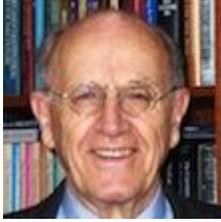


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Argument preview: When the license plate speaks

At 10 a.m. Monday, the Supreme Court will hold one hour of oral argument on the power of states to control the messages displayed on speciality license plates for cars and trucks. In Walker v. Sons of Confederate Veterans, a Texas state agency will be represented by the state's solicitor general, Scott A. Keller of Austin, with thirty minutes of time. Arguing for a group denied permission for a license plate design bearing a Confederate flag will be R. James George, Jr., of the Austin law firm of George Brothers Kincaid & Horton LLP, also with thirty minutes.

Background

If a state is forbidden by the Constitution to dictate the message that private citizens must put on their license plates, is it also forbidden to veto a message that citizens would prefer? That has been a lingering First Amendment question for nearly four decades, but the Supreme Court now seems prepared to answer it. The answer depends, simply, on whether the voice of the license plate is that of the government, or of the motorist.

In the famous decision in 1977 in *Wooley v. Maynard*, the Supreme Court treated license plate messages as a form of private speech on private property, but did not rule exactly that. Presuming it to be private speech, the Court said motorists could not be compelled to carry New Hampshire's preferred message, the state motto, "Live Free or Die." That mandate was challenged by a driver of the Jehovah's Witness faith.

Six years ago, the Court made clear, in the case of *Pleasant Grove City v. Summum*, that if the government is acting as the speaker in a public display (there, a monument in a public park in Utah), it has the right to pick a message it prefers and exclude others.

The federal courts of appeals are deeply divided now, however, on the nature of the speaker when a message is added to an auto or truck's license plate. Such messages, the U.S. Court of Appeals for the Sixth Circuit has ruled, are a form of government speech, and the First Amendment does not interfere with its choice.

Five other federal appeals courts, however, have concluded that the plate speaks for the motorist operating the vehicle, and government may not control the message in a discriminatory way.

One of the courts holding that second view, the U.S. Court of Appeals for the Fifth Circuit, applied that reasoning to Texas's specialty licensing plate program, treating a veto of a preferred display as a form of viewpoint discrimination in violation of the First Amendment's free-speech guarantee.

Texas allows motorists who are willing to pay an extra fee to buy a license plate with a special message, generated either by the legislature, the state motor vehicle department on request by a non-profit group, or an individual or organization acting through a vendor.

If a non-profit group proposes a specialty plate, a state board may approve it, or reject it if it finds the requested message "might be offensive to any member of the public."

The case now before the Supreme Court began when a Texas chapter of the Sons of Confederate Veterans, Inc., a group dedicated to remembering the soldiers who fought for the South in the Civil War, submitted a plate design including its name, its founding date (1896), and the Confederate flag.

Officials vetoed it initially by a four-to-one vote of the state board, and, after a renewed application, by a split four-to-four vote of a larger board. The board set a new vote, and held a public hearing, with most of the public comments opposed to the design. The board then rejected it unanimously.

A federal judge, finding the message to be private speech in a non-public forum, nevertheless ruled for the board. While the veto was based upon the content, it did not amount to discrimination based on viewpoint, the judge found, and went on to rule that the restriction was a reasonable one to accommodate public sentiment.

The Fifth Circuit ruled for the organization, relying upon the Supreme Court's *Wooley* decision to find viewpoint discrimination against a form of private speech. A reasonable observer, the Fifth Circuit said, would regard such a message to be that of the motorist, not the state.

State officials took the case on to the Supreme Court. Almost at the same time, the leaders of the two houses of the North Carolina state legislature had appealed to the Supreme Court to challenge a ruling by the U.S. Court of Appeals for the Fourth Circuit, finding that a state law allowing plates with the anti-abortion "Choose Life" message but refusing to allow display of the abortion rights message, "Respect Choice," interfered with private speech.

On December 5, the Court chose to review the Texas case, leaving the separate North Carolina case to be resolved based on what happens on the Texas program. The state agency's petition raised two questions: whether specialty plate messages are government speech, and whether the agency acted unconstitutionally in rejecting the Confederate flag design.

Briefs on the merits

The Texas agency's merits brief pressed for a complete exemption from First Amendment scrutiny for a state specialty license plate program, on the theory that the plates display government speech only. The brief spent comparatively little effort arguing on the second point, that it had not engaged in viewpoint discrimination.

In arguing that the plates speak for the government, in whatever they say, the agency relied upon a theory of complete control of the specialty license program. The state has not created a forum in which Texas citizens are invited to express themselves. While it has allowed motorists to propose messages that they would like on their plates, the state has in no way ceded control of the program to them, it argued. Motorists may join in displaying messages that the state approves, but the message is still the government's, the brief added.

As the agency in sole charge of the program, the filing went on, the state agency has authority to disassociate itself from messages, symbols or viewpoints that it does not want to convey or promote. It could not be compelled by the First Amendment, the agency said by way of illustration, to allow a swastika, a sacrilege, or an expression of overt racism, because that would have the state's imprimatur and make it the state's own message. Indeed, it argued, motorists want expressions on their license plates precisely because that gives their message the state's "seal of approval."

Motorists, the brief said, may put their own messages on their cars and trucks, by displaying bumper stickers or even by the paint job they choose. But that is on their own property, not the state's, it said.

In arguing that it did not engage in viewpoint bias by rejecting the Confederate flag display, the state agency contended that it would have done so only if had chosen to issue a specialty plate with the contradictory message of denouncing or demeaning the Confederacy or the Sons of Confederate Veterans. It simply has taken no position on such expression, it contended.

The brief on the merits of the Texas chapter of the Sons of Confederate Veterans, aside from mocking the state government for a wide variety of commemorations and recognitions of the Confederacy and its heroes, dwelled primarily upon the argument that specialty license plates — when opened by a state to message choices by drivers — do nothing more than express private views or tastes.

Relying on an expansive reading of the Court's precedent in *Wooley v. Maynard*, the organization essentially contended that the Court has already settled the debate over whose message license plates express. When the government wants to convey its own messages, the brief said, it creates more enduring expressions like public monuments, not the mobile platform of an auto or truck.

This brief sought to keep the Justices' attention focused on the particular kind of specialty plate program that was directly at issue: one in which the state invites motorists or organizations to come up with messages that they want on plates. Under that program, the only people who display the chosen message are those who embrace it, the brief noted; it does not speak for

anyone else. That is far different from a government program that is under the unfettered control of officials, and applies to everyone, the filing argued.

Once it is clear that the plate displays private speech, the organization said, it follows that the state government may not censor a chosen message, as it has done with the Confederate display. The standard the state used for vetoing that design, its potential to offend, is not a constitutionally valid basis for censorship, it said. Moreover, it argued, the record in this case does not show that any other organization has faced a veto of its specialty plate design, reinforcing the nature of the censorship in this instance.

Eleven states, plus a handful of advocacy organizations, support the state's plea to protect state governments from being associated with messages they do not embrace, while a few free-speech advocacy groups have provided support for the right of motorists to choose plate messages without state vetoes.

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