A Survey of the Fourth Circuit's Developing Government-Speech Jurisprudence

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A SURVEY OF THE FOURTH CIRCUIT’S DEVELOPING GOVERNMENT-SPEECH JURISPRUDENCE

M. TODD CARROLL & KEVIN A. HALL*

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I. INTRODUCTION

Of the many theories underlying the Free Speech Clause, undoubtedly one of the most readily accepted theories is that the Framers believed that unbridled discussion of the issues of the day was essential for self-governance1 and that, at

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1. See, e.g., Citizens United v. FEC, 130 S. Ct. 876, 898 (2010) (“Speech is an essential mechanism of democracy, for it is the means to hold officials accountable to the people.”).
bottom, the “marketplace of ideas” would separate the wheat from the chaff.\(^2\) This understanding of the Free Speech Clause, given life through the well-established forum analysis, strives to place only narrow, limited restraints on private speakers.\(^3\) Even in those forums where heightened speech restrictions are permitted, the Supreme Court has been clear that the government cannot regulate speech based only on the views a speaker wishes to express.\(^4\) As the United States Court of Appeals for the Fourth Circuit puts it: “The ban on viewpoint discrimination is a constant.”\(^5\)

In recent years, courts have started writing a different set of analytical rules to apply when the government itself attempts to join the debate. Instead of treating the government as just another speaker in a forum, courts have struggled to craft guidelines outside of the traditional forum analysis for allowing governments to speak.\(^6\) Given the government-speech doctrine’s unsettled state, courts often qualify discussions of it with a notation that the law in this area is still developing.\(^7\) It is somewhat surprising, though, that courts frequently fail to account for the First Amendment’s fundamental guarantees of free speech to private speakers when discussing the nuances of this fledgling doctrine. Instead,

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2. See Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting). The marketplace of ideas theory stems from Justice Holmes’s opinion in Abrams v. United States:

   But when men have realized that time has upset many fighting faiths, they may come to believe even more than they believe the very foundations of their own conduct that the ultimate good desired is better reached by free trade in ideas—that the best test of truth is the power of the thought to get itself accepted in the competition of the market, and that truth is the only ground upon which their wishes safely can be carried out. That at any rate is the theory of our Constitution.

Id.

3. See Schneider v. State, 308 U.S. 147, 160 (1939) (permitting municipalities to enact regulations to protect the health, welfare, and safety of its citizens so long as they do not abridge First Amendment liberties).


6. See, e.g., Wells v. City & County of Denver, 257 F.3d 1132, 1141 (10th Cir. 2001) (citing Knights of the Ku Klux Klan v. Curators of the Univ. of Mo., 203 F.3d 1085, 1093–94 (8th Cir. 2000)) (using a four-factor test announced by the Eighth Circuit); Downs v. L.A. Unified Sch. Dist., 228 F.3d 1003, 1011 (9th Cir. 2000) (rejecting the rules used for private speech and focusing instead on “who actually was responsible for the speech”).

courts have tended to interpret this new strain of First Amendment law in such a way so as to give the government an open microphone without giving dissenters a chance to air their viewpoints. The Fourth Circuit initially resisted this temptation,\(^8\) but at least one recent decision from that court greatly deferred to the government at the expense of private dissenting viewpoints when the government wished to participate in a discussion about pending legislation.\(^9\)

This Article surveys and critiques the Fourth Circuit’s government-speech decisions, paying particular attention to how the court has sometimes struggled to find a place for both government speech and private speech in the marketplace of ideas. This Article is not meant to serve as a comprehensive study of the government-speech doctrine, but it is designed to provide the reader with a thumbnail guide to the Fourth Circuit’s treatment of key issues that have arisen during the evolution of this thread of jurisprudence. As discussed below, the court has issued conflicting decisions and has frequently altered course on how it analyzes important—often dispositive—questions associated with the government-speech doctrine. Because multiple government-speech cases within the Fourth Circuit have received considerable attention with respect to the potential for en banc consideration, a rich series of exchanges among the judges colors the court’s jurisprudence on the doctrine’s fundamental points.

The next part of this Article provides an overview of the government-speech doctrine, including a discussion of problems commentators have identified with the doctrine. Part III then examines the Fourth Circuit’s decisions with respect to three key, often interrelated questions that arise in the government-speech context: (1) whether the traditional forum analysis has any applicability when government speech is present; (2) how to determine when the government is speaking; and (3) under what circumstances the government can convert private speech into its own speech. This Article concludes that, because of the strong, divergent views that the circuit’s members have espoused through the battery of case law, many answers to the scope and application of the government-speech doctrine will require further guidance from the Supreme Court.

II. OVERVIEW OF THE GOVERNMENT-SPEECH DOCTRINE

As noted above, courts have traditionally applied the established forum analysis to government restrictions on private speech that occurs on public property.\(^10\) For First Amendment purposes, government property can be

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\(^8\) See, e.g., Griffin v. Dep’t of Veterans Affairs, 274 F.3d 818, 821 (4th Cir. 2001) (blending the traditional forum analysis and the government-speech doctrine).

\(^9\) See Page v. Lexington County Sch. Dist. One, 531 F.3d 275, 288 (4th Cir. 2008) (holding that a school district’s communications constituted government speech, thus permitting the school district to communicate via its Web site and email in opposition to pending state legislation while at the same time excluding those in support of the legislation from communicating through the same channels).

\(^10\) See supra notes 3–5 and accompanying text.
classified as a public forum, a designated public forum, a nonpublic forum, or no forum at all.\(^{11}\) Although courts apply different levels of scrutiny to speech restrictions in each of these types of fora—a public forum is subject to strict scrutiny, while a nonpublic forum calls for a more relaxed standard—government regulation based only on a speaker’s viewpoint is unconstitutional irrespective of the forum’s label.\(^ {12}\) The prohibition on government discrimination among private speakers based on their views is a staple of the Free Speech Clause.\(^ {13}\) As the Supreme Court often reminds, the requirement of viewpoint neutrality ensures that the marketplace of ideas remains as competitive as possible.\(^ {14}\) But despite the fact that forum analysis is suited to account for all speech that occurs on public property, courts have largely carved the government’s own speech out of the forum analysis framework through the development of the government-speech doctrine.

The government-speech doctrine is grounded on the belief that the government, like any private speaker, can “speak for itself.”\(^ {15}\) For a communication to qualify as government speech, the government must be responsible for the message disseminated.\(^ {16}\) And when the government itself is speaking, its speech is largely free from scrutiny under the First Amendment, including the viewpoint-neutrality requirement.\(^ {17}\)

While the Free Speech Clause does not explicitly limit what the government may say, courts have recognized some restrictions on government speech. The

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11. See Ark. Educ. Television Comm’n v. Forbes, 523 U.S. 666, 677–78 (1998) (discussing the various designations of government property under the traditional forum analysis). As the Supreme Court frequently recognizes, the property that the private speaker attempts to access does not need to be a physical location for forum analysis to apply. Regulations on access to charity drives, Cornelius v. NAACP Legal Def. & Educ. Fund, Inc., 473 U.S. 788, 801 (1985), a student activities fund, Rosenberger v. Rector of the Univ. of Va., 515 U.S. 819, 830 (1995), and a school district’s internal mail distribution system, Perry Educ. Ass’n v. Perry Local Educators’ Ass’n, 460 U.S. 37, 46 (1983), have all been subjects of forum analysis.

12. See Forbes, 523 U.S. at 677–78 (explaining that the State may “restrict access to a nonpublic forum ‘as long as the restrictions are reasonable and [are] not an effort to suppress expression merely because public officials oppose the speaker’s view’” (alteration in original) (quoting Cornelius, 473 U.S. at 800)); SCV I, 288 F.3d at 616 n.4 (“[V]iewpoint-based restrictions of speech are presumptively unconstitutional.” (citing R.A.V. v. City of St. Paul, 505 U.S. 377, 382 (1992))).


16. See Johanns v. Livestock Mkg. Ass’n, 544 U.S. 550, 562 (2005) (concluding that an advertising campaign constituted government speech because “the government set[] the overall message to be communicated and approved[d] every word that [was] disseminated”).

Establishment Clause, for instance, limits government speech that has a religious flavor. Moreover, some argue that these restrictions on religious-based speech should be applied to government speech dealing with political matters. In this regard, several courts have interpreted local laws to bar government advocacy regarding political matters unless the State also affords equal time to dissenting viewpoints.

Notwithstanding these limitations, courts typically point to the ballot box as the principal check on government speech. Reliance on the electorate, rather than the judiciary, as the chief arbiter of government speech presumes both that the electorate is able to recognize when the government is speaking and that it is able to attribute favorable or objectionable speech to the public entity. As a

18. See id. at 1132 ("[G]overnment speech must comport with the Establishment Clause.").
19. See Robert D. Kamenshine, The First Amendment’s Implied Political Establishment Clause, 67 CAL. L. REV. 1104, 1104 (1979) ("[T]he courts should read the first amendment to contain an implied prohibition against political establishment."). Even courts that have permitted a public body to implore the citizenry to adopt a certain political position recognize that such advocacy “can undermine [the government’s] legitimacy as a champion of the people’s will and thereby subvert one of the principles underlying democratic society.” Kidwell v. City of Union, 462 F.3d 620, 625 (6th Cir. 2006). Judge Martin, dissenting in Kidwell, took the majority’s observation a step further and suggested that the government runs afoul of the Guarantee Clause’s assurance of a republican form of government when it engages in political advocacy. See id. at 635 n.5 (Martin, J., dissenting). Likewise, several Supreme Court Justices wrote separately in Pleasant Grove City to indicate that the government-speech doctrine would not defend political advocacy by a public entity. See Pleasant Grove City, 129 S. Ct. at 1139 (Stevens, J., concurring) (recognizing that the government’s decision to display a permanent monument on public grounds is acceptable when such a display does not communicate an “offensive or partisan message[”]); id. at 1140 (Breyer, J., concurring) (“Were the City to discriminate in the selection of permanent monuments on grounds unrelated to the display’s theme, say solely on political grounds, its action might well violate the First Amendment.”); see also Planned Parenthood of S.C. Inc. v. Rose (Rose II), 373 F.3d 580, 581 (4th Cir. 2004) (Wilkinson, J., concurring in denial of rehearing en banc) (arguing that it is improper for “the state to privilege private speech on one side—and one side only—of a fundamental moral, religious, or political controversy.”).

20. See, e.g., Mountain States Legal Found. v. Denver Sch. Dist. No. 1, 459 F. Supp. 357, 360–61 (D. Colo. 1978) (ruling that a school district’s devotion of public resources to only one side of a partisan issue violates the First Amendment); Stanson v. Mott, 551 P.2d 1, 9–10 (Cal. 1976) (arguing that the government cannot “bestow an unfair advantage on one of several competing factions”); Smith v. Dorsey, 599 So. 2d 529, 541 (Miss. 1992) (“For it is only when public coffers are used to advocate only one side, with no opportunity for dissenters to present their side of the issue, when school boards overstep lawful authority and any implied power. In a nutshell, the school board can inform, but not persuade.”) (citing Citizens to Protect Pub. Funds v. Bd. of Educ., 98 A.2d 673, 678 (N.J. 1953)); Citizens to Protect Pub. Funds, 98 A.2d at 678 (“It is the expenditure of public funds in support of one side only in a manner which gives the dissenters no opportunity to present their side which is outside the pale.”).

21. See, e.g., Bd. of Regents of the Univ. of Wis. Sys. v. Southworth, 529 U.S. 217, 235 (2000) (“If the citizenry objects, newly elected officials later could espouse some different or contrary position.”).

22. See Johanns v. Livestock Mktg. Ass’n, 544 U.S. 550, 571–72 (2005) (Souter, J., dissenting) (arguing that if the government intends to rely on the government-speech doctrine as a defense, “it must make itself politically accountable by indicating that the content actually is a
result, the government-speech analysis often looks to whether the government, not a private citizen, delivers a message in such a way that the government is politically accountable for the communication. By forcing the public entity to take unmistakable responsibility for a message, these analytical prongs are designed to cure the situation "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."

While most courts have dismissed challenges to government speech by directing the aggrieved party to voice its concern during the next election, some have been skeptical of the doctrine's blind reliance on the ballot box as a true safeguard in all situations. When the government uses public resources to promote a political outcome—such as for a candidate on the ballot or a vote on a bill pending before the legislature—the State risks irreparably distorting the speech market. This manufactured, rather than organic, consent could be the result of the citizenry's natural trust of an authority or of the asymmetry of resources available to a dissenting private speaker vis-à-vis the State. As government message" and explaining that such accountability requires the public entity to "explicitly label[] the speech as its own).

23. See, e.g., Turner v. City Council, 534 F.3d 352, 354 (4th Cir. 2008) ("In order to determine whether the speech in question is government or private speech, we consider... whether the government or the private entity bears the "ultimate responsibility" for the content of the speech." (quoting SCV I, 288 F.3d 610, 618 (4th Cir. 2002))).


25. See supra note 21 and accompanying text.

26. Numerous commentators have pointed out that government speech can create with respect to the legitimacy of the regulating authority. See, e.g., Leslie Gielow Jacobs, Who's Talking? Disentangling Government and Private Speech, 36 U. Mich. J.L. Reform 35, 42 (2002) ("Where the government skews the private speech market, it skews the basis of the consent that renders it legitimate."); Brian C. Castello, Note, The Voice of Government as an Abridgement of First Amendment Rights of Speakers: Rethinking Meese v. Keene, 1989 Duke L.J. 654, 676–81 (cataloging the "Undesirable Effects of Government Communication," including government coercion of consent, suppression of minority viewpoints, and an asymmetry of "bargaining power" in the "ideological marketplace"); The Supreme Court, 2004 Term—Leading Cases, 119 Harv. L. Rev. 169, 285 (2005) (warning that unrestricted government speech "seems to present the significant risk of a "falsified majority," a self-perpetuating feedback loop in which a majority is maintained not by virtue of the idea uniting it, but through continual reinforcement" (quoting Frederick Schauer, Is Government Speech a Problem?, 35 Stan. L. Rev. 373, 378 (1983))). These observations have been shared by some on the bench. See, e.g., Kidwell v. City of Union, 462 F.3d 620, 635 (6th Cir. 2006) (Martin, J., dissenting) ("The idea that governmental funds could be spent in an effort to perpetuate a government in office is no doubt antithetical to the values underlying the Constitution."); Student Gov't Ass'n v. Bd. of Trs. of the Univ. of Mass., 868 F.2d 473, 482 (1st Cir. 1989) ("There is no question that unfettered government speech can be dangerous to our democratic society."). In his Kidwell dissent, Judge Martin argued that unless the government creates a forum for the expression of all viewpoints, it risks crossing "the line of demarcation between informing and advocacy." 462 F.3d at 636–37 (Martin, J., dissenting).


28. See, e.g., Palm Beach County v. Hudspeth, 540 So. 2d 147, 154 (Fla. Dist. Ct. App. 1989) ("If government, with its relatively vast financial resources, access to the media and technical know-
President Yudof summed when warning about dangers inherent in government advocacy, “[e]xpression by government is critical to democratic processes, but the power of governments to communicate is also the power to destroy the underpinnings of government by consent. The power to teach, inform, and lead is also the power to indoctrinate, distort judgment, and perpetuate the current regime.” These concerns have resulted in calls for courts to develop the government-speech doctrine deliberately and narrowly to ensure that government entities do not use the defense to mask otherwise impermissible viewpoint discrimination.

The Fourth Circuit has long been considered to be on the forefront of government-speech jurisprudence. Beginning with a decision in 2001, the court has had several opportunities to refine the analysis in such a way to account for the concerns noted above—preserving the sanctity of the ballot box, preventing the use of public dollars to distort the speech market, and preventing the government from hiding discriminatory conduct by claiming that it is merely expressing its own position on a topic. The Fourth Circuit’s rulings in this area, however, have sometimes made the government-speech analysis more opaque and have failed to address with certainty key questions that arise in this context. The next part analyzes these decisions.
III. THE FOURTH CIRCUIT’S TREATMENT OF THE GOVERNMENT-SPEECH
DOCTRINE

The government-speech doctrine, while still early in its development, has received considerable attention in the Fourth Circuit. Since 2001, at least six different cases have given the court an opportunity to address the doctrine against a variety of factual backgrounds. The respective outcomes of these cases have largely hinged on whether the court found that the government itself was speaking, although several of these decisions demonstrate the considerable disagreement among the circuit’s judges as to how to determine when speech is the government’s own speech. The disparity in these decisions—as well as various other opinions from circuit judges in concurrence, in dissent, and with respect to en banc petitions—shows that some subtleties (as well as some fundamentals) of the government-speech doctrine are far from settled. This part addresses the Fourth Circuit’s decisions with respect to three issues that are at the core of the government-speech doctrine: (1) whether forum analysis has any applicability when government speech is present; (2) how the court determines when the government is speaking; and (3) under what circumstances the government can convert third-party speech into its own.

32. See WV Ass’n of Club Owners & Fraternal Servs., Inc. v. Musgrave, 553 F.3d 292, 294 (4th Cir. 2009) (challenging on First Amendment grounds “West Virginia’s restrictions on limited video lottery advertising”); Turner v. City Council, 534 F.3d 352, 353 (4th Cir. 2008) (challenging on First Amendment grounds a policy that required that legislative prayers to be nondenominational); Page v. Lexington County Sch. Dist. One, 531 F.3d 275, 277–78 (4th Cir. 2008) (challenging denial of access to school district’s modes of communication regarding proposed tax legislation as a violation of First Amendment rights); Planned Parenthood of S.C. Inc. v. Rose (Rose I), 361 F.3d 786, 787–88 (4th Cir. 2004) (Michael, J., writing separately) (challenging on First Amendment grounds the denial of pro-choice specialty license plates when state authorizes “Choose Life” license plates); SCV I, 288 F.3d 610, 613–14 (4th Cir. 2002) (challenging denial of license plate design as a First Amendment violation); Griffin, 274 F.3d at 819 (challenging prohibition of flying Confederate flag in Confederate cemetery as a denial of First Amendment right).

33. See infra Part III.B.

34. The Supreme Court has also struggled to craft a government-speech analysis on which all of the Justices can agree. The Johnanns decision, for instance, drew two dissenting opinions and a concurrence that rejected the government-speech doctrine as a basis for the judgment. 544 U.S. at 569 (Ginsburg, J., concurring); id. at 570 (Kennedy, J., dissenting); id. at 570–80 (Souter, J., dissenting). Similarly, although none of the Justices dissented from the Pleasant Grove City judgment, several wrote separate opinions with respect to the doctrine. Justice Stevens—joined by Justice Ginsburg—criticized the “recently minted government speech doctrine” as being “of doubtful merit.” 129 S. Ct. at 1139 (Stevens, J., concurring). Justice Breyer’s concurrence focused on the caveat that “the ‘government speech’ doctrine is a rule of thumb, not a rigid category.” Id. at 1140 (Breyer, J., concurring). And now-retired Justice Souter, concurring only in the judgment, suggested that the current test for government speech should be replaced by a “reasonable observer test.” Id. at 1142 (Souter, J., concurring in the judgment).
A. What Role Does Forum Analysis Play with Respect to the Government-Speech Doctrine?

As the discussion in Part II indicates, courts tend to treat forum analysis and the government-speech doctrine as incompatible. But this does not have to be so. In fact, in its first decision involving the government-speech doctrine, Griffin v. Department of Veterans Affairs, the Fourth Circuit blended the two frameworks to account for private speech when the government is also speaking within a forum. In that case, the court viewed government speech through the forum-analysis lens and concluded that government regulation of a forum in which the government is also a participant must be viewpoint neutral.

In Griffin, a private citizen sought to fly a Confederate flag daily in the Point Lookout Confederate Cemetery, which is maintained by the Veterans Administration, but a regulation required approval from the agency prior to the private “display of any placards, banners, or foreign flags.” When the agency denied Griffin’s request, he challenged the regulation on its face and also claimed to have been the subject of viewpoint discrimination. The Fourth Circuit, merging government-speech principles into the familiar forum analysis, rejected Griffin’s claims.

The court’s analysis began by labeling the national cemetery a nonpublic forum in which speech restrictions “must be both reasonable in light of the purpose of the forum and viewpoint neutral.” In applying this traditional test, it explained that the straightforward purpose of the national cemetery, as prescribed by Congress, was to honor fallen American soldiers. From there, the Griffin court examined the agency’s regulations—which vested the Veterans Administration with the sole discretion to establish what displays were permitted in the cemetery—as government speech and explained that, in order to pass constitutional muster, they must be reasonable in light of this legislative purpose as well as viewpoint neutral.

In the court’s view, the agency’s regulations were reasonable for two reasons. First, the regulations already allowed for the Confederate flag to be

35. 274 F.3d 818 (4th Cir. 2001).
36. See id. at 820–25.
37. See id.
38. Id. at 819–20 (citing 38 C.F.R. § 1.218(a)(14)(ii) (2001))
39. Id. at 820.
40. See id. at 820–25.
41. Id. at 820.
42. Id. at 821–22 (citing 38 U.S.C. § 2403(c) (2000)).
43. Id. at 822–25. In reaching this analytical prong, the court recited several broad propositions that are distinctly associated with the government-speech doctrine, including the basic idea that the government is allowed to express a particular viewpoint. See id. at 822 (“The government is entitled to promote particular messages and to ‘take legitimate and appropriate steps to ensure that its message[s] are] neither garbled nor distorted.’” (alterations in original) (citation omitted) (quoting Rosenberger v. Rector & Visitors of Univ. of Va., 515 U.S. 819, 833 (1995)).
flown at the cemetery two days each year.\textsuperscript{44} Second, the agency “could reasonably believe that the Confederate flag could cause controversy and that such controversy could undermine the VA’s goal of keeping the cemeteries free from partisan conflict.”\textsuperscript{45} Additionally, the regulations did not discriminate based on viewpoint because the agency did not treat requests to fly the Confederate flag differently from requests to display any other flag or banner in the cemetery.\textsuperscript{46} Because the challenged regulations—that is, the Veterans Administration’s speech—were reasonable, consistent with the cemetery’s purpose, and viewpoint neutral, the court rejected Griffin’s First Amendment claim.\textsuperscript{47}

The decision in Griffin is the only instance in the Fourth Circuit where the court directly considered government speech within the confines of the traditional forum analysis. But it is not the only occasion where some within the circuit have expressed a belief that the same guidelines established for speech restrictions in a forum must limit government speech. For instance, one judge dissented from the denial of rehearing en banc of a later government-speech decision:

> I must note that I do not necessarily agree with the panel’s implication...that the government can always engage in viewpoint discrimination when it is the speaker. It may be that “the values underlying viewpoint neutrality should in some circumstances limit the government’s ability to skew the debate and suppress disfavored ideas or information.”\textsuperscript{48}

As another judge explained in the context of legislation authorizing a pro-life specialty license plate, the government-speech doctrine should not be twisted in such a way that allows the State to enter a forum “as a covert but dominant speaker, advocating for one viewpoint in the abortion debate without political accountability and without authorizing the expression of the opposing viewpoint.”\textsuperscript{49}

\begin{itemize}
\item \textsuperscript{44} Id. at 823.
\item \textsuperscript{45} Id. (emphasis omitted).
\item \textsuperscript{46} Id. at 824–25.
\item \textsuperscript{47} See id. at 822–24 (examining the reasonableness of the government’s speech and concluding that “the VA’s restrictions are reasonable in light of the nature of this particular forum, a cemetery dedicated to honoring, as Americans, the Nation’s war dead”); id. at 825 (“The VA’s restrictions are not only reasonable in light of the purpose of the forum, but also viewpoint neutral.”).
\item \textsuperscript{48} Sons of Confederate Veterans, Inc. v. Comm’r of the Va. Dep’t of Motor Vehicles (SCV II), 305 F.3d 241, 251 n.1 (4th Cir. 2002) (Gregory, J., dissenting from the denial of rehearing en banc) (quoting Marjorie Heins, Viewpoint Discrimination, 24 Hastings Const. L.Q. 99, 159 (1996)).
\item \textsuperscript{49} Rose I, 361 F.3d 786, 799 (4th Cir. 2004) (Michael, J., writing separately).
\end{itemize}
More recent decisions, however, have suggested that a finding of
government speech ends the analysis and that the presence of government speech
exempts the State from First Amendment scrutiny.\textsuperscript{50} The Supreme Court has
indicated that this latter framework is the proper one,\textsuperscript{51} though several justices
have noted disagreement with this position.\textsuperscript{52}

Though \textit{Griffin} appears to have been trumped by later rulings, there is still
much merit in its approach to addressing government speech. Requiring speech
by a public entity to be reasonably related to the purposes of a forum places an
easily applied check on unbridled, and possibly abusive, government behavior.
Likewise, the universal requirement of viewpoint neutrality serves as a barrier to
the government monopolizing the speech market on a particular topic.\textsuperscript{53} To be

\textsuperscript{50} See, \textit{e.g.}, \textit{Page v. Lexington County Sch. Dist. One}, 531 F.3d 275, 280 (4th Cir. 2008)
(stating that the school district’s “success in this case” hinged only on whether the challenged
conduct amounted to government speech, not whether the challenged conduct satisfied review under
a forum analysis); \textit{Rose II}, 373 F.3d 580, 584 (4th Cir. 2004) (Shedd, J., dissenting from the denial
of rehearing en bane) (“If, on the other hand, the ‘Choose Life’ message is properly labeled
government speech, then the ordinary prohibition against viewpoint discrimination is inapplicable
and the statute survives First Amendment scrutiny.”).

\textsuperscript{51} See \textit{Pleasant Grove City v. Summum}, 129 S. Ct. 1125, 1131 (2009) (“If [the State was]
engaging in \cite{its} own expressive conduct, then the \textit{Free Speech Clause} has no application. The \textit{Free
Speech Clause} restricts government regulation of private speech; it does not regulate government
speech.”).

\textsuperscript{52} See \textit{supra} note 19 (outlining the positions taken in the various concurrences in
\textit{Pleasant Grove City}).

\textsuperscript{53} An illustrative case that considers the government to be just another speaker in a forum—
and thus subject to the requirements of forum analysis—is \textit{Bonner-Lyons v. School Committee}, 480
F.2d 442 (1st Cir. 1973). There, a school board passed a resolution opposing state legislation that
allowed forced busing for purposes of racially integrating the schools. \textit{Id.} at 442–43 (citing \textit{Mass.
Gen. Laws Ann.} ch 71, \textit{§§} 37C–37D (West 1969)). In furtherance of the board’s resolution, it
distributed notices to parents via the school system’s “internal distribution system,” informing them
of the board’s opposition to the integrating legislation and encouraging them to attend antibusing
rallies and “to write the Governor, the Senators and the Representatives in support of \cite{a competing
bill pending before the legislature} which opposes busing without the written consent of the
parents.” \textit{Id.} (internal quotation marks omitted). The \textit{Bonner-Lyons} plaintiffs requested access to
the same distribution system for purposes of distributing probusing notices, but the school board
refused. \textit{Id.} at 442. The First Circuit found the board’s denial of equal access improper, even though
the board was communicating its own message:

\cite{[T]his message tended to lend support and to mobilize opinion in favor of the position of
those private parties who sponsored \cite{the antibusing marches}. Under these circumstances,
we conclude that \cite{the school board}, by authorizing this distribution, sanctioned the use of
the school distribution system as a forum for discussion of at least those issues which
were treated in this notice.}

\textit{Id.} at 443. Even President Yudof, who does not advocate for much judicial regulation of
government speech, agrees that the \textit{Bonner-Lyons} decision was correctly decided in light of the
partisan nature of the communication disseminated by the school board. See \textit{Yudof, supra note 29},
at 299 (arguing that the plaintiff in \textit{Bonner-Lyons} was rightly awarded a right of reply to
government speech because the school board had used its “position of public trust” to convey a
partisan message to a captive audience).

\textit{Bonner-Lyons}, of course, predates the Supreme Court’s key government-speech opinions, so it
is given little weight by current courts. But the First Circuit’s reasoning in that case is faithful to
sure, the Supreme Court has previously ignored distinctions between private speech and government speech when discussing the dangers posed by having one speaker corner the marketplace of ideas.\textsuperscript{54} Nevertheless, the Fourth Circuit has been reasonably clear that when the government is a speaker, forum analysis has little applicability.\textsuperscript{55}

Although forum analysis appears to be inapplicable in the face of government speech, the Fourth Circuit has held that forum analysis is applicable when the challenged speech is anything short of pure government speech. On several occasions, such as in the context of vanity license plates and advertising regulations associated with a state-operated lottery program, the Fourth Circuit has found the relevant speech to be "hybrid" speech—that is, it contains elements of both private speech and government speech.\textsuperscript{56} In at least one instance, the court concluded that forum analysis applies to the challenged regulation despite the fact that the speech was at least partially attributable to the government.\textsuperscript{57} Without First Amendment scrutiny of hybrid speech, the thinking goes, the government could engage in "cloaked advocacy that allows the State to promote an idea without being accountable to the political process."\textsuperscript{58} Judge

both the First Amendment's prohibition on viewpoint discrimination and the notion that the government must be able to inform the citizenry of its programs in order to govern effectively. The limited holding of the case, therefore, is that when the government wishes to debate a partisan issue, it cannot monopolize the forum but instead must allow dissenting viewpoints to be aired. Although this approach could lead to logistical problems in accommodating other viewpoints (should the government be required to designate equal space in a newsletter to all competing views? only the primary dissenting view? all potential speakers? a representative sample of speakers?), \textit{Bonner–Lyons} and \textit{Griffin} seem to provide a better solution than the alternative approach that simply silences disfavored views. If the government wishes to avoid a logistical headache, though, it can simply stay out of the discussion and divert public resources to other tasks.

\textsuperscript{54} See, e.g., Red Lion Broad. Co. v. FCC, 395 U.S. 367, 390 (1969) ("It is the purpose of the First Amendment to preserve an uninhibited marketplace of ideas in which truth will ultimately prevail, rather than to countenance monopolization of that market, \textit{whether it be by the Government itself or a private licensee}." (emphasis added) (citing N.Y. Times Co. v. Sullivan, 376 U.S. 254, 270 (1964); Associated Press v. United States, 326 U.S. 1, 20 (1945); Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting))).

\textsuperscript{55} See \textit{infra} Part III.B.

\textsuperscript{56} See, e.g., WV Ass’n of Club Owners & Fraternal Servs., Inc. v. Musgrave, 553 F.3d 292, 298 (4th Cir. 2009) (concluding that an advertising restriction associated with a state lottery program "does not fit neatly into either category: it is hybrid speech"); \textit{Rose I}, 361 F.3d 786, 794 (4th Cir. 2004) (Michael, J., writing separately) (finding that a message on a specialty license plate "appears to be neither purely government speech nor purely private speech, but a mixture of the two"); \textit{id.} at 800 (Luttig, J., concurring in the judgment) (concluding that the speech at issue was hybrid speech); \textit{id.} at 801 (Gregory, J., concurring in the judgment) (expressing belief that speech at issue has elements of both private speech and government speech).

\textsuperscript{57} See, e.g., \textit{Rose I}, 361 F.3d at 794–95 (Michael, J., writing separately) (considering "whether the State has engaged in viewpoint discrimination" and recognizing that the State has provided "access to the license plate forum only to those who share its viewpoint"); \textit{id.} at 801 (Gregory, J., concurring in the judgment) (expressing his belief that the speech was hybrid speech and noting that "the judgment reached . . . applies the factors set forth in [\textit{SCV I}]").

\textsuperscript{58} \textit{Id.} at 795–96 (Michael, J., writing separately).
Michael explained that hybrid speech does not enjoy the same exemption from forum analysis as pure government speech:

When a certain viewpoint dominates a speech forum, it should be clear to the public whether that dominance reflects the prevailing view or whether it results from a government restriction. In this case, the pro-life position exclusively dominates the abortion debate in the license plate forum, but the reason for that dominance is not readily apparent to the ordinary citizen. Those who see the Choose Life plate displayed on vehicles, and fail to see a comparable pro-choice plate, are likely to assume that the presence of one plate and the absence of another are the result of popular choice. . . . The State can thereby mislead the public into thinking that it has already won support for the position it is promoting. This possibility thwarts "the rationale behind the government’s authority to draw otherwise impermissible viewpoint distinctions in the government speech context," namely, "the accountability inherent in the political process." 59

For plaintiffs seeking access to a forum, it is critical to be able to distinguish a challenged speech restriction from pure government speech. In the Fourth Circuit, showing that speech includes private elements is typically sufficient to avoid the dispositive government-speech defense and allows the analysis to proceed to a review of the forum and the legitimacy of a speech restriction. The next subpart addresses the often difficult question of how to determine when the government alone is speaking.

B. How Does the Fourth Circuit Determine When the Government Is Speaking?

Because the Fourth Circuit largely sets aside the requirement of viewpoint neutrality when the government is the sole speaker, it is critical that courts have clear guidelines for discerning when the government is speaking. This crucial inquiry, however, has created significant inconsistencies within the case law. A case-by-case review of this issue, which has been the subject of a robust dialogue among the circuit’s judges, is illuminating.

1. Sons of Confederate Veterans, Inc. v. Commissioner of the Virginia Department of Motor Vehicles and Planned Parenthood of South Carolina Inc. v. Rose: The Four-Factor Test

The Fourth Circuit’s lead opinion on the subject of distinguishing government speech from private speech is Sons of Confederate Veterans, Inc. v.

59. Id. at 798 (quoting SCV I, 288 F.3d 610, 618 (4th Cir. 2002)).
Commissioner of the Virginia Department of Motor Vehicles (SCV I), a decision dealing with vanity license plates. In SCV I, the court—drawing on out-of-circuit cases that had considered issues related to government speech—presented four factors for consideration that were neither exhaustive nor always applicable. These factors included the following:

(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 . . .

The aims of this four-factor test are clear and consistent with the underlying theories of the government-speech doctrine: speech should be attributed to the government only when the government creates the message and assumes accountability for the communication.

After examining these factors, the SCV I court concluded that the inclusion of the Confederate flag on a specialty license plate at the request of the Sons of Confederate Veterans was private speech rather than the speech of the Virginia highway department. This application of the four-factor test was not without criticism, however, and the Fourth Circuit—on its own initiative, rather than at the request of any party to the litigation—took an internal poll as to whether the ruling should be reconsidered en banc. The unusual proposition for a sua sponte en banc rehearing failed by a slim six-to-five vote, but it did produce five additional opinions with respect to the SCV I decision, three of which disagreed with the panel’s reasoning.

Judge Luttig agreed with the panel’s result but presented a forceful argument that the specialty license plates contain elements of both government and private speech and should, therefore, be considered a hybrid of the two. Judge Niemeyer and Judge Gregory, on the other hand, challenged the panel’s conclusion that the Sons of Confederate Veterans specialty plate represented the

60. 288 F.3d 610 (4th Cir. 2002).
61. Id. at 613.
62. See id. at 618–19 (citing Wells v. City & County of Denver, 257 F.3d 1132, 1141 (10th Cir. 2001); Downs v. L.A. Unified Sch. Dist., 228 F.3d 1003, 1011 (9th Cir. 2000); Knights of the Ku Klux Klan v. Curators of the Univ. of Mo., 203 F.3d 1085, 1093–94 (8th Cir. 2000)) (relying on decisions from the Eighth, Ninth, and Tenth Circuits when crafting the four-factor test).
63. Id. at 618.
64. Id. at 621. This conclusion of private speech rather than government speech resulted in a holding that the state agency’s refusal to place the logo on the Sons of Confederate Veterans’ specialty plate was unconstitutional viewpoint discrimination. Id. at 626.
65. SCV II, 305 F.3d 241, 242 (4th Cir. 2002).
66. See id.
67. See id. at 245 (Luttig, J., respecting the denial of rehearing en banc) (“[S]peech that appears on the so-called ‘special’ or ‘vanity’ license plate could prove to be the quintessential example of speech that is both private and governmental . . .”).
organization's own speech. In Judge Niemeyer's view, any speech that appears on a license plate must be considered government speech because the State "owns the license plates it issues and rightfully controls what appears on them." Judge Gregory's critique expressly focused on the panel's four-factor test, which he considered to be "incomplete at best" and "not . . . sufficiently nuanced" to address specialty license plates. No doubt, the most pointed exchange among the judges was Judge Luttig's dismissal of Judge Niemeyer's analysis for identifying government speech:

No one, upon careful consideration, would contend that, simply because the government owns and controls the forum, all speech that takes place in that forum is necessarily and exclusively government speech. Such would mean that even speech by private individuals in traditional public fora is government speech, which is obviously not the case.

Despite the narrow en banc vote and the internal criticism of the test announced in SCV I, the Fourth Circuit continued to measure speech against these four factors in its next government-speech ruling. Again, though, the court's judges disagreed with the test's application. In Planned Parenthood of South Carolina Inc. v. Rose (Rose I), a three-judge panel—Judges Michael, Luttig, and Gregory—agreed that a "Choose Life" specialty license plate that originated with the South Carolina General Assembly, rather than with a private organization, amounted to a mixture of private and government speech. The panelists, however, each wrote separately to explain their reasoning.

Judge Michael, whose opinion was by far the longest and most detailed, examined each of SCV I's four factors and concluded that two—the "purpose" and "editorial control" prongs—suggested that the specialty plate was government speech but that the remaining two—the "literal speaker" and

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68. See id. at 249 (Niemeyer, J., dissenting from the denial of rehearing en banc); id. at 252 (Gregory, J., dissenting from the denial of rehearing en banc).
69. Id. at 249 (Niemeyer, J., dissenting from the denial of rehearing en banc). Not surprisingly, Judge Niemeyer's analysis was expressly rejected by Judge Williams, see id. at 243 (Williams, J., concurring in the denial of rehearing en banc), who wrote the panel's opinion in SCV I, 288 F.3d at 613.
70. SCV II, 305 F.3d at 251–52 (Gregory, J., dissenting from the denial of rehearing en banc).
71. Id. at 246 (Luttig, J., respecting the denial of rehearing en banc).
72. See Rose I, 361 F.3d 786, 793 (4th Cir. 2004) (Michael, J., writing separately) ("I begin by applying the SCV test to determine whether the speech at issue can be characterized as either government or private speech."); id. at 801 (Gregory, J., concurring in the judgment) ("Accordingly, because I believe the judgment reached today applies the factors set forth in [SCV I] in a manner that begins to recognize the government speech interests that are implicated in the vanity license plate forum, I concur in the judgment.").
73. 361 F.3d 786 (4th Cir. 2004).
74. See id. at 787, 794 (Michael, J., writing separately); id. at 800–01 (Luttig, J., concurring in the judgment); id. at 801 (Gregory, J., concurring in the judgment).
“ultimate responsibility” prongs—weighed in favor of a private-speech finding. In Judge Michael’s view, the fact that the Choose Life message resulted from a statute meant both that the message’s purpose was to convey the State’s position on the issue of abortion and that the legislature maintained complete editorial control over the message. But the fact that drivers were allowed to choose whether they would display the Choose Life message on their vehicles rendered the drivers the actual speakers of the message and vested the drivers with ultimate responsibility for the antiabortion sentiment. This mixture of government speech and private speech prompted Judge Michael to conclude that South Carolina’s Choose Life specialty license plate was hybrid speech. The remaining panelists agreed with this conclusion, though Judge Luttig’s analysis was entirely independent of SCV I’s four-factor test and Judge Gregory’s analysis grudgingly accepted that test because it was circuit precedent.

Like its immediate predecessor, Rose I generated a poll regarding a rehearing en banc. And just as in SCV II two years earlier, the Fourth Circuit narrowly declined to reconsider the Rose I panel’s ruling en banc, but several judges generated additional opinions with respect to the en banc decision. This time, it was Judge Shedd—joined by Judge Williams, the author of SCV I—who took issue with the panel’s application of the four-factor test. His analysis diverged from Judge Michael’s analysis with respect to the literal speaker and ultimate responsibility prongs. Judge Shedd argued:

By giving interested citizens the option to endorse its message [by displaying a statutorily created specialty license plate], the State has not lost its place as the literal speaker of that message. The proper question is whether the private citizen “engages the government to publish his message” or the government “engages the private citizen to publish its message.” . . . The vehicle owner’s purchasing the specialty plate signifies his endorsement of the State’s message, not his engaging the State to speak his own message.

Because the message resulted from a statute, the legislature bore the ultimate responsibility for the speech:

75. Id. at 793–94 (Michael, J., writing separately).
76. Id. at 793.
77. Id. at 794.
78. Id.
79. See id. at 800–01 (Luttig, J., concurring in the judgment).
80. See id. at 801 (Gregory, J., concurring in the judgment).
82. Id. at 581.
83. See id. at 586–87 (Shedd, J., dissenting from the denial of rehearing en banc).
84. Id. at 586 (quoting SCV II, 305 F.3d at 246 (Luttig, J., respecting the denial of rehearing en banc)).
The General Assembly alone created the message, and it wrote that message into state law for the watching electorate to see. . . . I can think of no clearer demonstration of political accountability than for citizens opposed to this “Choose Life” license plate to turn out the current government and replace it with a government that will amend or repeal the statute and perhaps even replace it with a statute calling for pro-choice specialty plates. 85

Based on his assessment of the four factors, Judge Shedd argued that the Choose Life specialty plate reflected pure government speech. 86

Despite these divergent views on how courts should apply the four-factor test, it seems to be an established part of the Fourth Circuit’s government-speech jurisprudence. Moreover, other circuits have adopted the Fourth Circuit’s four factors as their own. 87 But before the Fourth Circuit could again consider the government-speech doctrine, the Supreme Court issued its ruling in Johanns v. Livestock Marketing Ass’n. 88 The intervening Johanns decision prompted the Sixth Circuit to reject the Fourth Circuit’s four-factor test and to criticize it as being in tension with the Supreme Court’s ruling. 89 The Fourth Circuit attempted to reconcile these positions in its next government-speech case.

85. Id. at 587.
86. Id. It is notable that Judge Williams joined this opinion. To a casual motorist unfamiliar with the various methods for creating specialty license plates in Virginia and South Carolina, the Sons of Confederate Veterans vanity plate would appear to be no different in form than the Choose Life plate. Yet Judge Williams found the Sons of Confederate Veterans plate to be purely private speech in SCV I, 288 F.3d 610, 621 (4th Cir. 2002), and the Choose Life plate to be purely government speech in Rose II, 373 F.3d at 587 (Shedd, J., dissenting from the denial of rehearing en banc). This divergence in reasoning could be cured by Justice Souter’s proposed “reasonable observer” test for government speech, Pleasant Grove City v. Summum, 129 S. Ct. 1125, 1142 (2009) (Souter, J., concurring in the judgment), which has been adopted by the Seventh Circuit. See Choose Life Ill., Inc. v. White, 547 F.3d 853, 863 (7th Cir. 2008) (“[T]he Fourth Circuit’s 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?”). In both instances, a typical motorist would likely recognize that a specialty tag—regardless of its message—would have been selected by the driver and therefore contained an element of private speech. The potential for subjectivity, however, probably renders this test just as problematic in application as the four-factor test.
89. See ACLU of Tenn. v. Breeden, 441 F.3d 370, 380 (6th Cir. 2006) (criticizing the SCV I test as leading to “indeterminate result[s]” and arguing that it is contrary to the Johanns reasoning (quoting Rose I, 361 F.3d 786, 793 (4th Cir. 2004) (Michael, J., writing separately))).
2. Page v. Lexington County School District One: The Four-Factor Test Set Aside

In its first post-Johanns decision that called for a government-speech analysis, the Fourth Circuit examined in Page v. Lexington County School District One that whether a school district improperly discriminated against a private citizen based on his viewpoint when it disseminated unsolicited, favored third-party messages using public resources—such as the district’s Web site, district-wide emails, and newsletters provided to students—to which the plaintiff was denied equal access. In articulating the controlling legal principles, the court initially reiterated SCV I’s four factors, but it explained that the Johanns Court “distilled them” into only two inquiries: (1) whether the government established the message, and (2) whether the government effectively controlled “the content and dissemination of the message.” The SCV I factors were absent from the remainder of the decision, and the court ostensibly focused instead on the Johanns analysis. But the Page court’s application of these new factors resurrected arguments that the Fourth Circuit had previously rejected in the government-speech context.

Although the Page court framed the government-speech discussion in terms of control over the content of challenged speech, as directed by Johanns, its actual analysis focused on whether the school district controlled the medium of communication. Throughout the decision, the court insisted that the plaintiff was not entitled to access public resources to express a viewpoint on pending legislation that was contrary to that of the district’s viewpoint—even though other third parties were given access to those same resources to express a viewpoint that was consistent with the district’s viewpoint—because the district maintained control of those “channels of communication.” As Judge Niemeyer wrote for the panel:

Accordingly, we conclude that the School District established its own message and effectively controlled the channels of communication through which it disseminated that message, as required for application of the government speech doctrine under Johanns, and therefore that it

90. 531 F.3d 275 (4th Cir. 2008).
91. Id. at 277–78.
92. Id. at 281 (citing Johanns, 544 U.S. at 560–62).
93. Id. at 281–82 (citing Johanns, 544 U.S. at 560–62).
94. See Johanns, 544 U.S. at 560–62.
95. See Page, 531 F.3d at 282–85.
96. See, e.g., id. at 282 (noting that the speech was the government’s speech because it was filtered through “channels of communications controlled by the School District”); id. at 285 (“[T]he School District sufficiently controlled this channel of communication so that its speech remained government speech.”).
did not create a limited public forum to which Page was entitled access.  

This reasoning was consistent with his opinion dissenting from the denial of rehearing en banc in SCV II.  

There, Judge Niemeyer argued that any speech appearing on a license plate should be attributed to the government because the State owns and controls the medium of communication.  

Though that analysis was not accepted by a majority of the Fourth Circuit during its debates regarding the Sons of Confederate Veterans’ license plate, it carried a unanimous panel in Page.

Page’s focus on government control of the channel of communication, rather than on the message’s actual content as instructed by Johanns, could have far-reaching implications, as forum analysis applies only to restrictions on private speech taking place on government property. Presumably, all government property is “effectively controlled” by the State. Therefore, under the Page analysis, all speech that takes place in a public or nonpublic forum could potentially be considered government speech. With the understanding that all speech in a forum could be attributed to the government, it is not difficult to imagine a public body surveying existing third-party messages in a forum and washing favorable communications of all private speech characteristics simply by saying “me, too.” Once government speech is present, of course, the public entity could then close the forum to all dissenting viewpoints without fear of First Amendment scrutiny.  

This would be viewpoint discrimination in its purest form and would give life to the very legitimate concern that “[i]t is nearly impossible to concoct examples of viewpoint discrimination on government channels that cannot otherwise be repackaged ex post as ‘government speech.”  

Later decisions, however, have signaled that Page’s reasoning will not control future government-speech cases within the Fourth Circuit.

97. Id. at 285 (emphasis added).
98. See SCV II, 305 F.3d 241, 247–51 (4th Cir. 2002) (Niemeyer, J., dissenting from the denial of rehearing en banc).
99. See id. at 249–50 (arguing that all content found on a license plate should be attributed to the government because the State has “complete control over license plates”).
100. For these reasons, Judge Luttig openly rebutted Judge Niemeyer’s SCV II opinion as being incompatible with the basic notion of private speech occurring in a public forum. See id. at 245–46 (Luttig, J., respecting the denial of rehearing en banc) (dismissing Judge Niemeyer’s conclusion that a specialty license plate constitutes government speech “because, and simply because, the government owns and controls the plate” because such reasoning could improperly render all private speech that takes place on public property that of the government). Of course, Judge Luttig was no longer on the bench when Page was decided.

Since Page, the Fourth Circuit has had two occasions to assess whether government speech is present in a given situation. Both times, it has measured the challenged speech against SCVT's four factors, rather than against Page's version of the government-speech test.102 In fact, neither case even cited to the Page decision.

The Fourth Circuit issued the first opinion, Turner v. City Council,103 exactly one month after it published Page. There, the court faced a challenge to a city council’s policy regarding prayers before council meetings.104 In order to determine whether these prayers amounted to the council’s own speech, the court called on SCVT's four-factor test alone.105 Because the prayers were a part of the council’s official agenda, regulated by a council policy, tailored to focus on government business, and given only by council members, the Turner court had no trouble concluding that each of the factors weighed in favor of a government-speech finding.106

The Fourth Circuit’s most recent government-speech ruling reiterated Turner’s preference for the SCVT test instead of Page’s reasoning. In West Virginia Ass’n of Club Owners & Fraternal Services, Inc. v. Musgrave,107 the court reviewed a series of statutes that restricted advertising for video lottery machines.108 As a matter of West Virginia constitutional law, the State runs all lotteries for revenue-raising purposes.109 Included among the legislative provisions for video lottery machines are those that allow a state agency to issue nontransferable licenses for the machines, restrict the number of video lottery machines that can be in any establishment to five, and prohibit any private advertising of video lotteries.110 Instead of allowing private advertisements, West Virginia permits “retailers to display only a 12 inch by 12 inch uniform sign,
distributed by the Lottery Commission, which states ‘West Virginia Lottery Products available here.’”¹¹¹

An organization representing clubs, restaurants, and convenience stores that held video lottery licenses challenged this advertising restriction, arguing that it amounted to an unconstitutional abridgement of its members’ commercial speech rights.¹¹² In order to assess whether those rights even existed in this context, the Fourth Circuit analyzed whether speech associated with West Virginia’s video lottery program amounted to government speech.¹¹³ The court held that elements of both government speech and private speech were present and, therefore, the regulation was subject to the scrutiny prescribed by the Supreme Court for restraints on commercial speech.¹¹⁴ It reached this conclusion by first evaluating whether the government was attempting to convey a particular message through the advertising restrictions associated with the State’s video lottery program and whether the State would bear the ultimate responsibility for the message.¹¹⁵ On both counts, the Musgrave court held that these factors weighed in favor of a government-speech finding.¹¹⁶ An advertisement’s literal speaker, however, would be the retailer who displayed it, which suggested an element of private speech.¹¹⁷ Accordingly, the speech at issue was a mixture of government and private, and the court subjected the regulatory scheme to First Amendment scrutiny.¹¹⁸

4. Guiding Principles from the Fourth Circuit’s Divergent Case Law

The failure of the Turner and Musgrave courts to rely on or even cite Page indicates that Page’s modified test for finding government speech may not be the controlling analysis in the Fourth Circuit. However, this likely remains an open question as the court continues to develop its government-speech jurisprudence. Nevertheless, a handful of guiding principles emerge from this battery of case law and opinions from the Circuit’s judges.

Principally, these decisions indicate that the government-speech doctrine applies when the government has actively and formally sought to communicate a

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¹¹¹ Id. at 297.
¹¹² Id.
¹¹³ See id. at 298.
¹¹⁴ See id. at 299–301.
¹¹⁵ Id. at 298–99.
¹¹⁶ See id. at 298 (“By requiring that the lottery only be advertised through uniform signs and by prohibiting all other advertisements, the state is conveying a message supporting measured use of the video lottery.”); id. at 299 (“The fact that the state is conveying a message for which it is politically accountable suggests that the speech at issue is government speech.”).
¹¹⁷ See id. at 299 (explaining that “[t]he speech being restricted also has attributes of private speech” while reminding that the “literal speaker” prong is one aspect of the circuit’s four-factor test (citing Rose I, 361 F.3d 786, 792–93 (4th Cir. 2004) (Michael, J., writing separately); SCV I, 288 F.3d 610, 618 (4th Cir. 2002))).
¹¹⁸ See id. at 301. The court had little problem concluding that the advertising restrictions passed constitutional muster. See id. at 302–07.
particular message. In all of the cases in which there was at least some indicia of government speech, the government had passed a statutory scheme,119 a written policy,120 or a resolution121 that explained the government’s position on the relevant subject. By contrast, in *SCV I*, there was no indication that the Virginia legislature had any interest in promoting the inclusion of the Confederate flag on license plates; in fact, the opposite was true.122

On a related point, the Fourth Circuit often focuses on whether the government will ultimately be politically accountable for the speech.123 As discussed above in Part III.A, the circuit has held that hybrid speech is subject to forum analysis and its accompanying requirement of viewpoint neutrality because, as Judge Michael described, a decision to the contrary would improperly allow the government to engage in “cloaked advocacy” and avoid any consequences for its messages.124 Similarly, the *Page* court devoted an entire section of its discussion explaining the political costs that school board members could face if the public disagreed with the district’s position on the legislative issue underlying the speech.125

Not surprisingly, these two points are in lockstep with the government-speech doctrine’s core principles. Synthesizing them into a test that can be universally applied to the satisfaction of the circuit’s judges has proven elusive thus far, however, and may require additional guidance from the Supreme Court. The Court’s most recent government-speech case, *Pleasant Grove City v. Summum*,126 failed to offer meaningful input into this question, though it did provide significant insight into the related issue of when the government is able to convert private speech into its own speech.127 That issue is examined next.

119. *See Musgrave*, 553 F.3d at 299; *Rose I*, 361 F.3d at 787; *Griffin v. Dep’t of Veterans Affairs*, 274 F.3d 818, 819–20 (4th Cir. 2001).
123. *See, e.g., Musgrave*, 553 F.3d at 299 (“The state is politically accountable for this message because it conducts the video lottery program. The fact that the state is conveying a message for which it is politically accountable suggests that the speech at issue is government speech.”); *Rose I*, 361 F.3d at 795 (“[T]he 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.”).
125. *See Page*, 531 F.3d at 287–88 (explaining that the ballot box is “available to check the government speech”).
127. *See id.* 1133 (“Just as government-commissioned and government-financed monuments speak for the government, so do privately financed and donated monuments that the government accepts and displays to the public on government land.”).
C. Is the Government-Speech Doctrine Applicable When a Public Body Involves Third Parties in the Creation or Dissemination of a Message?

A final issue that frequently arises in the government-speech context concerns the involvement of third parties in the creation or dissemination of a message that the government claims to be its own. A natural tension arises when a public body uses private messages or messengers to communicate a position that the government claims as its own. On the one hand, the Fourth Circuit has been clear that a public entity does not forfeit the government-speech doctrine when it promotes a position through its "agents." On the other hand, the court has also recognized that viewpoint-based distinctions "are ordinarily not permissible where the government exercises editorial discretion to choose from among private messages those it will favor or subsidize." To be sure, the Supreme Court has unambiguously held that "[w]hen speakers and subjects are similarly situated, the State may not pick and choose." But the government-speech doctrine seems to allow exactly this type of discriminatory conduct when the government is promoting a particular message and a private citizen agrees with the government’s position.

In examining this issue, early opinions from the Fourth Circuit measured the level of government control over the speech before its initial publication as a primary indicator of whether third-party speech could be considered speech of the government. In SCV I, for instance, the Virginia General Assembly argued that content on a specialty license plate was exclusively the government’s own in part because it was spelled out in a statute. The Fourth Circuit rejected this argument because Sons of Confederate Veterans initially designed the message and then provided it to the State for its consideration. Additionally, even though this private speech was subject to agency review and approval, the SCV I court found that the State rarely modified a proposed specialty plate message. The opposite was true in Rose I—the license plate’s message was initially created by the General Assembly and spelled out in a statute, not in any privately created document.

This reasoning was reinforced in the Supreme Court’s Johanss ruling. In that case, the Court examined whether the "Beef: It's What's For Dinner" advertising campaign constituted government speech even though private entities

128. SCV I, 288 F.3d 610, 617 (4th Cir. 2002).
129. Id. at 618 n.6.
131. See Page v. Lexington County Sch. Dist. One, 531 F.3d 275, 282 (noting that the school district circulated communications of third parties that supported its message).
132. See SCV I, 288 F.3d at 615–16.
133. See id. at 621 (explaining the wide discretion that Virginia’s department of motor vehicles’ guidelines provided to private sponsors for the design of their respective specialty plates).
134. See id. (noting that “the record reveals that little, if any, control ordinarily is exercised” over the content of specialty plates).
participated in the message’s creation. There, the drafting process was done by
a committee that was partially populated by appointees of the Secretary of
Department of Agriculture, and all messages were subject to final approval by
the Secretary himself before publication. Importantly, the Court noted that
the government’s involvement went beyond appointing members to the design
committee and reviewing the finished work product. Instead of remaining
passive during the creation of the challenged messages, “[o]fficials of the
Department also attend and participate in the open meetings at which proposals
are developed.” In light of this collaborative effort between the government
and private speakers, over which the government retained the final approval
authority, the *Johanns* Court concluded that the marketing campaign was
government speech.

Although the Supreme Court’s treatment of third-party participation in
creating government speech in *Johanns* was consistent with the Fourth Circuit’s
previous analyses, the circuit has not rigorously adhered to this standard of
prepublication input and oversight by the government. In *Page*, the school
district disseminated through public resources various materials that were
consistent with the district’s viewpoint on pending school-choice legislation but
that were independently prepared by private parties. Additionally, the district
linked its Web site directly to the Web sites of third parties who agreed with the
district’s position on the legislation, which in effect allowed those private groups
to broadcast whatever messages they chose through the government’s
resources. Despite the absence of any prepublication input by the district as to
these articles, talking-points pamphlets, PowerPoint presentations, and Web site
postings, the *Page* court held that the third-party Web sites amounted to
government speech because district personnel reviewed and approved them

137. See id. at 560 (noting that half of the design committee’s members are designees of the
Secretary of Agriculture); id. at 561 (“[T]he Secretary exercises final approval authority over every
word used in every promotional campaign.”).
138. See id. at 560–61 (“The message set out in the beef promotions is from beginning to end
the message established by the Federal Government.”).
139. Id. at 561.
140. See id. at 562 (“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.”).
142. See id. at 278. A sample of the district’s Web site as it existed at the time that the *Page*
litigation was commenced can be found through the Internet Archives database. See Lexington
screenshot of the school district’s Web site as it existed on November 25, 2005). Notably, the
district housed materials regarding the legislation on its Web site under a section entitled
“Controversial Issues.”
before they were redistributed through channels that the district ultimately controlled.\footnote{Page, 531 F.3d at 282, 288 (concluding that by disseminating these materials, the district “adopted and approved all speech, even that of third parties, as representative of its own position”).}

The Supreme Court seems to have approved in part the \textit{Page} analysis by its recent decision in \textit{Pleasant Grove City}. There, the Court held that a Ten Commandments monument that a private organization created and donated to a city for permanent display in a city park constituted government speech.\footnote{Pleasant Grove City v. Summum, 129 S. Ct. 1125, 1132–34 (2009).} The Court based its decision on several factors, including the fact that permanent displays in parks are usually selected by the government in its sole discretion, that such monuments are judged on whether they communicate a message that the public entity itself wishes to convey, and that the citizenry typically associates a permanent monument in a public park with the government instead of a private speaker.\footnote{See id. at 1134 (“Government decisionmakers select the monuments that portray what they view as appropriate for the place in question, taking into account such content-based factors as esthetics, history, and local culture. 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.”); see also id. at 1133 (“In this context, there is little chance that observers will fail to appreciate the identity of [the government as] the speaker.”).} Additionally, the Court noted that the City took ownership of the monument, thus cutting off the private party’s ability to alter the monument’s text.\footnote{See id. at 1134 (“All rights previously possessed by the monument’s donor have been relinquished.”).}

This reasoning appears to be congruent with \textit{Page}’s outcome with respect to the static materials that were at issue in that case, such as articles written by private parties.\footnote{See Page, 531 F.3d at 282.} An article that the government reprints cannot later be changed by the original author; therefore, the school district was able to review and adopt every word of the text as its own before circulating the message through government resources.\footnote{See id.} But \textit{Pleasant Grove City} and \textit{Page} diverge with respect to transitory third-party speech, such as a Web site link on a government site to the home page of a private entity.

The \textit{Page} court explained that such a link was government speech because the school district intended for the link to support its own message.\footnote{Id. at 284.} But the text on the private party’s Web site was beyond the school district’s control and could change without the district’s knowledge, including to a message that the district had no interest in promoting.\footnote{Id. at 284–85.} Such a link, therefore, is no different than a public entity inviting a favored private speaker onto public property and giving him an open microphone without the government having any prior knowledge or ability to preapprove his speech. The \textit{Pleasant Grove City} Court repeatedly noted that the permanency of the Ten Commandments monument influenced its
decision: the message contained on it could not be altered, the City was able to review and accept the monument in its final form, and a normal observer would understand that the City itself was speaking.151 The potential for messages displayed on a private party’s Web site to change at a moment’s notice and without warning, therefore, would appear to force links on government Web sites to dynamic third-party sites beyond the reach of the government-speech label under the Pleasant Grove City analysis.152

The Fourth Circuit will no doubt revisit this issue in future cases and refine the analysis further. But much like the question of when the government itself is speaking, it will likely take a definitive ruling by the Supreme Court to resolve the Fourth Circuit’s disparate treatment of third-party assistance in the context of government speech.

IV. CONCLUSION

To date, the government-speech doctrine has created more questions than answers. The Fourth Circuit, like the Supreme Court, has struggled at times to identify how this defense to a claim of viewpoint discrimination melds with established First Amendment norms. The government must be allowed to speak, of course, but thus far, the Fourth Circuit has not recognized any boundaries on the government’s ability to speak beyond those boundaries imposed by the Establishment Clause. Considerable disagreement among the circuit’s judges suggests that it may be difficult to build consensus on the court with respect to any limitations on the doctrine that are not prescribed by the Supreme Court. Additionally, while the circuit’s decisions indicate that the court is aware that a public entity may try to use the doctrine to avoid political scrutiny for a controversial message, it has not reached a clear answer as to how to resolve this problem. At bottom, the Fourth Circuit has provided much guidance for public entities wishing to exercise their ability to speak and has consistently been on the frontier of this area of the law. But because the doctrine’s finer points have been

151. See Pleasant Grove City, 129 S. Ct. at 1132 (“Permanent monuments displayed on public property typically represent government speech.”); id. at 1133 (noting that there is usually no confusion as to who is speaking when a display is permanent); id. at 1134 (reminding that “the City took ownership of [the] monument and put it on permanent display”); id. at 1138 (observing that forum analysis does not apply where permanent monuments are installed on public property and distinguishing prior cases that involved temporary speech, such as displays in parades).

152. This is particularly so when, as in Page, the government takes steps to distance itself from responsibility for the content of third-party Web sites that it broadcasts through public channels. See Page, 531 F.3d at 284 (reproducing a disclaimer on the school district’s Web site stating that the district “does not endorse, approve, certify or control these external Web addresses”). To be sure, when the government specifically states that it is not the speaker, it is difficult to see how it can be held politically accountable for the speech. It is not surprising, then, that in a similar situation, the Sixth Circuit held that the inclusion of links to dynamic third-party Web sites on a government’s Web site created a nonpublic forum. See Putnam Pit, Inc. v. City of Cookeville, 221 F.3d 834, 844 (6th Cir. 2000) (“[T]he city’s Web site, which established links to other Web sites, is a nonpublic forum under the First Amendment.”).
the subjects of multiple competing opinions from the Fourth Circuit’s judges, a comprehensive set of guidelines for the government-speech doctrine may be required from the Supreme Court before these issues can be fully resolved for governments and private speakers within the circuit.