1 IN THE SUPREME COURT OF THE UNITED STATES

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3 JOHN WALKER, III, IN HIS :

4 OFFICIAL CAPACITY AS :

5 CHAIRMAN OF THE BOARD, ET AL., :

6 Petitioners : No. 14-144

7 v. :

8 TEXAS DIVISION, SONS OF :

9 CONFEDERATE VETERANS, ET AL. :

10 - - - - - - - - - - - - - - - - - - x

11 Washington, D.C.

12 Monday, March 23, 2015

13

14 The above-entitled matter came on for oral

15 argument before the Supreme Court of the United States

16 at 10:03 a.m.

17 APPEARANCES:

18 SCOTT A. KELLER, ESQ., Solicitor General, Austin, Tex.;

19 on behalf of Petitioners.

20 R. JAMES GEORGE, ESQ., Austin, Tex.; on behalf of

21 Respondents.

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1 P R O C E E D I N G S

2 (10:03 a.m.)

3 CHIEF JUSTICE ROBERTS: We will hear

4 argument first this morning in Case No. 14-144, John

5 Walker v. The Texas Division of the Sons of Confederate

6 Veterans.

7 Mr. Keller.

8 ORAL ARGUMENT OF SCOTT A. KELLER

9 ON BEHALF OF PETITIONERS

10 MR. KELLER: Thank you, Mr. Chief Justice,

11 and may it please the Court:

12 Messages on Texas license plates are

13 government speech. The State of Texas etches its name

14 onto each license plate and Texas law gives the State

15 sole control and final approval authority over

16 everything that appears on a license plate. As in

17 Summum, Texas is not abridging any traditional free

18 speech rights. Motorists remain free to speak in all

19 sorts of ways, including on their cars through a bumper

20 sticker right next to a license plate, or a car-size

21 paint job or a window decal.

22 But the First Amendment does not mean that a

23 motorist can compel any government to place its

24 imprimatur on the Confederate battle flag on its license

25 plate.

1 JUSTICE GINSBURG: Well, one of -- one of
2 the problems with the scheme is it's a nebulous
3 standard: Would it be regarded as offensive to many
4 people? I mean, is it government speech to say "Mighty
5 fine burgers" to advertise a product?
6 MR. KELLER: The government -- yes, Justice
7 Ginsburg. The government is allowed to choose the
8 messages that it wishes to. It's simply because it has
9 approved parochial messages or has endorsed messages or
10 is accepting and generating revenue. To get -- to
11 propagate those messages doesn't defeat the fact that it
12 is government speech.
13 When the Library of Congress, for instance,
14 takes sponsorship from The Washington Post or Wells
15 Fargo for the National Book Festival, that's still a
16 government speech when they then put it on their
17 website.
18 JUSTICE ALITO: Suppose Texas erected 500
19 electronic billboards around the State, and on those
20 billboards they posted some government messages, wear
21 your seatbelt when you're driving, for example. But
22 then at the bottom people could put a message of their
23 choice. Would that be government speech?
24 MR. KELLER: Justice Alito, I think the
25 portion that the government had final approval authority

1 and sole control over, that would be government speech.
2 If the government, though, doesn't have sole control or
3 final approval authority over another portion, I think
4 that could be --
5 JUSTICE ALITO: No, the bottom, the
6 government has the same kind of approval authority that
7 it has here. It'll allow people to say inoffensive
8 things, but if they say something that's -- that's
9 offensive, then they won't allow that. That would be
10 government speech?
11 MR. KELLER: It would be government speech
12 under -- I think the best reading of both Summum and
13 Johanns together is precedent; that you have final
14 approval authority when the government isn't abridging
15 other traditional free speech rights.
16 But even if that weren't the test --
17 JUSTICE SOTOMAYOR: But, I'm sorry. I don't
18 understand. Almost anything the government does, it has
19 final authority to veto. Whether it's a school or a
20 government website, it always retains the authority to
21 say no. The issue is when can it say no
22 constitutionally.
23 So I don't think it's merely that. And in
24 Summum, the government actually created the words that
25 were -- that were being advertised. So isn't that

1 substantially different? Because the government's not
2 creating these words.
3 MR. KELLER: Well, Justice Sotomayor, if you
4 went on Summum, the Court indicated that --
5 JUSTICE SOTOMAYOR: That's the monument
6 case. I'm talking about Johanns.
7 MR. KELLER: That -- that -- that's right.
8 And in Summum though, the -- a private organization, the
9 Fraternal Order of Eagles, put its name on the monument.
10 It created the message; it then donated it to the park.
11 In Johanns, yes, the government did create a program to
12 espouse the message, "Beef, it's what's for dinner," but
13 even then, as the Court recognized the Secretary of
14 Agriculture didn't write ad copy. So it's not as if the
15 government had control -- I'm sorry, the government had
16 control, it just was not at every step of the way saying
17 this is how the message must be, but at the end of the
18 day it had final approval authority.
19 But to return to Justice Alito's
20 hypothetical and what the test should be, the test can
21 include other elements. And even if Summum and Johanns
22 could be read as just a two-part test, for all sorts of
23 reasons, this is government speech here. Texas has its
24 name on every license plate. There's a formal process
25 here of notice and comment, and the board takes a public

1 vote before approving any specialty license.

2 JUSTICE KAGAN: Mr. Keller --

3 JUSTICE KENNEDY: Well, do you want -- do

4 you want us to hold that because it's government speech,

5 the government can engage in viewpoint discrimination?

6 Is that what I'm supposed to write?

7 MR. KELLER: That's right, Justice Kennedy.

8 And the Court has recognized that in Summum and in

9 Johanns.

10 JUSTICE KAGAN: And does that have any

11 limits, Mr. Keller? I mean, suppose somebody submitted

12 a license plate to Texas that said, "Vote Republican,"

13 and -- and Texas said, yes, that's fine. And then the

14 next person submitted a license plate to Texas and it

15 said, "Vote Democratic," and Texas said, no, we're not

16 going to approve that one. What about that?

17 MR. KELLER: Yeah, Justice Kagan, I don't

18 think our position would necessarily allow that, but I

19 think that doesn't have --

20 JUSTICE KAGAN: But why -- why wouldn't it

21 allow that?

22 MR. KELLER: Because the Establishment

23 Clause, the Equal Protection Clause, Due Process Clause,

24 other independent constitutional bars could apply. As

25 Justice --

1 JUSTICE KAGAN: Well, this is not an
2 Establishment Clause issue. So I'm -- I'm curious as to
3 why -- what -- what constitutional constraints you think
4 there are and how they would play out as to the kind of
5 hypothetical I just gave you.
6 MR. KELLER: Absolutely, Justice Kagan. I
7 think partisan speech, candidate speech, as Justice
8 Stevens' concurrence in Summum recognized and Justice
9 Scalia's concurrence in Finley recognized, there could
10 be other constitutional bars such as the Equal
11 Protection Clause. The Oregon Supreme Court --
12 JUSTICE SCALIA: I think all you have to say
13 is -- is whatever prevents Texas itself in all of its
14 other activities, never mind license plates, from saying
15 vote Republican, right?
16 MR. KELLER: Absolutely. But --
17 JUSTICE SCALIA: Then you put the same
18 question: What stops Texas from -- from saying, in all
19 of its election literature that it passes out, vote
20 Republican? I think something prevents that. And
21 whatever prevents that would prevent it on the license
22 plates, too. No?
23 MR. KELLER: That's correct, Justice Scalia,
24 which is why that issue is -- is one of government
25 speech in general. But the Court has recognized

1 unanimously that the government can speak, that the
2 government speech doctrine does not allow -- or sorry,
3 that the government can speak even if it is going to
4 take certain viewpoints, and not --
5 JUSTICE KENNEDY: Well, what -- what's the
6 -- what case do you want me to read to show that the
7 government can engage in viewpoint discrimination when
8 it's its own speech? It's the monument cases?
9 MR. KELLER: Yes, Justice Kennedy. Summum
10 would be the best example.
11 JUSTICE KENNEDY: Is this -- is this a case
12 where the State, the government, has aided in creating a
13 new kind of public forum? People don't go to parks
14 anymore. If the government bought 17 soapboxes to put
15 around the park, that's government property, but the
16 government can't prohibit what kind of speech goes on
17 there. Why isn't this a new public forum in a -- in a
18 new era?
19 MR. KELLER: I don't think it's a public
20 forum for private speech for -- for various reasons.
21 The Court has never recognized a public forum for
22 private speech when the government places its name on
23 the message, when it completely controls the message in
24 the forum, when it is receiving notice and comment from
25 the public --

1 JUSTICE KENNEDY: No, but that's circular.
2 The whole question is whether you -- whether you can
3 control the message. You're assuming the answer to the
4 question.
5 MR. KELLER: Well, Justice Kennedy, I think
6 the Court has looked at governmental intent to determine
7 whether there's a public forum for private speech. And
8 for all of the reasons that we're pointing out that this
9 is government speech, it is the same -- it is the flip
10 side of why a public forum hasn't been created.
11 So --
12 CHIEF JUSTICE ROBERTS: I'm not quite sure
13 why it's government speech since it's -- there's no
14 clear, identifiable policy -- at least it's arguable
15 there's none -- that the State is articulating. I mean,
16 they're only doing this to get the money.
17 MR. KELLER: Mr. Chief Justice, a singular
18 programmatic message I don't think can be part of any
19 administrable test for government because government
20 must speak in all sorts of ways. The Court in Summum
21 indicated that the 52 structures in New York Central
22 Park were all government speech, and yet, those -- it's
23 a wide array of messages, such as Alice in Wonderland.
24 CHIEF JUSTICE ROBERTS: Well, but it's --
25 here, I mean, you -- you could have conflicting

1 messages. I mean, what is the government policy between
2 allowing University of Texas plates and University of
3 Oklahoma plates?
4 MR. KELLER: The State of Texas can
5 absolutely promote the educational diversity of its
6 citizenry.
7 CHIEF JUSTICE ROBERTS: Well, okay. What's
8 its policy between permitting "Mighty fine burger"
9 place -- plates and, you know, "Pretty good burgers"
10 plates?
11 (Laughter.)
12 MR. KELLER: Mr. Chief Justice, as a -- an
13 Austin, Texas establishment, the State of Texas, if it
14 wanted to, could promote that message. But even if
15 Mighty Fine Burgers weren't a Texas establishment, Texas
16 is allowed to endorse speech. And just because it would
17 be generating revenue --
18 CHIEF JUSTICE ROBERTS: So it's endorsing
19 speech?
20 MR. KELLER: It is the government's speech.
21 The analogy would be an endorsement of such as a
22 professional athlete. The professional athlete, for
23 instance, places a logo or a product or otherwise on
24 some apparel that the athlete is wearing. That's still
25 the speech of the athlete.

1 CHIEF JUSTICE ROBERTS: Right. But the
2 athlete doesn't advertise, you know, Nike on his jersey
3 and Adidas on his shoes. You can see one message. That
4 athlete is endorsing this brand. But Texas will put its
5 name on anything and the idea that this is their speech,
6 again, the only thing that unifies it is they have --
7 they get money from it.
8 MR. KELLER: Mr. Chief Justice, I don't
9 think Texas --
10 JUSTICE BREYER: I bet he would if he could.
11 MR. KELLER: The State of Texas does not put
12 its name on everything. It -- it follows a formal
13 process with a public vote --
14 CHIEF JUSTICE ROBERTS: Well, it does. You
15 told me yourself. You began, you said its name is
16 etched on the license plate.
17 MR. KELLER: Sir, every message that is
18 actually appearing on a license plate, yes, that is the
19 State's message. But that --
20 JUSTICE GINSBURG: And how many of them are
21 there? How many --
22 MR. KELLER: At -- as of the beginning of
23 this month, there were 438 specialty plates, 269 of
24 which were available for general public use.
25 JUSTICE KAGAN: How many have you

1 disapproved other than this one?

2 MR. KELLER: We address that argument in our

3 reply brief at pages 9 to 11. Texas has -- sorry.

4 Texas agencies have denied about a dozen plates. Some

5 of that information is in the record, some of it is not.

6 JUSTICE KAGAN: And in -- in -- which --

7 what other ones have you disapproved?

8 MR. KELLER: The board's predecessor denied

9 a pro life plate. The board itself denied a Texas DPS

10 Trooper's Foundation plate, and the board's predecessor

11 also denied about a dozen other plates.

12 Also, the --

13 JUSTICE KAGAN: All on the ground of

14 offense?

15 MR. KELLER: The -- the information is not

16 clear as to what the grounds for those denials were.

17 The legislature itself has also repealed

18 multiple specialty plates that it also had created.

19 So -- so this shows that --

20 JUSTICE KAGAN: And could -- could I ask,

21 Mr. Keller, if you go down to Texas and you just stare

22 at license plates, are most of them just the standard

23 license plate and then these 400 license plates you see

24 very carefully, or do most people actually have one of

25 these specialty plates?

1 MR. KELLER: While there is a -- a wide
2 range, I believe most plates are still the standard
3 plate and --
4 JUSTICE KAGAN: But there's a very --
5 there's a substantial percentage that are not? There --
6 it's not by any means unusual to see a specialty plate?
7 MR. KELLER: It would not be unusual to see
8 a specialty plate in the State of Texas. But the State
9 of Texas, by etching its name on it, can keep in control
10 of what appears on license plates. It's still the
11 State's message. All --
12 JUSTICE ALITO: What is the limits of this
13 argument? That's what concerns me. And your answer to
14 my billboard question was disturbing, but suppose people
15 still did go to parks, and the State had an official
16 State soapbox at the park, and every once in a while a
17 State official would mount the soapbox and, say, give
18 some official State announcement. But other times
19 people who pay the fee would be allowed to go up there
20 and say something that they wanted, provided that it was
21 approved in advance by the State. Would that be
22 official State speech?
23 MR. KELLER: Justice Alito, I think there
24 we're starting to cross over into a situation what this
25 called -- what this Court in Summum called of a

1 subterfuge, that if you are abridging traditional free
2 speech rights, if you're limiting access to a
3 traditional public forum, then that would be an instance
4 where government speech is crowding out speech and
5 therefore it raised constitutional --
6 JUSTICE ALITO: Well, what does --
7 JUSTICE KENNEDY: Why hasn't this become
8 traditional? I don't mean to interrupt Justice Alito,
9 but we're on, I think, on the same point. Why hasn't
10 this become traditional now that you have allowed it?
11 You have opened up a new forum.
12 MR. KELLER: Justice Kennedy, I don't think
13 it has become traditional because Texas has always
14 maintained control over its plates, and it has always
15 exercised editorial control. So unlike a park which has
16 been held since time immemorial for the benefit of the
17 public to speak, license plates are a regulatory --
18 JUSTICE KENNEDY: Well, do -- do you want us
19 to say that public -- the public fora cannot evolve over
20 time according to -- and people don't go to parks
21 anymore. They drive.
22 MR. KELLER: Justice Kennedy, absolutely.
23 The -- the public -- traditional public forum can evolve
24 over time. But the indicia of a traditional public
25 forum still has to be one that is open, and -- and Texas

1 has not opened license plates. If other States wanted
2 to --
3 JUSTICE KAGAN: But in a world in which you
4 have approved 400 license plates and they are pretty
5 common in the State of Texas and you have only
6 disapproved a very select few, you know, it does seem as
7 though you've basically given -- relinquished your
8 control over this and, you know, made it a people's
9 license plate for whatever private speech people want
10 to -- to say.
11 MR. KELLER: Justice Kagan, I think it would
12 be odd to say that it -- it's private speech when the
13 board is taking a public vote and receiving notice and
14 comment, a very -- a governmental function of when the
15 government wants to act, and then it is placing its name
16 on the license plate. When the government is placing
17 its name on the license plate, it is accepting and --
18 and signifying that this is the government's message,
19 and you never --
20 JUSTICE GINSBURG: Does -- does it have
21 notice and comment for -- for every one of the 430-odd
22 that it's approved? Every time there is a request, does
23 it -- is there a notice and comment procedure?
24 MR. KELLER: If it's a legislature-created
25 plate, the legislature, of course, would do it and then

1 there wouldn't be an agency notice and comment
2 proceeding. But under the existing law, notice and
3 comment would be required for every specialty plate
4 approved by the agency, which is all specialty plates
5 that are not approved by the legislature.
6 I -- I think a good analog to this case
7 would the U.S. Postal Services' postage stamp program.
8 There, the U.S. is placing its name directly on the
9 medium. Thousands of stamps have been issued in the
10 past, and yet there is also private input that is
11 allowed on to what those postage stamps are going to
12 look like. And just as it -- respondents can speak in
13 all sorts of ways on a bumper sticker right next to a
14 license plate or on a -- in the envelope on which a
15 stamp would appear, that doesn't mean that someone is
16 allowed responsive speech to whatever appears on a stamp
17 or whatever appears on a license plate.
18 JUSTICE SCALIA: Does Texas also have
19 specialty plates insofar as the -- the letters or
20 numbers of the plates are concerned? I mean, can you
21 get a license plate that says "Hot Stuff" or something
22 like that?
23 MR. KELLER: Justice Scalia, we do have
24 personalized plates in Texas.
25 JUSTICE SCALIA: And are those censored? I

1 mean, can you -- can you use a dirty word on those?
2 MR. KELLER: The -- the speech there is
3 controlled completely by the State of Texas.
4 JUSTICE SCALIA: I would think so.
5 MR. KELLER: Texas, and this is not in the
6 record, but --
7 JUSTICE SCALIA: Even though the individual
8 selects "Hot Stuff" or whatever other message he wants
9 to put. So I guess if this is not allowed, we can't
10 allow that either.
11 MR. KELLER: Yes, Justice Scalia.
12 JUSTICE SCALIA: Right? I mean, dirty words
13 are -- people are entitled to use dirty words.
14 MR. KELLER: That's right. Justice Scalia,
15 I -- the Court's holding in this case, I believe, would
16 directly affect the personalized plates. And when --
17 CHIEF JUSTICE ROBERTS: Well, I -- I'm not
18 sure your analogy to the postal service really works
19 because none of us can imagine the postal service having
20 commercial advertisements on its stamps. One of the --
21 a license plate's here for RE/MAX Realty. You are not
22 going to see that on a postal stamp.
23 MR. KELLER: Mr. Chief Justice, it may be
24 true that the U.S. Postal Service has not chosen to
25 engage in that type of expression, but I don't think

1 that defeats the fact that this is still government
2 speech. For all of the indicia the Court have
3 recognized in Summum and Johanns, and even Justice
4 Souter's dissent in Johanns, that wanted -- it was
5 looking for government disclosure, we have that here.
6 We have Texas's name etched onto the license plate.
7 Also untenable consequences could fall from
8 a -- an -- an opinion recognizing that Texas has to
9 offer responsive speech. Texas should not have to allow
10 speech about Al-Qaeda or the Nazi party simply because
11 it offers a license plate propagating the message "Fight
12 Terrorism".
13 CHIEF JUSTICE ROBERTS: Well, but there is
14 an easy answer to that, which is they don't have to get
15 in the business of selling space on their license plates
16 to begin with. If you don't want to have the Al-Qaeda
17 license plate, don't get into the business of allowing
18 people to buy their -- you know, the space to put on
19 whatever they want to say.
20 MR. KELLER: Mr. Chief Justice, I believe,
21 though, that would be an answer to all of the government
22 speech cases. And I -- in Summum for instance, the --
23 the Court didn't say, Well, if you don't want to accept
24 the Summum monument, just don't allow monuments. And
25 that is because government is allowed to select the

1 messages that it wants to propagate and it's allowed to
2 speak in medium that it chooses.
3 CHIEF JUSTICE ROBERTS: Well, that might be
4 because they've done that since, I don't know, the time
5 of the pyramids or whatever. But they haven't had
6 license plate messages since time immemorial, so maybe
7 that is why they shouldn't be considered just like the
8 monuments.
9 MR. KELLER: Mr. Chief Justice, I don't mean
10 to suggest that they are just like the monuments, but
11 there is still a fixed medium; an intangible message is
12 being displayed to a captive audience, as the Court
13 recognized in Lehman. It -- and in those situations,
14 the government is entitled to select the messages that
15 it wishes to propagate and that are going to be closely
16 identified --
17 JUSTICE SCALIA: Personally, I would rather
18 have the license plates than the pyramids. I -- I don't
19 know that we want to drive Texas to having pyramids.
20 MR. KELLER: Justice Scalia, we also want to
21 retain our license plates. And that shows, I think,
22 what this case is about. The Respondents want Texas to
23 place its stamp of approval on the Confederate battle
24 flag through license plates, and Texas doesn't have to
25 make that judgment.

1 JUSTICE ALITO: Well, I don't want to beat a
2 dead horse, but I -- if -- what -- what is the best
3 distinction you can give me between what you do with
4 license plates and billboards, a soapbox, an official
5 State website where people can put up a -- a message
6 that they want subject to State approval? If we were to
7 write an opinion that drew -- tried to draw a
8 distinction between the license plates on one side and
9 those other things on the other side, what would we say?
10 MR. KELLER: Sure, Justice Alito. I think
11 the very first thing is Texas has its name on it. I'm
12 not sure in the billboard example --
13 JUSTICE ALITO: Texas has its name on all
14 the other things, too.
15 MR. KELLER: In this situation, we have
16 exercised selectivity and control as my previous answer
17 to Justice Kagan suggested. Our reply brief at pages 9
18 to 11 addresses that. Also, we market this program to
19 the public saying specifically that no one is entitled
20 to whatever design they want; rather, the board of the
21 legislature has to approve it. That's at the final item
22 of the Joint Appendix. So this is not a situation where
23 out in the world if you were to see a soapbox in a park,
24 that you would wonder is this the government speaking?
25 Is this not the government speaking? Is the government

1 abridging traditional free speech rights? This is a
2 case where Texas wants to maintain and has maintained
3 control of what it says on license plates. And
4 Respondents -- everyone remains free to speak in all
5 sorts of ways. Speeches, leafletting, TV,
6 advertisements. They're on billboards.
7 JUSTICE SOTOMAYOR: I really don't think
8 that you've answered Justice Alito's question. In every
9 park you need, generally, a permit to do certain kinds
10 of speech. So the government controls that permit
11 process, and it tells you that it can say no.
12 So why is that different in the situations
13 that -- it can't be merely control is what I'm saying.
14 MR. KELLER: Justice --
15 JUSTICE SOTOMAYOR: The ability to veto
16 because that would then give you the ability to veto.
17 You could create a program in every public forum that
18 basically controls in the same way.
19 MR. KELLER: Justice Sotomayor, I think
20 there -- there's a difference -- we need to be clear
21 about what approval means. If approval means access to
22 a forum and it's not government controlling every single
23 word of the message, then I don't think you have
24 government speech. If it's simply -- you have a permit
25 to --

1 JUSTICE SCALIA: Have we held that you
2 can -- you can deny access to a park or to a forum on
3 the basis of the content of the speech?
4 MR. KELLER: Justice Scalia, content-based
5 regulations of speech --
6 JUSTICE SCALIA: Absolutely wrong. And
7 you're denying access on the basis of content; right?
8 It's a different -- different situation entirely.
9 MR. KELLER: Justice Scalia, that is
10 correct. We are -- we are denying access.
11 JUSTICE KAGAN: But Mr. Keller, one of
12 the -- one of the concerns that that raises, and this
13 really goes back to what Justice Kennedy said, is that
14 outside the traditional area of streets and parks, this
15 is a new world. There are all kinds of new expressive
16 forums being created every day and as those come into
17 play, as long as the State says, hey, look, we're going
18 to regulate everything for offense, we're going to keep
19 anything offensive out of this expressive forum. It
20 does create the possibility that in this new world with
21 all these new kinds of expressive fora, the State will
22 have a much greater control over its citizens' speech
23 than we've typically been comfortable with.
24 MR. KELLER: That's right, Justice Kagan.
25 And I think for all of those reasons, a narrow ruling in

1 this case would possibly be a beneficial way to go, but
2 that --
3 JUSTICE SCALIA: Do -- do you know of any
4 other expressive fora that are owned by the State that,
5 are manufactured by the State that have the State's name
6 on it as license plates do? I mean, if there are a lot
7 of fora like that, boy, I -- I wouldn't really worry.
8 But I don't know of any others. Do you know of any
9 others?
10 MR. KELLER: No, Justice Scalia. This
11 is -- this is a unique --
12 JUSTICE BREYER: What can you tell me, then,
13 to help me which might not help others? But I don't
14 think these categories are absolute. I think they help,
15 but they're not absolute. So I would ask the question
16 first, this isn't government speech in common English.
17 It is the speech of the person who wants to put the
18 message on the plate. The plate's owned by the State.
19 The State says we don't want certain messages to be
20 displayed. And my question is why? Why not? What is
21 the interest that the State is furthering in keeping
22 certain messages off the plate?
23 MR. KELLER: Justice Breyer, the State's
24 interest is selecting the messages it -- it wants to
25 put its --

1 JUSTICE BREYER: I'm sorry. If the
2 State -- then you have the Republican example,
3 Democrats. I mean, not every interest is a justifiable
4 interest. Some are not, and some are. That's why I
5 asked my question.
6 They keep some off, and they let some on.
7 What is their interest? Why -- which are the ones? I'm
8 asking a factual question. Why have they kept off the
9 ones they kept off while letting on the ones they left
10 on?
11 MR. KELLER: Justice Breyer --
12 JUSTICE BREYER: If they have no interest at
13 all in making such a distinction, then I think since
14 speech is hurt at least a little, they ought to lose.
15 But if they have a justifiable interest, since you can
16 put the bumper sticker next door, I think they win. And
17 therefore, I'd like to know what their interest is.
18 MR. KELLER: And the State of Texas interest
19 here is propagating messages that show the diverse
20 backgrounds, educational backgrounds, products of Texas.
21 JUSTICE BREYER: Well, yes -- I --
22 JUSTICE SCALIA: No. I'm asking the
23 interest of --
24 JUSTICE BREYER: I assume that Texas likes
25 each one of these interests that they allow to be put

1 on the -- on -- on the license plate. They like Texas
2 hamburger joints, and they probably would not approve
3 a -- a Chicago hamburger joint being on the Texas
4 license plate. They -- they -- they like some of these
5 messages; others they don't particularly like. Isn't
6 that right?
7 MR. KELLER: Justice --
8 JUSTICE BREYER: I'd like to get my answer.
9 I was asking you what is the interest in Texas, and why
10 does it keep off the messages it keeps off?
11 MR. KELLER: In this particular example --
12 JUSTICE BREYER: No. Not just this example.
13 There are a set of things they've kept off. Why?
14 MR. KELLER: Justice Breyer --
15 JUSTICE SOTOMAYOR: Now, don't try a general
16 rule. I think the Justice is asking you for a specific.
17 Why would you --
18 MR. KELLER: Justice Breyer, I'll use the
19 example of the Texas DPS Troopers Foundation plate that
20 was also denied. There, Texas didn't want that on its
21 license plate because it was concerned that if a
22 motorist were pulled over, that then the --
23 JUSTICE BREYER: Okay. So go through this.
24 Look, I can think of many reasons I could make up.
25 Maybe they want to keep controversial political messages

1 off. I'd say they have an interest in that in
2 suggesting to people Texas doesn't sponsor this -- I
3 just want to know what -- what they really are. And now
4 you've said one -- what was the one you just said?
5 MR. KELLER: The Texas DPS Troopers
6 Foundation plate, Justice Breyer.
7 JUSTICE KENNEDY: Well, I'm interested in
8 Justice Breyer's question. You're on the license plate
9 approval board. What standard do you follow? When do
10 you grant a request, and when do you deny it? What is
11 the rule? I think that's what Justice Breyer is asking.
12 MR. KELLER: Yes. And Texas regulations
13 provide that the board can deny a license plate for
14 something that members of the public would find
15 offensive, but it also says that the board can deny
16 plates for any reason established by a rule, which is --
17 JUSTICE BREYER: Fine. Then I think they
18 lose. The reason I think they lose is because I don't
19 see a State could come in and say we keep off a private
20 message, and we'll tell you the reason later.
21 We'll -- we can do it for any reason we want. There
22 you're hurting speech, and I don't see Texas's interest
23 in saying we can keep it off for any reason we want
24 because that would be the Republican-Democrat, too.
25 MR. KELLER: Well, but Justice --

1 JUSTICE BREYER: So what's
2 the -- I'm -- same question, but I just think you have
3 to have some kind of legitimate reason for keeping off
4 the -- and it doesn't have to be much. It could be just
5 a little.
6 MR. KELLER: Well, Texas can have legitimate
7 reasons for not allowing --
8 JUSTICE BREYER: Then why don't you tell us
9 what they are?
10 MR. KELLER: Well, I think, though, that
11 that would require something like a formal process
12 and Summum --
13 JUSTICE BREYER: No, it doesn't. I just
14 want to know what they are.
15 MR. KELLER: And Justice Breyer, Texas does
16 not have to associate itself with messages that it
17 doesn't want to and finds offensive. And because Texas
18 has given that explanation here, we know that. But many
19 times government officials speak and -- and they don't
20 disclose their motives, and that's perfectly --
21 JUSTICE GINSBURG: But here, Texas -- Texas
22 did. And now, we get full circle back to the -- my
23 first question.
24 Texas didn't just say no. It said this
25 message would be offensive to many people. So

1 that's -- if -- if a message would be offensive to many
2 people, that's a standard that they're applying. And I
3 asked isn't that too broad a discretion?
4 MR. KELLER: No, Justice Ginsburg. The fact
5 that we have that much discretion confirms that this is
6 government speech.
7 Mr. Chief Justice, let me remain -- reserve
8 the remainder of my time.
9 CHIEF JUSTICE ROBERTS: Thank you, Counsel.
10 Mr. George.
11 ORAL ARGUMENT OF MR. GEORGE
12 ON BEHALF OF RESPONDENTS
13 MR. GEORGE: Mr. Chief Justice, and may it
14 please the Court:
15 We're here representing the Sons of the
16 Confederate Veterans because they wanted to have a
17 license plate to raise money, in fact, for the State of
18 Texas to keep up monuments, which was the purpose of
19 their whole process in this case. And the State of
20 Texas has gone about issuing an open invitation to
21 everybody to submit to them public designs for license
22 plates and to create -- and thus, it's created a limited
23 public forum for these license plates.
24 JUSTICE SCALIA: Can Texas -- can Texas
25 itself formally, let's say, by a -- a joint resolution

1 of the legislature endorse the Grand Army of the
2 Republic and not the Sons of the Confederacy? Can Texas
3 do that?
4 MR. GEORGE: The legislature can endorse
5 anything it wants.
6 JUSTICE SCALIA: So the State can; right?
7 So -- so can the -- can the legislature endorse Austin
8 hamburgers?
9 MR. GEORGE: Well, the Legislature has
10 created a Confederate Heroes Day in --
11 JUSTICE SCALIA: And --
12 MR. GEORGE: -- in this particular case.
13 And the people on my side -- this side of the --
14 JUSTICE SCALIA: What about Yankee heroes?
15 Are they --
16 MR. GEORGE: They -- they -- they --
17 JUSTICE SCALIA: -- are they honored in
18 Texas?
19 MR. GEORGE: -- do -- well, they created a
20 holiday for --
21 JUSTICE SCALIA: To --
22 MR. GEORGE: -- people -- for Juneteenth
23 when the slaves were freed.
24 JUSTICE SCALIA: What I don't understand is
25 why this sticks in your craw when it's on -- on a

1 license plate --

2 MR. GEORGE: The --

3 JUSTICE SCALIA: -- when you acknowledge

4 that Texas can do all of these things so long as it's

5 Texas speech. The only question here is whether this is

6 Texas's speech or not. If it is Texas's speech, all of

7 these things can be said, can't they? Can't all of the

8 things --

9 MR. GEORGE: If it --

10 JUSTICE SCALIA: -- that are on the license

11 plates --

12 MR. GEORGE: If it's Texas speech by

13 itself --

14 JUSTICE SCALIA: It --

15 MR. GEORGE: -- and is not joint speech

16 because of --

17 JUSTICE SCALIA: Right.

18 MR. GEORGE: -- the location.

19 JUSTICE SCALIA: This doesn't seem to me

20 like a very significant issue --

21 MR. GEORGE: Well --

22 JUSTICE SCALIA: -- if that's all you are

23 concerned about.

24 MR. GEORGE: Well, the --

25 JUSTICE SCALIA: So long as Texas says

1 it's -- it's okay, but, boy, if you put it on a license
2 plate, that -- what -- I don't understand what the
3 theory is.
4 MR. GEORGE: Well, the State has created a
5 very successful money-raising program in which it
6 solicits people to come in and submit their design for
7 their license plate so they can -- they have to submit
8 the design. They have to put up the money to make
9 the -- put the -- a plate. And then the plate doesn't
10 ever get published to anybody until the person --
11 somebody orders it from the --
12 JUSTICE GINSBURG: Suppose -- suppose the
13 message -- the -- the applicant said, we want this
14 design, and the design is a swastika. Is that speech
15 that -- does -- does the -- the -- whoever is in charge
16 of it -- of the license plate, do they have to accept --
17 MR. GEORGE: I don't --
18 JUSTICE GINSBURG: -- that -- that design?
19 MR. GEORGE: I don't believe the State can
20 discriminate against the people who want to have that
21 design --
22 JUSTICE GINSBURG: So they could have the
23 swastika. And suppose somebody else says, I want to
24 have "Jihad" on my license plate. That's okay, too?
25 MR. GEORGE: Vegan?

1 JUSTICE GINSBURG: Jihad.

2 MR. GEORGE: Jihad. Jihad on the license

3 plate? Can be -- there is obviously a court of

4 appeal -- a district court from Ohio in which "Infidels"

5 was held to be -- the State --

6 JUSTICE KENNEDY: What is your answer --

7 MR. GEORGE: -- wouldn't put that.

8 JUSTICE KENNEDY: What is your answer in

9 this case as to Justice Ginsburg's hypothetical? Yes or

10 no, must the State put those symbols or messages on the

11 plates at the request of the citizen? Yes or no?

12 MR. GEORGE: Yes.

13 JUSTICE GINSBURG: How about "Make pot

14 legal."

15 MR. GEORGE: Say it again.

16 JUSTICE GINSBURG: "Make pot legal."

17 MR. GEORGE: Yes.

18 JUSTICE GINSBURG: That's okay? And "Bong

19 hits for Jesus"?

20 (Laughter.)

21 MR. GEORGE: Yes.

22 JUSTICE SCALIA: So you're -- you're really

23 arguing for the abolition for Texas specialty plates,

24 aren't you?

25 MR. GEORGE: I am arguing that if the

1 State --

2 JUSTICE SCALIA: I couldn't make a better

3 argument for -- in that direction than -- than what

4 you've been doing.

5 MR. GEORGE: Well, we had got along without

6 it a long time before we got it, and we can get along --

7 JUSTICE KENNEDY: So -- so in a way --

8 MR. GEORGE: -- without it again.

9 JUSTICE KENNEDY: So in a way, your argument

10 curtails speech?

11 MR. GEORGE: Only if --

12 JUSTICE KENNEDY: If you prevail, you are

13 going to prevent a lot of Texans from -- from conveying

14 a message -- you have to agree with that.

15 MR. GEORGE: I would -- if -- if the -- if

16 the State continues to use the same standard, which is

17 it might offend anybody, the State can -- can deny the

18 plate. If that's the standard, then the -- and -- and

19 they exercise the discretion on the statutory standard

20 that it might offend somebody --

21 JUSTICE KENNEDY: But you have no alternate

22 standard in order to have a proper -- or solution that

23 seems -- seems wise for Justice Ginsburg's hypothetical.

24 You have no standard.

25 MR. GEORGE: I -- the -- the answer to

1 having a standard that controls people's speech is that
2 the standard has to be pretty low-hanging fruit.
3 As -- in the Christian Law Students
4 Association, College of Hastings, v. Martinez, Justice
5 Alito, in the dissent for the dissenters in that case
6 said that offensive speech is something that -- speech
7 that we hate is something that we should be proud of
8 protecting.
9 JUSTICE BREYER: Yeah, that's in that
10 context. So you -- but I'm trying -- you say they can
11 or they cannot have a standard which says we're trying
12 to keep offensive speech off the license plate?
13 MR. GEORGE: I -- as long as the --
14 JUSTICE BREYER: You say yes or no?
15 MR. GEORGE: -- definition of offensive is
16 in the eyes of the beholder --
17 JUSTICE BREYER: Yeah.
18 MR. GEORGE: -- of course.
19 JUSTICE BREYER: They can do that?
20 MR. GEORGE: They can't have that.
21 JUSTICE BREYER: They can or cannot?
22 MR. GEORGE: Cannot.
23 JUSTICE BREYER: Okay. So now I see what
24 you're saying. But if I were to go back to sort of the
25 basic underlying thought here, is speech hurt?

1 MR. GEORGE: Yes.

2 JUSTICE BREYER: The answer is, yes, it is.

3 The private speech is somewhat hurt. A lot? Well, put

4 up a bumper sticker. You can't say a lot. How is it

5 hurt? You don't get the official imprimatur. Hmm,

6 okay.

7 Now, is there something to be said for

8 Texas? Yes. What they're trying to do is to prevent

9 their official imprimatur from being given to speech

10 that offends people. People don't like it? Put up a

11 bumper sticker.

12 All right. Now we have two interests in

13 opposite directions in many, many cases. We try to

14 weigh those things if the other things don't tell us the

15 answer. And I would guess -- I don't really see the big

16 problem -- that people who are putting up speech even

17 that Texas considers offensive, in part, for reasons

18 that Justice Scalia says, well, put up a bumper sticker.

19 What's the problem?

20 MR. GEORGE: Well, the -- I -- the culture

21 of creating specialty plates began in Texas in 1965.

22 We've been doing this, and we have gone bonkers with

23 people buying these things in the State. There are

24 50,000 people with -- with the private plates --

25 JUSTICE SOTOMAYOR: There's a lot of money

1 in this, isn't it? It's about $8,000?
2 MR. GEORGE: Say what?
3 JUSTICE SOTOMAYOR: Is it about $8,000 to
4 get one of these plates?
5 MR. GEORGE: I think it's a little more than
6 that.
7 JUSTICE SOTOMAYOR: More than that.
8 MR. GEORGE: And that -- that --
9 JUSTICE SOTOMAYOR: I have -- I -- I have a
10 different question, which is -- I actually do think that
11 this is hybrid speech. It's both government and the
12 individual speaking at the same time. But that goes
13 back to what Justice Scalia said. In Wooley we said we
14 can't compel the individual to put something on their
15 license plates that they disagree with.
16 MR. GEORGE: That's -- we had that case.
17 JUSTICE SOTOMAYOR: So why isn't the reverse
18 true for the government? If you're going to ask me to
19 put my name, because the law requires it, the State's
20 name on a license plate, why can you compel us to do
21 something we don't want to endorse?
22 MR. GEORGE: Well, the reason --
23 JUSTICE SOTOMAYOR: Why shouldn't it work
24 both ways when it's --
25 MR. GEORGE: The reason is that this has

1 become -- and it's the numbers -- it's become a limited
2 public forum for putting up messages.
3 JUSTICE SOTOMAYOR: But how -- how do I know
4 which is the government's and which is only the
5 individual's? I mean, I -- I -- I wouldn't have known
6 that pro -- that -- that pro anything was sponsored by
7 some States and not others, or endorsed by some States
8 but not others. So how do I know that a particular
9 license plate the government doesn't endorse?
10 MR. GEORGE: You can't tell whether the
11 government wants your speech in advance in this program.
12 You have to submit what you think you want, and then
13 the --
14 JUSTICE SOTOMAYOR: Well, that implies a
15 certain degree of approval.
16 MR. GEORGE: And these -- well, of course,
17 there is approval. Just like there's approval for
18 someone to speak in a park, the -- in the Columbus, Ohio
19 case where the --
20 JUSTICE GINSBURG: But that's -- that's -- I
21 think was brought out earlier. You can have time,
22 place, and manner regulations for speaking in the park.
23 You can't have content-based regulation. This is --
24 this is a content basis, content the State doesn't want.
25 MR. GEORGE: The -- and they have. They

1 have a standard that is -- that -- the lowest common --
2 common denominator. If any person could be offended,
3 they can deny it. That is their standard, which, in
4 fact, is --
5 JUSTICE GINSBURG: Well, it wasn't quite
6 that. It says it would be offensive to many people.
7 MR. GEORGE: No, ma'am. I think the statute
8 is -- it says, actually, any person. So --
9 JUSTICE SOTOMAYOR: Well, of course,
10 Mr. George. If you had a standard like that in a case,
11 in a normal case where we were regulating private
12 speech, of course, we would find that impermissible.
13 But the question is whether this is a very different
14 kind of context.
15 And let's go back to -- I think Justice
16 Scalia said it, about the nature of license plates. I
17 mean, I think there is a clear regulatory purpose here.
18 It's the government that actually makes the license
19 plate. I think the license plate continues to be public
20 property, if that's right, like you have to return the
21 license plate. It has the State's name on it. It's
22 clearly the official identification that the State gives
23 with respect to a car.
24 So why doesn't all of that make -- make this
25 a very different case from the typical forum cases

1 that -- that we usually address?

2 MR. GEORGE: Well, the reason is that we do

3 have hybrid speech and they opened up, and they created

4 this billboard, as Justice Alito said, they created a

5 billboard opportunity. And they have -- since they can

6 make everybody have a license plate, they said we're

7 going to create a billboard opportunity and put

8 messages -- let you put messages on it and pay us money

9 for using our billboard. That's what they've done. And

10 then they say to some people, but if I don't like your

11 message because you're a Republican or you're a Democrat

12 or you are -- you want to say Mighty fine burgers

13 instead of Whopper Burger, they can do that.

14 That sort of arbitrary control of speech

15 based upon a standard that it might offend anybody is

16 they either need to get rid of the program, or they need

17 to open up the program just to everybody else. And if

18 somebody publishes a speech they don't like, Justice

19 O'Connor in the Columbus, Ohio case suggested you just

20 make them put a number under it whom the Ku Klux Klan

21 puts a cross on the hill in Columbus, Ohio.

22 JUSTICE BREYER: I asked my question before,

23 if you remember it, really, because I wanted an answer.

24 MR. GEORGE: I'll try again.

25 JUSTICE BREYER: It wasn't a statement. It

1 was -- it was -- I'm trying to get rid of all the
2 conceptual basis here. You just go back -- forget the
3 public forum, et cetera, forget all that.
4 MR. GEORGE: Okay.
5 JUSTICE BREYER: Just go back to look to see
6 is speech being hurt, and the answer is of course yes,
7 but not much, because they can put a bumper sticker.
8 Then you look at the other side of it, and you say, does
9 the State have a legitimate interest here? And the
10 State says yes, our interest is that there are messages
11 we like, messages we don't care about, and messages we
12 don't like. And do we have a system for keeping the
13 last off because it is the government speaking, which
14 represents the citizens, and the citizens do -- its
15 their government, and they don't want, just as in the
16 examples Justice Scalia gave, to have their government
17 associated with messages that this commission doesn't
18 want. And maybe there are limits on that, but that's
19 the basic idea. Okay. Now, weigh those two things. I
20 think you'd say, little harm to speech, we see the other
21 broad, da, da, da, et cetera. Now, what's your
22 response?
23 MR. GEORGE: Well, the response is the forum
24 has been created.
25 JUSTICE BREYER: Forum. See, it's the

1 conceptual part, and I can't tell whether a forum -- a
2 license plate's a forum or not a forum, or if it's a
3 three-part test or -- I can't get that.
4 MR. GEORGE: I understand.
5 JUSTICE BREYER: I'm trying to go back to
6 the basics of it.
7 MR. GEORGE: Well, one of the -- one of the
8 ideas that you have articulated, and others on this
9 Court, is that what would the reasonable observer
10 believe this was. For example, the -- would they
11 believe that the speech is the State's speech or would
12 they believe it's the person who bought the plate,
13 because there's no -- nothing gets communicated --
14 JUSTICE GINSBURG: How about both? How
15 about both in answer to that? It is the State's license
16 plate. It has Texas on it in big letters, so -- and
17 Texas says, yes, we have to approve it, yes, we approve
18 a lot, but there's some we don't approve, because it's
19 our speech, it may be the car owner's speech as well,
20 but it is our speech.
21 MR. GEORGE: Both -- the State has dozens of
22 potential designs for plates that don't carry anybody
23 else's message, and they have 480 designs for
24 organizational messages and 50,000 personalized
25 messages. And the issue in this case is the person who

1 puts the license plates on their car is the one that
2 communicates the message. The other people are just
3 giving approval.
4 JUSTICE ALITO: Suppose the State had many
5 fewer plates from which to choose. So let's say they
6 have the standard plate, and then they have a plate for
7 every college or university in the State. That's your
8 choice. Would that be government speech?
9 MR. GEORGE: It certainly is government
10 speech in the sense that -- partly government speech,
11 the ability to choose somebody -- the universities in
12 the State. And if the standard by which they issue
13 those is that we're going to put one for all the
14 colleges in the State, and that is the standard, of
15 course that's okay. Because it is a -- a standard that
16 has -- they chose or the legislature chose, I suspect,
17 that says you can have -- everybody who has a college
18 can get into this program.
19 JUSTICE ALITO: All right. Suppose they
20 broaden it. So it's not only the colleges and
21 universities, but it's all the places in Texas of
22 historic interest or natural features of the State. How
23 about that? Now you've got a lot more.
24 MR. GEORGE: They actually do those and
25 those are not sponsored by anybody. Those are

1 State-created for -- and they charge more money --
2 JUSTICE KENNEDY: But answer -- answer the
3 hypothetical. Justice Alito says first colleges and the
4 next scenic places. That's an okay or not?
5 MR. GEORGE: Scenic places, they can -- they
6 actually --
7 JUSTICE KENNEDY: And then I'm sure he has
8 some other --
9 MR. GEORGE: -- they can and do.
10 JUSTICE KENNEDY: All right.
11 JUSTICE ALITO: And suppose that there's
12 some little town that thinks that it's really scenic and
13 they -- there's a way in which they can petition to get
14 on this list. Do you see where I'm going? At some
15 point, if it's -- if you have just a standard State
16 plate, of course that's government speech. If you've
17 got 5,000 different variations that people can create
18 for themselves, it becomes a lot harder to say that's
19 government speech. So where would you draw the line?
20 MR. GEORGE: My view is that when the people
21 get to create a message themselves, and then -- an
22 organization in this case -- create the message for
23 themselves, and then the people who look in the catalog,
24 pick out the license plate that they want and put it on
25 their car, then the speech is the speech of the person

1 who communicated it is predominantly --
2 JUSTICE SOTOMAYOR: My -- my problem with
3 this is, how do I know? There are three categories of
4 plates, I understand. There's the official State plate,
5 there are specialty plates created by the legislature,
6 and there are specialty plates created by an individual.
7 How do I tell the difference between the legislative
8 plates, which are government speech, and the private
9 plates? Do I need to?
10 What I do know is what I said at the
11 beginning, it's both people speaking. And I think both
12 people endorsing each other's message in some way. So
13 why should the government be compelled to accept speech
14 it rejects because it thinks it's wrong?
15 MR. GEORGE: In the first place --
16 JUSTICE SOTOMAYOR: And doesn't want to be
17 associated with directly.
18 MR. GEORGE: I understand. In the first
19 place, the way people pick out plates, there's a big
20 long catalog with 400 different organizational plates,
21 480 now, and it grows every day, of organizational
22 plates. And people pick them out of -- on -- out of a
23 catalog out of a website, and they pick the one they
24 want to pick, and then they put it on their license
25 plate. The communication of the information on the

1 license plates actually is controlled entirely by the
2 people who pick the plates.
3 JUSTICE KENNEDY: But what about Justice
4 Alito's hypothetical -- we never did quite finish --
5 where the direction of his question was, suppose the
6 State, all by itself, has 10 messages, 20 messages, 200
7 messages, 2000 messages, you can choose, but the State
8 makes up all the messages and gives you all the choices.
9 What results?
10 MR. GEORGE: Well, the result is if the
11 State has -- controls all -- has all the messages and
12 picks all the messages, and then the people from whom --
13 whom it picks -- who it sells the plates to --
14 JUSTICE KENNEDY: I know that's the result
15 of the hypothetical. I want to know the legal result.
16 What's the First Amendment answer?
17 MR. GEORGE: Well, the State can design all
18 kinds of license plates that it wants to choose --
19 JUSTICE KENNEDY: Is the scheme that I
20 proposed, and that followed from Justice Alito's
21 questions, consistent with the First Amendment or not?
22 MR. GEORGE: My -- it is not First -- when
23 the individual submits -- when people, other people
24 submit the design --
25 JUSTICE KENNEDY: That's not the

1 hypothetical.

2 MR. GEORGE: I understand that.

3 JUSTICE KENNEDY: The hypothetical is the

4 State has 5,000 designs, and the State makes them all

5 up, and you can choose. Is there a First Amendment

6 violation?

7 MR. GEORGE: I don't believe -- if the State

8 does everything, then it's -- it's the creator of the

9 message and the speaker is the driver.

10 JUSTICE KAGAN: What happens if private

11 people could submit messages, but they all had to go

12 through the legislature?

13 MR. GEORGE: My view is that it is a much

14 more difficult case for us if the legislature passes a

15 statute, because that is a legislative act and a clear

16 act of the State.

17 JUSTICE KAGAN: Well, what's the difference,

18 then? I mean, if you say -- if you think that that

19 would be all right, you know, Texas has said, well, the

20 DMV does it, not the legislature, a different branch of

21 government, but it's government just the same.

22 MR. GEORGE: I understand that. And the --

23 and the issue is whether or not the -- in the cases --

24 we have court of appeals cases that don't distinguish

25 between legislative action and non-legislative actions,

1 and those that do.

2 It is my judgment that the State has a

3 greater claim making its speech when every -- when the

4 legislature passes the bill and the governor signs it,

5 then the statute is clearly an explanation -- or

6 expression of the State.

7 JUSTICE BREYER: Well, if you --

8 MR. GEORGE: What regard when anybody buys a

9 license plate --

10 JUSTICE BREYER: When -- in Wooley, go back

11 to that for a second. I take it that if I object to the

12 message on the New Hampshire plate, Live Free of Die, I

13 have a right to be disassociated with that.

14 MR. GEORGE: Yes.

15 JUSTICE BREYER: Okay. Well, if the State,

16 which represents many people in Texas, doesn't want to

17 be associated with the particular message, why doesn't

18 it have the right to say we don't want that event, we

19 don't want that association.

20 MR. GEORGE: Because --

21 JUSTICE BREYER: I mean, the State

22 represents X million people. They don't want to be

23 associated with this message through their official

24 organ.

25 MR. GEORGE: I understand. Quite frankly --

1 JUSTICE BREYER: What's the difference?
2 MR. GEORGE: The difference is they invite
3 people to make their -- they charge people and have them
4 pay for the manufacture of the license plates by giving
5 them the chance to design a message. That's what they
6 do. They -- it costs the people who come up with these
7 things, they pay all the front-end costs, put up $8,000
8 collateral before any license plate is built, and it is
9 a money-making scheme that they use. The fact that they
10 choose to, apparently twice in history -- and there may
11 be more, but I, we can't document anymore -- they've
12 ever turned anybody down, this is not a forum which
13 people actually -- they make any decision besides an
14 economic decision. It's a factual matter; that's what
15 happens.
16 CHIEF JUSTICE ROBERTS: Counsel, can I ask
17 you, it's a somewhat technical question but you just
18 touched on it. Do you have an objection to the
19 materials that your friend has cited from outside the
20 record?
21 MR. GEORGE: I -- to the extent he's cited
22 issues relating to the other design, I do not have an
23 objection to that, because I think it's --
24 CHIEF JUSTICE ROBERTS: You think that it --
25 it's the extrarecord materials are accurate --

1 MR. GEORGE: I think --

2 CHIEF JUSTICE ROBERTS: -- actually.

3 MR. GEORGE: I think so. They are almost

4 certainly accurate from what we found since we filed our

5 brief.

6 CHIEF JUSTICE ROBERTS: Okay.

7 MR. GEORGE: And I -- the fact that we have

8 gone from 350 to 480 organizational designs since the

9 case was tried, I -- was not in the record either, but I

10 don't doubt that he has sold a lot more organizational

11 plates since then and they keep a better tally than we

12 do.

13 JUSTICE GINSBURG: So what is your -- the

14 choice, the choice that Texas had, am I right, that in

15 your view if they're going to have this -- these vanity

16 plates, it has to be open to everybody, or they can shut

17 the program down and nobody gets vanity plates. But

18 maybe if the legislature passes a law or laws saying

19 this plate is okay, that might be okay.

20 So what -- is the, is the choice between

21 everything or nothing, with the exception of what the

22 legislature does is okay?

23 MR. GEORGE: I -- I believe that the best

24 analysis is the legislature or the Motor Vehicle

25 Commission discriminates against people's speech on the

1 basis of the content of the speech, that is subject to
2 serious First Amendment concerns and is probably
3 illegal, although there may be some exceptions to that.
4 That's what I think the better rule is. But we have
5 conflicts in circuits about that and we have not -- this
6 Court has not addressed -- that is not this case, but I
7 believe it is a -- an issue --
8 JUSTICE KAGAN: Mr. George, could I just
9 take you back to the Chief Justice's question for a
10 moment and just make sure I understand it. Mr. Keller
11 has indicated that there are a number of other occasions
12 in which the State has disapproved plates, and in which
13 the State has done that on the grounds of offense. Do
14 you -- do you have any objections to those
15 representations?
16 MR. GEORGE: To the extent that they were
17 done on the grounds of offense, I do, because he has one
18 that I can -- that we have verified, and that one is
19 that there was concern about a danger on -- to the
20 driver's thinking that somebody's state trooper plate
21 made them a state trooper.
22 CHIEF JUSTICE ROBERTS: What if the
23 argument --
24 MR. GEORGE: That's what he said, at least.
25 CHIEF JUSTICE ROBERTS: Right. What if the

1 argument were not simply offensive but a higher degree?
2 You know, incitement or likely to give rise to -- I
3 mean, I think someone driving in Texas with a swastika
4 is, you know, likely to be -- to trigger public
5 violence. Is the level of the State's interest at all
6 pertinent to your position?
7 MR. GEORGE: Well, the -- this Court's
8 rule -- law on incitement, going back to Brandenburg v.
9 Ohio and the Ku Klux Klan rally that this Court decided
10 was not incitement, is -- is pretty thin at this point
11 in our history, because I don't know what the rule of
12 incitement would be today.
13 JUSTICE KAGAN: No, but Mr. George, just the
14 worst of the worst, whether it's the swastika or whether
15 it's the most offensive racial epithet that you can
16 imagine, and if that were on a license plate where it
17 really is provoking violence of some kind. You know,
18 somebody is going to ram into that car --
19 MR. GEORGE: I just don't -- I don't think
20 people can -- the government can discriminate on
21 content. They can put on the license plates that they
22 disagree with, "This is not the State's speech," in big
23 orange letters and disclaim that speech.
24 JUSTICE SOTOMAYOR: Where is that going to
25 fit on the license plate?

1 MR. GEORGE: Perfectly legitimate -- huh?
2 JUSTICE SOTOMAYOR: Where is that going to
3 fit on the license plate?
4 (Laughter.)
5 MR. GEORGE: They -- but those, that's --
6 you can put -- we have "Taxation Without Representation"
7 on the District of Columbia's license plate and that's a
8 political message. They can put --
9 JUSTICE KENNEDY: Your position is that if
10 you prevail, a license plate can have a racial slur.
11 That's your position?
12 MR. GEORGE: Yes. I don't think there's any
13 consistent decision otherwise, although the State can
14 disclaim it, undoubtedly, on the same license plate.
15 JUSTICE SCALIA: Do you have to put
16 "Taxation Without Representation" on your D.C. plate?
17 MR. GEORGE: That's my understanding.
18 JUSTICE SCALIA: Or can you ask for a clean
19 plate?
20 MR. GEORGE: I haven't -- well, I'm not
21 living here, but I believe it is required.
22 JUSTICE SCALIA: If somebody objects I guess
23 it's like, "Live Free Or Die," right?
24 MR. GEORGE: They can put it -- put it on --
25 tape it over. But you can put, obviously the disclaimer

1 idea, Justice O'Connor came up with that in -- in her
2 concurrence in the Columbus, Ohio, Ku Klux Klan, cross
3 on the hill case, and I thought that was a pretty good
4 idea. That is, that we have a disclaimer when you don't
5 like the speech, and you don't believe it's appropriate.
6 The State can do that.
7 And I think that's largely part of the
8 answers. This is not -- certainly not purely
9 governmental speech because the action of the State is
10 only approval.
11 As to the Pleasant Grove, City of Utah case,
12 monuments are in fact unique circumstances. This Court
13 had decided Perry -- Van Orden v. Perry some years ago
14 involving -- Justice Breyer put a map of the State
15 capital grounds with all the monuments in it, those
16 monuments -- and when that case was decided, been there
17 over 100 years and the monument in question had been
18 there 45 years. Monuments are different than any kind
19 of speech in the park, because of the nature of the --
20 the creation. You couldn't -- you'd have place in
21 commons with monuments every seven feet, which is you
22 can't do that. And that case turns on those facts, and
23 I believe it is absolutely correctly decided.
24 I'm also convinced that the Johanns v. the
25 Livestock Marketing board is correctly decided, because

1 it started with the statute passed by Congress telling
2 the Department of Agriculture to do something, right
3 where -- marketing from material, have it submitted back
4 to the secretary of agriculture, let him approve it,
5 then go market it and levy a tax on imported beef to
6 support it. That's all government speech.
7 JUSTICE ALITO: Do you know how much money
8 Texas makes from this?
9 MR. GEORGE: I don't have that -- it's not a
10 line item in the budget, but lots.
11 JUSTICE ALITO: That is really all this is
12 about, isn't it?
13 MR. GEORGE: Yes.
14 (Laughter.)
15 MR. GEORGE: That's why Texas is in the
16 business. And so people get to play and do business
17 with them that they like what they are saying, and they
18 don't get to do business with them when they don't like
19 what they said.
20 CHIEF JUSTICE ROBERTS: Thank you, counsel.
21 Mr. Keller, you have three minutes
22 remaining.
23 REBUTTAL ARGUMENT OF SCOTT A. KELLER
24 ON BEHALF OF PETITIONERS
25 JUSTICE KENNEDY: You have very limited

1 rebuttal time and I do have one question. You were
2 asked a question about the Republican -- the Democrat
3 distinction and you said, Oh, there might be some other
4 thing equal to it. Is there a First Amendment standard
5 that you can use to deny that plate?
6 MR. KELLER: I believe it would be
7 government speech and therefore there would not be a
8 First Amendment problem. But I believe it would not be
9 allowed because other constitutional bars would apply.
10 JUSTICE KENNEDY: No First Amendment.
11 MR. KELLER: Just as if a monument were put
12 it would be the government speaking, however, it would
13 not be allowed under other constitutional provisions.
14 Justice Alito and Justice Kagan, if I can --
15 if I can suggest a way to avoid the billboard problem.
16 When the government has its name on a speech and when
17 the -- it is part of a regulatory process or a program
18 of the government's and there's formal notice and
19 comment and there's a public vote and there's no
20 abridgement of traditional free speech rights, which is
21 this case, I think that's government speech.
22 Justice Breyer, to address some of the other
23 interests that Texas has here. Texas wants to prevent
24 offensiveness and vulgar speech and wants to prevent
25 confusion and misrepresentation, promote safety, it

1 wants to celebrate the diverse interests that the State
2 has.
3 Justice Sotomayor, you're absolutely right
4 that even if this is hybrid speech and it does take two
5 to tango in this situation, you need both the motorist
6 and the State propagating the message that that is still
7 government speech. All the -- all of this Court's cases
8 on government speech have been at posture.
9 For one clarificatory matter, all of our
10 cites in our reply brief and our opening brief to Title
11 43 of the Texas Administrative Code, those have been
12 renumbered since the filing of our reply brief, but the
13 substance is all the same.
14 And at base, this is not just about Texas
15 making money, although Texas does make money. This is
16 about the State of Texas not wanting to place its stamp
17 of approval on certain messages. And a speaker is not
18 entitled to the imprimatur of the State of Texas on
19 whatever message that it wishes to put on a license
20 plate.
21 Thank you, Mr. Chief Justice.
22 CHIEF JUSTICE ROBERTS: Thank you, Counsel.
23 The case is submitted.
24 (Whereupon, at 11:03 a.m., the case in the
25 above-entitled matter was submitted.)

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