No.

In the Supreme Court of the United States

JOHN WALKER III, IN HIS OFFICIAL CAPACITY AS CHAIRMAN OF THE BOARD, ET AL., PETITIONERS

v.

TEXAS DIVISION, SONS OF CONFEDERATE VETERANS, INC., ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Do the messages and symbols on state-issued specialty license plates qualify as government speech immune from any requirement of viewpoint neutrality?

2. Has Texas engaged in "viewpoint discrimination" by rejecting the license-plate design proposed by the Sons of Confederate Veterans, when Texas has not issued any license plate that portrays the confederacy or the confederate battle flag in a negative or critical light?

PARTIES TO THE PROCEEDING

Petitioners John Walker III, Victor Vandergriff, Clifford Butler, Raymond Palacios, Jr., Laura Ryan, Victor Rodriguez, Marvin Rush, and Blake Ingram were Defendants-Appellees in the court of appeals.[1]

Respondents Texas Division, Sons of Confederate Veterans, Inc., Granvel J. Block, and Ray W. James were Plaintiffs-Appellants in the court of appeals.

[1] Pursuant to Supreme Court Rule 35, the petitioners note that John Walker III, Victor Vandergriff, Clifford Butler, Raymond Palacios, Jr., Laura Ryan, Victor Rodriguez, Marvin Rush, and Blake Ingram were sued in their capacities as public officials. Victor Vandergriff and Clifford Butler no longer hold office. They have been replaced by Robert Barnwell III and Cheryl Johnson. John Walker III replaced Victor Vandergriff as Chairman of the Board.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes and Regulations

Other Authorities

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This petition presents two circuit splits for the Court's consideration. The first circuit split involves whether the messages and images that appear on state-issued specialty license plates qualify as government speech. The Sixth Circuit answered "yes." *See ACLU v. Bredesen*, 441 F.3d 370, 375–77 (6th Cir. 2006). Five other courts—including the court of appeals in this case—have answered "no." App. 16a; *Sons of Confederate Veterans, Inc. v. Comm'r of Va. Dep't of Motor Vehicles*, 288 F.3d 610, 621 (4th Cir. 2002); *Choose Life of Ill., Inc., v. White*, 547 F.3d 853, 863 (7th Cir. 2008); *Roach v. Stouffer*, 560 F.3d 860, 867 (8th Cir. 2009); *Arizona Life Coalition v.*

Stanton, 515 F.3d 956, 965 (9th Cir. 2008). In the five circuits that have rejected the government-speech argument, a State cannot issue specialty license plates unless it maintains viewpoint neutrality among proposed license-plate designs. In the Sixth Circuit, by contrast, a State may issue specialty license plates that espouse a particular viewpoint without undertaking a constitutional obligation to offer specialty plates that display the opposite viewpoint.

There is also a circuit split over whether a State that rejects a specialty license plate can defend itself against a charge of "viewpoint discrimination" if the State has never issued or approved a license plate bearing a different viewpoint on the subject matter of the rejected license plate. The Seventh Circuit answered "yes" in *Choose Life of Illinois*. *See* 547 F.3d 853 at 865. The court of appeals (along with three other circuits) answered "no." App. 22a; *Sons of Confederate Veterans*, 288 F.3d at 625–26; *Roach*, 560 F.3d at 870; *Arizona Life Coalition*, 515 F.3d at 971–72.

The State respectfully asks this Court to grant certiorari on each of these questions.

OPINIONS BELOW

The opinion of the court of appeals is available at 2014 WL 3558001. App. 1a–50a. The district court's opinion, which upheld the State's decision to exclude the confederate battle flag from its license plates, is available at 2013 WL 1562758. App. 53a–112a.

JURISDICTION

The court of appeals entered its judgment on July 14, 2014. App. 51a–52a. The petitioners timely filed this petition for a writ of certiorari on August 7, 2014. *See* 28 U.S.C. § 2101(c). This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Pertinent statutory provisions are set forth in the appendix to this petition. App. 115a–90a.

STATEMENT

The State of Texas requires state-issued license plates to be displayed on all registered motor vehicles. *See* Tex. Transp. Code § 504; 43 Tex. Admin. Code § 217.22. For many years the State offered only a single style of license plate. But Texas now manufactures a variety of license-plate designs and offers choices to the drivers who must display a state-issued license plate on their motor vehicles.

Drivers who choose to pay the normal vehicle-registration fee receive a plain-vanilla license plate with the State's name and nickname ("The Lone Star State"), along with a randomly generated sequence of numbers and letters. But drivers willing to pay an extra fee can receive a "specialty" plate containing a unique design or message. Sales of these specialty plates generate revenue for state agencies as well as charitable and non-profit organizations that the State deems worthy of support.

There are different ways by which a specialty-plate design can become part of the State's license-plate rep-

ertoire. Some plates are specifically authorized by the legislature. *See* Tex. Transp. Code §§ 504.601, 504.602–662. Texas also permits the Department of Motor Vehicles Board to design new specialty plates, either on its own initiative or in response to an application from a non-profit. *See* Tex. Transp. Code § 504.801. Finally, Texas sells plates though a private vendor, License Plates of Texas, LLC, dba MyPlates, which designs specialty plates and offers them to the public. *See* Tex. Transp. Code § 504.6011(a). Regardless of who designs or proposes a specialty plate, the Board must approve every license-plate design before it can be offered to the public. *See* 43 Tex. Admin. Code §§ 217.28(i)(7); 217.40.

In 2009, the Sons of Confederate Veterans proposed a specialty-plate design featuring the Sons of Confederate Veterans' logo. The logo consists of a square confederate battle flag surrounded on its four sides by the words "Sons of Confederate Veterans 1896"; the flag and its surrounding words are encapsulated together in an octagon. App. 191a (image of the proposed license-plate design). The Board received hundreds of public comments opposing the plate, and opponents of the plate appeared at the Board's meeting to voice their concerns. After hearing this testimony, the Board voted unanimously against issuing the plate, explaining that:

> The Board has considered the information and finds it necessary to deny this plate design application, specifically the confederate flag portion of the design, because public comments have shown that many members of the general public find the design offensive, and because

> such comments are reasonable. The Board finds that a significant portion of the public associate the confederate flag with organizations advocating expressions of hate directed toward people or groups that is demeaning to those people or groups.

App. 69a.

The Sons of Confederate Veterans sued, accusing the Board of violating the Speech Clause by rejecting their proposed license-plate design. The State responded that the government-speech doctrine allows a State to choose the messages and symbols that will appear on its specialty license plates, and that in all events the Board's decision to reject the Sons of Confederate Veterans' license-plate proposal was not unconstitutional "viewpoint discrimination." The district court rejected the State's first argument, concluding that the State's specialty plates were a "nonpublic forum" in which the State must refrain from "viewpoint discrimination." App. 78a–92a. But the district court agreed with the State's second argument, and held that the Board did not engage in "viewpoint discrimination" by refusing to issue the plaintiffs' proposed license plate. App. 92a–103a. The district court therefore rejected the plaintiffs' constitutional claims and entered judgment for the State. App. 114a.

The court of appeals (over dissent) reversed the district court's ruling. The majority first held that the messages and symbols on state-issued specialty license plates are "private speech," not government speech. The State had argued that *Pleasant Grove City v. Summum*, 555 U.S. 460 (2009), and *Johanns v. Livestock Marketing*

Ass'n, 544 U.S. 550 (2005), establish that a State's "final approval authority" and "effective control" over a proposed message makes the approved message government speech—even if it was designed or proposed by private entities. *Summum*, 555 U.S. at 472–73; *see also Johanns*, 544 U.S. at 561 ("The Secretary exercises final approval authority over every word used in every promotional campaign."). The majority, however, concluded that *Summum* "did not base its holding on [the] City's control over the permanent monuments," but rather "focused on the nature of both permanent monuments and public parks." App. 10a–11a. As for *Johanns*, the majority said only that "*Summum*, however, shows that 'the Supreme Court did not espouse a myopic "control test" in *Johanns*.'" App. 27a (quoting *ACLU of N.C. v. Tata*, 742 F.3d 563, 570 (4th Cir. 2014)).

The majority then held that the appropriate "test" for government speech comes from Justice Souter's opinion concurring in the judgment in *Summum*: "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." App. 11a (*quoting Summum*, 555 U.S. at 487 (Souter, J., concurring in the judgment)). The majority chose to apply Justice Souter's test for government speech even though it has never been endorsed by this Court, and despite language in *Johanns* that seems incompatible with Justice Souter's proposed approach. *See Johanns*, 544 U.S. at 564 n.7 ("[T]he correct focus is not on whether the ads' audience realizes the Government is speaking"); *id.* ("As we hold today, re-

spondents enjoy no right not to fund government speech—whether by broad-based taxes or targeted assessments, and *whether or not the reasonable viewer would identify the speech as the government's*.") (emphasis added). The majority then declared that "the differences between permanent monuments in public parks and specialty license plates on the back of personal vehicles convince us that a reasonable observer would understand that the specialty license plates are private speech." App. 11a–12a.

The majority also declined to follow the Sixth Circuit's opinion in *ACLU v. Bredesen*, 441 F.3d 370 (6th Cir. 2006), which held that specialty license plates are government speech immune from any requirement of viewpoint neutrality. The majority claimed that "the Sixth Circuit's analysis cannot be reconciled with Supreme Court precedent, specifically *Wooley*." App. 15a. The majority also tried to distinguish *Bredesen* by noting that Tennessee had "passed an act specifically authorizing, creating, and issuing a 'Choose Life' specialty license plate." App. 15a. But the majority did not deny that Texas's decision to reject the plaintiffs' license-plate proposal would have been upheld had the case been litigated in the Sixth Circuit. *See Bredesen*, 441 F.3d at 376 ("At least where Tennessee does not blatantly contradict itself in the messages it sends by approving such plates, there is no reason to doubt that a group's ability to secure a specialty plate amounts to state approval.").

Finally, the court of appeals held that the State engaged in impermissible "viewpoint discrimination" by rejecting the plaintiffs' license-plate proposal. App. 24a.

The State had argued that its decision to keep the confederate battle flag off its license plates was viewpoint-neutral because the State has not issued any license plate disparaging the confederacy, the confederate battle flag, or the views espoused by the Sons of Confederate Veterans. But the court of appeals rejected this argument. The court of appeals did not deny that the State has never approved a license plate that espouses any point of view on the confederacy or the confederate battle flag. But it said that "there is nothing in the Board's decision that suggests it *would* exclude all points of view on the Confederate flag." App. 22a (emphasis added). Then the court of appeals declared that "even if the Board were correct that its decision merely excluded multiple viewpoints on the meaning of the Confederate flag, that decision would be equally objectionable." App. 22a. In the court of appeals's view, *any* decision to reject a specialty license plate "based on the speaker's message" constitutes viewpoint discrimination. App. 23a ("[T]he state engaged in viewpoint discrimination when it denied a specialty license plate based on the speaker's message."); App. 23a ("Silencing both the view of Texas SCV and the view of those members of the public who find the flag offensive would similarly skew public debate and offend the First Amendment.").

Judge Smith dissented on the government-speech issue. App. 25a. Judge Smith first rejected the "reasonable observer test" that the majority used to distinguish government speech from private speech. In Judge Smith's view, "the 'reasonable observer' test demonstrably contradicts binding caselaw" from *Johanns* and *Summum*,

and he criticized the majority for "morph[ing] Justice Souter's lone concurrence [in *Summum*] (and his dissent from *Livestock Marketing*) into law." App. 27a; *see also* App. 29a ("If a 'reasonable observer' test were the law, then [*Johanns*] was incorrectly decided."). Judge Smith also argued that Texas's license plate program was analogous to the situation in *Summum* and rejected the majority's efforts to distinguish that case. App. 29a.

The majority opinion did not acknowledge or address several of the State's most important arguments. First, the State had argued that a "no viewpoint discrimination" rule would be untenable in the context of a specialty license plate program, because it would mean that States that issue "Fight Terrorism" specialty plates would become constitutionally compelled to offer license plates expressing support for terrorism or terrorist organizations. Many other specialty plates in Texas undeniably promote certain viewpoints at the expense of others, such as "Stop Child Abuse," "Mothers Against Drunk Driving," "Animal Friendly," and "Insure Texas Kids." The majority opinion did not explain how its "no viewpoint discrimination" rule could allow Texas to continue issuing these specialty plates without also offering plates that promote child abuse, drunk driving, animal cruelty, and messages opposing the State Children's Health Insurance Program.

Second, the State had argued that *Rust v. Sullivan*, 500 U.S. 173 (1991), allows States to control the messages and symbols that are used within the scope of a government program. *See id.* at 194; *see also Agency for Int'l Dev. v. Alliance for an Open Society Int'l, Inc.*, 133

S. Ct. 2321, 2329–30 (2013). The majority opinion did not cite *Rust* and did not address the State's claim that the text and logos on specialty license plates fall within the scope of a government program and therefore remain subject to the State's control under *Rust*. And the majority did not conduct any analysis of what the scope of the State's specialty license plate "program" might be.

Third, the State had argued that it should have the same freedom as private individuals to disassociate from messages or viewpoints that it does not wish to convey. *See, e.g.*, *Hurley v. Irish-American Gay, Lesbian & Bisexual Grp. of Bos.*, 515 U.S. 557 (1995); *Boy Scouts of Am. v. Dale*, 530 U.S. 640 (2000); *Wooley v. Maynard*, 430 U.S. 705 (1977). Just as the Constitution protects individual license-plate holders from being forced to transmit "the State's ideological message," *see Wooley*, 430 U.S. at 715, neither should a State be forced to convey a license-plate holder's message by etching it onto a plate marked with the State's name. The majority opinion did not address whether (or to what extent) a State may disassociate from messages or symbols that it does not wish to propagate. *See generally Texas v. Knights of the Ku Klux Klan*, 58 F.3d 1075 (5th Cir. 1995) (upholding Texas's exclusion of the Ku Klux Klan from its Adopt-a-Highway program).

REASONS FOR GRANTING THE PETITION

I. THERE IS A DEEP, WELL-DEVELOPED CIRCUIT SPLIT ON WHETHER SPECIALTY LICENSE PLATES QUALIFY AS GOVERNMENT SPEECH

There is a 5-1 circuit split on whether a state-issued specialty license plate qualifies as "government speech."

The Sixth Circuit held in *Bredesen* that specialty license plates are government speech, and rejected the ACLU's argument that the State had created a "forum" for private speech that triggered a viewpoint-neutrality requirement. The Sixth Circuit also made clear that its government-speech holding extended beyond the "Choose Life" plates that the State's legislature had authorized, and applied to *all* specialty-plate designs over which the State held final approval authority:

> [T]here 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. At least where Tennessee does not blatantly contradict itself in the messages it sends by approving such plates, there is no reason to doubt that a group's ability to secure a specialty plate amounts to state approval. It is noteworthy that Tennessee has produced plates for respectable institutions such as Penn State University but has issued no plates for groups of wide disrepute such as the Ku Klux Klan or the American Nazi Party. Plaintiffs' position implies that Tennessee must provide specialty plates for these hate groups in order for it constitutionally to provide specialty plates supporting any institution. Such an argument falls of its own weight.

Bredesen, 441 F.3d at 376–77.

The court of appeals specifically rejected *Bredesen*, declaring that "[t]he Sixth Circuit's conclusion that specifically license plates are government speech makes it the sole outlier among our sister circuits" and that "the Sixth Circuit's analysis cannot be reconciled with Supreme Court precedent, specifically *Wooley*." App. 15a.

The court of appeals also observed that *Bredesen* involved "facts different from those in the instant case," as *Bredesen* involved a challenge to "Choose Life" specialty plates that the Tennessee legislature had specifically authorized. App. 15a. But the court of appeals never explained how this could distinguish *Bredesen*—and this is not a tenable basis on which to distinguish *Bredesen*. Suppose that the Texas legislature had specifically authorized a specialty license plate denouncing the confederacy or portraying the confederate battle flag in a negative light. There is nothing in the court of appeals's opinion to suggest that this would have caused it to change its decision and hold that the denial of the plaintiffs' proposed license-plate design was "government speech" immune from any requirement of viewpoint neutrality. And there is no basis for treating specialty plates authorized by a state legislature differently from specialty plates authorized by a state agency. No matter which entity of a state government authorizes or approves a specialty plate, the idea for the specialty plate is almost always proposed or suggested by a person or interest group from outside the government.

The Fifth Circuit is not alone in rejecting *Bredesen*'s government-speech holding. The Fourth, Seventh, Eighth, and Ninth Circuits have also issued rulings ex-

plicitly rejecting *Bredesen*. *See ACLU of N.C. v. Tata*, 742 F.3d 563, 570 (4th Cir. 2014) ("The Sixth Circuit … held in *Bredesen* that Tennessee's 'Choose Life' specialty plate constituted pure government speech. . . . For the many reasons discussed above, we must agree with the Seventh Circuit that 'this conclusion is flawed …'"); *Choose Life Ill., Inc. v. White*, 547 F.3d 853, 863 (7th Cir. 2008) ("We think Judge Martin [who dissented in *Bredesen*] has it exactly right."); *Roach v. Stouffer*, 560 F.3d 860, 867 (8th Cir. 2009) ("Notwithstanding the Sixth Circuit's conclusion to the contrary, we 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."); *Arizona Life Coalition*, 515 F.3d at 963–68 (rejecting *Bredesen* and concluding that a "Choose Life" specialty plate represents "private speech," not government speech).

Six courts of appeals have now weighed in on this question, and they are divided 5-1 in favor of the view that messages and symbols on specialty license plates are private speech rather than government speech.[2]

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[2] The Eleventh Circuit has suggested in dictum that specialty license plates are not government speech. *See Women's Emergency Network v. Bush*, 323 F.3d 937, 945 n.9 (11th Cir. 2003) ("We fail to divine sufficient government attachment to the messages on Florida specialty license plates to permit a determination that the messages represent government speech."). But the Eleventh Circuit's opinion ultimately held that the plaintiffs lacked Article III standing to challenge Florida's "Choose Life" plates. *See id.* at 947 ("Appellants' (continued…)

There is little to be gained from awaiting further percolation. The opinion in *Bredesen* is thorough and scholarly, and five courts of appeals have issued opinions explaining why they reject that decision. The issue is ripe for this Court's resolution.

II. THE CIRCUITS ARE DIVIDED ON WHETHER A STATE ENGAGES IN "VIEWPOINT DISCRIMINATION" IF IT REJECTS A SPECIALTY PLATE WHEN IT HAS NOT APPROVED OR ISSUED A SPECIALTY PLATE ESPOUSING THE OPPOSITE VIEW

The Court should also grant certiorari to resolve whether Texas has engaged in "viewpoint discrimination" by rejecting the plaintiffs' license-plate proposal. The Fifth Circuit's analysis of viewpoint discrimination is untenable and irreconcilable with the Seventh Circuit's decision in *Choose Life Illinois, Inc. v. White*, 547 F.3d 853 (7th Cir. 2008). The Court should grant certiorari to resolve this additional conflict among the circuits.

The State had argued that its refusal to issue a confederate license plate was viewpoint-neutral because it had not approved or issued a plate expressing *any* viewpoint on the confederacy, the confederate battle flag, or

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alleged injury therefore is not redressable by a decision of this court, and Appellants lack standing to bring their claims."). We do not include the Eleventh Circuit's statement in our circuit-split count, because federal courts cannot rule on the merits when they lack jurisdiction over a case. *See Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 94 (1998).

the views espoused by the Sons of Confederate Veterans. But the court of appeals brushed aside that argument:

> [E]ven if the Board were correct that its decision merely excluded multiple viewpoints on the meaning of the Confederate flag, that decision would be equally objectionable. . . . Silencing both the view of Texas SCV and the view of those members of the public who find the flag offensive would similarly skew public debate and offend the First Amendment.

App. 22a–23a. This analysis obliterates any distinction between viewpoint discrimination and content discrimination, and renders a state guilty of "viewpoint discrimination" whenever it excludes any subject matter from its specialty license plate program. *See also* App. 23a ("[A] state engage[s] in viewpoint discrimination when it denie[s] a specialty license plate based on the speaker's message").

The Seventh Circuit's decision in *Choose Life Illinois* rejects this untenable understanding of "viewpoint discrimination." When Illinois refused to issue a "Choose Life" specialty plate, the Seventh Circuit held that this decision was viewpoint neutral because Illinois had not issued any specialty plate with abortion-related messages:

> Illinois has excluded the entire subject of abortion from its specialty-plate program. The Secretary argues this is a content-based but viewpoint-neutral restriction. We agree. . . . [T]he State has restricted access to the specialty-

> plate forum on the basis of the *content* of the proposed plate—saying, in effect, "no abortion-related specialty plates, period." This is a permissible content-based restriction on access to the specialty-plate forum, not an impermissible act of discrimination based on viewpoint.

Choose Life Ill., 547 F.3d at 865. True, the Seventh Circuit distinguished the Fourth Circuit's ruling in *Sons of Confederate Veterans, Inc. v. Commissioner of Virginia Department of Motor Vehicles*, 288 F.3d 610 (4th Cir. 2002), and agreed with the Fourth Circuit that Virginia had engaged in "viewpoint discrimination" by rejecting the same specialty license plate that the plaintiffs have proposed in this case. *See* 547 F.3d at 865 ("Virginia was not imposing a 'no flags' rule; it was prohibiting the display of a specific symbol commonly understood to represent a particular viewpoint."). But there can be no doubt that under the Fifth Circuit's ruling in this case, a State will not be allowed to deny a request for a "Choose Life" specialty plate on the ground that the State has chosen to exclude the entire topic of abortion from its specialty license plate program. App. 22a. *Choose Life Illinois* would have come out differently had the case been litigated in the Fifth Circuit rather than the Seventh; that is enough to establish a circuit split on this question.

This circuit split is well-developed. The Fourth Circuit, like the Fifth Circuit in this case, held that Virginia engaged in "viewpoint discrimination" by excluding the confederate flag from its specialty license plate program, and specifically rejected the State's argument that its exclusion was "content-based, but viewpoint-neutral, be-

cause it bans all viewpoints about the Confederate flag." *Sons of Confederate Veterans*, 288 F.3d at 623. The Eighth and Ninth Circuits have deployed similar reasoning in the context of a State's refusal to issue "Choose Life" specialty plates, holding that the States engaged in "viewpoint discrimination" even though those States had never issued *any* specialty plate with abortion-related messages. *See Roach v. Stouffer*, 560 F.3d 860, 870 (8th Cir. 2009); *Arizona Life Coalition*, 515 F.3d at 971–72. Each of these four decisions is incompatible with the Seventh Circuit's holding in *Choose Life Illinois*.

III. THE FIFTH CIRCUIT'S RESOLUTION OF THESE ISSUES WILL HAVE UNTENABLE CONSEQUENCES

Certiorari is even more urgent because the court of appeals's ruling imposes an untenable legal standard on the State's specialty-license-plate program. The notion that the Constitution requires States to maintain viewpoint neutrality when deciding whether to issue specialty license plates is unworkable and leads to absurdities. Texas and other States issue "Fight Terrorism" license plates; a ban on viewpoint discrimination would require these States to offer specialty plates with pro-terrorism messages. Numerous other specialty plates will be on the chopping block unless the State offers an equal and opposite specialty plate. Texas issues specialty plates with messages such as "Stop Child Abuse," "Mothers Against Drunk Driving," and "Keep Texas Beautiful." The State of Texas has not approved (and will not approve) specialty plates that encourage child abuse, drunk driving, or littering. Under the court of appeals's "no viewpoint dis-

crimination" rule, it is not clear how any of these specialty plates can survive.

Worse, the court of appeals's ruling defines "viewpoint discrimination" to include *any* exclusion of a symbol or subject matter from a state-issued specialty license plate. App. 23a (defining "viewpoint discrimination" to include any "deni[al of] a specialty license plate based on the speaker's message."). After this ruling, it is not apparent how the State could exclude profanity, sacrilege, or overt racism from its specialty license plates. And the court of appeals made no effort to cabin the scope of its holding or define the extent of its reach.

IV. THIS CASE PRESENTS AN IDEAL VEHICLE FOR RESOLVING BOTH FIRST AMENDMENT QUESTIONS

This case presents a clean vehicle for the Court to resolve both the government-speech and the viewpoint-discrimination issues. The petition for certiorari in *Berger v. ACLU*, No. 14-35, also presents the question whether state-issued specialty license plates are government speech. But it is beclouded by two jurisdictional issues that have divided the courts of appeals.

The first is whether the ACLU's challenge to North Carolina's "Choose Life" specialty plate is barred by the Tax Injunction Act. Two courts of appeals have held that the Tax Injunction Act prohibits federal courts from entertaining lawsuits to enjoin the issuance of "Choose Life" plates—on the ground that the fees that the State collects in exchange for those plates is a "tax." *See Henderson v. Stadler*, 407 F.3d 351 (5th Cir. 2005); *Hill v. Kemp*, 478 F.3d 1236 (10th Cir. 2007); *but see Arizona*

Life Coalition, 515 F.3d at 962–63 (rejecting *Henderson*'s analysis of the Tax Injunction Act); *Bredesen*, 441 F.3d at 374–75 (same). The Fourth Circuit did not discuss the Tax Injunction Act in *ACLU of N.C. v. Tata*, 742 F.3d 563, 570 (4th Cir. 2014), and the Attorney General of North Carolina did not raise the issue in his appellate briefing. But it does present a threshold jurisdictional issue for this Court to resolve, and the petitioners in *Berger* acknowledge that the Fourth Circuit's ruling is "at odds with" *Henderson*'s holding on the Tax Injunction Act. *See* Petition for a Writ of Certiorari at 14, *Berger v. ACLU of N.C.*, No. 14-35 (July 11, 2014).

The second jurisdictional issue in *Berger* is whether the plaintiffs have standing to seek a remedy that enjoins North Carolina officials from issuing "Choose Life" plates. The plaintiffs' alleged injury in *Berger* was their inability to obtain a specialty license plate with messages supporting abortion rights. *See* Complaint at 2, *ACLU of N.C. v. Conti*, 912 F. Supp. 2d 363 (E.D.N.C. 2012) (No. 5:11-cv-470-F). It is far from apparent how a judicial order shutting down the "Choose Life" specialty-plate program does anything to redress that alleged injury. As the Eleventh Circuit has explained:

> [T]he only cognizable injury Appellants could allege is that the State denied them an opportunity to assert their pro-choice point of view. The relief requested by Appellants, an injunction against the enforcement of [the statute authorizing "Choose Life" specialty plates], would not remedy this alleged injury. Removing pro-life speech from the forum does not in

> any way advance Appellants' opportunity to speak.

Women's Emergency Network v. Bush, 323 F.3d 937, 947 (11th Cir. 2003). Once again, the Fourth Circuit's opinion fails to discuss this jurisdictional problem. But this Court cannot ignore the threshold issue of standing, and the petitioners in *Berger* have already flagged it for this Court's attention. *See* Petition for a Writ of Certiorari at 18, *Berger*, No. 14-35.

The State respectfully submits that *Berger* would present an appropriate vehicle if this Court decides that it wants to resolve either or both of these threshold jurisdictional questions. We express no opinion on whether these jurisdictional issues are certworthy, as they are not presented in our case. But if the Court wants to resolve the merits of the First Amendment issues that have divided the courts of appeals, we respectfully urge the Court to grant certiorari in this case—regardless of whether the Court grants or denies the petition in *Berger*. Granting certiorari in *Berger* alone runs the risk that a majority of the Court will dispose of the case on jurisdictional grounds, preventing the Court from reaching the pressing First Amendment questions presented in these petitions.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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August 2014

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

United States Court of
Appeals Fifth Circuit

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Lyle W. Cayce Clerk

No. 13-50411

TEXAS DIVISION, SONS OF CONFEDERATE VETERANS, INCORPORATED, a Texas Corporation; GRANVEL J. BLOCK, Individually; RAY W. JAMES, Individually,

Plaintiffs-Appellants

v.

VICTOR T. VANDERGRIFF, In His Official Capacity as Chairman of the Board; CLIFFORD BUTLER, In His Official Capacity as a Member of the Board; RAYMOND PALACIOS, JR., In His Official Capacity as a Member of the Board; LAURA RYAN, In Her Official Capacity as a Member of the Board; VICTOR RODRIGUEZ, In His Official Capacity as a Member of the Board; MARVIN RUSH, in his official capacity as a Member of the Board; JOHN WALKER, III, In His Official Capacity as a Member of the Board; BLAKE INGRAM, In His Official Capacity as a Member of the Board,

Defendants-Appellees

Appeals from the United States District Court
for the Western District of Texas

Before SMITH, PRADO, and ELROD, Circuit Judges.
EDWARD C. PRADO, Circuit Judge:

The Texas Division of the Sons of Confederate Veterans and two of its officers (collectively "Texas SCV") appeal the district court's grant of summary judgment in favor of Victor T. Vandergriff, Chairman of the Texas Department of Motor Vehicles Board, and seven other board members (collectively "the Board"). Texas SCV argues that the Board violated its First Amendment right to free speech when the Board denied Texas SCV's application for a specialty license plate featuring the Confederate battle flag. The district court rejected Texas SCV's arguments and found that the Board had made a reasonable, content-based regulation of private speech. We disagree, and because the Board engaged in impermissible viewpoint discrimination, we reverse.

I. BACKGROUND

The State of Texas requires that all registered motor vehicles display a license plate. Tex. Transp. Code Ann. § 504.943; 43 Tex. Admin. Code § 217.22. Texas offers a standard-issue license plate, but, for an additional fee, drivers may display a specialty license plate on their vehicles. *See* Tex. Transp. Code Ann. § 504.008. Under Texas law, there are three different ways to create a specialty license plate. First, the legislature can create and specifically authorize a specialty license plate. *See id.* § 504.601–504.663. Second, any individual or organi-

zation can create a specialty plate through a third-party vendor. *Id.* § 504.6011(a). The Texas Department of Motor Vehicles Board must approve any plates created through the private vendor. 43 Tex. Admin. Code § 217.40.

The third and final means of creating a specialty license plate is at issue in this case. The Texas Department of Motor Vehicles Board can issue a new specialty plate, either on its own or in response to an application from a nonprofit organization. Tex. Transp. Code Ann. § 504.801(a). When a nonprofit organization proposes a plate, the Board must approve the plate's design and "may refuse to create a new specialty license plate if the design might be offensive to any member of the public." *Id.* § 504.801(c). The proceeds from the sale of these specialty license plates go to either the Texas Department of Motor Vehicles or to a state agency of the nonprofit organization's choosing. *Id.* § 504.801(b), (e).

Texas SCV, a nonprofit organization that works to preserve the memory and reputation of soldiers who fought for the Confederacy during the Civil War, applied for a specialty license plate through this third process. Texas SCV's proposed plate features the SCV logo, which is a Confederate battle flag framed on all four sides by the words "Sons of Confederate Veterans 1896." A faint Confederate flag also appears in the background of the proposed plate. The word "Texas" is at the top of the plate in bold text, and "Sons of Confederate Veterans" runs in capitalized letters along the bottom of the plate. An outline of the state of Texas appears in the top, right corner of the proposed plate.

Texas SCV submitted its application in August 2009 to the Texas Department of Transportation, which was the agency responsible for administering the specialty license plate program at the time. The Department of Transportation put Texas SCV's proposed plate to a vote of its seven-member panel. During the first vote, three members voted to approve the plate, and two members voted against; two members failed to vote despite repeated efforts to encourage them to cast their vote. Instead of moving the plate to the public comment period, the Department of Transportation chose to hold another vote. During this second vote, one member voted to approve the plate, four voted against, and two members again failed to vote. The Department of Transportation then denied Texas SCV's application.

The Texas Department of Motor Vehicles subsequently assumed responsibility for administering the specialty license plate program, and Texas SCV renewed its application for a specialty license plate with the Board. The Board invited public comment on Texas SCV's proposed plate on its website and set a date for final review of the plate. Eight of the nine members of the Board were present for the final review meeting, and their vote was deadlocked, four in favor and four against the plate. The Board rescheduled the vote, in the hope that all Board members would be able to be present for the vote. Many members of the public attended the Board meeting where the second vote was scheduled to occur. Texas SCV's proposed plate elicited numerous public comments; while some were in favor, the majority were against approving the plate. At its second vote, the Board unanimously voted against

issuing Texas SCV's specialty plate. The Board's resolution explaining its decision stated:

> The Board . . . finds it necessary to deny [Texas SCV's] plate design application, specifically the confederate flag portion of the design, because public comments have shown that many members of the general public find the design offensive, and because such comments are reasonable. The Board finds that a significant portion of the public associate the confederate flag with organizations advocating expressions of hate directed toward people or groups that is demeaning to those people or groups.

Texas SCV sued in federal district court under 42 U.S.C. § 1983, asserting violations of its rights under the First and Fourteenth Amendments. Both parties moved for summary judgment, and the district court granted the Board's motion. First, the district court found that the specialty license plates were private, not government, speech. The court then analyzed Texas SCV's claims under the First Amendment and found that (1) the specialty license plate program was a nonpublic forum; (2) the Board's rejection of Texas SCV's plate "was a content-based restriction on speech, rather than a viewpoint-based limitation"; and (3) the content-based regulation was reasonable. Thus, the district court concluded that the Board had not violated Texas SCV's rights under the First Amendment and entered judgment for the Board.[1] Texas SCV timely appealed.

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[1] The district court did not reach Texas SCV's claim that the Board had violated its rights under the Fourteenth Amendment, and Texas SCV does not raise its Fourteenth Amendment argument on ap-

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II. JURISDICTION

Neither party has argued that this Court lacks jurisdiction, but federal courts have a duty to consider their subject matter jurisdiction sua sponte. *See Gonzalez v. Thaler*, 132 S. Ct. 641, 648 (2012). In *Henderson v. Stalder*, 407 F.3d 351 (5th Cir. 2005), we were asked to decide whether Louisiana's specialty license plate program discriminated against pro-choice views in violation of the First Amendment. *Id.* at 352. Instead of reaching the merits, we held that the Tax Injunction Act ("TIA"), 28 U.S.C. § 1341, barred the suit, and we vacated and remanded with instructions for the district court to dismiss the case for lack of jurisdiction. *Id.* at 360. Because this case involves a seemingly similar fact pattern, we first consider whether the TIA bars the instant case.

Under the TIA, "[t]he district courts shall not enjoin, suspend or restrain the assessment, levy or collection of any tax under State law where a plain, speedy and efficient remedy may be had in the courts of such State." 28 U.S.C. § 1341. But, the TIA will not deprive federal courts of jurisdiction when "(a) the 'fees' charged by the state are not taxes for purposes of TIA, or if (b) *Hibbs v. Winn*, 542 U.S. 88 . . . (2004) can be read to encompass this suit." *Henderson*, 407 F.3d at 354. *Hibbs* opens the doors to federal court where the TIA might otherwise bar the suit if "(1) a third party (not the taxpayer) files suit, and (2) the suit's success will enrich, not deplete, the government entity's coffers." *Id.* at 359 (citing *Hibbs*, 542 U.S. at 105–09).

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peal.

We hold that the TIA does not bar this suit because this case falls under the *Hibbs* exception.[2] The first part of *Hibbs* is met because Texas SCV is a third party. *See Hibbs*, 542 U.S. at 108 ("[The TIA] has been read to restrain state taxpayers from instituting federal actions to contest their liability for state taxes, but not to stop third parties from pursuing constitutional challenges to tax benefits in a federal forum."). The second part of *Hibbs* is also met because, if Texas SCV succeeds in having its specialty license plate issued, it will actually enrich the state. *See* Tex. Transp. Code § 504.801(e) (explaining that the fees collected for specialty license plates reimburse the Board for administrative costs and also go to the credit of the state's specialty license plate fund or the Texas Department of Motor Vehicles fund).

Because the TIA does not bar this suit, the district court had jurisdiction pursuant to 28 U.S.C. § 1331. We have jurisdiction over this appeal of a final decision of a district court under 28 U.S.C. § 1291.

III. STANDARD OF REVIEW

We review the district court's grant of summary judgment de novo. *Elizondo v. Green*, 671 F.3d 506, 509 (5th Cir. 2012). We apply the same standard as

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[2] In *Henderson*, this Court concluded that the charges Louisiana citizens paid for the state's "Choose Life" specialty license plate were taxes, not fees. 405 F.3d at 356–59. Although there are differences between how the specialty license plate in *Henderson* and the specialty license plate here were created, we do not decide whether the charges for the specialty license plate here are taxes or fees. Because we hold that the *Hibbs* exception to the TIA applies, we have no reason to consider whether the first exception to the TIA applies.

the district court, and summary judgment is appropriate when "the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a); *see also Elizondo*, 671 F.3d at 509.

IV. DISCUSSION

This case presents two primary issues on appeal. First, we must determine whether the speech on specialty license plates is government speech or private speech. If we conclude that the speech is private speech, we must then ask whether the Board's decision to reject Texas SCV's specialty license plate was a permissible content-based regulation or impermissible viewpoint discrimination. We address each issue in turn.

A. Government Speech or Private Speech

As a threshold matter, we must decide if the speech at issue is government speech. "A government entity has the right to speak for itself. . . . [I]t is entitled to say what it wishes, and to select the views that it wants to express." *See Pleasant Grove City, Utah v. Summum*, 555 U.S. 467, 467–68 (2009) (alteration in original) (citations and internal quotation marks omitted). "The Free Speech Clause restricts government regulation of private speech; it does not regulate government speech." *Id.* at 467. Thus, if we conclude that the speech in this case is government speech, the analysis ends because there has been no First Amendment violation—in fact, the First Amendment would not even apply. *See id.* ("If [Pleasant Grove City and its local officials] were engaging in their own expressive conduct, then the Free Speech Clause has no application."). If, however, we determine that the speech in question is private speech, we must

then apply traditional First Amendment principles and analyze whether the Board violated Texas SCV's right to free speech.

The parties disagree over the standard we should apply to determine whether Texas SCV's proposed plate is government speech. Texas SCV maintains that Justice Souter's concurrence in *Summum* sets out the best test for determining government speech: whether a reasonable and fully informed observer would understand the expression to be government speech. *See id.* at 487 (Souter, J., concurring). Texas SCV argues that any reasonable observer would view a specialty license plate as the speech of the individual driving the car. The Board also relies on the Supreme Court's opinion in *Summum*, but argues that speech is government speech when it is under the government's "effective control." Because the specialty license plates are state-approved and the state owns the design, the Board urges this is government, not private, speech.

The government speech doctrine is "recently minted," s*ee id.* at 481 (Stevens, J., concurring), and neither the Supreme Court nor this Court has articulated a test to identify government speech. To determine whether the specialty license plates are government or private speech, we look to the two opinions where the Supreme Court has most clearly formulated the government speech doctrine, *Johanns v. Livestock Marketing Ass'n*, 544 U.S. 550 (2005), and *Summum*. As we explain, when we compare this case to *Johanns* and *Summum* and consider the Supreme Court's method of deciding those two cases, we conclude that the speech here is private speech.

In *Johanns*, the Supreme Court held that a promotional campaign to encourage beef consumption that the government "effectively controlled" was government speech. *Id.* at 560. The government did not pay for the campaign itself; instead, it funded the campaign by charging an assessment on all sales and importation of cattle and on imported beef products. *Id.* at 554. The government, though, had "set out the overarching message and some of its elements" and had "final approval authority over every word used in every promotional campaign." *Id.* at 561. Thus, because the message in the promotional campaign was "from beginning to end the message established by the Federal Government," the campaign was government speech. *Id.* at 560.

Summum, however, shows that "the Supreme Court did not espouse a myopic 'control test' in *Johanns*." *ACLU of N.C. v. Tata*, 742 F.3d 563, 570 (4th Cir. 2014). In *Summum*, the Supreme Court held that Pleasant Grove City, Utah ("the City") had not violated the First Amendment free speech rights of Summum, a religious organization, when the City refused to erect a permanent monument that Summum had tried to donate and place in a public park. The Court held there was no First Amendment violation because "the City's decision to accept certain privately donated monuments while rejecting [Summum's] is best viewed as a form of government speech." *Summum*, 555 U.S. at 481. The Supreme Court noted that the City "'effectively controlled' the messages sent by the monuments in the Park by exercising 'final approval authority' over their selection." *See Summum*, 555 U.S. at 473 (quoting *Johanns*, 544 U.S. at 560–61)). But, the Court did not base its holding on City's control over the permanent monuments. Instead,

its conclusion focused on the nature of both permanent monuments and public parks. The Court explained that governments have historically used monuments, such as statues, triumphal arches, and columns, "to speak to the public." *Id.* at 470. These "[p]ermanent monuments displayed on public property typically represent government speech." *Id.* The Court also recognized that public parks are a traditional public forum. *See, e.g.*, *id.* at 469 ("With the concept of the traditional public forum as a starting point . . . ."). "Public parks are often closely identified in the public mind with the government unit that owns the land." *Id.* at 472. Thus, given the context, there was "little chance that observers [would] fail to appreciate" that the government was the speaker. *Id.* at 471.

Considering the emphasis on context and the public's perception of the speaker's identity in *Summum*, we think the proper inquiry here is "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." *Id.* at 487 (Souter, J., concurring); *see also 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) (identifying government speech by asking "[u]nder all the circumstances, would a reasonable person consider the speaker to be the government or a private party").

Here, the differences between permanent monuments in public parks and specialty license plates on the

back of personal vehicles convince us that a reasonable observer would understand that the specialty license plates are private speech. Unlike their treatment of permanent monuments, states have not traditionally used license plates to convey a particular message to the public. Rather, license plates have primarily been a means of identifying vehicles. *See Wooley v. Maynard*, 430 U.S. 705, 716 (1977) (explaining that one of the reasons the state had asserted an interest in including its motto on state license plates was to "facilitate[] the identification of passenger vehicles"); Tex. Transp. Code Ann. §§ 504.001–504.948 (effecting a vehicle registration scheme); *see also id.* § 504.005 (mandating that each license plate have a "unique identifier"). License plates also do not have the permanent character of monuments in public parks. *See Summum*, 555 U.S. at 464, 480 (contrasting permanent monuments with "temporary displays" and "transitory expressive acts"). An individual may choose a new specialty license plate every year simply by paying a fee, *see* Tex. Transp. Code Ann. § 504.008, and an individual registers for a new license plate any time he or she moves to a new state.

Further, while public parks have traditionally been "closely identified in the public mind with the government" and have "play[ed] an important role in defining the identity [of] a city," the same cannot be said for license plates and the backs of cars. *See Summum*, 555 U.S. at 472. In *Wooley*, the Supreme Court held that New Hampshire could not force its citizens (the plaintiffs were Jehovah's Witnesses) to bear the "Live Free or Die" motto on standard issue license plates because it would be a violation of their First Amendment rights. 430 U.S. at 717. The Court never discussed whether the

plates were government or private speech. Instead, it presumed that the license plates were private speech, engaged in a First Amendment analysis, and explicitly stated that because a car was "private property," the government could not force individuals to bear a license plate with New Hampshire's motto. *Id.* at 713. Thus, the "Supreme Court has indicated 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." *Sons of Confederate Veterans, Inc. ex rel. Griffin v. Comm'r of Va. Dep't of Motor Vehicles*, 288 F.3d 610, 621 (4th Cir. 2002) (citing *Wooley*, 430 U.S. at 717). And while the plates at issue in *Wooley* were standard-issue plates, here a third party designed and submitted the specialty license plate, making the connection between the plate and the driver or owner of the car even closer. *See Matwyuk v. Johnson*, No. 2:13–CV–284, 2014 WL 2160448, *13 (W.D. Mich. May 23, 2014) (discussing *Summum* and concluding that "vanity plates are viewed as defining the identity of the driver of the vehicle bearing them . . . . and that [t]herefore, no reasonable government official . . . would have believed that [the vanity plate] constituted government speech").

Moreover, this case does not present the unworkable system that the Supreme Court feared would be created "[i]f government entities must maintain viewpoint neutrality in their selection of donated monuments." *See Summum*, 555 U.S. at 479. The *Summum* Court noted the "well founded" concerns that requiring viewpoint neutrality would force the City to "either 'brace themselves for an influx of clutter' or face the pressure to remove longstanding and cher-

ished monuments." *Id.* at 479. By contrast, here there is no danger of having too many specialty license plates because they do not take up physical space, nor is there a finite amount of space available for specialty plates. Indeed, whereas the park in *Summum* contained fifteen monuments, there are currently over 350 specialty plates in Texas. The Board has given no indication that there is any limit to the number of designs it will accept. Thus, given the differences between permanent monuments in public parks and specialty license plates on the back of cars, *Summum* does not dictate that specialty license plates are government speech.

Our conclusion that specialty license plates are private speech is consistent with the majority of other circuits that have considered the issue. *See Roach*, 560 F.3d at 867 (specialty plates are private speech); *Arizona Life Coal. v. Stanton*, 515 F.3d 956, 968 (9th Cir. 2008) ("Choose Life" plate with logo depicting the faces of two young children was private speech); *White*, 547 F.3d at 863 ("Messages on specialty license plates cannot be characterized as the government's speech"); *Sons of Confederate Veterans*, 288 F.3d at 621 ("SCV's special plates constitute private speech.").[3] Although only *Roach*

[3] In *Byrne v. Rutledge*, 623 F.3d 46 (2d Cir. 2010), the Second Circuit treated Vermont vanity plates as private speech. 623 F.3d at 53–54. The state did not argue that the vanity license plates were government speech before the district court, and though the state raised that argument on appeal, the Second Circuit declined to consider the issue. *Byrne*, 623 F.3d at 53 n.7 (explaining that it is "a well-established general rule that an appellate court will not consider an issue raised for the first time on appeal"). Because *Byrne* did not analyze whether the vanity license plates were government or private speech, we do not include it here.

was decided after *Summum*, the Eighth Circuit did not think that *Summum* mandated that the specialty license plates were government speech. 650 F.3d at 868 n.3. And for the reasons we explained above, we agree.

The Board, though, urges us to follow the Sixth Circuit's decision in *ACLU of Tennessee v. Bredesen*, 441 F.3d 370 (6th Cir. 2006), where the Sixth Circuit held that a specialty license plate was government speech. The Board claims *Bredesen*'s "holding extends to *all* specialty plates approved by state officials" and can serve as a model for this Court. We disagree. The Sixth Circuit's conclusion that specialty license plates are government speech makes it the sole outlier among our sister circuits. And the Sixth Circuit reached that holding based on facts different from those in the instant case: the Tennessee legislature itself had passed an act specifically authorizing, creating, and issuing a "Choose Life" specialty license plate. *Bredesen*, 441 F.3d at 372, 376. We think this distinction alone is sufficient to warrant a different outcome here. But even if it were not, we would decline to follow *Bredesen* because the Sixth Circuit's analysis cannot be reconciled with Supreme Court precedent, specifically *Wooley*. *See id.* at 386 (Martin, J., dissenting) (explaining that *Wooley* found the message on the license plate was private, even though the government had "crafted" and "had ultimate control over" the message); *see also White*, 547 F.3d at 863 (characterizing the Sixth Circuit's conclusion in *Bredesen* as "flawed" in part because of the difficulty in squaring the decision with *Wooley*).

As the Supreme Court has acknowledged, "[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." *Summum*, 555 U.S. at 470. But considering the situation here, we are confident that a reasonable observer would know that a specialty license plate is the speech of the individual driving the car. Thus, we hold that specialty license plates are private speech.[4]

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[4] The dissent asserts that the majority's "analysis presents a false dichotomy" that the speech must be only government or only private speech. But this is not so. Here, the reasonable observer test implicitly recognizes that specialty plates may have elements of both government and private speech. Ultimately, if "a reasonable and fully informed observer would understand the expression to be government speech," then it is just that. As we explain in the opinion, however, a reasonable observer would understand specialty plates to be private speech. In any event, we need not discuss or adopt a hybrid speech doctrine. Neither party has briefed the concept of hybrid speech or asked for the court to adopt such a doctrine. Nor has the Supreme Court addressed a hybrid speech doctrine.

Moreover, only the Fourth Circuit has discussed hybrid speech in evaluating restrictions of specialty license plates. *See Tata*, 742 F.3d at 568–69 & n.4; *Planned Parenthood of S.C., Inc. v. Rose*, 361 F.3d 786, 794, 800, 801 (4th Cir. 2004). In both opinions, the Fourth Circuit considered specialty license plates that the state legislature had specifically authorized. *Tata*, 742 F.3d at 566; *Rose*, 361 F,3d at 788. The Fourth Circuit used a traditional First Amendment analysis to hold, as we do, that a specialty license plate restriction constituted viewpoint discrimination. *See Tata*, 742 F.3d at 575; *Rose*, 361 F.3d at 794 ("My conclusion that the speech is mixed (both government and private) does not end the discussion, however. I must go on to consider whether the State has engaged in viewpoint discrimination and whether it may engage in viewpoint discrimination . . . .").

B. Content-Based Regulation or Viewpoint Discrimination

Because the specialty plate program is private speech, we must next determine whether the Board's rejection of Texas SCV's proposed plate was a permissible content-based regulation or impermissible viewpoint discrimination. Making this determination can at times be difficult because the distinction between a content-based regulation and viewpoint discrimination "is not a precise one." *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819, 831 (1995).

"It is axiomatic that the government may not regulate speech based on its substantive content or the message it conveys." *Id.* at 828. Thus, the government may not "favor one speaker over another," "discriminat[e] against speech because of its message," or target "particular views taken by speakers on a subject." *Id.* at 828–29 (citations omitted). Viewpoint discrimination is presumptively impermissible for private speech. *See id.* at 830 ("[V]iewpoint discrimination . . . is presumed impermissible when directed against speech otherwise within the forum's limitations." (citation omitted)); *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 46 (1983) (explaining that, in a nonpublic forum, the state may not regulate speech in "an effort to suppress expression merely because public officials oppose the speaker's view" (citation omitted)). On the other hand, we are also aware that "content discrimination . . . may be permissible if it preserves the purposes of [the] limited forum." *Rosenberger*, 515 U.S. at 830. In distinguishing between these two types of discrimination, the Supreme Court has explained viewpoint discrimination is "an egregious form of content discrimination" that is "a

subset or particular instance of the more general phenomenon of content discrimination." *Id.* at 829–31 (citation omitted).

Texas SCV argues that the Board's denial of Texas SCV's proposed plate was viewpoint discrimination, because the Board "endorsed the viewpoint of those offended by the Confederate battle flag and discriminated against the view [of Texas SCV] that the flag is a symbol honoring the Confederate soldier, history, and Southern heritage." The Board counters that its decision was not viewpoint discrimination because it did nothing to disparage Texas SCV's view of the Confederate flag, nor did it reject the proposed plate merely because the Board opposed Texas SCV's view. The Board argues it made its decision based solely on the "objective inquiry" of how members of the public would react to Texas SCV's license plate.

We agree with Texas SCV and hold that the Board engaged in impermissible viewpoint discrimination and violated Texas SCV's rights under the First Amendment. In explaining its denial of Texas SCV's application, the Board stated it denied the plate, "specifically the confederate flag portion of the design, because public comments have shown that many members of the general public find the design offensive." By rejecting the plate because it was offensive, the Board discriminated against Texas SCV's view that the Confederate flag is a symbol of sacrifice, independence, and Southern heritage. The Board's decision implicitly dismissed that perspective and instead credited the view that the Confederate flag is an inflammatory symbol of hate and oppression. Texas's specialty license plate program features a number of plates that honor veterans, including Ko-

rea Veterans, Vietnam Veterans, Woman Veterans, Buffalo Soldiers, Operation Iraqi Freedom, and World War II Veterans. Given Texas's history of approving veterans plates and the reasons the Board offered for rejecting Texas SCV's plate, it appears that the only reason the Board rejected the plate is the viewpoint it represents.

We understand that some members of the public find the Confederate flag offensive. But that fact does not justify the Board's decision; this is exactly what the First Amendment was designed to protect against. *Turner Broadcasting System, Inc. v. F.C.C.*, 512 U.S. 622, 641 (1994) ("Government action that stifles speech on account of its message . . . pose[s] the inherent risk that the Government seeks not to advance a legitimate regulatory goal, but to suppress unpopular ideas or information or manipulate the public debate through coercion rather than persuasion."). As the Supreme Court has already recognized, "any suggestion that the Government's interest in suppressing speech becomes more weighty as popular opposition to that speech grows is foreign to the First Amendment." *See United States v. Eichman*, 496 U.S. 310, 318 (1990). "[T]he fact that society may find speech offensive is not a sufficient reason for suppressing it. Indeed, if it is the speaker's opinion that gives offense, that consequence is a reason for according it constitutional protection." *Simon & Schuster Inc. v. Members of N.Y. State Crime Victims Bd.*, 502 U.S. 105, 108 (1991) (citations and internal quotation marks omitted).

Further, the Board's "might be offensive to any member of the public" standard lacks specific limiting standards, which gives the state "unbridled discretion"

that permits viewpoint discrimination. *Prime Media, Inc. v. City of Brentwood*, 485 F.3d 343, 351 (6th Cir. 2007). Indeed, the most recent license plate case to be decided by a federal court, *Matwyuk v. Johnson*, held just this. *Matwyuk* involved Michigan's vanity plate program, which did not allow any license plate configurations "that might carry a connotation offensive to good taste and decency." *Matwyuk*, 2014 WL 2160448, at *1. The *Matwyuk* court held that this "offensive" standard "impermissibly permits the . . . State to deny a license plate application based on viewpoint because the statute lacks objective criteria, and thus confers unbounded discretion on the decisionmaker." *Id.* at *10 (citing *Shuttlesworth v. City of Birmingham*, 394 U.S. 147, 150–51 (1969) (noting "the many decisions of this Court over the last 30 years, holding that a law subjecting the exercise of First Amendment freedoms to the prior restraint of a license without narrow, objective, and definite standards to guide the licensing authority, is unconstitutional")).

Matwyuk's conclusion is consistent with many other courts that have held that similar standards present a "very real and substantial" danger that the defendant would exclude speech solely because of its viewpoint. *See United Food & Commercial Workers Union, Local 1099* v. *Sw. Ohio Reg'l Transit Auth.*, 163 F.3d 341, 361–62 (6th Cir. 1998) (holding that the defendant's advertising policy prohibiting "controversial" advertisements was unconstitutionally overbroad because its application presented a "very real and substantial" danger that the defendant would exclude a proposed advertisement solely because of its viewpoint); *see McCauley v. Univ. of the V.I.*, 618 F.3d 232, 248–49 (1st

Cir. 2010) ("Paragraph R's use of 'offensive' is, 'on its face, sufficiently broad and subjective that [it] could conceivably be applied to cover any speech . . . th[at] offends someone.'" (alterations in original) (quoting *DeJohn v. Temple Univ.*, 537 F.3d 301, 317 (3d Cir. 2008))); *Aubrey v. City of Cincinnati*, 815 F. Supp. 1100, 1104 (S.D. Ohio 1993) (concluding that the Cincinnati Reds' banner policy allowing banners only if they were in "good taste" left "too much discretion in the decision maker without any standards for that decision maker to base his or her determination"); *Montenegro v. N.H. Div. of Motor Vehicles*, No. 2012-624, 2014 WL 1813278, at *5 (N.H. May 7, 2014) ("Because the 'offensive to good taste' standard is not susceptible of objective definition, the restriction grants DMV officials the power to deny a proposed vanity registration plate because it offends particular officials' subjective idea of what is 'good taste.'").

Here, the tortured procedural history that eventually led to the denial of Texas SCV's plate demonstrates that the subjective standard of offensiveness led to viewpoint discrimination. During the Department of Transportation's initial vote, a majority of a quorum voted to *approve* Texas SCV's plate. Instead of moving the plate to the next step in the approval process, the Department of Transportation chose to hold another vote. The record offers no valid procedural basis for the Department of Transportation's decision to disregard the initial vote approving the plate. Instead, e-mails between committee members reveal that some members wanted a second vote solely because of the controversial nature of Texas SCV's proposed plate; they denied the plate during this second vote. Once the Board took

control of the specialty license plate program, Texas SCV reapplied. At the public hearing before the Board voted on the plate, many members of the public who opposed Texas SCV's plate expressed their concerns about the fact that the plate featured the Confederate flag. Following this public hearing, the Board denied the plate. This sequence of events lends support to our conclusion that SCV's proposed plate was rejected because of its "controversial" and "offensive" viewpoint, which is impermissible viewpoint discrimination.

Further, we reject the Board's argument that the denial of Texas SCV's plate is a content-based regulation because it bans all viewpoints of the Confederate flag. First, there is nothing in the Board's decision that suggests it would exclude all points of view on the Confederate flag. The Board rejected Texas SCV's plate because members of the public found the proposed plate offensive without issuing any overarching ban on the use of the Confederate flag on Texas specialty license plates. But even if the Board were correct that its decision merely excluded multiple viewpoints on the meaning of the Confederate flag, that decision would be equally objectionable. As the Supreme Court explained in *Rosenberger*,

> The . . . assertion that no viewpoint discrimination occurs because the Guidelines discriminate against an entire class of viewpoints reflects an insupportable assumption that all debate is bipolar and that antireligious speech is the only response to religious speech. Our understanding of the complex and multifaceted nature of public discourse has not embraced such a contrived description of the marketplace of ideas.

> If the topic of debate is, for example, racism, then exclusion of several views on that problem is just as offensive to the First Amendment as exclusion of only one. It is as objectionable to exclude both a theistic and an atheistic perspective on the debate as it is to exclude one, the other, or yet another political, economic, or social viewpoint. The [idea] that debate is not skewed so long as multiple voices are silenced is simply wrong; the debate is skewed in multiple ways.

515 U.S. at 831–32. Silencing both the view of Texas SCV and the view of those members of the public who find the flag offensive would similarly skew public debate and offend the First Amendment.

We are not the only circuit to reach this conclusion. In fact, the majority of the other circuits to consider this question have held that the state engaged in viewpoint discrimination when it denied a specialty license plate based on the speaker's message. *See Byrne*, 623 F.3d at 59 (concluding that a Vermont statute barring vanity plate that referred to a religion or deity was viewpoint discrimination); *Roach*, 560 F.3d at 870 (concluding that Missouri's specialty plate program engaged in viewpoint discrimination when it denied a "Choose Life" plate); *Stanton*, 515 F.3d at 972 (holding that the denial of a specialty license plate application on the basis that the government chose not to enter the Choose Life/Pro-Choice debate was viewpoint discriminatory); *Sons of Confederate Veterans*, 288 F.3d at 626 (holding that a statute that prohibited display of the Confederate flag constituted viewpoint discrimination).

The Seventh Circuit's decision to the contrary does not persuade us to reach a different outcome. The Seventh Circuit is the only one of our sister circuits to consider this question and hold that excluding a specialty license plate because of its content did not violate the First Amendment. *White*, 547 F.3d at 867 (holding that excluding the entire subject of abortion from its specialty license plate program was content-based, but viewpoint-neutral, decision). But even the Seventh Circuit suggested it might have reached a different conclusion if faced with the denial of a specialty flag plate because it featured a Confederate flag. *See id.* at 865 ("The difference between content and viewpoint discrimination was more readily apparent in *Sons of Confederate Veterans* [*v. Virginia Department of Motor Vehicles*] . . . than it is here. Excluding the Confederate flag from a specialty-plate design . . . [was a] fairly obvious instance[] of discrimination on account of viewpoint. Virginia was not imposing a 'no flags' rule; it was prohibiting the display of a specific symbol commonly understood to represent a particular viewpoint."). Thus, even considering the reasoning in *White*, we are not convinced to reach the same decision as the Seventh Circuit.

The government may not "selectively . . . shield the public from some kinds of speech on the ground that they are more offensive than others." *See Erzonznik v. City of Jacksonville*, 422 U.S. 209, 209 (1975). That is precisely what the Board did, however, when it rejected Texas SCV's plate. Accordingly, we hold that the Board impermissibly discriminated against Texas SCV's viewpoint when it denied the specialty license plate.

V. CONCLUSION

For the foregoing reasons, we REVERSE and REMAND for further proceedings not inconsistent with this opinion.

JERRY E. SMITH, Circuit Judge, dissenting:

This is a jurisprudentially difficult case that can be conscientiously decided in a number of different ways. The majority has chosen a respectable approach: Applying a "reasonable observer test," it reverses a summary judgment for the state after holding that Texas's specialty license plates are not "government speech." Though I agree with much of the cogent and well-written majority opinion, I do not discern a "reasonable observer test" in the applicable caselaw and am also unable to distinguish *Pleasant Grove City, Utah v. Summum*, 555 U.S. 460 (2009). Because I would therefore affirm the summary judgment, I respectfully dissent.

I.

The majority correctly rules that we have jurisdiction to hear this matter, though I would not describe *Hibbs v. Winn*, 542 U.S. 88 (2004), as "open[ing] the doors to federal court[s] where the [Tax Injunction Act ("TIA")] might otherwise bar the suit" or as an "exception" to the TIA. *Winn* merely draws the contours of the TIA, holding that it does not apply where the plaintiff is *not* seeking to "enjoin, suspend or restrain" the collection of state taxes. That is the situation here, where plaintiff Texas Division, Sons of Confederate Veterans ("SCV") *wants* the state to collect taxes, and in *Winn*, in which the plaintiff *wanted* to compel Arizona to collect taxes, as contrasted with the situation in *Henderson v.*

Stalder, 407 F.3d 351 (5th Cir. 2005), in which the plaintiff wanted to *enjoin* Louisiana from collecting assessments on license plates. *Winn* does not provide an "exception" to the TIA's bar; if a plaintiff seeks to "enjoin, suspect or restrain" the collection of taxes, *Winn* would provide him no avenue for relief in federal court.

Moreover, I concur that the state has engaged in viewpoint discrimination: The reason it refused to allow SCV's license plate was that it objected to the pro-Confederate Flag design. I therefore agree that unless the government-speech doctrine protects the state's decision to refuse to produce the plate, SCV would be entitled to relief. I disagree with the majority, however, that the government-speech doctrine does not encompass Texas's decision as to what messages to accept on its license plates. The "reasonable observer" test is not an accurate reflection of discerned law but, instead, manifests an understandable desire to create a plain, quotable test.

II.

The "reasonable observer test" cannot be discerned from the law, though the majority is in good company, given that some of our sister courts have adopted it. The majority announces the "reasonable observer test" after analyzing *Johanns v. Livestock Marketing Association*, 544 U.S. 550 (2005), and *Summum*, but neither decision can be e1xplained by way of that test, and neither provides it. *Livestock Marketing*, as the majority acknowledges, was resolved by way of an "effective control" test. The Supreme Court was not opaque in its reasoning: The reason that government-speech doctrine encompassed ostensibly private ads for the beef industry was that the ads were "from beginning

to end the message established by the Federal Government," despite the major role played by private actors in crafting them. *Livestock Marketing*, 544 U.S. at 560.

Summum is of little more help to the majority, which logically must bypass large swaths of that opinion, inflate one portion of it, and ultimately morph Justice Souter's lone concurrence (and his dissent in *Livestock Marketing*) into law. Citing *ipse dixit* from the Fourth Circuit, the majority states that *Summum* "shows that 'the Supreme Court did not espouse a myopic 'control test' in [*Livestock Marketing*]." It is not obvious how the majority or the Fourth Circuit reaches that conclusion. According to the majority, *Summum* "did not base its holding on [the city's] control over the permanent monuments. Instead, its conclusion focused on the nature of both permanent monuments and public parks." From that characterization, the majority inaccurately reimagines *Summum* as a "reasonable observer" case.

Summum did discuss the association between public parks and governments, but that was only one portion of an opinion that emphasized "effective control" just as much, if not more:

> [T]he City has 'effectively controlled' the messages sent by the monuments in the Park by exercising 'final approval authority' over their selection. [*Livestock Marketing*], 544 U.S., at 560–561. 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; it has taken ownership of most of the monuments in the Park, including the Ten Command-

> ments monument that is the focus of respondent's concern; and the City has now expressly set forth the criteria it will use in making future selections.

Summum, 555 U.S. at 472–78.

The fairest reading of *Summum* is that the Court emphasized a variety of aspects of the public park and saw all of them to weigh in favor of finding government speech. Depending how we count them, the Court gave about half a dozen reasons why the city was entitled to judgment but without attempting to mint any "test," and it is a demonstrable misreading of *Summum* to pigeonhole it as providing otherwise.

The only Justice who favored of a "reasonable observer" test was Justice Souter, and even he does not seem to believe that that test is the law in the wake of *Summum*. Sitting as a circuit judge after *Summum*, Justice Souter—rather than believing that *Summum* manifested a coalescence around his twice-proposed test (despite that no Justice joined his concurrence in *Summum*)—described the post-*Summum* government-speech doctrine as "at an *adolescent stage of imprecision*." *Griswold v. Discoll*, 616 F.3d 53, 59 n.6 (1st Cir. 2010) (Souter, J.) (emphasis added).

Perhaps more poignantly, the "reasonable observer" test demonstrably contradicts binding caselaw. In *Livestock Marketing*, the Court—again, applying an "effective control" test—held that television advertisements for the beef industry were government speech. What would a reasonable observer have seen when watching those ads? He would have seen the familiar trademark "Beef. It's What's for Dinner." And he would have seen the message "Funded by America's Beef Producers," the

logo for the "Beef Board," and a checkmark with the word "BEEF." *Livestock Marketing*, 544 U.S. at 554–55. Nowhere would the ad have given any indication that the federal government had anything to do with this industry advertisement.

If a "reasonable observer" test were the law, then Livestock *Marketing* was incorrectly decided. That is why Justice Souter, espousing the "reasonable observer" test for the first time, dissented in that case.

As for *Summum*, several, if not all, of the privately donated monuments bore some inscription indicating the donor. For example, the Ten Commandments monument (the monument that triggered the suit) bore the mark of the Fraternal Order of Eagles and a prominent statement authored by the order that the display was presented by it to the city; the order maintained the monument and took steps to ensure that its inscription remained visible. If the court were only asking whether a "reasonable observer" would see private speech when looking at the monuments, why would that reasonable observer not have concluded that the Ten Commandments monument was the speech of the Fraternal Order of the Eagles?[1]

The same goes for *Rust v. Sullivan*, 500 U.S. 173 (1991), which involved restrictions on federal funding for "family-planning services" and which prohibited physi-

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[1] The answer is that the reasonable observer may well have attributed the speech to *both* the Fraternal Order *and* the city. A fundamental error in the majority opinion is describing the government-speech doctrine as presenting a binary choice: government or private speech. As I explain, every government-speech case that resulted in a victory for the government—including *Summum*—involved private participation in the relevant speech.

cians from receiving grants under a federal program ("Title X") from counseling patients on abortion "as a method of family planning." Against a First Amendment challenge, the Court upheld Title X as a permissible exercise of the government's policy preferences in favor of life and against abortion, despite that the ostensible speaker is the physician, not the government.

Finally, in *Chiras v. Miller*, 432 F.3d 606 (5th Cir. 2005), a pre-*Summum* case, we held that the state's selection and use of textbooks in public schools was government speech, notwithstanding that a reasonable observer would *also* attribute the speech to several private actors: the authors, publishers, and editors of the textbooks. In short, it is not reasonably possible to reconcile the "reasonable observer" test with existing caselaw.

A final comment: The reasonable observer test would bless the government's behavior in any case involving viewpoint discrimination *so long as it made it clear enough that the government is endorsing the speech that remains in the forum.* How can it be that the law would provide a test that, by its terms, would allow the government an easy mechanism to shut down speech in any forum on any topic it wants? Undoubtedly, courts would still routinely condemn viewpoint discrimination, no matter how clearly the government indicates to third-party observers that it is engaging in the censorship. But what that should reveal is that the "reasonable observer test" is not the law.

III.

The majority properly notes that five courts of appeals have expounded on the applicability of the gov-

ernment-speech doctrine to license plates.[2] The majority understandably emphasizes that all but one have held government-speech doctrine inapplicable.[3] But the landscape is more complicated than that.

None of those circuits meaningfully negotiates *Summum*. That is unsurprising, given that only one of their decisions post-dates *Summum*. And even that opinion was issued less than a month after *Summum*, relegated *Summum* to a footnote, and rejected its relevance summarily.[4] Yet, *Summum* makes the instant question more difficult than such treatment would suggest.

SCV conceded at oral argument that, despite its repeated admonitions that the (near) harmony of our sister courts' judgments should weigh heavily on our own, we are the first court meaningfully to consider the ap-

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[2] In this court's only post-*Summum* case dealing (briefly) with government speech, we, in *dictum*, stated that a city's financial support of certain street processions was insufficient to render it "government speech." The key reason was that, though the city gave the parade organizers waivers from having to pay for cleanup, the city did not otherwise have any relationship with the procession's message. *See Int'l Women's Day March Planning Comm. v. City of San Antonio*, 619 F.3d 346, 360 (5th Cir. 2010) (*dictum*; judgment affirmed on other grounds).

[3] *Compare Sons of Confederate Veterans, Inc. ex rel. Griffin v. Comm'n of Va. Dep't of Motor Vehicles*, 288 F.3d 610 (4th Cir. 2002) (coincidentally involving another division of the SCV); *Arizona Life Coal. Inc. v. Stanton*, 515 F.3d 956 (9th Cir. 2008); *Choose Life Ill., Inc. v. White*, 547 F.3d 853 (7th Cir. 2008); and *Rouch v. Stouffer*, 560 F.3d 860, 867 (8th Cir. 2009) (all holding government speech doctrine inapplicable) *with ACLU of Tenn. v. Bredesen*, 441 F.3d 370 (6th Cir. 2006) (over a dissent, applying government speech doctrine to specialty plates).

[4] *See Rouch* 560 F.3d at 868 n.3.

plicability of *Summum* to these facts. I address that now.

A.

Pleasant Grove City, Utah, has a 2.5-acre public park in its historic district that contained fifteen displays, at least eleven of which were donated by private groups or individuals. The monuments included, among other things, a Nauvoo Temple Stone (an artifact from the Mormon Temple in Nauvoo, Illinois, donated by John Huntsman), a Pioneer Water Well donated by the Lions Club, a Pioneer Granary donated by "the Nelson family," a September 11 monument donated by the Eagle Scouts, and—most relevant to the dispute in *Summum*—a Ten Commandments monument donated by the Fraternal Order of the Eagles in 1971. Several, if not all, of the privately donated monuments bore some inscription indicating the donor. For example, the Ten Commandments monument (which was the monument that, according to the plaintiffs, manifested Pleasant Grove's viewpoint discrimination) bore the mark of the Fraternal Order and a prominent statement authored by the order that the display had been presented by it to the city. The order maintained the monument and took steps to ensure that its inscription remained visible.

Summum, a religious organization, twice wrote to the mayor requesting permission to erect a stone monument containing the "Seven Aphorisms of SUMMUM," similar in size and nature to the Ten Commandments monument; the city rejected the request. Summum sued under 42 U.S.C. § 1983, claiming that the city was engaged in viewpoint discrimination by accepting a Ten Commandments monument but not Summum's religious monument.

The Court held that when the city decided which private monuments it would accept and install in the park, the city was itself speaking, even if it was joining the company of private speakers. Because the city was speaking for itself, the First Amendment were irrelevant, and dissenters could not force the city to accept monuments that it did not wish to have in its park. What is striking about *Summum* is just how much one can analogize almost every salient fact there to the facts here.

B.

1.

First, the Court noted that all parties in *Summum* had agreed that if "a monument . . . is commissioned and financed by a government body for placement on public land," the monument would undoubtedly "constitute[] government speech." *Summum*, 555 U.S. at 470 (describing this statement as an "obvious proposition").[5] The Court then held that the result did not change just because the monuments were privately financed and donated in final form:

> 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. It certainly is not common for property owners to open up their property for the installation of

[5] I take it that SCV would not dispute this proposition, *i.e.*, that this case exists only because Texas has decided not to force drivers to display plates that it designs on its own.

> permanent monuments that convey a message with which they do not wish to be associated.

Id. at 471. The same can be said of Texas's specialty license plates, which are made, owned, and sold by the state,[6] which also owns the intellectual property in those plates and does not permit owners to bear plates other than its own.

Just as Pleasant Grove invited or allowed private actors to submit possible monuments for placement in its parks, Texas invites private groups or persons to submit license-plate designs for consideration, but the state ultimately chooses what designs it wishes to adopt and which plates it wishes to manufacture for sale.[7] Also just as private monuments supplemented those placed by Pleasant Grove in its parks, the privately designed license plates supplement those designed by Texas itself.[8] The reasoning in *Summum* informs that if Texas license plates would constitute government speech if only Texas had designed the plates itself, they do not lose their governmental character just because Texas accepted a privately designed message, endorsed it, and then placed it on its plates.[9]

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[6] *See* TEX. TRANSP. CODE § 504.002(3) ("[T]he department is the exclusive owner of the design of each license plate.").

[7] *See* 43 TEX. ADMIN. CODE § 17.28(i)(8)(B) (providing the DMVB with "final approval authority of all specialty license plate designs"); 43 TEX. ADMIN. CODE § 217.40 (detailing elaborate approval process for private vendor plate designs).

[8] *See* TEX. TRANSP. CODE ANN. § 504.005.

[9] *See also Summum*, 555 U.S. at 471 ("[W]hile government entities regularly accept privately funded or donated monuments, they have exercised selectivity."); *id.* at 473 ("[T]he City has effectively controlled the messages sent by the monuments in the Park by exercising

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2.

Second, the *Summum* Court noted, 555 U.S. at 472, that "[p]ublic parks are often closely identified in the public mind with the government unit that owns the land," a phenomenon that will cause jurisdictions to be selective in which images they choose to represent them:

> [Parks] commonly play an important role in defining the identity that a city projects to its own residents and to the outside world. Accordingly, cities and other jurisdictions take some care in accepting donated monuments. Government decisionmakers select the monuments that portray what they view as appropriate for the place in question, taking into account such content-based factors as esthetics, history, and local culture. The monuments that are accepted, therefore, are meant to convey and have the effect of conveying a government message, and they thus constitute government speech.

Id.

Again, the same can be said of license plates: They are uniformly identified with the state governments that issue them. People see plates when driving on the highways and immediately will recognize and describe them as "Texas license plates." Even specialty plates cannot exist but for the state's cooperation and effort to manufacture and sell them.[10]

Unlike monuments, license plates broadcast an associational image of the state on Texas vehicles wherever

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'final approval authority' over their selection.") (quoting *Livestock Marketing*, 544 U.S. at 560–61).

[10] *See generally* TEX. TRANSP. CODE ANN. § 504.945(a).

they may travel. And unlike monuments, license plates play an integral role in the most usual and rote form of interaction between a citizen and a state's regulatory body: registering one's vehicle. And also unlike monuments, there are no license plates that do not bear the name of the state of registration, directly imputing the state's goodwill and reputation on whatever communication the plate bears.

License plates exist only because of state regulation. They are a method of effecting state vehicle registration regimes, at once *sui generis* and akin to drivers' licenses, passports, currency, green cards, public school or military IDs, or others documents produced by virtue of a state regulatory regime. The association between license plates and a particular government, for that reason alone, could hardly be stronger.[11] It follows that the law allows Texas to choose whether it wishes its name to be associated with any criticism associated with the Confederate flag—whether it wishes the state to be linked to that flag wherever Texas cars are driven.[12]

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[11] This analysis calls into question whether the majority is even applying its proffered test correctly. If a reasonable, *informed* observer knows all I have just described of Texas license plates, how could that observer not attribute the message to Texas?

[12] *Cf. Sutliffe v. Epping Sch. Dist.*, 584 F.3d 314, 331–32 (1st Cir. 2009) (applying *Summum* where a town decided which hyperlinks it would post on its website). The majority's contrary conclusion is largely *ipse dixit*, and I invite the reader to compare the reasons I have given for what would be an obvious association between a state and its license plates with the explanation given by the majority. The majority relies, in part, on *Wooley v. Maynard*, 430 U.S. 705, 716 (1977), noting that "one of the reasons the state had asserted an interest in including [the challenged motto in that case]" was to "facilitate[] the identification of passenger vehicles." What the

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3.

Third, the *Summum* Court, 555 U.S. at 474, distinguished between the kinds of free speech rights usually occurring on public lands—"the right to speak, distribute leaflets, etc."—and the monuments at issue. The "City ha[d] made no effort to abridge [Summum's] traditional free speech rights," so its followers could continue to go onto the park, speak, distribute literature, and presumably picket and hand out petitions. *Id.* Summum just could not erect fixtures on the park. What Summum really demanded, at bottom, was the city's "adopt[ion]" or "embrace" of its message. *Id.*

The same can be said here. Texas does not prevent SCV from engaging in speech on its or its members' vehicles in the same way that speech has traditionally been made: by license plate frames, bumper stickers, window stickers, window flags, or even painting cars with the Confederate flag. If SCV and its members can do all of those things, why is it seeking an order from a court compelling Texas to sell Confederate plates? The answer is the same answer in *Summum*: SCV seeks the kind of "adopt[ion]" and "embrace" that comes with being on Texas license plates, with appearing next to the state's flag, name, and likeness, and being given the kind of validation that follows from appearing on a

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majority does not mention is that the other interest asserted by New Hampshire was to "promote[] appreciation of history, individualism, and state pride." *Id.* So much for the putative novelty of Texas's speaking on its plates. In any event, as I will explain, neither this dissent nor *Summum* is in tension with *Maynard*, which involved a different First Amendment doctrine that addresses concerns different from those pressed by the plaintiffs here.

state-issued license plate. It is precisely the reason that SCV wants to force Texas to produce these plates that it should be denied a court order doing so. Texas, like Pleasant Grove, cannot be forced to associate with messages it does not prefer.

The analogy applies in another important respect. Unlike pamphleteering, speeches, marches, picketing, and bumper stickers—all of which unquestionably involve private speech, even if they occur on government-owned property—erecting monuments and manufacturing specialty license plates both *require* the government's assistance and complicity. That distinction, yet again, makes specialty plates more like park monuments and less like leafleting and bumper stickers.

C.

Although I have addressed the striking similarities between this case and *Summum*, there are differences: The relationship between the cases is that of an analogy, not an identity. Even in light of every distinction proffered by SCV, the district court, and the majority, there is no principled basis to deviate from *Summum*.

1.

The majority opinion presents government-speech doctrine as a binary choice, as deciding whether the plates are "government speech *or* private speech," and stating that "[i]f we conclude that the speech is private speech," we then ask whether the state engaged in viewpoint discrimination. According to the remainder of the majority's reasoning, if a reasonable observer would attribute the message on license plates to the driver, the analysis is over, and the speech is "private" as contradis-

tinguished from "government" speech. That analysis presents a false dichotomy not present in *Summum*.[13]

In *Summum*, the overwhelming majority of the monuments were designed, built, and donated by private actors; and at least some portion (if not all) of the privately donated monuments bore the inscription, name, and/or written message of the donors, including the particular monument that Summum challenged as manifesting viewpoint discrimination. Because of the city's selectivity in deciding which private messages to endorse, the Fraternal Order effectively had a venue that Summum did not. The Court did not hold, however, that such was enough to trigger the protections of the First Amendment.

Indeed, the Court did not seem to find particularly relevant that when the city spoke, it had the company of private speakers. To the contrary, the Court repeatedly disavowed the relevance of the private aspects of the speech that Pleasant Grove was adopting, emphasizing that a "government entity may exercise th[e] same freedom to express its views when it receives assistance from private sources for the purpose of a delivering a government-controlled message" as when it acts alone.[14]

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[13] *See* Andy G. Olree, *Identifying Government Speech*, 42 CONN. L. REV. 365, 400–10 (2009) (canvassing the growing awareness of the limits of this binary conception); *see also* Caroline Mala Corbin, *Mixed Speech: When Speech Is Both Private and Governmental*, 83 N.Y.U. L. REV. 605 (2008) (proposing to apply intermediate scrutiny to so-called "hybrid" speech cases).

[14] *See Summum*, 555 U.S. at 468 (citing *Livestock Marketing*, 544 U.S. at 562; *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819, 833 (1995)); *see also id.* at 470–71 ("Just as government-commissioned and government-financed monuments speak for the

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Because Texas cannot constitutionally force its citizens to carry its message on their cars,[15] there will always be an element of private expression in specialty license plates—no matter their method of distribution or the author of their design—because the driver must have voluntarily chosen to accept a Texas plate. If an affected element of private speech is enough to foreclose application of government-speech doctrine, then the majority's reasoning reduces to this: Texas may not speak on its license plates. It is a false dichotomy to suggest, then, that either Texas is speaking or private citizens are speaking.[16]

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government, so do privately financed and donated monuments that the government accepts and displays to the public on government land."); *id.* at 472 ("Although many of the monuments were not designed or built by the City and were donated in completed form by private entities, the City decided to accept those donations and to display them in the Park."); *Livestock Marketing*, 544 U.S. at 562 (stating 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); *Rosenberger*, 515 U.S. at 833 (opining that a government entity may "regulate the content of what is or is not expressed . . . when it enlists private entities to convey its own message").

[15] *See Maynard*, 430 U.S. at 717 (ruling that New Hampshire could not force Quaker to bear license plate with the phrase "Live Free or Die," the state motto).

[16] *See* Joseph Blocher, *Government Property and Government Speech*, 52 WM. & MARY L. REV. 1413, 1479–80 (2011) ("The unavoidable implication is that the expression emanating from specialty license plates is both governmental and private. . . . [A] reasonable observer would probably conclude that both the owner of the vehicle displaying the plate and the state government that authorized it support the plate's message.").

The kind of association between Texas and its specialty license reflects the kind of association typical of advertisers and sponsors generally. When we attend a Houston Texans NFL game at its home stadium and see "Ford: the Best in Texas," both the Houston Texans and Ford are speaking. Ford is saying it is the best in Texas; the Texans team is indicating that it is comfortable having its name, reputation, and goodwill associated with Ford and its products. And that association matters; endorsers and sponsors will engage or disengage with one another based on their mutual willingness to be associated with the other.[17]

In the end, *Summum* already tells us how to deal with the mixed quality of affected speech. There, as noted, the private designers and donors of the monuments often kept their own marks and included their own written messages with the monuments accepted by Pleasant Grove. In fact, the very monument that Pleasant Grove challenged as manifesting viewpoint discrimination bore the trademark of a private organization with a plaque containing a message that group had authored. By its facts, then, *Summum* already teaches that government

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[17] *Cf. Texas v. Knights of the Ku Klux Klan*, 58 F.3d 1075 (5th Cir. 1995) (upholding exclusion of the KKK from Texas's Adopt-a-Highway program, though describing the prohibition as "viewpoint-neutral"). Justice Stevens, who, like Justice Souter and the panel majority, would prefer a "reasonable observer test," does not fail to appreciate this. *See Summum*, 555 U.S. at 481 (Stevens, J., concurring) ("While I join the Court's persuasive opinion, I think the reasons justifying the city's refusal would have been equally valid if its acceptance of the monument, *instead of being characterized as 'government speech,' had merely been deemed an implicit endorsement of the donor's message*.") (emphasis added).

cannot be forced to associate with all viewpoints just because it chooses to associate with one.

The *dictum* in *Summum* describing other monuments suggests the same. The Court, apparently believing them to be obvious examples of government speech, discusses several monuments that have some elements of private speech, such as the Grego-Roman mosaic of the word "Imagine," donated to New York in memory of John Lennon. *See Summum*, 555 U.S. 474–78, for several similar examples. *Summum*, it should be noted, was not remarkable in this regard. Every government speech case in which the government won (few as they are) has involved private participation and sometimes even concerned, as here, private dissemination.[18]

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[18] *See Livestock Marketing*, 544 U.S. at 555 (finding government-speech doctrine applicable despite that a board of private beef growers managed and produced the relevant promotional campaigns and that the promotional materials were ostensibly associated with said private producers, where the Agriculture Secretary approved all messages before they were disseminated; the advertisement also ran on private newspapers and television stations); *Rust*, 500 U.S. at 192–95 (upholding use of private physicians and hospitals to disseminate government's policy encouraging live birth); *Sutliffe*, 584 F.3d at 329–35 (Town setting up and controlling a town website, choosing which third-party hyperlinks it would allow; describing *Summum* as "mak[ing] it clear that when the government uses its discretion to select between the speech of third parties for presentation through communication channels owned by the government and used for government speech, this in itself may constitute an expressive act by the government that is independent of the message of the third-party speech"); *Downs v. L.A. Unified Sch. Dist.*, 228 F.3d 1003, 1011 (9th Cir. 2000) ("While these faculty and staff members may have received materials from outside organizations, the faculty and staff members alone posted material on the bulletin boards, and at all times their postings were subject to

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Finally, the state can engage in government speech despite the adoption and use of private speech in delivering its message, though no one would question the "mixed" association an observer would have on the message. In *Chiras v. Miller*, 432 F.3d 606 (5th Cir. 2005), a pre-*Summum* case, we held that the state's selection and use of textbooks in public schools constituted government speech, notwithstanding that the textbooks were unquestionably also the speech of their private authors. These cases reveal that the fact that an observer might *also* associate a message with a driver (as well as a private sponsor, such as SCV, for that matter) in addition to the State of Texas does not render the government-speech doctrine inapplicable.

The foregoing analysis also meets SCV's argument that *Maynard*, which held, 430 U.S. at 717, that New Hampshire could not compel drivers to carry "Live Free or Die" license plates, forecloses applying the government-speech doctrine.[19] *Maynard* was decided before the Supreme Court announced the government-speech doctrine, so that was not at issue. Nevertheless, there is no tension between *Maynard* and the lessons to be drawn from *Summum*. Both compel us to conclude that speech on license plates is "mixed" insofar as it will be associated with both the state and the driver. *Maynard* informs us

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the oversight of the school principals."); *Newton v. LePage*, 789 F. Supp. 2d 172, 184 (D. Maine 2011) (private artist commissioned by state to paint a pro-labor mural); *Page v. Lexington Cnty. Sch. Dist. One*, 531 F.3d 275, 282 (4th Cir. 2008) (school board circulating communications by private individuals in support of board's position that particular piece of legislation be voted down).

[19] The panel majority did not rely on *Maynard*, but I address it because it was urged by SCV.

that, under the compelled-speech doctrine, the government may not *force* private speakers to disseminate its message in such a circumstance.[20] *Summum* informs us that, under the government-speech doctrine, the government will not be forced to associate with all private messages just because it associates with some.

So, if Pleasant View were *ordering* Summum to erect its monument with an inscription indicating its endorsement of the city, *Maynard* would say the city's conduct is unconstitutional. But where SCV wants to force Texas to produce plates bearing messages with which it does not want to be associated, *Summum* tells us that Texas may permissibly refuse.

2.

The majority attempts to distinguish *Summum* on the ground that "this case does not present the unworkable system that the Supreme Court feared would be created '[i]f government entities must maintain viewpoint neutrality in their selection of donated monuments.'" For at least two reasons, that second proffered distinction is not a helpful basis for deciding this case.

First, the Court was well aware that content-neutral time, place, and manner restrictions could unquestionably handle every "practical" problem that would manifest itself if park fixtures were considered to create a forum. The Court explicitly rejected the invitation to decide the case accordingly. *See Summum*, 555 U.S. at 479. Second, no other government-speech case[21] in which the government prevailed presented the

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[20] *See also W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943).

[21] The exception is *Newton v. LePage*, 789 F. Supp. 2d 172, 185 (D. Continued …

kind of "practicality" problem that physical congestion presented in *Summum*. *See, e.g.*, *Livestock Marketing* 544 U.S. at 555 (involving television ads).

Physical congestion, then, is not and cannot be a talisman for finding government speech. Do we have any reason to think that *Summum* would have come out differently if instead of a 2.5-acre park, the city had a 25-acre park? I can think of none. Moreover, *dictum* from the Supreme Court explicitly *assumed* that monuments in NYC's Central Park (which is 778 acres) would qualify as government speech for the same reason as did the park in *Summum*.[22]

For basically the same reason, it is no material distinction that there are 300 types of specialty license plates instead of 15 monuments. Do we have any doubt that Central Park could accommodate 300 privately donated fixtures if the city were inclined to accept them? I presume the argument is not that it would be surprising that the government would ever take positions on 300 topics; that would surely be wrong. At any rate, it would be impossible for us to derive a principle that Texas can speak on its own license plates without opening up a forum, but only if it resolves to associate with no more than X number of positions on Y number of topics.

Perhaps the majority is alluding to a distinction offered by the district court that license plates do not take up "public space." I assume what the court meant here is

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Maine 2011), which involved a mural inside a state building's anteroom.

[22] *See Summum*, 555 U.S. at 474–75 (discussing the John Lennon memorial in Central Park).

public real estate.[23] But that could not be relevant. Government messages on currency—the paradigmatic[24] example of government speech—similarly do not take up public "space." Nor do other more obvious methods of speaking, such as press conferences at the Presidential podium, sense-of-Congress resolutions, or, to take a dramatic example of government speech, the Emancipation Proclamation.

Less dramatically but more relevant, neither *Rust* nor *Livestock Marketing* involved occupation of public real estate. *Livestock Marketing*, for its part, involved television and print ads, the former of which occupies "space" in no sense except the metaphorical. *See Livestock Marketing*, 544 U.S. at 555. And *Rust* involved spoken and written words from physicians and hospitals to patients. *See Rust*, 500 U.S. at 179–80. So, it cannot be the law that the government can speak without opening up a forum and can elicit private assistance in disseminating or even endorsing its message, but only where its actual speech is a fixture on real estate.

The caselaw makes the point well enough, and reason confirms its lesson. The irrelevance of an "occupied public real estate" distinction becomes apparent when we recall what aspect of the specialized license plates triggered the challenge here. No one disputes that if Texas designed its own license plates and compelled driv-

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[23] That is because license plates do take up physical, though noncontiguous, space, and it would presumably be financially impracticable to have an infinite number of license plates.

[24] *See* Carl G. DeNigris, *When Leviathan Speaks: Reining in the Government-Speech Doctrine Through a New and Restrictive Approach*, 60 AM. U. L. REV. 133, 135 (2010).

ers to carry only those plates,[25] the government-speech doctrine would apply as clearly as it does to currency or passports. The only reason this case exists is because Texas lets drivers choose plates that were sometimes designed by private actors. Yet, we cannot say that one type of plate takes up "public space" but the other does not.

3.

The majority, like the district court, also attempts to distinguish *Summum* on the ground that license plates are not "permanent" as are the monuments. At first, this might appear to be a potentially important distinction until one realizes what the Court was explaining in *Summum* with its emphasis on monuments' "permanence" and when one pursues the logical rigor of a rule based on something as relative a concept as "permanence."

Although the *Summum* Court did repeatedly emphasize the permanent nature of the monuments, it had an obvious rhetorical purpose in doing so. Summum was arguing on appeal, with the aid of broad language from Supreme Court precedent, that public parks had been held since "time immemorial" to be a quintessential public forum, where state regulation of speech would be subject to the most exacting scrutiny. Because of that tradition, Pleasant Grove should not have been allowed to engage in what our jurisprudence would consider,

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[25] Perhaps with a blank option to satisfy *Maynard*, 430 U.S. at 717 (stating that the state could not force Quaker to bear license plate with the phrase "Live Free or Die," the state motto).

along with prior restraints, to be the very worst form of speech restriction: viewpoint discrimination.

The Court responded that the kind of speech that courts had in mind when describing public parks in such lofty terms did not include the installation of fixtures. *See Summum*, 555 U.S. 478–79. Rather, courts were considering things such as pamphleteering, giving speeches, canvassing, leafleting, demonstrations, and the like. So, when the Court emphasized the "permanence" of monuments, it does not appear to have thought that permanence *qua* permanence was significant but instead that that characteristic distinguished the kinds of speech that had already been held to be protected in public parks from the kinds of speech Summum wanted to engage in, which had never been held to be protected in public parks.

That is the only understanding of *Summum*'s discussion of "permanence" that accords with reason. We know that permanence cannot be significant in *itself*, because it is a relative concept that does not supply its own meaning, much less its own significance. Monuments, like license plates, can be removed and added over time.[26] More illustratively, the ads in *Livestock Marketing* were no more "permanent" than was the government

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[26] *See, e.g.*, *Newton* (applying government-speech doctrine to a governor's removal of a large, wall-sized mural depicting Maine's labor history from lobby of government building; the mural had been in place for three years). Many of the statutory specialty plates in Texas have been around for over ten years. *See, e.g.*, Registration of Vehicles and the Issuance of License Plates by the Texas Department of Transportation; Providing Penalties, 2003 Tex. Sess. Law Serv. ch. 1320 § 6 (H.B. 2971) (Vernon's). Does that connote less "permanence" than does a removable fixture?

speech on Texas's license plates—perhaps less so, because television and radio ads are by their nature fleeting. *See Livestock Marketing*, 544 U.S. at 555. Yet, that did not give the Court any pause in concluding that the ads in *Livestock Marketing* constituted government speech. And again, the quintessential forms of government speech (on currency, passports, and other traditional methods of speaking) do not suggest a kind of "permanence" that reveal the significance of that characteristic.

I do not take SCV to be arguing—as the plaintiffs in *Summum* were—that the putative forum in question is a traditional public forum,[27] like parks, in which the freedom of speech is at its apex. So, unlike the Court in *Summum*, we are not confronted with the difficulty of distinguishing *kinds* of speech in a particular forum and deciding whether all of those kinds of speech are similarly protected by our tradition.

IV.

In sum (pun intended), none of the differences between this case and *Summum* are differences in principle, and none offers a defensible justification for why Pleasant Grove City was entitled to a judgment in its favor in *Summum* but Texas is not so entitled here. The

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[27] The majority curiously attempts to distinguish *Summum* on the ground that license plates—unlike parks—are not traditional public forums. But that surely cuts in the opposite direction. Traditional public forums are where speech restrictions are most strictly scrutinized. The fact that parks had been held since "time immemorial" to be places of public speech was a hurdle for the city in *Summum*. That is, the city won in *Summum despite* the fact that public parks are traditional public forums, not *because* they are public forums.

attempt to distinguish *Summum* ultimately devolves to manifesting a conclusion in search of a reason. However insignificant one might find the dispute before us, the law entitles Texas to a judgment in its favor. I respectfully dissent.

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

United States Court of Appeals
Fifth Circuit

FILED
July 14, 2014

Lyle W. Cayce
Clerk

No. 13-50411

D.C. Docket No. 1:11-CV-1049

TEXAS DIVISION, SONS OF CONFEDERATE VETERANS, INCORPORATED, a Texas Corporation; GRANVEL J. BLOCK, Individually; RAY W. JAMES, Individually,

Plaintiffs - Appellants

v.

VICTOR T. VANDERGRIFF, In His Official Capacity as Chairman of the Board; CLIFFORD BUTLER, In His Official Capacity as a Member of the Board; RAYMOND PALACIOS, JR., In His Official Capacity as a Member of the Board; LAURA RYAN, In Her Official Capacity as a Member of the Board; VICTOR RODRIGUEZ, In His Official Capacity as a Member of the Board; MARVIN RUSH, in his official capacity as a Member of the Board; JOHN WALKER, III, In His Official Capacity as a Member of the Board; BLAKE INGRAM, In His Official Capacity as a Member of the Board,

Defendants - Appellees

Appeals from the United States District Court for the Western District of Texas, Austin

Before SMITH, PRADO, and ELROD, Circuit Judges.

J U D G M E N T

This cause was considered on the record on appeal and was argued by counsel.

It is ordered and adjudged that the judgment of the District Court is reversed, and the cause is remanded to the District Court for further proceedings in accordance with the opinion of this Court.

IT IS FURTHER ORDERED that each party bear its own costs on appeal.

JERRY E. SMITH, Circuit Judge, dissenting:

ISSUED AS MANDATE:

A True Copy
Attest

Clerk, U.S. Court of Appeals,
Fifth Circuit

By: _____
Deputy

New Orleans, Louisiana

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF TEXAS AUSTIN DIVISION

TEXAS DIVISION, SONS OF CONFEDERATE VETERANS, INC.; GRANVEL J. BLOCK; and RAY W. JAMES,

Plaintiffs,

-vs-

VICTOR VANDERGRIFF in his official capacity as Chairman of the Texas Department of Motor Vehicles Board; CLIFFORD BUTLER in his official capacity as a member of the Board; RAYMOND PALACIOS, JR. in his official capacity as a member of the Board; BLAKE INGRAM in his official capacity as a member of the Board; CHERYL JOHNSON in her official capacity as a member of the Board; LAURA RYAN in her official capacity as a member of the Board; MARVIN RUSH in his official capacity as a member of the Board; and JOHN WALKER, III, in his official capacity as a member of the Board,

Defendants.

Case No. A-11-CA-1049-SS

O R D E R

BE IT REMEMBERED on this day the Court reviewed the file in the above-styled cause, and specifically Plaintiffs Texas Division, Sons of Confederate Veterans, Inc, et al. (SCV)'s Motion for Summary Judgment [#35], Defendants Victor T. Vandergriff et al. (DMVB)'s[1] Response [#38] thereto; the DMVB's Motion for Summary Judgment [#37], the SCV's Response [#39] thereto, and the DMVB's Reply [#43]. Having considered the documents, the file as a whole, and the governing law, the Court now enters the following opinion and orders.

BACKGROUND

The issue before the Court is this: does the First Amendment require a state government to place the Confederate battle flag on customized, special license plates at the request of a nonprofit organization which has otherwise complied with state rules governing issuance of such plates? The Plaintiffs are the Texas Division of the Sons of Confederate Veterans, Inc., an organization dedicated to preserving the memory of those Americans who fought for the Confederacy during the Civil War, as well as the present and former "Commanders" of the Texas Division of the SCV. The SCV's membership is limited to male descendants of Confederate veterans. The Defendants are the board members of the Texas Department of Motor Vehicles Board, and are sued in their official capacities. Among its many duties,

[1] The Court will refer to the Defendant board members of the Board of the Texas Department of Motor Vehicles collectively as the "DMVB" in this opinion.

the DMVB is tasked with final approval of proposed "specialty license plates." The SCV claims its First Amendment rights have been violated by the DMVB's refusal to issue a proposed Sons of Confederate Veterans specialty license plate. The SCV's seal prominently incorporates the Confederate battle flag, which is the flag Confederate troops fought under during most of the Civil War, and which is also the flag most closely associated with the Confederacy in popular memory.[2] The SCV seeks to compel the DMVB to approve its specialty license plate, featuring the name and seal of the Sons of Confederate Veterans organization. Apparently, the SCV has successfully had similar plates issued by the states of Alabama, Georgia, Louisiana, Maryland, Mississippi, North Carolina, South Carolina, Tennessee, and Virginia. Pls.' Am. Compl. [#10] ¶ 4.18. The Court will now describe in turn (1) the various ways in which the state of Texas issues specialty license plates, (2) the Confederate battle flag and its significance, and (3) the SCV's applications to obtain a specialty plate, the denial of which underlie this case.

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[2] As its name suggests, however, the battle flag was not the national flag of the Confederacy, but rather was adopted for field use because—when viewed at a distance, and through the smoke of battle—the first national flag of the Confederacy could not be readily distinguished from the American flag borne by Union troops. This accounts for the (immaterial) dispute before the DMVB (discussed below) as to whether the battle flag was ever "flown over" the state of Texas as a sovereign flag. It does bear noting the second and third Confederate national flags both prominently incorporated the battle flag in their cantons. Pls.' Mot. Summ. J. [#35] at 3.

I. The Specialty Plate Programs

Texas has three avenues by which individuals or organizations may apply for the creation of a new specialty plate.[3] The first way is through direct legislative action, by which the Texas legislature authorizes specific plates. These plates are codified in Chapter 504, subchapter G of the Transportation Code. TEX. TRANSP. CODE §§ 504.601, .602–662; *e.g.*, *id.* § 504.662(a) ("The department shall issue specially designed license plates that include the words 'Choose Life.' The department shall design the license plates in consultation with the attorney general."). Taking the latter as an example, $22 from the sale and renewal of each "Choose Life" plate goes to a fund administered by the Texas Attorney General, to support nonprofit organizations which provide free "counseling and material assistance to pregnant women who are considering placing their children for adoption," and which do not provide abortion-related services. *Id.* § 504.662(b); TEX. GOV'T CODE § 402.036(g). Most of the other statutory plates relate to less controversial subjects, and apparently the Texas Department of Transportation, which previously reviewed proposed specialty plates, repeatedly rejected

[3] Regardless of their origin, once a plate is approved, drivers pay an extra fee in addition to the regular vehicle registration fee to obtain the desired specialty plate. 43 Tex. Admin. Code § 217.28(b)(2). The proceeds from the fee are divided in various ways depending on how the plate was created, but typically funds benefit both the entity which proposed the plate, and a state agency with similar goals. For example, proceeds from the SCV's proposed plate would have benefitted both the SCV itself, and its sponsoring state agency, the General Land Office, for the purpose of preserving historical monuments and records.

"Choose Life" designs as being too controversial, under prior regulations. Pls.' Mot. Summ. J. [#35-8], Ex. F, at 6. Like the DMVB-approved plates discussed below, statutory plates are available to the public through the DMVB's website.

The second route, at issue here, is through an agency approval process, originally overseen by the Texas Department of Transportation, but then assigned to the Department of Motor Vehicles Board. TEX. TRANSP. CODE § 504.702. Throughout this opinion, the Court will typically mean this program, supervised by the DMVB, when referencing the "specialty plate program." This route is limited to nonprofit organizations. *Id.* § 504.801(b). If the nonprofit group's plate is approved, a share of the proceeds from sales of the plate is given to the nonprofit. Although the statute states, "[t]he department shall design each new specialty license plate in consultation with the sponsor, if any," *id.* § 504.801(c), by rule and practice nonprofit groups, such as the SCV, propose the design, while the DMVB's input appears to be limited to (1) technical reformatting of a design to enable it meet visibility, distinctiveness, and reflectivity requirements, and (2) rejecting applications which otherwise do not conform to the various statutory and rule requirements for a specialty plate. Entities seeking approval of a plate by the DMVB may affiliate with a state agency as a sponsor,[4] in which case a share of the proceeds (less administrative costs of

[4] Confusingly, the statute refers to plate applicants as sponsors, while certain DMVB publications refer to the affiliated state agency supporting the plate as the sponsor. The Court will generally use "sponsor" to refer to any affiliated state agency, and "applicant" to refer to the nonprofit entity seeking issuance of a specialty plate.

$8) from sales of the plate ($22 per plate) goes to the state agency, which in turn passes on a portion to the nonprofit entity.[5] *Id.* § 504.801(e). Otherwise, all proceeds go to the state highway fund. *Id.* Nonprofit organizations proposing a specialty plate must pay an $8,000 deposit to cover the administrative costs for the first 1000 plates sold, which is reimbursed if plate sales and renewals exceed 1000.

Both statutes and regulations govern the DMVB's review of proposed plates. "The department may refuse to create a new specialty license plate *if the design might be offensive to any member of the public*, if the nominated state agency does not consent to receipt of the funds derived from issuance of the license plate, if the uses identified for those funds might violate a statute or constitutional provision, or for any other reason established by rule." *Id.* § 504.801(c) (emphasis added). Pursuant to the foregoing, the DMVB has promulgated rules which incorporate section 504.801, and which also direct the DMVB to consider the following:

> (B) the proposed license plate design, including:
>
> (i) whether the design appears to meet the legibility and reflectivity standards established by the department;
>
> (ii) whether the design meets the standards established by the department for uniqueness;

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[5] Because the SCV seeks to compel issuance of its proposed plate, which would therefore result in additional revenue for the state, the Court previously rejected DMVB's argument this suit is barred by the Tax Injunction Act. Order of Mar. 7, 2012 [#27] at 6.

> (iii) other information provided during the application process;
>
> . . .
>
> (v) whether a design is similar enough to an existing plate design that it may compete with the existing plate sales; and
>
> (C) the applicant's ability to comply with Transportation Code[] § 504.702 relating to the required deposit or application that must be provided before the manufacture of a new specialty license plate.

43 TEX. ADMIN. CODE § 217.28(i)(5)(B)–(C).

In addition, the prior version of the DMVB rules, in effect when the SCV plate was rejected, also included factors under which a plate could be considered offensive under Transportation Code section 504.801(c). As relevant here, one factor was whether the plate was "derogatory," defined as an "an expression of hate directed toward people or groups that is demeaning to people or groups, or associated with an organization that advocates such expressions." Former 43 TEX. ADMIN. CODE § 217.28(c)(3); Pl.'s Mot. for Summ. J. [#35-12], Ex. J, at 1.

Once an application is complete, the DMVB makes the proposed design available for public comment on its website. 43 TEX. ADMIN. CODE § 217.28(i)(6). No sooner than twenty-five days thereafter, the proposed plate is considered as an agenda item at a DMVB meeting. *Id.* The DMVB, at an open meeting, then determines whether to approve or reject the proposed design. *Id.* § 217.28(i)(7)(A). Even if a design is approved, the DMVB "has final approval authority of all specialty license plate designs and may adjust or reconfigure the submitted draft design to comply with the format or li-

cense plate specifications." *Id.* § 217.28(i)(8)(B). When a design is rejected, the DMVB will consider an amended design, in a new application, if "the design has been altered to an acceptable degree." *Id.* § 217.28(i)(7)(B)(ii).

Third, the state has also authorized a private vendor, MyPlates.com, to accept new plate applications, and to sell specialty plates to the public, through its own website.[6] Unlike the DMVB's program, this avenue is open to everyone, including for-profit entities. The DMVB nevertheless must approve designs submitted through MyPlates.com. TEX. TRANSP. CODE § 504.6011(a); 43 TEX. ADMIN. CODE § 217.40. The majority of the designs offered by MyPlates.com either offer a different color and style from the standard Texas plate, or bear the logo and name of assorted colleges, universities, and professional sports teams.[7] However, a number of plates displaying the names and logos of nonprofit and for-profit entities are also available, including such stalwart enterprises as Mighty Fine burgers, Freeb!rds burritos, and RE/MAX ("GET IT SOLD WITH RE/MAX"). Pl.'s Mot. Summ. J. [#35-13], Ex. K, at 1; *see also* MYPLATES.COM, http://www.myplates.com/ (last visited Apr. 9, 2013). No-

[6] As such, the motorist—or jurist—who wishes to review the full range of available plates must peruse two different websites.

[7] Including, in a rather odd juxtaposition (but one which is no doubt popular among persons who, not having been fortunate enough to be born (or to attend school) in Texas, nevertheless got here as soon as possible), many designs for colleges and teams which are located outside the state of Texas. For example, persons who had the good fortune of attending the University of Kansas can purchase a Texas plate which features a certain blue and red bird, and the legend, "JAYHAWKS." MyPlates.com, http://www.myplates.com/ (last visited Apr. 9, 2013). The parties have not suggested the Jayhawks plate is an endorsement of the historical Jayhawkers, however.

tably, one nonprofit plate, available through MyPlates, is the "Calvary Hill" plate, sales of which "benefit at-risk Texas children." *Design Series*, MYPLATES.COM, http://www.myplates.com/DesignSeries/PLPD236 (last visited Apr. 9, 2013). The design of the Calvary Hill plate features the legend "ONE STATE UNDER GOD," and, with obvious Christian symbolism, a silhouette of three crosses on a small rise. *Id.*; Pl.'s Mot. Summ. J. [#35-13], Ex. K, at 1.

II. The Confederate Battle Flag

The Confederate battle flag is a symbol which conveys different meanings to different audiences. *See A.M. ex rel. McAllum v. Cash*, 585 F.3d 214, 222 & n.5 (5th Cir. 2009) ("As an initial matter, plaintiffs agree that some view the Confederate flag in certain circumstances as a symbol of racism and intolerance, regardless of whatever other meanings may be associated with it. . . . This concession comports with other courts' views of the meanings associated with the Confederate flag."). To some—including, but by no means limited to, the SCV and its members—the flag is a symbol of pride, heritage, and sacrifice in a noble struggle to preserve states' rights, and an agrarian way of life. However, to others it is a symbol of an unconstitutional rebellion, aimed at keeping African-Americans in a state of slavery by destroying the Union, with the "states' right" at issue being the right to own slaves. Unfortunately, it is also used by some modern racists and white supremacists as a symbol of hatred directed towards African-Americans, some of whom in turn ascribe to it a racist meaning.[8] *See,*

[8] As the Eleventh Circuit noted:

Continued …

e.g., *Scott v. Sch. Bd. of Alachua Cnty.*, 324 F.3d 1246, 1249 (11th Cir. 2003) (noting the battle flag has multiple "emotionally charged" meanings, and is viewed by some as a symbol of white supremacy and racism, while others view it as a positive symbol of heritage).

> It is the sincerely held view of many Americans, of all races, that the confederate flag is a symbol of racial separation and oppression. And, unfortunately, as uncomfortable as it is to admit, there are still those today who affirm allegiance to the confederate flag precisely because, for them, the flag is identified with ra-

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> This debate, which is being played out in state legislatures, newspaper editorial columns and classrooms across the South is exemplified in the expert witness disclosures offered by the two sides in this case. The plaintiffs' experts plan to testify that "the Confederate battle flag is not a symbol of racism, but rather a historical symbol embodying the philosophical and political principals of a decentralized form of government in which states and local government retain all powers not expressly ceded to the centralized federal government under the constitution" and that thus the flag is merely "a symbol of southern heritage." The defendant's expert plans to testify that "from its inception, the confederacy was a political movement dedicated to the preservation of the institution of slavery. Therefore from its inception, the confederacy and its symbols represented approval of white supremacy" and that "the confederate flag is a symbol that has acquired numerous racist associations to the point that the flag itself has understandably come to be perceived as a racist symbol."
>
> The problem, of course, is that both of them are correct.

Scott v. Sch. Bd. of Alachua Cnty., 324 F.3d 1246, 1248–49 (11th Cir. 2003) (citations omitted).

> cial separation. Because there are citizens who not only continue to hold separatist views, but who revere the confederate flag precisely for its symbolism of those views, it is not an irrational inference that one who displays the confederate flag may harbor racial bias against African–Americans.

United States v. Blanding, 250 F.3d 858, 861 (4th Cir. 2001) (per curiam).

The Eleventh Circuit has noted white supremacists began to adopt the battle flag during the civil rights movement, as a symbol of opposition to efforts by the federal government to bring about desegregation. *Coleman v. Miller*, 117 F.3d 527, 528 (11th Cir. 1997).

> As many of Georgia's politicians and citizens openly resisted the Supreme Court's desegregation rulings, increasing numbers of white Southerners began expressing renewed interest in their Confederate heritage. It was in this environment of open hostility to the Supreme Court's civil rights rulings and of developing interest in Confederate history that the Georgia General Assembly acted to redesign its state flag. It chose as an official state symbol an emblem that historically had been associated with white supremacy and resistance to federal authority.

Id. At issue in *Coleman* was an Equal Protection and First Amendment challenge to the Georgia state flag, adopted in 1956, which included the battle flag, along with the state seal. Indeed, although several legislators did testify to the contrary, one member of legislature asserted the Georgia General Assembly had deliberately incorporated

the battle flag into the state flag "as a symbol of resistance to integration."[9] *Id.* at 528. "James Mackay, who was a member of the General Assembly in 1956, testified that 'there was a movement across the South: "Let's adopt the Confederate battle flag as a symbol of resistance to the law of this land."'" *Id.* at 529 n.4. The Eleventh Circuit ultimately rejected the challenge, finding a lack of evidence of any disproportionate impact along racial lines or of any government compulsion to endorse the state flag. *Id.* at 530–31. However, the court was not shy about noting the following regarding the meaning of the Confederate battle flag:

> We recognize that the Georgia flag conveys mixed meanings; to some it honors those who fought in the Civil War and to others it flies as a symbol of oppression. But because the Confederate battle flag emblem offends many Georgians, it has, in our view, no place in the official state flag. We regret that the Georgia legislature has chosen, and continues to display, as an official state symbol a battle flag emblem that divides rather than unifies the citizens of Georgia.[10]

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[9] Notably, "while addressing the States' Rights Council of Georgia at the beginning of the 1956 legislative session, Governor Griffin announced that 'the rest of the nation is looking to Georgia for the lead in segregation.'" *Coleman*, 117 F.3d at 528. In addition, while it was considering the flag bill, the General Assembly passed the Interposition Resolution, declaring the Supreme Court's rulings in *Brown v. Board of Education* to be null and void. *Id.*

[10] Although legal efforts to remove the battle flag failed, the Georgia Assembly appears to have ultimately agreed, and adopted a new flag in 2001, which relegated the battle flag to a tiny lineup of former

Continued …

Id. at 530.

The SCV's predecessor, the United Confederate Veterans, whose members were actual veterans of the Civil War, used the battle flag as its symbol. Since at least 1924, the SCV has in turn used a logo which includes the battle flag, surrounded by four tabs containing the words "Sons of Confederate Veterans 1896." Pl.'s Mot. Summ. J. [#35-5], Ex. C, at 4. There is no dispute the battle flag logo is the only logo used by the SCV, although local divisions sometimes add additional elements to it. In an apparent reaction to negative associations with the battle flag, the Sons of Confederate Veterans nationally adopted a resolution on September 3, 2010, unequivocally condemning "misuse of the Confederate Battle Flag by any extremist group or individual espousing political extremism and/or racial superiority," and denouncing "the use of the Confederate Battle Flag and any other Confederate symbol by any hate group and/or the Ku Klux Klan as the desecration of a symbol to which any hate group and/or the Ku Klux Klan has no claim." Defs.' Mot. Summ. J. [#37-4], Ex. 7, at 195.

III. Sons of Confederate Veterans' Plate Applications

The SCV applied to the Texas Department of Transportation (TxDOT)—which was then in charge of specialty plate approval—for a plate on August 18, 2009. Pls.'s Mot. Summ. J. [#35-4], Ex. B, at 1. Texas Land Commis-

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state flags along the bottom edge of the 2001 flag. Yet another flag was adopted by referendum in 2003, which abandoned the battle flag altogether, albeit in favor of a design apparently inspired by the first Confederate national flag. Edwin L. Jackson, *State Flags of Georgia*, NEW GEORGIA ENCYCLOPEDIA (Mar. 3, 2009), http://www.newgeorgiaencyclopedia.org/nge/Article.jsp?id= h-2671&hl=y.

sioner Jerry Patterson, on behalf of the Texas General Land Office, sponsored the application. *Id.* The proposed plate featured the SCV logo, and the legend "SONS OF CONFEDERATE VETERANS" at the bottom. *Id.* [#35-10], Ex. H., at 1. The Sons of Confederate Veterans specialty plates issued by other states include similar or identical versions of the logo, and several likewise repeat the name of the organization at the top or bottom of the plate. *Id.* [#35-3], Ex. A, at 1–5. There is no dispute the SCV's plate complied with the various technical requirements, and there is no dispute the SCV stands ready then and now to pay the $8,000 deposit.

TxDOT, after acknowledging receipt of the application, proceeded to put the plate to an anonymous vote by its seven-member special committee for reviewing proposed plates, via an internal website. *Id.* [#35-2], Ex. 1, at 3. On December 21, 2009, TxDOT sent SCV a letter denying the plate. Via an open-records request, the SCV subsequently obtained internal TxDOT emails regarding the plate, which revealed at one point the voting stood 3–2 in favor of the SCV plate, but with two members failing to vote, despite repeated pleas to do so by TxDOT officials. Although TxDOT officials debated whether the plate had been approved by the three votes, the plate was not moved to the public comment period required under the prior TxDOT regulations, but was instead held for a second vote, at which time the vote was 4–1 against the plate, two TxDOT committee members apparently being still too busy to click an online voting button.

Subsequently, review of specialty plate applications was transferred to the newly created, nine-member

DMVB. On October 27, 2010, the SCV sent a renewed application to the DMVB, accompanied with a cover letter decrying apparent bias by TxDOT officials. Although the SCV characterizes this action as an "appeal," there is no statutory or regulatory basis for treating it as an appeal. In any event, the DMVB, proceeding under the regulations described above, treated it as a new application, and opened the plate for public comment. The DMVB apparently approved the plate as to visibility and technical requirements on March 18, 2011. *Id.* Final review of the plate was placed on the agenda for an April 14, 2011 DMVB meeting. At the April meeting, one board member was absent, and the remaining eight members deadlocked 4–4 in two votes. DMVB Chairman Vandergriff apparently sought to reschedule the agenda item for a meeting with all boardmembers in attendance, however various personal difficulties frustrated this, and the SCV plate was ultimately taken up on November 10, 2011, again by only eight DMVB members.

This meeting was apparently well-attended by members of the public, and elicited numerous public comments, some in favor, but most opposed to the plate (which the Court will describe in more detail below). In the months leading up to the November hearing, the DMVB's website also recorded several hundred public comments, the balance of which were against the plate. Defs.' Mot. Summ. J. [#37-2], Ex. 4, at 1. Further, the DMVB received several letters urging rejection of the plate, including from nineteen state representatives, and the mayor of Houston. *Id.* [#37-3], Ex. 5.

Also before the DMVB on November 10, with remarkable timing, was another plate sponsored by Commissioner Patterson, the Buffalo Soldiers plate.

This plate was sought by the Buffalo Soldiers National Museum. The Museum honors all African-American soldiers throughout American history, albeit with a focus on the "Buffalo Soldiers," a term referring to those who joined the federal army after the Civil War, and served in the nineteenth-century frontier wars with Native Americans. The Buffalo Soldiers plate features a combined image, incorporating both the Buffalo Soldiers Museum logo (which in turn contains an image of a buffalo, and the words "Buffalo Soldiers National Museum, Houston, Texas") and another logo, comprised of a crossed rifle and sabre, with the words "Buffalo Soldiers" in large, cursive script superimposed. As noted below, some of the comments regarding the SCV plate also referenced the proposed Buffalo Soldiers plate, and the DMVB voted on both in close succession.

After receiving many public comments, the DMVB rejected the SCV plate by unanimous vote.[11] This decision was memorialized in a resolution, which made the following findings:

> Transportation Code, §504.80l(c) authorizes the Board to refuse to create a new specialty license plate if the design might be offensive to any member of the public or for any other reason established by rule. The provision of Title 43, Texas Administrative Code, §217.28(c)(3) lists factors under which a license plate may be considered objectionable or misleading. The objectionable factors include, but are not limited to whether the plate is found to be derogatory.

[11] The Buffalo Soldiers plate was approved 5–3, and is now available for purchase by Texas motorists.

> "Derogatory" is defined as an expression of hate directed toward people or groups that is demeaning to people or groups, or associated with an organization that advocates such expressions.
>
> The Board has considered the information and finds it necessary to deny this plate design application, *specifically the confederate flag portion of the design*, because public comments have shown that many members of the general public find the design offensive, and because such comments are reasonable. The Board finds that a significant portion of the public associate the confederate flag with organizations advocating expressions of hate directed toward people or groups that is demeaning to those people or groups.

Pls.' Mot. Summ. J. [#35-12], Ex. J., at 1 (emphasis added). The DMVB resolution also included an alternative reason for denying the SCV plate:

> The Board also finds there is a compelling public interest in protecting a conspicuous mechanism for identification, such as a license plate, from degrading into a possible public safety issue. The department shares a common public mission with several state agencies to protect public safety. The extent of the controversy surrounding this plate may challenge public safety since the design could distract or disturb some drivers to the point of being unreasonably dangerous.

Id. at 1–2.

The SCV then filed suit in this Court, asserting its First Amendment rights were violated by the DMVB.

Presently, both sides have moved for summary judgment.

DISCUSSION

I. Legal Standards

A. Summary Judgment

Summary judgment shall be rendered when the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine dispute as to any material fact and that the moving party is entitled to judgment as a matter of law. FED. R. CIV. P. 56(a); *Celotex Corp. v. Catrett*, 477 U.S. 317, 323–25 (1986); *Washburn v. Harvey*, 504 F.3d 505, 508 (5th Cir. 2007). A dispute regarding a material fact is "genuine" if the evidence is such that a reasonable jury could return a verdict in favor of the nonmoving party. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). When ruling on a motion for summary judgment, the court is required to view all inferences drawn from the factual record in the light most favorable to the nonmoving party. *Matsushita Elec. Indus. Co. v. Zenith Radio*, 475 U.S. 574, 587 (1986); *Washburn*, 504 F.3d at 508. Further, a court "may not make credibility determinations or weigh the evidence" in ruling on a motion for summary judgment. *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 150 (2000); *Anderson*, 477 U.S. at 254–55.

Once the moving party has made an initial showing that there is no evidence to support the nonmoving party's case, the party opposing the motion must come forward with competent summary judgment evidence of the existence of a genuine fact issue. *Matsushita*, 475 U.S. at 586. Mere conclusory allegations are not competent summary judgment evidence, and thus are insufficient to

defeat a motion for summary judgment. *Turner v. Baylor Richardson Med. Ctr.*, 476 F.3d 337, 343 (5th Cir. 2007). Unsubstantiated assertions, improbable inferences, and unsupported speculation are not competent summary judgment evidence. *Id.* The party opposing summary judgment is required to identify specific evidence in the record and to articulate the precise manner in which that evidence supports his claim. *Adams v. Travelers Indem. Co. of Conn.*, 465 F.3d 156, 164 (5th Cir. 2006). Rule 56 does not impose a duty on the court to "sift through the record in search of evidence" to support the nonmovant's opposition to the motion for summary judgment. *Id.* "Only disputes over facts that might affect the outcome of the suit under the governing laws will properly preclude the entry of summary judgment." *Anderson*, 477 U.S. at 248. Disputed fact issues that are "irrelevant and unnecessary" will not be considered by a court in ruling on a summary judgment motion. *Id.* If the nonmoving party fails to make a showing sufficient to establish the existence of an element essential to its case and on which it will bear the burden of proof at trial, summary judgment must be granted. *Celotex*, 477 U.S. at 322–23.

B. First Amendment Forum Analysis

The Supreme Court distinguishes between three or four types of forum for First Amendment purposes. The first is the traditional public forum, such as "streets and parks which 'have immemorially been held in trust for the use of the public, and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions.'" *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45 (1983) (quoting *Hague v. CIO*, 307 U.S. 496, 515

(1939)). The second category, often referred to as the designated public forum, "consists of public property which the state has opened for use by the public as a place for expressive activity." *Id.* In both traditional and designated public forums, the "rights of the state to limit expressive activity are sharply circumscribed."[12] *Id.* In these forums, "[f]or the state to enforce a content-based exclusion it must show that its regulation is necessary to serve a compelling state interest and that it is narrowly drawn to achieve that end." *Id.* "The state may also enforce regulations of the time, place, and manner of expression which are content-neutral, are narrowly tailored to serve a significant government interest, and leave open ample alternative channels of communication." *Id.*

A third category, or perhaps a subset of the second, is the limited public forum. *See Chiu v. Plano Indep. Sch. Dist.*, 260 F.3d 330, 345–47 & ns.10–12 (5th Cir. 2001) (noting a lack of precision in use of "designated" and "limited" terminology, and the resulting confusion). "A public forum may be created for a limited purpose such as use by certain groups, or for the discussion of certain subjects." *Perry Educ. Ass'n*, at 46 n.7 (citations omitted). Notwithstanding some confusion on terminology, as the Court understands matters, a limited forum is a nontraditional forum, which is additionally restricted to

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[12] The only practical difference between traditional and designated public forums appears to be the state's power to entirely close a designated public forum; i.e., having created a designated forum, the state is not required to keep it open forever. *Perry Educ. Ass'n*, 460 U.S. at 46. By contrast, the state cannot "prohibit all communicative activity" in a traditional public forum—public squares, parks, and the like, must forever remain open for public discourse. *Id.* at 45.

certain groups or to particular topics. *Id.* "When a public body establishes a limited public forum of this sort, that body may restrict the expression that takes place within the forum so long as the restriction (1) does 'not discriminate against speech on the basis of viewpoint' and (2) is 'reasonable in light of the purpose served by the forum.'" *Chiu*, 260 F.3d at 346 (quoting *Good News Club v. Milford Cent. Sch.*, 533 U.S. 98, 106–07 (2001)).

Finally, there is the nonpublic forum, which would appear to be the balance of government owned or controlled property on which expressive activity (usually incidental to other, primary purposes) takes place. "[T]he First Amendment does not guarantee access to property simply because it is owned or controlled by the government." *U.S. Postal Serv. v. Council of Greenburgh Civic Ass'ns*, 453 U.S. 114, 129 (1981). "[T]he mere fact that an instrumentality is used for the communication of ideas does not make [it] a public forum." *Perry Educ. Ass'n*, 460 U.S. at 49 n.9.

> Public property which is not by tradition or designation a forum for public communication is governed by different standards. We have recognized that the "First Amendment does not guarantee access to property simply because it is owned or controlled by the government." In addition to time, place, and manner regulations, the state may reserve the forum for its intended purposes, communicative or otherwise, as long as the regulation on speech is reasonable and not an effort to suppress expression merely because public officials oppose the speaker's view. As we have stated on several occasions, "the State, no less than a private owner of property,

> has power to preserve the property under its control for the use to which it is lawfully dedicated."

Id. at 46 (citations omitted). The Supreme Court subsequently expounded on nonpublic forums as follows:

> The government does not create a public forum by inaction or by permitting limited discourse, but only by intentionally opening a nontraditional forum for public discourse. Accordingly, the Court has looked to the policy and practice of the government to ascertain whether it intended to designate a place not traditionally open to assembly and debate as a public forum. The Court has also examined the nature of the property and its compatibility with expressive activity to discern the government's intent. For example, in *Widmar v. Vincent*, 454 U.S. 263, 102 S.Ct. 269, 70 L.Ed.2d 440 (1981), we found that a state university that had an express policy of making its meeting facilities available to registered student groups had created a public forum for their use. The policy evidenced a clear intent to create a public forum . . . . Additionally, we noted that a university campus, at least as to its students, possesses many of the characteristics of a traditional public forum. And in *Madison Joint School District v. Wisconsin Employment Relations Comm'n*, 429 U.S. 167, 97 S.Ct. 421, 50 L.Ed.2d 376 (1976), the Court held that a forum for citizen involvement was created by a state statute providing for open school board meetings. Similarly, the Court found a public forum where a municipal auditorium and a city-leased theater

> were designed for and dedicated to expressive activities.
>
> Not every instrumentality used for communication, however, is a traditional public forum or a public forum by designation. "[T]he First Amendment does not guarantee access to property simply because it is owned or controlled by the government." We will not find that a public forum has been created in the face of clear evidence of a contrary intent, nor will we infer that the government intended to create a public forum when the nature of the property is inconsistent with expressive activity. . . . Similarly, the evidence in *Lehman v. City of Shaker Heights*, . . . revealed that the city intended to limit access to the advertising spaces on city transit buses. It had done so for 26 years, and its management contract required the managing company to exercise control over the subject matter of the displays. Additionally, the Court found that the city's use of the property as a commercial enterprise was inconsistent with an intent to designate the car cards as a public forum. In cases where the principal function of the property would be disrupted by expressive activity, the Court is particularly reluctant to hold that the government intended to designate a public forum. Accordingly, we have held that military reservations, and jailhouse grounds, do not constitute public fora.

Cornelius v. NAACP Legal Def. & Educ. Fund, Inc., 473 U.S. 788, 802–04 (1985) (certain citations omitted). From the foregoing, the following factors for consideration can

be distilled: (1) the policy and practice of the government, (2) the nature of the property, (3) limited access, (4) the property's compatibility with expressive speech, and (5) any evidence of contrary intent. *See id.* As the Fifth Circuit has cogently put it: "The government does not create a public forum merely by permitting some speech." *State of Tex. v. Knights of the Ku Klux Klan*, 58 F.3d 1075, 1078 (5th Cir. 1995).

When the forum is nonpublic, the First Amendment still applies—albeit with reduced force. "Implicit in the concept of the nonpublic forum is the right to make distinctions in access on the basis of subject matter and speaker identity." *Perry Educ. Ass'n*, 460 U.S. at 49. "The touchstone for evaluating these distinctions is whether they are reasonable in light of the purpose which the forum at issue serves." *Id.*

Courts must uphold a governmental restriction on speech in a nonpublic forum as long as the restriction is reasonable and viewpoint-neutral. *See id.* at 46; *Cornelius*, 473 U.S. at 800; *see also Perry v. McDonald*, 280 F.3d 159, 170 (2d Cir. 2001) ("For instance, a state might be permitted to prohibit speech on scatalogical subjects, but it may not be able to prohibit the expression of particular views about such subjects."). However, even in nonpublic forums, content regulations "must be scrutinized more carefully to ensure that communication has not been prohibited '"merely because public officials disapprove the speaker's view."'" *U.S. Postal Serv.*, 453 U.S. at 132 (quoting *Consol. Edison Co. v. Pub. Serv. Comm'n*, 447 U.S. 530, 536 (1980) (quoting *Niemotko v. Maryland*, 340 U.S. 268, 282 (1951) (Frankfurter, J., concurring in result))). However, "[t]he fact that the State wishes to exclude only one group with a certain view-

point does not alone make the exclusion viewpoint-based." *Knights of the Ku Klux Klan*, 58 F.3d at 1081. Where the forum in question is comprised of or located on government property, the court's analysis must be mindful of "the special interests of a government in overseeing the use of its property." *See Consol. Edison Co.*, 447 U.S. at 539–40.

II. Application

There are no disputed material facts in this case. Rather, the case wholly turns on a matter of law—whether the First Amendment required the DMVB to accept the SCV's specialty plate application. The DMVB raises two lines of defense for its denial of SCV's proposed plate. First, the DMVB argues specialty plates constitute government, rather than private, speech, and are therefore not protected by the First Amendment at all. Alternatively, DMVB argues the specialty plates constitute only a limited public forum, or a nonpublic forum, and thus the SCV's application was properly rejected pursuant to viewpoint-neutral restrictions on content. For the reasons given below, the Court rejects the first argument, but finds the second is well taken, as the record shows the specialty plate program is a nonpublic forum.

The Court will first determine whether the speech in question is government speech, before considering what type of forum the specialty plate program is under the First Amendment. The Court will then address whether the regulations and state action in this case constitute viewpoint, or content, regulation, and if the restriction was a reasonable limitation. Finally, the Court will explain why two prior decisions in the SCV's favor are unavailing here, before noting the same result would apply even if

the specialty plate program constitutes a limited public forum.

A. Government or Private Speech

As a threshold issue, the Court must determine whether the speech in question is government or private speech. If it is government speech, then the First Amendment is inapplicable. *Pleasant Grove City, Utah v. Summum*, 555 U.S. 467, 468 (2009) ("If petitioners were engaging in their own expressive conduct, then the Free Speech Clause has no application. The Free Speech Clause restricts government regulation of private speech; it does not regulate government speech."). The DMVB, citing *Pleasant Grove*, argues the program is government speech because the state, through the DMVB, retains final control over the content of specialty plates. The DMVB further invokes Fifth Circuit cases, which have generally noted, citing *Pleasant Grove*, and *Johanns v. Livestock Marketing Ass'n*, 544 U.S. 550 (2005), the government "must exercise a high degree of control over speech" for "private speech to become the government's own." *Int'l Women's Day March Planning Comm. v. City of San Antonio*, 619 F.3d 346, 360 (5th Cir. 2010) (holding government support of marches did not transform the marches into government speech); *see also Pelts & Skins, LLC v. Landreneau*, 448 F.3d 743, 743–44 (5th Cir. 2006) (vacating and remanding, in light of *Johanns*, for determination of whether "Louisiana's alligator marketing program" was government speech, similar to the pro-beef advertising in *Johanns*, because of the degree of governmental control over the message).

The Court disagrees. There is no dispute the content of specialty plates is proposed by the private, nonprofit

entities who seek to have a specialty plate issued. Although the DMVB exercises *final* control over whether any particular plate is accepted, and further ensures the content and formatting of proposed plates conforms with the various regulations, the reality is private groups, not the government, compose the message to be placed on the specialty plates. *See* Defs.' Mot. Summ. J. [#37-2], Ex. 3 (specialty plate brochure), at 2 ("Q. Who provides the plate design? A. You do, though your design is subject to reflectivity, legibility, and design standards. Depending on which approval route you choose, My Plates or TxDMV will work with your organization to help you understand those standards."). The DMVB essentially acts as an editor, with right of refusal to publish, rather than as a speaker.

The DMVB asserts the Supreme Court placed final control at the center of government-speech analysis in *Pleasant Grove*. However, this reads too much into the *Pleasant Grove* opinion, which was focused on the very different, and rather narrow, question of whether privately donated monuments placed in a public forum constitute government or private speech. 555 U.S. at 464. The Supreme Court, noting (1) the limited space within parks, (2) the permanent nature of monuments, and (3) the import of the act of accepting a particular monument—which can operate as an endorsement of the message conveyed by the monument—found such monuments to be government speech. *Id.* at 472–73, 478. It is true the Supreme Court emphasized the government retained effective control over the message. However, the court's analysis, distinguishing permanent monuments from speeches or marches, precludes any finding the specialty plates are government speech. The Su-

preme Court distinguished monuments from speeches or other traditional First Amendment activities in public parks, because "public parks can accommodate only a limited number of permanent monuments." *Id.* at 478.

> Speakers, no matter how long-winded, eventually come to the end of their remarks; persons distributing leaflets and carrying signs at some point tire and go home; monuments, however, endure. They monopolize the use of the land on which they stand and interfere permanently with other uses of public space. A public park, over the years, can provide a soapbox for a very large number of orators—often, for all who want to speak—but it is hard to imagine how a public park could be opened up for the installation of permanent monuments by every person or group wishing to engage in that form of expression.

Id. at 479. Nor does *Pleasant Grove* purport to set out an "effective control" litmus test for whether speech is private or government. Rather, the city's control over the monuments in question appears to have simply been one consideration, albeit an important one, in finding the monuments constituted government speech. Nor is there any indication the *Pleasant Grove* opinion was intended to supplant the Supreme Court's then-recent explanation of government speech set forth in *Johanns*, discussed below, in which the speech was directed by the government "from beginning to end." 544 U.S. at 560–61.

Here, by contrast, there is practically no limit to the number of specialty plates the state could approve and issue, because putting a particular specialty plate on one person's car in no way precludes the placement of a different plate on a different vehicle. The plates do not

"monopolize" public space. *See id.* Indeed, a review of the DMVB's website shows some seventy-four plates for various nonprofit organizations are presently available, and no doubt more are on the way.[13] *See TxDMV–Special Plate Order Application*, TEX. DEP'T OF MOTOR VEHICLES, https://rts.texasonline.state.tx.us/NASApp/txdotrts/SpecialPlateOrderServlet?grpid=60 (last visited Apr. 8, 2013). Nor do specialty plates endure as do permanent monuments—they are only issued and renewed for so long as a driver continues to pay the annual $30 additional fee. Finally, the act of issuing specialty plates does not have the same import as the "dramatic" act of accepting a monument in a public park. *See Pleasant Grove*, 555 U.S. at 474 (noting the city's decision to accept and display a privately funded monument constituted a "dramatic form of adoption" of the message conveyed by the monument). As such, the special concerns which informed the holding in *Pleasant Grove* are wholly absent in this case, and the various specialty plates are more akin to speeches and other transitory uses of First Amendment forums, than to permanent monuments.

The DMVB also relies on *American Civil Liberties Union of Tennessee v. Bredesen*, 441 F.3d 370 (6th Cir. 2006), in which the Sixth Circuit found a special license plate constituted government speech. However, *Bredesen* is factually distinct from this case, and actually illustrates why the SCV's plate is not government

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[13] And this is not counting the bewildering array of available "MyPlates," *see* MYPLATES.COM, http://www.myplates.com/ (last visited Apr. 9, 2013), or other plates available through the DMVB, memorializing colleges, universities, and sports teams.

speech. There, the challenged specialty plate was created at the express and specific direction of the Tennessee legislature. *Id.* ("In 2003, the Tennessee legislature passed a law . . . authorizing issuance of a specialty license plate with a 'Choose Life' logotype 'designed in consultation with a representative of New Life Resources.'"). In other words, it was a plate akin to the various plates directly authorized by the Texas legislature, not the specialty plate program the SCV applied under. Although the Tennessee legislature did assign the design work to a private party—New Life Resources—the fact remains the plate was created because the legislature passed a specific act making it so. *See id.* ("The Tennessee legislature chose the 'Choose Life' plate's overarching message and approved every word to be disseminated."). Here, by contrast, no act of the Texas legislature specifically authorized the SCV's plate—if it had, this lawsuit would not have occurred.

In addition, finding the specialty plate program is private speech comports with the Supreme Court's holding in *Johanns v. Livestock Marketing Ass'n*, where the court found "[t]he message set out in the beef promotions is from beginning to end the message established by the Federal Government," because "Congress has directed the implementation of a 'coordinated program'" to promote beef consumption. 544 U.S. 550, 560–61 (2005). There, Congress and the Secretary of Agriculture directed "in general terms" what message was to be conveyed. *Id.* at 561. The entity charged by Congress to promote beef consumption, the Beef Board, was "answerable" to the government, in that it was composed of members who were all subject to removal by the Secretary, and half of whom were appointed by the Secretary.

Id. at 560–61. By contrast, here neither the Texas legislature, nor the DMVB, initiate the content of the DMVB-approved specialty plates. Nor are the private nonprofit entities—the ones who in fact propose the content of the plates—answerable to any part of the state government.

Finally, the Court notes the "government speech" doctrine is still relatively new, and its precise contours are uncertain. *Pleasant Grove*, 555 U.S. at 481 (Stevens, J., concurring). As such, Justice Souter cautioned (regarding the Supreme Court's finding monuments were government speech), "it would do well for us to go slow in setting its bounds, which will affect existing doctrine in ways not yet explored." *Id.* at 485 (Souter, J., concurring). The Court is heedful of this warning, particularly because Souter went on to say, in words which are apposite here:

> After today's decision, whenever a government maintains a monument it will presumably be understood to be engaging in government speech. If the monument has some religious character, the specter of violating the Establishment Clause will behoove it to take care to avoid the appearance of a flatout establishment of religion, in the sense of the government's adoption of the tenets expressed or symbolized. In such an instance, there will be safety in numbers, and it will be in the interest of a careful government to accept other monuments to stand nearby, to dilute the appearance of adopting whatever particular religious position the single example alone might stand for. As mementoes and testimonials pile up, however, the chatter may well make it less intuitively obvi-

> ous that the government is speaking in its own right simply by maintaining the monuments.
>
> If a case like that occurred, as suspicion grew that some of the permanent displays were not government speech at all (or at least had an equally private character associated with private donors), a further Establishment Clause prohibition would surface, the bar against preferring some religious speakers over others. But the government could well argue, as a development of government speech doctrine, that when it expresses its own views, it is free of the Establishment Clause's stricture against discriminating among religious sects or groups. Under this view of the relationship between the two doctrines, it would be easy for a government to favor some private religious speakers over others by its choice of monuments to accept.

Id. at 486–87 (citation omitted). The record in this case shows several specialty plates—approved and available to the public—contain references to God, or Christian symbols. Were the Court to find specialty plates are government speech, analogous to the monuments at issue in *Pleasant Grove*, then the scenario predicted by Justice Souter in 2009 has already come to pass.

The Court thus finds the contents of specialty plates are private speech. As such, First Amendment protection is available to the SCV, and the Court must proceed to determine what type of forum the plate program is.

B. Type of Forum

As a preliminary to First Amendment forum analysis, the Court concludes—and there appears to be no dispute—the forum at issue is the specialty plate program administered by the DMVB, and the plates themselves, not the separate MyPlates.com program, nor the public streets on which specialty plates are seen. This is because determining the relevant forum is based on the "access sought by the speaker." *Perry Educ. Ass'n*, 460 U.S. at 45; *see also Knights of the Ku Klux Klan*, 58 F.3d at 1078 (holding the forum in question was the "Adopt-a-Highway" program and its associated signs, rather than the public highways in general). However, in dispute is what type of forum the DMVB's specialty plate program is under First Amendment jurisprudence.

There is no suggestion the specialty plates are a traditional public forum. To the contrary, license plates, rather than being a place for people to gather, are discrete pieces of government-controlled property, serving the government's purposes of identifying vehicle ownership, regulating access to motor vehicles, and generating revenue. They are hardly venues for public debate since time immemorial. Instead, the question is whether the specialty plate program constitutes a designated public forum, a limited public forum, or a nonpublic forum.

Here, the record does not disclose any "clear intent" by the state of Texas to create a public forum. *Cornelius*, 473 U.S. at 802. Rather, the record shows the state, while allowing limited input from certain members of the public, has nevertheless "reserve[d] the forum for its intended purpos[e]." *Perry Educ. Ass'n*, 460 at 46. The state, via its agency, the DMVB, retains final control over the content of specialty plates. *See Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 268–69 (1988) (noting school

retained ultimate control over the content of a school newspaper, and the purpose of paper was educational rather than expressive, as part of the course curriculum); 43 TEX. ADMIN CODE § 217.28(i)(7). In addition, although it is unclear whether the state retains formal title to the physical plates after they are issued, the state does retain ownership of the designs. TEX. TRANSP. CODE § 504.002. Moreover, the state exercises ongoing control over the physical disposition of all license plates. *See id.* § 504.008(g) ("If the owner of a motor vehicle for which a specialty license plate is issued disposes of the vehicle or for any reason ceases to be eligible for that specialty license plate, the owner shall return the specialty license plate to the department."); *id.* § 504.901 (providing for DMVB oversight of transfer of plates between vehicles, and further requiring "dispos[al] . . . in a manner specified by the department," of any plates which are removed from a vehicle and not transferred to another); 43 TEX. ADMIN. CODE § 217.41(b)(2)–(3) (requiring plates which are not approved for transfer either be "disposed of in a manner that renders the license plates unusable or that ensures the license plates will not be available for fraudulent use on a motor vehicle," or retained by the owner of the vehicle they were removed from).

Any doubt is dispelled by assessing the indicia discussed in *Cornelius*, 473 U.S. at 802–04. First, Texas has limited participation in the DMVB-approved specialty plate forum to certain groups. Second, Texas, through the DMVB, retains full and final control over what messages are conveyed via the program. Third, the scope of speech which is possible through the program is very limited. Finally, the statute and regulations do not suggest the government's intent was to establish a public forum.

1. Limited Access

An important factor in determining if a forum is public or not is whether the government has limited who may participate in the forum. "In *Cornelius*, the Supreme Court noted that the government's consistent policy had been to limit participation in the fundraising campaign to certain voluntary agencies. The Court noted that this practice was inconsistent with an intent to create a public forum." *Knights of the Ku Klux Klan*, 58 F.3d at 1079 (citing *Cornelius*, 473 U.S. at 804). Similarly, participation in the DMVB's specialty plate program is limited to nonprofit entities. TEX. TRANSP. CODE § 504.801(b) ("Any nonprofit entity may submit an application . . . ."); *id.* § 504.801(i) ("The sponsor of a new specialty plate may not be a for-profit enterprise."). This is confirmed by the fact the Texas legislature created two separate avenues for obtaining distinctive license plates with no such limitation, the so-called "MyPlates" program, and of course the possibility of lobbying members of the Texas legislature to create particular license plates by statute. These limitations are a strong indication the specialty plate program is not intended to be a public forum. *See id.*

This result is consistent with the Supreme Court's holding in *Perry Education Association*: "If by policy or by practice the Perry School District has opened its mail system for indiscriminate use by the general public, then PLEA could justifiably argue a public forum has been created. This, however, is not the case." 460 U.S. at 47. Here the state has neither by policy, nor practice, opened the specialty license plate program to indiscriminate use by the general public. Rather, only qualified nonprofit entities are eligible. *See id.* ("We can only conclude that

the schools do allow some outside organizations such as the YMCA, Cub Scouts, and other civic and church organizations to use the facilities. This type of selective access does not transform government property into a public forum."). A further limitation is applicants must obtain the sponsorship of a state agency to receive the monetary benefits of the program.

2. State Control

There is no dispute the DMVB retains the final say on any proposed specialty plate, both as to the final form, and as to whether a plate should issue at all. 43 TEX. ADMIN. CODE § 217.28(i)(7). This is a further indication the specialty plate program is a nonpublic forum. *See Cornelius*, 473 U.S. at 803; *Knights of the Ku Klux Klan*, 58 F.3d at 1078.

3. Limited Scope of Speech

As a practical matter, the scope of speech permitted within the specialty plate program is very limited. This is due not only to the physical confines of a license plate, but also to the regulations governing specialty plate applications. Specialty plates may: (1) vary the color of the word "Texas" at the top, (2) apply a logo, within an area only a few square inches, on the left-hand side of the plate, (3) append twenty-five characters of text, in any color, at the bottom of the plate, and (4) optionally include or omit the silhouette of the state of Texas, in the upper right-hand corner. *See* Defs.' Mot. Summ. J. [#37-2], Ex. 2, att. A at 1 (specialty plate design template). As such, no detailed message or discussion is possible, or permitted.[14]

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[14] The Court is mindful a symbol alone, or even a single word, can

Continued …

To be sure, this factor is not dispositive alone, but it provides additional confirmation the specialty plate program is a nonpublic forum. *See Cornelius*, 473 U.S. at 802 ("The Court has also examined the nature of the property and its compatibility with expressive activity to discern the government's intent."); *Knights of the Ku Klux Klan*, 58 F.3d at 1078 ("Such limitations on the quantity and content of speech are indicative of an intent to maintain a nonpublic forum.").

4. No Expressed Intent to Create a Public Forum

A further factor is the absence of any expression of intent to establish a public forum. *Knights of the Ku Klux Klan*, 58 F.3d at 1078. For example, Chapter 504, subchapter A, entitled "General Provisions," and specifically section 504.008, "Specialty License Plates," contains no suggestion the legislature's purpose was to create a public forum. TEX. TRANSP. CODE § 504.008. Similarly, the relevant "Purpose and Scope" subsection of the Administrative Code merely references the DMVB's statutory duties to "issu[e] a plate or plates, . . . that, when attached to a vehicle as prescribed by the department, act as the legal registration insignia," including specialty plates. 43 TEX. ADMIN. CODE § 217.28(a). The subsection goes on to explain, "For the department to perform these duties efficiently and effectively, this section prescribes the policies and procedures

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constitute protected speech under the First Amendment. The Court does not suggest the practical limits of what can be expressed on a license plate renders such speech unprotected. Rather, the limited scope of expression is simply one factor among several the Court looks to in determining whether the specialty plate program is a public forum. *See Cornelius*, 473 U.S. at 802.

for the application, issuance, and renewal of specialty license plates, symbols, tabs, and other devices, through the county tax assessor-collectors, and establishes application fees, expiration dates, and registration periods for certain specialty license plates." *Id.* Absent is any hint the legislature or the DMVB is seeking to further First Amendment expression. *See Knights of the Ku Klux Klan*, 58 F.3d at 1078 ("Any opportunity for speech provided by the Program is peripheral to that central purpose [of facilitating litter control].").

As such, viewed in light of the rubric elided in *Cornelius*, the record here fails to show any intent, clear or otherwise, to create a public forum.

Finally, this result is governed by the Fifth Circuit's holding in *Knights of the Ku Klux Klan*. There, the Court of Appeals determined the state's "Adopt-a-Highway" signs were a nonpublic forum. *Id.* at 1078–79. The Adopt-a-Highway signs were similar to specialty plates: both allow for little more than displaying the name of the participating entity. *Id.* It is true the specialty plate program also permits the display of a logo, and so does provide for a modestly increased degree of expression. However, in another sense the Adopt-a-Highway program was vastly more open than the specialty plate program, because for-profit entities could participate, whereas the specialty plate program at issue here is exclusively limited to nonprofit entities. *Id.* at 1079. The specialty plate program is further limited by the requirement—absent from the Adopt-a-Highway program—of a sponsoring state agency in order to obtain the full benefits of the program. Also much like specialty plates, "[t]he State restricts and controls the size and content of the [Adopt-a-Highway] signs posted at the ends of

the adopted miles." *Id.* Corresponding to the specialty plate program's approval process, all Adopt-a-Highway applications were subject to approval by the Department of Transportation. *Id.* Taking all of these factors together, the Court is constrained under Fifth Circuit precedent to conclude the specialty plate program is, like the Adopt-a-Highway program, a nonpublic forum.[15] *Id.* (holding the foregoing factors were "inconsistent with an intent to create a public forum").

Much as school newspapers, *Hazelwood Sch. Dist.*, 484 U.S. at 267–68, mail boxes, *U.S. Postal Serv.*, 453

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[15] SCV attempts, in a footnote, to distinguish *Knights of the Ku Klux Klan*, but its sole argument for doing so is the following: "[U]nlike the highway adoption program . . . the specialty license plate program was specifically created to allow for personal expression by sponsoring organizations and drivers, and has as one of its primary purposes 'the provision of a forum for expressive activity.'" Pls.' Resp. [#39] at 6 n.3 (quoting *Knights of the Ku Klux Klan*, 58 F.3d at 1078). However, the SCV cites no authority or evidence in the record showing a "primary purpose" of the specialty plate program was to provide a forum for expressive activity, other than a quote from the *Knights* opinion, which of course does not speak to the purposes of the specialty plates program. To the contrary, the evidence, and the laws and regulations governing the specialty plates program, suggest its primary purpose is to generate revenue. *See* TEX. TRANSP. CODE § 504.702(b)(2), (e) (requiring $8,000 deposit for specialty plate applications); TEX. ADMIN. CODE § 217.28(i)(2)(D), (E) (requiring inclusion of "projected sales of the plate, including an explanation of how the projected figure was established," and "a marketing plan for the plate, including a description of the target market," in all specialty plate applications); *id.*(i)(5)(C) (directing the DMVB to consider, *inter alia*, the applicant's ability to comply with the deposit requirement). Moreover, SCV's argument amounts to no more than begging the question of whether the specialty plates forum is some type of public forum.

U.S. at 129–130, interschool mail systems, *Perry Educ. Ass'n*, 460 U.S. at 46–47, government-organized, workplace charity drives, *Cornelius*, 473 U.S. at 806, and Adopt-a-Highway signs, *Knights of the Ku Klux Klan*, 58 F.3d at 1078–79, are all nonpublic forums,[16] the Court finds the specialty plate program is a nonpublic forum, as it is not a traditional public forum, nor does the evidence establish the government's "clear intent" to designate the program as a public forum.[17]

C. Viewpoint or Content Discrimination

As the specialty plate program constitutes a nonpublic forum, the next question is whether the DMVB nevertheless engaged in constitutionally impermissible viewpoint discrimination, or if rejection of the SCV's application was permissible content discrimination. Having carefully reviewed the record, and mindful of the duty to closely scrutinize purported content discrimina-

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[16] By contrast, Supreme Court cases which rejected attempts to characterize limited or designated forums as nonpublic forums involved physical locations which permitted actual discourse in a traditional sense. *See Cornelius*, 473 U.S. at 802–03 (noting university campus, open school board meetings, municipal auditorium, and city-leased theater were all physically compatible with use as public forums).

[17] Further support is found in the Second Circuit's decision in *McDonald*, where Vermont's vanity plate program was held to be a nonpublic forum because (1) the primary purpose of license plates is vehicle identification, (2) the vanity plate program was aimed at raising revenue, rather than facilitating expression, (3) the state retained numerous restrictions on the program, similar to those at issue here, (4) the state retained final control over any plate, and (5) the nature of the plates made them an "unlikely means" to engage in meaningful debate. 280 F.3d at 167–68.

tion to ensure it is not, in fact, viewpoint-based, *see U.S. Postal Serv.*, 453 U.S. at 132, the Court concludes the DMVB's decision was content, rather than viewpoint, based, and therefore not offensive to the First Amendment, *see Knights of the Ku Klux Klan*, 58 F.3d at 1080–81 ("There is no indication in the record that the State's attempt to prevent the Klan from adopting a section of highway outside of Vidor is actually motivated by a desire to suppress the Klan's viewpoint.").

The Supreme Court has repeatedly upheld content-based exclusions in nonpublic forums, and cautioned that not all government property is a public forum. *Jones v. N.C. Prisoners' Union*, 433 U.S. 119, 134 (1977) (holding a prison is not a public forum, and upholding regulations on most speech by purported prisoners' union); *Greer v. Spock*, 424 U.S. 828, 838–39 (1976) (holding federal military reservation was not a public forum, and approving of base policy which permitted other civilian speakers, but barred all political speakers); *Lehman v. City of Shaker Heights*, 418 U.S. 298, 303–04 (1974) (plurality opinion) (finding advertising cards on public transit system were not a public forum, and therefore upholding ban on any political advertising). Although the foregoing three cases arguably involved unusual facts, the Supreme Court affirmed these cases lie within the mainstream of First Amendment jurisprudence in *Perry Education Association*: "It will not do, however, to put aside the Court's decisions holding that not all public property is a public forum, or to dismiss *Greer*, *Lehman*, and *Jones* as decisions of limited scope involving 'unusual forums.'" 460 U.S. at 49 n.9. Nor is *Perry Education Association* the only case to acknowledge *Lehman* and *Greer*'s importance. *See Consol. Edison Co.*, 447 U.S. at 538

("Nevertheless, governmental regulation based on subject matter has been approved in narrow circumstances.... [T]his Court has recognized that the government may bar from its facilities certain speech that would disrupt the legitimate governmental purpose for which the property has been dedicated.").

SCV has no evidence the DMVB discriminated against it on the basis of viewpoint. Indeed, there is no hint in the record the defendant board members ever considered the SCV's viewpoint. Rather, their concerns were entirely focused on the appearance of the Confederate battle flag within the SCV's logo, finding "specifically the confederate flag portion of the design" to be derogatory. Pls.' Mot. Summ. J. [#35-12], Ex. J, at 1. This is mirrored by the public comments the DMVB based its finding on, which focused on the battle flag, not the group requesting the specialty plate. The closest thing to a criticism of the SCV itself was a comment by Gary Bledsoe, who argued, "though there are good people in the Sons of Confederate Veterans, there are many there who are appended to or connected with other hate organizations ...." Defs.'s Mot. Summ. J. [#37-4], Ex. 6 (Nov. 10, 2011, DMVB Board meeting transcript), at 25 [hereinafter Nov. Trans.]. All the other comments the DMVB received were directed at the battle flag itself, and its meaning. Rather than criticizing the SCV, or discussing its mission of commemorating the service of Confederate troops, the various negative commentators discussed the meaning of the battle flag.

First, the participants debated whether the battle flag had ever been flown "over" Texas, i.e., as the sovereign flag of the state, with General Land Office Commissioner Jerry Patterson explaining it was probably used in bat-

tles which occurred within the state, and certainly was carried by Texas troops in battle elsewhere, as part of the Army of Northern Virginia. Then, numerous participants, including Congressman Lloyd Doggett, and many African-Americans, particularly members of the NAACP and local pastors, forcefully expressed the opinion the battle flag is a symbol of racism, oppression, and division.[18] Similarly, many of the speakers warned putting the Confederate battle flag on a state-sanctioned license plate would make it appear the state endorsed racist views. These same commentators likewise opined Texas should be moving away from racial division, not towards it.[19] One speaker went so far as to suggest the Confederate

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[18] One example of these comments will suffice:

> When I was ten years old we walked to school, to the black school. There was a white school where the white kids rode the bus, there was another white school that was a private school, and every morning as we walked on the sidewalks as black people, the white private school would ride by in their bus very slowly, spit out the window in our faces and display a Confederate battle flag. Every year in our school when they talked about the death of M.L.K., the white kids would bring in the Confederate battle flag and hold it up as a symbol of power.
>
> All my life in Georgia and Alabama and the whole South, it was very clear what the symbol meant. In fact, if you study the history of Georgia and Alabama, you see crime[] scenes where black folks were lynched, murdered and killed, and other relics like the flag were always on display.

Nov. Trans. [#37-4] at 53–54 (comments of Nelson Linder).

[19] The letters from nineteen state representatives, and the mayor of Houston, were in a similar vein to the sentiments summarized in the preceding three sentences. *See* Defs.' Mot. Summ. J. [#37-3], Ex. 5

battle flag and the Nazi swastika are "one and the same." *Id.* at 56. In what may have been a bit of shameless showboating, or perhaps a moving and emotional moment at the meeting (the cold record cannot convey the atmosphere), Congressman Al Green opined American troops serving in Afghanistan and Iraq fought for the American flag, not the Confederate flag, and proceeded to lead the audience in the pledge of allegiance. Finally, Congresswoman Sheila Jackson Lee echoed several of the above sentiments, and also suggested rejecting the SCV's application would not violate the First Amendment. In any event, with the possible and passing exception of Mr. Bledsoe's comment, quoted above, the debate was entirely focused on the meaning of the Confederate battle flag, not on the meaning of the SCV logo per se, nor on the views, merits, or values of the SCV itself.

Significantly, Commissioner Patterson, who was the first person to speak at the November hearing, started off his remarks not by describing the qualities of the SCV, but by quoting infamously ironic statements by Abraham Lincoln and Robert E. Lee, the former suggesting the Great Emancipator in fact harbored racist sentiments, and the latter tending to show General Lee opposed slavery and desired to see all slaves emancipated.[20]

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[20] Patterson attributed the following to Abraham Lincoln:

> "I will say then that I am not, nor have I ever been, in favor of bringing about in any way the social and political equality of the white and black races, that I am not now, nor have I ever been, in favor of making voters or jurors of Negroes, nor of qualifying them to hold office, not to intermarry with white people, and I will say in addition to this that there is a physical difference between the white and black races which I believe will forever forbid the two

Continued …

While these quotes help illustrate the complexity of the causes of the Civil War, they also further confirm the problem with the specialty plate at issue here has nothing to do with the SCV itself or any viewpoint it holds, but with the meaning of the Confederate battle flag, which has, unfortunately, become inseparably connected with racial tensions.

Reviewing the record, there is no indication the DMVB denied SCV's application either because of the identity of the applicant, or because SCV espouses a positive viewpoint regarding the battle flag. Rather, the record demonstrates conclusively the decision was based on the content of the message. *See McDonald*, 280 F.3d at 170 ("It is apparent that Vermont's policy does not oppose Perry's philosophical views as reflected in the vanity plate. Vermont's policy prohibits Perry's vanity plate not be-

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> races living together on terms of social and political equality. And inasmuch as they cannot so live, while they do remain together, there must be a position of superior and inferior, and I, as much as any other man, am in favor of having the superior position assigned to the white race."

Nov. Trans. at 7–8. He quoted from Robert E. Lee thus:

> "In this enlightened age there are few, I believe, but what will acknowledge that slavery as an institution is immoral and political evil in any country. I think it, however, a greater evil to the white than to the black race. . . . The emancipation will sooner result from the mild and melting influence of Christianity than the storms and tempests of fiery controversy. While we see the course of final abolition of human slavery is onward and we give the aid of our prayers and all justifiable means in our power."

Id. at 8–9. Of course, posterity has judged both men approvingly, but on the basis of their deeds, rather than the above words.

cause it stands for 'Shit happens (so don't let life's problems drive you to drink),' but because Perry chose to express that viewpoint using a combination of letters that stands in part for the word 'shit.' This restriction does not discriminate on the basis of viewpoint.").

A hypothetical confirms that what is before the Court is a question of content, rather than viewpoint. Imagine a historical society, we might call it, the "Axis & Allies Society," dedicated to studying all aspects of the Second World War from a nationally neutral and objective point of view. Accordingly, as its logo, it chooses some design which incorporates the various national symbols used by all the major combatants: a white star for the United States, the British tri-colored roundel, the rising sun of imperial Japan, the hammer and sickle of the Soviet Union, and the swastika of the Third Reich. If the historical society sought a specialty license plate using its composite logo, the design would properly be rejected under the specialty plate rules, not due to the (entirely unobjectionable) viewpoint of the society, but due to the derogatory content of its logo, specifically the swastika.

The mere fact the content-based denial impacted the SCV, and would not affect applicant groups with a different viewpoint, is immaterial. *See Madsen v. Women's Health Ctr., Inc.*, 512 U.S. 753, 763 (1994) ("In short, the fact that the injunction covered people with a particular viewpoint does not itself render the injunction content or viewpoint based."); *Knights of the Ku Klux Klan*, 58 F.3d at 1081 ("The fact that the State wishes to exclude only one group with a certain viewpoint does not alone make the exclusion viewpoint-based.").

The SCV repeatedly argues the fact the Buffalo Soldiers plate was approved indicates SCV was subjected to

viewpoint discrimination. SCV speculates Native Americans would be offended by the Buffalo Soldiers plate, because of the role played by African-American troops in the frontier wars of the nineteenth century. However, the record does not support this assertion: in contrast to the chorus of negative public comments raised against the SCV's plate, there appears to have been no significant objection to the Buffalo Soldiers plate, rendering SCV's assertion the Buffalo Soldiers plate is equally derogatory at best purely speculative. Indeed, the Buffalo Soldiers plate elicited only brief remarks at the November 2011 hearing: First, Commissioner Patterson spoke in favor of it, albeit mostly as a way of suggesting the SCV plate should also be adopted, by equating the service of Confederate servicemen with that of the Buffalo Soldiers.[21] Specifically, Patterson suggested anyone offended by either plate should "get a grip." *Id.* at 10 Second, Captain Paul J. Matthews, the founder of the Buffalo Soldiers National Museum in Houston, objected to such comparisons, asserting the Buffalo Soldiers were "peacekeepers" who fought to defend the American flag, whereas "the Confederacy fought to destroy [it]."[22] *Id.* at 75. Finally, when the

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[21] When Patterson was recognized to speak regarding the SCV plate, he also spoke in favor of the Buffalo Soldiers plate, even though it was technically a separate agenda item, to be considered after a vote on the SCV plate. Patterson was apparently losing his voice, and left the hearing before the DMVB turned to the Buffalo Soldiers plate. Captain Matthews, the principal behind the Buffalo Soldiers plate, voiced his objection to the comparison during the SCV discussion, and also spoke in favor of the Buffalo Soldiers plate when the floor was opened for comments on it.

[22] It bears noting this was one of the few negative remarks made about the Confederacy, as opposed to the battle flag as a symbol.

Buffalo Soldiers plate was actually before the DMVB, there were no speakers against it, and after brief remarks in favor by two speakers, it was approved.

More importantly, the content of the Buffalo Soldiers plate, unlike the SCV's design, is quite innocuous, consisting simply of the words "Buffalo Soldiers," a buffalo, and a crossed rifle and sabre. No inflammatory symbol comparable to the Confederate battle flag appears on the Buffalo Soldiers plate, nor is there any evidence those symbols are derogatory to any person. As such, the DMVB's approval of the Buffalo Soldiers plate is not evidence SCV was subjected to viewpoint discrimination. Rather, it confirms the DMVB was evenhandedly applying a permissible, content-based restriction on use of a nonpublic forum.

The Court thus finds rejection of the SCV's application was a content-based restriction on speech, rather than a viewpoint-based limitation. Because the restriction is one of content only, and because the specialty plates constitute a nonpublic forum, the Court concludes SCV's First Amendment rights were not *per se* violated by the DMVB's refusal to issue a specialty plate bearing the Confederate battle flag logo used by the SCV. *See Perry Educ. Ass'n*, 460 U.S. at 49 ("Implicit in the concept of the nonpublic forum is the right to make distinctions in access on the basis of subject matter . . . ."). Having so concluded the only remaining issue is the reasonableness of the restriction.

D. Is the DMVB's Restriction Reasonable?

Content-based restrictions on speech in a nonpublic forum are reviewed under a reasonableness standard. *Perry Educ. Ass'n*, 460 U.S. at 46. "The reasonableness

of a government restriction of access to a nonpublic forum is assessed 'in the light of the purpose of the forum and all the surrounding circumstances.'" *Knights of the Ku Klux Klan*, 58 F.3d at 1079 (quoting *Cornelius*, 473 U.S. at 809).

"Automobile license plates are governmental property intended primarily to serve a governmental purpose, and inevitably they will be associated with the state that issues them." *McDonald*, 280 F.3d at 169. Consequently, the state of Texas has a legitimate, significant interest in excluding derogatory content from specialty plates. The DMVB was presented with ample evidence, which the Court has summarized above, of the racially derogatory message connoted by the Confederate battle flag. Several Courts of Appeals opinions have likewise recognized this unfortunate fact. *E.g.*, *Scott*, 324 F.3d at 1248–49. Accordingly, there is no doubt the DMVB was authorized by generally applicable rules and the statute to reject the SCV's application. Given the apparent purposes of the specialty plate program are variously to (1) regulate and identify motor vehicles, (2) generate revenue for the state, and (3) provide limited financial support for nonprofit groups, rather than to set up an open, First Amendment forum, the Court finds it was reasonable for the state to exclude derogatory content generally from the specialty plate program. It was also imminently reasonable for the DMVB to conclude the Confederate battle flag portion of the SCV's application was such derogatory content.[23]

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[23] However, the Court finds the alternative basis advanced by the DMVB, premised on a supposed threat to public safety, by which the controversial nature of the battle flag would "distract or disturb

Continued …

This restriction is also reasonable in light of how little it otherwise burdens the SCV's First Amendment rights. The SCV's members are free to put their logo anywhere else on their vehicles, except for the state-issued license plates. *See McDonald*, 280 F.3d at 169 ("Moreover, Vermont's policy does not prevent Perry from communicating any particular message on her automobile. For instance, Perry may display a bumper sticker bearing the letters SHTHPNS if she so desires."). They are further free to put up signs with the SCV logo on their own property, or elsewhere with the owner's permission. They are likewise free to publish the logo wherever they may. They may even lobby the legislature to obtain a statutory plate.[24] As such, consistent with the Supreme Court's nonpublic forum precedent, other avenues of speech remain fully available to the SCV. *See Perry Educ. Ass'n*, 460 U.S. at 53–54 ("The variety and type of alternative modes of access present here compare favorably with those in other non-public forum cases where we have upheld restrictions on access.") (citing *Greer*, 424 U.S. at 839; *Pell v. Procunier*, 417 U.S. 817, 827–28 (1974) (noting prison inmates may communicate with

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drivers to the point of being unreasonably dangerous" is not reasonable. There was scant evidence before the DMVB to support such a finding. In addition, vague, "public safety" standards are no standard at all in First Amendment analysis, and generally cannot support a restraint on speech. *See Lewis v. Wilson*, 253 F.3d 1077, 1080–81 (8th Cir. 2001).

[24] Although suggesting a petitioner for judicial relief should look to the legislative branch for assistance is usually the practical equivalent of there being no relief available, here the Texas legislature can and frequently has approved a variety of plates—including controversial plates, such as "Choose Life"—by direct legislative action.

media by mail and through visitors)). The Court thus concludes the ban on derogatory content, both facially and as applied, is reasonable, and does not offend the First Amendment.

E. Prior Decisions in Favor of the SCV are Unavailing

SCV relies heavily on the District Court of Massachusett's opinion in *Sons of Confederate Veterans, Inc. v. Glendening*, 954 F. Supp. 1099 (D. Md. 1997). The Court has carefully reviewed this opinion, which is thoughtful and well written, but the Court finds it ultimately unpersuasive. There, confronting very similar facts, Judge Smalkin concluded:

> The SCV and SCV–MD indisputably view the flag in their logo as representing "honor and chivalry in battle during the War between the States." Presumably, the numerous, unnamed persons who complained to the [Motor Vehicle Administration (MVA)] view that same flag as a symbol of racial oppression and hostility. In light of these divergent views, when the MVA Administrator, in response to "numerous complaints," halted the issuance of SCV–MD organization plates bearing the Confederate battle flag logo and ordered the recall of all previously issued such plates, it is plain beyond dispute that he advanced the viewpoint of those offended by the flag and discouraged the viewpoint of those proud of it.

Id. at 1103–04 (citations omitted). The Maryland District court rested this conclusion on the Supreme Court's seminal holding in *R.A.V. v. City of St. Paul*,

505 U.S. 377 (1992). There, the Supreme Court struck down a ban on placing swastikas, burning crosses, or similarly offensive symbols on public or private property, when the actor in question knew or had reason to know doing so would arouse anger, alarm, or resentment in others due to race, color, creed, religion, or gender. *Id.* at 380.

> Displays containing abusive invective, no matter how vicious or severe, are permissible [under the ordinance] unless they are addressed to one of the specified disfavored topics. Those who wish to use "fighting words" in connection with other ideas—to express hostility, for example, on the basis of political affiliation, union membership, or homosexuality—are not covered. The First Amendment does not permit St. Paul to impose special prohibitions on those speakers who express views on disfavored subjects.

Id. at 391. After quoting the foregoing, Judge Smalkin reasoned:

> Similarly, under the Defendants' guidelines, although the use of the Confederate battle flag logo to convey that the flag is a symbol of honor may be prohibited because it is a view that some may find offensive as racially hostile or degrading speech, the use of the flag (perhaps inside a red circle superimposed with an x) to denounce racism would presumably be permissible. The First Amendment does not countenance such viewpoint discrimination, even for the purpose of suppressing speech that may be perceived as racially degrading or hostile.

Glendening, 954 F. Supp. at 1104.

The Court respectfully disagrees. The ordinance at issue in *R.A.V.* was not viewpoint neutral; rather, it singled out some types of offensive speech, directed at particular groups, making that speech illegal, while allowing speech of an otherwise equally offensive content, if the viewpoint was directed at other, unprotected groups, such as "political affiliation, union membership, or homosexuality." *R.A.V.*, 505 U.S. at 391.

With all due respect to Judge Smalkin, nothing in *this* record suggests a Confederate flag inside "a red circle superimposed with an x" would be permitted under the specialty plate regulations, which precludes application of Judge Smalkin's conclusion the similar regulations in *Glendening* were not viewpoint neutral. Placing the Confederate battle flag inside a circle–x is obviously derogatory towards those Americans who fought for the Confederacy, and would therefore offend the many people today who honor their service. As such, a plate design featuring a crossed-out Confederate battle flag would be just as impermissible under the regulations as the SCV's attempt to positively display the battle flag. For this reason, the regulations at issue here are distinguishable from the ordinance in *R.A.V.*, which, by protecting some groups, but not others, singled out some viewpoints as being impermissible, while allowing other viewpoints. This is confirmed by a comparison of the text of the regulation in *R.A.V.*, which, as noted above described specific classes of persons who are protected, and specific types of conduct which was prohibited, with the regulation here, which prohibits any type of derogatory speech, no matter who it is directed towards. *Compare id.* at 380 ("'Whoever places on public or private property a symbol, object, appellation, characterization or

graffiti, including, but not limited to, a burning cross or Nazi swastika . . . on the basis of race, color, creed, religion or gender . . . ."), *with* former 43 TEX. ADMIN. CODE § 217.28(c)(3) (defining "derogatory" as "an expression of hate directed toward people or groups that is demeaning to people or groups, or associated with an organization that advocates such expressions").

There is a further, very important, difference which *Glendening* did not consider.[25] The ordinance in *R.A.V.* was sweeping, and extended to all property, public and private. Under the ordinance, a landowner could not set up a swastika, or burn a cross, even on his own property.[26] Here, all that is restricted are the small areas of space taken up by the two license plates which Texas law requires be installed on all vehicles in the state.

SCV also relies heavily on a Fourth Circuit decision, however, it is factually distinct from this case. *Sons of Confederate Veterans, Inc. ex rel. Griffin v. Comm'r of the Va. Dep't of Motor Vehicles*, 288 F.3d 610 (4th Cir.

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[25] The Court does not suggest this was an oversight on Judge Smalkin's part. Rather, having concluded the state's attempt to recall the Sons of Confederate Veterans' plates constituted impermissible viewpoint discrimination, the District Court of Maryland had no need to consider whether the Maryland plate program constituted a designated public forum, or a nonpublic forum, thus obviating any need to look at the other aspects of the ordinance in *R.A.V.* *See Glendening*, 954 F. Supp. at 1103 ("The Court need not decide whether the organization plate is a public or nonpublic forum, however, because the MVA's actions constitute impermissible viewpoint discrimination in either forum . . . .").

[26] The ordinance also required knowledge or reason to know the conduct in question would cause offense, but it would be a rare person indeed who would put up those symbols and yet be unaware of their meaning.

2002). There, the Fourth Circuit considered the following Virginia statute:

> On receipt of an application therefor and written evidence that the applicant is a member of the Sons of Confederate Veterans, the Commissioner shall issue special license plates to members of the Sons of Confederate Veterans. *No logo or emblem of any description shall be displayed* or incorporated into the design of license plates issued under this section.

VA. CODE § 46.2-746.22 (emphasis added).

The statute in question, and the related license plates, were all part of a special plate program by which the Virginia legislature authorized issuance of special plates to members and supporters of a variety of organizations. *Griffin*, 288 F.3d at 614. "In contrast to other Virginia statutes authorizing special plates for members or supporters of various organizations, this statute contains a restriction (the logo restriction) providing that '[n]o logo or emblem of any description shall be displayed or incorporated into the design of license plates issued under this section.'" *Id.* at 613 (quoting VA. CODE § 46.2-746.22). The Court almost need go no further in discussing *Griffin*. The Fourth Circuit unsurprisingly found the SCV had been singled out based on its viewpoint, because it was forbidden from including any logo (when all other groups were permitted a logo), and therefore struck down the statute. Indeed, the Fourth Circuit, after careful review of the relevant statutes, found:

> The logo restriction is the only restriction of its kind contained in any of the numerous special-plate-authorizing statutes. A review of these numerous and varied statutes does not reveal

> any intent on the Commonwealth's part to limit, on the basis of content, the scope of speech within the special plate forum in any principled way.

Id. at 626.

In stark contrast, no statute or regulation is directed against the SCV in Texas. Rather, the DMVB cited the general prohibition on derogatory content, and safety concerns, in rejecting the SCV's application. There is no suggestion in the record the SCV's application would have been denied if its logo did not contain the Confederate battle flag; unlike in *Griffin*, the state has not singled out the SCV and forbidden it to use *any* logo on a specialty plate. As such, *Griffin* is distinguishable from this case. In further distinction, the Texas legislature, unlike that of Virginia, has crafted a generally applicable, principled limit on content: the ban on derogatory content authorized by section 504.801, and effected by former section 217.28(c)(3) of the Administrative Code. In sum, while *Griffin* reached a different result, the facts in *Griffin* stand in an illustrating contrast to the facts in this case, and thus the Court's findings here are not contrary to *Griffin*.

F. The Same Result Applies if the Specialty Plates are a Limited Forum

Alternatively, the Court finds even if the specialty plate program constitutes a limited public forum, the rule against derogatory content passes muster within the Fifth Circuit for the same reasons, because restrictions in both nonpublic forums, and limited forums, are permissible so long as the restrictions are reasonable, and not based on opposition to the speaker's viewpoint.

Chiu, 260 F.3d at 347. This is confirmed by a recent Supreme Court opinion regarding a limited forum.

The Supreme Court has reiterated that viewpoint-neutral restrictions on limited public forums are permissible, even when application of those restrictions falls more harshly upon some groups than others. *Christian Legal Soc'y Chapter of the Univ. of Cal., Hastings Coll. of the Law v. Martinez*, 130 S. Ct. 2971, 2978 (2010); *id.* at 2996 (Stevens, J., concurring) ("[I]t is a basic tenet of First Amendment law that disparate impact does not, in itself, constitute viewpoint discrimination."). There, the Supreme Court considered a student-fee funded, "registered student organization" (RSO) program. *Id.* at 2979 (majority opinion). The program, which was open to any student organization, allowed the use of Hastings' facilities, and provided financial support to qualifying student organizations. *Id.* Inclusion within the program, however, was predicated on the RSO's commitment to be open to "all-comers," meaning no student could be excluded from membership, or from the opportunity to compete for leadership within an RSO, on the basis of, *inter alia*, religion or sexual orientation. *Id.* at 2980–81. The Christian Legal Society was thus denied RSO status because it required its members to affirm their status as Christians, and to reject homosexuality as sinful. *Id.* However, Hastings allowed the Christian Legal Society free use of Hastings facilities for meetings; what was denied was access to certain RSO-only notice boards, and funding from student fees. *Id.* at 2981. The Supreme Court found this was not viewpoint discrimination, but rather was permissible limitation to a limited public forum. *Id.* at 2993.

What is instructive here is the Supreme Court held enforcing the "all-comers" rule, which of course negatively impacted the Christian Legal Society, but was readily complied with by other student organizations, nevertheless did not constitute viewpoint discrimination. *Id.* at 2994. In the same vein, the specialty plate rule precluding derogatory content has negatively impacted the SCV, but not other organizations. Nevertheless, just as Hastings was properly able to limit access to its limited public forum to those organizations which were able to conform to the viewpoint-neutral "all-comers" requirement, the Court finds Texas may properly limit the specialty plate forum to the viewpoint-neutral requirement that specialty plates not be derogatory in content. *See id.* Much as the Christian Legal Society was seeking "not parity with other organizations, but a preferential exemption from" the challenged policy, so the SCV is seeking an exemption from the rule forbidding issuance of a specialty plate which contains derogatory content. *Id.* at 2978. As Justice Stevens succinctly put it in his concurrence, "Although the First Amendment may protect CLS's discriminatory practices off campus, it does not require a public university to validate or support them." *Id.* at 2996 (Stevens, J., concurring). Similarly, the First Amendment protects SCV's determination to honor the courage of Confederate troops, and likewise protects SCV's decision to adopt and display the Confederate battle flag as its symbol. However, the First Amendment does not require the state to endorse the battle flag by putting it on government-controlled property where the state does not want it.[27]

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[27] Of course, as any casual visitor to the Texas Capitol can attest, Continued …

Conclusion

It is a sad fact the Confederate battle flag has been co-opted by odious groups as a symbol of racism and white supremacy. There is no reason to doubt the SCV and its members are entirely heartfelt in their condemnation of this misuse. It is to be hoped the passage of time, and efforts such as the SCV's resolution, will eventually remove a blight from the flag under which feats of great heroism and fortitude were accomplished. All the traditional avenues of public discourse are open to those who would fully redeem the battle flag. Nevertheless, the state of Texas has chosen to abstain from this debate, and the First Amendment does not require it to open up state-issued license plates as an additional forum in which to contest the flag's meaning.

Accordingly,

> IT IS ORDERED that Plaintiffs Texas Division, Sons of Confederate Veterans, Inc, et al.'s Motion for Summary Judgment [#35] is DENIED;

Texas is not averse to putting up public monuments which honor the service of Confederate troops. However, the legislature's decision there does not require it to put the Confederate battle flag anywhere a private citizen demands. Furthermore, the two large Confederate monuments on the Capitol grounds in fact illustrate why the state might be hesitant to endorse a plate consisting of little more than the battle flag. The monuments, one to Hood's Texas Brigade, the other to all armed forces of the Confederacy, feature statues of Confederate servicemen, and have detailed inscriptions memorializing their service. The battle flag is not a prominent feature on either monument. As such, there can be no mistake the state is endorsing the service of Confederate troops, not the latter-day, racist connotations of the battle flag.

IT IS FINALLY ORDERED that Defendants Victor T. Vandergriff et al.'s Motion for Summary Judgment [#37] is GRANTED.

SIGNED this the 12th day of April 2013.

SAM SPARKS
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

TEXAS DIVISION, SONS OF CONFEDERATE VETERANS, INC.; GRANVEL J. BLOCK; and RAY W. JAMES,
Plaintiffs,

-vs-

VICTOR T. VANDERGRIFF in his official capacity as Chairman of the Motor Vehicles Board; CLIFFORD BUTLER in his official capacity as a member of the Board; RAYMOND PALACIOS, JR., in his official capacity as a member of the Board; BLAKE INGRAM in his official capacity as a member of the Board; LAURA RYAN in her official capacity as a member of the Board; VICTOR RODRIGUEZ in his official capacity as a member of the Board; MARVIN RUSH in his official capacity as a member of the Board; and

Case No. A-11-CA-1049-SS

JOHN WALKER, III, in his official capacity as a member of the Board,
Defendants.

AMENDED JUDGMENT

BE IT REMEMBERED on this day the Court is advised its original judgment in this matter did not accurately reflect the Defendants to this lawsuit, as named in the Amended Complaint, and the Court therefore issues this amended judgment, correcting the style.

IT IS ORDERED, ADJUDGED, and DECREED that the Plaintiffs Texas Division, Sons of Confederate Veterans, Inc., Granvel J. Block, and Ray W. James TAKE NOTHING in this cause against the Defendants, the parties to bear their own costs.

SIGNED this the /s/ 1st day of May 2013.

/s/ Sam Sparks
SAM SPARKS
UNITED STATES DISTRICT JUDGE

Sec. 504.008. SPECIALTY LICENSE PLATES. (a) The department shall prepare the designs and specifications of specialty license plates.

(b) Any motor vehicle other than a vehicle manufactured for off-highway use only is eligible to be issued specialty license plates, provided that the department may vary the design of a license plate to accommodate or reflect its use on a motor vehicle other than a passenger car or light truck.

(c) An application for specialty license plates must be submitted in the manner specified by the department, provided that if issuance of a specialty license plate is limited to particular persons or motor vehicles, the application must be accompanied by evidence satisfactory to the department that the applicant or the applicant's vehicle is eligible.

(d) Each fee described by this chapter is an annual fee, provided that the department may prorate the fee for a specialty license plate fee on a monthly basis to align the license plate fee to the registration month for the motor vehicle for which the license plate was issued, and if a fee is prorated the allocation of the fee by this chapter to an account or fund shall be prorated in proportion.

(e) The director or the director's designee may refuse to issue a specialty license plate with a design or alphanumeric pattern that the director or designee considers potentially objectionable to one or more members of the public and the director or designee's refusal may not be overturned in the absence of an abuse of discretion.

(f) For each specialty license plate that is issued by a county assessor- collector and for which the de-

partment is allocated a portion of the fee for administrative costs, the department shall credit 50 cents from its administrative costs to the county treasurer of the applicable county, who shall credit the money to the general fund of the county to defray the costs to the county of administering this chapter.

(g) If the owner of a motor vehicle for which a specialty license plate is issued disposes of the vehicle or for any reason ceases to be eligible for that specialty license plate, the owner shall return the specialty license plate to the department.

(h) A person who is issued a specialty license plate may not transfer the plate to another person or vehicle unless the department approves the transfer.

Added by Acts 2011, 82nd Leg., R.S., Ch. 1296 (H.B. 2357), Sec. 173, eff. January 1, 2012.

SUBCHAPTER G. SPECIALTY LICENSE PLATES FOR GENERAL DISTRIBUTION

Sec. 504.601. GENERAL PROVISIONS APPLICABLE TO SPECIALTY LICENSE PLATES FOR GENERAL DISTRIBUTION. (a) Unless expressly provided by this subchapter or department rule:

(1) the fee for issuance of a license plate under this subchapter is $30; and

(2) of each fee received under this subchapter, the department shall use $8 to defray its administrative costs in complying with this subchapter.

(b) This section does not apply to a specialty license plate marketed and sold by a private vendor at the request of the specialty license plate sponsor under Section 504.6011.

Added by Acts 2003, 78th Leg., ch. 1320, Sec. 6, eff. Sept. 1, 2003.

Amended by:

Acts 2009, 81st Leg., R.S., Ch. 1381 (S.B. 1616), Sec. 4, eff. September 1, 2009.

Sec. 504.6011. GENERAL PROVISIONS APPLICABLE TO SPECIALTY LICENSE PLATES FOR GENERAL DISTRIBUTION SOLD THROUGH PRIVATE VENDOR. (a) The sponsor of a specialty license plate may contract with the private vendor authorized under Subchapter J for the marketing and sale of the specialty license plate.

(b) The fee for issuance of a specialty license plate described by Subsection (a) is the amount established under Section 504.851.

(c) Notwithstanding any other law, from each fee received for the issuance of a specialty license plate described by Subsection (a), the department shall:

(1) deduct the administrative costs described by Section 504.601(a)(2);

(2) deposit to the credit of the account designated by the law authorizing the specialty license plate the portion of the fee for the sale of the plate that the state would ordinarily receive under the contract described by Section 504.851(a); and

(3) pay to the private vendor the remainder of the fee.

(d) A sponsor of a specialty license plate authorized to be issued under this subchapter before November 19, 2009, may reestablish its specialty license plate under Sections 504.601 and 504.702 and be credited its previous deposit with the department if a contract entered into by the sponsor under Subsection (a) terminates.

Added by Acts 2009, 81st Leg., R.S., Ch. 1381 (S.B. 1616), Sec. 5, eff. September 1, 2009.

Amended by:

Acts 2011, 82nd Leg., R.S., Ch. 1296 (H.B. 2357), Sec. 203, eff. January 1, 2012.

. . . .

Sec. 504.602. KEEP TEXAS BEAUTIFUL LICENSE PLATES. (a) The department shall issue specialty license plates including the words "Keep Texas Beautiful." The department shall design the license plates in consultation with Keep Texas Beautiful, Inc.

(b) After deduction of the department's administrative costs, the remainder of the fee for issuance of the license plates shall be used in connection with the department's litter prevention and community beautification programs.

Added by Acts 2003, 78th Leg., ch. 1320, Sec. 6, eff. Sept. 1, 2003.

Sec. 504.603. TEXAS CAPITOL LICENSE PLATES. (a) The department shall design and issue specialty license plates relating to the State Capitol. The department may design the license plates in consultation with the State Preservation Board.

(b) After deduction of the department's administrative costs, the remainder of the fee for issuance of the license plates shall be deposited to the credit of the Capitol fund established under Section 443.0101, Government Code.

Added by Acts 2003, 78th Leg., ch. 1320, Sec. 6, eff. Sept. 1, 2003.

Amended by:

Acts 2013, 83rd Leg., R.S., Ch. 1251 (S.B. 1914), Sec. 2, eff. September 1, 2013.

Sec. 504.604. TEXAS COMMISSION ON THE ARTS LICENSE PLATES. (a) The department shall issue specialty license plates including the words "State of the Arts." The department shall design the license plates in consultation with the Texas Commission on the Arts.

(b) After deduction of the department's administrative costs, the remainder of the fee for issuance of the license plates shall be deposited to the credit of the Texas Commission on the Arts operating fund established under Section 444.027, Government Code.

Added by Acts 2003, 78th Leg., ch. 1320, Sec. 6, eff. Sept. 1, 2003.

Sec. 504.605. ANIMAL FRIENDLY LICENSE PLATES. (a) The department shall issue specialty li-

cense plates including the words "Animal Friendly." The department shall design the license plates.

(b) After deduction of the department's administrative costs, the remainder of the fee for issuance of the license plates shall be deposited to the credit of the animal friendly account established by Section 828.014, Health and Safety Code.

Added by Acts 2003, 78th Leg., ch. 1320, Sec. 6, eff. Sept. 1, 2003.

Sec. 504.606. BIG BEND NATIONAL PARK LICENSE PLATES. (a) The department shall issue specialty license plates that include one or more graphic images of a significant feature of Big Bend National Park. The department shall design the license plates in consultation with the Parks and Wildlife Department and any organization designated by it.

(b) After deduction of the department's administrative costs, the remainder of the fee for issuance of the license plates shall be deposited to the credit of the Big Bend National Park account in the state treasury. Money in the account may be used only by the Parks and Wildlife Department to support the activities of a designated nonprofit organization whose primary purpose is the improvement or preservation of Big Bend National Park.

Added by Acts 2003, 78th Leg., ch. 1320, Sec. 6, eff. Sept. 1, 2003.

Sec. 504.607. READ TO SUCCEED. (a) The department shall issue specialty license plates including the words "Read to Succeed." The department shall design the license plates.

(b) After deduction of the department's administrative costs, the remainder of the fee shall be deposited

to the credit of the "Read to Succeed" account in the general revenue fund. Money in the account may be used only to provide educational materials for public school libraries. The account is composed of:

(1) money required to be deposited to the credit of the account under this subsection; and

(2) donations made to the account.

Added by Acts 2003, 78th Leg., ch. 1320, Sec. 6, eff. Sept. 1, 2003.

Sec. 504.608. MOTHERS AGAINST DRUNK DRIVING LICENSE PLATES. (a) The department shall issue specialty license plates that include the words "Mothers Against Drunk Driving." The department shall design the license plates in consultation with Mothers Against Drunk Driving.

(b) After deduction of the department's administrative costs, the remainder of the fee for issuance of the license plates shall be deposited to the credit of the general revenue fund and may be appropriated only to the Texas Higher Education Coordinating Board in making grants to benefit drug-abuse prevention and education programs sponsored by Mothers Against Drunk Driving.

Added by Acts 2003, 78th Leg., ch. 1320, Sec. 6, eff. Sept. 1, 2003.

Amended by:

Acts 2005, 79th Leg., Ch. 575 (H.B. 1480), Sec. 2, eff. September 1, 2005.

Sec. 504.609. UNITED STATES OLYMPIC COMMITTEE LICENSE PLATES. The department shall issue specialty license plates including the words "United States Olympic Committee." The department shall design the license plates in consultation with the United States Olympic Committee.

Added by Acts 2003, 78th Leg., ch. 1320, Sec. 6, eff. Sept. 1, 2003.

Sec. 504.610. TEXAS AEROSPACE COMMISSION LICENSE PLATES. (a) The department may issue specialty license plates in recognition of the Texas Aerospace Commission. The department shall design the license plates in consultation with the Texas Aerospace Commission.

(b) After deduction of the department's administrative costs, the remainder of the fee for issuance of the license plates shall be deposited to the credit of the general revenue fund.

Added by Acts 2003, 78th Leg., ch. 1320, Sec. 6, eff. Sept. 1, 2003.

Amended by:

Acts 2013, 83rd Leg., R.S., Ch. 1135 (H.B. 2741), Sec. 79, eff. September 1, 2013.

Sec. 504.611. VOLUNTEER ADVOCATE PROGRAM LICENSE PLATES. (a) The department shall issue specialty license plates in recognition of children. The department shall design the license plates in consultation with the attorney general.

(b) After deduction of the department's administrative costs, the remainder of the fee for issuance of the license plates shall be deposited to the credit of the attorney general volunteer advocate program account in the general revenue fund. Money deposited to the credit of the volunteer advocate program account may be used only by the attorney general to fund a contract entered into by the attorney general under Section 264.602, Family Code.

Added by Acts 2003, 78th Leg., ch. 1320, Sec. 6, eff. Sept. 1, 2003.

Sec. 504.612. TEXAS YOUNG LAWYERS ASSOCIATION LICENSE PLATES. (a) The department shall issue specialty license plates including the words "And Justice for All." The department shall design the license plates in consultation with the Texas Young Lawyers Association.

(b) After deduction of the department's administrative costs, the remainder of the fee for issuance of the license plates shall be deposited to the credit of the basic civil legal services account established by Section 51.943, Government Code.

Added by Acts 2003, 78th Leg., ch. 1320, Sec. 6, eff. Sept. 1, 2003.

Sec. 504.613. HOUSTON LIVESTOCK SHOW AND RODEO LICENSE PLATES. (a) The department shall issue specialty license plates including the words "Houston Livestock Show and Rodeo." The department shall design the license plates in consultation with the Houston Livestock Show and Rodeo.

(b) After deduction of the department's administrative costs, the remainder of the fee for issuance of the license plates shall be deposited to the credit of the Houston Livestock Show and Rodeo scholarship account in the state treasury. Money in the account may be used only by the Texas Higher Education Coordinating Board in making grants to benefit the Houston Livestock Show and Rodeo.

Added by Acts 2003, 78th Leg., ch. 1320, Sec. 6, eff. Sept. 1, 2003.

Sec. 504.614. PROFESSIONAL SPORTS TEAM LICENSE PLATES. (a) The department may issue specialty license plates that include the name and insignia of a professional sports team located in this state.

The department shall design the license plates in consultation with the professional sports team and may enter a trademark license with the professional sports team or its league to implement this section. A license plate may be issued under this section only for a professional sports team that:

(1) certifies to the department that the requirements of Section 504.702 are met; and

(2) plays its home games in a facility constructed or operated, in whole or in part, with public funds.

(b) After deduction of the department's administrative costs, the remainder of the fee for issuance of the license plates shall be sent to the public entity that provided public funds for the construction or renovation of the facility in which the professional sports team plays its home games or that provides public funds for the operation of that facility. The funds shall be deposited to the credit of the venue project fund, if the public entity has created a venue project fund under Section 334.042 or 335.072, Local Government Code. If the public entity has not created a venue project fund, funds distributed to a public entity under this section must first be used to retire any public debt incurred by the public entity in the construction or acquisition of the facility in which the professional sports team plays its home games. After that debt is retired, funds distributed to the public entity may be spent only for maintenance or improvement of the facility.

(b-1) A public entity that receives money under Subsection (b) may contract with the private vendor under Section 504.6011 to distribute the entity's portion of

the money in a manner other than that described by Subsection (b).

(c) In this section:

(1) "Public entity" includes a municipality, county, industrial development corporation, or special district that is authorized to plan, acquire, establish, develop, construct, or renovate a facility in which a professional sports team plays its home games.

(2) "Professional sports team" means a sports team that is a member or an affiliate of a member of the National Football League, National Basketball Association, or National Hockey League or a major league baseball team.

Added by Acts 203, 78th Leg., ch. 1320, Sec. 6, eff. Sept. 1, 2003.

Amended by:

Acts 2011, 82nd Leg., R.S., Ch. 1296 (H.B. 2357), Sec. 204, eff. January 1, 2012.

Sec. 504.615. COLLEGIATE LICENSE PLATES. (a) The department shall issue specialty license plates that include the name and insignia of a college. The department shall design the license plates in consultation with the applicable college. The department may issue a license plate under this section only for a college that certifies to the department that the requirements of Section 504.702 are met.

(b) After deduction of the department's administrative costs, the remainder of the fee for issuance of the license plates shall be deposited to the credit of the general revenue fund. The money may be used only for:

(1) scholarships to students who demonstrate a need for financial assistance under Texas Higher Education Coordinating Board rule; or

(2) Texas Public Educational Grants awarded under Subchapter C, Chapter 56, Education Code, if the fee is for the issuance of a license plate for a college described by Subsection (e)(1).

(c) If the fee is for the issuance of license plates for a college described by Subsection (e)(1), the money:

(1) shall be deposited to the credit of the institution of higher education designated on the license plates; and

(2) is supplementary and is not income for purposes of reducing general revenue appropriations to that institution of higher education.

(d) If the fee is for the issuance of license plates for a college described by Subsection (e)(2), the money shall be deposited to the credit of the Texas Higher Education Coordinating Board. The money:

(1) shall be allocated to students at the college designated on the plates; and

(2) is in addition to other money that the board may allocate to that college.

(d-1) If the fee is for the issuance of license plates for a college described by Subsection (e)(3), the money:

(1) shall be deposited to the credit of the Texas Higher Education Coordinating Board; and

(2) is supplementary and is not income for purposes of reducing general revenue appropriations to that board.

(e) In this section, "college" means:

(1) an institution of higher education as defined by Section 61.003, Education Code;

(2) a private college or university described by Section 61.222, Education Code; or

(3) a college or university that is not located in this state.

Added by Acts 2003, 78th Leg., ch. 1320, Sec. 6, eff. Sept. 1, 2003.

Amended by:

Acts 2005, 79th Leg., Ch. 1181 (S.B. 1227), Sec. 53, eff. September 1, 2005.

Acts 2011, 82nd Leg., R.S., Ch. 1296 (H.B. 2357), Sec. 205, eff. January 1, 2012.

Sec. 504.616. TEXAS READS LICENSE PLATES. (a) The department shall issue specialty license plates including the words "Texas Reads" that incorporate one or more submissions from middle school students in a competition conducted by the department.

(b) After deduction of the department's administrative costs, the remainder of the fee shall be deposited to the credit of the Texas Reads account in the general revenue fund. Money from the account may be used only to make grants under Section 441.0092, Government Code. The account is composed of:

(1) money required to be deposited to the credit of the account under this subsection; and

(2) donations made to the account.

Added by Acts 2003, 78th Leg., ch. 1320, Sec. 6, eff. Sept. 1, 2003.

Amended by:

Acts 2011, 82nd Leg., R.S., Ch. 1296 (H.B. 2357), Sec. 206, eff. January 1, 2012.

Sec. 504.617. TEXAS. IT'S LIKE A WHOLE OTHER COUNTRY LICENSE PLATES. (a) The department shall issue specialty license plates that include the trademarked Texas patch and the words "Texas. It's Like A Whole Other Country." The department shall de-

sign the license plates in consultation with the Texas Department of Economic Development.

(b) After deduction of the department's administrative costs, the remainder of the fee for issuance of the license plates shall be deposited to the credit of the tourism account in the general revenue fund to finance the Texas Department of Economic Development's tourism activities.

Added by Acts 2003, 78th Leg., ch. 1320, Sec. 6, eff. Sept. 1, 2003.

Sec. 504.618. CONSERVATION LICENSE PLATES. (a) The department shall issue specialty license plates to support Parks and Wildlife Department activities. The department shall design the license plates in consultation with the Parks and Wildlife Department.

(b) After deduction of the department's administrative costs, the remainder of the fee for issuance of the license plates shall be deposited to the credit of the Texas parks and wildlife conservation and capital account established by Section 11.043, Parks and Wildlife Code. Money deposited in the Texas parks and wildlife conservation and capital account under this section is supplementary and is not income for the purposes of reducing general revenue appropriations to the Parks and Wildlife Department.

Added by Acts 2003, 78th Leg., ch. 1320, Sec. 6, eff. Sept. 1, 2003.

Sec. 504.619. TEXAS COMMISSION FOR THE DEAF AND HARD OF HEARING LICENSE PLATES. (a) The department shall issue specialty license plates in support of the Texas Commission for the Deaf and Hard of Hearing. The department shall design

the license plates in consultation with the Texas Commission for the Deaf and Hard of Hearing.

(b) After deduction of the department's administrative costs, the remainder of the fee for issuance of the license plates:

(1) shall be deposited to the credit of the general revenue fund; and

(2) may be appropriated only to the Texas Commission for the Deaf and Hard of Hearing for direct services programs, training, and education.

Added by Acts 2003, 78th Leg., ch. 1320, Sec. 6, eff. Sept. 1, 2003.

Sec. 504.620. TEXANS CONQUER CANCER LICENSE PLATES. (a) The department shall issue specialty license plates that include the words "Texans Conquer Cancer." The department shall design the license plates in consultation with the Cancer Prevention and Research Institute of Texas.

(b) After deduction of the department's administrative costs, the remainder of the fee for issuance of the license plates shall be deposited to the credit of the cancer prevention and research fund established by Section 102.201, Health and Safety Code.

Amended by:

Acts 2007, 80th Leg., R.S., Ch. 266 (H.B. 14), Sec. 6, eff. November 6, 2007.

Sec. 504.6201. CANCER OF UNKNOWN PRIMARY ORIGIN AWARENESS LICENSE PLATES.

(a) The department shall issue specialty license plates to raise awareness of cancer of unknown primary origin. The license plates must include the words "A Fine Cause for Unknown Cancer." The department shall de-

sign the license plates in consultation with the Orange Grove Family Career and Community Leaders of America.

(b) After deduction of the department's administrative costs, the remainder of the fee for issuance of the license plates shall be deposited to the credit of the cancer prevention and research fund established by Section 102.201, Health and Safety Code.

Added by Acts 2009, 81st Leg., R.S., Ch. 1005 (H.B. 4064), Sec. 1, eff. September 1, 2009.

Sec. 504.621. SPECIAL OLYMPICS TEXAS LICENSE PLATES. (a) The department shall issue specialty license plates that include the words "Special Olympics Texas." The department shall design the license plates in consultation with Special Olympics Texas.

(b) After deduction of the department's administrative costs, the remainder of the fee for issuance of the license plates shall be deposited to the credit of the Special Olympics Texas account established by Section 533.018, Health and Safety Code.

Added by Acts 2003, 78th Leg., ch. 1320, Sec. 6, eff. Sept. 1, 2003.

Sec. 504.622. GIRL SCOUT LICENSE PLATES. (a) The department shall issue specialty license plates that include the words "Girl Scouts." The department shall design the license plates in consultation with the Girl Scout Councils of Texas.

(b) After deduction of the department's administrative costs, the remainder of the fee for issuance of the license plates shall be deposited to the credit of the Girl Scout account in the state treasury. Money in the account may be used by the Texas Higher Education Co-

ordinating Board in making grants to benefit educational projects sponsored by the Girl Scout Councils of Texas.
Added by Acts 2003, 78th Leg., ch. 1320, Sec. 6, eff. Sept. 1, 2003.

Sec. 504.623. TEXAS YMCA. (a) The department shall issue specialty license plates in honor of the Young Men's Christian Association. The department shall design the license plates.

(b) After deduction of the department's administrative costs, the remainder of the fee for issuance of the license plates shall be deposited to the credit of the YMCA account established by Section 7.025, Education Code, as added by Chapter 869, Acts of the 77th Legislature, Regular Session, 2001.
Added by Acts 2003, 78th Leg., ch. 1320, Sec. 6, eff. Sept. 1, 2003.

Sec. 504.625. TEXAS AGRICULTURAL PRODUCTS LICENSE PLATES. (a) The department shall issue specialty license plates that include the words "Go Texan" and the "Go Texan" logo of the Department of Agriculture. The department shall design the license plates in consultation with the commissioner of agriculture.

(b) After deduction of the department's administrative costs, the department shall deposit the remainder of the proceeds to the credit of the "Go Texan" partner program account established by Section 46.008, Agriculture Code.
Added by Acts 2003, 78th Leg., ch. 1320, Sec. 6, eff. Sept. 1, 2003.

Sec. 504.626. TEXAS CITRUS INDUSTRY. (a) The department shall issue specialty license plates in honor

of the citrus industry in this state. The department shall design the license plates.

(b) After deduction of the department's administrative costs, the remainder of the fee for issuance of the license plates shall be deposited to the credit of an account in the general revenue fund that may be appropriated only to Texas A&M University-Kingsville to provide financial assistance to graduate students in the College of Agriculture and Human Sciences.

Added by Acts 2003, 78th Leg., ch. 1320, Sec. 6, eff. Sept. 1, 2003.

Sec. 504.627. WATERFOWL AND WETLAND CONSERVATION LICENSE PLATES. (a) The department shall issue specialty license plates including one or more graphic images supplied by the Parks and Wildlife Department. The department shall design the license plates in consultation with the Parks and Wildlife Department and any organization designated by it.

(b) After deducting the department's administrative costs, the remainder of the fee for issuance of the license plates shall be deposited to the credit of an account in the state treasury. Money in the account may be used only by the Parks and Wildlife Department to support the activities of a designated nonprofit organization whose primary purpose is the conservation of waterfowl and wetland.

Added by Acts 2003, 78th Leg., ch. 1320, Sec. 6, eff. Sept. 1, 2003.

Sec. 504.6275. SAVE OUR BEACHES LICENSE PLATES. (a) The department shall issue specialty license plates to support the coastal protection and improvement program.

(b) After deduction of the department's administrative costs, the remainder of the fee for issuance of the license plates shall be deposited to the credit of the coastal protection and improvement fund established by Section 33.653, Natural Resources Code, to fund the cleaning, maintaining, nourishing, and protecting of state beaches.

Added by Acts 2009, 81st Leg., R.S., Ch. 625 (H.B. 1286), Sec. 1, eff. September 1, 2009.

Sec. 504.628. UNITED WE STAND LICENSE PLATES. (a) The department shall issue specialty license plates that include the words "United We Stand" and include only the colors red, white, blue, and black.

(b) After deduction of the department's administrative costs, the remainder of the fee for issuance of the license plates shall be deposited to the credit of the Texas mobility fund.

Added by Acts 2003, 78th Leg., ch. 1320, Sec. 6, eff. Sept. 1, 2003.

Sec. 504.630. AIR FORCE ASSOCIATION LICENSE PLATES. (a) The department shall issue specialty license plates that include the words "Air Force Association." The department shall design the license plates in consultation with the Air Force Association of Texas.

(b) After deduction of the department's administrative costs, the remainder of the fee shall be deposited to the credit of the Air Force Association of Texas account in the state treasury. Money in the account may be used by the Texas Veterans Commission in making grants to benefit projects sponsored by the Air Force Association of Texas.

Added by Acts 2003, 78th Leg., ch. 1320, Sec. 6, eff. Sept. 1, 2003.

Sec. 504.631. TEXAS STATE RIFLE ASSOCIATION LICENSE PLATES. (a) The department shall issue specialty license plates to honor the Texas State Rifle Association.

(b) After deduction of the department's administrative costs, the remainder of the fee shall be deposited to the credit of an account in the general revenue fund that may be appropriated only to the Texas Cooperative Extension of The Texas A&M University System as follows:

(1) 50 percent to supplement existing and future scholarship programs supported by the Texas State Rifle Association; and

(2) 50 percent to support the 4-H Shooting Sports Program for youth.

Added by Acts 2003, 78th Leg., ch. 1320, Sec. 6, eff. Sept. 1, 2003.

Amended by:

Acts 2007, 80th Leg., R.S., Ch. 311 (H.B. 2045), Sec. 1, eff. September 1, 2007.

Sec. 504.632. URBAN FORESTRY LICENSE PLATES. (a) The department shall issue specialty license plates to benefit urban forestry. The department shall design the license plates in consultation with an organization described in Subsection (b).

(b) After deduction of the department's administrative costs, the remainder of the fee shall be deposited to the credit of the urban forestry account in the state treasury. Money in the account may be used by the Texas Forest Service in making grants to support the activities of a nonprofit organization located in Texas whose

primary purpose is to sponsor projects involving urban and community:

(1) tree planting;

(2) tree preservation; and

(3) tree education programs.

Added by Acts 2003, 78th Leg., ch. 1320, Sec. 6, eff. Sept. 1, 2003.

Sec. 504.633. SHARE THE ROAD LICENSE PLATES. (a) The department shall issue specialty license plates that include the words "Share the Road" and the image of a bicycle or a bicycle with a rider. The department shall design the plates in consultation with the Texas Bicycle Coalition Education Fund.

(b) After deduction of the department's administrative costs, the remainder of the fee shall be deposited to the credit of the share the road account in the state treasury to be used only by the Texas Education Agency to support the activities of a designated nonprofit organization whose primary purpose is to promote bicyclist safety, education, and access through:

(1) education and awareness programs; and

(2) training, workshops, educational materials, and media events.

(c) Up to 25 percent of the amount in Subsection (b) may be used to support the activities of the nonprofit organization in marketing and promoting the share the road concept and license plates.

Added by Acts 2003, 78th Leg., ch. 1320, Sec. 6, eff. Sept. 1, 2003.

Sec. 504.635. EL PASO MISSION VALLEY LICENSE PLATES. (a) The department shall issue El Paso Mission Valley specialty license plates. The de-

partment shall design the license plates in consultation with the Socorro Mission Restoration Effort.

(b) After deduction of the department's administrative costs, the remainder of the fee shall be deposited to the credit of the El Paso Mission Restoration account in the state treasury. Money in the account may be used only by the Texas Historical Commission in making grants to be used for the purpose of the preservation and rehabilitation of the Socorro, San Elizario, and Ysleta Missions.

Added by Acts 2003, 78th Leg., ch. 1320, Sec. 6, eff. Sept. 1, 2003.

Amended by:

Acts 2013, 83rd Leg., R.S., Ch. 301 (H.B. 1347), Sec. 1, eff. September 1, 2013.

Sec. 504.636. COTTON BOLL LICENSE PLATES. (a) The department shall issue specialty license plates depicting a graphic image of a cotton boll. The department shall design the license plates in consultation with Texas Cotton Producers, Inc.

(b) After deduction of the department's administrative costs, the remainder of the fee shall be deposited to the credit of the general revenue fund for use only by the Texas Higher Education Coordinating Board in making grants to benefit Texas Cotton Producers, Inc., for the sole purpose of providing scholarships to students who are pursuing a degree in an agricultural field related to the cotton industry while enrolled in an institution of higher education, as defined by Section 61.003, Education Code.

Added by Acts 2003, 78th Leg., ch. 1320, Sec. 6, eff. Sept. 1, 2003.

Sec. 504.637. DAUGHTERS OF THE REPUBLIC OF TEXAS LICENSE PLATES. (a) The department shall issue specialty license plates that include the words "Native Texan." The department shall design the license plates in consultation with the Daughters of the Republic of Texas.

(b) After deduction of the department's administrative costs, the remainder of the fee shall be deposited to the credit of the Daughters of the Republic of Texas account in the state treasury. Money in the account may be used only by the Texas Department of Economic Development or its successor agency in making grants to the Daughters of the Republic of Texas to be used only for the purpose of:

(1) preserving Texas historic sites; or

(2) funding educational programs that teach Texas history.

Added by Acts 2003, 78th Leg., ch. 1320, Sec. 6, eff. Sept. 1, 2003.

Sec. 504.638. KNIGHTS OF COLUMBUS LICENSE PLATES. (a) The department shall issue specialty license plates that include the words "Knights of Columbus" and the emblem of the Order of the Knights of Columbus. The department shall design the license plates in consultation with the Knights of Columbus.

(b) After deduction of the department's administrative costs, the remainder of the fee for issuance of the license plates shall be deposited to the credit of the State Council Charities account in the general revenue fund. Money in the account may be used only by the Texas Education Agency to make grants to State Council Charities to carry out the purposes of that organization.

Added by Acts 2003, 78th Leg., ch. 1320, Sec. 6, eff. Sept. 1, 2003.

Sec. 504.639. TEXAS MUSIC LICENSE PLATES. (a) The department shall issue specialty license plates that include the words "Texas Music." The department shall design the license plates in consultation with the governor's office.

(b) After deduction of the department's administrative costs, the remainder of the fee for issuance of the license plates shall be deposited to the credit of the Texas Music Foundation account established by Section 7.027, Education Code.

Added by Acts 2003, 78th Leg., ch. 1320, Sec. 6, eff. Sept. 1, 2003.

Sec. 504.640. SPACE SHUTTLE COLUMBIA LICENSE PLATES. (a) The department shall issue Space Shuttle Columbia specialty license plates. The department shall design the license plates in consultation with the Aviation and Space Foundation of Texas.

(b) After deduction of the department's administrative costs, the remainder of the fee for issuance of the license plates shall be deposited to the credit of the general revenue fund and may be used only by the Texas Aerospace Commission or its successor agency in making grants to benefit the Aviation and Space Foundation of Texas for the purposes of furthering aviation and space activities in Texas and providing Columbia Crew memorial scholarships to students.

Added by Acts 2003, 78th Leg., ch. 1320, Sec. 6, eff. Sept. 1, 2003.

Sec. 504.641. BE A BLOOD DONOR LICENSE PLATES. (a) The department shall issue Be a Blood

Donor specialty license plates. The department shall design the license plates in consultation with the Gulf Coast Regional Blood Center in Houston.

(b) After deduction of the department's administrative costs, the remainder of the fee for issuance of the license plates shall be deposited to the credit of the be a blood donor account under Section 162.016, Health and Safety Code.

Added by Acts 2003, 78th Leg., ch. 1320, Sec. 6, eff. Sept. 1, 2003.

Sec. 504.642. TEXAS COUNCIL OF CHILD WELFARE BOARDS LICENSE PLATES. (a) The department shall issue Texas Council of Child Welfare Boards specialty license plates. The department shall design the license plates in consultation with the Texas Council of Child Welfare Boards, Inc.

(b) After deduction of the department's administrative costs, the remainder of the fee for issuance of the license plates shall be deposited to the credit of a special account for abused and neglected children established at the Department of Protective and Regulatory Services. Money in the account may be used only by the Department of Protective and Regulatory Services to fund programs and services supporting abused and neglected children under Section 264.004, Family Code.

Added by Acts 2003, 78th Leg., ch. 1320, Sec. 6, eff. Sept. 1, 2003.

Amended by:

Acts 2011, 82nd Leg., R.S., Ch. 1296 (H.B. 2357), Sec. 207, eff. January 1, 2012.

Acts 2011, 82nd Leg., R.S., Ch. 1296 (H.B. 2357), Sec. 208, eff. January 1, 2012.

Sec. 504.644. MARINE MAMMAL RECOVERY LICENSE PLATES. (a) The department shall issue Marine Mammal Recovery specialty license plates. The department shall design the license plates in consultation with the Parks and Wildlife Department and the Texas Marine Mammal Stranding Network.

(b) After deduction of the department's administrative costs, the remainder of the fee for issuance of the license plates shall be deposited to the credit of an account in the state treasury. Money in the account may be used only by the Parks and Wildlife Department to support the activities of the Texas Marine Mammal Stranding Network in the recovery, rehabilitation, and release of stranded marine mammals. The Parks and Wildlife Department shall establish reporting and other mechanisms necessary to ensure that the money is spent for purposes for which it is dedicated.

Added by Acts 2003, 78th Leg., ch. 1320, Sec. 6, eff. Sept. 1, 2003.

Sec. 504.645. 4-H LICENSE PLATES. (a) The department shall issue specialty license plates that include the words "To Make the Best Better," the words "Texas 4-H," and the 4-H symbol of the four-leaf clover. The department shall design the license plates in consultation with the Texas 4-H and Youth Development Program.

(b) After deduction of the department's administrative costs, the remainder of the fee for issuance of the license plates shall be deposited to the credit of the general revenue fund and shall be used only by the Texas Cooperative Extension of the Texas A&M University System for 4-H and Youth Development Programs and to support the Texas Cooperative Extension's activities related to 4-H and Youth Development Programs.

Added by Acts 2003, 78th Leg., ch. 1320, Sec. 6, eff. Sept. 1, 2003.

Sec. 504.646. SMILE TEXAS STYLE LICENSE PLATES. (a) The department shall issue specialty license plates that include the words "Smile Texas Style." The department shall design the license plates in consultation with the Texas Dental Association.

(b) After deduction of the department's administrative costs, the remainder of the fee for issuance of the license plates shall be deposited to the credit of the general revenue fund to be used only by the Texas Department of Health in making grants to benefit the Texas Dental Association Financial Services for the sole use of providing charitable dental care.

Added by Acts 2003, 78th Leg., ch. 1320, Sec. 6, eff. Sept. 1, 2003.

Sec. 504.647. FIGHT TERRORISM LICENSE PLATES. (a) The department shall issue Fight Terrorism specialty license plates that include a pentagon-shaped border surrounding:

(1) the date "9-11-01" with the likeness of the World Trade Center towers forming the "11";

(2) the likeness of the United States flag; and

(3) the words "Fight Terrorism."

(b) The fee shall be deposited to the credit of the Texas Department of Motor Vehicles fund.

Added by Acts 2003, 78th Leg., ch. 1320, Sec. 6, eff. Sept. 1, 2003.

Amended by:

Acts 2011, 82nd Leg., R.S., Ch. 1296 (H.B. 2357), Sec. 209, eff. January 1, 2012.

Acts 2013, 83rd Leg., R.S., Ch. 1287 (H.B. 2202), Sec. 38, eff. September 1, 2013.

Sec. 504.648. GOD BLESS TEXAS AND GOD BLESS AMERICA LICENSE PLATES. (a) The department shall issue specialty license plates that include the words "God Bless Texas" and "God Bless America."

(b) After deduction of the department's administrative costs, the remainder of the fee shall be deposited to the credit of the share the road account in the state treasury and may only be used by the Texas Education Agency to support the Safe Routes to School Program of a designated statewide nonprofit organization whose primary purpose is to promote bicyclist safety, education, and access through:

(1) education and awareness programs; and

(2) training, workshops, educational materials, and media events.

(c) The fee for the license plates is $40.

(d) Up to 25 percent of the amount in Subsection (b) may be used to support the activities of the nonprofit organization in marketing and promoting the Safe Routes to School Program and the God Bless Texas and God Bless America license plates.

(e) The Texas Education Agency may use money received under this section to secure funds available under federal matching programs for safe routes to school and obesity prevention.

Added by Acts 2003, 78th Leg., ch. 1320, Sec. 6, eff. Sept. 1, 2003.

Amended by:

Acts 2009, 81st Leg., R.S., Ch. 201 (S.B. 161), Sec. 1, eff. May 27, 2009.

Sec. 504.651. MARCH OF DIMES LICENSE PLATES. (a) The department shall issue specialty license plates that include the words "March of Dimes."

The department shall design the license plates in consultation with the March of Dimes Texas Chapter.

(b) After deduction of the department's administrative costs, the remainder of the fee for issuance of the license plates shall be deposited to the credit of the Texas Department of Health for use in the Birth Defects Registry.

Added by Acts 2003, 78th Leg., ch. 1320, Sec. 6, eff. Sept. 1, 2003.

Sec. 504.652. MASTER GARDENER LICENSE PLATES. (a) The department shall issue specialty license plates that include the seal of the Texas Master Gardener program of Texas Cooperative Extension.

(b) After deduction of the department's administrative costs, the remainder of the fee for issuance of the license plates shall be deposited to the credit of an account in the general revenue fund. Money in the account may be used only by Texas A&M AgriLife Extension for graduate student assistantships within the Texas Master Gardener program and to support Texas A&M AgriLife Extension's activities related to the Texas Master Gardener program.

Added by Acts 2003, 78th Leg., ch. 1320, Sec. 6, eff. Sept. 1, 2003.

Amended by:

Acts 2013, 83rd Leg., R.S., Ch. 1135 (H.B. 2741), Sec. 80, eff. September 1, 2013.

Sec. 504.654. EAGLE SCOUT LICENSE PLATES. (a) The department shall issue specialty license plates that bear a depiction of the Eagle Scout medal.

(b) After deduction of the department's administrative costs, the remainder of the fee for issuance of the license plates shall be deposited to the credit of the Ea-

gle Scout account in the general revenue fund. Money in the account may be used only by the Texas Higher Education Coordinating Board in making grants to support projects sponsored by Boy Scout councils in this state. The Texas Higher Education Coordinating Board shall distribute grants under this section geographically as nearly as possible in proportion to the number of license plates issued under this section in each region of the state.

Added by Acts 2003, 78th Leg., ch. 1320, Sec. 6, eff. Sept. 1, 2003.

Sec. 504.6545. BOY SCOUT LICENSE PLATES. (a) The department shall issue specialty license plates that include the words "Boy Scouts of America." The department shall design the license plates in consultation with the Boy Scouts of America.

(b) After deduction of the department's administrative costs, the remainder of the fee for issuance of the license plates shall be deposited to the credit of the Boy Scout account in the general revenue fund. Money in the account may be used only by the Texas Higher Education Coordinating Board in making grants to benefit educational projects sponsored by Boy Scout councils in this state.

Added by Acts 2005, 79th Leg., Ch. 575 (H.B. 1480), Sec. 3, eff. September 1, 2005.

Sec. 504.656. TEXAS LIONS CAMP LICENSE PLATES. (a) The department shall issue Texas Lions Camp specialty license plates. The department shall design the license plates in consultation with the Texas Lions League for Crippled Children.

(b) After deduction of the department's administrative costs, the remainder of the fee for issuance of the

license plates shall be deposited to the credit of the Texas Lions Camp account in the state treasury. Money in the account may be used only by the Parks and Wildlife Department to support the activities of a designated nonprofit organization that is accredited by the American Camping Association and is licensed by the Texas Department of Health and whose primary purpose is to provide, without charge, a camp for physically disabled, hearing or vision impaired, and diabetic children who reside in this state, regardless of race, religion, or national origin. The Parks and Wildlife Department shall establish reporting and other mechanisms necessary to ensure that the money is spent only for the purposes for which it is dedicated.

Added by Acts 2003, 78th Leg., ch. 1320, Sec. 6, eff. Sept. 1, 2003.

Sec. 504.657. HIGHER EDUCATION COORDINATING BOARD LICENSE PLATES. (a) The department shall issue specialty license plates for the Texas Higher Education Coordinating Board. The department shall design the license plates in consultation with the coordinating board.

(b) After deduction of the department's administrative costs, the remainder of the fee shall be deposited to the credit of the "College For Texans" campaign account in the general revenue fund for use only by the Texas Higher Education Coordinating Board for purposes of the campaign.

Added by Acts 2005, 79th Leg., Ch. 1181 (S.B. 1227), Sec. 54, eff. September 1, 2005.

Sec. 504.658. INSURE TEXAS KIDS LICENSE PLATES. (a) The department shall issue specialty license plates that include the words "Insure Texas Kids."

(b) After deduction of the department's administrative costs, the remainder of the fee for issuance of the license plates shall be deposited to the credit of the general revenue fund and may be appropriated only to the Health and Human Services Commission to fund outreach efforts for public and private health benefit plans available for children.

Added by Acts 2007, 80th Leg., R.S., Ch. 1313 (S.B. 1032), Sec. 1, eff. September 1, 2007.

Sec. 504.659. MEMBERS OF AMERICAN LEGION. (a) The department shall issue specialty license plates for members of the American Legion. The license plates shall include the words "Still Serving America" and the emblem of the American Legion. The department shall design the license plates in consultation with the American Legion.

(b) The fee for the license plates is $30.

(c) After deduction of $8 to reimburse the department for its administrative costs, the remainder of the fee for issuance of the license plates shall be deposited to the credit of the American Legion, Department of Texas account in the state treasury. Money in the account may be used only by the Texas Veterans Commission in making grants to the American Legion Endowment Fund for scholarships and youth programs sponsored by the American Legion, Department of Texas.

Transferred and redesignated from Transportation Code, Section 504.413 by Acts 2011, 82nd Leg., R.S., Ch. 1296 (H.B. 2357), Sec. 210, eff. January 1, 2012.

Sec. 504.660. SEXUAL ASSAULT AWARENESS LICENSE PLATES. (a) The department shall design and issue specialty license plates to support victims of sexual assault.

(b) Repealed by Acts 2013, 83rd Leg., R.S., Ch. 1135, Sec. 140(3), eff. September 1, 2013.

(c) After deduction of the department's administrative costs, the remainder of the fee for issuance of the license plates shall be deposited to the credit of the sexual assault program fund established by Section 420.008, Government Code.

Added by Acts 2009, 81st Leg., R.S., Ch. 1381 (S.B. 1616), Sec. 6, eff. September 1, 2009.

Amended by:

Acts 2013, 83rd Leg., R.S., Ch. 1135 (H.B. 2741), Sec. 140(3), eff. September 1, 2013.

Sec. 504.661. MARINE CONSERVATION LICENSE PLATES. (a) After deduction of the department's administrative costs in accordance with Section 504.801, the remainder of the fees allocated under Section 504.801(e)(2)(A) from the sale of Marine Conservation plates shall be deposited to the credit of an account in the state treasury to be used by the Texas Parks and Wildlife Department to support the activities of Coastal Conservation Association Texas in the conservation of marine resources.

(b) The Texas Parks and Wildlife Department shall establish reporting and other mechanisms necessary to ensure that the money is spent for the purpose for which it is dedicated.

Added by Acts 2009, 81st Leg., R.S., Ch. 397 (H.B. 1749), Sec. 1, eff. September 1, 2009.

Redesignated from Transportation Code, Section 504.660 by Acts 2013, 83rd Leg., R.S., Ch. 161 (S.B. 1093), Sec. 22.001(53), eff. September 1, 2013.

Sec. 504.662. CHOOSE LIFE LICENSE PLATES. (a) The department shall issue specially designed license

plates that include the words "Choose Life." The department shall design the license plates in consultation with the attorney general.

(b) After deduction of the department's administrative costs, the department shall deposit the remainder of the fee for issuance of license plates under this section in the state treasury to the credit of the Choose Life account established by Section 402.036, Government Code.

Added by Acts 2011, 82nd Leg., R.S., Ch. 63 (S.B. 257), Sec. 1, eff. September 1, 2011.

Text of section as added by Acts 2013, 83rd Leg., R.S., Ch. 1102 (H.B. 3677), Sec. 1

For text of section as added by Acts 2013, 83rd Leg., R.S., Ch. 1135 (H.B. 2741), Sec. 81, see other Sec. 504.663.

Sec. 504.663. FOUNDATION SCHOOL PROGRAM LICENSE PLATES. (a) The department shall issue specially designed license plates to benefit the Foundation School Program. The department shall design the license plates in consultation with the Texas Education Agency.

(b) After deduction of the department's administrative costs, the department shall deposit the remainder of the fee for issuance of license plates under this section to the credit of the foundation school fund.

Added by Acts 2013, 83rd Leg., R.S., Ch. 1102 (H.B. 3677), Sec. 1, eff. September 1, 2013.

Text of section as added by Acts 2013, 83rd Leg., R.S., Ch. 1135 (H.B. 2741), Sec. 81

SUBCHAPTER H. ADMINISTRATIVE PROVISIONS RELATING TO SPECIALTY LICENSE PLATES FOR GENERAL DISTRIBUTION

Sec. 504.702. SPECIALTY LICENSE PLATES AUTHORIZED AFTER JANUARY 1, 1999. (a) This section applies only to specialty license plates that are authorized to be issued by a law that takes effect on or after January 1, 1999.

(b) The department may manufacture the specialty license plates only if a request for manufacture of the license plates is filed with the department. The request must be:

(1) made in a manner prescribed by the department;

(2) filed before the fifth anniversary of the effective date of the law that authorizes the issuance of the specialty license plates; and

(3) accompanied by a deposit of $8,000.

(c) Repealed by Acts 2011, 82nd Leg., R.S., Ch. 1296, Sec. 247(21), eff. January 1, 2012.

(d) If a request is not filed with the department before the date specified by Subsection (b)(2), the law that authorizes the issuance of the specialty license plates expires on that date.

(e) The department may issue license plates under:

(1) Section 504.614 for a particular professional sports team only if $8,000 has been deposited with the department for that sports team; or

(2) Section 504.615 for a particular institution of higher education or private college or university only

if $8,000 has been deposited with the department for that institution, college, or university.

(f) Money deposited with the department under Subsection (b)(3) or (e) shall be returned by the department to the person who made the deposit after 800 sets of plates have been issued.

Added by Acts 2003, 78th Leg., ch. 1320, Sec. 6, eff. Sept. 1, 2003.

Amended by:

Acts 2007, 80th Leg., R.S., Ch. 729 (H.B. 2627), Sec. 2, eff. September 1, 2007.

Acts 2011, 82nd Leg., R.S., Ch. 1296 (H.B. 2357), Sec. 211, eff. January 1, 2012.

Acts 2011, 82nd Leg., R.S., Ch. 1296 (H.B. 2357), Sec. 247(21), eff. January 1, 2012.

SUBCHAPTER I. DEVELOPMENT OF NEW SPECIALTY LICENSE PLATES

Sec. 504.801. CREATION OF NEW SPECIALTY LICENSE PLATES BY THE DEPARTMENT.

(a) The department may create new specialty license plates on its own initiative or on receipt of an application from a potential sponsor. A new specialty license plate created under this section must comply with each requirement of Section 504.702 unless the license is created by the department on its own initiative. The department may permit a specialty license plate created under this section to be personalized. The redesign of an existing specialty license plate at the request of a sponsor shall be treated like the issuance of a new specialty license plate.

(b) Any nonprofit entity may submit an application to the department to sponsor a new specialty license plate. An application may nominate a state agency to receive funds derived from the issuance of the license plates. The application may also identify uses to which those funds should be appropriated.

(c) The department shall design each new specialty license plate in consultation with the sponsor, if any, that applied for creation of that specialty license plate. The department may refuse to create a new specialty license plate if the design might be offensive to any member of the public, if the nominated state agency does not consent to receipt of the funds derived from issuance of the license plate, if the uses identified for those funds might violate a statute or constitutional provision, or for any other reason established by rule. At the request of the sponsor, distribution of the license plate may be limited by the department.

(d) The fee for issuance of license plates created under this subchapter before November 19, 2009, is $30 unless the department sets a higher fee. This subsection does not apply to a specialty license plate marketed and sold by a private vendor at the request of the specialty license plate sponsor.

(d-1) The fee for issuance of license plates created under this subchapter on or after November 19, 2009, is the amount established under Section 504.851.

(e) For each fee collected for a license plate issued by the department under this section:

(1) $8 shall be used to reimburse the department for its administrative costs; and

(2) the remainder shall be deposited to the credit of:

(A) the specialty license plate fund, which is an account in the general revenue fund, if the sponsor nominated a state agency to receive the funds; or

(B) the Texas Department of Motor Vehicles fund if the sponsor did not nominate a state agency to receive the funds or if there is no sponsor.

(f) Subchapter D, Chapter 316, Government Code, and Section 403.095, Government Code, do not apply to fees collected under this subchapter.

(g) The department may report to the legislature at any time concerning implementation of this section. The report may include recommendations concerning the appropriations, by amount, state agency, and uses, that are necessary to implement the requests of sponsors.

(h) The department may vary the design of a license plate created under this section to accommodate or reflect its use on a motor vehicle other than a passenger

car or light truck.

(i) The sponsor of a new specialty plate may not be for-profit enterprise.

Added by Acts 2003, 78th Leg., ch. 1320, Sec. 6, eff. Sept. 1, 2003.

Amended by:

Acts 2009, 81st Leg., R.S., Ch. 1136 (H.B. 2553), Sec. 38, eff. September 1, 2011.

Acts 2009, 81st Leg., R.S., Ch. 1381 (S.B. 1616), Sec. 7, eff. September 1, 2009.

Acts 2011, 82nd Leg., R.S., Ch. 1296 (H.B. 2357), Sec. 212, eff. January 1, 2012.

Acts 2013, 83rd Leg., R.S., Ch. 1287 (H.B. 2202), Sec. 39, eff. September 1, 2013.

SUBCHAPTER J. MARKETING OF SPECIALTY PLATES THROUGH PRIVATE VENDOR

Sec. 504.851. CONTRACT WITH PRIVATE VENDOR.

Text of subsection effective until September 01, 2014

(a) The department shall enter into a contract with the private vendor whose proposal is most advantageous to the state, as determined from competitive sealed proposals that satisfy the requirements of this section, for the marketing and sale of:

(1) personalized license plates; or

(2) with the agreement of the private vendor, other specialty license plates authorized by Subchapters G and I.

Text of subsection effective on September 01, 2014

(a) The department may enter into a contract with the private vendor whose proposal is most advantageous to the state, as determined from competitive sealed proposals that satisfy the requirements of this section, for the marketing and sale of:

(1) personalized license plates; or

(2) with the agreement of the private vendor, other specialty license plates authorized by Subchapters G and I.

(a-1) The department may not issue specialty, personalized, or souvenir license plates with background colors other than white, unless the plates are marketed and sold by the private vendor.

(a-2) Specialty license plates authorized for marketing and sale under Subsection (a) may be personalized and must include:

(1) specialty license plates created under Subchapters G and I on or after November 19, 2009; and

(2) at the request of the specialty license plate sponsor, an existing specialty license plate created under Subchapters G and I before November 19, 2009.

(a-3) The department may contract with the private vendor for the vendor to:

(1) host all or some of the specialty license plates on the vendor's website;

(2) process the purchase of specialty license plates hosted on the vendor's website and pay any additional transaction cost; and

(3) share in the personalization fee for the license plates hosted on the vendor's website.

(b) The board by rule shall establish fees for the issuance or renewal of personalized license plates that are marketed and sold by the private vendor. Fees must be reasonable and not less than the greater of:

(1) the amounts necessary to allow the department to recover all reasonable costs to the department associated with the evaluation of the competitive sealed proposals received by the department and with the implementation and enforcement of the contract, including direct, indirect, and administrative costs; or

(2) the amount established by Section 504.853(b).

(c) The board by rule shall establish the fees for the issuance or renewal of souvenir license plates, specialty license plates, or souvenir or specialty license plates that are personalized that are marketed and sold by the private vendor or hosted on the private vendor's website. The state's portion of the personalization fee

may not be less than $40 for each year issued. Other fees must be reasonable and not less than the amounts necessary to allow the department to recover all reasonable costs to the department associated with the evaluation of the competitive sealed proposals received by the department and with the implementation and enforcement of the contract, including direct, indirect, and administrative costs. A fee established under this subsection is in addition to:

(1) the registration fee and any optional registration fee prescribed by this chapter for the vehicle for which specialty license plates are issued;

(2) any additional fee prescribed by this subchapter for the issuance of specialty license plates for that vehicle; and

(3) any additional fee prescribed by this subchapter for the issuance of personalized license plates for that vehicle.

(c-1) Subsections (b) and (c) do not apply to the sale at auction of a specialty plate or personalized specialty plate that is not used on a motor vehicle.

(d) At any time as necessary to comply with Subsection (b) or (c), the board may increase or decrease the amount of a fee established under the applicable subsection.

(e) The portion of a contract with a private vendor regarding the marketing and sale of personalized license plates is payable only from amounts derived from the collection of the fee established under Subsection (b). The portion of a contract with a private vendor regarding the marketing, hosting, and sale of souvenir license plates, specialty license plates, or souvenir or specialty license plates that are personalized under Sec-

tion 504.102 is payable only from amounts derived from the collection of the fee established under Subsection (c).

(f) The department may approve new design and color combinations for personalized or specialty license plates that are marketed and sold by a private vendor under a contract entered into with the private vendor. Each approved license plate design and color combination remains the property of the department.

(g) The department may approve new design and color combinations for specialty license plates authorized by this chapter, including specialty license plates that may be personalized, that are marketed and sold by a private vendor under a contract entered into with the private vendor. Each approved license plate design and color combination remains the property of the department. Except as otherwise provided by this chapter, this subsection does not authorize:

(1) the department to approve a design or color combination for a specialty license plate that is inconsistent with the design or color combination specified for the license plate by the section of this chapter that authorizes the issuance of the specialty license plate; or

(2) the private vendor to market and sell a specialty license plate with a design or color combination that is inconsistent with the design or color combination specified by that section.

(g-1) The department may not:

(1) publish a proposed design or color combination for a specialty license plate for public comment in the Texas Register or otherwise, except on the department's website for a period not to exceed 10 days;

or

(2) restrict the background color, color combinations, or color alphanumeric license plate numbers of a specialty license plate, except as determined by the Department of Public Safety as necessary for law enforcement purposes.

(h) Subject to the limitations provided by Subsections (g) and (g-1), the department may disapprove a design, cancel a license plate, or require the discontinuation of a license plate design or color combination that is marketed, hosted, or sold by a private vendor under contract at any time if the department determines that the disapproval, cancellation, or discontinuation is in the best interest of this state or the motoring public.

(i) A contract entered into by the department with a private vendor under this section:

(1) must comply with any law generally applicable to a contract for services entered into by the department;

(2) must require the private vendor to render at least quarterly to the department periodic accounts that accurately detail all material transactions, including information reasonably required by the department to support fees that are collected by the vendor, and to regularly remit all money payable to the department under the contract; and

(3) may allow or require the private vendor to establish an electronic infrastructure coordinated and compatible with the department's registration system, by which motor vehicle owners may electronically send and receive applications, other documents, or required payments, and that, when secure access is necessary, can be electronically validated by the department.

(j) From amounts received by the department under the contract described by Subsection (a), the department shall deposit to the credit of the Texas Department of Motor Vehicles fund an amount sufficient to enable the department to recover its administrative costs for all license plates issued under this section, any payments to the vendor under the contract, and any other amounts allocated by law to the Texas Department of Motor Vehicles fund. To the extent that the disposition of other amounts received by the department is governed by another law, those amounts shall be deposited in accordance with the other law. Any additional amount received by the department under the contract shall be deposited to the credit of the general revenue fund.

(k) Repealed by Acts 2011, 82nd Leg., R.S., Ch. 1296, Sec. 247(22), eff. January 1, 2012.

(l) A contract entered into with the private vendor shall provide for the department to recover all costs incurred by the department in implementing this section. Under the contract, the department may require the private vendor to reimburse the department in advance for:

(1) not more than one-half of the department's anticipated costs in connection with the contract; and

(2) the department's anticipated costs in connection with the introduction of a new specialty license plate.

(m) If the private vendor ceases operation:

(1) the program may be operated temporarily by the department under new agreements with the li-

cense plate sponsors until another vendor is selected and begins operation; and

(2) the private vendor's share of the revenue is deposited to the credit of the general revenue fund.

Added by Acts 2003, 78th Leg., ch. 1320, Sec. 6, eff. Sept. 1, 2003.

Amended by:

Acts 2005, 79th Leg., Ch. 754 (H.B. 2894), Sec. 1, eff. June 17, 2005.

Acts 2009, 81st Leg., R.S., Ch. 933 (H.B. 3097), Sec. 2G.03, eff. September 1, 2009.

Acts 2009, 81st Leg., R.S., Ch. 1381 (S.B. 1616), Sec. 9, eff. September 1, 2009.

Acts 2009, 81st Leg., R.S., Ch. 1381 (S.B. 1616), Sec. 11(2), eff. September 1, 2009.

Acts 2011, 82nd Leg., R.S., Ch. 1296 (H.B. 2357), Sec. 215, eff. September 1, 2014.

Acts 2011, 82nd Leg., R.S., Ch. 1296 (H.B. 2357), Sec. 216, eff. January 1, 2012.

Acts 2011, 82nd Leg., R.S., Ch. 1296 (H.B. 2357), Sec. 247(22), eff. January 1, 2012.

Acts 2013, 83rd Leg., R.S., Ch. 1287 (H.B. 2202), Sec. 40, eff. September 1, 2013.

Texas Administrative Code

TITLE 43	TRANSPORTATION
PART 10	TEXAS DEPARTMENT OF MOTOR VEHICLES
CHAPTER 217	VEHICLE TITLES AND REGISTRATION
SUBCHAPTER B	MOTOR VEHICLE REGISTRATION
RULE §217.22	**Motor Vehicle Registration**

(a) Registration. Unless otherwise exempted by law or this chapter, a vehicle to be used on the public highways of this state must be registered in accordance with Transportation Code, Chapter 502 and the provisions of this section. Transportation Code, Chapter 501, Subchapter E prohibits registration of a vehicle whose owner has been issued a salvage or nonrepairable vehicle title. These vehicles may not be operated on a public roadway.

(b) Initial application for vehicle registration.

(1) An applicant for initial vehicle registration must file an application on a form prescribed by the department. The form will at a minimum require:

(A) the signature of the owner;

(B) the motor vehicle description, including, but not limited to, the motor vehicle's year, make, model, vehicle identification number, body style, carrying capacity for commercial motor vehicles, and empty weight;

(C) the license plate number;

(D) the odometer reading, or the word "exempt" if the motor vehicle is exempt from federal and state odometer disclosure requirements;

(E) the name and complete address of the applicant; and

(F) the name, mailing address, and date of any liens.

(2) The application must be accompanied by the following documents:

(A) evidence of vehicle ownership as specified in Transportation Code, §501.030, unless the vehicle has been issued a nonrepairable or salvage vehicle title in accordance with Transportation Code, Chapter 501, Subchapter E;

(B) registration fees prescribed by law;

(C) any local fees or other fees prescribed by law and collected in conjunction with registering a vehicle;

(D) evidence of financial responsibility required by Transportation Code, §502.046, unless otherwise exempted by law; and

(E) any other documents or fees required by law.

(3) An initial application for registration must be filed with the tax assessor-collector of the county in which the owner resides, except:

(A) an application for registration as a prerequisite to filing an application for title may also be filed with the county tax assessor-collector in the county in which the motor vehicle is purchased or encumbered; or

(B) if a county has been declared a disaster area, the resident may apply at the closest unaffected county if the affected county tax assessor-collector estimates the county offices will be inoperable for a protracted period.

(4) The recorded owner of a vehicle that was last

registered or titled in another jurisdiction and is subject to registration in this state may apply for registration if the owner cannot or does not wish to relinquish the negotiable out-of-state evidence of ownership to obtain a Texas title. On receipt of a form prescribed by the department and payment of the statutory fee for a title application and any other applicable fees, the department will issue a registration receipt to the applicant.

(A) Registration receipt. The receipt issued at the time of application may serve as proof of registration and evidences title to a motor vehicle for registration purposes only, but may not be used to transfer any interest or ownership in a motor vehicle or to establish a lien.

(B) Information to be included on the form. The form will include the:

(i) out-of-state title number, if applicable;

(ii) out-of-state license plate number, if applicable;

(iii) state or country that issued the out-of-state title or license plate;

(iv) lienholder name and address as shown on the out-of-state evidence, if applicable;

(v) statement that negotiable evidence of ownership is not being surrendered; and

(vi) signature of the applicant or authorized agent of the applicant.

(C) Accompanying documentation. An application for registration under this paragraph must be supported, at a minimum, by:

(i) a completed application for registration, as specified in paragraph (1) of this subsection;

(ii) presentation, but not surrender of, evidence from another jurisdiction demonstrating that legal evidence of ownership has been issued to the applicant as the motor vehicle's owner, such as a validated title, a registration receipt that is not more than six months past the date of expiration, a non-negotiable title, or written verification from the other jurisdiction; and

(iii) any other documents or fees required by law.

(D) Assignment. In instances in which the title or registration receipt is assigned to the applicant, an application for registration purposes only will not be processed. The applicant must apply for a title under Transportation Code, Chapter 501.

(E) Identification required.

(i) An application for initial registration is not acceptable unless the applicant presents a current photo identification of the owner containing a unique identification number and expiration date. The identification document must be a:

(I) driver's license or state identification certificate issued by a state or territory of the United States;

(II) United States or foreign passport;

(III) United States military identification card;

(IV) North Atlantic Treaty Organization identification or identification issued under a Status of Forces Agreement; or

(V) United States Department of Homeland Security, United States Citizenship and Immigration Services, or United States Department of

State identification document.

(ii) If the motor vehicle is titled in:

(I) more than one name, then the identification of one owner must be presented;

(II) the name of a leasing company, then:

(-a-) proof of the Federal Employer Identification Number/Employee Identification Number (FEIN/EIN) of the leasing company must be submitted, written on the application, and can be entered into the department's titling system. The number must correspond to the name of the leasing company in which the vehicle is being titled; and

(-b-) the leasing company may submit:

(-1-) a government issued photo identification, required under this subparagraph, of the lessee listed as the registrant; or

(-2-) a government issued photo identification, required under this subparagraph, of the employee or authorized agent who signed the application for the leasing company, and the employee's or authorized agent's employee identification, letter of authorization written on the lessor's letterhead, or a printed business card. The printed business card, employee identification, or letter of authorization written on the lessor's letterhead must contain the name of the lessor, and the employee's or authorized agent's name must match the name on the government issued photo identification;

(III) the name of a trust, then a government issued photo identification, required under this subparagraph, of a trustee must be presented; or

(IV) the name of a business, government entity, or organization, then:

(-a-) proof of the Federal Employer Identification Number/Employee Identification Number (FEIN/EIN) of the business, government entity, or organization must be submitted, written on the application, and can be entered into the department's titling system. The number must correspond to the name of the business, government entity, or organization in which the vehicle is being titled;

(-b-) the employee or authorized agent must present a government issued photo identification, required under this subparagraph; and

(-c-) the employee's or authorized agent's employee identification; letter of authorization written on the business', government entity's, or organization's letterhead; or a printed business card. The printed business card, employee identification, or letter of authorization written on the business', government entity's, or organization's letterhead must contain the name of the business, governmental entity, or organization, and the employee's or authorized agent's name must match the name on the government issued photo identification.

(iii) Within this subparagraph, "current" is defined as not to exceed 12 months after the expiration date, except that a state-issued personal identification certificate issued to a qualifying person is considered current if the identification states that it has no expiration.

(iv) Within this subsection, an identification document such as a printed business card, letter of authorization, or power of attorney, may be an original

or photocopy.

(v) A person who holds a general distinguishing number issued under Transportation Code, Chapter 503 or Occupations Code, Chapter 2301, is exempt from submitting to the county tax assessor-collector, but must retain:

(I) the owner's identification, as required under this subparagraph; and

(II) authorization to sign, as required under this subparagraph.

(vi) A person who holds a general distinguishing number issued under Transportation Code, Chapter 503 or Occupations Code, Chapter 2301, is not required to submit photo identification or authorization for an employee or agent signing a title assignment with a secure power of attorney.

(vii) This subparagraph does not apply to non-titled vehicles.

(c) Vehicle registration insignia.

(1) On receipt of a complete initial application for registration with the accompanying documents and fees, the department will issue vehicle registration insignia to be displayed on the vehicle for which the registration was issued for the current registration period.

(A) If the vehicle has a windshield, the symbol, tab, or other device prescribed by and issued by the department shall be attached to the inside lower left corner of the vehicle's front windshield in a manner that will not obstruct the vision of the driver.

(B) If the vehicle has no windshield, the symbol, tab, or other device prescribed by and issued by the department shall be attached to the rear license plate, except that registration receipts, retained inside

the vehicle, may provide the record of registration for vehicles with permanent trailer plates.

(C) If the vehicle is registered as a former military vehicle as prescribed by Transportation Code, §504.502, the vehicle's registration number shall be displayed instead of displaying a symbol, tab, or license plate.

(i) Former military vehicle registration numbers shall be displayed on a prominent location on the vehicle in numbers and letters of at least two inches in height.

(ii) To the extent possible, the location and design of the former military vehicle registration number must conform to the vehicle's original military registration number.

(2) Unless otherwise prescribed by law, each vehicle registered under this subchapter:

(A) must display two license plates, one at the exterior front and one at the exterior rear of the vehicle that are securely fastened at the exterior front and rear of the vehicle in a horizontal position of not less than 12 inches from the ground, measuring from the bottom, except that a vehicle described by Transportation Code, §621.2061 may place the rear plate so that it is clearly visible; or

(B) must display one plate that is securely fastened at or as close as practical to the exterior rear of the vehicle in a position not less than 12 inches from the ground, measuring from the bottom if the vehicle is a road tractor, motorcycle, trailer or semitrailer.

(3) Each vehicle registered under this subchapter must display license plates:

(A) assigned by the department for the pe-

riod; or

(B) validated by a registration insignia issued by the department for a registration period consisting of 12 consecutive months at the time of application for registration. Vehicles may be registered for 24 consecutive months only in accordance with Transportation Code, §548.102.

(4) The department will cancel or not issue any license plate containing an alpha-numeric pattern that meets one or more of the following criteria.

(A) The alpha-numeric pattern conflicts with the department's current or proposed regular license plate numbering system.

(B) The executive director finds that the alpha-numeric pattern may be considered objectionable or misleading, including that the pattern may be viewed as, directly or indirectly:

(i) indecent (defined as including a reference to a sex act, an excretory function or material, or sexual body parts);

(ii) a vulgarity (defined as curse words);

(iii) derogatory (defined as an expression of hate directed toward people or groups that is demeaning to people or groups, or associated with an organization that advocates such expressions);

(iv) a reference to illegal activities or substances, or implied threats of harm; or

(v) a misrepresentation of law enforcement or other governmental entities and their titles.

(C) The alpha-numeric pattern is currently issued to another owner.

(5) The provisions of paragraph (1) of this subsection do not apply to vehicles registered with annual license plates issued by the department.

(d) Vehicle registration renewal.

(1) To renew vehicle registration, a vehicle owner must apply, prior to the expiration of the vehicle's registration, to the tax assessor-collector of the county in which the owner resides.

(2) The department will send a license plate renewal notice, indicating the proper registration fee and the month and year the registration expires, to each vehicle owner prior to the expiration of the vehicle's registration.

(3) The license plate renewal notice should be returned by the vehicle owner to the appropriate county tax assessor-collector or to the tax assessor-collector's deputy, either in person or by mail, unless the vehicle owner renews via the Internet. The renewal notice must be accompanied by the following documents and fees:

(A) registration renewal fees prescribed by law;

(B) any local fees or other fees prescribed by law and collected in conjunction with registration renewal; and

(C) evidence of financial responsibility required by Transportation Code, §502.046, unless otherwise exempted by law.

(4) If a renewal notice is lost, destroyed, or not received by the vehicle owner, the vehicle may be registered if the owner presents personal identification acceptable to the county tax assessor-collector. Failure to receive the notice does not relieve the owner of the responsibility to renew the vehicle's registration.

(5) Renewal of expired vehicle registrations.

(A) In accordance with Transportation Code, §502.407, a vehicle with an expired registration may not be operated on the highways of the state after the fifth working day after the date a vehicle registration expires.

(B) If the owner has been arrested or cited for operating the vehicle without valid registration then a 20 percent delinquency penalty is due when registration is renewed, the full annual fee will be collected, and the vehicle registration expiration month will remain the same.

(C) If the county tax assessor-collector or the department determines that a registrant has a valid reason for being delinquent in registration, the vehicle owner will be required to pay for twelve months' registration. Renewal will establish a new registration expiration month that will end on the last day of the eleventh month following the month of registration renewal.

(D) If the county tax assessor-collector or the department determines that a registrant does not have a valid reason for being delinquent in registration, the full annual fee will be collected and the vehicle registration expiration month will remain the same.

(E) If a vehicle is registered in accordance with Transportation Code, §§502.255, 502.431, 502.435, 502.454, 504.315, 504.401, 504.405, 504.505, or 504.515 and if the vehicle's registration is renewed more than one month after expiration of the previous registration, the registration fee will be prorated.

(F) Evidence of a valid reason may include receipts, passport dates, and military orders. Valid reasons may include:

(i) extensive repairs on the vehicle;

(ii) the person was out of the country;

(iii) the vehicle is used only for seasonal use;

(iv) military orders;

(v) storage of the vehicle;

(vi) a medical condition such as an extended hospital stay; and

(vii) any other reason submitted with evidence that the county tax assessor-collector or the department determines is valid.

(6) Refusal to renew registration for delinquent child support.

(A) Placement of denial flag. On receipt of a notice issued under Family Code, Chapter 232 for the suspension or nonrenewal of a motor vehicle registration, the department will place a registration denial flag on the motor vehicle record of the child support obligor as reported by the child support agency.

(B) Refusal to renew registration. While a motor vehicle record is flagged, the county tax-assessor collector shall refuse to renew the registration of the associated motor vehicle.

(C) Removal of denial flag. The department will remove the registration denial flag on receipt of a removal notice issued by a child support agency under Family Code, Chapter 232.

(7) License plate reissuance program. The county tax assessor-collectors shall issue new multi-year license plates at no additional charge at the time of registration renewal provided the current plates are over seven years old from the date of issuance, including permanent trailer plates.

(e) Replacement of license plates, symbols, tabs, and other devices.

(1) When a license plate, symbol, tab, or other registration device is lost, stolen, or mutilated, a replacement may be obtained from any county tax assessor-collector upon:

(A) the payment of the statutory replacement fee prescribed by Transportation Code, §502.060 or §504.007; and

(B) the provision of a signed statement, on a form prescribed by the department, that states:

(i) the license plate, symbol, tab, or other registration device furnished for the described vehicle has been lost, stolen, or mutilated, and if recovered, will not be used on any other vehicle; and

(ii) the replaced license plate, symbol, tab, or other device will only be used on the vehicle to which it was issued.

(2) If the owner remains in possession of any part of the lost, stolen, or mutilated license plate, symbol, tab, or other registration device, that remaining part must be removed and surrendered to the department on issuance of the replacement and request by the county tax assessor-collector.

(f) Commercial farm motor vehicles, farm trailers, and farm semitrailers.

(1) An applicant must provide a properly completed application for farm plates. The application must be accompanied by proof of the applicant's Texas Agriculture or Timber Exemption Registration Number issued by the Texas Comptroller of Public Accounts. Proof of the registration number must be:

(A) legible;

(B) current; and

(C) in the name of the person or dba in which the vehicle is or will be registered, pursuant to Transportation Code, §502.146 and §502.433.

(2) A registration renewal of farm plates must be accompanied by proof of the applicant's Texas Agriculture or Timber Exemption Registration Number issued by the Texas Comptroller of Public Accounts.

(3) In accordance with Transportation Code, §502.146 and §502.433, an applicant's Texas Agriculture or Timber Exemption Registration Number may be verified through the online system established by the Comptroller.

(g) Out-of-state vehicles. A vehicle brought to Texas from out-of-state must be registered within 30 days of the date on which the owner establishes residence or secures gainful employment, except as provided by Transportation Code, §502.090. Accompanying a completed application, an applicant must provide:

(1) an application for title as required by Transportation Code, Chapter 501, if the vehicle to be registered has not been previously titled in this state; and

(2) any other documents or fees required by law.

(h) Electric personal assistive mobility device. The owner of an electric personal assistive mobility device, as defined by Transportation Code, §551.201, is not required to register it. The device may only be operated on a residential street, roadway, or public highway in accordance with Transportation Code, §551.202.

(i) Neighborhood electric vehicle. A neighborhood electric vehicle operated on a residential street, roadway, or public highway in accordance with Transportation Code, §551.303:

(1) must comply with the evidence of financial responsibility requirements established in Transportation Code, §502.046;

(2) must display a "slow-moving-vehicle emblem" if it meets the definition of a "slow-moving vehicle" as described in Transportation Code, §547.001; and

(3) is subject to all traffic and other laws applicable to motor vehicles.

(j) Enforcement of traffic warrant. A municipality may enter into a contract with the department under Government Code, Chapter 791 to indicate in the state's motor vehicle records that the owner of the vehicle is a person for whom a warrant of arrest is outstanding for failure to appear or who has failed to pay a fine on a complaint involving a violation of a traffic law. In accordance with Transportation Code, §702.003, a county tax assessor-collector may refuse to register a motor vehicle if such a failure is indicated in the motor vehicle record for that motor vehicle. A municipality is responsible for obtaining the agreement of the county in which the municipality is located to refuse to register motor vehicles for failure to pay civil penalties imposed by the municipality.

(k) Refusal to register due to traffic signal violation. A local authority, as defined in Transportation Code, §541.002, that operates a traffic signal enforcement program authorized under Transportation Code, Chapter 707 may enter into a contract with the department under Government Code, Chapter 791 to indicate in the state's motor vehicle records that the owner of a motor vehicle has failed to pay the civil penalty for a violation of the local authority's traffic signal enforcement system involving that motor vehicle. In accordance with Transportation Code, §707.017, a county tax assessor-collector

may refuse to register a motor vehicle if such a failure is indicated in the motor vehicle record for that motor vehicle. The local authority is responsible for obtaining the agreement of the county in which the local authority is located to refuse to register motor vehicles for failure to pay civil penalties imposed by the local authority.

(l) Refusal to register vehicle in certain counties. A county may enter into a contract with the department under Government Code, Chapter 791 to indicate in the state's motor vehicle records that the owner of the vehicle has failed to pay a fine, fee, or tax that is past due. In accordance with Transportation Code, §502.010, a county tax assessor- collector may refuse to register a motor vehicle if such a failure is indicated in the motor vehicle record for that motor vehicle.

(m) Record notation. A contract between the department and a county, municipality, or local authority entered into under Transportation Code, §502.010, Transportation Code, §702.003, or Transportation Code, §707.017 will contain the terms set out in this subsection.

(1) To place or remove a registration denial flag on a vehicle record, the contracting entity must submit a magnetic tape or other acceptable submission medium as determined by the department in a format prescribed by the department.

(2) The information submitted by the contracting entity will include, at a minimum, the vehicle identification number and the license plate number of the affected vehicle.

(3) If the contracting entity data submission contains bad or corrupted data, the submission medium will be returned to the contracting entity with no further action by the department.

(4) The magnetic tape or other submission medium must be submitted to the department from a single source within the contracting entity.

(5) The submission of a magnetic tape or other submission medium to the department by a contracting entity constitutes a certification by that entity that it has complied with all applicable laws.

(n) Fees.

(1) The department and the county will charge required fees, and only those fees provided by statute or rule.

(2) A $2 fee for a duplicate registration receipt will be charged if a receipt is printed for the customer.

Texas Administrative Code

TITLE 43	TRANSPORTATION
PART 10	TEXAS DEPARTMENT OF MOTOR VEHICLES
CHAPTER 217	VEHICLE TITLES AND REGISTRATION
SUBCHAPTER B	MOTOR VEHICLE REGISTRATION
RULE §217.28	**Specialty License Plates, Symbols, Tabs, and Other Devices**

(b) Initial application for specialty license plates, symbols, tabs, or other devices.

. . . .

(2) Fees and Documentation.

(A) The application must be accompanied by the prescribed registration fee, unless exempted by statute.

(B) The application must be accompanied by the statutorily prescribed specialty license plate fee. If a registration period is greater than 12 months, the expiration date of a specialty license plate, symbol, tab, or other device will be aligned with the registration period and the specialty plate fee will be adjusted to yield the appropriate fee. If the statutory annual fee for a specialty license plate is $5 or less, it will not be prorated.

Texas Administrative Code

TITLE 43	TRANSPORTATION
PART 10	TEXAS DEPARTMENT OF MOTOR VEHICLES
CHAPTER 217	VEHICLE TITLES AND REGISTRATION
SUBCHAPTER B	MOTOR VEHICLE REGISTRATION
RULE §217.28	**Specialty License Plates, Symbols, Tabs, and Other Devices**

(i) Development of new specialty license plates.

…

(5) Board decision. The Board's decision will be based on:

(A) compliance with Transportation Code, §504.801;

(B) the proposed license plate design, including:

(i) whether the design appears to meet the legibility and reflectivity standards established by the department;

(ii) whether the design meets the standards established by the department for uniqueness;

(iii) other information provided during the application process;

(iv) the criteria designated in §217.22(c)(3)(B) of this subchapter as applied to the design; and

(v) whether a design is similar enough to an existing plate design that it may compete with the existing plate sales; and

(C) the applicant's ability to comply with Transportation Code, §504.702 relating to the required deposit or application that must be provided before the manufacture of a new specialty license plate.

…

(7) Final approval.

(A) Approval. The Board will approve or disapprove the specialty license plate application based on all of the information provided pursuant to this subchapter at an open meeting.

(B) Application not approved. If the application is not approved under subparagraph (A) of this paragraph, the applicant may submit a new application and supporting documentation for the design to be considered again by the Board if:

(i) the applicant has additional, required documentation; or

(ii) the design has been altered to an acceptable degree.

(8) Issuance of specialty plates.

(A) If the specialty license plate is approved, the applicant must comply with Transportation Code, §504.702 before any further processing of the license plate.

(B) Approval of the plate does not guarantee that the submitted draft plate design will be used. The Board has final approval authority of all specialty license plate designs and may adjust or reconfigure the submitted draft design to comply with the format or license plate specifications.

Texas Administrative Code

TITLE 43	TRANSPORTATION
PART 10	TEXAS DEPARTMENT OF MOTOR VEHICLES
CHAPTER 217	VEHICLE TITLES AND REGISTRATION
SUBCHAPTER B	MOTOR VEHICLE REGISTRATION
RULE §217.40	**Marketing of Specialty License Plates through a Private Vendor**

(a) Purpose and scope. The department will enter into a contract with a private vendor to market department-approved specialty license plates in accordance with Transportation Code, Chapter 504, Subchapter J. This section sets out the procedure for approval of the design, purchase, and replacement of vendor specialty license plates. In this section, the license plates marketed by the vendor are referred to as vendor specialty license plates.

(b) Application for approval of vendor specialty license plate designs.

(1) Approval required. The vendor shall obtain the approval of the Board for each license plate design the vendor proposes to market in accordance with this section and the contract entered into between the vendor and the department.

(2) Application. The vendor must submit a written application on a form approved by the executive director to the department for approval of each license plate design the vendor proposes to market. The application must include:

(A) a draft design of the specialty license plate;

(B) projected sales of the plate, including an explanation of how the projected figure was determined;

(C) a marketing plan for the plate including a description of the target market;

(D) a licensing agreement from the appropriate third party for any design or design element that is intellectual property; and

(E) other information necessary for the Board to reach a decision regarding approval of the requested vendor specialty plate.

(c) Review and approval process. The Board will review vendor specialty license plate applications. The Board:

(1) will not consider incomplete applications; and

(2) may request additional information from the vendor to reach a decision.

(d) Board decision.

(1) Decision. The decision of the Board will be based on:

(A) compliance with Transportation Code, Chapter 504, Subchapter J;

(B) the proposed license plate design, including:

(i) whether the design meets the legibility and reflectivity standards established by the department;

(ii) whether the design meets the standards established by the department for uniqueness to ensure that the proposed plate complies with Transportation Code, §504.852(c);

(iii) whether the license plate design can accommodate the International Symbol of Access (ISA) as required by Transportation Code, §504.201(f);

(iv) the criteria designated in §217.22(c)(4)(B) of this subchapter (relating to Motor Vehicle Registration) as applied to the design;

(v) whether a design is similar enough to an existing plate design that it may compete with the existing plate sales;

and

(vi) other information provided during the application process.

(2) Public comment on proposed design. All proposed plate designs will be considered by the Board as an agenda item at a regularly or specially called open meeting. Notice of consideration of proposed plate designs will be posted in accordance with Office of the Secretary of State meeting notice requirements. Notice of each license plate design will be posted on the department's Internet web site to receive public comment at least 25 days in advance of the meeting at which it will be considered. The department will notify all specialty plate organizations and the sponsoring agencies who administer specialty license plates issued in accordance with Transportation Code, Chapter 504, Subchapter G, of the posting. A comment on the proposed design can be submitted in writing through the mechanism provided on the department's Internet web site for submission of comments. Written comments are welcome and must be received by the department at least 10 days in advance of the meeting. Public comment will be received at the Board's meeting.

(e) Final approval and specialty license plate issuance.

(1) Approval. The Board will approve or disapprove the specialty license plate application based on all of the information provided pursuant to this subchapter in an open meeting.

(2) Application not approved. If the application is not approved, the applicant may submit a new application and supporting documentation for the design to be considered again by the Board if:

(A) the applicant has additional, required documentation; or

(B) the design has been altered to an acceptable degree.

(3) Issuance of approved specialty plates.

(A) If the vendor's specialty license plate is approved, the vendor must submit the non-refundable start-up fee before any further design and processing of the license plate.

(B) Approval of the plate does not guarantee that the submitted draft plate design will be used. The Board has final approval of all specialty license plate designs and will provide guidance on the submitted draft design to ensure compliance with the format and license plate specifications.

(f) Redesign of vendor specialty license plates.

(1) On receipt of a written request from the vendor, the department will allow a redesign of a vendor specialty license plate.

(2) The vendor must pay the redesign administrative costs as provided in the contract between the vendor and the department.

(g) Multi-year vendor specialty license plates. Purchasers will have the option of purchasing vendor spe-

cialty license plates for a one-year, five-year, or ten-year period.

(h) License plate categories and associated fees. The categories and the associated fees for vendor specialty plates are set out in this subsection.

(1) Custom license plates. The fees for issuance of custom license plates are $85 for one year, $225 for five years, and $325 for ten years. Custom license plates include license plates with a variety of pre-approved background and character color combinations that may be personalized with either three alpha and two or three numeric characters or two or three numeric and three alpha characters. Generic license plates on standard white sheeting with the word "Texas" that may be personalized with up to six alphanumeric characters are considered custom license plates before December 2, 2010.

(2) T-Plates (Premium) license plates. T-Plates (Premium) license plates may be personalized with up to seven alphanumeric characters on colored backgrounds or designs approved by the department. T-Plates (Premium) license plates will be made available to coincide with extraordinary events of public interest to Texas registrants. The fees for issuance of T-Plates (Premium) license plates are $95 for one year until December 2, 2010, $155 for one year on or after December 2, 2010, $395 for five years, and $495 for ten years.

(3) Luxury license plates. Luxury license plates may be personalized with up to six alphanumeric characters on colored backgrounds or designs approved by the department. The fees for issuance of luxury license plates are $195 for one year, $495 for five years, and $595 for ten years.

(4) Freedom license plates. Freedom license plates include license plates with a variety of pre-approved background and character color combinations that may be personalized with up to seven alphanumeric characters. The fees for issuance of freedom license plates are $395 for one year, $695 for five years, and $795 for ten years.

(5) Background only license plates. Background only license plates include non-personalized license plates with a variety of pre-approved background and character color combinations. The fees for issuance of background only license plates are $55 for one year, $195 for five years, and $295 for ten years.

(6) Vendor souvenir license plates. Vendor souvenir license plates are replicas of vendor specialty license plate designs that may be personalized with up to twenty-four alphanumeric characters. Vendor souvenir license plates are not street legal or legitimate insignias of vehicle registration. The fee for issuance of souvenir license plates is $40.

(7) Auction of alphanumeric patterns. The vendor may auction alphanumeric patterns for 10 or 25 year terms with options to renew indefinitely, through 10 year terms, at the current price established for a 10 year luxury category license plate. The purchaser of the auction pattern may select from the vendor background designs at no additional charge at the time of initial issuance. The auction pattern may be moved from one vendor design plate to another vendor design plate as provided in subsection (n)(1) of this section. The auction pattern may be transferred from owner to owner as provided in subsection (l)(2) of this section.

(8) Personalization and specialty plate fees.

(A) The fee for the personalization of license plates applied for prior to November 19, 2009 is $40 if the plates are renewed annually.

(B) The personalization fee for plates applied for after November 19, 2009 is $40 if the plates are issued pursuant to Transportation Code, Chapter 504, Subchapters G and I.

(C) If the plates are renewed annually, the personalization and specialty plate fees remain the same fee as at the time of issuance if a sponsor of a specialty license plate authorized under Transportation Code, Chapter 504, Subchapters G and I signs a contract with the vendor in accordance with Transportation Code, Chapter 504, Subchapter J.

(i) Payment of fees.

(1) Payment of specialty license plate fees. The fees for issuance of vendor specialty license plates will be paid directly to the vendor for the license plate category and period selected by the purchaser. A person who purchases a multi-year vendor specialty license plate must pay upon purchase the full fee which includes the renewal fees.

(2) Payment of statutory registration fees. To be valid for use on a motor vehicle, the license plate owner is required to pay, in addition to the vendor specialty license plate fees, any statutorily required registration fees in the amount as provided by Transportation Code, Chapter 502, and this subchapter.

(j) Refunds. Fees for vendor specialty license plate fees will not be refunded after an application is submitted to the vendor and the department has approved issuance of the license plate.

(k) Replacement.

(1) Application. An owner must apply directly to the county tax assessor-collector for the issuance of replacement vendor specialty license plates and must pay the fee described in paragraphs (2), (3), or (4) of this subsection, whichever applies.

(2) Lost or mutilated vendor specialty license plates. To replace vendor specialty license plates that are lost or mutilated, the owner must pay the statutory replacement fee provided in Transportation Code, §504.007.

(3) No-charge replacement. The owner of vendor specialty license plates will receive at no charge replacement license plates as follows:

(A) one set of replacement license plates on or after the seventh anniversary after the date of initial issuance; and

(B) one set of replacement license plates seven years after the date the set of license plates were issued in accordance with subparagraph (A) of this paragraph.

(4) Optional replacements. An owner of a vendor specialty license plate may replace vendor specialty license plates before the seventh anniversary after the date of issuance by submitting a request to the county tax assessor-collector accompanied by the payment of a $6 fee.

(5) Interim replacement tags. If the vendor specialty license plates are lost or mutilated to such an extent that they are unusable, replacement license plates will need to be remanufactured. The county tax assessor-collector will issue interim replacement tags for use until the replacements are available. The owner's vendor specialty license plate number will be shown on the interim

replacement tags.

(6) Stolen vendor specialty license plates. The county tax assessor-collector will not approve the issuance of replacement vendor specialty license plates with the same license plate number if the department's records indicate that the vehicle displaying that license plate number was reported stolen or the license plates themselves were reported stolen.

(l) Transfer of vendor specialty license plates.

(1) Transfer between vehicles. The owner of a vehicle with vendor specialty license plates may transfer the license plates between vehicles by filing an application through the county tax assessor-collector if the vehicle to which the plates are transferred:

(A) is titled or leased in the owner's name; and

(B) meets the vehicle classification requirements for that particular specialty license plate.

(2) Transfer between owners. Vendor specialty license plates may not be transferred between persons unless the license plate pattern was initially purchased through auction as provided in subsection (h)(7) of this section. An auctioned alphanumeric pattern may be transferred as a specialty license plate or as a virtual pattern to be manufactured on a new background as provided under the restyle option in subsection (n)(1) of this section. In addition to the fee paid at auction, the new owner of an auctioned alphanumeric pattern or plate will pay the department a fee of $25 and complete the department's prescribed application at the time of transfer.

(m) Gift plates.

(1) A person may purchase plates as a gift for another person if the purchaser submits a statement that

provides:

(A) the purchaser's name and address;

(B) the name and address of the person who will receive the plates; and

(C) the vehicle identification number of the vehicle on which the plates will be displayed or a statement that the plates will not be displayed on a vehicle.

(2) To be valid for use on a motor vehicle, the recipient of the plates must file an application with the county tax assessor-collector and pay the statutorily required registration fees in the amount as provided by Transportation Code, Chapter 502, and this subchapter.

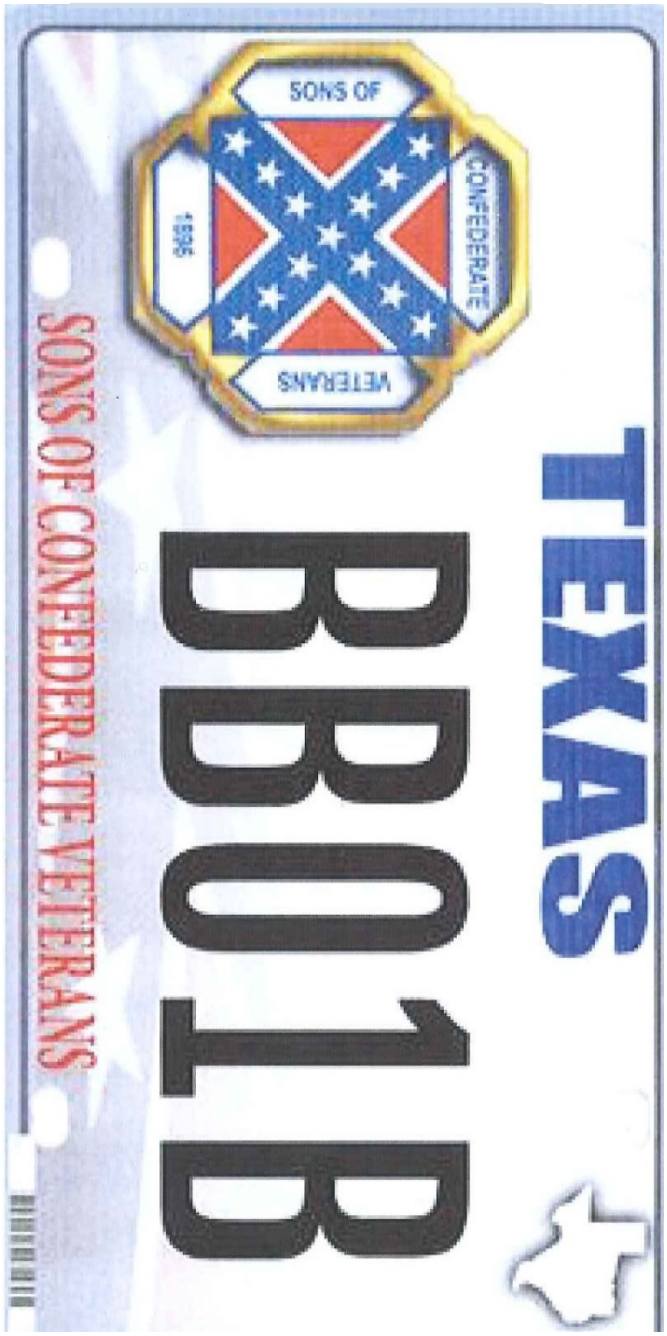
(n) Restyled vendor specialty license plates. A person who has purchased a multi-year vendor specialty license plate may request a restyled license plate at any time during the term of the plate.

(1) For the purposes of this subsection, "restyled license plate" is a vendor specialty license plate that has a different style from the originally purchased vendor specialty license plate but:

(A) is within the same price category, except if the pattern is an auction pattern; and

(B) has the same alpha-numeric characters and expiration date as the previously issued multi-year license plates.

(2) The fee for each restyled license plate is $55.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