NO. 22-1282

In The

United States Court Of Appeals
For The Fourth Circuit

NORTH CAROLINA DIVISION OF SONS OF CONFEDERATE VETERANS, INC.,

Plaintiff – Appellant,

v.

NORTH CAROLINA DEPARTMENT OF TRANSPORTATION; J. ERIC BOYETTE, in his official capacity as Secretary of Transportation of the State of North Carolina; NORTH CAROLINA DIVISION OF MOTOR VEHICLES; TORRE JESSUP, in his official capacity as Commissioner of Motor Vehicles of the State of North Carolina,

Defendants – Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF NORTH CAROLINA AT GREENSBORO

BRIEF OF APPELLANT

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UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

DISCLOSURE STATEMENT

- In civil, agency, bankruptcy, and mandamus cases, a disclosure statement must be filed by **all** parties, with the following exceptions: (1) the United States is not required to file a disclosure statement; (2) an indigent party is not required to file a disclosure statement; and (3) a state or local government is not required to file a disclosure statement in pro se cases. (All parties to the action in the district court are considered parties to a mandamus case.)
- In criminal and post-conviction cases, a corporate defendant must file a disclosure statement.
- In criminal cases, the United States must file a disclosure statement if there was an organizational victim of the alleged criminal activity. (See question 7.)
- Any corporate amicus curiae must file a disclosure statement.
- Counsel has a continuing duty to update the disclosure statement.

No. 22-1282 Caption: NC Division of Sons of Confederate Veterans v. NCDOT

Pursuant to FRAP 26.1 and Local Rule 26.1,

NC Division of Sons of Confederate Veterans
(name of party/amicus)

who is appellant, makes the following disclosure:
(appellant/appellee/petitioner/respondent/amicus/intervenor)

1. Is party/amicus a publicly held corporation or other publicly held entity? ☐YES ☑NO

2. Does party/amicus have any parent corporations? ☐YES ☑NO
If yes, identify all parent corporations, including all generations of parent corporations:

3. Is 10% or more of the stock of a party/amicus owned by a publicly held corporation or other publicly held entity? ☐YES ☑NO
If yes, identify all such owners:

4. Is there any other publicly held corporation or other publicly held entity that has a direct financial interest in the outcome of the litigation? ☐YES ☑NO
If yes, identify entity and nature of interest:

5. Is party a trade association? (amici curiae do not complete this question) ☐YES ☑NO
If yes, identify any publicly held member whose stock or equity value could be affected substantially by the outcome of the proceeding or whose claims the trade association is pursuing in a representative capacity, or state that there is no such member:

6. Does this case arise out of a bankruptcy proceeding? ☐YES ☑NO
If yes, the debtor, the trustee, or the appellant (if neither the debtor nor the trustee is a party) must list (1) the members of any creditors' committee, (2) each debtor (if not in the caption), and (3) if a debtor is a corporation, the parent corporation and any publicly held corporation that owns 10% or more of the stock of the debtor.

7. Is this a criminal case in which there was an organizational victim? ☐YES ☑NO
If yes, the United States, absent good cause shown, must list (1) each organizational victim of the criminal activity and (2) if an organizational victim is a corporation, the parent corporation and any publicly held corporation that owns 10% or more of the stock of victim, to the extent that information can be obtained through due diligence.

Signature: J Wil Date: 4-30-22

Counsel for: Appellant

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STATEMENT OF SUBJECT MATTER AND APPELLATE JURISDICTION

This is an action brought for a declaratory judgment pursuant to the provisions of G.S. § 1-253, for preliminary and permanent injunction, and for relief pursuant to the provisions of 42 U.S.C. § 1983.

The proceeding was initially filed in the Superior Court of Lee County, North Carolina on March 8, 2021. (App pp 15) Defendants were served with the Summons and Complaint on March 10, 2020. (App p 12) On April 8, 2021, Defendants filed a Notice of Removal, and the proceeding was removed to the United States District Court for the Middle District of North Carolina pursuant to the provisions of 28 U.S.C. §§ 1331, 1367, 1441, and 1446. (App pp 7-14)

On March 1, 2022, the Honorable William L. Osteen, Jr., United States District Court Judge for the Middle District of North Carolina issued a memorandum opinion granting Defendants' motion and dismissing Plaintiff's complaint. (App pp 83-111) Plaintiff gave notice of appeal in a timely manner from such decision on March 11, 2022. (App pp 112-114) On April 8, 2022, the district court filed a formal judgment dismissing the proceeding. (App p 115)

This Court has jurisdiction over this appeal pursuant to 28 U.S.C. § 1291 because the March 1, 2022 opinion and the April 8, 2022 order constitute final orders dismissing the proceeding in its entirety.

STATEMENT OF ISSUES PRESENTED FOR REVIEW

This appeal presents the single issue of whether the district court properly concluded that Plaintiff's complaint failed to state a claim upon which relief could be given thereby dismissing the complaint.

STATEMENT OF THE CASE

Plaintiff's complaint alleges that:

Plaintiff is a nonprofit fraternal organization which is organized and existing for the purpose of honoring and remembering the sacrifices made by those who served in the armed forces of the Confederate States of America during the American Civil War. SCV is a non-profit organization that works diligently to preserve the memory and reputation of the Confederate soldiers, emphasizing the virtues of their fight for the preservation of liberty and freedom. The organization, through its state affiliates, known as "divisions," and its local affiliates, known as "camps," provides a service to communities through preservation of monuments, flags, and other historical materials, as well as through educational activities and other civic activities. (App pp 31-32)

The SCV was originally organized at Richmond, Virginia in 1896 with a mission to honor and protect the legacy of those who had fought for the Confederacy. The membership is open to all male descendants of Confederate veterans who served honorably without regard to ethnicity, race, or religious creed whose ancestors fought for the Confederacy. (App pp 31-32)

The constitution of the SCV provides that the organization "shall be strictly patriotic, historical, educational, benevolent, non-political, non-racial and non-sectarian." The constitution of the SCV further states that the purposes of the organization, among others, is "[a]n unquestioned allegiance to the Constitution of the United States of America ...; to associate in one united, compact body all men of Confederate ancestry and to cultivate, perpetuate and sanctify the ties of fraternity and friendship entailed thereby; to aid and encourage the recording and teaching with impartiality of all Southern history and achievement ..., seeing to it especially that the events of the War Between the States are authentically and clearly written…." (App p 32) The SCV was not created out of hate and is nonpolitical, so it does not endorse politicians or political parties. The SCV has consistently resisted and opposed use of the Confederate Battle Flag by individuals and organizations pursuing political agendas or seeking to discriminate against individuals or groups.

The organization raises and donates money for the conservation and preservation of Confederate flags and records; identifies preserves and marks the graves of Confederate veterans; preserves memorials to veterans and Confederate units; supports museums; preserves battlefields threatened by development; and educates children and adults about the life of the Confederate soldier. (*Id.*) The SCV serves as a historical, patriotic, and non-political organization dedicated to insuring that the history of the period from 1861-1865 is preserved.

The status of Plaintiff SCV as a nationally recognized civic organization is objectively documented in the following particulars:

A. Plaintiff SCV has tax-exempt status under Section 501(c) (3) of the Internal Revenue Code of 1986 as a civic league or organization from the Internal Revenue Service, as well as under the provisions of Chapter 105 of the North Carolina General Statutes from the North Carolina Department of Revenue.

B. Plaintiff SCV has obtained a registered trademark (service mark) of its insignia from the United States Office of Patents and Trademarks.

C. Plaintiff SCV is in full compliance with all statutes and regulations applicable to non-profit entities in the State of North Carolina.

(App p 33)

North Carolina motorists are required to display valid license plates while traveling on the state's public roads. G.S. § 20-63 (2020). Specialty license plates are available for those motorists who wish to display a particular interest or affinity group, with each plate containing the word "North Carolina," a license plate number, and one of a selection of designs approved by the State. G. S. § 20-79.4(a3)(2020). One category of specialty plate that has been authorized by the state legislature is "civic club" plates. G.S. § 20-79.4(b)(44)(2020). If a civic club wants the DMV to issue a specialty plate for its club, it must gather 300 signatures from members, provide proof of nonprofit status, and submit a draft design of the proposed plate "bear[ing] a word or phrase identifying the civic club and the emblem of the civic club" for review and approval by DMV.

At all times relevant to the allegations of this complaint, members of Plaintiff SCV were eligible to be issued special commemorative license plates identifying them as members of the Plaintiff SCV pursuant to duly accepted applications for the same under the provisions of G.S. § 20-79.3a. Such special commemorative license plates bear the insignia of Plaintiff SCV which is a representation of the Confederate Battle Flag flanked on the left, top, and right sides by the words "SONS OF CONFEDERATE VETERANS," and on the bottom side by the year "1896." Although the Confederate Battle Flag was not used as the national Confederate flag, it was employed as the battle flag under which Confederate soldiers, including those from North Carolina, fought in multiple battles.

At all times relevant to the allegations of this complaint, members of Plaintiff SCV have held and renewed special commemorative license plates identifying them as members of the SCV pursuant to a duly accepted application for the same under the provisions of G.S. § 20-79.3a.

On or about January 11, 2021, Defendant DMV issued a letter in which it stated that it would no longer issue or renew special commemorative license plates bearing the Confederate battle flag, which is contained in the trademarked insignia of Plaintiff SCV. (App pp 44-45) A copy of such letter was appended to the complaint as Exhibit B.

SUMMARY OF THE ARGUMENT

Plaintiff contends that the district court erred in dismissing its complaint for failure to state a claim upon which relief could be granted in that the pleading raised a right to relief which was beyond mere speculation; and that the district court erred in summarily dismissing Plaintiff's pendent state law claim without discussion.

ARGUMENT

STANDARD OF REVIEW

The Fourth Circuit applies a de novo standard of review for appeals of orders granting motions to dismiss for failure to state a claim upon which relief could be granted. *E.g.*, *Benjamin v. Sparks*, 986 F.3d 332 (4th Cir. 2021).

In considering a Rule 12(b)(6) motion, the appellate court must accept as true all well-pleaded allegations, and it should view the complaint in a light most favorable to the plaintiff. *E.g.*, *Bonds v. Leavitt*, 629 F.3d 369, 385 (4th Cir. 2011). The factual allegations set forth in the complaint must be specific enough to raise a right to relief on behalf of the plaintiff beyond mere speculation. *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007). Once a claim has been stated adequately, the claim may be supported by showing any set of facts consistent with the allegations in the complaint. *Id.* at 563.

A complaint attacked by a Rule 12(b)(6) motion to dismiss will survive if it contains "enough facts to state a claim to relief that is plausible on its face." *Ashcroft*

v. Iqbal, 556 U.S. 662 (2009); *Walker v. Prince George's County, MD*, 575 F.3d 426 (4th Cir. 2009). A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged. *Ashcroft v. Iqbal, supra* at 678; *Nemet Chevrolet, Ltd. v. Consumeraffairs.com, Inc.*, 591 F.3d 250 (4th Cir. 2009). Once a claim for relief has been stated, a plaintiff "receives the benefit of imagination, so long as the hypotheses are consistent with the complaint" *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957); *accord, Swierkiewicz v. Sorema N. A.*, 534 U.S. 506 (2002); *compare Francis v. Giacomelli*, 588 F.3d 186 (4th Cir. 2009).

DISCUSSION

I. THE DISTRICT COURT ERRED IN DISMISSING PLAINTIFF'S COMPLAINT ON THE GROUND THAT THE SAME PLAUSIBLY STATED A FACTUAL BASIS FOR THE AWARD OF RELIEF.

A. *The North Carolina statutory scheme constitutes the articulated public policy of North Carolina to which the district court was obligated to defer.*

North Carolina's specialty license plate program is entirely a creature of statute, and, as a statutory program, it is a clear and unequivocal expression of the public policy of the State of North Carolina as articulated by the General Assembly. *In re Hatley,* 291 N.C. 693 231 S.E.2d 633 (1977); *Town of Newton v. State Highway Commission of North Carolina,* 192 N.C. 54 133 S.E. 522 (1926). Such an expression of public policy is entitled to due deference absent a clear and compelling

basis for proceeding otherwise. As a declaration of public policy, the statutory scheme amounts to a legislative determination of speech to be expressed on the part of the State of North Carolina.

G. S. § 20-79.4 provides, in pertinent part, that:

> (b) Types.--*The Division shall issue the following types of special registration plates*:
>
> > (44) Civic Club.--Issuable to a member of a nationally recognized civic organization whose member clubs in the State are exempt from State corporate income tax under G.S. 105-130.11(a)(5).

(emphasis added) The plain language of the statute requires no interpretation. The statute requires the Division of Motor Vehicles to issue a special registration plate to a member of a nationally recognized civic organization whose member clubs in North Carolina are exempt from State corporate income tax under G.S. 105-130.11(a)(5) and which bear a word or phrase identifying the civic club and the emblem of the civic club. If those three specific elements exist as to the organization in question, its members are entitled to a special registration plate which identifies the individual as a member of that specific organization.

G.S. § 20-79.4(a3) provides as follows:

> The Division shall develop, in consultation with the State Highway Patrol and the Division of Adult Correction and Juvenile Justice, a standardized format for special license plates. The format shall allow for the name of the State and the license plate number to be reflective and to contrast with the background so it may be easily read by the human eye and by cameras installed along roadways as part of tolling

> and speed enforcement. A designated segment of the plate shall be set aside for unique design representing various groups and interests. Nothing in this subsection shall be construed to require the recall of existing special license plates.[1]

The foregoing statute sets forth only two requirements for the format of a special license plate which must be met in order for a qualifying organization to have a special plate available to its members: (1) the name of the State and the license plate number must be reflective and contrast with the background so that it might be easily read by the human eye and by cameras installed along roadways for tolling and speed enforcement; and (2) a designated segment of the plate is to be set aside for the unique design representing the group or interest in question. The statute affords Defendants no discretion whatsoever in the design of the special plate or its

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[1] The North Carolina statute should be contrasted with that of the State of Texas, which provides under Section 504.801 (c) of the Texas Transportation Code:

> The department shall design each new specialty license plate in consultation with the sponsor, if any, that applied for creation of that specialty license plate. ***The department may refuse to create a new specialty license plate if the design might be offensive to any member of the public, if the nominated state agency does not consent to receipt of the funds derived from issuance of the license plate, if the uses identified for those funds might violate a statute or constitutional provision, or for any other reason established by rule.*** At the request of the sponsor, distribution of the license plate may be limited by the department. (emphasis added)

The Texas statute specifically contemplates that the state may choose which license plates it will permit to be displayed and those which it will not allow. This express reservation of discretion is to be contrasted with that of North Carolina's statutory scheme in which an objectively qualified civic organization is entitled to a special plate provided that it is ordered in a sufficient quantity and its design does not obstruct the readability of the name of the state and the license plate number itself.

content if these two statutory requirements are met; nor does the statute give Defendants any authority or discretion pertaining to the speech articulated on a specialty license plate issued to a civic club. Defendants are not authorized in any manner to regulate the design of the specialty license plate or the speech which it employs.

The action of Defendants as articulated in the letter of January 11, 2021, as upheld by the district court's ruling, is contrary to established authority as interpreted by the North Carolina courts because the provisions of the controlling North Carolina statutes do not allow DMV to exercise any discretion pertaining to the design of a commemorative license plate for a qualifying civic club. A core component of Plaintiff' SCV's mission is the dissemination of information pertaining to the South, the Confederate States of America, and those persons who served in the armed forces of the Confederacy. Indeed, the right of Plaintiff's members to purchase and display the special license plate is a settled question under North Carolina state law. In fact, the letter of January 11, 2021 cannot be considered as an articulation of the public policy of North Carolina because the General Assembly, by enacting the statutory framework for the special license plate program, has determined and settled the question of the State's public policy in this specific regard. *Amos v. Oakdale Knitting Co.*, 331 N.C. 348, 353, 416 S.E.2d 166, 169 (1992) ("Although the definition of 'public policy' approved by this Court does not include a laundry list of what is or is

not 'injurious to the public or against the public good,' at the very least public policy is violated when an employee is fired in contravention of express policy declarations contained in the North Carolina General Statutes.").

The provisions of Chapter 20 of the North Carolina General Statutes pertaining to the issuance of special license plates constitute a clear and unequivocal expression of the public policy of the State of North Carolina by its General Assembly which necessarily governs the conduct of subordinate administrative agencies and departments. The expression of public policy amounts to a declaration of speech to be articulated on behalf of the State of North Carolina and its constituent agencies and departments. That articulation was recognized and applied by the North Carolina Court of Appeals in the case of *North Carolina Division of Sons of Confederate Veterans v. Faulkner*, 131 N.C. App. 775, 509 S.E.2d 207 (1998).

In *Faulkner*, after receiving tax-exempt status as a "[c]ivic league[ ] or organization[ ]" from the North Carolina Department of Revenue, Plaintiff applied to the Division of Motor Vehicles for special registration license plates bearing its emblem. The Commissioner denied SCV–NCD's request, based on her conclusion that SCV "does not meet the statutory criteria for a civic club." Plaintiff appealed this decision to Wake County Superior Court, and, the trial court, after finding that Plaintiff met the criteria set forth by the General Assembly in G.S. § 20–79.4(b)(5), ordered the Division of Motor Vehicles to issue special registration plates to Plaintiff

upon its presentation to at least 300 applications. The Commissioner of Motor Vehicles appealed to the North Carolina Court of Appeals, which affirmed the judgment of the trial court.

The court recognized that SCV also sponsors charitable and benevolent activities within the community by noting that SCV, whose members are "[l]ineal and collateral descendants of Confederate Civil War veterans," engages in "historical and benevolent activities." The record revealed that SCV has divisions in twenty-four states, organized camps in foreign countries, and members in a majority of states in the United States. Although the court declined to impose an arbitrary number of members or states in which an organization is active to show that it is "nationally recognized," it observed that it is evidence of national recognition that an organization has ties to a majority of the states. The panel held that the evidence was sufficient to show that SCV is of a similar character as the qualifying organizations enumerated within section G.S. § 20–79.4(b)(5), and that it is a "nationally recognized civic organization" as that phrase is used in G.S. § 20–79.4(b)(5). As a result, the panel concluded that, as SCV–NCD met the four criteria enumerated in G.S. § 20–79.4(b)(5). In a footnote to the majority opinion, Judge Greene stated:

> SCV's emblem strikingly resembles the Confederate flag. We are aware of the sensitivity of many of our citizens to the display of the Confederate flag. *Whether the display of the Confederate flag on state-issued license plates represents sound public policy is not an issue*

> *presented to this Court in this case. That is an issue for our General Assembly. We are presented only with the issue of whether SCV–NCD has complied with the language of section 20–79.4(b)(5) and note that allowing some organizations which fall within section 20–79.4(b)(5)'s criteria to obtain personalized plates while disallowing others equally within the criteria could implicate the First Amendment's restriction against content-based restraints on free speech.*

131 N.C. App. at 777, 509 S.E.2d 209 (emphasis added).

The present case originated in the Superior Court of Lee County, North Carolina; it was removed from state court by Defendants to the United States District Court for the Middle District of North Carolina. Plaintiff's claim for a declaratory judgment concerning the lawfulness of Defendants' conduct, as articulated in the letter of January 11, 2020, directly implicated questions of statutory interpretation as set forth in *Faulkner*. The North Carolina Court of Appeals has neither overruled nor circumscribed the square holdings of *Faulkner*: (1) that Plaintiff and its membership qualify for purchasing a special license plate; (2) that the only restriction on a special license plate for a qualifying organization is that its design must not impair the visibility of the name of the state and the license plate number; and (3) that the availability of a license plate to a qualifying organization which displays a Confederate flag is a question of public policy to be determined by the state's General Assembly. A cursory examination of the North Carolina General Statutes will establish that the General Assembly has not amended or otherwise modified the statutory scheme establishing the special license plate program in any

manner since the *Faulkner* decision. Therefore, the articulated public policy of the State of North Carolina pertaining to the special license plate program remains unchanged since the *Faulkner* decision, and the district court was without jurisdiction to change that state public policy.

But for the Federal constitutional question raised in Plaintiff's complaint, this case could not have been removed to the district court. While the district court must apply Federal law to any claims arising under the United States Constitution or Federal statutes in any case removed from state court, *see United Mine Workers of America v. Gibbs*, 383 U.S. 715 (1966), to the extent that there is supplemental jurisdiction to hear pendant claims arising under state law, the district court must hear and decide such claims under the substantive law of the state. *Liberty Mut. Ins. Co. v. Triangle Indus., Inc.*, 957 F.2d 1153, 1156 (4th Cir. 1992); *Mason and Dixon Intermodal, Inc. v. Lapmaster International, LLC*, 632 F.3d 1056 (9th Cir. 2011); *Barton v. Clancy*, 632 F.3d 9 (1st Cir. 2011); *see also Gasperini v. Cntr. For Humanities, Inc.*, 518 U.S. 415 (1996); *United Mine Workers of Am. v. Gibbs*, 383 U.S. 715, 726 (1966) (holding that federal courts are "bound to apply state law" to pendant claims).

While the district court had jurisdiction to evaluate and decide any First Amendment issue arising under *Federal* law, it had no power to ignore North Carolina law which constituted controlling authority. The district court, sitting in

supplemental jurisdiction, had "a duty to apply the operative state law as would the highest court of the state in which the suit was brought." *Liberty Mut. Ins. Co. v. Triangle Indus., Inc.*, *supra*. If a state's highest court has not addressed an issue, then a "state's intermediate appellate court decisions constitute the next best indicia of what state law is although such decisions may be disregarded if the federal court is convinced by other persuasive data that the highest court of the state would decide otherwise." *Id.*

While the district court addressed *Faulkner* in the context of its First Amendment discussion, it ignored the fact that the decision of the North Carolina Court of Appeals constituted the best indicia of what the law of North Carolina is as it pertains to the construction of the special license plate statutory program and its expression as the articulated public policy of the state. The district court did not have the authority to ignore controlling North Carolina case law in a blatant usurpation of judicial power contrary to the provisions of Article III and the well-established contours of *Erie Railroad Co. v. Tompkins,* 304 U.S. 64 (1938). When faced with both a constitutional question and a statutory question, and where resolution of the statutory question may moot the constitutional question, courts should first consider the statutory question, and then, if necessary, decide the constitutional question. *See United States v. Sec. Indus. Bank,* 459 U.S. 70, 78 (1982) ("We consider the statutory question because of the cardinal principle that this Court will first ascertain whether

a construction of the statute is fairly possible by which the constitutional question may be avoided."); *compare McCorkle v. United States*, 559 F.2d 1258 (4th Cir. 1977).

When statutory language is susceptible of multiple interpretations, "a court may shun an interpretation that raises serious constitutional doubts and instead may adopt an alternative that avoids those problems." *Jennings v. Rodriguez*, 138 S. Ct. 830, 836 (2018) (discussing canon of constitutional avoidance). The canon of constitutional avoidance counsels that, "when deciding which of two plausible statutory constructions to adopt, a court must consider the necessary consequences of its choice. If one of them would raise a multitude of constitutional problems, the other should prevail . . . ." *See Clark v. Martinez*, 543 U.S. 371, 381-82 (2005).

B. The North Carolina statutory scheme constitutes the articulated government speech of the State of North Carolina to which the district court was obligated to defer.

While the district court correctly recognized the governmental speech doctrine, it incorrectly interpreted it, leading the court to misapply it to the present case.[2]

[2] Plaintiff contends that it was unnecessary for the district court to reach the constitutional question given the comprehensive nature of the North Carolina statutory framework and the manner in which it had been interpreted by *Faulkner*. Even so, Plaintiff does not wish to leave the district court's analysis of *Walker* unchallenged.

Government entities have the right to express their own speech and that such entities are entitled to choose the views which they wish to express. *Pleasant Grove City, Utah v. Summum*, 555 U.S. 460 (2009). Through the government-speech doctrine, a government entity has the right to speak for itself and may choose the views it wants to express. *Id.* at 467–68, 129 S.Ct. at 1131. ("[T]he Government's own speech ... is exempt from First Amendment scrutiny"); *Columbia Broadcasting System, Inc. v. Democratic National Committee*, 412 U.S. 94, 139, n. 7 (1973) (Stewart, J., concurring) ("Government is not restrained by the First Amendment from controlling its own expression"). A government entity has the right to "speak for itself." *Board of Regents of Univ. of Wis. System v. Southworth*, 529 U.S. 217, 229 (2000). "[I]t is entitled to say what it wishes," *Rosenberger v. Rector and Visitors of Univ. of Va.*, 515 U.S. 819, 833 (1995), and to select the views that it wants to express, *see Rust v. Sullivan*, 500 U.S. 173, 194 (1991); *National Endowment for Arts v. Finley*, 524 U.S. 569, 598 (1998) (Scalia, J., concurring in judgment) ("It is the very business of government to favor and disfavor points of view").

By purchasing the special registration plates, members of Plaintiff SCV are exercising their First Amendment right of free speech in a manner specifically authorized by the applicable laws of the State of North Carolina and in a manner consistent with the articulation of government speech by the statutory scheme

enacted by the North Carolina General Assembly. Defendants' attempt to bring this case within the purview of *Walker v. Texas Div., Sons of Confederate Veterans, Inc.*, 576 U.S. 200 (2015), necessarily fails because the district court misconstrued *Walker* as it was interpreted and applied in *Shurtleff v. City of Boston*, 2022 WL 1295700 (2022)

In *Walker*, the Supreme Court considered a free speech claim brought by the Texas Division of the Sons of Confederate Veterans, challenging Texas' decision to reject SCV's request for the state to issue a specialty license plate displaying the organization's name and a depiction of a confederate flag. *Walker*, 576 U.S. at 203-04. *Walker* is authoritative on the facts presented in that case, but it does not control the outcome of present case because of significant factual and legal distinctions.

The Texas State Motor Vehicles Board may approve a specialty plate design proposal that a state-designated private vendor has created at the request of an individual or organization. *See* §§ 504.6011(a), 504.851(a); 43 Tex. Admin. Code § 217.52(b). The Board may also "create new specialty license plates on its own initiative or on receipt of an application from a" nonprofit entity seeking to sponsor a specialty plate. Tex. Transp. Code Ann. §§ 504.801(a), (b). A nonprofit must include in its application "a draft design of the specialty license plate." 43 Tex. Admin. Code § 217.45(i)(2)(C). Texas law specifically vests in the Board authority to approve or to disapprove an application. See § 217.45(i)(7). The relevant statute

says that the Board "may refuse to create a new specialty license plate" for a number of reasons, for example "if the design might be offensive to any member of the public ... or for any other reason established by rule." Tex. Transp. Code Ann. § 504.801(c).

The statutory scheme considered in *Walker* is permeated with discretion. The Texas statutory scheme specifically provides that final authority over the design and content of specialty license plates, other than those specifically authorized by the Texas legislature, rests with the Board. The North Carolina approach, with regard to civic organizations, does not provide Defendants with any discretion provided that the design complies with the requirements of the governing statute. If the civic group meets the statutory definition as interpreted in *Faulkner*, it is entitled to a specialty plate bearing its name and insignia provided that its name and insignia do not obstruct the license plate number or render it unreadable as defined in the statute. By denying discretion in the statutory process for issuing specialty plates, North Carolina has chosen, as a matter of public policy, to impose a firm limit on Defendants' ability to restrict qualifying organizations from obtaining specialty license plates.

North Carolina's statutory scheme for special license plates necessarily implicates *Walker* as that case was interpreted and applied in *Shurtleff v. City of Boston*, *supra*. The question presented in *Shurtleff v. City of Boston* was whether the

City of Boston could constitutionally restrict access to a flagpole at city hall which had traditionally been available for private groups to display and honor their own standards. Speaking for a unanimous court, Justice Breyer observed:

> The First Amendment's Free Speech Clause does not prevent the government from declining to express a view. *See Pleasant Grove City v. Summum*, 555 U.S. 460, 467–469, 129 S.Ct. 1125, 172 L.Ed.2d 853 (2009). When the government wishes to state an opinion, to speak for the community, to formulate policies, or to implement programs, it naturally chooses what to say and what not to say. *See Walker*, 576 U.S. at 207–208, 135 S.Ct. 2239. That must be true for government to work. Boston could not easily congratulate the Red Sox on a victory were the city powerless to decline to simultaneously transmit the views of disappointed Yankees fans. The Constitution therefore relies first and foremost on the ballot box, not on rules against viewpoint discrimination, to check the government when it speaks. *See Board of Regents of Univ. of Wis. System v. Southworth*, 529 U.S. 217, 235, 120 S.Ct. 1346, 146 L.Ed.2d 193 (2000).
>
> *The boundary between government speech and private expression can blur when, as here, a government invites the people to participate in a program. In those situations, when does government-public engagement transmit the government's own message? And when does it instead create a forum for the expression of private speakers' views?*
>
> In answering these questions, we conduct a holistic inquiry designed to determine whether the government intends to speak for itself or to regulate private expression. Our review is not mechanical; it is driven by a case's context rather than the rote application of rigid factors. Our past cases have looked to several types of evidence to guide the analysis, including: the history of the expression at issue; the public's likely perception as to who (the government or a private person) is speaking; and the extent to which the government has actively shaped or controlled the expression. *See Walker*, 576 U.S. at 209–214, 135 S.Ct. 2239.

> Considering these indicia in *Summum*, we held that the messages of permanent monuments in a public park constituted government speech, even when the monuments were privately funded and donated. See 555 U.S. at 470–473, 129 S.Ct. 1125. In *Walker*, we explained that license plate designs proposed by private groups also amounted to government speech because, among other reasons, the State that issued the plates "maintain[ed] direct control over the messages conveyed" by "actively" reviewing designs and rejecting over a dozen proposals. 576 U.S. at 213, 135 S.Ct. 2239. In *Matal v. Tam*, 582 U. S. ——, 137 S.Ct. 1744, 198 L.Ed.2d 366 (2017), on the other hand, we concluded that trademarking words or symbols generated by private registrants did not amount to government speech. *Id.*, at —— – ——, 137 S.Ct., at 1758-1761. Though the Patent and Trademark Office had to approve each proposed mark, it did not exercise sufficient control over the nature and content of those marks to convey a governmental message in so doing. Ibid. These precedents point our way today.

142 S.Ct. at 1589-1590 (emphasis added).

Shurtleff rejected a rote application of a formula to the question of whether the government speech doctrine applies in a given case under *Walker*. Instead, it looks to a consideration of a variety of factors. In particular, in *Walker*, the statutory framework permitted the State of Texas maintain direct control over the messages conveyed by "actively" reviewing designs and rejecting over a dozen proposals. However, in North Carolina, the enabling statutes do not permit the exercise of such discretion. If an organization qualifies under the applicable statutes as interpreted in *Faulkner*, the DMV has discretion limited to the sole question of whether the proposed design interferes with the readability of the name of the state and the license plate number. Therefore, the content of the special license plates is generated not by the State of North Carolina but by the organization which has qualified for

the special license plate in the first place. *Compare Matal v. Tam, supra* at 1758-1761.

Even if the court were to analyze this case under the public forum doctrine, which Plaintiff-Appellant believes is unnecessary, the controlling authority favors reversing the district court.

A government entity may create a forum that is limited to use by certain groups or dedicated solely to the discussion of certain subjects provided that any restrictions on speech are reasonable and viewpoint neutral. *See Good News Club v. Milford Central School*, 533 U.S. 98, 106–107, 121 S.Ct. 2093, 150 L.Ed.2d 151 (2001). North Carolina's statutory requirements for specialty license plates requiring that the design utilized by a civic club does not obstruct the name of the state and the license plate number or otherwise impair its readability are reasonable and content neutral. Speech can be mixed in that it is "neither purely government speech nor purely private speech, but a mixture of the two." *Planned Parenthood of S.C. Inc. v. Rose*, 361 F.3d 786, 789 (4th Cir.2004). In deciding whether speech is private, government, or mixed, the Fourth Circuit court has looked to the purpose of the program in which the speech has occurred and the identity of the literal speaker. *Id.* at 793; *Sons of Confederate Veterans, Inc. v. Comm'r of Va. Dep't of Motor Vehicles*, 305 F.3d 241, 245–46 (4th Cir.2002*); Sons of Confederate Veterans, Inc. v. Comm'r of Va. Dep't of Motor Vehicles*, 288 F.3d 610, 618 (4th Cir.2002). In the context of

several states' specialty license plate programs, the Fourth Circuit has held that the instructive factors indicated mixed speech but tipped in favor of private speech interests so as to prohibit viewpoint discrimination. *Id.*

It is axiomatic that the government may not regulate speech based on its substantive content or the message it conveys. *Police Dept. of Chicago v. Mosley*, 408 U.S. 92, 96 (1972). In the realm of private speech or expression, government regulation may not favor one speaker over another. *Members of City Council of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789, 804 (1984). Discrimination against speech because of the content of its message is presumed to be unconstitutional. *See Turner Broadcasting System, Inc. v. FCC*, 512 U.S. 622, 641–643 (1994). These rules have historically informed the court's determination that government offends the First Amendment when it imposes burdens on certain speakers based on the content of their expression. *Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd.*, 502 U.S. 105, 115 (1991). When the government targets not subject matter, but particular views taken by speakers on a subject, the violation of the First Amendment is all the more blatant. *See R.A.V. v. St. Paul*, 505 U.S. 377, 391 (1992). The government must abstain from regulating speech when the specific motivating ideology, the opinion, or perspective of the speaker is the rationale for the restriction. *See Perry Ed. Assn. v. Perry Local Educators' Assn.*, 460 U.S. 37, 46 (1983).

When the government excludes from areas within its own control private speech protected by the First Amendment, precedent requires a forum analysis for assessing the constitutionality of the speech restriction. *Minn. Voters All. v. Mansky*, 138 S. Ct. 1876, 1885 (2018). "The forum doctrine has been applied in situations in which government-owned property or a government program was capable of accommodating a large number of public speakers without defeating the essential function of the land or the program." *Summum*, 555 U.S. at 478. The Supreme Court historically has used the forum analysis "as a means of determining when the Government's interest in limiting the use of its property to its intended purpose outweighs the interest of those wishing to use the property for other purposes." *Cornelius v. NAACP Legal Def. & Educ. Fund, Inc.*, 473 U.S. 788, 800-801 (1985). Under the forum doctrine, a court "must identify the nature of the forum, because the extent to which the Government may limit access depends on whether the forum is public or nonpublic." *Cornelius*, 473 U.S. at 797. Then the court "must assess whether the justifications for exclusion from the relevant forum satisfy the requisite standard." *Id.*

Courts must be vigilant in not permitting overly expansive interpretations of the government speech doctrine to overwhelm the fundamental First Amendment principles forbidding viewpoint discrimination in public forums. *See Gerlich v. Leath*, 861 F.3d 697 (8th Cir. 2017) (A state university's regime for granting

trademark licensure for student organizations was in a limited public forum, and not an exercise in government speech.). Construing the government's decision to allow or facilitate access to public property as engaging in government speech would turn First Amendment doctrine upside down. 1 Smolla & Nimmer on Freedom of Speech § 8:1.50 (2021). The private speech of citizens does not become the public speech of the government merely because the government provides the forum in which the private speech is expressed. *Cornelius,* 473 U.S.at 811–13 (a charity drive organized by government was nonpublic forum for private speakers to solicit donations, and therefore that viewpoint discrimination was prohibited*); Latino Officers Ass'n, N.Y., Inc. v. City of N.Y.*, 196 F.3d 458, 468–69 (2d Cir. 1999) (holding that a police department's refusal to permit police affinity group to march in parades was not a form of government speech); *compare Wandering Dago, Inc. v. Destito*, 879 F.3d 20, 35 (2d Cir. 2018)("The record contains no basis for thinking that Lunch Program vendors' names, any more than the names of other organizations that receive permits to use public lands for special events, are closely identified with the government "in the public mind.")

While the State of North Carolina requires that a motor vehicle display a license plate, if the government chooses to open the license plate program to the public in such a manner that the public can select the design of the license plate for the purpose of expressing a viewpoint, the state cannot favor one viewpoint over

another provided that the organization in question qualifies under the statutory framework as it was interpreted in *Faulkner* and provided further that the design of the special plate does not impair the visibility of the name of the state or the license plate number itself.

The record shows that the state's restriction of Plaintiff's speech was content based because they intended to display the Confederate Battle Flag. "Content-based laws – those that target speech on its communicative content – are presumptively unconstitutional and may be justified only if the government proves that they are narrowly tailored to serve compelling government interests." *Reed v. Town of Gilbert*, 576 U.S. 155, 163 (2015). Strict scrutiny is "the most demanding test known to constitutional law," *City of Boerne v. Flores*, 521 U.S. 507, 534 (1997), which government restrictions rarely survive. *See Burson v. Freeman*, 504 U.S. 191, 200 (1992).

Regulation of the subject matter of messages is an objectionable form of content-based regulation." *Hill v. Colorado*, 530 U.S. 703, 721 (2000). Plaintiff's members were denied renewal of their special license plates solely because of the intention of Petitioners to recognize and commemorate Confederate veterans. This denial amounts to a content-based restriction on speech that is presumptively unconstitutional and subject to strict scrutiny. *See Reed*, 576 U.S. at 163. It is the State's burden to prove narrow tailoring under strict scrutiny. *McCullen v. Coakley*,

573 U.S. 464, 495 (2014). However, North Carolina has never argued its censorship of Plaintiff's message by denial of the renewal applications was narrowly tailored. Instead, the State has relied solely on its contention that the government speech doctrine insulated it from having its decision challenged while completely and unilaterally ignoring the controlling precedent as enunciated in *Faulkner*.

It is not enough to show that the government's ends are compelling; the means must be carefully tailored to achieve those ends." *Sable Commc'ns of Cal., Inc. v. FCC*, 492 U.S. 115, 126 (1989). "Because First Amendment freedoms need breathing space to survive, government may regulate in the area only with narrow specificity." *NAACP v. Button*, 371 U.S. 415, 433 (1963). Total prohibitions on constitutionally protected speech are substantially broader than any conceivable government interest could justify. *Bd. of Airport Comm'rs of City of LA. v. Jews for Jesus, Inc.*, 482 U.S. 569, 574 (1987).

Defendants' actions as have been alleged in the complaint have unlawfully restricted the expression of speech which is consistent with the legitimate and recognized aims and purposes of the SCV as a civic organization. Therefore, Defendants' motion to dismiss ought to have been denied.

II. PLAINTIFF HAS SUFFICIENTLY ALLEGED A CLAIM ON THE GROUNDS OF DUE PROCESS AND EQUAL PROTECTION VIOLATIONS TO AVOID DISMISSAL OF ITS COMPLAINT FOR FAILURE TO STATE A CLAIM.

Plaintiff has similarly stated claims under the Due Process or Equal Protection Clauses of the U.S. Constitution. Plaintiff cites these clauses of the Constitution in the caption for its first "claim for relief." Plaintiff's due process clearly involves the unilateral and abusive use of discretion on the part of Defendants in ignoring the plain language of the controlling North Carolina statutes as interpreted in *Faulkner*. Such actions plainly ignore the expression of public policy by the General Assembly as articulated in the statutes.

A procedural due process claim requires a plaintiff to allege a protected liberty or property interest. *See Safety-Kleen, Inc.*, 274 F.3d at 860. The manner in which Defendants have acted effectively denied Plaintiff's First Amendment right to freedom of speech as guaranteed under the First Amendment. Plaintiff's complaint articulated in great detail and with supporting exhibits the constitutionally inadequate process engaged in by Defendants which was so egregious and so outrageous that it may fairly be said to shock the contemporary conscience.

Defendants' argument that Plaintiff's due process claim fails cannot be substantiated. Plaintiff's complaint specifically identified that it had recognizable right to freedom of speech; that Defendants' conduct deprived it of this liberty; and

that Defendants' actions fell outside the bounds of legitimate government action. *Sylvia Dev. Corp. v. Calvert Cnty., Md.*, 48 F.3d 810, 827 (4th Cir. 1995). Given the bare allegations in its Complaint, Plaintiff has not asserted facts plausibly giving rise to a substantive due process claim.

Plaintiff's equal protection argument can be sustained as a matter of law. The Equal Protection Clause of the Fourteenth Amendment commands that similarly situated persons be treated alike. *See City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 439 (1985). To establish an equal protection claim, a plaintiff must demonstrate: (1) "that he has been treated differently from others with whom he is similarly situated," and (2) that the differing treatment resulted from intentional discrimination. *Morrison v. Garraghty*, 239 F.3d 648, 654 (4th Cir. 2001).

Plaintiff has alleged facts which would establish that it has been treated differently from other civic clubs because of its emblem. The letter of January 11, 2021 is sufficient to establish that Defendants have demonstrated that Plaintiff was treated less favorably than other similarly situated applicants for specialty license plates based upon unlawful discriminatory intent and improper motive because of Plaintiff's association with the Confederate Battle Flag.

CONCLUSION OF LAW

The foregoing discussion of law, Plaintiff respectfully submits that the district court erred in dismissing its complaint for failure to state a claim upon which relief could be granted, and that this case should be remanded to the district court for further proceedings.

Respectfully submitted, this 9th day of June 2022.

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