GENERAL LEE SPEAKING: ARE LICENSE PLATE DESIGNS OUT OF THE STATE'S CONTROL? A CRITICAL ANALYSIS OF THE FOURTH CIRCUIT'S DECISION IN *SONS OF CONFEDERATE VETERANS, INC. V. COMM'R OF THE VA. DEPT. OF MOTOR VEHICLES*

INTRODUCTION

Whose speech is it anyway? That is the question courts have been grappling with over the recent free speech controversy involving automobile license plates. A number of specialty license plate cases have arisen recently centering on an organization called the Sons of Confederate Veterans ("SCV") and its efforts to obtain license plates with the organization's emblem, which, controversially, contains the Confederate flag.[1]

Specialty plate programs allow groups and organizations to apply for license plates that display features like the group's name, emblem, logo, or motto.[2] This leads to the question of whether the speech on special license plates is that of the government or of private individuals. More specifically, the issue involves whether or not the government is in a position to use discretion on what viewpoints it chooses to support.

This note analyzes the Fourth Circuit's decision in *Sons of Confederate Veterans, Inc. v. Commissioner of the Virginia Department of Motor Vehicles* under the view that it erred in determining that the speech contained on license plates was that of private individuals rather than the government. Part I discusses how the Specialty license plate program works, and the purpose for requiring license plates generally. Part II discusses the background case law regarding government speech, the forum analysis required if a court determines certain speech to be private, and other cases pertaining specifically to license plates. Part III summarizes the facts of the original case and on what basis the District court issued its opinion. Part IV discusses the Fourth Circuit's affirmation of the District Court's ruling as well as its denial to rehear the case en banc. Finally, Part V analyzes some

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[1] Jack Achiezer Guggenheim & Jed M. Silversmith, Note, *Confederate License Plates at the Constitutional Crossroads: Vanity Plates, Special Registration Organization Plates, Bumper Stickers, Viewpoints, Vulgarity, and the First Amendment*, 54 U. MIAMI L. REV. 563, 564 (2000).

[2] *See*, *e.g.*, Sons of Confederate Veterans, Inc. v. Glendening, 954 F. Supp. 1099, 1100 (D. Md. 1997) (explaining that specialty plates "may take the form of either: a 'non-logo' plate, bearing a special tag number and the name, initials, or abbreviation of the name of the organization; or a 'logo' plate, bearing a special tag number, the name, initials, or abbreviation of the name of the organization, and an emblem or logo that symbolizes the organization.") (citing MD. CODE ANN., Transp. II § 13-619(g)(1)(i-ii) (1992 & Supp. 1996)).

flaws in the reasoning that led to these results, and argues that it is constitutional for the state to prohibit the placement of the Confederate flag on license plates.

I. THE PURPOSE OF VIRGINIA'S ISSUANCE OF LICENSE PLATES AND THE ACQUISITION OF SPECIALTY LICENSE PLATES

All motor vehicles in Virginia are required to display the license plate issued to them by the Department of Motor Vehicles ("DMV").[3] This license plate must include the registration number assigned to the motor vehicle.[4] All license plates remain the property of the DMV and can be revoked, cancelled, and repossessed at any time as provided in title 46.2.[5] Consistent with this authority, Virginia directs that no person may alter the content of a license plate issued by the state or display a license plate that has been altered.[6] Not only do license plates contribute to the protection of public health, safety, and welfare, but they also produce revenue for the state.[7] This revenue is used to pay for the administration of automobile registration and to support the uninsured motorist fund.[8] The state allows the DMV to increase these revenues by issuing specialty plates to certain groups, as long as the legislature authorizes the plate.[9]

Virginia has established a program that allows specialized Virginia license plates to be issued to members and supporters of various organizations or groups.[10] The state has issued specialty license plates incorporating designs that honor over 180 diverse organizations, including various military veterans' groups, fraternal, and civic organizations.[11] "These plates must be specifically authorized by statute."[12] If a group or organization wants to have a special license plate made available to its members, that group or organization usually contacts a member of the General Assembly to request the introduction of a bill authorizing the issuance of a special plate.[13] The Virginia statute that created the special license plate program

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3 VA. CODE ANN. § 46.2-711 (West 2002).

4 *Id*. § 46.2-712.

5 *Id.* § 46.2-713.

6 *Id.* § 46.2-722.

7 *Id.* § 46.2-710.

8 *Id*.

9 VA. CODE ANN. §§ 46.2-725, 46.2-726 (West 2002).

10 Sons of Confederate Veterans, Inc. v. Comm'r of Va. DMV, 288 F.3d 610, 614 (4th Cir. 2002).

11 VA. CODE ANN. §§ 46.2-725-749.83 (West 2002).

12 Sons of Confederate Veterans, Inc. v. Comm'r of Va. DMV, 288 F.3d at 614 (citing VA. CODE ANN. § 46.2-725 (Michie 1998)).

13 *Id.*

states that "[all] special license plates issued pursuant to this article shall be of designs *prescribed* by the Commissioner and shall bear unique letters and numerals, clearly distinguishable from any other license plate designs, and be readily identifiable by law-enforcement personnel."[14] Ordinarily, a group that wants to order a specialty license plate is invited to submit a design through a designated "sponsor", who is authorized to communicate with the DMV on the group's behalf regarding the plate.[15]

II. BACKGROUND CASE LAW

The issue presented in *Sons of Confederate Veterans* is whether a group has a First Amendment right to display the Confederate flag on license plates issued and owned by the Commonwealth of Virginia. In *Cornelius v. NAACP Legal Def. & Educ. Fund, Inc.* (holding that the government does not violate the First Amendment when it limits participation in a charity drive aimed at federal employees), the Supreme Court laid out a three-step process for courts to use when analyzing restrictions on speech on government property.[16] First, the court must decide if the First Amendment protects the speech at issue.[17] Second, if it is protected speech, the court must "identify the nature of the forum." [18] Such an analysis determines the extent to which the Government may limit access to the forum, and is dependent on whether the forum is public or nonpublic.[19] Finally, the court "must assess whether the justifications for exclusion from the relevant forum satisfy the requisite standard."[20] Specifically, the court must determine "whether a content-based restriction can survive strict scrutiny, whether a content-neutral restriction is a valid regulation of the time, place, or manner of speech, or whether a restriction in a nonpublic forum is reasonable."[21]

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14 VA. CODE ANN. § 46.2-725(B)(3) (West 2002).

15 Sons of Confederate Veterans, Inc. v. Comm'r of Va. DMV, 288 F.3d at 614.

16 Cornelius v. NAACP Legal Def. & Educ. Fund, Inc., 473 U.S. 788, 797 (1985).

17 *Id.*

18 *Id.*

19 *Id.*

20 *Id.*

21 Wells v. City & County of Denver, 257 F.3d 1132, 1139 (10th Cir. 2001) (citing *Cornelius*, 473 U.S. at 797).

A. *Government Speech*

Determining whether or not the specialty plates represent government speech is pivotal because if they do, the First Amendment rights that protect private speech are not implicated. "Different principles" are involved when the government is the speaker.[22] "The government can speak for itself," and when it does, the constitutionality of its action is determined on that premise, rather that on the premise that it involves the regulation of private speech.[23] "The First Amendment does not prohibit the government, itself, from speaking, nor require the government to speak. Similarly, the First Amendment does not preclude the government from exercising editorial discretion over its own medium of expression."[24] Thus, when analyzing restrictions in the context of government speech, the forum analysis established in Cornelius is not applicable.[25] When government speech is involved it is constitutionally entitled to make "content based choices."[26] For example, "the state may regulate content in order to prevent hampering the primary function of the activity."[27] The government may also engage in "viewpoint-based funding decisions."[28] Regarding the special privileges granted the government in pursuit of its various functions, the Fourth Circuit has previously stated that "[the] government is entitled 'to promote particular messages' . . . , and to take legitimate and appropriate steps to ensure that its messages are neither garbled nor distorted."[29]

The problem with interpreting the doctrine on government speech is that the Supreme Court really has only applied it once.[30] There are other Supreme Court cases that discuss the doctrine, but do not apply it.[31] A few circuit courts have had the opportunity to apply the government speech

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22 Rosenberger v. Rector & Visitors of Univ. of Va., 515 U.S. 819, 834 (1995) (finding that selectivity for denial of funding for student publications was viewpoint discrimination).

23 Bd. of Regents v. Southworth, 529 U.S. 217, 229 (2000) (holding that mandatory student activity fee is constitutional provided that allocation of funding support is viewpoint neutral).

24 Muir v. Ala. Educ. Television Comm'n, 688 F.2d 1033, 1044 (5th Cir. 1982) (en banc).

25 *See Bd. of Regents*, 529 U.S. at 235.

26 *Rosenberger*, 515 U.S. at 833.

27 Schneider v. Indian River Cmty. Coll. Found., 875 F.2d 1537, 1541 (11th Cir.1989).

28 Legal Serv. Corp. v. Velazquez, 531 U.S. 533, 533 (2001).

29 Griffin v. Dep't of Veterans Affairs, 274 F.3d 818, 822 (4th Cir. 2001); *See* Rust v. Sullivan, 500 U.S. 173, 194-95 ("When the government appropriates funds to establish a program [which includes speech] it is entitled to define the limits of that program.").

30 *Rust*, 500 U.S. at 194 (holding that regulations prohibiting the federal funding of family planning clinics which encouraged, promoted, or advocated abortion as a method of family planning were constitutional); *But see Velazquez*, 531 U.S. at 554 (suggesting the proposition that *Rust* itself involved government speech is not universally accepted).

31 *See Velazquez*, 531 U.S. 533; *Rosenberger*, 515 U.S. at 833; Bd. of Regents v. Southworth, 529 U.S. 217, 235 (2000).

doctrine, and in lieu of a binding Supreme Court precedent, their opinions are instructive.[32] These circuits have relied on a number of factors to determine whether the speech in question is that of the government.[33] These factors include:

> 1) the central 'purpose' of the program in which the speech in question occurs; 2) the degree of 'editorial control' exercised by the government or private entities over the content of the speech; 3) the identity of the 'literal speaker'; and 4) whether the government of the private entity bears the 'ultimate responsibility' for the content of the speech, in analyzing circumstances where both the government and a private entity are claimed to be speaking.[34]

If these factors indicate that the speech is private, then courts are instructed to turn to a forum analysis.[35]

B. *Forum Analysis*

The Supreme Court adopted a forum analysis in evaluating government regulations concerning private individuals' speech on government-owned property.[36] The Court identified three forum categories: (1) the traditional public forum; (2) the designated public forum; and (3) the nonpublic forum.[37] Traditional public fora include places like public streets, parks, and sidewalks that "by long tradition or by government fiat . . . have been devoted to assembly and debate."[38] These traditional public fora exist regardless of the government's intent to create or not to create a forum for speech.[39] Speech that is restricted by the government in this forum is sub-

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32 Knights of the Ku Klux Klan v. Curators, 203 F.3d 1085, 1093-1094 (8th Cir. 2000); Wells v. City & County of Denver, 257 F.3d 1132, 1139-40 (10th Cir. 2001; Downs v. Los Angeles Unified Sch. Dist., 228 F.3d 1003, 1011 (9th Cir. 2000); Muir v. Ala. Educ. Television Comm'n, 688 F.2d 1033, 1044 (5th Cir. 1982).

33 Sons of Confederate Veterans, Inc. v. Comm'r of Va. DMV, 288 F.3d 610, 618 (4th Cir. 2002).

34 *Id.* (citing *Wells*, 257 F.3d at 1141 (analyzing these four factors in considering whether a sign listing the private sponsors of a public holiday display constituted government speech)); *Knights*, 203 F.3d 1085 (analyzing the same factors in considering whether announcements of sponsors' names and brief messages from sponsors on public radio station constituted government speech); *see also Downs*, 228 F.3d at 1011 (applying similar reasoning in considering whether postings to school bulletin boards were government or private speech).

35 Cornelius v. NAACP Legal Def. & Educ. Fund, Inc., 473 U.S. 788, 797 (1985).

36 Sons of Confederate Veterans, Inc. v. Comm'r of Va. DMV, 288 F.3d at 622.

37 *See Cornelius*, 473 U.S. at 797; Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 45 (1983).

38 *Perry Educ.*, 460 U.S. at 45; Gen. Media Communications, Inc. v. Cohen, 131 F.3d 273, 278 (2d Cir. 1997).

39 Sons of Confederate Veterans, Inc. v. Comm'r of Va. DMV, 288 F.3d at 623 n.10 (4th Cir. 2002) (citing Ark. Educ. Television Comm'n v. Forbes, 523 U.S. 666, 677 (1998)).

jected to strict scrutiny, meaning that it must be "necessary to serve a compelling state interest [and] narrowly drawn to achieve that interest."[40] However, the state can enforce regulations of the time, place, and manner of expression that are content-neutral, are narrowly tailored to serve a significant government interest, and leave open ample alternative channels of communication.[41]

A designated public forum is only created by the state intentionally opening a non-traditional forum for public discourse, not by inaction or by permitting limited discourse.[42] "Accordingly, the Court has looked to the policy and practice of the government to ascertain whether it intended to designate a place not traditionally open to assembly and debate as a public forum."[43] This includes an examination of the nature of the property to discern if the government's intent is compatible with expressive activity.[44] There is no requirement that the state keep a particular forum open, but, as long as it does, it is subject to the same standards that apply in a traditional public forum.[45]

In a nonpublic forum, the government "reserve[s] eligibility for access to the forum to a particular class of speakers, whose members must then, as individuals, 'obtain permission' . . . to use it."[46] When the nature of the property is inconsistent with expressive activity the court will not infer that the government intended to create a public forum.[47] The government may impose restrictions on speech in a nonpublic forum as long as they are reasonable and viewpoint-neutral.[48] The Supreme Court has said, "the State, no less than a private owner of property, has power to preserve the property under its control for the use to which it is lawfully dedicated."[49] Regardless of the type of forum at issue, viewpoint discrimination is presumptively impermissible in all fora for private speech.[50]

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40 *Cornelius*, 473 U.S. at 800.

41 United States Postal Serv. v. Council of Greenburgh, 453 U.S. 114, 132 (1981).

42 *Cornelius*, 473 U.S. at 802.

43 *Id.*

44 *Id.*

45 Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 45 (1983).

46 Sons of Confederate Veterans, Inc. v. Comm'r of Va. DMV, 288 F.3d at 623, n.10 (4th Cir. 2002) (citing Ark. Educ. Television Comm'n v. Forbes, 523 U.S. 666, 677 (1998)).

47 *See, e.g.*, Jones v. N.C. Prisoners' Labor Union, 433 U.S. 119 (1977).

48 *See Perry Educ.*, 460 U.S. at 45.

49 *Id*.

50 Rosenberger v. Rector & Visitors of Univ. of Va., 515 U.S. 819, 829-30 (1995).

C. *Cases Involving License Plates*

There is not an abundance of case law specifically dealing with the speech contained on license plates. The case law that does exist comes primarily from state and federal trial courts. The vast majority of license plate cases have dealt with either vanity plates, which allow citizens to choose their vehicle identification letters or numbers to spell a recognizable word or phrase, and specialty plates, which allow groups to place messages or designs on the portion of the plate not devoted to the vehicle identifying letter/number configuration. The following influential cases provide an illustrative display of the various views courts have taken regarding the classification of speech found within the four corners of a license plate.

1. Cases That Have Found License Plate Speech Regulations to Be Constitutional

In *Perry v. McDonald*, the Second Circuit held that an individual's right to have a vanity plate consisting of the letters "SHTHPNS" was not protected by the First Amendment.[51] The court determined that vanity license plates did not constitute a public forum and that the state's prohibition was reasonable and viewpoint neutral.[52] They listed four reasons supporting the District Court's determination that Vermont had not intended to designate a public forum when it created the vanity plate program.[53] First, the purpose of issuing license plates was for vehicle identification.[54] The court concluded that this purpose neither suggests, nor shows, an intention to create a public forum.[55] Second, they similarly concluded that there was nothing about the revenue-making purpose of the vanity plate program that suggests intent to create a public forum.[56] Third, the court determined that the numerous restrictions on permissible letter/number combinations placed by the government did not suggest intent to designate a public forum.[57] Fourth, because the general public must obtain permission to place a message on a vanity plate, and thus "does not have unimpeded access to Vermont license plates," the court concluded that this further indicates that the government did not intend to designate a public forum.[58]

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51 Perry v. McDonald, 280 F.3d 159 (2d Cir. 2001).

52 *See id.*

53 *Id*. at 167.

54 *Id.*

55 *Id.*

56 *Id.*

57 *Id*.

58 Perry v. McDonald, 280 F.3d 159, 168 (2d Cir. 2001).

Having concluded that a Vermont vanity plate was a nonpublic forum, the court said that they would uphold a government restriction that was reasonable and viewpoint-neutral.[59] In finding that the restriction was reasonable, the Second Circuit concluded that restrictions on scatological terms, such as the one in this case, "reasonably serve legitimate government interests. Automobile license plates are governmental property intended primarily to serve a governmental purpose and inevitably they will be associated with the state that issues them."[60] The court also determined that the state's prohibition of the profanity used on the license plate was not viewpoint discrimination.[61] As such, the Second Circuit concluded that Vermont's policy did not violate Perry's First Amendment rights and upheld the restriction.[62]

The Court of Appeals of Oregon, in *Higgins v. DMV*, handed down a similar decision.[63] In denying an application for customized license plates containing variations of words referring to wine, the court not only determined that license plates constituted a nonpublic forum, but they also concluded that speech found on vanity plates was the state's speech, not the private individual's.[64] In finding the vanity plates to be state speech the court said, "the opportunity to propose a message does not change the fact that the plates constitute a state communication for state purpose, and under the circumstances of this case, the state gets to decide what it will communicate in doing that."[65] The Higgins court's rationale for classifying license plates as a nonpublic forum essentially echoes one of the reasons provided by the Second Circuit in *Perry*.[66] The court determined that because people had to "obtain permission" from the DMV, as well as meet the statutory qualifications for obtaining a license plate, the program was best categorized as a nonpublic forum for First Amendment purposes.[67]

There have been two significant California cases that have upheld license plate regulations. The California Court of Appeals in *Katz v. Department of Motor Vehicles* handed down the first decision in 1973.[68] The automobile owner in this case wanted the state to issue a personalized license plate with the letters "EZ LAY."[69] The court concluded that the stat-

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59 *Id.* at 169.
60 *Id.* at 169.
61 *Id.* at 170.
62 *Id.*
63 Higgins v. DMV, 170 Or. App. 542 (Or. Ct. App. 2000).
64 *See id.*
65 *Id.* at 547-48.
66 *See supra* Part II.C.1.
67 *Higgins*, 170 Or. App. at 553.
68 Katz v. DMV, 108 Cal. Rptr. 424 (Cal. Ct. App. 1973).
69 *Id.*

ute permitting the DMV to reject such a plate did not abridge the owner's right of freedom of expression.[70] The *Katz* court based its decision in part on a standard enunciated by the Supreme Court in *United States v. O'Brien*.[71] "[W]hen 'speech' and 'nonspeech' elements are combined in the same course of conduct, a sufficiently important governmental interest in regulating the nonspeech element can justify incidental limitations on First Amendment freedoms."[72] Applying that standard to the *Katz* case, the California Court of Appeals found that the Vehicle Code section in question furthered the substantial government interest of vehicle identification.[73] Further, the court found that the section imposed "at best a minimal and incidental restriction on Katz' [sic] alleged First Amendment freedom of expression."[74] The court also, similar to the decisions discussed above,[75] found that the Code in question was designed to protect the legitimacy of the vehicle identification symbol, not to discriminate by any particular viewpoint, and that license plates do not constitute an open forum.[76]

The second significant case from California was the 1993 case of *Kahn v. Department of Motor Vehicles*.[77] In this case the California Court of Appeals dealt with a court reporter's license plate that read "TP U BG."[78] In stenographic court reporting symbols, this plate can be read as "if you can."[79] Unfortunately, seventeen years after acquiring the license plate, another court reporter complained that the license plate could also be read as the expletive "fuck."[80] In fact, that was the more natural reading of the license plate's message.[81] In sustaining the revocation of the license plate, the court once again emphasized that the state had a substantial interest in protecting the integrity of its license plates.[82] They ruled that the state's allowance of people to minimally vary the letter/number combinations of their license plates was purely incidental to the primary function of vehicle identification.[83] As such, the Vehicle Code in question was not unconstitutionally restricting anyone's freedom of expression.[84] The court further

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70 *Id.*

71 *Id.* at 426.

72 United States v. O'Brien, 391 U.S. 367, 376-77 (1968).

73 *Katz*, 108 Cal. Rptr. at 427.

74 *Id.*

75 *See supra* Part II.C.1.

76 *Katz*, 108 Cal. Rptr. at 428.

77 Kahn v. DMV, 20 Cal. Rptr. 2d 6 (Cal. Ct. App. 1993).

78 *Id.* at 8.

79 *Id*.

80 *Id*.

81 *Id*.

82 *Id.* at 11.

83 *Kahn*, 20 Cal. Rptr. 2d 6, 10 (Cal. Ct. App. 1993).

84 *Id.*

concluded that a person "remains free to express the same sentiment on [their] vehicle by using a bumper sticker, license plate holder or similar medium; [they] simply cannot continue to do so via the license plate itself."[85]

2. Cases That Have Found License Plate Speech Regulations to Be Unconstitutional

The Sons of Confederate Veterans ("SCV") organization has found some success in the court system. In 1997, the SCV brought action against Maryland state officials, challenging the state agency's decision to prohibit the organization from displaying the Confederate flag on their license plates.[86] Maryland differs from Virginia in that no legislative approval is required to obtain a specialty license plate.[87] The district court determined that disallowing the Confederate flag constituted impermissible viewpoint discrimination in violation of the organization's First Amendment free speech rights.[88] The court held that Maryland was "advanc[ing] the viewpoint of those offended by the flag and discourag[ing] the viewpoint of those proud of it."[89] Because such discrimination would be impermissible in any forum, the court found that it did not need to decide what type of forum was at issue.[90]

Virginia has been the venue for cases regarding the license plate speech controversy before.[91] In 1994, the United States District Court for the Eastern District of Virginia struck down the state's ban on references to deities on personalized license plates.[92] The case, *Pruitt v. Wilder*, dealt with an application for a vanity license plate saying "GODZGUD."[93] As in the Sons of Confederate Veterans case, the court ruled that there was no need to engage in a forum analysis because the DMV's ban against references to deities represented a viewpoint-based regulation of speech that would be unconstitutional in any forum.[94] The court explains that just because the state treats all references to deities the same does not mean that

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85 *Id.* at 11-12.

86 Sons of Confederate Veterans, Inc. v. Glendening, 954 F.Supp. 1099 (D. Md. 1997).

87 *See* MD. CODE ANN., Transp. II § 13-619 (West 2000).

88 *Glendening*, 954 F.Supp. 1099.

89 *Id.* at 1104.

90 *Id.* at 1103.

91 Pruitt v. Wilder, 840 F. Supp. 414 (E.D. Va. 1994).

92 *See id.*

93 *Id.* at 416.

94 *Id.* at 417.

the DMV's policy is viewpoint neutral.[95] The discrimination occurs by allowing religious speech that does not refer to deities on license plates, but not allowing religious speech that does refer to them.[96]

In *Lewis v. Wilson*, the United States Court of Appeals, Eighth Circuit focused on a somewhat different issue: the amount of discretion entrusted to government officials.[97] The court ruled that "where a regulation requires that a speaker receive permission to engage in speech, the official charged with granting the permission must be provided specific standards on which to base his or her decisions."[98] As such, Ms. Lewis did not need to prove that she was actually denied her "ARYAN-1" plate because of her viewpoint.[99] She only had to show that there was nothing in the ordinance to prevent the Missouri Department of Revenue ("DOR") from denying her the plate because of her viewpoint.[100] The court concluded that the Missouri statute authorizing the DOR to reject plates containing messages that were "contrary to public policy" gave the agency too much discretion in determining which license plates should get rejected.[101] This unfettered discretion, specifically the statutory language "contrary to public policy" was ultimately deemed unconstitutional.[102]

One of the few cases specifically dealing with specialty license plates was the 2000 Louisiana case of *Henderson v. Stalder*.[103] The case dealt with the constitutionality of a Louisiana statute creating a "Choose Life" specialty plate, and a "Choose Life" fund within the state treasury.[104] The plaintiffs in this case moved for a preliminary injunction, requiring the court to determine if the plaintiff met the burden of establishing a substantial likelihood of success on the merits.[105] The United States District Court for the Eastern District of Louisiana found that the plaintiffs did have a substantial likelihood of success on the merits of their free speech claim.[106] The court believed that there was a substantial likelihood the "State of Louisiana will be actively engaging in viewpoint discrimination by allowing a pro-life viewpoint to be expressed through license plates, but not a pro-choice view in contravention of the First Amendment right to free

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95 *Id.* at 418.
96 *Id*.
97 Lewis v. Wilson, 253 F.3d 1077 (8th Cir. 2001).
98 *Id.* at 1080.
99 *Id.*
100 *Id.*
101 *Id*.
102 *Id.* at 1082.
103 Henderson v. Stalder, 112 F. Supp. 2d 589 (E.D. La. 2000).
104 *Id.* at 591.
105 *Id.*
106 *Id.*

speech."[107] Based on this finding, along with other factors not related to this Note's discussion, the court issued a preliminary injunction halting the production of the specialty plates.[108]

3. The Supreme Court Speaks

The only Supreme Court case to consider speech on license plates was the 1976 case of *Wooley v. Maynard*.[109] The case did not deal with vanity or specialty plates, rather it considered whether New Hampshire could impose criminal sanctions on an automobile owner who refused to display the state motto, "Live Free or Die."[110] The court ruled that by forcing an individual to be "an instrument for advocating public adherence to an ideological point of view he finds unacceptable, 'invades the sphere of intellect and spirit which it is the purpose of the First Amendment . . . to reserve from official control."[111] The court determined that no matter how acceptable a particular ideology may be, "it cannot outweigh an individual's First Amendment right to avoid becoming the courier for such message."[112] The ruling in this case can arguably support either side of the Confederate flag debate. Some have argued that the same principle should ring true when the roles are reversed. Specifically, that the state should not be forced to be the courier of an individual's message.[113] Others contend that it supports the proposition that even though owned by the government, license plates implicate private speech interests because of the association between an owner or driver and a message expressed on his license plate.[114]

III. *SONS OF CONFEDERATE VETERANS, INCORPORATED V. HOLCOMB*

Sons of Confederate Veterans, Inc. v. Holcomb is an important case in Virginia case law because it deals with how we should classify state license plates. Specifically, the case deals with what type of forum specialty license

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107 *Id*.

108 *Id.* at 602.

109 Wooley v. Maynard, 430 U.S. 705 (1976).

110 *Id.*

111 *Id.* at 706.

112 *Id.* at 717.

113 Sons of Confederate Veterans, Inc. v. Comm'r of the Va. DMV, 2002 WL 31097448 (4th Cir. 2002) (Gregory, J., dissenting); *See* Laurie D. Medley, Note, *FRESPCH: Vanity Plates and the First Amendment*, 25 VT. L. REV. 879, 888 (2000).

114 Sons of Confederate Veterans, Inc. v. Comm'r of the Va. DMV, 288 F.3d at 621.

plates create, and whose speech is it, when a message is expressed on a state owned license plate.

A. *The Facts*

Plaintiffs in the case are the Sons of Confederate Veterans, Inc. ("SCV"), a non-profit corporation based out of Tennessee, and the Virginia Division of the corporation bearing the same name ("the Sons-VA").[115] The members of the Sons of Confederate Veterans are men "who can prove genealogically that one of their ancestors served honorably in the armed forces of the Confederate States of America."[116] They sued through the SCV's Commander-in-Chief, Patrick J. Griffin and the Commander of the Sons-Va, Robert W. Barbour.[117]

The Defendant is Richard D. Holcomb, the Commissioner of the Virginia Department of Motor Vehicles.[118] He is responsible for the specialty license plate program that is discussed above, and is at issue in this case.[119] "Access to this program is restricted to only those groups so designated under Virginia statute."[120]

The Commonwealth of Virginia statutorily authorized the Virginia Department of Motor Vehicles to produce a specialty license plate honoring the Sons of Confederate Veterans.[121] However, this same statute forbade the plates to contain any logo or emblem of any kind.[122] The statute reads as follows:

> On receipt of an application therefor and written evidence that the applicant is a member of the Sons of Confederate Veterans, the Commissioner shall issue special license plates to members of the Sons of Confederate Veterans. *No logo or emblem of any description shall be displayed or incorporated into the design of license plates issued under this section.*[123]

Out of the hundreds of other statutory provisions authorizing that certain organizations may qualify for special license plates, only § 746.22 has any sort of speech restriction.[124]

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115 Sons of Confederate Veterans, Inc. v. Holcomb, 129 F. Supp. 2d 941, 942 (W.D. Va. 2001).

116 Sons of Confederate Veterans, Inc. v. Comm'r of the Va. DMV, 288 F.3d at 614 (4th Cir. 2002) (citing Appellee's Brief at 4).

117 *Holcomb*, 129 F. Supp. 2d at 942.

118 *Id.*

119 *See supra* Part I.A.

120 *Holcomb*, 129 F. Supp. 2d at 942.

121 *Id.* (citing VA. CODE ANN. § 46.2-746.22 (West 2002)).

122 *Id.*

123 VA. CODE ANN. § 46.2-746.22 (emphasis added).

124 *Holcomb*, 129 F. Supp. 2d at 943.

Arguing that the logo and emblem restriction violated their free speech and equal protection rights under the First, Fifth and Fourteenth Amendments, as well as under 42 U.S.C. § 1983, the SCV sought both a declaratory judgment as well as an injunction requiring the Commissioner to issue special license plates with the SCV's logo, including the Confederate flag, to the members of the SCV who requested them.[125] The organization also sought nominal and compensatory damages for the intentional violation of its constitutional rights.[126]

B. *Holding and Rationale*

The court granted summary judgment for the SCV, and denied summary judgment for Holcomb because it found "the restricting language in § 746.22 to be an impermissible restriction on speech."[127] The District Court declared the logo restriction invalid because it violated the First Amendment as incorporated into the Fourteenth, and it entered an injunction enjoining the Commissioner from enforcing the restriction and requiring him to issue the SCV the specialty plates.[128] No ruling was made on the issue of costs and attorney's fees.[129]

The first issue that the District Court discussed in support of its ruling was whether the specialty plates represented government speech, the SCV's private speech, or the possibility that it is some sort of "joint speech."[130] The Court notes that certain license plate designs, like the official bird, the Commonwealth's state motto, and those honoring official governmental entities are "distinct and separate" from the type of speech conveyed in other specialty plates like that of the SCV's.[131] In analyzing the record, the Court found that because the design of the plates was left entirely to the organization and because of the DMV's repeated use of the word "your" in its correspondence with groups regarding plate design, that the speech at issue was clearly that of the SCV's.[132] In response to the Commonwealth's argument that the license plates were at all times government property, the Court said that "the fact that the government owns the medium for speech to which Plaintiffs seek access does not change the character of that speech

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125 *Id.* at 942.

126 *Id.*

127 *Id.*

128 Sons of Confederate Veterans, Inc. v. Comm'r of the Va. DMV, 288 F.3d 610, 614 (4th Cir. 2002).

129 *Holcomb*, 129 F. Supp. 2d at 949.

130 *Id.* at 943.

131 *Id.*

132 *Id.* at 944.

into the Commonwealth's message."[133] The court interestingly makes no distinction between vanity plates and specialty plates saying:

> both forms of communication allow private expression to be placed on the medium of a license plate. It makes no difference whether this expression is conveyed via the letters and numbers of CommuniPlates or the logos and emblems of specialty plates.[134]

Using these findings, the court determined that the specialty plates at issue represented the SCV's private speech, requiring it to perform a First Amendment analysis.[135]

Under this analysis, the Court's first step was to determine whether the logo restriction was viewpoint based.[136] The Court explains that because the SCV's logo is able to meet the objective parameters of the specialty plate program, the only motivation behind the Commonwealth's ban of logos or emblems was to avoid the controversy that the Commonwealth anticipated would develop in response to allowing the display of the Confederate battle flag on the license plate.[137] The Court found that "this is clearly a content-based restriction and runs explicitly afoul of the presumption that restrictions are 'impermissible' when directed against speech otherwise within the forum's limitations."[138] The District Court found the Commonwealth's argument that it wanted to keep a neutral position on a sensitive matter, which could easily be misunderstood, uncompelling.[139] As such, the District Court held that the prohibition of the SCV's logo was a violation of the First Amendment's protection against viewpoint discrimination.[140]

Although viewpoint discrimination alone is sufficient to strike down the Commonwealth's logo and emblem restriction,[141] the court chose to also undertake a forum analysis to support its ruling. Government property is typically divided into three categories for First Amendment analysis: the traditional public forum, the designated public forum, and the nonpublic forum.[142] To determine which forum the government property falls in, four

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133 *Id.* at 945.

134 Sons of Confederate Veterans, Inc. v. Holcomb, 129 F. Supp. 2d 941, 945 (W.D. Va. 2001).

135 *Id.* at 943.

136 *Id.* at 946 (citing Rosenberger v. Rector & Visitors of Univ. of Va., 515 U.S. 819, 833 (1995), which sets forth the framework for First Amendment analysis in saying "forbidding the State to exercise viewpoint discrimination, even when the limited forum is one of its own creation.").

137 *Holcomb*, 129 F. Supp. 2d at 946.

138 *Id.* (quoting *Rosenberger*, 515 U.S. at 830).

139 *Id*. at 947.

140 *Id.*

141 *See* Sons of Confederate Veterans, Inc. v. Glendening, 954 F. Supp. 1099, 1102 (D. Md. 1997) ("Regardless of the type of forum, any governmental regulation of speech must be viewpoint-neutral.").

142 *See supra* Part II.B (citing Cornelius v. NAACP, 473 U.S. 788, 802 (1985)).

factors are usually looked at by courts: (1) government policy; (2) government practice; (3) the nature of the property; and (4) the compatibility of the place with the expressive activity sought to be conducted there.[143] Regarding government practice, the court simply notes that a wide variety of specialty plates have been granted to organizations including fraternal, civic, and professional groups.[144] "This includes numerous groups that have taken sensitive or controversial positions on matters of public policy."[145]

Discussing the compatibility factor, the court found that the very existence of Virginia's specialty plate program proves that this type of speech is compatible with license plates.[146] Without discussing either the factors of government policy or of the nature of the property, the District Court concludes that its analysis indicates that the specialty plate program represents a designated public forum.[147] As such, the speech regulation must be subjected to strict scrutiny.[148] "Subjecting § 746.22 to strict scrutiny, the restriction on logos and emblems clearly fails. Simply stated, the Commonwealth does not put forth a compelling state interest protected by the prohibition on logos. Thus, forum analysis provides an independent, albeit corroborative, reason for finding constitutional violations in § 746.22."[149]

In providing a remedy, the court concludes that the portion of the statute prohibiting logos and emblems can be severed from the rest of the statute. "In Virginia, the test of severability in the Commonwealth 'is whether the legislature would be satisfied with what remains after the invalid part has been eliminated.'"[150] The court uses this common law test, together with the provision in Va. Code § 1-17.1 that the severed and remaining portions "must operate in accord with one another," to determine the fate of the logo and emblem restriction clause in § 746.22.[151] The District Court concludes that the overriding intent of the legislature was to honor the Sons of the Confederacy, and that the addition of restricting language was not intended in any way to lessen the honor bestowed on the SCV.[152] As such, the two sentences are severable, allowing the court to invalidate the logo restriction, while leaving the first portion intact.[153] The court found alterna-

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143 *Cornelius*, 473 U.S. at 802.

144 *Holcomb*, 129 F. Supp. 2d at 948.

145 *Id.* at 948 (The court includes in this group the NRA, AFL-CIO, Vietnam veterans, and the Boy Scouts.).

146 *Id.*

147 *Id.*

148 Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 45 (1983).

149 *Holcomb*, 129 F. Supp. 2d at 949.

150 *Id.* at 948 (quoting City of Portsmouth v. Citizens Trust Co., 216 Va. 695 (1976)).

151 *Id.* at 949 (quoting VA. CODE ANN. § 1-17.1 (Michie 2001)).

152 *Id.*

153 *Id.*

tively that even if the second sentence could not be severed from the first, which would invalidate the entire statute, it would act pursuant to its inherent equitable powers to compel the Commissioner to comply with the requirements of the first sentence and issue the SCV its specialty plate containing their logo.[154]

The court issued an injunction barring enforcement of the logo restriction and requiring issuance of license plates with the design sought by the organization.[155] The commissioner appealed this decision to the Fourth Circuit.

IV. *SONS OF CONFEDERATE VETERANS, INCORPORATED V. COMMISSIONER OF THE VIRGINIA DEPARTMENT OF MOTOR VEHICLES*

The Commissioner's argument on appeal has three parts. First, the Commissioner argues that special plates authorized in Virginia, specifically the one authorized for the SCV, constitute government speech.[156] Second, he contends that the logo restriction is a reasonable subject matter limitation, not an impermissible bar to viewpoint expression.[157] Third, the Commissioner argues that the District Court's decision creates a statute that the General assembly did not pass and would not have passed.[158]

A. *Appellate Court's Decision to Affirm the District Court's Ruling*

Unpersuaded by the Commissioner's argument, the Fourth Circuit affirmed the District Court's opinion. The Circuit Court held that (1) speech on license plates was private, rather than government speech; (2) the statute, by not allowing the display of the Confederate flag, constituted viewpoint discrimination in violation of the First Amendment; and (3) the portion of the statute containing the logo restriction was severable from the remainder of the statute.[159]

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154 *Id.*

155 *Holcomb*, 129 F. Supp. 2d at 950.

156 Sons of Confederate Veterans, Inc. v. Comm'r of the Va. DMV, 288 F.3d 610, 615 (4th Cir. 2002).

157 *Id.*

158 *Id.*

159 *Id*.

1. Government Versus Individual Speech

The Fourth Circuit made its most controversial holding in *Sons* when it affirmed the District Court's ruling that specialty plates should be considered as private speech. Because no clear standard has been enunciated in the Fourth Circuit, or the Supreme Court, for determining when the government is speaking, the Fourth Circuit reviewed factors that its sister circuits have considered to determine how the speech should be classified.[160] These include:

> a) the central "purpose" of the program; b) the degree of "editorial control" exercised by the government or private entities over the content of the speech; c) the identity of the "literal speaker"; and d) whether the government or the private entity bears the "ultimate responsibility" for the content of the speech.[161]

The Circuit Court did not find this list of factors to be exhaustive or always applicable, but did believe that, in conjunction with Supreme Court precedent, these factors could be used to resolve the issue in this case.[162]

The first factor involves defining the central "purpose" of the program.[163] The DMV Commissioner took the position that the central purpose of creating the specialty license plate program was to serve as a vehicle for the expression of government messages, honoring those groups for which it authorizes special plates.[164] The SCV contends that the purpose of the license plate program is to allow individuals to display their association with, and express pride in, their group.[165] The Circuit Court found that neither party was entirely correct, and that the program was designed more to make revenue while allowing the private expression of various views.[166]

The court gives three reasons why they come to this conclusion. First, is the very simple fact that the license plate program does collect fees, which even the Commissioner concedes, are "a source of additional revenue."[167] Second, the fee structure encompassed in Va. Code Ann. § 46.2-725(B)(1),[168] requiring 350 prepaid applications before license plates can

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160 *Id.* at 618.

161 *Id*. *See also* Wells v. City & County of Denver, 257 F.3d 1132, 1141 (10th Cir. 2001); Knights of the Ku Klux Klan v. Curators of the Univ. of Mo., 203 F.3d 1085 (8th Cir. 2000).

162 Sons of Confederate Veterans, Inc. v. Comm'r of the Va. DMV, 288 F.3d 610, 619 (4th Cir. 2002).

163 *Id.* at 618.

164 *Id.*

165 *Id.*

166 *Id.*

167 *Id*. at 619 (quoting Appellant's Brief at 50).

168 The Code states that, "[no] license plates provided for in this article shall be issued until the

be distributed, supports the view that the program's primary purpose is to produce revenue while allowing for the private expression of views.[169] In reaction to this fee structure, the Circuit Court says:

> The supposed 'honor' bestowed on a group for whom a special license plate is authorized, in other words, is conditioned on the willingness of 350 private persons to pay extra to obtain the plate expressing the 'honor.' If the General Assembly intends to speak, it is curious that it requires the guaranteed collection of a designated amount of money from private persons before its 'speech' is triggered. It is not the case, in other words, that the special plate program only incidentally produces revenue for the Commonwealth. The very structure of the program ensures that only special plate messages popular enough among private individuals to produce a certain amount of revenue will be expressed.[170]

The third reason the Circuit Court provides for its conclusion on the program's purpose is that the specialty plates are only available to those SCV members who can provide "written evidence" that they are members of the group.[171] The Court concludes that these types of restrictions are intended by the General Assembly to allow the "authorized recipients to express their pride in membership in an organization while facilitating the group's speech."[172] The Circuit Court suggests that these messages will be attributed to the individual because non-members are unable to obtain the plates.[173] Based on these three considerations, the Fourth Circuit concluded that the purpose of the specialty plate program was to produce revenue, and to allow for private expression of various views. Such a finding supports a ruling that the speech contained on license plates is private.

The second factor regarding classifying license plate speech was the degree of "editorial control" exercised by the government. The Circuit Court discounted the Commissioner's argument that the provision in Va. Code Ann. § 46.2-725(B)(3) stating that "all special license plates issued pursuant to this article shall be of designs prescribed by the Commissioner . . . "[174] demonstrated that the Commonwealth maintained control over the content of the special plates at all times.[175] The Court found only one other

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Commissioner receives at least 350 prepaid applications therefore. In the event that 350 or more prepaid applications have not yet been received on or before the last day of the third year from the date the license plates were last authorized, no such license plates shall be issued unless the license plates are reauthorized by the General Assembly." VA. CODE ANN. § 46.2-725(B)(1) (Michie 1998).

169 Sons of Confederate Veterans, Inc. v. Comm'r of the Va. DMV, 288 F.3d 610 (4th Cir. 2002).

170 *Id.* at 620.

171 *Id.*

172 *Id.*

173 *Id.*

174 *See*, *e.g.*, VA. CODE ANN. § 46.2-725(B)(3) (Michie 1998).

175 Sons of Confederate Veterans, Inc. v. Comm'r of the Va. DMV, 288 F.3d 610, 621 (4th Cir. 2002).

occasion where the Commissioner had used his discretion to reject a plate design.[176] The Court determined that in reality it was the organizations who made the substantive decisions as to the content of the specialty plate, and that ordinarily the General Assembly asserts no "editorial control" over the content of the plates.[177]

The third and fourth factors addressed by the Court in determining whether the government is speaking were the identity of the "literal speaker," and who bears the "ultimate responsibility" for the speech.[178] The Circuit Court acknowledged both that ownership of the means of communication was a valid consideration in determining whether it contained government speech, and that it was undisputed that Virginia maintained ownership of the specialty plates at all times.[179] Despite this, the court cites *Wooley v. Maynard*[180] to support its view that "license plates, even when owned by the government, implicate private speech interests because of the connection of any message on the plate to the driver or owner of the vehicle.[181] The court concludes that these factors, like the previous ones, result in a finding that the specialty plates issued to the SCV constituted private speech.[182]

2. Viewpoint Discrimination

The Fourth Circuit chose not to address the Commissioner's argument that the District Court erred in finding that the appropriate forum for analyzing the restrictions placed on the SCV was a "designated public forum."[183] The court based this decision on its finding that the logo restriction was not viewpoint-neutral, thus rendering it presumptively unconstitutional in any forum.[184] Turning to the question of whether the logo restriction is viewpoint-neutral, the Circuit Court points out that the Commissioner conceded that the logo restriction is an attempt to ban the display of the Con-

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176 *Id.* (citing Appellant's Brief at 45) (stating that the only other plate design that has been rejected contained the slogan, "Union Yes").

177 *Id.* This is asserted because the statute involved is the only legislation passed by the General Assembly, which contains a restriction on the design of the plate.

178 *Id.* at 618.

179 *Id.* at 621.

180 Wooley v. Maynard, 430 U.S. 705, 717 (1977).

181 Sons of Confederate Veterans, Inc. v. Comm'r of the Va. DMV, 288 F.3d at 614 (4th Cir. 2002).

182 *Id.*

183 *Id*. at 623. The Commissioner challenged this conclusion, arguing that the special plate program is a nonpublic forum.

184 *Id.* (citing Rosenberger v. Rector & Visitors of Univ. of Va., 515 U.S. 819, 829-30 (1995)).

federate flag.[185] The Commissioner argues that the logo restriction bans all viewpoints about the Confederate flag, making the restriction content-based and viewpoint-neutral. Because the court found that this logo restriction involved an "inherent danger of viewpoint discrimination," it felt that it needed to closely review both the "context in which the restriction [was] imposed" and the "effect of the restriction itself."[186]

In determining the context in which the restriction is imposed, the Circuit Court explains that they first must define the scope of the forum.[187] "The relevant forum is defined by focusing on 'the access sought by the speaker.'"[188] The forum in this case is the special license plate program established by Va. Code Ann. § 46.2-725, since that is what the SCV seeks access to, and the other specialty plates that have been authorized by the General Assembly make up the relevant context for analyzing the logo restriction.[189] The Circuit Court reasoned, under this relevant context, that not only was there no mention of any general Confederate flag restriction in any rules, the statute at issue, or the record, but that there were no general restrictions at all dealing with the content of specialty plates.[190] They further reasoned that the "content" of the speech, which was excluded from the SCV's specialty plates, was "similar, if not identical," to content allowed on plates that were authorized.[191] The Court concludes that "the nature of the restricted speech, the lack of a generally applicable content-based restriction, the breadth of the special plate program in Virginia, and the lack of any restrictions in statutes authorizing special plates other than the SCV's, result in a finding that the logo restriction is viewpoint discrimination.[192]

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185 *Id.* (citing Appellant's Brief at 10).

186 *Id.* at 624.

187 Sons of Confederate Veterans, Inc. v. Comm'r of the Va. DMV, 288 F.3d 610, 625 (4th Cir. 2002).

188 *Id.* at 625 (quoting Cornelius v. NAACP Legal Defense & Educational Fund, 473 U.S. 788, 801 (1985).

189 *Id.*

190 *Id.* at 626.

191 *Id.* at 620, 626. The court seems to say that the "content" of the Confederate flag is "similar, if not identical" to other organizations plates based simply on the fact that they too have distinct viewpoints in political or social debate. *See*, *e.g.*, VA. CODE ANN. § 46.2-746.10 (approving special plate for AFL-CIO supporters without restriction); VA. CODE ANN. § 46.2- 749.6 (approving special plate for supporters of the National Rifle Association without restriction).

192 *Id.* at 626. This finding requires the court to look at the restricted speech under the standard of strict scrutiny. To overcome this burden, the Commissioner would have to show that the particular viewpoint discrimination served a compelling government interest and that it was the least restrictive means available to serve that interest. *See* American Life League, Inc. v. Reno, 47 F.3d 642, 648 (4th Cir. 1995). The Circuit Court declined to consider this possibility because the Commissioner neither rebutted, nor attempted to rebut the presumption of unconstitutionality which necessarily follows from

In determining the logo restriction's effect, the court definitively asserts that the incorporation of the Confederate flag by the SCV represents a viewpoint. They argue, using the concession of the Commissioner as support, that the logo would "advance [the] view that the flag [is] a symbolic acknowledgment of pride in Southern heritage and ideals of independence."[193] Because the statute does not restrict the use of the Confederate flag generally, but rather, "as used in the SCV's logo," the court concludes that the restriction is not just based on subject-matter but on the SCV's particular use of the Confederate flag.[194] As such, the Circuit Court further concludes that the SCV's speech is discriminated against because of the views it would express.[195]

3. Severability of the Statute

The Fourth Circuit begins its discussion of whether the logo restriction could be severed from the rest of the statute by concluding that the only governing law is Va. Code Ann. § 1-17.1. That statute provides, "the provisions of all statutes are severable unless . . . it is apparent that two or more statutes or provisions must operate in accord with one another."[196] The court declares that the common law test of "whether the legislature would be satisfied with what remains after the invalid part has been eliminated" is no longer applicable.[197] This actually strengthens the SCV's argument because under the Code, unlike the common law test, a statute is presumed to be severable.[198] Under this standard the Court finds no reason why the first part of the specialty plate statute needs the logo restriction to be operable.[199]

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viewpoint discrimination against private speech.

193 Sons of Confederate Veterans, Inc. v. Comm'r of the Va. DMV, 288 F.3d 610, 625 (4th Cir. 2002) (citing Appellant's Brief at 40). The Court acknowledges that a competing viewpoint of the Confederate flag is that it is "a symbol of racial separation and oppression." United States v. Blanding, 250 F.3d 858, 861 (4th Cir. 2001).

194 Sons of Confederate Veterans, Inc. v. Comm'r of the Va. DMV, 288 F.3d at 625.

195 *Id.*

196 *Id.* at 627 (quoting VA. CODE ANN § 1-17.1 (Michie 2001)).

197 The court does say that even under the common law standard, the statute would still be severable because of a lack of a clear indication that the legislature's intent was to enact § 46.2-746.22 only with the logo restriction in place. *Id.* This seems somewhat conflicting with the Court's earlier dependence on this statute being the *only* one that has a logo restriction. What better evidence of a legislature's intent than to have a provision that is *only* included in one of the 350+ statutes . . . clearly they specifically intended approving this license plate on the *condition* that the Confederate flag would not appear.

198 *Id*. at 628.

199 *Id.*

B. *The Fourth Circuit's Denial of Rehearing En Banc*

The Fourth Circuit declined to rehear the case en banc on a narrow 6 to 5 vote.[200] Opinions written by two of the concurring judges stressed that this case must be resolved "as a free speech case, not as a Confederate flag case."[201] They emphasized the fact that the statute authorizing the SCV special plates was the only one with design and logo restrictions, and that such a singling out of a minority viewpoint would not be tolerated by the First Amendment.[202] In their dissents, both Judge Niemeyer and Judge Gregory expressed that the major concern, regarding the denial to rehear the case en banc, was that the Fourth Circuit has never fully analyzed whether the content on Virginia license plates is government speech.[203] A review of the dissenting opinions is helpful in detecting some of the fundamental errors in the Fourth Circuit's decision to demand the Department of Motor Vehicles to issue specialty plates which include the Confederate flag in its logo.

1. Dissenting Opinion of Judge Niemeyer

The dissenting opinion of Judge Niemeyer centers around his statement that "because Virginia owns the license plates it issues and rightfully controls what appears on them, it can, as part of its control, designate their content as its own speech."[204] He argues that when you consider the fact that every license plate contains the name "VIRGINIA" at the top, and that the state has control over every aspect of issuing license plates, it is hard not to conclude that any message conveyed by the plates' content would not be attributed to the state.[205] As such, the content on license plates is government speech.[206] According to Niemeyer, the state has explicitly chosen not to take a position on the Confederate flag, and instead has simply removed itself from the debate by refusing to authorize the logo on the license plates it issues.[207] Thus, he rejects the argument that the state has engaged in viewpoint discrimination. After engaging in an analysis of the case law regarding government speech, Judge Niemeyer concludes that, "a

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200 Sons of Confederate Veterans, Inc. v. Comm'r of the Va. DMV, 305 F.3d 241 (4th Cir. 2002).

201 *Id.* (Wilkinson, J. & Williams, J., concurring).

202 *Id.*

203 *Id.* (Niemeyer, J. & Gregory, J., dissenting).

204 *Id*. at 249 (Niemeyer, J., dissenting).

205 *Id.*

206 *Id.*

207 *Id.*

state that owns and controls its license plates must be authorized to regulate the content of speech on them."[208] Furthermore, he echoes his fellow dissenting colleague in pointing out that the statute was as least restrictive as possible, still permitting the display of the Confederate flag anywhere else on a motor vehicle (except for the state issued license plate), and authorizing the issuance of the specialty plate without the logo.[209]

2. Dissenting Opinion of Judge Gregory

Elaborating on the major concern addressed above,[210]Judge Gregory found two fundamental problems with the panel's analysis.[211] First, the panel's application of the test provided by its sister circuits, in which they found each factor to weigh in favor of private speech, was not thorough.[212] Disagreeing with the court's findings, Judge Gregory describes the court's opinion as proceeding in an "almost cursory fashion."[213] Specifically, he explains that, "[f]or example, I am utterly unconvinced that the private citizen bears the 'ultimate responsibility' for the speech in this case. The panel gave *very* short shrift to this factor—the factor I think may very well be a key to the case."[214]

Judge Gregory's second fundamental problem with the court's analysis was that the opinion failed to consider the possibility that the specialty license plate program actually "have elements of both private *and* government speech."[215] He argues that the most plausible explanation for the statute is the government's interest in "avoiding 'speech by attribution;' that is, the government's right not to be compelled to speak by private citizens."[216] There is little doubt, as Gregory asserts, that, "the display of the Confederate flag *will* be attributed to Virginia."[217] Inevitably, the inclusion of the Confederate flag on license plates issued and owned by the Commonwealth

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208 *Id.* at 250.

209 Sons of Confederate Veterans, Inc. v. Comm'r of the Va. DMV, 305 F.3d 241 (4th Cir. 2002) (Niemeyer, J., dissenting).

210 *See supra* Part IV.B.

211 Sons of Confederate Veterans, Inc. v. Comm'r of the Va. DMV, 305 F.3d 241, 251-53 (4th Cir. 2002) (Gregory, J., dissenting).

212 *Id.*

213 *Id.* at 251.

214 *Id.*

215 *Id*. at 252 (dissenting opinion of Judge Gregory) (adding that "this is particularly true with respect to the Confederate flag, which conveys a historically 'governmental' message.").

216 *Id.* See *supra* note 4 for a comparison of the position of the Commonwealth with the objecting drivers in Wooley v. Maynard, 430 U.S. 705 (1977).

217 Sons of Confederate Veterans, Inc. v. Comm'r of the Va. DMV, 305 F.3d 241, 252 (4th Cir. 2002) (Gregory, J., dissenting).

of Virginia is going to be perceived as a government endorsement.[218] Gregory believes avoiding this confusion, not the content of the SCV's message, or their particular viewpoint, is the motivation behind the enactment of the logo restriction.[219] Similar laws have been reviewed under an intermediate scrutiny standard, a standard that this statute could arguably survive.[220] He suggests that the Commonwealth disassociating itself from the Confederate flag serves a substantial government interest, and that the statute could not be tailored any more narrowly.[221] He says:

> The *only* place the flag cannot be displayed is on the state-owned, state-issued license plate. Moreover, the SCV can still have a license plate, but without the flag. The SCV is therefore able to communicate the message that the license plate provision was originally meant to enable that of membership in a particular organization.[222]

V. ANALYSIS

Imagine being a young African-American child driving with your family. You lose your way and stumble across a rally of chanting white-hooded adults. You do not understand why, you have been told it is because of the color of your skin, but you do understand that your safety is now in imminent danger. The experience is so frightening, you forever remember the visions of the burning crosses and waving Confederate flags that surrounded the rally. Is not wanting the state to be associated with conjuring up these images viewpoint discrimination? Perhaps precedent now would indicate that a group wanting to include the swastika on license plates must be allowed. Remember the swastika existed as a symbol of good fortune thousands of years before the Nazis ever existed, and is still used in Buddhism, Jainism, and Hinduism today.[223]

I would not count on those plates being available in the near future. There is just something so fundamentally wrong with a plate bearing the swastika that one would assume no court would ever allow that to happen.

The truth is, the legislature of the Commonwealth of Virginia did not uniquely decide to add a logo restriction to §746.22 because of the viewpoint taken by the SCV. In fact, viewpoint discrimination would exist if the

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218 *Id.*

219 *Id.*

220 *Id.* (citing Los Angeles v. Alameda Books, Inc., 533 U.S. 425 (2002)).

221 *Id.*

222 *Id.* at 252-53 (Gregory, J., dissenting).

223 Chirag Badlani, *Nazi Swastika or Ancient Symbol? Time to learn the Difference*, http://history1900's.about.com/cs/swastika.

legislature now, after the Court's injunction compelling the issuance of the specialty license plates with the logo, turns around and places a logo restriction on a group of Ku Klux Klan members who also wanted to place the confederate flag on license plates. Even without the logo, many will still argue that Virginia license plates should not honor confederate soldiers. However, disallowing such a plate *would* be discriminating by viewpoint.

The fact that the SCV has a view that the Confederate flag is a symbol of honor commemorating the bravery of Civil War veterans is irrelevant. Practically, the Confederate flag is likely a symbol for many things, good and bad. Significantly, the Fourth Circuit has recognized that:

> It is the sincerely held view of many Americans, of all races, that the confederate flag is a symbol of racial separation and oppression. And, unfortunately, as uncomfortable as it is to admit, there are still those today who affirm allegiance to the confederate flag precisely because, for them, that flag is identified with racial separation. Because there are citizens who not only continue to hold separatist views, but who revere the confederate flag precisely for its symbolism of those views, it is not an irrational inference that one who displays the confederate flag *may* harbor racial bias against African-Americans.[224]

The Commonwealth of Virginia has chosen to *not* choose between various viewpoints, and to simply take no stance on the Confederate Flag because of its potential harms on the general public. These harms certainly provide a compelling government interest for the state to protect against. The point is that just because the flag has alternative meanings, does not mean the state cannot protect itself and its citizens from the bad ones.

The big picture is important because it seems to shape the Fourth Circuit's opinion in this case. The court's preconceived notion that the DMV engaged in viewpoint discrimination of private speech results in the court moving through its government speech analysis, in the words of Justice Gregory, in an "almost cursory fashion."[225] A closer look at the factors determining the owner of the speech on license plates suggests that the contents of a license plate's message are more accurately classified as government speech, rather than private speech.

Still, if one does not come to that conclusion, eliminating the false presumption that the DMV engaged in viewpoint discrimination allows the court to undertake a forum analysis. Under such an analysis, license plates clearly fit most properly under a nonpublic forum. It is most likely that the speech on license plates could pass intermediate scrutiny, which is all that is required for restricting private speech in a nonpublic forum. As such, the Fourth Circuit Court of Appeals erred in affirming the district court's in-

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224 United States v. Blanding, 250 F.3d 861, 861 (4th Cir. 2001).

225 Sons of Confederate Veterans, Inc. v. Comm'r of the Va. DMV, 305 F.3d 241, 251 (4th Cir. 2002) (Gregory, J., dissenting).

junction mandating the issuance of the SCV's license plates without the logo restriction.

A. *Government Speech*

The opportunity to propose a message does not change the fact that the plates constitute a state communication for a state purpose. When the government is speaking, it is able to draw viewpoint distinctions[226] and make content-based choices.[227] Therefore, a state has the right to dissociate itself from speech, and to refuse to facilitate disfavored messages. The Fourth Circuit used four factors that their sister circuits have examined to determine whether the government was speaking.[228] The court's application of these factors is flawed in a number of ways.

1. The "Purpose" of the Program Is to Honor and Recognize Various Organizations

In applying these factors to the *Sons* case, the court first considered the "purpose" of the special plate program. As discussed earlier, the court concludes that the purpose of the program is primarily to produce revenue while allowing for the private expression of various views.[229] This conclusion, the court believes, supports the determination that the message conveyed on specialty license plates is private speech. They were totally unconvinced by the Commissioner's position that the program's purpose was to honor those groups for which it authorizes plates. The Court suggests that such a position was inconsistent with a program structured so that the authorization of a group's license plate is conditioned on the willingness of 350 people to pay extra to obtain the plate expressing the supposed "honor."[230] Ironically, this position is the exact *opposite* position taken by the district court. Although the district court did not take up this particular issue in its decision, it made some very concrete statements about the purpose of the specialty license plate program in discussing the severability of the statute. The district court judge said:

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226 *Id.*

227 Rosenberger v. Rector & Visitors of Univ. of Va., 515 U.S. 819, 833 (1995).

228 *See infra* Part IV.A.1.

229 *See infra* Part IV.A.1 (citing Sons of Confederate Veterans, Inc. v. Comm'r of the Va. DMV, 288 F.3d 610, 619 (4th Cir. 2002)).

230 *Id.* at 620. For the court's full quote expressing this suggestion, see *infra* Part IV.A.1.

> Based on the record before me, I conclude that the overriding intent of the legislature in § 746.22 was to *honor* the Sons of the Confederacy. The passage of any statute authorizing a specialty plate for a particular organization seems tautological proof of the *intent to honor* that organization. Moreover, the Commonwealth itself repeatedly underscores this intent in its filings with the Court.[231]

Virginia's desire to make money from the program is not necessarily mutually exclusive to the intent to honor various organizations. It makes perfect sense to expect a government agency, always in need of extra funds to improve its programs, to consider how it can make additional funds off of any new program it is implementing.

The Fourth Circuit's failure to follow the reasoning of the District Court or to believe the commissioner's position on the intent of the program is even more disgraceful when you consider the appropriate standard of review established *by* the Fourth Circuit. The Circuit Court reviews the District Court's grant of summary judgment de novo.[232] They said, "In reviewing the record, we 'draw all reasonable inferences in favor of the nonmoving party, . . . and we may not make credibility determinations or weigh the evidence.'"[233] If, using the same record, the District Court came to the conclusion that the "overriding intent was to honor the SCV," certainly one assumes that at least a reasonable inference can be made from the record. Yet, despite this procedural posture directing the Fourth Circuit to construe the facts in favor of the Commissioner, the court dismisses the strong evidence supporting the Commissioner's position.

The United States Postal Service ("USPS") has established a similar program. The Semipostal Stamp Program raises funds for causes that are in the national public interest and further human welfare by honoring them on postage stamps.[234] It is at the discretion of the postmaster general and the Citizens' Stamp Advisory Committee to determine what causes satisfy those two criteria.[235] All of the proposals come from private groups. In addition, providing perhaps an even more compelling argument for being private speech, is the fact that those private groups actually receive the profits from the program.[236] Under the Fourth Circuit's rationale, the message on these stamps must be perceived as private speech. The message clearly originates from a private source, and the primary purpose of creat-

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231 Sons of Confederate Veterans, Inc. v. Holcomb, 129 F. Supp. 2d 941, 949 (W.D. Va. 2001) (emphasis added).

232 Higgins v. E.I. Dupont de Nemours & Co., 863 F.2d 1162, 1167 (4th Cir. 1988).

233 Sons of Confederate Veterans, Inc. v. Comm'r of the Va. DMV, 288 F.3d 610, 619 (4th Cir. 2002) (quoting Edell & Assoc. v. Law Offices of Peter Angelos, 264 F.3d 424 (4th Cir. 2001).

234 Semipostal Stamp Program, 66 Fed. Reg. 31822, 31827 (June, 12, 2001) (to be codified at 39 C.F.R. pt. 551).

235 *Id.* at 31826.

236 *Id*.

ing the stamp is to raise money for that private source's cause. If this is the case, then certainly such a program would be attacked as being an exercise of viewpoint discrimination. In selecting only particular causes, the USPS would be showing its favoritism of certain causes or groups over others. This would be intolerable if the message on stamps was considered private speech, and would force the USPS to either allow all causes the right to have a semipostal stamp or to discontinue the program altogether. It is unlikely that the Fourth Circuit would support such a result. License plates, like stamps, serve fundamental governmental purposes. They are really no different than any other government licensing document.[237] "They are issued to a qualifying individual of the state, for a fee, in uniform format, conveying official information as part of a pervasive regulatory scheme."[238]

2. The Number of Restrictions and Rejections Made by the DMV Does Not Determine Its Level of Control Over the Program

Essential to regulating motor vehicles is the issuance of license plates. They provide proof that individuals have registered their vehicles, and that those vehicles are in compliance with safety and insurance requirements.[239] The essential role that license plates serve for the public health, safety, and welfare creates an inherent right for Virginia to retain control over the plates and their content.[240] Although an individual pays a fee to obtain plates, the state of Virginia retains a significant amount of ownership over them. In fact they expressly retain title to all state-issued license plates.[241] The state manufactures the plates, they regulate how the plates are to be displayed, they retain the right to revoke or recall the plates, and they can punish a person who alters the plate.[242]

The Fourth Circuit concludes that "little, if any, control ordinarily is exercised" by the Commonwealth of Virginia. This conclusion is based, in large part, on evidence in the record showing that on only one occasion has the commissioner rejected a plate design,[243] and only once has the legisla-

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237 *See* David Schuman's appellant's brief in Higgins v. Driver and Motor Vehicles Services Branch (DMV), 170 Or. App. 542 (1998).

238 *Id.*

239 Sons of Confederate Veterans, Inc. v. Comm'r of the Va. DMV, 305 F.3d 241 (4th Cir. 2002) (Niemeyer, J., dissenting); *see generally* VA. CODE ANN. §§ 46.2-701; 46.2-707; 46.2-708; 46.2-709; 46.2-712.

240 Sons of Confederate Veterans, Inc. v. Comm'r of the Va. DMV, 305 F.3d 241 (4th Cir. 2002) (Niemeyer, J., dissenting).

241 VA. CODE ANN. § 46.2-713 (West 2002).

242 *Id*. §§ 46.2-712; 46.2-713; 46.2-715; 46.2-722.

243 A plate design with the slogan "Union Yes."

ture placed a logo restriction on the design of a plate.[244] The court believes that this evidence is proof that neither the Commissioner, nor the General Assembly, ordinarily assert "editorial control" over the content of the special plates.

This faulty conclusion results from a misapplication of the term "editorial control." The Fourth Circuit seems to equate the degree of an entity's exercise of control with the number of times they have exercised their right to reject, change, or place restrictions on a design. In doing so, they completely discount the Commissioner's statutory discretion to approve *or* reject a given plate design.[245] This power of discretion means that the Commissioner must *accept* every specialty license plate. The act of accepting a plate design shows not only some, but complete control over it. Without the commissioner's acceptance the license plate cannot exist. Just because the Commissioner has not chosen to alter the vast majority of the designs, or found the need to reject applications for specialty plates, does not mean he is not using his discretion. In reality, it has not been necessary to reject or alter plate designs. A look at the content of the plates that have been accepted reveals that nothing even remotely close to the level of controversy surrounding the Confederate flag exists on any of them. This is not to say that some of the groups that have plates do not have controversial *views,* they just have designs that the state feels a compelling interest to not have on an official licensing document.

This view is consistent with the treatment of the SCV's application by the General Assembly. They wanted the members of the SCV to have a specialty plate, but the content of the design was unacceptable. The same result could be expected of a group that wanted to have a swastika or display a naked person on their plate. As one scholarly writer noted:

> [The] current controversies illustrate quite clearly that legislative approval of particular applications depends not only on meeting the ministerial application requirements, but also on presenting a message that the legislature deems substantively appropriate. This substantive review, pursuant to which the legislators act as legislators, 'pushing' particular applications quickly through the process while 'killing' others and openly relying on majority preferences for approving or rejecting particular applications, suggests that the government is doing more than neutrally managing a private speech forum. The degree of government involvement in the selection process suggests that the government itself is talking.[246]

Simply because the Commissioner and the General Assembly have not found the need to reject or restrict the vast majority of specialty plates does

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244 Sons of Confederate Veterans, Inc. v. Comm'r of the Va. DMV, 288 F.3d 610, 621 (4th Cir. 2002).

245 *See*, *e.g.*, VA. CODE ANN. § 46.2-725(B)(3) (West 2002).

246 Leslie G. Jacobs, Note, *Free Speech and the Limits of Legislative Discretion: The Example of Specialty License Plates*, 53 FLA. L. REV. 419, 447-48 (2001).

not indicate a lack of "editorial control." The fact that the rejections and restrictions are far outweighed by the number of acceptances is irrelevant. Every time a decision is made whether to accept, change, or reject an application for a plate design is an equal assertion of editorial control.

3. Display of the Confederate Flag Will Be Attributed to Virginia

A factor that the Fourth Circuit spent very little time considering was who bears the "ultimate responsibility" for the speech. Yet at least one judge on the *en banc* panel of the Fourth Circuit felt that it "may very well be a key to the case."[247] When citizens react and complain to license plates containing the Confederate flag it will be the Commonwealth of Virginia, not the individual groups, that are held accountable. The Virginia DMV is a state agency, as such it is the state who is responsible for the issuance of license plates. As a state agency, the DMV has the responsibility to be sensitive to the concerns of the public. It wisely made the determination that the potential gain of allowing the SCV to place the Confederate flag on license plates was far outweighed by the potential harm of offending a significant number of its citizens, which find the flag to be a racially hostile symbol. It was a compelling state interest not to be associated with this particular symbol. This is the concern that motivated the logo restriction's enactment, not the content of the SCV's message, or their particular viewpoint.[248]

Specialty plates do not acknowledge the identity of the message's actual author or owner. The only thing citizens see is the message, presumably containing the group's name, and the name "VIRGINIA" atop the license plate. This is similar to applicants receiving a letter denying employment from a government agency. Even though every word on the page is likely a particular individual's creation, that person is not "ultimately responsible" for the message conveyed. Someone receiving a letter does not consider the fact that a secretary or intern probably wrote the letter, nor does he attribute the message to the attorney who signs the letter. He sees the bold letterhead telling the reader that this message is from the government agency. What the individual puts on that piece of paper will undoubtedly be perceived as the message of the organization whose name appears atop the letter. Similarly, the "ultimate responsibility" for a message contained on a state-issued and state-owned license plate, containing in prominent fashion the title "VIRGINIA," is going to be the Commonwealth of

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247 Sons of Confederate Veterans, Inc. v. Comm'r of the Va. DMV, 305 F.3d 241, 251 (4th Cir. 2002) (Gregory, J., dissenting).

248 *Id.* (Gregory, J., dissenting).

Virginia. As such, this factor suggests that specialty plates are an expression of government speech.

B. *The Commonwealth Does Not Discriminate Against Any Particular View of the Confederate Flag*

Because the court found that the speech on the specialty plates was the SCV's, rather than Virginia's, the SCV's First Amendment rights were implicated. The Fourth Circuit determined that the logo restriction violated the First Amendment because it discriminated against the SCV's viewpoint. The essence of the court's decision is that the logo restriction does not restrict the Confederate flag as such, but rather the Confederate flag as used in the SCV's logo. Because the SCV's logo, incorporating the Confederate flag, represents a viewpoint, the logo restriction discriminates by viewpoint. Since viewpoint discrimination is presumptively impermissible in all fora for private speech,[249] there is no need to engage in a forum analysis.

The Fourth Circuit's rationale determining that Virginia exercised viewpoint discrimination is confusing. They find compelling the fact that there is no general restriction of Confederate flags in any of the statutes. The only logo restriction of any kind is the one that exists in the particular statute pertaining to the SCV's specialty license plate. Thus, the court concludes, the logo restriction is targeted not towards the Confederate flag, but rather the particular view held by the SCV that "the flag is a symbolic acknowledgment of pride in Southern heritage and ideals of independence."[250] This conclusion is problematic. The Court is basically telling the Virginia legislature that they must predict every possible concern a state might have regarding the content of license plates prior to authorizing specific plates. Without any general restrictions, the state has no discretion over what a group may use for their design. This is so because under the court's rationale, specific restrictions are presumptively based on viewpoints, and restrictions that are based on viewpoints violate the First Amendment.

For example, if members of the Nude Bathers of Virginia want a specialty plate, and their organizational emblem displays a naked person, the General Assembly cannot specifically restrict them from using the emblem because no general nude body parts restrictions exist in any other statute. Since there is no general restriction, the state "presumptively" is restricting

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249 *See* Cornelius v. NAACP Legal Defense & Educ. Fund, 473 U.S. 788 (1985).

250 Sons of Confederate Veterans, Inc. v. Comm'r of the Va. DMV, 288 F.3d 610, 624 (4th Cir. 2002).

the group's viewpoint that public nudity has a place in our society, not the content of nude body parts in general.

There are two fundamental reasons why applying the rationale used by the court leads to such an inane conclusion, and not the actual conclusion that the court seeks to achieve. First, the target of the regulation is the Confederate flag as a symbol, not as any particular viewpoint.[251] No other group has attempted to place the Confederate flag on the design of a specialty license plate. The restriction was established because of the particular nature of the Confederate flag. Just like the restriction in my hypothetical would obviously be focused on the offensive nature of nude body parts. The court fails to consider the logical conclusion that no other restriction exists because no other group has desired to have the Confederate flag on their specialty license plate. Their rationale completely disallows for the possibility of a restriction being the "first," and assumes that because no others have come before it that there is something unique about the context surrounding the symbol that is really being regulated.

The second reason is that the government regulation is not favoring one viewpoint over another. The court asserts that "the 'content' of the excluded speech *is similar, if not identical* to content allowed on plates authorized under the special plate program."[252] Specifically, they identify the plates designed for the NRA and the AFL-CIO because those groups are also affiliated with controversial opinions.[253] The court does not even discuss what the content of these other plates consists of, rather they feel it suffices to say that these groups have controversial viewpoints. It is important to note that the General Assembly did authorize a specialty plate for the SCV, just not the logo containing the Confederate flag. So under the court's rationale, the symbol of the Confederate flag is "similar if not identical" to any controversial viewpoint held by another group. This seems like quite a stretch by the court. The fact is, no other group's license plate design has consisted of content that the state has found a compelling interest to disallow. Neither the NRA, nor the AFL-CIO, use the Confederate flag as part of their emblem, in fact nothing is particularly controversial about either of the logos existing on their respective plates. Realistically, the state is utterly unconcerned with the SCV's view of the Confederate flag. The concern stems from the impact that will result from the Confederate flag being displayed on a state-issued license plate, and being associated with its negative connotations. The legislature has made the restriction in the least

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251 *Id*. at 623 (citing the Commissioner's concession, the Fourth Circuit acknowledges that the purpose of the logo restriction is to "ensure that the battle flag does not appear on the special license plate.").

252 *Id.* at 626 (emphasis added).

253 *Id.*

restrictive manner possible. The SCV was authorized to have a specialty plate, and the only place that the flag cannot be displayed is on the state-owned, state-issued license plate.

C. *A Proper Forum Analysis Would Classify License Plates As a Nonpublic Forum*

The Fourth Circuit failed to properly find the logo restriction to be viewpoint-neutral. Since viewpoint discrimination is presumptively impermissible in all fora for private speech,[254] the court found no need to engage in a forum analysis.[255] As a result, the court did not resolve the parties' dispute over the type of forum created by the specialty plate program. This determination is critical in deciding whether the state's logo restriction is unconstitutional. The District Court did undertake a forum analysis, though they failed to discuss half of the factors they listed as being determinative, and ruled that specialty license plates represented a designated public forum.[256]

A proper forum analysis supports the conclusion that specialty license plates are a nonpublic forum. Nonpublic forums consist of public property that is not a public forum by either tradition or designation.[257] The government may impose restrictions on speech in a nonpublic forum as long as they are reasonable and viewpoint neutral.[258] The key aspect of forum analysis is governmental intent.[259] The District Court correctly points out the four factors courts typically used to determine the government's intent.[260] These factors include: "1) government policy; 2) government practice; 3) the nature of the property; and 4) the compatibility of the place with the expressive activity sought to be conducted there."[261]

The primary purpose of the specialty plate program is to honor various organizations,[262] and to raise additional funds for the DMV.[263] Regarding the government's practice and policy, the District Court suggests that because "well over three hundred organizations have been granted specialty plates via statute," and because some of the organizations that have been

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254 *See infra* note 50 and accompanying text.

255 Sons of Confederate Veterans, Inc. v. Comm'r of the Va. DMV, 288 F.3d at 626, n.14.

256 Sons of Confederate Veterans, Inc. v. Holcomb, 129 F. Supp. 2d 941, 948 (W.D. Va. 2001).

257 Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 47 (1983).

258 *See infra* note 48 and accompanying text.

259 Gen. Media Communications, Inc. v. Cohen, 131 F.3d 273, 279 (2d Cir. 1997).

260 *Holcomb*, 129 F. Supp. 2d at 948.

261 *Id.* (citing Cornelius v. NAACP Legal Defense & Educational Fund, 473 U.S. 788, 802 (1985)).

262 *Id; see supra* Part V.A.1.

263 VA. CODE ANN. §§ 46.2-710; 46.2-725; 46.2-726 (West 2002); *see also supra* Part I.

authorized to have specialty plates take controversial positions, there is "a strong indication that the specialty plate program represents a designated public forum."[264] They do this without any explanation as to why this is indicative of a public forum. In fact, the court actually brought up some of the key distinctions between the specialty plate program and a public forum.

The Supreme Court has repeatedly emphasized that "the government does not create a designated public forum to a particular class of speakers, whose members must then, as individuals, 'obtain permission.'"[265] Virginia license plates are only available to the members of the public who actually own and register their vehicles in Virginia.[266] Moreover, the only individuals who may obtain a specialty license plate are members of groups that have greater than 350 people willing to purchase the plate.[267] The Virginia statute that created the specialty license plate program states that "[a]ll special license plates issued pursuant to this article shall be of designs prescribed by the Commissioner . . . ."[268] Ordinarily, organizations must get authorization from the General Assembly for issuance of a special plate.[269]

The Commonwealth of Virginia's policy and practice in administering the specialty plate program is hardly indicative of a public forum. The program is not generally available to the public. Only certain individuals have access to the specialty plate program, and even still, they must obtain permission to participate in the program." These characteristics support a conclusion that the specialty plate program should be classified as a nonpublic forum.

The nature of license plates is to serve as evidence of vehicle registration and as a way to identify and distinguish automobiles.[270] In contrast, "the principal purpose of traditional public fora is the free exchange of ideas . . . ."[271] It cannot fairly be said that a license plate has as its principal purpose this "exchange of ideas." Certainly the principal purpose of a license plate does not change simply because groups are allowed to place their logos around the identification symbols. Hence, the nature of license

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264 *Holcomb*, 129 F. Supp. 2d at 948.

265 Ark. Educ. Television Comm'n v. Forbes, 523 U.S. 666, 677 (1998). *See Cornelius*, 473 U.S. at 802 (public forums are not created by "permitting limited discourse"); Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 47 (1983) ("selective access does not transform government property into a public forum.").

266 *See* VA. CODE ANN. § 46.2-711 (West 2002).

267 *Id*. § 46.2-725(B)(1).

268 *Id.* § 46.2-725(B)(3).

269 Sons of Confederate Veterans, Inc. v. Comm'r of the Va. DMV, 288 F.3d 610, 614 (4th Cir. 2002) (citing VA. CODE ANN. § 46.2-725 (Michie 1998)).

270 *See* VA. CODE ANN. § 46.2-711 (West 2002).

271 Cornelius v. NAACP Legal Defense & Educational Fund, 473 U.S. 788, 800 (1985).

plates weighs in favor of the DMV's program constituting a nonpublic forum.

The final factor considered by courts is the compatibility of license plates to serve as a forum for expressive activity. The District Court finds it sufficient to say that "[t]he very existence of Virginia's specialty plate program proves that this type of speech is compatible with logo plates."[272] This analysis is incomplete. It is true that from a physical standpoint license plates are able to contain expressive messages, although when you consider the size of an ordinary plate, the expressions that one can make are quite limited. The real question of compatibility, however, is whether a state can realistically maintain the dignity and purpose of license plates, while allowing for the unlimited discourse of expression.

The District Court places significant weight on the fact that (1) other groups with controversial viewpoints have been allowed specialty plates and (2) that this is the only existing logo restriction.[273] In doing so, the court fails to properly distinguish the case of the Confederate flag. The Sons of Confederate Veterans were authorized to have specialty plates made just like other organizations with controversial positions. The only thing banned was the Confederate flag symbol. There is a big difference between an organization that takes a controversial position not being allowed to have a specialty plate, and a controversial symbol not being allowed on a plate. Significantly, this is the difference between a viewpoint-discriminatory and a viewpoint-neutral restriction. Consider, for example, the Boy Scouts of America. If the Commonwealth of Virginia denied the Boy Scouts a specialty plate because of its controversial position on gays, they would be discriminating by the group's viewpoint. However, if the group's logo contained two gay men with a red X over them, the state may feel compelled to avoid forcing the general public to be exposed to offensive material on state owned property. They would not be restricting a viewpoint, but rather the content of a symbol. If the state were forced to choose between a specialty plate program that would have to include any controversial message or to have no program at all, it clearly would choose the latter.[274] A nonpublic forum actually furthers First Amendment interests by encouraging the government to "open its property to some expressive activity in cases where, if faced with an all-or-nothing choice, it might not open the property at all."[275]

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272 Sons of Confederate Veterans, Inc. v. Holcomb, 129 F. Supp. 2d 941, 948 (W.D. Va.2001).

273 *Id.*

274 *See* Appellant's Brief at n.9, Higgins v. Driver and Motor Vehicles Services Branch, 170 Or. App. 542 (1998).

275 Arkansas Educ. Television Comm'n v. Forbes, 523 U.S. 666, 680 (1998).

For these reasons, not allowing the state to use discretion over the content of license plates is incompatible with the existence of Virginia's specialty plate program. If Virginia is forced to place offensive content on their license plates, the state will be forced to terminate the program in order to maintain the integrity and purpose of their vehicle identification system. This would be an unwanted result for both registered drivers in Virginia, as well as the DMV. Virginians would lose an opportunity to engage in expressive activities while the state would lose much needed additional revenue from the program.[276]

The government may impose restrictions on speech in a nonpublic forum as long as they are reasonable and viewpoint-neutral.[277] The viewpoint-neutrality of the logo restriction is discussed in detail above.[278] Regarding the reasonableness of a restriction, the Supreme Court has said, "[t]he government's decision to restrict access to a nonpublic forum need only be *reasonable*; it need not be the most reasonable or the only reasonable limitation."[279] In this case, the only place that the SCV cannot place their logo is within the four corners of the license plate. They are free to place the Confederate flag wherever and however they would like on their automobile. Moreover, the SCV is still authorized to have a specialty plate, just not one containing the Confederate flag.[280] Not only are there "reasonable alternatives for communication," the logo restriction also serves "the substantial government interest of disassociating the Commonwealth from the Confederate flag."[281] As such, the statute's logo restriction satisfies the reasonableness requirement.

The DMV's specialty plate program is a nonpublic forum. The state's logo restriction within this forum is both viewpoint-neutral and more than reasonable. For these reasons, both the Fourth Circuit and the District Court erred in finding the logo restriction unconstitutional.

CONCLUSION

Specialty license plates give individuals an opportunity to support a particular organization in a forum not designed for expression. The state benefits from this arrangement by getting an opportunity to honor the vari-

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276 *See* Appellant's Brief at n.9, Higgins v. Driver and Motor Vehicles Services Branch, 170 Or. App. 542 (1998).

277 *See infra* p. 8 and note 48.

278 *See supra* Part V.B.

279 Cornelius v. NAACP Legal Defense & Educ. Fund, 473 U.S. 788, 808 (1985).

280 Sons of Confederate Veterans, Inc. v. Comm'r of the Va. DMV, 305 F.3d 241 (4th Cir. 2002) (Gregory, J., dissenting).

281 *Id.*

ous groups that make up its community, and by raising additional funds to help Virginia drivers. The government cannot maintain such a program without having some discretion over what is allowed to appear on license plates. Asking the government to list in advance every type of content and symbol that will not be allowed on license plates is insufficient. The Fourth Circuit's decision in *Sons of Confederate Veterans* leaves states extremely vulnerable to unwanted messages being attributed to it. Faced with this lack of control, the state may be forced to reconsider whether it can maintain the dignity of its official vehicle licensing documents and still provide specialty license plates. The state should not be forced to make this decision.

The messages expressed on license plates belong to the Commonwealth of Virginia. Giving individuals an opportunity to propose a message does not change this fact. The existence of government speech is evidenced through the purpose of the program, the DMV's authority to reject or accept applications, and the fact that the speech on license plates will be attributed to Virginia. Classifying the contents of state owned license plates as private speech results from the Fourth Circuit's failure to fully analyze the determinative factors.

Allowing the Commonwealth of Virginia this power of discretion does not endanger anyone's viewpoint. The DMV has already clearly proven it is willing to accept applications from organizations with controversial positions. What Virginia is not willing to accept are inflammatory symbols that serve as a constant reminder of the pain and suffering felt by the families of so many of its citizens. The logo restriction is not a ban on anyone's viewpoint of the Confederate flag; it simply disallows any use of the Confederate flag. Virginia has a significant interest in protecting itself from messages that will clearly be attributed to the state. They have protected itself in as least a restrictive way as possible. Virginia permits drivers to place symbols of their choice anywhere on their vehicles except for the state owned license plates. Additionally, Virginia does not reject applications from groups that want to use the Confederate flag in their logo, they simply request that those groups not include that logo on its license plate design. As Judge Gregory insightfully suggests:

> Perhaps the legislature, duly elected by the people of Virginia, got it right. Enacting a statute that allowed members of the SCV to display their heritage in a proud and positive manner, without the Commonwealth of Virginia being perceived as promoting a symbol that has and continues to be the source of so much pain . . . .[282]

282 *Id.* (Gregory, J., dissenting).

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