

No. 22-932

In the Supreme Court of the United States

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

Petitioner,

v.

NORTH CAROLINA DEPARTMENT OF
TRANSPORTATION, ET AL.,

Respondents.

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

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Petitioner claims that a state statute requires the North Carolina Division of Motor Vehicles to issue any specialty license plate requested by a civic club, even if the plate features designs that the State finds offensive. Should this Court review this purely state-law issue?

2. In *Walker v. Texas Division, Sons of Confederate Veterans*, this Court held that “specialty license plate designs constitute government speech,” and that States may therefore decline to issue plates featuring offensive designs. 576 U.S. 200, 219 (2015). Petitioner agrees that *Walker* provides the governing framework, but claims that the courts below misapplied this framework in this case. Should this Court review this factbound, case-specific issue?

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INTRODUCTION

In 2021, the North Carolina Department of Transportation decided to stop issuing specialty license plates bearing the Confederate battle flag. In response, the North Carolina chapter of the Sons of Confederate Veterans (SCV) sued, claiming that this decision violated state and federal law. The Fourth Circuit rejected SCV's claims in a unanimous, unpublished, per curiam opinion.

Now, SCV asks this Court to reverse the court of appeals on state-law grounds. It argues that state law requires the North Carolina Division of Motor Vehicles to issue any specialty-plate application submitted by a civic club like SCV.

This Court should reject SCV's request. Disputes about pure questions of state law are not an appropriate focus of this Court's review. After all, anything this Court might say about the relevant state statutes would apply in North Carolina alone and could be promptly revisited by the state courts.

SCV alternatively urges this Court to review a federal question—whether North Carolina's choice to reject SCV's specialty-plate application ran afoul of the First Amendment. But that question does not warrant this Court's attention either. This Court already clarified the relationship between the First Amendment and specialty license plates eight years ago in *Walker v. Texas Division, Sons of Confederate Veterans, Inc.*, 576 U.S. 200 (2015). There, this Court held that “specialty license plate designs constitute government speech,” and that States are

“consequently entitle[d] to refuse to issue plates featuring” designs that they find offensive. *Id.* at 219-20.

That recent holding obviates any need for review here. Indeed, SCV concedes that *Walker* provides the relevant framework for deciding its First Amendment claim. It simply maintains that the Fourth Circuit misapplied that decision to the facts of this case. SCV’s plea for factbound error correction should be denied.

STATEMENT OF THE CASE

A. North Carolina’s License Plate Regime

North Carolina motorists are required to display state-issued license plates while traveling on the State’s public roads. N.C. Gen. Stat. § 20-111(1). These license plates are the “property of the State” and may be reclaimed by the Division of Motor Vehicles (DMV), a subdivision of the North Carolina Department of Transportation (NCDOT). *See id.* § 20-63(a).

North Carolina license plates typically take one of two forms. First, North Carolina offers three standard plates: (a) “First in Flight,” commemorating the Wright Brothers’ first flight on the dunes of Kitty Hawk; (b) “First in Freedom,” commemorating North Carolina’s role in declaring independence from Great Britain during the early stages of the American Revolution; and (c) the “National/State Mottos” plate, which contains the national and state mottos: “In God We Trust” and “To Be Rather Than To Seem.” *Id.* § 20-

63(b). Second, drivers can obtain specialty plates that feature a particular interest or affinity group. *Id.* §§ 20-79.4(b); 20-81.12. Any of these license plates—both specialty plates and the three default options—can be issued as vanity plates and personalized to “bear the letters or letters and numbers requested by the owner,” so long as the proposed message is not “offensive to good taste and decency.” *Id.* §§ 20-79.4(b)(189); 20-81.12(c).

This case involves specialty plates. In North Carolina, every specialty plate concept must be approved by the General Assembly. *Id.* § 20-79.3A. Every year, the DMV submits to the General Assembly a report identifying the groups that have applied for a specialty plate. *Id.* § 20-79.3A(c); *see also* N.C. Dep’t of Transp., *Guidelines for a New Specialty License Plate Category*, available at <https://bit.ly/3cz1j87>. The General Assembly then decides whether to authorize particular plates. N.C. Gen. Stat. § 20-79.3A(d)-(e). Following authorization, an applicant must submit several items, including the proposed “final artwork for the plate,” which the DMV reviews and approves. *Id.* § 20-79.3A(d).

North Carolina began issuing specialty plates in 1937 and currently offers more than 200 such plates. N.C. Code of 1935 § 2621(230) (Supp. 1937) (authorizing a specialty plate for the North Carolina National Guard); N.C. Gen. Stat. §§ 20-63(b1), 20-79.4(b) (listing current offerings). Some of these plates celebrate the natural beauty of the State. *E.g.*, N.C. Gen. Stat. § 20-63(b1)(22) (“Friends of the Great Smoky Mountains National Park”); *id.* § 20-63(b1)(30)

(“Mountains-to-Sea Trail, Inc.”); *id.* § 20-63(b1)(37) (“North Carolina State Parks”); *id.* § 20-79.4(b)(263) (“Wrightsville Beach”). Others promote the State’s sports teams or advocate on behalf of a particular cause. *E.g.*, *id.* § 20-79.4(b)(34) (“Carolina Panthers”); *id.* § 20-79.4(b)(7) (“ALS research”).

As relevant here, North Carolina has also authorized certain “civic club[s]” to obtain specialty plates. *Id.* § 20-79.4(b)(44). If a civic club wants the DMV to issue a specialty plate, it must gather 300 signatures from interested members, provide proof of nonprofit status, and submit a draft design of the proposed plate “bear[ing] a word or phrase identifying the civic club and the emblem of the civic club.” *Id.* § 20-79.4(a3), (b)(44). The DMV has approved plates from a range of civic clubs, such as the Jaycees, Kiwanis Club, and Rotary Club. *Id.*

B. Procedural History

SCV qualifies as a civic club for purposes of obtaining a specialty plate. *See N.C. Div. of Sons of Confederate Veterans v. Faulkner*, 509 S.E.2d 207 (N.C. Ct. App. 1998). The State has issued the organization specialty plates in the past. Pet. App. 7.

In early 2021, NCDOT decided to change that practice. *Id.* at 7-8. NCDOT therefore sent SCV a letter notifying the organization that the DMV would “no longer issue or renew specialty license plates bearing the Confederate battle flag or any variation of that flag.” *Id.* NCDOT explained that it had decided to discontinue such plates because “license plates bearing the Confederate battle flag have the potential

to offend those who view them.” *Id.* at 8. The letter went on to explain, however, that NCDOT would “continue to recognize [SCV] as a civic organization entitled to the issuance of a specialty plate” and “remain[ed] open to considering alternative artwork” for the plate’s design that “does not contain the Confederate battle flag.” *Id.*

After receiving this letter, SCV sued in state court, alleging a range of federal and state claims against NCDOT, DMV, the North Carolina Secretary of Transportation, and the North Carolina Commissioner of Motor Vehicles. *Id.* As relevant here, SCV argued that the DMV’s refusal to issue the group’s preferred plate violated (1) its free speech rights under the First Amendment and (2) the state statutes establishing North Carolina’s specialty-plate regime.

NCDOT removed the suit to federal court and then moved to dismiss the complaint for failure to state a claim. *Id.* at 8-9.

The district court granted NCDOT’s motion to dismiss. J.A. 110. The court explained that SCV’s First Amendment claim was foreclosed by two cases: this Court’s decision in *Walker* and the Fourth Circuit’s decision in *ACLU v. Tennyson*, 815 F.3d 183 (4th Cir. 2016). Pet. App. 18-23. In *Tennyson*, the Fourth Circuit applied *Walker*’s framework to North Carolina’s specialty-plate regime and found it “substantively indistinguishable” from the Texas regime at issue in *Walker*. 815 F.3d at 185. Together, the district court held, *Walker* and *Tennyson* made

clear that “specialty license plates issued under North Carolina’s program amount to government speech,” enabling the State “to reject license plate designs that convey messages with which it disagrees.” Pet. App. 18-19 (quoting *Tennyson*, 815 F.3d at 185). In the court’s view, SCV could not escape these cases’ “plain and unequivocal holding[s].” Pet. App. 19-23.

The court also summarily dismissed SCV’s claim that the DMV lacked discretion under state law to reject its preferred plate design. Pet. App. 23 n.6. That claim, the court explained, had been rendered moot by the court’s holding that “North Carolina’s specialty license plate statutory program facilitates government speech.” *Id.*

The Fourth Circuit affirmed the district court’s decision in a short, unpublished, per curiam opinion. Pet. App. 1. After summarizing the facts, procedural history, and standard of review, the court said simply: “We have thoroughly reviewed the briefs, joint appendix, and the entire record and find no reversible error.” Pet. App. 3.

REASONS FOR DENYING THE PETITION

I. SCV’s petition focuses primarily on a question of state law.

The primary argument in SCV’s petition turns entirely on a question of state law. Specifically, SCV argues that the courts below were wrong to apply this Court’s government-speech precedents to resolve this case. Instead, SCV contends, they should have looked to North Carolina’s specialty-plate statute. Pet. 33-38 (citing N.C. Gen. Stat. § 20-79.4). According to SCV,

that statute precludes the DMV from exercising its discretion to reject specialty-plate designs that are submitted by civic clubs. *Id.* SCV therefore claims that the statute provides “an adequate and independent state law basis” for its requested relief. *Id.*

SCV could not have been clearer that its principal complaint is that the courts below misconstrued state law. The petition states: “It is Petitioner’s position that the NC civic club specialty license plate statute does not implicate constitutional questions” because “the relevant [state] statutes” require DMV to issue SCV’s requested specialty plates. Pet. 34. And SCV frames its question presented as whether the Fourth Circuit “err[ed] in applying the ‘Government Speech’ doctrine where there was an adequate and independent state law basis which did not implicate the Constitution.” Pet. i.

But this Court does not grant certiorari to resolve pure issues of state law. *See Mullaney v. Wilbur*, 421 U.S. 684, 691 (1975) (“[S]tate courts are the ultimate expositors of state law.”); *see also* Sup. Ct. R. 10. And for good reason. Whether state law affords the North Carolina DMV discretion to deny specialty license plates is relevant to North Carolina alone. And even in North Carolina, this Court’s conclusions about the meaning of the State’s specialty-plate statute could “be displaced tomorrow by a state adjudication.” *R.R. Comm’n of Tex. v. Pullman Co.*, 312 U.S. 496, 500 (1941). Because SCV’s petition is predominantly

focused on a question of state law, the Court should decline review.¹

II. SCV’s petition alternatively seeks factbound error correction under settled law.

Though SCV principally urges this Court to focus on a pure question of state law, its petition also claims that the Fourth Circuit misapplied this Court’s First Amendment precedent. SCV agrees that this Court’s decision in *Walker* provides the appropriate framework for deciding its federal claim. *See* Pet. 16 (“The three-pronged analysis employed in *Walker* provides a guide for courts to determine if a specific government action constitutes government speech.”). But SCV maintains that, under the test set forth in *Walker*, specialty license plates in North Carolina amount to a public forum, not government speech. Pet. 11, 13, 16-20, 24-26.

SCV is incorrect. *See infra* Part III. But even if it were right, its argument does not satisfy any of this Court’s criteria for review. *See* Sup. Ct. R. 10. SCV alleges no split. Nor does it argue that this Court’s intervention is necessary to resolve an unsettled

¹ SCV also invokes the North Carolina Court of Appeals’ decision in *North Carolina Division of Sons of Confederate Veterans v. Faulker*, 509 S.E.2d 207 (N.C. Ct. App. 1998). Pet. 35-38. But that decision merely held that SCV constitutes a “civic club” under North Carolina state law. *Id.* at 211. That designation allows SCV to *apply* for a specialty plate—it does not entitle SCV to compel the DMV to issue its preferred specialty-plate design. In any event, this Court need not grant certiorari to determine whether a federal decision complied with a state intermediate appellate court’s understanding of state law.

federal question. Indeed, SCV explicitly concedes that no novel constitutional issues are raised in this case. *See* Pet. 11 (“The present case is not one in which Petitioners seek . . . [to] advance[e] a novel theory of constitutional interpretation” or “advance arguments in support of repudiating established constitutional jurisprudence.”).

Instead, SCV asks this Court to engage in factbound error correction. This Court should decline that invitation. Whether the courts below correctly applied the test set forth in *Walker* to a single State’s specialty license plate program is not worthy of this Court’s review. *See* Eugene Gressman et al., *Supreme Court Practice* 278 (10th ed. 2013) (explaining that this Court “is not primarily concerned with the correction of errors in lower court decisions,” as “has been reiterated many times”).

III. The Fourth Circuit’s decision was correct.

SCV’s petition should be denied for a final reason: the courts below rightly held that North Carolina’s decision to reject SCV’s specialty-plate application was constitutional.

Eight years ago, this Court held that specialty license plates in Texas “constitute government speech” and, thus, that Texas was “entitled to refuse to issue plates featuring” a Confederate battle flag. *Walker*, 576 U.S. at 219-20. Because the North Carolina specialty-plate regime parallels Texas’s in every meaningful respect, the decision below was correct.

“The Free Speech Clause restricts government regulation of private speech; it does not regulate government speech.” *Pleasant Grove City v. Summum*, 555 U.S. 460, 467 (2009). “When government speaks, it is not barred by the Free Speech Clause from determining the content of what it says.” *Walker*, 576 U.S. at 207. Were it otherwise, “it is not easy to imagine how government could function.” *Summum*, 555 U.S. at 468; *see also Walker*, 576 U.S. at 207-08.

In *Walker*, this Court considered whether specialty license plates communicate private or government speech. 576 U.S. at 207. To resolve that question, it applied a three-part test, which evaluated (1) the history of license plates as a means of communicating messages from the government, (2) the extent to which the public identifies the messages on license plates with the government, and (3) the degree of control the government exercised over the message on specialty plates. *Id.* at 210-14.

This Court held that each of these factors confirmed that Texas’s specialty plates conveyed government speech:

First, license plates “long have communicated messages from the States,” and Texas has been part of that history. *Id.* at 210-11. Since 1919, Texas has printed plates with a range of state-specific images and slogans, including the Lone Star emblem, a small silhouette of the State, and the phrase “150 Years of Statehood.” *Id.* at 211-12.

Second, “Texas license plate designs are often closely identified in the public mind with the State.” *Id.* at 212 (quoting *Summum*, 555 U.S. at 472) (cleaned up). Texas plates typically include the State’s name in large letters at the top and “serve[] the governmental purposes of vehicle registration and identification.” *Id.* at 212. In short, they “are, essentially, government IDs” that observers “routinely—and reasonably—interpret as conveying messages” with which the government agrees. *Id.* at 212-13 (quoting *Summum*, 555 U.S. at 471).

Third, Texas “maintains direct control over the messages conveyed on [their] specialty plates.” *Id.* at 213. “Texas law provides that the State has sole control over the design, typeface, color, and alphanumeric pattern for all license plates.” *Id.* (quoting Tex. Transp. Code Ann. § 504.005). And the State must “approve every specialty plate design proposal before the design can appear on a Texas plate.” *Id.*

“These considerations, taken together, convince[d]” the Court that the messages on specialty plates were government speech and, thus, that Texas could not be compelled to issue a plate bearing a Confederate flag. *Id.* at 213-14, 219-20.

The analysis is no different with respect to specialty plates in North Carolina:

First, North Carolina—like Texas—has long used license plates to communicate various messages. The State began issuing government plates in 1913 and has offered specialty plates since 1937. Act Regulating

the Use of Automobiles in North Carolina, Ch. 107, §§ 4, 9, 1913 N.C. Sess. Laws 184, 186 (requiring the Secretary of State to issue “display numbers” for registered automobiles and for such numbers to be “displayed conspicuously” on the rear of the assigned vehicle); N.C. Code of 1935 § 2621(230) (Supp. 1937) (authorizing a specialty plate for the North Carolina National Guard); *see also supra* pp. 2-4 (summarizing the history of North Carolina’s specialty-plate program).

Second, North Carolina plates—like Texas plates—“are, essentially, government IDs.” *Walker*, 576 U.S. at 212. They include the State’s name—typically in capital letters at the bottom of the plate—and, like Texas’s plates, are “government article[s] serving the governmental purposes of vehicle registration and identification.” *Id.*; *see* N.C. Gen. Stat. § 20-63 (“Every license plate must display the registration number assigned to the vehicle . . . , the name of the State of North Carolina . . . , and the year number for which it is issued or the date of expiration.”).

Third, North Carolina—like Texas—has “final approval authority” over license-plate designs. *Walker*, 576 U.S. at 213. North Carolina, too, has “sole control over the design, typeface, color, and alphanumeric pattern for all license plates.” *Id.* (quoting Tex. Transp. Code Ann. § 504.005); *see* N.C. Gen. Stat. § 20-79.3A(d). Moreover, before a specialty license plate can be issued, the concept must first be approved by the state legislature, and the design must

be accepted by the DMV. N.C. Gen. Stat. §§ 20-79.3A(c)-(e), 20-79.4(a3).

These three factors collectively make clear that specialty plates in North Carolina also communicate government speech. North Carolina therefore enjoys just as much latitude to deny offensive specialty license plates as Texas does. *See ACLU v. Tennyson*, 815 F.3d 183 (4th Cir. 2016) (applying *Walker* to North Carolina’s specialty-plate regime and holding that North Carolina plates communicate government speech).² As a result, the Fourth Circuit correctly applied this Court’s precedent when it upheld the North Carolina DMV’s decision to reject SCV’s specialty-plate application.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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² SCV quotes at length from *Shurtleff v. City of Boston*, 142 S. Ct. 1583 (2022), one of this Court’s recent government-speech cases. Pet. 28-32. But *Shurtleff* is entirely consistent with *Walker*, and SCV does not suggest otherwise. *Id.* at 1590-93. Indeed, *Shurtleff* expressly relied on *Walker* as the source of the test for “whether the government intends to speak for itself or to regulate private expression,” and the opinion’s primary analysis consisted of applying *Walker*’s three factors to the relevant speech. *Id.* at 1589-93.

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