# 11-5199

## United States Court of Appeals for the Second Circuit

CHILDREN FIRST FOUNDATION, INC.,

*Plaintiff-Appellee*,

v.

BARBARA J. FIALA, IN HER OFFICIAL CAPACITY AS COMMISSIONER OF THE NEW YORK STATE DEPARTMENT OF MOTOR VEHICLES,

*Defendant-Appellant*.

On Appeal from the United States District Court
for the Northern District of New York

**OPPOSITION TO PETITION FOR PANEL REHEARING AND REHEARING EN BANC**

ERIC T. SCHNEIDERMAN
*Attorney General of the State of New York*
*Attorney for Defendant- Appellant*
The Capitol
Albany, New York 12224
(518) 776-2031

BARBARA D. UNDERWOOD
*Solicitor General*
ANDREA OSER
*Deputy Solicitor General*
ZAINAB A. CHAUDHRY
*Assistant Solicitor General of Counsel*

Dated: July 22, 2015

# TABLE OF CONTENTS

**PAGE**

# TABLE OF AUTHORITES

**CASES** **PAGE**



**UNITED STATES CONSTIUTION**



**FEDERAL RULES AND REGULATIONS**



**STATE RULES AND REGULATIONS**

## Table of Contents (cont'd)

**STATE RULES AND REGULATIONS (cont'd)** **PAGE**



**MISCELLANEOUS**

## PRELIMINARY STATEMENT

Plaintiff Children First Foundation seeks panel rehearing or rehearing en banc of the Court's decision in this case. In the subject decision, the Court rejected plaintiff's First Amendment challenge to the determination by the New York Department of Motor Vehicles to deny its application for a custom license-plate series bearing its logo "Choose Life." The Court held, with one judge dissenting, that the Department's custom license-plate program constituted a forum for private speech to which forum analysis applied, but that the program was not facially invalid as a prior restraint on speech and that, as applied to plaintiff's application, the program was both viewpoint neutral and reasonable.

The Court's decision applied prior precedent, including precedent from this Court, treating state license-plate programs as forums for private speech to which forum analysis applies. The recent decision of the United States Supreme Court in *Walker v. Texas Div., Sons of Confederate Veterans, Inc.,* 576 U.S. ___, 135 S. Ct 2239 (2015), does not require rehearing because it merely provides a broader rationale for the Court's decision. In *Walker,* the Supreme Court held that Texas's analogous custom license-plate program did not implicate First Amendment protections at all because the designs offered were government speech. Plaintiff argues that a remand is necessary to analyze whether there are any factual distinctions between the New York and Texas programs that would render

*Walker's* holding inapposite. Plaintiff is mistaken. *Walker* simply offers an additional—and broader—rationale for the outcome that the Court already reached here. If New York's program is materially the same as Texas's—which appears uncontrovertible—then under *Walker,* New York's custom plates are government speech to which First Amendment restrictions do not apply and the complaint was properly dismissed. And if there are any material distinctions between the two programs such that *Walker* does not govern, then there is still no need for rehearing because the case was properly decided under prior precedent. There is, therefore, no need for rehearing, let alone rehearing en banc, and the Court should deny plaintiff's petition.

## BACKGROUND

1. The Department's custom-plate program permits a not-for-profit organization that meets certain prerequisites to submit an application to create a custom-plate series. If approved, the custom plates in the series bear the organization's logo and message in addition to the New York State banner and a state-issued plate number. State regulation provides, however, that no plates shall be issued which are, in the discretion of the Commissioner, "obscene, lewd, lascivious, derogatory to particular ethnic or other group, or patently offensive." N.Y. Comp. Codes R. & Regs. tit. 15 ("15 N.Y.C.R.R.") § 16.5(e). In addition, by longstanding policy and practice, the Department approves only those plates that

do not espouse politically charged and controversial issues, regardless of viewpoint.

In 2001, plaintiff applied to create a custom-plate series with the message "Choose Life." The Department denied the application on the ground that the custom plates proposed contained a politically sensitive message that could ignite angry discourse among drivers and could be perceived as constituting governmental support for one side of a divisive—and, at times, violent—national controversy. The Department had denied a similar application from another organization in 1998, as well as a previous application for a personalized license plate promoting a pro-choice message, namely, the alpha-numeric combination "RU486," a reference to the morning-after pill.

Plaintiff filed suit, asserting, among other things, that the denial of its application violated its First Amendment rights. After concluding that the speech at issue was private speech in either a nonpublic or limited public forum, the district court held that the denial of plaintiff's application discriminated on the basis of viewpoint and was unreasonable, and that the Department's program was unconstitutional on its face because it gave the Commissioner unbridled discretion over which plates to approve. Accordingly, the district court granted summary judgment to plaintiff. It also affirmatively directed the Department to approve plaintiff's application.

2. This Court, with one judge dissenting, reversed and remanded the case to the district court to enter judgment in favor of the Department. Op. 4, 53. First, in accordance with precedent, including precedent from this Court in *Byrne v. Rutledge*, 623 F.3d 46 (2d Cir. 2010), and *Perry v. McDonald*, 280 F.3d 159 (2d Cir. 2001), the Court held that the speech on the subject custom plates was private, and the forum nonpublic. Op. 3, 15-16, 23; *see also* Dissent 7-8. The Court rejected the Department's argument that the speech at issue constituted government speech even in part, and thus was not subject to First Amendment forum analysis at all.

Second, the Court held that the program as applied to plaintiff's proposal was both viewpoint neutral and reasonable. Op. 3-4. As to viewpoint neutrality, the Court held that the Department's exclusion of the entire subject matter of abortion from the custom plate program was a permissible, content-based restriction. Op. 46-48. And the Court held that the Department's asserted interests in limiting the potential for violence among motorists in order to promote highway safety, and avoiding the appearance of state endorsement for one side of a "unique" and—at the time—particularly volatile and contentious political issue, were "manifestly legitimate." Op. 48-52.

The Court squarely divided only over whether the custom-plate program on its face constituted a prior restraint on speech. Op. 3. The majority held it did not.

It found the Commissioner's discretion to be sufficiently circumscribed by the combined effect of the regulatory limitations set forth 15 N.Y.C.R.R. § 16.5(e) and the Department's longstanding policy and practice of declining to approve plate applications involving particularly controversial and divisive political or social issues. Op. 30-32, 34-35, 40-41. The dissenter reasoned that the program was unconstitutional on its face because neither the program nor the Department's practice placed a meaningful limit on the Commissioner's discretion, thereby inviting viewpoint discrimination. Dissent 1, 10, 30. Still, the dissenter agreed the affirmative relief granted by the district court was improper; it would have enjoined the Department from issuing any custom plates under the program. Dissent 28.

## ARGUMENT

### A. The Supreme Court's Broad Holding in *Walker* that Custom License Plates are Government Speech Provides an Additional Rationale for the Same Result that the Court Already Reached

Shortly after the Court's decision in this case, the United States Supreme Court held in a case involving Texas's analogous custom-plate program that such plates are government speech to which the restrictions of the First Amendment do not apply. *See Walker v. Texas Div., Sons of Confederate Veterans, Inc.*, 135 S.Ct. 2239, 2246-50 (June 18, 2015). The Supreme Court's broad holding in *Walker*

does not warrant rehearing this matter, however. To the contrary, it simply provides an additional rationale for the same result that the Court already reached.

1. *Walker* involved a determination by the Texas Department of Motor Vehicles to deny an application for a custom-plate series featuring a confederate flag. Relying primarily on its analysis of public park monuments in *Pleasant Grove City v. Summum*, 555 U.S. 460 (2009), the Court concluded that Texas's custom plates contain government speech because (1) license plates have a long history of communicating messages from States generally; (2) license plate designs are closely identified in the public mind with the State given the governmental nature and purpose of the plates; and (3) the State maintains direct control and final approval authority over plate designs and messages. *Walker*, 135 S.Ct. at 2246-50. The Court rejected the plaintiff's argument that Texas created a forum for private speech by accepting private parties' designs for plates and permitting such parties to profit from the fees thereafter collected, stating that those aspects of the Texas program would "not extinguish the governmental nature of the message or transform the government's role into that of a mere forum provider." *Id.* at 2251-52. Rather, the Court stated that forum analysis is "inapposite" in such a context because "the State is speaking on its own behalf" and, thus, "the First Amendment strictures that attend the various types of government-established

forums do not apply." *Id*. Accordingly, the Court upheld the Texas custom-plate program and that State's refusal to issue the controversial plate.

2. *Walker*'s holding provides no basis to revisit the Court's decision here because it simply provides an additional—albeit significantly broader—rationale for the same result that the Court reached. If, as appears uncontrovertible, New York's program is materially the same as Texas's, then New York's custom plates are similarly government speech to which First Amendment restrictions do not apply.

3. Indeed, there appears no basis to distinguish *Walker*. Even plaintiff previously acknowledged the factual similarities between *Walker* and this case; it had no trouble relying on the underlying decision from the Fifth Circuit which supported its position (Orig. Pet. 4, 10, 13). *See also* Plaintiff's F.R.A.P. 28(j) Letter, ECF No. 109 (describing Fifth Circuit decision as "squarely address[ing] the issues presented in this appeal").

And the three reasons that the *Walker* Court gave to explain its conclusion that Texas's custom plates are government speech apply equally here. The first of those reasons—the long history of the use of license plates by States generally to communicate government messages—necessarily applies because it does not involve the facts of Texas's program at all. And the facts of Texas's program that are implicated in the second and third reasons cited by the *Walker* Court are not at

all unique to Texas, but rather are shared by New York and likely most other States as well.

For its second reason, the *Walker* Court cited the governmental nature and purpose of Texas's license plates. But contrary to plaintiff's argument (Supp. Pet. 4-6), no additional factfinding or analysis is necessary—let alone a remand to the district court for this purpose—to establish that the nature and purpose of most license plates, including New York's plates, are the same. License plates are "essentially government IDs." *Walker*, 135 S.Ct. at 2249. The Court here already recognized that "by their very nature," license plates are designed "to identify vehicles [and] facilitate traffic safety." Op. at 23; *see also Perry v. McDonald*, 280 F.3d at 159 (Vermont's overriding policy in issuing license plates is identification); *see also* JA 1662-63 (Department official affidavit stating purpose of New York plates is vehicle identification). Additionally, as in Texas, New York's plates prominently bear on their face the State's name in capital letters (JA 207, 216-17), and New York law requires vehicle owners to display a license plate. N.Y. Veh. & Traf. Law ("VTL") §§ 402(1)(a), (4). Indeed, New York was the first State to require vehicle registration and identification plates in 1901, and the first state-issued plates were issued in 1910. J. Fox, *License Plates of the United States* 75 (1997). And every plate is still issued by the State in a manner prescribed by the Commissioner. VTL § 402(2); *see also* VTL §§ 401(3); 402(1)(a); 403; 404.

Further, all license plates remain the property of the State, under the control of the Commissioner. VTL § 402(4). Thus, New York license plates, like Texas plates—and plates from any other jurisdiction—are "closely identified in the public mind with the [State]." *Walker*, 135 S.Ct. at 2249.

Third and finally, the *Walker* Court looked at the extent to which the State maintained direct control and final approval authority over custom plate designs and messages. Once again, no further factfinding or analysis is necessary to see that New York is the same in this respect. New York law gives the Commissioner the authority to issue "special number plates," which includes custom plate series. VTL § 404. Applications must be made in accordance with the Commissioner's regulations, *see* VTL § 404(1) and 15 N.Y.C.R.R. Part 16, but the Commissioner is not required to establish a custom plate program or issue any particular plate (JA 1245, 1334, 1342-44). *See also* VTL §§ 404(1), (4). While the Commissioner maintained a program for administratively created custom plates (JA 207-17, 1663), as in Texas, the State retains discretion to approve individual proposals for custom-plate designs (JA 1663-64). *See also* 15 N.Y.C.R.R. § 16.5(e). And the Commissioner has exercised that authority, rejecting for example, an "RU486" pro-choice vanity plate and the "Restore the Wolf" custom plate (JA 1458-59; 1663-64). Like the Texas program, "[t]his final approval authority allows [New York] to choose how to present itself and its constituency." *Walker*, 135 S.Ct. at

2249. Indeed, plaintiff cannot seriously argue that the Commissioner does not have final approval authority while making a claim that he has unbridled discretion.

Thus, it is self-evident that *Walker*'s analysis applies here and simply confirms on different grounds the outcome of the Court's decision, namely, that the Department was entitled to refuse to issue the Choose Life plate. And plaintiff has identified no compelling reason for a remand to the district court. *Cf. Commissioner of Internal Revenue v. Solow*, 333 F.2d 76 (2d Cir. 1964) (remand not warranted where "highly improbable" that lower court would make contrary ruling which Court "would be compelled to reverse").

### B. The Panel's Decision Was Correct on the Law as it Stood Before *Walker* in any Event

1. Even if there were any relevant distinction between the Texas and New York programs that would not permit a conclusion that the New York program is government speech, rehearing would nonetheless not be warranted because the Court correctly found no First Amendment violation under the law applied to private speech as it stood before *Walker*. Perhaps recognizing just how controlling *Walker* is, plaintiff's supplemental petition makes no further argument regarding the merits of the Court's opinion.

Applying pre-*Walker* law, the Court correctly held that the Department's custom-plate program is not facially invalid as a prior restraint on speech because it does not impermissibly vest the Commissioner with unbridled discretion in approving custom-plate designs. Op. 3. Plaintiff concedes (Orig. Pet. 2) that the Court recited the correct legal standards. And for the reasons stated in our briefs on the appeal (ECF Nos. 50, 91), the Court also properly applied those standards here.

Plaintiff is wrong to assert (Orig. Pet. 3-5) that the Court's analysis of the unbridled discretion issue is internally inconsistent. As the Court's discussion on the issue as a whole makes clear, in concluding that the Commissioner's discretion was sufficiently circumscribed, the Court looked at the combined effect of the regulatory constraints set forth in 15 N.Y.C.R.R. § 16.5(e) and the Department's well-established and consistently applied policy and practice of declining to approve plate applications involving particularly controversial and divisive political or social issues. Op. 29-41. And the Court correctly rejected plaintiff's assertion—asserted again in its original petition (Orig. Pet. 5-7)—that the Department's practice was neither "well-understood" nor "uniformly applied," because, in plaintiff's view, the practice was "evolv[ing]" over time and the equally controversial union and "Cop Shot" plates were approved. Plaintiff cites nothing in the record that would cast any serious doubt on the well-established

nature of the Department's practice and policy. To the contrary, the Court correctly understood that, not only has the Department's policy been consistent, Op. 31-32, but there also was no basis in the record "to conclude that the Department failed to apply the policy against creating [other] plates that touch upon contentious political issues as opposed to having applied the policy and merely reaching a different result than it did with the 'Choose Life' plate." Op. 33.[1]

2. For the reasons stated in our briefs to the Court on appeal, the Court also correctly applied the relevant legal principles to further hold that the custom-plate program as applied to plaintiff's proposal was both viewpoint neutral and reasonable. Op. 3-4. Indeed, the dissenter did not find otherwise; having concluded that the custom-plate program should fail on its face, the dissenter did not go on to resolve the issue. Dissent 28-29. And the lack of disagreement among the panel members on this issue only further supports the position here that rehearing is not warranted. But the Court was correct in any event to find that the Department's exclusion of the entire subject matter of abortion from the custom plate program was a permissible, content-based restriction. Op. 46-48. The Court

[1] To be sure, were the Department to consider the politically controversial nature of a Cop Shot plate application made today, it might well find it "contentious given the national firestorm regarding police shootings of minorities" in several cities this past year (Orig. Pet. 6). But whatever determination the Department might make in the future about a plate on that subject has no bearing on whether the Department's policy was consistently applied at the time of plaintiff's application.

also correctly rejected plaintiff's argument (Orig. Pet. 13-14) that neither of the Department's justifications for its actions were reasonable, recognizing as "manifestly legitimate" the State's interests in limiting the potential for violence among motorists in order to promote highway safety and also avoiding the appearance of state endorsement for one side of particularly volatile and contentious political issue. Op. 48-52; *see also Walker*, 135 S.Ct. at 2249 (recognizing that "license plate designs convey government agreement with the message displayed").

In sum, even though *Walker* no longer requires courts to conduct a First Amendment analysis on the facts as presented here, neither further review by this Court nor a remand is warranted. Moreover, this Court did not overlook or misapprehend any point of law or fact in considering the case under pre-*Walker* precedent, *see* F.R.A.P. 40, nor does the case impact the "uniformity of the [C]ourt's decisions" or involve "a question of exceptional importance," F.R.A.P. 35.

## CONCLUSION

For the foregoing reasons, the petition for panel rehearing and rehearing en banc should be denied.

Dated: Albany, New York
July 22, 2015

Respectfully submitted,

ERIC T. SCHNEIDERMAN
*Attorney General of the*
*State of New York*
Attorney for Defendant-Appellant

By: _____
ZAINAB A. CHAUDHRY
Assistant Solicitor General

Office of the Attorney General
The Capitol
Albany, New York 12224
(518) 776-2031

BARBARA D. UNDERWOOD
*Solicitor General*
ANDREA OSER
*Deputy Solicitor General*
ZAINAB A. CHAUDHRY
*Assistant Solicitor General*
*of Counsel*