No. 14-144

In the Supreme Court of the United States

JOHN WALKER III, IN HIS OFFICIAL CAPACITY AS CHAIRMAN OF THE BOARD, ET AL., PETITIONERS

v.

TEXAS DIVISION, SONS OF CONFEDERATE VETERANS, INC., ET AL.

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

BRIEF FOR THE PETITIONERS

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QUESTIONS PRESENTED

1. Do the messages and symbols on state-issued specialty license plates qualify as government speech immune from any requirement of viewpoint neutrality?

2. Has Texas engaged in "viewpoint discrimination" by rejecting the license-plate design proposed by the Sons of Confederate Veterans, when Texas has not issued any license plate that portrays the confederacy or the confederate battle flag in a negative or critical light?

PARTIES TO THE PROCEEDING

Petitioners John Walker III; Victor Vandergriff; Clifford Butler; Raymond Palacios, Jr.; Laura Ryan; Victor Rodriguez; Marvin Rush; and Blake Ingram were Defendants-Appellees in the court of appeals.[1]

Respondents Texas Division, Sons of Confederate Veterans, Inc.; Granvel J. Block; and Ray W. James were Plaintiffs-Appellants in the court of appeals.

[1] Pursuant to Supreme Court Rule 35, the petitioners note that John Walker III; Victor Vandergriff; Clifford Butler; Raymond Palacios, Jr.; Laura Ryan; Victor Rodriguez; Marvin Rush; and Blake Ingram were sued in their capacities as public officials. Victor Vandergriff and Clifford Butler no longer hold office. They have been replaced by Joseph Slovacek and Robert Barnwell III. John Walker III replaced Victor Vandergriff as Chairman of the Board.

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The respondents want this Court to order Texas to issue a license plate adorned with the confederate battle flag. But neither the Speech Clause nor this Court's cases permit that result. The State of Texas, no less than a private individual, has the right to select the messages and viewpoints that it will promote and convey. *See Pleasant Grove City v. Summum*, 555 U.S. 460, 467–68 (2009). And Texas is not willing to propagate the confederate battle flag by etching that image onto state-issued license plates that bear the State's name.

There is nothing unconstitutional about the State's decision. No one contends that the Speech Clause imposes a freestanding obligation on States to issue license

plates featuring the confederate battle flag upon request. Rather, the respondents contend that Texas can no longer exclude the confederate battle flag from its license plates because it has begun placing state-approved and state-supported messages on *other* license plates issued to the public.

The respondents are mistaken. The speech that appears on state-issued license plates is government speech, and the Speech Clause allows a State to select the messages, symbols, and viewpoints that it is willing to publicly support. That remains the case even when private individuals propose license-plate designs for the State to accept or reject, *see Summum*, 555 U.S. at 470–71, and even when the State enlists private motorists to assist the State in conveying its state-approved messages, *see Rust v. Sullivan*, 500 U.S. 173, 192–95 (1991). And there is no requirement that a State maintain "viewpoint neutrality" in selecting the speech that it will display on state-issued license plates. The District of Columbia's license plates include the phrase "Taxation Without Representation"; the Speech Clause does not require the district to begin offering license plates with messages that praise the district's lack of voting representation in Congress. A State that issues "Fight Terrorism" specialty plates is not required to offer specialty plates with messages that praise al Qaeda. The respondents are not seeking to vindicate their freedom of speech; they are trying to coerce the State of Texas into propagating a message and image that it does not wish to convey.

OPINIONS BELOW

The opinion of the court of appeals is available at 759 F.3d 388. Pet. App. 1a–50a. The district court's opinion, which upheld the State's decision to exclude the confederate battle flag from its license plates, is available at 2013 WL 1562758. Pet. App. 53a–112a.

JURISDICTION

The court of appeals entered its judgment on July 14, 2014. *Id.* at 51a–52a. The petition for writ of certiorari was filed on August 7, 2014, and granted on December 5, 2014. This Court has jurisdiction under 28 U.S.C. § 1254(1).

None of the parties has argued that the Tax Injunction Act bars this lawsuit, but the court of appeals considered the issue on its own initiative. Pet. App. 6a–7a. The court of appeals correctly held that the Tax Injunction Act presents no obstacle because the respondents are not seeking a remedy that would "enjoin," "suspend," or "restrain" the collection of any tax. 28 U.S.C. § 1341.

STATUTORY PROVISIONS INVOLVED

Pertinent statutory and regulatory provisions are set forth in the appendix to the petition for writ of certiorari. Pet. App. 115a–190a.

STATEMENT

1. The State of Texas requires state-issued license plates to be displayed on all registered motor vehicles. *See* Tex. Transp. Code § 504.943; 43 Tex. Admin. Code § 217.22. For many years, the State offered only a single

style of license plate. But Texas now manufactures a variety of license-plate designs and offers choices to the drivers who must display state-issued license plates.

Drivers who choose to pay the normal vehicle-registration fee receive a plain-vanilla license plate with the State's name and nickname ("The Lone Star State"), along with a randomly generated sequence of numbers and letters. *See* Texas Department of Motor Vehicles, License Plates, http://bit.ly/1twt98g ("As part of your vehicle registration you are issued a set of general-issue license plates. The plate number is assigned to you by the TxDMV [and] cannot be personalized.") (last visited Dec. 30, 2014). But drivers willing to pay an extra fee can receive a "specialty" plate containing a specialized design or message. *See* Tex. Transp. Code § 504.008. Sales of these specialty plates generate revenue for state agencies as well as charitable and nonprofit organizations that the State deems worthy of support. *See id.* § 504.801.

There are different ways by which a specialty-plate design can become part of the State's license-plate repertoire. Some plates are specifically authorized by the Texas legislature. *See id.* §§ 504.601, .602–662. Texas also permits the Department of Motor Vehicles Board to design new specialty plates, either on its own initiative or in response to an application from a nonprofit organization. *See id.* § 504.801. Finally, Texas sells plates though a private vendor, License Plates of Texas, LLC, dba My-Plates.com, which designs specialty plates and offers them to the public. *See id.* § 504.6011(a). Regardless of who designs or proposes a specialty plate, the Board

must approve every license-plate design before it can be offered to the public. *See* 43 Tex. Admin. Code §§ 217.28(i)(7), .40.

2. In 2009, the Sons of Confederate Veterans proposed a specialty-plate design featuring the Sons of Confederate Veterans' logo. J.A. 17. The logo consists of a square confederate battle flag surrounded on its four sides by the words "Sons of Confederate Veterans 1896"; the flag and its surrounding words are encapsulated together in an octagon. Pet. App. 191a (image of the proposed license-plate design); J.A. 29 (same).

3. In 2010, the Board invited public comments and placed the proposal on the agenda for its meeting of April 14, 2011. Pet. App. 67a. At that meeting, one board member was absent and the remaining eight deadlocked on whether to approve the plate. *Ibid.* The plate was reconsidered at the Board's meeting of November 10, 2011. *Ibid.* By the time of the November meeting, the Board's website had received hundreds of public comments opposing the plate, and the Board received letters of opposition from nineteen state representatives as well as the mayor of Houston. *Ibid.* Opponents of the plate also appeared at the Board's November meeting, and the Board heard strong objections from elected officials, members of the clergy, and leaders of the NAACP.

State Senator Royce West, for instance, asked: "[W]hy should we as Texans want to be reminded of a legalized system of involuntary servitude, dehumanization, rape, mass murder?" Record 399. And State Senator Rodney Ellis noted that "[t]he Confederate battle flag has become a symbol of repression and violence, not

heritage[;] it provokes feelings of fear and intimidation amongst far too many Texans." *Id.* at 406; *see also id.* at 408 (B.J. Williams from the Garland branch of the NAACP stating: "The Rebel flag represents the darkest and the most dehumanizing period for African-Americans in the history of the United States. Public display of this symbol of hate, human servitude will add to and intensify an already toxic and viral political as well as social climate in our great nation and state."). Speakers also noted that Governor Rick Perry and Republican state Senator John Carona publicly opposed the respondents' license-plate proposal. *Id.* at 400, 406.

After hearing this testimony, the Board voted unanimously against issuing the plate, explaining in its order that

> [t]he Board has considered the information and finds it necessary to deny this plate design application, specifically the confederate flag portion of the design, because public comments have shown that many members of the general public find the design offensive, and because such comments are reasonable. The Board finds that a significant portion of the public associate[s] the confederate flag with organizations advocating expressions of hate directed toward people or groups that is demeaning to those people or groups.

Pet. App. 69a.

4. The Sons of Confederate Veterans sued, accusing the Board of violating the Speech Clause by rejecting its proposed license-plate design. J.A. 23. The State re-

sponded that the government-speech doctrine allows a State to choose the messages and symbols that will appear on its specialty license plates, and that in all events the Board's decision to reject the Sons of Confederate Veterans' license-plate proposal was not unconstitutional viewpoint discrimination. *See* Pet. App. 9a, 18a.

5. The district court rejected the State's first argument, concluding that the State's specialty plates were a "nonpublic forum" in which the State must refrain from "viewpoint discrimination." *Id.* at 78a–92a. But the court agreed with the State's second argument, holding that the Board did not engage in viewpoint discrimination by refusing to issue the respondents' proposed license plate. *Id.* at 92a–103a. The district court therefore rejected the respondents' constitutional claims and entered judgment for the State. *Id.* at 114a.

6. a. The court of appeals (over dissent) reversed the district court's judgment. The panel majority first held that the messages and symbols on state-issued specialty license plates are "private speech," not government speech. The State had argued that *Summum* and *Johanns v. Livestock Marketing Association*, 544 U.S. 550 (2005), establish that a State's "final approval authority" and "effective[] control[]" over a proposed message makes the approved message government speech—even if it was designed or proposed by private entities. *Summum*, 555 U.S. at 472–73; *see also Johanns*, 544 U.S. at 561 ("[T]he Secretary exercises final approval authority over every word used in every promotional campaign.").

The panel majority, however, concluded that *Summum* "did not base its holding on [the] City's control

over the permanent monuments," but rather "focused on the nature of both permanent monuments and public parks." Pet. App. 10a–11a. As for *Johanns*, the majority said only that "*Summum* ... shows that 'the Supreme Court did not espouse a myopic "control test" in *Johanns*.'" *Id.* at 27a (quoting *ACLU of N.C. v. Tata*, 742 F.3d 563, 570 (4th Cir. 2014)).

The majority also held that the appropriate "test" for government speech comes from Justice Souter's opinion concurring in the judgment in *Summum*: "whether a reasonable and fully informed observer would understand the expression to be government speech, as distinct from private speech the government chooses to oblige." *Id.* at 11a (*quoting Summum*, 555 U.S. at 487 (Souter, J., concurring in the judgment)). The majority then declared that "the differences between permanent monuments in public parks and specialty license plates on the back[s] of personal vehicles convince us that a reasonable observer would understand that the specialty license plates are private speech." *Id.* at 11a–12a.

The court of appeals further held that the State engaged in impermissible "viewpoint discrimination" by rejecting the respondents' license-plate proposal. *Id.* at 24a. The State had argued that its decision to keep the confederate battle flag off its license plates was viewpoint-neutral because the State has not issued any license plate disparaging the confederacy, the confederate battle flag, or the views espoused by the Sons of Confederate Veterans. *See id.* at 18a. Although the court of appeals did not deny that the State has never approved a license plate that espouses any point of view on the con-

federacy or the confederate battle flag, it concluded that "there is nothing in the Board's decision that suggests it *would* exclude all points of view on the Confederate flag." *Id.* at 22a (emphasis added).

The panel majority also declared that "even if the Board were correct that its decision merely excluded multiple viewpoints on the meaning of the Confederate flag, that decision would be equally objectionable." *Ibid.* In the court of appeals' view, *any* decision to reject a specialty license plate "based on the speaker's message" constitutes viewpoint discrimination. *Id.* at 23a ("[T]he state engaged in viewpoint discrimination when it denied a specialty license plate based on the speaker's message."); *ibid.* ("Silencing both the view of Texas SCV and the view of those members of the public who find the flag offensive would similarly skew public debate and offend the First Amendment.").

b. Judge Smith dissented on the government-speech issue. *Id.* at 25a. He first rejected the "reasonable observer test" that the panel majority used to distinguish government speech from private speech. In Judge Smith's view, "the 'reasonable observer' test demonstrably contradicts binding caselaw" (*Summum* and *Johanns*). *Id.* at 28a. Judge Smith also criticized the panel majority for "morph[ing] Justice Souter's lone concurrence [in *Summum*] (and his dissent in [*Johanns*]) into law." *Id.* at 27a; *see also id.* at 29a ("If a 'reasonable observer' test were the law, then [*Johanns*] was incorrectly decided."). Finally, Judge Smith argued that Texas's license plate program was analogous to the situation in

Summum and rejected the majority's efforts to distinguish that case. *Id.* at 29a.

c. The panel majority did not acknowledge or address several of the State's most important arguments. First, the State had argued that a "no viewpoint discrimination" rule would be untenable in the context of a specialty-license-plate program because it would mean that States that issue "Fight Terrorism" specialty plates would become constitutionally compelled to offer license plates expressing support for terrorism or terrorist organizations. Many other specialty plates in Texas unabashedly promote certain viewpoints at the expense of others, such as "Stop Child Abuse," "Mothers Against Drunk Driving," "Animal Friendly," and "Insure Texas Kids." The majority opinion did not explain how its "no viewpoint discrimination" rule could allow Texas to continue issuing these specialty plates without also offering plates that promote child abuse, drunk driving, animal cruelty, and messages opposing the State Children's Health Insurance Program.

Second, the State had argued that *Rust* allows States to control the messages and symbols that are used within the scope of a government program. *See also Agency for Int'l Dev. v. Alliance for Open Soc'y Int'l, Inc.*, 133 S. Ct. 2321, 2329–30 (2013). The panel majority did not cite *Rust* and did not address the State's claim that the text and logos on specialty license plates fall within the scope of a government program and therefore remain subject to the State's control.

Third, the State had argued that governments, like private individuals, enjoy a freedom *not* to speak, which

includes the right to disassociate from messages or viewpoints that they do not wish to convey. *See, e.g.*, *Summum*, 555 U.S. at 467–68 ("A government entity ... is entitled to say what it wishes *and to select the views that it wants to express*.") (emphasis added) (internal quotation marks and citations omitted); *Perry v. McDonald*, 280 F.3d 159 (2d Cir. 2001) (upholding a State's decision to revoke a previously issued vanity license plate that contained a vulgar combination of letters); *see also Boy Scouts of Am. v. Dale*, 530 U.S. 640 (2000); *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos.*, 515 U.S. 557 (1995); *Wooley v. Maynard*, 430 U.S. 705 (1977). Just as the Constitution protects individual license-plate holders from being forced to transmit "the State's ideological message," *Wooley*, 430 U.S. at 715, neither should a State be forced to convey a license-plate holder's message by etching it onto a plate marked with the State's name. The majority opinion did not address whether (or to what extent) a State may disassociate from messages, symbols, or viewpoints that it does not wish to propagate. *See generally Texas v. Knights of the Ku Klux Klan*, 58 F.3d 1075 (5th Cir. 1995) (upholding Texas's exclusion of the Ku Klux Klan from its Adopt-a-Highway program).

SUMMARY OF ARGUMENT

The Speech Clause prohibits the government from "*abridging*" an individual's "*freedom* of speech." U.S. Const. amend. I (emphasis added). It does not allow individuals to compel a State to support or propagate messages or symbols that the State does not wish to associate with. The respondents have every right to decorate

their cars with bumper stickers or placards that display the confederate battle flag. But they cannot commandeer the State into promoting the confederate battle flag on a state-issued license plate.

The court of appeals did not go so far as to hold that the Speech Clause *requires* the State of Texas to issue a confederate-flag license plate. Any such holding would reach far beyond the text of the Speech Clause, which protects only the individual's freedom of speech and does not require governments to aid or abet one's efforts to propagate a message or viewpoint. Instead, the court of appeals held that Texas lost its prerogative to exclude the confederate battle flag from its license plates once it started placing state-approved and state-supported messages on *other* license plates and selling those "specialty" plates to the State's motorists. The court of appeals' holding is wrong and should be reversed.

1. The court of appeals erred by failing to recognize that the messages and symbols that appear on state-issued license plates are government speech, and that States may therefore choose to promote certain viewpoints and not others when designing the license plates that they will issue to their motorists. The District of Columbia's license plates bear the phrase "Taxation Without Representation"; the Speech Clause does not require the district to offer license plates with messages praising the district's lack of voting representation in Congress. States that issue "Fight Terrorism" specialty plates are not required to offer specialty plates with messages that praise terrorist organizations. All of this is "viewpoint discrimination"—and all of it is constitutional because

the content of state-issued license plates is government speech and is therefore immune from any requirement of viewpoint neutrality. *See Summum*, 555 U.S. at 467–68 (holding that the Speech Clause does not require viewpoint neutrality in government speech).

For three independent reasons, the Court should uphold the State's refusal to issue a confederate-flag license plate under the government-speech doctrine. First, the government-speech doctrine permits a State to control the messages, symbols, or viewpoints used within the scope of a government program, and the content and design of state-issued license plates unquestionably occurs within the specialty-plate "program" that the State of Texas has created. *See Rust*, 500 U.S. at 194. That private motorists are willing to assist the State in propagating its state-approved license-plate designs—and to pay the State for this privilege—does not convert the State's specialty-plate "program" into a "forum" for private speech. *See Johanns*, 544 U.S. at 562 (holding that a State is "not precluded from relying on the government-speech doctrine merely because it solicits assistance from nongovernmental sources"); *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819, 833 (1995) ("[W]e have permitted the government to regulate the content of what is or is not expressed ... when it enlists private entities to convey its own message.").

Second, the government-speech doctrine permits a State to disassociate from messages, symbols, and viewpoints that it does not wish to transmit or promote. A State is fully within its rights to exclude swastikas, sacrilege, and overt racism from state-issued license plates

that bear the State's name and imprimatur. Likewise, a State can exclude less pernicious but still-controversial symbols such as the confederate battle flag. Just as the Constitution protects individual license-plate holders from being forced to transmit "the State's ideological message," *Wooley*, 430 U.S. at 715, neither can a State be forced to convey a license-plate holder's message by etching it onto a plate bearing the State's name. Texas—no less than a private motorist—has every right to insist that the messages and logos displayed on its license plates are mutually agreeable to both the driver and the State.

Third, the content of specialty license plates qualifies as "government speech" for the same reasons that a monument displayed in a public park is government speech: The State "effectively control[s]" and exercises "final approval authority" over the design, and a specialty plate is reasonably and routinely perceived as conveying some message on the government's behalf. *Summum*, 555 U.S. at 473. Indeed, the very reason that the respondents *want* the confederate battle flag depicted on the state-issued license plate—rather than being content to display the flag on far-more-visible adornments such as bumper stickers or paint jobs—is because the license-plate image comes with the State's seal of approval. But when a State places its imprimatur on a message or symbol by engraving it onto a state-issued license plate, it is engaged in government speech and may prefer certain viewpoints to the exclusion of others. *See ibid.*; *ACLU v. Bredesen*, 441 F.3d 370, 375–76 (6th Cir. 2006).

2. The court of appeals committed additional error in holding that the State had engaged in "viewpoint discrimination" by refusing to issue a confederate license plate. Pet. App. 18a. The State of Texas has not issued any specialty plate that negatively portrays the confederacy, the confederate battle flag, or the views espoused by the Sons of Confederate Veterans. Because the State has not issued *any* specialty plates reflecting *any* views on these topics, its actions (at most) reflect content or subject-matter discrimination, not viewpoint discrimination. *See, e.g., Bronx Household of Faith v. Bd. of Educ. of City of N.Y.*, 650 F.3d 30, 36, 39–40 (2d Cir. 2011) (distinguishing between content and viewpoint discrimination). The respondents cannot prove that the State has committed "viewpoint discrimination" in its specialty-plate program until it issues a specialty plate expressing one viewpoint on a topic and formally rejects a request for a plate expressing a different view on that same topic.

ARGUMENT

I. THE GOVERNMENT-SPEECH DOCTRINE ALLOWS STATES TO DETERMINE THE CONTENT OF STATE-ISSUED LICENSE PLATES

The Speech Clause protects the individual's "freedom of speech" from government intrusion. It does not give individuals a right to commandeer the machinery of government to promote their desired message. The Speech Clause, like so many provisions in the Constitution, is a protection of negative rather than positive rights. *See, e.g., Harris v. McRae*, 448 U.S. 297, 315 (1980) (noting

the "basic difference between direct state interference with a protected activity and state encouragement of an alternative activity consonant with legislative policy"); *Jackson v. City of Joliet*, 715 F.2d 1200, 1203 (7th Cir. 1983) (Posner, J.) ("[T]he Constitution is a charter of negative rather than positive liberties."); *see generally* David P. Currie, *Positive and Negative Constitutional Rights*, 53 U. Chi. L. Rev. 864 (1986).

The government-speech doctrine polices the boundary between claims that demand relief from government interference with private speech, and claims that seek to give private individuals control over the government's decisions to speak, to refrain from speaking, or to subsidize or withhold support from private messages. No individual has the right to thwart the government from promoting its message (or supporting private messages) with the resources or revenues that it collects. *See Johanns*, 544 U.S. at 559–62. And no individual has the right to force the government to propagate a message that it does not support or does not wish to associate with. *See Summum*, 555 U.S. at 467–77.

Three principles have emerged from this Court's recognition of the government's right to speak. First, a State may regulate the messages and symbols used within the scope of a government program. *See Agency for Int'l Dev.*, 133 S. Ct. at 2329–30; *Rust*, 500 U.S. at 194. Second, the "freedom of speech" enjoyed by the government as well as private individuals includes the right to disassociate from messages or symbols that one does not wish to associate with. *See Summum*, 555 U.S. at 467–68; *Boy Scouts*, 530 U.S. at 659; *Hurley*, 515 U.S. at 557, 573;

Wooley, 430 U.S. at 715. Third, the government-speech doctrine protects a government's decision to accept or reject privately funded or donated displays on public property. *See Summum*, 555 U.S. at 472–73 (explaining that the defendant city "effectively controlled" the messages conveyed by monuments in a park and exercised "final approval authority" over their selection—even though the monuments and their messages were created and proposed by private citizens).

Each of these principles—standing alone—is sufficient to uphold the Board's rejection of the confederate-flag license plate under the government-speech doctrine. And standing together, they present an insurmountable obstacle to the respondents' Speech Clause claim.

A. The Government-Speech Doctrine Permits States To Limit Speech That Occurs Within The Scope Of A Government-Created Program

This Court has long recognized that the government-speech doctrine allows States to regulate the messages and symbols that are used within the scope of a government program. *See Rust*, 500 U.S. at 194 ("[W]hen the government appropriates public funds to establish a program it is entitled to define the limits of that program."); *see also Agency for Int'l Dev.*, 133 S. Ct. at 2329–30.

The text and logos that appear on specialty license plates fall within the scope of the State's specialty license-plate program, and thus remain subject to the State's control. *See* Tex. Transp. Code §§ 504.002(3), .008(e). Just as the federal government may exclude

abortion-promoting speech from the scope of its Title X program, *see Rust*, 500 U.S. at 178, 203, so may Texas exclude pro-confederacy speech or symbols from the specialty-plate program that it has created.

This remains true even when private citizens or private entities partner with the State in implementing a government program—and even when private parties deliver the "speech" that occurs within the scope of that program. *See Johanns*, 544 U.S. at 562 (holding that a State is "not precluded from relying on the government-speech doctrine merely because it solicits assistance from nongovernmental sources"); *Rosenberger*, 515 U.S. at 833 ("[W]e have permitted the government to regulate the content of what is or is not expressed ... when it enlists private entities to convey its own message."); *Rust*, 500 U.S. 199 ("The employees' freedom of expression is limited during the time that they actually work for the project; but this limitation is a consequence of their decision to accept employment in a project, the scope of which is permissibly restricted by the funding authority.").

This Court has recognized that the boundary that defines the scope of a government "program" is not always clear, and it has cautioned litigants not to manipulate the definition of a program in an effort to defeat a Speech Clause claim. *See Agency for Int'l Dev.*, 133 S. Ct. at 2328; *Legal Servs. Corp. v. Velazquez*, 531 U.S. 533, 547 (2001). In this case, however, the contours of the program are obvious. The "speech" that appears on the state-approved and state-issued license plate is within

the specialty-plate program, while "speech" that appears elsewhere on a vehicle is outside the program.

A State could not withhold a license plate—or exclude a motorist from its specialty-plate program—on account of expression displayed elsewhere on the motorist's car. But as in *Rust*, a State may insist on physical separation between the speech that occurs within the program and the speech that the State does not wish to subsidize or promote. *See* 500 U.S. at 180–81 (upholding regulations requiring "physical separation" between government-funded Title X projects and abortion-promoting activities). The respondents remain free to display the confederate battle flag on bumper stickers or elsewhere on their vehicles, but Texas may require that display to be physically separated from the state-issued license plate that bears the State's imprimatur.

The court of appeals never denied that the "speech" that appears on specialty license plates occurs within the scope of the State's specialty-plate program. Indeed, the court of appeals entirely ignored the State's scope-of-the-program argument and did not cite or attempt to distinguish *Rust*. *See* Appellees' Br. 14–15, *Tex. Div., Sons of Confederate Veterans v. Vandergriff*, 759 F.3d 388 (2014) (No. 13-50411). The respondents likewise did not deny that the "speech" on their proposed license plate would occur within the scope of a state-created program. Instead, they tried to distinguish *Rust* by arguing that the State's specialty-plate program "is not a government subsidy," but a "revenue-generating" program in which motorists pay a fee in exchange for a state-issued license plate adorned with their preferred message or design.

Reply Br. 6, *Tex. Div., Sons of Confederate Veterans v. Vandergriff*, 759 F.3d 388 (2014) (No. 13-50411).

The respondents' efforts to distinguish *Rust* are unavailing. That motorists must pay fees in exchange for their specialty plates does not change the fact that the State is supporting and propagating their desired messages by etching them onto state-issued and state-owned license plates. The State does not relinquish control over the messages that it will support simply because the "program" generates offsetting benefits to the State's fisc. The State is supporting a message *in exchange for a fee*, but it is still supporting the messages that appear on its license plates and retains the prerogative to choose the type of speech that it is willing to promote. And the fee that the State collects does not change the fact that the "speech" that appears on the government-issued license plate still occurs within the scope of a state-created program—and therefore should remain subject to the State's control.

The fallacy of the respondents' argument becomes evident when one considers the following hypothetical. Suppose that Title X had been established not as a welfare program, but as a revenue-generating enterprise that provided family-planning services at market prices and remitted its profits to the federal treasury. Would that disable the government from excluding abortion-promoting speech within the scope of that government-created program? Of course not. In that scenario, *Rust*'s holding would remain equally applicable and allow the government to decide whether its revenue-generating

family-planning program should allow or disallow abortion referrals or other abortion-promoting speech.

The same would be true if a State established a revenue-generating public school that charged tuition and turned over its profits to the State's treasury. The State would hold the same prerogative that it wields over traditional public schools to control the curriculum taught within the scope of this state-created "program"—and it could prohibit the teaching of disfavored "viewpoints." *See Fleming v. Jefferson Cnty. Sch. Dist. R-1*, 298 F.3d 918, 926 (10th Cir. 2002) (noting that the Speech Clause "allows educators to make viewpoint-based decisions about school-sponsored speech"). The State's authority to regulate speech that occurs inside a government-created program does not turn on whether the program operates at a net loss or net gain to the State's fisc. It turns on the government's authority to speak, and its authority to establish programs that promote speech that the government wishes to promote and exclude speech that it wishes not to promote.[2]

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[2] In all events, the respondents' attempt to distinguish government "subsidies" from "revenue-generating" programs is untenable. Almost every government subsidy is designed to produce offsetting benefits to the government's fisc, and is therefore a "revenue-generating" program regardless of whether the government collects fees directly from the program's beneficiaries. By investing in family-planning services, Title X, for example, seeks to reduce government expenditures (and loss of tax revenues) caused by unplanned pregnancies. That is no less a "revenue-generating" program than the Texas specialty-plate program. The respondents have no basis for insisting that Title X be declared a government "subsidy" by ignoring the offsetting fiscal benefits that Title X produces, while (continued...)

Finally, the respondents are wrong to suggest that a "sponsored" specialty plate—such as the one proposed by the Sons of Confederate Veterans—serves as a revenue-generating venture for the State. The funds collected under the "sponsored" specialty-plate program are used to offset the cost of producing the plates and pay a small administrative fee to the county Tax Assessor ($ .50), with the remainder of the "extra" fee going to the nonprofit entity featured on the plate. *See* Tex. Transp. Code § 504.801(e). The State receives no profits from selling the specialty plates that are sponsored by nonprofit organizations.

The only other way to escape *Rust* is to characterize the State's specialty-plate program as a "forum" for private speech in which viewpoint-neutrality is required. *See Int'l Soc'y for Krishna Consciousness, Inc. v. Lee*, 505 U.S. 672, 678–79 (1992).[3] But the State's program

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simultaneously demanding that the offsetting fiscal benefits produced by Texas's specialty-plate program disqualify it from the title of "subsidy." *See generally* Daryl J. Levinson, *Framing Transactions in Constitutional Law*, 111 Yale L.J. 1311 (2002).

[3] Without applying any "forum" analysis, the court of appeals assumed that a "no viewpoint discrimination" rule followed automatically from its conclusion that "specialty license plates are private speech." Pet. App. 12a. That was error. There is no constitutional requirement that the government maintain viewpoint neutrality among private speakers. Congress may subsidize private speech that promotes democracy without subsidizing private speech that advocates fascism or communism. *See Rust*, 500 U.S. at 194. And governments may withhold tax subsidies from private institutions that espouse racially discriminatory views. *See Bob Jones Univ. v. United States*, 461 U.S. 574 (1983). Only when a "forum" for private (continued...)

cannot plausibly be described as opening a "forum" for private speech. To begin, every specialty-plate design must be approved by the DMV Board before it can appear on a state-issued license plate. *See* 43 Tex. Admin. Code § 217.28(i)(7). A State has not opened a "forum" for private speech when the State retains absolute control over the speech that takes place within the scope of its program. That the State allows private citizens to *propose* specialty-plate designs for State approval does not convert the state-approved messages into a "forum." Government speech can always be influenced by private citizens or private interest groups; the State's willingness to entertain proposals from outside sources does not forfeit its control over the license-plate designs that it will approve.

That the State has approved a large number of specialty plates likewise does not mean that the State has established a "forum" for private speech. The State retains absolute editorial control over the content of those plates, and the panoply of specialty plates reflects not the absence of editorial control, but rather the diverse array of Texans' educational backgrounds, interests, and points of pride that the State is willing to showcase. *See,*

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speech has been created does a "viewpoint neutrality" requirement kick in. *See Summum,* 555 U.S. at 468 ("It is the very business of government to favor and disfavor points of view" (citations and internal quotation marks omitted)). The court of appeals erred by *assuming* a prohibition on viewpoint discrimination without first analyzing whether the State had created a "forum" for private speech.

e.g., Scott W. Gaylord, *"Kill the Sea Turtles" and Other Things You Can't Make the Government Say*, 71 Wash. & Lee L. Rev. 93, 143–51 (2014) (hereinafter "Gaylord").

Finally, the State is *charging* its citizens who wish to display state-approved specialty license plates on their cars, and the respondents do not challenge the State's prerogative to assess fees for specialty plates. It is hard to see how a "forum" for private speech can exist when the State is imposing monetary assessments on those who wish to engage in what is supposed to be a constitutionally protected speech activity. *See Forsyth County v. Nationalist Movement*, 505 U.S. 123, 135-36 (1992); *Leathers v. Medlock*, 499 U.S. 439, 447 (1991).

The sounder view is to treat the display of a specialty license plate not as "private speech" protected by the First Amendment, but as a business transaction between the government and a private citizen. The State is selling a specialty plate adorned with a state-approved and state-owned design. *See* Tex. Transp. Code § 504.002(3) ("[T]he department is the exclusive owner of the design of each license plate."). In return, the State receives money to cover the costs of the plate and fund projects or nonprofit entities that the State deems worthy of support. The motorist is purchasing the prestige and satisfaction of having the State's seal of approval appearing behind a message that he supports. And the State is willing to undertake this transaction because the revenue it receives offsets the costs (if any) of sponsoring the message or design that appears on the specialty license plate. Forum analysis has no application when the State is selling its imprimatur or charging its citizens for a

state-created product; there is no First Amendment right to force the State into a business transaction that is not mutually beneficial to the State and the motorist.

B. The Government-Speech Doctrine Permits A State To Disassociate From Messages Or Symbols That It Does Not Wish To Propagate

The government-speech doctrine protects more than the government's own speech—although it certainly protects that. *See Summum*, 555 U.S. at 467 ("A government entity has the right to speak for itself.") (citation and internal quotation marks omitted). It also protects the government's right *not* to speak—and to disassociate from speech and viewpoints that it does not wish to promote or convey. *See id.* at 467–68 ("A government entity ... is entitled to say what it wishes *and to select the views that it wants to express*.") (emphasis added) (citation and internal quotation marks omitted). A State—no less than private entities—has the right to disassociate from messages or symbols that it does not wish to propagate. *See ibid.*; *Perry*, 280 F.3d at 169–70 (upholding State's decision to revoke vanity license plates with vulgar combinations of letters); *see also Boy Scouts*, 530 U.S. at 659; *Hurley*, 515 U.S. at 573; *Wooley*, 430 U.S. at 715.

The State of Texas has long exercised its prerogative to disassociate from messages, organizations, or viewpoints that it regards as odious. Texas, for example, excludes the Ku Klux Klan from its Adopt-a-Highway program—a program in which a business or organization "adopts" two miles of highway and collects litter, and the State in return posts signs naming the adopter at both

ends of the adopted miles. Texas rejected the Ku Klux Klan's application to adopt a highway because it is unwilling to associate with the racist viewpoints espoused by that organization. *See Knights of the Ku Klux Klan*, 58 F.3d at 1079–80 (upholding the State's exclusion). The Speech Clause of course protects the Ku Klux Klan's right to espouse racist beliefs. But the government-speech doctrine protects the State's prerogative to disassociate from those views—and to refrain from creating and posting signs honoring organizations that promote those views.

The government-speech doctrine equally protects the State's right to disassociate from viewpoints in its specialty-license-plate program. When a State manufactures and issues a specialty license plate adorned with the State's name, it is placing the State's imprimatur and prestige behind the messages and symbols that appear on the license plate. It is akin to a NASCAR driver's decision to sell advertising space on his uniform—the driver is publicly placing his name and reputation behind the messages, products, and corporations that appear on that uniform. Those advertisements are undoubtedly the "speech" of the NASCAR driver. One cannot acknowledge this and simultaneously deny that the State's decision to exclude the confederate battle flag from its state-issued license plates involves government speech.

Denying the government's right to disassociate from messages, symbols, and viewpoints that it does not wish to convey would have untenable and far-reaching consequences. Local governments would be unable to exclude

racist advertisements from city buses. School districts would be unable to exclude ads promoting marijuana legalization from school newspapers, yearbooks, and athletic programs. *But cf. Morse v. Frederick*, 551 U.S. 393, 409–10 (2007) (upholding a school principal's decision to discipline a student for displaying a banner advocating drug use). All of these exclusions would turn on the "viewpoint" expressed in the advertisements—but there is nothing unconstitutional about that. It is simply a decision by the government to withhold its sponsorship from messages and viewpoints that it is unwilling to associate with.

The panel majority said nothing about a government's right to disassociate from speech that it is unwilling to promote or propagate. And it made no effort to explain how the Speech Clause can protect the right of private citizens to disassociate from speech yet entirely withhold this prerogative from the government. Instead, the court of appeals held that the government-speech doctrine can apply *only* when "a reasonable and fully informed observer would understand the expression to be government speech, as distinct from private speech that the government chooses to oblige." Pet. App. 11a (quoting *Summum*, 555 U.S. at 487 (Souter, J., concurring in the judgment)). This is wrong for numerous reasons.

First, the court of appeals' "test" for government speech has never been accepted by this Court; it appears only in an opinion by Justice Souter concurring in the judgment in *Summum*. *See* 555 U.S. at 487 (Souter, J., concurring in the judgment)). No other Member of the Court joined the opinion or endorsed the "reasonable ob-

server" test. And it is hard to see how Justice Souter's "reasonable observer" proposal could be squared with *Johanns*, which held beef advertisements to be "government speech" based on the government's control over the message—and without any inquiry into whether a "reasonable observer" would perceive the advertisements as speech of the government. *See* 544 U.S. at 560–62; *id.* at 564 (noting that the beef advertisements were attributed to "America's Beef Producers," rather than the federal government); *id.* at 564 n.7 ("[T]he correct focus is not on whether the ads' audience realizes the Government is speaking"); *ibid.* ("As we hold today, respondents enjoy no right not to fund government speech—whether by broad-based taxes or targeted assessments, and *whether or not the reasonable viewer would identify the speech as the government's*.") (emphasis added); Pet. App. 29a (Smith, J., dissenting) ("If a 'reasonable observer' test were the law, then [*Johanns*] was incorrectly decided.").[4]

Second, the "reasonable observer" standard has failed to produce doctrinal coherence in the Court's Establishment Clause jurisprudence, and it should not be exported to other constitutional doctrines such as government speech. *See, e.g.*, *County of Allegheny v. ACLU*,

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[4] *See also* Gaylord, *supra*, at 127 ("*Summum* and *Johanns* focus on the level of control the government exercises over the speech, not on whom a reasonable observer views as the literal speaker."); *id.* at 131 ("*Johanns* precludes courts from limiting the government speech doctrine to situations in which a reasonable observer would know that the government is speaking.").

492 U.S. 573, 668 (1989) (Kennedy, J., concurring in the judgment in part and dissenting in part) (criticizing the "reasonable observer" test as a "most unwelcome[] addition to our tangled Establishment Clause jurisprudence.").

The imagined reactions of a hypothetical "reasonable observer" are almost impossible to confirm or refute with data or evidence. And the question of how to characterize the background knowledge or assumptions of the "reasonable observer" is entirely indeterminate; this causes different jurists to reach diametrically opposing conclusions. *Compare Town of Greece v. Galloway*, 134 S. Ct. 1811, 1825 (2014) (opinion of Kennedy, J.) ("It is presumed that the reasonable observer is acquainted with this tradition [of legislative prayer] and understands that its purposes are to lend gravity to public proceedings and to acknowledge the place religion holds in the lives of many private citizens, not to afford government an opportunity to proselytize or force truant constituents into the pews."), *with id.* at 1851 (Kagan, J., dissenting) (accusing the majority of "allowing the Town of Greece to turn its assemblies for citizens into a forum for Christian prayer"); *see also Am. Atheists, Inc. v. Davenport*, 637 F.3d 1095, 1119 (10th Cir. 2010) (en banc) ("How much information we will impute to a reasonable observer is unclear") (citation and internal quotation marks omitted); *id.* at 1108 (Gorsuch, J., dissenting from denial of rehearing en banc) (criticizing the panel opinion's "reasonable observer" as "biased, replete with foibles, and prone to mistake").

Similar efforts to incorporate the "reasonable person" standard into constitutional law have not fared well. *See, e.g.*, C. Peter Magrath, *The Obscenity Cases: Grapes of Roth*, 1966 Sup. Ct. Rev. 7, 59 (describing this Court's obscenity cases, which ask whether "the average person applying contemporary community standards" would find that the dominant theme of the material taken as a whole appeals to the prurient interest, as producing a "constitutional disaster area"). The "reasonable observer" standard also suffers from the same circularity as the "reasonable expectation of privacy" test in Fourth Amendment law: The perceptions of the "reasonable observer" will depend in part on the constitutional pronouncements from this Court. *See, e.g.*, *Kyllo v. United States*, 533 U.S. 27, 34 (2001).

Third, even if this Court were to attempt to apply the "reasonable observer" standard to the State's specialty-plate program, any "reasonable observer" should view the messages and symbols on specialty plates as the speech of *both* the motorist and the State. *See* Pet. App. 41a (Smith, J., dissenting); *Sons of Confederate Veterans, Inc. v. Comm'r of Va. Dep't of Motor Vehicles*, 305 F.3d 241, 245 (4th Cir. 2002) (Luttig, J., respecting the denial of rehearing en banc) ("[S]peech in fact can be, at once, that of a private individual *and* the government.") (emphasis added); Joseph Blocher, *Government Property and Government Speech*, 52 Wm. & Mary L. Rev. 1413, 1480 (2011) ("[A] reasonable observer would probably conclude that both the owner of the vehicle displaying the plate and the state government that authorized it support the plate's message."). The motorist selected the

specialty plate and paid a fee to display it on his car, while the State approved the specialty-plate design and placed its name and imprimatur behind the motorist's preferred design. The government and the motorist are collaborating to propagate a message that each of them supports.

The court of appeals' observation that it is "confident that a reasonable observer would know that a specialty license plate is the speech of the individual driving the car" is therefore beside the point. Pet. App. 16a. The specialty plate displays a message promoted *jointly* by the motorist and the State—and that empowers *both* the State and the motorist to insist that the content of the plate is mutually agreeable. *See Wooley*, 430 U.S. at 715. It is no different from the situation in *Summum*, where the monuments in the city park convey messages supported by both the donor of the monument and the city that accepted the monument for public display. *See infra* pp. 32–41.

Fourth, the court of appeals' "reasonable observer" test is insupportable because the government-speech doctrine protects more than simply the government's right to disseminate a government-crafted message. It also protects the government's right *not* to speak, and to refrain from placing its name and prestige behind viewpoints that it is unwilling to associate with or endorse. Municipalities and school districts may sell or lease advertising space on their buses to organizations that promote anti-smoking messages without triggering a corresponding constitutional obligation to sell advertising space to tobacco companies. *See, e.g.*, Minn. Stat.

§ 123B.93(a)(1); N.J. Stat. § 18A:39-31; N.M. Stat. § 22-28-1A(1); Tenn. Code § 49-6-2109(e); Utah Code § 41-6a-1309(2)(b)(iii)(A). That is because the government-speech doctrine allows the government to choose the messages and viewpoints that it will propagate and those that it will not. Governments hold that same prerogative when deciding whether to accept or reject a specialty-plate design that will appear on a state-issued license plate bearing the State's name. And they may engage in "viewpoint discrimination" when doing so.

C. A State's Decision To Accept Or Reject Specialty-Plate Designs Is Akin To A City's Decision To Accept Or Reject Privately Donated Monuments For Display On Public Land

There is yet a third and independent reason that the government-speech doctrine insulates the State's rejection of the confederate-flag license plate from First Amendment attack: The State's refusal to accept the respondents' proposed license plate into the State's specialty-plate repertoire is akin to Pleasant Grove City's decision to reject Summum's proposed monument for display in a public park. *See Summum*, 555 U.S. at 465–66.

Summum, a religious organization, had wanted to donate a monument for placement in a city park. The city declined, even though it had previously accepted and installed eleven other privately donated monuments in that park. *Id.* at 464–66. Summum sued, claiming that the city had violated the Speech Clause, but this Court held that the city's decision whether to accept a privately donated

monument for display in the park was "government speech" and exempt from any requirement of "viewpoint neutrality." *Id.* at 472, 479.

Accepting or rejecting a proposed specialty license-plate design likewise qualifies as government speech under this Court's reasoning in *Summum*. This is true for at least two reasons.

First, *Summum* holds that a State's "final approval authority" and "effective control" over a proposed message makes the approved message government speech, even if it is designed or proposed by private entities:

> [I]t is clear that the monuments in Pleasant Grove's Pioneer Park represent government speech. Although many of the monuments were not designed or built by the City and were donated in completed form by private entities, the City decided to accept those donations and to display them in the Park. Respondent does not claim that the City ever opened up the Park for the placement of whatever permanent monuments might be offered by private donors. *Rather, the City has "effectively controlled" the messages sent by the monuments in the Park by exercising "final approval authority" over their selection.*

555 U.S. at 472–73 (emphasis added) (*quoting Johanns*, 544 U.S. at 560–61); *see also Chiras v. Miller*, 432 F.3d 606, 616 (5th Cir. 2005) (holding that "the selection and use of textbooks in the public school classrooms constitutes government speech"). And this makes eminent sense. Judicial opinions are still the "speech" of the

judge who edits, approves, and signs them, even if law clerks assist in drafting them.

The State of Texas holds "final approval authority" and "effective control" over *every* specialty-plate design—the same prerogatives that Pleasant Grove City wielded over the monuments displayed in its parks. *See* 43 Tex. Admin. Code § 217.28(ii)(8)(B) (providing that the Department of Motor Vehicles Board "has final approval authority of all specialty license plate designs"); *see also* Tex. Transp. Code § 504.6011(a); 43 Tex. Admin. Code § 217.40.

Neither the respondents nor the court of appeals has ever denied that the State has complete editorial control and final approval authority over specialty license plates. Instead, they claim that the role of private citizens in proposing specialty-plate designs—and in selecting state-approved designs for display on their cars—take this case outside the government-speech doctrine. *See* Reply Br. 3–4, *Tex. Div., Sons of Confederate Veterans v. Vandergriff*, 759 F.3d 388 (2014) (No. 13-50411) ("The whole reason that drivers purchase specialty plates in the first place is to personally express a message they themselves endorse."); Pet. App. 13a ("[L]icense plates, even when owned by the government, implicate private speech interests because of the connection of any message on the plate to the driver or owner of the vehicle.").

Yet *Summum* makes clear that a State may allow private entities to propose or propagate government speech—without forfeiting the State's prerogative to control the content of these government-approved messages. *See* 555 U.S. at 468; Gaylord, *supra*, at 141 ("Un-

der *Summum*, the government does not lose the protection of the government speech doctrine simply because a private person assists the government in creating or disseminating its message and, at the same time, seeks to engage in expressive activity."); *see also Rust*, 500 U.S. at 192–94; *Johanns*, 544 U.S. at 562; *Rosenberger*, 515 U.S. at 833. What matters is whether the State "exercises final approval authority over every word used." *Johanns*, 544 U.S. at 561; *see also* Gaylord, *supra*, at 125. There is no dispute that it does.

Second, the State's willingness to engrave the State's name on a plate and issue that plate to a motorist signals that the State approves of its message—or is at least willing to associate with that message. This also suffices to trigger the government-speech doctrine and immunize the State from any requirement of viewpoint neutrality. As the Court explained in *Summum*:

> It certainly is not common for property owners to open up their property for the installation of permanent monuments that convey a message with which they do not wish to be associated. And because property owners typically do not permit the construction of such monuments on their land, persons who observe donated monuments routinely—and reasonably—interpret them as conveying some message on the property owner's behalf.

555 U.S. at 471.

The same is true of specialty license plates. States do not approve specialty plates containing messages with which the State is unwilling to associate (as this case

demonstrates). And drivers who observe specialty plates routinely and reasonably interpret them as conveying some message on the State's behalf: "Fight Terrorism," "Stop Child Abuse," "Mothers Against Drunk Driving," "Keep Texas Beautiful," "Operation Iraqi Freedom," "Insure Texas Kids," and "Share the Road." Indeed, the very reason the respondents *want* to display their logo on a state-issued license plate (rather than a bumper sticker) is because the specialty license plate comes with the appearance of state approval. The respondents could display their logos and messages far more prominently on other portions of their cars. Yet the respondents prefer the less conspicuous specialty license plate (even though they must pay a fee for it) because it would give their organization the prestige of the State's support.

The respondents have argued that some of the state-approved messages on Texas specialty plates are too parochial to be regarded as the government's speech. Some plates, for example, promote out-of-state universities, private businesses (Dr. Pepper, Mighty Fine Burgers), or messages tailored to the idiosyncrasies of the driver ("Rather be golfing."). The respondents insist that *these* messages "cannot possibly be considered government speech"—even if the more public-spirited specialty plates ("Fight Terrorism," "Keep Texas Beautiful") could pass as government messages. Reply Br. 9, *Tex. Div., Sons of Confederate Veterans v. Vandergriff*, 759 F.3d 388 (2014) (No. 13-50411).

The respondents are wrong to contend that the State's willingness to sponsor parochial messages forecloses a finding of government speech. To begin, the

State is *selling* its imprimatur, rather than offering it free of charge. It is entirely to be expected that when a person or entity is being paid for its sponsorship, it becomes more likely to utter messages that it would not propagate in the absence of remuneration.

Consider once again the analogy to the NASCAR driver. *See supra* p. 26. No one would expect state governments (or NASCAR drivers) to independently promote messages supporting golf, private businesses, or out-of-state universities. But when they are *paid* to partner with private entities in promoting those messages, the speech belongs as much to the sponsor as it does to the advertiser—regardless of the content of the message. The payments make the State less choosy in the messages and designs that it selects for display on its specialty license plates. But neither the payments nor the reduced choosiness take the State's specialty-plate program outside the realm of government speech. The messages and logos on a NASCAR driver's uniform are still the speech of the NASCAR driver—even though the driver is paid for his sponsorship and would not promote those companies absent their payments. So too for the messages that the State selects for its specialty-plate program.[5]

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[5] For these reasons, the Ninth Circuit erred by holding that the "revenue raising purpose" of a State's specialty-plate program cuts against a finding of government speech. *See Ariz. Life Coal. Inc. v. Stanton*, 515 F.3d 956, 966 (9th Cir. 2008). That the State collects fees in exchange for promoting the messages on its specialty license plates does nothing to diminish the State's total control over the speech that appears on those plates.

Consider also the example of monuments displayed in public parks. Many of these contain parochial messages. *See Summum*, 555 U.S. at 465, 470–72, 474–77. But that does not change the fact that accepted monuments "are meant to convey and have the effect of conveying a government message, and they thus constitute government speech." *Id.* at 472; *see also id.* at 476–77 ("By accepting a privately donated monument and placing it on city property, a city engages in expressive conduct, but the intended and perceived significance of that conduct may not coincide with the thinking of the monument's donor or creator.... By accepting such a monument, a government entity does not necessarily endorse the specific meaning that any particular donor sees in the monument."). If a city collected fees from organizations wishing to place their monuments in public parks, it might broaden the universe of monuments that the city would be willing to accept. But none of that would change this Court's holding that monuments displayed in public parks are government speech—and it assuredly would not convert the monument display into a "forum" for private speech. There will always be some monuments (and specialty-plate designs) that a State will not accept no matter how much a sponsor is willing to pay.

Finally, it is impossible for license-plate speech to occur without the government's cooperation and affirmative aid. Private citizens have no authority or ability to make license plates to display on their cars; the State holds a monopoly on production and must therefore lend its approval and assistance for any license-plate speech to occur. This leaves an unavoidable impression that

messages on specialty license plates are government-sanctioned speech—even if private citizens play a role in shaping, influencing, or propagating the message. And even if a private citizen or organization provided the design, the Department of Motor Vehicles holds all intellectual property rights in the messages and images that appear on a state-issued license plate. *See* Tex. Transp. Code § 504.002(3) ("[T]he department is the exclusive owner of the design of each license plate.").[6]

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[6] In the court of appeals, the respondents argued that specialty plates should not be deemed government speech because otherwise Texas would violate the Establishment Clause by issuing specialty plates emblazoned with "One State Under God." *See* Appellants' Br. 39, *Tex. Div., Sons of Confederate Veterans v. Vandergriff*, 759 F.3d 388 (2014) (No. 13-50411). The premise of this argument is dubious. Courts have already rejected an Establishment Clause challenge to the inclusion of "one state under God" in the Texas Pledge of Allegiance. *See Croft v. Perry*, 624 F.3d 157, 170 (5th Cir. 2010). If it is constitutional to include "one state under God" in the state pledge of allegiance that schoolchildren must recite each morning, then it should also be constitutional to include "One State Under God" on a state-issued license plate. Courts have also rejected constitutional challenges to the presence of a Christian cross in a city's insignia, which is undeniably government speech. *See Murray v. City of Austin*, 947 F.2d 147 (5th Cir. 1991); *see also Summum*, 555 U.S. at 483 (Scalia, J., concurring). But even if the respondents were correct to assert that the "One State Under God" license plate would violate this Court's Establishment Clause doctrine, that is not a reason to conclude that specialty license plates are private speech rather than government speech. The standard for determining government speech cannot be affected by a desire to save (or condemn) a particular license plate that the State has issued.

The court of appeals acknowledged *Summum* but tried to limit its holding to permanent monuments placed in public parks. Pet. App. 10a–11a (noting that the Court's "conclusion" in *Summum* "focused on the nature of both permanent monuments and public parks."). It is certainly correct to observe that this Court considered the nature of monuments placed in public parks in deciding whether the city was engaged in "government speech." But one cannot pass off *Summum* as a fact-bound holding that extends no further than a government's decision to accept or reject monuments for display in public parks.

What was crucial to this Court's government-speech finding in *Summum* was that: (1) the city "effectively controlled" the messages displayed by the monuments by exercising "final approval authority" over whether a monument should be placed in the park, 555 U.S. at 473; and (2) monuments on land are routinely and reasonably perceived as "conveying some message on the property owner's behalf," *id.* at 471. Both of those conditions apply here. Indeed, neither the court of appeals nor the respondents have argued otherwise. Their only response is to observe that specialty plates *also* convey a message on the motorist's behalf, but that does not distinguish *Summum*. The monuments that were accepted for the city park undoubtedly conveyed a message on the donor's behalf as well.

The court of appeals also tried to buttress its no-government-speech holding by observing that it was "consistent with the majority of other circuits that have considered the issue." Pet. App. 14a. But that does not

supply a legal justification for the court of appeals' ruling. *See* Ernest A. Young, *Foreign Law and the Denominator Problem*, 119 Harv. L. Rev. 148, 152 (2005) ("[T]here is no imperative to choose the most widespread practice or rule, for example, if the minority position seems better thought out."); *see also Cent. Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.*, 511 U.S. 164 (1994) (rejecting an interpretation of a statute that had been adopted by all 11 courts of appeals to have considered the question). What matters is whether those other appellate-court decisions supply persuasive *reasons* for rejecting the State's government-speech argument and its reliance on *Summum*. And they do not. All but one of those decisions pre-dates *Summum*,[7] and the one that does not relegates its discussion of *Summum* to a footnote and does not address any of the arguments that the State has advanced in this case. *See Roach*, 560 F.3d at 868 n.3.

D. Requiring States To Maintain "Viewpoint Neutrality" When Selecting The Messages That Appear On State-Issued License Plates Will Lead To Untenable Consequences

Finally, the notion that the Constitution requires States to maintain "viewpoint neutrality" when choosing

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[7] *See Roach v. Stouffer*, 560 F.3d 860, 867 (8th Cir. 2009); *Choose Life Ill., Inc., v. White*, 547 F.3d 853, 863 (7th Cir. 2008); *Ariz. Life Coal.*, 515 F.3d at 965; *Sons of Confederate Veterans, Inc., ex rel. Griffin v. Comm'n of Va. Dep't of Motor Vehicles*, 288 F.3d 610, 621 (4th Cir. 2002).

the content of state-issued license plates will have untenable and far-reaching consequences. Texas and other States issue "Fight Terrorism" license plates; a ban on viewpoint discrimination would require these States to offer specialty plates with pro-terrorism messages. The same would apply to specialty plates with messages such as "Stop Child Abuse," "Mothers Against Drunk Driving," and "Keep Texas Beautiful." Under the court of appeals' "no viewpoint discrimination" rule, none of these specialty plates can survive unless the State also provides specialty plates with messages supporting child abuse, drunk driving, and littering.

The Fourth Circuit has already applied the *reductio ad absurdum* of this approach by forbidding States to issue "Choose Life" license plates unless they issue specialty plates with pro-abortion messages. *See, e.g.*, *Planned Parenthood of S.C. Inc. v. Rose*, 361 F.3d 786 (4th Cir. 2004); *see also ACLU of N.C.*, 742 F.3d at 570. None of the judges on the *Planned Parenthood of South Carolina* panel attempted to explain how "Fight Terrorism" license plates, or the countless other specialty plates that favor one viewpoint at the expense of another, could survive their "no viewpoint discrimination" regime. *See* 361 F.3d at 787–800 (opinion of Michael, J.); *id.* at 800–01 (opinion of Luttig, J.); *id.* at 801 (opinion of Gregory, J.). Nor did they explain how the District of Columbia can issue "Taxation Without Representation" license plates to *all* of its drivers without simultaneously offering license plates with messages supporting the status quo.

There is nothing wrong—and there is surely nothing unconstitutional—with a State favoring certain viewpoints over others when selecting the messages that it will display on state-issued license plates. States may choose speech that promotes tolerance over bigotry, nonviolence over violence, smoking cessation over smoking, and humane treatment of animals over animal cruelty. *See Summum*, 555 U.S. at 467–68 ("It is the very business of government to favor and disfavor points of view" (citation and internal quotation marks omitted)).

Courts sometimes recoil at the notion that governments could engage in "viewpoint discrimination" when choosing the messages that will appear on their license plates. *See, e.g., Comm'n of Va. Dep't of Motor Vehicles*, 288 F.3d at 626; *Roach*, 560 F.3d at 870. They should be more troubled by the thought that the Constitution requires "viewpoint neutrality" whenever the government chooses to associate with private organizations and their viewpoints. The Eighth Circuit, for example, has reached the astonishing conclusion that Missouri cannot exclude the Ku Klux Klan from its Adopt-a-Highway program because that would represent "viewpoint-based discrimination" against the Klan's racist ideology. *See Robb v. Hungerbeeler*, 370 F.3d 735, 744 (8th Cir. 2004); *see also Cuffley v. Mickes*, 208 F.3d 702, 706 n.3 (8th Cir. 2000). Even if one assumes that this exclusion represents "viewpoint discrimination" against the racist views espoused by the Ku Klux Klan, what could possibly be *unconstitutional* about that? The First Amendment does not say that "no government shall engage in viewpoint discrimination." It prohibits laws that "abridge" the

"freedom of speech," and the Ku Klux Klan retains the same freedom to speak that it enjoyed before the Adopt-a-Highway program existed.

The holdings in *Robb* and *Cuffley* have left States and municipalities unable to deny Adopt-a-Highway applications from the American Nazi Party and the North American Man/Boy Love Association ("NAMBLA")—out of fear that they will end up on the losing end of a lawsuit if they deny the requests.[8] And a ruling from this Court that imposes a "no viewpoint discrimination" rule on specialty-plate programs will leave the States wondering whether they can refuse to issue specialty license plates sponsored by NAMBLA, the Ku Klux Klan, or the American Nazi Party.

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[8] *See* Editorial, *County Should Have Rejected Nazis,* Portland Oregonian, Feb. 4, 2005, at B10 (reporting that a county in Oregon allowed the American Nazi Party to adopt a stretch of highway, out of fear that it would be sued for "viewpoint discrimination" if it denied the request); Charles Johnson, *Adopt-a-Nazi in Oregon*, Little Green Footballs (Jan. 28, 2005), http://bit.ly/148HAUn (displaying the adopt-a-road sign honoring the American Nazi Party); John Kass, *If This Group Is Involved, It's a Really Bad Sign*, Chi. Trib., Apr. 14, 2005, at C2, http://trib.in/1BeZLCa (last visited December 30, 2014) (reporting that the North American Man/Boy Love Association was allowed to adopt a highway in Illinois when local officials feared they would lose a "viewpoint discrimination" lawsuit); *id.* ("[O]ne official told him that legally, NAMBLA might have the right to the sign, given a recent court case in Missouri in which the Ku Klux Klan retained its name on a similar adopt-a-highway sign on 1st Amendment grounds."); *see also The Evolution of Humanity, Sexuality and Philosophy*, Tilted Forum Project (Apr. 14, 2005), http://bit.ly/16ZXeTf (displaying the NAMBLA Adopt-a-Highway sign) (last visited December 30, 2014).

The courts of appeals have taken the "no viewpoint discrimination" concept too far. The Speech Clause does not give racist organizations a right to force the government to administer a state-run program under a name or logo that the State does not wish to promote. But *Robb* and *Cuffley* follow inevitably from the "no viewpoint discrimination" regime espoused by the respondents and the court of appeals. The Court should put a stop to this and hold that the government-speech doctrine allows States to engage in "viewpoint discrimination" when deciding whether to partner with private organizations in administering a government program, and when deciding whether to place the State's imprimatur on messages or symbols.

This is not to say that the States have *carte blanche* to engage in viewpoint discrimination when issuing specialty license plates. Discrimination that lacks a rational basis would present equal-protection problems, as would racially biased decisionmaking. And acts of political favoritism or corruption would implicate a variety of good-government laws, including state-law Hatch Acts and laws forbidding government property to be used for electioneering activities.[9] But the respondents have not alleged that the Board members acted out of racial animus, so their decision is subject only to rationality re-

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[9] For this reason, Judge Wilkinson's suggestion that viewpoint neutrality is needed to prevent States from "issu[ing] plates touting one [presidential] candidate, but not another" is groundless. *See Planned Parenthood of S.C. Inc. v. Rose*, 373 F.3d 580, 581 (4th Cir. 2004) (Wilkinson, J., concurring in the denial of rehearing en banc).

view. And it is rational for the State to disassociate from a symbol that many citizens will find racially offensive.

II. THE COURT OF APPEALS ERRED BY FINDING THAT THE STATE HAD ENGAGED IN VIEWPOINT DISCRIMINATION BY REFUSING TO ISSUE A CONFEDERATE LICENSE PLATE

Even if the court of appeals were correct to impose a "no viewpoint discrimination" rule on the State's specialty-plate program, its holding should *still* be reversed because the respondents are not victims of viewpoint discrimination. The State has not issued any specialty license plate that disparages the confederate battle flag or the views espoused by the Sons of Confederate Veterans. *See, e.g.*, *Choose Life Ill.*, 547 F.3d at 855 (no viewpoint discrimination when a State "has authorized neither a pro-life plate nor a pro-choice plate."). And the Board rejected the respondents' proposed license plate design because it determined that the confederate battle flag would be "offensive" to "member[s] of the public" under Texas Transportation Code § 504.801(c)—not because it opposed the respondents' efforts to commemorate the veterans of the confederacy or their beliefs regarding the meaning of the confederate flag. *See* Record 642–49; *see also Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 46 (1983) (defining viewpoint discrimination as "an effort to suppress expression *merely because* public officials oppose the speaker's view" (emphasis added)).

A. The court of appeals claimed that the Board necessarily engaged in viewpoint discrimination when it

found that the confederate battle flag "might be offensive to any member of the public." *See* Pet. App. 18a–19a. The court thought that by rejecting the plate because some members of the public would find the flag "offensive," the Board "discriminated against Texas SCV's view that the Confederate flag is a symbol of sacrifice, independence, and Southern heritage." *Id.* at 18a. According to the court of appeals,

> [t]he Board's decision implicitly dismissed that perspective and instead credited the view that the Confederate flag is an inflammatory symbol of hate and oppression. Texas's specialty license plate program features a number of plates that honor veterans, including Korea Veterans, Vietnam Veterans, Woman Veterans, Buffalo Soldiers, Operation Iraqi Freedom, and World War II Veterans. Given Texas's history of approving veterans plates and the reasons the Board offered for rejecting Texas SCV's plate, it appears that the only reason the Board rejected the plate is the viewpoint it represents.

Id. at 18a–19a; *see also Sons of Confederate Veterans, Inc. v. Glendening*, 954 F. Supp. 1099, 1103–04 (D. Md. 1997) (adopting a similar argument).

The court of appeals mischaracterized the Board's action and the requirements of section 504.801(c). Section 504.801(c) requires the Board to assess *how members of the public will view* a proposed specialty license plate. That is an objective inquiry and has nothing to do with whether the Board approves of the license-plate de-

sign, or whether it approves of the public's likely reaction to that design.

Suppose that a group were to propose a specialty license plate that ridicules a sports team. The Board might reject that plate as "offensive" to some "member[s] of the public." But in deeming that plate "offensive," the Board would not be "implicitly dismiss[ing]" the perspective of people who designed the license plate, nor would it be "credit[ing]" the views of the team's fans who would find the plate offensive. Even the team's most outspoken detractor could recognize that the proposed specialty license plate is likely to offend some members of the public. A Board that nixes this license-plate design is not signaling whether it approves or disapproves of the viewpoint that the rejected plate seeks to advance. The same is true when the Board disapproves images or symbols such as the confederate battle flag. In recognizing that members of the public will be offended, the Board is simply acknowledging a fact of life. That does not in any way signify the Board's agreement with those who view of the flag as a symbol of racism.

Under the court of appeals' reasoning, the Board could not reject *any* message or symbol as "offensive," because that determination will necessarily involve "viewpoint discrimination" against those who hold the disputed message or symbol in high regard. A State that prohibits profanity on its license plates will be engaged in "viewpoint discrimination" against those who regard profanity as lyrical. *See Cohen v. California*, 403 U.S. 15, 25 (1971) ("One man's vulgarity is another's lyric."). A State that prohibits swastikas on its license plates will be

engaged in "viewpoint discrimination" against those who regard the swastika as a venerated symbol. *See History of the Swastika*, United States Holocaust Memorial Museum, http://bit.ly/1y10tVK (last visited December 30, 2014) ("To this day [the swastiska] is a sacred symbol in Hinduism, Buddhism, Jainism, and Odinism. It is a common sight on temples or houses in India or Indonesia."). That is not a plausible theory of viewpoint discrimination.[10]

B. The court of appeals also complained that section 504.801(c) gives the Board "unbridled discretion" in deciding whether to approve proposed specialty license plates. Pet. App. 19a–22a. But section 504.801(c) calls for an objective inquiry: whether a license-plate proposal "might be offensive *to any member of the public*" (emphasis added). Predicting whether a license-plate proposal might offend others does not turn on the Board members' subjective feelings toward the plate, and it does not represent the "unbridled discretion" that troubled the Court in *City of Lakewood v. Plain Dealer Publishing Co.*, 486 U.S. 750, 764 (1988). Everyone knows that statements or logos touching on matters of politics or race are likely to offend others. And that principle is

[10] Indeed, on the court of appeals' reasoning, there appears to be *nothing* that a State could exclude from its specialty license plates on the ground of offensiveness. Pet. App. 19a ("We understand that some members of the public find the Confederate flag offensive. But that fact does not justify the Board's decision; this is exactly what the First Amendment was designed to protect against."). This appears to leave the State powerless to exclude not only swastikas and profanity, but also sacrilege and overt racism.

far more objective than the standards of "artistic excellence and artistic merit" that govern the grant-making process of the National Endowment for the Arts. *See* 20 U.S.C. § 954(d)(1); *Nat'l Endowment for the Arts v. Finley*, 524 U.S. 569, 588–90 (1998) (rejecting First Amendment and vagueness challenges to the standards governing the NEA's grant-making process).

The Board does retain discretion to approve specialty license plates even when they might offend others. But there is nothing unconstitutional about discriminating among levels of offensiveness, especially when the State is deciding whether to place its imprimatur on a license-plate message. *See id.* at 584–85 (upholding federal statute requiring the National Endowment for the Arts to consider "decency" and "respect for the diverse beliefs and values of the American public" when awarding grants). When the government is subsidizing or assisting speech, rather than regulating or prohibiting speech, it has more latitude to use discretionary criteria, and it may decide that racial offensiveness (as opposed to other forms of offense) is in a class by itself. *See id.* at 587–88. The National Endowment for the Arts might choose to withhold funding from racially offensive art without denying funding to every work of art that might offend someone on religious or other grounds. In like manner, the Board may decline to engrave the confederate battle flag on state license plates without triggering an obligation to cancel the "Choose Life" or "One State Under God" plates.

C. Finally, the court of appeals improperly rejected the State's defense that it had not issued *any* specialty

plates expressing *any* viewpoints on the confederacy or confederate battle flag—and therefore could not be found guilty of "viewpoint discrimination" for rejecting the respondents' specialty-plate design. The court of appeals reasoned that there was no evidence showing that the Board *would* exclude all points of view on the confederate battle flag. Pet. App. 22a. But the respondents must show that the Board is *currently engaged* in viewpoint discrimination, and they cannot make this showing until the Board approves a license plate that disparages the confederacy or the confederate battle flag. It is impossible for the State to prove or even predict how future Boards will respond to future specialty-plate proposals. The current Board cannot bind its successors—any policy can be repealed—and no one knows the future makeup of the Board or the future statutes, regulations, or policies that will govern the Board's decisionmaking. For the court of appeals to demand such proof from the State improperly shifts the burden of proof away from the respondents.

The court of appeals also erred by declaring that it would be "equally objectionable" for the Board to exclude all viewpoints on the meaning of the confederate battle flag. *Ibid.*; *see also id.* at 23a ("Silencing both the view of Texas SCV and the view of those members of the public who find the flag offensive would similarly skew public debate and offend the First Amendment."). In doing this, the court of appeals conflated viewpoint discrimination with content discrimination, and declared a state guilty of "viewpoint discrimination" whenever it excludes any subject matter from its specialty license plate pro-

gram. *Id.* at 23a ("[A] state engage[s] in viewpoint discrimination when it denie[s] a specialty license plate based on the speaker's message").

The court of appeals followed the misguided reasoning of the Eighth and Ninth Circuits, which held that the Speech Clause *compels* States to issue "Choose Life" specialty plates—even when the State has never issued a specialty plate supporting abortion. *See Roach*, 560 F.3d at 870; *Ariz. Life Coal.*, 515 F.3d at 971–72. Each of those courts rejected the State's defense that it had chosen to stay out of the abortion debate altogether and had therefore committed only content or subject-matter discrimination, not viewpoint discrimination. *See Roach*, 560 F.3d at 867–70; *Ariz. Life Coal.*, 515 F.3d at 971–72. Both of those courts were wrong—and so is the court of appeals in this case. A State that has never issued *any* specialty license plate relating to topics such as abortion or the confederacy is not engaged in "viewpoint discrimination" when it declines a request to extend its specialty-plate program into that new subject matter. Unless the respondents can prove that the State would have approved a specialty plate expressing a different view on the untouched subject matter, then they cannot establish that the State has engaged in viewpoint rather than content discrimination.

* * * * *

The ultimate question in this case is whether Texas has "abridg[ed]" the respondents' "freedom of speech" by declining to sell them a specialty license plate engraved with the confederate battle flag. U.S. Const. amend. I. The answer is easy: No. The respondents enjoy

the same freedom to speak that they had before the specialty-plate program existed. And the respondents cannot complain that they have been forced to pay into a program that excludes them on account of their views. *See, e.g.*, *Rosenberger*, 515 U.S. at 824–27; *Bd. of Regents of the Univ. of Wis. Sys. v. Southworth*, 529 U.S. 217 (2000). The added costs of producing specialty license plates are borne by the drivers who pay for them; none of those costs are passed on to taxpayers or shared with the respondents. *See* Tex. Transp. Code § 504.801(d).

In light of all of this, the respondents cannot show that their "freedom of speech" has been "abridg[ed]." Even the respondents would acknowledge that a State that refuses to establish a specialty-license-plate program has not "abridg[ed]" anyone's freedom of speech. Yet the only difference between the respondents and the residents of that hypothetical State is that Texas gives the respondents *more* choices for the messages and designs that can appear on their license plates. The respondents may not be happy with the choices that they have been offered, but they cannot maintain that Texas has *abridged* their freedom of speech by *increasing* the choices available to those who want a state-sponsored message to appear on their license plates. *See* Webster's Third New International Dictionary 6 (2002) (defining "abridge" to mean to "deprive" and "to diminish (as a right) by reducing").

In the end, the respondents cannot escape the fact that they are fighting the words of the First Amendment. The "freedom of speech" does not give anyone a right to commandeer the machinery of government to

support his or her desired message. And the government-speech doctrine ensures that the First Amendment will never be used toward those ends.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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