

The Sons of Confederate Veterans (SCV) is a nonprofit organization that is dedicated to preserving and honoring the memory of the southerners who fought during the Civil War. In 2009 and in 2010 the SCV applied to the Texas Department of Motor Vehicles for a specialty license plate that would feature a Confederate battle flag and the name of the organization. While the Department had accepted the vast majority of specialty license plates, the SCV application was rejected on the ground that “the design might be offense to any member of the public.” The SCV then sued John Walker, the Chairmen of the Texas Department of Motor Vehicles Board, claiming that the decision to deny them a specialty license plate violated the First and Fourteenth Amendments. The local district court rejected their claims, but that decision was reversed by the Court of Appeals for the Fifth Circuit. Walker appealed to the Supreme Court of the United States.

The Supreme Court by a 5-4 vote declared that Texas could refuse to authorize a specialty license plate for members of Sons of Confederate Veterans. Justice Stephen Breyer’s majority opinion held that license plates were an instance of government speech and when government spoke, government could determine what messages were sent. Justice Samuel Alito’s dissent insisted that Texas had established a limited public forum in which the state could not engage in content discrimination. Why does Justice Breyer think this is an instance of government speech? Why does Justice Alito think Texas established a limited government forum? Who has the better of the argument? Justice Thomas cast the crucial fifth vote in Walker. What explains his defection from the other conservative justices? Would the framers have considered this an instance of government speech or does some other factor explain Thomas’s position?

Justice BREYER delivered the opinion of the Court.

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When government speaks, it is not barred by the Free Speech Clause from determining the content of what it says. *Pleasant Grove City v. Sumnum* (2009). That freedom in part reflects the fact that it is the democratic electoral process that first and foremost provides a check on government speech. Thus, government statements (and government actions and programs that take the form of speech) do not normally trigger the First Amendment rules designed to protect the marketplace of ideas. Instead, the Free Speech Clause helps produce informed opinions among members of the public, who are then able to influence the choices of a government that, through words and deeds, will reflect its electoral mandate.

Were the Free Speech Clause interpreted otherwise, government would not work. How could a city government create a successful recycling program if officials, when writing householders asking them to recycle cans and bottles, had to include in the letter a long plea from the local trash disposal enterprise demanding the contrary? How could a state government effectively develop programs designed to encourage and provide vaccinations, if officials also had to voice the perspective of those who oppose this type of immunization? “[I]t is not easy to imagine how government could function if it lacked th[e] freedom” to select the messages it wishes to convey.

We have therefore refused “[t]o hold that the Government unconstitutionally discriminates on the basis of viewpoint when it chooses to fund a program dedicated to advance certain permissible goals, because the program in advancing those goals necessarily discourages alternative goals.” *Rust v. Sullivan* (1991). . . .

That is not to say that a government’s ability to express itself is without restriction. Constitutional and statutory provisions outside of the Free Speech Clause may limit government speech. And the Free Speech Clause itself may constrain the government’s speech if, for example, the government seeks to

compel private persons to convey the government's speech. But, as a general matter, when the government speaks it is entitled to promote a program, to espouse a policy, or to take a position. In doing so, it represents its citizens and it carries out its duties on their behalf.

In our view, specialty license plates issued pursuant to Texas's statutory scheme convey government speech. . . . In *Summum*, we considered a religious organization's request to erect in a 2.5-acre city park a monument setting forth the organization's religious tenets. . . . The religious organization argued that the Free Speech Clause required the city to display the organization's proposed monument because, by accepting a broad range of permanent exhibitions at the park, the city had created a forum for private speech in the form of monuments. This Court rejected the organization's argument. We held that the city had not "provid[ed] a forum for private speech" with respect to monuments. Rather, the city, even when "accepting a privately donated monument and placing it on city property," had "engage[d] in expressive conduct." The speech at issue, this Court decided, was "best viewed as a form of government speech" and "therefore [was] not subject to scrutiny under the Free Speech Clause."

We based our conclusion on several factors. First, history shows that "[g]overnments have long used monuments to speak to the public." . . . Second, we noted that it "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." . . . Third, we found relevant the fact that the city maintained control over the selection of monuments. . . .

. . . . Our analysis in *Summum* leads us to the conclusion that here, too, government speech is at issue. First, the history of license plates shows that, insofar as license plates have conveyed more than state names and vehicle identification numbers, they long have communicated messages from the States. . . . States have used license plate slogans to urge action, to promote tourism, and to tout local industries. . . . Second, Texas license plate designs "are often closely identified in the public mind with the [State]." Each Texas license plate is a government article serving the governmental purposes of vehicle registration and identification. . . . Texas license plates are, essentially, government IDs. And issuers of ID "typically do not permit" the placement on their IDs of "message[s] with which they do not wish to be associated." Consequently, "persons who observe" designs on IDs "routinely—and reasonably—interpret them as conveying some message on the [issuer's] behalf." *Ibid.*

Indeed, a person who displays a message on a Texas license plate likely intends to convey to the public that the State has endorsed that message. If not, the individual could simply display the message in question in larger letters on a bumper sticker right next to the plate. But the individual prefers a license plate design to the purely private speech expressed through bumper stickers. That may well be because Texas's license plate designs convey government agreement with the message displayed.

Third, Texas maintains direct control over the messages conveyed on its specialty plates. Texas law provides that the State "has sole control over the design, typeface, color, and alphanumeric pattern for all license plates." . . . This final approval authority allows Texas to choose how to present itself and its constituency. Thus, Texas offers plates celebrating the many educational institutions attended by its citizens. But it need not issue plates deriding schooling. Texas offers plates that pay tribute to the Texas citrus industry. But it need not issue plates praising Florida's oranges as far better. And Texas offers plates that say "Fight Terrorism." But it need not issue plates promoting al Qaeda.

. . . . That is not to say that every element of our discussion in *Summum* is relevant here. For instance, in *Summum* we emphasized that monuments were "permanent" and we observed that "public parks can accommodate only a limited number of permanent monuments." We believed that the speech at issue was government speech rather than private speech in part because we found it "hard to imagine how a public park could be opened up for the installation of permanent monuments by every person or group wishing to engage in that form of expression." Here, a State could theoretically offer a much larger number of license plate designs, and those designs need not be available for time immemorial.

But those characteristics of the speech at issue in *Summum* were particularly important because the government speech at issue occurred in public parks, which are traditional public forums for “the delivery of speeches and the holding of marches and demonstrations” by private citizens. By contrast, license plates are not traditional public forums for private speech.

And other features of the designs on Texas's specialty license plates indicate that the message conveyed by those designs is conveyed on behalf of the government. Texas, through its Board, selects each design featured on the State's specialty license plates. Texas presents these designs on government-mandated, government-controlled, and government-issued IDs that have traditionally been used as a medium for government speech. And it places the designs directly below the large letters identifying “TEXAS” as the issuer of the IDs. “The [designs] that are accepted, therefore, are meant to convey and have the effect of conveying a government message, and they thus constitute government speech.”

. . . . The parties agree that Texas's specialty license plates are not a “traditional public forum,” such as a street or a park, “which ha[s] immemorially been held in trust for the use of the public and, time out of mind, ha[s] been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions.” . . . It is equally clear that Texas's specialty plates are neither a “ ‘designated public forum,’ ” which exists where “government property that has not traditionally been regarded as a public forum is intentionally opened up for that purpose,” nor a “limited public forum,” which exists where a government has “reserv[ed] a forum] for certain groups or for the discussion of certain topics.” A government “does not create a public forum by inaction or by permitting limited discourse, but only by intentionally opening a nontraditional forum for public discourse.” . . .

Texas's policies and the nature of its license plates indicate that the State did not intend its specialty license plates to serve as either a designated public forum or a limited public forum. First, the State exercises final authority over each specialty license plate design. . . . Second, Texas takes ownership of each specialty plate design, making it particularly untenable that the State intended specialty plates to serve as a forum for public discourse. Finally, Texas license plates have traditionally been used for government speech, are primarily used as a form of government ID, and bear the State's name. These features of Texas license plates indicate that Texas explicitly associates itself with the speech on its plates.

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Of course, Texas allows many more license plate designs than the city in *Summum* allowed monuments. But our holding in *Summum* was not dependent on the precise number of monuments found within the park. Indeed, we indicated that the permanent displays in New York City's Central Park also constitute government speech. Further, there may well be many more messages that Texas wishes to convey through its license plates than there were messages that the city in *Summum* wished to convey through its monuments. Texas's desire to communicate numerous messages does not mean that the messages conveyed are not Texas's own.

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Justice ALITO, with whom THE CHIEF JUSTICE, Justice SCALIA, and Justice KENNEDY join, dissenting.

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Suppose you sat by the side of a Texas highway and studied the license plates on the vehicles passing by. You would see, in addition to the standard Texas plates, an impressive array of specialty plates. (There are now more than 350 varieties.) You would likely observe plates that honor numerous colleges and universities. You might see plates bearing the name of a high school, a fraternity or sorority, the Masons, the Knights of Columbus, the Daughters of the American Revolution, a realty company, a favorite soft drink, a favorite burger restaurant, and a favorite NASCAR driver.

As you sat there watching these plates speed by, would you really think that the sentiments reflected in these specialty plates are the views of the State of Texas and not those of the owners of the cars? If a car with a plate that says “Rather Be Golfing” passed by at 8:30 am on a Monday morning, would you think: “This is the official policy of the State—better to golf than to work?” If you did your viewing at the start of the college football season and you saw Texas plates with the names of the University of Texas's out-of-state competitors in upcoming games—Notre Dame, Oklahoma State, the University of Oklahoma, Kansas State, Iowa State—would you assume that the State of Texas was officially (and perhaps treasonously) rooting for the Longhorns' opponents? . . .

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This capacious understanding of government speech takes a large and painful bite out of the First Amendment. Specialty plates may seem innocuous. They make motorists happy, and they put money in a State's coffers. But the precedent this case sets is dangerous. While all license plates unquestionably contain some government speech (e.g., the name of the State and the numbers and/or letters identifying the vehicle), the State of Texas has converted the remaining space on its specialty plates into little mobile billboards on which motorists can display their own messages. And what Texas did here was to reject one of the messages that members of a private group wanted to post on some of these little billboards because the State thought that many of its citizens would find the message offensive. That is blatant viewpoint discrimination.

If the State can do this with its little mobile billboards, could it do the same with big, stationary billboards? Suppose that a State erected electronic billboards along its highways. Suppose that the State posted some government messages on these billboards and then, to raise money, allowed private entities and individuals to purchase the right to post their own messages. And suppose that the State allowed only those messages that it liked or found not too controversial. Would that be constitutional?

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Relying almost entirely on one precedent—*Pleasant Grove City v. Summum*, the Court holds that messages that private groups succeed in placing on Texas license plates are government messages. The Court badly misunderstands *Summum*.

In *Summum*, . . . [w]e held that the monuments represented government speech, and we identified several important factors that led to this conclusion.

First, governments have long used monuments as a means of expressing a government message. . . . [L]ong experience has led the public to associate public monuments with government speech. . . . Second, there is no history of landowners allowing their property to be used by third parties as the site of large permanent monuments that do not express messages that the landowners wish to convey. . . . Third, spatial limitations played a prominent part in our analysis. . . . Because only a limited number of monuments can be built in any given space, governments do not allow their parks to be cluttered with monuments that do not serve a government purpose, a point well understood by those who visit parks and view the monuments they contain.

These characteristics, which rendered public monuments government speech in *Summum*, are not present in Texas's specialty plate program.

I begin with history. . . . After the beginning of motor vehicle registration in 1917, more than 70 years passed before the proliferation of specialty plates in Texas. It was not until the 1990's that motorists were allowed to choose from among 10 messages, such as “Read to Succeed” and “Keep Texas Beautiful.” History at 101.

Up to this point, the words on the Texas plates can be considered government speech. The messages were created by the State, and they plausibly promoted state programs. But when, at some point within the last 20 years or so, the State began to allow private entities to secure plates conveying their own messages, Texas crossed the line.

The contrast between the history of public monuments, which have been used to convey government messages for centuries, and the Texas license plate program could not be starker.

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The Texas specialty plate program also does not exhibit the “selective receptivity” present in *Summum*. To the contrary, Texas's program is not selective by design. The Board's chairman, who is charged with approving designs, explained that the program's purpose is “to encourage private plates” in order to “generate additional revenue for the state.” . . . Texas does not take care to approve only those proposed plates that convey messages that the State supports. Instead, it proclaims that it is open to all private messages—except those, like the SCV plate, that would offend some who viewed them.

The Court believes that messages on privately created plates are government speech because motorists want a seal of state approval for their messages and therefore prefer plates over bumper stickers. This is dangerous reasoning. There is a big difference between government speech (that is, speech by the government in furtherance of its programs) and governmental blessing (or condemnation) of private speech. Many private speakers in a forum would welcome a sign of government approval. But in the realm of private speech, government regulation may not favor one viewpoint over another.

A final factor that was important in *Summum* was space. A park can accommodate only so many permanent monuments. Often large and made of stone, monuments can last for centuries and are difficult to move. License plates, on the other hand, are small, light, mobile, and designed to last for only a relatively brief time. The only absolute limit on the number of specialty plates that a State could issue is the number of registered vehicles. The variety of available plates is limitless, too. Today Texas offers more than 350 varieties. In 10 years, might it be 3,500?

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Texas has space available on millions of little mobile billboards. And Texas, in effect, sells that space to those who wish to use it to express a personal message—provided only that the message does not express a viewpoint that the State finds unacceptable. That is not government speech; it is the regulation of private speech.

What Texas has done by selling space on its license plates is to create what we have called a limited public forum. It has allowed state property (i.e., motor vehicle license plates) to be used by private speakers according to rules that the State prescribes. . . . Under the First Amendment, however, those rules cannot discriminate on the basis of viewpoint. But that is exactly what Texas did here. The Board rejected Texas SCV's design, “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.” These statements indisputably demonstrate that the Board denied Texas SCV's design because of its viewpoint.

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Messages that are proposed by private parties and placed on Texas specialty plates are private speech, not government speech. Texas cannot forbid private speech based on its viewpoint. That is what it did here. Because the Court approves this violation of the First Amendment, I respectfully dissent.