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.

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

REPLY BRIEF FOR THE PETITIONERS

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Through the program at issue, the Texas Legislature authorized non-profit organizations to submit applications to the Texas Department of Motor Vehicles proposing designs for new specialty license plates. *See* Tex. Transp. Code § 504.801. Once an application is submitted, the Department acquires complete control over whether the organization's design will be approved. *See* 43 Tex. Admin. Code §§ 217.28(i)(7), .40. If the Department approves a design, it may be printed on state-issued license plates, assuming all other statutory and regulatory conditions are met. *See id.* § 217.28(i)(8). If

the Department declines to approve a design, it may not lawfully appear on any state-issued plate. *See ibid.*

As the court of appeals recognized, its conclusion that specialty license plates produced under this program constitute private speech, rather than government speech, puts it in conflict with the Sixth Circuit. App. 15a (declining to follow *ACLU v. Bredesen*, 441 F.3d 370, 375–77 (6th Cir. 2006), and stating that *Bredesen* "cannot be reconciled with . . . *Wooley* [*v. Maynard*, 430 U.S. 705 (1977)]"). Four other circuits agree with the court of appeals on this point, reflecting the recurring nature of First Amendment challenges to state specialty plate programs and the uncertainty about how such challenges should be analyzed. *See Roach v. Stouffer*, 560 F.3d 860, 867 (8th Cir. 2009); *Choose Life Ill., Inc. v. White*, 547 F.3d 853, 863 (7th Cir. 2008); *Ariz. Life Coal. v. Stanton*, 515 F.3d 956, 965 (9th Cir. 2008); *Sons of Confederate Veterans, Inc. v. Comm'r of Va. Dep't of Motor Vehicles*, 288 F.3d 610, 621 (4th Cir. 2002). Respondents' efforts to downplay this conflict and portray it as inapplicable here fail, and their brief in opposition overlooks the complexities that arise, in the absence of guidance from this Court, when courts encounter speech containing elements of both private and governmental expression.

The Court should clarify the contours of the government-speech doctrine. This case is a good vehicle for doing so not only because litigation targeting specialty license plate programs is common and will continue to arise in the many States that have such programs, but also because the nature of the speech at issue allows for robust exploration of the doctrine.

1. As the Fourth Circuit noted more than a decade ago, "[n]o clear standard has yet been enunciated in our circuit or by the Supreme Court for determining when the government is 'speaking' and thus able to draw viewpoint-based distinctions, and when it is regulating private speech and thus unable to do so." *Sons of Confederate Veterans*, 288 F.3d at 618; *see also Sons of Confederate Veterans, Inc. v. Comm'r of Va. Dep't of Motor Vehicles*, 305 F.3d 241, 248 (4th Cir. 2002) (Niemeyer, J., dissenting from the denial of rehearing en banc) (observing that "[w]hether license-plate content is government speech has never been decided by our court, and the appropriate analysis is not clearly indicated by any Supreme Court precedent"). With respect to this Court's precedent, that statement remains true today, and the uncertainty renders suspect all of the circuit decisions on which the parties rely in this case.

a. Respondents are wrong that "[t]here is no circuit split applicable to these facts." Br. in Opp. 5. In response to the first question presented, respondents attempt to distinguish specialty plates authorized by state legislatures from specialty plates authorized by state agencies. *Id.* at 6, 9–11; *see id.* at 7 (asserting that, with respect to the second category of specialty plate, the courts of appeals agree that "private speech concerns [are implicated] and that government regulation must comply with the First Amendment").

That is a false dichotomy. When the question is whether a State or a private party is speaking, it does not matter whether the speech is authorized by a state legislature, a state agency, or a state official acting in his

or her official capacity. All three are equally governmental; respondents could not credibly assert that an official act of a state agency or a state official contains even a modicum of private expression. *See Stop the Beach Renourishment, Inc. v. Fla. Dep't of Envtl. Prot.*, 560 U.S. 702, 715 (2010) (plurality op.) (noting that, in determining whether a State has committed a taking, "the particular state *actor* is irrelevant"); *Mayor of Phila. v. Educ. Equal. League*, 415 U.S. 605, 615 n.13 (1974) (observing that "[t]he Constitution does not impose on the States any particular plan for the distribution of governmental powers"). And to the extent respondents assert that programs such as the one at issue here are "established for private parties to design specialty plates," Br. in Opp. 11, they elide the essential ingredient of state approval.

Far from promoting unfettered private speech, these programs merely allow private parties to propose speech that may or may not be approved for dissemination by the State on pieces of state property. In that respect, they are no different from programs through which legislatures are spurred to authorize specialty plates proposed by the citizens they represent. *See Bredesen*, 441 F.3d at 376 (noting that, "[a]t least where Tennessee does not blatantly contradict itself in the messages it sends by approving [specialty license] plates, there is no reason to doubt that a group's ability to secure a specialty plate amounts to state approval").

Accordingly, the conflict that petitioners identified between the Sixth Circuit and the Fourth, Fifth, Seventh, Eighth, and Ninth Circuits, Pet. 1–2, 11–14, is

applicable here. The Court should grant the petition to resolve it.[1]

b. Respondents next attempt to diminish the uncertainty surrounding the government-speech doctrine by stating that "[t]he courts of appeals engage in a variety of linguistic formulations of the test to be applied to determine whether speech is 'private' or 'government.'" Br. in Opp. 8 n.6. But the cases they cite do not merely use different words to describe a single test; they highlight the absence of a definitive test and proceed down different analytical paths. *See, e.g.*, App. 11a (following *Pleasant Grove City v. Summum*, 555 U.S. 460, 487 (2009) (Souter, J., concurring in the judgment)); *Choose Life Ill.*, 547 F.3d at 863 ("distill[ing]" and "simplif[ying]" a multifactor test used in other circuits); *Bredesen*, 441 F.3d at 375–77 (following *Johanns v. Livestock Mktg. Ass'n*, 544 U.S. 550 (2005)); *Sons of Confederate Veterans*, 288 F.3d at 618–19 (applying four factors that are

[1] Respondents do not deny the existence of circuit conflict on whether specialty license plates "created by specific legislative enactment[s]" present government speech. Br. in Opp. 9. As just noted, state governments speak through their legislatures, agencies, and officials alike, so the distinction that respondents draw on this point is illusory. But even assuming otherwise, the petition for a writ of certiorari in *Berger v. ACLU of North Carolina*, No. 14-35 (arising from *ACLU of North Carolina v. Tata*, 742 F.3d 563, 568, 575 (4th Cir. 2014)), unquestionably implicates that conflict. *See* Br. in Opp. 9–11 (conceding that *Bredesen* and *Tata* are irreconcilable). At the very least, the Court should hold the petition in this case pending its disposition of *Berger*.

neither "exhaustive" nor "always[] applicable"). These decisions only bolster the need for further review.

Moreover, the "reasonable observer" test that the court of appeals applied in this case, App. 11a, and that other courts of appeals have applied in this context, *e.g.*, *Roach*, 560 F.3d at 867, is drawn from Justice Souter's opinion concurring in the judgment in *Summum*. *See* 555 U.S. at 487 ("[T]he best approach that occurs to me is to ask whether a reasonable and fully informed observer would understand the expression to be government speech, as distinct from private speech the government chooses to oblige . . . ."). That courts of appeals are resorting to a single Justice's concurring opinion further underscores the need for guidance—particularly where the "reasonable observer" test is at best in tension with statements of a majority of this Court, *see* App. 29a (Smith, J., dissenting); Pet. 6–7, and the same jurist who proposed it later acknowledged that the government-speech doctrine remains in "an adolescent stage of imprecision." *Griswold v. Driscoll*, 616 F.3d 53, 59 n.6 (1st Cir. 2010) (Souter, J., by designation).

c. The relevant uncertainty extends beyond mere lack of agreement about the applicable test. Another open question is what leeway a governmental actor has under the First Amendment if the speech in question is a mixture of private and government expression.

Like the dissenting opinion below, App. 29a n.1, the Fourth Circuit has concluded that specialty license plates present this type of amalgam. *E.g.*, *Tata*, 742 F.3d at 568, 575 (acknowledging that this Court has not embraced the concept of mixed speech but nevertheless holding that a

"'Choose Life' plate . . . implicates private speech rights and [could not] correctly be characterized as pure government speech"); *see also Ariz. Life Coal.*, 515 F.3d at 960 (stating that "[m]essages conveyed through special organization plates—although possessing some characteristics of government speech—represent primarily private speech").

Accordingly, to the extent respondents identify a private component of the speech at issue here, that element of specialty license plates only provides an additional reason to grant the petition. As Judge Luttig suggested a dozen years ago, "speech that appears on the so-called 'special' or 'vanity' license plate could prove to be the quintessential example of speech that is both private and governmental." *Sons of Confederate Veterans*, 305 F.3d at 245 (Luttig, J., respecting the denial of rehearing en banc). The Court should accept Judge Luttig's tacit invitation to provide clarity on this point of law.[2]

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[2] Respondents' efforts to deny the existence of circuit conflict on the petition's second question, Br. in Opp. 11–14, likewise fail. Although the Seventh Circuit did identify exclusion of the confederate battle flag from a specialty plate design as an example of viewpoint discrimination, *Choose Life Ill.*, 547 F.3d at 865, there could be no question that, under the Fifth Circuit's sweeping understanding of that concept, the challenged action in *Choose Life Illinois* would be unconstitutional. *Compare* App. 22a–23a (stating that petitioners would be engaging in viewpoint discrimination if they "[s]ilenc[ed] both the view of [respondents] and the view of those members of the public who find the flag offensive"), *with Choose Life Ill.*, 547 F.3d at 865, 867 (holding that Illinois's "viewpoint neutral and reasonable" decision to deny *any* abortion-related specialty plate was permissible content discrimination).

2. It is undisputed that when the government speaks, the First Amendment does not restrict its expression. *Summum*, 555 U.S. at 467–68; *see* Br. in Opp. 17–18. For that reason, respondents' discussion of "established . . . First Amendment law" regarding regulation of offensive speech, Br. in Opp. 15; *see id.* at 6, 16–17, 20–21, would be relevant only if the speech at issue here were private.

But because content printed on state-issued license plates approved by government officials is either purely or predominately government speech, the court of appeals erred in concluding that inapplicable concerns about viewpoint discrimination forced Texas to approve respondents' application for a specialty license plate featuring the confederate battle flag. *See Summum*, 555 U.S. at 470–71 (holding that "privately financed and donated monuments that the government accepts and displays to the public on government land" express government speech); *Johanns*, 544 U.S. at 562 (concluding that "[w]hen . . . the government sets the overall message to be communicated and approves every word that is disseminated, it is not precluded from relying on the government-speech doctrine merely because it solicits assistance from nongovernmental sources in developing specific messages").

Respondents' contention that *Wooley* supports their position on the merits, Br. in Opp. 19, is based on a misreading of the opinion. The question in *Wooley* was whether New Hampshire could compel citizens who opposed the State's "Live Free or Die" motto to display that motto on their vehicles' license plates. 430 U.S. at 707–08, 713. The Court's opinion explaining why the

State could not do so supports petitioners' argument in two respects.

First, *Wooley* confirms that a message approved by a State and printed on state-issued license plates is government speech. As the Court explained, "New Hampshire's statute in effect require[d] that [the vehicle owners] use their private property as a 'mobile billboard' for *the State's ideological message*." *Id.* at 715 (emphasis added); *see also id.* at 717 (observing that "[t]he State [wa]s seeking to communicate to others *an official view*" (emphasis added)).

Second, *Wooley* held that a State may not force its citizens to display a message with which they disagree. *Id.* at 717. A private entity should likewise not be able to force a State to print and disseminate messages it finds offensive. *See Sons of Confederate Veterans, Inc.*, 305 F.3d at 252 & n.4 (Gregory, J., dissenting from the denial of rehearing en banc) (observing that a State that does not want to print the confederate battle flag on its license plates "is in a position very similar to that of objecting drivers in *Wooley*" and that "even if the display of the Confederate flag is not considered 'pure' government speech, that there will be a perception of government endorsement of the Confederate flag is undeniable").

Respondents fail to mention, let alone contest, the untenable consequences of a conclusion that States do not enjoy the privilege that the Court recognized in *Wooley* and instead must maintain viewpoint neutrality when speaking through their specialty license plate programs. *See* Pet. 17–18. Regardless of whether messages on such plates are best viewed as government speech or

a mixture of private and government speech, embracing respondents' position would force any State that has authorized a "Stop Child Abuse" plate, for example, to authorize a "Legalize Child Abuse" plate as well.

But the First Amendment is prohibitory, not mandatory. It generally forbids governmental interference with private speech, but it does not require governmental support of private speech with which the government disagrees. *See Rust v. Sullivan*, 500 U.S. 173, 194 (1991) (explaining that "[w]hen Congress established a National Endowment for Democracy to encourage other countries to adopt democratic principles, it was not constitutionally required to fund a program to encourage competing lines of political philosophy such as communism and fascism" (citation omitted)). The Court should grant the petition and hold that, although a State may generally not prohibit its citizens from offending one other, it cannot be forced by private parties to offend its citizens itself.

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The petition for a writ of certiorari should be granted.

Respectfully submitted.

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