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Scott W. Gaylord

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"Kill the Sea Turtles" and Other Things You Can't Make the Government Say

Scott W. Gaylord*

Abstract

In Pleasant Grove City v. Summum*, the Supreme Court confirmed that there is no heckler's veto under the government speech doctrine. When speaking, the government has the right to speak for itself and to select the views that it wants to express. But the Court acknowledged that sometimes it is difficult to determine whether the government is actually speaking. Specialty license plates have proven to be one of those difficult situations, raising novel and important First Amendment issues. Six circuits have reached four separate conclusions regarding the status of messages on specialty license plates. Three circuits have held that specialty plates are private speech, one has held that specialty plates are government speech, and another has held that specialty plates are hybrid speech. Yet another circuit has held that the issue is nonjusticiable under the Tax Injunction Act. And the uncertainty continues as North Carolina, Texas, and Oklahoma currently confront litigation over their license plates—litigation that will determine whether states or third parties have the right to select the messages on specialty license plates.*

This Article explores the Court's "recently minted" government speech doctrine in the context of specialty plates. In particular, it analyzes the circumstances under which a state can adopt one message ("Save the Sea Turtles") while refusing to authorize opposing viewpoints ("Kill the Sea Turtles"). To date, the majority of circuits have applied a literal speaker test, which looks to see if a reasonable observer would view specialty plates as government or private speech. Under that test, specialty plates are private

* Jennings Professor and Emerging Scholar, Associate Professor of Law, Elon University School of Law; M.A. and Ph.D, University of North Carolina at Chapel Hill; J.D., Notre Dame Law School.

speech, and any restrictions on the content of such plates must be reasonable and viewpoint neutral, even if a state disagrees with that message.

This Article contends that a careful review of Summum*, which was decided after all but one of the circuit court decisions, shows that the majority interpretation is wrong. The literal speaker test is inconsistent with the "control" test set out in* Summum *and* Johanns*. Under the Court's new test for government speech, many specialty license plate programs are government speech, and third parties cannot force states to promulgate messages with which they disagree. If a state has a "Save the Sea Turtles" plate to promote conservation and the protection of its wildlife, it cannot be forced to offer a "Kill the Sea Turtles" plate. And the same holds true for more controversial messages such as "Choose Life" in North Carolina as well as Texas's ban on plates containing divisive images such as a Confederate flag. Thus, this Article concludes that* Summum *marks a significant development in the Court's free speech jurisprudence, one that affirms the states' ability to control the messages on their specialty license plates as well as their other expressive activity.*

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I. Introduction

Sometimes important First Amendment issues hide in plain sight. Such is the case with specialty license plates. We see them all the time: "special" messages on license plates that celebrate

various organizations and causes, including the military, the environment, professional sports, education, civic groups, recreational activities, historical events, and other interesting (and sometimes novel) things associated with a state.[1] But who has control over the content of these specialty license plates? Do states get to decide what messages go on these plates or do nongovernmental actors dictate the content? If a state has a "Save the Sea Turtles" plate, must it allow a "Kill the Sea Turtles" plate to avoid discriminating based on viewpoint? Or, with respect to more controversial and socially divisive issues, must all of the states with a "Choose Life" plate also offer a "Respect Choice" plate? Must Texas authorize a "Sons of Confederate Veterans" plate, which includes a Confederate flag, if the group petitions for one?

As it turns out, the answers to these questions involve important—and highly contested—issues of First Amendment law. These questions have confounded the lower courts, leading to a four-way split among six circuits,[2] and challenges are ongoing in North Carolina,[3] Texas,[4] and Oklahoma.[5] The only thing that

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1. Each of the 50 states, as well as the District of Columbia, Puerto Rico, and the U.S. Virgin Islands, has specialty license plate programs. *License Plate Information*, NAT'L CONF. OF ST. LEGISLATURES, http://www.ncsl.org/research/transportation/license-plate-information.aspx (last updated July 2011) (last visited Jan. 12, 2014) (on file with the Washington and Lee Law Review). Although the number of specialty plates offered varies by jurisdiction, currently there are more than 4,600 specialty plates available across the country, and the number appears likely to continue to increase. *Id.*

2. *See* Roach v. Stouffer, 560 F.3d 860, 871 (8th Cir. 2009) (invalidating a specialty license plate program under the First Amendment); Ariz. Life Coal. Inc. v. Stanton, 515 F.3d 956, 973 (9th Cir. 2008) (same); Choose Life Ill., Inc. v. White, 547 F.3d 853, 867 (7th Cir. 2008) (same); Sons of Confederate Veterans, Inc. v. Comm'r of the Va. Dept. of Motor Vehicles, 288 F.3d 610, 629 (4th Cir. 2002) (same). *But see* ACLU of Tenn. v. Bredesen, 441 F.3d 370, 380 (6th Cir. 2006) (upholding a specialty license plate program under the First Amendment); Henderson v. Stalder, 407 F.3d 351, 360 (5th Cir. 2005) (dismissing the challenge for lack of jurisdiction under the Tax Injunction Act).

3. *See* ACLU of N.C. v. Conti, 835 F. Supp. 2d 51, 62–63 (E.D.N.C. 2011) (challenging North Carolina's "Choose Life" license plate).

4. *See* Sons of Confederate Veterans, Inc. v. Vandergriff, No. A-11-CA-1049-SS, 2013 WL 1562758, at *26 (W.D. Tex. Apr. 12, 2013) (seeking a court order to force Texas to provide a license plate with a confederate flag to members of the Sons of Confederate Veterans).

5. *See* Cressman v. Thompson, 719 F.3d 1139, 1140–41 (10th Cir. 2013)

the circuit courts have agreed on is that the government's ability to control the message on its specialty plates depends on whether the plates are government speech or private speech.[6] This determination is dispositive because "[t]he Free Speech Clause restricts government regulation of private speech; it does not regulate government speech."[7]

Under the Court's "recently minted"[8] government speech doctrine, the government has the right to "speak for itself"[9] and "to select the views that it wants to express."[10] As a speaker, the government can discriminate based on content and even viewpoint[11] "to ensure that its message is neither garbled nor distorted."[12] In the specialty license plate context, this means that when speaking a state can issue a "Save the Sea Turtles" plate

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(challenging an Oklahoma statute that prevented the plaintiff from covering an image on his license plate depicting a Native American shooting an arrow toward the sky).

6. *See, e.g.*, Roach v. Stouffer, 560 F.3d 860, 863 (8th Cir. 2009) ("To determine whether Missouri's specialty license plate scheme survives a First Amendment challenge, we must first decide whether the messages contained on specialty plates communicate government or private speech."); Ariz. Life Coal. Inc. v. Stanton, 515 F.3d 956, 963 (9th Cir. 2008) ("We must decide whether, by authorizing a specialty license plate . . . the State of Arizona has adopted that speech as its own."); Sons of Confederate Veterans, Inc. v. Comm'r of the Va. Dep't of Motor Vehicles, 288 F.3d 610, 616 (4th Cir. 2002) ("[W]e turn first to the question of whether the speech on the special plates authorized by the Virginia legislature is private speech or 'government speech.'").

7. Pleasant Grove City v. Summum, 555 U.S. 460, 467 (2009).

8. *Id.* at 481 (Stevens, J., concurring).

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

10. *Summum,* 555 U.S. at 460.

11. *See, e.g.*, Nat'l Endowment for the Arts v. Finley, 524 U.S. 569, 598 (1998) (Scalia, J., concurring) ("It is the very business of government to favor and disfavor points of view . . . ."); Rust v. Sullivan, 500 U.S. 173, 194 (1991) (arguing that if the government violated the Constitution when it chose to fund a program that advances certain goals to the detriment of other goals, then numerous government programs would be unconstitutional); Sons of Confederate Veterans, Inc. v. Comm'r of the Va. Dep't of Motor Vehicles, 288 F.3d 610, 618 (4th Cir. 2002) ("Thus, even ordinarily impermissible viewpoint-based distinctions drawn by the government may be sustained where the government itself speaks or where it uses private speakers to transmit its message.").

12. Rosenberger v. Rector & Visitors of the Univ. of Va., 515 U.S. 819, 833 (1995).

without offering a plate advocating for the opposite—"Kill the Sea Turtles." And the constitutional analysis is the same for more socially and politically charged topics such as "Choose Life" or "Respect Choice."

Of course, the opposite is true if the government is regulating private speech in a forum: "In the realm of private speech or expression, government regulation may not favor one speaker over another."[13] If a state's specialty plate program creates a forum for private speech, then the government is limited in its ability to restrict the speakers who may participate in the forum:

> 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." 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."[14]

Any restriction on private speech in the forum must be, at a minimum, viewpoint neutral and "reasonable in light of the purpose served by the forum."[15] Consequently, if a state allows a license plate on a given topic, it must permit all viewpoints on that issue—whether the plates involve sea turtles, abortion, the military or any other topic.[16]

As the Court acknowledged in *Pleasant Grove City v. Summum*,[17] though, "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."[18] Specialty license plates have proven to be one of those situations. Six

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13. *Id.* at 828.

14. Good News Club v. Milford Cent. Sch., 533 U.S. 98, 106–07 (2001) (citations omitted).

15. *Id.* at 107.

16. *Rosenberger*, 515 U.S. at 829–30 (explaining that there is "a distinction between . . . content discrimination, which may be permissible if it preserves the purposes of th[e] limited forum, and . . . viewpoint discrimination, which is presumed impermissible when directed against speech otherwise within the forum's limitations").

17. 555 U.S. 460 (2009).

18. *Id.* at 470.

circuit courts have reached four different conclusions regarding the status of messages on specialty license plates.[19] The Seventh, Eighth, and Ninth Circuits consider specialty license plates to be (primarily) private speech, offering drivers an opportunity to promote a group or cause with which they agree.[20] The Fourth Circuit views specialty plates as hybrid speech, involving both government speech and private expression.[21] In contrast, the Sixth Circuit holds that these plates are government speech, which means that the government can make viewpoint-based distinctions and allow a "Choose Life" plate while rejecting a "Respect Choice" plate.[22] The Fifth Circuit contends that the Tax Injunction Act[23] (TIA) divests the federal courts of jurisdiction over challenges to specialty plate programs because the extra charge for specialty plates constitutes a tax for TIA purposes.[24]

The First Amendment analysis is made all the more difficult because all but one of these circuit court cases were decided before the Supreme Court's decision in *Summum*,[25] which set out

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19. *Supra* note 2 and accompanying text.

20. *See, e.g.*, Roach v. Stouffer, 560 F.3d 860, 867 (8th Cir. 2009) ("[W]e now join the Fourth, Seventh and Ninth Circuits in concluding that a reasonable and fully informed observer would consider the speaker to be the organization that sponsors and the vehicle owner who displays the specialty license plate.").

21. *See* Planned Parenthood of S.C. Inc. v. Rose, 361 F.3d 786, 794 (4th Cir. 2004) ("[T]he speech here appears to be neither purely government speech nor purely private speech, but a mixture of the two."); *id.* at 800 (Luttig, J., concurring) ("I am pleased that the court adopts today the view that speech can indeed be hybrid in character.").

22. *See* ACLU of Tenn. v. Bredesen, 441 F.3d 370, 376 (6th Cir. 2006) ("As in *Johanns*, here Tennessee 'sets the overall message to be communicated and approves every word that is disseminated' on the 'Choose Life' plate. It is Tennessee's own message.").

23. Tax Injunction Act, 28 U.S.C. § 1341 (2012).

24. *See* Henderson v. Stalder, 407 F.3d 351, 359 (5th Cir. 2005) ("To fulfill the purposes of the Tax Injunction Act, and because the specialty plate charges cannot under these facts constitute regulatory fees, we are persuaded that the additional charges for specialty plates must be characterized as taxes.").

25. Not surprisingly, much of the commentary regarding specialty license plates also predates *Summum*. *See, e.g.*, Traci Daffer, *A License to Choose or a Plate-ful of Controversy? Analysis of the "Choose Life" Plate Debate*, 75 UMKC L. REV. 869 (2007); Helen Norton, *The Measure of Government Speech: Identifying Expression's Source*, 88 B.U. L. REV. 587 (2008); Caroline M. Corbin, *Mixed Speech: When Speech is Both Private and Governmental*, 83 N.Y.U. L. REV. 605 (2008); Jeremy T. Berry, Comment, *Licensing A Choice: "Choose Life" Specialty*

the Court's most recent and most thorough explanation of the government speech doctrine.[26] Under *Summum*'s "recently minted" government speech doctrine, governmental control over the expressive activity is the touchstone for government speech.[27] States may speak through their specialty license plates and reject unwanted messages if they exercise the requisite authority over their specialty plate programs.[28]

The circuits reaching the opposite conclusion have adopted a "literal speaker" test, which focuses on "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."[29] Under this test, a state loses the right "to select the views that it wants to express"[30] because vehicle owners—who reasonable observers think are sending the message—can force it to authorize specialty plates ("Kill the Sea Turtles" or "Respect Choice") that directly contradict its intended message.[31] Consequently, the literal speaker test is inapplicable in the specialty plate context because it requires states either to accept a proliferation of unwanted messages or to close the alleged specialty plate forums.[32] *Summum*, though, demonstrates

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License Plates and Their Constitutional Implications, 51 EMORY L.J. 1605, 1624–30 (2002); Jack Guggenheim & Jed Silversmith, *Confederate License Plates at the Constitutional Crossroads: Vanity Plates, Special Registration Organization Plates, Bumper Stickers, Viewpoints, Vulgarity, and the First Amendment*, 54 U. MIAMI L. REV. 563, 577–79 (2000).

26. *See* Pleasant Grove City v. Summum, 555 U.S. 460, 469 (2009) (ruling that the placement of permanent monuments in a public park is government speech and therefore not analyzed under strict scrutiny).

27. *See id.* at 472–73 (finding that monuments in a city-run park constituted government speech because the city exercised complete control in selecting the content of the monuments).

28. *See id.* (allowing a city to select the content of monuments in a city-run park because doing so constitutes government speech).

29. Roach v. Stouffer, 560 F.3d 860, 867 (8th Cir. 2009); *see also* Choose Life Ill., Inc. v. White, 547 F.3d 853, 863–64 (7th Cir. 2008) (stating that the most obvious speakers in the specialty license plates context are the vehicle owners and the sponsoring organizations).

30. *Summum*, 555 U.S. at 468.

31. *See White*, 547 F.3d at 863–64 (stating that the vehicle owners are the most obvious speakers in the specialty license plate context).

32. *See* Hurley v. Irish-Am. Gay, Lesbian, & Bisexual Grp., 515 U.S. 557, 576 (1995) ("[W]hen dissemination of a view contrary to one's own is forced upon

that the literal speaker test puts states in such an untenable position that "'public forum principles . . . are out of place in the context of this case.'"[33] Pursuant to the government speech doctrine, states that retain "effective control" over their specialty plate programs cannot be forced to promote "Kill the Sea Turtles" or any other message with which they disagree. Instead, these states can claim the "fundamental rule of protection under the First Amendment, that a speaker has the autonomy to choose the content of his own message."[34]

Contrary to the majority view among circuit courts,[35] these states can allow specialty plates on mundane and even controversial topics without providing for alternative viewpoints. To demonstrate why this is the case, Part II of this Article sets out the split among the circuit courts, exploring the differences between and among the decisions by the Fourth, Sixth, Seventh, Eighth, and Ninth Circuits, and analyzes the government speech

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a speaker intimately connected with the communication advanced, the speaker's right to autonomy over the message is compromised.").

33. Pleasant Grove City v. Summum, 555 U.S. 460, 478 (2009) (quoting United States v. Am. Library Ass'n, Inc., 539 U.S. 194, 205 (2003)).

34. *Hurley*, 515 U.S. at 573.

35. The majority of circuits follow the "literal speaker" test. *See* Roach v. Stouffer, 560 F.3d 860, 867 (8th Cir. 2009) (finding that specialty license plates are private speech). This approach bears "one key question: whether, under all the circumstances, the reasonable and fully informed observer would consider the speaker to be the government or a private party." *Id.* at 867. In answering this question, the courts look at four factors: the purpose of the program; the degree of editorial control exercised by the state; the identity of the literal speaker; and whether the state or the private speaker bears the ultimate responsibility for the message. *See* Sons of Confederate Veterans, Inc. v. Comm'r of the Va. Dep't of Motor Vehicles, 288 F.3d 610, 618 (4th Cir. 2002) (invalidating a specialty license plate program). In *Roach*, the court applied these four factors and joined the Fourth, Seventh, and Ninth Circuits in concluding that the "reasonable and fully informed observer would consider the speaker to be the organization that sponsors or the vehicle owner who displays the specialty license plate." *Roach*, 560 F.3d at 867; *see also* Ariz. Life Coal. Inc. v. Stanton, 515 F.3d 956, 960 (9th Cir. 2008) (concluding that specialty license plates constitute "primarily private speech" under the literal speaker test); Choose Life Ill., Inc. v. White, 547 F.3d 853, 863 (7th Cir. 2008) (concluding that under the literal speaker test, "[m]essages on specialty license plates cannot be characterized as the government's speech"); Planned Parenthood of S.C. Inc. v. Rose, 361 F.3d 786, 793 (4th Cir. 2004) (concluding that specialty license plates constitute a mixture of government and private speech under the literal speaker test).

doctrine as developed in *Summum*.[36] Part III explains why *Summum*'s control test for government speech is inconsistent with the literal speaker test that the Fourth, Seventh, Eighth, and Ninth Circuits employ.[37] The literal speaker test focuses on the wrong person in the communicative process—the viewer instead of the government speaker—and, in the process, ignores the Court's finding that the government's intended meaning may be interpreted differently by different observers. Moreover, contrary to the suggestion of several circuit courts, the Court's decision in *Wooley v. Maynard*[38] does not support a finding that specialty plates are government speech.[39] Finally, Part IV demonstrates why, in light of *Summum*, the Court's forum doctrine applies neither to monuments nor specialty license plates.[40] As a result, states retain their First Amendment rights as speakers to control their messages without having to permit other groups to advance inconsistent or undesired messages on the governments' property.

II. An Overview of the Government Speech–Private Speech Divide: Summum *and the Split Among Circuit Courts*

The complexity of the First Amendment issues implicated by specialty license plates garnered national attention in the early 2000s as states began issuing controversial plates, such as "Choose Life."[41] In the wake of *Planned Parenthood of*

36. *Infra* Part II.

37. *Infra* Part III.

38. 430 U.S. 705 (1977).

39. *See id*. at 716–17 (prohibiting New Hampshire from prosecuting criminally individuals who, due to their moral and religious beliefs, cover the motto "Live Free or Die" on their license plates).

40. *Infra* Part IV.

41. "Choose Life" license plates were not the only controversial specialty plates that fostered legal challenges. *See, e.g.*, Sons of Confederate Veterans, Inc. v. Comm'r of the Va. Dep't of Motor Vehicles, 288 F.3d 610, 610 (4th Cir. 2002) (dealing with a proposed Confederate flag license plate). As discussed below, one of the first challenges involved Virginia's denial of a specialty plate to the Sons of Confederate Veterans, which proposed a plate that included a Confederate flag as part of the design. *Id.*

Southeastern Pennsylvania v. Casey,[42] states sought to regulate abortion in a variety of ways, from banning partial birth abortions[43] to promoting childbirth through "Choose Life" license plates.[44] These "Choose Life" plates spawned litigation across the country,[45] and the federal courts were deeply divided as to how these challenges should be handled under the First Amendment.[46] Lacking Supreme Court guidance, several circuits borrowed from the Court's reasonable observer test in Establishment Clause cases[47] and developed a literal speaker test for government speech—whether a reasonable observer would view the specialty plates as government or private speech.[48] None of these cases, however, applied the Court's most recent government speech case, *Summum*.

The challenges to specialty plates continue today, with litigation ongoing in the Fourth Circuit regarding North Carolina's "Choose Life" plate,[49] Texas's rejection of a Sons of

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42. 505 U.S. 833 (1992). *Casey* challenged a Pennsylvania law that imposed various restrictions on receiving an abortion. *Id.* at 844–45. These restrictions include informed consent, a twenty-four hour waiting period, spousal notification, and reporting requirements. *Id*. at 881–900.

43. *See, e.g.*, Stenberg v. Carhart, 530 U.S. 914, 917–18 (2000) (invalidating Nebraska's partial birth abortion ban); Gonzales v. Carhart, 550 U.S. 124, 168 (2007) (validating a federal ban on partial birth abortions).

44. *See, e.g.*, Choose Life Ill., Inc. v. White, 547 F.3d 853, 855 (7th Cir. 2008) (stating that over 25,000 residents of Illinois joined a petition to create a "Choose Life" license plate).

45. *See, e.g.*, Ariz. Life Coal. Inc. v. Stanton, 515 F.3d 956, 960 (9th Cir. 2008) (challenging a "Choose Life" license plate); Roach v. Stouffer, 560 F.3d 860, 862–63 (8th Cir. 2009) (same); *White*, 547 F.3d at 855 (same).

46. *Compare White*, 547 F.3d at 853 (invalidating a "Choose Life" license plate), *with* ACLU of Tenn. v. Bredesen, 441 F.3d 370, 376 (6th Cir. 2006) (upholding a "Choose Life" license plate).

47. *See* Allegheny v. ACLU Greater Pittsburgh Chapter, 492 U.S. 573, 620 (1989) (stating that the constitutionality of government actions challenged under the Establishment Clause should be "judged according to the standard of a 'reasonable observer'" (citation omitted)).

48. *See Roach*, 560 F.3d at 867 (concluding that the reasonable observer of a specialty license plate would consider the speaker to be the sponsoring organization and the vehicle owner).

49. *See generally* ACLU of N.C. v. Conti, 835 F. Supp. 2d 51 (E.D.N.C. 2011).

Confederate Veterans plate,[50] and Oklahoma's standard issue plate that includes an image related to a Native American religion.[51] These current cases, though, are being litigated against a First Amendment landscape that has changed dramatically with *Summum*'s advancement of a new standard for government speech.[52] As discussed below, this standard undermines the literal speaker test that the Fourth, Seventh, Eighth, and Ninth Circuits previously applied to specialty license plates.[53] Consequently, *Summum* sets the stage for a new wave of litigation regarding the ability of states to promote preferred messages through their specialty plate programs.

A. The Circuit Split

Given the lack of guidance from the Supreme Court and the complexity of the First Amendment issues involved, courts understandably have struggled with the constitutionality of specialty plates. While the courts are divided as to the proper constitutional standard for specialty plates,[54] they agree on one thing—that the critical question is whether specialty plates are government speech.[55] Prior to the wave of "Choose Life" license

50. *See* Sons of Confederate Veterans, Inc. v. Vandergriff, No. A-11-CA-1049-SS, 2013 WL 1562758, at *1 (W.D. Tex. Apr. 12, 2013) (seeking a court order to force the State of Texas to provide a license plate with a Confederate flag to members of the Sons of Confederate Veterans).

51. *See* Cressman v. Thompson, 719 F.3d 1139, 1141–42 (10th Cir. 2013) (challenging an Oklahoma statute that prevented the plaintiff from covering on his license plate an image of a Native American shooting an arrow toward the sky).

52. Pleasant Grove City v. Summum, 555 U.S. 460, 472–73 (2009) (finding that monuments in a public park constitute government speech because the municipality controls the messages sent by the monuments).

53. *Supra* note 35 and accompanying text.

54. *Compare* ACLU of Tenn. v. Bredesen, 441 F.3d 370, 376 (6th Cir. 2006) (finding that Tennessee's specialty license plate was government speech because Tennessee effectively controlled the messages delivered by the license plates), *with* Roach v. Stouffer, 560 F.3d 860, 868 (8th Cir. 2009) (stating that the determinative factor in these cases is whether the reasonable observer would conclude that the government is speaking).

55. *See, e.g.*, *Roach*, 560 F.3d at 863 ("To determine whether Missouri's specialty license plate scheme survives a First Amendment challenge, we must

plate cases, the Supreme Court had indicated in cases like *Rust v. Sullivan*[56] and *Board of Regents of the University of Wisconsin System v. Southworth*[57] that the government had the right to speak for itself.[58] The Court, however, did not provide a detailed explanation of the government speech doctrine.[59] That changed in 2009 when the Court decided *Summum*. After *Summum*, to determine whether specialty plates are government or private speech, courts first must discern whether the literal speaker test or *Summum*'s control test governs that determination.[60] A careful review of *Summum* and *Johanns v. Livestock Marketing Ass'n*[61] reveals that the control test provides a new standard, one that is incompatible with the literal speaker test.

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first decide whether the messages contained on specialty plates communicate government or private speech."); Ariz. Life Coal. Inc. v. Stanton, 515 F.3d 956, 963 (9th Cir. 2008) ("We must decide whether, by authorizing a specialty license plate . . . the State of Arizona has adopted that speech as its own."); Sons of Confederate Veterans, Inc. v. Comm'r of the Va. Dep't of Motor Vehicles, 288 F.3d 610, 616 (4th Cir. 2002) ("[W]e turn first to the question of whether the speech on the special plates authorized by the Virginia legislature is private speech or 'government speech.'").

56. 500 U.S. 173 (1991).

57. 529 U.S. 217 (2000).

58. *See id.* at 235 (explaining that when the government speaks "it is, in the end, accountable to the electorate and the political process for its advocacy"); Legal Servs. Corp. v. Valezquez, 531 U.S. 533, 541 (2001) (explaining that while "[t]he Court in *Rust* did not place explicit reliance on the rationale that the counseling activities of the doctors . . . amounted to government speech[,] when interpreting the holding in later cases, . . . we have explained *Rust* on this understanding").

59. *See Legal Servs. Corp.*, 531 U.S. at 541 (invalidating under the First Amendment a federal statute that prohibited the Legal Services Corporation from providing funding to public interest legal organizations that challenge or attempt to amend existing welfare law).

60. *See* Pleasant Grove City v. Summum, 555 U.S. 460, 467 (2009) (stating that the parties "disagree sharply about the line of precedents" that applies in determining whether the government is speaking).

61. 544 U.S. 550 (2005).

1. The Fourth and Ninth Circuits' Four-Factor Test: Specialty Plates as Private Speech or Hybrid Speech

The Fourth Circuit was the first circuit to consider the constitutionality of restrictions on specialty license plates.[62] The court was asked to decide whether Virginia could deny a specialty plate because of a Confederate flag that was incorporated into the proposed design of the plate.[63] Pursuant to a Virginia statute, the Sons of Confederate Veterans (SCV), a nonprofit organization, applied for a specialty license plate.[64] The proposed plate would bear the group's name and its emblem, which included a Confederate flag.[65] The Commonwealth of Virginia granted SCV's application for an organizational specialty plate but only with what was, from the SCV's perspective, a significant modification—the SCV could not include its emblem on the plate.[66] SCV filed suit, claiming that Virginia violated its First Amendment rights by restricting its expression in a forum that was generally open to all organizations that met the statutory requirements, which SCV did (as evidenced by Virginia's issuing a modified form of its specialty plate).[67]

The Fourth Circuit recognized the novelty of SCV's First Amendment claim as well as the important threshold question it raised: "No 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."[68] Lacking direct guidance, the Fourth Circuit adopted a four-

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62. *See* Sons of Confederate Veterans, Inc. v. Comm'r of the Va. Dep't of Motor Vehicles, 288 F.3d 610, 610 (4th Cir. 2002) (invalidating Virginia's specialty license plate program under the First Amendment).

63. *Id.* at 613–14.

64. *Id.* at 613.

65. *Id.*

66. *Id.* Unlike other statutes that authorized specialty plates, the statute approving an SCV plate precluded SCV from including its emblem on the plate. *See* VA. CODE ANN. § 46.2-746.22 (West 2013) ("No logo or emblem of any description shall be displayed or incorporated into the design of license plates issued under this section.").

67. *Sons of Confederate Veterans*, 288 F. 3d at 614.

68. *Id.* at 618.

factor test that other circuits had developed in other First Amendment contexts.[69] Under the *SCV* test, courts resolve whether specialty plates are government speech or private speech by considering

> (1) the central "purpose" of the program in which the speech in question occurs; (2) the degree of "editorial control" exercised by the government or private entities over the content of the speech; (3) the identity of the "literal speaker"; and (4) whether the government or the private entity bears the "ultimate responsibility" for the content of the speech.[70]

Applying these factors, the *SCV* court concluded that specialty plates were private speech in a designated specialty license plate forum.[71] Virginia had created its specialty plate forum to raise money and to permit groups to promulgate their own messages.[72] The organizations had control over the design of the plates.[73] Drawing on *Wooley*, the court concluded that the driver was the literal speaker and bore ultimate responsibility for the message: "[T]he special plates are mounted on vehicles owned by private persons, and the Supreme Court has indicated that license plates,

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69. *See* Wells v. City & Cnty. of Denver, 257 F.3d 1132, 1141 (10th Cir. 2001) (applying the four-factor test in determining whether a sign listing the private sponsors of a public holiday display constituted government speech); Knights of the Ku Klux Klan v. Curators of the Univ. of Mo., 203 F.3d 1085, 1093–95 (8th Cir. 2000) (considering similar factors to resolve whether announcements of sponsors' names and short messages from sponsors on a public radio station were government speech); Downs v. L.A. Unified Sch. Dist., 228 F.3d 1003, 1011 (9th Cir. 2000) (using the same reasoning to decide whether postings to school bulletin boards were government speech or private speech).

70. Sons of Confederate Veterans, Inc. v. Comm'r of the Va. Dep't of Motor Vehicles, 288 F.3d 610, 618 (4th Cir. 2002).

71. *Id.* at 614. *See also* Berry, *supra* note 25, 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 25, at 577–79 (contending that specialty plates create a designated or limited public forum while vanity plates are a nonpublic forum).

72. *See Sons of Confederate Veterans*, 288 F.3d at 620 ("If the General Assembly intends to speak, it is curious that it requires the guaranteed collection of a designated amount of money from private persons before its 'speech' is triggered.").

73. *See id.* at 614 (stating that designing a specialty plate is a collaborative process—the organization proposes the design and the state approves it).

even when owned by the government, implicate private speech interests because of the connection of any message on the plate to the driver or owner of the vehicle."[74] As a result, Virginia's precluding of SCV's emblem constituted impermissible viewpoint discrimination.[75]

In *Planned Parenthood of South Carolina v. Rose*,[76] the Fourth Circuit once again was called on to decide the constitutionality of a state's specialty license plate program.[77] The South Carolina legislature, at the behest of two state legislators, approved a "Choose Life" specialty plate but not a corresponding pro-choice plate.[78] Planned Parenthood of South Carolina sued, claiming that South Carolina's specialty plate program favored a specific viewpoint on abortion ("Choose Life") and, consequently, discriminated against other viewpoints (such as "Respect Choice").[79] The panel employed the four-factor test articulated in *SCV* and reached a similar conclusion—that the state engaged in unconstitutional viewpoint discrimination.[80] Yet the *Rose* panel's reasoning differed significantly from the analysis in *SCV*. Instead of finding that the plates were private speech, the court, with each member of the panel writing a separate opinion, determined that South Carolina's "Choose Life" plate "embodie[d] a mixture of private and government speech."[81]

Judge Michael, who wrote the most detailed opinion, distinguished *SCV* on the grounds that the "Choose Life" plate was initiated by state legislators, not a private organization like SCV.[82] As a result, "the purpose of the Choose Life Act is

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74. *Id.* at 621 (citing Wooley v. Maynard, 430 U.S. 705, 717 (1977)).

75. *Id.* at 626–27.

76. 361 F.3d 786 (4th Cir. 2004).

77. *See id.* at 795–800 (finding that South Carolina's "Choose Life" license plate constituted viewpoint discrimination).

78. *Id.* at 788.

79. *Id.* at 793.

80. *Id.* at 793–94.

81. *Id.* at 793; *see also* L. Gielow Jacobs, *Who's Talking? Disentangling Government and Private Speech*, 36 UNIV. OF MICH. J.L. REFORM 1, 97 (2002) (contending that specialty plates contain "a mixture of government and private speech").

82. Planned Parenthood of S.C. v. Rose, 361 F.3d 786, 793 (4th Cir. 2004).

specifically to promote the expression of a pro-life viewpoint," not simply the message of a private group.[83] Unlike Virginia's specialty plate program, the South Carolina legislature "exercises complete editorial control over the content of the speech on the Choose Life plate."[84] The first two factors, therefore, favored government speech, while the second two—the literal speaker and ultimate responsibility—still weighed in favor of private speech.[85] Accordingly, the "Choose Life" plate constituted hybrid speech: "Therefore, the speech here appears to be neither purely government speech nor purely private speech, but a mixture of the two."[86]

SCV did not involve and consequently did not consider what standard applies when the message on a government-owned license plate implicates both government and private speech.[87] Confronted with this indeterminate result, the *Rose* panel relied on the Supreme Court's forum analysis, considering whether the government opened a forum and, if so, whether it could engage in viewpoint discrimination in that forum.[88] Although writing in separate opinions, the panel agreed that, having created a forum for private expression, South Carolina could neither "giv[e] its own viewpoint privilege above others" in that forum nor "authorize cloaked advocacy that allows the State to promote an idea without being accountable to the political process."[89] Those who viewed the "Choose Life" plate would not think that the

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83. *Id.*

84. *Id.*

85. *Id.* at 793–94.

86. *Id.* at 794.

87. Sons of Confederate Veterans, Inc. v. Comm'r of the Va. Dep't of Motor Vehicles, 288 F.3d 610, 621 (4th Cir. 2002) (concluding that specialty license plates constitute private speech).

88. *See* Planned Parenthood of S.C. Inc. v. Rose, 361 F.3d 786, 795 (4th Cir. 2004) ("In the license plate forum, South Carolina has authorized the expression of only one position of the debate, thereby promoting the expression of one viewpoint (pro-life) while preventing the expression of the other viewpoint (pro-choice).").

89. *Id.* at 795; *see also Sons of Confederate Veterans*, 288 F.3d at 618 ("The rationale behind the government's authority to draw otherwise impermissible viewpoint distinctions in the government speech context is the accountability inherent in the political process.").

government was the literal speaker and, therefore, could not hold the government accountable through the electoral process.[90] Thus, South Carolina's approving a "Choose Life" plate amounted to viewpoint discrimination under the First Amendment.[91]

In *Arizona Life Coalition, Inc. v. Stanton*,[92] the Ninth Circuit applied the Fourth Circuit's *SCV* four-factor test and reached the same result as the *SCV* court—that the specialty plate was private speech.[93] The specialty plate program in *Stanton* differed significantly from the programs in *SCV* and *Rose*. Whereas Virginia and South Carolina had to pass legislation authorizing each specialty plate, nonprofit organizations seeking an Arizona specialty plate could submit an application directly to the Arizona Department of Transportation (Arizona DOT).[94] Once the Arizona DOT certified that the organization was a nonprofit, it submitted the plate request to the Arizona License Plate Commission.[95] Pursuant to statute, the Commission was required to issue the specialty plate if the organization served the community, contributed to the welfare of others, and was not offensive or discriminatory in its purpose or name.[96] Under this

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90. *See Rose*, 361 F.3d at 794–95 (arguing that the state's advocacy of the pro-life viewpoint is veiled because people do not identify the state as the speaker in the specialty license plate context).

91. *Id.* at 799 ("In sum, South Carolina has engaged in viewpoint discrimination by allowing only the Choose Life plate, and it has insulated itself from electoral accountability by disguising its own pro-life advocacy. This is prohibited by the First Amendment."); *see also id.* at 800 (Luttig, J., concurring) ("[W]here the private speech component is substantial and the government speech component less than compelling, viewpoint discrimination by the state is prohibited.").

92. 515 F.3d 956 (9th Cir. 2008).

93. *Id.* at 960 ("Messages conveyed through special organization plates—although possessing some characteristics of government speech—represent primarily private speech.").

94. *See* ARIZ. REV. STAT. ANN. § 28-2404 (2011) (outlining the procedures by which special organizations may obtain specialty license plates).

95. *See id.* § 28-2404(A) (stating that if the department "determines the organization meets the [statutory] requirements of an organization . . . , the department shall submit the request for a special organization plate to the license plate commission"); *Stanton*, 515 F.3d at 961 (discussing the Arizona specialty license plate program).

96. ARIZ. REV. STAT. ANN. § 28-2404(B) (2011). Pursuant to statute, the organization also could not "promote a specific religion, faith or antireligious

administrative procedure, neither the legislature nor the executive had the authority to approve (or to deny) the organization's plate or to control the plate's design or content: "[T]he statutory requirements address who may speak, not what they may say."[97]

The Arizona Life Coalition, a nonprofit, applied for a "Choose Life" plate.[98] Despite meeting Arizona's statutory requirements, the Commission denied its application, and the Arizona Life Coalition sued on First Amendment grounds.[99] The plaintiffs argued that the Ninth Circuit should apply *Johanns*, a 2005 compelled subsidy case that involved government speech, when deciding whether specialty plates were government speech.[100] The Ninth Circuit declined the invitation and instead distinguished *Johanns*, arguing that *Johanns* did not apply because Arizona Life Coalition's claims implicated neither compelled speech nor compelled subsidies.[101] According to the court, the operative First Amendment question was whether Arizona Life Coalition was "'being denied the opportunity to speak on the same terms as other private citizens within a government sponsored forum,'" not whether third parties were being forced to contribute money to the government to sponsor the speech of others.[102]

Moreover, even though *Johanns* involved a compelled subsidy, the court viewed *Johanns* as consistent with the Fourth Circuit's four-factor test.[103] Because the Commission had only "de minimis editorial control over the plate design and color," there was no basis for "finding that the *messages* conveyed by the

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belief." *Id.*

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

98. *Id.* at 961.

99. *Id.* at 962.

100. *See id.* at 964 (addressing the issue of whether *Johanns* applied to the case at hand).

101. *Id.*

102. *Id.* (quoting ACLU of Tenn. v. Bredesen, 441 F.3d 370, 386 (6th Cir. 2006) (Martin, J., dissenting)).

103. *See id.* at 965 ("We therefore adopt the Fourth Circuit's four-factor test—supported by the Supreme Court's decision in *Johanns*—to determine whether messages conveyed through Arizona's special organization plate program constitute[d] government or private speech.").

organization constitute government speech."[104] Under Arizona's administrative procedure for specialty plates, the Arizona Life Coalition controlled the message on the plate, not the state, and individual vehicle owners chose to carry their favored message.[105] As a result, the Ninth Circuit concluded that the specialty plates were private speech and that the Commission engaged in viewpoint-based discrimination in denying the Arizona Life Coalition's specialty plate application.[106] The Arizona program did not prohibit abortion-related speech and was open to all organizations that met the statutory requirements.[107] Because Arizona Life Coalition met those requirements, the court remanded the case with instructions to require the Commission to issue the "Choose Life" plate.[108]

2. The Seventh and Eighth Circuits' Literal Speaker Test: Specialty Plates as Private Speech

In 2008, the Seventh Circuit weighed in on the First Amendment status of specialty license plates.[109] Under Illinois law, specialty plates required legislative approval.[110] Choose Life of Illinois, Inc. pursued legislation that would authorize a

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104. *Id.* at 966. The Ninth Circuit also analogized specialty plates to vanity license plates, which, subject to some general rules precluding offensive and sexual references, or both, enable vehicle owners to select a specific combination of letters and numbers on a state issued license plate (for example, CRZN, 4HIM, T TIME, and L8 AGN). *See id.* at 967. The fact that "most courts that have addressed vanity plates have concluded the messages are private speech" reinforced its conclusion that specialty plates also are private speech. *Id.* at 967; *see also* Perry v. McDonald, 280 F.3d 159, 166 (2d Cir. 2001) (finding no First Amendment right to use a vanity plate bearing the letters "SHTHPNS"); Lewis v. McDonald, 253 F.3d 1077, 1079 (8th Cir. 2001) (addressing whether a state could deny a request for a vanity plate reading "ARYAN-1").

105. *See* Ariz. Life Coal. Inc. v. Stanton, 515 F.3d 956, 967 (9th Cir. 2008) ("[I]ndividual members who choose to purchase the ['Choose Life'] plate voluntarily choose to disperse that message.").

106. *Id.* at 973.

107. *Id.* at 971.

108. *Id.* at 973.

109. Choose Life Ill., Inc. v. White, 547 F.3d 853, 867 (7th Cir. 2008).

110. *See* 625 ILL. COMP. STAT. 5/3-600(a) (2012) ("The Secretary of State shall issue only special plates that have been authorized by the General Assembly.").

"Choose Life" plate, collecting more than 25,000 signatures from prospective purchasers.[111] Despite the broad support for such a plate, the Illinois legislature did not approve the plate.[112] Choose Life Illinois then brought an action alleging that the state had violated the group's free speech rights by denying it access to the state-created specialty plate forum.[113] The district court agreed with Choose Life Illinois, finding that the state had engaged in viewpoint discrimination.[114]

On appeal, the Seventh Circuit reversed. Although the court found the reasoning of the Fourth and Ninth Circuits persuasive, it determined that the four-factor test "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."[115] Echoing the analysis in *Rose* and *Stanton*, the court concluded that specialty plates were private speech,[116] because (i) reasonable observers are apt to associate a specialty plate with the sponsoring organization and the vehicle owner rather than the state, (ii) the government's purpose is to raise money through the specialty plate program and not to express its own message, and (iii) the state and the sponsoring groups share editorial control regarding the plate's

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111. *White*, 547 F.3d at 857.

112. *See id.* at 855 ("Despite the strong showing of support, the proposal for a 'Choose Life' license plate died in subcommittee.").

113. *Id.*

114. *See id.* at 857 ("[T]he [district] court concluded that the Illinois specialty-plate program established a forum for private speech and that the exclusion of the 'Choose Life' message from this forum was viewpoint discrimination and could not withstand strict scrutiny.").

115. *Id.* at 863. In *Summum*, Justice Souter advocated for the same 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." Pleasant Grove City v. Summum, 555 U.S. 460. 487 (2009) (Souter, J., concurring). As discussed below, Justice Souter's concurrence reprises the test that the majority rejected in *Johanns*, and no other Justice joined his concurrence in *Summum*. *See infra* notes 186–87.

116. *See* Choose Life Ill., Inc. v. White, 547 F.3d 853, 863 (7th Cir. 2008) ("[The court] arrive[s] at the same conclusion as in . . . *Rose*, and *Stanton*: Messages on specialty license plates cannot be characterized as the government's speech.").

message and design.[117] Consistent with *Stanton*, the court also held that *Johanns* did not convert the private speech into government speech because specialty plates did not implicate compelled speech or a compelled subsidy.[118]

Choose Life Illinois, Inc. v. White[119] makes the First Amendment analysis of specialty plates even more complicated because the Seventh Circuit departed from *Stanton* by holding that Illinois's denial of the "Choose Life" plate did not constitute viewpoint discrimination.[120] Although the distinction between content and viewpoint discrimination "is not a precise one,"[121] the Seventh Circuit surmised that the State of Illinois had excluded the entire subject of abortion, not simply a particular viewpoint on that subject.[122] Under the Supreme Court's forum doctrine, such content-based exclusion is permissible in a limited designated forum provided that it is reasonable.[123] The court concluded that Illinois's exclusion of the topic of abortion was

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117. *See id.* at 863–64 (describing the factors that weigh in favor of finding elements of private speech that rule out the government-speech doctrine).

118. *See id.* at 863 ("Like many states, Illinois invites private civic and charitable organizations to place their messages on specialty license plates.").

119. 547 F.3d 853 (7th Cir. 2008).

120. *See id.* at 865 ("[The restriction of abortion-related specialty-plates] is a permissible content-based restriction on access to the specialty-plate forum, not an impermissible act of discrimination based on viewpoint.").

121. Rosenberger v. Rector & Visitors of the Univ. of Va., 515 U.S. 819, 831 (1995).

122. *See White*, 547 F.3d at 865 (determining that Illinois had excluded the entire subject of abortion from specialty plates, resulting in a permissible content-based restriction). As the concurrence notes, the only evidence that Illinois decided to exclude the subject of abortion "is nothing more than the Illinois legislature rejecting efforts to approve a single specialty license plate, 'Choose Life.' . . . by rejecting a 'Choose Life' plate, it is not clear to me that the legislature decided to exclude 'the *entire subject* of abortion.'" *Id.* at 867 (Manion, J., concurring).

123. *See*, *e.g.*, *Rosenberger*, 515 U.S. at 829–30 ("[W]e have observed a distinction between, on the one hand, content discrimination, which may be permissible if it preserves the purposes of that limited forum, and, on the other hand, viewpoint discrimination, which is presumed impermissible when directed against speech otherwise within the forum's limitations."); Ariz. Life Coal. v. Stanton, 515 F.3d 956, 969 (9th Cir. 2008) ("A limited public forum exists when the government intentionally opens a nonpublic forum to expressive activity by a certain class of speakers to address a particular class of topics." (citing Cogswell v. City of Seattle, 347 F.3d 809, 814 (9th Cir. 2003))).

reasonable because "messages on specialty license plates give the appearance of having the government's endorsement, and Illinois does not wish to be perceived as endorsing *any* position on the subject of abortion."[124] Thus, the Illinois legislature's denying the "Choose Life" plate did not violate the free speech rights of Choose Life of Illinois because those rights were not implicated by Illinois's specialty license plate forum.

In *Roach v. Stouffer*,[125] the Eighth Circuit also was called on to resolve whether a "Choose Life" specialty plate was government speech or private speech.[126] Under Missouri's specialty plate program, there were two ways to get specialty plates approved: (i) legislative enactment and (ii) department of revenue (DOR) approval.[127] Choose Life of Missouri submitted an application to the DOR for a "Choose Life" plate and met the

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124. *White*, 547 F.3d at 855. There is a palpable tension in the Seventh Circuit's analysis. The court concludes that specialty plates are private speech because their "messages are most closely associated with drivers and the sponsoring organizations, and the driver is the ultimate communicator of the message." *Id.* at 864. If true, then it is not clear why the government *reasonably* can believe that third parties will view the state as endorsing a message about abortion. *Id.* at 855. After all, under the Seventh Circuit's simplified version of the *SCV* test, a reasonable observer considers the speaker to be the driver, not the government. *Id.* at 864. That is the main reason why specialty plates are private speech. Hence, the Seventh Circuit's attempt to distinguish *Stanton* is unavailing.

125. 560 F.3d 860 (8th Cir. 2009).

126. *Id.* at 863.

127. *See id.* at 862 (noting that Missouri provides two methods to create specialty license plates); MO. REV. STAT. § 301.3150 (2012) (describing the process for department of revenue approval). The Eighth Circuit considers only the administrative process and does not have occasion to analyze whether the legislative process, pursuant to which the legislature passes a statute creating a specialty plate, might make the government responsible for the content of the specialty plate. *See Roach*, 560 F.3d at 869–70 (analyzing the amount of discretion allowed in the administrative process for the approval of specialty plates). This latter question is important given that (a) the legislative process accounted for roughly seventy of Missouri's specialty plates and (b) the Missouri legislature has passed legislation creating a variety of specialty license plates (for example, "We Shall Not Forget," "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 encourage. *Id.* at 862; *see also* MO. REV. STAT. §§ 301.3032–.3148 (noting various specialty license plates approved by the Missouri legislature).

statutory requirements under Missouri law.[128] Under the DOR process, though, a joint committee on transportation reviewed each application and voted to approve or deny the specialty plate request.[129] If the joint committee "receives a signed petition from five house members or two senators that they are opposed to the approval of the proposed license plate," then the committee must reject the application.[130] Because two senators objected to the "Choose Life" plate, the committee denied Choose Life of Missouri's application.[131] In response, the organization sued, arguing that the denial of its application violated the First and Fourteenth Amendments.[132] The district court ruled that the specialty plates were private speech and that Missouri's DOR process lacked adequate guidelines to prevent viewpoint discrimination.[133]

On appeal, the Eighth Circuit identified the same threshold question as the other circuits: "whether the messages contained on specialty plates communicate government or private speech."[134] After reviewing the case law from other circuits, the court adopted *White*'s simplified version of the *SCV* test—the literal speaker test: "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."[135] Following *SCV*, *Stanton*, and *White*, the Eighth Circuit concluded that specialty plates are private speech under this test: "[W]e now join the Fourth, Seventh and Ninth Circuits in concluding that a reasonable and

128. *Roach*, 560 F.3d at 863.

129. *See id.* at 862 ("The department of revenue shall submit for approval all applications for the development of specialty plates to the joint committee on transportation oversight during a regular session of the general assembly for approval." (quoting MO. REV. STAT. § 301.3150 (2012))).

130. *Id.* (quoting MO. REV. STAT. § 21.795(6) (2005) (amended 2009)).

131. *Id.* at 863.

132. *See id.* (claiming violation of "rights to free speech, due process and equal protection under the United States Constitution").

133. *See id.* ("The district court held that the specialty plates constituted private speech and that the statutory scheme lacked adequate guidelines to prevent viewpoint discrimination by the state . . . .").

134. *Id.*

135. *Id.* at 867.

fully informed observer would consider the speaker to be the organization that sponsors and the vehicle owner who displays the specialty license plate."[136]

Although the *SCV* test included four factors, *Roach* reasonably included the Fourth Circuit in the list of courts applying the literal speaker test. Under Judge Michael's analysis in *Rose*, "no one who sees a specialty license plate imprinted with the phrase 'Choose Life' would doubt that the owner of that vehicle holds a pro-life viewpoint."[137] From this, he concluded that the literal speaker "appears to be the vehicle owner, not the State, just as the literal speaker of a bumper sticker message is the vehicle owner, not the producer of the bumper sticker."[138] Judge Michael also acknowledged that the "same reasoning" applies to the "ultimate responsibility" prong of the *SCV-Rose* test.[139] Given that the reasoning is the same for the literal speaker and ultimate responsibility prongs, *Roach* reasonably views these factors as being effectively the same.[140] Moreover, although the first two *SCV* factors suggested government speech and the second two factors indicated private speech, the Fourth Circuit ultimately treated the South Carolina "Choose Life" plate as private speech in a designated limited forum based in large part on the identity of the speaker as determined by a reasonable

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136. *Id.*

137. Planned Parenthood of S.C. Inc. v. Rose, 361 F.3d 786, 794 (4th Cir. 2004).

138. *Id.* at 794. As discussed more fully below, the bumper sticker analogy, while having superficial appeal, misrepresents two important aspects of the specialty plate context. First, unlike with bumper stickers, the state owns the license plates. They are government property and bear the name of the issuing state. Second, in states like Virginia, North Carolina, South Carolina, and Tennessee, each specialty plate must be authorized by legislative act. The legislative and executive branches have exclusive authority to decide on the language and symbols included on the plate. The government lacks such control over the content of bumper stickers.

139. *Id.*

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

observer.[141] Thus, even in the Fourth Circuit, the literal speaker prong appears to be determinative in the specialty plate context.

Applying the literal speaker test, the Eighth Circuit, following *Rose* and *White*, relied heavily on its assessment of the purpose of the specialty plate program—to raise money and to allow private groups to promote their organizations and messages—and how a reasonable person would interpret the specialty plates—as conveying a message on behalf of the sponsoring organization and the vehicle owner.[142] Given that Missouri offers more than 200 specialty plates, "a reasonable observer could not think that the State of Missouri communicates all of those messages."[143] In addition, the reasonable observer would know that the owner made the effort to purchase the specialty plate to convey her own message and not a message forced on the owner by the state.[144] Thus, specialty plates promoted private speech in a state-created forum, and Missouri could not discriminate against particular viewpoints in that forum.[145] Because Missouri's specialty plate scheme provided "no standards or guidelines whatsoever,"[146] the joint committee had "unbridled discretion" to deny Choose Life of Missouri's application based on the organization's viewpoint.[147] This unfettered discretion rendered the DOR process unconstitutional.[148]

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141. *See Rose*, 361 F.3d at 798 ("The medium here—the specialty license plate scheme—is more like a limited forum for expression than it is like a school, museum, or clinic.").

142. *See*, *e.g.*, *Roach*, 560 F.3d at 867–68 ("[T]he organizations that sponsor the specialty plates and the vehicle owners who choose to purchase and display them are the literal speakers who bear the ultimate responsibility for the message.").

143. *Id.* at 868.

144. *See id.* ("[A] reasonable observer would understand that the vehicle owner took the initiative to purchase the specialty plate and is voluntarily communicating his or her own message, not the message of the state.").

145. *Id.*

146. *Id.* at 869.

147. *See id.* at 869–70 (reviewing the statute and noting that no standard for review for specialty plates is given).

148. *Id.* at 870.

In reaching this conclusion, the Eighth Circuit rejected the claim that specialty plates were government speech under the Court's 2009 *Summum* decision.[149] In a footnote, the Eighth Circuit attempted to distinguish *Summum*.[150] Whereas *Summum* dealt with "privately-donated monuments in a city park," specialty plates implicated "a much different issue: whether specialty license plates on privately-owned vehicles communicate government speech."[151] According to the Eighth Circuit, specialty plates, unlike monuments in public parks, permit expressive conduct on the part of organizations and their supporters, not the government.[152]

The Eighth Circuit's discussion of *Summum* ignores an important feature of the Court's reasoning—that donors may send a message through a monument even though the government accepts the monument for its own, and possibly different, reasons: "[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."[153] The Fraternal Order of Eagles certainly received a benefit from having its name, symbols, and message inscribed on a monument in a city park even though, as the Court confirmed in *Summum*, Pleasant Grove City adopted that monument to send its own message.[154] Thus, contrary to the Eighth Circuit's cursory

149. *See id.* at 868 ("[W]e conclude that the messages communicated on specialty plates are private speech, not government speech.").

150. *Id.* at 868 n.3.

151. *Id.*

152. *Id.*

153. Pleasant Grove City v. Summum, 555 U.S. 460, 476 (2009).

154. The Ten Commandments monument in *Summum* is "virtually identical" to the monument displayed on the Texas Capitol grounds that was at issue in *Van Orden*. *Summum*, 555 U.S. at 483 (Scalia, J., concurring); *see also* Van Orden v. Perry, 545 U.S. 677, 681–82 (2005) (describing the monument of the Ten Commandments). Both monuments were "donated by the Eagles 'as part of that organization's efforts to combat juvenile delinquency.'" *Summum*, 555 U.S. at 483 (quoting *Van Orden*, 545 U.S. at 701). As the Court noted in *Van Orden*, the State of Texas "had a valid secular purpose in recognizing and commending the Eagles for their efforts to reduce juvenile delinquency" even though the monument included "the text of the Ten Commandments[, a]n eagle

attempt to distinguish *Summum*, *Summum* and *Johanns* have much more to say about the government speech–private speech distinction. In fact, as I argue below, these cases articulate a new test for government speech, a test that is inconsistent with the literal speaker test adopted by the Fourth, Seventh, Eighth, and Ninth Circuits.

3. The Sixth Circuit's Johanns Test: Specialty Plates as Government Speech

In 2006, the Sixth Circuit was asked to consider the constitutionality of Tennessee's specialty plate program.[155] The Tennessee legislature had passed a statute authorizing a "Choose Life" plate.[156] Pursuant to that statute, half of the proceeds from the sale of the plate went to New Life Resources, Inc., which had to use the funds "exclusively for counseling and financial assistance, including food, clothing, and medical assistance for pregnant women in Tennessee."[157] While the bill was being considered, certain pro-choice groups sought to amend the statute to allow a "Pro-Choice" specialty plate, but the legislature rebuffed their requests.[158] After the "Choose Life" plate was approved, the American Civil Liberties Union and others challenged Tennessee's "Choose Life" plate, arguing that the statute violated the speech rights of groups advocating alternative viewpoints on the abortion issue.[159] The district court, applying the Fourth Circuit's four-factor test, agreed and enjoined enforcement of the statute.[160]

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grasping the American flag, an eye inside of a pyramid, . . . two small tablets with what appears to be an ancient script . . . [,] two Stars of David and the superimposed Greek letters Chi and Rho, which represent Christ." *Van Orden*, 545 U.S. at 681–82.

155. ACLU of Tenn. v. Bredesen, 441 F.3d 370, 380 (6th Cir. 2006).

156. *Id.* at 372.

157. *Id.* (quoting TENN. CODE ANN. § 55-4-306(c) (2013)).

158. *Id.*

159. *See id.* (claiming the act is facially unconstitutional).

160. *Id.*

On appeal, a split panel of the Sixth Circuit reversed. The majority relied on the Supreme Court's 2005 decision in *Johanns*, contending that *Johanns* established a new test for government speech: "*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."[161] In *Johanns*, the Court emphasized the government's complete control—"from beginning to end"—over the "Beef. It's What's for Dinner" message.[162] As a result, instead of analyzing the four factors set out in *SCV* and *Rose*, the Sixth Circuit focused on the level of control the Tennessee legislature had over the "Choose Life" plate.[163] The majority determined that Tennessee had the same type of control over the "Choose Life" license plate as the government had over the beef advertising campaign in *Johanns*.[164] Under Tennessee's statutory scheme, the legislature established "the overall message to be communicated," "wield[ed] 'final approval authority over every word used,'" and "retain[ed] a veto over its design."[165] Thus, the "Choose Life" plate was government speech, promulgating "Tennessee's own message."[166]

That the "Choose Life" plate was government speech meant that Tennessee's specialty plate program did not create a forum for private speech and, consequently, that Tennessee could promote a "Choose Life" message on its specialty plates without offering plates expressing other views on abortion. Given that "[g]overnment in this age is large and involved in practically every aspect of life," the majority found it reasonable that "Tennessee would use its license plate program to convey messages regarding over one hundred groups, ideologies,

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161. *Id.* at 375.

162. *See* Johanns v. Livestock Mktg. Ass'n, 544 U.S. 550, 560–61 (2005) (noting that Congress and the Secretary of Agriculture set the overarching message and a committee, answerable to the Secretary, developed the remaining details).

163. ACLU of Tenn. v. Bredesen, 441 F.3d 370, 376 (6th Cir. 2006).

164. *Id.*

165. *Id.* (citations omitted).

166. *Id.* (quoting *Johanns*, 544 U.S. at 562).

activities, and colleges."[167] If specialty plates were private speech, the state would lose its ability to convey its preferred messages in other contexts as well, such as "Register to Vote" pins, "Win the War" stamps, and "Spay or Neuter your Pets" license plates.[168] Moreover, Tennessee might be required to approve plates for the KKK and the American Nazi Party.[169] According to the court, "[s]uch an argument falls of its own weight" and eviscerates the government's right to speak for itself.[170]

In dissent, Judge Martin sought to distinguish and limit *Johanns* to the compelled subsidy context. According to Judge Martin, *Johanns* dealt with a compelled subsidy "where who is speaking is determinative, and if it is the government, consistent with its broad taxing authority, that speech is immune from First Amendment challenge."[171] Tennessee's specialty plate program was meant to foster private speech,[172] so *Johanns* simply did not apply in the speech forum context:

> Thus, the government speech doctrine, a la *Johanns*, is not the determinative question in this case. The specialty license plate issue at hand does not involve compelled speech. It does not involve a compelled subsidy for a private entity. And, it does not involve a compelled subsidy to support a government message.[173]

On this view, *Johanns* is not "a watershed First Amendment case" and "does not transform all First Amendment doctrine."[174] Instead, *Johanns* is concerned only with the compelled subsidy of speech, which Judge Martin believes is far removed from Tennessee's specialty license plate program.[175] For Judge Martin, Tennessee's program, like the programs in *Rose*, *Stanton*, and

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167. *Id.*

168. *Id.* at 378–79.

169. *Id.* at 376–79.

170. *Id.* at 377.

171. *Id.* at 387 (Martin, J., dissenting).

172. *Id.* at 381.

173. *Id.* at 386.

174. *Id.* at 387 n.12.

175. *See id.* at 387 (noting that the harm "is being denied the opportunity to speak on the same terms as other private citizens within a government sponsored program").

Roach, impermissibly discriminates based on viewpoint by allowing a "Choose Life" plate while prohibiting alternative views on abortion.[176]

B. Summum *and the Government Speech Doctrine:* Johanns *Applies Broadly to All Speech over Which the Government Has Effective Control*

In the wake of *Bredesen*, *SCV*, *Rose*, *Stanton*, *White*, and *Roach*, the threshold question in specialty license plate cases is not simply whether specialty plates are government or private speech,[177] but whether *Johanns*'s control test or the literal speaker test governs that determination. The answer to that question, in turn, depends on the scope of the government speech doctrine post-*Summum*. If the government speech doctrine applies broadly to government expression over which the state has effective control, then much of Judge Martin's criticism of the majority opinion in *Bredesen*—as well as the arguments made by the Fourth, Seventh, Eighth, and Ninth Circuits—falls away. If not, then the majority position properly cabined *Johanns* to the compelled subsidy context, and the literal speaker test endures. Thus, any analysis of specialty license plates now requires a careful review of *Summum*.

In *Summum*, the Court considered whether Pleasant Grove City could refuse to display in a park a monument containing the Seven Aphorisms of the Summum religion when the City already

176. *See id.* at 390 ("I would hold that Tennessee created a forum to encourage a diversity of viewpoints from private speakers and therefore the Constitution requires viewpoint neutrality.").

177. Government speech has received considerable attention over the last few years. Given that many circuits have employed some variation of the literal speaker test, it is not surprising that much of this literature has focused on the literal speaker test or *SCV*'s mixed speech analysis. *See, e.g.*, Corbin, *supra* note 25; Claudia E. Haupt, *Mixed Public-Private Speech and the Establishment Clause*, 85 TUL. L. REV. 571 (2011); Amy R. Lucas, Comment, *Specialty License Plates: The First Amendment and the Intersection of Government Speech and Public Forum Doctrines*, 55 UCLA L. REV. 1971 (2008); Norton, *supra* note 25; Andy G. Olree, *Identifying Government Speech*, 42 CONN. L. REV. 365 (2009); Mark Strasser, *Ignore the Man Behind the Curtain: On the Government Speech Doctrine and What It Licenses*, 21 B.U. PUB. INTEREST L.J. 85 (2011).

displayed a monument inscribed with the Ten Commandments.[178] Although directly involving religious expression in the public sphere, the Court decided the case on First Amendment speech, not Establishment Clause, grounds. In particular, the Court unanimously adopted the government speech doctrine, holding that the City could accept some facially religious monuments while rejecting others.[179] The Court confirmed what it previously had suggested in *Southworth*, *Rust*, and *Johanns*—that the government "has the right 'to speak for itself'"[180] and that when speaking the government "'is entitled to say what it wishes'"[181] and "to select the views that it wants to express."[182] Because the government is not regulating a forum when speaking but is giving expression to its own views, "the government's own speech . . . is exempt from First Amendment scrutiny."[183] As a speaker, the government can discriminate based on content and viewpoint.[184] To hold otherwise would be to undermine the government's ability to function:

> 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.[185]

But under *Summum*, what does the government have to do to qualify for the protection of the government speech doctrine?

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178. Pleasant Grove City v. Summum, 555 U.S. 460, 464–65 (2009).

179. *Id.* at 481.

180. *Id.* at 467 (quoting Bd. of Regents of the Univ. of Wis. Sys. v. Southworth, 529 U.S. 217, 229 (2000)).

181. *Id.* at 467–68 (quoting Rosenberger v. Rector & Visitors of the Univ. of Va., 515 U.S. 819, 833 (1995)).

182. *Id.* at 468.

183. *Id.* at 467 (quoting Johanns v. Livestock Mktg. Ass'n, 544 U.S. 550, 553 (2005)).

184. *See* Rosenberger v. Rector & Visitors of the Univ. of Va., 515 U.S. 819, 833 (1995) (stating that, if the government is speaking, "it may make content-based choices"); 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 . . . .").

185. Pleasant Grove City v. Summum, 555 U.S. 460, 468 (2009) (quoting Keller v. State Bar of Cal., 496 U.S. 1, 12–13 (1990)).

According to the majority of circuit courts that have reached the issue, the government is speaking for government speech doctrine purposes only if a reasonable person would attribute the expressive activity to the government.[186] Justice Souter advocated for this test in his concurrence in *Summum* and his dissent in *Johanns*: "[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."[187] The problem is that a majority of the Court has never adopted Justice Souter's proposed test. Instead, *Summum* focused on 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."[188] Under *Summum*, if the government exercises effective control over the message, it becomes the speaker and may claim the fundamental right protected by the Speech Clause—the right to choose its own 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."[189]

For specialty license plates to fall within the government speech doctrine, a state must have sufficient control over the selection and approval process to ensure that the government is

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186. *See, e.g.*, Roach v. Stouffer, 560 F.3d 860, 867 (8th Cir. 2009) ("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."); Choose Life Ill., Inc. v. White, 547 F.3d 853, 863 (7th Cir. 2008) (listing the relevant factors in making this determination as: "the degree to which the message originates with the government, the degree to which the government exercises editorial control over the message, and whether the government or a private party communicates the message").

187. *Summum*, 555 U.S. at 487 (Souter, J., concurring); *see also* Johanns v. Livestock Mktg. Ass'n, 544 U.S. 550, 578 (2005) (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.").

188. *Summum*, 555 U.S. at 473 (majority opinion) (quoting *Johanns*, 544 U.S. at 560–61 (majority opinion)).

189. Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos., Inc., 515 U.S. 557, 573 (1995).

sending its own message as opposed to simply facilitating the speech of private parties. As *Bredesen*, on the one hand, and *SCV*, *Rose*, *Stanton*, *White*, and *Roach*, on the other, demonstrate, the control test and the literal speaker test give different—and inconsistent—results in the specialty plate context.[190] Thus, whether an organization can force the government to issue a "Kill the Sea Turtles" plate depends on whether *Summum*'s control test supplants the literal speaker test espoused by Justice Souter and several circuit courts.

III. Specialty License Plates are Government Speech if the State Effectively Controls the Message Conveyed by Its Specialty Plates and Has Final Approval Authority over Their Selection

The government speech–private speech distinction is critical in the specialty plate context because how the speech is classified is dispositive of the First Amendment challenge. If specialty plates are government speech, then the First Amendment does not apply: "The Free Speech Clause restricts government regulation of private speech; it does not regulate government speech."[191] A state may speak through its specialty plates and even engage in viewpoint discrimination by offering a plate promoting one message ("Save the Sea Turtles" or "Choose Life") while precluding different messages on the same topic ("Kill the Sea Turtles" or "Respect Choice"). If specialty plates are private speech, the First Amendment applies fully, and any restriction on specialty plates must be, at a minimum, reasonable and viewpoint neutral.

As the Supreme Court acknowledges in *Summum*, "[t]here 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."[192] The split between and among the circuits bears this out. *Summum*, though, provides a new standard that is inconsistent with the subjective test that many

190. *Supra* Part II.A.

191. Pleasant Grove City v. Summum, 555 U.S. 460, 467 (2009).

192. *Id.* at 470.

of the circuit courts have used—the reasonable observer's perception of whom is speaking.[193] Thus, in the wake of *Summum*, the analysis of specialty plates by the Fourth, Seventh, Eighth, and Ninth Circuits is wrong.

Specifically, the majority's literal speaker test is inconsistent with the government speech doctrine set forth in *Johanns* and *Summum* for at least two reasons. First, unlike the four-factor test developed in *SCV*, *Summum* and *Johanns* focus on the level of control the government exercises over the speech, not on whom a reasonable observer views as the literal speaker.[194] As a result, the nature of the specialty plate program is important.[195] If states, such as Arizona and Missouri, create an administrative procedure that authorizes all specialty plates that organizations meeting some minimal statutorily defined criteria propose, then the plates may be private speech. Rather than retain control over the messages, the government permits any group meeting the specified criteria to express its views on the subjects permitted in that forum. If, however, states must pass legislation to authorize a specialty plate, then the government retains greater control over the content and approval process for each plate. Under *Summum*, this difference in control makes a constitutional difference. When a state "has 'effectively controlled' the messages

193. Justice Souter advocates for the literal speaker test, in part, to provide consistency between the Establishment Clause and Free Speech Clause analyses: "This reasonable observer test for governmental character is of a piece with the one for spotting forbidden governmental endorsement of religion in the Establishment Clause cases." *Summum*, 555 U.S. at 487 (Souter, J., concurring). The criticisms of the endorsement test apply with equal force to the literal speaker test. *See, e.g.*, Cnty. of Allegheny v. ACLU Greater Pittsburgh Chapter, 492 U.S. 573, 669 (1989) (Kennedy, J., concurring and dissenting) ("For the reasons expressed below, I submit that the endorsement test is flawed in its fundamentals and unworkable in practice.").

194. *See Summum*, 555 U.S. at 473 ("[T]he City has 'effectively controlled' the messages sent by the monuments in the Park by exercising 'final approval authority' over their selection."); Johanns v. Livestock Mktg. Ass'n, 544 U.S. 550, 560 (2005) ("The message of the promotional campaigns is effectively controlled by the Federal Government itself.").

195. The literal speaker test does not distinguish between a specialty plate program that requires legislative enactment and one that establishes an administrative procedure. The literal speaker associates specialty plates with the driver under both programs even though the government exercises substantially different levels of control over the speech in each program.

sent by [specialty license plates] by exercising 'final approval authority' over their selection," the plates are government speech.[196]

Second, several of the circuit courts improperly attempt to limit the government speech doctrine to cases like *Rust* and *Johanns* where the government sponsors a specific "program" or the speech is "'part of a larger governmental scheme to encourage some private activity, like beef consumption.'"[197] Neither *Summum* nor *Johanns* imposes such a "program" or "scheme" limitation on the government speech doctrine. In fact, *Summum* is inconsistent with any such requirement. The monuments in *Summum* were government speech even though there was no narrowly defined message or program at issue. As the Court explained, the park included fifteen permanent displays, at least eleven of which were donated by private groups or individuals, including "an historic granary, a wishing well, the City's first fire station, a September 11 monument, and a Ten Commandments monument."[198] Such a collection of monuments does not constitute a government program like the family planning services in *Rust v. Sullivan*[199] or the ad campaign in *Johanns*, yet the Court held that the monuments were government speech nonetheless.[200]

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196. *Summum*, 555 U.S. at 473.

197. Ariz. Life Coal. Inc. v. Stanton, 515 F.3d 956, 964 (9th Cir. 2008) (quoting Andy G. Olree, *Specialty License Plates: Look Who's Talking in the Sixth Circuit*, 68 ALA. LAW. 213, 214 (2007)); Planned Parenthood of S.C. Inc. v. Rose, 361 F.3d 786, 795 (4th Cir. 2004) ("[T]he State has created a limited (license plate) forum for expression, not a government program such as one, for example, that would be carried out through a school, museum, or clinic.").

198. Pleasant Grove City v. Summum, 555 U.S. 460, 465 (2008).

199. *See* Rust v. Sullivan, 500 U.S. 173, 194 (1991) (noting the absurd consequences of imposing viewpoint discrimination on government programs).

200. *See Summum*, 555 U.S. at 472 ("[I]t is clear that the monuments in Pleasant Grove's Pioneer Park represent government speech.").

*A. Post-*Summum*, the Level of Government Control over the Content of the Message Determines Whether the Government is Speaking, Not the Identity of the "Literal Speaker" as Determined by a Reasonable Third Party Observer*

Although the *SCV* test purports to have four factors, the majority of circuit courts, following pre-*Summum* decisions from lower federal courts, takes the identity of the literal speaker as determined by a third party observer to be critical in the specialty plate context. As Judge Michael noted in *Rose*, "[N]o one who sees a specialty license plate imprinted with the phrase 'Choose Life' would doubt that the owner of that vehicle holds a pro-life viewpoint. The literal speaker of the Choose Life message on the specialty plate therefore *appears* to be the vehicle owner, not the State."[201] Recognizing the central role the literal speaker prong plays in *SCV* and *Rose*, the Eighth Circuit concluded that the test "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."[202] The Seventh Circuit reached the same result in *White*.[203]

The problem is that the Supreme Court previously considered and rejected the "literal speaker" test. In a section of *Johanns* that the Seventh and Eighth Circuits did not discuss, the majority *denied* the respondents' claim that "[c]ommunications cannot be 'government speech,' . . . if they are attributed to someone other than the government."[204] Although many who viewed the "Beef. It's What's for Dinner" ads may not have known the government created the campaign, the Court held that the ads were still government speech: "[T]he

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201. *Rose*, 361 F.3d at 794 (emphasis added).

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

203. *See* Choose Life Ill., Inc. v. White, 547 F.3d 853, 863 (7th Cir. 2008) (adopting the *SCV* factors but explaining that these 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").

204. *See* Johanns v. Livestock Mktg. Ass'n, 544 U.S. 550, 564–65 (2005) ("Since neither the Beef Act nor the Beef Order *requires* attribution, neither can be the cause of any possible First Amendment harm.").

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."[205] The majority acknowledged that the identity of the speaker *might* be relevant to an as-applied compelled speech challenge, which would force respondents to show "that individual beef advertisements *were attributed* to [them]."[206] Because the beef producers were forced to subsidize the government's speech, the attribution of that speech to a specific beef producer might support a compelled speech claim.[207] In *Johanns*, though, there was no evidence of attribution to support an as-applied challenge, the only evidence in the record being one sentence that stated: "an employee of one of the respondent associations said he did *not* think the beef promotions would be attributed to his group."[208] Because the evidence did not show that there had been any attribution, there was no compelled speech and, consequently, no basis for an as-applied challenge.[209]

Justice Souter advanced the same test for government speech in his *Johanns* dissent: "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."[210] In *Summum*, Justice Souter argued, consistent with his dissent in *Johanns*, that the identity requirement applied to all government speech, not just government speech in the compelled subsidy context of *Johanns*: "[T]he government should lose [the protection of the government speech doctrine] when the character of the speech is

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205. *Id.* at 564 n.7.

206. *Id.* at 565 (emphasis added).

207. In his concurrence, Justice Thomas explained that, in his view, any unwanted association—regardless of the source of funding—would support a compelled speech claim: "The government may not, consistent with the First Amendment, associate individuals or organizations involuntarily with speech by attributing an unwanted message to them, whether or not those individuals fund the speech, and whether or not the message is under the government's control." *Johanns*, 544 U.S. at 568 (Thomas, J., concurring).

208. *Id.* at 565–66 (majority opinion).

209. *See id.* (discussing the lack of basis for an as-applied challenge).

210. *Id.* at 578 (Souter, J., dissenting).

at issue and its governmental nature has not been made clear."[211] Because (i) the majority in *Johanns* expressly rejected the literal speaker test advanced by the respondents and Justice Souter[212] and (ii) no other Justice joined Justice Souter's *Summum* concurrence, *Johanns* precludes courts from limiting the government speech doctrine to situations in which a reasonable observer would know that the government is speaking.[213]

Instead of considering who might *appear* to be speaking, the *Johanns* Court focused exclusively on the government's control over the message when deciding whether the beef advertisements were government speech.[214] Although a viewer reasonably might have thought the government was speaking, the advertisements in *Johanns* were government speech because the "message set out in the beef promotions is from beginning to end the message established by the Federal Government" and because the government "exercises final approval authority over every word used in every promotional campaign."[215] In his dissent, Justice Souter confirmed that the *Johanns* majority proffered a "control" test for government speech instead of considering whether a reasonable observer would identify the government as the speaker: "The Court takes the view that because Congress authorized this scheme and the Government controls (or at least has veto on) the content of the beef ads, the need for democratic accountability has been satisfied."[216] Justice Souter lamented that the majority applied the government speech doctrine even though the government's control over the message was not "made apparent to those who get the message."[217] Thus,

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211. Pleasant Grove City v. Summum, 555 U.S. 460, 485 (2009) (Souter, J., concurring).

212. *See* Johanns v. Livestock Mktg. Ass'n, 544 U.S. 550, 564 n.7 (2005) ("But the correct focus is not on whether the ads' audience realizes the Government is speaking . . . .").

213. *See id.* (refusing to limit the government speech doctrine to situations where the third parties know that the government is speaking).

214. *See id.* at 560–62 (discussing the government's complete control over the message).

215. *Id.* at 560–61 (emphasis added).

216. *Id.* at 578 (Souter, J., dissenting).

217. *Id.* In the *Rose* opinion, Judge Michael anticipated Justice Souter's

Justice Souter expressly acknowledged that the majority rejected his argument—that the government speech doctrine should apply only if a third party would understand the government to be the speaker—in favor of the "control" test that finds government speech where "Congress authorized this scheme and the Government controls (or at least has a veto on) the content of the beef ads."[218]

Moreover, any attempt to limit *Johanns* to the compelled subsidy context is unavailing in light of *Summum*.[219] To determine whether the government is speaking, *Summum* followed *Johanns* and evaluated the level of control that the government exercised over the speech.[220] In section IV of the opinion, the Court explained "it is clear that the monuments . . . 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."[221] Given that the *government* decided which monuments "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 message about its image was government speech.[222]

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concern with the identity of the literal speaker. Specifically, Judge Michael rejected a government "control" test because "this argument overlooks the fact that continuing transparency is essential to accountability" and "the identity of the speaker of the Choose Life message is likely to be unclear to viewers of the license plate." Planned Parenthood of S.C. Inc. v. Rose, 361 F.3d 786, 798–99 (4th Cir. 2004).

218. Johanns v. Livestock Mktg. Ass'n, 544 U.S. 550, 578 (2005) (Souter, J., dissenting).

219. *See* ACLU of Tenn. v. Bredesen, 441 F.3d 370, 387 (6th Cir. 2006) (Martin, J., dissenting) ("The government speech doctrine, as it is used in *Johanns*, is more appropriately utilized in the compelled subsidy context, where who is speaking is determinative, and if it is the government, consistent with its broad taxing authority, that speech is immune from First Amendment challenge."). Contrary to Judge Martin's suggestion, *Johanns*—at least when read in conjunction with *Summum*—is "a watershed First Amendment case" and not simply "a watershed *compelled subsidy* case." *Id.* at 387 n.12.

220. *See* Pleasant Grove City v. Summum, 555 U.S. 460, 472–73 (2009) (describing the level of control that the government exercised over the monuments).

221. *Id.* (quoting *Johanns*, 544 U.S. at 560–61).

222. *Id.* at 473.

B. Wooley *Precluded the Government's Compelling Speech Through Standard Issue Plates but Did Not Address Whether Specialty Plates Are Government Speech or Private Speech*

The Court's rejection of the literal speaker test helps to illustrate why *Wooley v. Maynard*[223] does not support the Fourth, Seventh, Eighth, and Ninth Circuits' conclusions that specialty plates are private speech.[224] In *White*, the Seventh Circuit invoked *Wooley* to show that specialty plates are not government speech: "[I]f messages on license plates implicated no private-speech interests *at all*, then *Wooley* (among other cases) would have come out differently."[225] Prior to *Summum*, this rigid separation between a government message and a private message may have been reasonable. Post-*Summum*, however, it is a false dichotomy.[226] Under *Summum* and *Johanns*, a third party's perception (or misperception) that a vehicle owner is conveying a message through a license plate may be relevant to a compelled speech claim,[227] but it does not determine whether the government is speaking. Under *Summum*, a driver may seek to convey a message by displaying a specialty plate just as a monument donor or a painter may seek to convey a message through her donation and artwork, respectively.[228] The government speech doctrine, though, enables the government to speak and convey its own message through the license plate, monument, or artwork: "the thoughts or sentiments expressed by

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223. 430 U.S. 705 (1977).

224. *Infra* notes 233–39 and accompanying text.

225. Choose Life Ill., Inc. v. White, 547 F.3d 853, 862 (7th Cir. 2008); *see also* Sons of Confederate Veterans, Inc. v. Comm'r of the Va. Dep't of Motor Vehicles, 288 F.3d 610, 621 (4th Cir. 2002) ("[T]he Supreme Court has indicated [in *Wooley*] that license plates, even when owned by the government, implicate private speech interests because of the connection of any message on the plate to the driver or owner of the vehicle." (citing *Wooley*, 430 U.S. at 717)).

226. *See infra* notes 227–40 and accompanying text (analyzing the difficulty of separating government and private messages).

227. *See* Johanns v. Livestock Mktg. Ass'n, 544 U.S. 550, 568 (2005) (Thomas, J., concurring) (discussing compelled speech claims).

228. *See* Pleasant Grove City v. Summum, 555 U.S. 460, 470–71 (2009) (discussing government- and privately financed and donated monuments that the government accepts and displays to the public on government property).

a government entity that accepts and displays such an object may be quite different from those of either its creator or its donor."[229]

In *Wooley*, the Court found that the message "Live Free or Die" was the government's message and that the statute required the Maynards to "use their private property as a 'mobile billboard' for the *state*'s ideological message—or suffer a penalty."[230] Although an observer might attribute a message to the driver, the government violated the First Amendment because it controlled the license plate process (from owning the license plate to selecting the message) and forced citizens to carry its message.[231] The constitutional violation in *Wooley*, therefore, was that the government compelled the Maynards to express the *government's* message.[232]

In the specialty plate context, the circuit courts do not—and cannot—rely on the Supreme Court's compelled speech cases because states do not require anyone to purchase and display specialty plates.[233] *Wooley* did not hold that the message on the New Hampshire license plate was the message of the Maynards; rather, the Court maintained that a private individual cannot be forced to involuntarily carry a *government* message.[234] The Court did not suggest that the plate involved private speech or discriminated against opposing viewpoints and, therefore, did not

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229. *Id.* at 476; s*ee also id.* at 476 n.5 ("Museums display works of art that express many different sentiments, and the significance of a donated work of art to its creator or donor may differ markedly from a museum's reasons for accepting and displaying the work.").

230. Wooley v. Maynard, 430 U.S. 705, 715 (1977) (emphasis added).

231. *See id.* ("Here . . . we are faced with a state measure which forces an individual, as part of his daily life . . . to be an instrument for fostering public adherence to [the government's] ideological point of view [that the individual] finds unacceptable.").

232. *See id.* (discussing how the "State 'invades the sphere of intellect and spirit which it is the purpose of the First Amendment to our Constitution to reserve from all official control'" (quoting W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 642 (1943))).

233. *License Plates & Placards*, DEP'T OF MOTOR VEHICLES, www.dmv.org/license-plates.php (last visited Oct. 4, 2013) (on file with the Washington and Lee Law Review).

234. *See Wooley*, 430 U.S. at 716 (concluding that the State of New Hampshire may not require the Maynards to display the state motto on their license plates).

require New Hampshire to stop using (or even to modify) the "Live Free or Die" plate.[235] Accordingly, the Court struck down only the part of the statute that prohibited covering up the motto because that provision "requires that [the Maynards] use their private property as a 'mobile billboard' for the *State's* ideological message."[236] Unlike the standard issue plate in *Wooley*, states do not compel anyone to purchase and display specialty license plates. Instead, motorists consent to be "the courier for [the government's] message."[237] Thus, *Wooley* implicitly acknowledges what *Summum* subsequently confirms—that the government can speak for itself even though private parties may also engage in speech activity.[238] Where, as in *Wooley*, the government compels others to speak, the First Amendment prevents such coercion.[239] But the government is still permitted to speak through drivers who are willing to keep Live Free or Die uncovered on their standard issue plates.[240]

In fact, if *Wooley* applies at all, it supports the argument of states requiring legislative approval of specialty plates that such plates are government speech. If the government is speaking, then private citizens do not have a heckler's veto. Private citizens cannot compel the government to carry their desired message any more than the government can force motorists—like the Maynards in *Wooley*—to carry its preferred message. That is,

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235. *See id.* at 713 (defining the issue as whether the state may constitutionally require an individual to participate in the dissemination of a state message).

236. *Id.* at 715 (emphasis added).

237. *Id.* at 717.

238. *See* Pleasant Grove City v. Summum, 555 U.S. 460, 468 (2009) ("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.").

239. *See* Wooley v. Maynard, 430 U.S. 705, 715 (1977) ("The First Amendment protects the right of individuals to hold a point of view different from the majority and refuse to foster, in the way New Hampshire commands [by requiring drivers to display the Live Free or Die license plates], an idea they find morally objectionable.").

240. *See id.* at 713 (holding that the government cannot require drivers to keep the "Live Free or Die" uncovered, but not extending the ruling to prohibit the slogan on the standard issue plates).

when speaking, the government "may also decide 'what not to say.'"[241]

But *Wooley* does not apply.[242] Unlike the "Live Free or Die" plate in *Wooley*, specialty plates "are privately financed and donated [to] government[s] . . . for public display on government [property]," namely the state-owned license plate.[243] Motorists voluntarily choose to display the state's message on their vehicles and are willing to pay for the opportunity to do so. In *SCV*, the Fourth Circuit suggests that it is "curious" that, if the government were speaking, the government would require a commitment from a certain number of drivers before making its message available through a specialty plate.[244] The additional fee suggests to the Fourth and Ninth Circuits that the "purpose" of the specialty plate program is to raise revenue, not to promulgate a government-controlled message.[245] Thus, on this view, the government's purpose is to create a forum for private speech from which it secures additional revenue. The government is not seeking to "subsidiz[e] the promulgation of government-chosen messages"[246] like it did through the subsidy program in *Rust*.[247] Consequently, specialty plates are not government speech for these circuits.

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241. Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos., 515 U.S. 557, 573 (1995) (quoting Pac. Gas & Elec. Co. v. Pub. Utils. Comm'n of Cal., 475 U.S. 1, 16 (1986) (plurality opinion)).

242. *Infra* notes 243–47 and accompanying text.

243. *Summum*, 555 U.S. at 461.

244. *See* Sons of Confederate Veterans, Inc. v. Comm'r of the Va. Dep't of Motor Vehicles, 288 F.3d 610, 620 (4th Cir. 2002) ("If the General Assembly intends to speak, it is curious that it requires the guaranteed collection of a designated amount of money from private persons before its 'speech' is triggered.").

245. *See id.* at 620 ("It is not the case, in other words, that the special plate program only incidentally produces revenue for the Commonwealth. The very structure of the program ensures that only special plate messages popular enough among private individuals to produce a certain amount of revenue will be expressed."); Ariz. Life Coal. Inc. v. Stanton, 515 F.3d 956, 966 (9th Cir. 2008) ("The revenue raising purpose of the Arizona special organization plate program supports a finding of private speech.").

246. *Sons of Confederate Veterans*, 288 F.3d at 620 n.8.

247. *See* Rust v. Sullivan, 500 U.S. 173, 178–81 (1991) (describing the Title X subsidy program that promulgated government messages about family planning).

As *Summum* demonstrates, though, the majority's reliance on the extra fee requirement is misplaced. "By accepting monuments that are privately funded or donated, government entities save tax dollars and are able to acquire monuments that they could not have afforded to fund on their own."[248] The additional charge for a specialty plate ensures that the costs of production and distribution are covered before manufacturing the plate (while in many states raising money for specific causes that the states support). Illinois's specialty plate statute expressly makes this point:

> The Secretary of State shall not issue a series of special plates unless applications . . . have been received for 10,000 plates of that series; except that the Secretary of State may prescribe some other required number of applications *if that number is sufficient to pay for the total cost of designing, manufacturing and issuing the special license plate*.[249]

In this way, states can promote a variety of messages that they might not otherwise have the resources to fund. In addition, the state is able to raise additional funds to support groups with activities that are consistent with the states' chosen messages.

The fact that individuals are willing to pay for the privilege of carrying the government's message (or of displaying that message for their own purposes) does not convert government speech into private speech.[250] As the Court explained in *Summum*, "[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-

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248. Pleasant Grove City v. Summum, 555 U.S. 460, 471 (2009).

249. 625 ILL. COMP. STAT. 5/3-600(a) (2012) (emphasis added).

250. The Fourth Circuit invoked *Rosenberger* to support its claim that specialty plate programs create fora in which the government cannot discriminate based on viewpoint: "'When the government targets . . . particular views taken by speakers on a subject, the violation of the First Amendment is all the more blatant.'" Planned Parenthood of S.C. Inc. v. Rose, 361 F.3d 786, 797 (4th Cir. 2004) (quoting Rosenberger v. Rector & Visitors of the Univ. of Va., 515 U.S. 819, 829 (1995)). *Rosenberger* is inapplicable, however, because in that case, unlike the specialty plate context, the government expressly disclaimed that it was speaking. *Rosenberger*, 515 U.S. at 835. As the University of Virginia put it, student groups were "not the University's agents, [were] not subject to its control, and [were] not its responsibility." *Id.*

controlled message."[251] That third-party volunteers agree with the state's message and are willing to assist the state in getting out its message does not mean the state has created a forum for private speech; rather, it demonstrates that the state has adopted a message that appeals to some segment of its population: "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."[252]

Under *Rust*, a state's specialty plate program would be constitutional if the state paid vehicle owners to carry a "Choose Life" or "Save the Sea Turtles" plate. Under *Summum*, the constitutional analysis is the same where those same vehicle owners volunteer—or agree to pay more—to carry the government's message.[253] Nor is this surprising given that the government speech doctrine is triggered by the level of government control over the message and not the source of the funding for that message. In the monument context, the government can intend to send—and actually send—a message through its monuments even though it is not able or willing to expend its own funds to do so.[254] For example, a city might want to erect a monument to honor its veterans but may be unwilling or unable to pay for the monument. If private citizens raise sufficient funds and submit a design that is acceptable to the city, the city is free to accept and display that monument without losing the protection of the government speech doctrine: "Indeed, when 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

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251. *Summum*, 555 U.S. at 468; *see also* Johanns v. Livestock Mktg. Ass'n, 544 U.S. 550, 562 (2005) (explaining that where the government controls the message, "it is not precluded from relying on the government-speech doctrine merely because it solicits assistance from nongovernmental sources").

252. ACLU of Tenn. v. Bredesen, 441 F.3d 370, 378 (6th Cir. 2006).

253. *See Summum*, 555 U.S. at 468 (drawing no distinction between private and public funding of speech controlled by the government).

254. *See id.* at 474 ("The City's actions . . . signify[] to all Park visitors that the City intends the [privately funded] monument to speak on its behalf.").

a monument, a government entity does not necessarily endorse the specific meaning that any particular donor sees in the monument."[255] Rather, the city "select[s] 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."[256]

The same is true for specialty license plates. Under the Supreme Court's government speech cases, organizations and individuals can propose specialty plates for their own reasons.[257] If legislation is required to approve the plate, the state exercises effective control and veto power over the message and, therefore, can authorize specialty plates to convey its intended message.[258] Under *Johanns* and *Summum*, the government has this authority even though (reasonable) third parties might not identify the government as the speaker (and thereby incorrectly attribute no message to the government) or misunderstand the government's intended message.[259] Consequently, the identity of the speaker as perceived by a third party is the wrong lens through which to see if the message is government or private speech.

A quick review of *Summum* might provide support for the literal speaker test. The Court identifies public accountability as one of the main checks on government speech: "a government entity is ultimately 'accountable to the electorate and the political process for its advocacy.'"[260] As the Fourth Circuit explained in *SCV*, "where the government itself is responsible, and therefore accountable, for the message that its speech sends, the danger ordinarily involved in governmental viewpoint-based choices is not present."[261] To hold the government accountable, so the

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255. *Id.* at 476–77.

256. *Id.* at 473.

257. *See supra* note 249 and accompanying text (discussing the ability of organizations and individuals to propose specialty license plates in Illinois).

258. *See supra* notes 249–51 and accompanying text (discussing legislation about specialty plates).

259. *See* Pleasant Grove City v. Summum, 555 U.S. 460, 476 (2009) (discussing the difficulties of identifying a monument's exact message and speaker).

260. *Id.* at 468 (quoting Bd. of Regents of the Univ. of Wis. Sys. v. Southworth, 529 U.S. 217, 235 (2000)).

261. Sons of Confederate Veterans, Inc. v. Comm'r of the Va. Dep't of Motor Vehicles, 288 F.3d 610, 618 (4th Cir. 2002); *see also* Planned Parenthood of S.C.

argument goes, the electorate must be able to know that the government is speaking.[262] As the Fourth Circuit noted in *Rose*, "the State's advocacy of the pro-life viewpoint may not be readily apparent to those who see the Choose Life plate, and this insulates the State's advocacy from electoral accountability."[263]

Consequently, in the absence of *Johanns* and the rest of the *Summum* decision, the literal speaker test is a facially plausible—even reasonable—way to demarcate government speech from private speech. As discussed above, however, *Johanns* and *Summum* prohibit courts from limiting the government speech doctrine to situations in which a reasonable observer would know that the government is speaking.[264] After all, in *Johanns*, a reasonable observer would have thought that a third party—and not the government—was speaking.[265] Moreover, *Wooley* does not alter the analysis. Specialty plates do not implicate compelled speech; rather, they display to the world a government message through volunteers who pay for the privilege to carry that message.

C. The Literal Speaker Test Fails to Account For the Fact that Government Speech May Have Many Meanings to Many Different People

Given *Johann*'s and *Summum*'s emphasis on the government's control over the message,[266] the literal speaker test

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Inc. v. Rose, 361 F.3d 786, 795–96 (4th Cir. 2004) ("The government speech doctrine was not intended to authorize cloaked advocacy that allows the State to promote an idea without being accountable to the political process.").

262. *See Sons of Confederate Veterans*, 288 F.3d at 618 (discussing the need to know when the government is "speaking").

263. *Rose*, 361 F.3d at 795.

264. *Supra* Part III.A.

265. *See* ACLU of Tenn. v. Bredesen, 441 F.3d 370, 377 (6th Cir. 2006)

> *Johanns* also says that a government-crafted message is government speech even if the government does not explicitly credit itself as the speaker. . . . In contrast, the medium in this case, a government-issued license plate that every reasonable person knows to be government-issued, a fortiori conveys a government message.

266. *See* Pleasant Grove City v. Summum, 555 U.S. 460, 467–68 (2009) (emphasizing the government's control over the message); Johanns v. Livestock

concentrates on the wrong person in the communicative process—the listener instead of the government speaker. This shift in focus undermines the government's ability to say what it wants. Whenever a reasonable observer improperly interprets a specialty plate as conveying a message on behalf of the driver, the government loses its right to regulate the speech on its specialty plates. What the literal speaker test overlooks is the fact that government speech may convey more than one message: "the thoughts or sentiments expressed by a government entity that accepts and displays [a monument] may be quite different from those of either its creator or its donor."[267] Under *Summum*, the government does not lose the protection of the government speech doctrine simply because a private person assists the government in creating or disseminating its message and, at the same time, seeks to engage in expressive activity.[268] "When, as here, the government sets the overall message to be communicated and approves every word that is disseminated, it is not precluded from relying on the government-speech doctrine merely because it solicits assistance from nongovernmental sources in developing specific messages."[269]

Individuals and organizations may donate monuments to convey "specific messages" that they want to communicate to others.[270] The key is that the government can adopt such monuments for its own purposes.[271] If a state has effective control over the speech—in other words, sets the overall message and approves every word conveyed—the speech is government speech.[272] This is true, even though the individuals who proposed

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Mktg. Ass'n, 544 U.S. 550, 560 (2005) (same).

267. *Summum*, 555 U.S. at 476.

268. *See id.* at 468 ("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.").

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

270. *See Summum*, 555 U.S. at 464 (giving an example of a private group donating monuments to place in a city park).

271. *See id.* at 473–74 (providing an example of a city taking ownership of a privately donated monument displayed in the city's park).

272. Johanns v. Livestock Mktg. Ass'n, 544 U.S. 550, 560 (giving one example of government speech).

the specialty license plate may intend to send their own, different message. Moreover, reasonable observers may interpret such monuments in even more and varied ways: "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."[273]

For example, in *Van Orden v. Perry*,[274] the Fraternal Order of Eagles commissioned a Ten Commandments monument to draw attention to child delinquency.[275] The State of Texas adopted the monument to convey its own message: "Texas has treated its Capitol grounds monuments as representing the several strands in the State's political and legal history. The inclusion of the Ten Commandments monument in this group has a dual significance, partaking of both religion and government."[276] Although Texas did not have a statutorily prescribed program, it had approved "17 monuments and 21 historical markers commemorating the 'people, ideals, and events that compose Texan identity.'"[277] These thirty-eight monuments and markers were designed and donated by various groups, but the government selected those that conveyed the message that the government wanted to send about Texas political and legal history.[278] Reasonable observers could interpret the Fraternal Order of Eagles monument as sending various messages, including a religious message.[279] Yet, despite there being a variety of possible interpretations of the

273. Pleasant Grove City v. Summum, 555 U.S. 460, 474 (2009).

274. 545 U.S. 677 (2005).

275. *Id.* at 681–82.

276. *Id.* at 691–92.

277. *Id*. at 681.

278. *See id.* at 702 (Breyer, J., concurring) ("[The setting and monuments] communicate[] to visitors that the State sought to reflect moral principles, illustrating a relation between ethics and law that the State's citizens, historically speaking, have endorsed.").

279. *See id*. at 718 (Stevens, J., dissenting)

> In choosing to display this version of the Commandments, Texas tells the observer that the State supports this side of the doctrinal religious debate. The reasonable observer, after all, has no way of knowing that this text was the product of compromise, or that there is a rationale of any kind for the text's selection.

monument,[280] for First Amendment purposes the monuments were government speech even though Texas did not adopt each monument as part of a specific program like Title X (*Rust*)[281] or beef advertisements (*Johanns*).[282]

The same analysis applies in the specialty license plate context. Through their specialty plate programs, states select those specialty plates "that portray what [government decisionmakers] view as appropriate for the [state], taking into account such content-based factors as esthetics, history, and local culture."[283] States that retain effective control over their specialty plates adopt only those specialty plates that convey something about the states that their legislatures think is appropriate for "presenting the image of the [state] that it wishes to project to all who" see the specialty license plates—which, given the mobility of people today, are seen in States across the country.[284] By approving many different plates, states convey a message about the things that make it unique and special—from the diversity of its citizens' interests and their educational backgrounds to the causes that the state supports: organ donation, military service, wildlife conservation, proper treatment of animals, education (for example, collegiate plates, Kids First), civic groups (for example, Kiwanis, Knights of Columbus, Oasis Temple, and Lion's Club), sports (for example, professional football, basketball, and hockey as well as NASCAR plates), wildlife conservation (for example, Save the Sea Turtles, Coastal Federation, State Parks, Trout Unlimited), recreational opportunities (for example, golf, tennis, skiing, ocean, and mountains), and the arts.[285]

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280. *See* Pleasant Grove City v. Summum, 555 U.S. 460, 474–75 (2009) (considering the numerous possible messages that observers might attribute to the Greco-Roman mosaic of the word "Imagine" that was donated to New York City's Central Park).

281. *See* Rust v. Sullivan, 500 U.S. 173, 178–81 (1991) (describing the Title X subsidy program adopted by the government).

282. *See* Johanns v. Livestock Mktg. Ass'n, 544 U.S. 550, 560 (2005) (describing the beef advertisement program as effectively controlled by the government).

283. *Summum*, 555 U.S. at 472.

284. *Id.* at 473.

285. *See, e.g.*, *Charitable & Collegiate Plates*, DEP'T OF MOTOR VEHICLES: ST.

At least under specialty plate programs that require legislative approval, states retain power over the message on each plate by "exercis[ing] editorial control over [proposed specialty plates] through prior submission requirements, design input, requested modifications, written criteria, and legislative approvals of specific content proposals."[286] The specialty plates, therefore, are government speech: "The [specialty plates] that are accepted, therefore, are meant to convey and have the effect of conveying a government message, and they thus constitute government speech."[287] As a result, under *Johanns* and *Summum*,[288] specialty plates are exempt from scrutiny under the Free Speech Clause of the First Amendment.

D. States Can Invoke the Government Speech Doctrine Even if Their Specialty Plate Programs Do Not Promulgate a Narrowly Defined Program or Message

The circuit courts that take specialty plates to be private speech try to avoid this result by arguing that specialty plates do not qualify as the type of "program" protected by the government speech doctrine: "Thus, because South Carolina has not created a program 'of the kind recognized in *Rust*,' it cannot justify the Act as 'necessary to define the scope and contours' of the license plate scheme."[289] These circuit courts impermissibly seek to limit the government speech doctrine to speech directed at a specific, narrowly defined program or message. On this view, *Rust* is a government speech case involving a federal program that promoted family planning but not abortion services.[290] The

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OF NEV., www.dmvnv.com/platescharitable.htm (last visited Oct. 11, 2013) (listing several charitable and collegiate causes and plates available in the State of Nevada) (on file with the Washington and Lee Law Review).

286. Pleasant Grove City v. Summum, 555 U.S. 460, 472 (2009).

287. *Id*.

288. *See* Johanns v. Livestock Mktg. Ass'n, 544 U.S. 550, 567 (2005) (affording no basis to a First Amendment challenge); *Summum*, 555 U.S. at 481 (same).

289. Planned Parenthood of S.C. Inc. v. Rose, 361 F.3d 786, 798 (4th Cir. 2004) (quoting Legal Servs. Corp. v. Velazquez, 531 U.S. 533, 547 (2001)).

290. *See* Rust v. Sullivan, 500 U.S. 173, 178–79 (1991) (describing the Title

government could require funding recipients to use the money only for the specific program set forth in Title X.[291] Similarly, *Johanns* involved government speech because the "Beef. It's What's for Dinner" campaign was created as part of a statutorily prescribed program to promote the marketing and consumption of beef products.[292] Because specialty plate programs allegedly do not convey a specific message on behalf of the states, they do not qualify as government speech.

The attempt to restrict government speech to narrowly defined programs fails for at least two reasons. First, a "specific program" requirement is inconsistent with *Summum*.[293] In *Summum*, the government did not espouse a specific message along the lines of the programs in *Rust* or *Johanns*.[294] Second, contrary to the Seventh and Eighth Circuits' suggestion,[295] a state does not forfeit its role as speaker simply by offering a variety of specialty plates. As the Sixth Circuit acknowledged in *Bredesen*, "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."[296] States can use their specialty plate programs to convey an overall image of the state by highlighting different aspects of the state that the

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X subsidy program that promulgated government messages about family planning programs that did not include abortion).

291. *See id.* ("[Title X] provides that '[n]one of the funds appropriated under this subchapter shall be used in programs where abortion is a method of family planning.'" (quoting 42 U.S.C. § 300a-6 (2012))).

292. *See Johanns*, 544 U.S. at 554 (describing the promotional projects authorized by the Beef Act including the familiar trademarked slogan "Beef. It's What's for Dinner").

293. *See* Pleasant Grove City v. Summum, 555 U.S. 460, 464–86 (2009) (discussing the city's right to select monuments for a public park without ever mentioning a "specific program" requirement).

294. *See id.* at 477 (noting that the message conveyed by a monument may evolve over time).

295. *See, e.g.*, Roach v. Stouffer, 560 F.3d 860, 868 (8th Cir. 2009) ("With more than 200 specialty plates available to Missouri vehicle owners, a reasonable observer could not think that the State of Missouri communicates all those messages.").

296. ACLU of Tenn. v. Bredesen, 441 F.3d 370, 376 (6th Cir. 2006).

legislature wants to celebrate. A state need not subsidize a specific program (such as Title X in *Rust*)[297] or promulgate a narrowly defined message (such as "Beef. It's What's for Dinner")[298] to fall within the government speech doctrine. After all, in *Summum*, the city had a wide range of monuments—for example, a wishing well, September 11 monument, fire station, granary, and the Ten Commandments monument—yet retained the protection of the government speech doctrine.[299] The central point for the Court was that 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."[300]

The Court never has imposed a narrow "program" requirement under the government speech doctrine even though the government certainly can and does speak through specific programs. This is apparent from *Hurley*.[301] In *Hurley*, a group of gay, lesbian, and bisexual descendants of Irish immigrants sought to march as a group in Boston's St. Patrick's Day parade.[302] After the private organizers of the parade denied their request, the group sued, contending that the exclusion of the group violated Massachusetts's public accommodation law.[303] A unanimous Court held that the First Amendment protected the organizers' right to exclude a group that would "impart[] a message the organizers do not wish to convey."[304] Given that parades are expressive activities, the organizers could claim the "fundamental rule of protection under the First Amendment, that a speaker has the autonomy to choose the content of his own message."[305] And this is true even if the speaker does not convey

297. *See* Rust v. Sullivan, 500 U.S. 173, 178–79 (1991) (describing the government subsidized Title X program).

298. Johanns v. Livestock Mktg. Ass'n, 544 U.S. 550, 555 (2005).

299. Pleasant Grove City v. Summum, 555 U.S. 460, 464–65 (2009).

300. *Id.* at 473.

301. 515 U.S. 557 (1995).

302. *See id.* at 572 ("[T]he disagreement goes to the admission of GLIB as its own parade unit carrying its own banner.").

303. *See id.* at 572–73 (discussing GLIB's grounds for the litigation).

304. *Id.* at 559.

305. *Id.* at 573.

a particularized message: "A speaker does not forfeit constitutional protection simply by combining multifarious voices, or by failing to edit their themes to isolate an exact message as the exclusive subject matter of the speech."[306] The parade organizers in *Hurley* were "rather lenient in admitting participants."[307] But they still were protected by the First Amendment because "a narrow, succinctly articulated 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 Schöenberg, or Jabberwocky verse of Lewis Carroll."[308]

Like the parade organizers in *Hurley*, states select those specialty plates that taken together convey a message about each state. And "since every participating unit affects the message conveyed," those who have messages that are not approved cannot "requir[e states] to alter the expressive content of their [program]."[309] When speaking, states retain the right to say what they want on certain topics and to remain silent on 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 on that day. Even if this view gives the Council credit for a more considered judgment than it actively made, the 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.[310]

As *Summum* confirms, under the government speech doctrine a state has "the choice . . . not to propound a particular point of view,"[311] which means it can exclude viewpoints that conflict with

306. *Id.* at 569–70.
307. *Id.* at 569.
308. *Id.* (citation omitted).
309. *Id.* at 572–73.
310. *Id.* at 574.
311. *Id.* at 575.

its vision of "what merits celebration"[312] about the state.[313] The fact that a state adopts "expressive units" (in other words, particular specialty plates that individuals or groups propose and pay for) relating to the people, history, sports, and natural beauty of that state does not cause it to lose the protection of the government speech doctrine. As the Court explains in *Johanns*, "[w]hen, as here, the government sets the *overall message* to be communicated and approves every word that is disseminated," a state does not relinquish First Amendment protection "merely because it solicits assistance from nongovernmental sources in developing *specific messages*."[314] Thus, because states, like the parade organizers in *Hurley*, (i) establish the message and (ii) have effective control over the content and dissemination of the message, states' specialty plate programs constitute government speech.[315]

Furthermore, the fact that some (reasonable) observers may attribute a message—"Save the Sea Turtles," "Choose Life," "Tobacco Heritage," or any other specialty plate—to the vehicle owner and not the state does not move the state outside the government speech doctrine. Although many (perhaps most) viewers thought a private beef association sponsored the "Beef. It's What's for Dinner" campaign, the speech still was

312. *Id.* at 574.

313. *See id.* at 573–74 (stating that the point of "this general rule, that the speaker has the right to tailor the speech, . . . is to shield just those choices of content that in someone's eyes are misguided, or even hurtful").

314. Johanns v. Livestock Mktg. Ass'n, 544 U.S. 550, 562 (2005) (emphasis added); *see also* Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos., 515 U.S. 557, 570 (1995) ("Nor, under our precedent, does First Amendment protection require a speaker to generate, as an original matter, each item featured in the communication.").

315. Even in the funding context, the Court does not limit the government speech doctrine to narrowly defined programs. As *Legal Services Corp. v. Velazquez* explains, the government can avail itself of the government speech doctrine whenever it is speaking, not only when it decides to use private speakers to advance specific programs: "We have said that viewpoint-based funding decisions can be sustained in instances in which the government is itself the speaker . . . or in instances, like *Rust*, in which the government 'used private speakers to transmit specific information pertaining to its own programs.'" 531 U.S. 533, 541 (2001) (citation omitted).

government speech.[316] Similarly, the government is speaking through its specialty plates even though "[t]hose who see the Choose Life plate displayed on vehicles, and fail to see a comparable pro-choice plate, are likely to assume that the presence of one plate and the absence of another are the result of popular choice."[317] States, such as North Carolina, Missouri, and Texas, may offer more than 100 specialty plates but that does not change the fact that the state controls the entire process for each specialty plate and selects only those plates "that portray what they view as appropriate for" each state.[318] By approving many different plates, these states send a message about the things they want to celebrate about their state and citizens—be that education, sports, recreation, civic organizations, military service, arts, environmental issues, and the list goes on.

In addition, *Summum*'s recognition that those who display or view the government's speech may interpret that message differently undermines Judge Martin's claim in his *Bredesen* dissent that Tennessee's specialty plate program promotes speech that appears difficult, if not impossible, to attribute to the state.[319] To use Judge Martin's example, Tennessee offers specialty plates with the emblems of a variety of universities and colleges, including the University of Tennessee and the University of Florida.[320] These school specialty plates enable motorists to show their pride in or support for particular schools. Contrary to Judge Martin's claim, though, these college plates do not send inconsistent messages. In offering a variety of school license plates, Tennessee does not advocate one school over another, even though individuals choosing a specific

316. *See Johanns*, 544 U.S. at 564–65 (holding that the slogan is government speech even though viewers may have attributed the slogan to private companies).

317. Planned Parenthood of S.C. Inc. v. Rose, 361 F.3d 786, 798 (4th Cir. 2004)

318. Pleasant Grove City v. Summum, 555 U.S. 460, 472 (2009).

319. ACLU of Tenn. v. Bredesen, 441 F.3d 370, 382 n.4 (6th Cir. 2006) (Martin, J., dissenting).

320. *See id.* at 382 n.5 (listing the various universities and organizations that have specialty plates in Tennessee).

college plate might do so.[321] Rather, by approving specialty plates for many colleges and universities, Tennessee conveys a message about its diverse, well-educated citizens and, at the same time, champions the various educational opportunities that Tennessee offers its citizens.[322] That a third party might see a Florida specialty plate and think the vehicle owner likes Florida does not change the fact that the state formally adopted the plate to send its own, albeit different, message about Tennessee—that Tennessee has well-educated citizens and is proud of its various institutions of higher learning.

Under *Johanns* and *Summum*, states may convey their desired messages—"Choose Life" or "Save the Sea Turtles"—if they have "effective[] control[]" and "final approval authority" over the content and selection of specialty license plates.[323] States that require statutory action for specialty plates have such control over the images and wording that appear on their specialty plates.[324] And, just as the legislatures can create new specialty plates through statute, they can revoke or amend any specialty plate by passing new legislation. Thus, these states have the same level of control over specialty plates that local governments exercise over monument selection, "generally exercis[ing] editorial control over [specialty plates] through prior submission requirements, design input, requested modifications,

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321. Under the literal speaker test adopted by several circuit courts, the purpose of the specialty plate program is to permit private expression in a designated forum. *See* Ariz. Life Coal. v. Stanton, 515 F.3d 956, 965 (9th Cir. 2008) (noting that the primary function specialty plates serve is the opportunity for citizens to identify themselves with particular messages).

322. *See Bredesen*, 441 F.3d at 382 n.5 (noting that the legislature only allows specialty license plates that serve the community and contribute to the welfare of others).

323. Johanns v. Livestock Mktg. Ass'n, 544 U.S. 550, 560–61 (2005).

324. *See, e.g.*, MO. REV. STAT. § 301.2999 (2012) (noting that the "director of revenue shall not authorize the manufacture" of specialty license plates unless certain conditions are met); S.C. CODE REG. 56-3-8000(F) (2012) ("The department may alter, modify, or refuse to produce any special license plate that it deems offensive or fails to meet community standards."); TEX. TRANSP. CODE ANN. § 504.008 (West 2012) (noting that "an application for specialty license plates must be submitted in the manner" specified by the department); VA. CODE ANN. § 46.2-725 (2011) ("No series of special license plates shall be created . . . except as authorized in this article.").

written criteria, and legislative approvals of specific content proposals."[325] The First Amendment, therefore, protects the states' right to issue a "Save the Sea Turtles" or "Choose Life" plate without offering plates that express alternative viewpoints.[326]

IV. The Literal Speaker Test Also Violates Summum *Because it Forces States to Either Allow a Cacophony of Speech with Which They Disagree, or to Terminate Their Specialty Plate Programs Altogether*

Given that most of the circuit courts decided their specialty license plate cases pre-*Summum*, they did not have the opportunity to consider an independent basis for the Court's decision.[327] In a section of *Summum* that has received scarce attention to date, the Court states that where "public forum principles . . . are out of place in the context of [a] case," it will not apply its forum doctrine.[328] The Court has applied its forum doctrine in situations in which "government-owned property or a government program was capable of accommodating a large number of public speakers without defeating the essential function of the land or the program."[329] Thus, a forum analysis is appropriate for speeches and parades in parks, the Combined Federal Campaign,[330] a student

325. Pleasant Grove City v. Summum, 555 U.S. 460, 472 (2009); *see also Johanns*, 544 U.S. at 560 ("The message set out in the beef promotions is from beginning to end the message established by the Federal Government.").

326. *See* Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos., 515 U.S. 557, 576 (1995) ("Thus, when dissemination of a view contrary to one's own is forced upon a speaker intimately connected with the communication advanced, the speaker's right to autonomy over the message is compromised.").

327. *See* Am. Civil Liberties Union of N.C. v. Conti, 912 F. Supp. 2d 363, 370 (E.D.N.C. 2012) (detailing the new interpretation the Supreme Court provided in "its latest opinion concerning government speech").

328. *Summum*, 555 U.S. at 478; *see also* United States v. Am. Library Ass'n, 539 U.S. 194, 205 (2003) ("The public forum principles on which the District Court relied . . . are out of place in the context of this case." (citation omitted)).

329. *Summum*, 555 U.S. at 478.

330. *See* Cornelius v. NAACP Legal Def. & Educ. Fund, Inc., 473 U.S. 788, 804–05 (1985) (determining whether a charity drive aimed at federal employees

activity fund at a university,[331] meetings in public buildings,[332] and a school's internal mail facility.[333]

But this analysis does not govern monuments in public parks. In *Summum*, the park could "accommodate only a limited number of permanent monuments" given its size.[334] While a park can host many speakers and demonstrations over time, it cannot display an unlimited number of monuments. Space runs out because "monuments . . . endure."[335] The Court's concern with spatial limitations may, at first glance, suggest that the forum analysis should apply in the specialty plate context. Specialty plates can accommodate a large variety of special interest messages, as evidenced by states' offering hundreds of such plates to vehicle owners.[336] Although this argument has facial appeal, the Court expressly stated that its forum analysis does not apply when the proffered private speech would undermine the government's proposed message regardless of whether that speech is undertaken through government-owned property or a government-sponsored program.[337] Where, as in a specialty plate

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was a public forum by applying forum analysis).

331. *See* Rosenberger v. Rector & Visitors of the Univ. of Va., 515 U.S. 819, 825 (1995) (concluding that the denial of monetary disbursements to certain student groups amounted to viewpoint discrimination).

332. *See* Widmar v. Vincent, 454 U.S. 263, 274–75 (1981) (noting that an open forum in a public university does not confer the imprimatur of state approval of particular religious groups).

333. *See* Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 39, 46–47 (1983) (determining that public property not traditionally a public forum may be reserved by the state for its intended purposes as long as the speech regulations are reasonable).

334. Pleasant Grove City v. Summum, 555 U.S. 460, 479 (2009).

335. *Id.*

336. In *American Civil Liberties Union of N.C. v. Conti*, now pending in the Fourth Circuit, the district court attempted to distinguish specialty plates from monuments in public parks because the latter are subject to spatial limitations while the former are not: "The specialty license plate program—which already has demonstrated its ability to accommodate a large variety of special interest messages—is wholly different from a public park which can only accommodate a limited number of monuments." 912 F. Supp. 2d 363, 372 n.4 (E.D.N.C. 2012), *argued sub nom.*, Am. Civil Liberties Union of N.C. v. Tata, No. 13–1030 (4th Cir. Oct. 30, 2013).

337. *See Summum*, 555 U.S. at 473, 480 (noting that the city selected the monuments it wanted to display for the purpose of presenting the image of the

program, the private speech would interfere with the government program (or the use of government property for its expressive purposes), the forum analysis does not apply.[338]

Stated differently, public forum principles are out of place where public access would defeat the essential function of a government program by forcing the government to send messages that conflict with its chosen message.[339] Thus, even if there was room for the Summum monument in the Pleasant Grove City park, the government could decline it—and any other monument—if the government determined that the monument conflicted with the government's intended message.[340] Otherwise, "[e]very jurisdiction that has accepted a donated war memorial may be asked to provide equal treatment for a donated monument questioning the cause for which the veterans fought."[341]

The same problem arises if courts apply the Court's forum analysis to specialty plate programs. The literal speaker test, which takes specialty plates to be private speech in a designated limited forum, does not provide any limiting principle to constrain the number and type of specialty plates that a state could be forced to offer: "If the government entities must maintain viewpoint neutrality in their selection of donated monuments, they must . . . 'brace themselves for an influx of clutter.'"[342] Instead, states are required to accept all viewpoints

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city that it wished to show, and that, generally, forum analysis does not apply in such a case).

338. *See id*. (noting that generally, forum analysis does not apply to the installation of permanent monuments on public property).

339. *See id.* at 478 (stating that public forum principles are out of place in the context of the case).

340. *See id.* at 472 ("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.").

341. *Id.* at 480. As the Court repeatedly states in *Summum*, local governments can "select the monuments that portray what they view as appropriate for the place in question," *id*. at 472, not simply because space is limited but also because the government has the right to send its desired message. *Id.* at 473.

342. *Id.* at 479.

relating to any of their specialty plates.[343] Under this test, once a state offers a "Choose Life" plate, it must offer plates expressing (presumably all) other viewpoints on that subject.[344] What is true with respect to a "Choose Life" plate, though, is true for other specialty plates (like a Sons of Confederate Veterans plate that includes the image of a Confederate flag). To avoid impermissible discrimination under the literal speaker test, states must either allow opposing viewpoints on any subject covered by an existing specialty plate—which could lead to a flood of different plates advancing positions or groups with which North Carolina disagrees—or do away with specialty plates altogether.[345]

For example, under the forum analysis used by many of the circuit courts, if a state offers a Veterans of Foreign Wars plate, it can be required to issue specialty plates questioning the cause for which these veterans fought.[346] Given that many states have a longstanding relationship with the military and are home to various military bases, these states also issue plates honoring those who currently serve in various branches of the military.[347]

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343. *See id.* at 480 (providing examples of how all viewpoints in the form of monuments would have to be represented).

344. In his concurrence in *Choose Life Ill., Inc. v. White*, Judge Manion contends that a "Choose Life" plate is viewpoint neutral because it presumes that a woman has a constitutionally protected right to choose. 547 F.3d 853, 867–69 (7th Cir. 2008) (Manion, J., concurring). A specialty plate program offering a Choose Life plate but not a Choose Abortion plate might be viewpoint neutral:

> But rather than devolve into the contentious debate about viewpoints concerning the legality of abortion, a state could reasonably seek to promote a common middle ground—shared by both those who support and those who object to the Supreme Court's decision to legalize abortion. States which find the "Choose Life" plate provides a positive non-confrontational area of shared consensus act reasonably in that conclusion and do not engage in viewpoint discrimination.

Id. at 869.

345. Pleasant Grove City v. Summum, 555 U.S. 460, 480 (2009) (noting that if all monuments were permitted, most parks would respond by refusing *all* donated monuments).

346. *Id.* ("Every jurisdiction that has accepted a donated war memorial may be asked to provide equal treatment for a donated monument questioning the cause for which the veterans fought.").

347. *See, e.g.*, N.C. GEN. STAT. § 20-79.4(a2) (2012) (providing standards for license plates based on military service).

Under the court's public forum analysis, simply offering such plates would force a state to issue plates criticizing the military or those who serve in it—sending a message that directly contravenes the state's intended message.[348] The state would be forced to promulgate a wide variety of plates that directly contravene its own preferred message or, at a minimum, to send a message with which the state does not want to be associated.

By the same token, having issued a "Save the Sea Turtles" plate, which expresses the state's concern for and pride in its coastal wildlife, the legislature may be asked to authorize a countervailing alternative, such as "Kill the Sea Turtles" or "Let the Sea Turtles Die." Under the literal speaker test, when confronted with such an alternative, the state would have to accept the proposed plate (thereby promoting a message directly at odds with its chosen view) or do away with the "Save the Sea Turtles" plate.[349] As the Court stated in *Summum*,

> On this view, when France presented the Statue of Liberty to the United States in 1884, this country had the option of either (a) declining France's offer or (b) accepting the gift, but providing a comparable location in the harbor of New York for other statues of a similar size and nature (*e.g.*, a Statue of Autocracy, if one had been offered by, say, the German Empire or Imperial Russia).[350]

Given that states, such as North Carolina, offer a variety of specialty plates, including "Support Our Troops," "Friends of the Great Smoky Mountains," "In God We Trust," "Kids First," and "Tobacco Heritage,"[351] applying the Court's forum analysis would force these states either to allow opposing viewpoints—"Undermine Our Troops," "Clear-Cut the Great Smoky Mountains," "In Atheism We Trust," "Kids Last," and "Tobacco

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348. *See Summum*, 555 U.S. at 480 ("If government entities must maintain viewpoint neutrality . . . they must either 'brace themselves for an influx of clutter' or face the pressure to remove longstanding and cherished monuments.").

349. *See id.* (noting that government entities would have to either allow all expressions, or none at all).

350. *Id.* at 479.

351. *See* N.C. GEN. STAT. § 20-79.4(b) (2012) (listing the numerous and various specialty license plates offered).

Causes Cancer"—or to terminate its specialty plate program. Faced with a similar challenge to the content of a parade in *Hurley*, the Court upheld the speaker's right to determine the content of the message:

> Under this approach any contingent of protected individuals with a message would have the right to participate in petitioners' speech, so that the communication produced by the private organizers would be shaped by all those protected by the law who wished to join in with some expressive demonstration of their own. But this use of the State's power violates the fundamental rule of protection under the First Amendment, that a speaker has the autonomy to choose the content of his own message.[352]

The threat of conflicting messages is made worse by the fact that there would be a number of viewpoints, and therefore a number of proposed specialty plates, on any given topic. For example, "Choose Life" and "Respect Choice" are not the only viewpoints on abortion and, in fact, are not even necessarily contradictory views in the abortion debate. Both slogans presuppose that "choice" is appropriate. Put differently, by advocating the choice of life, the state is acknowledging that the Constitution protects a woman's right to choose. As Judge Manion put the point in his concurrence in *White*:

> The [Choose Life] message acknowledges both choice and life, so most people who claim to be pro-life and a large number of people who claim to be pro-choice but personally opposed to abortion should be comfortable with this message that is directed at pregnant women who are contemplating abortion. The petition expressly recognizes that it is the woman's choice. But at the same time it recognizes that the life of the developing baby is also at stake.[353]

Through a "Choose Life" plate, the state is promoting childbirth over abortion, and, in the process, admitting that there is a constitutionally protected choice to be made. States are allowed to

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352. Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos., 515 U.S. 557, 573 (1995).

353. Choose Life Ill., Inc. v. White, 547 F.3d 853, 867–68 (7th Cir. 2008) (Manion, J., concurring).

do this under *Planned Parenthood of Southeastern Pennsylvania v. Casey*:

> To promote the State's profound interest in potential life, . . . the State may take measures to ensure that the woman's choice is informed, and measures designed to advance this interest will not be invalidated as long as their purpose is to persuade the woman to choose childbirth over abortion.[354]

If the Fourth, Seventh, Eighth, and Ninth Circuits are correct and specialty plates create a forum, then states cannot discriminate against any viewpoint relating to abortion.[355] Going forward, states must allow all viewpoints to be heard.[356] Consequently, even if a state wants to promote childbirth over abortion through its specialty plate program, its legislature must approve plates that express other viewpoints on abortion—Pro-life, Pro-abortion, Anti-life, Anti-abortion, Fetuses Are Persons, Fetuses Are Not Persons, Fetuses are persons after viability, Fetuses are persons at conception, Every Child a Wanted Child, Every Child is a Child, and the list could go on and on. To avoid all of these discordant messages—messages that conflict with the state's preferred "Choose Life" message—the state would have to shut down its specialty plate program. But as *Summum* expressly states, "where the application of forum analysis would lead almost inexorably to closing of the forum, it is obvious that forum analysis is out of place."[357]

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354. Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 878 (1992).

355. *See* Roach v. Stouffer, 560 F.3d 860, 870–71 (8th Cir. 2009) (finding that because Missouri's specialty plate program allowed denial of an application based on the organization's viewpoint, it permitted viewpoint discrimination, and thus violated the First Amendment); Ariz. Life Coal. v. Stanton, 515 F.3d 956, 972 (9th Cir. 2008) (determining that the license plate Commission discriminated on the basis of viewpoint in violation of the First Amendment); *White*, 547 F.3d at 853 (concluding that because the rejection of the "Choose Life" license plate was reasonable and viewpoint neutral, there was no First Amendment violation); Planned Parenthood of S.C. Inc. v. Rose, 361 F.3d 786, 799 (4th Cir. 2004) (deciding that South Carolina engaged in viewpoint discrimination by distorting the forum in favor of its own pro-life view).

356. *See Stanton*, 515 F.3d at 965 (noting that Arizona is providing a forum in which organizations can use the specialty license plates to express their First Amendment rights and raise money for their organization).

357. Pleasant Grove City v. Summum, 555 U.S. 460, 480 (2009); *see also* Page v. Lexington Cnty. Sch. Dist. One, 531 F.3d 275, 287 (4th Cir.

Whether states will be flooded with requests for alternative viewpoints if specialty plate programs are treated as designated limited forums is not idle speculation under *Summum*. Pleasant Grove City expressed the same concern in *Summum*, and the Court held that the state's "concerns are well founded."[358] According to the Court, "[i]f government entities must maintain viewpoint neutrality in their selection of donated monuments, they must either 'brace themselves for an influx of clutter' or face the pressure to remove longstanding and cherished monuments."[359] The same applies to specialty license plates, as illustrated by the "Kill the Sea Turtles" example.

Even if no organization has petitioned a state for a "Kill the Sea Turtles" plate, the threat to the government's First Amendment rights is the same as in the monument context.[360] In *Summum*, the Court highlighted the threat to the government's ability to convey *its* desired message with two examples that had never occurred.[361] In particular, the Court considered the possible conflicts with the government's message that might arise if the forum doctrine applied and concluded that the forum doctrine, therefore, did not apply.[362] According to the Court, "[e]very jurisdiction that has accepted a donated war memorial may be asked to provide equal treatment for a donated monument questioning the cause for which the veterans fought."[363] Similarly, the Court determined that, under its forum analysis,

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2008) (explaining that because "government speech almost always supports a given policy objective and '[t]he government is entitled to promote particular messages,' [the government] can surely 'take legitimate and appropriate steps to ensure that its message[s] [are] neither garbled nor distorted'" (quoting Griffin v. Dep't of Veterans Affairs, 274 F.3d 818, 822 (4th Cir. 2001), and Rosenberger v. Rector & Visitors of the Univ. of Va., 515 U.S. 819, 833 (1995))).

358. *Summum*, 555 U.S. at 479.

359. *Id.* (citation omitted).

360. *See supra* note 359 and accompanying text (discussing the threat in the monument context, whereby government entities would have to either maintain viewpoint neutrality, or brace for an influx of numerous monuments).

361. *See Summum*, 555 U.S. at 479–80 (providing the veterans monument and Statue of Liberty examples).

362. *See id.* at 480 ("But as a general matter, forum analysis simply does not apply to the installation of permanent monuments on public property.").

363. *Id.* at 480.

accepting the Statue of Liberty would require the government to accept monuments that are inconsistent with our nation's values:

> On this view, when France presented the Statue of Liberty to the United States in 1884, this country had the option of either (a) declining France's offer or (b) accepting the gift, but providing a comparable location in the harbor of New York for other statues of a similar size and nature (*e.g.*, a Statue of Autocracy, if one had been offered by, say, the German Empire or Imperial Russia).[364]

The same constitutional analysis applies to specialty license plates. If a state honors its military and veterans of foreign wars with their own plates, it would have to issue plates "questioning the cause for which the veterans fought."[365] The threat of a monument questioning the cause for which our veterans fought is as real as the threat of a specialty plate challenging that cause.[366] That no applications for anti-veterans or antiwar plates may have been submitted previously is not surprising. Given that the government controls the specialty plate process, no one imagined that the government would approve such plates. Under the literal speaker test, though, the government loses its control over the specialty plate process and, in turn, the message conveyed by the overall program.[367] As in *Summum*, states would be required to convey messages that they disagree with and that contradict the images of the states that they are trying to promote.[368] States would lose their right "to shape [their] expression by speaking on one subject while remaining silent on another."[369] Instead of promoting numerous messages that are inconsistent with the image of a state that its elected

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364. *Id.* at 479.

365. *Id.* at 480.

366. *See id.* at 479 (noting that concerns over alternative viewpoints being promulgated were "well founded").

367. *See id.* at 480 (noting that government entities would have to either allow all expressions, or none at all).

368. *See id.* at 479–80 (providing the veterans monument and Statute of Liberty examples).

369. Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos., 515 U.S. 557, 574 (1995).

representatives want to convey, states would have to shut down their specialty plate programs.[370]

This is not to say that a state cannot create a designated open or designated limited forum for specialty plates. Rather, it is to recognize, consistent with *Summum*, that "[i]t certainly is not common for property owners to open up their property for the installation of permanent monuments [or specialty plates] that convey a message with which they do not wish to be associated."[371] States can create a forum for monuments on public property if they want to, although it would be the rare case:

> 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 all those meeting some other criterion) could place the name of a person to be honored or some other private message. But as a general matter, forum analysis simply does not apply to the installation of permanent monuments on public property.[372]

Under such circumstances, a reasonable observer might "routinely—and reasonably—interpret [the monument] as conveying some message on the property owner's behalf."[373] But the observer would be wrong. Because the government relinquished its control over the monument, the government would lose the protection of the government speech doctrine even though a viewer would reasonably think that the government was the speaker.[374] As a result, the literal speaker test, which is predicated on how a reasonable observer would interpret the alleged government speech, cannot be used

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370. *See* Pleasant Grove City v. Summum, 555 U.S. 460, 480 (2009) (noting that if all monuments were permitted, most parks would respond by refusing *all* donated monuments).

371. *Id.* at 471.

372. *Id.* at 480.

373. *Id.* at 471.

374. *See id.* at 471 (explaining that where the government has erected a monument in a public park "there is little chance that observers will fail to appreciate the identity of the speaker" as the government).

reliably to distinguish government and private speech under *Summum* and *Johanns*.[375]

The same is true with respect to specialty license plates. Some states have created administrative procedures that operate like the hypothetical monument in *Summum* that is opened up for private messages and is subject to the Court's forum doctrine.[376] Other states have not, deciding instead to retain effective control and veto power over the entire process.[377] Thus, even under *Summum*'s control test, some specialty plate programs, like those in Arizona and Missouri, may create a limited designated forum.[378] For example, in *Stanton*, Arizona set up an administrative procedure for specialty plates under which "[t]he Commission[had] de minimis editorial control over the plate design and color."[379] Organizations meeting specified criteria were entitled to have their proposed license plates approved.[380] Because the Commission lacked effective control over the plate and its message, *Summum* would support a finding that the state created a forum for private speech and, therefore, could not discriminate based on viewpoint.[381]

Under the Fourth, Seventh, Eighth, and Ninth Circuit opinions, though, there is no difference between a specialty plate program that sets up an administrative procedure (under which specialty plates are approved without any meaningful

375. *See* Am. Civil Liberties Union of N.C. v. Conti, 912 F. Supp. 2d 363, 371–72 (E.D.N.C. 2012) (differentiating the speech at issue in *Summum* and *Johanns* from North Carolina's specialty plate program at issue).

376. *See, e.g.*, ARIZ. REV. STAT. § 28-2404(B) (LexisNexis 2011) (outlining the procedure for applying for the creation of a specialty license plate).

377. Johanns v. Livestock Mktg. Ass'n, 544 U.S. 550, 563–64 (2005) ("And Congress, of course, retains oversight authority, not to mention the ability to reform the program at any time. No more is required.").

378. *See* Ariz. Life Coal. v. Stanton, 515 F.3d 956, 971 (9th Cir. 2008) ("Finally, we note that the nature of the forum also supports a conclusion that Arizona intended only to create a limited public forum.").

379. *Id.* at 966.

380. *See id.* at 970 ("To gain access, the nonprofit organization must have its application reviewed and approved by the Commission.").

381. *See* Pleasant Grove City v. Summum, 555 U.S. 460, 479 (2009) (describing how viewpoint neutrality would preclude the government from selecting which monuments it wanted to have in the park).

involvement or oversight by the government) and one that requires the state legislature to enact legislation approving the form and content of each new specialty plate.[382] That is, the circuit courts fail to distinguish between programs where a state has minimal control and those where a state has total control.[383] Under *Summum*, this distinction is critical. Just as there is a constitutionally significant difference between monuments that the government controls and those that are opened to the public to "place the name of a person to be honored or some other private message," there is a constitutionally significant difference between these two types of specialty plate programs.[384] Yet the circuit courts' literal speaker test does not distinguish between the specialty plate programs that require legislative action and the purely administrative procedures that Arizona, Missouri, and other states employ.[385] Under the literal speaker test, specialty plates are always associated with the vehicle owners, which means a state's specialty plate program always creates a designated forum.[386] The level of control that the government exercises is irrelevant.[387]

The literal speaker test, therefore, contradicts the Court's analysis in *Summum* and should be rejected because it prevents states and cities from "portray[ing through specialty plates] what they view as appropriate for the place in question."[388] Instead, once a state approves a specialty plate, it must authorize plates advancing any viewpoint on the subject

382. *See supra* note 355 and accompanying text (citing circuit court opinions holding that specialty plates create a forum).

383. *See Stanton*, 515 F.3d at 966 ("The Commission's de minimis editorial control over the plate design and color does not support a finding that the *messages* conveyed by the organization constitute government speech.").

384. *Summum*, 555 U.S. at 480.

385. *See, e.g.*, Ariz. Life Coal. v. Stanton, 515 F.3d 956, 966–67 (9th Cir. 2008) (describing the literal speaker test and its application).

386. *See id.* at 968 (detailing the standards of a designated public forum as it applied to Arizona's "Choose Life" license plate).

387. *See id.* at 973 (noting that constitutional concerns outweigh government discretion in regulating speech, even in the limited public fora of license plate regulation).

388. Pleasant Grove City v. Summum, 555 U.S. 460, 472 (2009).

matter of the original plate (subject only to reasonable time, place, and manner restrictions).[389] Accordingly, because applying the Supreme Court's "forum analysis would lead almost inexorably to closing of the forum," courts should reject that analysis and find that legislature-controlled specialty plate programs are government speech.[390]

V. Conclusion

When deciding if expressive activity is government or private speech, the critical consideration under *Johanns* and *Summum* is not whether a third party can identify the government as the speaker but whether the government is actually speaking.[391] Where the government "sets the overall message to be communicated and approves every word that is disseminated"[392] or "has 'effectively controlled' the messages sent . . . by exercising 'final approval authority' over the selection"[393] of the message, it 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."[394]

Contrary to the majority of circuit courts that have considered the constitutionality of specialty license plates, states that approve such plates through legislative enactment do exercise the requisite level of control to qualify for the protection of the government speech doctrine.[395] In such cases,

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389. *See id.* at 479 (noting that viewpoint neutrality would lead to government entities' having to deal with an influx of clutter).

390. *Id.* at 480.

391. *See id.* at 470 ("Permanent monuments displayed on public property typically represent government speech."); Johanns v. Livestock Mktg. Ass'n, 544 U.S. 550, 563–64, (2005) (noting the reasons the beef advertisements were government speech).

392. *Johanns*, 544 U.S. at 563.

393. *Summum*, 555 U.S. at 473 (quoting *Johanns*, 544 U.S. at 560–61).

394. Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos., 515 U.S. 557, 573 (1995).

395. *See, e.g.*, S.C. CODE ANN. § 56-3-8000(F) (2012) ("The department may

the legislature has final approval authority over the images and wording that appear on all specialty plates.[396] And just as state legislatures create new specialty plates through statute, they can revoke or amend any specialty plate by passing new legislation.[397] Thus, because these states exercise complete control over the specialty plate program, "[n]o more is required."[398]

Furthermore, a finding that specialty plates are private speech undermines a state's right to speak for itself and creates a heckler's veto. If specialty plates authorized by statute are private speech, states will be forced to approve a wide range of specialty plates that send messages in conflict with the states' chosen messages.[399] But as *Summum* expressly holds, "where the application of forum analysis would lead almost inexorably to closing of the forum, it is obvious that forum analysis is out of place."[400] To the extent that certain citizens in a state dislike the messages that the state promulgates through its specialty plate program, they can avail themselves of the primary check on government speech—the political process: "[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.'"[401] What they cannot do is force the government to convey a message that is inconsistent with its view of the "image of the

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alter, modify, or refuse to produce any special license plate that it deems offensive or fails to meet community standards.").

396. *See, e.g.*, N.C. GEN. STAT. § 20-79.4 (2012) (noting that the state retains final approval authority over issuance of a specialty license plate).

397. *See* ACLU of Tenn. v. Bredesen, 441 F.3d 370, 371 (6th Cir. 2006) ("In this case we are required to decide the constitutionality of Tennessee's statute making available the purchase of automobile license plates with a 'Choose Life' inscription, but not making available the purchase of automobile license plates with a 'pro-choice' or pro-abortion rights message.").

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

399. *See* Pleasant Grove City v. Summum, 555 U.S. 460, 479–80 (2009) (noting that government entities will be required to allow all viewpoints or close the forum).

400. *Id.* at 480.

401. *Id*. at 468–69.

[state] that it wishes to project to all who" view the specialty license plates.[402] Under *Summum*, *Johanns*, and *Hurley*, a state need not "Kill the Sea Turtles" on its specialty plates any more than "Save" them. In fact, under the government speech doctrine, it cannot be forced to convey any message with which it disagrees.

402. *Id*. at 473.