctrine, there is no place for a "heckler's veto."⁸² Third parties who do not like the government's message cannot force the government either to remain silent or to express the third parties' desired message:

When Congress established a National Endowment for Democracy to encourage other countries to adopt democratic principles, it was not constitutionally required to fund a program to encourage competing lines of political philosophy such as communism and fascism. Petitioners' assertions ultimately boil down to the position that if the Government chooses to subsidize one protected right, it must subsidize analogous counterpart rights. But the Court has soundly rejected that proposition.⁸³

Summum holds that the same is true when the government speaks directly instead of subsidizing the speech of others. If the government decides to advocate a certain position, those who disagree with the message cannot force the government to be silent or to change its message. Accordingly, in *Summum*, the City could decide to accept and display only those monuments that reflected its chosen message regarding the history of the community.

81. *Id.* at 194.

82. *Johanns v. Livestock Mktg. Ass'n*, 544 U.S. 550, 574 (2005) (Souter, J., dissenting).

83. *Rust*, 500 U.S. at 194 (citation omitted).

Because the City, as speaker, could make content-based and viewpoint-based distinctions without violating the Free Speech Clause, it was *not* required to accept monuments from any and all donors. In fact, the City could, under the Free Speech Clause, accept one religiously-themed monument (i.e., the Ten Commandments monument) while declining to display other monuments, even other religiously-themed monuments (i.e., the Seven Aphorisms of the Summum religion).

2. Government control over the message means that the government's intent governs.

As discussed above, to receive the protection of the government speech doctrine, the government must control the speech so as to send its own message and not merely facilitate the speech of private parties. As with the monuments in *Summum*, it makes no difference whether the government creates the speech itself or adopts the speech of others. By selecting and displaying only "those monuments that it wants to display for the purpose of presenting the image of the City that it wishes to project to all who frequent the Park The monuments that are accepted . . . are meant to convey and have the effect of conveying a *government* message."⁸⁴ Moreover, the government's message may be general or specific. As the Court noted in *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston, Inc.*, "a narrow, succinctly articulable message is not a condition of constitutional protection, which if confined to expressions conveying a 'particularized message,' would never reach the unquestionably shielded painting of Jackson Pollock, music of Arnold Schoenberg, or Jabberwocky verse of Lewis Carroll."⁸⁵ In fact, a majority in *Summum* seems to approve of the general criteria that the City adopted with respect to the acceptance and display of monuments in Pioneer Park. Pursuant to a resolution, the City decided to display only those

84. *Pleasant Grove City v. Summum*, 129 S. Ct. 1125, 1134 (2009) (emphasis added).

85. *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston, Inc.*, 515 U.S. 557, 569 (1995) (citation omitted).

monuments that (i) related to the history of the City, (ii) were donated by a group with well-established connections to the community, or (iii) were consistent with general safety and esthetic concerns.⁸⁶ Thus, *Summum* suggests that the City could accept the Ten Commandments monument donated by a private sponsor intending to send a general message about the City's history, not a specific religious message about the Ten Commandments.

That the government may—and in fact has a right to—determine its own message has two important consequences. First, the government's intended message may differ significantly from how others interpret that message. Although the government may control its intended message by selecting and displaying only those monuments that “present[] the image of the City that it wishes to project to all who frequent the Park,”⁸⁷ it cannot control how others interpret a monument or other government message. Accordingly, the government does not forfeit the protection of the government speech doctrine simply because the message that it intends to send differs from that intended by the donor or sponsor of the monument. After all, as *Summum* acknowledges, a monument is not limited to “convey[ing] only one ‘message’” or only “the message intended by the donor.”⁸⁸ Similarly, those who hear the government's message may interpret the message in various ways without converting the government's speech into private speech: “even when a monument features the written word, the monument may be intended to be interpreted, and *may in fact be interpreted* by different observers, in a variety of ways.”⁸⁹

To illustrate this point, the Court considered the message of the mosaic of the word “Imagine” in New York City's Central Park. Those viewing the mosaic may “imagine” a variety of things—the music of John Lennon, the lyrics to his song of the same title, a favorite story, a different life, a world in which there is no sickness or religion.⁹⁰ In fact, the list of things that people might imagine

86. *Summum*, 129 S. Ct. at 1130.

87. *Id.* at 1134.

88. *Id.* at 1135.

89. *Id.* (emphasis added).

90. *See id.*

may be infinite. Yet, in accepting and displaying the monument, the City of New York may have *intended* viewers to attribute such varied meanings to the display or it may have intended some other meaning. The critical point is that the City controlled the content of the monument and agreed to display it for its own reasons. It simply does not matter whether the government's intended message is identical to the meaning that many (or possibly any) of the observers ascribe to the monument: "[I]t frequently is not possible to identify a single 'message' that is conveyed by an object or structure, and consequently, the thoughts or sentiments expressed by a government entity that accepts and displays such an object may be quite different from those of either its creator or its donor."⁹¹ Where, as in *Summum* and *Johanns*, the government exercises "effective control" over the message conveyed, the expressive activity remains government speech even though the government's message may be interpreted in various ways by different donors and observers.⁹²

Second, under *Summum*, a government speaker does not lose the protection of the government speech doctrine simply by enlisting the help of a third-party to disseminate the government-approved message. The Court's focus remains on who controls the message, not on who actually delivers that message.⁹³ For example,

91. *Id.* at 1136.

92. Similarly, the Court acknowledged that the meaning of a monument "may change over time" and/or may change "by the subsequent addition of other monuments in the same vicinity." *Id.* For example, the Court noted that the "meaning" of the Statue of Liberty has altered through the years, from "an emblem of international friendship and the widespread influence of American ideals" to "a beacon welcoming immigrants to a land of freedom." *Id.* But at no point in the opinion does the Court suggest that the differences in meaning attributed to a monument over time or to the government by various viewers in any way determines whether the monument is government speech. Rather, as noted above, in setting out the government speech doctrine, the Court took the government's complete control over the acceptance and display of the monument in *Summum* (and the message in *Johanns*) to be determinative.

93. See, e.g., *ACLU of Tenn. v. Bredesen*, 441 F.3d 370, 378 (6th Cir. 2006) ("There is nothing in the Supreme Court's decisions in *Rust* or *Johanns* that implies that the government has less right to control expressions of its policies when it relies on unpaid private people. No constitutionally

in *Rosenberger*, the Court held that in the education context “[w]hen the University determines the content of the education it provides, it is the University speaking, and we have permitted the government to regulate the content of what is or is not expressed when it is the speaker or when it enlists private entities to convey its own message.”⁹⁴ If the government exercises the requisite level of control over the message, “[n]o more is required.”⁹⁵ Similarly, in *Rust*, the Court upheld the government program that precluded recipients of Title X funds from providing abortion-related advice. The program in *Rust* was intended to promote family planning counseling through third-party funding recipients, not to encourage private speech generally. Yet, even though the program used non-governmental actors to promote the preferred message, the Court confirmed that the pro-family message was that of the government. Given that the government “is entitled to say what it wishes,”⁹⁶ it also is permitted to decide how best to communicate and promote that message—either directly or through third parties. Accordingly, in determining whether the government speech doctrine applies in a particular case, the Court’s central consideration is whether the government “effectively controlled” the message regardless of the way in which the government chooses to communicate that message to the public at large.

C. The interaction between the Free Speech and Establishment Clauses according to the concurring Justices.

If one read only the facts in *Summum*, one might think that it is an Establishment Clause case, along the lines of *Van Orden*. Through its president, the Summum religion sought to donate to

significant distinction exists between volunteer disseminators and paid disseminators.”).

94. *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819, 833 (1995); see also *Johanns v. Livestock Mktg. Ass’n*, 544 U.S. 550, 562 (2005) (noting that the government “is not precluded from relying on the government-speech doctrine merely because it solicits assistance from nongovernmental sources”).

95. *Johanns*, 544 U.S. at 564.

96. *Rosenberger*, 515 U.S. at 833.

the City a religiously themed monument, one inscribed with the Seven Aphorisms of the Summum religion. Despite previously accepting and displaying in a public park a monument inscribed with the Ten Commandments, the City declined Summum's request but continued to display the Ten Commandments monument. Thus, at first glance, it may appear that the City was advancing one religion over another in violation of the Establishment Clause. The majority opinion in *Summum* did not reach the Establishment Clause issue, however, because that issue was not before the Court. Although the parties litigated the case with the Establishment Clause in mind, the parties pursued only the Free Speech claim.⁹⁷

Yet the Court's opinion did say something about the Establishment Clause. The government does not have unlimited discretion to say whatever it wants—even when it has complete control over the message—because the Establishment Clause remains as a check on government speech, ominously lurking in the background of the Court's decision.⁹⁸ In fact, in what ultimately

97. See *Summum*, 129 S. Ct. at 1139 (Scalia, J., concurring) (“[I]t is also obvious that from the start, the case has been litigated in the shadow of the First Amendment’s *Establishment* Clause: the city wary of associating itself too closely with the Ten Commandments monument displayed in the park, lest that be deemed a breach in the so-called ‘wall of separation between church and State,’ Respondent menacingly observed that while the city could have formally adopted the monument as its own, that ‘might of course raise Establishment Clause issues.’”) (citations omitted); *id.* at 1141 (Souter, J., concurring) (“Even though . . . Establishment Clause issues have been neither raised nor briefed before us, there is no doubt that this case and its government speech claim has been litigated by the parties with one eye on the Establishment Clause.”).

98. The majority in *Summum* notes two other “restraints” on government speech. These restraints, while important, relate primarily to the checks provided by the majoritarian process, which are beyond the scope of this Article. First, government speakers may be constrained in what they say “by law, regulation, or practice.” *Id.* at 1132. That is, elected officials, in their capacities as representatives of their constituents, may impose limits on government advocacy through statutes or through custom. Second, as noted above, the political process provides the ultimate check on government speech. If the voters disagree with the government’s speech or do not believe that the government should engage in particular types of speech, the electorate always can vote the government speakers out of office: “[A] government entity is ultimately ‘accountable to the electorate and the political

may be one of the most important sentences of the opinion, the majority states simply that “government speech must comport with the Establishment Clause.”⁹⁹ The majority does not say anything about the limits that the Establishment Clause imposes on government speech; it says only that government speech must comply with it. At a minimum, then, the government as speaker cannot make any “law respecting an establishment of religion.”¹⁰⁰ But given the complexity of—or, as some have suggested, confusion in—the Court’s Establishment Clause jurisprudence, this is of little, if any, help. As Justice Souter notes, *Summum* merely raises the issue regarding the intersection of the Free Speech and Establishment Clauses without making any attempt to explore it: “The interaction between the ‘government speech doctrine’ and Establishment Clause principles has not, however, begun to be worked out.”¹⁰¹

Given the cursory mention of the Establishment Clause in Justice Alito’s opinion and the prominence of facially religious government speech—monuments, license plates, art, and legislative prayers—several of the concurring Justices felt compelled to provide their views as to the effect of the Court’s *Summum* decision on the Court’s Establishment Clause jurisprudence. And, not surprisingly, the Justices’ reactions are quite varied. Justices Stevens and Ginsburg emphasize that the decision is relatively narrow in scope and “signals no expansion of [the government speech] doctrine.”¹⁰² Moreover, given that the Establishment and

process for its advocacy. If the citizenry objects, newly elected officials later could espouse some different or contrary position.” *Id.* at 1132 (quoting *Bd. of Regents of Univ. of Wis. Sys. v. Southworth*, 529 U.S. 217, 235 (2000)) (citation omitted). All of the Justices appear to agree that the political process provides a critical check on government speech. *See, e.g., Johanns*, 544 U.S. at 575 (Souter, J., dissenting) (“Democracy, in other words, ensures that government is not untouchable when its speech rubs against the First Amendment interests of those who object to supporting it; if enough voters disagree with what government says, the next election will cancel the message.”).

99. *Summum*, 129 S. Ct. at 1132.

100. U.S. CONST. amend. I.

101. *Summum*, 129 S. Ct. at 1141 (Souter, J., concurring).

102. *Id.* at 1139 (Stevens, J., concurring).

Equal Protection Clauses still apply to government speech, these Justices contend that “the effect of today’s decision will be limited.”¹⁰³

Justices Scalia and Thomas, on the other hand, maintain that the Ten Commandments monument in Pioneer Park does not violate the Establishment Clause. By ruling that monuments in public parks are government speech, the Court did not make every religiously-themed monument into an Establishment Clause violation. In fact, because the Ten Commandments monument in Pioneer Park is “virtually identical” to the monument on the Texas State Capitol grounds, it survives Establishment Clause review for the reasons articulated in *Van Orden*.¹⁰⁴ For the plurality in *Van Orden*, the Ten Commandments monument has “‘an undeniable historical meaning’ in addition to [its] ‘religious significance.’”¹⁰⁵ For Justice Breyer, the monument in *Van Orden* “conveyed a permissible secular message” given its location in the Park, the history behind its donation, and its proximity to numerous secular monuments.¹⁰⁶ Accordingly, Justice Scalia contends that “[t]he city can safely exhale” because even a narrow reading of the Court’s opinion in *Van Orden* shows that the City has not violated the Establishment Clause.¹⁰⁷

Justice Souter, though, is more cautious in his assessment of how the Establishment Clause may affect the constitutionality of the Ten Commandments monument in Pioneer Park. Because the government speech doctrine is so new, he advocates a slow, methodical approach to determining the boundaries of the

103. *Id.*

104. *Id.* at 1139 (Scalia, J., concurring).

105. *Id.* at 1140 (quoting *Van Orden v. Perry*, 545 U.S. 677, 690 (2005)).

106. *Id.*

107. *Summum*, 129 S. Ct at 1140. In his concurrence, Justice Breyer does not address the Establishment Clause issue. Rather, Justice Breyer writes separately to suggest that the government speech doctrine “is a rule of thumb, not a rigid category” and to propose an alternative test—“whether a government action burdens speech disproportionately in light of the action’s tendency to further a legitimate government objective.” *Id.* at 1140 (Breyer, J., concurring). According to Justice Breyer, the Ten Commandments monument is lawful under either the government speech doctrine or his “proportionate restriction” test. *Id.* at 1141.

government speech doctrine in the Establishment Clause context. According to Justice Souter, under existing precedent, there is “safety in numbers”—the more monuments included in a display, the more the possibly religious message of a Ten Commandments monument is diluted. But with more monuments arises the possibility that the government is no longer speaking but instead has created some type of public forum, which would preclude viewpoint discrimination against the Summum religion as well as any other group.¹⁰⁸ Yet Justice Souter anticipates that some might argue that the government speech doctrine permits such viewpoint discrimination, that the government may “favor some private religious speakers over others by its choice of monuments to accept.”¹⁰⁹ Justice Souter ultimately does not evaluate the merits of this position; rather, he simply echoes Justice Breyer’s concern with a categorical rule that all monuments are government speech. Instead of a categorical rule, he advances a “reasonable observer” test for government speech: “whether a reasonable and fully informed observer would understand the expression to be government speech, as distinct from private speech the government chooses to oblige by allowing the monument to be placed on public land.”¹¹⁰ This “reasonable person” test is supposed to mirror the endorsement test that the Court has applied in the Establishment Clause context, thereby “serv[ing] coherence within Establishment Clause law.”¹¹¹

Unfortunately, because the Establishment Clause question was not before the Court, none of the Justices had occasion to consider how the Court would resolve a specific case that involved the intersection of the government speech doctrine and the Establishment Clause. The last section of this Article, though,

108. *See id.* at 1141-42 (Souter, J., concurring) (“As mementoes and testimonials pile up, however, the chatter may well make it less intuitively obvious that the government is speaking in its own right simply by maintaining the monuments [In that case,] a further Establishment Clause prohibition would surface, the bar against preferring some religious speakers over others.”).

109. *Id.* at 1142.

110. *Id.*

111. *Id.*

takes up this task—analyzing how the Court might decide cases where the government speech at issue is facially religious so as to implicate the Establishment Clause. In particular, the last section considers the impact that the government speech doctrine has on specialty license plates that have a religious theme, such as the “I Believe” license plate in South Carolina. If the government may make viewpoint-based distinctions when it is speaking generally, the question arises whether it can make such distinctions where the message is facially religious. But, of course, the antecedent question is whether specialty license plates are government speech, which is the focus of the next section.

III. *SUMMUM* AND THE FREE SPEECH CLAUSE — APPLYING THE GOVERNMENT SPEECH DOCTRINE IN THE CONTEXT OF SPECIALTY LICENSE PLATES

A. *The circuit split—locating specialty license plates on the forum-government speech continuum.*

As the concurring opinions indicate, the exact effect of the *Summum* decision on the Court’s interpretation of the Free Speech and Establishment Clauses remains to be determined. To begin evaluating the scope of *Summum*’s impact on the Free Speech Clause, this section focuses on how the Court’s development of the government speech doctrine in *Summum* resolves an ongoing controversy between and among the circuits regarding specialty license plates. In particular, after briefly canvassing the federal courts’ treatment of specialty plates pre-*Summum*, I analyze how *Summum* changes the foundation upon which the majority of circuits relies. I conclude this section by looking at the South Carolina district court’s recent decision in *Summers*, which enjoined the production and distribution of the “I Believe” specialty plate. Whereas pre-*Summum* the majority of circuits took specialty plates to be private or hybrid speech, *Summum* dictates that South Carolina’s specialty plate program, including the “I Believe” plate, is government speech.

The threshold inquiry under the Free Speech Clause with respect to specialty plates—and any other allegedly governmental speech—is whether the government is speaking. As the Court notes in *Summum*, in certain circumstances “it is difficult to tell whether a government entity is speaking on its own behalf or is providing a forum for private speech. . . .”¹¹² And given this difficulty, it is not surprising that the circuit courts analyzing specialty license plates both pre- and post-*Summum* have split on the issue whether such plates are government speech or create some type of forum.¹¹³ The majority of circuits that have considered the issue—including the Fourth, Seventh, Eighth, and Ninth—held that specialty license plates are either private or hybrid speech subject to the Court’s forum analysis. Two other circuits—the Second and Eleventh—have suggested, in an unpublished opinion and in dicta, respectively, that they hold a similar view.¹¹⁴ But even though these circuits share the general presumption that specialty license plates create some type of forum, they disagree as to the specific type of forum created. Pre-*Summum* decisions frequently do not identify the specific type of forum because they hold that the State discriminated based on viewpoint, which is prohibited under all types of forum analysis. Some courts and commentators that do reach the issue contend that

112. *Summum*, 129 S. Ct. at 1132.

113. See, e.g., *Roach v. Stouffer*, 560 F.3d 860 (8th Cir. 2009) (holding in a post-*Summum* decision that specialty plates are private speech such that Missouri’s refusal to issue a “Chose Life” plate constituted viewpoint discrimination); *Choose Life Ill., Inc. v. White*, 547 F.3d 853 (7th Cir. 2008) (holding that specialty plates create a nonpublic forum from which Illinois could exclude the entire subject of abortion, including a “Choose Life” plate); *Ariz. Life Coal., Inc. v. Stanton*, 515 F.3d 956 (9th Cir. 2008) (holding that specialty plates create a designated limited forum such that Arizona could not discriminate against “Choose Life” viewpoint); *ACLU of Tenn. v. Bredesen*, 441 F.3d 370 (6th Cir. 2006) (holding that under *Johanns* a “Choose Life” specialty plate was government speech); *Planned Parenthood of S.C., Inc. v. Rose*, 361 F.3d 786 (4th Cir. 2004) (holding in a pre-*Johanns* decision that a “Choose Life” specialty plate was a form of hybrid speech that was unconstitutional because it discriminated based on viewpoint).

114. *Children First Found., Inc. v. Martinez*, 169 F. App’x 637 (2d Cir. 2006); *Women’s Emergency Network v. Bush*, 323 F.3d 937, 945 n.9 (11th Cir. 2003).

specialty plates are best viewed as creating a designated open public forum.¹¹⁵ Others, such as the Ninth Circuit, hold that specialty plates create a designated limited public forum,¹¹⁶ while the Seventh Circuit recently concluded that specialty plates create a nonpublic forum, which allows the State to discriminate based on content provided the discrimination is reasonable.¹¹⁷ Thus, prior to *Summum*, the majority view has been that specialty plates are subject to the Court's forum analysis—whether designated open, designated limited, or nonpublic—and that the government, therefore, cannot engage in viewpoint discrimination when regulating speech on specialty license plates.

To date, the only circuit that has viewed specialty plates as government speech is the Sixth, which held that *Johanns* supplied the proper test for deciding whether the government speech doctrine applies in a specific situation. According to the Sixth Circuit, *Johanns* looked at the level of control that the government exercises over the specialty plate program. Because Tennessee “effectively controlled” the message and retained veto authority over specialty plates, the Sixth Circuit held that the “Choose Life”

115. See, e.g., *Sons of Confederate Veterans, Inc. v. Holcomb*, 129 F. Supp. 2d 941, 948 (W.D. Va. 2001), *aff'd on other grounds*, 288 F.3d 610 (4th Cir. 2002) (holding that Virginia's specialty plate program was “precisely the type of designated public forum contemplated by the Court in *Cornelius*” because in creating the program Virginia demonstrated its desire “to open up a nontraditional forum for public discourse”); Berry, *supra* note 5, at 1624-30 (stating that specialty plates create a designated public forum because “the ‘Choose Life’ plates involve an intentional effort by the states to open a nonpublic forum, the standard state license plate”); Guggenheim & Silversmith, *supra* note 5, at 577-79 (contending that specialty plates create a designated or limited public forum, while vanity plates are a nonpublic forum).

116. *Stanton*, 515 F.3d at 971 (“We therefore conclude that Arizona's specialty license plate program is a limited public forum, and that any access restriction must be viewpoint neutral and reasonable in light of the purpose served by the forum.”).

117. *White*, 547 F.3d at 865 (holding that Illinois's denial of a “Choose Life” specialty plate was constitutional because specialty plates create a nonpublic forum, but that Illinois's decision to exclude specialty plates relating to “the entire subject of abortion” was reasonable).

specialty plate was government speech.¹¹⁸ Moreover, because the government speech doctrine permits the government to engage in viewpoint discrimination, the Sixth Circuit contended that the State of Tennessee may offer the “Choose Life” plate even if it refused to approve a “Pro-Choice” specialty plate.¹¹⁹

Out of all the circuits that have addressed the issue so far, only the Eighth Circuit has considered a challenge to a State’s specialty license plate program post-*Summum*. After reviewing the decisions by its sister circuits as well as *Johanns* and *Summum*, the Eighth Circuit joined the majority in holding that the messages on specialty plates implicate private speech. Although the Eighth Circuit panel acknowledged that, “under *Johanns*, the more control the government has over the content of the speech, the more likely it is to be government speech,”¹²⁰ the panel articulated a test that does not focus on the level of governmental control over the message conveyed.¹²¹ Rather, the panel predicated the ability of the State to invoke the government speech doctrine on a reasonable and well-informed observer identifying the speech as that of the government: “Our analysis boils down to one key question: whether, under all the circumstances, a reasonable and fully informed observer would consider the speaker to be the government or a private party.”¹²²

118. *Bredesen*, 441 F.3d at 375 (“In this case, *Johanns* requires the court to conclude that ‘Choose Life’ is Tennessee’s message because the Act determines the overarching message and Tennessee approves every word on such plates.”).

119. *Id.* In *Henderson v. Stalder*, the Fifth Circuit also confronted a challenge to a “Choose Life” specialty plate. The Fifth Circuit ultimately did not reach the government speech issue, ruling instead that the Tax Injunction Act precluded plaintiffs’ First Amendment challenge to Louisiana’s specialty license plate program. 407 F.3d 351 (5th Cir. 2005). The *Stalder* decision was not unanimously welcomed by the Fifth Circuit. Writing in dissent from the Fifth Circuit’s denial of a petition for rehearing *en banc*, Judge Davis (joined by seven other members of the court) argued that the Tax Injunction Act did not apply and that the panel should have reached the merits of the underlying claim. *Henderson v. Stalder*, 434 F.3d 352, 353-56 (5th Cir. 2005) (*en banc*) (Davis, J., dissenting).

120. *Roach v. Stouffer*, 560 F.3d 860, 864 (8th Cir. 2009).

121. *Id.* at 867-68.

122. *Id.* at 867.

In formulating this test, the Eighth Circuit built on the Seventh Circuit's analysis as well as Justice Souter's dissent in *Johanns*. In *Choose Life Illinois, Inc. v. White*, the Seventh Circuit created a four-factor test that the Fourth and Ninth Circuits adopted for evaluating the status of specialty plates, but determined that those factors "can be distilled (and simplified) by focusing on the following inquiry: under all the circumstances, would a reasonable person consider the speaker to be the government or a private party?"¹²³ The panel's analysis tracked Justice Souter's position in *Johanns* that the government must be identifiable as the speaker if the government is to secure the protection of the government speech doctrine. In particular, he argued that the compelled subsidies in *Johanns* were appropriate to support government speech only if the government clearly identified such speech as its own:

I take the view that if government relies on the government-speech doctrine to compel specific groups to fund speech with targeted taxes, it must make itself politically accountable by indicating that the content actually is a government message, not just the statement of one self-interested group the government is currently willing to invest with power.¹²⁴

Justice Souter also articulated his position through his "reasonable observer test," which he set forth in his concurrence in *Summum*. According to Justice Souter, speech is government speech only if "a reasonable and fully informed observer would understand the expression to be government speech, as distinct from private speech the government chooses to oblige by allowing the monument to be placed on public land."¹²⁵ But these "reasonable observer" tests are not altogether novel, as is apparent from the work of Professors Bezanson and Buss, who developed a similar test several years

123. *Choose Live Ill., Inc. v. White*, 547 F.3d 853, 863 (7th Cir. 2008).

124. *Johanns v. Livestock Mktg. Ass'n*, 544 U.S. 550, 571-72 (Souter, J., dissenting).

125. *Pleasant Grove City v. Summum*, 129 S. Ct. 1125, 1142 (2009) (Souter, J., concurring).

earlier. Under their view, government speech is defined by “purposeful action by government, expressing its own distinct message, which is understood by those who receive it to be the government’s message.”¹²⁶

In applying its “reasonable observer” test to Missouri’s specialty plate program, the Eighth Circuit held that a reasonable and fully informed observer would view the vehicle owner, not the government, as the speaker.¹²⁷ The panel’s conclusion flowed, in part, from its view of the purposes of the specialty plate legislation, which were “to allow private organizations to promote their messages and raise money and to allow private individuals to support those organizations and their messages.”¹²⁸ Framed in this way, the purpose was to open specialty plates to private speakers, thereby creating a forum for expression by motorists. Under the Eighth Circuit’s view, Missouri did not use specialty plates to express its views but permitted private persons to engage in private expressive conduct through the program.

And the Eighth Circuit took the governing statutes to confirm this view. Under Missouri’s statutes, specialty plates may be authorized by a legislative or Department of Revenue (DOR) process.¹²⁹ In the latter case, editorial control over the content on the specialty plates is shared between the State and the sponsoring organization.¹³⁰ Although the Joint Committee on Transportation Oversight (“Joint Committee”) has final authority to approve or reject an application, it must do so based only on the general description of the proposed plate that the sponsoring organization provides as part of the application.¹³¹ If the Joint Committee approves the plate, then the DOR must produce the specialty plate

126. Randall P. Bezanson & William G. Buss, *The Many Faces of Government Speech*, 86 IOWA L. REV. 1377, 1384 (2001). See also Leslie Gielow Jacobs, *Who’s Talking? Disentangling Government and Private Speech*, 36 U. MICH. J.L. REFORM 35, 66 (2002) (noting that government speech must include an “identifiable and constitutionally valid message”).

127. *Roach v. Stouffer*, 560 F.3d 860, 868 (8th Cir. 2009).

128. *Id.* at 867.

129. *Id.* at 862.

130. *Id.* at 867.

131. *Id.*

as approved and without any additional input from the Joint Committee or any other government entity.¹³² In addition, the Eighth Circuit takes two other features of the Missouri program to be important to its analysis: (i) the number of specialty plates offered and (ii) the voluntary nature of the specialty plate program. First, given that Missouri offers more than 200 specialty plates, the court contends that it is not reasonable to believe that the government is sending each of those messages.¹³³ For example, the

132. Although the panel relies on a reasonable observer test, it still retains the general features of the *Sons of Confederate Veterans v. Commissioner of Virginia Dep't of Motor Vehicles* ("SCV") factors in its analysis. See *infra* note 164 and accompanying text. Based on (what the panel takes to be) the shared control over the content of specialty plates, the panel concludes that the motorists who purchase and display specialty plates "are the literal speakers who bear the ultimate responsibility for the message." *Roach*, 560 F.3d at 867-68. The panel neither explains how the Joint Committee's final approval power affects this analysis nor discusses why the legislative process, pursuant to which the legislature passes legislation specifying the details of a new specialty plate, does not make the government responsible for the content of the legislatively approved specialty plate. This latter question is all the more important given that (i) the legislative process and not the DOR process accounts for seventy of the specialty plates that have been approved in Missouri and (ii) the Missouri legislature has passed legislation creating a variety of specialty license plates (e.g., "Choose Life," "God Bless America," "Conservation," and "Be an Organ Donor") that are not, at least on their face, readily identifiable with a sponsoring organization — and that may express a policy that the State of Missouri seeks to promote and/or encourage). *Id.* at 862.

133. *Roach*, 560 F.3d at 868. On this point, the Sixth and Eighth Circuits also disagree. In *Bredesen*, the Sixth Circuit notes that "there is nothing implausible about the notion that Tennessee would use its license plate program to convey messages regarding over one hundred groups, ideologies, activities, and colleges. Government in this age is large and involved in practically every aspect of life." 441 F.3d 370, 376 (6th Cir. 2006). Further, in *Roach*, the Eighth Circuit does not consider the possibility that, by approving so many different plates, the State is sending a message about its own image — from the diversity of its citizen's interests and their education backgrounds to the causes that the State and its citizenry support (such as organ donation, pro-childbirth, good treatment of animals, conservation, etc.). Yet *Summum* expressly acknowledges the government's interest in expressing and right to control this type of message: "Government decisionmakers select the monuments that portray what they view as appropriate for the place in

court concludes that a reasonable observer would not believe that the government is conveying a message about Catholicism or the existence of God by authorizing specialty plates for the Knights of Columbus or the Grand Lodge, respectively.¹³⁴ As Justice Souter suggests, “[a]s mementoes and testimonials pile up, however, the chatter may well make it less intuitively obvious that the government is speaking in its own right simply by maintaining” the specialty plate program.¹³⁵ Second, the court emphasizes the voluntary nature of the specialty plate program. Because motorists choose to display a specific specialty plate, a reasonable observer would take the vehicle owner to be the speaker, who is willing to pay extra to convey her own message. And in a footnote, the Eighth Circuit denies that the Court’s decision in *Summum* alters the analysis or outcome.¹³⁶ Accordingly, Missouri’s specialty plate program constitutes private speech because a reasonable observer would find the message to be that of the motorist, not the government.

question, taking into account such content-based factors as esthetics, history, and local culture.” 129 S. Ct. 1125, 1134 (2009).

134. *Roach*, 560 F.3d at 868. In light of *Summum* and *Van Orden*, though, the panel’s analysis appears to provide a false dichotomy—either the government is endorsing religion or the speech is private. But this is not an exhaustive list of the possibilities. Under *Summum*, the government may mean something different than the sponsoring organization intended. For example, while the Knights of Columbus may take the specialty plate to promote Catholicism, Missouri may view it as a statement about the tradition and diversity of its citizenry, among whom are Catholics who participate in groups, such as the Knights of Columbus, that play important roles in the community.

135. *Summum*, 129 S. Ct. at 1141-42 (Souter, J., concurring).

136. *Roach*, 560 F.3d at 868 n.3. The Eighth Circuit distinguishes *Summum* on the grounds that monuments are different from specialty plates: “Unlike monuments displayed in public parks, specialty license plates that advertise the name or motto of a private organization facilitate expressive conduct on the part of the organization and its supporters, not the government.” *Id.*

B. Summers—The “I Believe” specialty plate is hybrid speech under the majority view.

As the circuit court cases above indicate, “Choose Life” specialty plates have been the subject of much litigation across the country. But challenges to other types of specialty license plates have surfaced, and courts have applied the majority view to these cases as well. For example, the district court in South Carolina recently applied the majority view in *Summers v. Adams*,¹³⁷ holding that specialty plates are hybrid speech subject to the Court’s forum analysis.¹³⁸ But *Summers* does something that the “Choose Life” cases do not—provides an example of facially religious speech that directly implicates the Establishment Clause. Thus, *Summers* serves as a vehicle to explore not only the scope of *Summum*’s government speech doctrine but also its intersection with the Establishment Clause, which is taken up in the next section.

South Carolina, like all other States, requires that motor vehicles be registered with and licensed by the Department of Motor Vehicles (“DMV”). As part of this program, vehicle owners must pay a standard biennial registration fee of \$24, which permits registrants to choose between two South Carolina license plates: (i) a dark blue palmetto tree and a crescent moon silhouetted against an orange sunrise with the words “Travel2SC.com” on the bottom, or (ii) a United States flag and the South Carolina State flag in the middle of a white plate with the words “In God We Trust” across the top.¹³⁹ For an additional fee and subject to some qualifications

137. No. 3:08-2265-CMC, 2008 WL 5401537 (D.S.C. Dec. 23, 2008).

138. *Id.* at *16.

139. *Id.* at *2. The palmetto tree plate is the standard-issue plate—if a vehicle owner does not request anything else, this is the plate that she will receive. The “In God We Trust” plate is a legislatively authorized specialty plate that is available for the same \$24 fee as the standard-issue plate pursuant to S.C. Code Ann. § 56-3-9200. *Id.* Although the phrase “In God We Trust” might also raise Establishment Clause concerns, this issue goes beyond the scope of this Article. Moreover, other courts, relying on the Supreme Court’s approval of “ceremonial deism,” have held that this phrase in the context of license plates does not infringe on the Establishment Clause. *See id.* at *13 n.25 (“In addition, the legislature has authorized an ‘In God We Trust’ plate. Although the court is not aware of any legal challenge to that plate, the

for certain plates,¹⁴⁰ South Carolina motorists may choose from more than 110 specialty license plates. Individuals or organizations also may seek approval of additional specialty plates through either of two statutorily prescribed processes:¹⁴¹ (i) legislative authorization and (ii) DMV approval of applications by qualifying organizations or institutions.¹⁴²

Pursuant to the legislative process, the South Carolina General Assembly may authorize specialty plates by statute. A specialty plate statute “is adopted in the same manner as any other legislation.”¹⁴³ The South Carolina legislature has not imposed any specific design limitations on specialty plates that it might approve and, therefore, may authorize specialty plates with mottos, statements, images, and/or symbols without any prior restrictions as to size or placement.¹⁴⁴ The legislature may restrict a specialty

Supreme Court has recognized that the national motto, ‘In God We Trust,’ has lost its religious meaning through overuse and therefore does not violate the Establishment Clause.”); *Lynch v. Donnelly*, 465 U.S. 668, 716 (1984) (stating that “In God We Trust” has lost its religious significance through “rote repetition”); *Studler v. Ind. Bureau of Motor Vehicles*, 896 N.E.2d 1156, 1160-63 (Ind. Ct. App. 2008) (upholding “In God We Trust” license plate against a privileges and immunities challenge under the Indiana State Constitution).

140. For example, South Carolina offers a specialty plate that has the picture of a Purple Heart on the plate as well as the words “Purple Heart.” This plate is not available to all motorists; rather, a motorist seeking this specialty plate must show that he or she received a Purple Heart. *See* S.C. CODE ANN. § 56-3-3310 (2006 & West Supp. 2009).

141. Vehicle owners in South Carolina, as in other States, also may order a “vanity plate,” which consists of a unique combination of letters and/or numbers on a South Carolina license plate. Vanity plates are governed by rules that are different from the rules for specialty plates, e.g., South Carolina vanity plates are limited to seven characters and require the vehicle owner to pay the basic biennial registration fee of \$24 as well as an additional \$30 fee. *See* S.C. CODE ANN. § 56-3-2010 (2006).

142. *See, e.g.*, S.C. CODE ANN. § 56-3-3710 (2006) (college or university license plates); S.C. CODE ANN. § 56-3-7750 (2006 & West Supp. 2009) (fraternity and sorority license plates); and S.C. CODE ANN. § 56-3-8000 (2006 & West Supp. 2009) (non-profit organization license plates).

143. *Summers*, 2008 WL 5401537, at *3.

144. *See id.* at *3; S.C. CODE ANN. § 56-3-8100 (2006 & West Supp. 2009) (describing the requirements that apply to specialty plates that the General Assembly approves after January 1, 2006).

license plate to qualifying individuals—e.g., Purple Heart recipients, Medal of Honor recipients, or Lions Club members—or may make a specialty plate available to motorists generally without imposing qualifications—e.g., “First in Golf” or “In God We Trust.”

Pursuant to the DMV process, the DMV may issue specialty license plates to non-profit organizations meeting certain requirements and may adopt additional policies relating to the issuance of DMV-approved specialty plates.¹⁴⁵ As a result, the DMV process is more cumbersome and limited than the legislative process. A non-profit organization seeking a specialty plate must incorporate with a State and secure 501(c)(3), 501(c)(7), or 501(c)(8) tax-exempt status from the Internal Revenue Service at least five years prior to applying for a specialty plate.¹⁴⁶ If the organization has maintained its non-profit status for at least five years, then it may apply to the DMV for a specialty plate. The application to the DMV must include each of the following: (1) a request for a specialty plate on the letterhead of the organization; (2) completed DMV Forms RG-504(a) and 504(d); (3) written permission to use any copyrighted or registered trademark, logo, or other design; (4) a computer CD containing a copy of the artwork to be displayed on the license plate and one color, hard copy of the artwork; (5) a detailed marketing plan; and (6) the specific amount above the standard \$24 fee, if any, that the organization seeks to have directed to the sponsoring organization.¹⁴⁷

After receiving a completed application, the Special Plate Review Panel of the DMV, which consists of members that the DMV Director appoints, reviews the application to ensure that the proposed plate satisfies all the design requirements. For example,

145. *Summers*, 2008 WL 5401537, at *3. See also S.C. CODE ANN. § 56-3-8000 (2006 & West Supp. 2009) (non-profit organization license plates); S.C. DMV Policy RG-504, available at <http://www.scdmvonline.com/DMVNew/forms/rg-504.pdf> (guidelines for application, approval, production, and distribution of specialty plates).

146. *Summers*, 2008 WL 5401537, at *3.

147. *Id.* In addition to the application, the sponsoring non-profit organization must provide documents verifying its tax-exempt status and provide copies of its tax returns for the last five years. *Id.*

specialty plates approved pursuant to the DMV process can contain only those mottos or words that are part of the organization's emblem, seal, or symbol, and any graphic to be included on the plate must meet certain maximum size requirements.¹⁴⁸ Moreover, the Special Plate Review Panel must determine that the design is "appropriate," i.e., that the design is not "offensive" and that it meets "community standards of propriety."¹⁴⁹ The Review Panel may reject a proposed specialty plate if it decides that the plate is "controversial, . . . or [subject to] litigation in other states," is "partisan," or is "potentially offensive, controversial, or inappropriate to the public."¹⁵⁰ Following its review, the Review Panel has one of three options: it may approve, conditionally approve, or reject the application. If the design is approved, the DMV produces two sample plates, which are forwarded to the Highway Patrol for approval. If approved by the Highway Patrol, the DMV's Chief of Staff and Director also must sign off on the design.¹⁵¹ If the Review Panel rejects the application and the Chief of Staff and Director agree with that decision, the sponsoring organization is notified and may either appeal or submit a new design, in which case the process starts over again.

Despite their differences, the legislative and DMV processes are similar in two significant ways. First, and most important for present purposes, since September 7, 2007, the legislature has had final review over both processes, either through the legislature's ability to pass new legislation or through the legislative review committee.¹⁵² Although an organization may appeal an adverse DMV decision to the legislative review committee, the review committee has authority to overrule *any*

148. *Id.* at *3.

149. *Id.* at *4 (quoting S.C. DMV Policy RG-504).

150. *Id.*

151. *Id.* The DMV follows a similar procedure for designs that are conditionally approved. The DMV's Chief of Staff and Director review the conditionally approved design and make suggested modifications. The sponsoring organization is notified of the suggested modifications and provided the opportunity either to submit a re-designed specialty plate or to appeal the initial decision. *Id.*

152. *Summer*, 2008 WLS 401537, at *3-4.

DMV decision (whether on appeal or not).¹⁵³ After review, the review committee may direct the DMV to end production of any specialty plate that the review committee “deems offensive or that fails to meet community standards.”¹⁵⁴ Accordingly, as the district court acknowledges in *Summers*, “all special plates are subject to final approval by the legislative committee.”¹⁵⁵

Second, production of any specialty plate does not commence immediately upon approval. Once a proposed specialty plate is approved by either the legislative or the DMV process, the DMV cannot produce and distribute the new specialty plate unless it receives 400 prepaid applications for the new plate or a \$4,000 deposit from a sponsoring individual or organization.¹⁵⁶ Further, the DMV must approve a marketing plan prior to production,¹⁵⁷ and the sponsoring person or entity must provide any emblem, seal, or other symbol that is to be included on the specialty plate along with the appropriate permission to reproduce such emblem, seal, or symbol.¹⁵⁸ After each of these requirements has been met, the DMV may produce and distribute the specialty plate.

In April 2008, two members of the South Carolina General Assembly introduced a bill to authorize a specialty plate with the words “I Believe” and the “image of a cross superimposed on a stained glass window.”¹⁵⁹ The South Carolina General Assembly unanimously approved the legislation, which stated:

The Department of Motor Vehicles may issue “I Believe” special motor vehicle license plates to owners of private motor vehicles registered in their names. The plate must contain the words “I Believe” and a cross superimposed on

153. *Id.* at *4.

154. *Id.* at *4 (quoting S.C. CODE ANN. § 56-3-8000 (2006 & West Supp. 2009)). As the district court notes, this statute was amended in 2006 to create the legislative review committee to oversee the DMV process regarding specialty plates proposed by organizations. *Id.*

155. *Id.*

156. S.C. CODE ANN. § 56-3-8000(B)(1) (2006 & West Supp. 2009).

157. *Id.* § 56-3-8000(B)(2).

158. *Id.* § 56-3-8000(G).

159. *Summers*, 2008 WL 5401537, at *1.

a stained glass window. The biennial fee for this special license plate is the same as the fee provided in Article 5, Chapter 3 of this title. The guidelines for the production of this special license plate must meet the requirements contained in Section 56-3-8100.¹⁶⁰

Thus, the “I Believe” specialty plate was authorized pursuant to the legislative process and became law in June 2008 without the Governor’s signature. The DMV, following the suggestion of the Governor, subsequently imposed an additional \$5 fee to cover the cost of producing the “I Believe” specialty plate.¹⁶¹ By November 2008, the DMV had received the required 400 prepaid applications and prepared to begin production of the “I Believe” specialty plate. In June 2008, though, plaintiffs filed suit to stop the production and distribution of the “I Believe” plate, claiming that the plate (i) endorsed religion in violation of the Establishment Clause and (ii) abridged the Free Speech Clause by discriminating against certain religious and non-religious viewpoints. In its opinion dated December 23, 2008, the district court enjoined the production of the “I Believe” specialty plate based on plaintiffs’ likely success on the merits of their Establishment Clause claim.

Although the district court based its injunction primarily on its Establishment Clause analysis, the court did consider plaintiffs’ Free Speech claim so that the Fourth Circuit might review all aspects of the case on appeal.¹⁶² Specifically, recognizing that a government speaker may advocate its own policies and exclude

160. *Id.* (quoting Act No. 253, which was to be codified at S.C. CODE ANN. § 56-3-10110).

161. *Id.* at *2.

162. Although the district court analyzed plaintiffs’ Free Speech claim, it held that the Free Speech claim was best understood as an Establishment Clause claim: “Plaintiffs complain that the legislature has improperly singled out one ‘favored’ viewpoint, Christianity, for promotion. This, however, strikes the court as an Establishment Clause argument, not a Free Speech (viewpoint discrimination) argument.” *Id.* at *8.

opposing viewpoints,¹⁶³ the district court determined that South Carolina's specialty plate program created "hybrid speech," *i.e.*, a mixture of government and private speech, subject to the Court's forum analysis. The district court reached this conclusion by applying the four-factor test articulated by the Fourth Circuit in *Rose* and *Sons of Confederate Veterans (SCV)*.¹⁶⁴ In *Rose*, the three judge panel held, by way of three separate opinions, that the "Choose Life" message on a South Carolina specialty plate (which was adopted pursuant to a similar legislative process as the "I Believe" plate) was hybrid speech. In so holding, the panel rejected the State's claim that viewpoint discrimination was permissible with respect to the messages on specialty plates because such plates were government speech. Judge Michael based his opinion on the four-factor *SCV* test. Under this test, whether speech is government or private is determined by analyzing: (1) the central purpose of the program in which the speech occurs, (2) the extent of editorial control that the government or other entities exercise over the content of the speech, (3) the identity of the literal speaker, and (4) whether the government or the private entity is ultimately responsible for the content of the speech.¹⁶⁵ Applying the test in *Rose*, Judge Michael found that the "Choose Life" plate was hybrid speech and that South Carolina engaged in viewpoint discrimination by approving only the "Choose Life" plate.¹⁶⁶

163. *Id.* at *15 ("If the speech is pure government speech, the state is presenting its own message rather than creating a forum and may advocate in favor of its policies without including opposing viewpoints.").

164. See *Planned Parenthood of S.C., Inc. v. Rose*, 361 F.3d 786, 792-93 (4th Cir. 2004); *Sons of Confederate Veterans, Inc. v. Comm'r of Va. Dep't of Motor Vehicles*, 288 F.3d 610, 618 (4th Cir. 2002). In *Bredesen*, the Sixth Circuit held that *Johanns* replaced the four-factor test that Judge Michael applied in *Rose*: "*Johanns* sets forth an authoritative test for determining when speech may be attributed to the government for First Amendment purposes. *Rose* relied instead on a pre-*Johanns* four-factor test of the Fourth Circuit's own devising that led to an 'indeterminate result' on the crucial issue of whether 'Choose Life' specialty plates express a governmental message." *ACLU of Tenn. v. Bredesen*, 441 F.3d 370, 380 (6th Cir. 2006).

165. *Rose*, 361 F.3d at 792-93.

166. *Id.* at 784.

In *Summers*, the district court also applied the *SCV* test and reached the same conclusion—that specialty plates are hybrid speech such that the government cannot discriminate based on viewpoint. Specifically, the district court held that the first and second factors weighed in favor of the “I Believe” plate being government speech. Consistent with the “Choose Life” plate in *Rose*, the South Carolina General Assembly passed the legislation creating the specialty plate program and controlled the specific content of the plate.¹⁶⁷ Yet the district court concluded that the third and fourth factors weighed in favor of private speech. Because specialty plates “are associated at least partly with the vehicle owners”¹⁶⁸ and the owners choose which plates to display on their vehicles, the district court held that the purchaser of the plate “bore the ultimate responsibility for the speech on the ‘Choose Life’ [and ‘I Believe’] license plate[s].”¹⁶⁹ Thus, even though the *SCV* factors pulled in different directions (as they had in *Rose*), the court determined that the Fourth Circuit would reach the same result in the “I Believe” case. Moreover, even if *Johanns* might change the Fourth Circuit’s analysis, the district court did not

167. *Summers*, 2008 WL 5401537, at *16. See also *Rose*, 361 F.3d at 793 (finding that the second *SCV* factor supports government speech because “the idea for a Choose Life plate originated with the State, and the legislature determined that the plate will bear the message ‘Choose Life.’ The State thus exercises complete editorial control over the content of the speech on the Choose Life plate.”).

168. *Rose* 361 F.3d at 794. Judge Michael, who invoked the four-factor test in his opinion, based his conclusion in part on the Supreme Court’s ruling in *Wooley*. Because the message on the standard-issue New Hampshire license plate (“Live Free or Die”) is associated with the vehicle owner, the message on a “voluntary” specialty plate, i.e., a plate that vehicle owners may choose to display but are not required to do so, also must be associated with the vehicle owner.

169. *Summers*, 2008 WL 5401537, at *16. With respect to the Choose Life plate, Judge Michael held that, although specialty plates are state-owned and carry a state-authorized message, “the specialty plate gives private individuals the option to identify with, purchase, and display one of the authorized messages. . . . [T]he private individual bears the ultimate responsibility for the speech on the Choose Life plate . . . [because] the private individual chooses to spend additional money to obtain the plate and to display its pro-life message on her vehicle.” *Rose*, 361 F.3d at 794.

believe that *Johanns* would change the result, i.e., the conclusion that specialty plates are hybrid speech:

The undersigned does not, however, believe that the Fourth Circuit would reach a different *result* where the decision to purchase the plate at issue is a matter of choice wholly within the discretion of the vehicle owner [especially where, as here,] the state actors take the position that the plate at issue is not governmental endorsement of religion for the very reason that the decision to purchase and display the plate is an individual one.¹⁷⁰

C. Summum's control test is inconsistent with Summers and the majority view.

The district court in *Summers* did not provide an extensive analysis of plaintiffs' Free Speech claim, having found that plaintiffs lacked standing to assert such a claim. But the district court did join the majority of circuits in holding that specialty plates implicate private speech sufficiently to trigger the Court's forum analysis. Although the district court might disagree with other courts as to the specific type of forum created, they all agree that specialty license plates are not government speech. As a result, if specialty license plates are government speech under *Summum*, then the district court in *Summers*, along with the Fourth, Seventh, Eighth, and Ninth Circuits, must reconsider its treatment of specialty license plates. This section explains why specialty license plates are government speech under the control test developed in *Summum* and *Johanns* and why the majority view therefore fails.¹⁷¹

170. *Summers*, 2008 WL 5401537, at *16.

171. In this way, license plates are similar to monuments—both are meant to be “a means of expression.” *Pleasant Grove City v. Summum*, 129 S. Ct. 1125, 1133 (2009). Although the history of monuments may be longer and the message frequently more compelling, license plates, at a minimum, certainly are meant to convey information about the particular vehicle, e.g., its registration and compliance with inspections. When the government institutes a program for specialty plates that contain additional information about

Prior to *Summum* and *Johanns*, the Court had identified government speech as a distinct category of speech and indicated that the rules governing it differed markedly from those applied under the Court's forum analysis. But, other than some general statements about government speech, the Court had not set out specific criteria to help circuit courts know when the doctrine applied. *Summum* and *Johanns* changed that by identifying government control over the message conveyed as the key feature of government speech. As the Sixth Circuit noted: "*Johanns* stands for the proposition that when the government determines an overarching message and retains power to approve every word disseminated at its behest, the message must be attributed to the government for First Amendment purposes."¹⁷² And the Court applied the same standard in *Summum*. Monuments displayed in public parks are government speech because "the City has 'effectively controlled' the messages sent by the monuments in the Park by exercising 'final approval authority' over their selection."¹⁷³

The Court's focus on the government's control over the content and wording of the message is in stark contrast to the majority view that finds expression in *Rose*, *Roach*, *Stanton*, and *White*. Unlike these circuit court cases, under *Summum* and *Johanns* the identity of the speaker does not determine whether the government speech doctrine applies in a particular case. Because the government has the right to speak for itself, the Court instead focuses on whether the government is actually speaking, not on whether a reasonable observer would identify the government as the speaker.¹⁷⁴ The majority view, which takes specialty plates to

groups, institutions, or individuals related to a particular state, the expressive use of plates is increased, not diminished: "When a government entity arranges for the construction of a monument [or specialty plate], it does so because it wishes to convey some thought or instill some feeling in those who see the structure [or license plate]." *Id.*

172. *ACLU of Tenn. v. Bredesen*, 441 F.3d 370, 375 (6th Cir. 2006).

173. *Summum*, 129 S. Ct. at 1134 (citing *Johanns v. Livestock Mktg. Ass'n*, 544 U.S. 550, 560-61 (2005)).

174. This is not to say that identifying the government as speaker cannot assist the court in assessing the level of control the government has over the message. Rather, it recognizes only that such an identification is not required. For instance, *Summum* notes that people are likely to identify the monuments

be (at least partly) private speech, therefore, is incompatible with *Summum* for at least three reasons.

First, those circuits taking the central inquiry to be “whether, under all the circumstances, a reasonable and fully informed observer would consider the speaker to be the government or a private party”¹⁷⁵ predicate their view on a position that, while understandable, was rejected by the Court in *Johanns*. Because political accountability provides a primary check on government speech, it makes intuitive sense to require the government to be identifiable as the speaker before invoking the government speech doctrine, as Justice Souter argued in his *Summum* concurrence.¹⁷⁶ But as Justice Souter acknowledged in his dissent in *Johanns*, the majority takes “control” over the message, and not the identity of the speaker, to be the essential requirement for government speech: “The Court takes the view that because Congress authorized this scheme and the Government controls (or at least has a veto on) the content of the beef ads, the need for democratic accountability has been satisfied.”¹⁷⁷ In fact, in

in Pioneer Park with the government: “The City’s actions provided a more dramatic form of adoption than the sort of formal endorsement that respondent would demand, unmistakably signifying to all Park visitors that the City intends the monument to speak on its behalf.” *Summum*, 129 S. Ct. at 1134. But the Court neither adopts a reasonable observer test nor overrules *Johanns*, in which the Court expressly denied that a reasonable observer must be able to identify the government as the speaker for the government speech doctrine to apply.

175. *Roach v. Stouffer*, 560 F.3d 860, 867 (8th Cir. 2009).

176. *Summum*, 129 S. Ct. at 1142 (Souter, J., concurring) (“[T]he best approach that occurs to me is to ask whether a reasonable and fully informed observer would understand the expression to be government speech, as distinct from private speech the government chooses to oblige by allowing the monument to be placed on public land.”).

177. *Johanns*, 544 U.S. at 578 (Souter, J., dissenting) (“The Court takes the view that because Congress authorized this scheme and the Government controls (or at least has a veto on) the content of the beef ads, the need for democratic accountability has been satisfied. But the Court has it backwards. It means nothing that Government officials control the message if that fact is never required to be made apparent to those who get the message, let alone if it is affirmatively concealed from them.” (citation omitted)). In *Rose*, Judge Michael appears to share Justice Souter’s concern with permitting government speech without direct accountability: “It might be argued that South Carolina

Johanns, the majority expressly rejected any such “identification” requirement. The beef ads in *Johanns* were government speech because “[t]he message set out in the beef promotions is from beginning to end the message established by the Federal Government,”¹⁷⁸ regardless of whether a reasonable observer could identify the government as the speaker:

But the correct focus is not on whether the ads’ audience realizes the Government is speaking, but on the compelled assessment’s purported interference with respondents’ First Amendment rights. As we hold today, respondents enjoy no right not to fund government speech—whether . . . or not the reasonable viewer would identify the speech as the government’s.¹⁷⁹

The fact that someone may (improperly) view a third party as the speaker does not undermine the government’s ability to claim the protection of the government speech doctrine any more than the “American Beef Producers” label precluded the federal government from doing so in *Johanns*. Thus, although the Court could require the government to identify itself as the speaker (or at least appear as the speaker to the reasonable observer), neither *Johanns* nor *Summum* imposes such a requirement on government speech.

is not hiding its identification with the message on the Choose Life plate because the General Assembly enacted the statute making the plate available But this argument overlooks the fact that continuing transparency is essential to accountability.” *Planned Parenthood of S.C., Inc. v. Rose*, 361 F.3d 786, 798 (4th Cir. 2004). Judge Michael’s insistence on an express connection between certain speech and the government is inconsistent with *Johanns*, which further undermines the vitality of *Rose* post-*Summum*.

178. *Johanns*, 544 U.S. at 560-61; see also *Summum*, 129 S. Ct. at 1134 (“Government decisionmakers select the monuments that portray what they view as appropriate for the place in question, taking into account such content-based factors as esthetics, history, and local culture. That monuments that are accepted, therefore, are meant to convey and have the effect of conveying a government message, and they thus constitute government speech.”).

179. *Johanns*, 544 U.S. at 564 n.7.

Given that the “reasonable observer” test is similar to the Fourth Circuit’s four-factor *SCV* test,¹⁸⁰ it is not surprising that *Johanns* and *Summum* also replace this multi-factor test. Although the Supreme Court had not articulated standards for the government speech doctrine when the Fourth Circuit adopted the *SCV* factors,¹⁸¹ such is not the case post-*Summum*. Whereas the district court considered all four factors, weighing the identity of the speaker and who had responsibility for the speech more heavily, neither *Johanns* nor *Summum* relies on a multi-factor test when analyzing possible government speech. Under *Summum* and *Johanns*, the government speaks when it “sets the overall message to be communicated” and “approves every word that is disseminated,”¹⁸² regardless of whether third parties know that the government is doing so. If the government exercises the requisite level of control, the message is government speech. To the extent one or more of the *SCV* factors relate to the level of governmental control, such factors may assist the Court in assessing whether speech is government speech. But, as discussed above, *Johanns* expressly denies that the government speech doctrine requires a reasonable observer to identify the government as the speaker. Thus, the district court’s analysis of the Free Speech claim fails because it improperly relies on the reasonable observer’s ability to

180. *Choose Life Ill., Inc. v. White*, 547 F.3d 853, 863 (7th Cir. 2008) (holding that the four-factor test used by the Fourth and Ninth Circuits “can be distilled (and simplified) by focusing on the following inquiry: Under all the circumstances, would a reasonable person consider the speaker to be the government or a private party?”).

181. *Rose*, 361 F.3d at 792 (acknowledging that “[n]o clear standard has yet been enunciated in our circuit or by the Supreme Court for determining when the government is ‘speaking’ and thus able to draw viewpoint-based distinctions, and when it is regulating private speech and thus unable to do so”) (quoting *Sons of Confederate Veterans, Inc. v. Comm’r of Va. Dep’t of Motor Vehicles*, 288 F.3d 610, 618 (4th Cir. 2002)). In *SCV*, the Fourth Circuit held that, although the Commonwealth of Virginia authorized a specialty plate for the nonprofit organization, the State discriminated against the *SCV*’s viewpoint when it prohibited that plate from bearing the *SCV*’s emblem, which included a Confederate flag.

182. *Johanns*, 544 U.S. at 562.

identify the government as the speaker instead of the government's level of control over the message.

Second, while the Eighth Circuit considered the impact that *Summum* might have on its analysis and, by extension, the majority view, the panel summarily held that *Summum* did not change the outcome. Specifically, in a short footnote, the Eighth Circuit distinguished *Summum* on the grounds that specialty plates, unlike permanent monuments, "advertise the name or motto of a private organization [and therefore] facilitate expressive conduct on the part of the organization and its supporters, not the government."¹⁸³ Unfortunately, the panel does not provide any more explanation. But without more, the panel's analysis appears to rest on its "reasonable observer" test—because specialty plates carry the name or motto of third parties, a reasonable observer would identify the third party as the speaker instead of the government. Yet the Eighth Circuit's "reasonable observer" test ignores two central tenets in *Summum*: (i) that the government may engage in speech even though a reasonable observer interprets the message differently than the government intended or, under *Johanns*, attributes the message to someone other than the government and (ii) that the government speech doctrine does not preclude a private person, who assists the government in disseminating its message, from engaging in expressive activity.¹⁸⁴ As *Summum* expressly states, a monument may convey more than one message:

Contrary to respondent's apparent belief, it frequently is not possible to identify a single 'message' that is conveyed by an object or structure, and consequently, the thoughts or sentiments expressed by a government entity that accepts and displays such an object may be

183. *Roach v. Stouffer*, 560 F.3d 860, 868 n.3 (8th Cir. 2009).

184. See *Children First Found., Inc. v. Martinez*, 169 F. App'x 637, 639 (2d Cir. 2006) ("[C]ustom license plates involve, at minimum, some private speech." (citation omitted)); *Women's Emergency Network v. Bush*, 323 F.3d 937, 945 n.9 (11th Cir. 2003) ("We fail to divine sufficient government attachment to the messages on Florida specialty license plates to permit a determination that the messages represent government speech.").

quite different from those of either its creator or its donor.¹⁸⁵

In contrast to the Fourth and Eighth Circuit's holdings, the same is true with respect to specialty plates—the message that the government conveys may be quite different from that of the sponsoring organization or the motorists who voluntarily display that specialty plate.¹⁸⁶ For example, after the North Carolina legislature made specialty plates available to the public, it approved both UNC-Chapel Hill and Duke license plates. Although certain individuals, legislators, and the schools may have wanted to show their pride in or support for their respective institutions, the government as a whole did not advocate one school over another even though individuals choosing a specific license plate might do so.¹⁸⁷ That is, in adopting both specialty plates, the government is

185. *Pleasant Grove City v. Summum*, 129 S. Ct. 1125, 1136 (2009). *See also id.* (denying that “a monument can convey only one ‘message’—which is, presumably [under Respondent’s argument], the message intended by the donor—and that, if a government entity that accepts a monument for placement on its property does not formally embrace *that* message, then the government has not engaged in expressive conduct”).

186. The passing comments of the Second and Eleventh Circuits, in an unpublished decision and in dicta, respectively, that specialty plates involve private speech are, therefore, unremarkable. Such comments simply reinforce that which *Summum* states directly—that the government’s intended message may be significantly different from the meaning that a donor or those who choose to display a specialty plate seek to send. The fact that the government controls the message does not preclude others from using that message for their own expressive purposes.

187. When a person sees a UNC-Chapel Hill license plate or a Duke plate, that person may assume that the vehicle owner is saying something about that institution—“I graduated from there” or “I support that school”—which is part of the reason that the Court decided *Wooley* as it did. *Wooley v. Maynard*, 430 U.S. 705 (1977). In *Wooley*, the government could not force its citizens to carry the government’s message, so motorists were permitted to cover up the motto “Live Free or Die” on the standard-issued license plate. *Id.* at 720. But the Court did not hold that the State could not keep the motto on its standard-issued license plate, let alone suggest that the motto could not be on a specialty plate. Focusing on the compelled speech in *Wooley*, the Court simply had no reason to address specialty plates, which involve a vehicle owner’s choosing to pay for and to place the specific specialty plate on her vehicle. But, at a minimum, *Wooley* is important because it acknowledges that

not saddled with (what many basketball observers might consider to be) an inconsistent message: supporting both Duke and UNC-Chapel Hill.¹⁸⁸ Instead, the government may convey a different message, one about the State itself—pride in and support for (i) its citizens who attended these schools and (ii) the rich educational opportunities at North Carolina's institutions of higher learning.¹⁸⁹ Moreover, although state legislatures may approve specialty plates for their own reasons, viewers of their specialty license plates (and monuments) may interpret them in a variety of ways: "These text-based monuments are almost certain to evoke different thoughts and sentiments in the minds of different observers, and the effect of monuments that do not contain text is likely to be even more variable."¹⁹⁰ Thus, under *Summum* the permanent Ten Commandments monuments in Pioneer Park and on the Texas Capitol grounds may "facilitate expressive conduct" by the Fraternal Order of Eagles, which donated the monuments, while still conveying a government-approved message.

the *government* speaks through its license plates even though motorists also may.

188. In *Johanns*, the Court suggests in passing that the government might lose the protection of the government speech doctrine if it sends an inconsistent message. But the Court did not have to resolve that issue because the government's messages regarding beef and dietary guidelines, like the various specialty plates in most states, were consistent: "Even if we agreed that the protection of the government-speech doctrine must be forfeited whenever there is inconsistency in the message, we would nonetheless accord the protection here. The beef promotions are perfectly compatible with the guidelines' message of moderate consumption—the ads do not insist that beef is also What's for Breakfast, Lunch, and Midnight Snack." *Johanns v. Livestock Mktg. Ass'n*, 544 U.S. 550, 561 n.5 (2005).

189. At present, North Carolina offers more than twenty specialty plates with the logos of North Carolina post-secondary institutions. See http://www.ncdot.org/dmv/vehicle_services/licenseplates/specializedReq.html (last visited Feb. 20, 2010). In addition, North Carolina offers five specialty plates with the logos of post-secondary institutions from other states, which may convey the message of the diverse educational backgrounds of North Carolina's residents. See *id.* Of course, the facts of each case (i.e., the reasons that a state approves specific specialty plates) will determine what the actual purpose of the specialty plate is and whether that purpose survives constitutional review.

190. *Summum*, 129 S. Ct. at 1135.

Third, the “control” test does not necessarily convert every public monument or specialty plate program into government speech. If the government does not exercise the required level of control over a specialty plate program or the selection of a monument in a given situation, then it may not secure the protection afforded by the government speech doctrine. Hence, the Court notes in *Sumnum* that there may be situations, albeit rare ones, where the government creates a forum for monuments in public parks:

To be sure, there are limited circumstances in which the forum doctrine might properly be applied to a permanent monument—for example, if a town created a monument on which all of its residents (or those meeting some other criterion) could place the name of a person to be honored or some other private message.¹⁹¹

And the same is true for specialty license plate programs. If the legislation creating a specialty plate program gives the sponsors of a plate control over the content, symbols, and message of the plate and requires the government to approve without modification every proposed plate, then the program may create a forum along the lines of *Rosenberger*.¹⁹²

For example, under Arizona’s specialty license plate program, an organization may submit an application for a specialty plate to the Arizona Department of Transportation, which certifies that the organization is a nonprofit and then forwards the

191. *Id.* at 1138.

192. The state might distance itself further from the sponsor’s message by expressly disclaiming responsibility for the messages on specialty plates, as the University of Virginia did in *Rosenberger*: “The distinction between the University’s own favored message and the private speech of students is evident in the case before us. The University itself has taken steps to ensure the distinction in the agreement each [eligible student organization] must sign. The University declares that the student groups eligible for [financial] support are not the University’s agents, are not subject to its control, and are not its responsibility.” *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819, 834-35 (1995).

application to the Arizona License Plate Commission.¹⁹³ According to the Ninth Circuit, the governing statute requires the License Plate Commission to issue the requested specialty plate—with the government’s retaining only “de minimis editorial control over the plate design and color.”¹⁹⁴ Under these circumstances, the Ninth Circuit, applying *Johanns* and the *SCV* factors, determined that, because the Arizona statutes “address[ed] who may speak, not what they may say,”¹⁹⁵ the sponsoring organizations and those “who choose to purchase the plate [and] voluntarily choose to disperse that message”¹⁹⁶ are the speakers. As a result, Arizona officials could not invoke the government speech doctrine to insulate its alleged viewpoint discrimination from review.¹⁹⁷ But under *Summum*, the creation of the forum is not predicated on a reasonable observers determining that the government is not speaking; rather, the forum is created by virtue of the governments ceding actual control over the message to the public. If the Arizona legislature has relinquished effective control over the specialty plate program, the government speech doctrine does not apply. Similarly, as the Eighth Circuit suggests, Missouri’s specialty plate program also may fall outside the government speech doctrine because sponsoring organizations design the specialty plates and, once approved, the DOR must produce the plate.¹⁹⁸ But even if

193. See *Ariz. Life Coal., Inc. v. Stanton*, 515 F.3d 956, 961 (9th Cir. 2008); ARIZ. REV. STAT. ANN. § 28-2404 (2004).

194. *Stanton*, 515 F.3d at 966.

195. *Id.*

196. *Id.* at 967.

197. *Id.* Because the Ninth Circuit determined that the messages on Arizona specialty plates are private speech, the Arizona License Plate Commission engaged in viewpoint discrimination by rejecting the Arizona Life Coalition’s application for a “Choose Life” specialty plate and, therefore, violated the First Amendment.

198. Although the Eighth Circuit recognized that “under *Johanns*, the more control the government has over the content of the speech, the more likely it is to be government speech,” the panel did not look closely at the level of control that Missouri exercises over its specialty plate program. See *Roach v. Stouffer*, 560 F.3d 860, 864 (8th Cir. 2009). In applying the “reasonable observer” test, the panel focused on who a reasonable person would identify as the speaker. *Id.* at 868. But there may be reason to view Missouri’s specialty plates as government speech when viewed under the proper test.

some specialty plate programs do not give rise to government speech, other programs—like those in South Carolina and Tennessee—do when viewed in light of *Summum* and *Johanns*.

D. The “I Believe” specialty plate is government speech under Summum.

To determine whether South Carolina’s specialty license plate program constitutes government speech, one must apply the appropriate test. The Sixth Circuit, relying on *Johanns*, held that Tennessee’s specialty plate program created government speech and, therefore, fell outside the constraints imposed by the Free Speech Clause. The district court in *Summers* followed Fourth Circuit precedent and applied the SCV factors. Because *Summum* and *Johanns* supplant the Fourth Circuit’s four-factor analysis with the “control” test, whether South Carolina’s specialty plate program is government speech depends on whether the South Carolina legislature exercises the requisite level of control over the program.

The level of control that the South Carolina legislature has over the approval of specialty license plates, though, is similar to that exercised by Tennessee in *Bredesen*. Under the governing South Carolina statutes, the legislature controls all facets of the specialty plate process, whether legislative or through the DMV.¹⁹⁹ The South Carolina specialty plate program is authorized by statute, and the general requirements for specialty plates are set forth in the governing statutes.²⁰⁰ The specific design, content, and

First, the legislature appears to have complete control over the legislative process and can determine the design and content of a specialty plate through the operative legislation. Second, even under the DOR process, the Joint Committee has veto authority over all designs, *id.* at 867, which power Justice Souter suggests was sufficient under the *Johanns* majority opinion. *Johanns v. Livestock Mktg. Ass’n*, 544 U.S. 550, 578 (2005) (Souter, J., dissenting) (“The court takes the view that because Congress authorized this scheme and the Government controls (or at least has a veto on) the content of the beef ads, the need for democratic accountability has been satisfied.”).

199. See S.C. CODE ANN. § 56-3-8000 (2006 & West Supp. 2009).

200. *Planned Parenthood of S.C. Inc. v. Rose*, 361 F.3d 786, 791 (4th Cir. 2004) (“Specialty license plates are a state-controlled medium of expression;

message on each plate are approved by a government actor — either the legislature directly²⁰¹ or the DMV's Special Plate Review Panel. Specialty plates that the State legislature approves directly are the responsibility of the State. And, according to the DMV's own policy, the same is true for DMV approved specialty plates:

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.²⁰²

whatever speech is not authorized by the State is therefore prohibited.” (citation omitted)); S.C. CODE ANN. § 56-3-8000(F) (“The joint legislative committee may also review all license plates issued by the department and instruct the department to cease issuing or renewing a plate it deems offensive or fails to meet community standards.”).

201. See S.C. CODE ANN. § 56-3-8100 (2006 & West Supp. 2009). See also *Summers v. Adams*, No. 3:08-2265-CMC, 2008 WL 5401537, at *1 (D.S.C. Dec. 23, 2008) (quoting the “I Believe” license plate statute, which states in relevant part that “[t]he plate must contain the words ‘I Believe’ and a cross superimposed on a stained glass window” and noting that the Act then specifies the fee and the guidelines for production by incorporating the requirements of S.C. Code Ann. § 56-3-8100).

202. *Summers*, 2008 WL 5401537, at *7 (quoting DMV Policy RG-504). The fact that a non-profit may propose a specialty plate design under the DMV process is not materially different from the Fraternal Order of Eagles donating the Ten Commandments monuments in *Summum* and *Van Orden*. Although a third party provides the general design, the State still retains ultimate control over the content and design. *ACLU of Tenn. v. Bredesen*, 441 F.3d 370, 376 (6th Cir. 2006) (“Thus, Tennessee’s statutory law, and its power to withdraw authorization for any license plate, gives the State the right to wield ‘final approval authority over every word used’ on the ‘Choose Life’ plate. As in *Johanns*, here Tennessee ‘sets the overall message to be communicated and approves every word that is disseminated’ It is Tennessee’s own message.”). Moreover, if the State adopts the design for a monument or specialty plate, the government sends its own message. *Pleasant Grove City v. Summum*, 129 S. Ct. 1125, 1133 (2009) (“Just as government-

The DMV's responsibility for organizational plates is apparent from the fact that the DMV must ensure that the message is "appropriate for a governmental entity."²⁰³ In particular, the DMV's Special Plate Review Panel must determine that the proposed specialty plate is "appropriate," i.e., that it is not "offensive," and that it meets "community standards of propriety."²⁰⁴ The Special Plate Review Panel can reject a proposed specialty plate if it decides that the plate is "controversial, . . . or [subject to] litigation in other states,' 'partisan,' or 'potentially offensive, controversial, or inappropriate to the public.'"²⁰⁵

Furthermore, both processes are subject to the legislative review, either directly through legislation or through the legislative review committee, which has veto power on all DMV-approved specialty plates. The legislative review committee may "reverse[] the department's decision . . . [and] may also review all license plates issued by the department and instruct the department to cease issuing or renewing a plate it deems offensive or fails to meet community standards."²⁰⁶ Thus, because "all special plates are subject to final approval by the legislative committee,"²⁰⁷ the South Carolina legislature "'effectively controlled' the messages sent by the [specialty plates] by exercising 'final approval authority' over their selection,"²⁰⁸ production, and distribution to the motorists in

commissioned and government-financed monuments speak for the government, so do privately financed and donated monuments that the government accepts and displays to the public on government land.").

203. *Summers*, 2008 WL 5401537, at *7 (quoting DMV Policy RG-504).

204. *Id.* at *4 (quoting S.C. CODE ANN. § 56-3-8000).

205. *Id.*

206. S.C. CODE ANN. § 56-3-8000(F) (2006 & West Supp. 2009) (alteration added).

207. *Summers*, 2008 WL 5401537, at *4.

208. *Pleasant Grove City v. Summum*, 129 S. Ct. 1125, 1134 (2009) (alteration added) (quoting *Johanns v. Livestock Mktg. Ass'n*, 544 U.S. 550, 560-61 (2005)). The South Carolina General Assembly and the legislative review committee exercise the same level of control over specialty plates as the Secretary of Agriculture and Congress exercised over the beef advertisements that were found to be government speech in *Johanns*: "The program is authorized and the basic message prescribed by federal statute, and specific requirements for the promotions' content are imposed by federal

South Carolina. Just as the Secretary of Agriculture had control “over every word used in every promotional campaign,”²⁰⁹ the South Carolina government—either through its DMV officials or directly through the legislature—has final authority over (and has approved only) those license plate designs “that it wants to display for the purpose of presenting the image of the [State] that it wishes to project.”²¹⁰ Thus, because (i) the basic program and message are set by South Carolina statute, (ii) the South Carolina legislature oversees the program and retains complete authority over the wording and approval of the specialty plates, and (iii) the South Carolina legislature may reform the program at any time, “[n]o more is required.”²¹¹ Specialty license plates, *a fortiori*, are government speech.

Moreover, the South Carolina legislature does not forfeit the protection of the government speech doctrine simply because individual motorists associate themselves with a particular specialty plate. By displaying specialty plates on their vehicles, motorists may say something about themselves, their state, or some cause.²¹² After all, the Fraternal Order of Eagles, which donated the Ten Commandments monuments in Texas and in Pioneer Park, is

regulations promulgated after notice and comment. The Secretary of Agriculture . . . oversees the program, appoints and dismisses the key personnel, and retains absolute veto power over the advertisements’ content, right down to the wording. And Congress, of course, retains oversight authority, not to mention the ability to reform the program at any time. No more is required.” *Johanns*, 544 U.S. at 563-64 (footnotes omitted) (alteration added).

209. *Johanns*, 544 U.S. at 561.

210. *Summum*, 129 S. Ct. at 1134. Moreover, there appears to be no evidence in the record indicating that South Carolina ever opened up its license plates “for the placement of whatever [message] might be offered” by private citizens or members of the legislature. *Id.* In fact, the Special Plate Review Panel approves an organizational plate only if the Review Panel determines that the design is “‘appropriate’” and meets “‘community standards of propriety,’” which indicates that specialty plates are not available “for the placement of whatever [message] might be offered.” *Summers*, 2008 WL 5401537, at *4 (quoting DMV Policy RG-504).

211. *Johanns*, 544 U.S. at 563-64 (footnote omitted) (alteration added).

212. See, e.g., Jacobs, *supra* note 126, at 97 (noting that specialty plates contain “a mixture of government and private speech”).

associated with each monument and conveys a message about its organization and goals through its monuments. For First Amendment purposes, though, *Summum* tells us that the monuments are government speech because the government adopted and displayed each monument for its own purposes. The same holds true with specialty license plates. Because South Carolina controls the message and motorists are not compelled to display the message as in *Wooley*, the speech remains that of the South Carolina legislature for purposes of First Amendment analysis. As *Summum* notes, the government “may exercise this same freedom to express its views when it receives assistance from private sources for the purpose of delivering a government-controlled message.”²¹³ Accordingly, the fact that a specialty plate may be associated “at least partly with the vehicle owners”²¹⁴ (or that one viewing the plate may not know about the government’s control and oversight of the process) does not change the fact that the government is speaking.

But this fact undermines the district court’s claim that motorists bear the ultimate responsibility for specialty plates by virtue of their choosing to associate themselves with the government’s message. Contrary to the district court’s conclusion, *Johanns* and *Summum* provide good grounds to believe that the Fourth Circuit should (and the Supreme Court would) reach a different result from *Rose* even though “the decision to purchase the plate at issue is a matter of choice wholly within the discretion of the vehicle owner.”²¹⁵ Under *Rust*, *Johanns*, and *Summum*, the fact that individuals agree to carry the government’s message and pay for the privilege to do so—regardless of whether they agree with that message or seek to send their own message²¹⁶—does not

213. *Summum*, 129 S. Ct. at 1131. See also *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819, 833 (1995) (A government entity may “regulate the content of what is or is not expressed . . . when it enlists private entities to convey its own message.”).

214. *Summers*, 2008 WL 540137, at *16.

215. *Id.*

216. One also might view the government as a market participant, trying to make its specialty plates attractive to motorists to get its message out and, in the process, generate revenue for the State or for specific organizations that

convert the speech into private or hybrid speech.²¹⁷ Moreover, neither *Johanns*, *Summum*, nor *Hurley* requires the government to have direct and exclusive control over every part of a message from beginning to end or to shun input from third parties: “Nor, under our precedent, does First Amendment protection require a speaker to generate, as an original matter, each item featured in the communication.”²¹⁸ Rather, just as “privately financed and donated monuments that the government accepts and displays to the public on government land” speak for the government,²¹⁹ so do specialty license plates that are proposed by non-profit groups or specific legislators. Under *Summum*, the government may rely on third parties to propose the design and wording of a specialty plate without losing the protection of the government speech doctrine:²²⁰

might benefit from the sale and that the government seeks to support. As the Sixth Circuit notes in *Bredesen*, given that specialty plates do not confer any special privileges on motorists, “[d]rivers’ only motive for buying such plates, therefore, must rest with the attractiveness of the ‘Choose Life’ message as Tennessee has marketed it, not a desire to obey Tennessee’s will.” *ACLU of Tenn. v. Bredesen*, 441 F.3d 370, 374 (6th Cir. 2006).

217. *Id.* at 378 (“The doctors in *Rust* disagreed with the government’s anti-abortion policy. But if they had been true believers in the policy and had volunteered to work in the program free of charge, the speech restrictions in *Rust* would still have expressed the government’s anti-abortion viewpoint — and therefore qualified for government speech treatment.”).

218. *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston, Inc.*, 515 U.S. 557, 570 (1995).

219. *Pleasant Grove City, Utah v. Summum*, 129 S. Ct. 1125, 1133 (2009).

220. The Ninth Circuit attempts to distinguish *Johanns* on the grounds that *Johanns* is a compelled subsidy case. *Ariz. Life Coal., Inc. v. Stanton*, 515 F.3d 956, 964 (9th Cir. 2008). In the specialty license plate context, so the argument goes, *Johanns* does not apply because motorists voluntarily choose to display such plates and are not forced to pay the government to support someone else’s message. According to the Ninth Circuit, the harm comes from not being able to speak on the same terms as others in a forum, not from a *compelled* subsidy. But *Summum*’s “control” test precludes this line of argument. *Summum*, 129 S. Ct. at 1134. In *Summum*, the Court concludes that public monuments are government speech because, under *Johanns*, the government has “effectively controlled” and “final approval authority” over the selection of the monuments — even though there was no issue of compelled subsidy. *Id.* See also *Bredesen*, 441 F.3d at 375 (“*Johanns* stands for the proposition that when the government determines an overarching message and retains power to approve every word disseminated at its behest, the

“[The government] is not precluded from relying on the government-speech doctrine merely because it solicits assistance from nongovernmental sources in developing specific messages.”²²¹

Similarly, the State remains the speaker, and therefore remains covered by the government speech doctrine, even where the government enlists third parties—whether volunteers or subsidized participants in the government program—to disseminate its message: “There is nothing in the Supreme Court’s decisions in *Rust* or *Johanns* that implies that the government has less right to control expressions of its policies when it relies on unpaid private people. No constitutionally significant distinction exists between volunteer disseminators and paid disseminators.”²²² For example, the fact that motorists are willing to pay for specialty license plates

message must be attributed to the government for First Amendment purposes.”). To qualify as government speech, the government simply has to have authority to regulate the message conveyed. But South Carolina’s specialty plate program fulfills this requirement—the legislature (either directly or through the DMV and the legislative review committee) has authority over each and every specialty plate and can cancel any specialty plate at any time.

221. *Johanns v. Livestock Mktg. Ass’n*, 544 U.S. 550, 562 (2005).

222. *Bredesen*, 441 F.3d at 378. In *Rust*, the Court upheld Title X funding to doctors for family planning counseling even though the recipients of such funds could not discuss abortion related services with the program’s patients. The Court explained that “[w]hen the government disburses public funds to private entities to convey a governmental message, it may take legitimate and appropriate steps to ensure that its message is neither garbled nor distorted by the grantee.” *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819, 833 (1995). Thus, the federal government was allowed to pay third parties to convey its preferred anti-abortion message. Nothing in the Court’s opinions in *Rust* or *Rosenberger* suggests that the government loses control over its message simply because those promulgating the message (i) are not subsidized but do so freely or (ii) agree with the government’s message. Some of the doctors in *Rust* may have shared the government’s anti-abortion message while others did not. But whether a third party who is willing to assist the government agrees with the underlying message is not of constitutional significance. The Court’s focus in *Johanns* and *Sumnum* is on the government’s control over the message, not the observer’s interpretation of or agreement with that message. Provided the government retains “effective control” and “final approval authority” over the message, it makes no difference that the individuals volunteer (or pay a fee for the opportunity) to carry the state controlled and approved message.

does not convert the motorists into speakers for First Amendment purposes. By *voluntarily* agreeing to carry the government-approved message on their vehicles or otherwise,²²³ motorists do not exercise any control over the government's decision to create the plate or the content of the message. Thus, the use of third party volunteers does not usurp the government's control over the message: "[a] government entity may exercise this same freedom to express its views when it receives assistance from private sources for the purpose of delivering a government-controlled message."²²⁴ As a result, specialty plates are "not a form of expression to which forum analysis applies,"²²⁵ and the South Carolina legislature may discriminate based on viewpoint.²²⁶

Having the discretion to discriminate based on viewpoint is important because it ensures that the State can get *its* message out

223. In this regard, specialty plates are similar to postage stamps, which over the years have carried a wide variety of government messages relating to, among other things, music, art, wars, Christmas, space exploration, and the civil rights movement. The messages on stamps are those of the government even though private individuals purchase those stamps and use them on their letters or other mail. Consistent with *Wooley*, the government may not require individuals to use specific stamps with specific messages, but individuals can volunteer (and agree to pay) to use particular stamps if they like the looks or message of a particular stamp. *Bredesen*, 441 F.3d at 379.

224. *Summum*, 129 S. Ct. at 1131; *see also Rosenberger*, 515 U.S. at 833 ("[T]he government [may] regulate the content of what is or is not expressed . . . when it enlists private entities to convey its own message.").

225. *Summum*, 129 S. Ct. at 1129.

226. The district court in *Summers* suggests that the differences between the legislative and DMV processes also fosters viewpoint discrimination: "The legislative process provided to those who espouse the views advanced by the 'I Believe' plate is decidedly easier than and allows for options not available through the DMV process. . . . [A]ny group forced to seek approval of a religious (or non-religious philosophy) plate through the DMV is disadvantaged in expressing its viewpoint. . . ." *Summers v. Adams*, No. 3:08-2265-CMC, 2008 WL 5401537, at *17 (D.S.C. Dec. 23, 2008). Of course, if the speech is government speech, it does not matter whether such differences constitute viewpoint discrimination because the government, as speaker, is permitted to discriminate based on viewpoint. Moreover, given that the entire specialty plate program is subject to legislative review, the political process provides the ultimate check on the entire program. Citizens who agree or disagree with particular specialty plates can vote for legislators who share their views and who can add or remove specific specialty plates.

to the public. Consistent with the way state and federal governments have dealt with public monuments, the practice of South Carolina and other States with respect to specialty plates “has been one of selective receptivity.”²²⁷ Neither the South Carolina legislature nor its DMV has approved any and all specialty plates that have been proposed. As a result, the South Carolina legislature has acted like the parade organizers in *Hurley*—approving specific plate designs that further the government’s intended message while rejecting others:

Rather like a composer, the Council selects the expressive units of the parade from potential participants, and though the score may not produce a particularized message, each contingent’s expression in the Council’s eyes comports with what merits celebration [T]he Council clearly decided to exclude a message it did not like from the communication it chose to make, and that is enough to invoke its right as a private speaker to shape its expression by speaking on one subject while remaining silent on another.²²⁸

When the government acts as a speaker, it is free to determine what merits celebration. *Summum* states this expressly with respect to monuments, and the same holds true for specialty plates. License plates, like public parks, “are often closely identified in the public mind” with the state issuing the plates and may “play an important role in defining the identity that a [state] projects to its own residents and to the outside world.”²²⁹ In fact, unlike permanent monuments, the images and words on a state’s license plates are carried far beyond the state’s borders and may serve to send an important and lasting impression about that state.²³⁰ The

227. *Summum*, 129 S. Ct. at 1133.

228. *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston, Inc.*, 515 U.S. 557, 574 (1995).

229. *Summum*, 129 S. Ct. at 1133-34.

230. Examples abound of States adopting license plate designs that convey a message about their people, history, climate, or culture. Florida is the Sunshine State, North Carolina is First in Flight, Illinois is the Land of

government's control over which specialty plates to approve, therefore, serves the same function as a city's control over the selection of monuments:

Government decisionmakers select the monuments that portray what they view as appropriate for the place in question, taking into account such content-based factors as esthetics, history, and local culture. The monuments that are accepted, therefore, are meant to convey and have the effect of conveying a government message, and they thus constitute government speech.²³¹

As discussed above, under South Carolina's license plate statutes, government decision-makers are charged with the responsibility of making the same types of decisions with respect to the specialty plates.²³² Just as "'municipalities generally exercise editorial control over donated monuments through prior submission requirements, design input, requested modifications, written criteria, and legislative approvals of specific content proposals,'"²³³ the South Carolina legislature exercises the same scope and level of control over specialty license plates.²³⁴

Lincoln, Minnesota is the Land of 10,000 Lakes, Rhode Island is the Ocean State, and the list goes on and on, especially if you include specialty plates. For example, South Carolina offers specialty plates relating to a variety of interests that the State seeks to promote, such as the Beaufort Water Festival, Education, Driven by the Arts, First in Golf, H.L. Hunley, and Hunting Island State Park. See S.C. Dept. of Motor Vehicles, Plate Gallery, <http://www.scdmvonline.com/DMVNew/plategallery.aspx> (last visited Feb. 19, 2010). Similar lists can be made for all 50 States.

231. *Summum*, 129 S. Ct. at 1134.

232. See *Summers v. Adams*, No. 3:08-2265-CMC, 2008 WL 5401537, at *4 (D.S.C. Dec. 23, 2008); S.C. CODE ANN. § 56-3-8000 (2006 & West Supp. 2009).

233. *Summum*, 129 S. Ct. at 1133 (citation omitted).

234. For example, the South Carolina statutes relating to specialty plates provide the government—through the DMV or the legislature itself—the same editorial control over specialty plates. Pursuant to the South Carolina specialty plate statutes, the legislative review committee and the DMV have control over the submission requirements, design input, modifications, and approval of specific content proposals. *Summers*, 2008 WL 5401537, at *2-4.

But the ability to discriminate based on viewpoint is important for another reason as well. If the state is required to accept and manufacture every specialty plate that private citizens or groups request, it would lose control over the message it intends to convey. In addition to honoring Veterans with a specialty plate, a state also would have to permit plates for anti-war groups. Having accepted a plate for one civic group, states would have to accept specialty plates for the Ku Klux Klan. But such forced inclusion would undermine the State's efforts to send specific messages about the State:

Since every participating unit affects the message conveyed by the private organizers, the state courts' application of the statute produced an order essentially requiring petitioners to alter the expressive content of their parade. . . . Under this approach any contingent of protected individuals with a message would have the right to participate in [the organizers'] speech . . . [which would] violate[] the fundamental rule of protection under the First Amendment, that a speaker has the autonomy to choose the content of his own message.²³⁵

Faced with messages that the government does not endorse and that might reflect poorly on the state, state government officials would have "little choice but to refuse all such" specialty plates and, as a result, would lose its right to speak for itself and to convey its

235. *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston, Inc.*, 515 U.S. 557, 572-73 (1995).

own message regarding the state.²³⁶ But *Hurley, Johannis*, and *Summum* do not mandate any such outcome.²³⁷

Finally, even assuming *arguendo* that the SCV factors apply post-*Summum*, the district court's cursory review of the third and fourth factors ignores its own findings regarding the level of control that the South Carolina government exercises over specialty license plates. As the district court expressly notes, the DMV's policy states both that the State bears the sole responsibility for the designs on specialty plates and that the State conveys its own message through such plates: "*Designs displayed on state license plates are approved by the State . . . and are the sole responsibility of the State. . . . [T]he 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.*"²³⁸ Although a motorist may choose to display a specialty plate because she agrees with the government's message or because she adopts the plate for her own purposes, the government has authority over the entire specialty plate program, including the design, size, and wording of each specialty plate. As the district court acknowledges, the legislature also exercises veto authority over any and all specialty plates either directly or through the legislative review committee, which may "reverse[] the department's decision . . . [and] may also review all license plates

236. *Summum*, 129 S. Ct. at 1138. See also *Hurley*, 515 U.S. at 573 (citations omitted) ("[O]ne important manifestation of the principle of free speech is that one who chooses to speak may also decide 'what not to say,' Indeed this general rule, that the speaker has the right to tailor the speech, applies not only to expressions of value, opinion, or endorsement, but equally to statements of fact the speaker would rather avoid.") (internal citations omitted).

237. See, e.g., *ACLU of Tenn. v. Bredesen*, 441 F.3d 370, 376-77 (6th Cir. 2006) (noting that Tennessee has approved plates for various respected institutions but has not issued specialty plates "for groups of wide disrepute such as the Ku Klux Klan or the American Nazi Party. Plaintiffs' position implies that Tennessee must provide specialty plates for these hate groups in order for it constitutionally to provide specialty plates supporting any institution. Such an argument falls of its own weight.").

238. *Summers v. Adams*, No. 3:08-2265-CMC, 2008 WL 5401537, at *7 (D.S.C. Dec. 23, 2008) (quoting DMV Policy RG-504).

issued by the department and instruct the department to cease issuing or renewing a plate it deems offensive or fails to meet community standards.”²³⁹ Given the legislature’s control over the process, the government is the literal speaker (i.e., the entity determining and expressing *its* message) and, as its DMV policy states, bears ultimate responsibility for that message. Accordingly, even under the third and fourth prongs of the Fourth Circuit’s *SCV* test, South Carolina’s “I Believe” plate is government speech, not hybrid speech as the district court contends.

IV. *SUMMUM* AND THE ESTABLISHMENT CLAUSE — WHY FACIALLY RELIGIOUS GOVERNMENT SPEECH IS NOT SUBJECT TO THE ENDORSEMENT TEST

Although government speech is not subject to the limitations imposed by the Free Speech Clause, it is not free from any and all restraints. In particular, the Court acknowledges that “government speech must comport with the Establishment Clause.”²⁴⁰ Unfortunately, the majority opinion does not say anything else about the scope of the limitation that the Establishment Clause imposes on government speech. All that we know from *Summum* is that, given the level of control that the government exercises over monuments in public parks, the government “intends the monument to speak on its behalf.”²⁴¹ Yet if the government is speaking through a religiously themed monument, such as a monument inscribed with the Ten Commandments, the government might be viewed as engaging in religious speech that would trigger Establishment Clause review. So what happens when the government, acting as a speaker, engages in facially religious speech? In particular, what does the Establishment Clause say when the government approves a specialty license plate with a picture of a cross superimposed on a stained glass window and the words “I Believe”?

239. *Id.* at *7 n.15 (quoting S.C. CODE ANN. § 56-3-8000(F)).

240. *Summum*, 129 S. Ct. at 1132.

241. *Id.* at 1134.

The government speech doctrine developed in *Johanns* and *Summum* appears to place the government squarely in the horns of a dilemma between the protection afforded by the Free Speech Clause and the prohibition imposed by the Establishment Clause. To fall within the government speech doctrine (and, therefore, avoid the need to remain viewpoint neutral) the government must have “effective control” over the message conveyed. But if the government exercises such “final approval authority” over a message that contains facially religious speech, the government risks endorsing religion in violation of the Establishment Clause. So the threshold question is whether the Establishment Clause precludes government engagement in facially religious speech when that speech is under its complete control. And, as Justice Scalia suggests, *Summum* apparently was litigated with just this concern in mind.²⁴²

But after *Summum*, the “dilemma” is not as ominous as it might first appear. Through *Summum*, we know that public monuments, such as the Ten Commandments monument on the Texas State Capitol grounds, are government speech. Through *Van Orden*, we know that the Ten Commandments monument on the Texas Capitol grounds did not violate the Establishment Clause. Thus, while there may be a threat of an Establishment Clause violation whenever the government engages in facially religious speech, there is no automatic violation—otherwise *Van Orden* and *Marsh v. Chambers* would have turned out differently.²⁴³ Because

242. See, e.g., *id.* at 1139 (Scalia, J., concurring) (“But it is also obvious that from the start, the case has been litigated in the shadow of the First Amendment’s *Establishment* Clause: the city wary of associating itself too closely with the Ten Commandments monument displayed in the park, lest that be deemed a breach in the so-called ‘wall of separation between church and State,’ . . . ; respondent exploiting that hesitation to argue that the monument is not government speech because the city has not sufficiently ‘adopted’ its message. Respondent menacingly observed that while the city could have formally adopted the monument as its own, that ‘might of course raise Establishment Clause issues.’”) (internal citations omitted).

243. See *Van Orden v. Perry*, 545 U.S. 677, 678 (2005) (holding that a Ten Commandments monument did not violate the Establishment Clause despite its apparent religious significance); *Marsh v. Chambers*, 463 U.S. 783, 786 (1983) (permitting prayer at the start of legislative sessions).

the government did not violate the Establishment Clause at all in *Van Orden*, it necessarily did not violate the Establishment Clause simply by approving the religiously themed Ten Commandments monument. As a result, the government may engage in facially religious speech under certain circumstances without violating the Establishment Clause. The question then becomes under what circumstances facially religious speech contravenes the Establishment Clause. In particular, how should the Court determine whether South Carolina's "I Believe" specialty plate violates the Establishment Clause? We—courts, practitioners, and academics—are left to consider how *Summum* affects the Court's resolution of the dilemma going forward and which tests—endorsement, coercion, and/or no primary religious purpose—the Court will apply.

A. *Summers* takes the "I Believe" plate to constitute an impermissible endorsement of religion.

In enjoining the production and distribution of the "I Believe" plate on Establishment Clause grounds, the district court in *Summers* did not rely on *Van Orden* but instead invoked a different line of cases. According to the district court, the central issue in *Summers* with respect to the Establishment Clause was "whether the 'I Believe' plate constitutes a constitutionally prohibited state-sponsored religious display."²⁴⁴ By framing the issue in this way, the district court connected the "I Believe" plate to the Supreme Court's "display" cases, such as *Lynch v. Donnelly*,²⁴⁵ in which Justice O'Connor started articulating the features of her endorsement test.²⁴⁶ A majority of the Court adopted the endorsement test in *County of Allegheny v. American Civil Liberties Union*, retaining the key features of Justice

244. *Summers*, 2008 WL 5401537, at *5.

245. *Lynch v. Donnelly*, 465 U.S. 668, 672 (1984) (holding that a Christmas display that included a crèche as well as other traditional holiday symbols such as reindeer, candy-striped poles, a Christmas tree, carolers, a teddy bear, and hundreds of colored lights, did not violate the Establishment Clause).

246. *Id.* at 689-94 (O'Connor, J., concurring).

O'Connor's formulation.²⁴⁷ The inquiry under the endorsement test²⁴⁸ is whether the government action signals to observers that the government is conveying a message of endorsement. If a reasonable observer, aware of the history and context surrounding the government action, would view that action as conveying a message that the government favors (or disfavors) religion, then the action violates the Establishment Clause.²⁴⁹ That is, the

247. *County of Allegheny v. ACLU*, 492 U.S. 573, 592 (1989). Although the district court focuses on the endorsement test, it begins its Establishment Clause analysis with the three-factored test set forth in *Lemon v. Kurtzman*, 403 U.S. 602 (1971). As has been well documented, the *Lemon* test has been the object of much criticism from within and without the Court. See, e.g., *Edwards v. Aguillard*, 482 U.S. 578, 636 (1987) (Scalia, J. dissenting) ("I have to this point assumed the validity of the *Lemon* 'purpose' test. In fact, however, I think the pessimistic evaluation that THE CHIEF JUSTICE made of the totality of *Lemon* is particularly applicable to the 'purpose' prong: it is 'a constitutional theory [that] has no basis in the history of the amendment it seeks to interpret, is difficult to apply and yields unprincipled results. . . .'" (quoting *Wallace v. Jaffree*, 472 U.S. 38, 112 (1985) (Rehnquist, J., dissenting))). A review of these criticisms goes beyond the scope of this paper. Instead, I focus on the endorsement test on which the district court relies extensively.

248. Although the first and second prongs of the *Lemon* test are similar, they are conceptually distinct. Yet the district court appears to conflate the two. Having held that several legislators had a primarily religious purpose in sponsoring the "I Believe" Act, the court invokes the legislative history once again to show endorsement. The district court notes that two legislators introduced the bill, which was unanimously approved, and that the Lieutenant Governor stated on his state website that the "'I Believe' plate reflects core values that are meaningful to our society." *Summers*, 2008 WL 5401537, at *13. Whereas the former fact by itself fails to speak to an impermissible religious purpose, the latter statement may provide a secular basis for the "I Believe" specialty plate—the message that Christianity and certain values espoused by that religion have been and may continue to be important in South Carolina history. *Marsh*, 463 U.S. at 792 (noting that legislative prayers often are an "acknowledgement of beliefs widely held among the people of this country.").

249. See, e.g., *County of Allegheny*, 492 U.S. at 593 (holding that the Establishment clause "preclude[s] government from conveying or attempting to convey a message that religion or a particular religious belief is favored or preferred" (quoting *Wallace*, 472 U.S. at 79 (O'Connor, J. concurring) (emphasis omitted))).

endorsement test focuses on the government's message as determined by a hypothetical reasonable observer.

In applying the endorsement test, the district court suggests that, although any facially religious specialty plate may fail Establishment Clause review,²⁵⁰ a specialty plate that is sponsored and authorized by the legislature "is clearly *more* offensive to the Establishment Clause than a plate sponsored by a non-governmental non-profit organization."²⁵¹ The district court bases this conclusion on the premise that in sponsoring facially religious speech, such as the "I Believe" specialty plate, the government permits the speech for its overtly religious content. Specifically, the district court emphasizes that the government sends a message that the State approves of this particular religious group: "This is because legislative authorization signals the state's affirmation, promotion, advancement, and endorsement of the referenced religion (Christianity)."²⁵² The key factor for the district court is the government's "signaling" to a reasonable observer that the State favors one religion over others or non-religion: "legislative authorization of this plate (and no other religious plate) *signals* that the referenced religion is uniquely worthy of legislative endorsement."²⁵³ Having chosen one religion for special recognition or promotion, the government "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."²⁵⁴ Just as the State promotes tourism to third parties

250. See, e.g., *Summers*, 2008 WL 5401537, at *7 ("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.").

251. *Id.*

252. *Id.*

253. *Id.* at *13 (emphasis added).

254. *Lynch v. Donnelly*, 465 U.S. 668, 688 (1984) (O'Connor, J., concurring). For example, the district court notes that "Plaintiffs find such endorsement offensive for a variety of reasons including, as to some of them,

by printing "Travel2SC.com" on its standard-issue license plate, so too the State promotes Christianity by creating and distributing the "I Believe" specialty plate.²⁵⁵ Thus, given the expressly religious nature of the "I Believe" plate, the district court contends that "a reasonable, objective observer would likely consider that a state-issued license plate carries the endorsement of the state."²⁵⁶ The "I Believe" plate, therefore, violates the Establishment Clause.

B. Summum's control test precludes application of the endorsement test to facially religious government speech.

The purpose of this section is to begin exploring the interaction between the government speech doctrine and the Establishment Clause and to see how this "recently minted" speech doctrine alters the Court's Establishment Clause analysis. In particular, I focus on South Carolina's "I Believe" specialty plate, which (as I argue above) is government speech under *Summum*. Whereas the district court took the Free Speech and Establishment Clause inquiries to be separate and distinct, I contend that after *Summum*, the Free Speech inquiry is logically prior to the Establishment Clause inquiry. One must know whether the speech is government speech to know which Establishment Clause test to apply. If the government is speaking and controls the content of its

that it suggests their chosen religion is less favored than the particular Christian denominations which might approve of and be represented by the 'I Believe' plate." *Summers*, 2008 WL 5401537, at *10.

255. *Summers*, 2008 WL 5401537, at *13.

256. *Id.* Interestingly, to support this claim, the district court cites to the DMV policy RG-504. The policy states that: "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." SOUTH CAROLINA DEPARTMENT OF MOTOR VEHICLES, POLICY RG-504 SPECIALIZED PLATES FOR ORGANIZATIONS (2009), available at <http://www.scdmvonline.com/dmvnew/forms/RG-504.pdf>. Under *Summum*, the fact that specialty plates are the "sole responsibility" of the State reinforces the view that such plates are government speech such that the government has control over the message and may send its preferred message even though others may interpret that message in various ways. *Pleasant Grove City v. Summum*, 129 S. Ct. 1125, 1133 (2009).

own message, the endorsement test, upon which the district court in *Summers* relied so heavily, does not apply.

Although questioning the viability of the endorsement test in relation to government speech may sound sacrilegious, it is not as radical as it may first appear. In fact, Justice O'Connor, who crafted the endorsement test, expressly acknowledged that not all of the Court's Establishment Clause tests apply to every alleged Establishment Clause violation: "Experience proves that the Establishment Clause, like the Free Speech Clause, cannot easily be reduced to a single test."²⁵⁷ And this is consistent with the Court's practice, applying specific tests in certain situations but not others.²⁵⁸ Accordingly, there should be nothing alarming about a specific Establishment Clause test, which was developed in the context of display cases, not applying in a different context, namely, government speech: "The Court today does only what courts must do in many Establishment Clause cases—focus on specific features of a particular government action to ensure that it does not violate the Constitution."²⁵⁹ That the government speech doctrine creates a situation to which the endorsement test does not apply, therefore, is simply an instantiation of the general rule that not all Establishment Clause tests apply to all circumstances.

1. The reasonable observer test is inconsistent with the government's right to determine its own message.

To understand why the endorsement test does not apply to government speech, one must recall the Free Speech foundation of the doctrine. Under *Summum*, the government, as speaker, has the right to "say what it wants" without regard for the viewpoints of

257. *Bd. of Educ. of Kiryas Joel Vill. Sch. Dist. v. Grumet*, 512 U.S. 687, 720 (1994) (O'Connor, J., concurring in part and concurring in judgment).

258. *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 299, 307, 311 (2000) (applying the no endorsement test, the no primary religious purpose test, and the coercion test); *Lee v. Weisman*, 505 U.S. 577, 587 (1992) (applying the coercion test); *Lemon v. Kurtzman*, 411 U.S. 192 (1973) (developing and applying the *Lemon* test).

259. *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819, 852 (1995) (O'Connor, J., concurring).

others. Because the government has “effective control” over the content of the speech, it need not worry about the objections of those who disagree with its message. The government may communicate its message even if others disagree with or misunderstand that message—subject, of course, to the constraints imposed by the Establishment Clause and the political process. But, as *Summum* explains, the government’s intended message may differ significantly from how others interpret that message: “These text-based monuments are almost certain to evoke different thoughts and sentiments in the minds of different observers, and the effect of monuments that do not contain text is likely to be even more variable.”²⁶⁰

At a general level, then, the endorsement test does not mesh well with facially religious government speech because it focuses on the wrong person in the communicative process—the observer instead of the speaker.²⁶¹ Instead of analyzing what is critical in the government speech context—the *government’s* intended message—the endorsement test considers the message that a reasonable observer, who is aware of the history and context, would attribute to the government. In so doing, the endorsement test presupposes a premise that *Summum* rejects—that the government’s message can be determined by the meaning that others attribute to the government, i.e., as *Summers* puts it, the meaning that the legislature “signals” to others.²⁶² Contrary to the

260. *Summum*, 129 S. Ct. at 1135.

261. In *County of Allegheny*, the Court held that a crèche on the grand staircase of a government building constituted an endorsement of religion. 492 U.S. 573, 579 (1989). Although it applied the endorsement test, the Court did not consider the effect of the government speech doctrine on its Establishment Clause analysis. Under the view developed in this section, if the crèche was government speech, then it still may have violated the Establishment Clause, but the inquiry would be whether the government had an impermissible primary purpose of establishing religion, not how a reasonable observer might interpret (or misinterpret) the government’s message.

262. Moreover, even if the endorsement test applies to government speech, the district court fails to apply the test properly. Under the endorsement test, one does not look at the specific legislative authorization in isolation; rather, one must consider the message sent within the context of the larger specialty plate program. For example, in *County of Allegheny*, the

district court's view, though, *Summum* recognizes that "it frequently is not possible to identify a single 'message' that is conveyed by an object or structure, and consequently, the thoughts or sentiments expressed by a government entity that accepts and displays such an object may be quite different from those of either its creator or its donor."²⁶³ Similarly, an observer (even a reasonable one) might attribute a variety of different meanings to the government, as the Court acknowledges in its discussion of "Imagine" in New York City.²⁶⁴ Given that monuments "evoke different thoughts and sentiments in the minds of different observers," whether government speech violates the Establishment Clause must be determined by looking at what the government intended, not at how others interpret (or misinterpret) it.²⁶⁵ After all, when speaking the government "has the right 'to speak for itself' . . . and to select the views that it wants to express."²⁶⁶ That is,

Court distinguished the multifaceted display in *Lynch* from the solitary crèche display on the grand staircase: "[T]he effect of a crèche display turns on its setting. . . . The *Lynch* display comprised a series of figures and objects, each group of which had its own focal point. . . . Here, in contrast, the crèche stands alone: it is the single element of the display on the Grand Staircase." *County of Allegheny*, 492 U.S. at 598.

263. *Summum*, 129 S. Ct. at 1136 ("By accepting such a monument, a government entity does not necessarily endorse the specific meaning that any particular donor sees in the monument.").

264. *Id.* at 1135.

265. *Id.* The concern that I have here is reflected in Justice Scalia's criticism of the majority opinion in *McCreary*. See *McCreary County v. ACLU*, 545 U.S. 844, 901 (2005) (Scalia, J., dissenting) (stating that the no primary religious purpose test is not consistent with the reasonable observer test because "the legitimacy of a government action with a wholly secular effect would turn on the *misperception* of an imaginary observer that the government officials behind the action had the intent to advance religion."). Of course, Justice Scalia is not a supporter of the *Lemon* test generally or the purpose prong in particular. See, e.g., *Edwards v. Aguillard*, 482 U.S. 578, 636 (1987) (Scalia, J. dissenting) (noting that the *Lemon* "purpose" test is not derived from the history of the First Amendment nor is its application useful). Yet the Court has repeatedly used the no primary religious test, and, as I argue above, *Summum* requires its application in the government speech context.

266. *Summum*, 129 S. Ct. at 1131 (quoting *Bd. of Regents of Univ. of Wis. Sys. v. Southworth*, 529 U.S. 217, 229 (2000)).

it has the right to accept and display a particular specialty plate or monument “for the purpose of presenting the image of the [State] *that it wishes to project to all who*” view it.²⁶⁷ Thus, under *Summum*, the focus is not on what a monument may “signal” to the donor or observer of a religiously-themed monument but on the government’s reasons for approving the monument and displaying it in a public park.

Yet there is another reason why the “reasonable observer” test is an improper lens through which to judge whether government speech violates the Establishment.²⁶⁸ If a court requires the government to convey only those messages that a reasonable observer would view as neutral towards religion, the government loses the “right to ‘speak for itself.’” Instead of “say[ing] what it wishes,”²⁶⁹ the government is forced to filter its speech to account for how the reasonable observer might interpret the message—even though, as *Summum* states, such an observer may interpret the message differently from how the government intended. For example, in *Van Orden*, the plurality held that there was no Establishment Clause violation because Texas agreed to display the Ten Commandments monument to convey an historical

267. *Id.* at 1134 (emphasis added).

268. In *Summum*, Pleasant Grove City stated that “its practice was to limit monuments in the Park to those that ‘either (1) directly relate to the history of Pleasant Grove, or (2) were donated by groups with longstanding ties to the Pleasant Grove community.’” *Id.* at 1130. The City ultimately passed a resolution that formalized this policy and made it express. *Id.* Thus, given these secular reasons for adopting monuments—whether religiously themed, such as the Ten Commandments, or not—the City’s message did not violate the Establishment Clause. *Id.* at 1139 (Scalia, J., concurring) (“The city ought not fear that today’s victory has propelled it from the Free Speech Clause frying pan into the Establishment Clause fire. Contrary to respondent’s intimations, there are very good reasons to be confident that the park displays do not violate *any* part of the First Amendment.”).

269. *Id.* at 1131 (quoting *Bd. of Regents of Univ. of Wis. Sys. v. Southworth*, 529 U.S. 217, 229 (2000) and *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819, 833 (1995)). See also *Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Boston, Inc.*, 515 U.S. 557, 573 (1995) (noting that “a speaker has the autonomy to choose the content of his own message”).

message.²⁷⁰ The dissenting Justices argued that there was an Establishment Clause problem because a reasonable observer would view the monument as an endorsement of religion.²⁷¹ But, as the split among the Justices demonstrates, reasonable observers—in this case, the Justices on the Court—may attribute different messages to the government, all of which may differ from the government's intended message. Accordingly, if the government must worry about how third party observers interpret its message, then it loses effective control over its own message. But this undermines the foundation of the government speech doctrine itself. Instead of the government's dictating the content of its own message, the government must adapt its message to account for how a third-party reasonable observer would interpret that message.

Put differently, *Summum* tells us that government speech falls outside the Court's traditional forum analysis, thereby altering both the Free Speech and Establishment Clause analyses. In a forum opened up to expressive conduct by private persons, the government is not speaking. Rather, the government serves as a monitor or forum-regulator that cannot discriminate based on content and/or viewpoint (depending on the nature of the forum):

When a university requires its students to pay fees to support the extracurricular speech of other students, all in the interest of open discussion, it may not prefer some viewpoints to others Viewpoint neutrality is the justification for requiring the student to pay the fee in the first instance and for ensuring the integrity of the program's operation once the funds have been collected.²⁷²

Having opened the forum to others, the government is not allowed to skew the debate.²⁷³ Because the government is not itself

270. *Van Orden v. Perry*, 545 U.S. 677, 688-89 (2005).

271. *Id.* at 718 (Stevens, J., dissenting)

272. *Southworth*, 529 U.S. at 233.

273. This also explains why the government is not allowed to engage in viewpoint discrimination in a traditional or designated public forum. Because

engaging in expressive conduct in a forum, it has no right to control the message of private speakers in the forum. The government, therefore, must remain neutral between and among the private speakers that use the forum. Given that the government's intent is not controlling, the Court considers whether a reasonable and fully informed observer would take the government action to convey a message of endorsement, i.e., a message that religion or a particular sect is preferred.²⁷⁴

As a speaker, though, the government can engage in content-based and viewpoint-based discrimination,²⁷⁵ selecting its

the government has opened up the forum to public discourse on some or possibly all topics, the government is not allowed to restrict subsequent speech in ways that are inconsistent with the purported scope of the forum: "Accordingly, the prohibition on viewpoint discrimination serves that important purpose of the Free Speech Clause, which is to bar the government from skewing public debate. Other things being equal, viewpoint discrimination occurs when government allows one message while prohibiting the messages of those who can reasonably be expected to respond." *Rosenberger*, 515 U.S. at 894 (Souter, J., dissenting). See also *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 785-86 (1978) ("Especially where . . . the legislature's suppression of speech suggests an attempt to give one side of a debatable public question an advantage in expressing its views to the people, the First Amendment is plainly offended."); *Madison Joint Sch. Dist. No. 8 v. Wis. Employment Relations Comm'n*, 429 U.S. 167, 175-76 (1976) ("To permit one side of a debatable public question to have a monopoly in expressing its views . . . is the antithesis of constitutional guarantees.").

274. See, e.g., *County of Allegheny v. ACLU*, 492 U.S. 573, 630, 635-36 (1989) (O'Connor, J., concurring in part and concurring in judgment) (noting that a crèche and menorah placed in Pittsburgh did not have the effect of endorsing either Christianity or Judaism).

275. *Summum*, 129 S. Ct. at 1131-32 (setting out the traditional rules governing public fora and contrasting those rules with the government speech doctrine pursuant to which the government may "say what it wishes," . . . and . . . select the views that it wants to express") (quoting *Rosenberger*, 515 U.S. at 833). See also *Southworth*, 529 U.S. at 235, in which the Court distinguishes government speech from the viewpoint neutrality requirement governing student fees used to support the extracurricular speech of other students as part of a designated forum: "Where the University speaks, either in its own name through its regents or officers, or in myriad other ways through its diverse faculties, the analysis likely would be altogether different. The Court has not held, or suggested, that when the government speaks the rules we have

own message without providing equal access to other viewpoints on the same topic: “A government entity has the right . . . to select the views that it wants to express.”²⁷⁶ But given that the government may discriminate based on viewpoint, it is not surprising that a third party observer—even a reasonable one—might think that her viewpoint and her standing in the community is being ignored (or that another viewpoint is being advanced). That just is the “benefit” that the government seeks by engaging in its own speech—the ability to advance its own views and policies free from a “heckler’s veto.” Because the government does not create a forum when speaking, the government may craft its message to communicate “the image of the [State] that it wishes to project”²⁷⁷ regardless of how a reasonable observer subsequently interprets that message.

2. The no primary religious purpose test is a substantive check on facially religious government speech.

Of course, one might wonder whether the government speech doctrine renders the Free Speech analysis co-extensive with the Establishment Clause analysis when the government engages in facially religious speech. A finding that facially religious speech is government speech would end the Establishment Clause inquiry because, so the argument goes, the government as speaker is free to discriminate based on viewpoint, even religious viewpoint. In fact, Justice Souter suggests that the Court might adopt such a position in his concurrence in *Summum*:

But the government could well argue, as a development of government speech doctrine, that when it expresses its own views, it is free of the Establishment Clause’s stricture against

discussed [regarding viewpoint neutrality] come into play.” *Id.* (citation omitted).

276. *Summum*, 129 S. Ct. at 1131 (internal citations omitted); *Nat’l Endowment for Arts v. Finley*, 524 U.S. 569, 598 (1998) (Scalia, J., concurring in judgment) (“It is the very business of government to favor and disfavor points of view . . .”).

277. *Summum*, 129 S. Ct. at 1134.

discriminating among religious sects or groups. Under this view of the relationship between the two doctrines, it would be easy for a government to favor some private religious speakers over others by its choice of monuments to accept.²⁷⁸

Under Justice Souter's proposal, the government would have broad discretion not only to choose which message to convey but also to promote religion or one sect over another.²⁷⁹

Yet there are at least two reasons to doubt that the Court will adopt such a position post-*Summum*. First, permitting the government intentionally to favor one religious group over another contradicts the explicit holding in *Summum* that the Establishment Clause restrains government speech. Under Justice Souter's proposal, the government could advance whatever religious view that it wanted—free from the strictures of the Free Speech and Religion Clauses—provided only that it controlled the message and engaged in expressive activity. But this broad authority undermines the Court's view in *Summum* that government speech must comport with the Establishment Clause, and the Court, therefore, is apt to reject this line of argument. Second, this line of reasoning is inconsistent with how the Court has handled cases, such as *Van*

278. *Id.* at 1142 (Souter, J., concurring).

279. Justice Souter acknowledges that the Court leaves open, and leaves us to speculate about, the contours of the Establishment Clause restrictions on government speech: "It is simply unclear how the relatively new category of government speech will relate to the more traditional categories of Establishment Clause analysis, and this case is not an occasion to speculate." *Id.* Undaunted, though, Justice Souter proceeds to proffer a test for government speech—a reasonable observer test—that "is of a piece with" the endorsement test: "[T]he best approach that occurs to me is to ask whether a reasonable and fully informed observer would understand the expression to be government speech, as distinct from private speech the government chooses to oblige by allowing the monument to be placed on public land." *Id.* According to Justice Souter, one benefit of this test is that "it would thus serve coherence within Establishment Clause law," thereby suggesting strongly that, even though we do not know the exact contours of the government speech doctrine's effect on the Establishment Clause, the government speech doctrine does not supplant the endorsement test. *Id.* Because the endorsement test does not apply, the symmetry that Justice Souter seeks is illusory.

Orden, where the Court has allowed government speech that may appear facially religious to a third-party observer. In *Van Orden*, the Court did not say that the Ten Commandments monument was constitutional because the government could discriminate against other religions. Instead, the majority looked to see if the government had a secular or non-religious reason for displaying the monument. Where, as in *Van Orden*, a secular reason serves as the impetus for the government's facially religious speech, there is no Establishment Clause violation. But the Court did not suggest, let alone hold, that the government may engage in facially religious speech for the express purpose of promoting certain religious view or speakers over others.

Thus, the government speech doctrine, while incompatible with the endorsement test, does not render the Establishment Clause superfluous with respect to government speech.²⁸⁰ Rather, by stating that "government speech must comport with the Establishment Clause,"²⁸¹ *Summum* imposes a substantive check on government speech that is separate and distinct from the Court's Free Speech analysis. Because government speech falls outside the Court's forum analysis, the Court must focus on the government's *intent*, i.e., the reasons why the government conveyed a facially religious message, to determine whether it had a permissible secular purpose. Although "a union of government and religion tends to

280. Not all of the Justices have embraced the endorsement test, which is yet another reason why a majority of the current Court may be inclined not to apply the test to government speech. In fact, the dissenters in *County of Allegheny* expressly rejected the test, arguing that it reflected "an unjustified hostility toward religion." 492 U.S. 573, 655 (1989) (Kennedy, J., concurring in judgment in part and dissenting in part). In its place, the dissenters argued for a more limited test: "government may not coerce anyone to support or participate in any religion or its exercise; and it may not, in the guise of avoiding hostility or callous indifference, give direct benefits to religion in such a degree that it in fact 'establishes a [state] religion or religious faith, or tends to do so.'" *Id.* at 659. But "[n]oncoercive government action within the realm of flexible accommodation or passive acknowledgement of existing symbols does not violate the Establishment Clause unless it benefits religion in a way more direct and more substantial than practices that are accepted in our national heritage." *Id.* at 662-63.

281. *Summum*, 129 S. Ct. at 1132.

destroy government and to degrade religion,”²⁸² *Van Orden* indicates that the government may engage in facially religious speech without, *ipso facto*, creating such an impermissible union. In fact, where the government engages in facially religious speech for non-religious reasons, the requirements of the Establishment Clause are met.

Because the government is no longer merely facilitating speech but engaging in it, the operative question shifts from who is speaking—private party or the government—to what message did the government intend to convey:

If there is to be assurance that the Establishment Clause retains its force in guarding against those governmental actions it was intended to prohibit, we must in each case inquire first into the purpose and object of the governmental action in question and then into the practical details of the program's operation.²⁸³

The investigation into the “purpose and object” of facially religious government speech is just an inquiry into the intent behind the government’s message. And although the endorsement test is not well suited for this task, the Court’s no primary religious purpose test is. Under this test, the government may not engage in facially religious speech if the “pre-eminent purpose” is religious.²⁸⁴ Because the no primary religious purpose test focuses on whether the government’s actual purpose is to endorse or disapprove religion, it tracks the distinguishing feature of the government speech doctrine—the government’s right to determine its own message. Thus, as a speaker, the government violates the Establishment Clause not simply by engaging in facially religious speech but by engaging in such speech for the purpose of promoting or advancing religion. That is, facially religious government speech violates the Establishment Clause only when the government

282. *Engel v. Vitale*, 370 U.S. 421, 431 (1962).

283. *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819, 838-39 (1995).

284. *Stone v. Graham*, 449 U.S. 39, 41 (1980).

expressly adopts facially religious speech as its own and does so for religious reasons.

As a result, to survive Establishment Clause review, the government must have a non-religious reason for engaging in the facially religious speech. But not any proffered secular justification is sufficient. As the Court held in *Edwards*, the government's proposed justification must "be sincere and not a sham."²⁸⁵ In *Edwards*, the Court struck down Louisiana's Balanced Treatment for Creation-Science and Evolution-Science in Public School Instruction Act because it concluded that "[t]he preeminent purpose of the Louisiana Legislature was clearly to advance the religious viewpoint that a supernatural being created humankind."²⁸⁶ In contrast, the plurality in *Van Orden* held that the Ten Commandments monument on the Texas Capitol grounds did not violate the Establishment Clause because it had "'an undeniable historical meaning' in addition to [its] 'religious significance.'"²⁸⁷ Thus, as these cases demonstrate, to survive Establishment Clause review, the government speaker must not engage in facially religious speech with the primary purpose of advocating the religious component of the speech.

Under *Summum*, then, the constitutionality of the "I Believe" plate hinges on the intent of the South Carolina legislature, not on the endorsement test, as the district court in *Summers* thought. Accordingly, the lower court's reliance on *McCreary* is misplaced.²⁸⁸ Although the Court held the Ten Commandments display unconstitutional in *McCreary*, it did so based on the government's having an impermissible primary religious purpose. The Court stated that "[w]hen the government

285. *Edwards v. Aguillard*, 482 U.S. 578, 587 (1987).

286. *Id.* at 591.

287. *Pleasant Grove City v. Summum*, 129 S. Ct. 1125, 1140 (2009) (Scalia, J., concurring) (quoting *Van Orden v. Perry*, 545 U.S. 677, 690 (2005)).

288. *Summers v. Adams*, No. 3:08-2265-CMC, 2008 WL 5401537, at *12 (D.S.C. Dec. 23, 2008) ("There are, however, numerous cases suggesting that government action of a similar nature violates the Establishment Clause."). See, e.g., *McCreary County v. ACLU*, 545 U.S. 844 (2005) (holding that Ten Commandment displays in Kentucky courthouses were impermissible endorsement of religion).

acts with the ostensible and predominant purpose of advancing religion, it violates th[e] central Establishment Clause value of official religious neutrality, there being no neutrality when the government's ostensible object is to take sides."²⁸⁹ But the majority in *McCreary* went on to conflate the primary purpose inquiry and the reasonable observer test. Because a reasonable observer would view the iteration of Ten Commandments displays at the courthouse as demonstrating a "continuing religious object," the Court found the displays unconstitutional.²⁹⁰ The problem is that the two inquiries are conceptually distinct:

Because in the Court's view the true danger to be guarded against is that the objective observer would feel like an "outside[r]" or "not [a] full membe[r] of the political community," its inquiry focuses not on the *actual purpose* of government action, but the "purpose apparent from the government action." Under this approach, even if a government could show that its actual purpose was not to advance religion, it would presumably violate the Constitution as long as the Court's objective observer would think otherwise.²⁹¹

Although the government may be said to endorse religion when it acts with a primarily religious purpose, the Court, not a reasonable observer, must determine whether the government's actual motive was improper. Thus, the reasonable observer test is separate from the no primary religious motive test, even though courts sometimes use "endorsement" to refer to both.

With respect to the "I Believe" specialty plate in South Carolina, there is no doubt that the government speech is facially religious. The Establishment Clause claim, therefore, centers on whether the South Carolina legislature had a primarily religious motive for adopting this plate. The inquiry into the government's intent requires the Court to look at the actual intent, not the intent

289. *McCreary*, 545 U.S. at 860.

290. *Id.* at 848.

291. *Id.* at 900-01 (Scalia, J., dissenting) (citation omitted).

of the sponsor of a specialty plate. Even though the Fraternal Order of Eagles may have had expressly religious reasons for donating the monument, the *Van Orden* Court did not automatically attribute those religious reasons to the government. Rather, a majority of the Court—the plurality and Justice Breyer—recognized that the government might have non-religious reasons for displaying such Judeo-Christian monuments.²⁹² And *Summum* suggests that a majority of the current Court is likely to sympathize with the plurality's opinion in *Van Orden*. Since *Van Orden*, Justice Alito, the author of the primary opinion in *Summum*, replaced Justice O'Connor, one of the dissenters in *Van Orden*. Thus, if Justice Alito agrees with the accommodationists on the Court that facially religious speech may have “an undeniable historical meaning,” then there are five Justices who think that the Establishment Clause permits the government to engage in facially religious speech so long as it has a permissible secular motive.

Moreover, if a legislator or a non-profit group proposes, and the legislature subsequently adopts, a specialty plate that contains a facially religious symbol or message, *Summum* precludes imputing that impermissible religious message to the government without evidence that the government entity had a primarily religious motivation in adopting the specialty plate:²⁹³

292. *Van Orden v. Perry*, 545 U.S. 677, 690 (2005) (Rehnquist, C.J., writing for plurality) (holding that the Ten Commandments monument did not violate the Establishment Clause because the Ten Commandments “have an undeniable historical meaning” as well as their “religious significance”); *Summum*, 129 S. Ct. at 1130 (noting that the City had a policy limiting monuments in the Park to those relating to the City's history or donated by groups with longstanding ties to the community).

293. *Summum*, 129 S. Ct. at 1136. Under South Carolina's specialty license plate program, 400 individuals must sign up to purchase a particular plate before production is started. S.C. CODE ANN. § 56-3-8100 (2006 & West Supp. 2009). These 400 participants in the program are similar to the numerous private donors that may contribute to a private monument that is subsequently donated to the government. Although each of the participants/donors may ascribe a certain meaning to the plate/monument, the government might not endorse any one of their intended messages: “[W]hen a privately donated memorial is funded by many small donations, the donors themselves may differ in their interpretation of the monument's significance. By accepting such a monument, a government entity does not necessarily

[A] painting of a religious scene may have been commissioned and painted to express religious thoughts and feelings. Even if the painting is donated to the museum by a patron who shares those thoughts and feelings, it does not follow that the museum, by displaying the painting, intends to convey or is perceived as conveying the same “message.”²⁹⁴

Just as a public museum may accept and display a “religious” painting without violating the Establishment Clause, so too may the government approve and distribute a facially religious license plate, such as the “I Believe” plate, without violating the First Amendment. Otherwise, the government’s acceptance and display of the Ten Commandment monuments in *Van Orden* would have created an Establishment Clause violation. But it did not. Similarly, although Wide Awake engaged in overtly religious speech in the limited forum created at the University of Virginia, it is possible that the State could have adopted Wide Awake’s speech without “endorsing” or promoting religion (e.g., if it had a secular reason for including this speech as part of its own message).²⁹⁵ If, however, the State adopted the religious speech for the purpose of

endorse the specific meaning that any particular donor sees in the monument.” *Summum*, 129 S. Ct. at 1136.

294. *Summum*, 129 S. Ct. at 1136 n.5.

295. Here again, the claim is only that it is conceptually possible under *Summum* and *Van Orden* that the State could adopt facially religious speech for one or more non-religious reasons. After all, even though Wide Awake’s materials expressed a distinctly Christian viewpoint, the same was said about the Ten Commandments monuments, which continue to be displayed on the Texas Capitol grounds and in Pioneer Park. Yet the Court held that the monument in *Van Orden* did not violate the Establishment Clause, and there is good reason to assume that the Court would hold the same with respect to the similar monument in Pioneer Park. See, e.g., *id.* at 1140 (Scalia, J., concurring) (“Even accepting the narrowest reading of the narrowest opinion necessary to the judgment in *Van Orden*, there is little basis to distinguish the monument in this case The city can safely exhale. Its residents and visitors can now return to enjoying Pioneer Park’s wishing well, its historic granary—and, yes, even its Ten Commandments monument—without fear that they are complicit in an establishment of religion.”).

promoting or advancing religion, then the State would violate the no primary religious purpose test.

Of course, whether the South Carolina legislature had a primarily religious purpose is a factual inquiry that the district court did not undertake in any level of detail. Instead of analyzing the possible secular purposes with which the legislature might have acted, the district court appears to take the “very appearance of the plate, with its Christian symbols and images, and the corresponding words ‘I Believe’” to violate the Establishment Clause.²⁹⁶ In support of its position, the district court cites to a Fourth Circuit case, *Mellen v. Bunting*, for the proposition 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.”²⁹⁷ Given the expressly religious nature of the “I Believe” plate, the district court rejects the State’s claim that the purpose of the “I Believe” specialty plate is “to provide South Carolina motorists with another message that they can elect to convey when selecting from over one hundred available specialty license plates.”²⁹⁸ According to the lower court, the facially religious

296. *Summers v. Adams*, No. 3:08-2265-CMC, 2008 WL 5401537, at *12 (D.S.C. Dec. 23, 2008).

297. *Mellen v. Bunting*, 327 F.3d 355, 373 (4th Cir. 2003).

298. *Summers*, 2008 WL 5401537, at *12 (quoting Defendants’ Responsive Brief to Motion for Preliminary Injunction). The State’s alleged purpose might suggest that the specialty license plate forum is a designated limited forum designed to permit motorists to convey their own messages. But, as discussed above, the South Carolina legislature retains complete control over the content and display of the message, which under *Summum* and *Johanns* makes the speech government speech. Under *Summum*, a State legislature might contend more effectively that each specialty plate that is approved is part of a larger message regarding the history and beauty of the State and/or the diversity and accomplishments of its citizenry. In this way, the legislature could argue that specialty plates are like monuments in that “[g]overnment decisionmakers select the [specialty plates] that portray what they view as appropriate for the place in question, taking into account such content-based factors as esthetics, history, and local culture The [government] has selected those [license plates] that it wants to display for the purpose of presenting the image of the [State] that it wishes to project to all who” see the specialty license plates. *Summum*, 129 S. Ct. at 1134 (discussing the monuments in public parks at issue in that case). If the government

nature of the specialty plate is sufficient to create an Establishment Clause violation. The fact that the “I Believe” plate includes a Latin cross on a stained glass window serves only to magnify the nature of that violation: “Although *any* such message would likely violate the Establishment Clause, the legislature’s decision to select a single (majority) religion for such treatment exacerbates the violation.”²⁹⁹

Contrary to the district court’s analysis, though, the no primary religious purpose test does not preclude any and all facially religious speech, which is why the “overtly and singularly religious nature” of the Ten Commandments monument did not give rise to an Establishment Clause violation in *Van Orden*. With respect to the “I Believe” plate, the district court must look beyond the appearance of the plate to consider the legislative purpose. Although, as the Supreme Court has recognized, determining legislative intent is a difficult business,³⁰⁰ the Supreme Court has undertaken such analysis in the past,³⁰¹ and *Sumnum* now requires lower courts to do so when the government speech doctrine is

disclaimed the message and gave its motorists authority to design and to display their own messages, then the case would be much closer to *Rosenberger*, in which a limited forum was created and the government lacked “effective[] control[]” and “final approval authority.” *Id.* But such is not the case in South Carolina, where the government—through the General Assembly, DMV, and the legislative review committee—retains complete control over the specialty license plate program.

299. *Summers*, 2008 WL 5401537, at *12.

300. *Edwards v. Aguillard*, 482 U.S. 578, 636-37 (1987) (Scalia, J., dissenting) (noting that the application of the “purpose” test has caused confusion as to what statutes violate the Establishment Clause); *United States v. O’Brien*, 391 U.S. 367, 383 (1968).

301. See, e.g., *McCreary v. ACLU*, 545 U.S. 844 (2005) (holding that the displays of the Ten Commandments in Kentucky courthouses did not have a secular purpose and thus violated the Establishment Clause); *Edwards*, 482 U.S. 578 (holding that the Louisiana statute permitting the teaching of evolution only if creationism was also taught had a religious purpose); *Stone v. Graham*, 449 U.S. 39 (1980) (noting that the purpose of a Kentucky statute requiring that the Ten Commandments be posted on the walls of all classrooms in the state was religious); *Epperson v. Arkansas*, 393 U.S. 97 (1968) (noting Arkansas’ rationale for a statute prohibiting teaching evolution in public schools).

implicated. Post-*Summum*, courts cannot simply rely on the facially religious nature of the speech—i.e., “the very appearance of the plate”—when resolving an Establishment Clause challenge because the government’s reasons for accepting a monument may differ significantly from the meaning that a donor or observer ascribes to the monument. Instead of focusing on the words or symbols used, the control test requires courts to evaluate the government’s intent.

The district court’s reasoning in *Summers*, therefore, is inconsistent with the Court’s holdings in *Van Orden* and *Summum*. To the extent that the district court considers legislative intent at all, it looks at only those “religious” comments that certain sponsoring legislators made without considering possible secular reasons that these or other legislators had for adopting the “I Believe” plate.³⁰² For example, the court cited to newspaper reports relating to three South Carolina legislators, one of whom allegedly said that he would not support a specialty plate for Islam, another that he did not consider Wicca a religion, and the third that he “would be very uncomfortable” with a Scientology plate.³⁰³ While it may be relevant that a specific legislator would or would not support a specialty license plate for other religions, it is not dispositive under *Summum*. Even if true, these statements do not, by themselves, give insight into the legislators’ answers to the underlying question as to why each legislator would not support such specialty plates. Each of the officials or the legislature as a whole might reject other religious plates because the allegedly “disfavored” religions do not have a strong connection to the history of the State or fail to meet other secular criteria.

Under *Summum*, though, the type of reason—secular or religious—makes a constitutional difference when evaluating the impact of the Establishment Clause on facially religious government speech. If the evidence shows that the South Carolina legislature approved the “I Believe” plate for the purpose of advancing mainstream Christianity over other religions, then there would be an Establishment Clause violation. On the other hand, if certain legislators or the legislature as a whole approved the “I

302. See *Summers*, 2008 WL 5401537, at *12.

303. *Id.* at *12 n.24.

Believe” plate for non-religious reasons—e.g., a tribute to the historical or cultural role that Christianity played in the State—then, as with Ten Commandments monuments on the Texas Capitol grounds, the decision to accept and display the religiously themed specialty plate would not violate the Establishment Clause.³⁰⁴ With respect to the “I Believe” license plate, then, the South Carolina legislature may issue a license plate relating directly to the religious beliefs of some of its citizens under the plurality’s view in *Van Orden* provided there is some historical significance (or other secular, non-religious) purpose. As in *McCreary* and *Van Orden*, the outcome will vary with the particular facts of each case.

Alternatively, even if the endorsement test applies to government speech, there is reason to think that the “I Believe” license plate is constitutional. The defendants argued (unsuccessfully) that, because the “I Believe” plate is one of more than 110 specialty plates available to South Carolina motorists, a reasonable observer, who is aware of the specialty program, would know that South Carolina offers a variety of specialty plates and is not promoting “I Believe” as its only (and singularly religious) message.³⁰⁵ In rejecting this view, the district court emphasized that South Carolina offered at most two religious plates—the “I Believe” plate and the “In Reason We Trust” plate. The court discounts the latter because (i) the “In Reason We Trust” plate is not readily traceable to the Secular Humanists, and (ii) it was approved through the DMV process (although given that the legislative review committee retains veto power over all plates, it is not clear why this is significant). The district court discounts the “In God We Trust” plate because, under the Supreme Court’s precedent, the national motto lacks religious content. Thus, because there are no other overtly religious plates, the district court contends that the government is endorsing Christianity.

304. See, e.g., *Pleasant Grove City v. Summum*, 129 S. Ct. 1125, 1140 (2009) (Scalia, J., concurring) (noting that in *Van Orden* “all the Justices agreed that government speech was at issue, but the Establishment Clause argument was nonetheless rejected . . . because [for the plurality] the Ten Commandments ‘have an undeniably historical meaning’ in addition to their ‘religious significance.’”).

305. *Summers*, 2008 WL 5401537, at *13 n.25.

Yet if the specialty plate program is subject to the endorsement test, then a court must consider the entire program, just as the Supreme Court considered the entire display in *Lynch v. Donnelly*:

Although the religious and indeed sectarian significance of the crèche . . . is not neutralized by the setting, the overall holiday setting changes what viewers may fairly understand to be the purpose of the display—as a typical museum setting, though not neutralizing the religious content of a religious painting, negates any message of endorsement of that content.³⁰⁶

Even if the “I Believe” plate is the only religious specialty plate, that plate cannot be viewed in isolation. The reasonable observer must consider the “I Believe” plate in the context of the specialty program as a whole. And when considered in this light, the reasonable observer may have a more difficult time deciding that the overall message is one of endorsement that would violate the Establishment Clause. As in *Rosenberger*, “[t]he governmental program here is neutral toward religion. There is no suggestion that the [government] created it to advance religion or adopted some ingenious device with the purpose of aiding a religious cause.”³⁰⁷ There is no evidence mentioned in the district court’s opinion that in approving the “I Believe” specialty plate the legislators who proposed that plate, let alone the entire South Carolina legislature, conveyed a message of endorsement. Moreover, the “I Believe” plate is only one out of more than 110 specialty plates that South Carolina offers. The number and variety of specialty plates are similar to the “17 monuments and 21 historical markers commemorating the ‘people, ideals, and events that compose Texan identity.’”³⁰⁸ Given the context in *Van Orden*, Justice Breyer concurred in the judgment, holding that “[t]he

306. *Lynch v. Donnelly*, 465 U.S. 668, 692 (1984) (O’Connor, J., concurring).

307. *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819, 840 (1995).

308. *Van Orden v. Perry*, 545 U.S. 677, 681 (2005).

circumstances surrounding the display's placement on the capitol grounds and its physical setting suggest that the State itself intended the latter, nonreligious aspects of the tablets' message to predominate."³⁰⁹ And the same may be said for the "I Believe" plate. "The widely divergent viewpoints of these many purveyors of opinion, all supported on an equal basis by the [government], significantly diminishes the danger that the message of any one publication is perceived as endorsed by the [government]."³¹⁰ Thus, given that the monument in *Van Orden* and the speech in *Rosenberger* did not violate the endorsement test, a reasonable observer may not view the "I Believe" plate in context as conveying a message of endorsement.

CONCLUSION

The analysis of government speech under both the Free Speech and Establishment Clauses has changed. And *Summum* is the cause. Whereas prior to *Summum* the majority of circuits required that a reasonable observer would be able to identify the government as the speaker for the government speech doctrine to apply, *Summum* looks to the level of control that the government actually has over the speech. To know whether the government is speaking post-*Summum*, courts must determine whether the government controls the message. If the government has "final approval authority" and exercises "effective[] control," then the message is that of the government—regardless of (i) whom a hypothetical observer (rightly or wrongly) thinks is speaking³¹¹ and (ii) how that observer interprets the government's message. As *Summum* states, government speech—through monuments, specialty license plates, or other expressive activities—"may in fact be interpreted by different observers, in a variety of ways."³¹² Yet, even though different interpretations of the government's message are possible, its speech is not subject to scrutiny under the Free

309. *Id.* at 701 (Breyer, J., concurring).

310. *Rosenberger*, 515 U.S. at 850 (O'Connor, J., concurring).

311. *Johanns v. Livestock Mktg. Ass'n*, 544 U.S. 550, 564 n.7 (2005).

312. *Pleasant Grove City v. Summum*, 129 S. Ct. 1125, 1135 (2009).

Speech Clause. The government may convey the message that it “view[s] as appropriate for the place in question, taking into account such content-based factors as esthetics, history, and local culture”³¹³ and may discriminate based on viewpoint in the process.

Moreover, contrary to the district court’s analysis in *Summers*, the inquiry into whether facially religious government speech violates the Free Speech Clause is not separate and distinct from the Establishment Clause inquiry. To know which Establishment Clause test to apply, the Court first must know whether the government is speaking. If the government is the speaker, then it may discriminate based on content and viewpoint to make sure that its message gets out to the public. But given that the government may engage in viewpoint discrimination when speaking, a reasonable observer may rightly believe that the government is not accounting for her particular religious viewpoint, not because the government is promoting a religious message but because either (i) the reasonable observer misinterpreted or misunderstood the message or (ii) the government is intending to send a secular, non-religious message that does not promote or denigrate any person’s religious perspective. Provided that it is not acting with a primarily religious purpose, the government may engage in facially religious speech without violating the Establishment Clause regardless of the effect of that speech on a reasonable observer. That a reasonable observer may feel disaffected by facially religious government speech does not show that what *the government intended to say* violated the Establishment Clause; it shows only that the message had a certain effect on the observer. This is not to say that a viewer is not without recourse, though. As with other types of government speech, if a listener does not agree with or like the government speech, that person may resort to the political process to vote for new legislators who may reflect more closely that person’s views.³¹⁴ Thus, under *Summum*,

313. *Id.* at 1134.

314. *Id.* at 1132 (quoting *Bd. of Regents of Univ. of Wis. Sys. v. Southworth*, 529 U.S. 217, 235 (2000)) (“And of course, a government entity is ultimately ‘accountable to the electorate and the political process for its advocacy.’”).

federal and state governments have more freedom to engage in facially religious speech and, when doing so, may safely exhale—at least until the next election.