Filed: October 7, 2002

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

No. 01-1242

Sons of Confederate Veterans, etc., et al.,

Plaintiffs - Appellees,

versus

Commissioner of the Virginia Department of Motor Vehicles, etc.,

Defendant - Appellant.

O R D E R

The court amends its order on rehearing filed September 20, 2002, as follows:

On page 6, first full paragraph, line 5 -- the extra “the” is deleted.

For the Court - By Direction

/s/ Patricia S. Connor
Clerk

PUBLISHED

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

SONS OF CONFEDERATE VETERANS, INCORPORATED, a Tennessee Corporation, by its Commander-in-Chief Patrick J. Griffin; VIRGINIA DIVISION OF SONS OF CONFEDERATE VETERANS, INCORPORATED, a Virginia Corporation, by its Commander Robert W. Barbour, Sr.,
Plaintiffs-Appellees,

v.

COMMISSIONER OF THE VIRGINIA DEPARTMENT OF MOTOR VEHICLES, in his official capacity,
Defendant-Appellant,

No. 01-1242

and

COMMONWEALTH OF VIRGINIA, whose agents and officers enacted and will enforce, on its behalf, VA. CODE ANN. 46.2-746.22; JAMES S. GILMORE, III, as Governor of the Commonwealth of Virginia, in his official capacity; SHIRLEY YBARRA, as Secretary of the Department of Transportation of the State of Virginia, in her official capacity,
Defendants.

Filed September 20, 2002

ORDER

Upon a request for a poll of the court on rehearing en banc, the court denies rehearing. Judges Niemeyer, Michael, Motz, King, and

Gregory voted for rehearing en banc. Chief Judge Wilkinson and Judges Widener, Wilkins, Luttig, Williams, and Traxler voted to deny rehearing en banc. Chief Judge Wilkinson and Judge Williams wrote separate opinions concurring in the denial of rehearing en banc. Judge Luttig wrote a separate opinion respecting the denial of rehearing en banc. Judge Niemeyer and Judge Gregory wrote separate opinions dissenting from the denial of rehearing en banc.

FOR THE COURT

_____
Clerk

WILKINSON, Chief Judge, concurring in the denial of rehearing en banc:

The closeness of the court's vote (6 to 5) leads me to explain my own. I concur in the denial of rehearing en banc because the legislative action here seems to me to violate basic First Amendment principles. The Virginia General Assembly has approved over one hundred special plates, and the statute authorizing the SCV special plate is the only one with design and logo restrictions. When a legislative majority singles out a minority viewpoint in such pointed fashion, free speech values cannot help but be implicated. And it is as a free speech case, not as a Confederate flag case, that this appeal must be resolved.

It is important to keep the issue here in some perspective. The vast majority of Virginians have no desire to display a Confederate logo on their license plates. The vast majority of Virginians seek venues other than a motor vehicle tag for the observance of their lineage, and do not view the Confederate flag as symbolically celebrating their line of descent. The vast majority of Virginians understand that one motorist's proclamation of heritage is another's reminder of the unspeakable cruelties of human bondage. The vast majority of Virginians recognize the sad paradox of Confederate history — namely, that individual southerners, so many good and decent in themselves, swore allegiance to a cause that thankfully was lost, and to practices that no society should have sought to defend.

But the First Amendment was not written for the vast majority of Virginians. It belongs to a single minority of one. It is easy enough

for us as judges to uphold expression with which we personally agree, or speech we know will meet with general approbation. Yet pleasing speech is not the kind that needs protection.

Our Constitution safeguards contrarian speech for several reasons. As the Civil Rights Movement demonstrates, yesterday's protest can become tomorrow's law and wisdom. Other contrarian speech should move popular majorities to reaffirm their own beliefs rather than suppress those of others. The reminders of history's most tragic errors only deepen our commitment to the dignity of all citizens: The Constitution that houses the First Amendment also shelters the Fourteenth, an everlasting reminder that a nation betrothed to liberty and equal justice under law must remain vigilant to realize both.

WILLIAMS, Circuit Judge, concurring in the denial of rehearing en banc:

There can be no doubt that the symbol desired by the SCV on their special plate is a controversial and divisive one. But as Chief Judge Wilkinson points out, this case must be resolved "as a free speech case, not as a Confederate flag case." *Ante* at 2. In essence, the Commonwealth has opened its license plates to myriad private speakers but wishes to restrict the message one of those speakers would express based on its disagreement with the viewpoint contained therein; this the First Amendment does not permit. I undertake herein to respond briefly to several points raised in the separate opinions of my colleagues respecting and dissenting from the denial of rehearing en banc.

My first dissenting colleague suggests that what is at issue here is pure government speech. For the reasons stated in the panel opinion, I disagree. I will respond here only to the suggestion that the Supreme Court's opinion in *Wooley v. Maynard*, 430 U.S. 705 (1977), compels the conclusion that government speech is at issue. As my first dissenting colleague notes, the Supreme Court in *Wooley* found the requirement that New Hampshire drivers display license plates bearing the slogan "Live Free or Die" to be impermissible because it forced the complaining driver "to be an instrument for fostering public adherence to an ideological point of view he finds unacceptable." *Wooley*, 430 U.S. at 715. My colleague thus concludes "that license plates are

the State's speech." *Post* at 15. I believe this conclusion misapprehends *Wooley*'s significance in this case. *Wooley* rested on the proposition "that the right of freedom of thought protected by the First Amendment against state action includes both the right to speak freely and the right to refrain from speaking at all." *Wooley*, 430 U.S. at 714. The complainant's First Amendment interests were implicated in *Wooley* because the message in question, displayed on his license plate, would be attributed to him. That the message the state created and required to be displayed on all plates — "Live Free or Die" — was the state's message is not a necessary component of *Wooley*'s holding. One might reason, of course, as my first dissenting colleague appears to, that if the driver is compelled to speak, the message must be the state's, and therefore anything on a license plate, under any circumstances, is government speech. Nowhere in *Wooley*, however, did the Court suggest this was the case; the only speech interest identified in *Wooley* was that of the driver. More significantly, the facts in *Wooley* indicate that even if the Supreme Court concluded that the state was the speaker, that conclusion would not control this case. In stark contrast to the situation in *Wooley*, where the same state slogan was required on nearly all license plates, the various mottos and logos on most special plates in Virginia are created and selected by drivers themselves.

As to the concerns expressed in my second dissenting colleague's opinion, I believe that they, too, are ultimately unpersuasive. My second dissenting colleague suggests that the the speech in question here is not easily placed on either side of the "blurry and sometimes overlapping line between private and government speech," *post* at 17, and that the test employed in the panel opinion for determining whether the government is the speaker was applied in a manner that did not adequately address the Commonwealth's interest in avoiding attribution of the logo's message to the Commonwealth.

As to the first concern, I believe that *Wooley* is again instructive. I note that my colleague identifies as unpersuasive the panel opinion's conclusion "that the private citizen bears the`ultimate responsibility' for the speech" on Virginia's special plates, suggesting that this factor "may very well be a key to the case." *Post* at 17 n.2. The Supreme Court in *Wooley*, however, apparently concluded that the message on New Hampshire's plate would be attributed *to the driver*, a conclu-

DOCKET ALARM

Explore Litigation Insights

Docket Alarm provides insights to develop a more informed litigation strategy and the peace of mind of knowing you're on top of things.

Real-Time Litigation Alerts

Keep your litigation team up-to-date with **real-time alerts** and advanced team management tools built for the enterprise, all while greatly reducing PACER spend.

Our comprehensive service means we can handle Federal, State, and Administrative courts across the country.

Advanced Docket Research

With over 230 million records, Docket Alarm's cloud-native docket research platform finds what other services can't. Coverage includes Federal, State, plus PTAB, TTAB, ITC and NLRB decisions, all in one place.

Identify arguments that have been successful in the past with full text, pinpoint searching. Link to case law cited within any court document via Fastcase.

Analytics At Your Fingertips

Learn what happened the last time a particular judge, opposing counsel or company faced cases similar to yours.

Advanced out-of-the-box PTAB and TTAB analytics are always at your fingertips.

API

Docket Alarm offers a powerful API (application programming interface) to developers that want to integrate case filings into their apps.

LAW FIRMS
Build custom dashboards for your attorneys and clients with live data direct from the court.

Automate many repetitive legal tasks like conflict checks, document management, and marketing.

FINANCIAL INSTITUTIONS
Litigation and bankruptcy checks for companies and debtors.

E-DISCOVERY AND LEGAL VENDORS
Sync your system to PACER to automate legal marketing.