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CONTESTED SYMBOL: The proposed design of the Sons of Confederate Veterans license plate rejected by the agency. COURTESY TEX. DEPT. OF MOTOR VEHICLES

SUPREME COURT PREVIEW: WALKER v. TEXAS DIVISION, SONS OF CONFEDERATE VETERANS

Note: The U.S. Supreme Court has scheduled oral argument March 23 in Walker v. Texas Division, Sons of Confederate Veterans; The National Standard is pleased to feature a preview of this case by the Legal Information Institute, Cornell University.

The Supreme Court will determine whether states may limit the messages and symbols on state-issued specialty license plates and whether Texas committed viewpoint discrimination in rejecting the Sons of Confederate Veterans license plate design that included a logo of the confederate battle flag. Walker argues that the messages and symbols on state-issued license plates constitute government speech—which allows the government to restrict the speech and evade the requirement of viewpoint neutrality—and that Texas did not engage in viewpoint discrimination in refusing the confederate design because it did not issue any plates disparaging the confederacy. SCV counters that the messages and symbols are private speech protected under the First Amendment right to free speech, and that Texas committed viewpoint discrimination by rejecting the confederate license plate design. The Court's decision in this case implicates states' ability to favor certain viewpoints on state-issued license plates.

Questions as Framed for the Court by the Parties

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

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?

Facts

Texas provides drivers with the opportunity to purchase and utilize specialty license plates. One possible method for the creation of a specialty license plate is if the Texas Department of Motor Vehicles Board, by the Board's initiative or after an application filed by a nonprofit organization, issues a new specialty license plate. If a nonprofit files an application for a new specialty license plate, the plate will only be issued if the de-

CONTENTS

Preview of Walker v.
SCV

PREVIEW: WALKER v. TEX. DIV., SONS OF CONFEDERATE VETERANS

sign gains the Board's approval. The Board has the authority to "refuse to create a new specialty license plate if the design might be offensive to any member of the public."

The Texas Division of the Sons of Confederate Veterans ("SCV") is a nonprofit organization dedicated to preserving the memory and reputation of confederate Civil War veterans. On August 2009, SCV applied for a specialty license plate featuring a logo of the confederate battle flag. Thereafter, the Texas Department of Transportation ("TxDOT") submitted the application for a vote to its seven-member panel. The TxDOT, responsible for approving specialty license plates in 2009, voted two different times on SCV's application and ultimately denied it. Subsequently, the TxDOT transferred its license-plate-approval power to the newly created nine-member Board. On November 2011, the Board unanimously denied SCV's renewed specialty license plate application. More specifically, the Board explained that comments submitted by the public reveal that a significant portion of the public associated the confederate flag with the expression of hate towards certain people or groups.

SCV filed a claim against various public officials including John Walker, 3d, (collectively, "Walker"), Chairman of the Board, on the grounds that the Board's denial violated the First Amendment. The United States District Court for the Western District of Texas, entered a judgment for Walker and SCV appealed to the United States Court of Appeals for the Fifth Circuit. The Fifth Circuit reversed the district court's ruling and entered a judgment for SCV. Walker filed a petition for writ of certiorari requesting the Supreme Court of the United States to resolve two circuit splits concerning the practice of government-speech and viewpoint-discrimination in state specialty license plates programs. In response, SCV argued that the two circuit splits Walker referenced are not applicable to the facts of this case and therefore asked the Supreme Court to uphold the decision of the Fifth Circuit.

Analysis

The Supreme Court will address whether the messages and symbols on state-issued specialty license plates constitute government speech, which does not require viewpoint neutrality, and whether Texas committed viewpoint discrimination in rejecting SCV's specialty license plate. Walker argues that the government-speech doctrine permits Texas to regulate the content and design of state-issued license plates, and that Texas did not commit viewpoint discrimination in refusing to issue SCV's license-plate design because the state did not approve any specialty license plates disparaging the confederacy. SCV counters that specialty license plate messages are private speech, meaning Texas cannot discriminate between license plates based on viewpoint without violating the First Amendment, and that Texas engaged in viewpoint discrimination by rejecting its confederate flag license-plate design.

Do Specialty License Plate Messages and Symbols Constitute Government or Private Speech?

Walker argues that Texas is permitted to determine the content of state-issued license plates under the government-speech doctrine, which recognizes the government's right to speak. According to Walker, the government-speech doctrine allows states to restrict speech that occurs within the scope of government-created programs. Walker claims the messages and symbols that appear on specialty license plates are within the scope of Texas's specialty license plate program, meaning Texas may exclude confederate messages and symbols regardless of whether the speech comes from private parties. Walker further contends that the government-speech doctrine permits Texas to disassociate from messages, symbols, and viewpoints it does not want to proliferate. Walker rejects the Fifth Circuit's holding that the government-speech doctrine applies 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." Walker claims the lower court erred in applying the reasonable observer standard to the government-speech doctrine because the Supreme Court has never accepted it as a legitimate test, and a reasonable observer would view the messages and symbols on a specialty license plate as the speech of the state and the driver. Finally, Walker argues that the rejection of a specialty plate is comparable to the *Pleasant Grove City v. Summum* decision rejecting a proposed monument for exhibit in a public park. In *Summum*, according to Walker, the Supreme Court held that messages are government speech if a state exercises final approval authority and effective control over proposed messages, even where messages were designed or proposed by private parties. Here, Walker main-

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VEXILLOLOGICAL ASSOCIATION OF THE STATE OF TEXAS

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tains, the specialty license plates are government speech because Texas holds final approval authority and effective control over all specialty-plate designs.

SCV counters that the messages and symbols on specialty plates are private speech that implicates the driver's First Amendment rights. SCV claims that there are two distinct categories of specialty license plates: those that are proposed and designed by state legislatures, and those that are created by private parties. According to SCV, specialty plates proposed and designed by state legislatures may be considered government speech, but all previous specialty license plate cases have considered plates created by private parties to constitute private speech. SCV contends that the driver exerts complete control over the speech because the driver must purchase and attach the license plate, and no speech would occur without the driver's actions. SCV argues that the Supreme Court's holding in *Sumnum* does not control here because specialty license plates are transitory and closely identified with the car's driver. Moreover, SCV claims, the driver exercises final approval authority in purchasing and affixing the license plate to the car. SCV also argues that this case is distinguishable from *Johanns v. Livestock Marketing Association*, where the Supreme Court held that the promotional campaigns created under the Beef Promotion and Research Act of 1985 were government speech. Here, SCV claims, the Texas Transportation Code does not specify what messages should be conveyed, and the citizens express their own personal messages. SCV also alleges that there is no statute or anything in the record that restricts the scope of the specialty-plate program to such a degree that would exclude the confederate plate. The specialty-plate program, SCV argues, was intended to promote free expression by private parties, and the SCV plate falls within the scope of the program.

Did Texas Engage in Viewpoint Discrimination?

Walker contends that, even if Texas were not permitted to engage in viewpoint discrimination, it did not engage in viewpoint discrimination in rejecting SCV's specialty license plate. Walker argues that Texas has not committed viewpoint discrimination because it has not issued any license plates belittling the confederate flag or SCV's beliefs. Walker supports his assertion by citing to the Seventh Circuit Court of Appeals' holding in *Choose Life Illinois v. White*, where the court held that a state does not engage in viewpoint discrimination if the state does not authorize a pro-choice or pro-life license plate. Moreover, Walker argues that the license plate was rejected under Texas Transportation Code § 504.801(c) because the license plate would offend "member[s] of the public." Walker claims that § 504.801(c) requires the Board to make an objective assessment of "how members of the public will view a proposed specialty license plate." Walker maintains that the Board's refusal to grant a specialty license plate does not mean that the Board dismisses the license plate creator's viewpoint; such a refusal is simply based off a factual inquiry into whether the license plate would likely offend a member of the public. Finally, Walker argues that Fifth Circuit's complaint that the Board has "unbridled discretion" in approving specialty license plates under § 504.801(c) is misguided because the factual inquiry does not depend upon the Board's subjective feelings, and members of the public are likely to be offended by statements relating to politics or race.

SCV counters that Texas's specialty license plate program created a forum for private citizens to speak, and the First Amendment right to freedom of speech prohibits Texas from differentiating between speakers based on a speaker's viewpoint. According to SCV, the First Amendment permits citizens to debate the meaning of the confederate flag through a public forum without state intervention based on viewpoint. SCV claims that by rejecting its proposed license plate, Texas discriminated against those who view the confederate flag as a heroic symbol by endorsing a viewpoint that the flag symbolizes racism. SCV argues that the Seventh Circuit's holding in *Choose Life Illinois* is inapposite here due to the differences between each state's specialty license plate program. SCV asserts that Texas has never abstained from issues related to the Confederacy, as evidenced by the state's celebration of Confederate Heroes Day. Moreover, SCV claims, Texas's written denial states the reason for denial as offensiveness rather than for Texas's desire to exclude the entire subject of the confederacy. Finally, SCV asserts, a key distinction between the two specialty license plate programs is that the program in Illinois did not permit private citizens to design their own license plates without receiving authorization from the legislature. Finally, SCV argues that the "might be offensive to any member of the public" standard is unconstitutional because it unduly constrains citizens' First Amendment right to free speech and creates an amorphous test with no objective standard.

Discussion

The Supreme Court has the opportunity to decide if the messages and symbols on state-issued specialty license plates constitute government speech that does not require viewpoint neutrality, and whether Texas committed viewpoint discrimination in rejecting SCV's specialty license plate application. Walker argues that state-issued specialty license plates represent government speech and are therefore not subject to viewpoint neutrality requirements. In opposition, SCV argues that specialty license plate messages constitute private speech and, by rejecting their application, Texas violated SCV's First Amendment right to free speech. A finding that the Board did not engage in viewpoint discrimination may present a threat to the liberty of speech. On the other hand, a ruling that the Board violated the First Amendment may make it unworkable for Texas to uphold viewpoint neutrality when issuing specialty license plates.

Viewpoint Neutrality and the Content of Speech on License Plates

Walker argues that if Texas is forced to uphold viewpoint neutrality when issuing specialty license plates, it will be forced to only approve license plates for which an opposing-view plate has already been approved. Walker further contends that Texas will have to issue opposing license plates to currently-approved and circulating license plates in order to comply with viewpoint neutrality. For example, Walker explains that Texas will have to issue license plates against stopping child abuse and opposing Mothers Against Drunk Driving if it issues plates supporting the prevention of child abuse and in support of Mothers Against Drunk Driving. Walker argues that states can constitutionally select the messages displayed on state-issued license plates in order to promote “tolerance over bigotry, non-violence over violence, smoking cessation over smoking, and humane treatment of animals over animal cruelty.”

The Cato Institute in support of SCV counters that viewpoint neutrality fosters offensive speech, which helps the citizenship develop personal autonomy and promotes freedom of expression. The Cato Institute argues the expression of different opinions, including offensive views, helps define individuals’ personalities. Also supporting SCV, Americans United for Separation of Church and State argue that if Texas is not required to comply with viewpoint neutrality when issuing specialty license plates, religious minorities and nonbelievers would inevitably suffer discrimination. This organization argues that the majority of the general public might find a minority religion offensive simply due to fear or unfamiliarity. It further contends that allowing Texas to select the message of specialty license plates will lead to discrimination of those whose beliefs are not widely held.

First Amendment Rights

In support of Walker, several states argue that Texas is not prohibiting speech, but rather it is simply choosing to not promote speech. The states explain that Texas is not in violation of an individual’s freedom of speech because Texas does not have to subsidize speech. They claim that if the Supreme Court rules that the Board violated the First Amendment by denying SCV’s application, states will be forced to either eliminate their specialty license plate programs or face the possibility of litigation every time state agencies approve or deny an application. Also supporting Walker, the Justice and Freedom Fund argues that license plates are not a place used to exchange ideas, but rather they are government-owned vehicle identifiers. The Justice and Freedom Fund further contend that Texas is not violating freedom of speech because people have the freedom to choose from a wide variety of messages to display on their license plates.

In support of SCV, the American Civil Liberties Union argues that the Texas specialty license plate program violates the First Amendment because regardless of how repugnant a viewpoint may be a state cannot discriminate against it. Also supporting SCV, the Becket Fund argues that Texas is violating the First Amendment by creating the specialty license plate program and excluding only certain viewpoints. The Becket Fund explains that Texas created a space for people to express their points of view, and it cannot exclude only selected viewpoints without controlling public discourse.

Conclusion

The Supreme Court will determine whether the messages and symbols on state-issued specialty license plates qualify as government speech and whether Texas engaged in viewpoint discrimination by rejecting the license plate design proposed by the Sons of Confederate Veterans. Walker argues that Texas is permitted to determine the content of state-issued license plates under the government-speech doctrine. On the other hand, SCV argues that specialty license plate messages constitute private speech and by rejecting their application Texas violated SCV’s First Amendment rights. If the Court upholds Walker’s claim there may be negative First Amendment repercussions, and if SCV prevails, states may have to dismantle or alter their specialty license plate programs.

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