No. _____

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Did the district court and Fourth Circuit Court of Appeals err in applying the "Government Speech" doctrine to limit the speech of private citizens and organizations participating in a specialty license plate program which originated in a statute that did not vest the government agency with any discretion with regard to the eligibility of civic groups or the design of the civic group's emblem?

2. Did the district court and Fourth Circuit Court of Appeals err in failing to apply the public forum doctrine to a specialty license plate program which originated in a statute which did not vest the government agency with any discretion with regard to the design of such specialty plates other than to ensure the readability of such plates?

3. Did the district court and Fourth Circuit Court of Appeals err in applying the "Government Speech" doctrine where there was an adequate and independent state law basis which did not implicate the Constitution to hold that the NC-DMV exceeded its authority by denying members of Petitioner the ability to obtain and display a specialty license plate?

PARTIES TO THE PROCEEDING

Petitioner North Carolina Division of Sons of Confederate Veterans, Inc. was the plaintiff in the district court proceedings and appellant in the Court of Appeals proceedings. Respondents North Carolina Department of Transportation; J. Eric Boyette, North Carolina Division of Motor Vehicles; and Torre Jessup were the defendants in the district court proceedings and appellees in the Court of Appeals proceedings.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 29.6, Petitioner North Carolina Division of Sons of Confederate Veterans, Inc. states that it has no parent corporation and no publicly held corporation holds 10% or more of its stock.

RELATED CASES

North Carolina Division of Sons of Confederate Veterans, Inc. v. North Carolina Department of Transportation; J. Eric Boyette, North Carolina Division of Motor Vehicles; and Torre Jessup; No. 1:21-cv-00296, United States District Court for the Middle District of North Carolina. Judgment entered April 8, 2022.

North Carolina Division of Sons of Confederate Veterans, Inc. v. North Carolina Department of Transportation; J. Eric Boyette, North Carolina Division of Motor Vehicles; and Torre Jessup; No. 22-1292, United States Court of Appeals for the Fourth Circuit. Judgment entered December 22, 2022.

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3. The district court and Fourth Circuit Court of Appeals erred when applying the "Government Speech" doctrine to limit the speech of private citizens and organizations participating in a specialty license plate program where there was an adequate and independent state law basis which did not implicate the Constitution to hold that the NC-DMV exceeded its authority by denying members of Petitioner the ability to obtain and display a specialty license plate 33

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Respondents.

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

PETITION FOR A WRIT OF CERTIORARI

The North Carolina Division of Sons of Confederate Veterans, Inc., ("SCV-NCD")[1] Petitioner in this

[1] Where the abbreviation "SCV" is used herein, it will refer to the national organization. When the abbreviation "SCV-NCD" is used herein, it will refer to the Petitioner.

action, respectfully requests that a writ of certiorari be issued to review the judgment of the United States Court of Appeals for the Fourth Circuit entered in this case on December 22, 2022.

OPINIONS BELOW

The December 22, 2022, opinion of the United States Court of Appeals for the Fourth Circuit is unreported, and it is reprinted in the Appendix to this Petition. App. 1

The prior opinion of the United States District Court for the Middle District of North Carolina, entered March 1, 2022, is reported at 2022 WL 604173, and it is reprinted in the Appendix to this Petition. App. 5.

STATEMENT OF JURISDICTION

The judgment of the Court of Appeals was entered on December 22, 2022. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the First Amendment to the Constitution of the United States, which provides as follows:

> Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

This case also involves § 1 of the Fourteenth Amendment to the Constitution of the United States, which provides as follows:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

The above United States Constitutional protections are actionable as this case involves N.C.G.S. § 20-79.4(a), (a1), (b), and (b)(44) which provides, in pertinent part, as follows:

> (a) General. – Upon application and payment of the required registration fees, a person may obtain from the Division a special registration plate for a motor vehicle registered in that person's name if the person qualifies for the registration plate. . . .

(a1) Qualifying for a Special Plate. – In order to qualify for a special plate, an applicant shall meet all of the qualifications set out in this section. The Division of Motor Vehicles shall verify the qualifications of an individual to whom any special plate is issued to ensure only qualified applicants receive the requested special plates.

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

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(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 N.C.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.

STATEMENT OF THE CASE

Petitioner is a non-profit organization which exists for the purpose of honoring and remembering the sacrifices made by those who served in the armed forces of the Confederate States of America. The SCV provides services to communities through historical preservation, education, and other civic activities. The membership is open to all male descendants of Confederate veterans who served honorably without regard to ethnicity, race, or religious creed.

The SCV was not created out of hate and is non-political, so it does not endorse politicians or political parties. The SCV has consistently opposed the use of the Confederate Battle Flag by individuals and organizations pursuing political agendas or seeking to discriminate against individuals or groups.

The organization raises money for the conservation and preservation of historical artifacts; identifies, preserves, and marks the graves of Confederate veterans; preserves memorials to veterans and military units; supports museums; preserves battlefields threatened by development; and educates children and adults about the life of the everyday soldier. All of these activities ensure that the history of the period from 1861 to 1865 is preserved.

The status of Petitioner SCV-NCD as a nationally recognized civic organization is objectively documented in the following particulars:

A. The SCV has a long history as a nationally recognized civic organization, dating back over 125 years serving the community.

B. The SCV-NCD has tax-exempt status under Section 501(c)(3) of the Internal Revenue Code of 1986 as a civic league or organization from the Internal Revenue Service, as well as under the provisions of Chapter 105 of the North Carolina General Statutes from the North Carolina Department of Revenue.

C. The SCV's nationally recognized emblem has been issued a trademark (service mark) by the United States Patent and Trademark Office.

D. Petitioner SCV-NCD is in full compliance with all statutes and regulations applicable to non-profit entities in the State of North Carolina.

Under North Carolina's relevant statutes concerning civic club specialty plates and *North Carolina Div. of Sons of Confederate Veterans v. Faulkner*, 131 N.C. App. 775, 509 S.E.2d 207 (1998), it is settled law that the NC-DMV[2] has no discretion over the design of a civic club's emblem. North Carolina ("NC")[3] motorists are required to display license plates while traveling on the state's public roads. N.C.G.S. § 20-63 (2020). Specialty license plates are available for motorists who wish to display a particular interest from a selection of

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

[3] Where the abbreviation "NC" (or "N.C.") is used herein, it will refer to the state of North Carolina.

designs set forth in the statute *or one created by a qualifying civic organization*. N.C.G.S. §§ 20-79.4(a3) and (b)(44) (2020).[4]

The statute expressly authorizes specialty plates for civic clubs. N.C.G.S. § 20-79.4(b)(44) (2020). 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 state statute, any qualifying civic organization may have its own specialty plate. Unlike the Texas (TX)[5] statute relied upon by the lower courts and the NC personalized plate statute,[6] NC's civic club statute[7] vests no discretion to the NC-DMV over the

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[4] *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. 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).

[5] Where the abbreviation "TX" is used herein, it will refer to the state of Texas.

[6] *See* N.C.G.S. § 20-79.4(b)(189) (2020).

[7] *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*.

design of a civic club's emblem or their name, which comprise the creative expression of the license plate.

However, the Respondents have attempted to confuse the matter by suggesting that discretion granted 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 a letter 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) provides as follows:

> Personalized. – Issuable to the registered owner of a motor vehicle. *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.

(Emphasis added.)

The surreptitious masking of the lack of discretion under N.C.G.S. § 20-79.4(b)(44) by citing another subpart of the same statute is a way 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.*

At all times relevant to the allegations in this complaint, the SCV was a qualifying civic organization under the NC statute; thus 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 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 government requiring the Petitioner and its members change their identity to participate in a public forum, when NC law does not support such demand.

On January 11, 2021, Respondent NC-DMV issued a letter in which it stated that it would no longer issue or renew specialty license plates bearing the Confederate Battle Flag, which is contained in the service marked emblem of the SCV. A copy of such letter was appended to the complaint as Exhibit C. No other civic organization has received such a letter in the history of the NC specialty plate program.

Thereafter, on March 8, 2021, Petitioner filed the instant action for a declaratory judgment pursuant to the provisions of N.C.G.S. § 1-253, for preliminary and permanent injunction, and for relief pursuant to the provisions of 42 U.S.C. § 1983 in the Superior Court of Lee County, N.C. On April 8, 2021, Respondents filed a Notice of Removal, and the proceeding was removed to the United States District Court for the Middle District of North Carolina pursuant to the provisions of 28 U.S.C. §§ 1331, 1367, 1441, and 1446.

On March 1, 2022, the Honorable William L. Osteen, Jr., United States District Court Judge for the Middle District of North Carolina, issued a memorandum opinion granting Respondents' motion to dismiss for failure to state a claim and dismissing Petitioner's complaint.[8] Petitioner gave notice of appeal to the United States Court of Appeals for the Fourth Circuit in a timely manner from such decision on March 11, 2022. On April 8, 2022, the district court filed a formal judgment dismissing the proceeding.

The Circuit Court of Appeals had jurisdiction over the appeal pursuant to 28 U.S.C. § 1291 because the March 1, 2022, opinion and the April 8, 2022, order of the district court constituted final orders dismissing the proceeding in its entirety and leaving no matters for future resolution.

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[8] *See* Fed. R. Civ. P. 12(b)(6).

On December 22, 2022, a panel of the United States Court of Appeals for the Fourth Circuit delivered its per curiam opinion in which the judgment of the district court dismissing Petitioner's complaint was affirmed without discussion.

REASONS FOR GRANTING THE WRIT

INTRODUCTION

The present case is not one in which Petitioners seek the court to grant its writ of certiorari for the purpose of advancing a novel theory of constitutional interpretation; nor is it one in which Petitioners advance arguments in support of repudiating established constitutional jurisprudence. Instead, Petitioners seek a writ of certiorari to request the court correct the errors of lower courts in ignoring the controlling NC statute and *Faulkner* as settled law, as well as distinguishing government speech from a public forum in which viewpoint discrimination is unconstitutional.

ARGUMENT

1. The district court and Fourth Circuit Court of Appeals erred when applying the "Government Speech" doctrine to limit the speech of private citizens and organizations participating in a specialty license plate program which originated in a statute that did not vest the government agency with any discretion with regard to the eligibility of civic groups or the design of the civic group's emblem.

The First Amendment works as a shield to protect private persons from "encroachment[s] by the government" on their right to speak freely, *Hurley v. Irish – Am. Gay, Lesbian & Bisexual Grp. of Bos., Inc.*, 515 U.S. 557, 566 (1995). "[T]he Free Speech Clause of the First Amendment restricts government regulation of private speech; it does not regulate government speech." *Pleasant Grove City v. Summum*, 555 U.S. 460, 467 (2009). "[A] government entity has the right to speak for itself," which consists generally in the ability "to say what it wishes" and "to select the views that it wants to express." *Id.* at 467-68.

"[I]n the realm of private speech or expression, government regulation may not favor one speaker over another." *Rosenberger v. Rector and Visitors of Univ. of Va.*, 515 U.S. 819, 828 (1995). Because characterizing speech as government speech "strips it of all First Amendment protection" under the Free Speech Clause, *Walker v. Texas Div., Sons of Confederate Veterans, Inc.*,

576 U.S. 200, 220 (2015) (Alito, J., dissenting), a court should tread lightly in applying the government speech label to action undertaken by the Government.

The analysis of the district court, as affirmed without discussion by the Fourth Circuit, in interpreting *Walker* to bring this case within the government speech doctrine must fail because the judge did not consider the factors enunciated in *Walker* as matters to weigh. Rather, the district court interpreted *Walker* as an inflexible bright-line rule. Government speech is not involved in this case; instead, this is a matter which requires application and understanding of the specific state statute involved. Petitioner SCV-NCD contends that the NC statute is substantially different from the TX statute considered in *Walker* and that such differences make a compelling argument that *Walker*'s application should be limited to its precise facts.

Under the NC statute there is no discretion allowed by the NC-DMV in the issuance of a civic club's license plate and under the TX statute a review by the TX-DMV[9] is allowed. In *Walker*, the Supreme Court of the United States considered a free speech claim brought by the Texas Division of the SCV which challenged Texas' decision to reject a request for the state to issue a specialty license plate displaying the SCV's name and a depiction of the Confederate Battle Flag. *Walker*, 576 U.S. at 203-04. *Walker* is authoritative on

[9] Where the abbreviation "TX-DMV" is used, it will refer to the Texas Department of Motor Vehicles.

the facts presented in that case under TX law, but it does not control the outcome of the present case because of the substantial factual and legal distinctions created by the NC statutory framework and affirmed by *Faulkner*.

Under the TX statute, 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 statutory scheme specifically provides that final authority over the design and content of specialty license plates, other than those specifically authorized by the Texas legislature, rests with the TX-DMV by stating in subsection (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*, . . .

(Emphasis added.)

In upholding the absolute right of the state of Texas to control the content of messages articulated on its license plates, this Court identified three distinct factors that when combined led to the conclusion that Texas had created a government speech forum.

First, "the history of license plates" suggests "they long have communicated messages from the States" in order to urge action, to promote tourism, to tout local industries, and to commemorate historically noteworthy events. *Walker*, 576 U.S. at 211-212. Such messages have been conveyed by graphics and slogans since the early twentieth century, and Texas had approved specialty license plates "for decades." *Id.*

Second, reasonable observers would conclude that Texas "agree[s] with the message displayed" on specialty license plates due to their purpose and design, *Id.* at 212-213. Each Texas license plate is a government article serving the governmental purposes of vehicle registration and identification.

Third, and most importantly, Texas exercised "direct control over the messages" on specialty license plates. *Id.* Under the governing regulations, the Texas Department of Motor Vehicles "must approve every specialty plate design proposal," and Texas dictates "the design, typeface, color, and alphanumeric pattern for all license plates," *Id.* (quoting 43 Tex. Admin. Code § 504.005(a)). This final approval authority allows Texas to discriminate in what groups can participate in the TX-DMV specialty plate program and control what can be printed on TX plates.

These three factors taken together established that the specialty license plates were government speech. The three-pronged analysis employed in *Walker* provides a guide for courts to determine if a specific government action constitutes government speech; however, it does not mandate an inflexible rule of constitutional doctrine that any governmental participation in an action necessarily implicates the government speech doctrine.[10] In fact, it implicates the public forum doctrine because of the lack of discretion on the part of the NC-DMV.

The decision of the Fourth Circuit in the present case is flawed because it affirmed, without discussion, the district court's application of *Walker*. The settled law of *Faulkner*, as well as the three-factor test of *Walker*, was ignored in favor of an attempt to cast this proceeding as one which implicates the government speech doctrine.

NC license plates customarily carry one of three specified sets of mottos and emblems as is provided in N.C.G.S. § 20-63(b).

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[10] *Tennyson*, *supra*, is distinguishable from the present case in that the Fourth Circuit specifically addressed whether the NC-DMV could be compelled to create a new category of specialty license plate not otherwise permitted by the General Assembly of North Carolina. Therefore, *Tennyson* is properly classified as a Government Speech decision. In the present case, the General Assembly has plainly authorized a specialty license plate for civic clubs that meet the statutory criteria. N.C.G.S. § 20-79.4(b)(44) (2020). *Faulkner* held squarely that SCV is a qualifying civic organization and under the law is allowed to participate in this public forum. Government speech is not implicated by this law.

The owner of a registered motor vehicle in NC can choose which set of mottos and emblems they wish to have on their license plate. Furthermore, Subsection (b1) of N.C.G.S. § 20-63 enumerates 42 different license plates which do not carry any of the three specified pairs of mottos and emblems. This element of choice on the part of a registered owner distinguishes NC's license plate regime from that implemented in Texas. The element of choice *ipso facto* takes the NC approach out of the first of the factors set forth in *Walker*. The messages presently communicated on NC license plates are the expression of those who own the motor vehicles.

The second factor identified in *Walker*, that a reasonable observer would conclude that the state "agree[s] with the message displayed" on specialty license plates due to their purpose and design. The third factor identified in *Walker*, that the state exercised "direct control over the messages" on specialty license plates. Both fall by the wayside upon strict scrutiny analysis of the NC civic club statute. *See* N.C.G.S. § 20-79.4(b)(44) (2020).

NC's specialty license plate program is entirely a creature of statute. As a statutory program, it is a clear and unequivocal expression of the public policy of the state of North Carolina as articulated by the General Assembly. *In re Hatley*, 291 N.C. 693, 231 S.E.2d 633 (1977); *Town of Newton v. State Highway Comm'n of N.C.*, 192 N.C. 54, 133 S.E. 522 (1926).

N.C.G.S. § 20-79.4 provides, in pertinent part, that:

(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 N.C.G.S. 105-130.11(a)(5).

(Emphasis added.) The plain language of the 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.

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 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. 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.

Therefore, the government speech doctrine does not apply to the case at all, and the Court of Appeals erred in affirming without discussion the district court's holding that, on the basis of *Walker*, Petitioner had failed to state a claim upon which relief could be granted. The present case and *Walker* share the superficial similarity of the fact that they both deal with license plates. If properly understood and applied, *Walker* has no relation to the NC program simply because the NC civic club specialty plates do not infringe any government speech. The only speech at issue in this NC case is that of motorists who qualify for a specialty plate as of right. NC 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.

2. The district court and Fourth Circuit Court of Appeals erred by failing to apply the public forum doctrine to specialty license plates. Thereby, limiting the speech of private citizens and organizations participating in a specialty license plate program which originated in a statute which did not vest the government agency with any discretion with regard to the design of such specialty plates other than to ensure the readability of such plates.

The First Amendment is implicated in this case in two respects: (1) the unlawful regulation of speech based on content; and (2) the public forum doctrine. These two issues are intertwined with each other.

"Content-based laws – those that target speech on its communicative content – are presumptively unconstitutional and may be justified only if the government proves that they are narrowly tailored to serve compelling government interests." *Reed v. Town of Gilbert*, 576 U.S. 155, 163 (2015). Strict scrutiny is "the most demanding test known to constitutional law," *City of Boerne v. Flores*, 521 U.S. 507, 534 (1997), which government restrictions rarely survive. *See Burson v. Freeman*, 504 U.S. 191, 200 (1992).

Regulation of the subject matter of messages is an "objectionable form of content-based regulation." *Hill v. Colorado*, 530 U.S. 703, 721 (2000). Petitioner's application was denied solely because of the intention of Petitioners to recognize and commemorate

Confederate veterans. This denial amounts to a content-based restriction on speech that is presumptively unconstitutional and subject to strict scrutiny. *See Reed*, 576 U.S. at 163. It is the State's burden to prove narrow tailoring under strict scrutiny. *McCullen v. Coakley*, 573 U.S. 464, 495 (2014).

It is not enough to show that the government's ends are compelling; the means must be "carefully tailored" to achieve those ends. *Sable Commc'ns of Cal., Inc. v. FCC*, 492 U.S. 115, 126 (1989). "Because First Amendment freedoms need breathing space to survive, government may regulate in the area only with narrow specificity." *NAACP v. Button*, 371 U.S. 415, 433 (1963). Total prohibitions on constitutionally protected speech are substantially broader than any conceivable government interest could justify. *Board of Airport Comm'rs of City of L.A. v. Jews for Jesus, Inc.*, 482 U.S. 569, 574 (1987).

"Any system of prior restraints of expression comes to this Court bearing a heavy presumption against its constitutional validity." *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 70 (1963). "[I]n the area of free expression a licensing statute placing unbridled discretion in the hands of a government official or agency constitutes a prior restraint." *City of Lakewood v. Plain Dealer Publ'g Co.*, 486 U.S. 750, 757 (1988). A law subjecting the exercise of First Amendment freedoms to "the prior restraint of a license must contain narrow, objective, and definite standards to guide the licensing authority." *Forsyth Cnty. v. Nationalist Movement*, 505 U.S. 123, 131 (1992). Speech, in whatever manner it is

conveyed, cannot be constitutionally restricted simply because it is offensive or hurtful to individuals or groups. *Papish v. Board of Curators of Univ. of Mo.*, 410 U.S. 667 (1973) (per curiam).

In reversing the Circuit Court's decision in *Papish v. Board of Curators of Univ. of Mo.*, this Court stated:

> *[T]he mere dissemination of ideas – no matter how offensive to good taste – on a state university campus may not be shut off in the name alone of 'conventions of decency.'* Other recent precedents of this Court make it equally clear that neither the political cartoon nor the headline story involved in this case can be labeled as constitutionally obscene or otherwise unprotected.

410 U.S. at 669-670 (emphasis added).

This Court has made it clear that "the public expression of ideas may not be prohibited merely because the ideas are themselves offensive to some of their hearers." *Street v. New York*, 394 U.S. 576, 592 (1969); *see also Texas v. Johnson*, 491 U.S. 397, 414 (1989) ("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."); *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46, 55-56 (1988); *Bachellar v. Maryland*, 397 U.S. 564, 567 (1970); *Tinker v. Des Moines Indep. Comm. Sch. Dist.*, 393 U.S. 503, 509-514 (1969).

From the time of its ratification in 1791 to the present, the First Amendment has "permitted restrictions upon the content of speech in very limited circumstances," and has never "include[d] a freedom to disregard these traditional limitations." *R.A.V. v. City of St. Paul*, 505 U.S. 377, 382-383 (1992). These categories include obscenity, *Roth v. United States*, 354 U.S. 476 (1957); defamation, *Beauharnais v. Illinois*, 343 U.S. 250, 254-255 (1952); fraud, *Virginia Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 771 (1976); incitement, *Brandenburg v. Ohio*, 395 U.S. 444, 447-449 (1969) (per curiam); and speech integral to criminal conduct, *Giboney v. Empire Storage & Ice Co.*, 336 U.S. 490, 498 (1949). These exceptions are "well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem." *Chaplinsky v. New Hampshire*, 315 U.S. 568, 571-572 (1942).

Chief Justice Roberts observed in *United States v. Stevens*, 559 U.S. 460, 470 (2010):

> The Government contends that "historical evidence" about the reach of the First Amendment is not "a necessary prerequisite for regulation today," . . . The Government thus proposes that a claim of categorical exclusion should be considered under a simple balancing test: "Whether a given category of speech enjoys First Amendment protection depends upon a categorical balancing of the value of the speech against its societal costs."

> *As a free-floating test for First Amendment coverage, that sentence is startling and dangerous. The First Amendment's guarantee of free speech does not extend only to categories of speech that survive an ad hoc balancing of relative social costs and benefits. The First Amendment itself reflects a judgment by the American people that the benefits of its restrictions on the Government outweigh the costs. Our Constitution forecloses any attempt to revise that judgment simply on the basis that some speech is not worth it. The Constitution is not a document "prescribing limits and declaring that those limits may be passed at pleasure."*

559 U.S. at 469-470 (emphasis added).

Freedom of speech is imperiled if the government can impose its will upon private speech. Private speech has always remained outside of the limited types of expression that have historically been part of the ambit of First Amendment protection by establishing a scheme limiting access to a public forum which fails to satisfy a compelling governmental interest. The forum doctrine has been applied in situations in which government-owned property or a government program was capable of accommodating a large number of public speakers without defeating the essential function of the land or the program. *United States v. Grace*, 461 U.S. 171 (1983). For example, a park can accommodate many speakers and, over time, many parades and demonstrations. *E.g.*, *Ward v. Rock Against Racism*, 491 U.S. 781 (1989). The streets and sidewalks of a

municipality can be managed in such a way that they can serve to channel traffic as well as provide an opportunity to express viewpoints which are clothed in protections afforded by the First Amendment. *See*, *e.g.*, *Marcavage v. City of New York*, 689 F.3d 98 (2d Cir. 2012).

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. NC law makes it abundantly clear that a qualifying civic organization and its members control their emblem and name on the plate.[11]

"[W]hile the government-speech doctrine is important – indeed, essential – it is a doctrine that is susceptible to dangerous misuse. If private speech could be passed off as government speech by simply affixing a government seal of approval, government could silence or muffle the expression of disfavored viewpoints." *Matal*, 582 U.S. at 235; *cf. Walker*, 576 U.S. at 221 (Alito, J., dissenting) ("The Court's decision passes off private speech as government speech and, in doing so, establishes a precedent that threatens private speech that government finds displeasing."). The government cannot, merely by reserving to itself

[11] *See* Shea Riggsbee Denning, *Whose Call on Confederate Flag License Plates?*, UNC SCH. OF GOV'T (July 29, 2015, 3:40 PM), https://www.sog.unc.edu/blogs/nc-criminal-law/whose-call-confederate-flag-license-plates (analyzing State law on the issue).

"approval" rights, convert to government speech the private speech it openly solicits and allows in its designated fora. Any claim by NC-DMV of direct or effective control over messages on the civic club specialty plate is a contrivance contradicted by the undisputed evidence of the statute's language.

In *Matal*, the lead singer of the rock group "The Slants," sought federal registration of the mark "THE SLANTS." The U.S. Patent and Trademark Office (USPTO) denied the application under a Lanham Act provision prohibiting the registration of trademarks that may "disparage . . . or bring . . . into contemp[t] or disrepute" any "persons, living or dead." 15 U.S.C. § 1052(a). After the administrative appeals process was exhausted, the case was heard in the Federal Circuit, which found the disparagement clause facially unconstitutional.

In affirming the Federal Circuit, Justice Alito noted:

> *But no matter how the point is phrased, its unmistakable thrust is this: The Government has an interest in preventing speech expressing ideas that offend. And, as we have explained, that idea strikes at the heart of the First Amendment. Speech that demeans on the basis of race, ethnicity, gender, religion, age, disability, or any other similar ground is hateful; but the proudest boast of our free speech jurisprudence is that we protect the freedom to express "the thought that we hate."*

> The clause reaches any trademark that disparages any person, group, or institution. It applies to trademarks like the following: "Down with racists," "Down with sexists," "Down with homophobes." *It is not an anti-discrimination clause; it is a happy-talk clause. In this way, it goes much further than is necessary to serve the interest asserted.*

582 U.S. at 245-246 (emphasis added) (citations omitted). Justice Holmes echoed these same concerns in dissenting from a decision upholding the denial of a woman's petition for naturalization on the basis that she declined to take up arms in defense of the United States. *United States v. Schwimmer*, 279 U.S. 644, 655 (1929) (Holmes, J., dissenting).

Heightened scrutiny is required "whenever the government creates a regulation of speech because of disagreement with the message it conveys." *Sorrell v. IMS Health Inc.*, 564 U.S. 552, 566 (2011). Such heightened scrutiny is particularly required when the government seeks to restrict the use of a public forum by a private individual or group who seeks to make a statement with which the government disagrees, or which other individuals find offensive or otherwise troubling. *National Socialist Party of Am. v. Skokie*, 432 U.S. 43 (1977).

Upon remand, the Illinois Supreme Court affirmed the order directing that the parade be permitted and reversed the restriction upon displaying the swastika. In so holding, the court stated:

> How is one to distinguish this from any other offensive word (emblem)? Surely the State has no right to cleanse public debate to the point where it is grammatically palatable to the most squeamish among us. Yet no readily ascertainable general principle exists for stopping short of that result were we to affirm the judgment below. . . .
>
> *****
>
> [W]e cannot indulge the facile assumption that one can forbid particular words without also running a substantial risk of suppressing ideas in the process. Indeed, governments might soon seize upon the censorship of particular words (emblems) as a convenient guise for banning the expression of unpopular views.

Village of Skokie v. National Socialist Party of Am., 69 Ill.2d 605, 613-615, 373 N.E.2d 21, 23-24 (1978).

The foregoing discussion must be viewed in the context of the most recent Supreme Court case considering the public forum, *Shurtleff v. City of Boston*, 142 S. Ct. 1583, 1587 (2022). The line between a forum for private expression and the government's own speech is important, but not always clear.

In *Shurtleff*, an organization called Camp Constitution, asked to hold a flag raising event at City Hall Plaza in Boston. The event would "commemorate the civic and social contributions of the Christian community" and feature remarks by local clergy. As part of the ceremony, the organization wished to raise what it

described as the "Christian flag," a photograph of which was attached to the event application. On the plaza stand three 83-foot flagpoles. Boston flies the United States flag from the first pole, along with a banner honoring prisoners of war and soldiers missing in action. From the second, it flies the flag of the Commonwealth of Massachusetts. From the third, it usually, but not always, flies Boston's flag.

Since at least 2005, the City of Boston has allowed groups to hold flag-raising ceremonies on the plaza which include hoisting a flag of their choosing on the third flagpole, in place of the city's flag, and fly it for the duration of the event. Between 2005 and 2017, Boston approved about 50 unique flags, raised at 284 ceremonies, which included the flags of other countries and those of specific groups or causes. Boston has no record of refusing a request before the events that gave rise to the *Shurtleff* case.

The commissioner of Boston's Property Management Department denied the request on the basis that the flag was the Christian flag because the commissioner believed that flying a religious flag at City Hall could violate the Constitution's Establishment Clause and that there was no record of Boston ever having raised such a flag. Shurtleff was told that Camp Constitution could proceed with the event if they would raise a different flag.

The district court held that flying private groups' flags from City Hall's third pole amounted to

government speech. *See* 2020 WL 555248 (D. Mass., Feb. 4, 2020).

The First Circuit affirmed. *See* 986 F.3d 78 (1st Cir. 2021).

The Supreme Court reversed and remanded the case. Speaking for the Court, 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. . . .
>
> Considering these indicia in *Summum*, we held that the messages of permanent monuments in a public park constituted government speech, even when the monuments were privately funded and donated. . . . *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. *Ibid*. These precedents point our way today.

142 S. Ct. at 1589-90 (emphasis added) (citations omitted). Justice Breyer recognized explicitly that the lines between government speech and private speech are unclear when the government invites private individuals to participate in a program constituting a forum.

Justice Breyer focused on the identical point made by Petitioner. TX maintained direct control over the messages conveyed. No such direct control is authorized under the NC statutes except for the limited purpose of ensuring visibility. Justice Breyer went on to state:

> 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).

On this record, 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 action of the NC-DMV with regard to the SCV closely parallels the facts presented in *Matal v. Tam* because 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 NC civic club specialty license plate, saving and excepting 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). Just as the mere involvement of private parties in selecting a government message does not, in and of itself, make the message private expression, 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. Access to many public forums requires an application or some form of

permission from the government, but an application requirement by itself cannot transform private speech in a public forum into government speech.

3. The district court and Fourth Circuit Court of Appeals erred when applying the "Government Speech" doctrine to limit the speech of private citizens and organizations participating in a specialty license plate program where there was an adequate and independent state law basis which did not implicate the Constitution to hold that the NC-DMV exceeded its authority by denying members of Petitioner the ability to obtain and display a specialty license plate.

A federal court will not review a question of law decided by a state court if the decision of that court rests on a state law ground that is independent of the federal question and adequate to support the judgment. *Fox Film Corp. v. Muller*, 296 U.S. 207, 210 (1935); *Klinger v. Missouri*, 80 U.S. (13 Wall.) 257 (1872). This rule applies whether the state law ground is substantive or procedural. *See*, *e.g.*, *Fox Film, supra*; *Herndon v. Georgia*, 295 U.S. 441 (1935). Because the federal courts have no power to review a state law determination that is sufficient to support the judgment, resolution of any independent federal ground for the decision could not affect the judgment and would therefore be advisory. *See Herb v. Pitcairn*, 324 U.S. 117, 125-126 (1945) ("We are not permitted to render

an advisory opinion, and if the same judgment would be rendered by the state court after we corrected its views of federal laws, our review could amount to nothing more than an advisory opinion"); *see also Sochor v. Florida*, 504 U.S. 527, 533-534 (1992).

It is Petitioner's position that the NC civic club specialty license plate statute does not implicate any constitutional questions and that there is authoritative NC case law construing the relevant statutes as being a valid declaration of public policy.

The action of Respondents as articulated in the letter of January 11, 2021, is contrary to their statutory authority because the provisions of the controlling NC statutes do not allow them to exercise any discretion pertaining to the design of a civic club license plate. The right of Petitioner's members to purchase and display the specialty license plate is a settled question under NC state law.

The letter of January 11, 2021, cannot be considered as an articulation of the public policy of NC because the General Assembly, by enacting the statutory framework for the special license plate program, has determined and settled the question of the State's public policy in this specific regard. *Amos v. Oakdale Knitting Co.*, 331 N.C. 348, 353, 416 S.E.2d 166, 169 (1992) ("Although the definition of 'public policy' approved by this Court does not include a laundry list of what is or is not 'injurious to the public or against the public good,' at the very least public policy is violated when an employee is fired in contravention of express policy

declarations contained in the North Carolina General Statutes.").

The provisions of N.C.G.S. § 20-79.4 pertaining to the issuance of special license plates constitute a clear and unequivocal expression of the public policy of the state of North Carolina by its General Assembly which governs the conduct of subordinate administrative agencies and departments who are not at liberty to pursue actions which are contrary to such an articulation. The expression of public policy amounts to a declaration of speech to be articulated on behalf of those persons who qualify to purchase and display a specialty license plate issued under the statutory framework. That articulation was recognized and applied by the North Carolina Court of Appeals in the case of *Faulkner*.

In *Faulkner*, after receiving tax-exempt status as a "civic league or organization" from the North Carolina Department of Revenue, Petitioner applied to the NC-DMV for special registration license plates bearing its name and emblem. The Commissioner denied SCV-NCD's request, based on her conclusion that SCV "does not meet the statutory criteria for a civic club." Petitioner appealed this decision to the Wake County Superior Court, and, the trial court, after finding that Petitioner met the criteria set forth by the General Assembly in N.C.G.S. § 20-79.4(b)(5) (1997),[12] ordered

[12] N.C.G.S. § 79.4(b)(5) (1997) has been amended by multiple State laws subsequently. The same subsection is now codified in N.C.G.S. § 79.4(b)(44) (2020) (Civic Club) and is identical to the statute cited in *Faulkner*.

the NC-DMV to issue special registration plates to Petitioner upon its presentation of at least 300 applications to the agency. The Commissioner of Motor Vehicles appealed to the North Carolina Court of Appeals, which affirmed the judgment.

The court recognized that SCV sponsors charitable and benevolent activities within the community by noting that SCV, whose members are "[l]ineal and collateral descendants of Confederate Civil War veterans," engages in "historical and benevolent activities." *Id.* The record revealed that SCV has divisions in twenty-four states, organized camps in foreign countries, and members in a majority of states in the United States. Although the court declined to impose an arbitrary number of members or states in which an organization is active to show that it is "nationally recognized," it observed that it is evidence of national recognition that an organization has ties to a majority of the states.

The court held that the evidence was sufficient to show that SCV is of a similar character as the qualifying organizations enumerated within section N.C.G.S. § 20–79.4(b)(5), and that it is a "nationally recognized civic organization" as that phrase is used in N.C.G.S. § 20–79.4(b)(5). As a result, the panel concluded that, as SCV-NCD met the four criteria enumerated in N.C.G.S. § 20–79.4(b)(5). In a footnote to the majority opinion, Judge Greene stated:

> SCV's emblem strikingly resembles the Confederate flag. We are aware of the sensitivity

> of many of our citizens to the display of the Confederate flag. *Whether the display of the Confederate flag on state issued license plates represents sound public policy is not an issue presented to this Court in this case. That is an issue for our General Assembly.* We are presented only with the issue of whether SCV–NCD has complied with the language of section 20–79.4(b)(5) and note that *allowing some organizations which fall within section 20–79.4(b)(5)'s criteria to obtain personalized plates while disallowing others equally within the criteria could implicate the First Amendment's restriction against content-based restraints on free speech.*

131 N.C. App. at 777, 509 S.E.2d 209 (emphasis added).

The present case originated in the Superior Court of Lee County, N.C.; and it was removed from state court by Respondents to the United States District Court for the Middle District of North Carolina. Petitioner's claim for a declaratory judgment concerning the lawfulness of Respondents' conduct, as articulated in the letter of January 11, 2021, directly implicated questions of statutory interpretation as set forth in *Faulkner*. The North Carolina Court of Appeals has neither overruled nor circumscribed the square holdings of *Faulkner*: (1) that Petitioner and its membership qualify for purchasing a special license plate; (2) that the only restriction on a special license plate for a qualifying organization is that its design must not impair the visibility of the name of the state and the license plate number; and (3) that the availability of a

license plate to a qualifying organization which displays a Confederate flag is a question of public policy to be determined by the legislature.

A cursory examination of the North Carolina General Statutes will establish that the General Assembly has not modified the statutory scheme establishing the specialty license plate program since the *Faulkner* decision. Therefore, the public policy of the state of North Carolina pertaining to the specialty license plate program remains unchanged since the *Faulkner* decision. When the adequate and independent state ground doctrine is applied, a U.S. district court is without jurisdiction to change that state's public policy. *See*, *e.g.*, *Fox Film*, *supra*; *Herndon v. Georgia*, 295 U.S. 441 (1935).

The action of the North Carolina General Assembly in promulgating the public policy enunciated in the specialty license plate statute is clear that a civic club which generates at least 300 applications is entitled to a specialty license plate. That declaration of public policy vitiates any claim that the government speech doctrine applies to this case. The public policy of NC, insofar as it concerns civic club specialty license plates, is that a person who is a member of a qualifying civic organization is entitled to obtain a specialty license plate whose ostensible message is that of the civic club and the motorist, not the state of North Carolina.

SUMMARY OF PETITIONER'S CASE

The federal district court and the Court of Appeals for the Fourth Circuit erred in applying this Court's test in *Walker*, ignoring the North Carolina Court of Appeals' binding decision in *Faulkner*, and granting a Rule 12(b)(6) motion to dismiss. Under the Free Speech Clause of the First Amendment and 42 U.S.C. § 1983, Petitioner was entitled to judicial review of the unconstitutional, ultra vires act of Respondents to deny issuance of a specialty license plate under North Carolina General Statutes section 20-79.4(b). As Petitioner qualifies as an eligible civic organization and the state of North Carolina solicits specialty license plate designs, the statutory scheme creates a public forum that must be kept free of viewpoint discrimination or content-based regulation under the Free Speech Clause.

Section 20-79.4(b)(44) is not a government-speech provision, and the lower courts erred in dismissing Petitioner's complaint upon such a theory. Government speech is a narrow classification of speech or creative expression in which the State retains total control over the message or communications *à la Walker*. Mere invitation or collaboration with private persons, groups, or organizations does not transform private speech into government speech under *Shurtleff*, *Matal v. Tam*, etc. If the government speech theory were liberally applied, it could threaten private free speech or expression by circumventing the strict-scrutiny test. Such a rule would chill untold amounts of speech as dissenting Justice Alito warned in *Walker*.

Under a strict scrutiny analysis, the state of North Carolina through its agents and divisions has no justification for applying prior restraint to Petitioner's specialty license plate design displaying the Confederate Battle Flag. The Respondents cannot censor Petitioner's free expression or creative, private speech merely because they find it disagreeable or controversial. Without narrow tailoring and a compelling government interest, Respondents infringed upon Petitioner's First Amendment right under the Free Speech Clause and due process of law, and the Court should review this case in light of the public forum cases under *Shurtleff*, *Good News Club*, and *Papish*.

A writ of certiorari should be granted to the Fourth Circuit to clarify the contours of that doctrine (public fora) and the common law of "government speech" under the First and Fourteenth Amendments to the United States Constitution and the Due Process Clause. This case is ripe for adjudication, and Petitioner has standing to sue for redress. Respectfully, the question presented is: Whether 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 North Carolina General Statutes and a state court ruling in *Faulkner*.

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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 22nd day of March, 2023.

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