

In The
Supreme Court of the United States

NORTH CAROLINA DIVISION OF SONS OF
CONFEDERATE VETERANS, INC.,

Petitioner;

v.

NORTH CAROLINA DEPARTMENT OF
TRANSPORTATION; J. ERIC BOYETTE,

In his official capacity as Secretary of Transportation of
the State of North Carolina; NORTH CAROLINA
DIVISION OF MOTOR VEHICLES; and TORRE JESSUP,

In his official capacity as Commissioner of
Motor Vehicles of the State of North Carolina,

Respondents.

**On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Fourth Circuit**

REPLY BRIEF

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ARGUMENT

RESPONDENTS HAVE PURPOSEFULLY SOUGHT TO CONFUSE AND OBFUSCATE THE SUBSTANTIAL DIFFERENCES BETWEEN THE TEXAS AND NORTH CAROLINA STATUTORY SCHEMES GOVERNING SPECIALTY LICENSE PLATES IN ORDER TO ARGUE THAT THE GOVERNMENT SPEECH DOCTRINE BARS PETITIONER'S CLAIM FOR RELIEF.

In order to understand the basis for Petitioner's argument, as well as the distinction which Petitioner draws between the present case and *Walker v. Texas Div., Sons of Confederate Veterans, Inc.*, 576 U.S. 200 (2015), one must realize there are three types of license plates authorized under Chapter 20 of the North Carolina General Statutes: (1) license plates bearing a randomly generated and assigned combination of letters and numbers; (2) vanity plates which bear words or a combination of symbols formulated by a motorist and approved by NC-DMV; and (3) specialty plates specifically authorized by the North Carolina General Assembly.

The vast majority of license plates in North Carolina consist of plates bearing a randomly generated and assigned combination of letters and numbers created by NC-DMV and available through local NC-DMV offices at the time a motor vehicle is either titled for the first time or transferred to another owner.

The second type of license plate is governed by N.C.G.S. § 20-79(b)(189) and it is identified as a

personalized license plate. The statute provides that a personalized license plate may be issued to the registered owner of a motor vehicle and that:

The plate will bear the letters or letters and numbers requested by the owner. The Division may refuse to issue a plate with a letter combination that is offensive to good taste and decency. The Division may not issue a plate that duplicates another plate.

The enabling statute authorizing *personalized* license plates specifically vests NC-DMV with full discretion over the contents the messages conveyed by them. In so doing, these specifically *personalized* letter combinations fall within the parameters of the holding of *Walker v. Texas Div., Sons of Confederate Veterans, Inc.*, *supra*, because the North Carolina General Assembly made a public policy decision to empower NC-DMV with authority to reject a plate application which the agency found to be offensive to good taste and decency. Because of this reservation of discretion in the enabling legislation, a *personalized* license plate constitutes an example of government speech, and the NC-DMV is authorized to determine for the State of North Carolina which messages it will convey and which messages it will not convey on such plates.

The third type of license plate available in North Carolina includes that which is available to a qualifying civic club under N.C.G.S. § 79.4(b)(44). That statute provides:

(b) *Types. – The Division shall issue the following types of special registration plates:*

* * * * *

(44) *Civic Club. – Issuable to a member of a nationally recognized civic organization whose member clubs in the State are exempt from State corporate income tax under G.S. 105-130.11(a)(5). Examples of these clubs include Jaycees, Kiwanis, Optimist, Rotary, Ruritan, and Shrine. The plate shall bear a word or phrase identifying the civic club and the emblem of the civic club. A person may obtain from the Division a special registration plate under this subdivision for the registered owner of a motor vehicle or a motorcycle. The registration fees and the restrictions on the issuance of a specialized registration plate for a motorcycle are the same as for any motor vehicle. The Division may not issue a civic club plate authorized by this subdivision unless it receives at least 300 applications for that civic club plate.*

The foregoing statute must be read in tandem with N.C.G.S. § 20-79.4(a3) which provides:

The Division shall develop, in consultation with the State Highway Patrol and the Division of Adult Correction and Juvenile Justice, a standardized format for special license plates. The format shall allow for the name of the State and the license plate number to be reflective and to contrast with the background so it may be easily read by the human eye and by

cameras installed along roadways as part of tolling and speed enforcement. A designated segment of the plate shall be set aside for unique design representing various groups and interests. Nothing in this subsection shall be construed to require the recall of existing special license plates.¹

(Emphasis added).

Under North Carolina's relevant statutes concerning civic club specialty plates, as interpreted in *North Carolina Div. of Sons of Confederate Veterans v. Faulkner*, 131 N.C. App. 775, 509 S.E.2d 207 (1998) makes it

¹ The North Carolina statute should be contrasted with that of the State of Texas, which provides under Section 504.801(c) of the Texas Transportation Code:

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. (emphasis added)

The foregoing statute was that which was construed in *Walker*, and it is similar to the North Carolina statute which authorizes personalized license plates. The North Carolina statutory scheme does not give Defendants any authority or discretion pertaining to the design of a specialty license plate for a civic club.

clear that NC-DMV² has no discretion over the design of a civic club specialty license plate other than ensuring that its emblem does not obstruct the readability of the alpha/numeric identification assigned to the plate by NC-DMV.³

If a civic club wants a specialty plate for its group, it must gather at least 300 applications from members, provide proof of non-profit status, and request the statutory issuance of specialty plates “bear[ing] a word or phrase identifying the civic club and the emblem of the civic club” that shall be printed in a “designated segment of the plate” “set aside for unique design[s] representing various groups and interests.” N.C.G.S. § 20-79.4(a3). Under the North Carolina statute, any qualifying civic organization may have its own specialty plate provided that the design complies with a narrowly drawn statutory limitation.

N.C.G.S. § 20-79.4(a3) provides, in pertinent part, as follows:

The format shall allow for the name of the State and the license plate number to be

² Where the abbreviation “NC-DMV” is used herein, it will refer to the North Carolina Department of Transportation, Division of Motor Vehicles.

³ Compare *American Civil Liberties Union of N.C. v. Tennyson*, 815 F.3d 183 (4th Cir. 2016), and its companion case, *ACLU v. Tata*, 742 F.3d 563 (4th Cir. 2012) dealt with the selection of designs expressly created by statute by action of the General Assembly. Neither case dealt with the civic-club statute, N.C.G.S. § 20-79.4(b)(44) (2020), which is divisible from N.C.G.S. §§ 20-79.4(b)(1)-(43) and (45)-(265).

reflective and to contrast with the background so it may be easily read by the human eye and by cameras installed along roadways as part of tolling and speed enforcement. A designated segment of the plate shall be set aside for unique design representing various groups and interests. . . .

The foregoing statute sets forth only two requirements for the format of a special license plate: (1) the name of the State and the license plate number must be reflective and contrast with the background; and (2) a designated segment of the plate is to be set aside for the unique design representing the group or interest in question. Such a plate is distinct from a personalized vanity or self-designed license plate over which NC-DMV has complete discretion over the message to appear. Unlike the Texas (TX)⁴ statute relied upon by the lower courts and the NC personalized plate statute,⁵ NC's civic club statute⁶ vests no discretion to the NC-DMV over the design of a civic club's emblem or their name, which comprise the creative expression of the license plate.

Respondents have consciously attempted to confuse the matter by suggesting that discretion granted

⁴ Where the abbreviation “TX” is used herein, it will refer to the state of Texas.

⁵ See N.C.G.S. § 20-79.4(b)(189) (2020).

⁶ See N.C.G.S. § 20-79.4(b)(1)-(43); *id.* § 20-79.4(b)(45)-(265) (2020) (publishing the list of license plate designs approved by the North Carolina General Assembly). Subsection (b)(44) is distinguishable within the specialty plate framework and should be considered a “civic club law” under *Faulkner*.

to the NC-DMV under the “personalized” plate section of N.C.G.S. § 20-79.4(b)(189), which is based upon whether the “owner” of a motor vehicle requesting a personalized plate has chosen an alpha/numeric combination that “is offensive to good taste and decency[,]” somehow extends to the emblem and name of an eligible “civic club” under N.C.G.S. § 20-79.4(b)(44). Their argument is patently false. The discretionary standard for such plates under N.C.G.S. § 20-79.4(b)(189) is limited to personalized plates only. That discretion appears nowhere else in the statutory scheme for license plates in North Carolina.

The surreptitious masking of the lack of discretion under N.C.G.S. § 20-79.4(b)(44) by citing another sub-part of the same statute is a way for Respondents to bootstrap the government speech doctrine into a field in which the N.C. General Assembly has knowingly created a public forum. Even if a motorist chose a hybrid (personalized and civic club) specialty plate, the provisions of N.C.G.S. § 20-79.4(b)(189) only grant the NC-DMV discretion over the combination of the personalized letters as requested by the motorist, not the emblem or name of the civic club upon the plate. *Id.*

Respondents do not deny that the SCV was a qualifying civic organization under the North Carolina statute; therefore, its members were eligible to be issued specialty plates identifying themselves as members of the SCV pursuant to N.C.G.S. § 20-79.3A, N.C.G.S. § 20-79.4(b), and the decision rendered in *Faulkner*. Such specialty plates bear the emblem of the SCV (its USPTO Service Mark), which contains a

representation of the Confederate Battle Flag. Petitioner SCV's registered emblem represents its membership and their shared ancestry. The Respondents' demand that the SCV adopt a different emblem is not only governmental censorship of public speech, but it is an attempt to require Petitioner and its members to change their identity to participate in a public forum. A specialty license plate does not implicate the government speech doctrine for the simple reason that the controlling statute does not enable or authorize Respondents to make any decision concerning the message being conveyed so long as the specialty plate complies with the standards for readability. The NC civic club statute does not allow Respondents any discretion in the design of the specialty plate or its content if the statutory requirements are met. In the absence of any discretionary authority over the content of a civic club specialty license plate, the government speech doctrine does not apply to the case at all. The mere involvement of the government in providing a forum likewise does not constitute sufficient control to make the message government speech. *See Matal v. Tam*, 582 U.S. 218 (2017). An application requirement by itself cannot transform private speech in a public forum into government speech. North Carolina law makes it abundantly clear that a qualifying civic organization and its members control their emblem and name on the plate.

The plain language of the *applicable and governing* statute requires no interpretation. The statute *requires* the Division of Motor Vehicles to issue a

specialty plate to a member of a nationally recognized civic organization whose member clubs in NC are exempt from taxes under N.C.G.S. § 105-130.11(a)(5) and which bear a word or phrase identifying the civic club and the emblem of the civic club.

Under the TX statute construed in *Walker*, the Texas Department of Motor Vehicles may “create new specialty license plates on its own initiative or on receipt of an application from a” non-profit entity seeking to sponsor a specialty plate. Tex. Transp. Code Ann. §§ 504.801(a), (b). A non-profit must include in its application “a draft design of the specialty license plate.” 43 Tex. Admin. Code § 217.45(i)(2)(C). The relevant statute says that the TX-DMV “may refuse to create a new specialty license plate” for a number of enumerated reasons; for example, “if the design might be offensive to any member of the public . . . or for any other reason established by rule.” Tex. Transp. Code Ann. § 504.801(c). The Texas DMV “must approve every specialty plate design proposal.” 43 Tex. Admin. Code § 504.005(a)

Governmental participation in an action does not necessarily implicate the government speech doctrine. The public forum doctrine is implicated in this case because the North Carolina General Assembly has created a public forum with regard to civic club license plates under the enabling statute, and it has denied NC-DMV any discretion in the matter.

In *Shurtleff v. City of Boston*, 142 S. Ct. 1583, 1587 (2022), Justice Breyer observed:

In answering these questions, we conduct a holistic inquiry designed to determine whether the government intends to speak for itself or to regulate private expression. Our review is not mechanical; it is driven by a case's context rather than the rote application of rigid factors. Our past cases have looked to several types of evidence to guide the analysis, including: the history of the expression at issue; the public's likely perception as to who (the government or a private person) is speaking; and the extent to which the government has actively shaped or controlled the expression. . . .

. . . *In Walker, we explained that license plate designs proposed by private groups also amounted to government speech because, among other reasons, the State that issued the plates "maintain[ed] direct control over the messages conveyed" by "actively" reviewing designs and rejecting over a dozen proposals.* In *Matal v. Tam*, . . . on the other hand, we concluded that trademarking words or symbols generated by private registrants did not amount to government speech. . . . Though the Patent and Trademark Office had to approve each proposed mark, it did not exercise sufficient control over the nature and content of those marks to convey a governmental message in so doing.

142 S. Ct. at 1589-90 (emphasis added) (citations omitted).

Walker has no relation to the North Carolina program simply because North Carolina civic club specialty plates do not infringe upon any government speech. The only speech at issue in this case is that of motorists who qualify for civic club plate as a matter of right. The governing North Carolina statutes do not allow the NC-DMV to regulate content other than for the limited purpose of assuring the visibility of the number displayed on the license plate itself. In *Shurtleff*, Justice Breyer observed:

In *Walker*, a state board “maintain[ed] direct control” over license plate designs by “actively” reviewing every proposal and rejecting at least a dozen. . . . Boston has no comparable record.

The facts of this case are much closer to *Matal v. Tam*. There, we held that trademarks were not government speech because the Patent and Trademark Office registered all manner of marks and normally did not consider their viewpoint, except occasionally to turn away marks it deemed “offensive.” . . . Boston’s come-one-come-all attitude – except, that is, for Camp Constitution’s religious flag – is similar.

142 S. Ct. at 1592 (citations omitted); *see Matal v. Tam*, 582 U.S. 218 (2017).

There is no evidence that the State of North Carolina has ever denied a qualifying civic group the opportunity to create and display a specialty license plate other than the SCV. The civic club’s emblem and

message displayed on a specialty license plate does not originate with a governmental agency nor is the message itself subject to governmental approval. All of the content on a North Carolina civic club license plate, except the letters and numbers uniquely identifying the plate, comes from the qualifying organization itself. When a government does not speak for itself, it may not exclude speech in a manner which constitutes impermissible viewpoint discrimination. *Good News Club v. Milford Central Sch.*, 533 U.S. 98 (2001). The mere involvement of the government in providing a forum likewise does not constitute sufficient control to make the message government speech. *See Matal v. Tam, supra* at 235.

SUMMARY OF PETITIONER'S CASE

A writ of certiorari should be granted for the purpose of clarifying the contours of the public forum doctrine in such a manner as to distinguish it from the government speech doctrine under the First and Fourteenth Amendments to the United States Constitution.⁷ The fundamental question presented is: Whether

⁷ Respondents seem to bemoan the fact that this case has wound its way through the Federal courts and now appears on this Court's docket. Respondents' position is disingenuous, at best. Petitioner originally brought this action in the Superior Court of Lee County, North Carolina. The proceeding was removed by Respondents themselves to the United States District Court for the Middle District of North Carolina. But for the action of Respondents, this case would have been heard in courts of the State of North Carolina rather than in the Federal courts. In any

the court erred in applying *Walker*'s government speech test to a license-plate regime that vests ultimate creative control in a statutorily defined "civic club" under the enabling statute enacted as an expression of public policy by the North Carolina General Assembly.

CONCLUSION

The Petitioner respectfully prays that this Court issue its writ of certiorari to the United States Court of Appeals for the Fourth Circuit so that the issues presented herein might be considered in argument.

Respectfully submitted, this 17th day of May 2023.

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event, *Faulkner* is authoritative on the issue because it holds that NC-DMV cannot deny a civic club license plate to members of an organization which meets the statutory criteria.