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A Test of Free Speech and Bias, Served on a Plate From Texas

By Adam Liptak

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WASHINGTON — The next great First Amendment battleground is just six inches high. It is a license plate bearing the Confederate flag.

Nine states let drivers choose specialty license plates featuring the flag and honoring the Sons of Confederate Veterans, which says it seeks to celebrate Southern heritage. But Texas refused to allow the group's plates, saying the flag was offensive.

On Monday, the Supreme Court will hear a challenge to that decision in *Walker v. Sons of Confederate Veterans*, No. 14-144, a case that considers the limits of free expression and the meaning of a charged symbol that many associate with secession and slavery.

Texas has hundreds of specialty plates. Many are for college alumni, sports fans and service organizations, but others send messages like "Choose Life," "God Bless Texas" and "Fight Terrorism."

Texas officials refused to issue this specialty plate bearing a Confederate battle flag. Supreme Court to Hear Cases on License Plates and Mentally Disabled Death Row Inmates DEC. 5, 2014

The state almost never rejects a proposed design. But the eight members of the board of its motor vehicles department deadlocked in April 2011 over whether to allow one featuring the Confederate flag. By the time the board next considered the question, in November 2011, civil rights groups had mobilized.

Nine states let drivers choose specialty license plates with the Confederate flag in honor of the Sons of Confederate Veterans.

"They bused in high school kids," recalled Granvel Block, a former commander of the heritage group's Texas division. "They had preachers. It was a circus."

Among those who spoke up against allowing the Confederate symbol was the Rev. George V. Clark, 82, an African-American minister. "It saddens me," he told the board, "that the possibility even exists that I might still be driving around the state and frequently see something that represents hate, something that has made people feel less than human."

The board then voted unanimously to reject the license plate. In the process, it weighed in on a part of Civil War history that continues to reverberate across the nation, from a fraternity at the University of Oklahoma to South Carolina's state capitol, 150 years later.

"A significant portion of the public," the board explained, "associates the Confederate flag with organizations advocating expressions of hate directed toward people or groups that is demeaning to those people or groups."

The Sons of Confederate Veterans filed a First Amendment challenge, winning in the United States Court of Appeals for the Fifth Circuit, in New Orleans. The court said Texas had discriminated against the group's view that "the Confederate flag is a symbol of sacrifice, independence and Southern heritage."

Ben Jones, a national spokesman for the group, described its mission. "It's a heritage organization," he said. "It's not a bunch of racists. It's a group that longs for reconciliation and progress, but will not forget the past."

Mr. Jones, a Democrat who served two terms in Congress representing Georgia, said the Confederate flag "represents the independent spirit of the South, no matter what race you are."

His group says it has 30,000 members and is open to "any male descendants of any veteran who served honorably in the confederate armed forces."

"There are black members, Hispanic members, Jewish members and Native American members," Mr. Jones said, adding that he could not provide numbers and doubted that such breakdowns are kept.

Mr. Jones, who three decades ago played the mechanic Cooter Davenport in the CBS television series "The Dukes of Hazzard," said that the Confederate flag had been featured without controversy on top of the General Lee, the orange Dodge Charger featured in the show's chases and stunts.

Today, the flag appears on license plates in Alabama, Georgia, Louisiana, Maryland, Mississippi, North Carolina, South Carolina, Tennessee and Virginia.

Sherrilyn Ifill, president of the NAACP Legal Defense and Educational Fund, said the Confederate flag has only one fundamental meaning. "It's a powerful symbol of the oppression of black people," she said in an interview.

Texas has mounted a vigorous defense of its decision to reject the plates. “Our fundamental right to free speech must be protected, but that right does not include compelling the state of Texas to approve any image on state-issued license plates,” said Cynthia Meyer, a spokeswoman for the state’s attorney general, Ken Paxton.

In 2011, not long before the motor vehicles department rejected the plates, Gov. Rick Perry indicated he supported such a move. “We don’t need to be scraping old wounds,” he said.

Civil liberties groups and First Amendment specialists have filed briefs in the Supreme Court supporting the Southern heritage group. The briefs acknowledge that the flag is offensive to many people.

“The Confederate battle flag was the banner for those who supported slavery and sought to break our nation apart,” a brief filed by the American Civil Liberties Union said. “It later served as a rallying sign for those seeking to maintain racial separation in all facets of life, from the voting booth to the wedding chapel.”

But censorship, the group said, was not justified.

“However reasonable this distaste for a symbol of racism,” the brief said, “the Constitution does not permit the state to discriminate against messages in a forum it has created for private speech.”

A brief from the libertarian Cato Institute, the satirist P. J. O’Rourke and three prominent advocates for free expression — Martin Garbus, Nat Hentoff and Nadine Strossen — urged the court to protect caustic speech at a time when it is under attack around the world. “It would be offensive to the First Amendment to allow Texas to tell us what is offensive,” the brief said.

Texas responded that statements on specialty license plates, which typically cost an extra \$30, are the government’s speech, not that of the car’s owner. If that is correct, the Supreme Court has said, the First Amendment largely drops out of the analysis, as the government is free to say what it likes.

Texas said it should not be required to endorse all sorts of distasteful messages.

“A state is fully within its rights to exclude swastikas, sacrilege and overt racism from state-issued license plates that bear the state’s name and imprimatur,” the state’s brief said. “Likewise, a state can exclude less pernicious but still-controversial symbols such as the Confederate battle flag.”

It said the Sons of Confederate Veterans should convey its views on bumper stickers, window decals or paint jobs.

“States that issue ‘Fight Terrorism’ specialty plates are not required to offer specialty plates with messages that praise terrorist organizations,” the state’s brief added.

Most federal appeals courts, including the Fifth Circuit in the Texas case, have ruled that specialty license plates convey private speech. The appeals court in Chicago, the Seventh Circuit, for instance, ruled that specialty plates are “mobile billboards” for “organizations and like-minded vehicle owners.”

The heritage group accused Texas of hypocrisy. It has noted that the state celebrates Confederate Heroes Day, has erected monuments to Confederate soldiers and sells miniature Confederate flags in the Texas Capitol gift shop. (The flags, the state said in response, are “replicas of the first national flag of the Confederacy, which does not contain the St. Andrew’s Cross that makes the Confederate battle flag a forceful symbol in the minds of many Americans.”)

The last time the Supreme Court considered what the First Amendment has to say about license plates was in 1977, when it ruled in *Wooley v. Maynard* that New Hampshire could not require people to display plates bearing the state’s motto, “Live Free or Die.”

That case involved the question of what the government may force people to say. *Walker v. Sons of Confederate Veterans* asks what it must allow people to say.

Mr. Jones, the heritage group’s spokesman, said he hoped the Supreme Court would resist what he described as “an intense attack on the South and any vestige of the Confederacy in that heritage.”

“It’s not popular speech that needs protecting,” he added.