No. 14-144

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.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Can a state establish a program for private individuals, non-profit organizations, and businesses to design specialty license plates, and then deny access to an eligible non-profit organization because the organization's logo featuring the Confederate battle flag "might be offensive to any member of the public"?

CORPORATE DISCLOSURE STATEMENT

Texas Division, Sons of Confederate Veterans, Inc. has no parent corporation and no publicly held corporation owns 10% or more of its stock.

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STATEMENT OF THE CASE

The Fifth Circuit's opinion accurately describes the specialty license plate system in Texas. *Texas Div., Sons of Confederate Veterans, Inc. v. Vandergriff*, 759 F.3d 388, 390-91 (5th Cir. 2014); Pet. App. 2a-3a.[1] In short, specialty license plates are either (a) created by the legislature by specific legislation[2] or (b) designed by private individuals, non-profits, and businesses who submit their applications to the Texas Department of Motor Vehicles ("DMV") directly or through a third-party vendor in contract with the state.[3] Essentially, Texas has created a program through which it sells space on license plates for individuals, non-profits, and businesses to publish messages and advertising. Drivers who wish to express a message pay a premium for such specialty

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[1] In this brief, "App. ___" refers to the page in Texas SCV's Record Excerpts filed in the Fifth Circuit Court of Appeals. "USCA5 ___" refers to the page in the Record on Appeal filed in the Fifth Circuit Court of Appeals. "Pet. ___" and "Pet. App. ___" refer to the pages in the Petition for Writ of Certiorari and its Appendix, respectively.

[2] *See* Tex. Transp. Code §§ 504.601, 504.602-504.662. Some examples of plates made available by statute in Texas include "Animal Friendly," "Keep Texas Beautiful," "Texas Reads," and a Daughters of the Republic of Texas plate that reads "Native Texan." Tex. Transp. Code §§ 504.602, 504.605, 504.616, 504.637.

[3] Non-profit organizations can send their application directly to the DMV, but individuals and for-profit businesses must submit their applications through the third-party vendor who helps facilitate and market specialty plates. The DMV must still approve plates submitted to the third-party vendor.

plates and the program results in increased revenue to the state.

The more than 350 specialty plates available in Texas express a wide variety of messages. Some of the specialty plates available to Texas drivers are: Choose Life, Calvary Hill ("One State Under God"), God Bless Texas, Knights of Columbus ("One Nation Under God"), Buffalo Soldiers, Insure Texas Kids, Boy Scouts, Girl Scouts, Texas Masons, Texas Lions Camp, Rotary International, March of Dimes, Be a Blood Donor, College for All Texans, Enduring Freedom, Fight Terrorism, Korea Veterans, Vietnam Veteran, Former Prisoner of War, Woman Veteran, World War II Veterans, Mothers Against Drunk Driving, NASCAR, Operation Iraqi Freedom, Pearl Harbor Survivor, Organ Donor, Rather Be Golfing, Read to Succeed, Stop Child Abuse, Texas It's Like a Whole Other Country, United We Stand, World Wildlife Fund, University of Alabama, University of Arizona, University of Arkansas, University of Georgia, University of Illinois, University of Kansas, University of Kentucky, University of Louisiana, University of Mississippi, University of Missouri, University of Nebraska, University of Oklahoma, University of South Carolina, University of Tennessee, Notre Dame, Oklahoma State University, Re/Max, Dr. Pepper, Mighty Fine Burgers, Master Gardener, Share the Road, YMCA, Young Lawyers Association,

Texas State Rifle Association, Texas Trophy Hunters Association, and Animal Friendly.[4]

The Fifth Circuit opinion accurately describes Texas Sons of Confederate Veterans' ("Texas SCV's") application for a specialty license plate and the "tortured procedural history" at the Texas Department of Transportation ("TxDOT") and Texas Department of Motor Vehicles Board ("DMVB"). Pet. App. 3a-5a, 17a-18a. The plate, including the Confederate battle flag in Texas SCV's logo, was initially approved by a simple majority vote.[5] Despite no evidence of any procedural basis for taking another vote, a second vote was conducted and the plate was

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[4] *See* examples included at App. 110-111, USCA5 324-325. *See also* http://myplates.com, last visited 9/25/14; http://txdmv.gov/motorists/license-plates/specialty-license-plates, last visited 9/25/14.

[5] The committee at TxDOT in charge of approving specialty plates at the time initially approved the plate by a simple majority vote. App. 103, USCA5 280. But the Director of the Vehicle Titles and Registration Division maintained that the plate did not pass and suggested that Texas SCV be notified that its application was rejected. *Id*. In response, another board member emailed the following: "Since it is now documented that we had a quorum and that the plate passed by a simple majority. I don't think we can just declare a no pass. An open records request would expose the vote and we will be shown as biased. I believe we should follow the procedures and let the public decide!" *Id*. Upon the Director's insistence that there be a re-vote based upon the "controversial" nature of the plate, a re-vote was conducted, and the plate was rejected. *See* App. 106, USCA5 293. There is no evidence of a valid procedural basis for the committee ignoring the initial quorum vote.

rejected. *See* App. 106, USCA5 293. Texas SCV then reapplied with the DMVB, which deadlocked four to four in two votes and then ultimately denied the plate unanimously after an impassioned public hearing. App. 80, ¶¶ 17, 20, USCA5 254; App. 118-119, USCA5 445-446.

At the same hearing, the DMVB approved a Buffalo Soldiers plate by a five to three vote, despite the fact that Land Commissioner Jerry Patterson, who sponsored both the Texas SCV and the Buffalo Soldiers plates, told the DMVB at the hearing that he had had conversations "with a group of Indians, who were offended by the . . . Buffalo Soldier plate." USCA5 377; App. 121, USCA5 451.

In its written rejection of Texas SCV's application for a specialty plate, the DMVB stated:

> 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.

App. 108, USCA5 322. The Board cited a provision of the Texas Transportation Code which provides, in part, that the Board "may refuse to create a new specialty license plate if the design might be offensive to any member of the public." Tex. Transp. Code § 504.801(c).

Following the denial of its application for a specialty plate, Texas SCV filed the underlying lawsuit challenging the DMVB's decision as unconstitutional under the First and Fourteenth Amendments to the Constitution.

The district court granted the DMVB's motion for summary judgment and denied Texas SCV's motion for summary judgment. *Texas Div., Sons of Confederate Veterans, Inc. v. Vandergriff*, A-11-CA-1049-SS, 2013 WL 1562758 (W.D. Tex. Apr. 12, 2013). The court held that the specialty plates implicated private speech concerns but found no viewpoint discrimination. *Id*. The Fifth Circuit reversed and remanded, holding that the specialty plates were private speech and the State engaged in viewpoint discrimination in denying Texas SCV's specialty plate. *Texas Div., Sons of Confederate Veterans, Inc. v. Vandergriff*, 759 F.3d 388 (5th Cir. 2014).

SUMMARY OF THE ARGUMENT

This case is not as complicated or remarkable as Petitioners would have this Court believe. There is no circuit split applicable to these facts, as every circuit to address a specialty plate program enabling private parties to submit their own specialty plate designs has held that the plates constitute private speech, the First Amendment applies, and regulation has to be viewpoint neutral. Neither of the two circuit splits Petitioners assert is applicable to the facts of this

case. Further, First Amendment case law has long-established that "offensiveness" is not a permissible standard to limit speech. Decades of Supreme Court precedent have established (1) that the State cannot open a forum for speech and then deny access to that forum on the basis of viewpoint and (2) that "offensiveness" is not a permissible standard to restrict speech. This case presents no novel questions or circuit splits for this Court to resolve, and the petition for writ of certiorari should be denied.

REASONS FOR DENYING THE PETITION

I. THE CIRCUIT SPLITS DESCRIBED BY PETITIONERS ARE NOT APPLICABLE TO THIS CASE

Petitioners argue there is a circuit split about whether specialty plates are "private speech" or "government speech." However, Petitioners fail to point out that there are two kinds of cases considered by the various courts of appeals. First, there are cases involving specialty license plates created by specific individual enabling legislation (hereinafter "Legislative Plates") passed by a state legislature. Second, there are cases where the state has created a revenue generating program by selling space on license plates to private citizens to express themselves. In this second category, private individuals and organizations apply to a state agency, such as the DMVB in this case, to have their own designs published on specialty license plates.

This case is in the second category. Respondents are not complaining of any specialty plate issued by an individual act of the Texas legislature. The Texas legislature has passed legislation authorizing "Animal Friendly," "Keep Texas Beautiful" and many other plates, which are all unchallenged. Instead, Texas SCV and its members sought to communicate their message in the same manner as many other non-profit organizations in Texas have done, by designing a specialty license plate. After being denied access to the forum because Texas SCV's logo was deemed "offensive," Texas SCV filed suit.

A. EVERY COURT OF APPEALS TO ADDRESS THE TYPE OF SPECIALTY PLATE AT ISSUE HERE HAS HELD THAT THE FIRST AMENDMENT APPLIES AND STATE REGULATION MUST BE VIEWPOINT NEUTRAL

Every circuit to address the type of specialty plate program at issue here – specialty plates designed by individuals, non-profit organizations, and/or for-profit businesses pursuant to a program for private parties to apply for plates, as opposed to specialty plates designed by state legislatures through individual legislation – has held that the specialty plates implicate private speech concerns and that government regulation must comply with the First Amendment. *See Arizona Life Coalition, Inc. v. Stanton*, 515 F.3d 956 (9th Cir. 2008), *cert. denied*, 555 U.S. 815 (2008) (Arizona's "special organization

license plate program" was primarily private speech and restrictions had to be viewpoint neutral); *Roach v. Stouffer*, 560 F.3d 860 (8th Cir. 2009) (Missouri's organizational license plate program held to be private speech of the organization and the vehicle owner); *Texas Div., Sons of Confederate Veterans, Inc. v. Vandergriff*, 759 F.3d 388 (5th Cir. 2014). Including the Fifth Circuit, there have now been three circuit courts of appeals to address the type of specialty plates at issue here, and each one of them has concluded that the specialty plates at issue in this type of program implicate private speech and the state's regulation of them must be viewpoint neutral.[6]

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[6] The courts of appeals engage in a variety of linguistic formulations of the test to be applied to determine whether speech is "private" or "government." *See Sons of Confederate Veterans, Inc. ex rel. Griffin v. Commissioner of the Virginia Department of Motor Vehicles*, 288 F.3d 610 (4th Cir. 2002) (applying a four-factor test which includes (1) the central purpose of the program in which the speech occurs, (2) the degree of "editorial control" exercised by the government or by private entities over the content of the speech, (3) the identity of the "literal speaker," and (4) whether the government or the private entity bears the "ultimate responsibility" for the content of the speech); *American Civil Liberties Union of Tennessee v. Bredesen*, 441 F.3d 370, 375 (6th Cir. 2006), *cert. denied*, 548 U.S. 906 (2006) (legislative "Choose Life" plate was government speech because "the Act determines the overarching message and Tennessee approves every word on such plates"); *Choose Life Illinois, Inc. v. White*, 547 F.3d 853 (7th Cir. 2008), *cert. denied*, 558 U.S. 816 (2009) (distilling the four-factor test to whether, under all the circumstances, a reasonable person would consider the speaker to be the government or a private party); *Arizona Life Coalition,* 515 F.3d at 965 (applying Fourth Circuit's

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B. THE CIRCUIT SPLIT REGARDING PLATES DESIGNED BY STATE LEGISLATURES IS NOT APPLICABLE TO THIS CASE

There is indeed a circuit split between the Fourth Circuit and the Sixth Circuit with regard to specialty plates, but the split only involves plates created by specific legislative enactment. The Sixth Circuit held in 2006 that Tennessee's legislature did *not* violate the First Amendment by creating a "Choose Life" plate while not offering a pro-choice plate.[7] *ACLU v.*

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four-factor test); *Roach*, 560 F.3d at 867 ("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."); *Texas Div., Sons of Confederate Veterans, Inc.*, 759 F.3d at 394 ("the proper inquiry 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' "), quoting *Pleasant Grove City, Utah v. Summum*, 555 U.S. 467, 487 (2009) (Souter, J., concurring). For the purposes of deciding the petition for certiorari, however, evaluating the different formulas for determining whether the First Amendment is implicated is unnecessary because every circuit to address the same specialty plate program as this case has held that private speech is implicated and the First Amendment applies, regardless of the test applied.

[7] The Sixth Circuit stands alone in holding that specialty license plates do not implicate private speech concerns. All other circuits to address specialty plates, of any type, have held that they implicate private speech concerns and government regulation is subject to the First Amendment. *See Sons of Confederate Veterans, Inc. ex rel. Griffin v. Comm'n of Virginia Dept. of Motor Vehicles*, 288 F.3d 610, 621 (4th Cir. 2002) ("SCV's special plates constitute private speech."); *Arizona Life Coalition*, 515 F.3d at

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Bredesen, 441 F.3d 370, 375-77 (6th Cir. 2006), *cert. denied*, 434 U.S. 1070 (2006). The court held that the plate created by legislative enactment was government speech, and did not implicate private speech rights. *Id*. at 375 ("Choose Life" plate was government speech because "the Act determines the overarching message and Tennessee approves every word on such plates."). The Fourth Circuit reached the opposite conclusion on similar facts in 2014, holding that North Carolina *did* violate the First Amendment in creating a "Choose Life" plate while not offering a pro-choice plate. *American Civil Liberties Union of North Carolina v. Tata*, 742 F.3d 563, 576 (4th Cir. 2014), *pet. filed.* ("Because the specialty plate speech at issue implicates private speech rights and is not pure government speech, North Carolina's authorizing a 'Choose Life' plate while refusing to authorize a pro-choice plate constitutes viewpoint discrimination in violation of the First Amendment.")[8] Both of these

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965 ("Choose Life" plate was private speech); *Choose Life Ill., Inc. v. White*, 547 F.3d 853, 863 (7th Cir. 2008) ("Messages on specialty license plates cannot be characterized as the government's speech"); *Roach,* 560 F.3d at 867 (specialty plates are private speech); *Texas Div., Sons of Confederate Veterans, Inc.,* 759 F.3d at 396 (same). *See also Women's Emergency Network v. Bush*, 323 F.3d 937 (11th Cir. 2003) (noting, *in dicta*, that the specialty plates at issue were not government speech); *Wooley v. Maynard*, 430 U.S. 705, 717 (1977) (New Hampshire violated First Amendment rights of objecting drivers by requiring them to display the state motto "Live Free or Die" on their license plates).

[8] *See* Petition for a Writ of Certiorari, *Berger v. ACLU of N.C.*, No. 14-35 (July 11, 2014).

cases considered the question of when a state legislature authorizes a pro-life plate by statute, does the First Amendment require the issuance of a pro-choice plate? At issue was not a denial of a private speaker's application for a specialty plate pursuant to a program established for such speech. These cases indeed constitute a split of authority, but they involve Legislative Plates and not a specialty plate program established for private parties to design specialty plates. The circuit split is therefore not applicable to the facts of this case, and this case is not a vehicle for addressing such a split.

C. THE SEVENTH CIRCUIT'S DECISION IN *CHOOSE LIFE ILLINOIS* DOES NOT EVIDENCE A CIRCUIT SPLIT RELEVANT TO THIS CASE

Petitioners also argue – despite no evidence in the record to support this theory – that Texas is purposefully avoiding the subject of the Confederate flag entirely, and thus there is no viewpoint discrimination. *See* Pet. at 14-17. Petitioners argue there is a circuit split between the Fifth Circuit decision in this case and the Seventh Circuit decision in *Choose Life Ill. Inc. v. White*, 547 F.3d 853, 863 (7th Cir. 2008), *cert. denied,* 558 U.S. 816 (2009).

In *Choose Life Illinois*, a pro-life advocacy group sought a specialty plate, which in Illinois required a specific legislative enactment. The General Assembly failed to pass enabling legislation to create a "Choose

Life" plate, and the advocacy group sued. The Seventh Circuit held that specialty license plates implicated private speech, but that the specialty plate forum was only a non-public forum. The court then concluded that Illinois had decided to exclude the entire subject of abortion, and thus the denial of the plate was content-based but viewpoint neutral. "It is undisputed that Illinois has excluded the *entire subject* of abortion from its specialty-plate program," the court held. *Id*. at 855 (emphasis original).

Petitioners argue that the Seventh Circuit's holding means that Texas "can defend itself against a charge of 'viewpoint discrimination' if [it] has never issued or approved a license plate bearing a different viewpoint on the subject matter of the rejected license plate." Pet. at 2. Under the Seventh Circuit's rationale, Petitioners argue, there is no viewpoint discrimination under the present facts because Texas has not issued any plates pro- or anti- the Confederate flag. Pet. at 14-15. Petitioners urge this Court to hear this case based on an alleged circuit split between the Fifth Circuit's decision and *Choose Life Illinois*.

There is no circuit split between the Fifth Circuit and the Seventh Circuit because the rationale of *Choose Life Illinois* cannot apply to the facts of this case. First, the DMVB expressly rejected Texas SCV's plate because it was deemed "offensive," not because Texas was avoiding an issue raised by the Texas SCV plate. The DMVB's written denial says nothing about the State excluding an entire subject related to the

Texas SCV plate. Tellingly, Petitioners fail to point to any evidence in the record indicating that the State decided to exclude everything having to do with the Texas SCV or the Confederate flag. Nowhere in this record is there any evidence that the State has purposefully eschewed the entire "issue" raised by the Texas SCV plate, however that issue may be defined. The State's decision to avoid an entire issue, akin to Illinois's avoidance of the abortion debate, is simply absent from this record.

Second, the specialty plate program in Illinois required a separate legislative enactment for every specialty plate. *Choose Life Ill.*, 547 F.3d at 855. It did not involve the same specialty plate program at issue here, where individuals, non-profits, and businesses could design plates and apply to the DMV. Because the legislature in Illinois had to authorize each plate, there was an element of legislative discretion and control that is absent from the private parties' specialty plate program in Texas.

Third, most issues are not binary, including whatever issues are implicated by the Texas SCV plate. Thus, the Seventh Circuit's logic that the abortion debate can be neatly divided into two positions – pro-choice or pro-life – is simply inapplicable to the Confederate flag. How would one even define the viewpoints about the Confederate flag or the Sons of Confederate Veterans? Is someone pro-Southern heritage or anti-Southern heritage, pro-historical reenactments or anti-historical reenactments, pro-civil war monuments or anti-civil war monuments, or

even pro-racism and anti-racism? It is impossible to divide the issues raised by the Texas SCV plate into distinct categories that could be purposefully avoided by the State like abortion was in Illinois.

Finally, the Seventh Circuit itself noted in its opinion that if the case involved the Confederate flag, it would come out differently. The court noted, "Excluding the Confederate flag from a specialty-plate design . . . [is a] fairly obvious instance[ ] of discrimination on account of viewpoint." *Id*. at 865. The Seventh Circuit recognized that the Confederate flag itself is a "viewpoint-specific symbol" and banning it is inherently viewpoint discrimination. *Id*. Thus, even if this case was decided by the Seventh Circuit, the Seventh Circuit would have reached the same conclusion as the Fifth Circuit.

II. THE FIFTH CIRCUIT DECISION IS SQUARELY IN LINE WITH SUPREME COURT PRECEDENT

Not only is there no circuit split applicable to the specific facts of this case, the Fifth Circuit's decision is also correct on the merits.

A. WHETHER SPEECH "MIGHT BE OFFENSIVE TO ANY MEMBER OF THE PUBLIC" IS NOT A CONSTITUTIONALLY VALID STANDARD TO LIMIT SPEECH

The DMVB denied Texas SCV's specialty plate application because it determined "that many members of the general public find the design offensive." App. 108, USCA5 322. It has long been an established rule of First Amendment law that speech cannot be curtailed simply because it may be offensive.

> If there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable. . . . [T]he Constitution does not permit the government to decide which types of otherwise protected speech are sufficiently offensive to require protection for the unwilling listener or viewer. Rather . . . the burden normally falls upon the viewer to avoid further bombardment of [his] sensibilities simply by averting [his] eyes.

Snyder v. Phelps, 131 S. Ct. 1207, 1219-20 (2011) (alterations in original, internal quotations and citations omitted). "[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 New York State Crime Victims Bd.*,

502 U.S. 105, 118 (1991) (quotations omitted). "[I]n public debate [we] must tolerate insulting, and even outrageous, speech in order to provide adequate 'breathing space' to the freedoms protected by the First Amendment." *Snyder,* 131 S. Ct. at 1219 (internal quotation omitted).

Whether something "might be offensive to any member of the public" "is so nebulous and malleable [that it could mean] anything presently politically expedient." *See Lewis v. Wilson*, 253 F.3d 1077, 1080 (8th Cir. 2001) (alteration original, quotation omitted), *cert. denied sub nom Fischer v. Lewis*, 535 U.S. 986 (2002) (rejecting "contrary to public policy" and "inflammatory" standards under personalized license plate regulations as unconstitutional and ordering Missouri to reissue personalized plate to applicant) (internal quotation omitted). The history of this case proves that the "might be offensive to any member of the public" standard provides no objective guidance to speakers, gatekeepers, and courts to evaluate speech. Four different votes were taken by TxDOT and the DMVB, with widely different results.[9] The proposed

[9] In October 2009, at the initial vote on the Texas SCV plate, three out of five of the members of the TxDOT specialty plate committee apparently determined that Texas SCV's plate was not offensive, and voted to approve the plate. App. 103, USCA5 280. In December 2009, TxDOT's same committee voted again and determined by a majority that the plate was offensive. *See* App. 106, USCA5 293. In a vote on April 14, 2011, four members of the DMVB concluded that the Texas SCV plate was not offensive, and four other members disagreed. App. 80, ¶ 17, USCA5 254. However, in the vote on November 10, 2011, all

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speech had not changed at all during this process, proving the "offensiveness" standard is completely subjective.

There is almost no speech that does not offend someone. Non-Christians and atheists could be offended by the "One State Under God" plate with its depiction of three crosses on Calvary Hill, or the "One Nation Under God" Knights of Columbus plate. There was some evidence in front of the DMVB that people were offended by the Buffalo Soldiers plate, but it was approved shortly after Texas SCV's was denied. App. 121, USCA5 451. There is no objective standard by which to determine if a proposed specialty plate is "offensive." Not even the committees in charge with enforcing the standard could consistently apply it.

The Constitution does not allow the State to censor unpopular viewpoints because the majority finds them "offensive." Such a standard allows for unbridled discretion and is a recipe for viewpoint discrimination.

B. THE SPECIALTY PLATES AT ISSUE ARE PRIVATE SPEECH

Nothing about specialty plates in general or this case in particular is truly that remarkable. Undoubtedly the State can engage in government speech, and

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eight attending members of DMVB concluded that the plate was offensive. App. 80, ¶ 20, USCA5 254; App. 119, USCA5 446.

when it is speaking for itself it can say what it wants and decline to say what it does not want to say. *See Pleasant Grove City, Utah v. Summum*, 555 U.S. 467, 467-68 (2009) ("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.") (alteration in original, citations and internal quotation marks omitted). The government can be in favor of adoption over abortion, for example, and can condition government funding on supporting that view. *Rust v. Sullivan*, 500 U.S. 173 (1991). A state can pick and choose which monuments to display in a public park, and does not have to accept all monuments until no open space remains. *Pleasant Grove City, Utah*, 555 U.S. at 470. The cases outline a doctrine of government speech that resonates with common sense and practical realities. But the "government speech" cases did not overturn years of First Amendment precedent providing that when the government opens up a forum for private citizens to speak, such as the State did when it created the specialty plate program at issue, the government cannot distinguish among potential speakers based on the speakers' viewpoints. *See, e.g.*, *Police Dept. of City of Chicago v. Mosley*, 408 U.S. 92, 96 (1972) ("[U]nder the Equal Protection Clause, not to mention the First Amendment itself, government may not grant the use of a forum to people whose views it finds acceptable, but deny use to those wishing to express less favored or more controversial views."); *Rosenberger v. Rector & Visitors of Univ. of Virginia*, 515 U.S. 819, 829 (1995) ("Once it has opened a

limited forum . . . the State must respect the lawful boundaries it has itself set. The State may not exclude speech where its distinction is not reasonable in light of the purpose served by the forum . . . nor may it discriminate against speech on the basis of its viewpoint. . . .") (internal quotations and citations omitted).

The Fifth Circuit correctly determined that organizational specialty plates at issue here are private speech and not government speech. *See Wooley v. Maynard*, 430 U.S. 705, 716 (1977) (Court presumed that license plates implicated private speech and engaged in a First Amendment analysis to hold that New Hampshire could not force its citizens to bear the state motto on standard issue license plates); *Arizona Life Coalition, Inc. v. Stanton*, 515 F.3d 956 (9th Cir. 2008), *cert. denied*, 555 U.S. 815 (2008) (Arizona's "special organization license plate program" was primarily private speech, and restrictions had to be viewpoint neutral); *Roach v. Stouffer*, 560 F.3d 860 (8th Cir. 2009) (Missouri's organizational license plate program held to be private speech of the organization and the vehicle owner).

C. DENYING TEXAS SCV'S SPECIALTY PLATE WITH THE CONFEDERATE BATTLE FLAG WAS VIEWPOINT DISCRIMINATION

It is undeniable that the Confederate battle flag is a symbol which evokes passionate viewpoints, both in favor and in opposition. As a Georgia district court observed:

> [T]here is no consensus today, almost forty years after the [adoption of state flag containing the Confederate battle flag] by the [Georgia] General Assembly, on its meaning. There are citizens of all races who view the flag as a symbolic acknowledgement of pride in Southern heritage and ideals of independence. Likewise, there are citizens of all races who perceive the flag as embodying principles of discrimination, segregation, white supremacy, and rebellion.

Coleman v. Miller, 912 F. Supp. 522, 530 (N.D. Ga. 1996), *aff'd*, 117 F.3d 527 (11th Cir. 1997). *See also Briggs v. Mississippi*, 331 F.3d 499, 506 (5th Cir. 2003) ("It is common knowledge that public reaction to and the debate over the flying of the Confederate battle flag, or its being a part of a state flag, has been virtually exclusively in relation to its symbolism of the Confederacy and the valor of its troops and whether or to what extent this symbolism extols or excuses slavery, racial oppression or resistance to racial equality."). The discussion that arises about the Confederate flag is exactly the sort of robust debate

that is protected by the First Amendment, and speakers in that debate cannot be discriminated against by the State on the basis of their viewpoint. *See Denno v. School Bd. of Volusia Cty.*, 218 F.3d 1267, 1285 (11th Cir. 2000) (J. Forrester, concurring and dissenting in part) ("The Confederate battle flag itself is a catalyst for the discussion of varying viewpoints on history, politics and societal issues. Discourse on such issues, without the fear of undue government constraint or retaliation, is exactly what the First Amendment was designed to protect."). That there is controversy surrounding the Confederate flag shows that it is a symbol that should be a topic for open debate, without the government censoring one side or the other.

When the DMVB rejected Texas SCV's plate, it entered into the debate over the flag's meaning and endorsed a particular viewpoint. The State gave its imprimatur to the viewpoint that the Confederate battle flag was a symbol of racism, and discriminated against those who view the flag as a historic symbol of the soldier's sacrifice, independence, and Southern heritage. The DMVB's rejection of the Texas SCV plate constitutes impermissible viewpoint discrimination under the First Amendment.

CONCLUSION

For the foregoing reasons, the petition for certiorari should be denied.

Respectfully submitted,

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