

**IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT**

United States Court of Appeals
Fifth Circuit

FILED

July 14, 2014

Lyle W. Cayce
Clerk

No. 13-50411

TEXAS DIVISION, SONS OF CONFEDERATE VETERANS,
INCORPORATED, a Texas Corporation; GRANVEL J. BLOCK, Individually;
RAY W. JAMES, Individually,

Plaintiffs–Appellants

v.

VICTOR T. VANDERGRIFF, In His Official Capacity as Chairman of the Board; CLIFFORD BUTLER, In His Official Capacity as a Member of the Board; RAYMOND PALACIOS, JR., In His Official Capacity as a Member of the Board; LAURA RYAN, In Her Official Capacity as a Member of the Board; VICTOR RODRIGUEZ, In His Official Capacity as a Member of the Board; MARVIN RUSH, in his official capacity as a Member of the Board; JOHN WALKER, III, In His Official Capacity as a Member of the Board; BLAKE INGRAM, In His Official Capacity as a Member of the Board,

Defendants–Appellees

Appeals from the United States District Court
for the Western District of Texas

Before SMITH, PRADO, and ELROD, Circuit Judges.

EDWARD C. PRADO, Circuit Judge:

The Texas Division of the Sons of Confederate Veterans and two of its officers (collectively “Texas SCV”) appeal the district court’s grant of summary judgment in favor of Victor T. Vandergriff, Chairman of the Texas Department of Motor Vehicles Board, and seven other board members (collectively “the Board”). Texas SCV argues that the Board violated its First Amendment right

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to free speech when the Board denied Texas SCV's application for a specialty license plate featuring the Confederate battle flag. The district court rejected Texas SCV's arguments and found that the Board had made a reasonable, content-based regulation of private speech. We disagree, and because the Board engaged in impermissible viewpoint discrimination, we reverse.

I. BACKGROUND

The State of Texas requires that all registered motor vehicles display a license plate. Tex. Transp. Code Ann. § 504.943; 43 Tex. Admin. Code § 217.22. Texas offers a standard-issue license plate, but, for an additional fee, drivers may display a specialty license plate on their vehicles. *See* Tex. Transp. Code Ann. § 504.008. Under Texas law, there are three different ways to create a specialty license plate. First, the legislature can create and specifically authorize a specialty license plate. *See id.* § 504.601–504.663. Second, any individual or organization can create a specialty plate through a third-party vendor. *Id.* § 504.6011(a). The Texas Department of Motor Vehicles Board must approve any plates created through the private vendor. 43 Tex. Admin. Code § 217.40.

The third and final means of creating a specialty license plate is at issue in this case. The Texas Department of Motor Vehicles Board can issue a new specialty plate, either on its own or in response to an application from a nonprofit organization. Tex. Transp. Code Ann. § 504.801(a). When a nonprofit organization proposes a plate, the Board must approve the plate's design and “may refuse to create a new specialty license plate if the design might be offensive to any member of the public.” *Id.* § 504.801(c). The proceeds from the sale of these specialty license plates go to either the Texas Department of Motor Vehicles or to a state agency of the nonprofit organization's choosing. *Id.* § 504.801(b), (e).

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Texas SCV, a nonprofit organization that works to preserve the memory and reputation of soldiers who fought for the Confederacy during the Civil War, applied for a specialty license plate through this third process. Texas SCV's proposed plate features the SCV logo, which is a Confederate battle flag framed on all four sides by the words "Sons of Confederate Veterans 1896." A faint Confederate flag also appears in the background of the proposed plate. The word "Texas" is at the top of the plate in bold text, and "Sons of Confederate Veterans" runs in capitalized letters along the bottom of the plate. An outline of the state of Texas appears in the top, right corner of the proposed plate.

Texas SCV submitted its application in August 2009 to the Texas Department of Transportation, which was the agency responsible for administering the specialty license plate program at the time. The Department of Transportation put Texas SCV's proposed plate to a vote of its seven-member panel. During the first vote, three members voted to approve the plate, and two members voted against; two members failed to vote despite repeated efforts to encourage them to cast their vote. Instead of moving the plate to the public comment period, the Department of Transportation chose to hold another vote. During this second vote, one member voted to approve the plate, four voted against, and two members again failed to vote. The Department of Transportation then denied Texas SCV's application.

The Texas Department of Motor Vehicles subsequently assumed responsibility for administering the specialty license plate program, and Texas SCV renewed its application for a specialty license plate with the Board. The Board invited public comment on Texas SCV's proposed plate on its website and set a date for final review of the plate. Eight of the nine members of the Board were present for the final review meeting, and their vote was deadlocked, four in favor and four against the plate. The Board rescheduled the vote, in the hope that all Board members would be able to be present for

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the vote. Many members of the public attended the Board meeting where the second vote was scheduled to occur. Texas SCV's proposed plate elicited numerous public comments; while some were in favor, the majority were against approving the plate. At its second vote, the Board unanimously voted against issuing Texas SCV's specialty plate. The Board's resolution explaining its decision stated:

The Board . . . finds it necessary to deny [Texas SCV's] plate design application, specifically the confederate flag portion of the design, because public comments have shown that many members of the general public find the design offensive, and because such comments are reasonable. The Board finds that a significant portion of the public associate the confederate flag with organizations advocating expressions of hate directed toward people or groups that is demeaning to those people or groups.

Texas SCV sued in federal district court under 42 U.S.C. § 1983, asserting violations of its rights under the First and Fourteenth Amendments. Both parties moved for summary judgment, and the district court granted the Board's motion. First, the district court found that the specialty license plates were private, not government, speech. The court then analyzed Texas SCV's claims under the First Amendment and found that (1) the specialty license plate program was a nonpublic forum; (2) the Board's rejection of Texas SCV's plate "was a content-based restriction on speech, rather than a viewpoint-based limitation"; and (3) the content-based regulation was reasonable. Thus, the district court concluded that the Board had not violated Texas SCV's rights under the First Amendment and entered judgment for the Board.¹ Texas SCV timely appealed.

¹ The district court did not reach Texas SCV's claim that the Board had violated its rights under the Fourteenth Amendment, and Texas SCV does not raise its Fourteenth Amendment argument on appeal.

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II. JURISDICTION

Neither party has argued that this Court lacks jurisdiction, but federal courts have a duty to consider their subject matter jurisdiction *sua sponte*. See *Gonzalez v. Thaler*, 132 S. Ct. 641, 648 (2012). In *Henderson v. Stalder*, 407 F.3d 351 (5th Cir. 2005), we were asked to decide whether Louisiana’s specialty license plate program discriminated against pro-choice views in violation of the First Amendment. *Id.* at 352. Instead of reaching the merits, we held that the Tax Injunction Act (“TIA”), 28 U.S.C. § 1341, barred the suit, and we vacated and remanded with instructions for the district court to dismiss the case for lack of jurisdiction. *Id.* at 360. Because this case involves a seemingly similar fact pattern, we first consider whether the TIA bars the instant case.

Under the TIA, “[t]he district courts shall not enjoin, suspend or restrain the assessment, levy or collection of any tax under State law where a plain, speedy and efficient remedy may be had in the courts of such State.” 28 U.S.C. § 1341. But, the TIA will not deprive federal courts of jurisdiction when “(a) the ‘fees’ charged by the state are not taxes for purposes of TIA, or if (b) *Hibbs v. Winn*, 542 U.S. 88 . . . (2004) can be read to encompass this suit.” *Henderson*, 407 F.3d at 354. *Hibbs* opens the doors to federal court where the TIA might otherwise bar the suit if “(1) a third party (not the taxpayer) files suit, and (2) the suit’s success will enrich, not deplete, the government entity’s coffers.” *Id.* at 359 (citing *Hibbs*, 542 U.S. at 105–09).

We hold that the TIA does not bar this suit because this case falls under the *Hibbs* exception.² The first part of *Hibbs* is met because Texas SCV is a

² In *Henderson*, this Court concluded that the charges Louisiana citizens paid for the state’s “Choose Life” specialty license plate were taxes, not fees. 405 F.3d at 356–59. Although there are differences between how the specialty license plate in *Henderson* and the specialty license plate here were created, we do not decide whether the charges for the specialty license plate here are taxes or fees. Because we hold that the *Hibbs* exception to the TIA applies, we have no reason to consider whether the first exception to the TIA applies.

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